In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

KERRY LYN DALTON,

Defendant & Appellant.

CAPITAL CASE

Case No. S046848

San Diego County Superior Court Case No. CR135002
The Honorable MICHAEL D. WELLINGTON, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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I. THE TRIAL COURT PROPERLY ADMITTED TUCKER'S LAY OPINION BECAUSE IT WAS NOT BASED ON INADMISSIBLE HEARSAY

Dalton argues that the trial court abused its discretion in admitting social worker Tucker's lay opinion because it was based on inadmissible hearsay. (Supp. AOB 22-27.) Specifically, she complains that Tucker based her opinion that May would not abandon her children in part on May's out-of-court statement that she wanted her children back. Dalton also claims admission of such statements violated her Sixth Amendment right to confrontation. (Supp. AOB 27-29.) However, May's statement to Tucker was non-hearsay because it was not offered for the truth of the matter asserted; rather, it was offered as foundation for the witness's lay opinion that May would not abandon her children (and thus was in fact dead rather than missing). And even if the statement was hearsay, it was admissible under the "state-of-mind" exception to the rule against hearsay. Further, admission of May's statements did not violate Dalton's constitutional right to confrontation because such statements were not testimonial—the primary purpose of the statement was not for proving past events relevant to later criminal prosecution. Finally, even assuming error in admitting the statements, Dalton was not prejudiced because Tucker based her opinion on her other independent observations of May; and any error in admitting Tucker's lay opinion was harmless because Dalton would not have enjoyed a more favorable outcome if only the jury had not learned of May's statement to Tucker.

A. The Admission of Tucker's Opinion

Nina Tucker, a Child Protective Services worker at the time of May's murder, testified for the People. (35 RT 3362.) Tucker was assigned to May's case in December of 1987; her job was to make sure that May and

her husband complied with weekly urine screenings so that they could remain unified with their three children. (35 RT 3362-3363.) After Tucker was assigned to May's case, she saw May about once a month at May's home, and she saw May three times in court. (35 RT 3364.) May never missed a court date or a scheduled visit with Tucker. (35 RT 3364-3365.) May frequently called Tucker just to talk or to let her know what she was doing. (35 RT 3365.)

At this point, defense counsel objected that Tucker's statements regarding the content of her conversations with May were inadmissible hearsay. (35 RT 3365-3366.) The court responded that the People were offering the statements not for their truth but as foundation for Tucker's lay opinion testimony that May cared for her children and would not abandon them. (35 RT 3366.)

Tucker continued. She testified that she filed for removal of May's children on June 14, 1988. (35 RT 3368.) Tucker's last contact with May was on June 24, 1988. (35 RT 3367.) May told Tucker that she was living with a friend in Lakeside, and she wanted to make some changes in her lifestyle; she said she was tired of living in the street, and she wanted her children back. (35 RT 3367.) Tucker asked May to meet with her on the following Monday, and May was pleased and anxious to meet with Tucker. But Tucker never heard from May again. (35 RT 3368-3369.) Tucker did receive a phone call from JoAnne Fedor (the woman who owned the trailer in which May was murdered), and Tucker subsequently called the police and made a missing person report.[1] (35 RT 3369-3370.)

Tucker observed that May loved her children very much; May was responsive to her children, and the children's behavior showed that May did

[1] What Fedor said to Tucker in the phone call that led her to call the police was not elicited during Tucker's testimony. (35 RT 3370.)

not harm them. (35 RT 3370.) Tucker opined that based on her observations, May would not abandon her children. (35 RT 3370.)

B. May's Statement Did Not Constitute Inadmissible Hearsay Because It Was Not Offered for the Truth of the Matter Asserted

Dalton argues that Tucker's lay opinion that May would not abandon her children was improperly admitted because it was based on May's statement to Tucker that she wanted to be with her children, and that statement was inadmissible hearsay. (Supp. AOB 21-27.) However, the trial court did not abuse its discretion in admitting Tucker's opinion, and the particular statement by May to Tucker was admitted as non-hearsay because it was not offered for its truth; rather, it was Tucker properly relaying her personal observations of May to support her lay opinion about whether May would abandon her children.

An out-of-court statement made by a nontestifying witness, offered for the truth of the matter asserted, is inadmissible hearsay. (Evid. Code, § 1200.) Conversely, a statement "offered for some purpose other than to prove the fact stated therein is not hearsay." (Sen. Com. on Judiciary com., 29B pt. 4 West's Ann. Evid. Code (2015 ed.) foll. § 1200, p. 3; see *People v. Davis* (2005) 36 Cal.4th 510, 535-536.)

A lay witness may express opinion based on his or her perception, but only where helpful to a clear understanding of the witness's testimony. (Evid. Code § 800, subd. (b); *People v. Sanchez* (2016) 63 Cal.4th 411, 456.) "A lay witness generally may not give an opinion about another person's state of mind, but may testify about objective behavior and describe behavior as being consistent with a state of mind." (*Id.* at p. 456, citing *People v. Chatman* (2006) 38 Cal.4th 344, 397.) The decision whether to permit lay opinion rests in the sound discretion of the trial court. (*People v. Sanchez, supra,* 63 Cal.4th at p. 456.)

Here, the trial court did not abuse its discretion in admitting Tucker's lay opinion that May would not abandon her children, because Tucker's opinion was based on her personal observations, not on the truth of May's statement. Tucker specifically said, "It was my *observation* that [May] loved her children. She was very responsive to them. The children seemed to have not been afraid or harmed in any way. They did not exhibit any behavior that would be indicative, of fear. They were not withdrawn. [May] loved her children very much and even verbalized that to me." (35 RT 3370, emphasis added.) When asked if "based on her *observations*" she believed that May would abandon her children, Tucker replied "no." (35 RT 3370, emphasis added.) Tucker's testimony made clear that her interactions with May necessarily included Tucker having conversations with May, and Tucker's reliance on May's verbal statements was part of Tucker's general perception of May's behavior— but her opinion did not rest on the truth behind May's words. Rather Tucker relied on her observations of May which included the fact that May called Tucker to talk about her children, May's verbal enthusiasm about meeting with Tucker to work toward reuniting with her children, the frequency of Tucker's verbal conversations with May, and the fact that May volitionally verbalized her love for her children without prompting. Tucker's reliance on May's verbal statement was thus not based on the truth asserted in that statement, but instead based on Tucker's personal observations of May during those interactions.

Dalton relies on this court's opinion in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), for the proposition that a lay opinion cannot be based on hearsay. (Supp. AOB at 23-25.) But her reliance on *Sanchez* is misplaced. *Sanchez* addressed an issue involving expert opinion, not lay opinion. In *Sanchez*, this court observed that, traditionally, an expert witness's testimony explaining the general basis for her opinion has not

been characterized as hearsay; however, such "expert basis" testimony has been excluded as hearsay when it includes case-specific facts about which the expert has no independent knowledge. (*Sanchez, supra*, 63 Cal.4th at p. 676.) In discussing expert opinions, the court did observe that unlike expert witnesses, lay witnesses may testify only about matters within their personal knowledge. (*Sanchez, supra*, 63 Cal.4th at p. 675.) This observation was in the context of the concern in *Sanchez*, which was over a police officer giving an expert opinion that relied on case-specific facts about which the officer has no independent knowledge. Here Tucker's lay opinion was based on information that she personally and independently perceived from her interactions with May. Indeed, as noted in *Sanchez*, a lay opinion must be based on evidence which the lay person personally observes.

