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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DALE RAY HURD, Defendant and Appellant.	B250698 (Los Angeles County Super. Ct. No. SA013730)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Philip M. Brooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Dale Ray Hurd of the first degree murder of his wife Beatrice Hurd (Pen. Code, § 187, subd. (a))[1] and found that he intentionally committed the murder for financial gain (§ 190.2, subd. (a)(1)) and personally used a firearm to commit the crime (§ 12022.5, subd. (a)). The trial court sentenced defendant to life imprisonment without the possibility of parole plus two years.[2]

In this appeal, defendant contends that the trial court abused its discretion in making several evidentiary rulings: that the jury was erroneously instructed; that the trial court did not properly respond to the jury's request for a readback of testimony; and that trial counsel provided ineffective assistance. We find no prejudicial error and therefore affirm the judgment.

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[1] All statutory references are to the Penal Code unless stated otherwise.

[2] This was the third time defendant was tried for his wife's murder. The first trial ended in declaration of a mistrial after the jury deadlocked. Following a second trial, defendant was convicted. We affirmed his conviction in *People v. Hurd* (1998) 62 Cal.App.4th 1084, an opinion issued following grant of rehearing and certified for partial publication. The California Supreme Court denied review and the United States Supreme Court denied defendant's petition for certiorari. However, defendant prevailed in a subsequent federal habeas corpus proceeding. (*Hurd v. Terhune* (9th Cir. 2010) 619 F.3d 1080.) The federal appellate court found that the trial court improperly allowed the prosecution to present as affirmative evidence of defendant's guilt his refusal, during police interrogation, to reenact what he claimed was the accidental shooting of his wife. That court held that use of this evidence violated *Miranda v. Arizona* (1966) 384 U.S. 436 and *Doyle v. Ohio* (1976) 426 U.S. 610 and that its admission at trial was prejudicial. It issued a writ of habeas corpus, requiring defendant's release from custody unless the prosecution chose to retry him. Following finality of that decision, the People elected to retry defendant. Proceedings resumed in the superior court, resulting in the conviction from which defendant now appeals.

STATEMENT OF FACTS

A. FACTUAL OVERVIEW

At the time of the alleged murder, defendant and Beatrice had been married eight years. Several months earlier, Beatrice had retained counsel who initiated divorce proceedings. One month before, Beatrice had moved out of the family home with their two young children and, with the assistance of a family counselor, had told defendant that there was no hope of reconciliation.

In the month preceding Beatrice's death, defendant, whose income was more than twice that of Beatrice's, told a work colleague that he would lose all of his discretionary income in the event of a divorce. Defendant asked the colleague (a former police officer) for help in locating someone to murder Beatrice, stating that killing her was the easiest way to resolve his problem.

The day she was killed, Beatrice went to defendant's home to pick up their two young children. He asked her to come upstairs to review some divorce documents. Once upstairs, he presented her with a completely one-sided marital agreement he had drafted. Beatrice refused to sign it. Defendant shot her once through the heart from a distance of no more than six inches. Beatrice staggered from the bedroom, screaming as she fell down the stairs. Defendant did nothing to assist her.

Based upon the evidence set forth in the preceding three paragraphs, the prosecution argued that defendant murdered Beatrice to avoid paying spousal and child support.

Defendant testified and conceded that he had shot Beatrice but claimed it was an accident. According to defendant, he took out the loaded gun because he wanted to show Beatrice that he could protect and care for her. He wanted to impress her by showing her how to chamber a round but the bullet jammed. As he tried to dislodge the jam, the gun accidentally went off, striking Beatrice.

B. THE PROSECUTION'S CASE

1. *Events Prior to the Murder on April 17, 1993*

Defendant and Beatrice married in 1984. They had two children: Diana and Charlie who were, respectively, seven and four years old, at the time Beatrice was killed. The family lived in Culver City, behind the Pacific Division police station. Defendant had a Ph.D. in economics, worked at the accounting firm of Coopers & Lybrand, and, in 1992, earned $8,467 per month. Beatrice worked as a supervisor in the City of Santa Monica's Utilities Department and, in 1992, earned $3,885 per month.

As will be explained in more detail below, Beatrice, during her marriage, told many individuals about her fear of guns as well as her fear of defendant. The prosecution offered this evidence to establish the implausibility of defendant's claim that Beatrice, who had initiated divorce proceedings, would have been alone with him while he showed her a loaded gun. In addition, the prosecution offered evidence of two instances of domestic violence, witnessed by their daughter, during which defendant attacked Beatrice.

In early January 1993,[3] Beatrice retained attorney Michael Robinson, a family law practitioner, to initiate divorce proceedings. Over the next several months, Beatrice and Robinson spoke and met many times. Robinson opined that upon divorce, defendant would have been required to pay Beatrice between $2,800 and $3,300 in monthly support.

In late January or early February, Beatrice began a sexual relationship with Paul Curley, a family friend, with whom she had developed a friendship in the previous months.

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[3] All subsequent dates in this section refer to 1993.

On February 25, Beatrice met with Martha Fehte, a psychotherapist specializing in marriage and family counseling. Beatrice told Fehte that she wanted to separate from defendant. Over the next six weeks, Fehte had five sessions with Beatrice. (We discuss the specifics of Beatrice's statements to Fehte later in this opinion when we review the evidence offered about Beatrice's fear of defendant.)

On March 12, Beatrice and the two children moved out of the family residence into a rental home approximately a mile away.

In March, defendant had three conversations about Beatrice with Joseph Loggia, a colleague from Coopers & Lybrand. Loggia had been a police officer. In the first conversation, defendant told Loggia that Beatrice had moved out "and was sleeping with his best friend." In the second conversation, defendant was discussing the pending divorce and asked Loggia, in a "matter of fact" and not "joking" manner, if he "kn[e]w someone from [his] old job that [they] could get to take [Beatrice] out?" In the third conversation, defendant said that he had used a computer program to calculate the support he would owe Beatrice upon divorce and "that he had figured out that he was going to have to pay her two thirds of his income, and that he would have no discretionary" or spending money "left." Defendant told Loggia "that it would be just easier to get rid of her [Beatrice]."

On March 29, Fehte, pursuant to Beatrice's request, conducted a joint counseling session with Beatrice and defendant. During the session, Beatrice made it clear to defendant that she did not intend to reconcile with him but that she wanted to reach an agreement regarding shared custody of their two children. Defendant became angry and blamed Beatrice's relationship with Curley for causing the divorce.

On April 1, Robinson served defendant with divorce papers, setting April 30 as the hearing date on an order to show cause to require payment of temporary

spousal and child support. Neither defendant nor an attorney acting on his behalf responded to the documents. In addition to initiating dissolution proceedings, Robinson scheduled an April 20th appointment for Beatrice and defendant to meet with a mediator to develop a child custody arrangement.

On April 8, Fehte met with Beatrice for the last time. Beatrice remained firm in her decision to divorce defendant. Beatrice explained that she had tried, without the aid of counsel, to negotiate with defendant a settlement of their "financial arrangements" but since that effort proved unsuccessful, she would contact her attorney (Robinson).

On April 16, defendant had lunch with three colleagues from Coopers & Lybrand: Loggia, Alan Funk (a former FBI agent) and Julie Plat (an accountant). During the lunch, defendant asked about guns. Defendant wanted to know the effect of hollow point bullets on a body and how loud a gunshot is.

The evening of April 16, Beatrice took Diana and Charlie to defendant's home because her usual babysitters were not available. The children spent the night at defendant's home. Beatrice spent the evening at her home with Curley.

2. *The Murder and Subsequent Investigation*

On April 17, the day of the murder, law enforcement was on tactical alert because the verdicts in the federal prosecution of the police officers in the Rodney King case were going to be announced.

That morning, Beatrice returned to defendant's home to pick up the children to take them to a swim meet. She went upstairs to the children's bedroom, woke them up, and told them to go downstairs to eat breakfast. While they were eating, defendant asked Beatrice to come upstairs with him to look over and sign divorce papers. Beatrice told the children to wait in her car and then walked upstairs with defendant. Diana went to the car but Charlie stayed inside of the home.

A loud gunshot rang out. Beatrice cried out and screamed. She came "running, stumbling down the stairs, falling" and then "collapse[d] onto the ground[,] [j]ust lying on her side." She was no longer screaming or crying. Defendant came down the stairs. He did not stop to help Beatrice but, instead, picked up Charlie, took Charlie outside to Beatrice's car where Diana was seated, and said he would call 911. Defendant was calm, did not appear upset, and was not crying. He returned to the home using "a normal walk."

Clarence Wandrey, a neighbor, took Diana and Charlie into his home. Charlie told Wandrey "[M]ommy wouldn't write the papers" and repeatedly said "Daddy tried to get Mommy to write."

Shortly after the shooting, the police and paramedics arrived. Defendant was seated outside of the house on the steps. He was "expressionless" and not crying. The paramedics transported Beatrice to a hospital where she died. There were abrasions and bruises on her face that appeared to have been inflicted before her death. Beatrice had been shot once through the left chest. The bullet went through her heart and then right lung before exiting through her back.

Inside the master bedroom of the home, the police found the murder weapon: a semi-automatic pistol (a Beretta .380) loaded with hollow point bullets. Defendant had owned the gun since January 1986. According to Robert Hawkins, a recognized firearms expert, if the handgun had jammed, there would be a scrape or dent on the bullet that ultimately was fired. However, there was no such mark on the bullet that had killed Beatrice. Further, when the police tested the handgun, it functioned properly. Drake Powers, another firearms expert, opined that based upon his examination of the evidence, defendant was one to six inches away from Beatrice when she was shot and that the bullet was shot downward at an angle of 35 to 40 degrees. These facts were consistent with the conclusion that Beatrice was seated when shot.

Nine days after the murder, the police, having spoken with Loggia (among others), executed search warrants at defendant's home and office. At defendant's home, the police found, inside a briefcase, a book entitled "How To Do Your Own Divorce in California." At defendant's office, the police found a "Family Law 1992 Reference" book and, on his computer, a marital settlement agreement. The marital settlement agreement recited that defendant would pay Beatrice $1,000 a month in child support and that Beatrice waived all spousal support. The police did not find a printed copy of this agreement in defendant's home.

