No. B329873

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

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

v.

PAUL RUBEN FLORES,
Defendant and Appellant.

Monterey County Superior Court, Case No. 22CR003712
The Honorable Jennifer O'Keefe, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant killed Kristin Smart, who was a freshman classmate of his at Cal Poly San Luis Obispo, during the commission of a rape or attempted rape. Having previously displayed a romantic interest in Smart that was not reciprocated, he did so yet again at an off-campus party on May 24, 1996. That night, appellant made unwanted sexual advances on two other female students before returning to Smart. After appellant spent some time in Smart's presence, she became so heavily intoxicated from alcohol and/or Rohypnol ("roofie")[1] that she ended up on the ground in a semiconscious state. Although Timothy Davis and Cheryl Anderson had already started to help Smart get back to her dorm, appellant inserted himself into the group and then took over the role of helping Smart to walk after Davis turned toward his dorm. At that point, appellant repeatedly attempted to isolate Smart by stopping on two occasions to engage in some physical contact with her—once to rub her arms and the other to give her a hug—while encouraging Anderson to continue walking without them. When Anderson eventually separated from them to go to her dorm, she declined appellant's requests for a kiss and a hug. But Anderson secured a promise from appellant to get Smart safely back to her dorm, which was only about 400 feet away from appellant's dorm. Despite appellant's promise, Smart never made it back to her dorm, and she was never seen again.

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[1] Like the witnesses in this case, respondent will refer to Rohypnol by its slang term, roofie. Because the drug is a powerful sedative that produces a hypnotic effect, it is commonly referred to as a "date rape" drug.

An investigation showed that appellant killed Smart in his dorm room, that he buried her body under a deck outside his family home, and that he moved the body years later just after detectives completed a search of the inside of that home. Four dogs that had been trained in locating human remains separately searched appellant's dorm building about one month after Smart vanished, and each dog passed numerous rooms before alerting their respective handlers that someone had died in appellant's room. Two different dogs that had been trained in locating human remains separately searched the yard of appellant's family home before indicating that the targeted odor existed under the deck. Likewise, ground penetrating radar showed an anomaly under the deck that did not exist in the same size and depth elsewhere in the yard. At that point, an archaeologist excavated the area under the deck. The area had jumbled soil that suggested it had been dug by hand on two occasions, a size that was consistent with a human grave, darkly stained soil that tested positive for hemoglobin (which is found in the blood of humans), and fibers that were consistent with the red and black clothing Smart wore the night of her disappearance.

Appellant's words and conduct further showed that he killed Smart during the commission of a rape or attempted rape. Following Smart's disappearance, appellant gave conflicting explanations as to the source of a black eye that he obtained around the time of Smart's disappearance, he acted strangely whenever he was asked about Smart, and he kept his girlfriend away from the deck where Smart was very likely buried at the

time. More importantly, appellant admitted being responsible for Smart's death on two occasions. First, appellant told a girl that he had buried Smart because she was a "dick tease." Second, appellant failed to respond during a recorded telephone conversation when his mother suggested that he might not be able to "punch holes" in a podcaster's accusation that he was responsible for Smart's disappearance.

Finally, although uncharged in this case, appellant surreptitiously drugged and then raped two women, R.D. and S.D., who were incapable of resisting because they were either unconscious or semiconscious throughout the sexual attacks.[2] Combined with the other evidence, their testimony left no doubt that appellant killed Smart during a rape or attempted rape.

Convicted by a jury of first degree murder, appellant raises seven meritless claims. First, appellant's challenge to the trial court's refusal to discharge a sitting juror lacks merit because substantial evidence supports the court's finding that the juror could be fair and impartial. Second, appellant's challenge to the admissibility of the uncharged rapes lacks merit because they were admissible under Evidence Code section 1108, which applies to every criminal action in which a defendant is accused of a sexual offense. Third, appellant forfeited his meritless claim that a witness, who had previously been roofied, should have been precluded from opining that Smart acted as though she may have been roofied. Fourth, appellant's claim of prosecutorial

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[2] The trial record refers to each of the uncharged sexual assault victims by first name, using "Doe" as the last name.

misconduct lacks merit because the prosecutor did not ask the jury to draw any improper or unreasonable inference from a photograph that was admitted at trial. Fifth, appellant's challenge to the first degree murder finding lacks merit because the verdict is supported by substantial evidence. Sixth, appellant's claims of instructional error are forfeited and lack merit because appellant did not object when the court gave the standardized instruction for attempted crimes and because the court gave the standardized instruction on voluntary intoxication in the exact language that appellant proposed. Seventh, appellant's cumulative prejudice argument lacks merit because he fails to establish even one error and because he suffered no prejudice from any errors, whether considered individually or cumulatively.

STATEMENT OF THE CASE

The San Luis Obispo County District Attorney charged appellant with murder (Pen. Code, § 187, subd. (a))[3] with an allegation that the murder occurred during the commission or attempted commission of rape (§ 189, subd. (a)). (1CT 126-127; 10CT 2867-2869.) After appellant successfully moved for a change of venue, the case was transferred to Monterey County, where a jury found him guilty of first degree murder.[4] (22CT

[3] Unless otherwise specified, all further statutory references are to the Penal Code.

[4] Appellant's father, Ruben Flores (Ruben), was charged with being an accessory after the fact to the murder (§ 32). (1CT 126-127.) Although appellant and Ruben were tried together, they had separate juries. (1Aug.RT 38.) Ruben was acquitted. (34CT 10171.)

6368-6390; 32CT 9585; 47RT 13805.) The trial court sentenced appellant to state prison for an indeterminate term of 25 years to life. (49RT 14531.)

Appellant filed a notice of appeal. (35CT 10285.)

STATEMENT OF FACTS

A. Prosecution evidence

1. Appellant showed that he was romantically interested in Smart, but she had no interest in him

In the fall of 1995, both appellant and Smart began their freshman year in college at Cal Poly San Luis Obispo ("Cal Poly"). (2RT 311-312, 341; 13RT 3700-3701.) Appellant lived on the first floor of the Santa Lucia dorm, in room 128. (6RT 1578-1579; 8RT 2233-2236.) Although Smart was initially assigned to off-campus housing, she subsequently moved into the first floor of the Muir Hall dorm, room 120, with Crystal Calvin (now Teschendorf).[5] (2RT 341, 439; 6RT 1579-1580, 1587-1589; 14RT 4079.)

Smart became friends with a number of people who also lived in the Muir dorm. These friends included Vanessa Brinley (now Shields), Margarita Campos, and Steven Fleming. (3RT 685-687; 4RT 923-924; 6RT 1641-1642, 1661-1662.)

In early May of 1996, Brinley came to realize that appellant was romantically interested in Smart. At two separate parties,

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[5] Like appellant's opening brief, respondent refers to witnesses by the surnames that they had in college even if there had been a change by the time of the trial. Additionally, because two unrelated witnesses share the last name of Moon, this brief will refer to those two witnesses by their first name.

Brinley saw appellant stare at Smart in an intense and "creepy" manner. At the second party, Brinley was standing with Smart when appellant approached and made an awkward effort to speak with Smart. After Smart showed that she was not interested in appellant, he walked to the other side of the room. But shortly thereafter, Brinley noticed that appellant was "staring intently" at Smart. The "really focused" way that appellant stared at Smart left Brinley "feeling very unsettled, very uneasy." (3RT 688-692, 705-706.) Smart never showed any interest in appellant, and she expressly told Brinley that she had no interest in appellant following their interaction at the party. (3RT 693.) Smart viewed appellant as strange and creepy. (3RT 697.)

Campos also came to realize that appellant was romantically interested in Smart. On one occasion when she was with Smart at the campus grocery store, Campos saw appellant staring in their direction. (4RT 950.)

Likewise, Fleming saw signs that appellant was romantically interested in Smart. Although appellant did not live at Muir, he spent some time in Muir's common areas with no apparent reason for being there. (6RT 1664-1666, 1675-1676.) Fleming believed that appellant was following Smart and that it made Smart uncomfortable. She never showed any interest in appellant. (6RT 1664, 1667, 1672-1673, 1676.) On one occasion, Fleming saw appellant inside Smart's room. Smart's body language showed that she was not comfortable with appellant's presence. (6RT 1667-1669; 7RT 1892-1893.) Similarly, other

women at Cal Poly, including a tennis player named Hannah, told Fleming that appellant made them feel uncomfortable. (7RT 1813-1817.)

2. On the night Smart disappeared, appellant continued to show interest in her, and he was the last person seen with her prior to the disappearance

On Friday, May 24, 1996, appellant's roommate, Derrick Tse, drove to his family home in Oakland for that Memorial Day weekend. Prior to leaving, Tse told appellant that he would not return until Tuesday.[6] (8RT 2236-2238.)

On that same Friday, Smart was in a good mood as she made plans to spend the extended weekend on campus. (3RT 693-695.) Smart called her parents and left a voicemail in which she sounded excited. Smart said that she had some good news to share with them on Sunday, which was the day of the week that she regularly spoke with her family. (2RT 316, 331-332, 344-345, 411, 425-428, 435; 4RT 909-915.)

That evening, Smart and Campos spent time listening to music and talking in Smart's dorm room. They went out together, but went separate ways before 10 p.m. (4RT 927-929, 934.) At the time, Smart was wearing black vinyl shorts, a gray shirt, and red shoes. (4RT 937-938, 967-968.) She was "not under the influence at all." (4RT 967.)

Smart then went to a house party on Crandall Ave near the Cal Poly campus. (4RT 1007-1011.) At two points during the

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[6] Although Tse had no issues with appellant, he noted that appellant would become confrontational and verbally aggressive when he consumed alcohol. (8RT 2247-2248.)

party, appellant showed that he was interested in Smart. He did so by approaching people he saw with Smart and asking about her availability. (4RT 1007-1011; 7RT 1907-1908; 8RT 2110-2112.)

The first instance occurred after Smart spent some time talking with Ross Ketcham and Matthew Toomey. During the conversation, Ketcham noticed that appellant was eyeing Smart from across the room. (4RT 1012-1014.) When Smart had an opportunity to speak privately with Toomey, she asked whether Ketcham had a girlfriend. As soon as that conversation ended, appellant approached Toomey to ask about Smart. After expressing his belief that Smart was good looking, appellant asked whether Ketcham had a relationship with Smart. (7RT 1909-1913, 1924-1928.)

The second instance occurred following an interaction between Smart and Trevor Boelter. Smart introduced herself to Boelter, gave him a quick kiss and escorted him into a bathroom. (7RT 1920, 1952; 8RT 2149-2050, 2159-2160.) There, she expressed some romantic interest in Ketcham, who was one of Boelter's friends. (8RT 2108-2109.) As soon as Boelter left the bathroom, he was approached by appellant. Appellant asked Boelter what he did with Smart in the bathroom. (8RT 2110, 2120.) When Boelter said "nothing," appellant appeared to be relieved. (8RT 2110-2112.)

But appellant's romantic interest was not limited to Smart during the house party. He made unwanted advances on two females, Cheryl Anderson (now Manzer) and Kendra Koed.

With respect to Anderson, appellant put his arm around her. Because the contact was not consensual, Anderson walked away from appellant. (4RT 1038-1039, 1049.)

With respect to Koed, appellant acted more aggressively. When Koed started asking people for gum, appellant struck up a conversation with her. Moments later, appellant started kissing Koed without her consent. Koed pushed appellant away and informed him that she had only wanted gum. (3RT 726-730.) At that point, appellant said, "Okay." Because Koed still wanted gum and believed that he was going to retrieve it from a nearby car, she followed him out of the house. But appellant suddenly grabbed Koed's arms and attempted to kiss her for a second time. Koed pushed appellant away and walked back into the house. (3RT 730-731.)

Both Koed and Ketcham subsequently saw appellant with Smart at the party. Appellant was standing next to Smart with his arm around her as she sat on a washing machine. When Smart fell off the machine, appellant attempted to help her stand up. (3RT 731-736, 748-749; 4RT 1014-1015, 1022, 1026-1030.) Given Koed's prior interaction with appellant, she was uncomfortable with his behavior toward Smart. (3RT 736-737.) Although Koed did not know Smart, she walked Smart to the front patio and sat with her. Smart was very intoxicated. After a few minutes, Koed returned to the party. (3RT 737-741, 780.)

Upon leaving the party later that night, some people—Koed, Toomey, and Eric Wilkins—separately saw Smart lying on the ground in front of the house. She appeared to be under the

influence or "drunk" and "semiconscious." Although they offered to help, Smart declined the invitations. (3RT 740-741, 776-777, 784; 7RT 1913-1920, 1946; 8RT 2176-2177, 2193-2194.)

Shortly thereafter, at around 1:30 or 2:00 a.m., Anderson left the party with her friend, Timothy Davis. Upon seeing Smart, who was still lying on the ground, they helped her up so that Davis could walk both Anderson and Smart back to their dorms. (4RT 1039-1040, 1043; 8RT 2195-2196; 10RT 2737, 2741-2750.) Smart was very intoxicated. Her speech was slurred, and she needed help standing. (4RT 1040; 10RT 2745-2749, 2783, 2797, 2816.) Suddenly, appellant appeared and said that he would walk with the group back to the dorms. The four of them walked together with Davis initially providing physical support to Smart. But when Davis left the others to walk in the direction of his own residence, appellant took over the responsibility of helping Smart. (4RT 1043-1045; 10RT 2750-2751, 2755-2758, 2763, 2770, 2799-2806, 2809, 2814.)

Appellant helped Smart to walk for a short distance before he stopped and began rubbing her arms. Smart did not respond in any way. Appellant encouraged Anderson to continue walking without them. But Anderson declined the invitation because she did not want to walk by herself. (4RT 1045-1047.) The three of them resumed walking before appellant stopped for a second time. Appellant hugged Smart without receiving any response to the affectionate behavior. Although appellant again encouraged Anderson to go ahead without them, she declined to do so. (4RT 1047-1050.)

When they got close to Anderson's dorm, she asked appellant if he would get Smart back home safely. Appellant assured Anderson that he would do so. Appellant then asked Anderson for a kiss. She refused. Undeterred, appellant asked Anderson for a hug, but she refused that as well. After securing a second commitment from appellant to get Smart back to her room safely, Anderson walked home. (4RT 1054-1057, 1094.)

By that time, Calvin and one of her friends, Jana Schrock (now Lord), had already arrived at the dorm room that Calvin and Smart shared. Smart was not there. Calvin gathered her belongings and went to her boyfriend's dorm so that Schrock could sleep in Calvin's bed. (6RT 1594-1596; 14RT 3979-3980, 3988.)

At some point between 2:00 and 3:00 a.m., Schrock awoke to the sound of someone knocking on the window of the first-floor room. Schrock looked outside and saw that it was Ted Munley, the roommate of Calvin's boyfriend. At his invitation, Schrock left the dorm to smoke a cigarette. (14RT 3984, 3992.) Standing just outside the exterior door that was closest to Calvin's dorm room, Schrock smoked one cigarette and returned to the dorm less than 15 minutes later. Schrock went back to sleep in Calvin's bed, and she told Munley that he could sleep on the floor. Schrock awoke at 9:00 a.m. Smart was not there, and the undisturbed pile of clothes on Smart's bed suggested that she had not returned the prior night. (14RT 3985-3987.)

