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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. OGANIS AGDAIAN, Defendant and Appellant.	B236437 (Los Angeles County Super. Ct. No. LA061963)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Affirmed.

Eric S. Multhaup for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Oganis Agdaian appeals from a sentence of 16 years to life following his conviction for murdering his wife. He contends the conviction should be reversed because (1) the trial court erred in dismissing a seated juror, (2) the prosecutor committed misconduct in referring to his nontestimonial courtroom demeanor, and (3) the trial court admitted improper dog scent evidence. Finding no reversible error, we affirm.

STATEMENT OF THE CASE

A jury convicted appellant of second degree murder (Pen. Code, § 187, subd. (a)).[1] The jury found true that appellant used a blunt object, a deadly weapon within the meaning of section 12022, subdivision (b)(1). It acquitted appellant of first degree murder. The trial court sentenced appellant to prison for a term of 16 years to life. Appellant timely appealed from the judgment of conviction.

STATEMENT OF THE FACTS

A. *Prosecution Case*

The prosecution's theory of the case was that on April 11, 2009, appellant killed his wife, arranged the house to make it appear as though she had been killed during a burglary, and went to a gym to create a false alibi and to dispose of evidence.

Appellant worked in the taxicab business, leasing cars to drivers and occasionally servicing the cars at his home. Artur Karapetyan testified that he lived on the same street as appellant, and had met appellant about a year before the homicide. Karapetyan and appellant went to each other's homes frequently, and Karapetyan had talked with appellant's wife, Aykui, "many times." On the

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

morning of the homicide, Karapetyan saw appellant walking his dog, as appellant did every day. While the two men were having coffee at Karapetyan's home, appellant received a telephone call that one of his cab drivers had come to his house, so he went home. At trial, Karapetyan could not remember when appellant left his house. However, during a prior police interview, Karapetyan had told the police that appellant left at about 9:00 a.m.

At 11:47 a.m. that day, appellant called Karapetyan's cell phone and said, "Quickly, make your way to our home." Appellant "was short of breath." Karapetyan arrived within minutes, entering through the open back door of appellant's home. Karapetyan saw appellant on the couch in the living room, "in [a] semi-unconscious condition." Appellant's face was "pale"; it was "all mixed up and it was, like, the color of the wall. It looked bad." Appellant also was "breathing badly." He was wearing the same clothing he had worn earlier that morning.

Karapetyan ran toward appellant and asked, "What happened? What's going on? How do you feel?" Appellant responded in a "scared [and barely audible] voice . . . , 'Aykui, Aykui.'" When Karapetyan asked, "Aykui what?" appellant replied, "Kitchen," and then asked for water. Karapetyan ran toward the kitchen and saw Aykui's body on the floor.

Karapetyan told appellant he would call 911, and appellant said, "Yeah, call, and give me water." Appellant did not go into the kitchen; he remained on the couch. The 911 operator gave Karapetyan some instructions, and Karapetyan touched Aykui's wrist, which was "cold."

Gholam Pournayeb, a driver who had rented a cab from appellant, testified that on the date of the homicide, he had an appointment with appellant. Pournayeb went to appellant's home at 8:50 a.m. to have appellant change the oil and filter in

his cab. When he arrived at appellant's house, he noticed that another cab driver, whom he knew as Luis, was leaving. Appellant's wife was present, and she told Pournayeb that appellant was at Artur Karapetyan's house and would return. Pournayeb read the newspaper for five to seven minutes until appellant came back with his dog. Appellant changed the oil and the filter, and engaged in small talk with Pournayeb. Appellant's wife came out again and greeted them. Pournayeb was there for about 45 minutes to an hour, and left around 9:45 a.m.

Armine Neshanian, the daughter of appellant and the victim, testified that her mother worked at a bank and was not involved in any criminal activity. On the morning of the homicide, shortly before 10:00 a.m., Neshanian called her mother, and spoke to her for about five minutes. Aykui was well. Neshanian phoned her again at 12:17 p.m., but no one answered. On cross-examination, Neshanian testified that she saw her father several days after the murder of her mother. They "sobbed together and held each other. And he was crying, and I was crying."

Gerard Prest lived across the street from appellant. Prest described their neighborhood as "[v]ery quiet" and "very low crime." On the morning of the homicide, Prest was expecting to have a television delivered to his home between 9:00 a.m. and noon. Prest woke up about 10:30 or 10:45 a.m., had a quick breakfast, and went to his garage to locate an old television, which he intended to give to the delivery people to take away. His garage door was open, and he could see appellant's house.

Since Prest was waiting for the delivery people, he paid more attention to the front of his house than he normally did. From around 11:00 a.m. to 12:15 p.m., Prest did not see or hear anything unusual, except when he saw the ambulance arrive across the street. Prest did not recall seeing any strange persons or strange cars near appellant's home. Prest had noticed on prior occasions that appellant's

dog would bark when people passed by appellant's house, but Prest did not hear the dog bark that day.