Several weeks after the murder, Charlie told his uncle John Cook: "Daddy called Mommy upstairs to write some papers, and that . . . he saw Mommy go upstairs [and] then heard her say she wouldn't sign the papers." After the conversation, Cook arranged for Charlie to speak with the police. On May 10, Charlie told the police: "Daddy was upstairs and Mommy was downstairs. Daddy called Mommy upstairs to write the papers. [I] heard a gunshot from upstairs, heard Mommy scream, come down the stairs by herself. Mommy lying on the floor next to the door still screaming. Mommy stopped screaming. Daddy came downstairs after Mommy stopped screaming. [Daddy] did not go to Mommy or help Mommy. Daddy put Charlie in the car with Diana, said he was going to call 911."

3. *Prior Acts of Domestic Violence*

Diana testified to two acts of domestic violence she had witnessed. The first occurred at some point in the four years preceding the murder. Diana saw defendant push Beatrice up against a wall in the "TV-den area" with such force that pictures were knocked off of the wall. In the second (and subsequent) incident, Diana was awakened by Beatrice's screams. Diana walked into her parents' bedroom. They were on the bed and defendant "had his leg wrapped

around [Beatrice's] neck, and he was choking her." Diana screamed at defendant to get off of Beatrice. He did, yelling at Beatrice that she had scratched him.[4]

Diana recalled that once she saw Beatrice wearing a neck brace and that Beatrice had told her she had been in a car accident.

Diana also testified that she remembered a conversation during which Beatrice had told another person that "she was scared of [guns]." At this point, the trial judge stated:

> "All right, I need to tell the jury something now.
>
> "Ladies and gentlemen, we are having statements come in from the decedent [Beatrice] in this matter. She obviously will not be available for cross-examination.
>
> "But these statements are not coming in, they are coming in for a limited purpose. And they are being admitted for state of mind and for that limited purpose only.
>
> "The lawyers will be arguing and telling you about state of mind and why it is important in this case. But that is why these statements from the decedent, Miss Hurd, is coming in, okay.
>
> "And as you probably heard [during the opening statements], there will be a number of instances where people will be repeating what Miss Hurd said, and it is being offered for the state of mind, her state of mind."

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[4] At the close of trial, the court submitted CALJIC No. 2.50.02, the pattern instruction explaining the circumstances under which the jury may use evidence of domestic violence as propensity evidence.

4. *Beatrice's Fear of Guns*

a. *Testimony of Jean Cook*

Jean Cook, Beatrice's mother, testified that Beatrice had been afraid of guns since she had been a little girl. As an adult, Beatrice often had expressed her fear of guns for both herself and her children.

b. *Testimony of Clarence Wandrey and Ann Picker*

Two neighbors, Wandrey and Ann Picker, testified about conversations that took place during the riots that followed the not guilty verdicts in the 1992 Rodney King case. Wandrey, his wife, defendant and Beatrice were concerned because "the fires were going on within several blocks" of their homes. Defendant asked Wandrey if he wanted to borrow one of his firearms. Wandrey said that he did. Defendant handed Wandrey a rifle and ammunition. Beatrice became "visibly afraid." She told Wandrey that she "was frightened of" and "didn't like guns." Picker testified that Beatrice appeared "quite upset" and said "that she did not want anything to do with guns regardless if they were for protection."

c. *Testimony of Janice White*

Janice White had known Beatrice since 1981. They were "very close" friends. According to White, Beatrice "was terrified" of firearms. When asked the basis for that opinion, White testified about two incidents. The first occurred in 1981. She and Beatrice were sharing a house when an acquaintance brought a gun into the house and showed it to the two women. Beatrice "just started screaming and telling him get out of the house, put that away, get it out of here. [¶] I can't stand guns." Immediately after this testimony, the trial court stated:

> "I have got to remind the jury, *I won't do it in every instance, when we are dealing with hearsay from Ms. Bea Hurd, it is not*

coming in for the truth of the matter, but it is coming in for state of mind to show her state of mind.

"And, the lawyers will later argue to you and tell you why that is or is not important okay. Because it is hearsay, and she is obviously not available to be cross examined." (Italics added.)

After the trial court's admonition to the jury, White testified that when she (White) was dating an FBI agent, Beatrice said: "I hope he doesn't have a gun." When the man came to the women's home, Beatrice said: "[D]oes he have a gun? Is he wearing a gun? [¶] I don't want him bring that gun in here."

Beatrice never allowed White to bring or possess a gun in their residence.

d. *Testimony of Carol Meadow O'Neal*

Carol Meadows O'Neal worked with Beatrice the three years before the murder. Shortly before Beatrice moved out of the family home, Beatrice told O'Neal that defendant "had a gun" and that "she was very afraid of guns."

e. *Testimony of Paul Curley*

Paul Curley testified that in December 1992, Beatrice told him that "she was afraid of [defendant] with his guns." One evening in early December when defendant was out of town, Beatrice asked Curley to "come over" "to help her with a clip in a gun. She was afraid of it." When Curley arrived at the home, she took him to the master bedroom. She showed him a loaded .380 semi-automatic Beretta—the gun defendant used four months later to murder her—in a dresser drawer. Curley removed the clip from the gun and returned the gun to the dresser. Curley said: "[N]ow this gun is useless. It's just a piece of metal." Curley gave the clip to Beatrice who took it with great trepidation, Beatrice had "a worried look

on her face. She wasn't too happy about the whole situation[,] the gun and all that." She said defendant "had pointed it at her before." A few minutes later, Curley left. (At this point, their relationship was not sexual.)

f. *Testimony of Terry Guajardo*

Terry Guajardo had known Beatrice since 1985. The two women worked together. Guajardo had two conversations with Beatrice about guns. The first occurred in the early 1990's when Guajardo told Beatrice that she (Guajardo) had purchased a gun after someone had tried to break into her house when she and her young son were at home. Beatrice was "upset" about Guajardo's action. Beatrice explained "that she was afraid of them [guns], she did not like them." The second conversation took place over the phone in the week preceding Beatrice's death. Beatrice told Guajardo that defendant "had guns in the house" and "she was scared to death of them." Guajardo told Beatrice to check to see whether the guns were loaded and, if they were, she (Guajardo) would tell Beatrice how to unload them. Beatrice refused: "She didn't even want to touch the guns. She wanted no part of the guns." During this conversation, Beatrice "was pretty shook up."

g. *Testimony of Marilyn Harris*

Marilyn Harris and Beatrice met at work and became friends. Shortly after Diana was born in December 1985, Beatrice told Harris that defendant "had a gun in the house and she felt very uncomfortable about it."

5. *Beatrice's Fear of Defendant*

a. *Testimony of Janice White*

White (Beatrice's good friend since 1981) testified that in February 1993, Beatrice told her that she was in the process of divorcing defendant. White knew

that Beatrice was having an affair with Curley. Beatrice told White "that [defendant] was very violent" and that there had been several violent incidents before she had moved out. Beatrice told White that in January 1990, defendant "had her on the floor, and he was sitting on her chest with . . . his hands around [her] neck, and he was pounding her head into the floor." As a result, Beatrice went to the hospital and wore a neck brace.

b. *Testimony of Paul Curley*

In December 1992, Beatrice told Curley that defendant "tried to strangle her" following an argument. After she screamed at defendant "You are killing me[,]" their daughter Diana walked in and defendant stopped. Thereafter, Beatrice went to the hospital to treat the injury to her neck. When the prosecutor asked Curley if Beatrice had told him about other instances of physical abuse, Curley replied: "She mentioned a couple other times. I can't be more specific than that." The trial court interjected: "Again, I want the jury to keep in mind this is not coming in for the truth of the matter. It is coming in as to her state of mind or fear or whatever."

Curley saw Beatrice the evening of April 15. She was upset because she had been at defendant's home to prepare their income tax returns and "had a big shouting match" with him.

The next evening (April 16), Curley and Beatrice went out. She was upset. She had "somewhat of a blow-up" with defendant.

c. *Testimony of Martha Fehte*

Before Fehte (Beatrice's marriage counselor) testified, the trial court instructed the jury:

"At one time I told you during the trial that statements of the decedent, statements of the victim, Bea Hurd, are admissible only for the limited purpose of her state of mind and that purpose only.

"It can't be used – I should have been reminding you over and over throughout the trial, and I want you to keep that in mind.

"All right.

"Thank you, very much. You may continue. And this limiting instruction that I just read, it only applies in this case for this witness, okay? Does everybody follow?

"But it is true, not to mislead you, I am giving basically the essentially the same one, but mine might be slightly different and for all the other witnesses, the live witnesses, my instruction controls.[5] Okay? It controls for this witness."

Fehte testified that Beatrice told her that there was "a history of domestic violence" and "physical abuse" in her relationship with defendant; that "she was frightened of [him]"; and that defendant had a history of alcoholism. Beatrice explained that because defendant had minimized his consumption of alcohol there had been no physical abuse in the preceding three years but that there "was an aggression in the household." (Fehte defined physical abuse as "[a]ny abuse that left marks on the body or required medical attention.") Beatrice explained that in order to avoid defendant's physical abuse, she submitted, on an "almost nightly" basis, "to other types of physical violence" "in the upstairs bedroom." At the first

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5 The trial court referred to "live" witnesses because some of the witnesses, including Fehte, were unavailable to testify. The testimony of those unavailable witnesses was read to the jury as it met the criteria of the former testimony exception to the hearsay rule. (Evid. Code, § 1290.)

counseling session, Beatrice showed Fehte a bruise on her arm that she said was the result of defendant physically restraining her.

