Filed 3/13/17 P. v. Bradford CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DOUGLAS GORDON BRADFORD, Defendant and Appellant.	B260886 (Los Angeles County Super. Ct. No. YA075023)

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed.

Donald R. Tickle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

In the early morning hours of August 30, 1979, Lynne Knight (Knight) was strangled with a homemade garrote and repeatedly stabbed with a kitchen knife. Thirty-one years later, Douglas Gordon Bradford (defendant) was charged with her murder. The case against defendant was entirely circumstantial, as there were no eyewitnesses to the killing, and no forensic evidence tied him to the crime scene. The jury found the circumstantial evidence compelling and convicted him of murder. In this appeal, defendant does not attack the sufficiency of the evidence. Instead, he challenges the trial court's rulings admitting nearly every piece of circumstantial evidence presented to the jury and excluding evidence of two other suspects the police initially pursued but quickly eliminated. Defendant also argues that he was prejudiced by the prosecution's delay in investigating and charging him, and asserts error with a single jury instruction. We conclude there was no prejudicial error, and affirm his conviction.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. The crime

Around 3:00 a.m. on August 30, 1979, Knight was murdered in her backlot apartment. While Knight laid in her bed, naked, the killer sat astride her and pushed down on her neck with a homemade garrote—that is, a piece of wire strung between two pieces of wood. The killer crushed her windpipe, so Knight's screams sounded more like the cries of an animal being slaughtered. Unable to dispatch her with the garrote, the killer got up, retrieved a 10-inch knife from her kitchen, and proceeded to "slice[], dice[] and butcher[]" her, ultimately severing her femoral artery; Knight bled to death. Knight's death did not stop

the killer, as the killer stabbed one of her breasts after she was dead and rearranged her body to place her right hand over her pubic area.

B. Defendant's relationship with Knight

Defendant and Knight had dated for approximately four months in the winter and spring of 1979. Knight was a neonatal nurse. During the time they dated, defendant would come and go from Knight's apartment through a semi-concealed side entrance when she was not home and do chores for her. Also during that time, Knight asked defendant to be her date to her sister's wedding. Ultimately, however, defendant wanted his relationship with Knight to be exclusive and long-term; he later went so far as to describe her as the "love of his life."

Knight felt differently. In June 1979, she broke it off with defendant. The next day, defendant showed up at her apartment uninvited; Knight was with another man. Defendant was furious, called her a "goddamn whore," and threw a lamp at her. Although defendant denied ever going near Knight after that incident, Knight's neighbor saw defendant at her apartment a week or two before the murder.

C. The investigation

After hearing Knight's screams, Knight's neighbor looked out his window and saw "a shadow of [a] man" leave through the sliding door of the apartment, exit through the side entrance, and then take off running. He only saw the assailant's back.

Police responded and examined the crime scene. The killer left behind the garrote. Knight had often worn a medallion on a gold chain necklace; the medallion and the necklace's clasp were found near Knight's body, but the necklace was nowhere to be found. The invitation for Knight's sister's upcoming wedding lay

in a crumpled wad in or near a trash can. Knight's wallet and car keys were taken from her purse, although the killer never took her car. There were also blood smears on the curtain for the apartment's sliding door, indicating that the killer had worn gloves.

Police then spoke with several of Knight's former boyfriends, all of whom were cooperative except defendant. Police interviewed defendant a few days after the murder. As a ploy, police informed him that Knight was merely missing, but defendant on his own stated she was dead and was somebody he wanted to put out of his mind. Defendant admitted that the necklace missing from Knight's apartment was one he had given her, although he changed his story to say he had just helped her buy it. Defendant agreed to let the police search his car; in their cursory search, they found no blood but the car reeked of Armor All cleanser. The police did not conduct any chemical analysis of the car. Defendant offered an alibi: He said he was sailing a two-man sailboat by himself at night, with no running lights, and that he did not get back until 3:00 a.m. because the wind had died out, and he had to row the 4,600-pound boat back into the marina using a four and a half foot long paddle.

Although defendant was the lead suspect, investigators suspended the investigation in August 1982, for lack of sufficient evidence to convict.

In 2000, police reopened Knight's case.

They re-interviewed several witnesses. Knight's sister told investigators that defendant had wanted to marry Knight, and that Knight would never have crumpled up the invitation for the upcoming wedding because Knight was going to participate as the maid of honor.

In 2007, police executed search warrants at defendant's current home and his mother's home (which is where defendant was living in 1979). From his mother's home, they seized wire used to hang paintings his mother had painted. From defendant's home, they seized a photograph of a crossbow and a manual on how to construct one and an address book that contained the contact information for Jerilyn Seacat (Seacat).

Police compared the wire seized from defendant's mother's home with the wire used to make the garrote. Although the low quality of the wire made it impossible to make an exact match, forensic analysis revealed that six different types of eight-strand braided wire found in defendant's mother's home had the same general characteristics as the eight-strand braided wire in the garrote.

Police also interviewed Seacat. She said she had been dating defendant since 1996. Defendant had told her that he was "once in love with a nurse" and "almost married her," but that she "became ill and had a terminal something and she died . . . right away." Seacat ended the relationship in 2009, after she learned that defendant was a suspect in Knight's murder. Thereafter, defendant let himself into her house through an unlocked door and waited for her in her bedroom; he repeatedly called her and tried to reconcile, and at one point told her she did not correctly remember what he told her about the nurse he almost married because that nurse had died of melanoma, not from a "terminal something"; he followed her in his car, telling her "it must look like I'm stalking you"; he mentioned he knew about her new boyfriend; she received an anonymous note comprised of letters cut out from a magazine that asked her to meet at a restaurant she and defendant used to frequent; he left

a refurbished bicycle in her yard; and he showed up on her back porch.

Police also consulted a behavioral crime scene analyst, who provided a report examining the crime scene and opining, among other things, that the killing had been motivated by a preexisting interpersonal conflict and was meant to punish and humiliate Knight.

In May 2009, police executed an arrest and search warrant at defendant's home. Police recovered an enlarged photograph of Knight, dated a month before her murder, in a desk drawer.

II. Procedural Background

On November 30, 2010, the People charged defendant with a single count of first degree murder (Pen. Code, § 187, subd. (a)), and further alleged that he did so using deadly and dangerous weapons (namely, a garrote and a knife) (Pen. Code, § 12022, subd. (b)).

At trial, the People introduced several items of evidence to prove that defendant was Knight's killer, including defendant's statements to the police and to Seacat, defendant's conduct after Seacat broke up with him, the similarity between the wire used to manufacture the garrote and the wire found in defendant's mother's home, the "how-to" manual for building a crossbow, and the opinion of the behavioral expert that the killer had known Knight. Defendant put on his alibi defense.

The jury found defendant guilty of first degree murder and found the weapon allegation to be true. After the trial court denied defendant's postverdict motion to dismiss due to pre-charging delay and motion for a new trial, the court sentenced defendant to 26 years to life, comprised of 25 years to life for the murder plus an additional year for the weapon enhancement.

