In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

v.

JAMES ANTHONY DAVEGGIO and MICHELE LYN MICHAUD,

Appellants.

CAPITAL CASE

Case No. S110294

Appellate District, Case No. 134147 A&B
Alameda County Superior Court, Case No.
The Honorable Larry J. Goodman, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On November 5, 1998, the Alameda County Grand Jury indicted appellants on charges that they committed: two counts of forcible oral copulation (Pen. Code, section 288a, subd. (d))[1] on Sharona Doe (Counts 1 & 2); and one count of oral copulation with a person under 18 years (§ 288a, subd. (b)(1)) on April Doe (Count 3). (1 CT 211-212.)[2]

The indictment further charged appellants with the first degree murder (§ 187, subd. (a)) of Vanessa Lei Samson (Count 4) with the felony-murder special circumstances that it was committed during a kidnapping (§ 190.2, subd. (a)(17)(B)) and rape by instrument (§ 190.2(a)(17)(K)). (1 CT 212-213.) As to Daveggio, the indictment charged that he had a prior conviction (§§ 667(e)(1) & 1170.12(c)(1)) for assault with intent to commit rape. (1 CT 213.)

On October 15, 1999, the prosecution notified appellants that it intended to seek the death penalty against them. (1 CT 227.)

On May 15, 2001, the court ordered that: (1) motions and objections made by one party are deemed made by both unless otherwise stated; (2) all objections made during the course of the trial are based on any grounds stated under the federal constitution; (3) hearsay objections include an objection based on the Confrontation Clause of the Sixth and Fourteenth Amendments to the United States Constitution; (4) objections made on relevancy grounds, or under Evidence Code section 352, include objections based on the Fifth and Fourteenth Amendments to the United States Constitution and the Due Process Clause of the federal constitution; (5) any objections regarding prosecutorial misconduct are also challenged under the

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[1] Unless stated otherwise, all further statutory references are to the Penal Code.

[2] The parties agreed that the minor victims would be referred to as Does. (4 RT 751.)

authority of the Fifth and Fourteenth Amendments to the United States Constitution; (6) all objections made during the trial encompass the Eighth Amendment of the Constitution; (7) all motions are considered to be continuing objections; and (8) all in limine motions need not be renewed. (1 RT 32-35.)

On July 2, 2001, the prosecution moved to admit evidence of prior uncharged sex offenses committed by appellants under Evidence Code sections 1101 and 1108[3] in the guilt phase, and to also use those offenses as aggravating evidence during the penalty phase of the trial. (4 CT 770-791, 871-891.) The trial court ruled that only evidence of uncharged offenses committed by both appellants could be admitted, and limited the evidence to offenses committed against Christina Doe, Rachel Doe and Amy Doe and Aleda Doe. (5 CT 1205-1206.)

On October 22, 2001, Daveggio pleaded guilty to counts 1 through 3 of the indictment. (9 RT 2119-2122.)

On February 5, 2002, jury trial began and the trial court informed the jury that Daveggio had pled guilty to counts 1 through 3. (7 CT 1617; 16 RT 3584-3590.)

On May 6, 2002, the jury convicted Michaud on all counts and found true both special circumstances. (8 CT 1833-1837.)

The jury convicted Daveggio of the first degree murder of Samson and found both special circumstances to be true. (8 CT 1836; 34 RT 7398-7399.)

On May 13, 2002, the prosecution began its penalty phase case. (8 CT 1865.)

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[3] All further references to sections 1101 and 1108 are to the Evidence Code.

On June 12, 2002, the jury recommended that both appellants be sentenced to death. (8 CT 1935-1938.)

On September 25, 2002, the court denied Michaud's motion to modify the verdict and sentenced Michaud to: death on Count 4 (§ 187, subd. (a)), a three-year upper term on Count 3 (§ 288a, subd. (b)(1)), eight months (one-third of two-year middle term) on Count 2 (§ 288a, subd. (d)), and eight months (one-third of two-year middle term) on Count 1 (§ 288a, subd. (d)), with Counts 1 through 3 running consecutively. The sentences on Counts 1 through 3 were stayed pending the appeal on Count 4. (8 CT 2047.)

On the same date, the trial court denied Daveggio's motion to modify the verdict and sentenced Daveggio to: death on Count 4 (§ 187, subd. (a)), a three-year upper term on Count 3 (§ 288a, subd. (b)(1)), eight months (one-third of two-year middle term) on Count 2 (§ 288a, subd. (d)), eight months (one-third of two-year middle term) on Count 1 (§ 288a, subd. (d)), with Counts 1 through 3 running consecutively. The sentences on Counts 1 through 3 were stayed pending the appeal on Count 4. (8 CT 2043.)

STATEMENT OF FACTS

Prosecution Guilt Phase

Michaud Meets Daveggio

In the winter of 1996, Michaud's neighbors introduced her to Daveggio after she assisted them in finding their 12-year-old daughter who had run away. (17 RT 3830.) At the time of their introduction, Michaud lived in a tri-level home in Sacramento on McFadden Street. (16 RT 3754-3757, 3759.) Michaud's son, Randy, and her daughter, Rachel, lived with her in the tri-level. Michaud's parents, Leland and Regina, lived nearby. Michaud's younger sister, Misty, also lived in the neighborhood with her boyfriend, Rick Boune, and their son Cody. (16 RT 3746-3754.)

At the time Daveggio met Michaud, Michaud had been working as a prostitute and was receiving financial assistance from her clients. Bill Reed provided Michaud with credit cards. Before Daveggio's arrival Reed lived at the tri-level and paid the bills at the residence. (19 RT 4276.)

Another client, Burdell (Skip) Wulf, helped Michaud purchase a green 1994 Dodge minivan. The minivan had two front seats, two middle seats, and a bench seat for the rear. The middle and back seats were attached to the floor with a set of hooks and could be removed. (16 RT 3762; 17 RT 3846, 3924, 3882-3888.)

Before meeting Daveggio, Michaud did not use drugs and sent her daughter Rachel to a Catholic school. Michaud did volunteer work for the school and was a member of the school's Altar Society and a crossing guard. (17 RT 3830, 3846, 3854.)

Daveggio Moves in with Michaud

In the spring of 1997, Daveggio moved into the tri-level with his biological daughters, April and Jamie, and his stepdaughter Briann. (16 RT 3755-3757.) Misty and Boune frequently socialized with Michaud and Daveggio. Michaud called DaVeggio either "Frog," "Daddy," or her "Purple God of Thunder." (16 RT 3756-3757.) After Daveggio moved in, Boune often took methamphetamine with Michaud. (16 RT 3760-3261.) Michaud's children, Randy and Rachel, also began using drugs. (17 RT 3831-1832.) As a result, Michaud was evicted from the tri-level in August 1997. (17 RT 3755.)

Following the eviction, appellants' friends, Janet and Ted Williams, gave appellants permission to stay at their home for a few days in the beginning of September 1997. (18 RT 4111.) Janet saw Daveggio with her minicassette player and Ted saw Daveggio with a revolver. (18 RT 4111, 4146-4147.)

On September 11, 1997, Janet drove Ted to his sister's home in Petrolia and returned to Sacramento on September 14, 1997. She did not notice anything wrong with the house upon her return. (18 RT 4114-4116.)

On September 19, Janet and Daveggio drove back to Petrolia to pick up Ted. While in Petrolia, Ted's daughter cut Daveggio's shoulder-length hair and gave him a crew cut. (18 RT 4120-4122, 4140.) Janet had not given anybody permission to be at their home while she was gone. When the Williams got home on September 20, Ted noticed some things were out of place. A screen on a bathroom window was bent and the piggy banks were empty. (18 RT 4117-4118.)

Ted searched the house looking for anything else that might have been taken and discovered that he was missing a ten or twelve-foot length of rope and a "come-along." (18 RT 4143.) A come-along is a device for lifting heavy objects. (18 RT 4144.) In addition, Janet's minicassette player was gone, but Daveggio had left a minicassette behind. (18 RT 4112-4114.) Appellants also left a suitcase and a box in the Williams' garage, which the Williams eventually turned over to the FBI. (18 RT 4111-4112.) After Janet Williams listened to the minicassette tape, she also turned it over to the FBI. (18 RT 4111-4112, 4146-4147.)

Michaud subsequently called Janet and said that she and Daveggio had stayed in her home between September 11 and September 14 because they did not have any place else to go. (18 RT 4123-4125.)

Appellants Assault Christina Doe at the Williams' Home

In September 1997, Christina Doe was 13 years old. Christina was good friends with Michaud's daughter Rachel and had known Rachel since she was four years old. The two lived in the same neighborhood. Christina also knew Michaud's parents who lived nearby. (18 RT 4157-4158.)

Christina first met Daveggio when he moved into the tri-level. (18 RT 4161.)

Some time around the middle of September 1997, Michaud came to Christina's house and asked Christina if she wanted to run some errands with her. Christina agreed to go and left with Michaud in her green minivan. (18 RT 4163-4164.) The middle row of seats in the minivan was missing. (18 RT 4165.) Michaud did not run any errands with Christina and instead took her to the Williams' home. (18 RT 4166-4167.)

When they came inside, DaVeggio was sitting on the couch watching television. Christina got an "uncomfortable," "eerie feeling." (18 RT 4167.) Christina thought DaVeggio looked like he had "no emotion." (18 RT 4167-4168.) DaVeggio was watching a movie on serial killers. He told Christina that he collected cards of serial killings and that he enjoyed "stuff like that." (18 RT 4169.)

Appellants took out some methamphetamine and divided it into three lines. DaVeggio had previously given Christina methamphetamine. (18 RT 4121-4174.) Appellants each snorted a line and said that the third one was for Christina. Christina felt "uncomfortable" and declined the offer. Although Christina did not want to take methamphetamine, she did so at appellants' insistence. (18 RT 4176-4177.)

After Christina snorted the methamphetamine, Michaud grabbed Christina by the arm and said she needed to speak to her in the bathroom. (18 RT 4178.) Michaud guided Christina into the bathroom and locked the door. Michaud urinated in front of Christina and then said she "wanted to party" with her. (18 RT 4181.) When Christina said no, Michaud pulled out a small handgun from the back of her pants, held it in front of Christina for a moment, and then put it on the bathroom counter. (18 RT 4181-4182.)

Michaud ordered Christina to undress. Christina refused. Michaud started taking off Christina's clothes until she was completely naked. Michaud also undressed. (18 RT 4183-4186.) Michaud licked Christina's chest and told Christina to do the same thing to her. Christina refused to do so. Christina did not resist because she feared Michaud would shoot her. (18 RT 4187.) Michaud shoved Christina out of the bathroom. Christina used one arm to shield her breasts and the other arm to cover her genitals. (18 RT 4183-4186.) Michaud pushed Christina towards Daveggio and said, "Here's your present." (18 RT 4186.)

DaVeggio began kissing Christina and walked her backwards towards a bedroom. DaVeggio stopped in the doorway. Michaud took off DaVeggio's pants and began licking DaVeggio's rectum. (18 RT 4188-4190.) Next, DaVeggio pushed Christina onto the bed, licked her crotch, and stuck his fingers into Christina's vagina. (18 RT 4190-4192.)

Meanwhile, Michaud sat on the bed masturbating and "was yelling out," "Daddy." (18 RT 4192.) Michaud appeared to have an orgasm while masturbating. (18 RT 4193.) Michaud then "began to suck on [Daveggio's] penis." (18 RT 4194.) Michaud told Christina to do the same thing, but Christina refused. Michaud kept pushing Christina's head towards DaVeggio's penis; Christina continued to pull her head up. (18 RT 4194.)

After Michaud sucked on DaVeggio's penis, DaVeggio got on top of Christina and raped her for about 15 minutes. (18 RT 4200.) Christina had "uncontrollable" tears running down her face throughout the ordeal, but did not make any noise. Because Christina knew DaVeggio liked serial killers, she tried not to make any noise which would give him pleasure. (18 RT 4201.) During the rape, Michaud was licking DaVeggio's rectum. (18 RT 4201-4202.)

After the rape, Michaud took Christina into the bathroom and said she would show her how to give herself a "whore's bath." (18 RT 4202.) Michaud took a bar of soap and began rubbing it on her vagina. Michaud told Christina to do the same and then rinse herself off. (18 RT 4202-4203.) Michaud warned Christina that if she told anybody about what happened, Michaud "would personally come and kill [her]." (18 RT 4204.) Christina tried to act "like everything was okay" so that Michaud and DaVeggio would not think she "was going to go and tell." (18 RT 4204.) On the way home, Michaud again warned Christina that if she said anything, she had "a lot of friends." (18 RT 4206.) Christina took this as a threat because Michaud and DaVeggio "dealt with biker gangs." (18 RT 4206.)

After the attack, Christina did not immediately tell anybody about what happened because she took Michaud's threats seriously. (18 RT 4207.)

Aleda Doe

Approximately two weeks after assaulting Christina, appellants attacked their next victim. On September 29, 1997, 20-year-old Aleda was attending Morrison College in Reno, Nevada. Aleda was four feet, ten inches tall and weighed about 120 pounds. (17 RT 3999.) Aleda got out of her evening college class around 10:00 p.m. She paged her boyfriend to come pick her up, but he never called Aleda back. (17 RT 3996-3997.) Aleda stood outside with a security officer who wanted to go home. Aleda waited for about 15 minutes, but felt uncomfortable about detaining the security officer so she decided to walk home. (17 RT 3992-3998, 4038.)

Aleda was approximately half-way home when a van passed her coming from the opposite direction. About a minute later, the van drove up next to her. At first, Aleda thought it was her boyfriend because on previous occasions he had picked her up en route to home. A moment later,

"a big man" grabbed her by her hair and her backpack and threw her in the van. (17 RT 4001-4002.)

Aleda ended up behind the driver's seat and could see that Michaud had a long pale face with shoulder length brown hair with split ends. (17 RT 4009-4110.) After Michaud drove the van onto Highway 80, DaVeggio began the assault. While Aleda was clothed, he started feeling her breasts and putting his fingers in her vagina. (17 RT 4015-4016.) DaVeggio next ordered Aleda to undress. Aleda fearfully complied. (17 RT 4017-4019.) DaVeggio started biting Aleda on her face and lips. DaVeggio again "pushed" his fingers into her vagina and then "grabbed" Aleda's head and put it on his penis. (17 RT 4019-4020.) Daveggio's penis was soft and never became completely hard. (17 RT 4022.)

Next, Daveggio raped Aleda, inserting his penis into her vagina. (17 RT 4026.) During the rape, DaVeggio tried to slap Aleda's buttocks. (17 RT 4051.) Aleda began crying, but did not want DaVeggio to know that. "At some point" Aleda tried to get Michaud's attention and pulled her hair "to tell her, please do something." (17 RT 4026.) Michaud "didn't care. She was just driving." (17 RT 4026.)

DaVeggio "grabbed" Aleda's hand and "forced" her "to put it in his butt," and then did the same thing to her. (16 RT 4028.) He also forced Aleda to touch his testicles. DaVeggio made Aleda put "two fingers down his rectum." (17 RT 4028.) DaVeggio scratched Aleda's back and breasts with his finger. (17 RT 4029-4030.) As appellants approached the agricultural checkpoint between Nevada and California, DaVeggio got off of Aleda, threw a jacket and pillow over her, and told her to be quiet. (17 RT 4030-4031.) Aleda was afraid to say anything when they went through the checkpoint because the person "could not do anything" besides call the police" and the van she was in would "take off." (17 RT 4031-4032.)

Once in California, DaVeggio resumed the attack, making Aleda put her mouth on his penis again. As before, Daveggio "grab[bed]" her head and put it on his penis. This time, he ejaculated all over her face and hair. (17 RT 4033.)

Aleda began talking to DaVeggio as if nothing wrong had happened. She didn't want appellants "to be mad." Aleda wanted to be able to remember as much as she could so she could tell the police. (17 RT 4637.) Aleda asked DaVeggio about a song that he and Michaud were singing in the van. (17 RT 4041.) DaVeggio explained that the song was about a man in Reno who killed another man "just to see him die." (17 RT 4042.) Aleda asked DaVeggio whether he had killed somebody. When DaVeggio said no, she felt "a sense of relief." (17 RT 4042.)

Aleda also asked DaVeggio what they planned to do with her. Aleda told them that she needed to go to school, and had to be at work by 8:00 a.m. Aleda also told appellants that she had a baby that her mom was baby-sitting and that her mom would get mad if she did not return, and would be mean to the baby. Aleda made this story up because she had a nine-month-old nephew. (17 RT 4042-4044.) DaVeggio informed Aleda that they could not take her back to Reno because they had "kidnapped" her and could go to jail. (17 RT 4045.) DaVeggio told Aleda she was "asking too many questions." (17 RT 4047.) DaVeggio then asked Aleda if she liked women, and whether she would like him to "bring" Michaud into the back of the van. Aleda did not respond to the question. (17 RT 4047-4051.)

Next, DaVeggio asked Michaud if they should "go ahead with the plan?" (17 RT 4052.) DaVeggio also stated, "What have you decided?" (17 RT 4052.) During this conversation, Aleda became frightened that they were going to kill her. (17 RT 4053.) Aleda asked DaVeggio if he would just drop her off on the side of the road which prompted DaVeggio to ask Michaud whether they should go forward with the plan. Michaud told

DaVeggio that she needed "ten minutes" "to think about it." (17 RT 4055.) When Michaud asked Aleda if she had kids, Aleda lied and said she had a son named Luis. (17 RT 4055-4056.) DaVeggio said, "I will leave it up to you," referring to Michaud. (17 RT 4057-4058.)

Michaud took the next exit off the freeway, drove to the end of a dead-end street and told Aleda to get out of the van. (17 RT 4059-4060.) Michaud warned Aleda "not to walk on the streets by [herself] again because otherwise [she] wasn't going to be so lucky and find as nice of [sic] people." (17 RT 4061.) Michaud ordered Aleda to count to 20 and "not look back" because they were "going to be watching." (17 RT 4062.) Aleda subsequently flagged down a car and got a ride to the police station where she described how the green van had a rosary hanging from the rear view mirror. (17 RT 4065-4067.)

The body fluid sample recovered from Aleda's face and hair contained a mixture of both semen and saliva. (24 RT 5627-5628.) Lisa Calandro, a DNA specialist, testified that swabs taken from Aleda's face showed a mixed profile which included both Aleda and Daveggio's DNA. (26 RT 5728, 5729.) Another swab taken from Aleda's face exclusively contained Daveggio's DNA. The chances of somebody sharing Daveggio's DNA profile were one in six to eight billion Caucasians. (26 RT 5730-5731.)

Rachel Doe

Appellants' next attack occurred about two weeks after the sexual assault of Aleda. Rachel, Michaud's daughter, was seventeen years old and in foster care at the time of trial. (19 RT 4272-4273.) Rachel moved into the tri-level home when she was eleven years old. (19 RT 4275.) Her brother Randy lived with her for much of the time, but also lived with family friends, in a group home, and in "Sutter Psychiatric Ward." (19 RT 4272-4273.)

After Michaud and DaVeggio were evicted from the tri-level, 12-year-old Rachel moved into her boyfriend's home. (19 RT 4287-4288.) Michaud came over to Rachel's boyfriend's house, saying she wanted to spend some time with Rachel because she and DaVeggio were moving to Oregon. (18 RT 4208; 19 RT 4288.) Michaud then took Rachel to her friend Clara's house where everybody was taking methamphetamine. Michaud told Rachel she would bring her back around 11:00 p.m. A few hours later, Michaud asked Rachel if she just wanted to go to Oregon with her and DaVeggio. Rachel said yes because she wanted to get out of school, had never been to Oregon, and wanted to go on a road trip. (19 RT 4292-4293.)

On the way to Oregon, Rachel fell asleep on the bench seat of the van. The middle seats were gone. When she awoke, DaVeggio was massaging her leg. (19 RT 4294.) DaVeggio continued to massage the inside of Rachel's leg and tried to put his hand inside her pants. After pushing Daveggio's hand away, Rachel got up and moved to the front seat to be near Michaud and to get away from DaVeggio. (19 RT 4295.) DaVeggio came up behind Rachel and started fondling her right shoulder. (19 RT 4298.)

When they stopped to use the restroom, Rachel told Michaud what DaVeggio had done and asked her to make him stop. Michaud assured Rachel that she would make DaVeggio stop. (19 RT 4299.) Once they got back in the van, Michaud began telling Rachel that she was her "secret lust" and said that she had had sex with her son, Randy, with her father, Leland, and with her mother, Regina. Michaud did not directly state that she had had sex with Misty, but said "nobody can ride like your aunt Misty." (19 RT 4306.) Michaud told Rachel that she had "let the dog lick her," and that she had had sex with Christina, Rachel's friend. Michaud said Rachel was "her fantasy," and that she was "going to be an adventure." (19 RT 4307.)

Michaud remarked that Christina had been "one of their adventures, and that [she] was going to be the next one." (19 RT 4307.)

Michaud also told Rachel that when she was passed out from smoking pot, she would "eat [Rachel] out" and enjoyed doing that when Rachel was having her period because her blood "tasted sweet." (19 RT 4308.) Rachel explained that when she smoked a lot of marijuana, she would go into a deep sleep and wake up to find that Randy had written all over her with a permanent marker. (19 RT 4309.)

While Michaud was talking about her incestuous relations, she kept saying, "Right, James." Rachel looked in the rear view mirror and saw DaVeggio "nodding his head yes" while keeping "a deep stare" on Rachel. DaVeggio looked very "very focused, like not blinking or anything." (19 RT 4310-4311.) Rachel, who was holding a soda cup, dropped the cup, prompting Michaud to say, "See you are getting wet just thinking about it." (19 RT 4312.) Rachel was "disgusted" by Michaud's comment. (19 RT 4314.)

Michaud said that she was going to pull the van over and have a talk with Rachel. Rachel told Michaud not to stop because she was frightened by Michaud's bizarre behavior and her statements that she was going to be "their next adventure." (19 RT 4315.) Rachel said, "Don't you stop this fucking van." (19 RT 4316.) Michaud stopped the van. Scared, Rachel reached for her shoes because she was "going to try to run." (19 RT 4317.)

As Rachel got one shoe on, Michaud pushed the lock button which prevented passengers from opening the doors. Unable to free herself, Rachel "started panicking" and tried to kick out the window. (19 RT 4318.) Suddenly, DaVeggio hit the front passenger seat's lever and the seat went down. Michaud jumped on top of Rachel, straddling her with her legs. (19 RT 4319-4320.) Michaud "undid" Rachel's pants, while

DaVeggio held Rachel's arms down. (19 RT 4320.) Michaud "stuck her fingers" down Rachel's pants and into her vagina. (19 RT 4320- 4322.)

When Rachel said, "Mommy stop," Michaud told her not to call her mommy. (19 RT 4323.) DaVeggio started orally copulating Rachel who was "screaming, crying, [and] trying to fight." (19 RT 4324-4325.) In the meantime, Michaud masturbated while DaVeggio was assaulting Rachel. (19 RT 4325.) Michaud also began licking DaVeggio's rectum. (19 RT 4326.)

Suddenly, appellants stopped assaulting Rachel and acted like nothing had happened. (19 RT 4327.) Rachel got dressed and cried herself to sleep on the bench seat. (19 RT 4328.) The next thing Rachel remembered was waking up in a motel room with Michaud lying naked on the bed next to her. (19 RT 4330-4331-4334.) Michaud asked, "Is it okay if James fucks you?" (19 RT 4336.) Rachel said, "No." (19 RT 4336.) Daveggio stated, "Don't worry. I'm not going to do that." (19 RT 4337.)

Appellants held Rachel down and taped Rachel's mouth shut with duct tape which stretched "from ear to ear." (19 RT 4337-4338.) After duct-taping Rachel's mouth shut, appellants turned her over and duct-taped her hands together behind her back. (19 RT 4339.) Although Rachel kept struggling and kicking, appellants overpowered her. (19 RT 4340-4341.) DaVeggio began orally copulating Rachel again, just like he did in the van. (19 RT 4341.) Michaud was masturbating as she watched DaVeggio assaulting Rachel. (19 RT 4342.) The sexual assault ended when Michaud stopped masturbating and "actually told him to stop." (19 RT 4352.) DaVeggio complied and stopped orally copulating Rachel. (19 RT 4352.)

Michaud then began orally copulating DaVeggio and licking his rectum. (19 RT 4343-4444.) About 30 minutes later, Michaud asked Rachel if she "was going to be good" and not scream if she took the duct tape off. Rachel nodded yes and Michaud removed the tape. (19 RT 4344-

4346.) That evening, DaVeggio came back to the motel with some razors and shaved his head. Daveggio said that a motorcycle club was looking for him and he did not want anybody to recognize him. (19 RT 4346-4347.)

After appellants drove back to Sacramento, Rachel and Michaud went to Christina's house. DaVeggio hid in the van with a blanket over him. (19 RT 4350.) Christina was surprised to see Rachel because the two of them had been fighting. Rachel was very "distraught" and acted "like she wasn't all there." (18 RT 4208.) Christina saw "red marks" and "black lines around her cheeks, around her mouth, and also around her wrists." (18 RT 4209; 19 RT 4351.)

When Michaud asked Christina if she wanted to go to Santa Cruz with them, Christina agreed to go because Rachel looked so frightened and she did not want to leave Rachel alone. (18 RT 4224-4225.) Christina stated, "I didn't want Rachel to be alone because if anything did happen to her, I know that it's more scary to be alone than to have comforting person next to you." (18 RT 4258-4259.)

Rachel and Christina got into the minivan with appellants to go to Santa Cruz. They asked to stop because they needed to use the restroom. DaVeggio and Michaud stopped at an AM/PM minimart. In the bathroom, Rachel told Christina about what happened. (18 RT 4222-4224.) Christina then told Rachel what had happened to her. (18 RT 4210.)

On the way back from Santa Cruz DaVeggio drove the van to a remote location. He "pulled out his gun," and began "waving it" at Christina and Rachel. Rachel thought she and Christina would be killed, but DaVeggio fired a shot out the window. (18 RT 4259; 19 RT 4354.) Christina interpreted Daveggio's behavior as a threat. (18 RT 4260.)

Amy Doe

Amy Doe was appellants' next victim. Amy testified that on November 1, 1997, she was at a friend's house when Michaud came over. Amy was addicted to methamphetamine and was upset about the anniversary of her father's death. (19 RT 4440-4442.) Michaud asked Amy if she wanted to go for a ride. During the ride, Michaud told Amy that she was staying at a Motel 6 and needed to go there to receive a phone call. (19 RT 4444-4446.) When Amy and Michaud went inside the motel room they were lamenting the sorry state of their male companions. Suddenly, Amy was struck on her head with what felt like a gun. (19 RT 4448-4451.) Amy's ex-boyfriend had hit her over the head with a gun so she knew what it felt like. Amy was dazed from the blow and came close to "blacking out." (19 RT 4452.)

Next, Amy felt Daveggio clamping a handcuff over her wrist. (19 RT 4453.) As Amy struggled, DaVeggio punched her in the mouth with his fist. (19 RT 4454.) Appellants kept telling Amy to shut up or she would die. The punch split Amy's lip open, causing her to bleed profusely. (19 RT 4452-4456.) Appellants then managed to get Amy's other hand into the handcuffs which were placed behind her back. Michaud put a blindfold on Amy. Although she was handcuffed, Amy continued to struggle and was kicking out at appellants. (19 RT 4456-4458.)

The next thing she knew, somebody was placing duct tape over her mouth as she screamed for help. (19 RT 4458-4459.) The duct tape did not stick very well because of all the blood on Amy's face. Michaud "grabbed" Amy's hair while sitting on Amy's butt, straddling her legs. Michaud used scissors to cut Amy's shirt and bra off, and also removed her pants and shoes. (19 RT 4460-4461.) As Michaud pulled Amy's hair back, DaVeggio tried to insert his penis into Amy's duct-taped mouth. (19 RT

4462-4463.) However, DaVeggio did not have an erection and therefore was unable to get his penis in Amy's mouth. (19 RT 4464.)

Appellants rolled Amy over onto her back and Michaud started sucking on Amy's breasts while DaVeggio masturbated. DaVeggio told Michaud "to go down on" Amy. Michaud initially refused, but then laughed "and said okay." (19 RT 4464-4465.) After Michaud stopped orally copulating Amy, DaVeggio got on top of her and raped her. (19 RT 4465-4466.) DaVeggio raped Amy for what "seemed like forever," after which appellants rolled Amy back over onto her stomach. It felt like Michaud was straddling her back. Then Amy felt Michaud pull her buttocks open and DaVeggio began sodomizing Amy with his penis. (19 RT 4465-4467.) Amy could feel Michaud and DaVeggio moving around on the bed next to her and heard DaVeggio "groan." (19 RT 4468.)

During the assault Amy felt a gun placed behind her left ear. She heard a "click," after which DaVeggio stated, "Damn, it jammed." (19 RT 4469.)

Appellants unhandcuffed Amy. Michaud slowly pulled the duct tape off Amy's mouth. The tape was stuck in Amy's hair. (19 RT 4469.) Amy began choking on her own blood. (19 RT 4470-4471.) Michaud gathered all the bloody items. Meanwhile, Amy lay naked on the bed with DaVeggio and "prayed." (19 RT 4472.) DaVeggio told Amy that the assault "was all Michaud's idea." (19 RT 4491.) When Michaud returned with clean laundry, appellants told Amy that if she "said anything [she] would die." Amy believed them. (19 RT 4472-4473.) Amy estimated that her ordeal lasted "at least six or seven hours." (19 RT 4474.)

Before dropping Amy off, Michaud stopped at a welfare office. (19 RT 4475.) Michaud told Amy that she could explain her injuries by saying she had been to a bar and fallen down. (19 RT 4476.) Appellants reiterated their death threat. (19 RT 4477.) A few days later, Michaud saw Amy at a

mutual friend's house. Michaud said: "I see you didn't tell." (19 RT 4478-4479.) Amy responded: "I'm still alive." (19 RT 4479.)

Sharona Doe (Counts 1 and 2)

On November 3, 1997, only two days after the attack on Amy, appellants attacked Sharona Doe. Sharona was best friends with Daveggio's daughters, April and Jamie. In the summer of 1997, Sharona was 17 years old. She spent lots of time at the tri-level and was using methamphetamine with appellants and April and Jamie. (20 RT 4507-4513, 4516.)

In September, Sharona moved into her grandparents' home in Pleasanton and began working at Q-Zar, a laser tag arena. (20 RT 4513.) Sharona helped Jamie get a job there, too. (20 RT 4514-4515.) On November 3, appellants came to visit Sharona at Q-Zar while Sharona was working the evening shift. Sharona was outside smoking a cigarette and saw appellants pull into the parking lot. (20 RT 4516-4517.) Michaud asked Sharona if she wanted to snort some methamphetamine. Sharona said, "Yes." (20 RT 4517-4519.)

Sharona asked if they could do the methamphetamine in the bathroom because she did not want the manager or assistant manager to see her getting into a van. Appellants "didn't like that idea." (20 RT 4519-4520.) Michaud got into the back seat of the minivan where Sharona thought "she was chopping up a rail." (20 RT 4520.) Next, there was a commotion and Michaud claimed she had dropped the mirror holding the methamphetamine. Sharona approached the back of the van to see if she could find anything that had fallen down. Michaud tried to grab Sharona and push her down in the van but Sharona was able to fight her off. (20 RT 4520-4523.) Sharona "was in shock" and "didn't know exactly was going on" but "knew something was wrong." (20 RT 4525.)

Daveggio came over from the driver's seat and hit Sharona on the head so hard that she "saw a whole bunch of flashing lights" and "couldn't comprehend anything." (20 RT 4526-4527.) Sharona was very dazed and felt herself being handcuffed. (20 RT 4526-4528.) Sharona believed Daveggio handcuffed her behind her back because she remembered her "shoulders really hurting." (20 RT 4528.) Daveggio began tying up Sharona's legs and Michaud drove the minivan out of the parking lot onto Highway 580. (20 RT 4528-4529.)

Daveggio ordered Sharona "to go down on him." (20 RT 4530.) Sharona complained that the handcuffs were "digging into" her and Daveggio removed them. (20 RT 4529-4530.) Daveggio told Sharona that she better "suck his dick" and "act like [she] liked it." (20 RT 4531.) Crying, Sharona followed Daveggio's orders and put her mouth on Daveggio's penis for about two and one-half minutes. Michaud stopped the car in a neighborhood with large houses. Michaud came into the back of the van and told Sharona that the doors were locked and that there was no way to escape. (20 RT 4531-4533.)

Daveggio told Sharona that he "was done with [her]," but Michaud "was going to have fun with [her]." (20 RT 4533-4534.) Michaud removed Sharona's pants and underwear and "began to go down" on Sharona. (20 RT 4534.) Daveggio "was masturbating while he watched." (20 RT 4534.) Sharona continued to cry as Michaud orally copulated her for about the next 20 minutes. (20 RT 4534-4535.) As Sharona continued to cry during the assault, Sharona told them about how her stepfather "used to do something to [her] when she was younger." (20 RT 4536.)

Daveggio told Michaud "to stop." (20 RT 4536.) He "pulled out a camera and took a picture" of Sharona who was naked from the waist down, and told [her] that if [she] ever told anybody that he would show the

picture to everybody." (20 RT 4536.) Daveggio made Sharona feel "very dirty and low while he said it." (20 RT 4536-4537.)

Appellants began driving Sharona back to Q-Zar and started "talking about how they could not let [her] go because [she] knew who they were. (20 RT 4537.) Daveggio threatened to kill Sharona, prompting Sharona to ask him how his daughters would feel if he killed her. (20 RT 4541.) Sharona "told them [she] wouldn't tell if they let [her] go." (20 RT 4537.) Sharona said that she "would tell the cops that a bunch of kids took [her] and that [she] didn't know who it was that did it." (20 RT 4538.) Michaud ripped Sharona's shirt as part of the effort to deceive the police. (20 RT 4551.) When appellants dropped Sharona off at a gas station, they showed her a gun. Daveggio "flashed" the gun in a way that made Sharona knew that if she "told that he was going to kill" her. (20 RT 4540.) After showing Sharona the gun, appellants left Sharona at a Shell gas station and then "took off." (20 RT 4541.)

Sharona called the assistant manager at Q-Zar who came and picked her up. (20 RT 4551.) When Sharona got back to Q-Zar, her grandfather was there because someone from Q-Zar had called him. (20 RT 4542.) Sharona lied to the police and told them that "three guys" had attacked her. (20 RT 4545.) Sharona pointed out a location in the parking lot where her alleged assailants had attacked her. Cigarette butts littered the ground where appellants had been smoking. (20 RT 4546.)

Officer Rebecca Gandsey took the police report regarding the attack on Sharona. (21 RT 4742.) Sharona's shirt was torn, and she was "almost incoherent." (21 RT 4744.) Sharona would be "hysterical," and then would "get angry." (21 RT 4745.) Sharona told Gandsey a story about three men attacking her. (21 RT 4745.) Gandsey and her supervisor compared the story Sharona told Gandsey, with that told to a different

deputy, and noted that Sharona's descriptions of what occurred were "very different." (21 RT 4746.)

Michael Hart, an Alameda County deputy sheriff, also interviewed Sharona. Hart observed that she had marks on her wrists which looked like those incurred by inmates who resisted being handcuffed. (21 RT 4759-4760.) Hart was suspicious of Sharona's story because of several inconsistencies between what she told deputy Gandsey and what she told him. (21 RT 4763-4764.)

After appellants' arrest on December 3, 1997, Hart reinterviewed Sharona on December 8, 1997. Sharona told Hart that everything she had previously told him was a lie. (21 RT 4764-4765.) Sharona described how Michaud called her over to the van and pretended to drop methamphetamine. (21 RT 4765-4766.) Sharona then described being struck from behind by Michaud who had Daveggio help her handcuff Sharona. (21 RT 4767.) Sharona also told Hart that Daveggio had shown her a gun which she took as a threat. (21 RT 4767-4768.) Sharona stated that until appellants were arrested, she had feared for her life. Sharona indicated that she would press charges if she could be sure appellants did not get out of jail. (21 RT 4771-4772.)

Appellants Discuss Murder

On November 4, the day after the assault on Sharona, Michaud called her sister Misty, asking if she and DaVeggio could stay with Misty and Boune because she had run out of money. (16 RT 3777.) When appellants came over, the group started playing Yahtzee. The movie, "Silence of the Lambs," came on during the Yahtzee game. Michaud started reading a book called, "Sex Slave Murders." (16 RT 3779-3780.)

DaVeggio told Boune that he had read "every book on every documented serial killer" that had been published. (16 RT 3781.) DaVeggio added that of all the serial killers he had read about, the ones

"that he admired the most [were] Gerald and Charlene Gallegos," and that "if he was ever going to be a serial killer, he would be just like [the] Gallegos." (16 RT 3782-3783.) DaVeggio acted like the Gallego family was his "hero." (16 RT 3783.) Boune knew who the Gallegos were because their murders were committed in Sacramento. (16 RT 3782.) Boune did not know that the "Sex Slaves Murder" book that Michaud was reading was about the Gallegos. (16 RT 3783.) Disgusted by Daveggio's comments, Boune told DaVeggio that he "was a sick mother fucker." (16 RT 3783.) DaVeggio just laughed. (16 RT 3788.)

As Daveggio discussed his fascination with the Gallegos, Michaud showed Boune a box of serial killer trading cards which had a card featuring the Gallegos. (16 RT 3784.) Michaud said that if "they were ever going to do anything like that," "they would have a card like that." (16 RT 3805.) Boune decided that he wanted them to leave his house. (16 RT 3787.)

The next morning, Daveggio and Michaud had a big argument. The two were screaming and yelling at each other. Daveggio took out a gun, pointed it at the middle of Michaud's head, and told her that if she did not get out of the minivan he "was going to blow her fucking head off." (16 RT 3787.) Daveggio began throwing all her belongings onto the sidewalk. Boune "took all of her crap" into his house. (16 RT 3788.)

Daveggio left in the minivan. When he returned the next day, Michaud acted like it was a "birthday present." The two stayed one more night and then left to drive to Santa Cruz to pick up a welfare check. (16 RT 3789-3790.) When Michaud returned to retrieve belongings she had left at Boune's house, she specifically discussed getting a .38 semi-automatic pistol. (16 RT 3795.)

Christina and Rachel Talk to the Police

Sometime around November 15, Christina Doe saw a television news report regarding the Aleda Doe attack. Because the composite of Aleda's assailants looked like Daveggio and Michaud, Christina told her father about the sexual assault and he called the police. Subsequently, Leland, Rachel, Christina and her father all spoke to the police. (18 RT 4210-4211, 4214-4221.)

Sometime thereafter, the FBI arrived at Boune's house trying to find appellants. Boune told them Michaud had a court date up in Lake Tahoe where she had passed bad checks. (16 RT 3800-3801.)

April Doe (Count 3)[4]

From November 25, through November 27, appellants stayed at the Candlewood Suites motel. Daveggio's daughters, April and Jamie, stayed with them and were taking lots of methamphetamine with appellants. (20 RT 4610-4611, 4616, 4618.) Jamie, who was pregnant at the time, testified that Michaud had told her that it was okay for her to do drugs because she had used "coke when she was pregnant with her kids." (21 RT 4894-4895.) Michaud said that since her kids "came out fine" it was okay if Jamie smoked methamphetamine while pregnant. (28 RT 4895.)

On November 27, appellants celebrated Thanksgiving with Daveggio's ex-wife, Annette, and her husband, Chris Carpenter. April and Jamie were also present for the festivities. (21 RT 4880-4881.) According to April, Daveggio had an automatic gun out and was "caressing" it like "it was his baby." (20 RT 4622.) April testified that Daveggio told her that he

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[4] During jury selection, Daveggio pleaded guilty to oral copulation with a person under 18 years of age in violation of section 288a, subdivision (b)(1)the charges involving April and Sharona. (9 RT 2119-2122.)

thought it would "be cool to torture people" so he could "see the fear in their eyes." (20 RT 4703.)

After the Thanksgiving meal, Jamie got ready to go to the Candlewood motel with appellants. Daveggio told Jamie that it would be "better if (she) just stayed home and got some rest." (21 RT 4895.) Daveggio, however, suggested that April spend the night at the Candlewood motel so he could take her to get her driver's license the next morning since the motel was close to the Department of Motor Vehicles (DMV). (20 RT 4627-4630.)

At the Candlewood motel, Daveggio talked to April about the perfect way to rob an armored truck and asked April if she "wanted to go "hunting" with him and Michaud. (20 RT 4631-4634.) April asked him what he meant by going hunting. Daveggio said it was "where you stalk someone to kill." (20 RT 4635.) Michaud sighed and giggled while Daveggio explained what hunting meant. (20 RT 4635-4636.)

In addition, Daveggio talked about seeing "fear in people's eyes," and said "that it was an adrenaline rush." (20 RT 4636.) Daveggio also discussed "torturing someone and the way that they show fear." (20 RT 4637.) Daveggio was "content" during the discussion and he appeared to be "empty" behind his eyes. (20 RT 4637-4638.) Daveggio told April that "people who don't care don't show any remorse" and "don't show" any "emotions through their eyes." (20 RT 4637.) Daveggio said that he had no emotions. April noticed that Daveggio had a blank look when saying this. He told her that she "had the same look." (20 RT 4637.)

April explained that Daveggio had begun the conversation by saying, "Looking at you reminds me of me. You show no remorse." (20 RT 4638.) Daveggio emphasized that "you can't have feelings for anyone," and that if, for instance, April's little sister saw him "do something" then "he would have to kill her too." (20 RT 4650.) Daveggio said that if he

had to kill her he "wouldn't care" and that "you can't have feelings." (20 RT 4650.)

Daveggio talked about how serial killers "could go on with their everyday life" "and no one would know what they had done." (20 RT 4638.) Daveggio discussed a case involving a serial killer janitor and stated that he had "studied his flaws" and "that he knew how to get away with it." (20 RT 4639.) Daveggio also stated that serial killers sometimes turned themselves in because they wanted to be famous. (20 RT 4639-4640.)

April read a book about serial killers which Daveggio had given her. (20 RT 4641.) When Daveggio gave the book to April, he told her to take special care of it because "it meant a lot to him" and he did not want her "to lose it." (20 RT 4642.) April read part of the book which discussed a man named Henry Lee Lucas who had a girlfriend who "lured" the victims and "killed a lot of people." (20 RT 4642.)

Daveggio asked April if she had ever killed anybody. April said, "No," and asked him if he had ever killed anybody. Daveggio said that he would not tell April whether he had or not because he did not want her "to have to lie for him." (20 RT 4644.) Daveggio then described an incident in Union City where he shot at a train conductor who fell. Daveggio did not know whether the conductor "died, but it made him feel good." (20 RT 4644-4645.)

Towards the end of the conversation, Daveggio got up to take a shower. Michaud sat down next to April and told her that when Daveggio got out of the shower he was "going to have oral sex" with April because she did not enjoy having oral sex. (20 RT 4652.) Michaud said that she thought April "would feel better" if she knew what was going to happen. (20 RT 4651-4652.) April was "in shock" and "didn't know what to do." (20 RT 4653.)

Daveggio got out of the shower and sat next to April. Daveggio said, "You know that I love you," and began "touching" April over her clothing. (20 RT 4653.) When April said "No," Daveggio told her not to worry because she "would enjoy herself." (20 RT 4657.) Daveggio removed April's pants and underwear and kissed her stomach and legs. While Daveggio kneeled on the floor orally copulating April, Michaud was lying on the floor beneath him giving Daveggio "head." (20 RT 4658.) Daveggio then "ate" April's "pussy" for about an hour. (20 RT 4655-4656.) April stared at the clock on the nightstand and cried during the assault. (20 RT 4657.) The assault began around "12:07" a.m. and finished at "1:08" or "1:09" a.m. (20 RT 4657-4658.)