Leon Papu, appellant's next-door neighbor, testified that he left his home to go to a restaurant that morning and returned around 11:32 a.m. He heard two men talking "pretty calm[ly]" in a foreign language, "like Russian, or Armenian, or . . . a Czechoslovakian-type language." Papu also heard the gate to appellant's house open and close. About eight minutes later, Papu saw the fire truck and the paramedics arrive.

Papu noticed that when appellant was later interviewed by a police officer in front of his house, appellant "looked perfectly calm, very cool. He was holding his dog, and he was petting his dog." Appellant's demeanor struck Papu "as odd." After the homicide, Papu observed that appellant continued to leave his garage open. He also noticed that "the rear gate -- the rear door to the back of [appellant's] house was open." Papu testified he had often heard appellant's dog, Ringo, bark, and had seen Ringo bark at the mailman. On cross-examination, Papu stated that appellant's prior dog, Charlie, barked more than Ringo.

Los Angeles Fire Department Captain John Ruedy testified that on April 11, 2009, he and several other persons from the engine company and the paramedic rescue team went to appellant's house in response to Karapetyan's 911 call. The paramedic team determined that the victim was dead, and Captain Ruedy notified the police that she did not die from natural causes. Captain Ruedy and his team waited until officers from the Los Angeles Police Department (LAPD) arrived.

Captain Ruedy observed that appellant "wasn't overly anxious . . . or hysterical for seeing his wife in the kitchen and in the state that [she was] in." Captain Ruedy asked appellant what had happened. Appellant said "he had gone to the gym and came back and found the scene the way it was." Captain Ruedy,

who had experience treating people in a state of shock, said appellant did not appear to be in shock. "He was coherent. He knew what was going on, or he had his faculties about him."

LAPD Officer Moises Cervantes testified that he and his partner responded to the crime scene shortly after the paramedic team called the police. When Officer Cervantes arrived, appellant and Karapetyan were sitting on the living room couch. Officer Cervantes testified that when he saw the victim in the kitchen, he determined that the area was a crime scene. He asked the paramedic personnel, appellant and Karapetyan to step outside. He set up crime scene tape, and asked for additional units to respond.

Officer Cervantes then looked around the house to see if any other persons were present. During his walkthrough, he noticed that "[t]he bedrooms appeared to be ransacked." Officer Cervantes testified he had investigated several hundred residential burglaries. In his opinion, the crime scene "didn't appear to be [a] typical break-in or burglary." The drawers were pulled only half-way out, but in a typical residential burglary, the burglars "go through your drawers, they literally pull the drawers out, completely out, and throw the items onto the floor, and they proceed to the next one. They do that to every nightstand. So every drawer is typically out, and everything is on the floor, so they make a big mess." In contrast, the scene at appellant's home appeared to have been staged.

Officer Cervantes then spoke to appellant, who was sitting in a chair in the driveway, just outside the residence. Appellant told Officer Cervantes that he left his home that morning at about 10:15 or 10:30 a.m. to go to the gym, while his wife stayed home to cook. When he came home about an hour later, he discovered his wife dead in the kitchen.

Observing appellant, Officer Cervantes thought his behavior was unusual. Appellant "was calm. His thoughts were collected. [He] [d]idn't appear to be in shock. [He] [d]id not display any emotional trauma." There were no tears. Officer Cervantes had responded to prior homicide scenes, and from his experience, the "family members are very devastated; and they're either pacing back and forth, they're hysterical, their heart's racing, or they're very fidgety. They're moving around. They cannot be sitting still." In contrast, appellant was sitting down, appeared to be calm and relaxed, and was looking down at his feet. It made Officer Cervantes wonder: "Why are you so calm?" "What are you looking at?"

During the conversation, Officer Cervantes noticed that appellant rubbed the top of his shoes against the back of his pant leg several times. Officer Cervantes focused on appellant's shoes, and noticed that the shoes had a red substance on them that appeared to be blood. Officer Cervantes informed his supervisor, Sergeant Quinn, and the two officers asked appellant for the shoes. Appellant argued with them, but relinquished the shoes. Officer Cervantes examined appellant's clothing, but observed no blood on it.

Ogbonna Chinwah, a deputy medical examiner with the Los Angeles County Department of the Coroner, testified that Aykui died from "multiple blunt force trauma [to] the head," which caused her skull to fracture and her brain to hemorrhage. Chinwah opined that Aykui died within 10 minutes of the infliction of such injury. Chinwah also testified that Aykui had "extensive, multiple injuries" to other areas of her body. The wounds to Aykui's hands and forearms were consistent with defensive wounds. There were no indicia of sexual assault.