Defendant filed this timely appeal.

DISCUSSION

I. Pre-Charging Delay

Defendant argues that the trial court erred in denying his motion to dismiss the charge against him on the ground that the prosecutorial delay in charging him violated his constitutional rights.

Under both federal and California law, "'[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions.'" (*People v. Alexander* (2010) 49 Cal.4th 846, 874, quoting *People v. Catlin* (2001) 26 Cal.4th 81, 107.) To establish a constitutional violation, a defendant must first establish that the delay in charging prejudiced him. (*Ibid.*) Prejudice refers to the "'"loss of material witnesses due to lapse of time . . . or loss of evidence because of fading memory attributable to the delay."' [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 430.) Prejudice will not be presumed and must be established with evidence. (*Alexander*, at p. 874.) If, and only if, the defendant shows prejudice, the prosecution must then offer its reasons for the delay and the court must "'balance[] the harm to the defendant against the justification for the delay.'" (*Ibid.*) *Purposeful* delay almost always warrants dismissal, even where there is minimal prejudice. (*Cowan*, at pp. 430-431.) Investigative delay—whether negligent or not—typically requires a much greater showing of prejudice. (*Ibid.*; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 915 ["the more reasonable the delay, the more prejudice the defense would have to show to require dismissal"].) This stems from the recognition that

"'[p]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt,'" and that courts may "not second-guess the prosecution's decision" in that regard. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1256 (*Nelson*).) We review for substantial evidence a trial court's assessment of whether prejudice has been shown, and review for an abuse of discretion a trial court's balancing of prejudice against the justification for delay. (*Cowan*, at p. 431.)

A. Prejudice

The trial court found that defendant had not established that he was prejudiced by the delay in prosecuting him. As is permissible, the court postponed making this finding until after trial, at a time when it could assess the allegedly missing evidence against the full backdrop of the trial that had occurred. (*People v. Pinedo* (2005) 128 Cal.App.4th 968, 975.)

Defendant lists 10 ways, several of which have subparts, in which he was prejudiced by the prosecution's delay. Nearly all of these are irrelevant to his claim of pre-charging delay because they stem from the prosecution's failure to collect or preserve evidence within the initial stages of the investigation, and not from investigative or prosecutorial delay. Specifically, we disregard defendant's assertions that the prosecution erred in not collecting sufficient quantities of samples from a bracelet Knight was wearing or from Knight's body to test it for DNA matches and in not taking down the name of a possible witness at the marina regarding the feasibility of defendant's sailing alibi; that the prosecution did not retain the records of a weather station close to the marina regarding wind readings on the night of the murder, a copy of the questions it posed to another one of

Knight's former boyfriends during a lie detector test, or the records regarding that boyfriend's assault on Knight years before the murder; and that the prosecution did not retain for future forensic testing Knight's address book, the crumpled wedding invitation, several items of furniture in Knight's apartment (and fingerprint cards containing the prints lifted from some of those items), the jacket worn by a person found a half-mile from Knight's apartment after the murder, the car driven by one of Knight's former boyfriends or the contents of the ex-boyfriend's then-girlfriend's apartment, or a plastic bag found a half-mile from Knight's apartment that contained underwear and a list of patients from the hospital where Knight worked (and the fingerprint card containing a print lifted from the bag).[1] What is more, the prosecution's failure to *collect* evidence does not independently violate a defendant's constitutional rights. (*People v. Montes* (2014) 58 Cal.4th 809, 837 ["[g]enerally, due process does not require the police to collect particular items of evidence"]; *People v. Frye* (1998) 18 Cal.4th 894, 943, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) Nor does the prosecution's failure to *retain* evidence unless it destroyed the evidence in bad faith. (*People v. Carrasco* (2014)

---

[1] The omission of many of these items was not prejudicial in any event. Subsequent DNA testing of Knight's bracelet showed that the hair in the bracelet came from Knight herself, and that the semen in her vagina was deposited 24 to 96 hours before her death; that defendant had been given access to Knight's address book at the time he was under active investigation; that the likelihood of obtaining any meaningful fingerprints from the furniture in Knight's apartment was next to nil because the killer had worn gloves; and the jacket worn by the person found a few blocks away was stained, but tested negative for blood.

59 Cal.4th 924, 961.) There is no evidence that the prosecution acted in bad faith here.

The only possible prejudice attributable to the delay in prosecuting defendant stems from (1) the deaths of the coroner who examined Knight's body, defendant's father, and one of Knight's former boyfriends; (2) defendant's inability to locate the person found a half-mile from the murder scene, an unnamed person who was at the marina the evening defendant claimed to have gone sailing, or the woman defendant was dating at the time of Knight's murder. Upon closer inspection, however, defendant has not adduced any evidence that the absence of these witnesses harmed him. The coroner's death did not prejudice defendant because any qualified expert witness could have testified to the factual findings contained in the autopsy report. (E.g., *People v. Trujeque* (2015) 61 Cal.4th 227, 274-277.) Nor was the death of defendant's father's prejudicial because the jury heard the father's testimony through a taped police interview conducted before his death. Defendant has provided no evidence indicating that the other unavailable witnesses would have provided any evidence exonerating him or impeaching the prosecution's case. The unnamed person at the marina told police that the wind had died down after dark that night and that a single person could paddle a sailboat like the one defendant allegedly sailed that night. However, this witness told police he never saw defendant that night, and other defense witness testified at trial to the wind conditions and the feasibility of paddling the sailboat. Defendant further speculates that the person found a half-mile away might have testified that defendant's car was not parked near Knight's house at the time of the murder, and that defendant's girlfriend would have testified

that he was out sailing at the time of the murder and was not a violent person. But he provides no basis for believing these two witnesses would make these statements; and, indeed, his girlfriend would at most be able to testify that he was not with her (rather than where he actually was). Defendant provides no proffer of what Knight's former boyfriend might have said. This is speculation, and "[s]peculation does not constitute substantial evidence." (*People v. Smith* (2005) 37 Cal.4th 733, 755.)

B. Balancing reason for delay against prejudice

There is no evidence that the prosecution's delay in this case was intentional. Instead, the evidence indicates that the prosecution identified defendant as its prime suspect by the early 1980's, but suspended its investigation when it felt it did not have enough evidence to convict him. The prosecution spent the intervening years gathering more evidence—testing certain items for DNA matches, obtaining and analyzing the braided wire from defendant's mother's home, re-interviewing old witnesses and interviewing new witnesses (such as Seacat), and consulting a behavioral expert regarding the crime scene. Because "[i]t is not enough for a defendant to argue that if the prosecutorial agencies had made his or her case a higher priority or had done things a bit differently they would have solved the case sooner" (*Nelson*, *supra*, 43 Cal.4th at p. 1257), the trial court did not abuse its discretion in determining that the weak showing of prejudice in this case was outweighed by the prosecution's justification for delay. In support of reversal, defendant cites *People v. Boysen* (2007) 165 Cal.App.4th 761, but *Boysen* supports the trial court's ruling here. *Boysen* simply held that the trial court did not abuse its discretion in determining that the prejudice to the defendant outweighed the proffered justification for delay. (*Id.* at pp. 777-

781.) Similar deference to the trial court's ruling is warranted here.