During the assault, Daveggio told April that she "was the only girl he could touch that would make him nut." (20 RT 4656.) April explained that "nut" meant ejaculate. Daveggio stopped assaulting April after he ejaculated in Michaud's mouth. Daveggio climbed back up on the bed, kissed April on her stomach and her neck and said, "You know I love you, right." (20 RT 4660.) April felt so "violated" that she "wanted to die." (20 RT 4660.) April "just wanted to die." (20 RT 4660.)

The day after Thanksgiving, appellants took April back home to the Carpenter residence because the DMV was closed. Michaud "cornered" April in the laundry room and tried to talk April "into going on a hunt with them." (20 RT 4704.) Michaud said that the day after Thanksgiving was the biggest shopping day of the year and thus "would be a perfect day to find someone to kill." (20 RT 4704.) Michaud became angry when April told her that she had other "things to do." (20 RT 4705.)

Later that evening, April went to her boyfriend's house. (20 RT 4707.) April's boyfriend, Spencer Burton, testified that he and April went to his house around midnight. As he started to become intimate with April, she "proceeded to break down" and began "crying." (21 RT 4712-4713.)

April "divulged" that her father and his girlfriend "had molested her in a sexual manner." (21 RT 4714.) April told Burton that her ordeal lasted "a good, hour and a half." (21 RT 4714.) April said that if her father called, he was supposed to tell him that she was not there. (21 RT 4715.)

Appellants Purchase Their Torture Devices

On November 30, appellants went to a K-Mart store in Hayward where they purchased two curling irons. (21 RT 4868-4873.)

On December 1, appellants entered an adult entertainment store called "Not Too Naughty." (21 RT 4844.) The store's video camera reflected appellants purchasing a ball gag and a tape called "Submissive Young Girls." (21 RT 4849, 4856.)

A Federal Warrant Is Issued for Daveggio's Arrest in the Aleda Doe Assault

Also on December 1, the FBI compiled photographic lineups containing appellants' pictures as a result of the information given by Christina and Rachel. (24 RT 5401.) Aleda identified Daveggio as her assailant, but did not select Michaud's photo. Based on Aleda's positive identification of Daveggio, a federal warrant was issued for Daveggio's arrest. (24 RT 5404.)

Appellants Kidnap Vanessa

Vanessa's mother, Christina Samson, testified that on December 2, 1997, Vanessa was 22 years old. The family lived in Pleasanton and Vanessa normally walked to work. On the morning of the kidnapping, Samson was wearing a San Diego State University sweatshirt and had a backpack on. (22 RT 4927-4934.) She left for work between 7:20 and 7:45 a.m. and was never seen alive again. (22 RT 4935.)

On the day of the kidnapping, David Valentine and David Elola were working on Valentine's roof near the Samsons' home. (22 RT 4942.)

Valentine heard "a very loud scream." (22 RT 4945.) Elola also heard a "high pitched" scream followed by the sound of a sliding door being shut. (22 RT 4975.) The sound came from a woman and Valentine "knew in [his] heart" that "something was wrong." (22 RT 4945.) Both men saw a woman in a green van drive away slowly. (22RT 4976.) Valentine remembered that the van's license plate began with the number 3. (22 RT 4947-4949, 4952.) Valentine wanted to call the police but Elola reassured him that a woman was driving the van and was probably picking up her daughter. (22 RT 4979.) Because the van driver was female and had driven away slowly, Valentine accepted Elola's advice and did not call the police. (22 RT 4959.)

Valentine subsequently saw a flier posted on his door about a missing girl. Valentine began crying and then told the police about the green van with a California license plate beginning with the number 3. (22 RT 4953, 4960.)

After kidnapping Vanessa, appellants drove to the Sacramento welfare office so that Michaud could pick up her welfare check. The clerk, Terri Hardy, knew Michaud. (22 RT 4987-4990.) Hardy thought Michaud looked well-coiffed and acted normally. Michaud was nicely dressed and did not appear to be upset. Michaud did not say anything about needing help, even though a security guard was in the office. (22 RT 5001.) Michaud left the office at 9:52 a.m. and cashed her $538.00 check at a nearby check-cashing facility. (22 RT 4994-4498, 5012-5014.)

Michael Peterson worked at Sly Park recreation area, a campground near Lake Tahoe. On December 2, he saw appellants pull into the campground in a green minivan which had large white stripe below the windows that ran the length of the van. (22 RT 5027.) Near the back of the van, Peterson saw Daveggio, whom he described as a white male about five feet, 11 inches tall, with a pot belly. Peterson also saw Michaud—a white

female with longish brown hair—near the front of the van. (22 RT 5027-5031.)

Mukesh Patel, the proprietor of the Tahoe Sundowner Motel, confirmed that appellants registered at the motel around 11:15 a.m. (22 RT 4050-4052.) Daveggio parked the van in front of their assigned motel room. A few minutes later, Patel saw Michaud drive away. About half an hour later, Michaud returned and parked the van near the assigned room. (22 RT 5061-5064.) That evening, Patel noticed that the windows in appellants' room were all fogged up. The light was on, but the van was gone. (22 RT 5063-5064.)

Appellants left the next morning. When Patel entered the room around 11:00 a.m., the room was clean; the trash can was emptied and its liner had been removed. Patel noticed a brown stain on the bedspread which he subsequently laundered. (22 RT 5057-5058, 5065.)

The next day, Michaud was required to appear in court in Lake Tahoe as a result of a bad check case. (23 RT 5100-5104.) Gary Marchesano, the prosecutor, testified that when he met Michaud that day, she appeared to be "at ease" and was "very cooperative." (23 RT 5100.)

Appellants Are Arrested

At 7:19 p.m., appellants registered at the Lakeside Inn & Casino in Stateline, Nevada. (23 RT 5080-5086.) That evening, appellants were placed under surveillance based on information from Rick Boune who had informed the FBI that Michaud was going to be in Lake Tahoe for her court appearance. The FBI arrested Daveggio on the Aleda Doe federal kidnapping charge at a casino in Tahoe. (23 RT 5112-5115.) The arrest warrant also sought the registered owners of Michaud's green minivan. (23 RT 5124.) When appellants' motel room was searched, the FBI recovered a loaded semi-automatic pistol and drug paraphernalia. (23 RT 5136-5137,

5171.) At the time Michaud was arrested, authorities recovered a three-foot long, yellow rope from her pants pocket. (23 RT 5179.)

Vanessa's Body is Discovered

On December 4, the day after appellants' arrest, John Schoettgen was driving down Highway 88 from Sonora, California (23 RT 5239.) Around 10:30 a.m., Schoettgen pulled over into a plowed turnout. Schoettgen exited his vehicle and looked down the embankment where he saw somebody lying face down in the snow. (23 RT 5240.) Schoettgen called out to the person to see if he or she was okay but received no response. (23 RT 5240-5241.) Schoettgen panicked and immediately drove to a pay phone where he called 911. (23 RT 5241.)

Alpine County deputy sheriffs Henry Veatch and Everett Brakensiek responded to Schoettgen's 911 call. Brakensiek looked down the embankment saw Vanessa lying face down in the snow. There were no footprints next to Vanessa. (23 RT 5265-5266.) Brakensiek approached Vanessa's body and saw a ligature mark around her neck, and a red nylon lunch bag under her body. (23 RT 5267-5269, 5272.)

Near Vanessa's body, deputies recovered a backpack, napkins, and a six-foot piece of black rope with human hair stuck in it. (23 RT 5277-5278.) Vanessa's jeans were buttoned at the top and unzipped. One shoe was tied; the other was not. (23 RT 5282-5284.) Vanessa's backpack contained her driver's license, a cassette tape player, a hair clip and a pager. (23 RT 5286-5287.) Using Vanessa's driver's license, Brakensiek ran Vanessa's information through the missing persons' database and found that she was listed as a missing person from Pleasanton. (23 RT 5290.)

Evidence Recovered From the Minivan

When the minivan was searched, the police recovered a rosary with a cross on the rear view mirror and a card that stated, "Sit on my face and let

me eat my way to your heart." (24 RT 5431-5434; 26 RT 5798.) In addition, a gun, ammunition and a cocked crossbow were found in the van. (24 RT 5431-5434; 26 RT 5868.)

Police also recovered two curling irons. (24 RT 5579.) The first curling iron examined was 12 inches long. The clamp portion had been removed and the electrical cord had been cut off. Duct tape covered the area where the clamp had been removed. (27 RT 5918-5927.) "Brown material" was found in the grooves. A pellet nearly an inch long was embedded in the tip of one of the curling irons. (27 RT 5922-5925.) Swabs taken of the curling iron tested positive for the presence of blood. (27 RT 5937-5941.)

The second curling iron was also examined. The second curling iron was 13 inches long. Like the first curling iron, the clamp and the electrical cord had been cut off. Duct tape was wrapped around the area where the clamp had been removed. The tip on the second curling iron was "wider and shallower than the first curling iron." A brown pellet was lodged in the tip which tested positive for the presence of blood. (27 RT 5938-5943.) The brown pellets in both curling irons had the "appearance and characteristics of fecal material." (27 RT 5967-5971.)

Among other things, the minivan also contained: a curled yellow cord; an AM/PM cup, a partial roll of duct tape; a green foam rubber ball gag with a leather harness; three paper napkins; and a strip of cloth about three inches wide and about 30 inches long. (27 RT 5930-5933.) Three sets of bite marks were found on the ball gag. (27 RT 5948.) One of the napkins had a "distinct U-shaped appearance" and had "several brown stains." (27 RT 5954-5955.) The napkin looked as if it had been used to wipe off the curling irons. (27 RT 5954-5955.)

Also recovered from the van was a piece of carpet which had four slits cut into it. (24 RT 5514.) A template was made of the carpet with the

location of the slits. (24 RT 5517-5518; 28 RT 6109.) When placed in the van, the marks on the template lined up with the eye bolts to which the van's middle seats would be attached. (28 RT 6110-6111.)

Police also recovered orange rope, red rope, and yellow rope. The yellow rope measured 37 feet and four inches. The yellow rope taken out of Michaud's jeans pocket measured 37 inches. (28 RT 5787, 5790, 6111-6114.)

Other Evidence Discovered After the Murder

Appellants left several boxes of belongings in Jamie's room. Appellants' book collection included: "Sex Slaves," "Sex Slave Murders," "Slave Girls," "Journey into Darkness," "Deadly Goals," and "Most Wanted." (21 RT 4772, 4806, 4816.) Appellants also had serial killer trading cards, a Bonnie and Clyde movie, and a crossbow. (21 RT 4805, 4813-4815, 4817.) In addition, an empty plastic rope package was also located in appellants' belongings. (28 RT 6114.)

DNA Evidence

Vanessa's DNA was found on an AM/PM cup, the ball gag, the curling irons, and the feces-stained napkin. (27 RT 5976-5977.) Only one out of 8.9 billion Caucasian people would share the same DNA as Vanessa. (24 RT 5437; 27 RT 5978.)

Stipulations

The parties stipulated that Daveggio had a vasectomy on December 15, 1993. (24 RT 5534.)

Fingerprint Evidence

Michaud's right thumb fingerprint was found on the duct tape wrapped around the 13-inch curling iron. (28 RT 6134.) Michaud's right index print and a left palm print were also located on the 13-inch curling iron. (28 RT 6134-6135.)

Prints from Michaud's left index and right middle fingers were found on the 12-inch curling iron. (28 RT 6145.)

Daveggio's fingerprints were found on a book entitled, "Dead of Night," and on various soda cans and bottles. (28 RT 6148-6149.) An AM/PM cup in the van bore Vanessa's right thumb print, Daveggio's right and left thumb prints, and Michaud's right thumb and middle fingerprints. (28 RT 6152-6154.) Daveggio's fingerprints were also on a black cash box. (26 RT 5860.)

The Autopsy

Dr. Curtis Rollins conducted Vanessa's autopsy. However, as a result of Dr. Rollins' substance abuse problems, Dr. Brian Peterson testified in his stead, relying on written reports and photographs. (28 RT 6044.) Dr. Peterson opined that Dr. Rollins had conducted "a very detailed, very thorough examination." (28 RT 6052.)

At the autopsy, Vanessa's clothing was removed; fecal matter was in her underwear and was coming out of her rectum. (23 RT 5325-5326.) Vanessa was five feet, four inches tall and weighed 120 pounds. (28 RT 6066.)

According to Dr. Peterson, Vanessa had bruising underneath her scalp which was attributable to low impact blunt force injuries. (28 RT 6054, 6055.) Such injuries could result from Vanessa being struck on the head with a hard object, or from Vanessa's head being slammed against a hard surface. (28 RT 6054-6055.)

The next injury documented was to Vanessa's neck. Vanessa had a "ligature furrow" which was ten inches long and one-quarter inch wide. The furrow had "areas of weaving." (28 RT 6056.) The woven pattern in the ligature furrow was consistent with a rope having been used to strangle Vanessa. (28 RT 6056.)

Peterson explained that if one viewed the neck as a cylinder containing multiple different structures, the larynx, or voice box, would be closest to the outside. Beneath the larynx is the trachea, or windpipe. And behind that lies the esophagus which connects the mouth to the stomach. (28 RT 6059.) Underneath those structures are a series of "strap muscles." (28 RT 6059.) In Vanessa's case, "there was extensive bleeding" involving all those structures and muscles. The bleeding was "so deep" that it involved the "back of the esophagus." (28 RT 6059.) In addition, there were petechial hemorrhages, i.e., burst blood vessels, in all of those structures. All of those findings were consistent with strangulation. (28 RT 6059.)

However, because the damage to those structures went beyond what Peterson would expect to see in a ligature strangulation, Peterson believed that Vanessa had also been manually strangled. Peterson explained that he had seen cases of purely ligature strangling by hanging where there was no "bleeding in the strap muscles at all." (28 RT 6060.) Peterson had also seen "known cases of manual strangulation where there was moderate bleeding in those strap muscles." (28 RT 6060.)

In contrast, the bleeding in Vanessa's neck "involved multiple layers of muscle all the way to the back of the neck" which suggested to Peterson "that substantial manual force was also involved." (28 RT 6060.) Peterson therefore believed that the crushed structures in Vanessa's throat showed that she had been manually strangled as well as being strangled by ligature. (28 RT 6062.) Peterson opined that the ligature and manual strangulation could have occurred either separately or at the same time. (28 RT 6060-6062.)

Vanessa also had petechial hemorrhages in her eyes and in the pericardium—outer membrane—of her heart. (28 RT 6057-6058, 6063.) In addition, petechial hemorrhages were found on Vanessa's lungs. (28 RT

6063.) Blood-tinged foam in Vanessas's mouth also pointed to strangulation. (28 RT 6062.)

Vanessa's chest and left armpit had scrapes and bruises. (28 RT 6063-6064.) Vanessa's buttocks also had significant bruising. Vanessa's left buttock bore a bruise measuring three and three-quarter inches by three inches. (28 RT 6064-6065.) The bruising was very deep and extended all the way to the muscles. (28 RT 6065.) The bruises "likely involved blows with a blunt object of some type." (28 RT 6066.) Peterson did not believe that the bruising could have resulted from a fall. (28 RT 6092-6093.)

There were no physical injuries suggesting she had been restrained. (28 RT 6066-6067.) Peterson noted that even where bindings are known to be involved, it was "basically unusual to see evidence of that." (28 RT 6068.)

Michaud's Guilt Phase Defense

Dr. Carl Reiber testified that the bleeding in Vanessa's throat, as well as the petechial hemorrhages in her eyes were consistent with nonlethal strangulation. (29 RT 6216-6217.) Even though Vanessa had petechial hemorrhages on her face, in her eyes, in the lining of her voice box, on the surface of her heart, and on her lungs—all signs that were consistent with strangulation—Reiber did not believe that they necessarily indicated that she had died of asphyxiation. (29 RT 6233-6236.) Although the ligature used to strangle Vanessa caused deep bleeding in five different muscle groups in her neck, Reiber thought it only "might" be evidence that she died from strangulation. (29 RT 6236-6237.)

Reiber opined that Vanessa may have been subject to nonlethal strangulation and died of exposure after being thrown down a snowy embankment. (29 RT 6217-6218, 6222.) Dr. Reiber further opined that the deep bruises on Vanessa's buttocks could have resulted from being thrown onto the road. (29 RT 6218, 6240-6241.) Dr. Reiber conceded, however,

that there were no clinical signs that Vanessa froze to death and that his opinion that she might have frozen to death was based on the fact that "she was found in the snow in a very cold environment." (29 RT 6225.)

On cross-examination, Reiber agreed that there were no defensive wounds on Vanessa, and that one would expect such wounds if the victim's hands were free while being strangled. (29 RT 6249.) Reiber also agreed that the lack of marks on wrists and ankles does not necessarily indicate that somebody was not restrained since the type of binding and the victim's level of resistance, or lack thereof, could determine whether sufficient pressure existed to make marks. (29 RT 6249-6250.)

Likewise, a lack of injury to the vagina or rectum does not mean that no assault in those regions occurred. Indeed, in approximately 60 percent of cases in which forcible sodomy occurred, there would not be any findings of physical trauma. (29 RT 6250-6251.)

With respect to the issue of bias, Reiber acknowledged that his contract with Sacramento County had been terminated. (29 RT 6224.) Reiber also acknowledged that on one occasion he had identified a skull found in a garbage dump as belonging to an orangutan, rather than a human. (29 RT 6269, 6272.) Dr. Rollins, the pathogist who conducted Vanessa's autopsy, had disputed that finding and had concluded that the skull found in the dump was that of a child between six and eight years old. (29 RT 6262-6269.) After a third doctor examined the skull, Reiber rewrote his report to state that the skull found was that of a human. (29 RT 6269-6270.)

Phil Schmaling testified that he lived at the tri-level house with Michaud and her children, Randy and Rachel, and Daveggio's daughter, April, and his stepdaughter, Briann. (30 RT 6369-6370.) One time Schamling saw Rachel and Michaud having a fight in which Rachel screamed at Michaud and pushed her down the stairs. (30 RT 6370.)

On another occasion it was Rachel's turn to do the dishes, but Rachel refused to do them. After Schmaling said he would help her with the dishes, Rachel told Schmaling that she did not have to do anything he told her to do, and that "all it takes is a phone call and [he would be] history." (30 RT 6370.) Rachel warned Schmaling that she would tell police that he raped her or tried to rape her. (30 RT 6371.)

Fred Martinez was friends with Michaud and Daveggio. He testified that Michaud lost a lot of weight around 1997 and was no longer outgoing. (30 RT 6382.) Daveggio also appeared as if he had increased his methamphetamine use. (30 RT 6383.) Martinez acknowledged that he had said that Daveggio and Michaud were "equal partners" and could stand up to each other. (30 RT 6385-6386.)

Sheri James met Michaud when Michaud was 16 years old and came to James's massage parlor for a prostitution job. (30 RT 6508.) Michaud came with her own clients. (30 RT 6508-6509.) Michaud was not a dominatrix and did not use whips or other bondage instruments on her clients. (30 RT 6512-6517.) Michaud did not do drugs very often, but had a drinking problem and would burn herself with cigarettes. (30 RT 6508.)

Michaud's father, Leland, would bring customers to the massage parlor who would go into Michaud's room. Leland also came to the massage parlor by himself and would collect money from Michaud. James saw Leland go into Michaud's room and stay there for awhile. When Leland emerged, he was often putting his shirt on or zipping up his pants. On one occasion James walked into Michaud's room and saw Leland and Michaud "making love." (30 RT 6509.) Leland went into Michaud's room about two or three times a week. (30 RT 6524-6525.)

James was also acquainted with Johnny Garcia, Michaud's former boyfriend. Michaud often came to work with bruises while she was in that relationship. James recalled an incident in which she saw Garcia and

Michaud in the parking lot. Garcia was dragging Michaud by her hair and was also kicking her. On a different occasion, Garcia was thrown out of the massage parlor because he was beating Michaud as a result of her refusal to leave with him. (30 RT 6510.)

Tina Murrell was Sheri James' adopted daughter. (30 RT 6473, 6534.) Murrell had known Rachel and Christina since they were nine and ten years old. Both girls told Murrell they were Sureño gang members. Murrell saw Rachel flashing Sureño gang signs which said "N-K," for "Norteños-Killer." (30 RT 6457-6459.) Murrell acknowledged that her family was "affiliated" with Norteño gang members, but that some family members associated with the Sureños. (30 RT 6459-6460.)

On one occasion Rachel told Randy that a boy she was mad at had chased her down and tried to take her skirt off her. Consequently, Randy beat the boy up based on Rachel's allegations. Murrell knew the allegations were false because after Randy left to beat up the boy, Rachel was laughing and said she was just mad at the boy for something he had done earlier that day. (30 RT 6453-6454.)

Murrell also knew Amy. She lived with Amy from approximately March 1997, until February 1998, and never saw her with any cuts or bruises during that time period. (30 RT 6453.) Nor did Amy ever tell her that she had been raped by Daveggio and Michaud. (30 RT 6453.)

Dr. Pablo Stewart opined that Michaud suffered from post-traumatic stress disorder (PTSD) as a result of her life of prostitution, and would be likely to behave subserviently with men. (31 RT 6606-6607, 6613.)

In forming his opinion, Stewart interviewed appellant and reviewed a psychological report by Dr. Michael Fraga. Stewart also spoke to Sheri James, Burdell Wulf, and Dr. Helga Mueller, the psychiatrist who treated Michaud's son Randy. In addition, Stewart reviewed testimony from Aleda Doe and Rick Boune. (31 RT 6600.)

On cross-examination, Stewart acknowledged that although he had interviewed Michaud for approximately six hours, he had not taken a single note during the entire interview. (31 RT 6622.) Likewise, Stewart took no notes of any of his discussions with other defense witnesses like Burdell Wulf, somebody he considered to be an important source of information. Stewart did not ask Wulf whether Michaud liked sodomy and the use of restraints during their sexual encounters. (31 RT 6625-6626, 6629.) Wulf did not tell Stewart that Michaud's parents owned the property where Michaud was living, thus explaining why Wulf had given money to Michaud's parents. (31 RT 6634-6636.)

Not only did Stewart fail to take a single note during his interviews with Michaud and other various people, Stewart did not write a report regarding his findings. Stewart was aware that if he did write a report, it would be discoverable and could be reviewed by other psychiatric experts. (31 RT 6623-6624.)

When forming his opinions, Stewart was unaware that two curling irons were alleged to have been used to sodomize Vanessa during the crime. (31 RT 6625.) Nor did Stewart know anything about Michaud's fingerprints being discovered on the duct tape wrapped around the curling irons. (31 RT 6628-6629.)

Stewart acknowledged that the defense investigator and Michaud's friends, Sheri James and Tina Murrell, were present during his interview of Michaud. (31 RT 6627.) Although Stewart relied on Dr. Fraga's psychological examination, he did not recall that Dr. Fragas' report explicitly stated that Michaud's statements should not be taken at face value because she had a tendency to exaggerate somatic complaints. (31 RT 6629-6631.)

Randy's psychiatrist, Dr. Mueller, told Stewart that Michaud was a prostitute who dressed "very suggestively." (31 RT 6642-6643.) Although

Mueller said that that Randy had problems from seeing Michaud physically abused, Stewart did not recall Mueller telling him that Randy had problems related to watching his mother have sex with her clients in their home. (31 RT 6642.) Mueller did not tell Stewart about Michaud physically abusing Randy or abandoning Randy. Likewise, Mueller did not inform Stewart that, at the age of eight, Randy went through therapy and told Michaud that he did not want to live with her anymore. (31 RT 6642-6643.)

Similarly, Mueller did not tell Stewart that on many occasions Michaud would pull Randy out of therapy, hospitals and group homes because she did not like what Randy was saying. (31 RT 6643-6644.) On the contrary, Stewart recalled Mueller telling him that Michaud was very good about keeping appointments. (31 RT 6643-6644.) Stewart was not sure that his opinion that Michaud was a dutiful parent would be changed if, in fact, Michaud pulled Randy out of therapy against the recommendation of medical professionals because Randy had said he did not want to live with Michaud any longer. (31 RT 6644-6645.)

Stewart also examined a police report regarding Johnny Garcia in which Michaud accused Garcia of abusing her. Stewart did not observe a videotape on which Michaud informed the police that she had fabricated stories about her orally copulating her father's penis because Garcia "got off" on that. (31 RT 6650-6652.) Stewart was also unaware that Michaud told the police that she had been a willing participant in sex acts involving duct tape and foreign objects. (31 RT 6653-6654.)

Stewart acknowledged that although he had opined that a person suffering from PTSD was more likely to be dominated or controlled by somebody, the most recent version of the Diagnostic Statistical Manual (DSM) did not list that as a known trait associated with PTSD. (31 RT 6656-6657.) Stewart agreed that the most recent DSM stated that caution

should be utilized when diagnosing PTSD in a forensic setting when somebody is charged with a crime. (31 RT 6657-6658.)

Stewart further agreed that in forming his diagnosis of Michaud, he had not been provided with 318 pages of medical records from Children's Protective Services (CPS) in Sacramento. (31 RT 6659.) Nor had he reviewed the 1,025 pages of records regarding Michaud's incarceration in Washoe County. (31 RT 6659-6660.) The only medical record Stewart had relied upon when forming his opinion was Dr. Fraga's report. (31 RT 6658.)

Although Stewart believed that Michaud had suffered early childhood trauma in the form of sexual abuse by her father, Stewart did not interview any of her family members, even her father who allegedly abused her. Thus, Stewart did not talk to her brothers, Michael and Marty, or to her sister, Misty. (31 RT 6661-6662.) Stewart conceded that he talked to nobody who knew Michaud when she was 11 years old, the time she allegedly suffered childhood trauma. (31 RT 6662.) Stewart stated that he had made no efforts to speak to family members because he had been told they were unwilling to talk to him. (31 RT 6662-6663.)

Stewart declared that, even if the abuse allegations were fabricated, that would "absolutely not" change his opinion regarding her PTSD diagnosis because she had been a prostitute since her childhood. (31 RT 6663-6664.) Stewart had not been provided with a copy of Michaud's memoirs entitled, "My Escapades in a Massage Parlor," and had not read that she became a prostitute for the intrigue and excitement. In any event, that information would not change his PTSD diagnosis because the life of a prostitute is traumatic, even if entered into voluntarily. (31 RT 6664.)

It would also not change his opinion even if he knew that the introduction to her memoirs stated that she would teach people about the meaning of the words "sadist, masochist, and domination," and also

discussed her desire to tie up her clients and whip them severely. (31 RT 6664-6665.)

Stewart agreed, however, that part of the basis of his PTSD diagnosis was Michaud's claim that her father had sexually abused her, and pimped her out since the age of 11. (31 RT 6666.) Stewart did not know that Michaud's memoirs stated that she had not told Leland about her prostitution because she knew he would not approve of that kind of lifestyle and she had to lie to him. (31 RT 6666.) Although Michaud said she had become a prostitute at age 11, the fact that she actually became one at age 17 would not change his opinion. (31 RT 6668.) Nor would it change Stewart's opinion that Michaud's father tried to make her quit being a prostitute. (31 RT 6669.) Likewise, Michaud's description of tying the feet and hands of her prostitution clients had no effect on his opinion that she was a victim. (31 RT 6669-6670.)

Stewart was also unaware that after her arrest, Michaud had sent her father a notarized letter which stated:

> I, Michelle Lyn Michaud, have never as a young girl or older, into my adulthood, ever been molested sexually or otherwise by my father, Leland Andrew Michaud, nor has either of my children Randy Lee Michaud or Rachel Marie Michaud. My father is a good man and has always been of good and high moral of character. His honor and integrity as a person and a father are without question. My father's friends, not to mention his very family, love and respect him. I am hoping that this letter informs and also enlightens you to whom my father is. I am his daughter and love him with all my heart. My father could not and has not ever done such a thing to me or anyone else ever.

(31 RT 6671-6672.) The foregoing letter did "not at all" change Stewart's opinion and was, in his view, totally consistent with an abuse victim. (31 RT 6672.)

Stewart explicitly acknowledged that in opining that Michaud had PTSD and was acting under the domination of Daveggio, he had disregarded the testimony of Christina, Rachel, Amy, Sharona and April. (31 RT 6673-6680.) Stewart believed that even if those witnesses described Michaud as being an active, willing participant in the assaults, that did not alter his determination that she was under the domination of Daveggio. (31 RT 6690-6692.) Stewart did agree that Aleda's testimony that Daveggio left it to Michaud to decide whether she would live or die was a factor in his opinion. (31 RT 6692, 6708.) If Michaud told Daveggio that she would stick a knife in the ass of any female competitor and slit her all the way to her clitoris, it would not affect Stewart's opinion that Michaud was under the domination of Daveggio. (31 RT 6712-6713.)

Daveggio's Guilt Phase Defense

In an effort to counteract Michaud's claim that she was a battered woman who was dominated by Daveggio, Daveggio presented the testimony of Vickie Fairbanks, his former girlfriend who was friends with both him and Michaud. According to Fairbanks, Michaud was "obsessed" with Daveggio and described Michaud's behavior towards Daveggio as "stalking." (32 RT 6738.) Michaud would constantly monitor Daveggio's movements so she could be wherever he was. (32 RT 6726-6727.) Michaud would drive by Daveggio's residence and would try to become friends with anybody he knew so she could be around Daveggio. (32 RT 6738.) On one occasion, when Fairbanks' friend said she wanted to talk to Daveggio, Michaud stepped in front of her friend and stated: "You don't talk to James, you tell me what you want. You have to go through me." (32 RT 6750.)

Michaud would falsely tell Daveggio that she had been threatened by members of Devil's Horsemen motorcycle gang. (32 RT 6729-6730.)

Prosecution Guilt Phase Rebuttal

Dr. Curtis Rollins testified that on the day he conducted Vanessa's autopsy, he had not taken any Demerol. (32 RT 6816.) Rollins did not believe that the injuries to Vanessa's buttocks were caused by falling on gravel. (32 RT 6820-6821.) Had the injuries been caused by falling onto gravel, there would have been abrasions. Instead, there were "strictly bruises," which were "consistent with a blunt force injury delivered to her buttocks." (32 RT 6821.)

Vanessa's head had a total of five areas of bruising; two bruises were on the right side of her head and three bruises were on the right side. (32 RT 6822.) Rollins had "absolutely no doubt" that Vanessa died from ligature strangulation and opined that she had "some of the worst neck injuries" he had "ever seen." (32 RT 6829.) Had Vanessa died of hypothermia, Rollins would have expected to see a severe skin discoloration that is known as cherry lividity. (32 RT 6829.)

Penalty Phase Prosecution Evidence

Liz Silos was Vanessa's "best friend" and "more like a sister than anything." (35 RT 7486.) Vanessa "was special." She was "always there giving a helping hand," and "was always there no matter what." (35 RT 7487.) Silos and Vanessa had planned to be in each other's weddings, have their kids grow up together and to act as aunts to each other's children. (35 RT 489.)

On Thanksgiving weekend Vanessa called and wanted to get together. Silos said she could not do so because she had to study for finals and did not want to get stuc k in traffic. Silos and Vanessa agreed they would see each other the following weekend. (35 RT 7494.)

When Silos tried to contact Vanessa after Thanksgiving weekend, her repeated pages to Vanessa went unanswered. Silos kept paging, "Where

are you, this is an emergency?" (35 RT 7494.) Silos never heard from Vanessa again. (35 RT 7494.) When nobody could find Vanessa, Silos called the radio station they both listened to and had a deejay go on the air and ask Vanessa to call her family. "No one got any calls." (35 RT 7495-7496.)

The time when Vanessa was missing "felt like an eternity of hell." (35 RT 7496.) For the first year after Vanessa's murder Silos would page Vanessa just to hear her voice on her voice mail. Sometimes Silos even left messages on her voice mail because "that was the only way [she] could talk to her." (35 RT 7497.) When Silos thought about what Vanessa had gone through she felt "dead inside." (35 RT 7497.)

As a tribute to Vanessa, Silos wrote a poem to read at her funeral. The poem stated:

> As each day goes by, we think and remember the days of laughter, the days when we were all together, the parties, the clubbing, the trips to Vegas. We cherish the memories, plus we have videos of us, the dog piles, the snow trip, the times we had sleepovers, the time we were stuck in traffic, and pulled an all-nighter. These times are vivid and are close to the heart with memories such as these, we will never be apart. When you need Vanessa, she is but a prayer away, she is here for us more now each and every day, keep her close to your heart and her memories alive, we will need these for healing which will only come in time. And Ness, to you we would like to say, when we needed you most, you went out of your way, you helped us out the whole way through, we want to say thanks and that we love you. When times were tough, we all turned to each other, our friendship grew stronger. You became our sister. You gave us words of comfort and encouragement. Ness we miss you and you are forever our friend.

(35 RT 7500.)

Vanessa's boyfriend, Robert Oxanian, loved Vanessa who made him feel "so special." (35 RT 7543.) On Thanksgiving weekend, Oxanian and Vanessa went shopping and then to Starbucks to have some coffee.

Vanessa kissed a napkin and wrote, "I love you" on it before giving it to Oxanian. That was Oxanian's "last piece of memorabilia from her." (35 RT 7545.)

On Vanessa's birthday, Oxanian made a special tape which had a mix of songs so that he "could tell a story" about what she meant to him. (35 RT 7545.)

After Oxanian found out what had happened to Vanessa, "it was like something you would see in a movie." His "legs got so weak that [he] could barely stand." Oxanian "just lost it." (35 RT 7549.) Oxanian began "crying" and his friends drove him home because "they didn't want [him] to do anything stupid." (35 RT 7549.)

When Oxanian saw Vanessa's body he was in a state of "disbelief." (35 RT 7549.) Oxanian testified:

> I kept looking at her and hoping that it wasn't her. And it just didn't look like her, so I was thinking: This isn't her. This is someone else. But for some reason, I could recognize the way her arms looked. And it was horrible to see that there were bruises on them. I could see through the makeup.

(35 RT 7549.) Oxanian kept thinking of what he could have done to prevent the murder and felt guilty that he had not "been there to protect her." (35 RT 7550.) Since the murder, Oxanian always felt like a part of him "was missing." (35 RT 7550.) Oxanian wished he could have driven her to work that day. Because Oxanian never got to give Vanessa a wedding ring as he had hoped to do, he asked Vanessa's mother if he could give her a ring for her burial. Oxanian "didn't want to put it on [himself], so they did it for [him]." (35 RT 7551.) Oxanian stood with Vanessa's mother who watched while the mortician put the ring on her as she lay in her casket. (35 RT 7550-7551.)

Vanessa's sister, Nichole Samson, described how Vanessa was always a very supportive sister and would attend her volleyball games and give her

advice, even if that meant telling Nichole that she "was out of line." (35 RT 7655-7657.)

On the day appellants kidnapped Vanessa, Nichole thought Vanessa was with their mother. Nichole kept waiting to hear the sound of Vanessa who wore "clunky shoes," "but it never happened." (35 RT 7659.) While waiting for Vanessa, Nichole and Vanessa's friends talked about how they were going to go to San Francisco to celebrate her birthday which was on December 13. (35 RT 7659-7660.)

When asked how it felt to lose Vanessa, Nichole stated, "I wake up every morning. Vanessa is one of my first thoughts and one of my last thoughts before I go to bed. There's not a day that goes by that I don't think about Vanessa." (35 RT 7660.) Nichole explained that there were "good days" and "bad days." On her bad days, Nichole considered them "the worst" because she felt "lucky" if she even made it "out of the house to go somewhere and do something." She also would think about how she never would experience a life watching Vanessa get married and have children. (35 RT 7660-7661.)

Nichole blamed herself for Vanessa's murder because the day before the kidnapping she had taken Vanessa to work. However, on the night before the kidnapping she had stayed at a friend's house and was not there in the morning to drive Vanessa to work. Nichole thought that if she "had just called her a little sooner, paged her sooner that day or left [her] friend's house a little earlier, [she] would have been there. This wouldn't have happened." (35 RT 7661.) Nichole stated that she was "never going to be normal again" and that it was "hard to be motivated to get up every day and go on with [her] life." (35 RT 7661-7662.)

Nichole described an incident which occurred the day after Thanksgiving. Vanessa and Nichole went to San Francisco. Nichole had a severe allergy attack and had to stuff tissues up her "nose [to keep it] from

running." Although they were on BART, and Nichole could not stop blowing her nose and sneezing, Vanessa was not embarrassed and "was really understanding about it." (35 RT 7665-7666.)

Nichole fondly remembered how the rule when everybody went out dancing was that "when you're out with the girls," everybody would come in the same car and leave in the same car. Nichole also thought about how she used to pick Vanessa up after work and she "always used to have her little red bag." (35 RT 7665-7666.) So when she saw photos of Vanessa lying in the snow with her red lunch bag "it was really hard." (35 RT 7666.)

Vanessa's brother, Vincent, testified that Vanessa had been a very loving sister. On one occasion, they were at a rest stop on the way to Los Angeles and Vanessa asked her mom if they could provide food to a family who was camped out at the rest stop. (35 RT 7667-7668.)

During the time Vanessa was missing, Vincent felt like he was on "an emotional roller coaster." "It wasn't like her to disappear like that without calling. She always called." (35 RT 7668.) When told by police that Vanessa's body had been found, Vincent "didn't believe it at first." (35 RT 7669.) Vincent wanted to be sure it was Vanessa because he did not want to tell his parents "something that would just break their hearts" unless it were true. (35 RT 7669.) After the police initially told him that Vanessa had been found, he was "really excited" at first because he thought that "maybe she took a road trip somewhere." (35 RT 7669-7670.) Once Vincent learned that Vanessa was dead, he "just lost it." (35 RT 7670.) Vincent found that it was "one of the most difficult things that life doesn't prepare you for, telling your parents that they've lost their child." (35 RT 7670.) Since the murder, not a day went by that Vincent did not think about Vanessa. Holidays were "the most difficult times." Thanksgiving

would "never be the same again." Christmas also would never be the same. (35 RT 7671.)

Vanessa's dad, Daniel Samson, testified that Vanessa became his fishing buddy because his job schedule left him home with her during the days and he did not want to leave her alone. (35 RT 7673-7674.) Since the murder, Mr. Samson felt like his "insides" had been "sucked out." (35 RT 7675.) Mr. Samson visited Vanessa's grave every day after work "to say a few words." (35 RT 7675.) Another ritual was to read Vanessa's calendar which had a special reading for each day. (35 RT 7676.) The calendar was in Vanessa's room which was kept just as it was when appellants murdered Vanessa. (35 RT 776-7677.)

Vanessa's mother, Christina Samson, testified that Vanessa was given the middle name of Lei as a tribute to her Hawaiian grandmother. (35 RT 7678.) To Mrs. Samson, "Vanessa was sunshine. She was always positive, always happy, caring." (35 RT 7679.) When Mrs. Samson got sick, Vanessa would be her "nursemaid." (35 RT 7679.) Vanessa would "butt heads" with her big brother Vincent and tell him that he could not tell her what to do. (35 RT 7679.)

On the morning of the kidnapping, Mrs. Samson was getting ready for work with the bedroom door open and could see Vanessa in her bathroom mirror. Vanessa told Mrs. Samson that she was leaving for work. Since the murder, Mrs. Samson could no longer leave her bedroom door open because she would "remember her standing there for the last time." (35 RT 7679.)

Mrs. Samson also described how she formerly had a habit every morning of looking out the window to see what the weather was going to be like that day, but no longer did so because she did not "want to see a foggy morning" which only brought back "the memories of Vanessa leaving that morning and never coming back." (35 RT 7691.)

Mrs. Samson hated coming home from work now because Vanessa had always started or prepared dinner before she got home and would be watching television. (35 RT 7679-7680.) Because Mrs. Samson did not want to come home to an empty house, "she used to go shopping almost every day" and "would just roam the mall." (35 RT 7680.) Mrs. Samson fondly recalled how Vanessa had told her that she would be the first child "to give [her] a grandchild." (35 RT 7680.)

Mrs. Samson remembered how on the day of the kidnapping, she got home from work and picked up the message from Vanessa's work supervisor asking why Vanessa had not called if she was not coming in. Mrs. Samson was "immediately concerned because that was not like Vanessa." (35 RT 7681.) Mrs. Samson paged Nichole to tell her that Vanessa had not come home. Nevertheless, Mrs. Samson went ahead with her plans that evening, thinking that Vanessa had perhaps "told her sister where she was going about her plans, and just failed to text [her]." (35 RT 7682.)

When Mrs. Samson got home at 9:00 p.m. and Vanessa still was not there, she knew something was wrong and immediately "got the word out." (35 RT 7681-7682.) Nichole had already called the police who were at the house taking a report. Mrs. Samson testified that the "good thing about Vanessa and her friends [was] they had a wonderful network and they would get the word out, and so they all knew that Vanessa was missing." (35 RT 7682.)

That evening, Mrs. Samson could not eat or sleep, desperately hoping that Vanessa would be home by midnight. "That was a magic hour, she was going to come home at midnight." (35 RT 7682.) Part of Mrs. Samson hoped that Vanessa had done something irresponsible on impulse and "would walk in that door any minute." She made herself promise that if Vanessa came home, she "wouldn't get mad at her," and "would just be so

grateful that she was at home." (35 RT 7683.) But she "didn't hear anything," and just stayed up waiting for her. Mrs. Samson recalled another case of a missing woman and thinking: "How can her mother possibly live all these years knowing that her child is out there and not knowing where she is." (35 RT 7684.) Like Nichole, Mrs. Samson kept waiting to hear Vanessa's shoes going "clunk, clunk, clunk" but "just never heard the sound again." (35 RT 7683.)

On the night Mrs. Samson learned that Vanessa had been murdered, she was glad at least that they "were able to give her a proper burial." (35 RT 7684.) "Knowing that your child is dead is like somebody kicks you in the stomach and you can't get enough air, you try, but you can't." (35 RT 7684.) According to Mrs. Samson: "Part of you is missing. You're never complete. I can laugh, I can smile, I can joke, but there's always a sadness that hits me and I always think about Vanessa." (35 RT 7685.)

Mrs. Samson found it very painful to look at pictures of Vanessa's body in the snow, surrounded by her belongings, and to "and to listen how your child is dissected" and learn that "her body was just cut into pieces, just so we could have evidence." (35 RT 7685.)

Mrs. Samson left Vanessa's room exactly how it had been on the day she was kidnapped "because there is so much of her essence in that room that I can't bring myself to clear it out." (35 RT 7691-7692.) Mrs. Samson kept Vanessa's basket of hair scrunchies on top of the dresser because it was as if "it was just sitting there, like ready for her to come home." (35 RT 7691.) Mrs. Samson did not go into Vanessa's room as much as Mr. Samson because "it hurts too much to be in there. I can feel her and I can smell her." (35 RT 7692.)

When asked what she missed most about Vanessa, Mrs. Samson stated: "I miss her calling me mom. She's always calling me mom. And I miss her laugh. Her giggle. I miss her snuggling up to me on the couch.

Although she was an adult, whenever we were sitting on the couch watching television she would snuggle up to me like a little kid and just giggle and then we'd both be giggling. And that's what I'm going to miss." (35 RT 7692.)

Pattie Doe

The prosecution produced a series of witnesses who testified regarding violent assaults perpetrated by Daveggio. Pattie Doe testified that on July 7, 1984, she attended a wedding and became very drunk. (35 RT 7600.) After the wedding, Pattie went to the Black Angus restaurant in Pleasanton to wait for her boyfriend, Charles Vasquez, to get off work. (35 RT 7599-7600.) When Vasquez escorted Pattie to her car to wait for him, he took Pattie's keys to make sure she would not drive. (35 RT 7599-7600.)

The next thing Pattie remembered was "waking up in somebody else's car." (35 RT 7600.) Pattie vomited in the front seat which made Daveggio "real angry" and start hitting her. Daveggio threw his body across Pattie and said he wanted oral sex. Daveggio told Pattie that he did not want to rape her, but only wanted to ejaculate in her mouth. (35 RT 7607-7608.)