Elizabeth Swanson, a criminalist in the LAPD's field investigation unit, testified she went to the crime scene and collected evidence. She conducted

preliminary tests of several stains in appellant's home, and the results showed that those stains might be blood. Swanson collected samples of the stains by rubbing them with sterile swabs.

Swanson also conducted a preliminary test on the shoes appellant had been wearing. The test showed the stains on the shoes might be blood. The preliminary test of the steering wheel of appellant's car indicated there was blood. The preliminary tests of the car trunk did not show possible blood stains, but Swanson did not test the whole trunk. Swanson also tested appellant's gym bag for blood, but the test came back negative.

Susan Rinehart, a criminalist assigned to the LAPD's DNA/Serology unit, opined that appellant's DNA was found on two of the swabs collected by Swanson: a swab of the red stain on the sliding glass door at the rear of the residence and a swab of the red stains on the door jamb. Angela Zdanowski, a criminalist in the Los Angeles Police Department's scientific investigation division, agreed that those swabs contained appellant's DNA. She further opined that Aykui's DNA profile matched the partial DNA profiles on the shoes appellant was wearing.

Ronald Linhart, a retired criminalist and former assistant director of the Los Angeles County Sheriff's Department's crime lab, testified as an expert on blood spatter evidence. Linhart explained:

> "When blood is deposited as a liquid onto other surfaces, it will be deposited with a . . . physical configuration that could be called a pattern. That pattern can be used to determine the various aspects of the manner in which that blood was deposited and, from that, one can work backwards to the nature of the events that caused that deposit."

In addition to opining that the number, size, and distribution of blood droplets in the kitchen were characteristic of a "blunt-force pattern," Linhart also looked at the photos of appellant's shoes. The blood droplets on the shoes were

"[r]elatively small," ranging from one millimeter to two-tenths of a millimeter. Linhart opined "that the shoe was relatively close to the source of the blood that was projected onto the shoe; probably within three feet or so" since "small droplets don't travel very far, because they are . . . more subject to the air resistance."

Linhart opined that merely brushing up against the victim's body would not have resulted in the pattern of blood droplets on the shoes. He explained that the droplets of blood were "projected due to the application of some considerable force. They are not contact transfers." In addition, Linhart opined that if the person who wore the shoes stepped into the blood at the crime scene, this could not have caused the blood droplets found on the shoes. Linhart stated that, "[I]f it [is] spattered blood, it would spatter away from the shoe, not back in a recurve arc up on top of the shoe. Furthermore, stepping into blood would tend not to apply sufficient force to form droplets of that small a size."

Linhart also opined that the blood drops on the shoe heel had been "disturbed by contact while the blood droplet[s] w[ere] still wet." This occurred within a "few minutes" after the droplets landed on the shoe. It also "could have and probably was [caused by] the shoe wiping against some other object such as a pant leg, or . . . the opposite shoe, while the blood drops were still wet."

On cross-examination, Linhart stated that the LAPD did not have a blood spatter expert. He also stated that California does not have "certifications or testing or licensing bodies" in regard to blood spatter analysis. He "absolutely" agreed that "blood stain pattern interpretation has its strengths and has its weaknesses." Linhart admitted that preliminary blood tests and sampling for DNA could distort the blood spatter patterns.

LAPD Detective Steve Castro testified that he was assigned to investigate the homicide. When he responded to the crime scene on the day of the homicide,

he spoke briefly with appellant. Appellant's demeanor was calm, he was not crying, he seemed to understand what Detective Castro said, and he responded accordingly. Detective Castro inspected the crime scene. He saw no evidence of forced entry. In the house, he found the following: "currency; other valuable property such as a watch, camera, binoculars, another camera, gift baskets, jewelry; and a . . . purse that belonged to the victim [which] was not disturbed." In the first drawer of the desk was a green folder with several hundred dollar bills. The victim's wedding ring was on her finger.

Detective Castro interviewed appellant at the police station later that evening, at around 5:20 p.m. Detective Castro's partner and an officer who was an Armenian translator were also present. A videotape of the interview was played for the jury, and a transcript of the interview published to the jury.

During the interview, appellant stated that he left his home sometime after 10:00 a.m. that day and drove to the gym. He estimated that he was gone about an hour, and that he arrived home between 11:30 a.m. and noon. When he came home, he called his wife's name, but heard no answer. He looked in the kitchen, and saw his wife's body on the kitchen floor. He "pushed" her legs, but she did not respond. He went into shock and called his friend Artur Karapetyan, asking him to come over.

Appellant stated that he had no enemies, that no one wanted to hurt him, that no one was angry at him, that he owed no one money, and that he had no financial problems. Appellant stated he kept around $6,000 to $7,000 cash in his house for emergencies, but that only he and his wife knew about the money.