II. Erroneous *Admission* of Evidence

A. Braided wire, enlarged photograph of Knight, manual on how to make a crossbow, and Seacat's testimony

Defendant raises several challenges to the trial court's admission of evidence regarding the braided wire seized from his mother's home, the enlarged photograph of Knight and manual on how to make a crossbow seized from his home, and the testimony of Seacat (as the fruit of finding her name and contact information).

1. Suppression of evidence under the Fourth Amendment

Defendant moved to suppress the above-described evidence, all of which was recovered or derived from the 2007 searches of his home and his mother's home and the 2009 search of his home, arguing that the pertinent search warrants were not supported by probable cause. The trial court ruled that the 2007 warrants were supported by ample probable cause; that the 2009 warrant lacked probable cause because the pertinent affidavit was attached to the *arrest* warrant, but not the *search* warrant; but that the 2009 search was nevertheless valid under the "good faith exception" to the warrant requirement.

a. 2007 warrants[2]

Defendant contends that there was no probable cause to support the two 2007 warrants because the information contained in them pertained to a 28-year-old crime and was accordingly "stale." For a warrant to be valid, the accompanying affidavit must provide probable cause "to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." (*Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 556; *People v. Mesa* (1975) 14 Cal.3d 466, 470 (*Mesa*).) "No bright-line rule defines the point at which information [set forth in the affidavit] is considered stale." (*People v. Carrington* (2009) 47 Cal.4th 145, 163.) Because "'[t]he length of the time lapse alone is not controlling'" (*Alexander v. Superior Court* (1973) 9 Cal.3d 387, 393 (*Alexander*)), the "question of staleness turns on the facts of each particular case" (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652). A magistrate's determination that the information underlying a finding of probable cause is not stale is part of its determination of probable cause; as such, it is entitled to "great deference" on

---

[2] The People assert that defendant does not have standing to object to the search of his mother's home because he did not live there in 2007. Defendant had standing under the rule of vicarious standing in effect in 1979, which permitted a person to seek suppression of evidence obtained in violation of anyone's constitutional rights rather than just his own. (*People v. Martin* (1955) 45 Cal.2d 755, 761, abrogated by Cal. Const., art. I, § 28, subd. (f)(2).) Although this rule was abrogated by the voters when they enacted Proposition 8 in 1982, "Proposition 8 applies only to prosecutions for crimes committed on or after its effective date." (*People v. Smith* (1983) 34 Cal.3d 251, 258.) Thus, we apply the vicarious standing rule to this 1979 murder.

appeal, and our narrow task is only to independently assess whether there is a "substantial basis" for the trial court's determination. (*People v. Kraft* (2000) 23 Cal.4th 978, 1040-1041; *People v. Lim* (2000) 85 Cal.App.4th 1289, 1296.)

Here, the trial court had a "substantial basis" upon which to conclude that the items sought in the 2007 search warrants of defendant's mother's home and defendant's home—namely, wooden dowels and wire of a type used to make the garrote, Knight's missing necklace, and mementos of and further musings regarding his relationship with Knight—would likely be present at the time of the search, notwithstanding the fact that the underlying crime occurred in 1979. The recent decision in *People v. Lazarus* (2015) 238 Cal.App.4th 734 (*Lazarus*) is almost directly on point. There, the court rejected a staleness argument for a warrant to search for "items evidencing" the defendant's "romantic obsession" with the victim's husband, including "photographs, journals and diaries," even though the murder had occurred over 20 years earlier. (*Id.* at pp. 764-766.) The court reasoned that "it was probable that [the defendant] would have continued to retain items evidencing her relationship with [the victim's husband] and her feelings toward [the victim's husband], even after all the years that had passed." (*Id.* at p. 765.) The same logic applies here. In the 2007 warrants, the police sought personal mementos or reflections, and the braided wire and dowels that the affiant to the warrants stated a person would have no reason to suspect could be matched and thus could be incriminating. There is a substantial basis to believe there was probable cause to find those items still in defendant's home or defendant's mother's home (where defendant lived at the time of Knight's murder). (Cf. *People v. Hirata* (2009) 175 Cal.App.4th

1499, 1507-1508 [no probable cause to believe illegal drugs would remain in a location for over a month]; *Alexander*, *supra*, 9 Cal.3d at p. 393 [same, as to drugs a year later].)

Defendant raises several arguments in response. First, he suggests that *Lazarus* improperly creates a "cold case" exception to the general rules regarding staleness, and the Supreme Court has rejected similar categorical exceptions to the Fourth Amendment. (See *Flippo v. West Virginia* (1999) 528 U.S. 11, 14-15 [no crime scene exception]; *Mincey v. Arizona* (1978) 437 U.S. 385, 395 [no "murder scene" exception].) However, *Lazarus* simply applied the usual staleness rules; it did not by words or effect create an exception to them. Relatedly, defendant argues that *Lazarus* applies only when the defendant and victim have a continuing relationship. But nothing in *Lazarus*'s logic limits it to romantic obsessions that end in crimes short of homicide or the homicide of others.

Second, defendant attempts to synthesize a new test for evaluating probable cause in cold cases. Specifically, he argues that probable cause exists only if (1) someone personally saw the items to be seized on the premises being used to commit the crime, or (2) the items to be seized pertain to a continuing crime. As support for each factor, he respectively cites *Mesa*, *supra*, 14 Cal.3d 466 and *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206, superseded on other grounds by Penal Code section 1054.9. However, *Mesa* and *Gonzalez* simply found probable cause to exist in each of those circumstances; neither case purported to hold that probable cause could not arise under different circumstances.

Third, defendant asserts that the warrants were overbroad because they allowed for the search for evidence on his

computers. In his view, computers may be searched only if (1) they are an instrumentality of the crime (as per *United States v. Lemon* (8th Cir. 2010) 590 F.3d 612, 615-616 and *People v. Nicholls* (2008) 159 Cal.App.4th 703, 715), or (2) there is specific information that evidence will be found on computers (as per *United States v. Payton* (9th Cir. 2009) 573 F.3d 859, 864). The law is to the contrary. Defendant's first proffered rule is inconsistent with the statute authorizing the issuance of search warrants for items constituting instrumentalities *or* evidence of felonies (§ 1524, subd. (a)(2), (4)), and with *Lazarus*, which upheld the search of the defendant's computers because she may have "transferred information or records . . . to computers" she later purchased (*Lazarus*, *supra*, 238 Cal.App.4th at p. 766). Defendant's second proffered rule, while ostensibly supported by *Payton*, is inconsistent with *People v. Balint* (2006) 138 Cal.App.4th 200, 209, which holds that a search warrant authorizing a search for particular items reaches electronic copies as well as hard copies because there is "no reasonable basis to distinguish between records stored electronically on [a] laptop and documents placed in a filing cabinet . . . ." We elect to follow *Balint*. Defendant also contends that there was an insufficient factual basis for the affiant's opinion that people sometimes put their personal thoughts down in electronic documents; this is of no concern because the magistrate could reasonably draw this inference himself or herself (e.g., *People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1315 [magistrate """is entitled to draw reasonable inferences about where evidence is likely to be kept"""]) and because *Lazarus* upheld a nearly identical search.