C. May's Statement Was Also Admissible Under the "State of Mind" Exception to Hearsay

Even if May's statement was hearsay, it was nevertheless admissible under the "state of mind" exception to hearsay. Though the trial court did not admit May's statement under this exception to hearsay, it has long been the law that a correct decision made by a court for the wrong reason will not be disturbed on appeal. (*People v. Vera* (1997) 15 Cal.4th 269.)

The state-of-mind exception to the rule against hearsay applies when the out-of-court statement is "offered to prove the declarant's state of mind, emotion, or physical sensation ... when it is itself an issue in the action" or it is "offered to prove or explain acts or conduct of the declarant." (Evid.Code, § 1250, subd. (a)(1).) A hearsay statement that would otherwise be admissible under the state-of-mind exception is inadmissible if made under circumstances that indicate the statement's lack of trustworthiness. (*People v. Harris* (2013) 57 Cal.4th 804, 843-844; Evid.

Code, § 1252). A statement is trustworthy when it is "made in a natural manner, and not under circumstances of suspicion." (*Ibid*., internal quotations omitted.)

May's statement that she loved and wanted to be with her children was admissible to show her state of mind, that is, that she would not abandon her children. Whether May fled the state or country instead of died was at issue in the action.

Dalton asserts that May's statement to Tucker was an untrustworthy representation of her state of mind because May had a motive to deceive Tucker into believing she wanted her children back in order to prove compliance with the court order requiring May to stay sober. (Supp. AOB 25-27.) But clearly there was no reason for May to mislead Tucker over wanting her children back in order to demonstrate to the court that she was complying with its order to maintain her sobriety. Dalton argues May's statement was untrustworthy because she was a drug addict and lost her children because of her addiction (Supp. AOB 26), but she fails to explain how that fact would render May's statement to Tucker untrustworthy. If, as Dalton suggests, May's true state of mind rested with a desire to abandon her children for drugs, or feign compliance with the court order to remain sober, it would not make any sense for her to call Tucker and falsely plead to have her children returned. May's statement that she loved and wanted to be with her children was not inherently untrustworthy, and it was properly admissible under the state-of-mind exception to hearsay.

D. May's Statement Was Not Testimonial Hearsay in Violation of Dalton's Constitutional Right to Confrontation

May's out-of-court statement to Tucker was not testimonial hearsay within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36, because the statement was not offered for its truth, and May did not make

the statement for the primary purpose of creating an out-of-court substitute for trial testimony related to a future criminal prosecution. Accordingly, there was no violation of Dalton's right to confrontation from admitting May's statement to Tucker that she wanted her children back.

The Sixth Amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." (U.S. Const., Amend. VI.) In *Crawford, supra,* 541 U.S. 36, the United States Supreme Court held that the Sixth Amendment bars the introduction of a witness's "testimonial hearsay" statements at trial unless the witness is unavailable and the defendant has had an opportunity to cross-examine the witness. (*Id*. at pp. 68-69.) There is no confrontation clause violation "if a statement is not offered for its truth, or is nontestimonial in character[.]" (*People v. Blacksher* (2011) 52 Cal.4th 769, 808 (*Blacksher*); also *People v. Clark* (2011) 52 Cal.4th 856, 1000.) Under *Crawford*, therefore, the "crucial determination about whether the admission of an out-of-court statement violates the confrontation clause is whether the out-of-court statement is testimonial or nontestimonial." (*People v. Geier* (2007) 41 Cal.4th 555, 597.) While the *Crawford* court struggled to articulate when a person acts as a "witness" and did not provide "a comprehensive definition" of testimonial evidence, it ultimately held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id*. at p. 68 & fn. 10.)

A statement is not testimonial "unless the statements are given in the course of an interrogation or other conversation whose 'primary purpose ... is to establish or prove past events potentially relevant to later criminal prosecution.'" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1214 (*Rangel*), internal citation & quotations omitted.) "Under this test, '[s]tatements made to someone who is not principally charged with uncovering and

prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.'" (*Ibid*., citing *Ohio v. Clark* (2015) 135 S.Ct. 2173, 2182.) Ultimately, "the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" (*Id*. at pp. 1214-1215, internal quotations omitted.)

Here, the confrontation clause was not a bar to admission of May's out-of-court statement because it was not offered for its truth, as discussed above. (*Blacksher*, *supra*, 52 Cal.4th at p. 813 [admission of statements not offered for truth of the matter asserted do not run afoul of confrontation clause].) And even if the statement did constitute hearsay, its admission did not violate Dalton's right to confrontation because Tucker's primary motive was not to create "'an out-of-court substitute for trial testimony'" (*ibid.*) or obtain evidence for a potential prosecution. Indeed, Tucker was not law enforcement personnel and was not soliciting statements for potential prosecution; rather, she wanted to ascertain the best lifestyle for May's children, advocate for a suitable family environment for the May children, and encourage May to stay on track on her path to a healthier life with her children.

For these reasons, there was no violation of Dalton's right to confrontation.

E. Even Assuming Error, Dalton Was Not Prejudiced

In any event, even assuming May's statement was inadmissible hearsay, any error in its admission was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836, because it is not reasonably possible that, had her statement been excluded, the verdict would be more favorable to Dalton. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1308 [*Watson* standard applies to erroneous admission of hearsay evidence].) Even

assuming a violation of Dalton's right to confrontation, it would be harmless under the more rigorous harmless beyond a reasonable doubt standard that is applicable to a violation of that federal constitutional right.

Tucker based her lay opinion on multiple admissible personal observations of May including the following: her observations of how May interacted with her children, May's dedication to her court appearances, May's dedication to her meetings with Tucker, the fact that May called Tucker on multiple occasions on her own initiative, May's enthusiasm about meeting with Tucker to work toward reuniting with her children, the frequency of Tucker's verbal conversations with May, and other less articulable observations like May's tone of voice and expressions. (35 RT 3362-3370.) Considering the brevity of the introduction of May's statement that she loved and wanted to be with her children—and considering the unsurprising nature of that statement—along with Tucker's other personal observations, there is no reasonable probability that admission of May's statement changed the jury's perception of, or altered the weight given to, Tucker's lay opinion that May would not have abandoned her children.

In addition to Tucker's opinion being based on other extensive personal observations independent of May's stated desire to have her children returned to her, the fact that May was dead was established by evidence independent of Tucker's testimony. Specifically, May's death was established by Fedor's testimony regarding the events at her trailer involving May and Dalton the night before the murder, as well as Fedor's testimony about the state of her trailer when she returned home—notably, all of her furniture was rearranged, items like her new recliner, clothing, and towels were missing, wall wiring was peeled back and burned at the edges, extension cords were in the shape of an eight as though they were used to tie up someone, there was blood spattered in multiple places around

the trailer, there was a screwdriver covered in blood, hair, and a piece of skull, there was a pillow filled with blood in the trash, and there was blood covering the bar of soap in the shower. (30 RT 2597-2607.) Multiple other witnesses corroborated that Fedor's trailer was covered in blood (31 RT 2878 [Eckstein]; 30 RT 2666-2671 [Fedor's daughter, Alishia]), including a lab technician who testified that the trailer was covered in human blood (32 RT 2942). McNeely, TK's cellmate for three months, testified that TK talked about the murder of May in a trailer and claimed, "we [the jury heard 'I'] tortured the hell out of that bitch." (32 RT 3074.) TK told McNeely that he cut May's body into pieces and deposited it on an Indian Reservation. (32 RT 3076-3078.) Fisher testified that Baker confessed to the murder (33 RT 3227), and of course, Baker testified at length and in great detail as an eyewitness to the murder and gruesome torture of May. (33 RT 3123-3136.) Finally, May's sudden disappearance corroborated the other testimony and evidenced May's murder. (31 RT 2914 [an investigator found no record of May in the 50 states and Puerto Rico after June 6, 1988].)