When Calvin returned to her room in the late morning, Schrock informed Calvin that she had not seen Smart. (6RT

1597; 14RT 3982-3983, 3987.) Moreover, the room looked identical to when Smart and Campos left it during the early evening hours the previous night. Additionally, the room contained Smart's everyday personal effects, like makeup and a hairbrush, that she would not have left behind if she had gone on a trip. (3RT 695-696; 4RT 942-946, 980-981; 6RT 1597-1599, 1632-1633.)

None of Smart's friends or family ever saw or heard from Smart again. (2RT 333, 335; 3RT 694; 4RT 915, 987; 8RT 2207.)

3. Appellant was seen with a black eye shortly after Smart went missing, and he acted strangely when asked by others about his eye or Smart's disappearance

On Sunday, May 26, 1996, appellant spent some time with his friend, Jeromy Moon ("Jeromy"), in Arroyo Grande. Appellant's parents had a family home in that town on White Court, which was about 13 miles away from the Cal Poly campus. (9RT 2459-2466; 13RT 3668; 14RT 4022; 17RT 4882-4885.) Upon noticing that appellant had a black eye, Jeromy asked about it. Appellant said that he "woke up with it." (10RT 2829-2832, 2849-2850.) The next day, appellant and Jeromy spent several hours together playing basketball. Appellant did not appear to get injured during the game. (10RT 2832.)

When appellant's roommate, Tse, returned from Oakland on Tuesday night, appellant did not initially tell him that he was the last person to see Smart. But Tse raised the issue with appellant after hearing other people talking about it. (8RT 2248, 2260.) When appellant acknowledged being the last person to see Smart, Tse jokingly told appellant that he had probably done something

with Smart. Appellant looked Tse in the eyes and replied, "She's at my house, eating lunch with my mom." Appellant's demeanor was "[p]retty serious" when he made the statement. (8RT 2245-2247, 2250, 2263.) Appellant never told Tse that he went to his family house during that Memorial Day weekend. (8RT 2248.)

The following day, appellant saw Mario Garcia, a Cal Poly student with whom he often played pool. Although appellant had a baseball hat pulled down unnaturally far, Garcia could see that he had a black eye. When Garcia asked what happened to his eye, appellant said that he had been pushed at a party. Appellant seemed nervous when he made the statement. (9RT 2410-2412, 2424.)

During the weekend of June 8, 1996, appellant attended a high school graduation party that was held in Arroyo Grande. At the party, Karen Hall, whose son was one of the graduating seniors, used a video camera to record conversations with her son's friends. (14RT 4014-4016.) With the camera recording, Hall approached appellant, said something about him attending Cal Poly and asked whether his name would be called in four years at a graduation ceremony. He said, "no way." At that point, someone interjected that appellant's name would be called for a court date. In response, Hall asked appellant whether he had information on the missing girl before asking, "What'd you do with her." Appellant said "nothin[g]" as he lowered his head and resumed eating. (35CT 10397; see 14RT 4016-4019.) Appellant never spoke to Hall again. (14RT 4019.)

4. Upon being interviewed by the police, appellant lied about his romantic interest in Smart, the amount of contact he had with her at the party, and the cause of his black eye

San Luis Obispo Police Officer Robert Cudworth interviewed appellant at the Cal Poly campus store during the afternoon of May 28, 1996. Appellant told the officer that had had not spoken with Smart at the party on Crandall before he helped her walk back to the dorms. Acknowledging that he was left alone with Smart after Davis and Anderson each went their own way home, appellant said that he subsequently separated from Smart. Appellant claimed that he had not been romantically interested in Smart. (12RT 3412-3418, 3426-3428.)

Detective Lawrence Kennedy interviewed appellant later that day and again on May 30. (10RT 2872-2873, 2883; 12RT 3418-3419.) During the first interview, appellant's breathing suggested that he was very nervous. When Detective Kennedy mentioned the nervous behavior, appellant said he thought the detective wanted to arrest him for a traffic violation, which previously resulted in a warrant before it was resolved. (10RT 2874-2878, 2890, 2903-2904.)

While interviewing appellant, Detective Kennedy noticed that appellant had a bruised right eye as well as some scratches or scrapes to one of his knees. (10RT 2874-2878, 2890, 2903-2904.) When he was asked about the black eye, appellant claimed that he got it playing basketball. (10RT 2878, 2892; 12RT 3337, 3419; see 35CT 10387-10391 [appellant claimed to have sustained the bruise and scratches during a basketball game with his friend, "Jeromy"].)

Appellant told Detective Kennedy that he did not really know Smart prior to the party on Crandall. Acknowledging that he helped her walk home from the party and that he gave her two hugs during the walk, appellant said that he did not have any other physical contact with Smart. Appellant claimed that he parted ways with Smart, whom he did not find attractive, near Sequoia Hall because they lived in different dorms. (10RT 2879-2882, 2888.) The distance from that location to Smart's dorm was less than 400 feet. (17RT 4895.) Asked how much he had to drink that night, appellant said too much and claimed that he threw up after the walk, "right when we got back, pretty well much." (35CT 10366.) Appellant said that he took a shower and went to bed around 5:00 a.m. Asked whether anyone saw him enter the residence, appellant said he did not see anyone upon entering the building but did see someone later in the bathroom. Appellant claimed that he could not remember the person he saw in the bathroom. (35CT 10370; 10RT 2880, 2885.) Although the detective stressed the importance of gathering information about that person, no such witness was ever located during the investigation. (10RT 2885-2887.)

On May 31, 1996, appellant was interviewed by two investigators from the San Luis Obispo County District Attorney. (13RT 3613-3614.) During this interview, appellant admitted talking to Smart during the party. Appellant said that Smart approached him and that she appeared to be intoxicated. The conversation was brief, and they had no further contact until he helped walk her back to the dorms. Appellant said that he had

no interest in Smart because he did not like the "type of girls" who flirt with too many guys. Appellant claimed that he spent the rest of Friday night in his dorm, hung around the campus on Saturday, and went to a movie with a friend named Javier on Saturday night. (13RT 3617-3626, 3674-3682.) Appellant said that his father, Ruben, picked him up on Sunday morning and brought him to the family home in Arroyo Grande. (13RT 3625.) Appellant said that he did not see Jeromy prior to Monday when they played a game of basketball in which appellant sustained an elbow to his eye, which resulted in the bruise. (13RT 3625-3626.) Asked what he thought had happened to Smart, appellant said he believed she had gone off with someone and was no longer alive. (13RT 3628.)

During a subsequent interview on June 19, 1996, appellant initially claimed that he did not know how he sustained the bruise to his eye. Appellant then gave two conflicting accounts about the bruise. Appellant first claimed that he sustained the bruise during a basketball game, but he then claimed that he sustained it by accidentally striking his face on the steering wheel of his truck while he was attempting to uninstall the radio. (13RT 3628-3634, 3636; 35CT 10349-10352.) Confronted with his prior claim that the injury occurred during a basketball game, appellant said that he told the "white lies" because the issue was not important. (13RT 3634; 35CT 10352-10353.) Denying Jeromy's assertion that he saw appellant's bruise on Saturday, appellant claimed that his father did not pick him up at Cal Poly and bring him to Arroyo Grande until Sunday and that he did not

see Jeromy until Monday. (35CT 10357-10358.) As to the party on Crandall, appellant denied ever seeing Smart on the floor inside the house, and appellant denied ever kissing any female during that party. (13RT 3634-3635.)

5. During the summer of 1996, appellant called Smart a "dick tease," and he admitted to having buried her underground

During the summer of 1996, Jennifer Hudson was a 17-year-old girl who lived in Huasna, a rural town that was just outside of Arroyo Grande. Her boyfriend at the time, Brent Moon ("Brent"), enjoyed skateboarding. (26RT 7552-7555.)

One day that summer, Hudson and Brent went to a house where Brent and other people made use of a skateboard ramp. Meanwhile, Hudson sat inside the house near appellant and a third person, who was known to Hudson only as "Red." (26RT 7556-7557, 7561, 7601-7602.) As they listened to the radio, Hudson heard a public outreach asking for any tips about the disappearance of Smart. (26RT 7555-7558.) As soon as the commercial break ended, appellant made a comment about Smart. He said that Smart was a "dick tease" and that he had been sick of waiting for her. Appellant also said that he had either "put her" or "buried her" at his place in Huasna, under a skateboard ramp. (26RT 7558, 7563, 7575-7582.) When appellant made the statement, his eyes looked vacant, and his demeanor was very cold, without any smile, smirk, or other suggestion that he was attempting to be humorous. Moreover, appellant did not appear to be intoxicated. (26RT 7558-7559.)

Because Hudson was "creeped out," she left the house minutes later. (26RT 7559.)

Two weeks later, Hudson saw appellant during a chance encounter when she drove a few acquaintances to a place where people liked to skateboard. Upon seeing Hudson, appellant approached and asked if she wanted to go "skinny dipping." Hudson vomited, shut her car door, and drove back home. Hudson did not call the police because she was afraid, especially because she was living on her own.[7] (26RT 7561-7563.)

In 2001 or 2002, Hudson told her best friend, Justin Goodwin, about appellant's statement concerning Smart. Hudson told Goodwin not to tell anyone because she was afraid of getting involved. (26RT 7563-7565; 28RT 8205-8209, 8260.) Goodwin did not provide the information to any law enforcement agency until 2019. (28RT 8210, 8214.) By that time, Hudson could no longer remember the name of the two acquaintances that had been with her during her second interaction with appellant. (26RT 7607.)

[7] Hudson testified that appellant had a green or blue Ford Ranger during her first encounter with him and a white pickup truck during the second. (26RT 7561-7562, 7601-7601.) DMV records showed that, during that time period, the Flores family owned a blue/green Ford Ranger and a white Nissan pickup truck. (32RT 9378-9381.)

6. Four dogs, which had been trained and certified in locating human remains, separately searched the Santa Lucia dorm and passed numerous rooms before alerting their respective handlers that someone had died in appellant's room

On June 29, 1996, three dog handlers, with expertise in using dogs to find locations where someone had died, responded to Cal Poly. The dogs that they brought were all reliable and certified in the detection of human remains. (15RT 4239-4260, 4274-4278, 4295, 4305-4306, 4315, 4335; 16RT 4569-4570, 4577-4587, 4594; 18RT 5109-5131, 5211-5212.)

Adela Morris brought her dog, Cholla, to the first floor of the Santa Lucia dorm and gave the dog a command to search for human remains. At the time of the search, Morris possessed no information that could have resulted in bias. (15RT 4278-4279; 16RT 4520-4521.) Morris removed Cholla's leash, which allowed the dog to freely go down a long hallway of rooms that all had closed doors. At one of the doors, Cholla provided an alert signal for human remains by coming back to Morris and jumping on her. (15RT 4284-4286; 16RT 4527.) The room was number 128. There was no police tape on the door or other indication that it was appellant's room. (15RT 4287, 4320-4321; see 8RT 2234-2236.) When the door was opened, Cholla repeatedly and enthusiastically gave an alert for the bed on the left, which was appellant's side of the room. Cholla showed absolutely no interest in the other side of the room. (15RT 4288-4290, 4296-4297, 4316-4317; see 8RT 2240.) Upon leaving appellant's dorm room, Morris had Cholla walk the entire hallway of all three floors of the Santa Lucia dorm. Cholla did not alert on any other

dorm room. (15RT 4303-4305.) Cholla also did not give any alert signal upon being taken to Smart's room at Muir Hall. (15RT 4316.)

Morris subsequently conducted a separate search of the Santa Lucia dorm with her second dog, Cirque. Like Cholla, Cirque alerted on the left side of appellant's dorm room, and the dog did not alert on any other dorm room throughout the three floors of the building. (15RT 4309-4310.)

Like Morris, Wayne Behrens took his dog, Sierra, to the Santa Lucia dorm to search for human remains. Behrens initially allowed Sierra to walk along the outside of the Santa Lucia building off leash. At some point, Sierra showed interest in a particular windowsill by placing her front paws on it. Because Behrens was not following the dog closely, he was unable to ascertain exactly which one of three windowsills Sierra had touched. (16RT 4580-4581, 4586-4587, 4622.) Upon entering the Santa Lucia building, the unleashed dog was allowed to search the first floor. Sierra passed numerous dorm rooms as well as a common area before showing a desire to get inside one room. (16RT 4588-4590, 4593.) The room was number 128. (16RT 4590.) After the door was opened, Sierra went to the bed on the left side of the room and gave the sign of a clear and unambiguous alert by jumping on Behrens. (16RT 4591.) The windowsill for Room 128 was one of the three windowsills that Sierra may have identified from outside the building. (16RT 4595.)

At that point, a detective collected appellant's mattress and box spring cover. (12RT 3444-3449; 14RT 3914, 3937-3948, 3971-3974; 30RT 8786-8787.) The box spring cover had a small brownish stain. When the stain was subjected to a presumptive test for blood, it produced a positive result. DNA testing of the stain showed that Smart and appellant could neither be included nor excluded as having contributed to the mixture. (30RT 8742-8745, 8787, 8792; 32RT 9315, 9324-9326, 9345, 9367.)

Later, Gail LaRoque took her dog, Torrey, to the Santa Lucia dorm to search for human remains. From a doorway on the first floor, LaRoque watched as Torrey went down the hallway. After passing a number of rooms, Torrey provided an alert on room 128. (18RT 5131, 5137-5139.) Upon entering the room, Torrey alerted on the bed frame that had no mattress, which was on the left side of the room. (18RT 5147-5149.)

Appellant's first-floor room was 20 to 30 feet from the nearest side exit of the building. (12RT 3444-3449; 15RT 4218.) Additionally, the dorm room had a large window that could be opened with the use of hinges. The frame for the window was 69.5 inches in width, with a half-window on the right side that was more than 35 inches wide. The height of the frame was 46 inches, and it began 36 inches above the floor. (14RT 4041-4046.)

Telephone records for appellant's dorm room showed that, on Sunday, May 26, 1996, a call was placed from the dorm room to the number associated with his family's home on White Court. The call, which was placed at 9:47 a.m., lasted 50 seconds. (9RT 2459-2466; 12RT 3437; 13RT 3668; 14RT 4022-4023; 17RT 4882-

4885.) The next call from the dorm to the White Court address occurred on May 28, 1996, at 7:42 p.m., which was shortly after appellant had been interviewed by the police. The call lasted seven minutes. (14RT 4023-4024.) As soon as that call ended, a new call was placed to a number associated with appellant's sister, Ermelinda, who lived less than one mile from the campus. The call lasted 38 seconds. (14RT 4022-4025, 4049-4050.)

