IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **FRANKLIN LYNCH,** Defendant and Appellant.	**CAPITAL CASE** S026408

Alameda County Superior Court No. H-10662
The Honorable Philip V. Sarkisian, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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XXX

THE TRIAL COURT DID NOT ERROR BY PERMITTING EVIDENCE REGARDING THE INCIDENT IN LAVINIA HARVEY'S BACKYARD

In a supplemental brief, appellant argues the trial court erred in admitting evidence of an uncharged incident at the residence of 86-year-old Hayward resident Lavinia Harvey. (Supp. AOB 1-22.) Over defense objection that admission of the evidence was precluded under Evidence Code section 1101, the trial court permitted Harvey to testify that she startled a Black man she saw in the backyard or her corner-lot home on the afternoon of August 12, 1987, one day before the fatal attack on Anna Constantin. (24 RT 3032-3034, 3047-3049, 3052-3053.) Harvey confronted the man while holding a two-foot long piece of pipe. (24 RT 3052-3053.) The man claimed to be looking for a "kid" in Mrs. Harvey's backyard. (24 RT 3054.) After a brief time, Mrs. Harvey ordered the man out of her yard and watched him walk away until he disappeared from her view. (24 RT 3057-3058.) Although Mrs. Harvey was unable to positively identify appellant from a six-photo show-up, she did identify him from a different single photo shown to her and later identified him at the live lineup and

again at trial as the man she had seen in her backyard. (24 RT 3054-3055, 3062-3066.)

Appellant contends that the trial court committed prejudicial error by "allowing the introduction of evidence of appellant's unrelated, lawful conduct at the home of Lavinia Harvey." (Supp. AOB 2.) He maintains the evidence should have been excluded under Evidence Code section 1101 because there were insufficient common marks between this incident and the charged crimes to permit an inference of identity. (Supp. AOB 2-13.) But appellant utterly overlooks that—irrespective whether Mrs. Harvey's testimony was relevant to prove identity—it was certainly admissible to prove that appellant had the *opportunity* to commit the charged crimes against Mrs. Constantin, Ruth Durham, and Bessie Herrick, which occurred within five days of Mrs. Harvey's encounter with appellant. Likewise, appellant overlooks that Mrs. Harvey's testimony was relevant to show appellant's *planning* and *preparation*. Apart from the fact that Mrs. Harvey directly confronted and spoke with appellant, her description of events was highly similar to that of witness Irma Casteel, who testified that she saw appellant walking on the next street over from Adeline Figuerido's street the day before Mrs. Figuerido was murdered. (29 RT 3798-3802, 3809-3810, 3812-3813.) As with Mrs. Harvey's testimony, Ms. Casteel's testimony was relevant at the very least to show opportunity, planning, and preparation. Appellant made no objection to Ms. Casteel's testimony at trial, nor does he challenge its relevance on appeal.

Mrs. Harvey's testimony placed appellant in the general community where Mrs. Constantin was murdered on August 13, where Mrs. Durham was attacked on August 15, and where Mrs. Herrick was attacked on August 17. According to the prosecutor, Mrs. Harvey's home was only three or four blocks away from Mrs. Durham's. (24 RT 3034.) In overruling appellant's objection to the evidence, the trial court focused on the proximity in time and location between

the Harvey incident and the charged crimes. (24 RT 3034.) Evidence that appellant was present in the area of the subsequent crimes close in time to their commission was unquestionably relevant to show that he had the opportunity to commit those crimes. (Evid. Code, § 1101, subd. (b) ["Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his disposition to commit such an act"]; see also *People v. Thomas* (1992) 2 Cal.4th 489, 520 [where it was unknown how killer came upon victims, evidence that defendant had previously played a game where he snuck up on unsuspecting persons was "certainly relevant to show opportunity"].)

Accordingly, it is unnecessary to analyze whether the evidence was also relevant to show identity. But, we have no doubt that the evidence of the Harvey incident was equally permissible for that purpose under Evidence Code section 1101. (See, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1317 [similarity in victims and proximity in time and place supported inference of identity]; *People v. Miller* (1990) 50 Cal.3d 954, 989 ["collective significance" of geographical proximity of crimes sharing multiple common general characteristics supported inference of identity].)