In addition, Beatrice told Fehte that she was "fearful" of a handgun that defendant kept in their bedroom and that he kept other weapons, including rifles, in their home. One of the reasons she (Beatrice) wanted to leave the marriage was that "she was living in fear" with defendant.

d. *Dr. Glenn Lopez*

Dr. Lopez was a staff physician at a local hospital on January 29, 1990 when he treated Beatrice for a neck injury. Beatrice told him that she had sustained the injury as a result of a "physical altercation with her husband" when "he was pulling on [her] neck." At this point of the doctor's testimony, the court stated:

> "Again, I want to keep the jury on the same page, we are not hearing statements made by Bea Hurd.
>
> "She is not available for cross-examination. That means it is hearsay. However, I am permitting it to come in under the state of mind exception, and that is the limited purpose for which it is coming in, not for the truth of the matter but for the purpose I said, go ahead."

Dr. Lopez proceeded to testify that Beatrice had a significantly decreased range of motion in her neck caused by muscle stiffness and/or significant pain. He diagnosed her as suffering from neck strain. He gave her a neck brace and prescribed a muscle relaxant and Motrin.

e. *Terry Guajardo*

As stated earlier, Terry Guajardo had known Beatrice since 1985. The two women worked together. A few years before the murder, Guajardo saw Beatrice wearing a neck brace. Guajardo asked Beatrice what had happened. Beatrice

became tearful. Later that day, Beatrice told her that defendant "had choked her" but that she had told everyone else at work that she had been in a car accident. Beatrice explained that "this sort of abuse had happened before" at defendant's hands. Beatrice removed the neck brace and Guajardo saw that Beatrice's neck was red.

On April 10, 1993, Guajardo and Beatrice were discussing the possibility of unrest after the verdicts were reached in the federal trial of the police officers in the Rodney King case. Beatrice said she "was more scared of [defendant] than even anything related" "to the King verdicts."

On April 11, 1993, Beatrice accompanied defendant and their two children to Disneyland to celebrate their four-year-old son's birthday. Beatrice told Guajardo she "was uncomfortable with [defendant's] behavior . . . at Disneyland" because "whenever they got on a ride, [defendant] made her sit in a certain place every time" and "she was afraid that he was going to try to push her off."

f. *Testimony of Tobi Smith*

Tobi Smith and Beatrice had been "best friends" in the six years preceding Beatrice's death. In January 1990, Smith saw Beatrice wearing a neck brace at a social event. Later that evening, Beatrice told Smith that defendant "had tried to strangle her." Beatrice asked to stay with Smith that evening, explaining that "[s]he was afraid to go home." Smith agreed. Back at Smith's residence, Beatrice removed the neck brace. Smith saw "bruising around [Beatrice's] neck." Beatrice told Smith that "[t]here were times that she was terrified of [defendant]."

Several years before the murder, Beatrice told Smith that defendant had a handgun and that because they "fought a lot," "she was fearful for her life." About four months before the murder, Beatrice told Smith that defendant had pointed "a

gun at her during [arguments] . . . three times." Smith asked Beatrice to give her the gun so that she could hide it. Beatrice told her that she had "stole[n] the clip."

In the months preceding Beatrice's March 12th leaving the family home, she often told Smith that she had become more afraid of defendant and wanted to leave. After she moved out, she told Smith that she "knew [defendant] had a gun and she was afraid to be alone with him."

On one occasion, Smith saw Beatrice with a black eye. Beatrice explained that defendant had hit her and that she was frightened of him.

g. *Dr. Lois Dasaro*

In 1991, Beatrice consulted Dr. Lois Dasaro, a psychologist. Beatrice had 20 sessions with Dr. Dasaro. During those sessions, Beatrice told the doctor about physical abuse in her marriage.

h. *Marlene Morris*

Marlene Morris, a neighbor, was a friend of Beatrice. Once, Beatrice came with her two young children to the Morris residence late in the evening. Beatrice was distraught and asked to stay because she was afraid of defendant. In addition, "on more than one occasion," Beatrice told Morris that defendant abused her. In 1990, Beatrice told Morris that she had to go to the emergency room because of defendant's abuse.

On cross-examination, Morris conceded that after Beatrice "became serious with [Curley]," Beatrice told her that she "was afraid that [defendant] wouldn't give her a divorce, and so she was talking about things just to make sure that people would know what was happening." "[S]he talked to people at work a lot, making sure that people knew, so that [defendant] would be more likely to give her a divorce." "She was afraid that [defendant] would not give her [a divorce], so she

wanted to help her case by telling people that maybe, you know, that things were bad, and that so that she could get a divorce."

i. *Michael Robinson*

Robinson, Beatrice's divorce attorney, testified that in the majority of conversations he had with Beatrice, she discussed her fear of defendant and the physical abuse he had inflicted.

j. *Maria Gomez*

Maria Gomez helped Beatrice move from the family home to her rental home. During that activity, Beatrice said that she would not "worry about living in fear anymore" of defendant.

k. *Jean Cook*

In early 1993 Beatrice phoned her mother, Jean Cook, and told her that she had "moved into a room down the hall from the [master] bedroom and . . . had to lock the door because [defendant was] getting violent." In a subsequent phone call, Beatrice told her mother: "[W]e must get out of this house. It is like an armed camp."

6. *Expert Testimony about Domestic Violence*

The prosecution called Gail Pincus, a qualified expert on the issue of domestic violence. Pincus explained that it is common for domestic violence victims to minimize or even deny that they have been abused and to stay in an abusive relationship for some time. Further specifics of Pincus' testimony will be set forth when we discuss defendant's contention that admission of her testimony constituted prejudicial error.

C. THE DEFENSE CASE

1. *Defendant's Testimony*

The defense case rested primarily on defendant's testimony. Defendant testified on his own behalf as follows.

a. *Possession of Firearms*

Defendant had owned firearms since he was 17 years old. He bought the Beretta (the murder weapon) for protection but never fired it before April 17. He had 700 rounds of live ammunition in the house because he intended to practice shooting the handgun. In addition to the Beretta, he kept three rifles in the home.

Defendant knew that Beatrice was "afraid of guns" and that she was "fearful about the safety issues associated with [them]." Although she had asked him to take them out of the house, he decided to keep them "over her objections." Defendant denied having ever pointed a gun at Beatrice prior to the day he shot her.

He last handled the Beretta a week before the shooting when he put the clip in the gun. He was concerned about possible civil unrest because jury deliberations had commenced in the federal Rodney King trial.

b. *Prior Acts of Domestic Violence*

Defendant acknowledged that in 1990, he "grabbed [Beatrice] by the arms" "from behind and held her" while she struggled "to get away from [him]." As a result, Beatrice went to a hospital and was fitted with a neck brace. When she returned, she said that "she was hurt and it was [his] fault."

In addition, he acknowledged that on one occasion his daughter Diana found him and Beatrice engaged in "a physical altercation" in the master bedroom.

Other than those two occasions, defendant denied that he ever hit Beatrice, gave her a black eye or used any force against her.

c. *The Divorce*

Defendant was angry about both Beatrice's decision to divorce him and her affair with Curley. He was shocked, angry and devastated when served with divorce papers on April 1. He did not want a divorce and, up to the moment he shot Beatrice, thought they would reconcile. He spoke to, but did not hire, an attorney. He believed he would be required to pay up to $2,500 a month in support, an amount he could "easily" afford. He acknowledged using a book to draft the marital settlement agreement found on his office computer but claimed he neither printed it out nor presented it to Beatrice.

Defendant denied making the incriminating statements attributed to him by Loggia.

d. *The Shooting*

Beatrice arrived at the home on April 17 to pick up their two children. She and defendant went upstairs to the master bedroom. The television was on and the news was reporting about the upcoming release of the verdicts in the federal Rodney King trial. After he and Beatrice "talked a bit about the situation that was unfolding[,]" he removed the Beretta from the dresser drawer and showed the loaded gun to her. He "was trying to impress her, show her that [he] could protect her and care for her. . . . [He] was being macho." Beatrice expressed no fear of the gun.

Defendant attempted "to impress [Beatrice] by showing her how to chamber a round" but "the bullet wouldn't go in the chamber. It was jammed." He "tried to clear the jam . . . and the gun went off." To explain why the bullet hit Beatrice

directly in the heart, defendant testified that when he first brought the gun out of the drawer, he pointed it down. But when it jammed, he "brought [it] up to see what was wrong with it." He un-jammed the gun and felt the bullet move into the chamber. At that moment, he was distracted by an announcement on the television as he "moved the gun . . . to point it back down at the ground. It came across Bea while [he] was looking over [at the television]. And as it came across her, it discharged" and hit her directly in the heart. She was within six inches of him when shot. Defendant's memory was "blank" or "black" in regard to the exact moment he shot Beatrice. He explained: "I don't recall touching the trigger. I really don't know what caused the gun to go off. I didn't do it intentionally."

Beatrice walked out of the bedroom and defendant followed. Beatrice said: "Oh, my God, I'm shot." According to defendant, Beatrice "was walking fine," "normally" down the stairs and was not screaming. When she reached the bottom, "she collapsed and fell." Defendant did not check on her. Instead, he picked up Charlie, took him outside, and placed him in Beatrice's car where Diana was seated. He returned to the house, checked on Beatrice, and called 911. He had not called 911 earlier—either from the phone in the master bedroom or the phone in the downstairs kitchen 10 feet away from the bottom of the stairs—because he intended to take Beatrice (along with their two young children) to a hospital located three miles away.

Defendant denied having asked Beatrice to sign any papers on April 17 before he shot her.

e. *Impeachment of Defendant's Trial Testimony By His Prior Inconsistent Statements*

On two previous occasions defendant gave different versions of the operative events. The first occasion was when he spoke with the police after the

shooting.[6] Then, he claimed that he was showing Beatrice how to use the gun when he shot her. The second was in an earlier proceeding. There, he testified that he told Beatrice the gun was easy to use; that he was showing her how to load the gun; and that the gun accidentally discharged.