7. Appellant and his father kept people away from the deck on White Court

One day during the summer of 1996, Smart's father, Stan, drove to White Court and parked on the street in front of the Flores property. As Stan got out of his car, Ruben came out and met him on the public street. When Stan identified himself and said that he wanted to talk, Ruben said, "No, you ought to leave or someone might get shot." Stan drove away. (2RT 431-434.)

Angie Carrizel dated appellant for two years starting in 2004. (18RT 5226-5227.) At some point during their relationship, Carrizel went with appellant to meet appellant's parents at the house on White Court. When Carrizel stepped into the backyard, she noticed a change in the demeanor of appellant and Ruben. They acted like they did not want her to be in the backyard. Carrizel was quickly redirected to the front of the house, and she was never invited to return to the residence. (18RT 5228-5233; 19RT 5413; 24RT 6907-6908; see 35CT 10395.)

David Stone rented a room from Ruben at the White Court house from 2010 until 2020. (20RT 5774.) At some point during that period, a plumber came to the house to fix a leak under the kitchen sink. But when the plumber told Ruben that he needed

to go under the deck to fix it, Ruben told him to forget about it. Stone believed appellant fixed the problem. (20RT 5783-5784, 5805.) At another point, Ruben became upset with Stone for placing some large, empty drums under the deck without obtaining his permission. (20RT 5799-5800, 5806.)

8. Appellant failed to respond when his mother suggested that he might not be able to "punch holes" in a podcaster's accusation that he was responsible for Smart's disappearance

On January 6, 2020, Detective Gregory Smith initiated a court-approved wiretap for 30 days on cell phones that belonged to appellant, his parents, and his sister. (21RT 6022-6024.) To stimulate conversation within the Flores family, detectives leaked some information to a person who released podcasts about Smart's disappearance.[8] (21RT 6033.)

On January 26, 2020, appellant's mother, Susan, referenced the podcast during a telephone conversation with him. (21RT 6025-6026.) At one point during the conversation, appellant replied affirmatively when Susan told him, "I need you to make the call. I would think. 'Cause uh—I need to know where it's at…You know to make sure that you're covered 'cause the rest of us are." (35CT 10396; see 21RT 6026.) Immediately thereafter, Susan said:

> And they're gonna work together, these four attorneys. If we ever get to that point. Which I don't know if we will or not. The other thing I need you to do is to start listening to the podcast. I need you to listen to

[8] Chris Lambert's podcasts about Smart's disappearance contained segments that focused on appellant, including an episode that was entitled, "The Only Suspect." (3RT 753; 21RT 6033.)

> everything they say so we can punch holes in it. Um, wherever we can punch holes. Maybe we can't. Y— you're the one that can tell me.

(35CT 10396.) At that point, Susan changed the subject. (35CT 10396; 21RT 6039.)

On February 5, 2020, detectives obtained a warrant and searched the Flores house on White Court. In Ruben's bedroom, a detective found newspaper articles and postcards about Smart's disappearance. (20RT 5812, 5816-5822.)

Four days after the White Court house was searched, one of Ruben's neighbors, Jamilyn Holman, heard some yelling. When Holman looked at Ruben's property, she saw a cargo trailer, a travel trailer, and a white van. She had not previously seen any of those vehicles at Ruben's house. (20RT 5830-5831.) The cargo trailer was backed up to the garage with the garage door opened. (20RT 5833.) Later that day, Holman saw the cargo trailer parked to the right side of the house. All three vehicles were still there the following morning. (20RT 5834.)

9. In 2021, two dogs, which had been certified in finding human remains, detected the presence of remains under the deck of the Flores home

Kristine Black, the assistant director for the Santa Clara Sheriff's Search and Rescue Team, became a dog handler and began working with canines certified in detecting human remains. (21RT 6051-6057.) In 2017, Black started working with a certified and reliable dog, Annie. They responded to more than 70 search requests. In one search for human remains, Annie found a human skeleton that was buried nine feet under the

ground. (21RT 6065-6070.) In another, Annie properly gave no alert for human remains after clearing a yard that had a *dog* skeleton buried just 12 inches under the ground. (21RT 6066-6067.)

On March 15, 2021, Black went with Annie to the Flores home on White Court. (21RT 6070.) After completing a grid search of the backyard, as well as a Volkswagen and a crawl space under the house without providing an alert for human remains, Annie went under the deck. (21RT 6072-6076.) While searching under the deck, Annie provided an indication that she had discovered the scent of human remains. (21RT 6077.) But Annie did not provide a final alert, which was consistent with a situation in which the primary scent of human remains had been removed. (21RT 6082-6085.)

On the same day that Black searched the White Court property with Annie, another certified dog handler, Karen Atkinson, searched it with her dog, Amiga. Amiga was certified and reliable in human remains detection, having worked on more than 100 cases. (22RT 6308-6320, 6325-6327.) Like Annie, Amiga showed no interest in the Volkswagen, the crawl space, or the backyard. But Amiga indicated that the targeted odor existed under the deck. (22RT 6328-6343.)

10. Ground penetrating radar showed that an area under the Flores deck had been dug by hand with dimensions that were consistent with a human grave

Philip Hanes was an archaeologist with expertise in the use of radio waves, or ground penetrating radar, which he used to look for underground anomalies in finding burial locations.

Hanes described an anomaly as anything different from its nearby environment, which could include a void or simply a change in the soil. (22RT 6353-6356, 6362.) Hanes explained the significance of soil density in searching for burial locations. After noting that soil becomes more compressed over time, Hanes explained that, if dirt has been excavated and then redeposited, an anomaly would be shown on the radar machine because some air would have been introduced into that soil. (22RT 6356-6357.)

Hanes had used ground penetrating radar to find remains in some "cold case" investigations, as well as in locating cemeteries that were more than 100 years old. The machine that Hanes used was designed for relatively shallow geological investigations that were generally no more than 10 feet deep. It provided the rough dimensions, plus or minus 12 inches, for any anomaly it found. (22RT 6360-6363, 6382.)

At the request of the San Luis Obispo Sheriff's Department, Hanes went to the Flores property on White Court on March 15, 2021. After using his machine to cover the backyard, Hanes found that there were four locations in which there was some anomaly. (22RT 6363-6365.) One of the four locations was under a deck.[9] (22RT 6366-6367.) Hanes believed the location under the deck was the most promising area of the four because it consisted of an anomaly from the surface area to depth, which would need to occur if a hole had been dug. Additionally, the size

[9] The deck on White Court was built in 1991 by a contractor, Edward Chadwell. In building the deck, Chadwell did not find any human or animal remains in the ground. (20RT 5716-5719.)

of the anomaly was consistent with a burial location because it was roughly six feet by four feet with a depth of between three and four feet. As to the other three locations, one was very small and had little anomaly near the surface, another was a widespread and diffuse anomaly that was likely attributable to tree roots, and the final one likely occurred during the construction process because it was right next to the house. (22RT 6367-6371, 6407.)

Cindy Arrington, an archaeologist with expertise and certification in the recovery and identification of human remains, went to the Flores house after Hanes had finished using the ground penetrating radar. (23RT 6609-6612, 6621-6626.) In excavating the soil under the deck, Arrington noticed a lack of continuity, with jumbled soil showing that there been a prior excavation in that area that was about six feet by four feet with a depth of four feet. As no mechanical marks were visible near the edges of the excavated area, Arrington opined that the area had been dug by hand with a shovel rather than by a machine. (23RT 6614-6619, 6626-6633, 6668.)

11. Under the deck, at a depth of about four feet, the soil contained some blood as well as some fibers, both cotton and synthetic

During the excavation under the deck, Arrington noticed dark staining on some of the soil. The staining, which had an irregular pattern, was consistent with human decomposition that results when fluids slowly leak into the soil, especially if the body was wrapped in something like a tarp. (23RT 6614-6619, 6626-6633, 6668.) Additionally, Arrington noticed that some of the

staining had been interrupted and that there were no bones in the hole, which was consistent with some decomposition occurring in a hole before that area was excavated for a second time with the removal of the decomposing object. (23RT 6669-6678.)

Shelby Liddell, a forensic specialist with the San Luis Obispo Sheriff's Department who was present during the excavation, noticed the same dark staining of soil. Liddell took samples of the stained soil at more than one depth. (25RT 7217-7221, 7236-7248.) Liddell later took six different control samples of the soil on the property, including one of unstained soil that was very close to the stained soil that had already been collected. (2RT 7225-7226.)

Faye Springer, who was an expert in analyzing trace evidence, used a stereomicroscope to analyze fibers that were found during the excavation under the deck. (26RT 7508-7509, 7513-7515, 7544, 7549; 30RT 8732.) Some of the fibers were cotton, while others were synthetic, like vinyl or polyester. The fibers included red, black, brown, and blue strands, as well as some light-colored ones that could have been white. (26RT 7515-7516, 7519-7520, 7523-7527.)

Angela Butler, a forensic DNA analyst at the Serological Research Institute who was an expert in DNA and fluid identification, examined the soil that was collected from the excavation under the deck. (28RT 8265, 8286; 30RT 8707-8708; 32RT 9367-9369.) Using a HemDirect test, which detects hemoglobin that is found in the blood of humans, ferrets,

monkeys, and higher primates, Butler found no indication of hemoglobin in the upper, unstained soil samples. (28RT 8280-8281; 30RT 8714, 8769-8771.) But some deeper soil samples tested positive for human blood. (30RT 8714-8715, 8727-8731, 8739, 8772.) Butler was unable to assess blood type or extract any DNA from the samples. (30RT 8722-8723, 8729-8730, 8735-8736.)

12. A few months after the search of the ground under the deck, Ruben admitted having committed a felony

Having searched the Flores property, detectives obtained a warrant to collect DNA samples by means of buccal swabs from both of appellant's parents and from Mike McConville, who was the owner of the cargo trailer that had previously been parked in front of the property.[10] (32RT 9402-9404.)

On May 21, 2021, detectives went to the Flores residence to obtain those samples. Ruben opened the door and began reviewing the warrant. (32RT 9402-9405.) Upon reading that the warrant applied to Susan and McConville, Ruben said, "They haven't committed no felonies." After a brief pause, Ruben said, "Only me." But then Ruben showed some concern about his

[10] When a Bluestar chemical test was applied to the inside of a cargo trailer that had been parked on the Flores property, a blue glow was visible in the dark. That glow signified the likely presence of blood inside the trailer. (25RT 7249-7256.) But the Bluestar test result was not conclusive for human blood because the chemical can also react to "certain animal blood" as well as to bleach, paint and varnish. (25RT 7255.) DNA testing of plywood removed from the trailer established that it contained a mixture of DNA in which McConville could not be excluded. (25RT 7256-7257; 30RT 8742.)

admission and attempted to correct it by stating that he was the only one of the three to have been arrested. (32RT 9406, 9410.)

13. Uncharged crimes -- appellant raped two women after giving them a roofie or another drug to render them unconscious

a. Appellant raped R.D. in 2008

In 2008, R.D. went with some friends to a bar in Redondo Beach called the Thirsty Club. As they prepared to leave and return to R.D.'s house, one of her friends, Gabe, invited appellant to join them. (17RT 4814-4818.) Appellant accepted the invitation but said that he needed to stop by his house first. Although they offered to give him directions to R.D.'s home, he convinced R.D. to go with him. R.D. had consumed a few alcoholic beverages that night, but she was not intoxicated. (17RT 4818-4819.)

After appellant and R.D. walked together to his house, he went into the kitchen and returned with a glass of water that he gave to her. R.D. drank it. (17RT 4818-4822.) Shortly thereafter, R.D. lost consciousness. When R.D. regained consciousness, she was naked on appellant's bed, and he was having sexual intercourse with her. R.D. lost consciousness again. When she regained consciousness, she was face down on appellant's bed with a red ball gag in her mouth. Appellant was having anal sex with her. At several points during the sexual assault, appellant asked R.D. if she knew his name. He was pleased when she said that she could not recall it. After the assault ended, R.D. curled up beside appellant's bed and cried. He drove her home. (17RT 4823-4826.)

R.D. did not report the crime in 2008 because she believed that rape cases were not usually prosecuted. (17RT 4827.) But when she saw appellant's photograph in connection with the Smart case, R.D. reached out to law enforcement. (17RT 4827, 4830, 4843.)

b. Appellant raped S.D. in 2011

One night during the spring of 2011, S.D. and a female friend went to the Crimsin Bar in San Pedro. When they arrived, there were only six people inside the bar. Appellant was one of them. As she talked with her friend, S.D. noticed that appellant looked in their direction quite often. (24RT 6912-6914.)

When S.D. and her friend stepped outside the bar to smoke a cigarette, appellant followed them. After they had some friendly conversation, appellant purchased a drink for each of them. (24RT 6915-6916.) Although S.D. only had a total of about four drinks over a period of four hours, she did not remember much from the remainder of the night. S.D. had consumed a similar amount of alcohol on occasions, both before and after that night, without ever having such difficulty with memory. (24RT 6918-6920.)

After leaving the bar, S.D. remembered being alone with appellant at his house. Upon drinking something that appellant gave her, S.D. started going in and out of consciousness. S.D. remembered being in a bedroom with appellant on top of her. He was engaging in nonconsensual sexual intercourse with her. (24RT 6920-6922.) At some point, appellant attempted to gag

S.D. with a red ball, but she screamed.[11] Appellant attempted to forcibly put the gag into her mouth several more times before ultimately giving up. When she awoke in the morning, S.D. got dressed and left the house. As she walked out of the house, S.D. told appellant that "no means no." He looked down and said, "okay." (24RT 6922-6925.) S.D. did not immediately report the crime to the police because she had been so confused that night. (24RT 6927.)

B. Defense evidence

Detective Clinton Cole testified that, on November 14, 2019, Goodwin told him what he had heard from Hudson concerning Smart's disappearance. When Detective Cole spoke with Hudson a few days later, she told him about appellant's 1996 admission. Specifically, Hudson said that appellant admitted that he had been at a party with the "bitch" where she was just leading him on, that he finally had enough of her "shit," and so he "took care of her" and buried her underground at his place in Huasna. Hudson told the detective that a person known as Red was sitting near her at the time, but she did not know Red's actual name. Detective Cole was not able to identify Red. (36RT 10563-10573, 10587.) But given Hudson's statement, two locations in Huasna were excavated. Neither location contained any human remains. (36RT 10537-10539.)

[11] A computer found during the 2020 search of the Flores house contained a video of a woman with a red ball gag in her mouth. A still photograph taken from the video was shown to the jury. (32RT 9376, 9412-9417; Peo. Exh. 458.)

Hudson's former boyfriend, Brent, testified that she never told him about appellant's admission. But Brent acknowledged that, after the day in which the admission allegedly occurred, Hudson immediately stopped going with him whenever he went skateboarding. Brent was somewhat surprised by Hudson's change of behavior. Brent knew Red, but he did not know Red's actual name. Brent did not know appellant. (34RT 9985-9987, 9992-9997.)