Pattie kicked her foot through his windshield. Daveggio, however, pulled away Pattie's pantyhose and underwear and put his fingers in Pattie's "vagina and anus." (35 RT 7603-7604.) After exposing Pattie's breast, he bit her nipple, telling her that he "was going to bite [her] tit off if [she] didn't do what he wanted." (35 RT 7602.) Daveggio "ripped" Pattie's dress, called her a "bitch" and forced her to orally copulate him. (35 RT 7604.)

When Pattie "tried to get her panty hose up and get out of the car," Daveggio "slammed [her] in the side of [her] face and then, thank God, drove [her] back." (35 RT 7600.) Pattie did not know how long she was in Daveggio's car but "it seemed like forever." (35 RT 7604.) After the

assault, Pattie's dress was torn. She had bite marks on her right breast, and her face was bruised from being struck with his fist. (35 RT 7605-7606.)

Pleasanton police officer Joseph Languemi responded to the incident. At approximately 3:30 a.m., Languemi was dispatched to the Black Angus restaurant based on a report from Charles Vasquez that his girlfriend was missing. (35 RT 7582-7583.) Vasquez reported that his girlfriend was extremely inebriated and that he was very concerned about her welfare. (35 RT 7584.)

After talking to Vasquez, Languemi began to exit the Black Angus parking lot to look for the missing woman when he saw Daveggio pulling into the parking lot with a woman who fit Pattie's description. Pattie jumped out of the car and ran to Vasquez and began hugging him. Pattie was "very, very, very upset. She was crying. She was just very emotional." (35 RT 7585-7586.) Pattie said that Daveggio had forced her "to go down on him." (35 RT 7586.) Languemi got back into his patrol car and pulled Daveggio over. Languemi knew him as "Froggy" based on prior contacts with him. (35 RT 7586-7587.)

The parties stipulated that Languemi arrested Daveggio after the assault and that a forensic examination did not reveal the presence of semen in Pattie's mouth. (35 RT 7615.)

Beverly Doe

On July 25, 1985, Beverly Doe was at a bar named "Joey's" in Tracy. While drinking at the bar she met Daveggio and his friend Jeff Hostettler. Since it was very hot at Joey's, Beverly suggested that Daveggio and Hostettler accompany her to a different bar where it was cooler. Beverly drove her car to the second bar and Daveggio and Hostettler followed her in their car. (35 RT 7503-7505.)

After they got to the second bar, Beverly was feeling very drunk and decided to go home. Beverly wanted to walk home because she already

had a drunk driving conviction as a result of her alcoholism. Daveggio then offered Beverly a ride home which she accepted. (35 RT 7506.)

Once Beverly got into Daveggio's car, Daveggio turned in a direction away from her house. When Beverly protested, Daveggio told her that they were going to get a couple of beers. Beverly said she really needed to get home and began crying when Daveggio continued to drive farther and farther away. Beverly kept pleading to be let out of the car, to no avail. Annoyed by Beverly's crying, one of the men turned around and hit Beverly so hard on the head that she felt like she "blacked out." (35 RT 7057-7058.) The more she cried, the more she "was hit." (35 RT 7058.)

After Daveggio stopped the car, he got into the back seat and forced Beverly to orally copulate him. Daveggio kept pushing her head down as she kept trying to pull it away. Daveggio told Beverly that if she did not do a "good job" that he would "beat the crap" out of her. (35 RT 7509.) When Daveggio decided Beverly had orally copulated him to his satisfaction, he allowed her to get out of the car so she could urinate. As Beverly squatted down, "a gunshot went off" near her head. (35 RT 7511.) Beverly had earlier seen Hostettler loading a gun and dropping shells on the floor. (35 RT 7511.) The two let Beverly put her shirt back on and began driving back to Tracy. (35 RT 7516.) Daveggio was pulled over by the police. When the officer asked Beverly if she was okay, she quickly shook her head no because she was very worried about the loaded gun in the car. (35 RT 7516.)

Officer Michael Reiter testified that he had pulled Daveggio over for not dimming his high beam lights. (35 RT 7525.) As Reiter told Daveggio why he had pulled him over, Beverly appeared very upset and was shaking her head as if "she was trying to pass on some kind of message." (35 RT 7526.) Reiter ordered Daveggio and Hostettler out of the car. Beverly who

was "crying" and "terrified," told him she had been kidnapped and raped. (35 RT 7527.)

Reiter traveled back to the location where Beverly was assaulted and found a wet spot on the ground as Beverly had described. Reiter also found three live rounds of .38 caliber ammunition in the same area. A .38 revolver was found in the car which contained more ammunition. (35 RT 7528-7530.)

Daveggio stipulated that he was convicted of assault with intent to rape. (36 RT 7771.)

Donetta Doe

Donetta Doe married Daveggio on May 7, 1982, when she was 19 years old. (35 RT 7616.) About eight months later, Daveggio left the bedroom while Donetta was sleeping naked under the covers. When Daveggio returned, he brought a friend named Gary Silvestri with him. (35 RT 7617-7618.) Daveggio got under the bed covers and pushed Donetta towards Silvestri who sat on the other side of the bed from Daveggio. (35 RT 7619.)

Daveggio told Silvestri that he could get under the covers, too. Donetta said, "No," but Daveggio pinned Donetta's arms over her head while Silvestri began orally copulating her. (35 RT 7619-7620.) Donetta believed the assault lasted about 15 minutes. (35 RT 7621.)

Donetta recalled an occasion when Daveggio was arrested in her car and the passenger side of the car's front windshield had been cracked. (35 RT 7621-7622.)

On a different occasion, Donetta remembered an incident in which Daveggio was arrested in Tracy. When Donetta picked up the car, she found a bra inside the back seat of it. (35 RT 7621-7623.)

Hope Doe

Hope Doe grew up in Pleasanton and used to hang out at the Pastine Pool Hall because the man who owned it was a father figure to her. Daveggio also hung out at the same place and was married to her best friend's sister. (35 RT 7553.).

When Hope was 13 years old, she wanted to go see her boyfriend and Daveggio agreed to take her there. During the drive, Daveggio pulled off on a "desolate" road, telling Hope that "he had to get sick." (35 RT 7556.) After Daveggio got out of the car briefly, he returned to the car, pulled the lever to put Hope's seat back, and jumped on top of Hope. (35 RT 7557-7560.)

Hope screamed and Daveggio grabbed her "by the throat and decked [her] with three full blows." (35 RT 7561.) Daveggio shoved his hand up Hope's skirt and stuck his fingers between her knees as he tried to force them apart. At the time of trial, Hope still bore scars on her knees which Daveggio inflicted as he was trying to force her legs apart. (35 RT 7561.) According to Hope, Daveggio "was willing to take the meat off her kneecap to get [her] skirt up." (35 RT 7561.)

After Daveggio struck her, Hope "started praying." Her grandfather had just died so she thought to herself, "God, Grandpa, someone please help me." (35 RT 7563.) Hope then suddenly thought that she should allow Daveggio to stick his tongue in her mouth. When Daveggio did, Hope bit down on his tongue and "didn't let go." (35 RT 7563.) Hope "bit it full force" and "was not letting it go for nothing." (35 RT 7563.) Hope, who only weighed around 60 pounds, made Daveggio open the door and get off of her. While still biting down on his tongue, Hope ripped barb wire off of a fence in hopes of using it to tie Daveggio up. Hope let go of Daveggio's tongue and ran to the driver's seat of the car in order to drive

the car away. Daveggio had blood on him and was screaming about his tongue. Daveggio jumped in the passenger seat. (35 RT 7563-7564.)

Suddenly, Hope saw a car coming down the road. Hope "ran out in front of it. [She] didn't care if it hit [her] because [she] would rather die than be in the arms of him." (35 RT 7564.) The car "turned out to be a carload" of her friends whom she believed "God sent." (35 RT 7565.) Hope was very upset when she told her friends what Daveggio had done. After she got to her boyfriend's house, her friends "were going out with shotguns" to look for Daveggio even though "they were just kids." (35 RT 7565.)

Daveggio's blood was all over Hope's skirt, "all over [her] shirt," and "down [her] face." (35 RT 7565.) Hope did not return home for two days because she did not "know how to explain it to [her] mother." Hope's mother said Hope needed to call Annette (Daveggio's ex-wife) and tell her that she needed to keep her children away from Daveggio because "there was something wrong with him." (35 RT 7566.)

Daveggio came to the pool hall about two weeks later. Hope began throwing pool balls at him while saying: "Get him out of here or I will kill him." (35 RT 7567.) When asked why Hope's mother had never reported the attack, Hope replied: "Small town, small families." (35 RT 7569.)

Rachel Doe

Michaud's daughter, Rachel Doe, discussed an incident which occurred on the way home from the trip to Santa Cruz. According to Rachel, Michaud pulled into the parking lot of a shopping mall while discussing how Daveggio wanted to murder his ex-girlfriend, Liz Bingenheimer. Michaud dropped him off to go kill her. (35 RT 7635-7636.) Rachel knew what they were talking about because she knew Liz and also saw Daveggio stuff a gun into his pants before Michaud dropped him off. (35 RT 7635-7637.) Daveggio sounded serious when he put the

gun in his pants. (35 RT 7637-7638.) Michaud told Daveggio "to be careful." (35 RT 7639-7640.)

Daveggio's Penalty Phase Evidence

Deta Daveggio, Daveggio's wife, testified that she met Daveggio in 1987 and got married in 1988. (36 RT 7728.) According to Deta, Daveggio "had a firm belief in God" when she met him. (36 RT 7733.) The couple took religion classes before getting married, and had a son together, "James Anthony Daveggio the Second." James Junior was 12 years old at the time of trial and was sitting in the audience during Deta's testimony. (36 RT 7729.)

Daveggio coached Pee Wee football for about three years. (36 RT 7729.) Most of the children were underprivileged. (36 RT 7730.) According to Deta, Daveggio "revered women," "was very protective of her," and was a "very loving" husband. (36 RT 7731.)

On cross-examination, Deta acknowledged that she was aware that Daveggio was a registered sex offender at the time she met him, and that her daughter, Briann, was only eight years old. (36 RT 7745.) Thus, beginning in 1987, she allowed Daveggio to be around eight-year-old Briann. (36 RT 7745.)

Deta denied telling an investigator that Daveggio was the first person who gave Briann methamphetamine. (36 RT 7746.) She might have said that it was better to provide Briann with methamphetamine which they had procured. (36 RT 7749.)

Throughout the marriage, Daveggio continued to see other women. (36 RT 7746.) Deta acknowledged that right after their seventh wedding anniversary, Daveggio left her to go live with Liz Bingenheimer. (36 RT 7749.) Deta did not remember telling a Pleasanton detective that she was sorry the girl from Pleasanton was dead, but that she wished it had been Liz Bingenheimer. (36 RT 7751.)

Nor did Deta recall Daveggio telling her that he was going to kill Liz Bingenheimer. (36 RT 7751.) Deta did not know that a smog shop business she owned with Daveggio was shut down for conducting fraudulent car inspections. (36 RT 7753.)

Deta was aware that Daveggio stole $1,700.00 from Briann's college fund to buy methamphetamine. (36 RT 7753-7754.) Deta denied telling Briann that she was a liar and was trying to ruin her marriage when Briann told her that Daveggio was molesting her. (36 RT 7755-7756.) Nor did Briann ever tell her that Daveggio was spanking her in a perverted manner. (36 RT 7755-7756.) Deta stoutly denied that Donetta had ever warned her about Daveggio. (36 RT 7759-7761.) Deta agreed, however, that she had said on many occasions that nobody could tell her anything that would make her leave Daveggio. (36 RT 7761-7762.)

Terry Harrington, Daveggio's older sister, testified that their mother left their biological father when Daveggio was about one and one-half years old. (36 RT 7695-7696.) A few years later, their mother remarried and their stepfather helped raise all of the children. Their mother worked split shifts in the evening while the father worked day shifts. Consequently, they "were never left with a sitter, and there was always one parent home." (36 RT 7697.)

According to Harrington, their "parents were very involved when [they] were growing up." (36 RT 7698.) Harrington was a cheerleader. Daveggio played football and Joanna, the younger sister, played baseball. They also went camping every summer. (36 RT 7698.) Harrington did not know about Daveggio molesting Joanna. (36 RT 7711.) Although their parents were not overtly affectionate, the children knew they were loved. (36 RT 7698.) Harrington did not know why Daveggio had murdered Vanessa. "He didn't come off the streets. He came from a decent family." (36 RT 7704.)

Reverend Perry Leach testified that he was a chaplain at the Washoe County jail in Nevada. Daveggio was always polite and thanked Leach whenever Leach gave him Christian literature. (36 RT 7773-7775.) Daveggio would also ask Leach to pray for him each time Leach came by with a book cart. (36 RT 7776.)

Mike McCaw, another Washoe County jail chaplain, testified that Daveggio asked to be baptized. McCaw believed Daveggio's religious conversion was sincere. (36 RT 7795-7798.)

John Hamilton and Blaine Beard, Washoe County jail deputies, both testified that Daveggio was a model inmate while incarcerated at the Washoe County jail. (36 RT 7777-7785.)

The parties stipulated that Daveggio's only disciplinary violation while incarcerated was for hoarding medication. (36 RT 7793.)

Daveggio testified about the crimes, claiming that he was accepting responsibility for what he had done. (36 RT 7802.) He and Michaud had discussed kidnapping somebody while staying at a Motel 6 in Pleasanton. As they roamed the streets looking for a victim, Michaud saw Vanessa and said, "There's one." (36 RT 7801.) Michaud parked the van while Daveggio stayed in the back with the sliding door partially open. As Vanessa walked past, Daveggio leapt out of the van and grabbed Vanessa, who yelled, "What have I done?" (36 RT 7802-7803.) Daveggio asked Vanessa if he needed to tie her up. Vanessa said he did not. Daveggio changed places with Michaud and drove. Michaud went into the back of the van where Vanessa was under the blankets. (36 RT 7803-7804.)

Daveggio testified that he never struck Vanessa with the crossbow which he had bought to protect himself from the motorcycle gang. Daveggio chose a crossbow because you could shoot somebody with it "and not make any noise." (36 RT 7803.)

On one occasion, Daveggio turned around and saw Michaud sitting against the back of the van with Vanessa's head "between her legs." (36 RT 7805.) During the trip to the campground, Daveggio saw Vanessa "on all fours" with Michaud's hand inside her vagina. (36 RT 7810.) At one point, Daveggio observed Michaud with one of the curling irons used to sodomize Vanessa, but Vanessa started to defecate which is why there was a feces-covered white napkin in the van. (36 RT 7810.) Daveggio drove into the Sly Park campground so Michaud could take Vanessa to a bathroom. (36 RT 7811.) Daveggio observed the campground attendant looking at him and felt that "it wasn't the right place to be." (36 RT 7811.)

Daveggio decided they should go to the Sundowner motel and parked directly in front of the room. (36 RT 7812.) After Daveggio went into the room Michaud and Vanessa came into the room. Michaud and Daveggio told Vanessa to go take a shower while they decided what to do with her. Michaud and Daveggio told Vanessa they were going to go to McDonald's and asked her if she wanted anything. Vanessa said she wanted a Happy Meal. When Michaud returned with the food, Vanessa took only one bite of the hamburger and asked if she could save it for later. (36 RT 7813-7814.)

Daveggio left to put air in one of the van's tires. When he returned, Vanessa and Michaud were naked on the bed in a "69 position." Michaud began orally copulating him and Daveggio stuck two fingers in Vanessa's vagina. After Daveggio ejaculated, he did not want to participate in any more sexual activity and instead wanted to go gambling. (36 RT 7815-7816.)

Michaud and Daveggio began arguing about what to do with Vanessa. Daveggio wanted to let her go because she had never fought back and was "just like Aleda Doe." (36 RT 7817.) Michaud told Daveggio that he needed to kill Vanessa because she could identify them. (36 RT 7817.)

After a "heated discussion," they decided they were "going to let Ms. Samson go." (36 RT 7817.)

Michaud and Vanessa went out to the van while Daveggio used the bathroom. When Daveggio got out of the bathroom, Michaud was standing in the motel room. Daveggio "was pretty angry" and wanted "to know why she wasn't out in the van with Ms. Samson." (36 RT 7818.) Michaud told Daveggio that she had killed Vanessa. According, to Daveggio, this was "not the first time" Michaud had told him that she had "killed somebody." Then they argued about what they were going to do with Vanessa's body. Daveggio went out to the van to make sure Vanessa was in fact dead. (36 RT 7818-7819.)

When Daveggio opened the van's door, "the smell of defecation" "was really strong." (36 RT 7819.) Vanessa was lying on the floor with her head towards the back door. She was tied up with black rope that went over her jacket and was threaded through a hole in the back door. (36 RT 7819-7820.) During the trip to dump Vanessa's body, Michaud was untying Vanessa from the door, complaining that the knots in the rope were tight. Upon reaching the location where they dumped Vanessa's body, Daveggio pulled into the turnout. As he began taking out Vanessa out of the van, Vanessa "slipped out of [his] hands" and hit her head on the ground. (36 RT 7821-7823.) Daveggio then pushed Vanessa over the embankment while Michaud threw her belongings and a black rope over the side. (36 RT 7822-7823.)

After dumping Vanessa's body, he and Michaud returned to the motel and cleaned up their room to remove any evidence that Vanessa had been there. When they left the Sundowner, they went to McDonald's to throw evidence away, including four pieces of yellow rope. (37 RT 7947-4951.) Daveggio was astonished to discover that the curling irons and other evidence had not been thrown away. (36 RT 7825-7828; 37 RT 8038.)

Michaud and Daveggio then drove to the Lakeside Inn because it was near the courthouse where Michaud had a scheduled appearance in her bad check case. (36 RT 7826-7827; 37 RT 8037-8038.)

On cross-examination, Daveggio denied that Michaud was under his domination and control. (36 RT 7830.) On the contrary, they were both manipulative, confident persons, each of whom habitually carried guns. (36 RT 7835-7836.) At the beginning of their relationship, Daveggio discovered that they both enjoyed tarot cards and what Michaud called "white witchcraft." (36 RT 7832.) Daveggio and Michaud's relationship was based on a desire for sex, violence and aggression. Daveggio believed that Michaud was even more turned on by violence and aggression than he was. (36 RT 7839; 37 RT 7910.) Daveggio learned that Michaud liked aggressive, violent sex when she discussed her life as a prostitute. (36 RT 7861-7862.) Daveggio discovered that he had a dark side when he was in his early teens. (36 RT 7862-7863.)

Daveggio thought Michaud was "a very good conner." (36 RT 7864.) Thus, in order to lure Daveggio to the tri-level she took care of the kids. Daveggio believed "it was an equal partnership." (36 RT 7864-7866.)

The day before they kidnapped Vanessa they had "lengthy conversations about where [they] were going to go, [and] what [they] were going to do." (36 RT 7687.) Daveggio testified that "the number one motive" for kidnapping Vanessa was sexual gratification and agreed that grabbing an innocent girl off the streets was thrilling. (36 RT 7874-7875.)

During the lengthy conversation about the kidnapping plan, Daveggio and Michaud discussed whether they were going to let the victim live. (36 RT 7868.) They decided that "if necessary, the person would be killed." (36 RT 7868-7869.) Daveggio did not remember discussing the method that would be used in killing the victim. (36 RT 7870-7871.) Daveggio acknowledged that at the time they grabbed Vanessa, they intended to

kidnap her, to sexually assault her and to murder her "if necessary." (37 RT 7974.)

Daveggio estimated that they drove around for about 40 minutes before finding Vanessa. (37 RT 7967.) Daveggio did not see anybody else before finding Vanessa and left it up to Michaud to pick their victim. (37 RT 7968.) Michaud said, "There is one," and pulled up in front of Vanessa. (37 RT 7968.) Because Vanessa was walking with her head down. Daveggio "did not actually see her face." (37 RT 7970.) When Vanessa came abreast of the van, Daveggio jumped out of the van's sliding door, and pulled Vanessa into the van. (37 RT 7976-7977.)

While pulling Vanessa into the van, Daveggio kept one hand over her face "so that she wouldn't be able to scream," but Vanessa managed to yell, "What have I done? What have I done?" (37 RT 7978.) Daveggio told Vanessa "to shut the fuck up." (37 RT 7978.) Daveggio asked Vanessa whether "she was going to behave," or whether he "needed to tie her up." (37 RT 7979.) Vanessa said she did not need to be tied up. (37 RT 7979.)

However, anticipating that Vanessa might need to be tied up, Daveggio already had four pieces of yellow rope at the ready. (37 RT 7975.) On the issue of restraints, Daveggio testified that he personally conducted an experiment using himself to simulate his would-be victim. In the experiment, Daveggio cut four similarly-sized pieces of rope and attempted to tie himself to the anchor bolts for the minivan's middle seats which had been removed. He found, however, that the bolts were "not wide enough to tie somebody down, to actually tie their hands and feet unless you were going to tie their whole body." (37 RT 7948.) Daveggio "knew that before the carpet was put in there," so he was not "sure why [he] put the slits in the carpet knowing those weren't going to work." (37 RT 7948.) Daveggio initially left the four ropes threaded through the

anchor bolts but eventually removed them because "it was uncomfortable sleeping on top of the ropes." (37 RT 7952.)

Daveggio denied sexually assaulting Vanessa during the drive to the Sacramento welfare office. (37 RT 7978-7980.) Daveggio explained that he wanted to sexually assault Vanessa, but could not do so because he was driving. (37 RT 7980.) Daveggio needed to drive because of Michaud's erratic driving during the Aleda Doe attack. (37 RT 7981.) However, as soon as he switched positions with Michaud, Michaud went into the cargo area of the van and begun "sexually assaulting" Vanessa. (37 RT 7981.) While Daveggio was driving, Michaud was under a blanket with Vanessa. (37 RT 7981-7982.) According to Daveggio, Vanessa "never cried" and did not ask him if she could call her mother. (37 RT 7981.)

When they stopped for gas, Vanessa was lying on her stomach, covered by the blanket with her head sticking out. Daveggio could not see if her head was tied up, but could see that the ball gag had not been put in her mouth. (37 RT 7983.) Once they arrived at the welfare office, Michaud went inside while Daveggio stood guard over Vanessa. Daveggio came over to the sliding door and saw both curling irons by the door. Daveggio also saw the ball gag in the same place. (37 RT 7987-7988.)

After Michaud cashed her welfare check, Daveggio left Vanessa with Michaud while he went in to use the bathroom. Daveggio was not worried about Vanessa trying to escape because Michaud was "pretty strong" and Vanessa "hadn't fought at all." (37 RT 7986.) Although Daveggio could not see under the blanket, it did not appear from her position that she was tied up. (37 RT 7986.) Daveggio asked Vanessa whether she wanted anything to drink, but Vanessa said no. Vanessa appeared to Daveggio to be in a state of shock. (37 RT 7987.)

After getting back on Highway 50, Daveggio began looking for a place to sexually assault Vanessa. (37 RT 7989.) During the drive,

Michaud and Vanessa were under the blanket. (37 RT 7990.) The only thing Daveggio saw was one occasion when Michaud was at the back of the van and "Vanessa's head was between Michaud's legs." (37 RT 7991.) Daveggio heard Michaud tell Vanessa "how nice her ass was." (37 RT 7992.)

As they drove towards the campground, Daveggio looked in the rear view mirror and saw Vanessa "on all fours" with her head facing the rear of the van. Daveggio knew that she was wearing the ball gag because he could see its strap on the back of her head. (37 RT 7995.) Vanessa was completely naked while in this position. Daveggio could not see her hands so he didn't know if they were bound. (37 RT 7995-7996.) As Vanessa kneeled in this position, Michaud's "whole hand" was inside Vanessa. (37 RT 7996.) While Michaud had her entire hand up Vanessa, she asked Daveggio if he "had even seen anybody fist fucked before." (37 RT 7997.)

When Michaud picked up the curling iron to sodomize Vanessa with, Vanessa "started to defecate" which is what caused "the stains on the white napkin." (37 RT 7996.) Daveggio knew that both curling irons were used on Vanessa, but did not "know which orifice that either of them penetrated." (37 RT 7998.)

At the campground, Michaud walked Vanessa to the bathroom. (37 RT 7929-8000.) When they saw the camp attendant, they decided to leave and look for a motel room. (37 RT 7999-8000.) After reaching the Sundowner Motel, Daveggio checked the room to make sure it was not connected to another room, and did not have a large bathroom window. (37 RT 8000-8001.) Daveggio then returned to the van and Michaud walked Vanessa into the motel room. (37 RT 8001-8002.)

Once inside the room, appellant ordered Vanessa to take a shower so they could discuss what they were going to do to her "outside her presence." (37 RT 8003-8004.) Appellants decided to have Michaud go to

McDonald's to get something to eat. After Vanessa got out of the shower appellants allowed her to get dressed. Vanessa ordered a cheeseburger Happy Meal. (37 RT 8006-8007.)

While Michaud was at McDonald's, Vanessa sat on the bed as Daveggio snorted methamphetamine." (37 RT 8006.) When Michaud returned with the food, Vanessa took one bite of the cheeseburger and then threw up. (37 RT 8007.)

Next, Daveggio left the room to get the tire on the minivan fixed. Upon his return, he saw Vanessa and Michaud lying on the bed completely naked. (37 RT 8011-5012.) Vanessa and Michaud were in a "69" position with Michaud orally copulating Vanessa's vagina and Vanessa orally copulating Michaud's vagina. (37 RT 8013-8014.)

Daveggio sat on the bed and Michaud undid his pants. (37 RT 8014.) Michaud began orally copulating Daveggio while Daveggio put two fingers in Vanessa's vagina. (37 RT 8014.) Daveggio testified that that was the only sexual conduct he had with Vanessa because he "had a quick orgasm." (37 RT 8014.) If he had not "had a quick orgasm" "he would have done a whole lot more to Ms. Samson." (37 RT 8014.)

After Daveggio ejaculated, he told Vanessa to take another shower. (37 RT 8016.) While Vanessa was in the shower, Daveggio and Michaud discussed whether they would murder Vanessa. (37 RT 8017.) During the discussion, Michaud said Daveggio should kill Vanessa because she "knew everything" about them. (37 RT 8018.) When Michaud told Daveggio to kill Vanessa, she did not give any instructions on how to do it and did not need to do so because Daveggio knew "how to kill people." (37 RT 8019.) Daveggio's position was: "What difference did it make? All of these people have seen us. And up until the arrest, most of these people hadn't went [sic] to the police." (37 RT 8018.) Daveggio said there was no reason for Vanessa to die since she "never cried," "never screamed," "never

fought," and "never tried to escape." (37 RT 8017.) At the conclusion of the "heated conversation" about Vanessa's fate, appellants decided to "drop her off just like [they] did [with] Aleda." (37 RT 8018.)

Once Vanessa got out of the shower, Daveggio ordered her to get dressed except for her socks and shoes which were in the van. (37 RT 8019.) Daveggio told Vanessa they were going to let her go and Vanessa left the room with Michaud. (37 RT 8019-8020.)

Daveggio was in the bathroom for approximately ten to fifteen minutes because he was constipated. As Daveggio emerged from the bathroom, he saw Michaud standing in the motel room's doorway looking "spacey." (37 RT 8021-8022.) Michaud said in a flat tone, "I killed her." (37 RT 8022.) Michaud and Daveggio got into an argument, not because Michaud had killed Vanessa, but because now Daveggio did not know what to do with her. (37 RT 8022.)

Daveggio explained that "because of everything that was going on at the time there was nothing to be mad about." (37 RT 8023.) "The only thing that angered [him] was [he] didn't know how [he] was going to deal with it." (37 RT 8023.) Daveggio agreed he was not mad about the murder because that was the plan from the beginning. (37 RT 8023-8024.) Daveggio stated that they didn't "really have a plan" about what to do with Vanessa's body because he had no experience in getting rid of dead bodies. (37 RT 8024.)

When Daveggio looked inside the van, Vanessa "was laying [sic] in the cargo area." (37 RT 8025.) What caught Daveggio's attention was "the smell [he] noticed." (37 RT 8025.) Vanessa had her hands bound with a black rope which was threaded through a hole in the back door. (37 RT 8026.) Daveggio did not believe that the black rope was used to strangle Vanessa. (37 RT 8026.)

After driving to the location where appellants dumped Vanessa, Daveggio told Michaud to gather Vanessa's belongings and throw them out next to her body. (37 RT 8029.) When Daveggio went to get Vanessa, she was lying on the floor with her head towards the back of the van. (37 RT 8030.) Daveggio did not know how Vanessa got the injuries to her scalp, but speculated she may have hit her head when he grabbed her and threw her into the minivan. (37 RT 8030.) Daveggio denied hitting her, saying "there was no need to." (37 RT 8030.) Daveggio also denied spanking Vanessa or beating her buttocks. (37 RT 8031.) Daveggio did not see Michaud beating Vanessa and did not know how the injuries were inflicted. (37 RT 8031.)

After they finished dumping Vanessa's body, appellants began discussing the murder. Daveggio asked Michaud what she used to kill Vanessa. (37 RT 8033.) Michaud responded that she had "used this" and "pulled out the heavy yellow rope." (37 RT 8034.) Michaud said they were "bound together for life." (37 RT 8035.)

Upon returning to the Sundowner motel, appellant wiped down the motel room to remove any fingerprints and removed the trash can liner in order to avoid leaving any trace evidence. (37 RT 8035-8036.) Daveggio explained that they left that motel room because he wanted to be closer to the casinos to gamble and Michaud needed to be closer to the court where she was required to make an appearance. (37 RT 8037.)

Daveggio admitted that it was his idea to buy the curling irons to use as "sex toys" on kidnapping victims. (36 RT 7885-7886.) Michaud, however, decided on her own to modify them by cutting off the cords and breaking off the clamps. (36 RT 7887-7890.)

Daveggio was not sure why they purchased the ball gag because "you can put that gag in your mouth and still definitely scream." Besides, they had the duct tape to silence their victims. (37 RT 7960.) Daveggio knew

that the ball gag could not silence screams because Michaud tried it out in the parking lot of Nice and Naughty. (37 RT 7960-7961.) Daveggio opined that it was "more used in people that are into S&M." (37 RT 7960.)

Daveggio agreed that he had read the "Sex Slave Murders" book about the Gallegos and had been to many of the bars frequented by the Gallegos. (37 RT 7898-7899.) As for the serial killer trading cards, Daveggio testified that Michaud had purchased them for him as a Christmas gift. (37 RT 7926.) Daveggio denied, however, that he and Michaud had discussed wanting to become notorious killers who would be featured on a trading card. (37 RT 7927.) Daveggio agreed that if he and Michaud had not been arrested they would have committed more murders. (37 RT 7927.)

Daveggio also testified regarding the assaults he and Michaud jointly perpetrated, as well as those he committed before meeting Michaud. Regarding the assault on Christina, Daveggio explained that he and Michaud had "kept discussing" whether Michaud "could pick anybody out for [them] to have sex" with, and Daveggio kept telling Michaud that "she couldn't do it." (36 RT 7832.) According to Daveggio, "the basic conversation was that she could bring anybody into a threesome that she chose and [Daveggio] told her that [he] didn't believe she could." (36 RT 7833.) They both discussed Christina as being a possible target and knew that she was only 13 years old. (36 RT 7833.)

As for the assault on Rachel, Daveggio agreed that Michaud told Rachel that Rachel was her secret lust. Michaud also told Rachel that she had had sex with Rachel's brother, Randy. (37 RT 7905-7807.) Daveggio had not suggested that Michaud have intercourse with her son, and had only learned about Michaud's sexual assaults on Randy after they had already occurred. (37 RT 7907.) Michaud also told Daveggio that she had had Randy sodomize her. (37 RT 7908.) While Randy was sodomizing her,

Michaud said something to Randy about him learning "that his mom was so good . . . at what she was doing." (37 RT 7908.) Michaud basically said, "I bet you didn't know your mama could do this." (37 RT 7908.) Daveggio only learned that had occurred on multiple occasions by talking to Randy. (37 RT 7909.)

Daveggio discussed the second assault on Rachel which took place in the motel room. The second assault was his idea. In the motel room, Daveggio prepared for the attack by tearing duct tape into pieces which could be used to restrain Rachel. He explained that "duct tape is very good to gag somebody with as long as you completely wrap it around their head." (37 RT 7914.) Just to be safe, Daveggio tore three pieces of duct tape to use on Rachel "in case one of the pieces didn't work." (37 RT 7914.)

According to Daveggio gagging a victim was a purely utilitarian method of keeping the victim quiet. (37 RT 7915.) Binding the wrists was also simply a means of preventing the victim from fighting back. (37 RT 7915.) Since Rachel had cried during the assault in the van, it was important to keep her quiet in the motel room by binding and gagging her. (37 RT 7915-7916.) Daveggio agreed that seeing fear in his victims' eyes was "an adrenaline rush." (37 RT 7916-7917.) Daveggio denied calling any of the victims' slaves. (37 RT 7920.)

With respect to the sexual assault of April, Daveggio stated that the intent to commit that crime was hatched at the Candlewood Motel when he and April discussed killing people and seeing "the fear in people's eyes." (37 RT 7964.) Daveggio agreed that both he and Michaud were very manipulative. (36 RT 7834.)

Daveggio also admitted that he had assaulted Donetta, Hope and Amy, and had threatened to kill Liz Bingenheimer because she had lied to

the motorcycle club by saying he had stolen a safe. (37 RT 7878-7880, 7892-7893.)

Regarding Aleda Doe, both he and Michaud had begun discussing the subject of kidnapping girls off the street. (36 RT 7838.) The "Folsom Prison Blues" song they listened to while Daveggio was sexually assaulting Aleda talked about killing a man just to watch him die. (37 RT 7959.)

As for the crossbow, Daveggio explained that that had been purchased in response to his problems with the Devil's Horsemen motorcycle club, and that Michaud was in full agreement with the decision to purchase it. (36 RT 7873.)

On the topic of prior murders committed by Michaud, Daveggio testified that Michaud had told him that the Hell's Angels had hired her to kill a bail bondsman. (37 RT 7900.) Michaud said she had put a gun to the bondsman's head and said, "Leo, you fucked up," and shot him. (37 RT 7901.) Michaud also described an incident in which she had been raped by a Black man. As revenge for the rape, Michaud "and some other people" castrated and "hung him." (37 RT 7901.) Michaud referred to it as a "lynching" of a "nigger." (37 RT 7901.)

Daveggio also described an incident in which he and Michaud "were going to abduct somebody and picked the wrong person because this person was a fighter." (37 RT 7930.)

On cross-examination by Michaud's counsel, Daveggio testified that he was now aware that Michaud had given a lengthy statement to the F.B.I about the Aleda Doe attack and had read the transcripts of the interview. (37 RT 8042.) Daveggio agreed that Michaud had accepted a plea deal in the Aleda case in which she would testify against Daveggio. (37 RT 8043.)

Daveggio also agreed that in April's statement to the police, she had accused him of molesting her on four other occasions besides the charged

offense and that those incidents occurred before he met Michaud. (37 RT 8044.)

With respect to the assault on Donetta, Daveggio admitted that he and Silvestri had done the same thing "quite a few times" to other women because he and Silvestri were "bar buddies." (37 RT 8048.)

In an effort to show that it was Daveggio who sodomized Vanessa, Michaud elicited Daveggio's admission that Liz Bingenheimer liked sodomy and that Daveggio had gotten a tattoo of a frog, which represented him, mounting a lizard which represented Bingenheimer. (37 RT 8069.)

Daveggio denied testifying at the penalty phase as a means of retaliating against Michaud. (37 RT 8076.)

On re-direct, Daveggio testified that he had moved into the triplex because Michaud said her son had hit her and she needed someone to protect her from him. (37 RT 8080.)

Michaud's Penalty Phase Evidence

Dr. Helga Mueller, a board-certified psychiatrist, was Randy's treating physician in 1988 and 1989. (38 RT 8229-8231.) Michaud brought Randy to her for treatment because she believed Randy was out of control. Randy had previously been hospitalized, and had been diagnosed with "schizophreniform disorder." (38 RT 8228-8230.)

When Mueller first saw Randy, "he was an extremely aggressive and angry child." (38 RT 8235-8236.) Randy exhibited "some strange behavior [towards Michaud] in that sometimes he would be very clingy, very loving with her, and at other times he would suddenly get very angry and go and actually hit her, [and] sometimes try to bite her." (38 RT 8236.)

Mueller began taking notes about Michaud's appearance because she "saw her many times" with bruises on her arms and black eyes. (38 RT 8239.) Because she frequently saw Michaud with injuries, Mueller believed Michaud was a battered woman who was overwhelmed by taking

care of her children. (38 RT 8241.) Michaud acted "pretty helpless" during the therapy sessions which was consistent with a passive personality. Somebody with a passive personality typically likes other people to make decisions. In contrast, people with active personalities are self-confident and can "kill their own snakes." (28 RT 8240.)

According to Mueller, battered women have a very poor sense of self "and require another person in their lives to give them that sense of self." (38 RT 8243.) Many battered women "will do almost anything to protect the batterers because loss of the batterer would mean loss of emotional support." (38 RT 8243.) It is very common for battered women to have been emotionally, physically, or sexually abused as a child. They also tended to self-medicate with alcohol or drugs. (38 RT 8249-8250.)

During the prosecutor's cross-examination, Mueller explained that, at the time she was seeing Randy, she was aware that Michaud was a prostitute and that Randy was living with Marie and Colin Ward. (38 RT 8264-8265.) Mueller agreed that Randy had abandonment issues because he had been dumped at his grandparents' house and at Marie and Collin Ward's home. (38 RT 8266-8267.) Mueller was unaware that Randy had also been placed in the care of Michaud's brother and his wife. (38 RT 8269.)

Mueller knew that Michaud brought Randy in for treatment because she "was afraid of abusing him severely." (38 RT 8271.) Mueller also knew from the CPS records that "there was a possibility that there could be abuse," but saw no evidence of abuse while Randy was in treatment with her. (38 RT 8272.) Mueller then recalled, however, that she did file a report with CPS for physical abuse. (38 RT 8272-8273.)

Mueller did not recall that Michaud was calling Randy "Norman Bates," the character from the movie "Psycho." (38 RT 8273-8274.) Similarly, Mueller also did not remember that there were incidents when

Randy was struck with a spoon and a high-heeled shoe. (38 RT 8275-8276.)

Mueller agreed that Randy had suffered some type of "preverbal trauma" which meant the trauma occurred before he was capable of describing it. (38 RT 8276-8277.) Mueller did not recall that Randy's CPS file reflected that he had described how Michaud would stick her tongue in his ear and that he liked it when he was a little boy. (38 RT 8278.) Mueller was not certain that Randy's preverbal abuse was sexual in nature. (38 RT 8278.) Her opinion was not changed even if Randy said to his first grade teacher, "My mommy sticks her tongue in my ear and I like it and what we do is a secret." (38 RT 8278-8279.) Mueller also did not remember Randy telling her that what he did with his mother was a secret. (38 RT 8280.) Mueller agreed that if a seven-year-old is acting a bizarre sexual manner with his mother, it could indicate that he was being sexually abused, or was watching his mother have sex with her clients. (38 RT 8284.)

The prosecutor questioned Mueller about CPS reports indicating that Michaud hit Randy with a belt, struck him in the face with her fists, twisted his arm behind his back, and pushed his head into the ground. Mueller responded that even though she believed Michaud was passive, it was very common for battered women to be physically abusive towards their children. (38 RT 8280-8281.)

On the topic of Randy's hospitalizations, Mueller forgot that she had written a note reflecting that Michaud was taking Randy out of Sutter Psychiatric Hospital "against medical advice and was resisting further hospitalization." (38 RT 8231.) Mueller did remember that one of the reasons Michaud pulled Randy out of the psychiatric hospital was because Randy had said in a therapy session that he did not want to live with Michaud anymore. (38 RT 8282.) Mueller believed that Michaud's

parents were not supportive of Randy's hospitalization even though CPS records indicated that they were very supportive. (38 RT 8283.)

With respect to the criminal charges against Michaud, Mueller believed that Michaud's deception and sexual assaults could still be considered passive behavior if she did it to satisfy Daveggio. (38 RT 8287.) Mueller maintained that even when Michaud told her own daughter that she was her "secret lust," and masturbated to the point of orgasm while Daveggio raped her daughter, that Michaud was acting consistently with the profile of a battered woman. (38 RT 8293.) Mueller stated that since battered women were often sexually abused, Michaud "was transported back to that time." (38 RT 8293.) In addition, Michaud likely "disassociated" because this was her daughter. (38 RT 8292-8293.)

When Rachel cried, "Mommy, mommy, and Michaud responded, "Don't call me mommy," it was because Michaud was not feeling like a mother at that time. (38 RT 8294.) If Michaud told Rachel that Daveggio was going to "fuck" her, that was simply a way of appeasing Daveggio who had difficulty getting and maintaining an erection. (38 RT 8294-8295.) Michaud "was trying to please him." (38 RT 3295.) When Michaud told Rachel that she was her "secret lust" and would "hunt her down" and kill her if she told anybody about the rape, Michaud was acting in a manner consistent with a battered woman who wanted to please her abuser. (38 RT 8292-8293.) Likewise, jumping on Amy's back and spreading her buttocks open was also behavior consistent with a battered woman who wished to please her abuser. (38 RT 8297-8298.)

When questioned about Michaud's treatise on her life as a prostitute, as well as her desire to explain the concepts of sadism and domination, Mueller felt that was consistent with Michaud's "tendency to tell tall tales." (38 RT 8303.) Mueller thought Michaud's tendency to fabricate was "an effort to make herself look better than she actually felt she was." (38 RT

8303.) Mueller did not mean that she was a liar. She "was just one of these people that needed to tell stories about herself in order to use that fantasy to help her feel better about herself." (38 RT 8304.) Mueller believed that portraying herself as a sadistic prostitute who practiced domination simply improved Michaud's self-esteem. (38 RT 8304.) References to whipping people and urinating on people would make her feel more powerful than she was. (38 RT 8304.)

Mueller did not know that when CPS was trying to decide where to place Rachel following Michaud's arrest, Michaud wrote a letter to Leland saying that Leland had not molested her. (38 RT 8307.) Michaud did not tell Mueller that she had asked Randy to steal the letter from Leland. (38 RT 8308.) Mueller's opinion was not changed by the fact that CPS investigated the molestation charges and placed Rachel in Leland's custody. (38 RT 8308.)

On Daveggio's cross-examination, Mueller testified that a battered woman would not be capable of suggesting any kind of activity that she and the abuser should engage in. (38 RT 8318-8319.) Rather, such a woman is a puppet, whose sole means of power is to instigate "abuse before it gets really bad." (38 RT 8322-8323.)

Burdell Wulf testified that he had known Michaud for 15 years and had met her in a massage parlor. (37 RT 8095.) Wulf was a client of Michaud and also paid rent for the triplex. (37 RT 8096.) Wulf did not engage in any kinky sex with Michaud. (37 RT 8097.) He denied telling Inspector Painter that he engaged in anal intercourse with her. (37 RT 8100.) Wulf believed that Michaud was like a puppet on a string whenever Daveggio was around her. (37 RT 8098.)

On cross-examination, Wulf agreed that he would go to the tri-plex to have sex with Michaud while her son Randy and her daughter Rachel were at home. (37 RT 8101, 8105.) Wulf also bought Michaud a gun. (37 RT

8101.) Michaud told Wulf that some of the money she earned from him was going to her parents. (37 RT 8105.) Wulf recalled writing a $2,000 check to Michaud's mother. (37 RT 8109.)