Because there was probable cause to believe that the braided wire, dowels and mementos would be present in

defendant's house or his mother's house in 2007, and because the remaining items admitted at trial were in plain view as the executing officers searched for those items (see generally *Horton v. California* (1990) 496 U.S. 128), the trial court properly denied defendant's motions to suppress evidence from the 2007 warrants.

b. 2009 warrant

Defendant argues that the trial court erred in concluding that the People could rely upon the good faith exception to the warrant requirement to save the concededly invalid 2009 warrant. Under the good faith exception, the Fourth Amendment does not mandate the suppression of evidence obtained with a "technically defective" warrant if the officers who obtained that evidence "act[ed] with objective good faith." (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1220; *United States v. Leon* (1984) 468 U.S. 897, 918.) The good faith exception does not apply if (1) the officer supplied a ""bare bones" affidavit"' or intentionally or recklessly provided false information in the affidavit; (2) "'the issuing magistrate wholly abandoned his judicial role'"; (3) the affidavit was ""so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable""; or (4) the warrant was "'so facially deficient . . . that the executing officers cannot reasonably presume it to be valid.'" (*People v. Willis* (2002) 28 Cal.4th 22, 31-32, quoting *Leon*, at pp. 919, 923.)

Although the 2009 *search* warrant was "technically defective" because the affidavit appended to the 2009 *arrest* warrant was not also appended to the search warrant, the magistrate reviewed the arrest warrant's affidavit at the time he signed both warrants, and the officers acted in good faith when

relying on the search warrant. Defendant argues that the affidavit was so overbroad as to be facially deficient, but we reject that argument for the reasons noted above. Defendant also asserts that the magistrate had "wholly abandoned his judicial role." That exception refers to magistrates who get paid more if they sign warrants (*Tumey v. Ohio* (1927) 273 U.S. 510, 522-523), to magistrates who are simultaneously prosecutors (*Coolidge v. New Hampshire* (1971) 403 U.S. 443, 449-450), or to magistrates who go along with police in executing warrants (*Lo-Ji Sales, Inc. v. New York* (1979) 442 U.S. 319, 326-327); it does not apply to magistrates, as defendant suggests, who simply fail to catch a typo regarding the date of the murder.

2. Relevance of crossbow evidence

Defendant argues that the trial court erred in admitting (1) an image of a crossbow and a manual on how to make one, which police recovered from the 2007 search of defendant's home, and (2) testimony that a crossbow was similar to a garrote in that both could be "constructed at home and both were weapons that could be used to kill silently." Defendant did not object to the first items of evidence, so he cannot assign it as error on appeal. (Evid. Code, § 353.)[3] The trial court overruled his relevance objection to the latter testimony. We review the trial court's evidentiary rulings for an abuse of discretion. (*People v. Harris* (2005) 37 Cal.4th 310, 337 [relevance]; *People v. Clark* (2016) 63 Cal.4th 522, 586 (*Clark*) [discretionary exclusion of unduly prejudicial evidence].)

---

[3] All further statutory references are to the Evidence Code unless otherwise indicated.

The trial court did not abuse its discretion in admitting any of the evidence regarding the crossbow. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) A court may nevertheless exclude relevant evidence under section 352 if its admission will "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Although evidence that a defendant possessed a weapon not used in the charged crime is *not* relevant to show that he is "'the kind of person who surrounds himself with deadly weapons'" (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393), "evidence of weapons unconnected to the crime may be relevant for other purposes." (*People v. Merriman* (2014) 60 Cal.4th 1, 81-82.) In this case, no crossbow was ever found or introduced. Instead, the testifying officer explained that the manual on how to make a crossbow was relevant to show that defendant was the killer—not because he surrounds himself with deadly weapons—but because defendant, like the killer, had taken steps to learn how to make a homemade weapon of medieval origin. Although this evidence may be of marginal relevance, its admission was not an abuse of discretion.

3. Absence of foundation to introduce evidence of match between braided wire in garrote and wire found in defendant's mother's home

Defendant contends that the trial court erred in admitting evidence that six types of eight-strand wire recovered from the house where he was living at the time of Knight's murder had the same general characteristics as the eight-strand wire used to make the garrote used in Knight's murder. In particular, defendant argues that (1) this evidence is not relevant absent an "exact match" of the wires and proof that the wire recovered from

defendant's mother's home was purchased before the murder, (2) this evidence was at best marginally relevant, such that its admission was more prejudicial than probative under section 352, and (3) the admission of this evidence violated his federal constitutional rights to due process and a fair trial. Because "the routine application of provisions of the state Evidence Code law does not implicate a criminal defendant's constitutional rights" (*People v. Jones* (2013) 57 Cal.4th 899, 957 (*Jones*)), the validity of all three of defendant's arguments turns on whether the trial court's evidentiary rulings were an abuse of discretion (*Clark*, *supra*, 63 Cal.4th at p. 597).

The wire match evidence was relevant, even without proof of an exact match or proof that the braided wire from defendant's mother's house was manufactured prior to 1979. As noted above, evidence is relevant if it has "*any* tendency in reason to prove or disprove" a disputed fact. (§ 210, italics added.) Here, the fact that police recovered braided wire of the same basic type as the wire used to kill Knight from the home where defendant lived at the time of Knight's death, coupled with the fact that the wire was relatively uncommon in 1979, has some "tendency" to prove that defendant had at his disposal the materials necessary to manufacture the garrote used to strangle Knight and thus that he might be Knight's killer. Even if "'[s]tanding alone[,] the inference may have been weak, . . . that does not make the evidence irrelevant.'" (*People v. Farnam* (2002) 28 Cal.4th 107, 156-157 [upholding admission of the defendant's possession of a knife consistent with the sharp instrument used to gain entry to scene of a crime], citing *People v. Freeman* (1994) 8 Cal.4th 450, 491.)