Dr. David Carter, a professor of forensic sciences who focused on the study of decomposition with most of his research involving animal remains rather than human remains, viewed the photographs and reports of the excavations at the Flores property. (33RT 9611-9616, 9678.) Carter testified that he had not seen any data from the Flores excavations that confirmed the presence of decomposing human remains. (33RT 9631-9634, 9642, 9730.) Carter explained that the excavations failed to uncover items that he would expect to see at a burial location, such as hair, teeth, clothing, or other accessories connected to the remains. (33RT 9642-9643, 9675.) With respect to the staining, Carter testified it looked different from the staining he had seen at other burial locations. He opined that the stains looked like bands of clay with "high iron content." (33RT 9667.) But Carter acknowledged that a person who was personally present during an excavation would be in a better position to make an evaluation as to a potential burial location rather than one who only looked at photographs. (33RT 9681.) Carter further acknowledged that

the presence of human blood "could be" consistent with a grave site. (33RT 9689.)

Dr. Elizabeth Johnson, a forensic DNA consultant, opined that the HemDirect results were unreliable. Johnson was unaware of any study that addressed the accuracy of the test when applied to soil samples. Johnson stated that the accuracy of the test could have been affected by the pH of the soil, which was never tested. Additionally, Johnson stated that blood tends to degrade quickly when exposed to the elements. (33RT 9743, 9773-9784, 9791-9797; 34RT 9909.)

C. Rebuttal

Butler addressed the reliability of the HemDirect test on older blood. Specifically, Butler explained that the test was able to detect the hemoglobin in blood for stains that had been in existence since the 1970s. (37RT 10833-10834.)

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT JUROR NO. 273 HAD NOT LOST HER ABILITY TO REMAIN NEUTRAL

Appellant contends the trial court violated his constitutional right to a unanimous verdict of impartial jurors by declining to remove Juror No. 273. According to appellant, the court was required to find Juror No. 273 was unable to remain neutral and follow the court's instructions. First, appellant asserts the juror demonstrated a lack of neutrality by advising the court that she had experienced some anxiety from defense counsel's aggressive cross-examination of prosecution witnesses. Second, appellant asserts a lack of neutrality was displayed when the juror showed

some emotion during witness testimony and then explained that she reacted emotionally when she began to view appellant as possibly guilty. Finally, appellant asserts that the juror failed to follow the court's instruction not to discuss the case with anyone prior to deliberations. (AOB 41-51.)

Appellant's claim lacks merit because substantial evidence supports the trial court's finding that Juror No. 273 could serve as an impartial and unbiased juror. The court was not required to find that the juror was incapable of fulfilling her duties simply because she cried, experienced some anxiety from defense counsel's aggressive questioning, and came to realize that the evidence might establish appellant's guilt. Additionally, there was no indication that Juror No. 273 had any substantive discussion about the case or otherwise received any extraneous information. Under the foregoing circumstances, it was reasonable for the court to find Juror No. 273 credible in her repeated assertions that she was willing and able to keep an open mind to impartially decide the case based solely on the evidence presented at trial.

A. Factual background

At a break during the testimony of a prosecution witness, Juror No. 273 informed the bailiff that she wanted to address the trial court. At a hearing held in the presence of counsel, Juror No. 273 stated that she had been experiencing some anxiety, but that she was not feeling biased toward any person whatsoever. Specifically, she said:

> I do feel that I'm experiencing some anxiety from the – like, sometimes the aggressiveness of the questions or

> the repetitions of the questions that had already been answered. [¶] So I'm like, every time, I guess, you know, it's in my head, and I just feel like a little bit of – and I don't know if that's just me or maybe that's something everybody experiences because we can't talk to anybody about it so I just wanted to hear what you had to say about it. [¶] And, you know, it's just like – I – it's hard to put into words. It's just like this, like, feeling of tension in my chest so – it's not that I feel a certain way about any particular person at all. I feel I'm very unbiased in the situation so it's not so much directed towards what's – what the topic is, I guess, it's more of just interactions.

(7RT 1847.) Advising the juror that "sometimes things get heated" during trial because there were sides "with different versions," the court told the juror that her feelings were natural and that she should reach out again if her anxiety caused her difficulties. (7RT 1848.)

Appellant's attorney thereafter asked the trial court to excuse Juror No. 273, arguing that she was biased against the defense because of his aggressive questioning. But the court denied the request after finding no indication of bias. (7RT 1851-1853.)

After detectives testified about a court-approved wiretap and a search of the White Court property that was based on a warrant, Juror No. 273 submitted a question. The question asked, "What qualified the warrant to be approved, specific items, meetings, conversations, any relevant [evidence] found?" (21RT 6047.)

When a prosecution witness later testified that the dark staining of soil under the deck at the Flores home was consistent

with fluids being released during human decomposition, Juror No. 273 gasped, began to cry, and asked the trial court for a break. (23RT 6634-6636.) During the break, Juror No. 273 issued an apology to the courtroom deputy before stating that she had been completely neutral until she heard the testimony and started to feel that appellant could be guilty. (23RT 6640 [Deputy Sullivan reported hearing juror say that she came to believe that appellant "was probably guilty"], 6655 [Deputy Sullivan reported hearing juror say that she "felt for the first time that there could be guilt"].) In response to the outburst and comment, the court asked some questions of Juror No. 273 and reminded her of the duties required to serve as a juror. Juror No. 273 said that she was doing okay and that she would be able to base her decision on the evidence without allowing bias, sympathy, or prejudice to affect her decision. (23RT 6647-6650.) Juror No. 273 further stated that she had not made up her mind about the case. The juror further assured the court that she would consider all evidence and that she would listen to the views of other jurors during deliberations. (23RT 6650, 6656.) Juror No. 273 stated that she could perform all the duties of a juror fairly and impartially, with an open mind to all of the evidence that had yet to be presented. Expressing a belief that she would not have any problems listening to the remaining evidence, Juror No. 273 advised the court that she would ask for a break if she needed one in the future. (23RT 6651-6652.) Given the juror's responses, the court declined a defense request to excuse Juror No. 273. (23RT 6661.) But, to address defense

counsel's additional concern that the outburst could have affected other jurors, the court subsequently reminded the jurors about their duties before inviting them to submit a note if they had any questions or concerns. (23RT 6665-6667.)

After some additional prosecution witnesses testified, Juror No. 273 requested a short break in the evidence. When the trial court asked the reason for the break, the juror explained that she had been experiencing some anxiety because some of the questioning by the defense "felt a little aggressive." (28RT 8287.) Juror No. 273 explained that she just had not previously experienced situations where there was repetitive questioning even though she understood that it could be the job of a lawyer to do so. The juror also stated that the questioning felt "a little bit more aggressive" when an attorney and a witness talked over each other. (28RT 8289.) Asked whether any aspect of the defense questioning caused her to form an opinion about the case or would make it difficult to deliberate, Juror No. 273 said that it would not and that she could be a fair and impartial juror. (28RT 8290.) The court denied a defense request to excuse Juror No. 273. (28RT 8293-8299.)

At a break during the defense case, the trial court brought Juror No. 273 into the courtroom to address an issue concerning the juror's social media presence. Specifically, the court stated that Juror No. 273 had a Pinterest board that had tips on septic systems, the removal of tree stumps, and the ability to test soil pH without a kit. The court noted that soil pH was an issue that had been covered during the trial. (37RT 10807-10808.) In

response to the court's inquiry, Juror No. 273 stated that the tips predated her selection as a juror and that she had not conducted any research related to appellant's case. (37RT 10812-10813, 10819-10820.) Juror No. 273 said that she knew people who had listened to the podcast concerning the case, but she had not allowed them to tell her anything about it. (37RT 10820.) Although defense counsel again asked the court to remove Juror No. 273, the court denied the request after finding that the juror had not received outside information. (37RT 10824-10828.)

B. A trial court's denial of a request to discharge a sitting juror will be upheld if supported by substantial evidence

The federal and state Constitutions guarantee a criminal defendant the right to a trial by an impartial and unbiased jury. A deprivation of that right occurs even if only one juror is biased. (*People v. Brooks* (2017) 3 Cal.5th 1, 98.) As such, a trial court will discharge a sitting juror for good cause if the record shows as a "demonstrable reality" that a juror is incapable of, or unwilling to, decide the case based solely on the evidence. (§ 1089; *People v. Lopez* (2018) 5 Cal.5th 339, 365; *People v. Cleveland* (2001) 25 Cal.4th 466, 474-477.) But "[g]reat caution is required when deciding to excuse a sitting juror." (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71.) Indeed, the California Supreme Court has recognized that, because the jury is a "fundamentally human" institution, the system cannot function unless the courts "tolerate a certain amount of imperfection short of actual bias." (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

A trial court's denial of a request to discharge a juror is reviewed for an abuse of discretion and will be upheld if supported by substantial evidence. (*Lopez*, *supra*, 5 Cal.5th at p. 365.) Accordingly, the evidence will not be reweighed on appeal. (*Ibid.*) Thus, where a juror has given conflicting responses, an appellate court must defer to a trial court's determination that the juror would be able to perform the duties fairly and impartially. (*People v. Mickel* (2016) 2 Cal.5th 181, 217.)

A juror may be discharged if that juror "becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances." (*Cleveland*, *supra*, 25 Cal.4th at p. 485.) Likewise, dismissal may be appropriate if a juror expresses "a fixed conclusion at the beginning of deliberations and refuses to engage with other jurors." (*People v. Jones* (2020) 50 Cal.App.5th 694, 700.)

But a trial court is not required to discharge a juror who expresses a belief in their own ability to serve merely because that juror has previously shown emotion or reported being stressed. (See, e.g., *Lopez*, *supra*, 5 Cal.5th at p. 365; *People v. Beeler* (1995) 9 Cal.4th 953, 972.) In *Lopez*, the California Supreme Court found no abuse of discretion in declining to discharge a juror who expressed a willingness to continue deliberating after having asked to be excused from the trial because she was so stressed that it prevented her from doing her job. (*Lopez*, *supra*, 5 Cal.5th at p. 365.) In *Beeler*, our high state court found no abuse of discretion in declining to discharge a juror who, after having an emotional outburst in which she cried

and doubted her ability to serve in such an unsettling case, apologized for the outburst and believed that she would be able to serve. (*Beeler*, *supra*, 9 Cal.4th at pp. 972-975.)

Likewise, a trial court is not obligated to discharge a juror who, prior to the onset of deliberations, expresses some belief that the defendant may be guilty. (*Allen and Johnson*, *supra*, 53 Cal.4th at p. 72 [dismissal improper where juror's statement suggesting that he had prejudged the case was "not entirely clear"]; *People v. Kipp* (1998) 18 Cal.4th 349, 366 [it was reasonable for trial court to determine juror would impartially perform duties despite expressed prejudice against defendant's appearance]; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 192 [no good cause to discharge juror who ultimately recanted her initial claimed inability to judge impartially]; *People v. Franklin* (1976) 56 Cal.App.3d 18, 25-26 [same].) Indeed, the California Supreme Court has recognized that "it would be entirely unrealistic to expect jurors not to think about the case during the trial." (*People v. Ledesma* (2006) 39 Cal.4th 641, 729.) Accordingly, "[a] juror who holds a preliminary view that a party's case is weak does not violate the court's instructions [not to form an opinion] so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations." (*Allen and Johnson*, *supra*, 53 Cal.4th at p. 73.)

A trial court also is not required to discharge a juror who expresses frustration with defense counsel. (*People v. Kaurish* (1990) 52 Cal.3d 648, 694 [no hearing required when juror made

derogatory remark directed toward defense counsel, calling the lawyer a "son-of-a-"]; *People v. Zemek* (2023) 93 Cal.App.5th 313, 337-338 [trial court was not required to discharge juror who expressed frustration with length of defense counsel's closing argument in lamenting that the trial would never end because it was defense counsel's strategy].) Indeed, the California Supreme Court has recognized that "the law makes room for a juror's humanity" during a stressful trial. (*People v. Mora* (2018) 5 Cal.5th 442, 485.)

Finally, a trial court is not required to discharge a juror merely because the juror failed to adhere to an instruction, especially where there has been no deliberate misconduct or indication that disobedience would continue and thereby render the juror unable to serve. (*People v. Holloway* (2004) 33 Cal.4th 96, 124-125 [substantial evidence supported trial court's determination that juror was able to serve impartially even though the juror twice violated court instruction not to discuss the case]; *People v. Daniels* (1991) 52 Cal.3d 815, 864 [finding no abuse of discretion where trial court removed a juror who committed "serious and willful misconduct" by repeatedly violating court instructions not to discuss the case].) Accordingly, discharge is not mandated simply because a juror had an improper discussion about the case, especially if the discussion was brief and did not cover anything of substance. (*Holloway*, *supra*, 33 Cal.4th at pp. 124-125; see *People v. Stewart* (2004) 33 Cal.4th 425, 510 [recognizing that no prejudice occurs when a

juror's improper discussion with a nonjuror does not involve "anything of substance concerning the merits of the case"].)

C. Substantial evidence supported the trial court's finding that Juror No. 273 could be fair and impartial

Here, substantial evidence supports the trial court's finding that Juror No. 273 could satisfy her duty of serving as a fair and impartial juror. Although Juror No. 273 experienced some anxiety and cried on one occasion, she did not believe that her emotional state would prevent her from continuing to serve as a juror. (7RT 1847; 23RT 6634-6636; 28RT 8287.) Under such circumstances, the California Supreme Court has not mandated the discharge of an emotional juror. (See, e.g., *Lopez*, *supra*, 5 Cal.5th at p. 365; *Beeler*, *supra*, 9 Cal.4th at p. 972.) As for her evidence-based realization that appellant could be guilty, Juror No. 273 assured the court that that she had not come to any conclusion and that "it could still go either way" in her mind, which remained "open." Moreover, she assured the court that she would come forward if she ever reached a decision about the case because any such decision would render incapable of being fair. (23RT 6655-6656.) Accordingly, this case resembles *Allen and Johnson* in that it was far from clear that the challenged juror had prejudged the case. (See *Allen and Johnson*, *supra*, 53 Cal.4th at p. 72.) As for Juror No. 273's complaint about "aggressive" questioning from defense counsel, the court was not required to find that her opinion—which was neither bombastic nor insulting—would prevent her from keeping an open mind, especially since she recognized that it may have been the lawyer's

job. (28RT 8289.) Her mild frustration with counsel's questioning pales in comparison to the juror in *Kaurish* who was not required to have been discharged even though he called the lawyer an obscene name. (*Kaurish*, *supra*, 52 Cal.3d at p. 694.) Finally, to the extent Juror No. 273 told some people that she was a juror on the case, her communication of the fact was not tantamount to a receipt of outside information or a substantive discussion of the merits. In any event, she explained that she did so for a laudable reason—to avoid having anyone provide her with information about the case. (37RT 10820.) Because the court could find that Juror No. 273 did not intentionally engage in any serious and repeated misconduct, it was not required to discharge her. (See, e.g., *Holloway*, *supra*, 33 Cal.4th at pp. 124-125.)