Jessie Andrews was Rachel's eighth grade teacher at a Catholic school affiliated with the St. Rose Parish. Michaud offered to pick up supplies and also purchased doughnuts which were used as incentives for the students. (37 RT 8118-8119.) Michaud was a member of a group known as the "Holy Ladies" who would take care of the school church's altar. Michaud also acted as a crossing guard. (37 RT 8120-8121.) In addition, Michaud worked at the school's thrift store. (37 RT 8121.)

Maria Alcala was the director of religious education at the St. Rose Parish. Alcala knew Michaud because she had brought her children to the religion classes Alcala taught and helped out at the office. (37 RT 8128-8129.)

Pamela Jiacomo also knew Michaud from Michaud's involvement with the St. Rose Parish. Like Alcala, Jiacomo was a religion instructor and had Michaud's son Randy in her class. (37 RT 8134.) Michaud volunteered to be a teacher's aide and corrected papers for Jiacomo. (37 RT 8134-8135.) Michaud spent one and one-half hours in the class every Saturday. (37 RT 8135.) Jiacomo also knew that Michaud had worked for the altar society and as a school crossing guard. (37 RT 8136-8137.)

Father Kavanaugh was the priest for the St. Rose Parish. (37 RT 8171-8172.) Kavanaugh knew Michaud to be a member at the altar society and the prayer group. (37 RT 8172-8173.) Father Kavanaugh had not heard that Michaud was receiving free tuition because the school principal, David Hoffman, had been one of her clients. (37 RT 8184-8186.) Kavanaugh would be very upset if that were true and would dismiss Hoffman. (37 RT 8186.)

Dolores Gutierrez was a former neighbor of Michaud when Michaud lived at the tri-plex. (37 RT 8138.) Before Daveggio moved into the tri-plex, Gutierrez was good friends with Michaud. However, once Daveggio moved in, the neighborhood atmosphere changed. Gutierrez stopped seeing Michaud because she was fearful of Daveggio. (37 RT 8140.) Gutierrez recalled a party at the tri-plex which a large number of Daveggio's biker friends attended. (37 RT 8140-8141.)

On cross-examination, Gutierrez acknowledged that she knew Michaud was working as a prostitute and that Michaud's clients were coming to the tri-plex. (37 RT 8142.)

Moises Baldizan also lived in Michaud's neighborhood. (37 RT 8162.) According to Baldizan, the neighborhood atmosphere changed significantly after Daveggio moved into the tri-plex. Michaud changed "dramatically" once she became involved with Daveggio. (37 RT 8165.) Formerly, Michaud had a good relationship with her neighbors, but after Daveggio's arrival, Michaud became withdrawn and stopped interacting with neighbors. (37 RT 8165.) Baldizan thought Michaud looked like a zombie. (37 RT 8166.) Baldizan stopped having her grandchildren playing outside because some "bad elements" "moved into the neighborhood." (37 RT 8164.) Daveggio would be riding a "chopper" motorcycle "and would race up and down the street taking corners fast." (37 RT 8164.) Daveggio's conduct "was very loud and dangerous to the children playing in the streets." (37 RT 8164-8165.)

On cross-examination, Baldizan explained that approximately 12 years earlier, she had met Michaud's father, Leland and thought he was a fine person. Baldizan also became friends with Michaud's mother, Regina. (37 RT 8166-8167.) Baldizan felt that Leland and Regina were both good parents. (37 RT 8167.)

Donetta Doe was called back to testify for Michaud's defense in order to impeach Deta's testimony regarding Daveggio. Donetta testified that when she met Daveggio in 1981, she had informed him that her parents were divorced and that her employer had recently died. (38 RT 8201-8202.) Donetta told Daveggio that because she had been molested as a child, she did not like oral sex performed on her. (38 RT 8203.) During the four years and seven months she was married to Daveggio, he only worked about six months. (38 RT 8203-8204.) Daveggio would take Donetta's paychecks and blow the money on gambling. (38 RT 8204.)

Donetta considered Daveggio to be a leader, not a follower. Daveggio always wanted to be in control, but had never been physically abusive. (38 RT 8204.)

After being incarcerated for the Tracy offense, Daveggio told Donetta that the prison guards liked him because he followed orders and pretended to become religious. (38 RT 8211-8212.) He said that he knew that was what he needed to do in order to get released. (38 RT 8210-8212.)

Donetta subsequently tried to warn Deta about Daveggio. Donetta asked Deta if she knew why Daveggio had been incarcerated and whether she was aware that Daveggio was a registered sex offender. (38 RT 8214.)

Donetta agreed that she had told Inspector Painter that she would like to see Daveggio get the death penalty and wanted to see him "get the needle in his arm" so she would "know that he is gone." (38 RT 8216.) Donetta also acknowledged that she had hoped other inmates would kill Daveggio. (38 RT 8217-8218.)

Stipulations

The parties stipulated that Inspector Tim Painter of the Alameda County District Attorney's Office was a peace officer who was legally permitted to tape record a telephone conversation without the knowledge or permission from the other party to the conversation. (38 RT 8346.)

The parties further stipulated that Daveggio had been diagnosed as a diabetic and was in chronic care section of the Alameda County Jail. (38 RT 8346.)

Daveggio's Penalty Phase Rebuttal

Daveggio testified that after meeting Michaud, she asked him to move into the tri-level because Randy was out of control and had hit her. (38 RT 8350.) Daveggio moved into the tri-level and Bill Reed moved out. (38 RT 8350.) Daveggio felt that Michaud was "stalking" him. When Daveggio moved into Liz Bingenheimer's, Bingenheimer "constantly complained that Michaud was cruising around the neighborhood." (38 RT 8351.) The only time Daveggio pointed a gun at Michaud was when they had an argument about her bringing people to the house and the gun went off while Daveggio was waving it around. (38 RT 8351.)

Daveggio did not threaten or belittle Michaud and never tried to isolate her from her family. When Daveggio first moved into the house, Michaud's mother was constantly coming over to take care of Randy. (38 RT 8352.)

About three weeks after living in the tri-level, Daveggio told Michaud that he was going to move out. However, Michaud convinced Daveggio that "she was dying of colon cancer." (38 RT 8353.) Leland told Daveggio that she was lying, but Daveggio did not believe him. (38 RT 8353.) Daveggio went to Kaiser hospital for medical visits and the doctor "would say she does not have colon cancer." (38 RT 8353.) "At that point [Michaud] quit seeing her mother and father." (38 RT 8353.)

ARGUMENT

I. THE TRIAL COURT DID NOT MISINSTRUCT PROSPECTIVE JURORS ON THE MEANING OF THE REASONABLE DOUBT STANDARD

Michaud asserts that the trial court misinstructed prospective jurors on the meaning of reasonable doubt because it: (1) failed to inform them that proof beyond a reasonable doubt required an "abiding conviction" of the defendant's guilt; (2) lowered the prosecution's burden of proof by stating that the prosecution was required to substantially tip the scales of Lady Justice in favor of the truth of the charges; (3) erroneously informed the prospective jurors that they could ascertain the existence of reasonable doubt by using common sense and reason; and (4) referred to "human affairs and human interaction" when describing the reasonable doubt standard. (MOB 113.)[5]

Michaud's claims are both forfeited and meritless.

A. Background

During voir dire, the trial court explained the concepts of reasonable doubt and the presumption of innocence in nearly identical terms on nine occasions to different panels of prospective jurors. The following quotes are representative examples of the court's comments on those subjects:

> The defendants sit here cloaked in innocence. Because they entered a plea of not guilty, it is up to the prosecution to prove the defendants' guilt. They must prove each and every element of each and every charge that they have filed against the defendants, and they must prove it to beyond a reasonable doubt, which I will discuss with you in a moment.

(4 RT 772; see also 4 RT 675, 739, 808, 831, 864; 5 RT 897, 927, 961.)

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[5] MOB refers to Michaud's opening brief.

In the same vein, the court further explained that because the defendants are presumed to be innocent, the defense has no duty to present evidence and the defendant has a constitutional right to not testify. (4 RT 772-773; see also 4 RT 676, 739-740, 808-809, 831-832, 865; 5 RT 897-898, 927-928, 961-962.)

Next, the court instructed the prospective jurors on the prosecution's burden of proof and the definition of proof beyond a reasonable doubt.

> [T]the burden of proof the prosecution has to meet is what we call beyond a reasonable doubt. It is the highest burden of proof provided for in the law. Now, it doesn't mean beyond all possible or imaginary doubt, because we can always conjure up some sort of doubt about anything. But what we are talking about is an evaluation of the evidence based upon common sense and reason and whether you are left with any doubt that is based upon reason. You may have seen the Lady of Justice who has the scales of justice. And the best way to demonstrate this visually is when we start off a criminal trial, the scales start tipped this way in favor of the defense, because they are presumed to be innocent. The prosecution has the burden of moving those scales into balance and substantially tipping them in favor of the truth of the charges they have filed. There is no number we assign to this and no percentage. But you can see that it is a fairly substantial burden that the prosecution must meet to prove their case. Also, all 12 jurors have to agree that that burden of proof has been met before a verdict of guilty can be returned.

(4 RT 777.)

At the conclusion of the guilt phase, the trial court instructed the jury with CALJIC No. 2.90 which provided:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(138 CT 36377; 34 RT 7344.)

B. Forfeiture

Michaud acknowledges that she failed to object to any of the trial court's statements she now deems objectionable, but asserts that her claim is nonetheless cognizable under section 1259. (MOB 93.)

That section provides as follows:

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

(§ 1259.) When interpreting section 1259, "[t]he cases equate 'substantial rights' with reversible error under the test stated in *People v. Watson* (1956) 46 Cal.2d 818." (*People v. Felix* (2008) 160 Cal. App. 4th 849, 857-858.) Thus, "[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Ramos* (2008) 163 Cal. App. 4th 1082, 1087; accord, *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

A review of the merits of Michaud's claim will establish that there was no error. Consequently, her claim is forfeited.

C. Applicable Law

A trial court must instruct the jury on the allocation and weight of the burden of proof and must do so correctly. (*People v. Mower* (2002) 28 Cal.4th 457, 483.) The due process clauses of the Fifth and Fourteenth

Amendments to the United States Constitution protect a criminal defendant from conviction except upon proof beyond a reasonable doubt of every element necessary to constitute the crime.[6] (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) As explained in *In re Winship* (1970) 397 U.S. 358,

> The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

(*Id.* at pp. 363–364; accord, *People v. Posey* (2004) 32 Cal.4th 193, 208, fn. 6 ["the United States Constitution demands that the state prove every element of a crime beyond a reasonable doubt to the satisfaction of the jury"].)

1. The failure to use the term "abiding conviction" during voir dire did not violate Michaud's due process rights

Citing *People v. Freeman* (1994) 8 Cal.4th 450, Michaud asserts that the definition of reasonable doubt requires a reference to abiding conviction, and that the failure to use that term when speaking to prospective jurors constituted prejudicial error. (MOB 103-104.) In *Freeman*, this Court recommended that reasonable doubt be defined as follows:

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[6] Of course, Fifth Amendment due process restricts the powers of the federal government and does not apply to state actions. Only Fourteenth Amendment due process applies to state actions. (See *Bartkus v. Illinois* (1959) 359 U.S. 121, 124; see also *Pruett v. Dumas* (N.D. Miss. 1996) 914 F.Supp. 133, 136.)

> "It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

(*Freeman*, *supra*, 8 Cal.4th at p. 504, fn. 9; accord, *Victor v. Nebraska* (1994) 511 U.S. 1, 14–15 ["An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof"].)

Based on the foregoing authorities, Michaud asserts that by failing to use the term abiding conviction during voir dire, the trial court "omitted a critical and important aspect of what it means to prove appellant's guilt beyond a reasonable doubt" and thereby "diluted the standard of proof." (MOB 104.)

Appellant is incorrect. The trial court was not required to give a verbatim description of the reasonable doubt standard during voir dire. *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, supports this conclusion. In that case, the defendant asserted that "the trial court prejudicially erred in voir dire by erroneously preinstructing the jury on the nature and elements of the provocative act doctrine." (*Id.* at p. 1073.) The *Kainzrants* court rejected the claim, stating:

> The instructions given to the jury by the trial court, considered as a whole, stated the rule of the provocative act theory fully and clearly. The fact the trial court did not explain all elements of the doctrine at the beginning of the jury selection process does not devalue the complete written instructions delivered to the jury before they began deliberations. These instructions properly defined all relevant elements of the provocative act doctrine as established by law, which is clearly recorded in the transcripts.

(*Id.* at p. 1075; accord, *People v. Claxton* (1982) 129 Cal.App.3d 638, 668-669 [no reversible error where court's explanatory comments about

reasonable doubt standard during voir dire did not misstate the law and were not reiterated during final instructions].)

Here, as in *Kainzrants*, the trial court's comments during voir dire did not misstate the law Instead, the trial court merely gave the prospective jurors a general description of the reasonable doubt standard, it was not required to give a verbatim rendition of the instruction which included the term "abiding conviction." Furthermore, like the circumstances in *Kainzrants*, the jury was given complete oral and written instructions at the conclusion of the guilt phase. (138 CT 36377; 34 RT 7344.) Accordingly, no error has been shown.

2. The trial court's reference to the scales of Lady Justice did not dilute the reasonable doubt Standard of proof

Appellant next claims the trial court impermissibly lessened the reasonable doubt standard by describing it as a "fairly substantial burden" that is met if the scales of justice "substantially tip" in favor of the truth of the charges. (MOB 104-107; 4 RT 773-774.) Appellant cites *People v. Garcia* (1975) 54 Cal.App.3d 61, in support of that contention.

In *Garcia*, the court considered the propriety of a supplemental instruction which sought to clarify the reasonable doubt standard. The appellate court held that although the reasonable doubt instruction had conveyed the correct legal principles, those standards were diluted by language in the supplemental instruction indicating that a reasonable doubt "meant no more than a doubt which presented itself to them after "weighing the evidence in the scales, one side against the other, in a logical manner in an effort to determine wherein lies the truth." (*People v. Garcia*, *supra*, 54 Cal.App.3d at p. 68.)

In so holding, the court found that the explanatory instruction was "strikingly comparable" to the civil "preponderance of evidence" standard

which directed the jury "to weigh 'the evidence in the scales . . . in an effort to determine wherein lies the truth,' and thus the guilt or innocence of the accused." (*People v. Garcia*, *supra*, 54 Cal.App.3d at p. 69.) The court determined that a "'weighing' process, where a tipping of the scales determines the 'truth,' is wholly foreign to the concept of proof beyond a reasonable doubt," and that the challenged language "was calculated to divert the jury, in some degree, from their constitutionally prescribed duty not to find guilt unless they 'be reasonably persuaded to a near certainty.'" (*Ibid.*)

Based on *Garcia*, appellant asserts that the trial court's use of the terms "substantially tipping the scales" and "fairly substantial burden," did "not connote a burden of producing evidence of the truth of the charges to a 'near certainty' or 'near certitude'" as required by the reasonable doubt standard. (MOB 109.) Appellant is mistaken. The trial court's use of those terms was not accompanied by any statement suggesting that the jurors weigh or balance one side versus another side in a manner evocative of the preponderance of the evidence standard. Instead, the trial court's described the reasonable doubt standard as "the highest burden of proof provided for in the law," and one in which it was solely the prosecutor's burden to prove the truth of the charges. Those statements were accompanied by an immediate proviso that the standard did *not* involve any number or percentage. (4 RT 777.) Based on the foregoing, *Garcia* is unpersuasive.

Appellant next cites *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, to support her claim that the trial court mischaracterized the reasonable doubt standard. In *Katzenberger*, the prosecutor described the reasonable doubt standard and then began an illustrative Power Point presentation in which six different puzzle pieces were displayed sequentially. According to the Court of Appeal,

> The picture is immediately and easily recognizable as the Statue of Liberty. The slide show finishes when the sixth puzzle piece is in place, leaving two rectangular pieces missing from the picture of the Statue of Liberty—one in the center of the image that includes a portion of the statue's face and one in the upper left-hand corner of the image.

(*Id.* at p. 1264.) After presenting the foregoing display, the prosecutor informed the jury that they knew what the picture was "without looking at all the pieces of that picture," and emphasized that concept during the remainder of her argument. (*Id.* at p. 1265.)

The appellate court found that the prosecutor's Power Point presentation constituted misconduct for two reasons. First, the Statue of Liberty was almost immediately recognizable in the prosecution's Power Point presentation even with only one or two pieces displayed. Consequently, the pictorial presentation, together with the prosecutor's accompanying argument, left "the distinct impression that the reasonable doubt standard" could be satisfied "by a few pieces of evidence." (*Katzenberger*, *supra*, 178 Cal.App.4th at pp. 1266-1267.) In addition, the display invited "the jury to guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt." (*Id.* at p. 1267.)

Second, *Katzenberger* found that the prosecutor's argument improperly quantified the reasonable doubt standard. The court noted that the puzzle of the Statue of Liberty was composed of eight pieces, and that when six pieces were in place, the prosecutor informed the jury that the reasonable doubt standard was satisfied, thereby "inappropriately suggesting a specific quantitative measure of reasonable doubt, i.e., 75 percent." (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1268.) The court next concluded that the prosecutor's "use of an easily recognizable iconic

image along with the suggestion of a quantitative measure of reasonable doubt combined to convey an impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt." (*Ibid.*)

Michaud claims that here, as in *Katzenberger*, the trial court "used a familiar iconic image, the Lady Justice and her scales, to illustrate the reasonable doubt standard of proof." (MOB 108.) Michaud further asserts that the "court provided a quantitative measure of reasonable doubt by graphically describing the movement of the scales as being "substantially tipped." (MOB 108.)

Katzenberger does not assist appellant because the trial court's statements here differed significantly from those at issue in *Katzenberger*. Nothing in the trial court's comments in this case diminished the reasonable doubt standard of proof or suggested that it was satisfied by a quantitative analysis. Rather, the moving of the scales simply exemplified the high burden faced by the prosecutor in proving her case. Indeed, since the transcript implies that the trial court was actually moving the scales of a statue of Lady Justice, there is no way of ascertaining how far the scales were tipped. Given the complete absence of any objection by four different counsel during these displays, this Court can reasonably infer that the scales were tipped sufficiently to illustrate the heavy nature of the prosecutor's burden. (*People v. Eubanks* (2011) 53 Cal. 4th 110, 130 [under Evidence Code section 664, it is presumed that an "official duty has been regularly performed"].)

Moreover, as mentioned previously, the court specifically informed the jury that the reasonable doubt standard could not be quantified. (4 RT 777 ["There is no number we assign to this and no percentage"].) Under these circumstances, appellant cannot demonstrate any error.

In a similar vein, Michaud next objects to the trial court's use of the word "substantially" when it described the tipping of the scales of Lady Justice. (4 RT 773-774.) She claims that the use of that term when explaining the reasonable doubt standard can somehow be equated with the meaning of "substantial" under the substantial evidence test used to review insufficiency-of-evidence claims. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 ["In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt"].) And since Michaud believes that standard can be "easily satisfied," she argues that the use of the word had the effect of lowering the prosecution's burden of proof. (MOB 110.)

Michaud never explains, however, why a prospective lay juror would be familiar with the substantial evidence standard and would utilize the legal definition of that term in the sufficiency-of-the-evidence context when considering the reasonable doubt standard. Furthermore, since substantial evidence is defined as evidence that is "reasonable, credible, and of solid value," (*People v. Johnson*, *supra*, 26 Cal.3d at p. 578), it does not connote a lesser standard which had the effect of diluting the reasonable doubt standard. Therefore, the trial court did not err by using the term "substantially" while describing the reasonable doubt standard.

3. The trial court's reference to common sense did not equate the reasonable doubt standard with ordinary decision making

Michaud further asserts that the trial court wrongly described the reasonable doubt standard when it told prospective jurors that the standard required "an evaluation of the evidence, based upon common sense and

reason, to see if you are left with any reasonable doubt after you hear the testimony and see the other evidence." (MOB 112.) Michaud cites *People v. Paulsell* (1896) 115 Cal. 6, in support of that proposition. In *Paulsell*, this Court found reversible error where the trial court instructed, in part:

> "Now, the reasonable doubt that you have heard me speak of means precisely what the words import: A fair doubt, growing out of the evidence in the case, based upon reason and common sense. It is such a doubt as may leave the minds of the jury, after considering all the evidence in the case, in that state that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

(*Id.* at pp. 6-7.) *Paulsell* criticized "experimental departures from the well-established language sanctioned by all courts upon the subject of reasonable doubt" (*id.* at p. 12), and concluded:

> In the present case, it is sufficient to say that the court introduced the new and unused phrase "common sense," and told the jury that the doubt must be based upon that. Counsel for appellant argues—after giving some of the definitions of common sense to be found in the dictionaries—that this language is merely the equivalent of saying that a jury should convict if they are satisfied of the guilt of the defendant to such a certainty as would influence their minds in the important affairs of life; which was [previously] held to be unsound by this court. It is sufficient to say, however, that the phrase "common sense" is about as uncertain as any phrase in the language. When one speaks of common sense, he generally means his own sense; and there is no warrant for the unnecessary use of such a term when there is apt language to express the idea of reasonable doubt which has been frequently approved and pointed out as the language proper to be used.

(*People v. Paulsell*, *supra*, 115 Cal. at p. 12.)

Approximately three months after the *Paulsell* decision, this Court explained that the reversal in *Paulsell* was not based on "the instruction that was given, but because an instruction often approved by this court was refused." (*People v. White* (1897) 116 Cal. 17, 19.) In reviewing the same

instruction that was given in *Paulsell*, the *White* Court held that even though it was not as clear as the "oft-approved" standard definition of reasonable doubt, it was "nevertheless free from error." (*Ibid.*)

Relying on *Paulsell's* criticisms regarding the term common sense, Michaud notes that common sense is variously defined as "sound and prudent judgment based on a simple perception of the situation or facts,'" or as "'ordinary good sense or sound practical judgment.'" (MOB 112.) Appellant then asserts that "[n]othing in Penal Code section 1096 sanctions a juror's application of his 'own sense' in lieu of 'reason' in evaluating the evidence." (MOB 112.)

It is established, however, that jurors are not required to leave their life experiences at the door of the jury room. Instead, "jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them." (*People v. Venegas* (1998) 18 Cal.4th 47, 80.) Indeed, CALCRIM No. 226 expressly sanctions the use of common sense when it informs jurors to use their "common sense and experience" when deciding whether testimony is "true and accurate," and doing so does not dilute the reasonable doubt standard. (*People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1269, *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510; see also *People v. Richardson* (2008) 43 Cal. 4th 959, 1017-1018 ["prosecutor's recommendation that the jury should use its common sense when both evaluating conflicting expert evidence and examining the photographs fell well within the boundaries of permissible argument"].) Accordingly, the trial court's use of the term "common sense" when describing the reasonable doubt standard did not lessen the prosecution's burden of proof.

4. The trial court's references to human affairs and human interaction did not misstate the law regarding reasonable doubt

Michaud next claims the trial court erred by referring to human interactions when explaining that beyond a reasonable doubt did not mean beyond all possible doubt. She challenges the following statements made to prospective jurors:

> Now, it doesn't mean beyond all possible or imaginary doubt, because we can always conjure up some sort of doubt about anything.

(4 RT 740.)

> It doesn't mean beyond all possible or imaginary doubt because when you talk about humans interacting and human conduct, you can always conjure up some possible doubt.

(4 RT 809:6-9.)

> It does not mean beyond all possible or imaginary doubt when you are talking about people's interactions and people's affairs.

(4 RT 832.)

> It does not mean beyond all possible or imaginary doubt, because whenever you talk about human action or human interaction you can conjure up some possible or imaginary doubt.

(4 RT 865.)

> It doesn't mean beyond all possible or imaginary doubt, because you can always conjure up some possible or imaginary doubt based upon people's interactions and how they—people treat each other and do things in society.

(5 RT 928.)

> It does not mean beyond all possible or imaginary doubt, because whenever you talk about people interacting and human affairs, you can always conjure up some imaginary or possible doubt.

(5 RT 962.)

> It doesn't mean beyond all possible or imaginary doubt, because we can always conjure up some sort of doubt when we talk about how people interact and what people do in everyday life.

(4 RT 677.)

Citing *People v. Brannon* (1873) 47 Cal. 96, *People v. Johnson* (I) (2004) 115 Cal.App.4th 1169, *People v. Johnson* (II) (2004) 119 Cal.App.4th 976, and *People v. Nguyen* (1995) 40 Cal.App.4th 28, Michaud asserts that the trial court's "references to 'people's interactions,' 'how people interact,' 'what people do in everyday life,' and to 'how people treat each other and do things in society,'" caused the jurors to misinterpret the reasonable doubt instruction they eventually received at the conclusion of the guilt phase. (MOB 114-115.)

In *People v. Brannon*, *supra*, 47 Cal. 96, it was reversible error to tell the jurors it was their duty to convict if they were "'satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the important affairs of life.'" (*Id.* at p. 97.) In so holding, the Court reasoned:

> The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence . . . . But in the decision of a criminal case involving life or liberty, something further is required . . . . There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence. They must be entirely satisfied of the guilt of the accused.

(*Ibid.*)

Relying on *Brannon*, the court in *People v. Johnson* (*I*), *supra*, 115 Cal.App.4th 1169, found that the trial court had erred by equating the reasonable doubt standard to everyday decision-making such as "tak[ing] vacations" and "get[ting] on airplanes," and that the effect of such was to lower the prosecution's burden of proof. (*Id.* at p. 1171.)

Similarly, the court in *People v. Johnson (II)*, *supra*, 119 Cal.App.4th 976, held that the trial court erred by equating proof beyond a reasonable doubt to everyday decision-making such as driving a car and picking a restaurant for lunch. (*Id.* at pp. 979-983.) Likewise, in *People v. Nguyen*, *supra*, 40 Cal.App.4th 28, the court concluded that it was improper for the prosecutor to suggest that the reasonable doubt standard applied to daily life decisions such as changing lanes or getting married. (*Id.* at pp. 35-37.)

The foregoing cases are inapposite. The trial court's references to "human affairs" simply mirrored the reasonable doubt instruction (CALJIC No. 2.90) which explained: "'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt." (34 RT 7344.) The propriety of that terminology was confirmed in *Victor v. Nebraska*, *supra*, 511 U.S. 1, which upheld an instruction expressly stating that reasonable doubt "is not mere possible doubt; because every thing relating to *human affairs*, and depending on moral evidence, is open to some possible or imaginary doubt." (*Id.* at p. 8, italics added; accord, *Holland v. United States* (1954) 348 U.S. 121, 140 ["important affairs" instruction does not permit conviction upon proof less than the reasonable doubt standard].)

Nor did the trial court err in making various references to "how people interact," "what people do in everyday life," and "how people treat each other and do things in society," since those statements were simply reiterations—albeit with slightly different wording—of the human affairs language in the approved instruction. (*Victor v. Nebraska*, *supra*, 511 U.S. 1, 13 [reference to human affairs in reasonable doubt instruction interpreted to mean that "absolute certainty is unattainable in matters relating to human affairs"].)

Unlike the circumstances in *Johnson I*, *Johnson II* and *Nguyen*, the trial court used no specific analogy to any particular life experience, made

no mention of any daily or routine decision-making examples, nor analogized the decision-making process to any other decisionmaking situation. (See *People v. Johnson (I)*, *supra*, 115 Cal.App.4th at p. 1171 [error to equate reasonable doubt standard to everyday decision-making such as "taking vacations" and "getting on airplanes"]; *People v. Johnson (II)*, *supra*, 119 Cal.App.4th at pp. 979-983 [trial court erroneously equated proof beyond a reasonable doubt to everyday decision-making such as driving a car and picking a restaurant for lunch]; *People v. Nguyen*, *supra*, 40 Cal.App.4th at pp 35-37 [prosecutor improperly suggested reasonable doubt standard applied to daily life decisions such as changing lanes or getting married].)

On the contrary, the trial court prefaced the challenged comments by emphasizing that the reasonable doubt standard was "the highest burden of proof provided for in the law" (4 RT 777), thereby reinforcing the demanding nature of the standard and the seriousness of the jurors' task. Accordingly, because the trial court emphasized the heavy burden borne by the prosecution, and the jury received the correct written instruction, there is no reasonable likelihood that the jurors "understood the instructions to allow conviction" based on insufficient proof. (See *People v. Flores* (2007) 153 Cal. App. 4th 1088, 1093 ["Any challenged instruction must be considered in light of the full set of jury instructions and the trial record as a whole"].) And since the trial court's voir dire comments correctly stated the law, Michaud's claim is both forfeited and meritless. (*People v. Ramos*, *supra*, 163 Cal. App. 4th at p. 1087 [determining whether a failure to object results in forfeiture requires an examination of the merits of the claim to determine if any prejudicial error occurred]; accord, *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

II. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Daveggio and Michaud assert that the prosecutor committed misconduct during her opening statement and closing argument when she: (1) improperly appealed to the jury's passions and prejudices by seeking to engender sympathy for their victims; (2) displayed excessive emotion by allegedly crying; and (3) argued facts not in evidence. (MOB 245, 258, 268; DOB 159, 161, 167-168.[7])

A. The Prosecutor's Statements at Issue

1. Opening statement

a. Purported appeals to passions and prejudices

In her introductory remarks during her opening statement, the prosecutor described the nature of the case against appellants, stating:

> James Daveggio, the defendant Ms. Michaud, counsel for the defendants, family and friends of Vanessa Samson, may it please the court: Your Honor, Ladies and Gentlemen of the Jury, the defendant.
>
> October 29, 1996, was a dark day, a very dark day. It was the beginning of a partnership, a partnership that would be formed between equal partners. It was a partnership that would have a mission, not a mission statement . . . .

(16 RT 3597; comment 1.)[8]

> []The mission of this partnership was to prey upon the young and vulnerable; to prey upon children, girls, and women. These two predators that sit before you today, the defendants, James Anthony Daveggio and Michelle Lyn Michaud, would select each of their victims carefully. They would select them in order to accomplish their goals that they had previously agreed upon,

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[7] DOB refers to Daveggio's opening brief.

[8] Respondent is numbering each challenged comment in order to facilitate this Court's review of respondent's argument that appellants forfeited claims of prosecutorial misconduct where they lodged no objection.

> to ambush these young women and children by deceit, by a betrayal of trust or by sheerly [sic] overpowering them with brute force.
>
> Their goals were to abduct them, to terrorize them, to subdue them either by monumental fear or physical restraints, to inflict their own depraved will upon each of these victims, and then to physically and emotionally assault them to the very core of their being; to humiliate them and degrade them, to sexually assault them, to physically inflict pain on them, and to take pleasure in their victims' pain, to rape them, to sodomize then, to force objects into their young bodies, to do vile acts upon them, and then to threaten to kill them if they ever told a soul, that is, if they let you live to tell.

(16 RT 3598-3599; comment 2.)

The prosecutor described the charges against appellants and told the jurors that in addition to testimony from charged victims Sharona and April, they would also hear testimony from defendants' other victims based on "special laws" that allowed the jury to hear that type of evidence even though there were no criminal charges in connection with those victims. (16 RT 3603 ["There are special laws that provide the court a means of allowing you to hear that evidence under 1101 and 1108"; comment 3].) At this juncture, the trial court interrupted the prosecutor and castigated her for impermissibly arguing the case. In a sidebar conference, the trial court stated:

> [The Court]: I think you are getting in the area of argument. You are not suppose [sic] to go over what the law is in opening statement.
>
> [Ms. Backers]: Okay. I am explaining to them -
>
> [The.Court]: I know you are explaining, but that is for me to tell them and for argument as to why. I don't think you should go over that in opening.

(16 RT 3603-3604.)

After the admonishment, the prosecutor told the jurors that appellants "were completely obsessed with sexual depravity and serial murder." (16 RT 3604; comment 4.) She also described their possession of serial killer trading cards and stated:

> The defendants, Daveggio and Michaud, actually studied and discussed the planning, the preparation and the methods of famous serial killers. Both of them read books on serial murderers. In fact, the defendant, James Daveggio, would often brag about how he had studied and memorized the cases and the method of every documented serial killer, and not just studied them, but learned from their mistakes.
>
> The defendants collected trading cards, a collection of trading cards that glorified infamous serial killers. They discussed these infamous serial murderers and their tactics with many friends and relatives. And out of all of those murderers they heard of and studied, there was one pair of murderers that the defendants especially admired, it was a couple, a man and wife couple, an evil pair of serial murderers. It was the pair that became known as those who committed the sex slave murders.
>
> These two serial murderers were the defendants' personal heroes. They spoke of them often. The sex slave murders were committed by Gerald Gallego and Charlene Williams Gallego. When they met in the late 70's, it was Gerald Gallego and Charlene Williams. Soon they became crime partners and married one another, becoming the Gallegos. They committed 11 brutal murders that became known as the sex slave murders. They even called their victims disposable love slaves. The Gallegos would use their prey in every sexual perverted way, then throw them away like disposable love slaves.

(16 RT 3605; comment 5.)

The prosecutor explained how appellants had tried to emulate the Gallegos and then began discussing People's Exhibit 12, a poster board holding the various serial killer trading cards found in appellants' possession. (16 RT 3606-3608.) The prosecutor stated:

> [Ms. Backers] : And what was the information in each of the defendants' head [sic] that made these defendants [the Gallegos]

their personal heroes, the card they had on top, card no. 65, the front of the card has a picture of the two Gallegos covered in blood.

The card reads:

"Charlene Williams, born in 1958, was a gifted violinist with an I.Q. of 160, and the adored child of an affluent Stockton, California, family. In 1978, she met Gerald Gallego, then 33 years old, on a blind date, and from that point on was virtually hypnotized by the cruel and hardened man. Gallego was the son of a convicted cop killer and often boasted that he was "touched by the devil."

[The Court]: Excuse me. Ms. Backers, can I see you and counsel at side bar.

[Whereupon, the following proceedings were held at side bar.]

[The Court]: This is closing argument. This is not opening statement.

[Ms. Backers] You made a finding that this goes to their state of mind.

[The Court]: I understand that, but the way you are presenting it, it is an argument, okay. You are making—the way you are doing it, it is argumentative. This is not closing argument, okay. I am giving you as much leeway as I can, but you can't read everything that is on the board. You are arguing is what you are doing.

[Ms. Backers]: I know, but you made a finding this particular card was relevant to their state of mind and that is the card they had.

[The Court]: I am not objecting to what it is. I am objecting on my own to the way it is being presented. It is in an argumentative form. So now you will have to -

[Ms. Backers]: Can I finish reading the card? You made a finding.

[The Court]: I know. I know I did. It goes beyond giving an outline of what you are going to show. It is argumentative.

[Ms. Backers]: We are talking about a piece of evidence we recovered.

[The Court]: I know. But they can read the card themselves. The way you are doing it, it is argument. That is all I can tell you.

[Ms. Backers]: I am asking the court whether I am allowed to finish it.

[The Court]: I won't make you stop in the middle, but I will start interposing objections in open court if you keep presenting this like argument.

[Ms. Backers]: That is fine.

(16 RT 3608-3610; comment 6.)

The prosecutor finished reading the text from the Gallegos' trading card, after which defense counsel for Daveggio objected that the remarks were argumentative. The court overruled the objection. (16 RT 3610; comment 7.)

Next, the prosecutor began discussing the prior offense involving Aleda Doe and noted that Daveggio had sexually "assaulted this little four-foot-ten girl for 93 miles." (16 RT 3617; comment 8.) The prosecutor also made the following comments regarding the attack on Aleda:

Daveggio forced Aleda to touch his penis and to orally copulate his penis, to put her mouth on his penis. He forced his penis into her mouth. He forced this little girl to touch his testicles with her hands. He slapped her on the buttocks, hitting her on the buttocks. He scratched her on the back. He attempted to bite her face and neck and lips. He forcibly kissed her all over.

Daveggio shoved his fingers into Aleda's vagina. He shoved them into Aleda's rectum. He raped Aleda by shoving his penis into Aleda's vagina.

(16 RT 3617; comment 9.)

The prosecutor further stated:

> Instead, Daveggio forced Aleda to touch his testicles. And then he took Aleda's hand and forced her fingers up into his rectum while at the same time he forced his penis into her mouth.
>
> He touched her buttocks with his hand. And while she was being forced to orally copulate him, he was simultaneously forcing his fingers into her rectum. While Daveggio forced Aleda to orally copulate his penis, he kissed her on the neck. He now took his penis out of her mouth and began masturbating. Daveggio ejaculated in Aleda's face. He ejaculated on her face and in her hair.

(16 RT 3619; comment 10.)

The prosecutor also discussed the conversation appellants had about what they were going to do with Aleda after the assault. She recounted how Aleda had begged Daveggio not to kill her and how Daveggio had reacted to Aleda's plea by telling her that he would be leaving it up to Michaud, who responded that she needed 10 minutes to think about it. The prosecutor then stated that while Michaud thought about whether "Aleda would live or die," Daveggio allowed Aleda to get dressed. (16 RT 3620; comment 11.)

At the next recess, appellants' defense counsel objected that the prosecutor's remarks were inflammatory, and asserted that there was no evidence that Vanessa had ejaculate on her or had had been subjected to the type of sexual assaults perpetrated against Aleda.

> [Defense Counsel Mr. Ciraolo]: Your Honor, I will object to some of Ms. Backers' opening comments. The detail that she is presenting on Aleda Doe is only calculated to inflame the jury. The court has allowed the Aleda Doe testimony to come in for the purpose of similar [sic] and identity.
>
> There is no evidence that I can recall that this kind of conduct occurred to the victim. There is no evidence of ejaculation on Samson, the 187 victim. The court said that it can come in, because it is a similar for identity. None of this detail has been

indicated to have occurred to the 187 victim. It is only calculated for the prosecution to try to have the jury be inflamed and speculate that this sort of thing might have happened to Ms. Samson.

So I know what the court's ruling is on the evidence, but I want to be clear that from its inception Ms. Backers is attempting to inflame this jury.

[The Court]: Mr. Karl?

[Defense Counsel Mr. Karl]: We agree.

[The Court]: I have a bigger problem with the way it is being presented. I mean, I have about reached the limit: As Michelle thought about whether she lives or dies? You have no damned idea of what Michelle was thinking about. That is argument. That is an inference as to what was going on as to what the initial plan was. I mean, you are arguing the case.

[Ms. Backers]: Excuse me. That is what the victim is going to testify to.

[The Court]: She doesn't know what Michelle Michaud was thinking about.

[Ms. Backers]: She knows that the defendant Daveggio said he was leaving it up to Michelle.

[The Court]: Leaving what up? That is an inference.

[Ms. Backers]: That was the conversation she heard.

[The Court]: That is an inference, Ms. Backers. I am putting you on notice that if this continues, I will start making objections while you are doing it. That is argument. What Michelle was thinking is argument. It is an inference that can be drawn from the facts. I will let you argue that, but you are not going to do it in opening statement. This is an opening statement. This is not closing argument. And you are arguing the case and you know better. And I am trying to get everybody to get this thing started, but I am not a happy camper with the way this is going. So you are on notice that you better start presenting this stuff as an opening statement and not closing argument.

(16 RT 3622- 3623.)

2. Alleged crying

The prosecutor thereafter began to describe events on Thanksgiving Day when appellants attacked April, Daveggio's daughter. She also contrasted events of that day with what Vanessa's family had done during the same time period, stating:

> That same Wednesday night, the night before Thanksgiving in the same town of Pleasanton, a different scene was taking place in the Samson home. Vanessa Samson's family was preparing for their Thanksgiving the next day.
>
> On Thanksgiving morning, Thanksgiving Day, Jamie and April Daveggio were going to celebrate Thanksgiving with their mother and father. So Annette Carpenter [Daveggio's ex-wife] invited James and Michelle to celebrate a family meal with them at her home in Dublin.
>
> When they were in her bedroom, before Thanksgiving dinner, April was standing there with her father. She was 16. And her father was playing with his gun, fondling it in a particular way, which she'll describe for you. And he asked her if she wanted to hold it. He handed it to her and right when he handed her the gun, her mother called her down for dinner. They went down and had Thanksgiving dinner together.

(16 RT 3677.)

Daveggio's counsel asked to approach the bench and stated:

> [Mr. Ciraolo]: I can't see the district attorney's face, but from her tone of voice I don't know whether she's crying or not. I don't know if the court can observe it.
>
> [Ms. Backers]: No, I'm not.
>
> [Mr. Ciraolo]: She started breaking up.
>
> [Defense Counsel Mr. Strellis]: If we are going to start contrasting with what happened with Vanessa -
>
> [The Court]: I don't want to do that, Ms. Backers.

[Ms. Backers]: No.

[The Court]: I don't want anything about what's going on in the Samson home.

[Ms. Backers]: I'm talking about what happened in the Daveggio household.

[The Court]: You said something very different was going on in the Samson house and that's inappropriate, so stay away from that kind of stuff.

[Ms. Backers]: Okay. I'm talking about the Dublin household.

[Mr. Ciraolo]: You were breaking up.

[Ms. Backers]: No, not at all.

[Mr. Ciraolo]: Well, I couldn't tell.

(16 RT 3677-3678.)

3. Facts allegedly not in evidence

As she continued with her opening statement, the prosecutor told the jury about how Tim Painter, the district attorney's investigator, had made a template of a piece of carpet which had been taken from Michaud's van. The carpet had four slits in it which matched the locations of the eyebolts used to secure the seats to the van's floor. She stated:

> We took the template and laid it down in the van and then examined where the holes in the carpet would be and what they were in relation to if you looked through the holes. And lo and behold, they matched eyebolts where you could actually put something through there and restrain someone if they were spread eagle [sic] in the van.
>
> So that [sic] what we did, is we took exemplar rope, this is actually blue electrical rope or wire, about two feet each, and we put them through the hole and through the matching bolt, the anchor bolt, to see if they lined up. And they did.
>
> And this is an illustration for you to understand where those slits are, that if there was an interpretation that someone could have

put that carpet down, it could only be—it couldn't be to put the seats down, so it could only be to use those anchor bolts for some other purpose and that those slits were now in the carpet.

(16 RT 3698- 3699; comment 12.)

The prosecutor next described the evidentiary significance of an empty plastic bag of rope and pieces of rope found in the van and in Michaud's pocket. (16 RT 3699-3700.)

I asked [district attorney's investigator] Inspector Painter to find out who this manufacturer [as indicated on empty plastic rope bag] was and order up the rope. It happens to be laying here on this board as "L." That is an exemplar rope that we packaged so you could see what originally came in the empty bag we recovered under Samie's desk, in the defendants' belongings.

When you take the length that comes in a normal package from the manufacturer, they give you extra footage. It is about 48 feet, little bit more. It is supposed to be 45, but they always give you extra. And when you take the length of what you purchase at the store, and you take the length of the rope that was recovered on the white towel in the right, front passenger floorboard, and you take the length of the rope that was recovered in Michaud's front pocket, there is eight feet missing. And that is why when we did the exemplar restraints we used approximately two feet for each of the restraints that were at the four slits.

(16 RT 3700-3701; comment 13.)

Defense counsel for Daveggio objected, arguing that there was no evidence that restraints were ever used in the manner described by the prosecutor:

[Mr. Ciraolo]: I am objecting to the use of restraints. There is no evidence that the van was used for restraints.

[The Court]: Yeah. I was going to say you have to stay away from that until you argue. That is an inference. They are going to argue it is not, and you will argue it is.

[Ms. Backers]: That is fine.

[The Court]: I will tell the jury to disregard the use of restraints. You want me to highlight that?

[Mr. Ciraolo]: Yeah. We are going too far afield

[Whereupon, the following proceedings were held in open court.]

[The Court] : All right. Ladies and Gentlemen, we are kind of going over the line into an area of argument at this time. So I will instruct you at this time to disregard Ms. Backers' choice of words in using the word "restraints" as relates to those ropes. There is no evidence of that at this point and that is an inference that may be argued later on, but opening statements are not for argument so you will disregard those terms.

(16 RT 3701.)