For much the same reason, the trial court did not abuse its discretion in concluding that the probative value of this evidence was not substantially outweighed by the danger of undue prejudice. In this vein, defendant argues that the expert opinion on the "type" match was without foundation, and cites *People v. Moore* (2011) 51 Cal.4th 386 and *People v. Lucas* (1995) 12 Cal.4th 415. However, *Moore* held that it was error to elicit an answer to a hypothetical question that was unsupported by the facts (*Moore*, at p. 405) and *Lucas* held that it was error not to strike evidence premised on the existence of a preliminary fact that was never proven (*Lucas*, at pp. 467-468); neither case dictates the exclusion of the "type" match testimony in this case. Defendant also asserts that this testimony should have been excluded because there was no proof he ever possessed the garrote. Although such proof certainly would have made the "type" match testimony devastating evidence, its absence does not render the testimony inadmissible as irrelevant or under section 352.

4. Seacat's testimony

Defendant argues that Seacat's testimony should have been excluded not only as fruit of the unlawful search of his home in 2007, but also because (1) her testimony regarding his behavior after Seacat broke up with him was improper character evidence, and (2) her testimony regarding his account of how the "love of his life" died and his later efforts to convince Seacat that her memory of his account was wrong was improper evidence of his consciousness of guilt.

a. Improper character evidence

Although "evidence of a person's character or a trait of his or her character . . . is [generally] inadmissible when offered to

prove his or her conduct on a specified occasion" (§ 1101, subd. (a)), "evidence of [a] defendant's commission of other domestic violence" may be admitted to show that he engaged in domestic violence as charged (§ 1109, subd. (a)(1)). In deciding whether to admit other incidents of domestic violence to prove a defendant's propensity, a court must assess (1) whether the other incident meets the definition of "domestic violence" (*id.*, subds. (a)(1) & (d)(3)); (2) whether the probative value of the other incident is substantially outweighed by the danger of undue prejudice under section 352, while "consider[ing] . . . any corroboration and remoteness in time" (*id.*, subds. (a)(1) & (d)(3)); and (3) if the other incident "occur[ed] more than 10 years before the charged offense," whether admission of that incident "is in the interest of justice" (*id.*, subd. (e)). There are two definitions of "domestic violence": The narrower definition set forth in Penal Code section 13700 applies, except where "the [other] act occurred no more than five years before the charged offense," in which case the broader definition set forth in Family Code section 6211 applies. (*Id.*, subd. (d)(3).) We review the admission of such evidence for an abuse of discretion (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539), but examine questions of statutory interpretation de novo (*People v. Prunty* (2015) 62 Cal.4th 59, 71 (*Prunty*)).

The trial court erred in admitting Seacat's testimony for purposes of showing his propensity to commit domestic violence. Defendant's conduct qualifies as stalking (Pen. Code, § 646.9), and thus as "domestic violence" within the meaning of Family Code section 6211 (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 894). However, his conduct toward Seacat did not occur within "five years before the charged offense" (§ 1109, subd. (d)(3)) or even "within five years of the charged offense" (*People*

v. Ogle (2010) 185 Cal.App.4th 1138, 1143 (*Ogle*)). As a result, we must apply Penal Code section 13700's narrower definition of "domestic violence," which requires a showing that defendant was "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (Pen. Code, § 13700, subds. (a) & (b).) Defendant's conduct against Seacat, while undeniably disturbing, did not place her in "reasonable apprehension of imminent serious bodily injury." (*Ibid.*)

Nevertheless, the admission of Seacat's testimony to show defendant's propensity for committing domestic violence was not prejudicial because the same testimony *was* admissible to prove his intent, plan or preparation, and identity under section 1101, subdivision (b). Section 1109 expressly preserves the admissibility of domestic violence evidence for purposes other than propensity. (§ 1109, subd. (a)(1).) And section 1101, subdivision (b) authorizes admission of other acts to "prove some fact"— including "intent, [common scheme or] plan, [and] identity." When admitted to prove intent, the other act and charged act need only be "sufficiently similar"; when admitted to prove a common scheme or plan, the acts must have a """concurrence of common features"""; and when admitted to prove identity, the acts must share "'common features that are so distinctive as to support an inference that the same person committed them.' [Citation.]" (*People v. Armstrong* (2016) 1 Cal.5th 432, 456-457; *People v. Soper* (2009) 45 Cal.4th 759, 776 & fn. 8.) In this case, defendant's conduct in showing up at Seacat's home and confronting her after she broke up with him is very similar to his conduct in showing up at Knight's home and

confronting her after Knight broke up with him. It is compelling evidence that defendant engages in a similar pattern of conduct—namely, that he fixates on a woman after she rejects him—that is relevant to show his intent, a common plan or scheme and even his identity.

Ogle is almost directly on point. There, the Court of Appeal concluded that the trial court erred in admitting evidence of prior stalking activity under section 1109 and thus should have instructed the jury not to consider that activity as evidence of the defendant's propensity to engage in such conduct. (*Ogle*, *supra*, 185 Cal.App.4th at pp. 1143-1145.) However, the court determined that the prior stalking activity was still admissible to show the defendant's intent under section 1101, subdivision (b). (*Ogle*, at pp. 1143-1144.) The real error, the court reasoned, was the fact that the jury was allowed to consider the prior stalking activity as proof of the defendant's propensity as well as for the more limited purpose of proving his intent. (*Ibid.*) However, the court concluded that it was not reasonably probable that an instruction limiting the admission of this evidence to proof of intent would have led to a more favorable result. (*Id.* at p. 1145, citing *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

We come to the same conclusion as the court in *Ogle*. Although defendant did not kill Seacat, his post-breakup behavior toward Seacat was otherwise very similar to his post-breakup behavior toward Knight; as such, it was admissible to prove his intent, common scheme or plan, and identity. The probative value of the evidence for these purposes was not substantially outweighed by the danger of undue prejudice. (§ 352.) Although the trial court should have limited the jury's consideration of that evidence to those purposes, it is not

reasonably likely that such a limiting instruction would have lead to a more favorable result because defendant's stalking behavior was strong evidence of intent, common scheme or plan and identity, but weak evidence of propensity. As defendant points out, he did not kill Seacat and was never violent with her; his conduct in stalking Seacat thus provides, at most, tepid support for the argument that he had the *propensity to kill* Knight. It is also not inflammatory vis-à-vis the charged murder. By contrast, his stalking conduct with Seacat is strong evidence of how he fixates on a woman after rejection and thus provides compelling evidence of his intent, common scheme or plan, and thus identity. Because the evidence of his conduct toward Seacat was most relevant for the purposes for which it was properly admissible, its erroneous admission for an impermissible purpose to which it was less relevant is harmless. When considered alongside the other evidence tending to show that defendant was the perpetrator (his violent outburst toward Knight, the missing necklace and crumpled wedding invitation, his knowledge of Knight's death despite the police ruse), admission of this evidence without a limiting instruction is also harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

b. Improper evidence of consciousness of guilt

When a person makes "[f]alse statements regarding incriminating circumstances" or attempts to "suppress testimony against himself," that conduct can reflect a consciousness of guilt that tends to prove he is guilty of the crime from which he is trying to distance himself. (*People v. Louis* (1984) 159 Cal.App.3d 156, 160, disapproved on other grounds in *People v. Mickey* (1991) 54 Cal.3d 612; *People v. Hannon* (1977) 19 Cal.3d 588, 599.) We

review the admission of such evidence for an abuse of discretion. (*Prunty*, *supra*, 62 Cal.4th at p. 71.)