In short, the record supports a finding that Juror No. 273 was emotionally able to serve as a juror, that she had not prejudged the case, that she could remain impartial, and that she committed no misconduct. In declining to discharge the juror, the court was entitled to rely on her representations. (7RT 1847 ["I'm very unbiased"]; 23RT 6647-6656 [after crying, she said that she was okay, that she had not made up her mind, and that she would be able to base her decision on the evidence without any bias]; 28RT 8290 [she said that she could be a fair and impartial juror].)

For his part, appellant attempts to downplay the significance of the juror's self-assessment by arguing that a "trial court must look beyond the juror's own statement." (AOB 48.) In

support of his contention, appellant cites a unique case in which a trial court was found to have abused its discretion for "allow[ing] a juror to remain on the panel after learning the juror was personally acquainted with the victim herself to the depth and degree made manifest by the existence of a teacher-student relationship from which, even three years later, the teacher continued to have positive memories and impressions." (*People v. Romero* (2017) 14 Cal.App.5th 774, 781-782 [finding "no case matching this fact pattern in California jurisprudence" and noting that the absence of a case was likely because "it would have been axiomatic for the court to excuse and replace that juror," which would have precluded the issue from becoming a claim on appeal].) The instant case is nothing like *Romero*, which does not purport to preclude reviewing courts from generally deferring to lower court assessments of juror representations concerning their ability to remain impartial and decide the case based solely on the evidence. Indeed, any such interpretation would contravene California Supreme Court authority, which is binding on this Court. (See, e.g., *Mickel*, *supra*, 2 Cal.5th at pp. 216-217 [deferring to trial court's finding that a juror, who gave ambiguous or conflicting responses, could be impartial]; *People v. Harris* (2008) 43 Cal.4th 1269, 1304 [where juror stated that his ability to be impartial would not be affected by threat he received, the California Supreme Court stated that "[c]ourts may properly rely on such statements to determine whether a juror can maintain his or her impartiality after an incident raising a suspicion of prejudice"]; see *Auto Equity Sales, Inc. v. Superior*

Court (1962) 57 Cal.2d 450, 455 [Supreme Court decisions are binding on the Court of Appeal].) As such, appellant's claim fails.

II. THE UNCHARGED RAPES WERE ADMISSIBLE UNDER EVIDENCE CODE SECTION 1108 BECAUSE THE CHARGING DOCUMENT ALLEGED THAT APPELLANT KILLED SMART DURING THE COMMISSION OF A RAPE OR ATTEMPTED RAPE, EACH OF WHICH CONSTITUTED A QUALIFYING SEXUAL OFFENSE UNDER THE STATUTE

Appellant contends the trial court erred by admitting evidence of uncharged rapes that he committed. Alleging that Evidence Code section 1108 was inapplicable to his case, appellant asserts that the prosecution failed to make a "threshold showing" that he committed, or attempted to commit, a sexual offense against Smart. Appellant asserts that such a preliminary fact was necessary to admit evidence of the uncharged rapes. (AOB 51-67.) Appellant asserts that the improper admission of such evidence requires a reversal of his murder conviction or, in the alternative, the felony-murder finding. (AOB 67-75.)

Appellant's claim lacks merit because the charging document alleged that appellant raped or attempted to rape Smart during the commission of the murder. Because a qualifying sexual crime was alleged, Evidence Code section 1108 necessarily applied. The statute does not require the prosecution to make any threshold showing of evidence prior to application. Nevertheless, any required showing was satisfied in this case. Moreover, any error in admitting the evidence was harmless because it is not reasonably probable that appellant would have obtained a better result absent evidence of the two uncharged rapes.

A. Factual background

Before the preliminary hearing was held, the prosecutor moved to amend the complaint to add two counts of rape by means of drugging that appellant separately committed against two females, neither of whom was Smart. (2CT 466-470, 533-535.) But the motion was denied. Characterizing such evidence as inflammatory, the judge stated that the rapes would not be cross-admissible on the murder charge under Evidence Code section 1108 because there was little or no proffered evidence that appellant engaged in sexual conduct with Smart. (5CT 1324-1333.)

Following the appointment of a different judge to handle the trial, the prosecutor filed a motion in limine that sought to introduce sexual misconduct allegations from nine women, including R.D. and S.D., under Evidence Code section 1108 as well as Evidence Code section 1101, subdivision (b). (27CT 8001-8032.) The prosecutor also sought to admit evidence found on computers associated with appellant. Specifically, the prosecutor sought to introduce videos of appellant having sexual intercourse with women who appeared to be unconscious, including one in which a woman had a red ball gag in her mouth. The prosecutor also sought to introduce Google searches concerning the rape of unconscious women. (27CT 8003-8004.)

The defense opposed the motion, arguing that uncharged sex acts were not admissible because there was no evidence that appellant committed a sex offense in the charged case. The defense further asserted that the evidence was inadmissible under Evidence Code section 352. (28CT 8193-8196, 8297-8299.)

Although the trial court prohibited the prosecutor from presenting most of the evidence, it allowed the prosecutor to present evidence that appellant had drugged and raped R.D. as well as S.D. Acknowledging that there was no direct evidence that Smart had been sexually assaulted, the court found that Evidence Code section 1108 nevertheless applied because such a finding was supported by circumstantial evidence. (6Aug.RT 1597-1598.)[12] The court also found that the evidence was admissible under Evidence Code section 1101, subdivision (b), to show intent and to establish the existence of a common plan or scheme. (6Aug.RT 1599.)

As for the video that showed a red ball gag, the trial court declined to admit it. But the court allowed the prosecutor to introduce a still photograph of the gag that was taken from the video for purposes of establishing that appellant owned the type of gag described by R.D. and S.D. (6Aug.RT 1600-1602; 32RT 9416-9426.)

B. Evidence Code section 1108 applies to every criminal action in which a defendant is "accused" of a sexual offense

Evidence Code section 1108, subdivision (a), states: "In a criminal action in which the 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." Thus,

[12] The court further ruled that the prosecution was allowed to present evidence that appellant similarly raped a third woman, but no evidence was ultimately presented as to that rape.

in any case in which a defendant has been accused of a sexual offense, a prior sexual offense may be admitted to establish the defendant's propensity to commit a sexual offense. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.) The prior offense need not have resulted in a conviction, and it only need be proven by a preponderance of the evidence for the jury to conclude that the defendant was disposed and inclined to commit the charged sexual offense. (*People v. Merriman* (2014) 60 Cal.4th 1, 42.) Moreover, a defendant has the "burden of rebutting the strong presumption of admissibility of the sexual assault crimes evidence under Evidence Code section 1108." (*Merriman*, *supra*, 60 Cal.4th at p. 42.)

For Evidence Code section 1108 to apply, a defendant need not be directly charged with a sexual offense. Rather, it also applies to felony-murder cases where a sexual offense is identified as the target crime. (*People v. Story* (2009) 45 Cal.4th 1282, 1294.) In fact, the California Supreme Court has characterized the need for the evidence to be "especially compelling when the sexual assault victim was killed and cannot testify." (*People v. Avila* (2014) 59 Cal.4th 496, 515.)

Under Evidence Code section 352, a trial court may exclude relevant evidence if it finds the probative value is substantially outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Miles* (2020) 9 Cal.5th 513, 587-588.) Prejudice is not synonymous with damaging. Rather, undue prejudice is shown only where the evidence is likely to "inflame the emotions of the jury" and create a substantial

likelihood the jury will act out of emotion and improperly punish or reward a party as a result. (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

On appeal, a trial court's application of Evidence Code section 352 or 1108 will not be overturned absent an abuse of discretion. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 824; *Story*, *supra*, 45 Cal.4th at p. 1295.) Thus, no evidentiary error will be found unless the court exercised its discretion in an arbitrary, capricious or patently absurd manner. (*People v. Chhoun* (2021) 11 Cal.5th 1, 26.)

C. The trial court did not abuse its discretion by admitting the uncharged sex crimes under Evidence Code section 1108

Appellant was charged with murder committed during the commission or attempted commission of a rape. (1CT 126-127) Both rape and attempted rape constitute a sexual offense under Evidence Code section 1108, subdivision (d)(1)(A). (*People v. Pierce* (2002) 104 Cal.App.4th 893, 898.) Although Evidence Code section 1108 does not require any level of similarity between the charged and uncharged conduct, the probative value of the uncharged rapes in this case was elevated because the evidence supported an inference that appellant drugged and/or took advantage of an unconscious or semiconscious woman in each instance. Moreover, the potential for the uncharged crimes to inflame the jury was somewhat lessened in this case where appellant was charged with murder. Given the strong presumption favoring the admissibility of such evidence under Evidence Code section 1108 and the especially compelling need

for such evidence because Smart had been killed and was unable to testify (see *Avila*, *supra*, 59 Cal.4th at p. 515), the court did not exceed the bounds of reason in admitting evidence of the uncharged rapes.

For his part, appellant does not assert or provide any analysis attempting to establish that the trial court abused its discretion in weighing the probative value versus the potential prejudice under Evidence Code section 352. (See AOB 56-65.) Accordingly, this Court need not address that issue. (See, e.g., *People v. Britt* (2002) 104 Cal.App.4th 500, 506 ["And since Britt does not otherwise assert the trial court abused its discretion in weighing the prejudice of the evidence against its probative value, the claim must fail"].)

As his sole challenge to the evidence, appellant asserts that Evidence Code section 1108 does not apply unless the prosecution has satisfied some unspecified "threshold showing" of factual support for the current charge or allegation of a sexual crime. (AOB 51.) Citing a litany of decisions upholding the admission of such evidence where the defendant was accused of felony murder based upon a sex crime, appellant argues that those cases are distinguishable because the prosecution's theory in each case had "actual support in the evidence." (AOB 57-58.) Moving away from cases that address Evidence Code section 1108, appellant relies upon decisions establishing that, with respect to some categories of evidence, the relevance of the evidence depends on the existence of a preliminary fact. (See AOB 58-60.)

Appellant's challenge lacks merit. The language of Evidence Code section 1108 is clear. It expressly applies to any criminal action in which a defendant has been "accused" of a sexual offense. Because the statutory language is not ambiguous, "the plain meaning of the language governs." (*People v. Walker* (2002) 29 Cal.4th 577, 581.) Moreover, it is telling that none of the section 1108 cases cited by appellant contained any suggestion that the prosecution was required to satisfy a "threshold showing" beyond the existence of a qualifying accusation contained in a charging document. (AOB 57-58.) Rather, the California Supreme Court looked solely to the charging document in deciding whether section 1108 applied. (See, e.g., *Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 824; *Avila*, *supra*, 59 Cal.4th at p. 515; *Story*, *supra*, 45 Cal.4th at p. 1294.) For instance, *Avila* succinctly explained:

> Defendant was charged with a sexual offense both because he was charged with committing lewd and lascivious acts on a child under the age of 14 and because he was charged with murder under the special circumstance of murder while committing the lewd and lascivious acts. [Citation] Accordingly evidence of other sexual crimes, such as the evidence admitted in this case, is admissible under Evidence Code section 1108.

(*Avila*, *supra*, 59 Cal.4th at p. 515.) Likewise, *Daveggio and Michaud* stated:

> Defendants do not dispute that section 1108 applies, and for good reason: This case is "a criminal action." (§ 1108, subd. (a) (section 1108(a)).) Both defendants were "accused of a sexual offense." [Citations] And neither defendant contests that evidence of the four incidents in question was "evidence

> of the defendant's commission of another sexual offense or offenses." (§ 1108(a).)

(*Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 824.) In short, the applicability of Evidence Code section 1108 begins and ends with the nature of the allegations contained in the charging document. There is no unspoken requirement that the prosecution establish a preliminary fact or otherwise satisfy some unspecified "threshold showing" of evidence.

The charging document in this case alleged that "the murder was committed while the defendant was engaged in the commission of, or attempting to commit, the crime of Rape, in violation of Penal Code section 261 within the meaning of Penal Code section 189(a)." It further provided appellant notice of the prosecution's intent to admit evidence of prior sexual acts pursuant to Evidence Code section 1108. (10CT 2867-2869.) Because the charging document alleged that appellant committed a qualifying sexual offense, Evidence Code section 1108 necessarily applied to this case.

But to the extent this Court disagrees and imposes—for the first time—a requirement that the prosecution make some sort of threshold showing, the amount of independent evidence required should be slight, and the standard should be deemed satisfied in this case. (See *People v. Dalton* (2019) 7 Cal.5th 166, 218 [only "slight" independent evidence must be present to satisfy corpus delicti rule].) Specifically, appellant had repeatedly displayed a romantic interest in Smart even though she communicated a lack of interest in him. (3RT 688-693, 697, 705-706; 4RT 950; 6RT 1664-1676; 7RT 1892-1893.) On the night Smart disappeared,

appellant showed a continuing romantic interest in her during a party by asking two separate people about her availability. (4RT 1007-1014; 7RT 1907-1928; 8RT 2110-2112.) At the same party, appellant made unwanted sexual advances on two other women, Koed and Anderson. As to Koed, appellant kissed her without consent, was rebuffed, and then attempted to kiss Koed a second time after acknowledging that she did not want to be kissed by him. (3RT 726-731; 4RT 1038-1039, 1049.) When Davis and Anderson started to walk a barely conscious Smart home from the party, appellant interjected himself into the group and offered to help Smart even though he did not really know any of them. (4RT 1043-1045; 10RT 2750-2758, 2763, 2770, 2799-2809, 2814.) Shortly after Davis left the group, appellant stopped walking with Smart on two occasions. Each time, appellant attempted to isolate Smart by encouraging Anderson to continue without them. Appellant also used the pauses to rub Smart's arms and to give her a hug, which went unreciprocated. Before Anderson left appellant alone with Smart, he asked Anderson for a kiss or a hug. She refused the requests before securing a promise from him to get Smart back to her dorm room safely. But Smart was never seen again. (4RT 1045-1057, 1094.)

After Smart went missing, appellant denied having a romantic interest in Smart, he denied kissing Koed, and he gave conflicting responses as to how he had sustained a "black eye" that was consistent with a physical struggle. (10RT 2879-2882, 2888; 13RT 3617-3636.) Finally, when a radio broadcast mentioned Smart, appellant showed that the homicide was

sexually motivated by admitting to Hudson that he buried Smart underground because she was a "dick tease." (26RT 7558, 7563, 7575-7582.) In short, the record shows that there was considerable evidence, aside from the uncharged rapes, that appellant killed Smart during a rape or attempted rape. Accordingly, Evidence Code section 1108 applied to appellant's case, and the trial court did not exceed the bounds of reason in admitting evidence of the two uncharged rapes.