Appellant stated that the only routine he followed daily was to walk his dog in the morning, between 8:00 and 8:30 a.m., and in the evening, between 5:00 and 5:30 p.m. Appellant noted that his dog barked "a lot." He barked at strangers, and

"always" barked at the mailman or at passing cars. The dog barked whenever someone passed appellant's driveway. When appellant returned home that day, his dog was not barking, and was waiting for him. When informed that the neighbors had said the dog had not barked at all that day, appellant responded, "Yes, I know."

Appellant acknowledged that he and his wife had argued that morning. They were going to a party later that day. Appellant wanted his wife to make fish to bring to the party, but she said they were going as guests and that she did not feel like making fish. However, before he left for the gym, she was starting to cook the fish. Appellant also stated that he and his wife had begun to argue every day over "[e]very small thing."

Detective Castro testified that he drove to appellant's gym from appellant's home in the morning. It was less than a mile away, and it took Detective Castro three minutes to get there. Along the way, the officer looked for possible areas where a weapon could be discarded, primarily in trash dumpsters. When Detective Castro arrived at the gym, he downloaded the gym's surveillance video. The video was played for the jury. It showed appellant taking a gym bag out of his car trunk and walking into the gym at around 10:57 a.m. It showed appellant leaving approximately 40 minutes later (at 11:38 a.m.), putting his bag in the trunk of his car. The police impounded appellant's car. Detective Castro testified that he asked two cadaver dog handlers, Agneta Cohen and Shirley Smith, to inspect appellant's car.

Smith testified she was a volunteer canine handler with the Los Angeles County Sheriff's Department. She specialized in handling "cadaver dogs," trained to locate dead bodies and parts of bodies. Smith's dog, a 13-year-old border collie, was a certified cadaver dog also trained to look for bodily fluids.

On April 16, 2009, five days after the homicide, Smith and her dog went to the police garage where there were three cars. Her practice was to work "blind" and not to know anything about the case. Smith's dog "started alerting on the [one] car that was riddled with bullet holes and soaked in blood." Detective Castro did not want the dog to investigate that car. Therefore, Smith pulled her dog away from that car. She directed her dog to "check" another specific car, which was six to eight feet away from the bloodied car. The dog circled that car -- appellant's car -- four times. The police opened the trunk, and the dog "alerted" to the trunk. He jumped in the trunk and "downed in a particular point" of the trunk. On cross-examination, Smith acknowledged her concern that her dog's reaction to appellant's car might be unreliable if it was tainted by the dog's exposure to the adjacent bloody car. She so stated in her report. On re-direct examination, Smith stated that her dog's reaction to appellant's car was not necessarily invalidated by the dog's initial reaction to the first car, because a cadaver dog could discover different scent sources -- such as multiple dead bodies -- during an area search.

LAPD Detective Gustavo Barrientos, a supervisor in the North Hollywood burglary/theft section, testified as an expert on residential burglaries. He testified that in 2009, there were 723 reported residential burglaries in the North Hollywood Division, where appellant's house was located. In none of those cases was the homeowner or occupant physically harmed.

After reviewing the police reports and the crime scene photographs of appellant's home, Detective Barrientos opined that "the crime scene was staged." His opinion was based upon the timing of the robbery and the "select[ive] ransacking" of the house. First, the crime occurred on a Saturday, although 75 percent of the burglaries in that neighborhood occurred on a weekday when most homeowners are not present. Detective Barrientos explained that a residential

burglar generally wants only the homeowner's personal property, and does not want to encounter the homeowner during the burglary. If the burglar notices that the victim is home or is confronted by a homeowner, the burglar usually "[f]lees."

In addition, there was only selective ransacking of the house. Detective Barrientos noted that the computer was left on the desk, a bookcase was never searched or ransacked, a closet did not appear to have been ransacked, and a mattress was never moved or tossed. Detective Barrientos opined that a burglar would not have left the cash in the drawer; "cash is king with a burglar" because it cannot be traced. Detective Barrientos also opined that a burglar would not leave jewelry, a purse, or a gold ring behind. He stated: "Really, when you look at . . . the burglary crime scene, there's no continuity of the crime. It's very select and random. When a suspect burglarizes a residence . . . he doesn't know where your precious metals, your guns, your money [are] located -- so a suspect has to search throughout your house. He's not concerned about cleaning up your house later on, so the contents are all going to be thrown out of the drawers, or most of the contents; and he's searching for those small, precious metals."