Defendant argues that the trial court abused its discretion in allowing Seacat to testify that (1) the nurse he was "in love with" and "almost married" "had a terminal something and she died . . . right away," and (2) defendant subsequently tried to convince Seacat that this prior "love" had died from melanoma and that Seacat was confused. Specifically, defendant contends that this evidence (1) was speculative, (2) did not reflect a consciousness of guilt, and (3) was the product of manipulation by law enforcement.

Defendant's arguments lack merit. With respect to his first argument, defendant asserts that the evidence was speculative because there was no corroborative evidence he and Knight almost got married; to the contrary, he points out, Knight did *not* want to marry him. This argument ignores that the source of defendant's statements to Seacat was defendant himself, and the jury was entitled to credit her testimony regarding his prior statements. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 [the "testimony of a single witness is sufficient to support a conviction"].) Moreover, the fact that defendant lied to Seacat about the mutuality of the affection between himself and Knight is what gives rise to the inference of a consciousness of guilt.

With respect to his second argument, defendant argues that he had other reasons to lie to Seacat about his prior relationship with Knight other than his guilt of Knight's murder, such as the fact that he was trying to keep Seacat from learning that he was married to another woman while he was dating Seacat, that he was consequently trying to keep Seacat disinterested in marrying him, and that he—as would any

innocent person—was merely denying involvement in Knight's murder. He further asserts that he had no reason to lie to Seacat in 1996, when he was not under suspicion of Knight's murder. Thus, he argues, other inferences can be drawn from his lies to Seacat. However, it is the jury's job to "resolve conflicting inferences," not the trial court's—particularly when both sets of inferences are reasonable. (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.)

With respect to defendant's final argument, defendant argues that the police manipulated Seacat into believing that defendant was guilty of Knight's murder, and that her testimony was tainted. Seacat merely related to police what defendant had said to her before the police first interviewed her, and what he said after they had contacted her; the fact that police told Seacat their working theory about defendant does not amount to manipulation. What is more, Seacat's interviews were recorded and reveal no manipulation. Defendant nevertheless cites *People v. Kennedy* (2005) 36 Cal.4th 595, overruled in part on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, *Bermudez v. City of New York* (2d Cir. 2015) 790 F.3d 368, and *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862 to support his argument, but those cases are irrelevant. (*Kennedy*, at p. 609 [dealing with unduly suggestive identification procedures]; *Bermudez*, at p. 376 [denying summary judgment in civil suit against prosecutors when triable issues remained as to whether prosecutor's decision to bring charges was tainted by misleading information about how witnesses came to identify the civil plaintiff as the perpetrator]; *Alcala*, at p. 877 [dealing with exclusion of defense witness testimony].)

B. Testimony of behavioral crime scene expert

Defendant argues that the trial court erred in allowing the People's behavioral expert to opine, based on his examination of the crime scene evidence, that (1) Knight was specifically targeted by the killer, (2) the killing was motivated by a preexisting interpersonal conflict, and the killer stabbed Knight's breast and staged her body after she was dead because he wanted to punish and humiliate her, (3) the killer tried to make the scene look like a robbery and sexual assault by taking her keys and checkbook, but not using either, (4) the killer acted with premeditation, taking the time to make a homemade garrote and wearing gloves to the scene. We review the admission of expert testimony for an abuse of discretion. (*People v. Jackson* (2013) 221 Cal.App.4th 1222, 1237 (*Jackson*).)

Defendant argues that this evidence was inadmissible on a number of grounds.

1. Threshold admissibility

A witness may testify as an expert, if he possesses the requisite "special knowledge, skill, experience, training, or education," on any "subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" if it is "[b]ased on matter . . . perceived by or personally known to the [expert]," and "is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject . . . ." (§§ 720, 801, subds. (a) & (b).) To enforce these requirements, a trial court must "act[] as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon Enterprises, Inc. v. University of*

Southern California (2012) 55 Cal.4th 747, 771-772.) As part of this responsibility, a trial court may exclude expert testimony if it concludes that "'there is simply too great an analytical gap between the data and the opinion offered.' [Citation.]" (*Id.* at p. 771.)

The trial court did not abuse its discretion in concluding that the behavioral expert in this case was qualified, and that the substance of his opinion was analytically sound. *Jackson* is directly on point. There, the Court of Appeal affirmed the admission of testimony from the very same expert who testified in this case. (*Jackson*, *supra*, 221 Cal.App.4th at pp. 1225, 1228.) In *Jackson*, as here, that expert "analyz[ed] [the] violent crime scene from a behavioral and physical evidence forensic standpoint," and opined that factors from the crime scene indicated that the "homicide . . . resulted from interpersonal aggression" and that the killer was a "mission-oriented offender" who tried to make the scene look like a "sexual assault" when no such assault took place. (*Id.* at pp. 1228-1233.) The Court of Appeal upheld the admission of this testimony because the "trial court could reasonably conclude the jury would be assisted by [the] expert testimony." (*Id.* at p. 1239.)

Defendant challenges this analysis on three grounds. First, he argues that the expert's testimony is unreliable because it is not scientific. But the Evidence Code permits expert testimony to be grounded in experience as well as science. (§ 720; *People v. Prince* (2007) 40 Cal.4th 1179, 1219-1220 (*Prince*) [experience-based testimony permitted].) Second, defendant contends that the expert's testimony is unreliable, and the only reason the trial court did not come to the same conclusion is because it erroneously excluded several academic articles defendant offered

against the expert's testimony. Without a witness to lay foundation for those articles, they were hearsay and thus well within the court's discretion to exclude. (§ 1220.) Even if the studies had been admitted and considered, in light of *Jackson*, *supra*, 221 Cal.App.4th 1222, the court would not have abused its discretion in rejecting those articles and in admitting the expert's testimony. Lastly, defendant asserts that the expert's testimony was unnecessary because jurors could look at the crime scene evidence and draw the same conclusions as the expert. However, "'the jury need [not] be wholly ignorant of the subject matter'" before an expert may testify (*People v. Brown* (2014) 59 Cal.4th 86, 101), for in such circumstances, it may "aid [the jury] to learn from a person with extensive training in crime scene analysis" (*Prince*, at p. 1223).