Because the evidence was admissible under section 1108, this Court need not decide whether it also could have been admitted under section 1101, subdivision (b) (see AOB 65-67). (*Britt, supra,* 104 Cal.App.4th at p. 506 ["Since the trial court correctly admitted the testimony concerning the uncharged offenses under section 1108, we need not reach the question of its admissibility under section 1101"].) But respondent notes that the evidence was also admissible for purposes of establishing appellant's intent and to show that he acted pursuant to a common scheme. (See *People v. Balcom* (1994) 7 Cal.4th 414, 423 [to establish common scheme or plan, the evidence must contain "'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 the individual manifestations'"]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 [to admit evidence of another offense to demonstrate intent, the uncharged offense need only be similar enough "to support the inference that the defendant 'probably harbored the same intent in each instance'"].) No evidentiary error occurred.

D. Any error in admitting the testimony was harmless

Any error in admitting evidence under Evidence Code section 1108 is subject to the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658-659; *People v. Harris* (1998) 60 Cal.App.4th 727, 741; see *People v. Falsetta* (1999) 21 Cal.4th 903, 913-916 [Evidence Code section 1108 does not violate a defendant's due process rights].) Under that standard, appellant must show that it is reasonably probable he would have obtained a better result absent the alleged evidentiary error. (*Watson, supra*, 46 Cal.2d 818, 836.)

Here, the prosecution presented compelling evidence of appellant's guilt without regard to the uncharged rapes. The prosecution presented direct evidence of appellant's guilt in the form of his admission to Hudson that he buried Smart because she was a "dick tease." (26RT 7558, 7563, 7575-7582.) But the prosecution also presented circumstantial evidence that was powerful when considered in totality.

The circumstantial evidence of guilt included appellant's behavior before Smart disappeared. Appellant repeatedly showed a romantic interest in Smart even though the interest was not mutual, and he repeatedly displayed that interest the night Smart went missing. (4RT 1007-1014; 7RT 1907-1928; 8RT 2110-2112.) After making unwanted sexual advances on two other women, appellant again focused on Smart, who was heavily inebriated. Appellant interjected himself into her group and made several efforts to isolate Smart by encouraging Anderson to

continue walking without them. When Anderson left appellant alone with Smart a short distance from Smart's dorm, she secured a promise from appellant to get Smart home safely. But he never did. She was never seen again. (4RT 1045-1057, 1094.)

The circumstantial evidence also included appellant's appearance and conduct after Smart went missing. Appellant admitted that he lied in giving conflicting explanations for a "black eye" that he sustained around the time of Smart's disappearance. (10RT 2879-2882, 2888; 13RT 3617-3636.) Additionally, appellant acted strangely when asked by other people about Smart's disappearance. (8RT 2245-2250 [when Tse made a joke about appellant having done something with Smart, appellant gave him a serious look and said that Smart was at his house having lunch with his mother]; 14RT 4016-4019 [when Hall asked appellant what he did with Smart, he lowered his head and never spoke to her again].) Appellant also failed to respond when his mother suggested that he listen to the podcasts about Smart and see if some holes could be punched in the theory (of appellant's guilt) because only he would know. (21RT 6025-6026; 35CT 10396 [transcript of telephone call that was recorded surreptitiously].) Finally, in 2004, appellant did not allow his girlfriend to go near the deck at his family home on White Court, which had significance because other evidence showed that Smart's body was likely buried there at the time. (18RT 5228-5233; 19RT 5413; 24RT 6907-6908.)

Additionally, about one month after Smart disappeared, no less than four dogs—that had been certified and were reliable in

detecting human remains—indicated that someone had died on appellant's side of his dorm room. The dogs passed by many other dorm rooms before providing the first (and only) alert on appellant's room. Upon entering appellant's room, the dogs alerted their handlers that someone had died on appellant's side of the room. (15RT 4284-4297; 15RT 4303-4305; 16RT 4588-4593; 18RT 5131-5149.)

Moreover, in 2021, detectives found strong evidence that Smart had previously been buried under the deck of appellant's family home on White Court. Two dogs, which had been certified in finding human remains, searched the backyard and other areas before providing an indication that some of the targeted odor existed under the deck. (21RT 6072-6085; 22RT 6328-6343.) At that point, ground penetrating radar showed that a hole had previously been dug under the deck that was consistent with a burial location because it was roughly six feet by four feet with a depth of between three and four feet. (22RT 6367-6371, 6407.) Although no bones were found when the area under the deck was excavated, an archaeologist determined that there had been a prior excavation of the area in which hand tools were used.[13] (23RT 6614-6619, 6626-6633, 6688.) Additionally, some of the soil in the likely burial location had dark stains that were consistent with human decomposition with fluids slowly leaking

[13] The evidence supported an inference that the prior excavation occurred a few days after detectives executed a search warrant at the Flores house on White Court. (20RT 5812-5822 [search of house on February 5, 2020], 5830-5834 [neighbor heard yelling and saw a cargo trailer backed up next to Flores house on February 9, 2020].)

into the ground, and the stained soil tested positive for hemoglobin, which is found in human blood. (23RT 6614-6619, 6626-6633; 30RT 8714-8715, 8727-8731.) Finally, some fibers found during the excavation were consistent with the red and black clothing that Smart had worn the night she disappeared. (26RT 7516-7527.) In short, the evidence of appellant's guilt was compelling.

Arguing otherwise, appellant asserts the evidence should be viewed as weak because many years passed before the charges were filed against him. (AOB 68-70.) But no such inference can be drawn from the failure to file charges earlier because it may simply reflect a conservative and patient prosecutorial agency, especially because an important piece of evidence—the burial plot under the deck of the Flores home—was discovered just one month before appellant was arrested and charged. (AOB 68-70.) Similarly, this Court should reject appellant's attempt to draw an inference as to the strength of the evidence against him from a different jury's acquittal of his father on the charge of being an accessory after the fact. (AOB 73.) The acquittal may have resulted from the jury's belief that there was insufficient evidence that Ruben affirmatively aided appellant even if he knew that appellant buried her under the deck. (See *People v. Partee* (2020) 8 Cal.5th 860, 867-869 [section 32 does not cover passive conduct; it requires overt or affirmative assistance].) Alternatively, the verdict may have resulted from an act of lenience in recognition of a father's understandable desire to protect his child. (See *People v. York* (1992) 11 Cal.App.4th 1506, 1510 ["Inconsistent

findings by the jury frequently result from leniency, mercy or confusion"].) Finally, this Court should reject appellant's assertion that the case should be deemed close—even though the jury never reported itself to be deadlocked—simply because the deliberations took five days following a trial that lasted two months. (AOB 72-73; see *People v. Houston* (2005) 130 Cal.App.4th 279, 300 [deliberations over four days did not show case was close but instead showed jury's "conscientious performance of its civic duty"]; *People v. Walker* (1995) 31 Cal.App.4th 432, 439 [six and a half-hour deliberation following two and a half-hour presentation of the evidence did not indicate that the evidence was closely balanced].)[14]

Instead, any prejudice analysis should focus on the strength of the evidence that was presented at trial. For the reasons set forth above, without considering the uncharged sexual offenses, the remaining evidence of appellant's guilt was strong on both the murder charge and on the allegation that appellant committed the homicide during the commission or attempted commission of a rape.

Contrary to appellant's assertion (see AOB 69-70), the significance of the admission he made to Hudson was not undermined by the fact that he apparently provided her with an incorrect location as to where he "buried" Smart. Likewise, the

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[14] The case upon which appellant relies for this proposition, *In re Martin* (1987) 44 Cal.3d 1, 51, was specifically addressed by *Walker*. Recognizing that *Martin* inferred a close case from unduly lengthy deliberations, *Walker* found that it "would amount to sheer speculation" to draw such an inference under the facts of its case. (*Walker*, *supra*, 31 Cal.App.4th at p. 439.) The same holds true here.

existence of any "false alerts" (see AOB 69) did not undermine the significance of the fact that no less than four dogs all passed by numerous dorm rooms without providing an alert before doing so at the door of appellant's room. Finally, as none of the defense experts testified about any instances in which HemDirect provided false positives for hemoglobin, there is no support for appellant's assertion that they "cast doubt" on the results (see AOB 73). This is especially true given the other evidence that Smart previously had been buried there—with such evidence including the size of the hole, the fibers found in the hole, appellant's attempt to keep his girlfriend away from the deck, and appellant's admission to having "buried" Smart. But even if appellant could cast doubt on some aspect of the prosecution evidence, the remaining evidence was nevertheless very strong when viewed in totality. (See *People v. Delgado* (2013) 56 Cal.4th 480, 492 [*Watson* requires a reviewing court to examine entire record in assessing prejudice].) Accordingly, appellant was not prejudiced by any error in admitting the uncharged offenses.

III. APPELLANT FORFEITED HIS MERITLESS CLAIM THAT BOELTER, WHO HAD PREVIOUSLY BEEN ROOFIED, SHOULD HAVE BEEN PRECLUDED FROM OPINING THAT SMART ACTED AS THOUGH SHE MAY HAVE BEEN ROOFIED

Appellant contends that the trial court erred by allowing Boelter to opine that Smart acted as though she may have been roofied. Appellant asserts that the prosecution failed to lay an adequate foundation for Boelter's testimony that Smart's behavior was similar to how he felt and acted when his friend gave him a roofie. Appellant further asserts that the hearsay rule was violated by Boelter's testimony that he had read some

stories in a newspaper about girls being roofied or drunk. (AOB 75-80.)

Appellant, however, forfeited his claim by failing to object when Boelter first opined that Smart may have been under the influence of a drug. In any event, the trial court did not abuse its discretion in admitting the challenged portions of Boelter's testimony. An adequate foundation was established for the lay opinion because Boelter testified, without any objection, that he had a personal experience of being roofied. Boelter's general reference to unspecified newspaper articles did not constitute hearsay because no underlying statement from an article was ever offered for the truth; rather, the evidence was admissible for the nonhearsay purpose of explaining the impact of the articles on Boelter's thought process. Nevertheless, any improperly admitted testimony was harmless under *Watson*.

A. Factual background

On direct examination, Boelter testified that Smart became more inebriated towards the end of the party on Crandall. (8RT 2115.) With no objection from the defense, Boelter described Smart's condition as follows:

> She was really like – like tripping on something. I don't know how to describe it. Like, she was – it didn't seem like drunk. It just seemed like, I don't know, druggie; like just kind of, like, out of it, really spacey. I don't know. Like she wasn't standing straight. [¶] I mean that's the only way I can describe it. So you could say that's drunk or you could say it's – she had drugs. I mean, she just seemed not on her feet, not stable.

(8RT 2115-2116.)

Under questioning from defense counsel, Boelter testified that he had previously referred to Smart as "the drunk girl." (8RT 2138-2139.) Additionally, Boelter testified that, prior to July of 2012, he had not said anything about the possibility that Smart had been under the influence of drugs. Boelter explained that he had assumed Smart was drunk. (8RT 2158.)

On redirect, Boelter was asked why he later considered the possibility that Smart was under the influence of drugs. Boelter replied,

You know, as the years went on and you think about the case I remember in the newspaper, there was a school newspaper, there was a number of stories about girls being roofied or drunk.

(8RT 2161.) Although defense counsel objected on hearsay grounds as to what was in the newspaper, the trial court overruled the objection after noting that the witness had not related anything specific. (8RT 2161.)

At that point, Boelter added, without any objection from the defense, that he "had a personal experience being roofied at a bar." (8RT 2161-2162 [defense counsel withdrew initial objection].) Boelter then described his personal experience:

> I felt it was a wild feeling after I ingested that drink. I felt really happy and I wanted to dance. I'm not a huge dancer. I was really talkative and social. And then I started to feel really bad and getting sick and then to the point of passing out and my friends carrying me out of this bar. [¶] So when I reflected on that I went, whoa, that reminds me of that night and seeing Kristin Smart. So that's where that comes from, from that personal experience.

(8RT 2162-2163.) Defense counsel objected under Evidence Code section 352 and asserted that no foundation had been established for the opinion. (8RT 2163.) The objections were overruled. (8RT 2163.)

On recross, Boelter testified that he never saw any evidence of drugs at the party. Boelter also testified that he never saw Smart become unconscious or unable to speak that night. (8RT 2168.)

On redirect, Boelter was asked whether, based on his experience, Smart's behavior at the party was consistent with having been roofied. But a defense objection was sustained, and the question was never answered. (8RT 2169.)

B. Appellant forfeited his challenge to the admission of Boelter's opinion by failing to raise a timely objection when Boelter first testified that Smart may have been under the influence of a drug

To preserve a claim that a trial court erroneously admitted evidence, a defendant must make a clear, specific, and timely objection at trial. (Evid. Code, § 352; *People v. Zapien* (1993) 4 Cal.4th 929, 979.) An objection on one ground will not permit an appeal on another ground. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 912.) On the timeliness front, a defendant must object when the objectionable material is first introduced. (See, e.g., *People v. Suff* (2014) 58 Cal.4th 1013, 1075-1076 [defendant forfeited objections to testimony by failing to raise them until there was a subsequent break after the witness testified]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 22 [recognizing that an objection must occur when the nature of a question indicates that the evidence sought is inadmissible].)

Here, appellant raised no objection whatsoever when Boelter first opined that Smart appeared to be under the influence of a drug rather than simply drunk. (8RT 2115-2116.) Although defense counsel objected when Boelter later reiterated his opinion that Smart may have been under the influence of a drug (see 8RT 2162-2163), that objection was too late because Boelter had previously given his opinion without any objection from the defense. (See, e.g., *Suff, supra*, 58 Cal.4th at pp. 1075-1076.)

C. The court did not abuse its discretion by allowing Boelter to opine that Smart acted as if she had been roofied

Evidence Code section 800 provides that a lay witness may testify as to an opinion if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony. Lay opinion concerning drug or alcohol intoxication is admissible as long as the party eliciting the evidence establishes a foundation. (*People v. Navarette* (2003) 30 Cal.4th 458, 493; *People v. Leahy* (1994) 8 Cal.4th 587, 620.) The requisite foundation is established as long as the witness is sufficiently knowledgeable about the substance to render an opinion as to whether another person was under the influence of that substance. (*Navarette, supra*, 30 Cal.4th at p. 494.) The knowledge requirement may be satisfied from the observation of others or from personal experience. (See, e.g., *People v. Williams* (1988) 44 Cal.3d 883, 915-916 [witness, who had seen other people "strung out" on drugs, opined that defendant did not appear "strung out"]; see AOB 78 [acknowledging that a lay witness who had "been 'roofied' could perhaps render an

admissible opinion on whether another person's behavior resembled his own"].) Ultimately, a trial court's ruling on the admissibility of lay opinion is reviewed for an abuse of discretion. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1254; *People v. Bradley* (2012) 208 Cal.App.4th 64, 83.)

In challenging the foundation for Boelter's opinion that Smart had been roofied, appellant asserts that the evidence was insufficient to establish that Boelter ever had an experience of being roofied. Notwithstanding appellant's concession that Boelter "claimed" to have been roofied, appellant asserts that such testimony was inadequate because Boelter "did not explain how he knew that roofies had been placed in his drink." (AOB 78.)