2. *Testimony of William McTaggart*

Defendant proffered McTaggart's testimony in an effort to establish that he (defendant) had never printed out the marital settlement agreement found on his computer. McTaggart is an attorney and had been a friend of defendant for some years. The day after the murder, McTaggart and defendant's trial counsel Jeffrey Brodey visited defendant "in the lock up." Approximately a week later, Brodey asked McTaggart to accompany him to the crime scene (defendant's home). Brodey had the keys to the house. They were in the house an hour-and-a-half to two hours. They looked for defendant's checkbook and "anything apparent that [Brodey] would feel was relevant to the case." They went through the house, including the master bedroom where Beatrice had been shot. Neither he nor Brodey took any papers from the bedroom. McTaggart did not recall seeing the marital settlement agreement in the house but "may have [seen] some type of divorce type documents around." In a downstairs eating room, the men found defendant's briefcase. McTaggart searched the briefcase and retrieved defendant's check book. McTaggart did not recall taking anything from the home other than the check book.

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[6] After conducting an evidentiary hearing, the trial court ruled that defendant's statements to the police taken in violation of *Miranda* were voluntary and could be used to impeach him. In this appeal, defendant does not contest that ruling.

3. *Testimony of Lee Morris*

Lee Morris and defendant were longtime friends. He was married to Marlene Morris who, as we have discussed, testified that on several occasions Beatrice had told her that defendant had abused her and on one occasion had asked to spend the night at the Morris home because she was afraid of defendant. Lee Morris remembered that occasion, recalling that Beatrice had said she was afraid and scared of defendant. But the core of Lee Morris' testimony, from defendant's point of view, was that Beatrice told him that she was having an affair with a man she did not identify. He testified: "[Beatrice] told me that she had to make up stories at work because she didn't want them to know that she was having a relationship." Beatrice never elaborated to him except to state that she made up stories to explain "[w]hy she wasn't living at home."

4. *Testimony of Julie Plat*

Julie Plat worked with defendant, Loggia and Funk at Coopers & Lybrand. She had been present at the April 16 lunch (the day before the murder) with the three men. She contradicted Loggia's testimony about the conversation. According to her, defendant never asked any questions about guns. Further, based upon her experiences with Loggia, she did not think he was a truthful person.

DISCUSSION

A. ADMISSION OF CIRCUMSTANTIAL EVIDENCE OF BEATRICE'S STATE OF MIND

Defendant first contends that the trial court committed prejudicial error in admitting circumstantial evidence of Beatrice's state of mind that spoke (inferentially) to her fear of defendant. We disagree.

1. *Legal Background*

Before discussing the specifics of defendant's contention, we set forth the governing law.

Evidence Code section 1250 provides:

> "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> "(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> "(2) The evidence is offered to prove or explain acts or conduct of the declarant.
>
> "(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

In *People v. Riccardi* (2012) 54 Cal.4th 758, 800-825 (*Riccardi*), the California Supreme Court concluded that state-of-mind evidence includes two separate categories of evidence with different theories of admissibility: statements that are admissible as hearsay under section 1250,[7] and statements that are not hearsay but admissible, if relevant, as circumstantial evidence of state of mind. (*Id.* at p. 822.)

The first category consists of statements that are direct declarations of the victim's state of mind—e.g., "I am afraid of defendant." These statements, offered for the truth of the matter asserted—to prove the victim's fear of the defendant—

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[7] All statutory references in part A of the Discussion are to the Evidence Code.

are admissible under section 1250 as exceptions to the hearsay rule, and, if relevant to a disputed issue in the case pose little danger of undue prejudice. (*Riccardi, supra*, 54 Cal.4th at p. 822.)

The second category consists of statements that are not hearsay because they are not offered for the truth of the matter asserted but, instead, are offered as circumstantial evidence of the victim's state of mind. This nonhearsay category includes statements that *indirectly* reflect the victim's state of mind because they contained descriptions or assessments of the defendant's conduct that engendered her fear or altered her conduct—e.g., "Defendant kidnapped me at gunpoint." These statements are not hearsay if offered to prove circumstantially the victim's state of mind or conduct; e.g. the victim feared the defendant because he had pulled a gun on her. (*Riccardi, supra*, 54 Cal.4th at p. 823.) However, the statements become inadmissible hearsay if offered to prove the truth of the matter asserted regarding the defendant's conduct (e.g. to prove the defendant actually pulled a gun on the victim). (*Ibid.*, citing section 1250, subd. (b) and the Comment of the Assembly Committee on the Judiciary regarding enactment of section 1250.)[8]

Both direct (hearsay) evidence and indirect (nonhearsay) circumstantial evidence of the victim's state of mind are admissible if the evidence meets the

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[8] Section 1250, subdivision (b) provides: "This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed." The Comment of the Assembly Committee on Judiciary states, in relevant part: "Statements of a decedent [here, Beatrice] narrating threats or brutal conduct by some other person [here, defendant] may also be used as circumstantial evidence of the decedent's fear—[her] state of mind—when that fear is itself in issue or when it is relevant to prove or explain the decedent's subsequent conduct; *and, for that purpose, the evidence is not subject to a hearsay objection because it is not offered to prove the truth of the matter stated. . . . But when such evidence is used as a basis for inferring that the alleged threatener must have made threats, the evidence falls within the language of Section 1250(b) and is inadmissible hearsay evidence.*" (Italics added.)

threshold requirement of relevance. (§ 210.) (*Riccardi, supra,* 54 Cal.4th at pp. 814-815.) The victim's out-of court statements expressing fear, directly or indirectly, of the defendant are relevant "when the victim's conduct in conformity with that fear is in dispute." (*Id*. at p. 816.) In particular, the admission of such evidence is proper "when the victim's fearful state of mind rebut[s] the defendant's claim[] that the victim's death was accidental [citation]." (*Ibid.*; see also *People v. Kovacich* (2011) 201 Cal.App.4th 863, 884-885 and cases cited therein [evidence of the murder victim's fear of the defendant is admissible when the defendant claims that the victim acted in a manner inconsistent with that fear].)

Admission of circumstantial evidence of the victim's state of mind can present an increased risk of prejudice "if the jury is unable to distinguish between the truth of the matters asserted and the inferences concerning the declarant's state of mind." (*Riccardi, supra*, 54 Cal.4th at p. 823.) To mitigate that potential harm, the trial court can submit a limiting instruction about the use to which the jury can put the evidence. However, the trial court has no obligation to give such an instruction on its own motion. (*Id.* at pp. 824-825.) Consequently, a failure by trial counsel to request such an instruction constitutes a forfeiture of any appellate claim that the trial court erred in not instructing the jury that the evidence was relevant only as circumstantial proof of the victim's statement of find (fear of the defendant) but not to show that the event (the defendant pulled a gun) had actually occurred. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 215-216, fns. 18-20.)

2. *Factual Background*

Prior to trial, the court conducted a lengthy hearing to determine the extent to which it would permit the People to introduce evidence, both direct and indirect, about Beatrice's state of mind in regard to her fear of guns and her fear of defendant. In conducting the hearing, the parties relied, to a large extent, upon the

testimony the witnesses had given in the previous trial. This gave the trial court a detailed knowledge of the proffered testimony and allowed it to balance the probative value of each item of evidence against its potential prejudicial effect upon the defense. The court excluded from evidence a number of statements in which Beatrice told third parties that defendant had raped her or engaged in other forms of sexual assault. As to the evidence it agreed to admit, the court stated several times that it would give the jury a limiting instruction but also reminded defense counsel of his obligation to request one if he felt it necessary at any particular point.

At the close of trial, the parties discussed jury instructions. The trial court proposed modifying CALJIC No. 2.09, the pattern limiting instruction, to explain that it had allowed "evidence that may show the victim's fear of the defendant and the victim's fear of guns. This evidence was admitted to show the victim's state of mind as it may be relevant in this case." The trial court told defense counsel that it proposed the modification "for your benefit." "I don't have to identify for them the evidence. Plus, I did it throughout the trial so I think I've covered the record, but I was doing this for your purpose." Trial counsel responded: "Well, I would ask you actually just to give the regular instruction. *To me this emphasizes*. . . . [¶] *I don't see the benefit to me*." (Italics added.) The trial court agreed to submit CALJIC No. 2.09 unmodified, stating: "I'll leave it to your arguments to explain to them what that evidence means. And I told them a number of times, so I believe the record is replete with examples of me explaining that that evidence was not being admitted for all purposes." Consequently, the court instructed the jury: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do

not consider this evidence for any purpose except the limited purpose for which it was admitted." (CALJIC No. 2.09.)

3. *Discussion*

In this appeal, defendant does not complain about the evidence regarding Beatrice's fear of guns or the evidence about her direct assertions of her fear of him. Instead, he contends that the trial court erred in permitting "the prosecution to put before the jury, in the guise of state of mind evidence, [Beatrice's] many hearsay accusations that [defendant] assaulted and abused her at various times during their marriage." We review the trial court's ruling for abuse of discretion. (*Riccardi, supra,* 54 Cal.4th at p. 826.)

In this case, there was no dispute that Beatrice was fatally shot with defendant's gun. The key issue was whether it was an intentional or accidental act. Defendant put Beatrice's state of mind in issue when he claimed the shooting was an accident that occurred while he was showing her the loaded gun in an effort to impress her. To credit this defense, the jury would have to believe that she voluntarily stood by when he first showed her the loaded gun and then tried to unjam it. Circumstantial evidence about Beatrice's fear of defendant based upon his prior acts of physical abuse was relevant to rebutting that claim.[9] The trial court's ruling allowing this evidence was therefore not an abuse of discretion.