2. Lack of general acceptance in the scientific community

When expert testimony relies on a "'new scientific technique,'" its admissibility turns on further findings—namely, that (1) "'the technique is generally accepted as reliable in the relevant scientific community,'" (2) that the expert is properly qualified to testify about it, and (3) "'the person performing the test in the particular case used correct scientific procedures.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 315-316, quoting *People v. Bolden* (2002) 29 Cal.4th 515, 544-545 [describing the test articulated in *People v. Kelly* (1976) 17 Cal.3d 24].) A judicial finding as to the reliability of scientifically based evidence is required because scientific evidence is viewed as imparting "some definitive truth which the expert need only accurately recognize and relay to the jury," such that the jury can be misled by the "aura of infallibility" that may surround unproven scientific methods. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156 (*Stoll*);

People v. McDonald (1984) 37 Cal.3d 351, 372-373.) We independently review whether a particular technique is subject to *Kelly*. (*People v. Jackson*, *supra*, 1 Cal.5th at p. 316.)

The expert's testimony in this case was not based on any "new scientific technique," so the trial court was not required to make the additional findings required for scientific evidence. The expert's crime scene analysis was based on his prior *experience* with crime scenes and the conclusions he drew from the objective facts of the crime scene, not on any scientific analysis. It makes no sense to require that such testimony be *scientifically* sound. (*Prince*, *supra*, 40 Cal.4th at p. 1225 [finding of scientific acceptance not required for expert testimony comparing crime scenes for commonalities]; *Stoll*, *supra*, 49 Cal.3d at pp. 1157-1158 [finding of scientific acceptance not required for expert testimony grounded in psychiatric diagnosis]; *People v. Townsel* (2016) 63 Cal.4th 25, 46, fn. 3 [same]; cf. *In re Amber B.* (1987) 191 Cal.App.3d 682, 691 [finding of scientific acceptance required for expert testimony opining that child abuse occurred based on how the alleged victim behaves with anatomically correct dolls]; *In re Sara M.* (1987) 194 Cal.App.3d 585, 592 [same].) Defendant cites cases from other jurisdictions that require crime scene analysis to be scientifically validated, but those decisions are contrary to California law and are thus irrelevant.

3. Impermissible profile evidence

An expert witness may not offer an opinion that a defendant is guilty (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47) or an opinion that the defendant's behavior fits a particular "profile" (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084-1085). The expert's testimony in this case did not transgress either of these limits because it did not offer an opinion on the

defendant's guilt and did not create any profile to which defendant could be compared. (Accord, *Jackson*, *supra*, 221 Cal.App.4th at pp. 1239-1240 [rejecting argument that this same expert's crime scene analysis constituted "profile" evidence].) The expert's testimony also did not purport to offer any insight into *defendant's* state of mind.

4. Failure to exclude under section 352

Relevant expert testimony may be excluded as more prejudicial than probative under section 352. However, the trial court has "broad discretion" under this section (*Clark*, *supra*, 63 Cal.4th at p. 586), and defendant has not established an abuse of that discretion as a matter of law.

5. Constitutional violations

Because the trial court's admission of the expert's testimony complied with the rules of evidence, defendant's constitutional rights were not violated. (*Jones*, *supra*, 57 Cal.4th at p. 957.)

III. Erroneous *Exclusion* of Evidence

Defendant contends that the trial court erred in excluding evidence regarding two other suspects in Knight's murder that the police initially investigated, but ultimately ruled out as suspects.

The admissibility of evidence that a third party other than the defendant committed the charged crime turns on two factors: (1) whether the evidence is "'capable of raising a reasonable doubt of defendant's guilt'" (*People v. Vines* (2011) 51 Cal.4th 830, 860, quoting *People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*)); and (2) whether the probative value of such evidence is nevertheless substantially outweighed by danger of undue prejudice, of confusing the issues, or of misleading the jury (*People*

v. McWhorter (2009) 47 Cal.4th 318, 367-368 (*McWhorter*); § 352). Evidence is "capable of raising a reasonable doubt" only if it "link[s] the third person either directly or circumstantially to the actual perpetration of the crime." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325 (*Bradford*).) A defendant seeking to admit this evidence "need not show 'substantial proof of a probability' that the third person committed the act," but it is not enough to show that the person had "mere motive or opportunity to commit the crime." (*Hall*, at p. 833.) We review a trial court's decision to exclude such evidence for an abuse of discretion. (*Clark*, *supra*, 63 Cal.4th at p. 597.)

A. Evidence regarding Gerardo Juarez (Juarez)

After responding to the scene of Knight's murder, police canvassed the neighborhood near Knight's apartment and detained Juarez a half-mile from the apartment. He was disheveled and wearing a stained jacket. Knight's neighbor did not recognize Juarez's face, but when police asked the neighbor to look at Juarez from behind, he said, "[t]hat looks like the guy," and it "possibly could have been" the person leaving Knight's apartment based on his build and the color of his jacket. Police later determined that the stains on Juarez's jacket were not blood and that Juarez possessed none of Knight's belongings (such as her car keys, purse or necklace), even though the crime scene was bloody and those items were missing. A search of Juarez's home revealed no connection whatsoever to Knight. The neighbor later told police said he was wrong in identifying Juarez from behind because Juarez was "too small." The trial court excluded evidence of Juarez's possible commission of Knight's murder, finding that the evidence linking Juarez to the murder was not

reliable and the identification "weak" because it was solely from behind.

The trial court did not abuse its discretion in excluding this evidence. Juarez's proximity to the murder scene meant that Juarez had, at most, the opportunity to commit the crime. That is not enough. (*Hall*, *supra*, 41 Cal.3d at p. 833.) The only other evidence linking Juarez to the murder was the neighbor's statement that Juarez "possibly could have been" the person leaving Knight's apartment, but that identification was based entirely on seeing him from behind and was later recanted. Even if this is construed as "link[ing]" Juarez "either directly or circumstantially to the actual perpetration of the crime" (*Bradford*, *supra*, 15 Cal.4th at p. 1325), it is of such minimal probative value that the trial court did not abuse its discretion in excluding it under section 352 given the absence of any other evidence connecting Juarez to Knight's murder.

Defendant argues that it was error to exclude evidence of Juarez's potential commission of the murder because, in his view, the neighbor's identification of Juarez from behind was not the product of an unduly suggestive identification procedure under the due process clause. (See generally *People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.) But whether or not the neighbor's identification should (or should not) have been excluded on the basis of police-coerced pressure has nothing to do with whether it is reliable enough to support a link between Juarez and Knight's murder, which turns on the totality of evidence. Although the due process precedent also identifies the factors bearing on whether an identification is reliable (*ibid.*), the reliability of the neighbor's identification in this case does not cure the fact that it was made from behind and later recanted, or

compensate for the absence of any other link between Juarez and Knight's murder.