Appellant also argues that admission of the incident in Mrs. Harvey's backyard should have been excluded as more prejudicial than probative under Evidence Code section 352 (Supp. AOB 13-16) and as a violation of his federal constitutional right to due process (Supp. AOB 16-18). The only objection appellant made below was that the evidence "would be excludeable under 1101 of the Evidence Code." (24 RT 3032.) He has thus failed to preserve objection on the section 352 and due process grounds he belatedly raises on appeal. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 453 [objection on relevancy grounds

does not preserve claim of error under Evidence Code section 352]; *People v. Champion* (1995) 9 Cal.4th 879, 918 [failure to object at trial on Evidence Code section 352 or due process grounds to admission of other crimes evidence waives appellate review].)

Finally, appellant complains that the admission of Mrs. Harvey's testimony was prejudicial largely based on the entirely permissible inferences the prosecutor argued—without objection (32 RT 4194-4196)—the jury should draw from the incident. (Supp. AOB 18-21.)[1/] This is unavailing not only because, as we have shown, the evidence was correctly admitted, but also because it is inconceivable that admission of this testimony prejudiced appellant. Nine witnesses identified appellant, connecting him with every crime scene on the day of each crime, as we detailed at pages 18 through 21 of our Respondent's Brief. A tenth witness (Ms. Casteel) placed appellant in the vicinity of Mrs. Figuerido's home the day before she was murdered. And, appellant sold the Russian bracelet stolen from Mrs. Constantin's residence to a second-hand dealer in Oakland on the same afternoon as Mrs. Constantin was murdered. Mrs. Harvey's testimony did not describe any serious misconduct by

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1. Appellant assumes the trial court's delivery of CALJIC No. 2.50, regarding how the jury should consider "other crimes" evidence, was directed towards this incident. (Supp. AOB 3-4.) We disagree. The trial court did not identify any particular incident as falling within the ambit of CALJIC No. 2.50. There was other evidence admitted against appellant at trial that clearly showed uncharged criminal conduct—namely, appellant's admissions that he possessed stolen jewelry and furnished drugs to another. (29 RT 3850-3853, 3858-3859.) Even though the prosecutor—without objection—characterized the incident testified to by Mrs. Harvey as a trespass (32 RT 4193-4194), we tend to agree that it did not amount to any crime at all. But this did not make it any less admissible as evidence relevant to show opportunity, preparation, planning, and even identity. The prosecutor's reference to the incident as a "trespass" could not somehow transform the correct admission of that incident into error. Lastly, the inference of identity the prosecutor asked the jury to draw from the incident was both permissible and unchallenged at trial.

appellant, and appellant was able to argue that her identification was not particularly reliable. (28 RT 3698, 3701-3705.) Given this evidence, there is no reasonable probability that appellant would have received a more favorable outcome had Mrs. Harvey's testimony been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant's reliance on the "beyond a reasonable doubt" harmlessness standard for federal due process error (Supp. AOB 18; *Chapman v. California* (1967) 386 U.S. 18) is misplaced because, as we have shown, he did not object to the evidence on that ground at trial. But even if the *Chapman* standard were appropriate, any error in admitting Mrs. Harvey's testimony would have been harmless for the same reasons discussed above.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: May 5, 2008

Respectfully submitted,

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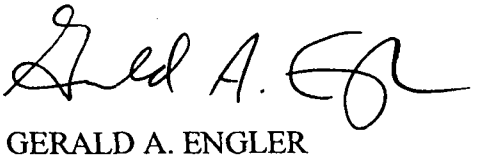

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 1309 words.

Dated: May 5, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Franklin Lynch***
Case No. **S026408**

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. 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 that same day in the ordinary course of business.

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RESPONDENT'S SUPPLEMENTAL BRIEF

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on May 5, 2008, at San Francisco, California.

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