4. Sympathy for the victim

When the prosecutor began to speak about Vanessa's murder, she commenced by saying:

Vanessa Samson was the youngest daughter in the Samson family. She has an older brother Vincent and older sister Nicole. At this particular time, they were all living together on Siesta Court. And, back in December of 1997 her mother was working days and her father was working graveyard. And Vanessa was 22 years old. She was taking a small break from Ohlone College. She had some classes she was taking, but she took a break and was going to go back to college in January.

And during this time, her old car just went kaput on her and she needed to earn money at her new job to earn the money to get a new car. She also had this job at SCJ Insurance Company where she would walk sometimes to work. It is about a mile away. Or she would get rides from her sister or brother.

The previous summer, 1996, she met a man named Rob Oxonian.

(16 RT 3705-3706; comment 14.)

Defense counsel objected to the "victim impact" aspect of the prosecutor's remarks and specifically pointed to the prosecutor's reference

to Vanessa's boyfriend, Rob Oxonian. The trial court noted it had earlier ruled that the prosecutor could state that when Vanessa disappeared she was wearing a San Diego State University sweatshirt that her boyfriend had given to her. The court also asked that the remarks be limited: "That is why she is wearing that sweatshirt. We talked about this. [¶] Try not to get into a whole lot. She has a boyfriend who has a sweatshirt." (16 RT 3706.)

The prosecutor continued, as follows:

> So since the summer of 1996, Vanessa was with Rob. He was attending school at San Diego State University. He gave her a sweatshirt. And that sweatshirt said San Diego State University. Actually it said "SDSU" in big, bold red letters and she often wore that sweatshirt.
>
> On December 1st, 1997, I indicated to you that Vanessa's car she no longer had so she was in the process of working to earn that money to get a car. So many times she would walk to work. On this particular day, she walked to work, but she got a ride home from her sister Nicole.
>
> Sometimes when she walked to work she would play her Walkman and listen to her tapes that she would carry with her.
>
> When she got a ride home on Monday, December 1st, from her sister Nicole, she ended up going grocery shopping with her Mom.

(16 RT 3706-3707; comment 15.)

At this point, the trial court interrupted the prosecutor and admonished her: "I don't care what happened December 1st. Go to December 2nd [the day Vanessa disappeared]." (16 RT 3707-3708.)

5. Facts not in evidence

Later, in describing the autopsy of Vanessa Samson performed by Dr. Rollins, the prosecutor stated:

> Before I show you the findings of the autopsy, I wanted to tell you that the person who did the autopsy was a person by the name of Dr. Curtis Rollins, R-O-L-L-I-N-S. And since he

> performed the autopsy, which he documented and photographed, and there is an actual business record of the autopsy, since then, he has gotten into some trouble of his own with the law. He has a drug problem and ended up getting charged with some crimes involving his drug addiction.
>
> So what I had done is I had a separate, second, pathologist, completely independent of Dr. Rollins, review his work. I took all of the findings of the autopsy, all of the crime scene photos from Alpine County, all of the pictures from the autopsy, and had an expert, Dr. Brian Peterson review Dr. Rollins's work.

(16 RT 3735- 3736; comment 16.)

Michaud's counsel objected that because Rollins would not be testifying, the prosecutor could not describe Rollins's findings. (16 RT 3736.) Daveggio's counsel also objected that just because Rollins had gotten into trouble with the law did not mean that his testimony was not the best evidence regarding the autopsy. (16 RT 3737.) After overruling the foregoing defense objections, the court proffered its own objection to the prosecutor's statements and said: "You are kind of testifying, though. I am more concerned that you are sort of giving testimony: I did this, I did that. You are not a witness." (16 RT 3738.)

After the prosecutor resumed giving her opening statement, she discussed Dr. Peterson's findings and started to describe how Vanessa's brother learned about Vanessa's murder. She stated:

> So Dr. Peterson will tell you that in his opinion Vanessa was strangled to death, that she was beat on the head with a very blunt, hard metal object, and that she was beat on the buttocks with some kind of an object and that she had cuts, scratches, and bruises.
>
> He will also tell you what his findings are, based on the amount of blood that he found in her neck, or that he read about in the report, and that he saw in photographs that you will see later.
>
> When Vincent Samson, on the afternoon of the 4th, was standing at the police department, he looked through the glass

> counter there at the Pleasanton Police Department and could see that everyone was staring at him. And then it became all too clear when Sergeant Joe Buckovic—

(16 RT 3741; comment 17.)

Daveggio's counsel stated, "Objection," after which the trial court stated that the objection was sustained and admonished the prosecutor that her comment was "not appropriate." (16 RT 3743.)

The prosecutor concluded her opening statement by playing the videotape of the recovery of Vanessa's body and describing the various things seen in the video. (16 RT 3744.) The prosecutor stated:

> The video will show you the black rope and it will show you both ends of the black rope. It will show you an end of the black rope that is in a twisted curved position. Then the video will take you to the other end of the black rope and you will see the clump of dark hair that is on the end of that black rope right next to Vanessa's body. And it will show you the condition of her socks, her shoes, her open zipper, and the position of her body.
>
> []
>
> Ladies and Gentlemen, James Daveggio and Michelle Michaud left Vanessa on that snowy embankment. They made sure that she couldn't tell.
>
> Thank you.

(16 RT 3744-3745; comment 18.) Counsel for both appellants asserted that the last line of the opening statement was "objectionable" and requested the court to admonish the jury. The trial court agreed that the challenged statement was "argument stuff" and admonished the jury that statements of counsel are not evidence. (16 RT 3745-3746.)

B. Closing Argument

At the end of the guilt phase of the case, the prosecutor began her closing argument by stating:

We are gathered here for one reason, and that is for Vanessa Samson.

We are gathered here because the two people, who sit before you on trial at this counsel table, because they formed the darkest and most predatorial partnership you can have ever imagined, a partnership to prey on the young and vulnerable.

James Anthony Daveggio and Michelle Lyn Michaud are predators of the most vile nature. They formulated a plan to grab girls, to use those girls for their own sick and perverted pleasure. The defendants formulated a plan to lure young girls that trusted them into a web of horrifying dimensions; they would violate the young bodies of these girls and leave their souls permanently scarred. And then, when they longed for a different taste, a different brush, they would snatch innocent young girls off the street and violate them.

With all their victims they would ambush, young women and children, either by deceit, by betrayal of trust, or by overpowering them with sheer brute force.

They had several goals. Their goals were:

To abduct them;

To terrorize them;

To subdue them either by monumental fear or physical brute force;

To inflict their will on these young people;

To physically and emotionally assault the very core of these young people's beings;

To humiliate them;

To degrade them;

To sexually assault them;

To inflict pain on them; and

To take pleasure from the very infliction of pain on them;

To rape them;

To sodomize them;

To shove objects into their young bodies and to force these young girls and women to do vile acts to their captors, and then to threaten to kill them if they ever told a soul, that is, if they decided to let you live.

So what I ask you to do over the next several days is to remember why we are here. And this is why we are here; it is for Vanessa Samson. This is the murder case of Vanessa Samson.

James Daveggio and Michelle Michaud kidnapped, tormented, and murdered Vanessa Samson, and then dumped her body far, far away, at about the 7,000 foot elevation, like a piece of discarded trash.

They snatched this perfectly innocent young girl, they beat her, they gagged her, they sodomized her with two different curling irons, and then they strangled the very life out of her. Then they dumped her down an embankment where if there had been one heavy snowfall we would have never found her.

(33 RT 7080-7081; comment 19.)

The prosecutor also argued that the van had been modified to use the anchor bolts for the seats as a means of restraining Vanessa. She stated:

And then you have the van and the fact that all the seats are out of the back and they put this carpet down, for which there is no other explanation than to put these four little tiny razor-like one inch slits so they could tie somebody down. There is no other explanation for that piece of carpet. You can't put the seats down through it. It came up positive for P30. There's no other explanation.

Then you have ropes. The van is full of ropes. She [appellant] has rope in her pocket. There is rope at the murder scene. There is eight feet of missing rope. If you take eight and divide it by four that makes four two-foot tiedowns. And the slits in the carpet aren't just slits in the carpet, ladies and gentlemen, they match the anchor bolts exactly. You take the slits and look at where those anchor bolts are and they match the four outer most

anchor bolts exactly. You slip a piece of rope through there and you can tie her wrists and ankles.

(33 RT 7089-7090; see also 33 RT 7197; comment 20.)

C. Forfeiture

In order "to preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition." (*People v. Earp* (1999) 20 Cal.4th 826, 858.) However, a defendant will be excused from the requirement of making a timely objection and request for an admonition if an admonition "would not have cured the harm, or if either would be futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 237 [trial court overruled counsel's objections to improper questioning, making further objections futile].)

Furthermore, even if the reviewing court determines that an objection and admonition would not have sufficed to cure the harm, reversal is warranted only if, "on the whole record the harm resulted in a miscarriage of justice . . . ." (*People v. Bell* (1989) 49 Cal.3d 502, 535.)

1. Alleged improper comments during opening statement and closing argument

Here, a review of the record establishes that out of the 20 challenged comments, appellants made only two objections which were accompanied by requests for admonitions. Thus, when the prosecutor asserted that appellants had used ropes to restrain Vanessa (16 RT 3700-3701; comment 13), appellants requested and received an admonition directing the jury to "disregard" the prosecutor's use of the word "restraints" when talking about the ropes because there was no evidence of that "at this time." (16 RT 3701.) Similarly, when challenging the portion of the opening statement in which the prosecutor asserted that by murdering Vanessa, appellants had "made sure" that she "couldn't tell" on them (16 RT 3744-

3745; comment 18), counsel also requested and received an admonition to the jury. (16 RT 3745-3746; comment 18.)

Appellants also objected to the prosecutor: (1) reading from the serial killer trading card (comment 7; 16 RT 3610); (2) recounting acts Daveggio perpetrated on Aleda Doe (comments 9-11; 16 RT 3617-3620); and (3) describing the circumstances preceding the kidnapping and how Vanessa's boyfriend had given her the sweatshirt she was wearing when appellants murdered her (comment 14; 16 RT 3705-3706). Appellants, however, never sought any curative admonitions in connection with those objections.

Furthermore, appellants never objected to any of the other statements they now claim to be misconduct. (Comments 1-6, 8, 12-13, 15-17, 19.) Since appellants only sought curative admonitions in connection with two of the 20 instances of claimed misconduct, the remaining claims are forfeited for failure to either object, or to seek an admonition. (*People v. Earp*, *supra*, 20 Cal.4th at p. 858.)

2. Alleged crying

Likewise, appellants' claim that the prosecutor committed misconduct by allegedly crying is also forfeited. It is established that if a party makes an objection, he must make an effort to obtain a ruling on the objection. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 984 [failure to "press for a ruling" on motion to sever forfeited the issue on appeal]; *People v. Bolin* (1998) 18 Cal.4th 297, 312-313 [same; venue motion]; *People v. Pinholster* (1992) 1 Cal.4th 865, 931 [same; motion to sever]; *People v. Morris* (1991) 53 Cal.3d 152, 195 [objection to admission of evidence forfeited on appeal by failure to press for a ruling].) Accordingly, the "failure to press for a ruling on a motion . . . forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance. [Citation.]" (*People v. Lewis* (2008) 43 Cal. 4th 415, 481.)

Here, the record reflects that Daveggio's counsel requested a sidebar conference, alleging that he could not "tell," but thought the prosecutor might have been crying because the tone of her voice suggested that she was "breaking up." (16 RT 3677-3678.) At the sidebar, the prosecutor denied that she was crying. Clearly, had the prosecutor appeared at the sidebar with red eyes or a tear-streaked face after such an accusation, counsel would most certainly have pointed that out. Instead, the only reasonable inference from the record is that there was no evidence that the prosecutor had been crying and that Daveggio's counsel did not wish to make himself appear more foolish by repeating his accusation that the prosecutor had been crying when her face bore no evidence of such.

This inference is further buttressed by the failure of Michaud's counsel to make any similar accusation. Thus, Michaud's counsel said nothing about any alleged crying and merely objected that the prosecutor should not be contrasting what happened at Vanessa's home with what happened at Daveggio's home. (16 RT 3677-3678.) Similarly, the trial court made no comment on the crying issue and simply admonished the prosecutor not to discuss what Thanksgiving Day was like in the Samson household. Since it is evident that defense counsel deliberately chose not to obtain a ruling on the crying claim, this attempt at gamesmanship should be soundly rejected. (See *People v. Kenner* (1990) 223 Cal.App.3d 56, ["Our interpretation of this record is that appellant realized that the trial court forgot the *Faretta* motion in the confusion resulting from his custody situation, and slyly saved his *Faretta* ace to play triumphantly on appeal"].)[9]

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[9] Contrary to appellants' argument, this case is not analogous to a *Marsden* claim which imposes a duty to inquire why the defendant seeks new counsel in order to facilitate an appellate determination whether the

(continued...)

Appellants, however, assert that all of their claims are cognizable despite their failure to either object, seek curative admonitions, or obtain a ruling on the crying claim. Appellants argue that objections would have been futile because the trial court failed "to make [an] appropriate inquiry into defense allegations [that] the prosecutor was crying," and because the record was "replete with the trial court's repeated [unsuccessful] efforts to rein in the prosecutor's multiple attempts at arguing the case in opening statement." (DOB 160-161; see also MOB 270.)

Not so. Nothing prevented Daveggio's defense counsel from asking the trial court to make an inquiry and finding in connection with his crying claim. (See *People v. Brewer* (2000) 81 Cal.App.4th 442, 461-462 ["the party who objected or made the motion must make an effort to have the court actually rule, and . . . when the point is not pressed and is forgotten the party will be deemed to have waived or abandoned the point and may not raise the issue on appeal"].) On the contrary, every shred of evidence suggests that defense counsel deliberately made a tactical choice not to do so. Only now, several years later, does Daveggio seek to ambush Respondent on appeal with a manufactured claim of prejudice which could have, and should have, been addressed at the time of trial. As stated in *People v. Brown* (2003) 31 Cal. 4th 518, the "purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial." (*Id.* at p. 553.)

(...continued)
refusal to grant new counsel constituted error. (MOB 272, fn. 87; DOB 162, fn. 52.) Here, Daveggio was represented by two death-qualified trial counsel who were fully capable of making objections and requesting rulings on objections.

People v. Bain (1971) 5 Cal.3d 839, cited by appellants, does not suggest a contrary conclusion. In *Bain*, defense counsel and the prosecutor engaged in numerous rancorous, racially charged exchanges throughout the trial. Although the prosecutor repeatedly expressed his personal belief in the defendant's guilt and vowed that as a black man, he would not have prosecuted a black defendant unless he was sure he was guilty, the trial court did not admonish the prosecutor or otherwise control the parties. (*Id.* at pp. 845-847.) This Court held:

> "[B]y not reprimanding either counsel, the trial judge in the instant case allowed the trial to be conducted at an emotional pitch which is destructive to a fair trial. And by not sustaining the objections of defense counsel, the judge allowed the prosecutor to make an argument based on racial prejudice and the status of the public prosecutor's office—a serious threat to objective deliberation by jurors."

(*Id.* at p. 849.) Consequently, the *Bain* Court concluded that the prosecutor committed reversible misconduct. (*Ibid.*)

Bain bears no resemblance to this case. Here, the trial court vigorously clamped down on the prosecutor and kept making its own objections to her opening statement on the erroneous basis that it was impermissibly argumentative.[10] In doing so, the trial court essentially bent over backwards to be fair towards appellants in its scrupulous, if mistaken, belief that portions of the prosecutor's opening statement were inappropriate. Accordingly, since the trial court did not permit the prosecutor to ride rough-shod over appellants, or allow the proceedings to become disorderly, *Bain* is inapposite and does not assist appellants.

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[10] When addressing the merits of the alleged misconduct, respondent will demonstrate that the trial court's view on the permissible content of an opening statement was plainly erroneous. (See *infra*, RB 125.)

For the same reasons, appellants cannot show that their objections, had they ever been proffered, would have been futile. Even if it were assumed that the trial court was unable to stop the prosecutor from arguing the case during opening statement, nothing prevented appellants from objecting and seeking curative admonitions. The futility exception to the general forfeiture rule is properly reserved for "unusual circumstances." (*People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821; accord, *People v. Riel* (2000) 22 Cal.4th 1153, 1212-1213.) Thus, it has been applied in situations where the trial court had improperly overruled a previous objection to related misconduct or had admonished counsel for making a previous objection, and when defense counsel was subjected to a barrage of pervasive misconduct by the prosecutor which the trial court failed to control. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821; *People v. Zambrano*, *supra*, 124 Cal.App.4th at p. 237.)

No such circumstances exist here. Far from repeatedly overruling defense objections, the trial court in this case sustained almost every objection and also granted all of defense counsel's requests for admonishment. Furthermore, although the trial court frequently berated the prosecutor for being argumentative during her opening statement, absolutely nothing prevented counsel from asking the trial court to admonish the jury to disregard those statements, just as it admonished the jury to disregard the prosecutor's description of the ropes as restraints, and reminded the jury that statements of counsel are not evidence. Accordingly, appellants have failed to make the requisite showing of futility.

Appellants next assert that even if they had objected, the challenged statements were not capable of being cured by admonition. They note that when the prosecutor stated that they had left Vanessa on the snowy embankment to make "sure that she couldn't tell," the trial court's

admonition that statements of counsel are not evidence did not suffice to obviate the harm. They observe that the challenged statement was followed by a law enforcement videotape depicting Vanessa's body in the snow surrounded by her belongings. Appellants believe that taken in combination, "the court's admonition did very little to mute the emotional impact of the moment upon jurors who had been repeatedly told they were all gathered there for Vanessa Samson." (DOB 162; MOB 272-273.)

Appellants are grasping at straws. It is presumed that juries follow instructions. (See *Greer v. Miller* (1987) 483 U.S. 756, 767, fn. 8 [absent an overwhelming probability to the contrary, courts presume that jury will follow an instruction to disregard inadmissible evidence inadvertently presented to the jury]; *People v. Samayoa* (1997) 15 Cal.4th 795, 842-843 [curative admonition to disregard victim impact references corrected any erroneous impression held by the jurors as to the relevance of the evidence in determining the issue of intent to kill]; *People v. Osband* (1996) 13 Cal.4th 622, 718 ["as with any other instance of misconduct, we presume that the jury would have followed the court's direction to disregard the offending action"].)

Courts have repeatedly found forfeiture for failure to object where the prosecutor was accused of appealing to the passions and prejudices of the jury, misstating the evidence, and being unduly argumentative. (*People v. Redd* (2010) 48 Cal. 4th 691, 753-754 [claim that prosecutor appealed to passions and prejudices forfeited for failure to object]; *People v. Rundle* (2008) 43 Cal. 4th 76, 193-194 [claim that prosecutor appealed to passions and prejudices and misstated the evidence forfeited for failure to object]; *People v. Hinton* (2006) 37 Cal. 4th 839, 863 [claim that prosecutor was improperly argumentative forfeited for failure to object]; *People v. Crew* (2003) 31 Cal.4th 822, 839 [forfeiture found where prosecutor elicited evidence court previously found inadmissible]; *People v. Morales* (2001)

25 Cal.4th 35, 41 [prosecutor's misstatement of law during argument is forfeited by failure to object]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 [prosecutor's references to the defendant as a "contract killer," a "snake in the jungle," "slick," "tricky," a "pathological liar," and "one of the greatest liars in the history of Fresno County," were deemed forfeited because any harm from these remarks could have been cured by admonition].)

Here, even if it were assumed that the prosecutor's comments during opening statement were inappropriate, they necessarily could have been obviated by admonitions since the comments in question did nothing more than foretell what would become obvious from the evidence admitted at trial. Thus, with or without the prosecutor's comments, the jury was going to read the contents of the serial killer trading cards glorifying the Gallegos' murders. It also was going to hear that appellants sexually assaulted their own children and friends, and had sodomized Vanessa with curling irons which had been specially purchased and modified for use against their helpless victim. Likewise, the jury was going to see the video of Vanessa's lifeless body discarded like trash on a snowy embankment, irrespective of the prosecutor's comments. In arguing that the prosecutor's comments were incurably prejudicial because they were accompanied by a video depicting Vanessa's lifeless body, appellants seek to use the heinous nature of their actions as a sword against the prosecution, when in fact it is their vicious conduct which is inflammatory, not the prosecutor's accurate descriptions of their vile actions. Since the prosecutor did nothing more than accurately describe the evidence admitted at trial, nothing she said was incurably prejudicial. (See *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 [presuming "that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade"]; *People v. Davenport* (1995) 11

Cal.4th 1171, 1213 [no misconduct where opening statement describes evidence which is ultimately admitted at trial].) Therefore, appellants have forfeited all claims of misconduct save those where they objected and sought a curative admonition (comments 13 & 18).

D. Even if All of Appellants' Claims are Preserved, They Are Meritless

Assuming arguendo that appellants' claims are preserved, they are meritless and warrant no relief.

The applicable federal and state standards regarding prosecutorial misconduct are well established.

> A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) 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 court or the jury . . . . (*People v. Espinoza, supra*, 3 Cal.4th at p. 820.) . . . . Additionally, 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. Samayoa* (1997) 15 Cal.4th 795, 835, internal quotation marks omitted; accord, *People v. Brady* (2010) 50 Cal. 4th 547, 583-584.) The burden of proof is on the defendant to show the existence of such misconduct. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427-432.) If misconduct is demonstrated, reversal is only warranted "when it is 'reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked

by the defendant.' [Citation.]" (*People v. Milner* (1988) 45 Cal.3d 227, 245; see also *People v. Espinoza*, *supra*, 3 Cal.4th at pp. 820-821.)

The purpose of the opening statement is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect, and the use of matters which are admissible in evidence, and which are subsequently in fact received in evidence, may aid this purpose. (*People v. Wash* (1993) 6 Cal.4th 215, 257; *People v. Dennis* (1998) 17 Cal. 4th 468, 518-519.) A prosecutor is allowed to make vigorous arguments and may even use epithets as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury. (*People v. Sanders* (1995) 11 Cal.4th 475, 527; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1251.) Accordingly, where warranted by the evidence, it is not misconduct for a prosecutor during opening statement to characterize the defendant's actions as "more horrifying than your worst nightmare" because such statements constituted "no more than fair comment" on what the prosecutor "anticipated the evidence would show." (*People v. Farnam* (2002) 28 Cal.4th 107, 168-169.)

Moreover, remarks made in opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor was so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted. (*People v. Davenport*, *supra*, 11 Cal.4th at p. 1213; *People v. Wrest* (1992) 3 Cal.4th 1088, 1108; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1225, fn. 5.) Accordingly, where the evidence admitted at trial tracks the contents of the opening statement, no prejudice can be shown. (See *People v. Hinton*, *supra*, 37 Cal.4th 839, 863 [defendant could not have been prejudiced by the prosecutor's comments in opening statement where "the prosecutor's argument essentially tracked what was proved at trial," "the jury was repeatedly instructed the attorneys'

statements were not evidence," and the challenged "comments and jury deliberations were separated by more than six weeks"].)

1. Passion and victim impact

As discussed previously, appellants assert that the prosecutor committed misconduct by personalizing the victim and her brother, as well as using dramatic language and epithets during her opening statement and closing argument. More specifically, they object to the prosecutor describing why Vanessa's car troubles resulted in her walking to work and how her brother looked stricken after the crime. (16 RT 3706-3707, comments 14 & 15 [description of Vanessa meeting boyfriend and describing the reasons why she was walking to work]; 16 RT 3741, comment 17 [prosecutor admonished for describing how Vanessa's brother saw police staring at him and knew something bad had happened].)

They also believe it was improper for the prosecutor to read the text on serial killer trading cards which were admitted into evidence, and for her to state that they were vile predators who terrorized their victims, and were obsessed with sexual depravity and serial murder. (16 RT 3597, comment 1 [references to "very dark day" and appellants had "a mission, not a mission statement"];16 RT 3598-3599, comment 2 [goals were to abduct, terrorize and subdue]; 16 RT 3604, comment 4 [appellants "were completely obsessed with sexual depravity and serial murder"]; 16 RT 3605, comment 5 [describing appellants as obsessed with the Gallegos]; 16 RT 3608-3609, 3610, comments 6 & 7 [reading from serial killer trading card describing the Gallegos]; 33 RT 7080-7081, comment 19; ["predators of the most vile nature" who formed "a partnership to prey on the young and vulnerable"].)

In addition, they object to the prosecutor's description of the sexual assault of Aleda Doe, claiming that she improperly attempted to elicit sympathy by referring to four-foot-ten-inch Aleda Doe as a "little girl" who

had Daveggio's finger "shoved" into her vagina and rectum, and who also endured having Daveggio ejaculate all over her face and hair. (16 RT 3617, comment 8 [sexually "assaulted this little four-foot-ten girl for 93 miles"];16 RT 3617, comment 9 ["forced little girl" to touch his testicles and "shoved" his fingers and penis into Aleda's vagina and rectum]; 16 RT 3619, comment 10 ["forced her fingers up into his rectum" and ejaculated on her face and hair].)

Appellants further assert that it was improper for the prosecutor to say that Daveggio allowed Aleda Doe to get dressed while Michaud thought about whether Aleda would be allowed to live or die. (16 RT 3620, comment 11 [Daveggio allowed Aleda Doe to get dressed while Michaud thought about whether "Aleda would live or die"].)

The foregoing comments were supported by the evidence and therefore did not constitute misconduct. It is settled that "[n]othing prevents the [prosecutor's opening] statement from being presented in a story-like manner that holds the attention of lay jurors and ties the facts and governing law together in an understandable way." (*People v. Millwee* (1998) 18 Cal.4th 96, 137.) "[T]he prosecutor is not required to shield the jury from all favorable inferences about the victim's life or to describe relevant events in artificially drab or clinical terms." (*Id.* at p. 138.)

Thus, for example, in *People v. Dennis*, *supra*, 17 Cal.4th 468, *Dennis*, this Court held that it was not misconduct for the prosecutor to refer several times to the murder victim's daughter, who witnessed the murder, and make statements such as, "She was to feel death's very presence in her own home where she felt normally very safe indeed." (*Id.* at pp. 518-519.) Likewise, in *Millwee*, this Court held that there was nothing improper about referring, in opening statement, to the killing of the victim as an "execution." (*People v. Millwee*, *supra*, 18 Cal.4th at p. 138.)

The court noted that the term was merely a way of summarizing an intentional and premeditated murder. (*Ibid.*)

Similarly, in *People v. Hayes* (1971) 19 Cal.App.3d 459, 469, the court rejected a claim alleging that the prosecutor used "inflammatory words" in his opening remarks when he told the jury that the defendant "exploded" and "kept right on coming and was using the knife in a whirling fashion . . . , chopping on [the victim] in a fashion like this[.]" (*Id.* at p. 469, omission in original.) And in *People v. Gurule* (2002) 28 Cal.4th 557, this Court rejected the defendant's claim that the prosecutor had committed misconduct because "he argued his case to the jury instead of summarizing it." (*Id.* at p. 610.) Instead, *Gurule* found that "[t]he function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning." (*Ibid.*)

Based on the foregoing authorities, it is evident that the prosecutor is not limited to making an opening statement in a clinical manner as appellants seem to believe, but is allowed to make the jury aware of the force and nature of the evidence and to make reasonable inferences. Accordingly, the prosecutor was fully entitled to describe why Vanessa was walking to work that day and to describe how she came to possess the clothes she was wearing at the time appellants murdered her since all of that evidence was ultimately admitted at trial.

For the same reason, she was also fully entitled to play the video of the recovery of Vanessa's body, to recite the contents of the serial killer trading cards, and to describe how appellants' behavior demonstrated their obsession with serial killers. (See *People v. Wash*, 6 Cal.4th 215, 257 [no error in using photographs and tape recordings intended to be admitted in evidence]; *People v. Fauber* (1992) 2 Cal.4th 792, 826 [use of poster on which portion of preliminary hearing testimony was displayed was

appropriately used as visual aid]; *People v. Green* (1956) 47 Cal.2d 209, 215 [permissible for opening statement to include photos of victim, a motion picture depicting locations of where events happened, and articles which were subsequently introduced as exhibits].)

And given the barbaric nature of the crimes, the prosecutor was amply justified in describing appellants as "predators of the most vile nature" (33 RT 7080-7081) since the comment was "'founded on evidence in the record and fell within the permissible bounds of argument.'" (*People v. Fuiava* (2012) 53 Cal. 4th 622, 691-692; *People v. Young* (2005) 34 Cal.4th 1149, 1224 [no error in using "opprobrious epithets when they are reasonably warranted by the evidence"]; see also *People v. Garcia* (2011) 52 Cal.4th 706, 759-760 [describing defendant as an "animal" and a "predator" who pursued "sadistic passions" proper in light of defendant's behavior]; *People v. Friend* (2009) 47 Cal.4th 1, 84 [evidence warranted defendant being described as an "'insidious little bastard,' with 'no redeeming social value'"]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1172 [describing defendant as "'evil,' a liar, and a 'sociopath'" permitted]; *People v. Stanley* (2006) 39 Cal. 4th 913, 953 [given brutal nature of the crime, no misconduct occurred when the prosecutor referred to the defendant as a person who was "cold-blooded" and had "no remorse"]; *People v. Harrison* (2005) 35 Cal.4th 208, 244-246 [prosecutor did not exceed the bounds of permissible closing argument by describing the defendant as someone who enjoyed killing like "a little kid opening his toys at Christmas," as "the executioner," as the "terminator of precious life," as "a head hunter" and as "the complete and total essence of evil" with "a cold unyielding heart"]; *People v. Farnam*, *supra*, 28 Cal.4th at pp. 199–200 [proper to refer to defendant as a " 'monster,' an 'extremely violent creature,' and the 'beast who walks upright'"]; *People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1030

[prosecutor's description of the defendant as a "snake in the jungle," a "pathological liar" and "slick" permissible in view of the evidence].)

Furthermore, given the strength of the evidence in support of all the charges, and appellants' admission of their involvement in the murder, the prosecutor's comments "would not have had such an impact 'as to make it likely the jury's decision was rooted in passion rather than evidence.'" (*People v. McDermott* (2002) 28 Cal.4th 946, 1003.)

Nor was it improper for the prosecutor to describe four-foot, ten-inch Aleda Doe as a "little girl" whom Daveggio sexually assaulted at length. (*People v. Millwee*, *supra*, 18 Cal.4th 96, 137 [no misconduct where prosecutor's opening statement presented a "social history" of the victim because the "prosecutor is not prohibited from identifying traits that made the victim particularly vulnerable to attack where such facts bear on the charged crimes and are not otherwise inadmissible on their face"].) Contrary to appellants' belief, the prosecutor was indeed allowed to discuss how appellants picked vulnerable victims who consisted of children, drug addicts, and petite women wearing backpacks.

Likewise, it was not misconduct for the prosecutor to use the words "forced" and "shoved" when describing Aleda's assault in which Daveggio made Aleda put her fingers into his rectum and in which he put his fingers into her vagina and rectum. Indeed the term "forced" was factually accurate since Aleda certainly did not consent to these acts; and the term "shoved" also connoted the involuntary nature of the assault. Similarly, it was appropriate for the prosecutor to recount how Daveggio ejaculated all over Aleda's face and hair since that was a factual circumstance of the crime, and provided the means to test Daveggio's DNA and conclusively identify him as the perpetrator. And finally, given Aleda's testimony that Daveggio left it to Michaud to determine whether Aleda would be murdered, there was nothing improper about the prosecutor's statement that

Michaud thought about whether "Aleda would live or die." (16 RT 3620, comment 11.) Consequently, no error has been shown. (*People v. Hamilton* (2009) 45 Cal.4th 863, 928 [prosecutor "enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom"].)

2. Facts allegedly not in evidence

Appellants further complain that the prosecutor testified about facts not in evidence when she: (1) explained that Dr. Rollins was not expected to testify because of a drug abuse problem; (2) asserted that since the four slits in the carpet lined up with the minivan's anchor bolts for the seats, appellants intended to use the van to tie up their victim spread-eagled on the floor; and (3) argued that the eight feet of missing rope was used to tie Vanessa to the van's anchor bolts. (DOB 167; MOB 276-277.)

A prosecutor commits misconduct by referring during argument to matters outside the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) A prosecutor, however, has wide latitude during argument so long as the argument is a fair comment on the evidence, which includes reasonable inferences or deductions drawn therefrom. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336-337; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1052.)

With respect to the issue regarding Dr. Rollins, appellants cannot establish any prejudice because Dr. Rollins ultimately ended up testifying to the same information the prosecutor discussed during her opening statement. (32 RT 6779-6845.) Thus Dr. Rollins testified that he had been prosecuted for addiction to Demerol. Therefore, the prosecutor's comments during opening statement correctly presaged the evidence admitted at trial.

Appellants further claim that the prosecutor's discussion of Vanessa being tied up in the van also constituted misconduct and cite *People v. Kirkes* (1952) 39 Cal.2d 719, in support of that proposition. In *Kirkes*, the

prosecutor made the following challenged statements during closing argument:

> "As a member of the District Attorney's Office of this County [for 19 consecutive years] I have taken an oath to prosecute cases to the best of my ability. If, during the conduct of this trial I have been—I have appeared to you to have been overly aggressive or tenacious, then I say to you that I was following out that oath, that in all sincerity I believe and I still believe and knew prior to the time that I became associated in this particular prosecution in the month of October, that this particular Defendant was guilty of this particular offense. I would not have been associated with the prosecution of this particular case unless I had so believed."

(*People v. Kirkes*, *supra*, 39 Cal.2d at pp. 721-722.)

The prosecutor also discussed the defense's efforts to discredit Mrs. Egan, an important prosecution witness, stating:

> "The Court will instruct you that you have a right to make inferences and deductions from the evidence. . . . You have the right to infer that this girl waited for her own safety until this Defendant was apprehended, until he was indicted by a Grand Jury of this County, until proceedings were had against him, to bring him to justice, before coming forward, because if she had come forward, with the knowledge that that man had of every portion of the evidence in this case, her life wouldn't be worth that."

(*Id.* at p. 722.)

Kirkes found that the challenged remarks were prejudicial misconduct because the prosecutor expressed a personal belief in the defendant's guilt which was akin to "testifying to the ultimate fact in issue without disclosing the source of his information." (*People v. Kirkes*, *supra*, 39 Cal.2d at p. 724.) The *Kirkes* Court further concluded that the prosecutor's comments regarding Mrs. Egan were also inappropriate, stating:

> Equally well-settled is the rule that statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct. [Citation.] Here, Mrs. Egan's long

> silence was excused by her asserted fear for her own safety if she testified against Kirkes. There is no evidence whatever upon which to base that statement. To picture Kirkes as a murderer who would kill again to cover his crime and so bold that he had threatened those who might testify against him was entirely unjustified.

(*Ibid.*)

Relying on *Kirkes*, appellants assert that "despite the absence of any evidence that anyone was shackled to the van by spread-eagled extremities, the prosecution argued that this occurred to Vanessa Samson." (DOB 172; MOB 277.)

Kirkes does not assist appellants. Unlike the circumstances in *Kirkes*, the prosecutor's arguments in this case were amply supported by the evidence. Here, a piece of carpet was discovered in the van which had been specially modified to include four slits which lined up with the seat bolts. In addition to the modified piece of carpet, the van also contained a 36-foot piece of yellow rope, as well as red rope and orange rope. Michaud was discovered with a three-foot piece of yellow rope in her pocket, and a black rope was found next to Vanessa's body with hair on it.

Not only was rope found in the van, on Michaud's person, and next to Vanessa, the evidence reflected that Vanessa had died of both ligature and manual strangulation. It is apparent, therefore, that appellants were clearly using rope in their criminal endeavors. When evidence of the rope is combined with evidence regarding the modified carpet, as well as the evidence about appellants' fascination with sex slaves and bondage items such as the ball gag they purchased, the prosecutor was amply justified in inferring that appellants had concocted a method to tie somebody to the seat bolts.

Indeed, appellants' claim is particularly spurious since Daveggio's penalty phase testimony completely supported the inferences drawn by the

prosecutor in her guilt phase arguments. Thus, during the penalty phase, Daveggio testified that he personally conducted an experiment using himself to simulate his would-be victim. In the experiment, Daveggio cut four similarly-sized pieces of rope and attempted to tie himself to the anchor bolts. He found, however, that the bolts were "not wide enough to tie somebody down, to actually tie their hands and feet unless you were going to tie their whole body." (37 RT 7948.) Daveggio "knew that before the carpet was put in there," so he was not "sure why [he] put the slits in the carpet knowing those weren't going to work." (37 RT 7948.)

Daveggio initially left the ropes threaded through the anchor bolts but eventually removed them because "it was uncomfortable sleeping on top of the ropes." (37 RT 7952.) The foregoing testimony thus establishes that the prosecutor's argument was not only a fair inference from the evidence, it was a remarkably accurate description of appellants' diabolical plot. That appellants ultimately abandoned the endeavor in no way undermines the legitimacy of the argument. Under these circumstances, the prosecutor's comments were not misconduct and appellants' claim to the contrary must be rejected.

3. Alleged misconduct in other cases

Appellants next seek to bolster their misconduct claim by asserting that the prosecutor committed similar misconduct in other cases. (DOB 168-170; MOB 280-281.) In making this argument, appellants cite to the record in *People v. Keith Lewis* (S086355) and *People v. Ropati Seumanu* (S093803). In the *Lewis* case, defense counsel accused the prosecutor of committing misconduct by crying at various times during the trial and by

eliciting testimony that several responding officers, as well as bystanders, were upset and crying at the crime scene. (DOB 169-170; MOB 280-281.)[11]

Appellants also cite to the prosecutor's closing argument in *People v. Ropati Seumanu* (S093803) in which she stated:

> This case is about good and evil. It is about the joyful bliss of anticipation of your wedding day which is replaced with sheer and unending terror; it is about Nolan, an innocent bridegroom, a son, a brother, who becomes Paki's captive. And the first day of the rest of your life never comes. It is about a bride's gift to her handsome husband that becomes a murderer's trophy. It is about a wedding that becomes a funeral, a plea for mercy which is denied with an intense explosion that rips apart your heart. The breath of life becomes bloody lungs filled with hot pellets. And you die, scared to death, begging for your life, all alone on your wedding day. That is the defendant's crime. That is Paki's crime for which he is on trial. And today is the day [in] which he must be held accountable for this horrible, brutal murder.

(DOB 169; *Seamanu* 17 RT 3429.)

First, the prosecutor's conduct in other trials is completely irrelevant to the question of whether she committed misconduct in this case. This Court has long established that a finding of prosecutorial misconduct is based on objective standards and requires no showing that the prosecutor subjectively intended to commit misconduct. "The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor." (*People v. Hamilton* (2009) 45 Cal.4th 863, 920.) Accordingly, "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill*, *supra*, 17 Cal.4th 800, 823, fn. 1; accord, *People v. Friend* (2009) 47 Cal.4th 1, 31 [prosecutor's violation of

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[11] Appellants filed a motion seeking judicial notice of the material referred to in the argument.

evidentiary ruling, "whether done intentionally or not," constituted misconduct].) Since a prosecutor's subjective intent is immaterial to a finding of misconduct, and since a finding of misconduct is based solely "on the effect of the prosecutor's action on the defendant," (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 920), rather than on events in other trials, the prosecutor's conduct in other proceedings has no bearing on whether she committed misconduct in this case and therefore should not be considered by this Court.

Second, even if the prosecutor's conduct in other trials were considered, none of the cited material supports a finding of misconduct. If indeed the prosecutor cried at various points in the *Lewis* case, this display of emotion was not prosecutorial error. Appellants have not cited a single case, nor has Respondent been able to locate one, holding or implying that a display of such emotion constitutes an improper attempt to appeal to the passions of a jury.

Likewise, the prosecutor's use of theatrical language in the *Seumanu* case was not improper since it was certainly no more inflammatory than the use of harsh epithets sanctioned by this Court. (*People v. Garcia*, *supra*, 52 Cal. 4th at pp. 759-760 [describing defendant as an "animal" and a "predator" who pursued "sadistic passions." proper in light of defendant's behavior]; *People v. Friend*, *supra*, 47 Cal.4th at p. 84 [evidence warranted defendant being described as an "'insidious little bastard,' with 'no redeeming social value'"]; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1172 [describing defendant as "'evil,' a liar, and a 'sociopath'" permitted]; *People v. Stanley*, *supra*, 39 Cal. 4th at p. 953 [given brutal nature of the crime, no misconduct occurred when the prosecutor referred to the defendant as a person who was "cold-blooded" and had "no remorse"]; *People v. Farnam*, *supra*, 28 Cal.4th at pp. 199–200 [proper to refer to defendant as a "'monster,' an 'extremely violent creature,' and the 'beast

who walks upright'"]; *People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1030 [prosecutor's description of the defendant as a "snake in the jungle," a "pathological liar" and "slick" permissible in view of the evidence].) Accordingly, the prosecutor's actions in other cases was not misconduct and have no bearing whatsoever on the issues before this Court. Appellants' claim to the contrary should therefore be rejected.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF APPELLANTS' PRIOR SEX OFFENSES

Appellants assert that the trial court violated their federal due process right to a fair trial by admitting evidence of prior sex offenses under Evidence Code sections 1101 and 1108.[12] (DOB 57-127; MOB 141-191, 231-281.)

A. Background

Before trial, the prosecutor moved to admit several incidents of appellants' prior uncharged sexual assaults.[13]

Joanna Doe

Joanna Doe is Daveggio's little sister. When Joanna was in the third grade, Daveggio was in the fifth grade, and their older sister was in the seventh grade. On one occasion, Joanna's older sister was out front kissing her boyfriend goodbye. Daveggio then told Joanna to give him a French kiss. (4 CT 871.)

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[12] Appellants' briefs have separate arguments regarding evidence admitted under section 1101 and evidence admitted under section 1108. Because current case law provides that an 1101 analysis is unnecessary if evidence is admitted under section 1108, Respondent addresses their claims in a single argument. (*People v. Loy*, *supra*, 52 Cal.4th 46, 63.)

[13] Because a number of the witnesses identified in the section 1108 motion testified at the penalty phase–Hope, Aleda, Donetta, Pattie and Beverly–respondent will not repeat the facts here.

A few years later, when Joanna was approximately nine years old, she and Daveggio got their clothing all wet from playing in the snow. Joanna's mother told her to take off her wet jeans and ride home in her underwear. Joanna was seated in the back of the station wagon next to Daveggio with a blanket over the two of them. During the car ride, Daveggio put his hand underneath her underwear and fondled her vagina. Joanna did not tell anybody because she was afraid since her mother always blamed her and her siblings for Daveggio's misdeeds. (4 CT 872.)

In August 1972, Joanna was 10 years old. One day she and Daveggio were the only ones home after school. Daveggio ripped open her buttoned shirt. Joanna tried to get away, but Daveggio held her down. He then began sucking on her left breast and left a large hickey. Joanna finally got away from Daveggio and ran to the neighbor's house. (4 CT 872.)

Monica Doe

On May 15, 1985, Monica was working at a Fotomat drive-thru window. Daveggio, who was shirtless, pulled up to the drive-through window and stayed there while masturbating his erect penis. As Daveggio remained masturbating and appeared to ejaculate, Monica's brother drove up to the window on the opposite side. Monica told him what Daveggio was doing and the brother wrote down Daveggio's license plate number. (4 CT 875.) When Daveggio was subsequently charged with indecent exposure, he said that he was at the drive-through window but did not do that "kind of thing." (4 RT 875.)

Briann Doe

Briann was Deta's child and Daveggio's stepdaughter. (4 CT 877.) Daveggio began assaulting Briann beginning when she was 13 years old. (4 CT 877.) The first time, Daveggio pulled Briann's pants down and began spanking her bottom, claiming that he was disciplining her. Daveggio struck Briann with a belt about 20 times and also fondled her

bottom. (4 CT 878.) Briann showed Deta the welts and bruises Daveggio inflicted and told her step-sister, Jamie, that Daveggio had fondled her buttocks in a perverted manner. (4 RT 878.)