These same reasons establish that any error in admitting May's statement in violation of Dalton's right to confrontation was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *People v. Pearson* (2013) 56 Cal.4th 393, 463.) And contrary to Dalton's assertion, harmless error analysis under *Chapman* does not require proof that the guilty verdict "actually rendered in *this* trial" was unattributable to the error (Supp. AOB 31). Rather, the inquiry is "whether it is clear beyond a reasonable doubt that *a* rational jury would have rendered the same verdict absent the error." (*People v. Merritt* (2017) 2 Cal.5th 819, 831, emphasis added, citing *Neder v. United States* (1999) 527 U.S. 1, 18.) The significant evidence listed above demonstrates beyond a reasonable

doubt that absent May's statement that she wanted to be with her children, a rational jury would have rendered the same verdict.

II. SUBSTANTIAL EVIDENCE SUPPORTED THE LYING-IN-WAIT SPECIAL-CIRCUMSTANCES ALLEGATION

Dalton argues that the trial court erred by instructing the jury on the lying-in-wait special-circumstances allegation for murder (Pen. Code, § 190.2, subd. (a)(15)) because insufficient evidence showed that she engaged in a substantial period of watching and waiting, and that she engaged in a surprise attack. (Supp. AOB 33-40.) Substantial evidence supported the lying-in-wait special circumstance finding.

To determine whether the evidence supports a special-circumstance finding, this court reviews the entire record in the light most favorable to the judgment to determine whether there is reasonable evidence upon which a reasonable jury could find the special circumstance true beyond a reasonable doubt. (*People v. Becerrada* (2017) 2 Cal.5th 1009, 1028 (*Becerrada*).) In determining whether a reasonable jury could have found Dalton guilty beyond a reasonable doubt, this court presumes in support of the judgment "the existence of every fact the trial could reasonably deduce from the evidence. [Citation.]" (*People v. Nelson* (2016) 1 Cal.5th 513, 550 (*Nelson*).) The special circumstance in effect at the time of Dalton's crime requires that the murder be committed "while" lying in wait. (Pen. Code, § 190.2, former subd. (a)(15).)[2] Accordingly, the prosecution was required to prove that Dalton intentionally murdered May "'under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and

[2] The language of the lying-in-wait special circumstance was revised in 2006 to remove the word "while" and substitute the phrase "by means of." (*Nelson*, *supra*, 1 Cal.5th at p. 549, internal citation omitted.)

(3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*Nelson*, *supra*, 1 Cal.5th at p. 549, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557.) Dalton argues the evidence was insufficient to meet the second and third prongs: that she engaged in a substantial period of watching and waiting, and that she engaged in a surprise attack. (Supp. AOB 34, 38.)

A. Substantial Evidence Supported the Jury's Finding That Dalton Engaged in a Substantial Period of Watchful Waiting

First, substantial evidence showed that Dalton engaged in a substantial period of watching and waiting. The jury was instructed that "[t]he lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (39 RT 3895-3896.) Importantly, this court has "'never placed a fixed time limit on this requirement.'" (*Nelson*, *supra*, at p. 550.) Even waiting a couple of minutes may suffice to establish lying in wait. (*People v. Moon* (2005) 37 Cal.4th 1, 23 [waiting for 90 seconds before killing victim constituted a substantial period of waiting].) A "classic lying-in-wait special-circumstance murder" occurs where the defendant drives the victim to a secluded location on some other pretext and then murders the victim from that position of advantage. (*People v. Johnson* (2016) 62 Cal.4th 600, 631 (*Johnson*).) For example, in *Johnson*, the victim was killed by means of lying in wait when the defendant drove with the victim to a deserted alleyway on the pretext of buying drugs, then halfway down the alleyway the defendant and his cohorts shot the victim in the back of the head. (*Ibid.*) Similarly, in *People v. Bonilla* (2007) 41 Cal.4th 313 (*Bonilla*), the defendant committed murder by lying in wait when he drove the victim to a vacant office park on the pretext of meeting with a real estate agent. The defendant's cohorts—who were posing as a

real estate agent and a security guard—stood together in the parking lot with the victim before suddenly attacking him and suffocating him to death. (*Bonilla*, *supra*, at pp. 321-322.)

Like *Johnson* and *Bonilla*, Dalton committed a "classic lying-in-wait special-circumstance murder." (*Johnson*, *supra*, at p. 631.) Dalton led her victim to a secluded place and then waited for the opportune time to strike when the victim was unaware and unsuspecting. Specifically, Dalton drove to Fedor's trailer while May followed behind in another truck. (30 RT 2575-2576.) There was no way to leave the trailer park without a car because it was in such a remote location (33 RT 3134 [the trailer was "in the boonies"]). Dalton, May, Baker, TK, and a man named "Bob" used drugs and stayed up all night while Fedor and Fedor's children tried to sleep. (30 RT 2575, 2580-2581.) In the morning, someone called the police seeking medical help for May who was having an asthma attack, but Dalton refused to let paramedics into the trailer to help May; she told TK to tell the paramedics that the call was for him and that he was okay now. (30 RT 2590.) This evidence supported the theory that Dalton was planning to kill May because it shows she did not want any authorities to know that May was at the trailer, and she wanted to keep anyone from removing May from the trailer. Dalton then waited for Fedor and the others to leave before attacking May. (30 RT 2591-2592.) Dalton specifically told TK to take Baker with him away from the trailer. (33 RT 3120.) The jury could reasonably infer this because TK advised Fedor not to go back in for the item she had forgotten once they left the trailer. (See RB 77; 30 RT 2592 [TK warned, "If I were you, don't go in there. Don't go in there."].) When Baker and TK returned to the trailer, they found May tied to a chair with a sheet over her head. (33 RT 3125-3126.) Thus, there was solid, credible evidence upon which a reasonable jury could determine that Dalton waited to ambush May until May was secluded in a remote location

and Dalton was in a position of advantage. The purpose of the "watchful waiting" requirement—"to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse"—was satisfied here. (*People v. Casares* (2016) 62 Cal.4th 808, 829.) The trial court likewise agreed that sufficient evidence supported the lying-in-wait allegation, observing after all the evidence was admitted that there was sufficient evidence for the jury to find that Dalton intended to wait for an opportune time to take the victim by surprise when Fedor was not there. (38 RT 3675.)

Dalton relies on *Nelson* and *Becerrada* to support her position that she did not engage in a substantial period of waiting, but those decisions are inapposite. In *Nelson, supra,* 1 Cal.5th 513, the defendant rode his bicycle to a store's parking lot before work, where he shot two of his coworkers in quick succession, then left. This court held that insufficient evidence supported the "watching and waiting" prong of the lying-in-wait allegation because there was "no evidence" that Nelson arrived at the murder scene "before the victims or waited in ambush for their arrival." (*Nelson, supra,* at p. 551.) Hence, there was no evidence that supported the inference that Nelson engaged in "any distinct period of watchful waiting" as opposed to spontaneously arriving and attacking the victims from behind. (*Ibid*.) Conversely, here, there was evidence upon which a jury could determine that Dalton engaged in watchful waiting—witness testimony established that Dalton waited for hours until the others left her and May alone in the trailer so that she could attack May. (30 RT 2592 [TK advised Fedor to not return to the trailer for an item she forgot inside] 33 RT 3125-3126 [when TK and Baker returned to the trailer, Dalton had bound May to a chair].) Unlike the defendant in *Nelson,* the evidence here established that Dalton spent hours with May until she found an opportune time to ambush May

from a position of advantage. (30 RT 2580-2581 [Dalton and May were up all night together at the trailer].)