B. *Defense Case*

Dr. Scott Fraser, a psychologist, testified about scientific studies into human stress reaction patterns. He stated that the research literature into acute stress reaction pattern of the dissociative type showed that an individual suffering from acute stress experiences a "form of mental shock" and becomes "numbed." He further stated that "[t]o outsiders, it looks like the person's indifferent, even though there has been some kind of terrific traumatic type of experience that they've had." Post-traumatic stress disorder (PSTD) is similar to acute stress reaction pattern, except the duration for PSTD is "much longer." On cross-examination, Dr. Fraser acknowledged that he did not examine appellant or administer any tests, but simply

was called to "explain the scientific principles of acute stress reaction, dissociative types."

Luis Herrera, a cab driver, testified that on the date of the homicide, he picked up his taxicab from appellant's house at around 9:30 a.m. As he left, he saw another taxicab pull up to the house, but he did not recognize the cab driver. Later that morning, at around 11:34 a.m., he spoke with appellant on the telephone. On cross-examination, Herrera admitted he had given Detective Castro and a defense investigator inconsistent statements about when he picked up his taxicab that morning. At various times, he had stated he picked up his vehicle at 9:30, 9:45, 9:50 and 10:30 a.m. Herrera stated, "I was all messed up with my times. Even now, I was trying to put in order all the time[s] and think but, no, I don't know." He also stated, "I can't remember exactly at what time I picked up the taxi."

Robert Broderick, an LAPD criminalist assigned to the LAPD's DNA/serology unit, testified he conducted preliminary tests on appellant's clothing. On the sweatpants, there were several spots below the knee that tested positive for blood. Appellant's shirt tested negative for blood.

Dr. Silvia Comparini, a medical examiner, opined that the cause of death was blunt force injuries to the head and upper extremities. Dr. Comparini stated that blood spatter interpretation is a "tool that you have to use in conjunction with . . . your crime lab experts"; she agreed that it is not an "end-all or the only tool necessary" or "[a]n unlimited tool." After reviewing Broderick's report on the tests conducted on appellant's clothing, Dr. Comparini opined that it was "highly unlikely" that the murderer was wearing those clothes when he killed Aykui. She also opined that "there would be more blood" on the assailant's shoes than were found on appellant's shoes.

Arman Agdaian, appellant's and Aykui's son , testified that he saw appellant shortly after appellant was interviewed in front of their home. Appellant "seemed kind of shocked, [and] confused." While Arman held his father's hand, his father "choked up, and . . . said, 'Mom's gone.'" Both men cried. Arman also testified that appellant's former dog, Charlie, had passed away before the date of the homicide. Charlie was "[v]ery active, very spunky, a loud barker." Appellant's dog on the date of the homicide, Ringo, was much "less vocal" than Charlie. He further testified that he personally observed his father conduct cash transactions, including one "unusual" transaction where his father purchased two cabs for $25,000 to $30,000. Arman testified that his father kept between $3,000 and $8,000 in cash at the house for emergencies. Shortly after the homicide, Arman looked for this cash but did not find it.

Appellant did not testify.

DISCUSSION

As noted, appellant contends his conviction should be reversed because he was deprived of his right to due process and to a fair jury trial by: (1) "the trial court's unwarranted dismissal of a seated juror without good cause," (2) "prosecutorial misconduct in attesting to appellant's non-testimonial courtroom demeanor," and (3) "the erroneous admission of contaminated and prejudicial dog scent evidence." We address each contention in turn.

A. *Dismissal of Seated Juror*

During the direct examination of the prosecution's second witness, Juror No. 9 blurted out, "Your Honor, I'm sorry. I'm not feeling well." He explained, "I sometimes get panic attacks, and I'm getting one now. I really apologize. I'm embarrassed. But I'm not feeling well." The judge asked if the juror wanted some water, but he responded, "It's not working. Maybe I can take some medication."

After confirming that the juror had medication with him, the judge stated, "You have water. Sure. Go ahead, take a pill." The juror replied, "Okay. I'll do my best but, you know, I have to let you know how I feel." He agreed to tell the judge if he could not continue.

Shortly thereafter, during cross-examination of the second witness, the judge asked, "Juror number 9, is it still a problem?" The juror indicated it was and apologized. When the judge asked whether the issue was likely to recur, the juror replied, "I don't know. It comes on suddenly, and I can't anticipate it. Really, it's terrifying. It's just a very bad condition, so . . . if I could be excused." He offered to bring a "doctor's note." The judge stated, "No. Let me talk to counsel at side-bar."

Outside the jury's presence, the judge held a sidebar with both counsel. The judge stated, "It seems to me, legitimately, that he's having panic attacks." The judge noted there were four alternate jurors. Appellant's trial counsel replied, "My preference would be to -- and I hate to do it to you, Judge, but to excuse the jury today. If it happens a second time, we'll go to an alternate." The court stated:

> "[W]e took a day and-a-half -- almost a full day for the first witness. We got the second witness on the stand. It's only 2:00 o'clock. We're [not] going to waste two hours of testimony today to see if he's better, when he says these things happen all the time, and he doesn't know when they're going to happen."