When Briann was 14 years old, she awoke to find Daveggio standing at the foot of her bed masturbating. Briann pretended to be asleep. Daveggio took one of Briann's bras and fondled the bra while masturbating. Daveggio left Briann's room, walked outside, and stood below her window, telling Briann to show him her "tits." Briann ran into the bathroom and locked the door. Daveggio came back, and tried to open the bathroom door, but was unable to get in. The next morning, Briann told her mother what had happened and Deta said she would talk to Daveggio. Daveggio denied doing anything and Deta accused Briann of fabricating everything to try to ruin her marriage to Daveggio. (4 CT 878.)

On the third occasion, Briann was seventeen years old and living with Daveggio and Liz Bingenheimer. (4 CT 878.) Daveggio sat on one end of the couch while Briann was on the other end. Daveggio masturbated while watching a pornographic movie. (4 RT 878.)

On the last occasion, Briann was about 18 years old. Sometime around October 3, 1997, Deta was at work. Daveggio told Briann to come play some games on the computer. Daveggio kept climbing on Briann and trying to kiss her, Briann finally managed to get Daveggio off of her and ran outside to find her little brother, and stayed out there until she knew Daveggio was gone. (4 CT 879.) When Briann came back inside, she found a mini-cassette tape on the kitchen table. When Briann listened to the tape, it was a recording of an apology to Deta. Deta became angry when Briann turned the tape recording over to the police. (4 CT 879.)

April Doe

The first molestation perpetrated against April occurred when she was about ten years old. (4 CT 879.) April was visiting Daveggio at Deta's

house. On the night in question, April and Daveggio were sitting on the couch watching television. Daveggio asked April if she remembered taking a shower with him when she was a little girl, and began rubbing her shoulders. Daveggio then stuck his hand down April's pants and began rubbing her vagina. Next, he put his fingers in her vagina. (4 CT 879.)

The second offense also occurred at Deta's. April was playing videogames on the bed when Daveggio came into the room and sat behind her. Daveggio began touching her chest and kissing the back of her neck. Daveggio also put his hand under April's shirt and fondled her breasts. As with the first molestation, Daveggio put his hand down April's underpants and rubbed her vagina again. (4 CT 880.)

The third offense took place at Liz Bingenheimer's house in early 1996. When April was 14 years old, Daveggio again stuck his hand down April's underpants, but because she was older, she had the courage to tell him to stop. During the same time frame, there was yet another molestation in which Daveggio thrust his hand inside her underwear when she was sleeping, and then rubbed her leg. When April turned over, Daveggio jumped away and acted as if nothing was happening. (4 CT 880.)

Jessica Doe

In mid-September 1997, Jessica Doe was 20 years old when she was assaulted by Michaud and Daveggio. Jessica was high on methamphetamine and got into Michaud's minivan. While Michaud drove the minivan, Daveggio offered Jessica some methamphetamine and asked her to take her clothes off. When Jessica refused, Daveggio forced her to undress and sexually assaulted her. Daveggio orally copulated and raped Jessica as Michaud drove into the mountains. Later, Michaud got into the back of the minivan and participated in the assault. (4 CT 882.)

B. The Trial Court's Ruling

On September 12, 2001, the trial court issued a statement of decision regarding the motion to admit uncharged acts. The court first observed that it had reviewed the facts of each uncharged act to determine if it met the criteria for "relevancy and materiality." (5 CT 1203.) It found that with some exceptions, "all of the uncharged acts contained elements and similarities with the charged acts to meet the relevancy and materiality tests." (5 CT 1204.)

In making those determinations, the court expressly considered whether: (1) the source of the evidence for the uncharged act was "independent from the source of the evidence for the charged acts;" (2) there was "a close proximity in time from the uncharged acts and the charged acts;" (3) there were "distinct similarities between the uncharged acts and the charged acts;" (4) the uncharged acts were "more inflammatory than the charged acts"; and (5) the defendants were convicted of the uncharged acts in another proceeding. (5 CT 1204.)

The court ruled at the outset that only acts involving "both defendants acting in concert, jointly as principals and/or aiders and abettors would be admissible." (5 CT 1205.) The court made this ruling based "on the fact that the uncharged acts involving only one of the defendants would not meet the relevancy and materiality criteria as to the uninvolved defendant." (5 CT 1205.) The court was also concerned that "the cumulative effect of the uncharged acts involving only one defendant could b e inflammatory as to the uninvolved defendant," and that "limiting the acts to only those involving both defendants" eliminated the potential for undue prejudice. (5 CT 1205.)

Based on the foregoing analysis, the court ruled that the uncharged acts involving Christina Doe, Aleda Doe, and the "first act involving

Rachel Doe and Amy Doe, would be admitted under 1101(B) and 1108 of the Evidence Code." (5 CT 1205.)

The court, however, concluded that under its section 352 discretion, the uncharged acts involving Jessica Doe should be excluded because of a "lack of similarities" with the charged offenses, which rendered it more prejudicial than probative. (5 CT 1205.)

C. Sections 1101 and 1108

In *People v. Foster* (2010) 50 Cal.4th 1301, this Court described the standards for determining whether evidence of other crimes is admissible under section 1101. The Court stated:

> Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.
>
> The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. In order to be admissible to prove intent, the uncharged conduct must be sufficiently similar to support the inference that the defendant probably harbor[ed] the same intent in each instance. A greater degree of similarity is required in order to prove the existence of a common design or plan. . . . [E]vidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations. The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. . . . [T]he 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 as to be like a signature. The highly unusual and distinctive nature of both the charged and [uncharged] offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense.

(*Id.* at p. 1328.)

In 1995 the Legislature enacted section 1108 which governs sex crime prosecutions. Under that section, where the defendant is accused of a sexual offense, evidence of his commission of another sexual offense "is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a).). Thus, "[s]ection 1108 was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.)

In order to determine the admissibility of prior sex crimes under section 1108,

> trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta*, *supra*, at p. 917.) Like any ruling under section 352, the trial court's ruling admitting evidence under section 1108 is subject to review for abuse of discretion. (*People v. Kelly* (2007) 42 Cal.4th 763, 783; *People v. Pierce*, *supra*, 104 Cal.App.4th at p. 901.)

(*People v. Story* (2009) 45 Cal.4th 1282, 1294-1295.) Thus, because evidence that a defendant committed prior sex offenses is "particularly probative" in a sex offense case (*People v. Story*, *supra*, 45 Cal.4th at p. 1293), such propensity evidence is presumptively admissible unless, under Evidence Code section 352, 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, confusing the issues or misleading the jury. (*People v. Loy*, *supra*, 52 Cal.4th 46, 62; accord, *People v. Dejourney* (2011) 192 Cal. App. 4th 1091, 1105-1106 [no error in admitting prior sex crimes because the presumption of probative value was not outweighed by their prejudicial effect].)

In *People v. Loy*, *supra*, 52 Cal. 4th 46, this Court discussed the interplay between sections 1101 and 1108, and rejected the defendant's argument that the evidence regarding prior sex offenses was improperly admitted because it did not satisfy the criteria set forth in section 1101. The *Loy* court found that when such evidence is admissible under section 1108, it is immaterial whether it is admissible under section 1101. The Court stated:

> Defendant claims the court had to exclude evidence of the previous crimes because "they bore no similarity to the capital case." Even if true, this circumstance, although relevant to the trial court's exercise of discretion, is not dispositive. Before section 1108 was enacted, Evidence Code section 1101 governed the admission of prior criminal conduct, and a body of law developed concerning how similar the prior conduct had to be to the charged crime; the required degree of similarity varied depending on the use for which the evidence was offered. (See generally *People v. Ewoldt* (1994) 7 Cal.4th 380.) "All of that radically changed with respect to sex crime prosecutions with the advent of section 1108. . . . [S]ection 1108 now 'permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses for any relevant purpose' (*People v. James* (2000) 81 Cal.App.4th 1343, 1353, fn. 7), subject only to the prejudicial effect versus probative value weighing process required by

> [Evidence Code] section 352." (*People v. Britt*, *supra*, 104 Cal.App.4th at p. 505.) "In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101." (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 405.) Or, as another court put it, "[t]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40–41.)

(*Id.* at p. 63.)

D. Discussion

Here, a review of the section 1108 factors establishes that appellants have failed to meet their burden of establishing any abuse of discretion.

1. Nature and relevance of the evidence

In applying this first factor, the court examines the nature of the prior acts evidence to assure that it is "no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

Here, the nature of the prior sex offenses committed by appellants was certainly no more inflammatory than the charged offenses. In the uncharged offenses, appellants ambushed their prey and then perpetrated sexual assaults which involved sodomy, rape, and forced oral copulation. Thus, Amy was anally raped by Daveggio, while Aleda was forced to sodomize Daveggio with her finger, as well as endure having him sodomize her with his finger. In addition, oral copulation was a prominent feature in both the charged and uncharged crimes. It is apparent, therefore, that those uncharged crimes were of the same general nature as those perpetrated against Vanessa, April, and Sharona, but were significantly less

inflammatory since the victims in the uncharged offenses were not sodomized with curling irons, or murdered. (See *People v. Wesson* (2006) 138 Cal.App.4th 959, 969-970 [prior forcible oral copulation offense was "of the same class and nature" as charged offenses of forcible sexual penetration and forcible sodomy].) Given the heinous nature of the crimes perpetrated against Vanessa, it cannot be doubted that the uncharged offenses were less inflammatory.

Not only were the uncharged crimes less inflammatory than the charged crimes, they were also highly relevant to demonstrate appellants' modus operandi and their intent. Based on the uncharged crimes, the jury could infer that April, Sharona and Vanessa had all been ambushed for the purposes of sexual assault. Appellants' intent in this regard was particularly important because Daveggio admitted that he was criminally liable for Vanessa's murder, but claimed that the kidnapping and sodomy special circumstances were untrue because their sole purpose in kidnapping Vanessa was to murder her, not to sexually assault her. Accordingly, the evidence regarding the uncharged offenses was highly relevant to disprove appellants' claim that Vanessa was kidnapped solely for the purpose of murder, and not for the purpose of sexual assault. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1287 [similarity between sexual crimes increases the probative value of prior sexual offense evidence]; see also *People v. Frazier* (2001) 89 Cal.App.4th 30, 41 ["evidence shows defendant has a pattern of molesting his young female relatives"].)

2. Remoteness

The passage of time between the prior and current conduct "is an appropriate factor to consider in a section 352 analysis." (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 739.) But "there is no bright-line rule" for assessing remoteness. (*Ibid.*) "No specific time limits have been established for determining when an uncharged offense is so remote as to

be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284; *People v. Pierce, supra*, 104 Cal.App.4th at p. 900.)

In this case, the uncharged crimes were committed in close temporal proximity to the charged crimes. Therefore, there is no issue of remoteness which militates against the admission of the uncharged offenses.

3. Certainty of commission and likelihood of confusion

Where no conviction results from the prior misconduct, that circumstance may heighten "the danger that the jury might have been inclined to punish defendant for the uncharged offenses" and thus risk jury confusion. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 405; *People v. Harris, supra*, 60 Cal.App.4th at pp. 738-739; accord, *People v. Ennis* (2010) 190 Cal. App. 4th 721, 734. ["The danger to be avoided is that evidence of additional crimes might cause the jurors to want to punish the defendant for those crimes, even if they are not entirely sure he committed the one(s) at issue"].) However, instructing the jury on the limited purpose of evidence of prior uncharged sex crimes reduces the possibility of jury confusion. (*People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1103.)

In the instant case, Daveggio was convicted of the Aleda Doe offense and pleaded guilty to the crimes against April and Sharona, thus demonstrating certainty of the commission of the crimes, and also obviating the risk that the jury would want to punish him for uncharged offenses. For her part, Michaud was also convicted of the Aleda Doe offense.

As for the other uncharged offenses, the striking similarities among those offenses provided compelling proof that appellants committed them, which, in turn helped to prove appellants' guilt in the charged offenses. And since both appellants admitted being involved in Vanessa's murder, and primarily sought to refute the special circumstance allegations, they cannot possibly demonstrate that the admission of the uncharged offenses

caused the jury to convict them of that crime merely as retribution for their commission of uncharged offenses.

4. Similarity to the charged offense

"Evidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179; see also *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 141 [evidence of other offenses is "extremely relevant, especially with regard to sexual offenses"].) Under section 1108, subdivision (d)(1)(A) through (F), the prior and charged offenses are considered sufficiently similar for admissibility if they are both the type of sexual offenses enumerated there. (*People v. Miramontes*, *supra*, 189 Cal.App.4th 1085, 1099; *People v. Frazier*, *supra*, 89 Cal.App.4th 30, 40–41.) The degree of similarity between the prior and current conduct is a pertinent factor in assessing probative value, even in a case governed by section 1108 rather than section 1101. (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 740; see also *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917 [among the section 1108 factors is the prior act's "similarity to the charged offense"].)

As discussed above, the uncharged offenses were strikingly similar to the charged offenses. In all instances, appellants acted as a team to either lure victims they knew to a location where they could be sexually assaulted, or to kidnap their victims off the street as in the cases of Aleda and Vanessa. Because of the marked similarities between the charged and uncharged offenses, admission of the uncharged offenses was particularly probative and thus appropriately admitted. (See *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1117 [propensity evidence was highly probative because "the uncharged conduct [was] similar enough to the charged behavior to tend to show the defendant did in fact commit the charged offense"].)

5. Prejudicial impact

In *People v. Loy*, *supra*, 52 Cal. 4th 46, this Court described how the enactment of section 1108 altered the traditional manner in which evidence is weighed under section 352 because evidence of other uncharged offenses is no longer considered intrinsically prejudicial. The Court stated:

> Evidence of previous criminal history inevitably has some prejudicial effect. But under section 1108, this circumstance alone is no reason to exclude it. "[S]ection 1108 affects the practical operation of [Evidence Code] section 352 balancing '"because admission and consideration of evidence of other sexual offenses to show character or disposition would be no longer treated as intrinsically prejudicial or impermissible. Hence, evidence offered under [section] 1108 could not be excluded on the basis of [section] 352 unless 'the probability that its admission will . . . create substantial danger of undue prejudice' . . . substantially outweighed its probative value concerning the defendant's disposition to commit the sexual offense or offenses with which he is charged and other matters relevant to the determination of the charge. As with other forms of relevant evidence that are not subject to any exclusionary principle, the presumption will be in favor of admission." [Citations.]

(*Id.* at p. 62.)

Furthermore, the prejudice referred to in section 352 "'applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) "Evidence is not 'unduly prejudicial' under the Evidence Code merely because it strongly implicates a defendant and casts him or her in a bad light, or merely because the defendant contests that evidence and points to allegedly contrary evidence." (*People v. Robinson* (2005) 37 Cal.4th 592, 632.)

Based on the foregoing principles, it is evident that appellants suffered no undue prejudice from the admission of the uncharged crimes. As

already explained, evidence of the other crimes was extremely probative on appellants' intent when they kidnapped Vanessa. And with respect to Michaud, the prior uncharged crimes shed light on her intent regarding the sexual assault on April in which only Daveggio engaged in the actual assault itself. Under those circumstances, evidence that she had been a direct participant, rather than an observer, in numerous other assaults illuminated her intent in all of the charged crimes. Furthermore, her active and willing participation in all of the uncharged crimes strongly refuted her claim that she was a battered woman who only acted under duress in Vanessa's murder. Thus, Aleda's testimony that Daveggio left it to Michaud to determine Aleda's fate provided particularly compelling evidence that Michaud was not acting under the dominion and control of Daveggio. Accordingly, given the highly probative nature of the uncharged crimes evidence, appellants cannot establish any undue prejudice.

6. Burden of Defending Against Uncharged Offenses

In this case, appellants did not face an undue burden in defending against the uncharged offenses. Based on the nature of the charged offenses, appellants were already facing a lengthy and complex trial. The addition of testimony from Christina, Aleda, Rachel and Amy did not materially lengthen an already-lengthy trial. This is especially true with respect to Aleda's testimony since both defendants had already been convicted of that offense. (*People v. Daniels* (2009) 176 Cal. App. 4th 304, 317 [since defendant was already convicted of uncharged offense, he bore no burden to defend against it].) Accordingly, because the burden on defendant was minimal in the context of the entire trial, that factor did not militate against admitting th e uncharged crime evidence. (See *People v. Pierce* (2002) 104 Cal.App.4th 893, 901 ["Little time was devoted to the prior offense; it involved only 17 pages of transcript"].)

7. Less prejudicial alternatives

Under *Falsetta*, trial courts determining whether to admit uncharged offenses should consider less prejudicial alternatives "such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.)

The trial court did just that. In her pre-trial motion, the prosecutor sought to present evidence of a total of 13 different uncharged crimes. After hearing argument from the parties, the trial court allowed the admission of only four different episodes of uncharged misconduct. (5 CT 1203-1207.) It is thus apparent that the trial court carefully exercised its discretion in the matter and specifically allowed only those incidents involving both defendants to be admitted precisely to avoid having one defendant be unfairly tainted with the other defendant's misconduct. Utilizing that rationale, the Court excluded evidence that April had been molested on numerous occasions prior to the charged offense. Likewise, for the same reason, it excluded evidence that Daveggio had molested Briann, his stepdaughter, on numerous occasions. Consequently, given the careful exercise of discretion, appellants cannot meet their burden of demonstrating that the trial court acted in an "arbitrary, capricious, or whimsical manner." (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.) Nor did the admission of such evidence violate their due process rights under the federal constitution. (*People v. Falsetta*, *supra*, at pp. 916-922.) Accordingly, the claim fails.

IV. THE INSTRUCTIONS REGARDING THE UNCHARGED OFFENSES CORRECTLY STATED THE LAW AND DID NOT VIOLATE APPELLANTS' DUE PROCESS RIGHTS

Michaud and Daveggio claim that the instructions given regarding the uncharged offenses violated their due process rights. Specifically,

appellants assert that the section 1101 instruction was inappropriate because it "had no application to the facts of the case," and "failed to correctly limit the jury's use of other-crimes evidence to the relevant disputed issues." (MOB 196, 200; DOB 101.) Appellants further assert that the section 1108 propensity instructions "improperly allowed the jury to find disposition for the charged offense from the commission of other charged offenses." (DOB 116; MOB 211.)[14]/[15]

The claims are forfeited for failure to challenge the instructions on those grounds, or to seek limiting instructions curing any purported deficiencies. And even if the claims were not forfeited, they are meritless. The 1101 instruction correctly stated the law and was relevant to the issues in the case. Likewise, the 1108 instruction correctly stated the law and did not, contrary to appellants' claim, authorize the jury to use one charged offense as propensity evidence for another charged offense. Finally, even if the 1108 instruction did allow propensity inferences between charged offenses, no due process violation has been established.

A. Appellants' Claims of Instructional Error Are Forfeited

A defendant may not "remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.) Because

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[14] Daveggio's caption to the argument also asserts that his propensity to commit sex offenses was improperly used to support the charged murder. Daveggio's brief, however, never discusses the contention. Consequently, respondent does not address the claim. (*People v. Ashmus* (1991) 54 Cal.3d 932, 985, fn. 15 [Points "perfunctorily asserted without argument in support" are not properly raised].)

[15] The question of whether evidence of a charged sexual offense may be used as evidence of a defendant's propensity to commit another charged sexual offense is currently pending before this court. (*People v. Villatoro* (2011) 194 Cal.App.4th 241, review granted July 20, 2011, S192531.)

appellants never sought to modify the instructions they now claim are erroneous, they have forfeited any claim of error. (*People v. Lewis and Oliver* (2006) 39 Cal. 4th 970, 1036-1037 [challenge to section 1101 instruction forfeited for failure to object or seek clarification of allegedly ambiguous language].)

Even if the claims are not forfeited, a review of controlling authority establishes that they are meritless.

B. Standard for Reviewing Claims of Instructional Error

The standard for reviewing claims of ambiguous or erroneous jury instructions is whether there is a reasonable likelihood that the jury applied the challenged instruction in a manner that violates the Constitution. (*People v. Frye* (1998) 18 Cal.4th 894, 957; see *People v. Clair* (1992) 2 Cal.4th 629, 663.) Of crucial importance is what meaning the instructions communicated to the jury. If the meaning was not objectionable, the instructions cannot be deemed erroneous. (*People v. Williams* (1997) 16 Cal.4th 153, 272; *People v. Benson* (1990) 52 Cal.3d 754, 801.) In evaluating a contention regarding ambiguous or erroneous jury instructions, a reviewing court must examine the challenged instruction in its proper context in determining whether the instruction violates due process. (See e.g., *People v. Roybal* (1999) 14 Cal.4th 481, 526-527; *People v. Frye*, *supra*, 18 Cal.4th at p. 957; *People v. Burgener* (1986) 41 Cal.3d 505, 538.)

C. The Evidence Code section 1101 Instruction Correctly Stated the Law and Was Directly Relevant to the Evidence Introduced at Trial.

In the proceedings below, the trial court instructed the jury with CALJIC No. 2.50. The instruction stated:

> Evidence has been introduced for the purpose of showing that the defendants committed crimes other than that for which he or she is on trial in this case. Except as you will otherwise be instructed, this evidence, if believed, may not be considered by

you to prove that either of the defendants is a person of bad character or that he or she has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:

A motive for the commission of the crimes charged, or the special circumstances alleged; The existence of the intent which is a necessary element of the crimes charged, or the special circumstances alleged;

A characteristic method, plan or scheme in the commission of the criminal acts similar to the method, plan or scheme used in the commission of the offenses in this case which would further tend to show the existence of the intent which is a necessary element of the crimes charged, or the special circumstances alleged;

The defendants did not reasonably and in good faith believe that the person or persons with whom he or she engaged in a sexual act consented to such act.

As to the Aleda Doe incident only, this evidence, if believed, may also be considered by you only for the limited purpose of determining if it tends to show:

The identity of the person or persons who committed the crime and special circumstances of which the defendants are accused in count four.

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

Except as otherwise instructed, you are not permitted to consider such evidence for any other purpose.

(34 RT 7325-7326.)

Appellants assert that because the uncharged conduct evidence was neither "relevant" nor "admissible," the instruction was not properly tied to the evidence and therefore improperly allowed the jury to use other-crimes evidence to convict them of Vanessa's murder. (MOB 200-206; see also DOB 100.) Michaud further asserts that, with the exception of the

reference to the uncharged Aleda Doe offense, the court's instruction to the jury on its use of other-crimes evidence was defective because it failed to name the complaining witnesses and allowed the jury to consider their testimony regarding other-crimes to "prove motive, intent, common plan or scheme, and absence of consent, although not all of the evidence was relevant to prove all those matters." (MOB 202.) Both appellants cite *People v. Swearington* (1977) 71 Cal.App.3d 935 and *People v. Nottingham* (1985) 172 Cal.App.3d 484 in support of these contentions.

In *Swearington*, the defendant was convicted of indecent exposure. On appeal he asserted that the trial court erroneously admitted prior acts of public nudity and then misinstructed the jury that the foregoing evidence was relevant to identity, motive, intent and common plan or scheme. (*Swearington*, *supra*, 71 Cal.App.3d at pp. 946-947.) The appellate court found that the prior acts evidence was only relevant to motive, and that it was error for the "trial judge to give CALJIC instruction No. 2.50 and list four separate issues upon which the evidence is being received and which the jury may consider unless the evidence is relevant and admissible with respect to each of such four issues." (*Id.* at p. 947.)

In so holding, the court reasoned that since the defendant did not contest his identity as the naked person at issue in both the charged and uncharged offenses, "evidence of the other acts committed by defendant ha[d] no relevancy under any theory of a common scheme plan or modus operandi." (*Swearington*, *supra*, 71 Cal.App.3d at p. 947.) The court further concluded that where "evidence is irrelevant and, hence, inadmissible," it cannot be "offered to prove an undisputed issue of fact." (*Ibid.*) Based on the foregoing premise, the court found that the trial court prejudicially "misled the jury" by giving instructions allowing it to "consider the other acts as evidence on irrelevant, nonexistent and nondisputed issues of motive, characteristic scheme or plan and identity,

and which could lead to use on the prejudicial and inadmissible issue of defendant's propensity or character trait to commit indecent exposure offenses." (*Id.* at p. 949.)

Relying on *Swearington*, the court in *People v. Nottingham*, *supra*, 172 Cal.App.3d 484, held that the trial court erred by admitting uncharged act evidence and then failing to specify the issues on which the prior act evidence was relevant, thereby allowing the jury to use it an overbroad manner on irrelevant issues. (*Id.* at p. 501.) The court stated:

> The trial court has a duty to assist the jurors by telling them the precise issues to which the other-crimes evidence relates and to limit their consideration of such evidence accordingly. [Citation.] It is error to give an instruction which correctly states a principle of law which has no application to the facts of the case.

(*Ibid.*, internal quotation marks omitted.)

Swearington and *Nottingham* are inapposite. First, this Court has already determined that CALJIC No. 2.50—the instruction at issue here—correctly states the law. (*People v. Wilson* (2005) 36 Cal.4th 309, 328; *People v. Carter* (2005) 36 Cal.4th 1114, 1151.) The instruction is no less correct simply because appellants dispute the trial court's ruling admitting the other-crimes evidence. As discussed previously, the other-crimes evidence was both highly relevant and admissible on the issues of identity, intent, and common plan or scheme. Thus, testimony that appellants kidnapped and sexually assaulted Aleda was highly relevant to show that appellants kidnapped Vanessa for the purpose of sexually assaulting her. Likewise, evidence that appellants attacked Rachel, Christina and Amy helped prove that appellants committed the charged offenses against Sharona and April. (5 CT 1206 [trial court specifically found that the uncharged acts involving Christina, Rachel and Amy had "sufficient common features to demonstrate the existence of a plan rather than [being]

spontaneous acts," and therefore were relevant to appellants' "intent, motive and common plan and design"].) Consequently, CALJIC No. 2.50 not only correctly stated the law, but also directly applied to the facts of the case. Accordingly, since the other-crimes evidence was directly tied to the evidence, *Swearington* and *Nottingham* do not assist appellants.

Second, *Swearington*'s premise—that a defendant's failure to challenge a particular element of a crime renders other-crimes evidence regarding that element irrelevant, and thus inadmissible—is manifestly incorrect. It is established that a prosecutor cannot be foreclosed from proving all of the elements of a crime simply because a defendant has made a tactical decision not to contest particular elements of the crime. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69; accord, *People v. Balcom* (1994) 7 Cal.4th 414, 422; *People v. Thornton* (2000) 85 Cal.App.4th 44, 47-49 [criminal defendant may not limit the prosecution's ability to put in evidence on an element of an offense by promising not to argue that issue to the jury].) This is true even where the defendant seeks to stipulate to an element of the crime. (*People v. Waidla* (2000) 22 Cal.4th 690, 723, fn. 5 [trial court cannot compel a prosecutor to accept a stipulation that would deprive the state's case of its evidentiary persuasiveness or forcefulness]; accord, *People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1007.) Therefore, to the extent *Swearington* rests upon the notion that a defendant's failure to dispute an element of the crime renders evidence on that element inadmissible, it is inconsistent with controlling authority.

Third, contrary to appellants' contention, the instruction given adequately delineated its application to particular issues. The instruction at the outset informed the jury that it had received evidence of "other" crimes which the jury could consider for the limited purposes of showing a "motive," "the existence of the intent which is a necessary element of the crimes," and a common "plan or scheme." (34 RT 7325-7326.) After

listing those purposes for which the evidence could be used, the instruction further specified that as "to the Aleda Doe incident only, this evidence, if believed," could be considered "for the limited purpose of determining" if it tended "to show the identity of the person or persons who committed the crime and special circumstances of which the defendants are accused in count four." (34 RT 7325-7326.)

Thus, the instruction clearly informed the jury that, as to the Aleda Doe offense only, the other-crimes evidence was admissible on the issue of identity. Therefore, as a matter of common sense, the jury would necessarily infer that the other-crimes evidence regarding Christina, Rachel and Amy was to be evaluated only in connection with the issues of intent, motive, and common plan or scheme. (See *People v. Payton* (1992) 3 Cal.4th 1050, 1072 [court required to determine the most reasonably likely interpretation the instruction would be given by a reasonable juror].) That common sense interpretation of the instruction was reinforced by the prosecutor's closing argument in which she explained how the other-crimes evidence helped show appellants' intent and plan in the charged offenses. Accordingly, the prosecutor argued that the jury could "consider" what appellants "did with all those other girls to decide their motive" and "intent." (33 RT 7095.)

Given the content of the instruction, as well as the prosecutor's explanation of the instruction, appellants cannot show that the jury was misled as to the proper use of the instruction. (See *People v. Hughes* (2002) 27 Cal.4th 287, 341 ["Viewing together the instructions, counsel's legally correct argument, and the evidence presented to the jury for its consideration, we do not believe that it is reasonably likely the jury was 'misled to defendant's prejudice' or that the jury would have understood CALJIC No. 4.20 to operate in the manner asserted by defendant"].) And since the instruction was correct and relevant to the issues in the case, it did

not lessen the prosecution's burden of proof or violate appellants' right to a reliable death sentence. (*People v. Catlin* (2001) 26 Cal.4th 81, 145-147 [court rejected contention that CALJIC No. 2.50 lessened the prosecution's burden of proof]; *People v. Coddington* (2000) 23 Cal. 4th 529, 642 [instruction containing correct statement of law "is adequate to ensure reliability in a death verdict"].)

D. The 1108 Instruction was Correct and Did Not Violate Appellants' Due Process Rights

At the close of testimony in the guilt phase, the trial court gave a modified version of CALJIC No. 2.50.1 which instructed the jury that it could use "prior sexual offenses" to infer that appellants had a propensity to commit sexual offenses. (34 RT 7329.) Rather than using the standard language requiring prior offenses to be proved by a preponderance of the evidence, the instruction only authorized consideration of such prior offenses if they were proven beyond a reasonable doubt. The instruction commenced by informing the jury that evidence had been "introduced for the purpose of showing that the defendants engaged in a sexual offense on one or more occasions *other* than that charged in this case." (34 RT 7328, italics added.) After defining the meaning of sexual offense, the instruction further stated:

> If you find that a defendant committed a *prior sexual offense*, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that a defendant had this disposition, you may, but are not required to, infer that he or she was likely to commit and did commit the crimes of which he or she is accused. However, if you find *beyond a reasonable doubt* that a defendant committed *prior sexual offenses*, that is not sufficient by itself to prove beyond a reasonable doubt that he or she committed the *charged* crimes. The weight and significance of the evidence, if any, are for you to decide. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(34 RT 7329, italics added.)

Appellants argue that the foregoing 1108 instruction was ambiguous, and that, as a result of the purported ambiguity, it impermissibly allowed the jury to use one charged offense as propensity evidence of another charged offense. Appellants believe that since section 1108's constitutionality was predicated upon a trial court's discretion to exclude evidence of other offenses under section 352, use of one charged offense as propensity evidence of another charged offense is unlawful because "the other-crimes evidence is automatically admitted as a charged crime against the defendant." (DOB 121; MOB 211, 217; *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917 ["trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge"].)

Appellants are wrong on all counts. First, the instruction was not ambiguous and only authorized the jury to use uncharged offenses as propensity evidence for charged offenses. Second, even if the instruction allowed one charged offense to be used as propensity evidence of another charged offense, this inference is permissible under section 1108 which makes no distinction between charged and uncharged offenses. Finally, since the trial court expressly ruled that that evidence regarding one charged offense was cross-admissible in the other charged offenses under section 1108, appellants cannot establish any prejudice.

1. The 1108 instruction only authorized the use of uncharged offenses as propensity evidence

Appellants first assert that the 1108 instruction was confusing because it used different terminology to describe uncharged offenses. Appellants note that the instruction initially informed the jury that evidence would be introduced that appellants "engaged in a sexual offense" "*other* than that charged in this case." (MOB 225; DOB 127.) Appellants next emphasize

that the instruction later stated on two different occasions that if appellants engaged in a "*prior sexual offense*," and the "*prior sexual offense*" was proven beyond a reasonable doubt, the jury could infer that appellants had a "disposition to commit sexual offenses," but that was not "sufficient by itself" to prove that appellants "committed the *charged crimes*." (MOB 226; DOB 128, italics added.) Michaud asserts: "The infirmities of the instructions are evident on their face. There is one reference to 'other' sexual offenses and two references to 'prior' sexual offenses and nothing in the instruction to inform the jury that 'other' and 'prior' are intended to be synonymous." (MOB 226.) Michaud also notes that CALCRIM No. 1191, the current analogue to CALJIC No. 2.50.1, consistently refers to the prior offenses as "uncharged crimes" "without euphemisms such as 'other' and 'prior' that fail to inform that they must be read synonymously." (MOB 228.)[16]

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[16] The pattern instruction set forth in CALCRIM No. 1191 provides: "The People presented evidence that the defendant committed the crimes _____ <insert description of offense[s]> that were not charged in this case. These crimes are defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit _____ <insert charged sex offense[s]> as charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <insert charged sex offense[s]>. The People must still prove each element of the charge beyond a reasonable

(continued...)

Appellants vainly seek to manufacture ambiguity where none exists. As stated in *Boyde v. California* (1990) 494 U.S. 370:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with common sense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

(*Id.* at pp. 380-381.)

In this case, the instructional language consistently differentiated an uncharged offense from a charged offense, and limited potential propensity inferences to uncharged offenses. Thus, the very first line of the instruction stated that "evidence has been introduced for the purpose of showing that the defendants committed crimes "*other than that for which he or she is on trial in this case.*" (34 RT 7328, italics added.) That reference unmistakably informed the jury that it had received evidence regarding uncharged offenses. The instruction then went on to state that if a "prior sexual offense" was proven beyond a reasonable doubt, jurors could infer that appellants had a "disposition to commit sexual offenses," but that was not "sufficient by itself" to prove that appellants "committed the *charged crimes*." (34 RT 7328, italics added.) It is thus apparent that the foregoing instructional language clearly differentiated uncharged offenses from charged offenses; it also delineated the purpose for which the uncharged

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(...continued)
doubt. [¶] [Do not consider this evidence for any other purpose [except for the limited purpose of _____ <insert other permitted purpose, e.g., determining the defendant's credibility>].]" Courts have concluded that CALJIC No. 2.50.1 is "similar in all material respects to CALCRIM No. 1191 . . . in its explanation of the law on permissive inferences and the burden of proof." (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 87; accord, *People v. Wilson* (2008) 166 Cal.App. 4th 1034, 1049.)

crimes had been introduced and further specified how the uncharged crime evidence was relevant to the charged offenses. Nothing in that language remotely indicated that evidence of one charged offense could be used as propensity evidence of another charged offense since the reference to potential propensity inferences was made in express relation to uncharged offenses.

Appellants, however, claim that, not only was the instructional language ambiguous, the potential for jury confusion on how to use the uncharged offenses was exacerbated because the trial court read the section 1101 and section 1108 instructions before Aleda's testimony (17 RT 3989), but gave no such instructions before testimony from Christina, Rachel, and Amy. Accordingly, Michaud believes that "there was nothing from which the jury might have inferred that the evidence pertaining to these four women fell within the special class of evidence that should be treated differently than evidence pertaining to April and Sharona. (MOB 228-229; DOB 130.)

Appellants are mistaken. As discussed, the instructional language in CALJIC No. 2.50.1 clearly differentiated between charged and uncharged offenses. That the instruction was given before Aleda's testimony but not before the testimony of the other section 1108 witnesses did nothing to alter the content of the 1108 instruction, or to change the prosecutor's argument on how the uncharged offense evidence should be utilized. Since the instruction plainly distinguished between charged and uncharged offenses, and limited propensity inferences to uncharged offenses, appellant's claim of instructional ambiguity fails. (See *Boyde v. California*, *supra*, 494 U.S. at pp. 380-381.)

2. Even if the instruction allowed one charged offense to be used as propensity evidence of another charged offense, this inference is permissible under section 1108 which makes no distinction between charged and uncharged offenses

Section 1108 authorizes the jury to draw an inference of propensity to commit a charged sex offense from evidence admitted to prove commission of another charged sex offense. Using the evidence in that fashion is contemplated by the plain language of the statute.

> "The aim of statutory construction is to discern and give effect to the legislative intent. [Citation.] The first step is to examine the statute's words because they are generally the most reliable indicator of legislative intent. [Citations.] To resolve ambiguities, courts may employ a variety of extrinsic construction aids, including legislative history, and will adopt the construction that best harmonizes the statute both internally and with related statutes. [Citations.]"

(*Summers v. Newman* (1999) 20 Cal.4th 1021, 1026.)

As already discussed, the admission of propensity evidence is normally restricted by section 1101:

> As a general rule, evidence that is otherwise admissible may be introduced to prove a person's character or character trait. (§ 1100.) But, except for purposes of impeachment (see § 1101, subd. (c)), such evidence is inadmissible when offered by the opposing party to prove the defendant's conduct on a specified occasion (§ 1101, subd. (a)), unless it involves commission of a crime, civil wrong or other act and is relevant to prove some fact (e.g., motive, intent, plan, identity) *other than a disposition to commit such an act* (§ 1101, subd. (b)). Under section 1102, defendants in criminal cases may introduce evidence of their character or character traits to prove their conduct in conformity (§ 1102, subd. (a)), and the prosecution may use similar evidence to rebut that evidence (§ 1102, subd. (b)).

(*People v. Falsetta*, *supra*, 21 Cal.4th 903, 911, original italics (*Falsetta*).)

The use of propensity evidence in sex offense cases, on the other hand, is not circumscribed in the same manner. Indeed, as previously stated, the Legislature enacted section 1108 "to expand the admissibility of disposition or propensity evidence in sex offense cases." (*Falsetta*, *supra*, 21 Cal.4th at p. 911.) By doing so, the Legislature sought "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta*, *supra*, 21 Cal.4th at p. 911.)

Consistent with section 1108's purpose of expanding the admissibility of sex offenses, its language plainly encompasses evidence of one charged offense being used to prove another charged offense, specifically, "evidence of the defendant's commission of another sexual offense or offenses." (§ 1108, subd. (a).) By its use of the term "another" rather than "uncharged," the Legislature demonstrated its intent to include both charged and uncharged offenses in its scope. When there are multiple charges, the inference based on the evidence admitted as to one count that the defendant has the propensity to commit sex offenses is relevant to the defendant's guilt on another count for the same type of crime.

Using charged sex offenses in this manner comports with the use of charged offenses under section 1101. It is well-established that, when the requirements of subdivision (b) of that section are met, the jury may use evidence admitted to show guilt of one charge to infer matters such as intent, common plan, or identity as to another charge. In fact, this Court long ago recognized in *People v. Kelly* (1928) 203 Cal. 128, that, where "[t]he indictment showed that the three murders were committed by the same person, on the same day, and in the same city and county[,] . . . [t]he circumstances under which each crime was committed, and the proof required to establish it, necessarily threw light upon the other two." (*Id.* at p. 135.)

Since *Kelly*, this Court has repeatedly instructed that section 1101 evidence of charged offenses is admissible for the same purposes as of uncharged offenses. In *People v. Ochoa* (1998) 19 Cal.4th 353, this Court rejected a claim that the trial court should have instructed sua sponte that the jury could not consider evidence of a charged assault "for any other purpose, including propensity for violence." (*Id.* at p. 410.) This Court reasoned, "[E]vidence of each assault could be used under Evidence Code section 1101, subdivision (b), to show defendant's mental state for each other assault, namely his intent." (*Ibid.*)

The same principle was applied in *People v. Kraft* (2000) 23 Cal.4th 978. There, the defendant was convicted of 16 counts of murder. Guilt as to some of the counts was based in part on inferences arising from evidence admitted to establish guilt of other counts. This Court recognized, "Physical evidence linked defendant to eight of the murders, but with respect to the remainder, the prosecution relied on the similarity of the modus operandi and the existence of the so-called death list . . . ." (*Id.* at p. 1002; see also, e.g., *id.* at p. 1062 ["given the commonality of certain features of the various offenses present in the record of this case, the task of determining the degree of distinctiveness and the number of such circumstances necessary to establish defendant's identity as the perpetrator of these offenses was a matter for the jury"]; *People v. Beagle* (1972) 6 Cal.3d 441, 456 [even if court had instructed jurors to "decide each count separately on the evidence and law applicable thereto, uninfluenced by their verdict on any other count, . . . it would not have instructed the jury 'to disregard its finding on the facts as regards any count in determining any other count in which those facts are relevant.' [Citation.] Here all evidence was relevant to both counts"].)

More recently, in *People v. Catlin* (2001) 26 Cal.4th 81, this Court dispelled the notion that section 1101 evidence was limited to uncharged

offenses. The defendant in *Catlin* argued that the trial court erred in refusing to give a proposed special instruction that stated that "'[e]vidence applicable to each offense charged must be considered as if it were the only accusation before the jury.'" (*Id.* at p. 153.) In rejecting the contention, this Court explained that "[c]ontrary to the import of the proposed special instruction, under Evidence Code section 1101 the jury properly could consider other-crimes evidence in connection with each count, and also could consider evidence relevant to one of the charged counts as it considered the other charged count." (*Ibid.*)[17]

A defendant in a case in which evidence is cross-admissible under section 1108 should not be in a different position than a defendant in a case in which evidence is cross-admissible under section 1101. It is equally appropriate to permit the jury to draw the legislatively authorized inference under section 1108 as it is to permit the jury to draw a legislatively authorized inference under section 1101. This is particularly true since the purpose of section 1108 is to loosen the evidentiary restraints posed by section 1101. (*People v. Falsetta*, *supra*, 21 Cal.4th 903, 911 ["available legislative history indicates section 1108 was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed"].)

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[17] Appellants further assert that "allowing one charged offense to be used to prove guilt on every other charged offense " is "inconsistent with the instruction stating: "Each charge is a distinct crime. You must consider each crime separately." (MOB 218; 138 CT 36441.) Controlling authority refutes this contention. CALJIC No. 17.02 merely informs the jury that each count must be decided separately. It presents no obstacle to consideration of the same evidence in support of multiple counts. (See *People v. Castro* (1985) 38 Cal.3d 301, 307–313 [instruction to decide each count separately does not mean jury should disregard relevant facts pertaining to other counts]; *People v. Catlin*, *supra*, 26 Cal.4th 81.) As held in *Catlin*, the jury is entitled to use evidence in support of one charged count as evidence in support of another charged count and doing so does not violate CALJIC No. 17.02.

People v. Wilson, *supra*, 166 Cal.App.4th 1034, supports this conclusion. In *Wilson*, the court held that using one charged offense as propensity evidence of another charged offense comports with both the language and purpose of the statute. The court stated:

> We discern three reasons for permitting the jury to use evidence of charged sex offenses to show a propensity to commit another charged offense. First, the plain wording of Evidence Code section 1108 does not limit its application to cases involving uncharged sex offenses. The statute provides that when a "defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." The statute does not distinguish between charged and uncharged offenses. Second, in cases such as this, involving multiple sexual offenses against multiple victims, permitting the jury to use propensity evidence in this way serves the legislative purpose behind section 1108. Third, the policy concerns or factors that *Falsetta* described as "supporting the general rule against the admission of propensity evidence" are not implicated where multiple offenses are charged in the same case. (*Falsetta*, *supra*, 21 Cal.4th at p. 915.) The defendant does not face an "unfair burden of defending against both the charged offense and the other uncharged offenses" or "protracted 'mini-trials' to determine the truth or falsity of the prior charge" or "undue prejudice arising from the admission of the . . . other offenses" in cases such as this, since he is already required to defend against all of the charges. (*Id.* at pp. 915-916.) Thus, the reasons for excluding propensity evidence set forth in *Falsetta* do not apply to cases involving propensity evidence based on charged offenses.