In *Becerrada, supra*, 2 Cal.5th 1009, the defendant expected the victim to drop rape charges against him, and then he murdered the victim once he learned that she did not drop the charges. The prosecution argued that Becerrada was lying in wait because he learned that the victim did not drop the charges, then he lured her to his home the next morning intending to kill her, and then he waited for an opportune moment to kill her from an advantageous position. (*Id*. at pp. 1028-1029.) This court held that Becerrada did not engage in a substantial period of watchful waiting because no evidence existed that the defendant learned "*before*" the victim's trip to defendant's home that she had not dropped the charges. (*Id*. at p. 1029.) There was simply no evidence that Becerrada engaged in any period of watchful waiting to gain an opportune moment to attack his victim. (*Ibid*.) Unlike *Becerrada*, there was substantial evidence that Dalton engaged in watchful waiting. Even if Dalton did not lure May to the trailer to murder her, she engaged in a substantial period of watchful waiting after they arrived. (See 48 RT 4630 [trial court reasoned that even if Dalton did not lure May to the trailer, "the evidence is overwhelming that there was as substantial waiting for a period to act."].) Dalton expressed her hatred for May and treated her badly over the span of multiple hours (30 RT 3582), and the evidence showed that she planned to kill May after her friends left because she did not want the paramedics to know May was present at the trailer (30 RT 2590), and TK warned Fedor not to return to the trailer once Dalton and May were alone together (30 RT 2592).

B. Substantial Evidence Supported the Jury's Finding That Dalton Engaged in a Surprise Attack

Second, substantial evidence showed that Dalton engaged in a surprise attack on an unsuspecting victim from a position of advantage. A surprise attack occurs once the defendant launches a "continuous assault which ultimately causes [the victim's] death." (*People v. Streeter* (2012) 54 Cal.4th 205, 249 (*Streeter*).) There is no "cognizable interruption" between the period of watchful waiting and the commencement of the surprise attack as long as the attack commences a *continuous* assault that ultimately causes the victim's death; this is true even where discrete events occur between the surprise attack and the ultimate death of the victim. (*Ibid*.) A surprise attack is not undermined simply because the victim attempts to flee or fights back after the defendant initiates contact if the attack "had already begun." (*Ibid*.)

Here, the evidence shows that immediately after Dalton watchfully waited, once the time was opportune, she made a surprise attack on May from a position of advantage. Dalton and May were left alone for no more than a couple of hours,[3] and in that time, Dalton was able to attack May, remove wiring from the walls, use that wiring to tie up May, find four or five syringes and battery acid, then fill those syringes with battery acid. (30 RT 2605-2607; 33 RT 3127-3128.) Once Baker and TK arrived back at the trailer and found May tied up, they proceeded with Dalton's plan to kill May: they attempted to inject May with battery acid, hit her over the head with a frying pan, and then stabbed May in the chest and throat until she

[3] TK and the others left around noon at the earliest. (31 RT 2898 [the call to the paramedics was canceled at 11:21 a.m.].) They arrived back at the trailer in the afternoon (33 RT 3124), and they arrived prior to 3:30 p.m. (30 RT 2595-2596 [TK did not return to pick up Fedor and her children from the honor camp at 3:30 p.m., as they had arranged].) Thus, they could not have been gone for more than a couple of hours.

died. (33 RT 3127-3134.) Thus, once the attack begun, it constituted one continuous assault from initiation until death. Furthermore, the jury could reasonably infer that Dalton engaged in a surprise attack, because May did not leave the trailer with everyone else that afternoon, and there was no evidence that she asked Baker or Fedor if she could join them in the truck; had she suspected that Dalton planned to murder her, it is reasonable to infer she would not have stayed.

Dalton relies on *People v. Hajek* (2014) 58 Cal.4th 1144 (*Hajek*), to support her position that the evidence was insufficient to establish a surprise attack (Supp. AOB 38-39), however that case is readily distinguishable. As this court has cautioned, "When we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts." (*People v. Casares*, *supra*, 62 Cal.4th at p. 828.) In *Hajek*, this court held there was insufficient evidence that the defendant was lying in wait because no evidence showed that the defendant's concealment of his murderous intent was contemporaneous with a substantial period of watchful waiting, or that such concealment allowed the defendant to launch a surprise attack. (*Hajek*, *supra*, at p. 1185.) There, the defendant tied up the murder victim—the grandmother of the intended teenage victim—upstairs in her family's house, and then the defendant left her there while his codefendant looked for the intended victim at her high school. (*Hajek*, *supra*, at p. 1185.) Multiple hours passed since he tied up the grandmother, and the defendant engaged in other activities like playing cards with the intended victim's younger sister downstairs while waiting for his codefendant to return. (*Ibid*.) This court held there was insufficient evidence that a surprise attack immediately followed the watchful waiting period because the initial attack was followed by "a series of nonlethal events" over the course of many hours, and then the swift calculated murder of the victim. (*Ibid*.) But

unlike *Hajek* where the defendant left the murder victim alone so he could engage in multiple non-murderous activities for hours before attacking her, Dalton's surprise attack immediately followed her period of watchful waiting, and her assault was continuous from initiation until death as Dalton engaged in one murder-related task after another until May was finally dead. (33 RT 3127-3134.)

Dalton argues that her case is like *Hajek* because she engaged in multiple "nonlethal" activities from the time she tied up May until May died, and May likely was unsurprised that she was in mortal danger by the time Dalton administered the final lethal blow. (Supp. AOB 38-39.) But the "nonlethal" events in *Hajek* involved actions unrelated to the murderous task at hand which broke the chain of events that demarcate a hallmark in a "lying-in-wait" murder. Lying-in-wait murders are not confined to those that are swiftly completed out and immediately successful. Though the actual murder in this case was not swiftly completed because it took multiple physical attempts to kill May, that did not detract from the initial surprise attack because those actions were part of an unbroken sequence of events. And unlike the defendant in *Hajek*, whose culpable mental state may have lapsed between the watchful waiting and the homicide, there was no cognizable interruption between Dalton's initial attack and the ultimate homicide because any discrete events that transpired following the surprise attack were part of one continuous series of actions designed to effectuate May's death. (See *Streeter*, *supra*, 54 Cal.4th at p. 249.) A slow and tortuous death may still be instigated by a surprise attack. Moreover, a surprise attack is not undermined simply because during the continuous assault the victim becomes aware of the nature of the attack. (See *Streeter*, *supra*, at p. 249.)

In sum, in the light most favorable to the judgment, substantial evidence supported the lying-in-wait special-circumstance finding. Dalton

committed murder in the exact way contemplated by the lying-in-wait special circumstance statute: she bided her time and concealed her ultimate murderous objective until the time was right, then she attacked her victim from a place of advantage and surprise. (*People v. Stevens* (2007) 41 Cal.4th 182, 201-202 ["The factors of concealing murderous intent, and striking from a position of advantage and surprise, 'are the hallmark of a murder by lying in wait.'"].)