But appellant forfeited his challenge to the adequacy of the foundation because he failed to object when Boelter first testified that he "had a personal experience being roofied at a bar." (8RT 2161-2162.) Appellant is precluded from asserting for the first time on appeal that Boelter was never actually roofied. Thus, the relevant question on appeal is whether Boelter, having been roofied, had a sufficient foundation to opine that Smart exhibited symptoms that were like the symptoms he exhibited while under the influence of a roofie. Because a "yes" answer to that question does not exceed the bounds of reason, appellant's evidentiary claim lacks merit.

D. Boelter's testimony concerning the school newspaper did not violate the hearsay rule because it was not offered to prove the truth

Hearsay has been defined as an out-of-court statement offered for the truth of its content. Hearsay is generally inadmissible unless it falls under an exception. (Evid. Code, § 1200, subd. (b); *People v. Davis* (2005) 36 Cal.4th 510, 535-536.)

An out-of-court statement offered for some purpose other than the truth does not constitute hearsay. Such evidence is admissible if "the nonhearsay purpose is relevant to an issue in dispute." (*Davis, supra,* 36 Cal.4th at p. 535.) "For example, an out-of-court statement is admissible if offered solely to give context to other admissible hearsay statements." (*Id.* at p. 536.) Likewise, an out-of-court statement is admissible if offered to prove the impact the statement had on the person who heard it. (See, e.g., *People v. Bolden* (1996) 44 Cal.App.4th 707, 715.)

Here, the prosecution did not offer evidence of any specific newspaper article, nor did the prosecution attempt to establish that any article had truthfully and accurately stated that any particular female had been roofied. (See 8RT 2161.) Instead, the prosecution merely offered Boelter's rather generic testimony that he read some newspaper articles on that topic, which caused him to consider the possibility that Smart had been roofied. Thus, the prosecution did not actually offer any out-of-court statement. But even if Boelter provided sufficient information about the articles to constitute an out-of-court statement, his momentary reference to them was offered for the nonhearsay purpose of explaining why he changed his mind and began to consider the possibility that Smart's intoxication could have been

caused by a drug rather than merely alcohol. As such, Boelter's reference to the articles did not constitute hearsay. (*Bolden*, *supra*, 44 Cal.App.4th at p. 715.)

E. Any error in admitting Boelter's testimony was harmless

Any error in admitting opinion testimony under Evidence Code section 800 or hearsay under Evidence Code section 1200 is subject to the *Watson* standard, requiring the judgment be affirmed unless it is reasonably probable that appellant would have obtained a more favorable result absent the error. (*People v. Sanchez* (2016) 63 Cal.4th 665, 698 [nontestimonial hearsay is subject to the *Watson* standard]; *People v. Shorts* (2017) 9 Cal.App.5th 350, 362 ["Improper admission of lay opinion evidence is a state law error subject to the *Watson* test"].) Likewise, the erroneous admission of such evidence will not violate a defendant's federal constitutional right to due process, which requires a showing that the error rendered the trial fundamentally unfair. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 813 [rejecting claim that erroneously admitted hearsay violated due process]; see *People v. Partida* (2005) 37 Cal.4th 428, 439 [recognizing that erroneous admission of evidence under state law does not violate due process unless it makes the trial fundamentally unfair].)

Here, it is not reasonably probable that appellant would have obtained a better result if the trial court had precluded Boelter from opining that Smart may have consumed a roofie. As no objection was raised on direct examination when Boelter first testified to his belief that Smart may have been under the

influence of drugs rather than alcohol (8RT 2115-2116), any subsequent testimony on the issue could not have been prejudicial because it was superfluous. (See, e.g., *People vs. Nelson* (2011) 51 Cal.4th 198, 214-215 [recognizing that the improper admission of superfluous evidence was clearly harmless].) In any event, Boelter's testimony on the issue of whether Smart was under the influence of alcohol and/or a roofie was rather equivocal as he left the door open to both possibilities. (8RT 2115-2116.) Moreover, the evidence of appellant's guilt was compelling whether Smart was heavily under the influence of alcohol, a drug, or both. Contrary to appellant's suggestion, a jury did not need to find that appellant roofied Smart to find that he murdered her during a rape or attempted rape. Accordingly, any error was harmless under *Watson*.

IV. THE PROSECUTOR DID NOT ASK THE JURY TO DRAW ANY IMPROPER INFERENCE FROM THE STILL PHOTOGRAPH OF THE UNIDENTIFIED WOMAN WHO HAD HER EYES CLOSED WITH A BALL GAG IN HER MOUTH, AND ANY PROSECUTORIAL ERROR WAS HARMLESS

Appellant contends the prosecution closing argument asked the jury to draw an improper inference from the still photograph taken from a video that he took of an unidentified woman who had her eyes closed with a ball gag in her mouth. Recognizing the photograph was admitted for the limited purpose of showing that he owned such a ball gag, appellant asserts that the prosecutor improperly asked the jury to consider the photograph for character purposes by arguing that the unidentified woman was not having any "fun." (AOB 83-87.)

Appellant's claim lacks merit. After defense counsel told the jury that the prosecution case amounted to nothing more than a "fun" conspiracy, the prosecutor was entitled to respond by arguing that the people who became involved in the case did not have any fun. In doing so, the prosecutor listed five of the witnesses who testified at trial as well as the woman in the photograph. The prosecutor's brief comment, which did not ask the jury to infer that appellant committed any sexual crime against her, was a very reasonable inference to be drawn from the photograph of a woman who had her eyes closed and was likely unconscious. Accordingly, the court reasonably overruled a defense objection to the argument. In any event, the comment had little potential to prejudice a jury that heard testimony from R.D. and S.D. as to how appellant roofied and raped them.

A. Factual background

R.D. and S.D. both testified that appellant made use of a red ball gag in sexually assaulting them. (17RT 4823-4826; 24RT 6922-6925.) The trial court later allowed the prosecution to introduce evidence that a computer found in the Flores home contained a video of a woman with a red ball gag in her mouth. (32RT 9415-9417; Peo. Exh. 458.) But when a still photograph taken from the video was shown, the court instructed the jurors that the image was being admitted only for the limited purpose of establishing, if it did, that appellant possessed a red ball gag. (32RT 9416-9417.)

At a recess after the photograph was shown, the trial court noted that defense counsel had previously objected to it. Given

an opportunity to restate the objection, counsel tacitly conceded that the photograph supported the uncharged offenses that were admitted under Evidence Code section 1108. Counsel, however, asserted that the photograph was unduly prejudicial under Evidence Code section 352. (32RT 9420-9422.) In response, the prosecutor noted that he had requested permission to show clips of the video that showed appellant's face, but the court limited the evidence to a single photograph. The prosecutor further argued that the probative value was very high because it corroborated both witnesses. (32RT 9423.) After hearing the argument of counsel, the court explained its reason for admitting the photographic still rather than the video, which the court characterized as too inflammatory. (32RT 9425-9426.)

After the parties rested, the trial court discussed its reason for excluding the prosecution's proffered videos that had been in appellant's possession. Stating that the videos were graphic because they showed the genital area and faces of naked women, the court found that Evidence Code section 1108 did not apply because the women were never identified. According to the court, it was impossible to ascertain whether the conduct was consensual without locating the women and asking them. (37RT 10877-10878.)

Turning to the photo of the red ball gag that was admitted into evidence, the trial court stated that detectives also had been unable to identify her. Under the circumstances, the court excluded the video of that woman, but it admitted the photograph for the sole purpose of showing that appellant owned a red ball

gag. The court thereafter ordered that the videos and photographs of the unidentified women be sealed to protect their privacy interests. (37RT 10879-10884.)

In his opening argument to the jury, the prosecutor only mentioned the photograph of the red ball gag once. In discussing the evidence of the uncharged rapes of R.D. and S.D., the prosecutor noted that the two women—who did not know each other—described being assaulted in a similar fashion with the use of a red ball gag. The prosecutor noted that their testimony was "consistent with the red ball gag [photo] that was found on his [appellant's] computer." (39RT 11495-11496.)

At the conclusion of the prosecutor's summation, defense counsel argued that the prosecutor had presented "basically a bunch of conspiracy theories" that were not supported by facts. Defense counsel stated that, while "conspiracy theories are fun," the job as a juror was "not to buy into a conspiracy theory" in rendering a verdict. (39RT 11498-11499.)

The prosecutor's closing argument challenged the defense accusation that there was a grand conspiracy against appellant. (41RT 12094-12095.) Responding to defense counsel's claim that conspiracy theories are fun, the prosecutor said:

> And then Counsel said, [c]onspiracy theories are fun. Okay, maybe you think it's possible that everybody, the dogs are in on it. Did it look like the woman with the ball gag in her mouth was having fun in this conspiracy theory?

(41RT 12095-12096.) At that point, defense counsel raised an objection without specifying the grounds, and the trial court overruled it while noting that the prosecutor was engaged in

argument. (41RT 12096.) The prosecutor continued by asking whether other people involved in the case were part of a fun conspiracy. Specifically, the prosecutor asked if it looked like S.D., R.D., Fleming, Campos, Hudson, or any other witness had fun testifying. The prosecutor then said that there was nothing fun about the case. (41RT 12096.)

At a break after the prosecutor's closing argument, defense counsel asserted that the prosecutor's argument misstated the burden of proof and that it asked the jury to draw an improper inference from the photograph of the ball gag. (41RT 12121-12122.) But the court found there had been no misconduct. (41RT 12128.)

B. The prosecutor did not commit misconduct or otherwise err during closing argument by asserting that the girl in the photo did not appear to be having fun

A prosecutor's misconduct violates the Fourteenth Amendment if it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hoyt* (2020) 8 Cal.5th 892, 943.) "A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves the use of deceptive or reprehensive methods to attempt to persuade either the court or the jury." (*Ibid*, internal quotation marks omitted.)

In challenging remarks made by a prosecutor in arguing the case to the jury, the defendant is required to show that, in context of the whole argument and instructions, there was a reasonable likelihood the jury understood the remarks in an improper or erroneous manner. (*People v. Centeno* (2014) 60

Cal.4th 659, 667.) A reviewing court does "'not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*Ibid.*) Moreover, a trial court's ruling on a claim of prosecutorial misconduct is reviewed for an abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 792-793.)

"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. Cortez* (2016) 63 Cal.4th 101, 130, quoting *People v. Benson* (1990) 52 Cal.3d 754, 793.) A prosecutor "is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1251.) A prosecutor is also entitled to ask the jury to draw inferences from the evidence that may not be particularly strong because the jury is entitled to decide the reasonableness of such inferences. (*People v. Tafoya* (2007) 42 Cal.4th 147, 181; *People v. Thornton* (2007) 41 Cal.4th 391, 454.) But a prosecutor is precluded from referring to matters outside the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) Similarly, a prosecutor is precluded from "urging use of evidence for a purpose other than the limited purpose for which it was admitted." (*People v. Lang* (1989) 49 Cal.3d 991, 1022.)

Here, the prosecutor's brief reference to the ball gag did not violate the Fourteenth Amendment or California law. After

defense counsel's argument asserted that the prosecution case consisted of "fun" conspiracy theories, the prosecutor responded by explaining that there was no grand conspiracy among the numerous prosecution witnesses who did not know each other and did not have any "fun" being involved in the case. (41RT 12094-12095.) Tacitly conceding that there was nothing wrong with such an argument, appellant asserts the prosecutor acted improperly by noting that the woman in the photograph also did not appear to be having any fun. (AOB 85.) But the prosecutor's brief comment asked the jury to draw a very reasonable inference from the photograph. Additionally, in overruling defense counsel's objection, the trial court showed that the argument did not run afoul of the court's previous ruling concerning the limited purpose of the photograph. (41RT 12096, 12128.) Moreover, the prosecutor's brief remark was made in response to defense counsel's argument. (See *Cortez*, *supra*, 63 Cal.4th at p. 133 [finding no misconduct where challenged statement was brief and offered in response to defense counsel's comments].) Under the foregoing circumstances, where the prosecutor did not ask the jury to draw an inference that was not plainly obvious from the photograph itself, no error or misconduct occurred.[15]

C. Any improper argument was harmless

To the extent the prosecutor's brief comment on the photograph constituted misconduct, it could not have rendered

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[15] Prosecutorial error is a more apt description of appellant's claim in that no culpable state of mind for the prosecutor is required. (*Centeno*, *supra*, 60 Cal.4th at pp. 666-667.)

the trial fundamentally unfair. Accordingly, the *Watson* standard of review applies. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.)

Here it is not reasonably probable that appellant would not have obtained a more favorable result if the prosecutor had not included the woman depicted in the photograph in the list of people who had no "fun" being involved in the case. This Court should presume the jury abided by the trial court's admonitions that the argument of counsel did not constitute evidence (32CT 10405 [CALCRIM No. 222) and that evidence admitted for a limited purpose could be considered only for that limited purpose (32CT 10414 [CALCRIM No. 303]). *People v. Seumanu* (2015) 61 Cal.4th 1293, 1336.) Moreover, contrary to appellant's suggestion (AOB 85), the prosecutor's recognition of something obvious in the photograph in no way encouraged the jurors to convict appellant because of some unknown crime done to the unidentified woman. In any event, it would have made little difference to the jury whether there was evidence that appellant drugged and raped two or three women. Either way, the jury could infer that appellant had a propensity to commit sexual offenses. Given the nature of the alleged error and the strength of the evidence presented at trial, appellant was not prejudiced by the prosecutor's comment on the photograph.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING OF MURDER IN THE FIRST DEGREE

Appellant contends the evidence was insufficient to support his first degree murder verdict under a felony-murder theory or under a theory of premeditation. (AOB 88-90.) In raising the

claim, appellant acknowledges that the verdict must be upheld if substantial evidence supports either theory. (AOB 88.)

Appellant's challenge to the sufficiency of the evidence lacks merit. The record contains substantial evidence to support the felony-murder theory.