(*Id.* at p. 1052.)

The *Wilson* court further found that the modified instruction given in that case did not violate the defendant's due process rights because: (1) the instruction required proof beyond a reasonable doubt of all propensity evidence; (2) the jury was told that it could, but was not required to, make a propensity inference from the evidence and that such evidence was not sufficient by itself to prove the defendant's guilt of a charged crime; (3) the

instruction limited use of the propensity evidence to the question regarding the defendant's intent; and (4) the trial court engaged in the requisite weighing process under section 352. (*Wilson*, *supra*, 166 Cal.App.4th at pp. 1052-1053.)

Appellants argue that *Wilson* is inapposite because, in that case, the trial court utilized its section 352 discretion—the lynchpin undergirding section 1108's constitutionality—and "weighed the propriety of using evidence of one offense as circumstantial evidence to prove one of the other offenses." (DOB 124; MOB 224 [the "trial court in *Wilson* actually engaged in the Evidence Code section 352 weighing process that *Falsetta* credited with saving Evidence Code section 1108 from a due process challenge"].)

Appellants are incorrect. Although the trial court never entertained a motion to admit one charged offense as propensity evidence of another charged offense, it did rule on appellants' severance motion in which they sought to sever the charges relating to Vanessa from those relating to April and Sharona. (4 CT 972-984.) The trial court denied the motion, finding that if the April and Sharona assault charges were severed from the murder charge, the evidence would nonetheless be admissible regarding the murder charge because the conduct involving April and Sharona was "similar to the facts involving the other uncharged Does and thus admissible under Evidence Code 1101(b) on the issue of intent, motive and common plan and design *or under Evidence Code section 1108*." (5 CT 1207, italics added.) Consequently, the court concluded that "there would be cross-admissibility of evidence, which would be the determining factor on the bifurcation issue." (5 CT 1207.)

In so ruling, the court further observed that although the evidence in support of all the charges was somewhat inflammatory," none of the counts is noticeably more inflammatory than the others." (5 CT 1207.) And,

likewise, because the counts were similar in strength, joinder of the charges would not result in a "strong case" being "used to bolster a weak case." (5 CT 1207.) It is thus apparent that, here, as in *Wilson*, the trial court specifically utilized its discretion when evaluating the propriety of having multiple sex offenses tried together.

And, more importantly, the trial court's finding of cross-admissibility simply forecloses any claim of prejudice from the 1108 instruction since the trial court determined that evidence from one charged offense would be admissible in another charged offense under the more stringent standards of section 1101 and under the more relaxed standards of section 1108. (5 CT 1207.) Accordingly, in light of the manifest exercise of discretion utilized by the trial court when determining whether the charged offenses could be jointly tried, as well as its determination that charged offenses would be cross-admissible even if tried separately, appellants cannot demonstrate any error even if the instruction given permitted one charged offense to be used as propensity evidence of another charged offense. Appellants' claim fails.

V. THE TRIAL COURT DID NOT ERR BY GIVING CALJIC NO. 3.00

Appellants both claim that the trial court erred by giving CALJIC No. 3.00 which explained the principles governing aiding and abetting liability. More specifically, appellants take exception to the instruction's statement that an aider and abettor is "equally guilty" of the crime committed by a direct perpetrator. Michaud asserts that the "equally guilty" language was prejudicially misleading because she "lacked the requisite mental state" to be "guilty of first-degree premeditated murder." (MOB 133.) Michaud notes that her theory of defense was that she acted under duress. Although duress does not constitute a defense to murder, and does not reduce murder to manslaughter, she asserts that it may nonetheless negate "the deliberation or premeditation required for first-degree murder." (MOB 133.) Michaud

also contends that the challenged language was prejudicial with respect to her oral copulation conviction involving April Doe because there was no evidence that she was a direct perpetrator in that crime and the jury asked whether she could be found guilty of the crime as an aider and abettor. (MOB 124.)

Daveggio asserts that the instruction also harmed him because it was "plausible to infer" that "the actual killer made an individual decision to kill that was neither discussed with nor conveyed to the other." (DOB 140.)

First, the claim is forfeited because at the time the instructions were given, neither appellant objected to the "equally guilty" language they now challenge.

Second, the "equally guilty" language was not misleading because there is no evidence that appellants acted with different mental states during the murder, and the defense of duress is inapplicable in capital proceedings. And, even if it were applicable, there is no evidence that Michaud acted under duress and reflexively—rather than premeditatedly—killed Vanessa based on a threat of imminent harm from Daveggio. Moreover, the true findings on the special circumstances demonstrated that both appellants acted with the requisite mental states for first degree murder.

Finally, with respect to Michaud's claim regarding her oral copulation conviction, the challenged language could not have affected that verdict because there are no different degrees or less culpable mental states of that offense.

A. Background

In the proceedings below, neither appellant objected to the giving of CALJIC No. 3.00, and both specifically requested that CALJIC No. 3.01, a companion instruction, be given. (33 RT 7001-7002.)[18]/[19]

With the parties' assent, the jury was subsequently given CALJIC No. 3.00 which provided:

> Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. Principals include: one, those who directly and actively commit or attempt to commit the act constituting the crime; or two, those who aid and abet the commission or attempted commission of the crime.

(34 RT 7349.)

The jury was also given CALJIC No. 3.01, which provided:

> A person aids and abets the commission or attempted commission of a crime when he or she: one, with knowledge of the unlawful purpose of the perpetrator; and two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime; and three, by act or device, aids, promotes, encourages or instigates the commission of a crime. Mere presence at the scene of a crime which does not itself assist the commission of a crime does not amount to aiding and abetting. Mere knowledge that a crime is being committed and failure to prevent it does not amount to aiding and abetting.

(34 RT 7349.)

In addition to the aiding and abetting instructions, the jury was also given instructions on the special circumstances of a murder occurring

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[18] Respondent has been unable to locate a written copy of appellants' proposed jury instructions in the Clerk's Transcript.

[19] Michaud did, however, object to the special circumstance instructions on the basis that the "equally guilty" language in CALJIC No. 3.00 conflicted with the special circumstance instructions which required a finding that the defendant was a major participant. (33 RT 7064-7065.)

during kidnapping and rape by instrument. The special circumstances instruction explained that a defendant who is not the actual killer can nonetheless come within the special circumstances if, with intent to kill, the defendant aided the actual perpetrator, or was a substantial participant in the underlying felony and acted with reckless indifference to life. The instruction stated in relevant part:

> The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true. Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that a defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance true. If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstances to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited requested or assisted in the commission of the kidnapping in violation of Penal Code section 207 or rape by instrument in violation of Penal Code section 289, which resulted in the death of a human being, namely Vanessa Samson.

(34 RT 7368-7369.)

B. Forfeiture

"A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Hart* (1999) 20 Cal.4th 546, 622; see also *People v. Riggs* (2008) 44 Cal.4th 248, 309; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

Since neither appellant objected to the giving of CALJIC No. 3.00, their claim is forfeited. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 [claim that "equally guilty" language forfeited for failure to object].) Furthermore, since the instruction was not misleading in this case, appellants' substantial rights were not affected. (§ 1259 [claim not forfeited for failure to object if the defendant's substantial rights were affected].) Consequently, there is no basis to entertain the claim despite the lack of objection.

Even if the claim were not forfeited, a review of controlling law establishes that it is meritless.

C. Claims of Instructional Error

In analyzing jury instructions for possible error, reviewing courts must consider whether it is reasonably likely that the trial court's instructions caused the jury to misapply the law. (*People v. Carrington* (2009) 47 Cal.4th 145, 192; *People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. Kelly* (1992) 1 Cal.4th 495, 525-527.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [alleged ambiguity in instructions must be viewed in light of the instructions as a whole and the entire record].) An instructional error may be deemed harmless if the jury necessarily resolved the pertinent factual issues against the defendant under other, properly-given instructions. (*People v. Castillo*, *supra*, 16 Cal.4th at p. 1016.)

D. Duress and the Special Circumstance of Killing during the Commission of a Specified Felony

It is established that the defense of duress is inapplicable to capital crimes. As explained in *People v. Vieira* (2005) 35 Cal.4th 264:

> Penal Code section 26 declares duress to be a perfect defense against criminal charges when the person charged "committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." That section also provides that this defense does not apply to crimes "punishable with death." We recently rejected the argument that duress could negate the elements of malice or premeditation, thereby reducing a first degree murder to manslaughter or second degree murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 781–784.) We decline defendant's invitation to reconsider the holding in *Anderson*. Moreover, because duress cannot, as a matter of law, negate the intent, malice or premeditation elements of a first degree murder, we further reject defendant's argument that duress could negate the requisite intent for one charged with aiding and abetting a first degree murder. (See *Anderson, supra*, 28 Cal.4th at p. 784.)

(*Id.* at pp. 289-290; accord, *People v. Hinton* (2006) 37 Cal. 4th 839, 882-883.)

In *People v. Estrada* (1995) 11 Cal. 4th 568, this Court described the standards for determining whether a felony-murder special circumstance can be applied to a defendant who is not the actual killer. The Court stated:

> A defendant convicted of first degree murder with at least one special circumstance found true will be sentenced to either death or life imprisonment without the possibility of parole. (Pen. Code, § 190.2; all further statutory references are to this code.) One of these special circumstances is the felony-murder special circumstance under which a murder occurred during the commission or attempted commission, or the immediate flight after commission, of one of eleven specified felonies. (§ 190.2, subd. (a)(17)(i-xi).) A felony-murder special circumstance is applicable to a defendant who is not the actual killer if the defendant, either with the "intent to kill" (§ 190.2, subd. (c)), or "with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [one of the eleven enumerated felonies]." (§ 190.2, subd. (d), italics added.)

(*Id.* at pp. 571-572; accord, *People v. Mil* (2012) 53 Cal. 4th 400, 408-409 ["a person other than the actual killer is now subject to the death penalty or life imprisonment without the possibility of parole if that person intended to kill or was a major participant in the underlying felony and acted with reckless indifference to human life"].)

E. Aiding and Abetting

In *People v. McCoy* (2001) 25 Cal.4th 1111, this Court described the law governing aiding and abetting liability as follows:

> A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. [Citations.] [O]utside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator. To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citation.] When the offense charged is a specific intent crime, the accomplice must share the specific intent of the perpetrator; this occurs when the accomplice knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.

(*Id.* at p. 1118, internal quotation marks omitted.)

In *McCoy*, this Court considered whether an aider and abettor of a first degree murder is always guilty of the same offense as the perpetrator. *McCoy* held that an aider and abettor could be found guilty of a different degree of homicide than the actual perpetrator of the killing if the perpetrator and the aider and abettor acted with different mental states.

(*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1117-1118.) In so holding, *McCoy* stated:

> We have described the mental state required of an aider and abettor as different from the mental state necessary for conviction as the actual perpetrator. [Citation.] The difference, however, does not mean that the mental state of an aider and abettor is less culpable than that of the actual perpetrator. On the contrary, outside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator. To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citation.]

(*Ibid.*, internal quotation marks omitted.)

Thus, under *McCoy*, an "aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state." (*McCoy*, *supra*, 25 Cal.4th at p. 1117.) Therefore,

> [w]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator.

(*Id.* at p. 1122.)

Relying on *McCoy*'s holding that aiders and abettors may be guilty of a greater crime than the actual perpetrator, the defendants in *People v. Samaniego*, *supra*, 172 Cal.App.4th 1148, challenged the "equally guilty" language contained in CALCRIM No. 400 (the CALCRIM analogue to CALJIC No. 3.00). According to the defendants, the instructional language at issue required the jury to convict them of first degree murder as aiders and abettors regardless of their individual mental states, "thereby

eliminating the need for the jury to make factual determinations regarding appellants' intent, willfulness, deliberation and premeditation." (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1163.) *Samaniego* found that while generally correct, the "equally guilty" language was potentially misleading in exceptional cases where the jury could find that the codefendants acted with differing mental states. (*Ibid.*) The court stated:

> Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. . . . Consequently, CALCRIM No. 400's direction that "[a] person is equally guilty of the crime . . . whether he or she committed it personally or aided and abetted the perpetrator who committed it" [citation], while generally correct . . ., is misleading [in a murder case] and should [be] modified [accordingly].

(*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.)

The *Samaniego* court, however, found any possible ambiguity harmless, noting that the jury was instructed with CALCRIM No. 401 (the CALCRIM analogue to CALJIC No. 3.01), which advised jurors that before acting, the aider and abettor had to have knowledge of the perpetrator's intent and share that intent. (*Samaniego*, *supra*, 172 Cal.App.4th at pp. 1165-1166.) The court stated, "It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (*Id.* at p. 1166; accord, *People v. McCoy*, *supra*, 25 Cal.4th at p. 1123 ["Absent some circumstance negating malice one cannot knowingly and intentionally help another commit an unlawful killing without acting with malice"].)

In *People v. Nero* (2010) 181 Cal.App.4th 504, the propriety of the "equally guilty" instructional language was further explored. In that case, defendant Nero fatally stabbed the victim with a knife handed to him by his

codefendant, Lisa Brown. Both defendants were charged with murder. The prosecution's theory was that Nero was the actual perpetrator while Brown acted as the aider and abettor in the crime. During deliberations, the jury asked if Brown, the aider and abettor, could be found guilty of a greater or a lesser homicide-related offense than Nero, the direct perpetrator. The court responded by rereading CALJIC No. 3.00 which stated that "the principals in a crime are equally guilty." (*Id.* at p. 507.) The jury then found Nero and Brown "equally guilty of second degree murder." (*Ibid.*)

The Court of Appeal reversed Brown's murder conviction, finding that the trial court's rereading of CALJIC No. 3.00 in response to the jury's question was prejudicial error. (*Nero*, *supra*, 181 Cal.App.4th at p. 507.) It stated:

> Notwithstanding [the several] instructions suggest[ing] that Brown's mental state was not tied to Nero's the jury still asked if they could find Brown, as an aider and abettor, guilty of a greater or lesser offense than Nero. This suggests to us that the aider and abettor instructions—namely, CALJIC No. 3.00—are confusing and should be modified. And where, as here, the jury asks the specific question whether an aider and abettor may be guilty of a lesser offense, the proper answer is 'yes,' she can be. The trial court, however, by twice rereading CALJIC No. 3.00 in response to the jury's question, misinstructed the jury.

(*Nero*, *supra*, 181 Cal.App.4th at p. 518.)

F. CALJIC No. 3.00 Was Not Misleading

In this case, the "equally guilty" language was not misleading because there is no evidence that appellants acted with different mental states during the murder, and the true findings on the special circumstances foreclose any claim that appellants lacked the requisite mental state for first degree murder. With respect to Daveggio, his "defense" to the charges was that he kidnapped Vanessa for the sole purpose of murdering her, but claimed that the special circumstances were not true since there was no proof of sexual

assault, and the kidnapping was specifically for the purpose of committing the murder. (34 RT 7225-7226 ["you can find a first-degree murder against Mr. Daveggio," but "the special circumstances of kidnapping and rape by instrument have not been established"].) Given Daveggio's admission that he was criminally liable for premeditated murder, there is no basis whatsoever for the jury to have concluded that Daveggio acted with a less culpable state of mind than Michaud.

As for Michaud's culpability, there is no evidence whatsoever that she acted with a less culpable state of mind or committed anything less than premeditated murder. Although Michaud admitted to involvement in the kidnapping, she argued that she did so because she was under the "domination and control" of Daveggio who acted as "the muscle" during the crimes while she "follow[ed] the orders of the dominant perpetrator." (34 RT 7264, 7267, 7270-7271.)

She also, however, specifically adopted Daveggio's arguments that the kidnapping was incidental to the murder and that there had been no sexual assault. (34 RT 7272.) In so arguing, she essentially admitted that Vanessa had been kidnapped for the purpose of murder, but claimed the jury would have to decide whether she was guilty of first degree murder or second degree murder. (34 RT 7272 [Michaud's participation in kidnapping for the purpose of murder would not mean she "goes home scot-free," but would require jury to determine "whether she's guilty of first-degree murder, or second-degree murder"].) Although defense counsel couched his argument to avoid a direct admission of premeditation, the practical implication of his admission that Vanessa had been kidnapped for the purpose of murder necessarily constituted a concession that Vanessa's murder was premeditated. Thus, as with Daveggio, the evidence unerringly pointed to premeditation and the concomitant conclusion that both defendants acted with the same mental state during the murder.

Furthermore, even though Michaud argued that she was submissive to Daveggio, she never presented a duress defense because the defense is inapplicable in capital proceedings. (*People v. Vieira*, *supra*, 35 Cal.4th at pp. 269-270 [duress "does not apply" to crimes "'punishable with death'"].) Nor was there any evidence that Daveggio threatened her with immediate harm if she did not kill Vanessa. (*Id.* at p. 290 ["The common characteristic of all the decisions upholding [a duress defense] lies in the immediacy and imminency of the threatened action: each represents the situation of a present and active aggressor threatening immediate danger"].)

Not only did Michaud fail to present a duress defense, every shred of evidence demonstrated that appellants acted as a well-honed team of predators who acted jointly with the same mental state. Michaud was in charge of luring the victims into the trap while Daveggio acted as the "muscle" after their prey was cornered. The testimony of the surviving victims demonstrated that once the victims had been trapped, either Michaud assaulted the victims herself, or helped bind and gag them so Daveggio could assault them. Indeed, Aleda Doe recounted how appellants discussed whether they were going to kill her, with Daveggio leaving it up to Michaud to decide her fate.

In addition to acting as a team during the crimes, appellants jointly expressed their mutual desire to go "hunting" and discussed how the day after Thanksgiving was the best day of the year to find their prey. In fact, April testified that Michaud "cornered" her the day after Thanksgiving and asked her if she wanted to go "hunting." April also testified that not only did Michaud specifically ask her to go hunting, she became angry when April declined. (20 RT 4704-4705.)

The joint nature of the crimes was further demonstrated by the video depicting both Daveggio and Michaud buying the ball gag used to silence Vanessa's screams while they sodomized her with the curling irons which

they specially purchased and modified to use as implements of torture. Not coincidentally, Michaud's fingerprints were found on the curling irons, thus positively linking her to the sexual assault. Given the months-long joint crime spree, there is no basis for inferring that appellants acted with different mental states during the murder. Consequently, under the circumstances of this case, the equally guilty language in CALJIC No. 3.00 was not misleading.

Furthermore, the true findings of the special circumstances foreclose any claim that Michaud lacked the requisite mental state for first degree murder. In order to find the special circumstances true, the jury was required to find that either Michaud intended to kill or, if not the actual killer, "was a major participant in the underlying felony and acted with reckless indifference to human life." (*People v. Mil*, *supra*, 53 Cal. 4th at pp, 408-409; see also 34 RT 7368-7369.) Given that finding, there is no basis for inferring that Michaud acted with anything but the mental state required for first degree murder.

Not only did the special circumstance findings demonstrate that Michaud was found to have acted with the requisite mental state, the totality of the instructions made it very clear that the prosecution was required to demonstrate each person's intent in order to convict appellants of murder. Thus, under CALJIC No. 3.01, the jury was informed that to prove guilt as an aider and abettor the prosecution was required to prove that the perpetrator committed the crime; the defendant knew the perpetrator intended to commit the crime; before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. (34 RT 7349.)

Along with the need to prove malice aforethought pursuant to CALJIC Nos. 8.10 and 8.11 (138 CT 36401-36402), and the definition of

first degree murder in CALJIC No. 8.20 (138 CT 36403-36405), the instructions essentially informed the jury that it had to find that each defendant knew the other defendant intended to commit first degree murder, intended to aid and abet that crime, and did so. The jury was also instructed with CALJIC No. 17.00 to decide each defendant's guilt separately. (138 CT 36440.) Therefore, it was not reasonably likely that appellants' murder convictions were based solely on the actions of the other appellant. (See *People v. Prettyman*, *supra*, 14 Cal.4th at p. 272.) As stated in *Samaniego*, "It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1166.) Because the evidence overwhelmingly established that appellants acted with the same mental state, and that the murder of Vanessa was premeditated, the equally guilty language was not misleading.

G. The *McCoy* Doctrine Does Not Apply to Michaud's Oral Copulation Conviction Because There Are No Degrees of That Offense.

During deliberations, the jury requested a readback of April's testimony and wished to know whether physical contact was necessary, or if she could be found to be a principal under the aiding and abetting instructions. (7 CT 1820; 8 CT 1822.) Over the objection of counsel, the trial court reread CALJIC No. 3.00, the aiding and abetting instruction. (8 CT 1822-1823.)

As already discussed, *McCoy* held that an aider and abettor's guilt is based on a combination of the actual perpetrator's acts, the aider and abettor's acts and the aider and abettor's mental state. (*McCoy*, *supra*, 25 Cal.4th at p. 1117.) In the case of murder, the mental states of an actual perpetrator and aider and abettor are critical because different mental states

are required for different degrees of homicide. (*Id.* at p. 1119 ["'It is possible for a primary party negligently to kill another (and, thus, be guilty of involuntary manslaughter), while the secondary party is guilty of murder, because he encouraged the primary actor's negligent conduct, with the intent that it result in the victim's death'"].) Consistent with the theoretical underpinnings of the *McCoy* decision, this Court specifically limited its holdings to homicides. (*Id.* at p. 1122, fn. 3 ["Because we cannot anticipate all possible nonhomicide crimes or circumstances, we express no view on whether or how these principles apply outside the homicide context"].) And the only cases interpreting the "equally guilty" language based on *McCoy* are homicides. (*Nero*, *supra*, 181 Cal.App.4th at p. 518; *People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.)

Conversely, there are no degrees of nonforcible oral copulation with a person under 18 years old which is a general intent crime. (§ 288a, subd. (b)(1); see also *People v. Muniz* (1989) 213 Cal.App.3d 1508, 1517 ["Forcible oral copulation does not require a specific intent or purpose"].) Consequently, unlike homicide, there are no differing mental states underlying the commission of that crime and therefore no basis to assess different levels of culpability. Accordingly, the "equally guilty" language in CALJIC No. 3.00 was not misleading and Michaud's claim to the contrary should be rejected.

VI. BECAUSE CALJIC NO 8.81.17 ADEQUATELY DESCRIBED THE ELEMENTS OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE, THERE WAS NO BASIS TO GIVE APPELLANTS' REQUESTED PINPOINT INSTRUCTION

Appellants assert that the trial court committed prejudicial error by refusing to give a pinpoint instruction which they believed clarified language in CALJIC No. 8.81.17. That instruction provides that a kidnapping-for-murder special circumstance is not established if the kidnapping was "merely incidental to the commission of the murder."

According to appellants, the term "incidental" is vague and misled the jury. (MOB 366; DOB 226.)

Appellants' claim is foreclosed by *People v. Horning* (2004) 34 Cal. 4th 871, which held that CALJIC No. 8.81.17's use of the word "incidental" adequately conveyed the controlling law set forth in the instruction.

A. Background

At the close of the guilt phase, the defense requested that the court modify CALJIC No. 8.81.17 and give the following instruction based on *Ario v. Superior Court* (1981) 124 Cal.App.3d 285:

> If you find that the kidnapping was for the purpose of murder, then under the law, murder was not committed while the defendant was engaged in kidnapping. Hence, the special circumstance of murder in commission of kidnapping is not established.

(7 CT 1779.)

The prosecutor objected to the request on the basis that the proposed instruction was a misstatement of the law and that an accurate statement of the law would require that the kidnapping be solely for the purpose of murder, a concept that was adequately conveyed in the second paragraph of CALJIC No. 8.81.17. (33 RT 7026.)

The court denied the request, finding that the suggested pinpoint instruction was incorrect. (33 RT 7053-7054.) Instead, it gave CALJIC No. 8.81.17, which provided:

> To find that the special circumstance, referred to in these instructions as murder in the commission of Kidnapping in violation of Penal Code section 207, or Rape by Instrument, in violation of Penal Code section 289, is true, it must be proved:
>
> The murder was committed while a defendant was engaged in or was an accomplice in the commission or attempted commission of a Kidnapping, or Rape by Instrument; and

> The murder was committed in order to carry out or advance the commission of the crime of Kidnapping, or Rape by Instrument, or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the Kidnapping, or Rape by Instrument, was merely incidental to the commission of the murder.

(34 RT 7366-7367, 138 CT 36428.)[20]

B. Applicable Law

The trial court has a sua sponte duty to instruct the jury on general legal principles that are closely and openly connected with the evidence and necessary for the jury's understanding of the case. (*People v. Gutierrez* (2009) 45 Cal. 4th 789, 824; *People v. Flannel* (1979) 25 Cal.3d 668, 680 681; *People v. Freeman* (1978) 22 Cal.3d 434, 437.) That duty includes an obligation to instruct the jury on relevant defenses that are relied on by the defense or that are raised by substantial evidence and not inconsistent with the defendant's theory of the case. (*People v. Gutierrez*, *supra*, 45 Cal. 4th at p. 824.)

A defendant is entitled on request to an instruction "pinpointing" his theory of defense. However, an instruction which invites the jury to draw inferences favorable to the defendant from specified items of evidence and/or elevates one or more factors in the jury's decision making process over others is properly rejected as argumentative. (*People v. Wharton*

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[20] CALCRIM No. 730, the current analogue to former CALJIC NO. 8.81.17, describes the independent purpose requirement as follows: [In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> independent of the killing. If you find that the defendant only intended to commit murder and the commission of _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.]

(1991) 53 Cal.3d 522, 570 571; *People v. Wright* (1988) 45 Cal.3d 1126, 1137-1138.) A trial court need not instruct the jury pursuant to a requested defense instruction that misstates the law. (See *People v. Earp* (1999) 20 Cal.4th 826, 903 [trial court did not err in refusing to instruct the defense instruction because it was legally "inaccurate"].) Nor is a trial court required to give a pinpoint instruction if it "merely duplicates other instructions . . . ." (*People v. Bolden* (2002) 29 Cal.4th 515, 558-559; *People v. Benson* (1990) 52 Cal.3d 754, 805, fn. 12; *People v. Kegler* (1988) 197 Cal.App.3d 72, 80 [pinpoint instruction properly refused where other instructions adequately explained the instruction].)

In *People v. Horning*, *supra*, 34 Cal.4th 871, this Court discussed the genesis of felony-murder special-circumstance allegations which require a showing that the commission of the underlying felony was not simply incidental to the murder. The Court stated:

> In *People v. Green*, *supra*, [(1980)] 27 Cal.3d 1, the defendant had taken the murder victim's clothing at gunpoint in order to attempt to conceal the murder. We held that, although the taking constituted a technical robbery, the robbery-murder special circumstance was not established because the crime was not a murder in the commission of robbery, but a robbery in the commission of murder. (See *People v. Kimble* (1988) 44 Cal.3d 480, 500.) We said that the felony-based special circumstances reflected a legislative belief that it was appropriate to make those who killed "to advance an independent felonious purpose" death eligible, but that this goal was not achieved when the felony was "merely incidental to the murder. . . ." (*Green*, *supra*, at p. 61.) As we have summarized the rule, "to 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.)

(*Id.* at pp. 907-908.)

The *Horning* Court further noted that the second paragraph of CALJIC No. 8.81.17 was drafted to explain the independent-felonious-purpose rule and addressed the defendant's claim that the jury had been misinstructed because the trial court only gave the second sentence of that paragraph:

> The standard jury instructions were modified to reflect [*Green*'s] holding. Today, as at the time of trial, CALJIC No. 8.81.17, paragraph 2, explains that, for a felony-based special circumstance to be found true, it must be proved: "The murder was committed in order to carry out or advance the commission of the crime . . . . In other words, the special circumstance referred to in these instructions is not established if the [crime] was merely incidental to the commission of the murder." At trial, for reasons not clear from the record, the court gave the second, but not first, sentence of this paragraph. Thus, the court told the jury: "In other words, the special circumstance referred to in these instructions is not established if the robbery or burglary were merely incidental to the commission of the murder."

(*People v. Horning*, *supra*, 34 Cal.4th at p. 907.)

The *Horning* Court discussed the instructional omission, and found that no precise language was required to explain the independent-felonious-purpose requirement:

> Defendant contends the court erred in not also telling the jury the murder had to be committed in order to carry out or advance the robbery or burglary. We disagree. As the transitional words in the instruction, "In other words," suggest, *Green* established one requirement, not two. The point we made in *People v. Green*, *supra*, 27 Cal.3d 1, is that if the felony was merely incidental to the murder—as the evidence showed it was in *Green*—no separate felony-based special circumstance exists. We have used various phrasings in explaining this requirement, two of which are included in CALJIC No. 8.81.17, but we have never suggested that we had created two separate requirements, or that any precise language was required to explain the concept to the jury. There is nothing magical about the phrase "to carry out or advance" the felony. Indeed, we ourselves have stated the requirement without using that phrase. (See *People v. Mendoza*,

> *supra*, 24 Cal.4th at p. 182; *People v. Clark* (1990) 50 Cal.3d 583, 608.) Several ways exist to explain the requirement. Even if it might have been better to give the entire second paragraph of CALJIC No. 8.81.17, the court's explanation that the burglary or robbery must not be "merely incidental to the commission of the murder," adequately conveyed the requirement.

(*People v. Horning*, *supra*, 34 Cal.4th at pp. 907-908.)

In *People v. Davis* (2009) 46 Cal.4th 539, the defendant asserted that the trial court erred by rejecting as duplicative two pinpoint instructions. One of the instructions required the prosecution to prove that "'the defendant had a purpose for the [attempted lewd act, robbery, burglary and kidnapping] wholly independent of murder.'" (*Id.* at p. 616.) The other instructed the jury that it "'may not convict the defendant of first degree murder based upon the commission or attempted commission of burglary if the defendant entered the premises with the intent to [murder].'" (*Ibid.*) The defendant argued that the foregoing instructions were necessary to clarify CALJIC No. 8.81.17's reference to an underlying felony being "merely incidental" to the commission of murder. (*Ibid.*) The *Davis* Court found no error, even though the jury had asked for clarification on the meaning of the term "merely incidental" as set forth in CALJIC No. 8.81.17. This Court stated:

> After a day and a half of deliberations . . . . the jury asked: "What is the definition of 'merely incidental'?" The parties agreed to give the jury a definition of "incidental" from Black's Law Dictionary: "[D]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal, something incidental to the main purpose." Defendant contends that this definition was vague and ambiguous, and that it should have been supplemented by a nonlegal dictionary definition or replaced by his requested pinpoint instructions. Defendant faults the trial court for not consulting an ordinary dictionary. But defense counsel said that a common dictionary meaning would not be helpful, assented to the use of the definition in Black's Law Dictionary, and did not renew his request for the pinpoint

> instructions. Thus, defendant has forfeited the claim of error. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) Forfeiture aside, the definition given by the trial court was superior to defendant's proposed pinpoint instructions because it was better targeted to the specific issue that caused the jurors' concern. In any event, the jury's difficulty with this issue does not necessarily mean that it was improperly instructed; rather, the jury may simply have grappled with the evidence pertaining to the robbery. (See *People v. Brown* (1985) 40 Cal.3d 512, 535 [rejecting the argument that the jury's lengthy deliberations showed prejudice and noting that "the jury may simply have sifted the evidence with special care ..."], revd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538.)

(*Id.* at pp. 616-617.)

C. Discussion

Here, as established by *Horning* and *Davis*, the standard language in CALJIC No. 8.81.17 adequately instructed the jury on the requisite elements of the felony-murder special-circumstance allegation. (*People v. Horning*, *supra*, 34 Cal.4th at pp. 907-908; *People v. Davis*, *supra*, 46 Cal.4th at pp. 616-617.)

Despite the foregoing authorities, Michaud cites *People v. Roberge* (2003) 29 Cal.4th 979 and *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, decisions interpreting the term "likely" as used in different provisions of the Sexually Violent Predator's Act (SVPA). (MOB 365.) Michaud believes that the term "incidental," like the term "likely," is neither plain nor unambiguous, thus rendering CALJIC No. 8.81.17 defective. (MOB 366.) *Roberge* and *Ghilotti* do not assist Michaud.

In *Roberge*, this Court construed the meaning of the term "'likely [to] engage in sexually violent criminal behavior' as used in the SVPA's section 6600, subdivision (a)," which describes the findings which must be made to "to determine whether the convicted sex offender . . . should be committed

to a state mental hospital as a sexually violent predator." (*People v. Roberge*, *supra*, 29 Cal.4th at p. 985.)

While reviewing the meaning of the term "likely," the *Roberge* Court summarized its prior holding in *Ghilotti*, stating:

> There, we resolved several issues pertaining to the SVPA, including the meaning of the word "likely" in section 6601, subdivision (d). That term is also at issue here, albeit in a different provision of the SVPA, namely section 6600, subdivision (a). Section 6601, subdivision (d), at issue in *Ghilotti*, pertains to the evaluation of the convicted sex offender's mental condition by two practicing psychiatrists or psychologists, the first phase of the SVPA's involuntary commitment proceedings. (*Ghilotti*, *supra*, 27 Cal.4th at pp. 915-924.) The phrase we construed there was "likely to engage in acts of sexual violence without appropriate treatment and custody." (§ 6601, subd. (d), italics added.)
>
> We noted that several dictionaries and modern legal references had given the word "likely" a variety of meanings flexibly covering "a range of expectability from possible to probable." (*Ghilotti*, *supra*, 27 Cal.4th at p. 916.) We further observed that as used in section 6601, subdivision (d), the term had to be "given a meaning consistent with the [SVPA's] clear overall purpose," which is "to protect the public from that limited group of persons who were previously convicted and imprisoned for violent sex offenses, and whose terms of incarceration have ended, but whose current mental disorders so impair their ability to control their violent sexual impulses that they do in fact present a high risk of reoffense if they are not treated in a confined setting." (*Ghilotti*, *supra*, 27 Cal.4th at p. 921.)
>
> Thus, we concluded in *Ghilotti*: "[T]he phrase '*likely to engage in acts of sexual violence*" (italics added), as used in section 6601, subdivision (d), connotes much more than the mere possibility that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. [But] the statute does not require a precise determination that the chance of reoffense is better than even. Instead, an evaluator applying this standard must conclude that the person is 'likely' to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent

> sexual behavior, the person presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit such crimes if free in the community.' (*Ghilotti*, *supra*, 27 Cal.4th at p. 922.)

(*People v. Roberge*, *supra*, 24 Cal.4th at pp. 985-986.)

Based on *Ghilotti*, the *Roberge* Court concluded that "the phrase 'likely [to] engage in sexually violent behavior' in section 6600, subdivision (a), should be given the same meaning as the phrase 'likely to engage in acts of sexual violence without appropriate treatment and custody' in section 6601, subdivision (d), the provision at issue in *Ghilotti*." (*People v. Roberge*, *supra*, 29 Cal.4th at p. 987.)

Michaud's reliance on *Roberge* and *Ghilotti* is manifestly unavailing. This Court has already concluded that the phrase "merely incidental"—the term at issue here—adequately conveys controlling law. (*People v. Horning*, *supra*, 34 Cal.4th at pp. 907-908; *People v. Davis*, *supra*, 46 Cal.4th at pp. 616-617.) Therefore, this Court need not concern itself with the definition of a different term being utilized in a wholly separate statutory scheme. (See *People v. Johnson* (2012) 53 Cal. 4th 519, 528 ["'[C]ases are not authority for propositions not considered.'"].)

Furthermore, not only did the special circumstance instruction adequately describe the controlling law, the meaning of the term "merely incidental" was discussed at length by all of the parties. Thus, the prosecutor described a scenario to explain the meaning of "merely incidental" and stated that if, for example, a defendant went to a person's house with the intent to kill, and then decided afterwards to steal something, the special circumstance would not be established since the taking was an afterthought. (34 RT 7127.)

The prosecutor emphasized that in order to establish the rape-with-instrument special-circumstance, it must be shown that there was an intent to rape, not just to kill, and that appellants' purchase and modification of

the curling irons used to sodomize Vanessa demonstrated that they had a preexisting intent to rape Vanessa. (34 RT 7128.) She further explained that if defendants "had the intent to kill only, if you believe the kidnap was just merely incidental to the crime, then, then and only then can you say the special is not true." (34 RT 7304, 7305 ["In other words, the special circumstance is not established if the kidnapping or rape was merely incidental to the murder. That means they set out with the intent to kill only and the kidnap and rape was just kind of merely incidental"].)

The prosecutor further disputed the defense claim that the special circumstances had not been proven because "they only had the intent to kill and no other intent," and that the kidnapping and "rape by instrument," "were merely incidental to the murder [because] their sole purpose was to kill." (34 RT 7281.)

Similarly, Daveggio's defense counsel also discussed the requirements of the kidnapping special circumstance, stating that it could "be sustained only if the evidence will support a reasonable inference that the kidnapping was for some purpose other than merely to facilitate the primary crime of murder. If the kidnapping was merely incidental to the murder, the kidnapping special is not established." (34 RT 7254.) Counsel submitted that what had happened was that the kidnapping had "only" been committed "for the evil purpose of murder, which means that the way the case has been charged, the way the case has been presented to you, the special circumstance of kidnap . . . hasn't been proved." (34 RT 7255-7256; see also 34 RT 7230 ["if the kidnapping was for the purpose of murder and killing, it is not a special circumstance"].)

Likewise, Michaud's counsel adopted the arguments of Daveggio's counsel and urged the jury not to find the kidnapping special circumstance true because the kidnapping was "merely incidental to a killing." (34 RT 7272.) Although appellants now argue that the term "merely incidental" is

vague and ambiguous, defense counsel never alluded to any difficulty in explaining what the term meant and simply argued in a common sense fashion that the primary purpose of the crime was to murder Vanessa and that consequently, the special circumstance allegations had not been proven.

Indeed those arguments simply highlight the conclusion that the word "incidental" had no special meaning in this context. The dictionary definition of "incidental" is "1: being likely to ensue as a chance or minor consequence. . . . 2: occurring merely by chance or without intention or calculation." (Merriam-Webster's Collegiate Dictionary (10th ed. 2001) p. 586.) It is established that a "word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that differs from its nonlegal meaning." (*People v. Smithey* (1999) 20 Cal.4th 936,981.) Thus, "terms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance." (*People v. Estrada* (1995) 11 Cal. 4th 568, 574-575.) It is apparent, therefore, that the term "merely incidental" had no special legal meaning that differed from the common interpretation of the phrase and that no special instruction was required to explain the meaning of that term.

It should further be observed that the term "incidental" was used in other instructions without objection by appellants. Thus, the instruction concerning the elements of kidnapping for the purpose of rape repeatedly utilized the term "merely incidental." That instruction explained that kidnapping was a forcible movement of the victim which was not "merely incidental" to the commission of the rape. (139 CT 36466.) Kidnapping also occurred when the victim—under compulsion from the perpetrator, rather than by physical force—was moved for a substantial distance where the movement was not "merely incidental" to the commission of the sexual

assault. (139 CT 36466.) The instruction further stated that "brief movements" to facilitate the sexual assault are "incidental," in contrast to movements involving a substantial distance. (139 CT 36466-36467.) It is apparent, therefore, that the concept of the term "incidental" was utilized in various instructions and was further elucidated by counsel for both the prosecution and the defense during closing arguments. Because there is no reasonable likelihood that the jury was confused or misapprehended the meaning of the term "merely incidental," appellants' claim fails. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4 [reviewing courts consider whether there is a reasonable likelihood of misapplication by evaluating the whole record, including the instructions in their entirety and the arguments that counsel presented to the jury]; accord, *People v. Kelly* (1992) 1 Cal.4th 495, 526-527.)

VII. THE TRIAL COURT DID NOT ERR BY REFUSING TO CONDUCT A HEARING ON THE ADMISSIBILITY OF FINGERPRINT EVIDENCE

Appellants assert the trial court erred in denying their motion for a hearing pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 on the admissibility of the fingerprint evidence. (DOB 173-202; MOB 284-326.) Appellants' claim is foreclosed by *People v. Webb* (1993) 6 Cal.4th 494 and *People v. Farnam* (2002) 28 Cal.4th 10. Consequently, the trial court did not abuse its discretion in denying appellants' request for a hearing.

A. Background

Before trial, appellants moved to prevent a fingerprint examiner from testifying that he had found appellants' fingerprints on various items in Michaud's green minivan. Daveggio showed the court a newspaper article describing how a Fourth Circuit federal judge had concluded that

fingerprint evidence did not "pass *Kelly/Frye*[21] muster," and had only allowed a fingerprint examiner to testify about points of similarity between the fingerprints being compared, and precluded that examiner from testifying that the fingerprints matched. (15 RT 3513.) Based on the foregoing, counsel sought to prevent both the fingerprint examiner and the prosecutor from stating that there was a fingerprint match. (15 RT 3513-3514.)

After the trial court rejected the request, counsel moved for a hearing under *People v. Kelly*, *supra*, 17 Cal.3d 24. When the trial court denied this motion, counsel sought permission to question the fingerprint expert about an FBI study in which examiners were given the same prints, but did not reach unanimous conclusions. The trial court stated that it would conduct an Evidence Code section 402 hearing with the fingerprint examiner if appellants wished to do so, but if the expert was not aware of the study, defense counsel would be precluded from asking him about it. (15 RT 3514-3515.)

During trial, the prosecutor elicited testimony that the FBI had conducted a study in which a fingerprint exemplar and two latent prints were sent out to 39 different agencies. Of the agencies who examined the prints, 30 made the same identifications as the FBI. Of the nine remaining agencies, five did not make positive identifications of both latent prints, and four did not make identifications of either latent print. None of the agencies made mistaken identifications. (28 RT 6169-6170.)

B. Applicable Law

In *People v. Kelly*, *supra*, 17 Cal.3d 24, this Court set forth the standard governing the admission of evidence involving a new scientific technique. In order to admit such evidence, the reliability of the method

[21] *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014.

must usually be established expert testimony. The witness furnishing the testimony must be properly qualified as an expert, and the proponent of the evidence must demonstrate that correct scientific procedures were used in the case. (*Id.* at p. 30.)

"*Kelly* is applicable only to 'new scientific techniques.'" (*People v. Leahy* (1994) 8 Cal.4th 587, 605.) The test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. (*People v. Venegas* (1998) 18 Cal.4th 47, 80.) Thus, the purpose of requiring a *Kelly* foundational hearing is to "protect the jury from . . . 'new,' novel or 'experimental,' [scientific techniques that] convey a 'misleading aura of certainty.'" (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1156, quoting *Kelly*, *supra*, 17 Cal.3d at pp. 30-32.) In other words, by requiring a threshold foundation, the approach outlined in *Kelly* is intended to "prevent lay jurors from being unduly influenced by procedures which seem scientific and infallible." (*People v. Webb*, *supra*, 6 Cal.4th 494, 524.)

Kelly applies only to "'that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law.'" (*People v. Cowan* (2010) 50 Cal. 4th 401, 470.) Fingerprint analysis is not a new scientific technique. On the contrary, its use is widespread and its general acceptance is well established. (See, e.g., *People v. Andrews* (1989) 49 Cal.3d 200, 211; *People v. Johnson* (1988) 47 Cal.3d 576, 601; *People v. Gardner* (1969) 71 Cal.2d 843, 849; *People v. Adamson* (1946) 27 Cal.2d 478, 495.) A claim that expert opinion evidence has been improperly admitted is reviewed under the deferential abuse of discretion standard. (*People v. Panah* (2005) 35 Cal.4th 395, 478.)

C. Discussion

Here, appellants claim that although the science of fingerprint analysis is not new, its reliability has been drawn into question, thus requiring an evidentiary hearing under *Kelly*. (DOB 188; MOB 316.) Appellants further assert that this Court's decisions in *People v. Webb*, *supra*, 6 Cal.4th 494, and *People v. Farnam*, *supra*, 28 Cal.4th 10, do not mandate a contrary result.