C. Even Assuming the Lying-in-Wait Special Circumstance Was Unsupported by Substantial Evidence, Dalton Would Not Be Entitled to Reversal of the Death Judgment in Light of the Torture-Murder Special Circumstance Finding

Even assuming insufficient evidence supported the lying-in-wait special-circumstance finding, Dalton would not be entitled to a reversal of her death sentence because of the torture-murder special circumstance finding.

The invalidation of a special circumstance does not require reversal of the judgment of death if another valid special circumstance finding remains. (*Hajek*, *supra*, 58 Cal.4th at p. 1186 [invalidity of the lying-in-wait special circumstance did not warrant reversal of death sentence because substantial evidence supported torture-murder special circumstance].) Even where evidence is insufficient to establish lying in wait, the jury may still have appropriately considered that same evidence in finding another special valid circumstance true. (*Ibid*., relying on *Brown v. Sanders* (2006) 546 U.S. 212.) There is no constitutional violation in the sentencing process where the jury considers an invalid special circumstance if the jury properly considered and found another special circumstance. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 224.)

Since the jury properly found the torture special circumstance true, and in doing so appropriately considered the same evidence that was before the jury in support of the lying-in-wait special-circumstance allegation, then Dalton would not be entitled to reversal of her death sentence even if the lying-in-wait special circumstance was unsupported by the evidence. As argued in more detail in the Respondent's Brief (RB 72-75), May suffered a number of nonlethal wounds before she was stabbed to death: she was injected with battery acid, shocked with electric wiring, hit on the head with a cast iron frying pan, and stabbed with a screwdriver all while she was tied up and helpless. (RB 74.) The jury was also presented with evidence of sadistic intent: Dalton subsequently told someone that she killed May because May was a rat and deserved to die (33 RT 3209-3210), she excitedly bragged to someone years later that she shot up a woman with battery acid and burned her body (33 RT 3255), and she once become angry with TK for taking credit for the murder (33 RT 3211-3212). The fact that May suffered a slow death combined with duplicative wounds, nonlethal wounds, and evidence of sadistic intent all supported the torture-murder special circumstance. (*Hajek, supra*, 58 Cal.4th at pp. 1187-1192.)

Thus, even if the lying-in-wait special-circumstance finding were found to be unsupported by substantial evidence, Dalton would not be entitled to the reversal of her death sentence because the jury properly considered the same evidence that was before it to prove the lying-in-wait special circumstance in finding true the torture-murder special circumstance.

III. THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER

Dalton claims the prosecutor committed misconduct during closing arguments when he misstated the burden of proof in various ways and

misstated the presumption of innocence. (Supp. AOB 41-68.)[4] Dalton forfeited these arguments by failing to make an objection below. In any event, the prosecutor did not commit error because there is no reasonable likelihood that the jury understood or applied the challenged statements in an improper or erroneous manner in light of the context of the statements themselves and the trial court's instructions. Even assuming error, Dalton was not prejudiced.

A prosecutorial error does not violate due process under the federal Constitution, unless it is so egregious that it infects the entire trial with fundamental unfairness. (*Blacksher, supra*, 52 Cal.4th at p. 828, fn. 35.) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

A reviewing court does not reverse a defendant's conviction because of prosecutorial error unless it is reasonably probable the result would have been more favorable to the defendant in the absence of the error. (*Blacksher, supra*, 52 Cal.4th at p. 828, fn. 35.)

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[4] Because there is no evidence that the prosecutor intentionally or knowingly committed misconduct, appellant's claim should be characterized as one of prosecutorial "error" rather than "misconduct." (ABA House of Delegates, Resolution 100B (August 9-10, 2010) [adopting resolution urging appellate courts to distinguish between prosecutorial "error" and "misconduct"]; see *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [noting prosecutorial transgression is more aptly described as "error" than as "misconduct"], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

A. Dalton Forfeited Her Claims That the Prosecutor Committed Misconduct During Rebuttal Argument by Failing to Object and Request an Admonition

Dalton's claim of prosecutorial error during rebuttal closing argument is not cognizable on appeal because she failed to make timely objections and request admonitions below.

"In order to preserve a claim of [prosecutorial] misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." (*People v. Thompson* (2010) 49 Cal.4th 79, 120-121, citations & internal quotation marks omitted.) A prosecutor's misstatements of law are generally curable by an admonition from the court, and thus an appellant forfeits the issue on appeal when he fails to object to such misstatements and obtain an admonition from the court. (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*).) Counsel's silence will be excused only if an objection would have been futile, or if an admonition would not have cured the harm caused by the prosecutor's statement. (*Id*. at p. 663.)

Recognizing that her failure to object and/or request an admonition generally results in forfeiture, Dalton suggests that this court should make an exception to the objection and admonition requirements. (Supp. AOB 62-63.) However, she makes no argument why such exception is warranted in this case, or why any objection would be futile or would not have cured any harm caused by the prosecutor's statement. Accordingly, this court should find that Dalton forfeited her claims of prosecutorial misconduct.

B. The Prosecutor Did Not Commit Error When He Analogized the Reasonable Doubt Standard to Doubt Imparted by a Pestering Spouse, or Used a Thermometer to Explain Different Burdens of Proof, or Encouraged Jurors to Reasonably Interpret the Evidence

In the first of Dalton's two claims of prosecutorial error during rebuttal argument, she contends that the prosecutor misstated the burden of proof in three ways. (Supp. AOB 45-51.) The prosecutor did not misstate the burden of proof in closing argument.

First, in rebuttal, the prosecutor cautioned the jury that the attorney's arguments were not evidence and to not let the attorneys manipulate the jury's determination of whether the case was proven beyond a reasonable doubt. (39 RT 3857.) He then gave the jury an example of an unreasonable doubt: he asked the jury to imagine that they were married or living with someone and it was their job to turn off the lights before going to bed. "You go over and you lock the door, turn the TV off. You switch the lights out. You do it that way every night, because that's your job and you do it. [] You climb in bed and your wife says, 'Did you turn that light off? …And now you're a big dummy. You never turn it off, you big goof ball. You forgot your socks the other day. You probably didn't turn it out.'" (39 RT 3857.) "And all of a sudden, she starts creating a reasonable doubt in your mind, or that doubt—or it's not reasonable, because when you went to bed you knew you turned it out. Don't let me create that doubt; don't let [defense counsel] create that doubt." (39 RT 3857-3858.) The prosecutor continued, "The guy goes downstairs and, sure enough, the lights were off and the doors were locked. You knew what you had done. You did it right. You did it conscientiously, just like you'll do in this case." (39 RT 3858.)