Appellant's trial counsel replied, "Okay." The judge observed, "I think there's good cause just to excuse him." Appellant's trial counsel objected and stated, "I prefer we give him one bite at the apple, to see if he can regain his composure." The trial judge denied the request. He explained, "I'm not going to waste two full hours of testimony to have this happen again on Monday or Tuesday, as he assures us that it probably will." The judge stated that he would excuse the juror.

Appellant's trial counsel moved for a mistrial, and the court denied the motion. Before excusing Juror No. 9, however, the court made further inquiry. First, the court remarked, "I wish you had told us about this during jury selection." The juror replied: "This has never happened to me in a public setting before. I'm retired, so I'm usually alone. I've never been in a social situation where this has taken place before, Your Honor." The juror further explained that he had experienced panic attacks more than 10 years earlier, but "they went away" and had only returned that year. He was trying to get treatment, but had been unable to reconnect with his previous therapist. Asked how he felt during a panic attack, the juror stated, "I'm terrified. All I can describe i[s], it's terror. It's agoraphobic. I want to go inside and get under a blanket. It's a very debilitating situation."

The judge asked, "When you're having that attack, can you focus on what's going on in this courtroom and the testimony?" The juror replied, "No. I'm totally obsessed. It's a feeling of impending doom, where you think you're going to die; and your heart is racing; and you're having thoughts of imminent, you know, demise." When asked how long the panic attacks generally lasted, the juror replied, "Sometimes, 15 minutes. Sometimes, an hour. . . ." He did not know ahead of time when he would have a panic attack. He added that his medication usually helped, but indicated he was still "feeling very anxious" and did not "want to disrupt the proceedings."

Following this colloquy, the judge held a sidebar and stated, "In my mind, he's already been dismissed. The comments that the juror made now only reinforced that decision." Appellant's trial counsel reiterated his objection, and argued, "[T]he fact that he said that this appears to be an isolated incident only reinforces my position that we should accommodate his current condition, if it

should reoccur." The judge found good cause to dismiss the juror, stating, "So my position stands, and the juror's been excused."

Appellant contends the trial court erred by failing to conduct an adequate inquiry as to Juror No. 9's suitability to continue, and that saving two hours of trial time did not constitute good cause to dismiss a seated juror. We conclude there was no error.

Under section 1089, a court may order a juror discharged and replaced with an alternate "[i]f at any time, whether before or after the final submission of the case to the jury, a juror . . . becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor." In reviewing a decision to discharge a seated juror, this court applies a heightened standard of review. (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71.) "The basis for a juror's discharge must appear on the record as a '"demonstrable reality'" and 'involves "a more comprehensive and less deferential review" than simply determining whether any substantial evidence' supports the court's decision. [Citation.] The reviewing court does not reweigh the evidence but looks to see whether the court's '"conclusion is manifestly supported by evidence on which the court actually relied." [Citation.]'" (*Ibid*.) California courts have upheld a trial court's decision to discharge a juror who was suffering from undue stress and could not perform his or her functions. (See, e.g., *People v. Diaz* (2002) 95 Cal.App.4th 695, 701-703 [trial court properly dismissed juror who was emotionally distraught because brother-in-law had died the day before]; *People v. Van Houten* (1980) 113 Cal.App.3d 280, 287-288 [trial court properly dismissed juror because record supported "'demonstrable reality'" that juror would not be able to perform function of a juror due to physical and emotional reaction to trial testimony and evidence];

People v. Tinnin (1934) 136 Cal.App. 301, 318-319 [trial court properly dismissed juror who was afflicted on several occasions with severe attacks of hysteria].)

Here, Juror No. 9 stated that he was suffering from panic attacks that he had experienced in the past and that had recently begun to recur. He had been unsuccessful in seeking effective treatment. The medication he had brought in case of an attack had not alleviated his symptoms. He could not state when an attack would occur -- only that it was "terrif[ying]," lasting 15 minutes to an hour, and precluding him from focusing on what was occurring in the courtroom.