B. Evidence regarding Joe Giarrusso (Giarrusso)

Giarrusso and Knight dated for a few years in 1975 and 1976, but were just good friends by 1979. Because Knight wanted to borrow Giarrusso's camera for her sister's upcoming wedding, she invited him to her apartment for dinner on the night she would be murdered. Giarrusso arrived at Knight's apartment at 8:30 p.m. and left around 11:40 p.m. or 11:50 p.m. to go to his girlfriend's house. Knight's neighbor said he saw a light blue Volkswagen bug—the type of car Giarrusso drove—parked in front of Knight's apartment around 11:30 p.m. or 11:40 p.m. that night. Giarrusso's girlfriend confirmed that Giarrusso arrived sometime after 11:00 p.m. and was with her the rest of the night. Knight's neighbor said the car was gone when he looked out the window after hearing Knight's screams. When the neighbor was re-interviewed 24 years later, the neighbor said he saw "the same beat up looking light blue VW stopped at an intersection" near Knight's apartment after the police responded to the call about Knight's screams. The neighbor also said he saw Giarrusso again between 2007 and 2010, even though Giarrusso had died in 1994. When police initially contacted Giarrusso about Knight's death, he was "distraught" and fully cooperated with police by granting them permission to search his house and his car. No evidence linking him to the murder was recovered. The trial court excluded evidence of Giarrusso's possible commission of Knight's murder because there was insufficient evidence tying him to the crime, finding that neither Giarrusso's presence at Knight's apartment earlier in the evening nor the neighbor's belated remembrance that he saw a light blue

Volkswagen—a fairly common car in 1979—after the police arrived sufficiently linked Giarrusso to the murder.

The trial court did not err in excluding this evidence because it reflects, at best, that Giarrusso had the opportunity to commit Knight's murder because he was at Knight's apartment hours before her death and possibly seen in the neighborhood after her death. As noted above, opportunity is not enough. (*Hall*, *supra*, 41 Cal.3d at p. 833.)

Defendant raises several challenges to this conclusion. First, he argues that the trial court was wrong to discount the neighbor's remembrance that he saw a light blue Volkswagen after the police arrived, asserting that there was no evidence on the frequency of light blue Volkswagens in that neighborhood in 1979, and that the court's discounting in those circumstances invaded the province of the jury to assess the weight of the evidence. Defendant is wrong. Part of the assessment of whether to admit third-party culpability evidence is weighing its probative value against its potential for undue prejudice, and that process necessarily involves weighing the evidence. (Accord, *People v. Fruits* (2016) 247 Cal.App.4th 188, 191.) In so doing, the court also properly considered that Giarrusso did not in any way match the neighbor's physical description of the person the neighbor saw leaving Knight's apartment.

Second, defendant asserts that trial court gave insufficient weight to a variety of facts that tend to show that Giarrusso might be the killer—namely, that Giarrusso knew about the side entrance to Knight's apartment, that he knew what a garrote was, that he had a bandage on his thumb when police spoke with him a few days after the murder, and that he had once hit Knight while they dated. However, none of these facts forges a greater

link between Giarrusso and Knight's murder. Giarrusso's familiarity with the side entrance to Knight's apartment stems from his years-long friendship with her; he said he knew what a garrote was because he had seen James Bond films where they were used; and the bandage on Giarrusso's thumb could not have been a wound inflicted from handling the garrote because the killer had worn gloves to avoid such injuries. Any prior violence between Giarrusso and Knight, aside from being remote in time, was not admissible because "'a history of violence'" between the victim and a third person "'does not amount to direct or circumstantial evidence linking the third person to the actual perpetration of the crime.'" (*McWhorter*, *supra*, 47 Cal.4th at p. 373; *Prince*, *supra*, 40 Cal.4th at pp. 1239-1242 [same].)

Third, defendant argues that the trial court erred in denying his request to admit the conclusion found in Knight's autopsy report that Knight had last eaten two to three hours before her death at 3:00 a.m. Defendant asserts that this conclusion refutes Giarrusso's assertion that he and Knight ate dinner before he left at 11:40 p.m. or 11:50 p.m., and thus shows that Giarrusso might have been at her apartment later than he said. The trial court did not abuse its discretion in excluding the autopsy report's conclusion. Although the report's factual findings fall within the public record exception to the hearsay rule (*People v. Wardlow* (1981) 118 Cal.App.3d 375, 387-388), defendant presented no admissible expert testimony that the contents of her stomach at the time of death could be used to calculate when and what she last ate. What is more, the court had evidence before it indicating that the opinion defendant sought to introduce was not scientifically sound. But even if the court had considered the conclusions in the report, that evidence

would have demonstrated that Giarrusso was at Knight's apartment later than he said but would not have created any further link between himself and the actual commission of her murder.

Lastly, defendant argues that the exclusion of this evidence violated his constitutional rights. Because the exclusion was consistent with the rules of evidence, there was no constitutional violation. (*Jones*, *supra*, 57 Cal.4th at p. 957.)

IV. Instructional Error

Defendant asserts that the trial court erred by instructing the jury with CALCRIM No. 315, the pattern jury instruction that enumerates the factors a jury is to consider in "evaluating identification testimony." That instruction starts with the statement, "You have heard eyewitness testimony identifying the defendant" and goes on to list 14 different factors a jury may consider in evaluating that testimony. (CALCRIM No. 315.) Two of those 14 factors are: "How well could the witness see the *perpetrator*?" and "Was the witness asked to pick the *perpetrator* out of a group?" (*Ibid.*, italics added.) Defendant argues CALCRIM No. 315 implies that some witness identified him as the perpetrator of Knight's murder, and that this implication is inconsistent with the evidence and thus improperly reduced the People's burden of proof in violation of his constitutional rights. We review claims of instructional error de novo. (*People v. Johnson* (2016) 6 Cal.App.5th 505, 509-510.)

There was no instructional error in this case. The instruction itself refers to "eyewitness testimony identifying *the defendant*," and in this case witnesses identified defendant as the person who had a fight with Knight after he and Knight broke up and as the person seen near Knight's apartment a few weeks

before her murder. The mischief defendant complains about—namely, the implication that someone identified him *as the perpetrator of Knight's murder* when there was no evidence of such—stems solely from the use of the word "perpetrator" in two of the 14 factors. In assessing whether the jury read the instruction's potential ambiguity on this point as implying that someone had identified defendant as the actual killer, we look at the instruction as a whole and "inquire whether there is a reasonable likelihood that the jury misunderstood or misapplied the instruction." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 906.) There was no reasonable likelihood here. As noted above, the thrust of the instruction is how to evaluate identifications *of the defendant*; only two of the factors even refer to identifications *of the perpetrator*. More to the point, neither the trial court nor any of the attorneys otherwise represented or argued that someone had seen defendant at the scene of Knight's murder as it was occurring or soon thereafter. Under these circumstances, we conclude there was no reasonable likelihood the jury would have construed CALCRIM No. 315 as suggesting there was such evidence or that the People were relieved from proving defendant's identity as the perpetrator of Knight's murder.

V. Cumulative Error

Because there was only one error, there is no error to cumulate. (*People v. Sandoval* (1992) 4 Cal.4th 155, 198.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

---

* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.