Dalton claims these statements oversimplified and trivialized the deliberative process in a way similar to *Centeno*. (Supp. AOB 46-47.) In *Centeno*, the prosecutor made a rebuttal argument focusing on the reasonable doubt standard. (*Centeno*, *supra*, 60 Cal.4th at p. 664.) She displayed a diagram showing the geographical outline of California, and used the diagram to characterize the issue in a hypothetical trial asking the jurors, "[W]hat state is this?" (*Ibid*.) She then laid out hypothetical "testimony" given by witnesses that contained inconsistencies, omissions, and inaccuracies, but urged that, even had the jurors heard such evidence in the hypothetical trial, they would have no reasonable doubt that the state was California. (*Ibid*.) The *Centeno* court pointed out that the use of an iconic image like the shape of California, unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt because the image draws on the jurors' own knowledge rather than evidence presented at trial. (*Id*. at p. 669.) Additionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the jurors to guess or jump to a conclusion. (*Ibid*.) The prosecutor had begun with the assumption that her outline was a state, which was not supported by evidence. It invited the jury to jump to a conclusion before the prosecutor even presented any hypothesized evidence. (*Id*. at p. 670.) The hypothetical itself was misleading because it failed to accurately reflect the evidence in the case. (*Ibid*.) While noting that not all visual aids are suspect, the *Centeno* court held that the prosecutor's hypothetical using the state, along with an additional argument that the jury could find the defendant guilty based on a reasonable account of the evidence, likely misled the jury about the applicable standard of proof and how the jury should approach its task. (*Id*. at p. 674.)

But the prosecutor's argument in this case did not imply that the jury's task was "less rigorous than the law requires" by "relating it to a

more common experience." (Supp. AOB 47, quoting *Centeno, supra,* 60 Cal.4th at p. 671.) The prosecutor did not turn the deliberative process into a game, utilize any information that was inaccurate or incomplete, or encourage jurors to jump to conclusions about evidence. Rather, he was simply asking the jurors to be confident in their ability to follow the law, be confident in their decision once they evaluated the evidence, and be confident in their ability to decide whether they had any reasonable doubts about Dalton's guilt. The prosecutor was cautioning the jury to do its job methodically, and once it made its decision, to trust that abiding conviction absent a genuine and reasonable doubt. The prosecutor's analogy about which Dalton is complaining about differs significantly from the circumstances in *Centeno*. Unlike the hypothetical in *Centeno*, in which the prosecutor was addressing how the jury should decide conflicting evidence in a complex case, the prosecutor's argument here was simply cautioning the jury not to lack confidence in their assessment of what the evidence shows.

Second, Dalton claims the prosecutor improperly used a thermometer graphic to dilute the burden of proof. (Supp. AOB 50.) To the contrary, the prosecutor's use of this diagram did not misstate the law or risk confusing the jurors about the burden of proof.

It is improper for the prosecutor to misstate the law generally, and in particular, to attempt to lower the burden of proof. (*People v. Hill*, *supra*, 17 Cal.4th at p. 829.) To establish prosecutorial error, there must be a reasonable likelihood that the jury understood or applied the challenged statements in an improper or erroneous manner "in the context of the whole argument and the instructions." (*Centeno*, *supra*, 60 Cal.4th at p. 667.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*Ibid*., internal citations omitted.) The reviewing

court "presume[s] that the jury relied on the instructions, not the arguments, in convicting [appellant]." (*People v. Morales*, *supra*, 25 Cal.4th at p. 47; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 139 ["[W]e and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury.' [Citations.]"].) Jurors are presumed to be intelligent and capable of understanding instructions and applying them to the facts of the case. (*People v. Lewis* (2001) 26 Cal.4th 334, 390 (*Lewis*).) If the challenged comments, viewed in context, "would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable." (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

The prosecutor here used a drawing of a thermometer to explain the different burdens of proof; he moved up the thermometer explaining that preponderance of the evidence was "not enough in a criminal case." (39 RT 3855-3856.) He continued, explaining that clear and convincing evidence was still not enough to convict. He moved up the thermometer and reached proof beyond a reasonable doubt, explaining this was the standard that the jury must use. The prosecutor then moved up the scale again, telling the jury that the law does not require proof beyond all possible doubt to reach a criminal conviction. (39 RT 3856.) All of these statements were correct statements of law. He observed that some jurors were confused about the burden of proof during voir dire and incorrectly believed the burden was "beyond a shadow of a doubt." (39 RT 3855.) The prosecutor was simply educating the jury on burdens of proof to make sure it applied the correct one.

Dalton likens the prosecutor's argument to a chart used in *People v. Medina* (1995) 11 Cal.4th 694, 745 (*Medina*), which this court cautioned prosecutors from using. (Supp. AOB 50-51) In *Medina*, the concern arose over the use of a diagram suggesting that the jury could convict even if it

was not 100 percent certain of the defendant's guilt, because the applicable burden of proof was not that rigorous. (*Medina*, *supra*, at p. 745.) Such description of the burden of proof may be problematic because it may insinuate that any standard less than "beyond a reasonable doubt" is *also* sufficient. But here, the prosecutor explained each burden of proof in a sequential fashion, and at no point did the prosecutor misstate the law or state that his burden was easy to meet. As the *Centeno* court took care to note, "not all visual aids are suspect." (*Centeno, supra*, at p. 660.) The visual aid here was not suspect.

Third, Dalton complains the prosecutor—noting the case is built on circumstantial evidence and telling the jury it must ask, "What's the reasonable interpretation? That's all we're looking for. What's reasonable? What isn't?" (39 RT 3858)—effectively told the jury that the People's burden would be satisfied so long as the prosecution's interpretation was reasonable. (Supp. AOB 49.) But the prosecutor did no such thing. The prosecutor was appropriately discussing the standard for evaluating conflicting evidence in applying the beyond-a-reasonable-doubt standard. There was also no reasonable likelihood the jury understood the prosecutor's rebuttal in an improper manner, particularly given its brevity, and the fact that burden of proof was correctly relayed at various times by both counsel during their argument and the trial court correctly instructed the jury. And even assuming error, it is reasonably probable the result would have been more favorable to the defendant in the absence of the error. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133 (*Barnett*).)

The prosecutor's challenged argument during rebuttal is analogous to argument found proper by this court in *People v. Romero* (2008) 44 Cal.4th 386, 416 (*Romero*). In *Romero*, the court held that the prosecutor did not improperly lessen the burden of proof by asking jurors to "decide what is

reasonable to believe versus unreasonable to believe" and to "accept the reasonable and reject the unreasonable." The court explained that this explanation did not misstate the burden of proof because the People "must prove the case beyond a reasonable doubt, not beyond an unreasonable doubt." (*Ibid*.)

Just like in *Romero*, here, there was no error because the prosecutor did not attempt to impermissibly lower the burden of proof; rather, he was attempting to articulate the standard for evaluating conflicting evidence in applying the beyond-a-reasonable-doubt standard. In rebuttal, the prosecutor was asking the jury to decide what was reasonable and unreasonable when evaluating conflicting evidence. Consistent with the instruction that court gave the jury (39 RT 3871 [if "one interpretation of evidence appears to you to be reasonable the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable"]), the prosecutor's argument was about the evidence in the context of what was reasonable and unreasonable.

In claiming prosecutorial error, Dalton takes the prosecutor's statement out of context. The prosecutor commented on the reasonableness of the prosecutor's arguments and the believability of the People's witnesses—he did not misstate the burden of proof. The prosecutor did not suggest to the jury that a "reasonable" account of the evidence satisfied the People's burden of proof beyond a reasonable doubt; and the prosecutor directed the jury to the court's instruction on reasonable doubt. (39 RT 3855.) Just as in *Romero*, the prosecutor was emphasizing that it "must prove the case beyond a reasonable doubt, not beyond an unreasonable doubt." (*Romero*, *supra*, 44 Cal.4th at p. 416.) Additionally, the trial court here instructed the jury, in part, that if "one interpretations of the evidence ... appears to you to be reasonable, the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the

unreasonable." (39 RT 3898.) Looking at the prosecutor's statements themselves, and the statements in context of the arguments and the instructions given, there is no reasonable likelihood that the jury understood or applied the challenged statements in an improper or erroneous manner. (*Centeno, supra*, 60 Cal.4th at p. 667.)