In evaluating a challenge to the sufficiency of the evidence, a reviewing court reviews the entire record to determine whether the verdict is supported by substantial evidence. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) Viewing the evidence in the light most favorable to the prosecution, the court presumes the existence of every fact a reasonable jury could deduce from the evidence. (*Ibid.*) Moreover, a reviewing court must consider all of the evidence that was presented at trial, including evidence that was improperly admitted. (*Story*, *supra*, 45 Cal.4th at p. 1296 [in evaluating a challenge to the sufficiency of the evidence, a reviewing court "must consider *all* of the evidence presented at trial, including evidence that should not have been admitted"]; *People v. Lara* (2017) 9 Cal.App.5th 296, 328, fn. 17.) Thus, a verdict may not be overturned merely because the circumstances might also be reconciled with a contrary finding. (*People v. Solomon* (2010) 49 Cal.4th 792, 811-812.) Under this standard, "a defendant bears an enormous burden in claiming there is insufficient evidence" to support a conviction. (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) First degree murder includes unlawful killings committed during the perpetration of certain

specified felonies, including rape and attempted rape. (§ 189, subd. (a).) First degree murder also includes any murder that is willful, deliberate and premeditated. (*Ibid.*)

As appellant acknowledges (see AOB 88), "When a jury is instructed on two theories of first degree murder, a first degree murder verdict will be upheld [even] if there is insufficient evidence as to one of the theories." (*People v. Sandoval* (2015) 62 Cal.4th 394, 424.) Where the inadequacy of proof is purely factual, the jury is presumed to be "fully equipped to detect" the deficiency and must have relied on the other, factually valid theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

Here, the record contains substantial evidence to support appellant's first degree murder conviction based on a felony-murder theory. The prosecution presented evidence that, on two separate occasions, appellant isolated a woman from her friend or friends, gave her a roofie, and then raped her when she was in a semiconscious state. (17RT 4818-4826; 24RT 6920-6925.) From this evidence, the jury could infer that appellant was disposed to commit sexual offenses and that he was "likely to commit and did commit rape or attempted rape as charged in the special allegation." (32CT 10440 [CALCRIM No. 1191A instructed the jury that uncharged offenses must be considered with other evidence because they are not sufficient by themselves to prove felony-murder theory].) The prosecution also presented evidence that appellant was romantically interested in Smart and that, when she was semiconscious, he separated her from other people who could intervene. (3RT 688-693, 705-706; 4RT 1045-1057;

6RT 1664-1676; 7RT 1907-1928; 8RT 2110-2112.) Accordingly, appellant's actions with Smart followed the same pattern as the two uncharged rapes.[16] Moreover, in telling Hudson that he buried Smart underground because she was a "dick tease," appellant showed that the killing had a sexual component. (26RT 7558, 7563, 7575-7582.) Under the foregoing circumstances, a jury could infer that appellant killed Smart during the commission of a rape or attempted rape. As such, this Court need not determine whether the evidence was sufficient to support the premeditation theory. The claim lacks merit.

VI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE MENTAL STATE REQUIRED FOR ATTEMPTED RAPE OF AN INTOXICATED PERSON, AND IT PROPERLY INSTRUCTED THE JURY ON ITS ABILITY TO CONSIDER EVIDENCE OF APPELLANT'S INTOXICATION

Appellant contends the trial court misstated the mens rea for attempted rape of an intoxicated person in two ways. First, appellant asserts the instructions set forth in CALCRIM Nos. 460 and 1002 combined to permit the jury to find he committed an attempted rape of an intoxicated person, even if he did not personally know that Smart's level of intoxication precluded her consent, provided a reasonable person would have known as much. Second, appellant asserts the pinpoint instruction on his voluntary intoxication, set forth in CALCRIM No. 625,

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[16] Appellant posits that he could have had sex with Smart hours after she walked home with him and that the "effects of the alcohol could have dissipated" by that time. (AOB 89.) But the jury was entitled to infer that, just as appellant did not wait for R.D. or S.D. to regain their full consciousness, he did not wait for Smart to do so either.

improperly precluded the jury from considering appellant's intoxication in evaluating his assessment of Smart's condition. (AOB 90-98.)

Appellant's claims of instructional error lack merit and cannot be raised for the first time on appeal. Given the entirety of the instructions and the evidence of counsel, it is not reasonably likely the jury would have interpreted the standardized instruction on attempted crimes as appellant proposes. Appellant's failure to request any clarifying language in the court below precludes his current challenge to the legally correct instruction. Likewise, appellant is precluded from raising his meritless claim that the standardized pinpoint instruction on voluntary intoxication should have been modified to allow the jury to consider such intoxication in assessing his knowledge.

A. Factual background

The trial court instructed the jury that felony murder applies when a killing occurs during the commission of a rape or an attempted rape. As to rape, the court instructed the jury with CALCRIM No. 1000 on forcible rape, CALCRIM No. 1002 on rape of an intoxicated person, and CALCRIM No. 1003 on rape of an unconscious person. (35CT 10435-10438.) CALCRIM No. 1002 permitted a conviction for the rape of an intoxicated person if "[t]he defendant knew or reasonably should have known that the effect of an intoxicating, anesthetic, or controlled substance prevented the woman from resisting." (See 35CT 10437 [CALCRIM No. 1002].)

For attempted rape, the court gave CALCRIM No. 460. It required the prosecution to prove that "[t]he defendant took a direct but ineffective step toward committing the rape" and that "[t]he defendant intended to commit rape." Additionally, the standardized instruction stated, "To decide whether the defendant intended to commit rape, please refer to the separate instructions that I will give you on that crime." (35CT 10439.)

The trial court also gave a pinpoint instruction concerning the applicability of evidence that appellant was voluntarily intoxicated. Under CALCRIM No. 625, the court instructed the jury:

> You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, the defendant acted with deliberation and premeditation or the defendant was unconscious when he acted. [¶] . . . [¶] You may not consider evidence of the defendant's voluntary intoxication for any other purpose.

(35CT 10434.)

B. Appellant is precluded from raising his meritless claim that the instructions allowed the jury to find that he attempted to rape an intoxicated person without finding that he attempted to have intercourse with a person incapacitated by intoxication

In evaluating a claim of instructional error, a reviewing court determines whether there is a reasonable likelihood that the jury understood the instructions in a manner that violated defendant's rights. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1296.) The instructions are viewed as a whole in light of the

entire trial record, including the arguments counsel made to the jury. (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1312.)

Additionally, "[a] trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Jackson* (2016) 1 Cal.5th 269, 336; *People v. Simon* (2016) 1 Cal.5th 98, 143.) Thus, a defendant is precluded from arguing for the first time on appeal that a generally accurate statement of law was potentially misleading. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.)

An attempt to commit a crime requires a specific intent without regard to whether the underlying crime required a specific intent, a general intent, or no intent at all. (*People v. Fontenot* (2019) 8 Cal.5th 57, 67-69; see *People v. Bailey* (2012) 54 Cal.4th 740, 747-750.) Accordingly, although the intent requirement for rape of an intoxicated person is satisfied if the accused "knew or reasonably should have known" that an intoxicating substance prevented the woman from resisting, an attempt to commit the crime requires that the defendant "must not only intend to have intercourse, but to have intercourse with a person incapacitated by intoxication." (*People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1249.)

In section 21a, the Legislature codified the safeguard concerning the intent requirement for all attempted crimes. (*Fontenot*, *supra*, 8 Cal.5th at p. 68.) It provides, "An attempt to commit a crime consists of two elements: a specific intent to

commit the crime, and a direct but ineffectual act done towards its commission."

CALCRIM No. 460 tracks section 21a in a nearly verbatim manner. As given here, the instruction stated, "To prove that the defendant is guilty of an attempt to commit rape, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing rape; [¶] AND [¶] 2. The defendant intended to commit rape." (35CT 10439.) As such, CALCRIM No. 460 properly instructed the jury that appellant could not be guilty of attempted rape unless he had the specific intent to commit a rape. Elsewhere, CALCRIM No. 460 admonished the jury that, in deciding whether the defendant intended to commit rape, it should refer to the separate instructions on that crime. By referring to the other instructions on the crime of rape, it simply allowed the jury to find appellant guilty if he intended to commit any of the three types of rape alleged: by having non-consensual sexual intercourse with a woman by means of force, violence, duress, menace, or fear (CALCRIM No. 1000); by having sexual intercourse with a woman who was prevented from resisting by the effect of an intoxicating, anesthetic, or controlled substance (CALCRIM No. 1002); or by having sexual intercourse with a woman who was unable to resist because she was unconscious of the nature of the act (CALCRIM No. 1003). The reference to the instructions on rape did not somehow override or modify the specific intent aspect of the two-element test that required appellant to have "intended to commit rape," which meant that appellant intended to have intercourse with Smart without her

consent—whether by means of overcoming any resistance or by taking advantage of her incapacity to resist that resulted from either intoxication or unconsciousness.

The evidence and arguments of counsel further show that the jury would understand that attempted rape of an intoxicated person required a finding that appellant intended to have intercourse with a person incapacitated by intoxication. Having presented evidence that appellant roofied and raped two women who were prevented from resisting by the intoxicating substance, the prosecutor characterized appellant as a "serial drugger, who enjoyed raping drugged women, [and] had Kristin Smart to himself" just steps from his dorm the night she went missing. (41RT 12098.) The prosecutor asserted that appellant certainly knew that Smart was so intoxicated as to be unable to resist:

> He knew perfectly well she was too incapacitated to consent, which is why he inserted himself in that situation. So when you combine the other rapes with the facts of this case, the only conclusion is that he intended to rape Kristin Smart, had a plan to do so, and took one step towards putting that plan into action.

(39RT 11494.)

In short, viewing the record in its entirety, it is not reasonably likely that the jury misunderstood the standardized instructions set forth in CALCRIM Nos. 460 and 1002. As appellant did not ask the trial court to provide any modifying or clarifying language to these standardized instructions that accurately set forth the law (38RT 11160 [defense counsel recognized that CALCRIM No. 460 was "a straight CALCRIM"]),

he is precluded from raising the issue on appeal. (*Jackson*, *supra*, 1 Cal.5th at p. 336.)

Under appellant's reasoning, the incorporation language in CALCRIM No. 460 would not just create error in this case, but in every case for which the offense attempted requires a general criminal intent or even no intent at all. It is telling that appellant has not found a single case suggesting that CALCRIM 460 may mislead a jury under such circumstances. Appellant's reliance on *People v. Dillon* (2009) 174 Cal.App.4th 1367 is misplaced because the reviewing court did not address CALCRIM No. 460 and because it found that the instructional claim was not properly raised on appeal since no request for modifying language was proposed at trial. (*Dillon*, *supra*, 174 Cal.App.4th at p. 1380.) Accordingly, appellant's claim of instructional error lacks merit.

C. Appellant forfeited his meritless claim concerning the scope of the pinpoint instruction on his voluntary intoxication

"Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 29.4, subd. (b).) "[T]he plain language of the statute does not permit the admission of voluntary intoxication evidence on the issue of whether or not the defendant met the knowledge requirement of a general intent crime." (*People v. Suazo* (2023) 95 Cal.App.5th 681, 702-703; *People v. Berg* (2018) 23 Cal.App.5th 959, 969.)

The standardized instruction on voluntary intoxication is set forth in CALCRIM No. 625. Because it is a pinpoint instruction, courts have no sua sponte duty to give it. (*People v. Saille* (1991) 54 Cal.3d 1103, 1120.)

Here, the trial court granted defense counsel's request to give CALCRIM No. 625, and it gave the instruction in the exact format that appellant requested. (38RT 11155.) Appellant cannot now complain on appeal that the court failed to give a different pinpoint instruction that he never requested. (*Saille*, *supra*, 54 Cal.3d at p. 1120.)

In any event, appellant's claim fails on the merits because section 29.4 does not allow the jury to consider evidence of a defendant's voluntary intoxication on the issue of knowledge. (*Suazo*, *supra*, 95 Cal.App.5th at pp. 702-703.) But even if it could be considered on the issue of knowledge, the court was not required to so instruct because the record did not contain substantial evidence that appellant's intoxication had any effect on his ability to perceive that Smart was too intoxicated to resist. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 635, 677-678 ["Assuming this scant evidence of defendant's voluntary intoxication would qualify as 'substantial,' there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent"]; see *People v. Bolden* (2002) 29 Cal.4th 515, 558 [recognizing that a trial court need not give a pinpoint instruction that is not supported by substantial evidence].) In short, the court did not err by giving the instruction that the defense requested.

D. Any instructional error was harmless

Any misstatement of an element of an offense is subject to the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, which requires the judgment be reversed unless the error was harmless beyond a reasonable doubt. (*People v. Lamas* (2007) 42 Cal.4th 516, 526.) But the *Watson* standard applies where there are ambiguous, conflicting, or improperly omitted jury instructions. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299; *People v. Beltran* (2013) 56 Cal.4th 935, 955.) The *Watson* standard also applies to the failure to give a requested pinpoint instruction on voluntary intoxication. (*People v. Pearson* (2012) 53 Cal.4th 306, 325 [failure to give pinpoint on voluntary intoxication subject to *Watson* standard] ; *People v. McGehee* (2016) 246 Cal.App.4th 1190, 1206.)

As neither CALCRIM No. 460 nor No. 1002 misstated any element, appellant's first claim of instructional error is tantamount to a claim that the instructions were ambiguous or conflicting when considered together. Under such circumstances, the *Watson* standard applies to the first claim as well as to the second claim, which asserts the court failed to give a broad enough pinpoint instruction. But any instructional error was harmless even under *Chapman*.

Aside from appellant's self-serving statements made to the police, there was precious little evidence that appellant was even intoxicated. Although Davis once told a detective that appellant appeared to have been drunk, appellant could not have been too intoxicated because he would have been unable to provide the physical support that Smart required. In any event, there was

absolutely no evidence that appellant was so intoxicated that it could have affected his ability to recognize that which was plain to all—that Smart was too intoxicated to resist an unwanted sexual assault. Moreover, given evidence that appellant roofied and raped two other women, it is inconceivable that the jury would have found that, because of his own intoxicated state, he personally did not know that Smart was too intoxicated to resist his attempt to have sexual intercourse with her. There simply was no evidence that appellant personally believed that Smart had the capacity to consent. Any instructional error was harmless.

VII. THE CUMULATIVE ERROR ARGUMENT LACKS MERIT

Appellant contends the cumulative effect of some of the errors alleged in his opening brief deprived him of his state and federal constitutional rights to due process and a fair trial. (AOB 99-100.) The cumulative error argument lacks merit.

As set forth above, each alleged error lacked merit and was harmless. To the extent that appellant has demonstrated more than one type of error in this case, their cumulative effect did not infringe on any of his state or federal constitutional, statutory, or other legal rights. (See, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1075 ["whether considered separately or in combination, the few errors that occurred during defendant's trial, as discussed earlier, were inconsequential"]; *People v. Wrest* (1992) 3 Cal.4th 1088, 1111.) Appellant was entitled to a fair trial, not a perfect one. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *People v. Mincey* (1992) 2 Cal.4th 408, 454.) Appellant received a fair trial.

CONCLUSION

For the foregoing reasons, respondent respectfully submits the judgment should be affirmed.

Respectfully submitted,

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April 14, 2025

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Century Schoolbook font and contains **22,870** words.

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April 14, 2025

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DECLARATION OF ELECTRONIC SERVICE
AND SERVICE BY U.S. MAIL

Case Name: ***People v. Paul Ruben Flores*** No.: **B329873**

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On April 14, 2025, I electronically served the attached **RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system:

Solomon R. Wollack
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Sixth District Appellate Program

(Service Via TrueFiling)

On April 14, 2025, I served the attached **RESPONDENT'S BRIEF** by transmitting a true copy via electronic mail to:

Christopher Peuvrelle
Deputy District Attorney
(Courtesy Copy Via Email)

Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on April 14, 2025, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230, addressed as follows:

The Honorable Jennifer O'Keefe
Monterey County Superior Court
Salinas Courthouse
240 Church St.
Department 4, 2nd Floor
Salinas, CA 93901

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 14, 2025, at Los Angeles, California.

J. Wu	***/s/ J. Wu***
Declarant	Signature

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