Appellant's contention that the court misconstrued the juror's answers, failed to make an adequate inquiry, and should have treated the panic attack as an isolated incident is unpersuasive. By the juror's own admission, his susceptibility to such attacks was longstanding; they were recently recurring, unpredictable, not amenable to immediate treatment and utterly debilitating. Even a brief period serving as a juror in the instant case had triggered an attack that left the juror "totally obsessed" with "thoughts of imminent . . . demise." On this record, we find a demonstrable reality, manifestly supported by evidence on which the court relied, that Juror No. 9 could not perform his sworn duty to serve as a juror. Accordingly, the trial court did not err in discharging the juror for cause.[2]

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[2] Appellant's contention that the trial court should have conducted further inquiry is unpersuasive. The inquiry in the instant case was sufficient to show a demonstrable reality that Juror No. 9 could not fulfill his duties as a juror. Neither *People v. McNeal* (1979) 90 Cal.App.3d 830 (*McNeal*) nor *People v. Espinoza* (1992) 3 Cal.4th 806 (*Espinoza*), relied upon by appellant, is to the contrary. In *McNeal*, the appellate court held that the trial judge should have conducted an inquiry into whether a juror had personal knowledge of facts in the case. (*McNeal*, at pp. 834-839.) In *Espinoza*, the California Supreme Court concluded the trial court did not err in failing to question a juror whom defense counsel complained appeared to have slept during trial. (*Espinoza*, at p. 821.) The facts of those cases bear no resemblance to those of the instant case.

B. *Prosecutorial Misconduct*

During closing argument, the prosecutor commented on appellant's demeanor after the homicide and during the police interview. She also made the following comments at various times during closing:

(1) Papu [appellant's neighbor] was "the only person I've even seen in this whole courtroom who even looked a little sad or had a tear for the victim."

(2) "I don't know if you saw this. I'm sure some of you did. Throughout this trial, there have been so many photos of [appellant's] wife bludgeoned to death on the screen, and he never has shown one emotion; but as soon as his lawyer put the photo up of the dog -- of the dog that was hit by a car or put to sleep -- he started tearing up. Tears were coming down his face. He took his glasses off to wipe his eyes. Because he loved his dog but he hated his wife."

(3) "You've got the D.N.A. . . . . You've got the staged robbery. You've got his demeanor."

(4) "Then you might have his demeanor. You know, he was calm and cool and collected."

Appellant's trial counsel did not object to any of these comments.

After completion of the prosecution's initial closing argument, the court noted at sidebar that she had improperly commented on appellant's courtroom demeanor. The court stated it understood why defense counsel might not have objected "for tactical reasons," but noted that the comments were improper. The court further observed, however, that the misconduct could be cured by a jury admonition. The court asked defense counsel if he wanted an admonition. Defense counsel stated:

> "What I was doing, thinking tactically, in my mind, whether I wanted to object or comment that [appellant's daughter] was on the witness stand, and that was emotional for him with his daughter here. And then, you know, . . . I didn't want to do a belated objection. I was sort of in a dilemma."

The court asked again if defense counsel wanted it to admonish the jury, and counsel stated he did. Immediately after the court completed its discussion at sidebar and before the defense closing argument, the court instructed the jury: "I want to tell you one important thing. The demeanor of the defendant at counsel table is not evidence in this case and should not be considered by this jury for any purpose whatsoever."

Appellant now contends the prosecutor committed misconduct by commenting on his nontestimonial courtroom demeanor. As an initial matter, we note that a prosecutor can comment on a defendant's demeanor prior to trial. The third and fourth challenged comments above, when examined in context, related to appellant's demeanor after his wife's body was found and during a police interview. There was no misconduct in making those statements. The prosecutor, however, did commit misconduct when she made the first and second challenged comments, because a prosecutor may not comment on the courtroom demeanor of a nontestifying defendant. (*People v. Heishman* (1988) 45 Cal.3d 147, 197; *People v. Boyette* (2002) 29 Cal.4th 381, 434.) However, "'[i]n order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

Here, appellant's trial counsel purposely chose not to object when the prosecutor made her comments. Thus, appellant has forfeited this claim. Moreover, the trial court averted any potential prejudice when the judge identified

the misconduct on its own and promptly and unequivocally admonished the jury. (See, e.g., *People v. Garcia* (1984) 160 Cal.App.3d 82, 92-93 [trial court did not err when it admonished two jurors to ignore nontestifying defendant's jeering at witness during trial].)[3]

C. *Dog Scent Evidence*

Finally, appellant contends the trial court erred in admitting the dog scent evidence because (1) the dog's identification of a substance in appellant's trunk was the result of an impermissibly suggestive procedure (cf. *Simmons v. United States* (1968) 390 U.S. 377, 384 [human eyewitness lineup] and *People v. Carlos* (2006) 138 Cal.App.4th 907 [photo array]), and (2) the prosecution failed to establish a "foundational" basis for the admission of the dog scent evidence, as any physical evidence in the trunk was possibly contaminated by the presence of appellant's skin sheddings. We conclude the trial court did not abuse its discretion in admitting the dog scent evidence.