Dalton's reliance on *Centeno* is misplaced. In *Centeno*, the prosecutor repeatedly told the jury in closing argument that if it rejected the defendant's arguments as unreasonable, then it should conclude that the defendant was "good for it." (*Centeno*, *supra*, at pp. 671-672.) This court held that the prosecutor misstated the burden of proof when she repeatedly remarked that the jury could "*find the defendant guilty*" based on a "reasonable" account of the evidence. (*Id*. at p. 673.) The court distinguished the facts in *Centeno* of the case from the situation in *Romero*, *supra*, 44 Cal.4th 386, where the prosecutor properly urged the jury to accept reasonable inferences and reject unreasonable inferences. (*Id.* at pp. 672-673.) In contrast to *Centeno*, the prosecutor here never told the jury that it could find Dalton guilty simply based on a "reasonable" account of the evidence or suggested that the jury must find Dalton guilty if it found her argument or evidence unreasonable. Here, just like in *Romero*, the prosecutor simply stated that in applying the standard of proof beyond a reasonable doubt, the jurors must use their common sense and life experience to determine what was reasonable to conclude.

Dalton's case is akin to *People v. Cortez* (2016) 63 Cal.4th 101 (*Cortez*), in which this court found no prosecutorial error concerning the burden of proof. In *Cortez*, this court found no error where the prosecutor stated in rebuttal argument that proof beyond a reasonable doubt is when "you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.'" (*Id*. at p. 130.) This court held that the prosecutor's statement was a correct

statement of law, and it was, at best, an incomplete definition of the beyond-a-reasonable-doubt standard. (*Id*. at p. 131.) Unlike the prosecutor in *Cortez* who specifically defined reasonable doubt, the prosecutor here never specifically defined reasonable doubt as consisting of the statement Dalton contends was misconduct. But even if the prosecutor did define reasonable doubt as such, under *Cortez*, that statement would still not constitute error because it is a correct statement of law and, at best, an incomplete definition of reasonable doubt. If there was no error in *Cortez*, surely there was no error here.

Moreover, there is no reasonable likelihood that the jury understood or applied the challenged statements in an improper or erroneous manner in light of the court's instructions and the arguments of counsel. Defense counsel correctly defined reasonable doubt for the jury. (39 RT 3802, 3803.) The trial court correctly instructed the jury on reasonable doubt. (39 RT 3879.) Furthermore, the jury was instructed to follow the law when the court explained, "If anything concerning the law said by the attorneys in their arguments or any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (39 RT 3867-3868.) The court also instructed that "statements made by the attorneys during the trial are not evidence." (39 RT 3868.) As discussed above, jurors are presumed to follow instructions. (*Lewis, supra*, 26 Cal.4th at p. 390.)

However, even assuming the prosecutor misstated the law in argument, Dalton was not prejudiced. First, as discussed above, the court's instructions to the jury rendered harmless any misstatement by the prosecutor. (*Medina, supra*, 11 Cal.4th at p. 745 [any error in misstating the burden of proof was harmless because the judge admonished the jury to follow the court's instructions].) The jury is presumed to follow the court's instructions. (*Lewis, supra*, 26 Cal.4th at p. 390.) Furthermore, any error

was harmless because this was not a close case. (See *People v. Mendoza* (2007) 42 Cal.4th 686, 704 [prosecutorial error in requesting jury to imagine the victims' fear was not prejudicial in light of overwhelming evidence of defendant's guilt].) Here, there was strong evidence of Dalton's guilt, as discussed *supra* in Argument I. Accordingly, any assumed error was harmless because it is not reasonably probable the result would have been more favorable to appellant in the absence of the assumed error. (*Barnett, supra*, 17 Cal.4th at p. 1133.) Nor was the assumed error prejudicial under the federal standard, since it was not so egregious that it infected the entire trial with fundamental unfairness. (*People v. Jablonski* (2006) 37 Cal.4th 774, 835.)

C. The Prosecutor Did Not Commit Error in Arguing the Presumption of Innocence Had Been Overcome

Similarly unavailing is Dalton's claim that the prosecutor committed error when he stated that Dalton was no longer protected by the presumption of innocence because he met his burden of proof. (Supp. AOB 51-52.)

The prosecutor told the jury in rebuttal that Dalton had the presumption of innocence at the start of the case, but "now that the evidence is here ... it is gone. The evidence shattered that presumption of innocence." (39 RT 3854.) He then reiterated that he had the burden of proof—not the defense. (39 RT 3854.)

The prosecutor was simply arguing that based on the weight of the evidence of Dalton's guilt, the People rebutted the presumption of innocence and proved Dalton's guilt beyond a reasonable doubt. The prosecutor's comment here was similar to the prosecutorial argument in *People v. Booker* (2011) 51 Cal.4th 141 (*Booker*), which this court held did not constitute misconduct. In that case, the prosecutor told the jury:

"'I had the burden of proof when this trial started to prove the defendant guilty beyond a reasonable doubt, and that is still my burden....' [¶] 'The defendant was presumed innocent until the contrary was shown. That presumption should have left many days ago. He doesn't stay presumed innocent.'" (*Id*. at p. 183.) This court reasoned that the prosecutor "simply argued the jury should return a verdict in his favor based on the state of the evidence presented." (*Id*. at p. 185.) Similarly, here, the prosecutor was simply commenting that the jury should return a verdict of guilt based on the weight of the evidence.

Dalton relies on *People v. Cowan* (2017) 8 Cal.App.5th 1152 (*Cowan*) (Supp. AOB 52), where the court of appeal concluded the prosecutor unfairly shifted the burden of proof to the defendant when the prosecutor told the jury that the presumption of innocence is in place "only when the charges are read" and that the "presumption is gone" thereafter. (*Cowan*, *supra*, at p. 1159.) *Cowan* is distinguishable because here, the prosecutor did not misstate the law. And, in contrast to *Cowan*, and just as in *Booker*, the prosecutor in this case followed up his statement about the presumption of innocence by assuring the jury that he had the burden of proof—not the defense. (39 RT 3854.)

In any event, even assuming the prosecutor committed misconduct, Dalton was not prejudiced. As discussed above, viewing the prosecutor's statements in the context of his entire argument, the jury was properly informed about the prosecutor's burden and the presumption of innocence.

D. Defense Counsel Did Not Provide Ineffective Assistance by Failing to Object to the Alleged Instances of Prosecutorial Misconduct by Forgoing Interposing Meritless Objections

Alternatively, Dalton argues that her trial counsel provided ineffective assistance when he failed to object to both alleged instances of

prosecutorial misconduct. (Supp. AOB 63-67.) Defense counsel did not provide ineffective assistance for failing to object because such objections would have been meritless.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's representation was deficient, meaning the representation failed to meet an objective standard of professional reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) A defendant must also show that he or she was prejudiced by counsel's deficient representation, i.e., that absent counsel's deficiencies, there is a reasonable probability the result would have been more favorable to the defendant. (*Ibid*.)

There is a strong presumption that counsel's conduct falls within the wide range of professional reasonableness, and great deference should be given to counsel's tactical decisions. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 688.) On appeal, a conviction should not be reversed for ineffective assistance of counsel unless the record discloses there was no rational tactical purpose for counsel's act or omission. (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

As set forth above, the prosecutor committed no error. Because there was no error, it necessarily follows that Dalton's trial counsel did not provide ineffective assistance by failing to object. (See *People v. Thomas* (1992) 2 Cal.4th 489, 531 [failure to make meritless objection does not constitute ineffective assistance of counsel]; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 616 ["[b]ecause there was no sound legal basis for objections, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance"].)