In *People v. Webb*, *supra,* 6 Cal.4th 494, the Court held that a laser procedure for visualizing latent fingerprints was not subject to *Kelly* because the procedure merely isolates physical evidence which may be evaluated by laypersons, and the reliability of the process to produce that result is equally apparent. (*Id.* at p. 524.)

In *People v. Farnam*, *supra*, 28 Cal.4th 10, the defendant challenged the admission of fingerprint evidence which had been located as a result of running the defendant's fingerprints through a centralized fingerprint database. The defendant argued that the evidence should have been excluded as irrelevant and confusing under Evidence Code section 352, and that it also lacked "the requisite scientific foundation." (*Id.* at p. 159.)

The *Farnam* court rejected those assertions. It observed that even if it were assumed that the testimony was irrelevant, it "presented little, if any, potential for prejudice" since the witness merely testified that the computerized fingerprint data base produced a list of possible candidates whose fingerprints were similar to those found at the crime scene, after which an examiner would be required to conduct an actual comparison. Accordingly, contrary to the defendant's claim, "it was not 'the type of evidence that might evoke prejudice' by 'making it appear as though [defendant] was the subject of some unimpeachable computerized decision.'" (*People v. Farnam*, *supra*, 28 Cal.4th at p. 159.) Similarly, the defendant was not entitled to a *Kelly* hearing regarding the underlying

fingerprint analysis since "the prosecution relied on a long-established technique—fingerprint comparison performed by fingerprint experts—to show the jury that defendant's fingerprints matched those found at the Mar residence." (*Id.* at p. 160.)

Appellants seek to distinguish *Webb* and *Farnam* by asserting that their challenge "is not to the process by which the print is detected and recovered, but to the reliability of fingerprint identification evidence itself." (MOB 316; DOB 192.) Thus, appellants note that the *Webb* decision only adjudicated the issue of whether laser beams could be used to detect finger prints and thus cannot be considered binding authority on the issue of the reliability of fingerprint analysis in general. (DOB 192; MOB 315-316.) As for *Farnam*, appellants claim that the Court rejected the challenge to the computerized fingerprint database because it was only "used to explain how the police were led to the defendant," and did not involve a challenge to the science underlying fingerprint analysis itself. (DOB 194; MOB 317 [*Farnam* inapposite because no challenge to the underlying reliability of fingerprint analysis].)

Appellants' efforts to evade the binding authority of those decisions are unavailing. While it is true that *Webb* and *Farnam* involved challenges to the techniques used to find or visualize fingerprints, rather than the underlying science of fingerprint comparison, they nonetheless stand for the proposition that the analysis of fingerprint evidence itself is not subject to a *Kelly* hearing. Thus, in *Webb*, this Court noted that the fingerprint analyst "found a 'positive' match using *settled* law enforcement standards calling for 'eight points of similarity.'" (*People v. Webb*, *supra*, 6 Cal.4th at p. 524, italics added.) *Webb* further observed that where "a procedure isolates physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the reliability of the process in producing that result is equally apparent and need not be debated under the

standards of *Kelly*." (*Ibid.*) It therefore determined that "the laser-derived fingerprint image could not properly have been excluded on grounds it was derived by scientifically unproven means." (*Ibid.*) *Webb* thus establishes that *Kelly* concerns are not implicated by fingerprint analysis because it is the type of science which a lay person can evaluate by simply comparing the fingerprints of the defendant to those found at a crime scene.

Likewise, the *Farnam* court concluded that the admission of testimony regarding the fingerprint data base "did not implicate the concerns addressed in *Kelly*" because the "reliability of the computerized system in comparing latent prints to fingerprints in its database was apparent" since the "*jury could make its own comparisons between the latent prints found at the Mar crime scene and defendant's fingerprints . . . .*" (*People v. Farnam*, *supra*, 28 Cal.4th at p. 160, italics added.) The *Farnam* court also noted that even though the police used the computerized database to "narrow the range of potential candidates whose fingerprints might match the latent prints, the prosecution relied on a long-established technique—fingerprint comparison performed by fingerprint experts—to show the jury that defendant's fingerprints matched those found at the Mar residence." (*Ibid.*) Accordingly, no *Kelly* error was found. (*Ibid.*)

Based on the foregoing cases, it is evident that the science underlying fingerprint analysis is not subject to a *Kelly* hearing because the science is not new, and its reliability is apparent to a lay person. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 160; *People v. Webb*, *supra*, 6 Cal.4th at p. 524.)

Nevertheless, appellants assert that while fingerprint science may not be new, that fact does not render it immune from scrutiny under *Kelly*. (MOB 309; DOB 188.) Appellants note that *Kelly* itself foresaw the possibility that the admission in court of a new scientific technique could "control subsequent trials, at least until new evidence is presented reflecting

a change in the attitude of the scientific community. (*People v. Kelly*, *supra*, 17 Cal.3d at p. 32.) Similarly, in *People v. Leahy*, *supra*, 8 Cal.4th 587, this Court found that a sobriety test focusing on the individual's eye movements was "new" for purposes of *Kelly*, and stated: "To hold a scientific technique could become immune from *Kelly* scrutiny merely by reason of long-standing and persistent use by law enforcement outside the laboratory or courtroom, seems unjustified." (*Id.* at p. 606.)

Appellants, however, have not adduced any new evidence reflecting a "change in the attitude of the scientific community" regarding fingerprint comparisons. Appellants' offer of proof was simply that there had been an FBI study reflecting that fingerprint experts did not make uniform conclusions regarding a particular set of fingerprints. (15 RT 3514-3515.) This offer of proof is patently insufficient to show that fingerprint analysis is subject to a *Kelly* hearing. On the contrary, the study in question merely demonstrates that fingerprint identification is not infallible, a conclusion one could reach with respect to all human endeavors, scientific or otherwise.

Moreover, appellants cannot establish any possible prejudice from the denial of a *Kelly* hearing since the fingerprint examiner testified about the FBI study (28 RT 6169-6170), and appellants were permitted to fully cross-examine the fingerprint expert regarding any perceived deficiencies in his methods of analysis, or his conclusion that Samson's fingerprint was found on a cup in the minivan, and that Michaud's fingerprints were on the curling irons. Indeed, had that conclusion been suspect, appellants were free to present their own expert to challenge the conclusions made by the state's expert. And finally, just as in *Webb* and *Farnam*, the jury in this case was fully capable of studying the print found on the paper cup and comparing it with Samson's known fingerprints. Under these

circumstances, appellants can show neither error nor prejudice and the claim must, therefore, be denied.

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE REGARDING APPELLANTS' POSSESSION OF GUNS, CROSSBOWS AND A MODIFIED PIECE OF CARPET

Appellants assert that the trial court erred by admitting evidence regarding: (1) a piece of carpet found in Michaud's van which had four slits in it which corresponded with the locations of the outermost exposed anchor bolts used to attach the middle seats; (2) a loaded crossbow found in the van; and (3) guns which were in the van and in appellants' motel room at the time of their arrest. Appellants claim that the evidence was irrelevant, more prejudicial than probative, and constituted inadmissible character evidence. (DOB 203; MOB 331.)

First, appellants only objected to the introduction of photographs of a template made from the carpet which depicted ropes coming through each anchor bolt. They did not object to the template of the carpet, or to the carpet itself. (14 RT 3458-3459; 32 RT 6894-6895.) Consequently, they have forfeited any objection to the introduction of the piece of the carpet or to the template of the carpet. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 819 [claim forfeited for failure to object].) Moreover, even if the issues were fully preserved, appellants' claims fail on the merits since the challenged evidence was relevant and was not more prejudicial than probative.

A. Background

1. Rope and carpet evidence

Before trial, the prosecutor sought to admit items found in the van which the prosecutor believed were used to restrain Vanessa. According to the prosecutor's offer of proof, investigators discovered an empty package

of rope in appellants' boxes, and a 36-foot length of yellow rope in the van. In addition, a piece of black rope was found lying next to Vanessa's body and Michaud had a three-foot piece of yellow rope in her pocket when she was arrested. However, during the autopsy, there was no evidence of any marks on Vanessa's wrists or ankles. (14 RT 3444-3446.)

In addition to the rope, the prosecutor also sought to admit into evidence a piece of carpet found in Michaud's van on the theory that it was relevant to appellants' plan to restrain Vanessa by tying her with rope to four anchor bolts coming through the slits in the carpet. The carpet was about 73 inches long and about 46 inches wide at its widest point; it had four slits cut into it which formed a quadrangle. (24 RT 5516.)

After making a template of the carpet, the district attorney's investigator placed the template over the exposed anchor bolts where the van's middle seats had been removed. The slits in the template corresponded with the locations of the four outermost exposed anchor bolts, i.e., the two bolts farthest in the front and farthest in the back. (14 RT 3454-3455.) Because there were more anchor bolts than slits, the seats could not have been attached over the carpet. (14 RT 3455.)

The prosecutor's photographs of the template showed the four anchor bolts coming through the template with ropes attached to each anchor bolt. (14 RT 3458-3459.) Daveggio's counsel initially objected to the template itself and the carpet (14 RT 3457), but then appeared to withdraw that objection when he said he did not object to a photograph of just the template without the rope going through the slits made in the template. (14 RT 3458.) Michaud's counsel "strenuously objected to pictures of the ropes going through the template because there was no evidence that rope had been threaded through the slits in the carpet. (14 RT 3457.)

The trial court admitted the carpet evidence on the basis that it was relevant on the issue of "planning, premeditation, and scheming." It also

admitted evidence of the photograph depicting ropes coming through the slits. (15 RT 3506.)

During the penalty phase, Daveggio testified that he had conducted an experiment to determine if a victim could be tied to the anchor bolts on the floor where the middle seats had been removed. Daveggio cut four similarly-sized pieces of yellow rope and attempted to tie himself to the anchor bolts. He found, however, that the bolts were "not wide enough to tie somebody down, to actually tie their hands and feet unless you were going to tie their whole body." (37 RT 7948-7949.) Daveggio already knew that before he made the slits in the carpet so he was not sure why he had modified the carpet to put slits in it. (37 RT 7948.) Daveggio initially left the four ropes threaded through the anchor bolts but eventually removed them because "it was uncomfortable sleeping on top of the ropes." (37 RT 7952.)

2. Guns and crossbow

The prosecutor also sought to admit evidence of guns found in the van and in appellants' motel room because they were relevant to the force and fear allegations in counts 1 and 2. A .38 caliber handgun and ammunition were found in the van and a .25 caliber gun was found in their motel room. The prosecutor noted that two of the sexual assault victims were threatened with guns while being assaulted and that victims would testify that they complied with appellants' sexual demands because appellants were known to carry weapons. The prosecutor also observed that Amy would testify that she was struck over the head with a gun, after which she heard a click and Daveggio exclaim that the gun had jammed. (14 RT 3451-3453.)

The prosecutor further sought to admit evidence that a loaded crossbow had been found in the van and that another crossbow was found in a box of appellants' belongings which they had left in Jamie's room. According to the prosecutor's offer of proof, the pathologist would be

testifying that the deep bruises on Vanessa's buttocks were likely caused by being struck with a hard metal object and the prosecutor believed that the crossbow could have been used for that purpose. (14 RT 3452-3453.)

Daveggio objected to the crossbow evidence on the grounds that it was irrelevant, more prejudicial than probative and noted that Vanessa had not been killed by a crossbow. (14 RT 3453.)

The court found that "if the allegation is force and fear," deadly weapons "found at the scene of the alleged crime" were "certainly as relevant as you need to get." (14 RT 3453.)[22]

At the conclusion of trial, Daveggio renewed his objection to the introduction of the crossbow evidence on the basis that it was irrelevant, together with a standing constitutional objection. (32 RT 6893-6895.) Likewise, he renewed his objections to photographs of the template showing ropes protruding through the slits. (32 RT 6894.) Those objections were overruled. (32 RT 6895.) Daveggio also renewed an objection to the admission of guns and ammunition on the basis that no evidence existed to show they had been used. (32 RT 6858-6959.)

B. Applicable Law

The standards governing the admission of evidence are well settled:

> Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) On appeal we consider "(1) whether the challenged evidence satisfied the 'relevancy' requirement set forth in Evidence Code section 210, and (2) if the evidence was relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the [evidence] was not substantially

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[22] Although the trial court's ruling did not refer to the crossbow in appellants' box of belongings, it appears that evidence was also deemed admissible since testimony was adduced at trial regarding its presence in the box of belongings. (21 RT 4785.)

> outweighed by the probability that its admission would create a substantial danger of undue prejudice." (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) "The trial court is vested with wide discretion in determining the relevance of evidence," although a court "has no discretion to admit irrelevant evidence." (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

(*People v. Alexander* (2010) 49 Cal.4th 846, 903-904.)

In *People v. Prince* (2007) 40 Cal.4th 1179, this Court considered the propriety of admitting evidence of weapons in the defendant's possession even though those weapons were not specifically linked to the murder. The *Prince* Court rejected the defendant's claim that the weapons were irrelevant and simply constituted bad character evidence. It stated:

> Although none of the knives evidently was used as a murder weapon, it is reasonable to conclude that defendant used one or more of them during the various charged burglaries and attempted burglaries that were committed subsequent to the murders. There was evidence that at least in the Schultz and Keller murders, defendant came armed with his own knife, and the subsequently committed burglaries and attempted burglaries bore enough similarities to those murders (and the burglaries related to those murders) to enable the jury to reasonably conclude he was armed with his own knife (perhaps one of the knives discovered in his automobile) when he committed some of the charged burglaries and attempted burglaries.

(*Id.* at p. 1248.) *Prince* also rejected the defendant's assertion that the knives should have been excluded under the rationale set forth in *People v. Riser* (1956) 47 Cal.2d 566. The Court stated:

> Defendant's reliance upon *People v. Riser* (1956) 47 Cal.2d 566, overruled on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 648–649, is misplaced. In that case the evidence established that a murder had been committed with a Smith and Wesson .38-caliber Special revolver, which never was recovered. We concluded it was error to admit evidence that the defendant possessed a Colt .38-caliber revolver that could not have been the murder weapon. The only purpose of admitting the evidence would be to demonstrate that the defendant is "the sort of person who carries deadly weapons." (*People v. Riser*,

supra, 47 Cal.2d at p. 577; see also *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392–1393.)

> The knives seized from defendant's vehicle apparently were not used to inflict the fatal wounds upon the murder victims, but the charge of murder was not the only one faced by defendant. As noted, the knives bore some relevance to the weapons shown by the evidence to have been involved in other charged crimes. They did not simply constitute bad character evidence. (See *People v. Cox* (2003) 30 Cal.4th 916, 956–957 ["[w]e have also held that when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible. [Citations.] Thus, in *Neely* we admitted evidence of a rifle located in the defendant's truck parked near the crime scene even though the rifle was not the murder weapon, as it was 'not irrelevant' to the charged offenses. [Citation.] In *Lane*, we upheld the admission of guns found in an 'abandoned truck miles from the scene of the homicide,' not as relevant to the homicide per se, but as weapons 'of a character which could be used in armed robbery . . . in furtherance of the criminal plan'"].)

(*Id.* at pp. 1248-1249; accord, *People v. Cox* (2003) 30 Cal.4th 916 [no error in admitting guns because they "were relevant either as possible murder weapons, or as weapons that could have been used to coerce the victims into defendant's car or otherwise subdue them, 'in furtherance of the criminal plan' to kill them"]; *People v. Smith* (2003) 30 Cal.4th 581, 613-614 [although gun and ammunition were not used in murder they were nonetheless relevant to the credibility of the defendant's explanation for the homicide].)

C. Discussion

1. Weapons

Here, as in *Prince*, the weapons admitted were not irrelevant since many victims testified about being threatened with firearms during the crimes perpetrated against them. Sharona, one of the charged victims, testified that Daveggio waved a gun at her when threatening to kill her after

the sexual assault. Likewise, Christina testified that Michaud showed her a gun during the assault in the bathroom and that Daveggio had fired a gun out the van's window when she and Rachel were returning from the Santa Cruz trip. Similarly, Amy testified that Daveggio bludgeoned her over the head with a gun, after which Daveggio pushed it against her head and tried to shoot her, only to exclaim that the gun had jammed. In addition, Daveggio's daughter, April, testified that Daveggio handed her a gun after the Thanksgiving dinner. It is apparent, therefore, that the use of firearms was a recurring theme and common characteristic of almost all of the sexual assault evidence. Consequently, it was highly relevant to both the charged and uncharged offenses.

Likewise, given appellants' penchant for using weaponry to intimidate and control their victims, as well as evidence of the loaded gun in the motel room, it was entirely reasonable to infer that the cocked crossbow in the van was used for a similar purpose when appellants were transporting Vanessa on her long journey to Lake Tahoe. (*People v. Cox*, *supra*, 30 Cal.4th 916 [no error in admitting guns because they "could have been used to coerce the victims into defendant's car or otherwise subdue them, 'in furtherance of the criminal plan' to kill them"].) Although the second crossbow was not in appellants' possession at the time they murdered Vanessa, it nonetheless was relevant to demonstrate appellants' preconceived murder plot. (*People v. Neely* (1993) 6 Cal.4th 877, 896 [rifle located in the defendant's truck parked near the crime scene properly admitted even though the rifle was not the murder weapon because it was "not irrelevant" to the charged offenses]; *People v. Lane* (1961) 56 Cal.2d 773, 784 [guns found in an "abandoned truck miles from the scene of the homicide" found admissible as weapons "of a character which could be used" in "furtherance of the criminal plan"].)

Similarly, it was equally reasonable to infer that the carpet with slits in it, combined with the rope found in Michaud's pocket and in the van, was also intended for use in appellants' diabolical plot to torture and murder Vanessa. Although appellants claim that this supposition was based on "pure speculation," they have offered no explanation for why four slits would be cut into a carpet that matched the four outermost eyebolts on the van's floor. The lack of any legitimate purpose for such was merely reinforced by evidence that there were more eyebolts than slits, thus making it impossible to attach the seats over the piece of carpet. It is self-evident that cutting four slits into a piece of carpet to specifically correspond with the eyebolts was clearly done for a specific purpose, and was not simply a random act as appellants would have this Court believe. It was no coincidence that four eyebolts could protrude through the carpet, each of which could restrain Vanessa's four limbs in a spread eagle fashion, a position which would facilitate the perpetration of a sexual assault. That it was not a random act was merely reinforced by Daveggio's penalty phase testimony in which he admitted that the carpet had been modified as part of a plan to use restraints on Vanessa, but that when he tried it on himself it did not work as expected and thus abandoned that endeavor. (37 RT 7948-7949.)

Nor, in the context of the atrocious nature of this offense, was the carpet evidence particularly inflammatory. The jury was already aware that appellants had specifically bought and modified two curling irons for use as implements of torture which they used to sodomize Vanessa, and had also purchased a ball gag to silence Vanessa's screams of pain and terror. The jury already knew that Vanessa had likely been tortured in the van and in the hotel room since the feces-stained napkin used to clean off the curling irons was found in the van and since a brown stain had been found on the motel room's bedspread. Evidence regarding the modified carpet was

simply part and parcel of appellants' depraved criminal plot and was no more inflammatory than any of the rest of the evidence. As the trial court stated when admitting evidence of a graphic videotape found in the van, "When you do strange, bizarre things, sometimes you get caught up with the strange, bizarre evidence." (32 RT 6897.)

Appellants, however, assert that the weapon and carpet evidence simply functioned as bad character evidence and should have been excluded as being more prejudicial than probative. They cite *People v. Riser*, *supra*, 47 Cal.2d 566, *People v. Henderson* (1976) 58 Cal.App.3d 349, and *United States v. Hitt* (9th Cir. 1992) 981 F.2d 422, in support of that conclusion.

In *Riser*, the court held that it was error to admit evidence that the defendant possessed a gun several weeks after the murder since the prosecution had specifically alleged that the murder had been committed with a different weapon. The Court stated:

> When the prosecution relies . . . on a specific type of weapon [as the murder weapon], it is error to admit evidence that other weapons were found in [defendant's] possession, for such evidence tends to show, not that he committd the crime, but only that he is the sort of person who carries deadly weapons.

(*People v. Riser*, *supra*, 47 Cal.2d at p. 557.)

In *Henderson*, the defendant was charged with assault with a deadly weapon after firing two shots at police officers who were serving a search warrant. Over defense objection, the prosecution was permitted to ask the defendant whether he was aware that a second loaded Derringer gun had been found in the pocket of a pair of pants which he was not wearing at the time he fired the shots. (*People v. Henderson*, *supra*, 58 Cal.App.3d at p. 359.) The appellate court ruled that the defense objection should have been sustained, stating:

> Neither logic, experience, precedent nor common sense supports the proposition that, from the possession in one's home of two loaded guns, a reasonable inference may be drawn that the possessor has an intent to commit the crime of an assault with a deadly weapon. Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons—a fact of no relevant consequence to determination of the guilt or innocence of the defendant. (*People v. Riser* (1956) 47 Cal.2d 566, 577; *People v. Vaiza* (1966) 244 Cal.App.2d 121, 125; cf. *People v. DeVaney* (1973) 33 Cal.App.3d 630, 635 (admissibility of nonrelevant tools of a crime found in defendant's possession waived by defendant's failure to object).) The claimed relevance of the loaded Derringer gun on the issue of defendant's intent is without substance. The inference sought by the prosecution is purely one of sheer speculation—the antithesis of relevancy. The admission into evidence of this irrelevant evidence—highly prejudicial in nature—also constitutes reversible error.

(*People v. Henderson*, *supra*, 58 Cal.App.3d at p. 360.)

In *Hitt*, the defendant was convicted of owning a machine gun and the "key question . . . was whether the rifle would in fact rapid-fire." (*United States v. Hitt*, *supra*, 981 F.2d at p. 423.) After the rifle fired differently during different tests, the defense asserted that the rapid-fire result in one test was caused by a malfunction, possibly because the interior parts of the gun were worn and dirty. In response, the prosecution introduced a photograph of the gun which they believed showed that the gun was neither worn nor dirty. The photograph at issue, however, also depicted at least a dozen other weapons, including knives and guns, which were owned by the defendant's roommate. The Court of Appeals found that the photo had very little probative value since it did not show the gun's inner workings which might have caused it to misfire and was highly prejudicial because it made it appear that the defendant owned all of the weapons depicted in the photo and the trial testimony did not even refer to the roommate. (*Id.* at pp. 423-424.)

The foregoing cases are patently inapposite because the weapons depicted or discovered were not connected to the crime and instead functioned solely as bad character evidence. Thus, in *Riser* and *Henderson* it was indisputable that the guns admitted were not linked to the charged crimes and simply made it appear as if the defendants were fond of weaponry. (*People v. Riser*, *supra*, 47 Cal.2d at p. 557; *People v. Henderson*, *supra*, 58 Cal.App.3d at p. 360.).) And in *Hitt*, the photo was misleading because the arsenal of weapons next to the defendant's gun did not even belong to the defendant and the photo showed nothing about whether the guns inner workings were defective such that it could rapid-fire as a result of a malfunction. (*United States v. Hitt*, *supra*, 981 F.2d at p. 424.)

In distinct contrast to *Riser*, *Henderson* and *Hitt*, the evidence at issue in this case was indeed connected to the crimes and was not misleading. As noted previously, the testimony at trial established that appellants used weapons to intimidate and control their victims and often bound their arms behind their backs. Consequently, evidence that appellants possessed weapons corroborated the victims' testimony and supported the inference that weapons were also used to intimidate and control Vanessa. Similarly, given the rope found in the van, next to Vanessa's body, and in Michaud's pocket, it was obvious that appellants' murder plot necessarily involved physically restraining Vanessa. The carefully modified carpet which fit over the anchor bolts was simply one more piece of evidence reflecting the extreme premeditation and planning that went into the crime. Accordingly, the evidence was properly admitted and no abuse of discretion has been shown.

IX. THE TRIAL COURT DID NOT ERR BY GIVING CALJIC NO. 2.60 OVER MICHAUD'S OBJECTION

Michaud asserts that the trial court erred by giving CALJIC No. 2.60—the instruction directing the jury not to draw adverse inferences from a defendant's failure to testify—over her objection. (MOB 135-140.) No error appears.

A. Background

During the parties' discussion regarding proposed guilt phase jury instructions, Daveggio indicated that he wished to have the jury instructed with CALJIC No. 2.60. (33 RT 6998.) That instruction provided:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

(138 CT 36368.)

Michaud, however, objected to the giving of the instruction, claiming that it would draw the jury's attention to the fact that Michaud did not testify. (33 RT 6999.) When the trial court offered to modify the instruction to have it refer to Daveggio only, Michaud declined to accept the modification and argued that the proposed modification did not "cure" the problem counsel perceived since the modified instruction would still have the practical effect of highlighting Michaud's failure to testify. (33 RT 6999.) The trial court then elected to give the instruction over Michaud's objection. (33 RT 6999.)

B. Applicable Law

It is established that the Fifth Amendment forbids comment by the prosecution on the silence of the accused, or instructions which direct that silence is evidence of guilt. (*Griffin v. California* (1965) 380 U.S. 609, 615.)

In *Lakeside v. Oregon* (1978) 435 U.S. 333, an instruction nearly identical to CALJIC No. 2.60 was given over the defendant's objection that it constituted comment on the defendant's failure to testify in violation of *Griffin*. The United States Supreme Court rejected the claim, stating:

> It is clear from even a cursory review of the facts and the square holding of the *Griffin* case that the Court was there concerned only with adverse comment, whether by the prosecutor or the trial judge—comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

(*Id.* at pp. 338-339.)

The *Lakeside* Court further explained that an instruction barring negative inferences from a defendant's failure to testify could not be equated with an adverse comment on a defendant's silence, stating:

> But a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of his privilege not to testify is "comment" of an entirely different order. Such an instruction cannot provide the pressure on a defendant found impermissible in *Griffin*. On the contrary, its very purpose is to remove from the jury's deliberations any influence of unspoken adverse inferences. It would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect.

(*Lakeside v. Oregon*, *supra*, 435 U.S. at p. 339.) The Court concluded, however, that states were free to forbid the giving of such an instruction over objection as a matter of state law. (*Id.* at p. 340.)

In *People v. Roberts* (1992) 2 Cal. 4th 271, the defendant asserted that the court erred by giving an unmodified version of CALJIC No. 2.60 over his objection after requesting a modification specifying various reasons why a defendant might not take the stand. (*Id.* at p. 314.) This Court held that the instruction need not be modified to explain why a defendant might choose not to testify, but ruled that since "the purpose of the instruction is to protect the defendant," the trial court should "accede" to any request that

the instruction not be given. (*Ibid.*) This Court found, however, that the defendant was not prejudiced by giving the instruction, stating:

> We must assume that the jury followed the admonition not to take into account defendant's failure to testify. Under that view, it is inconceivable that the giving of the instruction led to a less favorable outcome for defendant.

(*Id.* at pp. 314-315.)

C. Discussion

In this case, the trial court correctly recognized that it was duty bound to give CALJIC No. 2.60 upon Daveggio's request. (*Carter v. Kentucky* (1981) 450 U.S. 288, 300; *People v. Lopez* (2005)129 Cal.App.4th 1508, 1535 [defendant entitled to have CALJIC No. 2.60 given on request]; accord, *People v. Evans* (1998) 62 Cal.App.4th 186, 190–191.) Given Daveggio's unbridled right to have the instruction given, together with Michaud's refusal to have the instruction modified to only apply to Daveggio, the trial court was left with no choice but to give the instruction.

Furthermore, even if the instruction should not have been given, Michaud cannot establish any prejudice. Here, as in *Roberts*, it must be assumed that "the jury followed the admonition not to take into account defendant's failure to testify." (*People v. Roberts*, *supra*, 2 Cal. 4th at pp. 314-315.) Consequently, Michaud's claim fails.

X. DAVEGGIO WAS NOT ENTITLED TO PRESENT A REBUTTAL ARGUMENT

Daveggio claims that the trial court denied his request for time to present a rebuttal argument in response to Michaud's closing argument, thereby violating his due process rights. (DOB 242.) The claim is meritless and no abuse of discretion has been shown.

A. Background

During Michaud's closing argument, counsel asserted that although Michaud had been a prostitute, she had been a good mother, had helped find a 12-year-old runaway, and did not become a drug addict until she became involved with Daveggio. (34 RT 7262.) In addition, he argued that Michaud's personality radically changed after being with Daveggio, claiming that Daveggio was "the muscle" during the crimes and that Michaud had "follow[ed] the orders of the dominant perpetrator." (34 RT 7264, 7267, 7270-7271.)

After Michaud's argument, the following colloquy occurred:

> The Court: Mike, you want to put something on the record?
>
> Mr. Ciraolo: Yes, your honor. We previously requested an opportunity to rebut Mr. Karl's argument and we would ask for that at this time.
>
> The Court: Okay. How long do you think you will take to do it?
>
> Mr. Ciraolo: Probably five or ten minutes.
>
> The Court: All right.
>
> Mr. Strellis: We would oppose it. There is an order to these things.
>
> The Court: Yeah, let me think about that before I grant that request. Let me think about that.

(34 RT 7273.)

After the prosecutor's rebuttal argument, and the reading of instructions, counsel asked the trial court if it was denying the request for a second argument. The trial court indicated that it was indeed denying the request. (34 RT 7385.)

B. Applicable Law

Under section 1044, the trial court is vested with broad discretion to control the conduct of a criminal trial. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1333; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387.) "A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact." (*People v. Benavides* (2005) 35 Cal.4th 69, 110.) However, this "does not mean that closing arguments in a criminal case must be uncontrolled or even unrestrained." (*Herring v. New York* (1975) 422 U.S. 853, 862.) On the contrary,

> [t]he presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he [or she] must have broad discretion.

(*Herring v. New York*, *supra*, 422 U.S. at p. 862; accord, *People v. Gonzales* (2011) 51 Cal.4th 894, 956 ["right to have counsel present closing argument" is not "unbounded" and "the trial court retains discretion to impose reasonable time limits"].) In exercising its discretion under section 1044, a trial court must be impartial and must assure that a defendant is afforded a fair trial. When there is no patent abuse of discretion, a trial court's determinations under section 1044 must be upheld on appeal. (*People v. Marshall* (1996) 13 Cal.4th 799, 855; *People v. Cline*, *supra*, 60 Cal.App.4th at p. 1333; *People v. Ponce*, *supra*, 44 Cal.App.4th at p. 1387.)

C. Discussion

Here, no abuse of discretion has been shown. At the time of closing argument, Daveggio's counsel was well-aware that the entire thrust of Michaud's defense was to present herself as a victim of post-traumatic stress disorder who was dominated by Daveggio. Thus, consistent with that defense, Michaud presented testimony from Dr. Pablo Stewart who opined that Michaud was a victim of domestic violence. Similarly, Sherri James, Michaud's former madam, testified that Michaud was beaten up by a former boyfriend, Johnny Garcia, and that Michaud was the victim of incest with her father. Indeed, in response to Michaud's guilt phase defense evidence, Daveggio presented testimony that Michaud was obsessed with Daveggio and also tried to manipulate his behavior by falsely claiming to have been threatened by the Devil's Horseman motorcycle gang. It is thus apparent that Michaud's closing argument sprung no unfair surprises which entitled Daveggio to a rebuttal argument, an entirely anomalous procedure.

Furthermore, Daveggio cannot show how the refusal to give him an extra ten minutes to rebut Michaud's closing argument prejudiced him. During his closing argument, Daveggio admitted that he was criminally liable for Vanessa's murder, but sought to evade the rape and kidnapping special circumstance allegations by claiming that she was kidnapped solely for the purpose of murdering her and that she had not been sexually assaulted. Nothing Michaud's counsel said about him being the leader in the crimes detracted in any way from those defenses. Indeed, one focus of Michaud's argument was that she had not voluntarily assisted Daveggio in assaulting April, a crime to which Daveggio had already pleaded guilty. (33 RT 7265-7267.) Likewise, her argument that Daveggio "was the prime moving force" and the "muscle" in the murder of Vanessa did not detract from Daveggio's claim that murder had been the only purpose when they kidnapped Vanessa. (33 RT 7268.) In fact, Michaud, like Daveggio,

argued that Vanessa had not been sexually assaulted. Thus, Michaud's counsel explicitly *joined* in Daveggio's argument on that subject, claiming that if the curling irons had been used to sodomize Vanessa, there would have been obvious injuries to her rectum. (33 RT 7268-7269, 7272.) Likewise, Michaud explicitly joined Daveggio's argument that the kidnapping special circumstance had not been proven because the kidnapping was merely "incidental" to the murder. (33 RT 7272.) Given Daveggio's admission to involvement in Vanessa's murder, combined with the symmetry of appellants' claims regarding the special circumstances, there is no possible manner in which Daveggio was prejudiced by not being allowed an additional opportunity for argument specifically to rebut Michaud's claim that she was subservient to Daveggio.

Daveggio, however, argues that if had he been allowed to rebut Michaud's closing argument, he could have disputed Michaud's claim that she only became a drug addict after meeting him. (DOB 248.) Daveggio further claims that by "having a chance to portray herself as a pawn who was overwhelmed" by him, Michaud "effectively disputed" his testimony regarding how the "killing occurred." (DOB 248.) Accordingly, he argues that by painting him "as the dominant figure, counsel for Michaud made him more culpable and more deserving of death." (DOB 249.) Not so. First whether Michaud became a drug addict only after meeting Daveggio is completely immaterial to her culpability for the charged crimes. Consequently, any dispute over the timing of her drug addiction could not possibly have affected the verdict.

Second, Daveggio's testimony at the penalty phase was certainly not in evidence during the guilt phase. Therefore, his inability to rebut Michaud's closing argument during the guilt phase could not have affected the penalty phase since he was fully capable of adducing mitigation evidence during that phase and rebutting Michaud's claim that he was the

dominant figure in the killings. And, most obviously, the jury's decision to give Michaud a death sentence constitutes proof positive that Michaud's claim of lesser culpability was soundly rejected. Given her death sentence, Daveggio cannot demonstrate how the lack of a rebuttal argument in the guilt phase prejudiced him in the penalty phase. Accordingly, since Daveggio can establish neither error nor prejudice, his claim fails.

XI. THERE WERE NO ERRORS REQUIRING REVERSAL OF APPELLANTS' CONVICTIONS

Appellants assert that the cumulative effect of purported errors requires reversal of their convictions. (DOB 250-253; MOB 371-375.) Respondent disagrees.

A criminal defendant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432]; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 ["[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"].)

When a defendant invokes the cumulative error doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*)

Here, appellants have failed to demonstrate that there were any errors whatsoever. On the contrary, the record reflects that the trial court scrupulously protected appellants' right to a fair trial at every step and

exercised its discretion in a fair and even-handed manner. Given the strength of the evidence, together with the judicious nature of the trial court's rulings, there is no basis for invoking the cumulative error doctrine. (See *People v. Seaton* (2001) 26 Cal.4th 598, 639 ["Because we have found no errors, his claim of cumulative error fails."].)

Accordingly, appellants' claim fails.

XII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Daveggio asserts that California's death penalty law violates the United States Constitution in numerous respects. (DOB 254-305.) Controlling law establishes otherwise and he offers no justification for this Court to revisit its prior decisions.

A. Section 190.2 is Not Overbroad

Daveggio claims that the death penalty statute (§ 190.2) is overbroad because the special circumstances used to justify its imposition do "not meaningfully narrow the pool of murderers eligible for the death penalty." (DOB 255.)

This Court has concluded, however, that the "statutory special circumstances that qualify a defendant for the death penalty (§ 190.2) are not unconstitutionally overbroad." (*People v. Eubanks* (2011) 53 Cal.4th 110, 153; *People v. Jennings* (2010) 50 Cal.4th 616, 688 ["the various special circumstances are not so numerous as to fail to perform the constitutionally required narrowing function"].)

B. Section 190.3, As Applied, Did Not Result in the Arbitrary and Capricious Imposition of the Death Penalty.

Daveggio contends that factor (a) of section 190.3—which allows the jury to consider the circumstances of the crime—results in a "wanton and freakish" application of the death penalty since "almost all features of every

murder" have been characterized as aggravating factors by the prosecutor. (DOB 259.)

In *People v. Elliott* (2012) 53 Cal.4th 535, this Court reiterated that permitting the "jury to consider the circumstances of the crime, does not result in the arbitrary or capricious imposition of the death penalty." (*Id.* at p. 593; accord, *People v. Moore* (2011) 51 Cal.4th 386, 415; *People v. Kennedy* (2005) 36 Cal.4th 595, 641.)

C. Section 190.3 Contains Adequate Safeguards to Avoid Arbitrary and Capricious Sentencing

Daveggio argues that numerous deficiencies in the death penalty statute result in arbitrary and capricious sentencing. (DOB 265.) The claims are meritless.

1. Daveggio's death verdict need not be based on unanimous findings that aggravating factors outweigh mitigating factors beyond a reasonable doubt.

Daveggio asserts that he had a constitutional right to have the jury unanimously determine that one or more aggravating factors existed beyond a reasonable doubt. (DOB 266-281.) Those assertions were rejected in *People v. Famalaro* (2011) 52 Cal.4th 1, wherein this Court held that the state need not prove beyond a reasonable doubt whether "aggravating circumstances exist." (*Id.* at p. 44.)

2. There is no requirement that a jury may only impose a death sentence if it is persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty

Daveggio further asserts that his due process and Eighth Amendment rights were violated because the jury was not instructed that it could impose a death sentence only if it was persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors, and that death

was the appropriate penalty. (DOB 283-285.) The absence of those requirements did not violate Daveggio's constitutional rights. (*People v. Dement* (2011) 53 Cal.4th 1, 55-56; *People v. Famalaro*, *supra*, 52 Cal.4th at p. 44.)

3. The prosecution need not prove by a preponderance of the evidence that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate sentence

Daveggio next asserts that even if the prosecutor need not prove beyond a reasonable doubt that an aggravating factor exists, that the aggravating factors outweigh mitigating factors, and that death is the appropriate penalty, due process nonetheless requires that a preponderance of the evidence standard apply to the foregoing issues. (DOB 288.) This claim is meritless. (*People v. Enraca* (2012) 53 Cal.4th 735, 769 [federal constitution does not require a penalty phase jury to "find all aggravating factors proved beyond a reasonable doubt or by a preponderance of the evidence"]; accord, *People v. Blacksher* (2011) 52 Cal.4th 769, 848-849; *People v. Carrington*, *supra*, 47 Cal.4th at p. 200 [jury not required to find death sentence appropriate either beyond a reasonable doubt or by preponderance of the evidence].)

4. The death penalty statute does not require any burden of proof to establish a tie-breaking function

Daveggio argues that some burden of persuasion—even if not beyond a reasonable doubt, or a preponderance of the evidence—must apply to the imposition of the death penalty in order to act as a "tie-breaking rule" which will help ensure even-handed punishment. (DOB 289-290.) Given the normative nature of the decision whether to apply the death penalty, this Court has held that "no 'tie-breaking rule'" is required. (*People v.*

Castaneda (2011) 51 Cal.4th 1292, 1355; accord, *People v. Brady* (2010) 50 Cal.4th 547, 590.)

5. The court is not required to instruct the jury that there is no burden of proof

Daveggio argues that even if it is constitutional not to have a burden of proof at the penalty phase, the jurors must be instructed to that effect. (DOB 290.) The trial court, however, is not "required to instruct the jury that there is no burden of proof." (*People v. Dement*, *supra*, 53 Cal.4th at pp. 55-56; accord, *People v. Virgil* (2011) 51 Cal.4th 1210, 1289 [neither "the federal or state Constitution require an instruction explaining that there is no burden of proof in the penalty phase"].)

6. There is no requirement that the jury make written findings regarding aggravating factors

Daveggio claims that in order to facilitate meaningful appellate review, a sentence of death must be based on written findings. (DOB 291-293.) It is established, however, that a "jury's death verdict need not be based on written findings regarding aggravating factors." (*People v. Elliot*, *supra*, 53 Cal.4th at p. 594; accord, *People v. McKinnon* (2011) 52 Cal.4th 610, 697.)

7. The absence of inter-case proportionality review does not render the death penalty unconstitutional

Daveggio asserts that the absence of intercase proportionality review renders the death penalty unconstitutional. (DOB 294-296.) Controlling authority refutes this contention. (*People v. Eubanks*, *supra*, 53 Cal.4th at p. 154 ["Our state death penalty statute is not unconstitutional for failing to require intercase proportionality review or disparate sentence review"]; accord, *People v. Bacon* (2010) 50 Cal.4th 1082, 1129.)

8. The prosecution is entitled to rely on unadjudicated criminal activity during the penalty phase

Daveggio claims that "any use of unadjudicated criminal activity by the jury during the sentencing phase" violates due process unless it is unanimously found true beyond a reasonable doubt. (DOB 297-298.) Since the "jury's consideration of the defendant's unadjudicated criminal activity as an aggravating circumstance is constitutionally permissible, and the jury need not agree unanimously that the defendant committed the unadjudicated crimes," Daveggio's claim fails. (*People v. Elliott*, *supra*, 53 Cal.4th 535 at pp. 593-594.)

9. The use of restrictive adjectives when describing potential mitigating factors does not violate the Eighth Amendment

Daveggio argues that section 190.3's use of adjectives such as "extreme" and "substantial" "act as [unconstitutional] barriers to the consideration of mitigation" evidence. (DOB 298.) It is established, however, that section 190.3's "use of restrictive adjectives, such as 'extreme' and 'substantial,' in section 190.3's list of potential mitigating factors does not render it unconstitutional." (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 849.)

10. The court was not required to identify which factors in section 190.3 were considered mitigating.

Daveggio asserts that "the failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded" a fair application of the death penalty. (DOB 299.) Daveggio is incorrect. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 849 ["A penalty phase jury need not be instructed as to which factors are aggravating and which are mitigating or to restrict its consideration of evidence in this regard"].)

D. Section 190.3 Does Not Violate the Equal Protection Clause

Daveggio argues that "California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes," thereby violating his equal protection rights. (DOB 301.) This claim has been repeatedly rejected. "Because capital defendants are not similarly situated to noncapital defendants, California's death penalty law does not deny capital defendants equal protection by providing certain procedural protections to noncapital defendants but not to capital defendants." (*People v. Enraca*, *supra,* 53 Cal.4th at p. 770; accord, *People v. Elliott*, *supra*, 53 Cal.4th at p. 594; ["California's death penalty law does not violate the federal Constitution's equal protection guarantee by denying capital defendants procedural safeguards that are available to defendants charged with noncapital crimes"].)

E. California's Death Penalty Law Does Not Violate International Standards or the Eighth and Fourteenth Amendments to the United States Constitution

Daveggio claims that even if "capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes—as opposed to extraordinary punishment for extraordinary crimes—is." (DOB 308.) This Court has concluded that "California does not employ the death penalty as a 'regular punishment for substantial numbers of crimes,'" and that "its imposition does not violate international norms of decency or the Eighth Amendment's prohibition against cruel and unusual punishment." (*People v. Clark* (2012) 52 Cal.4th 856, 1008; accord, *People v. Lee* (2011) 51 Cal.4th 620, 654 [death penalty does not violate international norms or the Eighth Amendment].)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment below be affirmed.

Dated: June 6, 2012

Respectfully submitted,

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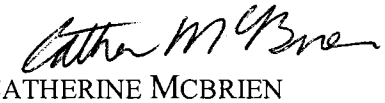

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 70,196 words.

Dated: June 6, 2012

KAMALA D. HARRIS
Attorney General of California

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DECLARATION OF SERVICE

Case Name: ***People v. James Anthony Daveggio and Michele Lyn Michaud***

No.: **S110294**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 11, 2012, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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On June 11, 2012, I caused one original and thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at **350 McAllister Street, San Francisco, CA 94102** by **Personal Delivery**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 11, 2012, at San Francisco, California.

M. Argarin
Declarant

Signature

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