Appellant attempts to analogize the dog scent evidence to cases involving eyewitness identifications. In *Simmons v. United States*, the police showed five

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[3] Appellant contends the misconduct here could not be corrected by an admonition, but does not further explain this argument in his opening brief, except to cite *People v. Hill* (1998) 17 Cal.4th 800, 819. That citation merely holds that a defendant will be excused for failing to request an admonition if the admonition would not cure the harm caused by the conduct or if the defendant lacked an opportunity to request an admonition. It is inapplicable to the instant case. (See *id*. at pp. 819-821.) Appellant's later reliance on *People v. Fuiava* (2012) 53 Cal.4th 622 is unavailing, as in that case the misconduct claims were deemed forfeited. (*Id*. at p. 687.) Thus, we need not consider appellant's argument that the admonition given did not cure the misconduct. (See *Diamond Springs Lime Co. v. American River Constructors* (1971) 16 Cal.App.3d 581, 608 [point raised without legal analysis or authority is forfeited].) In any event, the challenged comments did not evoke "an emotional response impervious to a timely, curative admonition." (*People v. Williams* (1997) 16 Cal.4th 153, 255.)

eyewitnesses a photograph of several robbery suspects one week before asking the eyewitnesses to identify the suspects in a lineup. The U.S. Supreme Court held that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States, supra,* 390 U.S. at p. 384.) The court concluded there was "little chance" the procedure used led to misidentification because the defendant did not wear a mask when he committed his crime, the crime took place in a well-lit bank, and all five eyewitnesses identified defendant as a robbery suspect, while none identified another defendant shown in the photographs as a suspect. (*Id*. at pp. 385-386.)

In *People v. Carlos*, the appellate court concluded that a "photo array was impermissibly suggestive and prejudicial because the labeling and positioning of [the defendant's] picture plainly made his photograph 'stand out' from the others, because the method of labeling (not merely on the front of the array but directly under [the defendant's] photo) was unnecessary, because the photo array was not disclosed to the defense until the first day of trial, because defense counsel's request for a brief continuance was denied, and because none of the witnesses identified [the defendant] at trial." (*People v. Carlos*, *supra*, 138 Cal.App.4th at p. 912.)

Assuming arguendo that *Simmons v. United States* and *People v. Carlos* are applicable to dog scent evidence, we conclude the evidence here was not the result of an impermissibly suggestive procedure. Although Smith directed her dog to examine a specific vehicle, there is no evidence she also directed her dog to find evidence in the vehicle. Rather, the record suggested she directed the dog to focus

on a particular area, and the dog found some evidence of bodily fluids in a specific part of that area -- the trunk of the car. Thus, the trial court did not err in allowing Smith to testify.

Appellant also contends the evidence in the trunk may have been contaminated by his skin sheddings. During the Evidence Code section 402 hearing in this case, Smith testified that it would not be an issue for her dog to distinguish between cadaver scent and scent from shedded skin. The trial court credited her testimony, and we find no abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 466 ["The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion. [Citation.]."].)

We note that the trial judge's duty is to determine whether there is sufficient foundation for relevant evidence to be presented to the jury. It is up to the jury to determine the weight of the evidence. Here, the jury heard from Smith about the procedure used to identify a scent in appellant's trunk. The jury heard Smith's concerns about contamination of evidence. The jury also heard from a prosecution witness, Swanson, that preliminary tests did not show any blood in the trunk. Thus, the jury was sufficiently informed about the possible weaknesses of the dog scent evidence, and was allowed to determine how much weight, if any, to give such evidence.

Moreover, had we found error, we would conclude it was harmless beyond a reasonable doubt. (*People v. Watson* (1956) 46 Cal.2d 818, 837.) At best, the dog scent evidence permitted an inference that appellant might have placed bloodied clothing or the murder weapon in the trunk of his car. Even absent such inference, the evidence was more than sufficient to persuade a reasonable jury that appellant killed his wife. The jury was provided evidence of motive (appellant and his wife had been having disagreements and had argued that day), as well as opportunity

(appellant was present during the time frame of the murder). The blood spatter evidence suggested he was present when his wife was killed. In addition, appellant's defense that his wife had been killed by an unknown assailant in the course of a burglary was contradicted by (1) expert testimony that the evidence of an alleged burglary had been staged, (2) the fact that appellant's dog had not barked that morning, and (3) the fact that appellant continued to leave his garage and rear gate open even after the alleged intrusion and brutal murder. Finally, appellant evinced neither surprise nor grief immediately following his wife's violent death. In light of this evidence, we find no reasonable probability that the jury would have reached a more favorable verdict had it not heard the dog scent evidence. (*Watson, supra*, 46 Cal.2d at p. 837.)[4]

[4] During oral argument, appellant requested that this court consider his separately filed petition for writ of habeas corpus when determining whether any error was harmless. (See *In re Oganis Agdaian* (Sept. 4, 2012, B243637).) We have considered the habeas petition, and conclude it does not change our harmless error analysis. The petition will be addressed in a separate order.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.