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[9] The trial court reiterated this point when it denied defendant's motion for a new trial that urged, in part, that the admission of the circumstantial evidence of Beatrice's statement of mind denied him a fair trial. The trial court explained that the evidence "was admissible to refute the fact that this was an accidental shooting" because her "statements of fear in combination with her fear of guns showed it was unlikely that she would have allowed defendant to show her the loaded gun in close proximity to her." The trial court also correctly noted "that many of the statements by the witnesses [regarding Beatrice's statements of physical abuse] were just a couple of sentences. [¶] *There was no long term questioning regarding these incidents.* . . . [¶] And a number of the witnesses, when you look at what they said about the domestic violence, it could be

Defendant does not argue that any particular evidence should have been excluded. Instead, he attacks the admission of all the evidence. First, he argues error because "the statements repeatedly alleged conduct by [him], rather than describing [Beatrice's] state of mind." But this is precisely the class of evidence that *Riccardi* found admissible as circumstantial evidence of state of mind. (*Riccardi*, *supra*, 54 Cal.4th at pp. 823-825.) That is, Beatrice's statements to the witnesses that defendant had physically abused her constituted circumstantial evidence that she feared him, creating an inference that she would not have allowed him to show her the loaded gun.

Next, defendant urges error because "the kinds of conduct alleged were highly inflammatory." Defendant ignores the fact that the trial court, in exercising its discretion, excluded multiple statements from Beatrice in which she said defendant had sexually assaulted her because the court found that they were inflammatory and would have unduly prejudiced the defense. Further, the multiple limiting instructions the trial court submitted were designed to prevent the jury from being inflamed and using the evidence for the wrong purpose.

Turning to the limiting instructions, defendant contends that "it was unreasonable to expect limiting admonitions to the jury would assure that the evidence would only be considered as circumstantial evidence of state of mind." The law is to the contrary. "Any prejudice that the challenged information may have threatened must be deemed to have been prevented by the court's limiting instruction[s] to the jury. We presume that jurors comprehend and accept the court's directions. [Citation.] We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors

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encapsulated in two paragraphs or one paragraph. . . . [T]hat goes into the weighing process of how prejudicial this evidence was." (Italics added.)

generally understand and faithfully follow instructions. [Citation.] Defendant's assertion to the contrary notwithstanding, that presumption stands unrebutted here."[10] (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

In a further attack on the limiting instructions, defendant urges that "the admonitions actually given by the court were not reasonably likely to achieve [their stated] purpose." This claim has been forfeited because defense counsel failed to object to the admonitions the court gave, failed to ask the court to give a modified admonition, and, in fact, declined the court's invitation to give a more fact-specific version of CALJIC No. 2.09 at the close of trial. (*People v. Chism* (2014) 58 Cal.4th 1266, 1308.)

Lastly, defendant argues that the circumstantial evidence of Beatrice's state of mind should not have been admitted because it was not trustworthy. He relies upon section 1252 which provides:

> "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

Statements are considered trustworthy under section 1252 if "made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are '"made at a time when there was no motive to deceive."'" (*People v. Edwards* (1991) 54 Cal.3d 787, 820.) Here, eleven witnesses for the prosecution testified to statements by Beatrice that constituted circumstantial evidence of her fear of

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[10] To a certain extent, defendant argues that the prosecutor's opening statement and closing arguments contained misconduct (misleading statements of the law) that rebut that presumption. As we explain later when discussing defendant's contention of ineffective assistance of counsel, trial counsel's failure to object to the opening statement or those portions of the closing argument constitutes a forfeiture of that argument.

defendant. The statements were made over a period of three years and four months. Beatrice made the first statement in January 1990 to Dr. Lopez and the last statements in April 1993 to Terry Guajardo just a week before she was killed. The statements were made in varying circumstances to a wide variety of individuals: friends, co-workers, and professionals (physician, psychologist, marriage counselor and attorney). The statements appear to have been spontaneous and made in the company of an individual Beatrice trusted. Given all of these circumstances, the trial court did not abuse its discretion in finding the statements to be trustworthy.

To reach a contrary conclusion, defendant argues that Beatrice made "most" of the statements "*after* she started her affair with Paul Curley, and this gave her a motive to fabricate or exaggerate in order to justify to others her decision to leave her husband." The trial court rejected that argument. We find no abuse of discretion in that ruling.

First, defendant's claim that Beatrice made "most" of the statements after she began her affair with Curley is incorrect. Beatrice and Curley began their sexual affair in late January or early February 1993. But before that date, Beatrice told six individuals in diverse circumstances about defendant's physical abuse. In January 1990, she told Dr. Lopez about a physical altercation with defendant. That same month, she told Smith that defendant had tried to strangle her. At some point in 1990, Beatrice told Marlene Morris that defendant's physical abuse sent her to the emergency room. In 1991, Beatrice had 20 sessions with Dr. Dasaro (a psychologist) during which she described the physical abuse in her marriage. Several years before the murder, Beatrice told Guajardo that defendant had tried to strangle her and that he had previously abused her. And she told Curley in December 1992 (a month or two before their sexual affair began) that defendant had once tried to strangle her and had pointed a gun at her.

Significantly, Beatrice's statements made after she began the affair with Curley were remarkably similar to those made before the affair, giving the latter statements an indicia of trustworthiness. Further, some of those statements were made in a professional relationship (an attorney and a marriage counselor) in which it was in Beatrice's interest to be candid and honest. Thus, the trial court did not abuse its discretion in finding all of the statements to be trustworthy.[11] Whether Beatrice may have shaded a particular statement to a certain person went to the weight of that item of evidence, not its admissibility. And the defense was given wide latitude to explore, prove and argue this point throughout trial. Defense counsel cross-examined some of the witnesses on this issue; he called a witness (Lee Morris) to testify, in essence, that Beatrice had told him that she had fabricated the claim of abuse to cover-up her affair with Curley; and defense counsel set forth this theory in his opening statement and closing argument.

B. EXCLUSION OF BEATRICE'S STATEMENT TO DEFENDANT

Defendant contends that the trial court committed prejudicial error when it precluded him from testifying that on the day of the murder, Beatrice told him that she was fearful about potential rioting. We find that the ruling was error but, under the facts of this case, it was not prejudicial under any standard of review.

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[11] The trial court explained: "Now I understand that you [defense counsel] are saying that she [Beatrice] is trying to deceive someone because she is suggesting that it is the fear of her husband that is causing her to leave the marriage and not her new found love for Mr. Paul Curley. [¶] But I just don't find that to be true. [¶] On this record, I find that it seems clear to me that the statements that she made regarding her fears of [defendant] are made in a manner and at a time and without any evidence that there was a motive to deceive, thereby making them trustworthy. [¶] And they are done over a course of time, done to several people. . . . [¶] And it seems to me that they are given over a long enough period of time and to enough individuals and to enough circumstances to indicate that they are trustworthy."

1. *Factual Background*

After defendant testified that he had taken out the gun because he was concerned about potential civil unrest following the verdict in the federal Rodney King trial, his attorney asked him: "Was Bea nervous about the verdict?" The prosecutor objected that the question called for speculation. The court sustained the objection and convened a sidebar conference. A lengthy colloquy ensued between the court and the parties. The court asked defense counsel for an offer of proof as to how defendant would answer the question. Defense counsel replied: "He'll say that she [Beatrice] was nervous." Defense counsel said he would follow up by asking defendant what he suggested to Beatrice and that defendant would reply that he would "suggest the gun. . . . [¶] He's going to say he showed her [the gun] without her asking for it. *Her fear, it goes to why . . . he's showing her the gun*." (Italics added.) The court stated that evidence Beatrice was nervous was not relevant unless she also asked defendant for the gun. The trial court ultimately sustained the prosecutor's hearsay objection to the testimony. The judge told defense counsel that defendant could testify "he thought [Beatrice] was afraid and that's why he showed her the gun" but that he could not testify to Beatrice's hearsay statement that she feared a riot. Thereafter, defendant testified that Beatrice came upstairs that morning and he showed her the gun "to impress her, show her that I could protect her and care for her."

2. *Discussion*

Defendant contends that the trial court improperly precluded him from testifying that Beatrice told him that she was afraid of potential civil unrest. He argues that "the jury needed to know that, at the time the shooting happened, [Beatrice's] principal fear was her fear of the danger outside her home, not her

purported fear of her husband" and that the accidental shooting "occurred while he was attempting to show [her] how to prepare the gun for firing."[12]

We consider, first, the claim that the trial court's decision to preclude evidence that Beatrice told defendant about her fear of possible riots was error. The evidence was not hearsay. It was not offered for the truth of the matter asserted to prove that Beatrice was, in fact, afraid of riots that day. Instead, the evidence was offered for its effect on the listener (here, defendant). It was offered to explain why he showed the gun to Beatrice.

However, we reject defendant's argument that the exclusion of the evidence "unduly infringed on his right to testify in his own behalf, and on his right to present a complete defense." His defense was that the shooting was accidental. Defendant testified at length to explain how the "accident" occurred. In addition, his trial counsel cross-examined Powers, the People's firearms expert, about the possibility of the gun jamming as defendant claimed it had. At the close of trial, the court submitted the pattern instruction, CALJIC No. 4.45, about accident and defense counsel's closing argument urged that defendant was not guilty because Beatrice's death was the result of an accidental shooting. Thus, it is clear that the excluded evidence addressed only why defendant came to show Beatrice the gun before it "accidentally" discharged. "[T]he exclusion of defense evidence on a minor or subsidiary point does not interfere with [the] constitutional [due process]

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[12] To a large extent, defendant constructs a factual argument based upon evidence that was not included in his offer of proof at the side bar conference. He relies upon statements that he made to the police when first arrested and his testimony from the second trial. However, because none of these statements were brought to the trial court's attention when it made its ruling, defendant cannot now rely upon them to claim error. (Evid. Code § 354, subd. (a); *People v. Morrison* (2004) 34 Cal.4th 698, 712.) We therefore limit our analysis of error to the evidence proffered by defense counsel: Beatrice told defendant she was scared about the possibility of riots and, upon hearing that, defendant showed her the gun.

right [to establish a defense]. [Citation.] Accordingly, such a ruling, if erroneous, is 'an error of law merely,' which is governed by the standard of review announced in *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.)