Since it is not reasonably probable the jury would have reached a result more favorable to Dalton had defense counsel objected to the two

alleged instances of prosecutorial error, Dalton's claim of ineffective assistance of counsel also fails due to her failure to demonstrate prejudice from the failure to object. (*People v. Ochoa (*1998) 19 Cal.4th 353, 414.)

IV. DALTON'S CONSPIRACY CONVICTION WAS NOT TIME-BARRED BECAUSE PROSECUTION FOR CONSPIRACY TO COMMIT MURDER MAY BE COMMENCED AT ANY TIME

Dalton argues that her conspiracy to commit murder conviction was time-barred by the statute of limitations (Supp. AOB 69-79), but this argument is directly contradicted by the controlling relevant statutes, which clearly establish that prosecution for conspiracy to commit murder may be commenced at any time.

In 1976, this court applied a three-year statute of limitations to the crime of conspiracy. (*People v. Zamora* (1976) 18 Cal.3d 538, 548 (*Zamora*).) However, in 1984, The Legislature amended Penal Code section 799 to state that "[p]rosecution for an offense punishable by death or by imprisonment in the state prison for life or for life without the possibility of parole, or for the embezzlement of public money, may be commenced at any time." (Pen. Code, § 799.) Conspiracy to commit murder is an offense punishable by death or life in prison. (Pen. Code, § 182 [punishment for conspiracy is same as target offense of murder]; Pen. Code, § 190 [punishment for murder in the first degree is death or life in prison].) Accordingly, there is no statute of limitations applicable to the crime of conspiracy to commit murder in California. (Pen. Code, § 805 ["For the purpose of determining the applicable limitation of time pursuant to this chapter: (a) An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed."]; See *People v. Sconce* (1991) 228 Cal.App.3d 693, 701, fn. 3 [recognizing there is no statute of limitations applicable to crime of conspiracy to commit murder].)

Dalton's reliance on *Zamora*, *supra*, 18 Cal.3d 538, is incorrect because *Zamora* predated the legislative amendments to the Penal Code, as stated above. Dalton also relies on *People v. Milstein* (2012) 211 Cal.App.4th 1158 (*Milstein*), in arguing that the statute of limitations for conspiracy is three years, but that case is not persuasive. *Milstein* addressed the specific crime of conspiracy to defraud by false pretenses (Pen. Code, § 182, subd. (a)(4)) and held that the relevant statute of limitations for conspiracy is distinct and separate from the limitations period for the underlying offense. (*Milstein*, *supra*, at p. 1167.) But *Milstein* wholly failed to take into account Penal Code section 805, which states how to determine the applicable limitation of time for an offense. Section 805 clearly states, "For the purpose of determining the applicable limitation of time pursuant to this chapter: ¶ (a) An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed." *Milstein* is unpersuasive in light of the plain language of section 805.

Indeed, the language of Penal Code sections 805, 799, 182, and 190 are clear and unambiguous, thus the inquiry stops there. (*People v. Hendrix* (1997) 16 Cal.4th 508, 512 ["When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it."].) Accordingly, Dalton's conspiracy conviction was not time-barred because there is no statute of limitation for conspiracy to commit murder.

V. THE UNITED STATES CONSTITUTION DOES NOT MANDATE THAT CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS REQUIRE THE JURY'S WEIGHING DETERMINATION BE FOUND BEYOND A REASONABLE DOUBT

Dalton contends that California's death penalty statute violates the Sixth Amendment because it does not require that the jury find that the

aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. (Supp. AOB 80-95.) Dalton acknowledges that the court has already held that the weighing determination is not a finding of fact and therefore falls outside the scope of *Ring* and *Apprendi*.[5] (See *People v. Merriman* (2014) 60 Cal.4th 1, 106 (*Merriman*); *People v. Griffin* (2004) 33 Cal.4th 536, 595 (*Griffin*); *People v. Prieto* (2003) 30 Cal.4th 226, 262-263.) However, Dalton urges the court to reconsider its rulings in light of *Hurst v. Florida* (2016) 577 U.S. ___ [136 S.Ct. 616] (*Hurst*), a United States Supreme Court decision invalidating Florida's capital sentencing scheme.

This court has already determined that *Hurst* does not alter its prior rulings regarding the constitutionality of California's death penalty statute. (*People v. Henriquez* (2017) 4 Cal.5th 1, 45; *People v. Jones* (2017) 3 Cal.5th 583, 619; *Rangel*, *supra*, 62 Cal.4th at p. 1235.) As explained by the court, the "California sentencing scheme is materially different from that in Florida." (*Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16.)[6] Moreover, *Hurst* does not address the standard of proof required for determining whether aggravating factors outweigh mitigating factors.

The Sixth Amendment does not require that the jury determine beyond a reasonable doubt that the aggravating factors outweigh those in mitigation because "[d]etermining the balance of evidence of aggravation and mitigation and the appropriate penalty do not entail the finding of facts

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[5] *Ring v. Arizona* (2002) 536 U.S. 584, 608 [aggravating circumstance necessary for the imposition of death penalty must be found by a jury]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 [holding that any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt].

[6] Under Florida's capital sentencing scheme, the trial court had the authority to impose a death sentence if the jury rendered an "advisory sentence" of death and the court found sufficient aggravating circumstances existed. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-622.)

but rather, 'a single fundamentally normative assessment [citations] that is outside the scope of *Ring* and *Apprendi*.'" (*Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *Griffin*, *supra*, 33 Cal.4th at p. 595.) "[S]entencing is an inherently moral and normative function, and not a factual one amenable to burden of proof calculations." (*People v. Winbush* (2017) 2 Cal.5th 402, 489.)

The United States Supreme Court acknowledged the moral and normative nature of the weighing determination in *Kansas v. Carr* (2016) 577 U.S. ___ [136 S.Ct. 633, 642] (*Carr*). In *Carr*, the Court expressed doubt that it was even possible to apply a standard of proof to the mitigating-factor determination or the weighing determination:

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it.
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> (*Ibid*.)[7]

[7] In addition to *Hurst*, Dalton relies on a few state supreme court decisions holding that the weighing determination is a finding of fact that falls within the *Apprendi/Ring* rule. (Supp. AOB 89, 93-95.) However, these cases are contrary to *Carr*. In addition, the sentencing schemes at issue in those cases were much different than California's. (*Rauf v. State* (Del. 2016) 145 A.3d 430, 457 [under Delaware law, jury's choice between a life and death sentence was completely advisory, and the judge could impose a sentence of death as long as the jury had unanimously found the existence of a single aggravating factor]; *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 261-262 [under Missouri statute, if jurors could not agree on punishment, a judge could impose the death penalty]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 259-262 [under Colorado law, capital sentencing determinations were made by a three-judge panel after the jury's verdicts on first degree murder].)

Hurst has no effect on this court's repeated rulings that the federal Constitution does not require the jury to find beyond a reasonable doubt

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that the aggravating factors outweigh the factors in mitigation. Dalton's death sentence is valid and should be affirmed.

Dated: April 16, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 11,166 words.

Dated: April 16, 2018

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STATE OF CALIFORNIA
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PROOF OF SERVICE

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Date

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