The trial court's exclusion of evidence that Beatrice told defendant she was fearful about riots was not prejudicial under the *Watson* standard. The evidence of defendant's guilt of a willful, deliberate and premeditated first degree murder committed for financial gain is overwhelming. Beatrice had hired an attorney and initiated divorce proceedings. A mediation regarding child custody was set for April 20 (3 days after the murder) and a hearing on Beatrice's petition to order temporary spousal and child support was scheduled for April 30 (13 days after the murder). In the month preceding the murder, defendant twice told Loggia about his desire to kill Beatrice. First, he asked Loggia for his assistance in finding a hired killer to murder her. Second, he told Loggia that he had calculated that he would be required to pay Beatrice two thirds of his income in spousal and child support and because that would leave him with no discretionary income, the easier solution was to kill Beatrice. In addition, at lunch the day before the murder, defendant asked Loggia and Funk questions relevant to murdering Beatrice: the effect of hollow point bullets (relevant because the next day he shot her with a hollow point bullet) and the loudness of a gunshot (relevant because his home was adjacent to a police station).

The day of the murder, defendant asked Beatrice to come upstairs to review and sign divorce papers. Once there, he presented her with the one-sided marital settlement agreement he had prepared. Beatrice refused to sign it and he shot her directly in the heart at a distance of no more than six inches.

Charlie's statements, made over a period of three weeks after the events of April 17, support the jury's implied finding that defendant shot Beatrice after she

refused to sign the marital settlement agreement. The day of the shooting, Charlie told Wandrey: "Daddy tried to get Mommy to write" and "[M]ommy wouldn't write the papers." Several weeks later, Charlie told his uncle: "Daddy called Mommy upstairs to write some papers, and that . . . he saw Mommy go upstairs [and] then heard her say she wouldn't sign the papers." Thereafter, Charlie told the police: "Daddy called Mommy upstairs to write the papers. [I] heard a gunshot from upstairs [and] heard Mommy scream."

Defendant's conduct after the shooting provides further proof of his guilt. Immediately after Beatrice was shot, he took no steps to assist her. He did not call 911 from the master bedroom. He did nothing as she screamed and fell down the stairs. He waited until she had stopped screaming before he went downstairs. Even then, he did not stop to assist her or to contact 911 from the downstairs phone. Instead, he took his son out to the car. Defendant did not appear to be upset and returned to his home, using a normal walk.

In light of all of the evidence, it is not reasonably probable that defendant would have obtained a more favorable verdict had defense counsel been permitted to elicit defendant's testimony about Beatrice's expressed fear of riots. Stated another way, the exclusion of that testimony is not what undermined defendant's case. Insofar as defendant's testimony is concerned, his case was undermined by his failure to explain why Beatrice accompanied him upstairs, his inability to explain how and why he pulled the trigger, his "blank" memory about the exact moment he shot Beatrice, his claim that he did not immediately assist Beatrice after the shooting because he wanted to take her (along with their two young children) to a hospital located three miles away, and his prior inconsistent statements about why he showed Beatrice the gun. Further, unrebutted expert testimony refuted the defense theory of an accidental shooting that occurred when defendant tried to dislodge a jammed bullet: if the gun had jammed as defendant

claimed there would have been a scrape or dent on the bullet that killed Beatrice but there was no such mark. In sum, defendant's case lacked a modicum of credibility.

Furthermore, even if we were to assume that the exclusion of the evidence deprived defendant of a right under the federal constitution, the error was "harmless beyond a reasonable doubt" within the meaning of *Chapman v. California* (1967) 386 U.S. 18, 23-24. Given the overwhelming evidence of defendant's guilt set forth in the previous paragraphs, even if the jury had been informed about Beatrice's statement that she feared potential civil unrest, we conclude that evidence would not have raised a reasonable doubt among the jurors about defendant's guilt. (See *People v. Robinson* (2005) 37 Cal.4th 592, 627-628.)

C. TESTIMONY FROM DOMESTIC VIOLENCE EXPERT

Defendant contends that the trial court committed prejudicial error in allowing testimony from a domestic violence expert about battered women's syndrome.

1. *Factual Background*

During the prosecution's case-in-chief, the prosecution moved to call Gail Pincus to testify as an expert witness about battered women's syndrome. The parties filed briefs and the trial court conducted a hearing.

The People argued that Pincus' testimony was relevant because the defense, in two instances, had put Beatrice's credibility as a victim of domestic violence in issue. The first occurred during defense counsel's opening statement in which he stated that Beatrice's claims of abuse were exaggerations or falsehoods. The second occurred during defense counsel's cross-examination of Marlene Morris when he elicited testimony suggesting that Beatrice had told her that she was only

telling people about defendant's physical abuse to assure he would agree to a divorce. Defense counsel countered that such expert testimony is relevant only when the victim of domestic violence recants her allegations. The trial court found the evidence was relevant, a finding it reiterated when it later denied defendant's motion for a new trial that urged, in part, that it had been error to allow Pincus' testimony.

Pincus began by testifying about her qualifications as an expert and about the phases of battered women's syndrome. The court then stopped her and instructed the jury: "Evidence . . . is being presented . . . regarding intimate partner battering . . . and its effects are sometimes referred to as battered women's syndrome. [¶] This evidence is not received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crimes charged. [¶] You should consider this evidence for certain limited purposes only. [¶] Namely, that the alleged victim's reactions as demonstrated by the evidence are not inconsistent with her having been physically abused, the beliefs, perceptions or behaviors of victims of domestic violence."

Thereafter Pincus explained that it is common for domestic violence victims to minimize or even deny that they have been abused and to stay in an abusive relationship for some time.

During her testimony, the following exchange occurred between Pincus and the prosecutor.

> "Q [THE PROSECUTOR]: Does – is strangulation significant in terms of battered women's syndrome?
>
> "A [PINCUS]: Yes.
>
> "Q How is that?

"A Well, it is a newish part of evolving field of domestic violence that we have come to understand."

The trial court immediately called for a sidebar conference. It directed the prosecutor not to pursue the issue of strangulation and domestic violence because it was not relevant to the case. The trial court stated it would sustain its own objection of "non-responsive." Defense counsel made no comment or request during the side bar discussion. When proceedings resumed, the prosecutor moved to a different topic.

Later in Pincus' testimony, the following occurred.

"Q [THE PROSECUTOR]: Is the danger to the victim more prevalent as the victim decides to leave?

"A [PINCUS]: Yes.

"Q And why is that?

"A There is a lot of studies, and I am on the death review committee for Los Angeles County looking at domestic violence homicides, and certainly in the work that I have done here and in the research and my experience is that there is a 75 percent increase in the danger to the victim once they decide to leave the relationship. They actually don't even have to physically have left in order for that phenomena to kick in.

"[DEFENSE COUNSEL]: Your Honor, may we approach the bench for one second?

"THE COURT: Yes."

At sidebar, defense counsel argued that Pincus' testimony was "totally damning to [defendant], because now she has testified that the end result of domestic violence is death. [¶] . . . [A]ll this points to [defendant] being guilty of

murder. [¶] I think this is far worse than I ever expected it to be." He moved to strike all of Pincus' testimony and for a mistrial, arguing "this is really damning . . . and I think although the People say this doesn't go to the ultimate act," it does. The court denied the mistrial motion. It found that overall Pincus' testimony was appropriate because it explained "the various aspects of domestic violence and how that might affect the victim in this case." The court noted two exceptions. First, the court explained: "I just don't want her [Pincus] to keep throwing strangulation because I do think that she is kind of indirectly saying if there is strangulation, then there is this [murder], and I am concerned about that because she is not supposed to comment on the acts in this case." Second, the court found that Pincus' comment that if a victim leaves an abusive relationship, the danger to her increases 75 percent was inappropriate. When proceedings resumed in front of the jury, the court stated: "I want you to disregard and not consider as evidence the statement about the 75 percent increase. Okay? Disregard that."

The prosecutor quickly finished her direct examination of Pincus. Defense counsel declined to cross-examine Pincus.

The prosecutor's closing argument reviewed at length the witnesses' testimony about Beatrice's statements that defendant had abused her. After doing so, the prosecutor turned to Pincus' testimony to argue that Beatrice fit the profile of a battered woman who stayed in an abusive relationship, failed to report the abuse, and lied about the source of her injuries. The prosecutor then stated: "The physical abuse starts by pushing, shoving, grabbing, slamming up against the wall. Sounds like what Bea Hurd went through? And then it graduates to beatings, strangulations, threats with guns, and then the ultimate, murder." Defense counsel objected. The court stated: "I will sustain it. Next argument. That is sustained." The prosecutor continued, without any objection from defense counsel: "Well, we know what happened to Bea Hurd. [¶] And as Gail Pincus concluded her

arguments [*sic*], I think this is so apropos to what we saw here, there are more dangerous, there is more danger to the victim when the victim decides to leave. [¶] And in this case, there was more danger to Bea Hurd when she left. [¶] Abuse? Clear. Clear abuse. Proven to you beyond a reasonable doubt, beyond any doubt." The prosecutor then turned to the issue of Beatrice's fear of guns.

2. *Discussion*

Defendant first urges that the trial court erred in permitting Pincus to testify. We disagree. Evidence Code section 1107 authorizes the admission of expert testimony about "intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence" "if the proponent of the evidence establishes its relevancy." (Evid. Code, § 1107, subd. (a) & (b).)

A trial court's ruling to admit this evidence is reviewed for abuse of discretion. (*People v. Riggs* (2008) 44 Cal.4th 248, 292-294.) The evidence was relevant for several reasons. One was to explain why Beatrice would deny to others that defendant had abused her. In that regard, Guajardo had testified that Beatrice admitted that she had falsely told her coworkers that she was wearing a neck brace because of a car accident when, in fact, defendant had caused the injury. In a similar vein, Diana had testified that Beatrice told her that she was wearing a neck brace as a result of a car accident when, in fact, the evidence suggested that defendant had caused the injury. Pincus' testimony was relevant also to explain why Beatrice would remain married to defendant while she complained of his abuse. In that regard, Fehte had testified that Beatrice had told her that throughout the marriage she had suffered physical abuse or had submitted "to other types of physical violence." Lastly, Beatrice's credibility had been put in issue by defense counsel's cross-examination of Marlene Morris. He had elicited

evidence suggesting that Beatrice was exaggerating or fabricating her claims of physical abuse to induce defendant to agree to a divorce. (Lee Morris' testimony in the defense case made a similar point.) In sum, the trial court did not abuse its discretion in permitting Pincus to testify to help the jury understand Beatrice as a domestic violence victim and evaluate her credibility. (*People v. Brown* (2004) 33 Cal.4th 892, 906-907; *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594-595.)

Defendant next urges that the trial court erred when it denied his motion to strike all of Pincus' testimony or to declare a mistrial. We do not agree.

Here, the court struck Pincus' testimony that the danger to a victim increases 75 percent when she leaves an abusive relationship, specifically instructing the jury to disregard it. The jury is presumed to follow that instruction as well as CALJIC No. 1.02, submitted at the close of trial, that stated: "Do not consider for any purpose . . . any evidence that was stricken by the court; treat it as though you had never heard of it." (See, in general, *People v. Mickey*, *supra,* 54 Cal.3d at p. 689, fn. 17 [jury is presumed to follow the court's instructions].) Thus, the trial court's decision to strike only the objectionable portion of Pincus' testimony was not an abuse of discretion.

Insofar as defendant urges that the trial court erred in denying his motion for a mistrial, such a motion "'is directed to the sound discretion of the trial court. . . . "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions."' [Citations.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 614.) Because the trial court struck the objectionable portion of Pincus' testimony and directed the jury to disregard it, its denial of defendant's mistrial motion was not an abuse of discretion.

Furthermore, having reviewed Pincus' testimony, we reject defendant's argument that Pincus "repeatedly overstepped the boundaries set by the court in allowing [her] testimony in the first place." Pincus' testimony, with the exceptions of the portions set forth earlier, was properly confined to the boundaries set by the trial court. To support a contrary conclusion, defendant points to her testimony that domestic violence follows a pattern of increasing seriousness. But this was part of Pincus' *initial* testimony in which she explained the theories and phases of battered women's syndrome. And immediately following that testimony, the trial court informed the jury not to consider Pincus' testimony "to prove the occurrence of the act or acts of abuse which form the basis of the crimes charged." We presume that the jury followed that instruction. (See *People v. Jones* (2011) 51 Cal.4th 346, 371.) In sum, Pincus did not improperly describe the conduct of batterers in a manner that suggested defendant was guilty of murdering Beatrice.

Lastly, we are not persuaded by defendant's argument that "the error in failing to strike the testimony was prejudicial and requires reversal of his conviction, because of the impact of the prosecutor's arguments to the jury." The jury is presumed to have ignored the portion of the prosecutor's argument to which the trial court sustained defense counsel's objection. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1205.) To the extent that the prosecutor then improperly repeated Pincus' stricken assertion that the danger to a domestic violence victim increases when she leaves the relationship, trial counsel's failure to object constitutes a forfeiture of any claim of misconduct. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1001.) And contrary to what defendant argues, we find that the remaining portion of the prosecutor's argument set forth above was proper. Diana had testified about two incidents of domestic violence she witnessed, defendant had acknowledged two incidents of domestic violence, and the court submitted

CALJIC No. 2.50.02 that permitted the jury to use such evidence as propensity evidence.

D. INSTRUCTION ON ACCIDENT

Defendant contends that the trial court committed prejudicial error in regard to instructing about the defense of accident. We disagree.

1. *Factual Background*

Over defendant's objection, the trial court submitted CALJIC No. 4.45. The instruction reads: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show neither criminal intent nor purpose, nor criminal negligence, he does not thereby commit a crime."

The trial court rejected defendant's request to submit CALJIC Nos. 5.00 and 5.15.

CALJIC No. 5.00 provides: "The unintentional killing of a human being is excusable and not unlawful when (1) committed by accident and misfortune in the performance of a lawful act by lawful means and (2) where the person causing the death acted with that care and caution which would be exercised by an ordinarily careful and prudent individual under like circumstances."

CALJIC No. 5.15 provides: "Upon a trial of a charge of murder, a killing is lawful if it was [justifiable] [excusable]. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not [justifiable] [excusable]. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty."

In rejecting defendant's request, the trial court relied upon the Use Note to CALJIC No. 5.00 which explains: "While this instruction is based upon Penal Code § 195, subdivision (1), CALJIC 4.45, based upon Penal Code § 26,

subdivision (5), would appear to be a preferable instruction in a case requiring proof of criminal negligence for conviction. This is because this instruction, considered alone and not as part of a whole, suggests that ordinary rather than criminal negligence could be a basis for liability."

2. *Discussion*

Defendant argues that the failure to submit CALJIC Nos. 5.00 and 5.15 constitutes prejudicial error because CALJIC No. 4.45 did not state that the prosecution was required to prove beyond a reasonable doubt that the killing was not an accident and it did not explain that an accidental killing was "excusable."

The contention lacks merit. CALJIC No. 4.55 explained that an accidental killing—a killing without criminal intent or criminal negligence—is not a crime. Because the trial court had instructed the jury on the lesser included offense of involuntary manslaughter based upon criminal negligence (CALJIC Nos. 3.35 & 3.36), CALJIC No. 4.45 was the proper instruction. Otherwise, as explained in the Use Note, the jury could have convicted defendant of involuntary manslaughter based upon a finding of ordinary negligence.

Furthermore, other instructions, taken together, explained that it was the prosecution's burden to establish each and every element of the charged crime (as well as lesser included offenses, the special circumstances allegation, and the use of a firearm allegation) beyond a reasonable doubt. (CALJIC Nos. 2.90, 8.10, 8.20, 8.30, 8.37, 8.71, 8.72, 8.75, 8.80.1, 17.19.) The prosecutor reiterated this point throughout her closing and rebuttal arguments. She never suggested that it was defendant's burden to prove accident; instead she argued that his testimony about an accidental shooting was not credible. In this context, it is not reasonably likely that the jury misunderstood the concept that an accidental killing was not

criminal. (See *People v. Ervine* (2009) 47 Cal.4th 745, 787; *People v. Chavez* (2004) 118 Cal.App.4th 379, 390.)

Contrary to defendant's suggestion, *People v. Anderson* (2011) 51 Cal.4th 989 does not hold that the trial court is required to submit CALJIC Nos. 5.00 and 5.15 on request. That case did not discuss the interplay between those two instructions and CALJIC No. 4.45, or, for that matter, any other CALJIC instruction. Instead, in the context of reviewing CALCRIM instructions, it concluded that the trial court had no sua sponte duty to instruct on accident. In language relevant to this case, it concluded that when "the defense of accident [is] raised to rebut the mental element" of the charged crimes, there is no sua sponte duty to instruct on accident as long as "the jury receive[s] complete and accurate instructions on the requisite mental element of the" charged crimes. (*Id*. at p. 998.) Here, as already noted, the jury in this case did receive complete and accurate instructions on the mental elements of the charged crime and the lesser included offenses of second degree murder and involuntary manslaughter in addition to the instruction about accident. In addition, CALJIC No. 8.55 informed the jury: "To constitute murder or manslaughter there must be, in addition to the death of a human being, an unlawful act which was a cause of that death." CALJIC No. 4.45 explained that an accidental killing is not a crime, and hence not an unlawful act. Taken as a whole, the submitted instructions explained that before the jury could convict defendant of murder, it had to find beyond a reasonable doubt that defendant did not accidentally kill Beatrice but, instead, committed an unlawful act.

In any event, even if error occurred in rejecting defendant's request to submit CALJIC Nos. 5.00 and 5.15, the error was harmless beyond a reasonable doubt under the standard of *Chapman v. California, supra*, 386 U.S. at page 24. The jury resolved the intent issue against defendant when it found beyond a

reasonable doubt that he committed a willful, deliberate, and premeditated murder for the purpose of financial gain. That is, the jury necessarily determined beyond a reasonable doubt that the killing was intentional, not accidental, under other properly given instructions. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 25.)

E. CALJIC No. 8.51

Without objection from defense counsel, the trial court submitted a modified version of CALJIC No. 8.51. It reads, in pertinent part: "*If a person causes another's death, while committing a felony which is dangerous to human life, the crime is murder.* If a person causes another's death, while committing a lawful act which is dangerous to human life under the circumstances of its commission, the crime is involuntary manslaughter." (Italics added.) The remainder of the instruction explains criminal negligence and implied malice.

Defendant contends the first sentence in the instruction about felony murder could have prejudiced him because it suggested that the jury could convict him of murder without finding he acted with malice.

Trial counsel's failure to object to that portion of the instruction or to seek a modification of the instruction to delete that language constitutes a forfeiture of the claim. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1348 ["Because the instruction is a correct statement of the law and defendant did not request different language, he has forfeited his claim that the instruction should have been modified."].)

In any event, any error in submitting the instruction was harmless. Because the instruction "could have removed the mental-state element of the [charged and lesser included] offenses from the jury's consideration[,] . . . federal due process is implicated and the [*Chapman*] beyond-a-reasonable-doubt standard for assessing prejudice applies. [Citations.]" (*People v. Chavez, supra,* 118 Cal.App.4th at p.

387.) In that regard, we must determine whether "'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" (*Ibid*.) Which is to say we must "'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citations.] The evidence must be '"of such compelling force as to show beyond a reasonable doubt" that the erroneous instruction "must have made no difference in reaching the verdict obtained."'" (*Ibid*.) Employing this standard, we conclude the error was harmless beyond a reasonable doubt. The prosecutor *never* argued for a murder conviction based on felony murder but, instead, argued that the evidence proved beyond a reasonable doubt that defendant committed first degree murder based upon premeditation and deliberation for financial gain. Nor did the defense proceed on the basis that a felony-murder theory had been presented. The verdict of first degree murder establishes the jury found malice. The special circumstance finding established that the jury found that defendant intentionally killed Beatrice for financial gain. And, as explained earlier, the evidence that defendant intentionally killed Beatrice in a willful, deliberate and premeditated manner is overwhelming. In sum, any error was harmless beyond a reasonable doubt. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1205; *People v. Barnett* (1998) 17 Cal.4th 1044, 1154-1155.)

F. CALJIC No. 2.50.02

Defendant contends that the trial court should have modified CALJIC No. 2.50.02, the propensity instruction about domestic violence, to make it clear that it applied only to the incidents witnessed by Diana.

The contention has been forfeited. The instruction accurately states the law. If trial counsel believed that it required modification, it was his obligation to make

such a request. The failure to do so constitutes a forfeiture of the claim. (*People v. Whalen* (2013) 56 Cal.4th 1, 81-82.)

G. READBACK OF TESTIMONY

Defendant argues that the trial court improperly responded to the jury's request for a readback of testimony. We disagree.

1. *Factual Background*

During deliberations, the jury requested a readback of "[defendant's] testimony on why he asked Bea to come upstairs on 4/17/93."

The trial court informed the parties that the court reporter had reviewed defendant's testimony and found no testimony in which defendant explained why he asked Beatrice upstairs.

Defense counsel suggested the following testimony from defendant was close enough to be read to the jury:

> "Q [Defense Counsel]: Now, on April 17th, when she [Beatrice] came inside the master bedroom, where was the gun?
>
> "A [Defendant]: In the dresser by the T.V.
>
> "Q And when she came in there, did you—what did you do?
>
> "A Well, we talked a bit about the situation that was unfolding. It was playing on the T.V. and they were interviewing people and talking about the verdicts and what it looked like. And so we had a brief discussion about what was going on."

The trial court declined to read that the testimony to the jury because it did not include any claim that defendant had invited Beatrice to the bedroom, let alone state what reason he gave for inviting her there.

The court stated that it had identified the following passage as the closest to answering the jury's question and proposed reading it to the jury:

> "Q [Defense Counsel]: Did you show—did she come upstairs at any point on the morning of the 17th?
>
> "A Yes, she did.
>
> "Q And when she came upstairs, did you show her the gun?
>
> "A Yes, I did."

Defense counsel agreed that the above passage should be read to the jury. The following exchange occurred with the jury:

> "THE COURT: After examining the transcript of [defendant's] testimony, I could not find anything in the record that answers your specific question. [¶] There is a reference, a brief reference to [Beatrice] coming upstairs, and I am willing to read it, but I don't believe it answers your question certainly the way you wrote it. [¶] I mean, it doesn't answer it, but I will read it if you want.
>
> "JUROR 11 [FOREPERSON]: That is part of our problem as well.
>
> "THE COURT: The question was: [¶] Question: Did you show—did she come upstairs at any point on the morning of the 17th? [¶] That was the question. [¶] And the answer by the witness yes she did. [¶] And that is about it. [¶] Again, it is specificity. The specific nature of your question, and it is just not there in the transcript okay. So that is my answer."

2. *Discussion*

The general rule is that under section 1138, a trial court must satisfy requests by the jury for rereading of testimony. (*People v. Box* (2000) 23 Cal.4th 1153, 1213.)

Defendant contends that the trial court erred in declining to read to the jury the portion of testimony about watching television in response to the jury's request for a readback of his testimony as to why he asked Beatrice to come upstairs. However, in that testimony (or any other portion of his testimony for that matter) there simply was no statement that he invited Beatrice upstairs, let alone a reason for such an invitation. If the trial court had read the testimony about defendant and Beatrice watching television, it would have misled the jury into believing that defendant testified that he had invited Beatrice upstairs to watch television. Consequently, the trial court appropriately declined to read that testimony. As the trial court explained to the jury, the testimony it sought had not been given. No more was required.[13]

H. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

As noted throughout our previous discussion, several of defendant's claims have been forfeited because trial counsel either failed to object or failed to seek a modification of a jury instruction. In this appeal, defendant urges that in each of those instances, "there can be no satisfactory explanation for [trial] counsel's actions or omission." He therefore contends that his contention of ineffective assistance is cognizable on appeal and, because he has established prejudice as a result of these failings, reversal of the judgment is required.[14] We disagree.

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[13] Defendant suggests that the trial court's response to a request to readback an unrelated portion of testimony (Funk's testimony about defendant's questions about bullets and gunshots at the April 16 lunch) was error. But defendant never claims that alleged error prejudiced him. We therefore do not discuss it.

[14] During the pendency of this appeal, defendant filed a petition for writ of habeas corpus alleging ineffective assistance of trial counsel. (*In re Hurd*; B261874.) In an order filed today, we deny the petition.

a. *Legal Background*

To establish ineffective assistance of counsel, a defendant must show "'"that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant."'" (*In re Crew* (2011) 52 Cal.4th 126, 150.) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

When, as here, the record fails to disclose directly why counsel failed to act in the specific manner challenged, we will affirm the judgment unless "there simply could be no satisfactory explanation" for counsel's omission. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Further, even if there can be no satisfactory explanation for trial counsel's action, "[i]t is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different. [Citations.]" (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.) "'"'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"' [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

b. *Factual Background*

Trial counsel, Jeffrey Brodey, represented defendant in the two previous trials and obviously was very familiar with how the jury could view the evidence and respond to instructions. (See fn. 2, *ante*.) We presume that his tactical

decisions in this case were informed by his experience from those two trials. In particular, two portions of the record indicate that his strategy was, in large part, based upon a decision to avoid drawing undue attention to the circumstantial evidence of Beatrice's state of mind.

The first, and perhaps most telling, illustration of this point was his decision to decline the trial court's invitation to submit a modified version of the pattern limiting instruction (CALJIC No. 2.09) that would have pinpointed the evidence it addressed and explained its limited purpose. Trial counsel explained, essentially, that he saw no benefit to such an instruction because it unduly emphasized the evidence.[15]

The second portion of the record that illustrates trial counsel's tactical decision to minimize the circumstantial evidence of Beatrice's state of mind is his opening statement setting forth the defense view of the case. He sought to minimize the significance of the prosecution's "state of mind" witnesses by correctly noting that none of them had actually witnessed any act of the abuse. He urged that Beatrice exaggerated, if not fabricated the claims of abuse, because she wanted a divorce because of her affair with Curley, not because of her fear of defendant. He attempted to undermine the evidence of domestic violence by conceding that defendant had abused Beatrice in a few instances but by then claiming that the prosecutor exaggerated their severity. And he dismissed the

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[15] Trial counsel's tactical decision to avoid drawing attention to the circumstantial evidence about Beatrice's state of mind explains his failure to request more limiting instructions during trial or to ask the court to modify any of the five limiting instructions it did give. He simply did not want to draw any more attention to the evidence since the prosecutor was already was emphasizing it. (See *Riccardi, supra,* 54 Cal.4th at p. 825 ["[T]here may be situations in which the decision to seek a limiting instruction is best left to defense counsel's discretion in order to evaluate whether the risk of such an instruction highlighting the defendant's conduct outweighs the benefit the instruction may provide."].)

prosecution's theory of a premeditated murder committed for financial gain by suggesting that Loggia was not credible and that it would have been easier for defendant simply to reach an agreement with Beatrice.[16] Defense counsel explained: "[Y]ou are going to have to decide whether or not this was premeditated [murder or] whether or not it was an accident." He concluded: "[T]his is a case that is very inflammatory, it is very easy to get angry and . . . upset[,] . . . but if you listen to the evidence, and if you listen with particularity and you really begin to look at it you will see the story is not the way it has been described here. [¶] And if you do that, then you can be fair and impartial and make a judgment on the evidence not on the inflammatory information."

With trial counsel's view of the case in mind, we turn to defendant's specific claims of ineffective assistance.

c. *Opening Statement*

Defendant urges that the prosecutor's opening statement increased the prejudicial impact of the circumstantial evidence of Beatrice's state of mind and that trial counsel's failure to object constituted ineffective assistance of counsel. We disagree.

To begin, defendant mischaracterizes the prosecutor's opening statement. "The purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case. [Citation.] Nothing prevents the statement from being presented in a story-like manner that holds the attention of lay jurors and ties the facts and governing law together in an

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[16] Defense counsel stated: "[C]ertainly going to prison [for murder] is a lot worse than paying alimony. [¶] It makes no sense that he would shoot her as opposed to making some arrangement."

understandable way." (*People v. Millwee* (1998) 18 Cal.4th 96, 137.) That is what happened here.

The prosecutor began by reiterating the court's admonition that counsel's opening statements did not constitute evidence. She then stated that Beatrice, "after years of marriage and a history of domestic violence," had decided she wanted a divorce. After that, the prosecutor set forth what happened on the day of the murder.

The prosecutor explained that while it may have appeared that the marriage was happy, "inside those walls" was "domestic violence." The prosecutor properly noted that Diana would be the *only* individual to testify to actually observing defendant's physical abuse of Beatrice.

The prosecutor next explained that other witnesses would testify to two themes: Beatrice "was routinely abused physically by the defendant" and that she was "terrified of guns." The prosecutor proceeded to explain the specific testimony witnesses would give regarding Beatrice's statements about defendant's physical abuse, her fear of guns and her fear of defendant's guns. She explained the evidence would explain why Beatrice made a firm decision to divorce defendant (get away from a life of physical abuse) and why, on the day of the shooting, she would not have been alone in a room with defendant while he showed her a loaded gun. She ended that portion of her opening statement with: "So how do we bridge the gap between domestic violence we know there is domestic violence going on in the house you will hear the testimony of that. [¶] To what culminated in the murder." After that, the prosecutor set forth in detail defendant's incriminating conversations with Loggia. She concluded: "And you will hear throughout this trial the consistent theme that Bea Hurd was not only terrified of [defendant] but terrified of guns as well."

The prosecutor did not commit misconduct in her opening statement. Although she stated several times that the People would establish a history of domestic violence, nothing in her statements could reasonably be construed as suggesting that this showed a propensity on defendant's part to abuse his wife making it more likely that he intentionally murdered her. A fair reading of her opening statement is that she canvassed the history of domestic violence to explain that evidence about Beatrice's fear of defendant and her fear of guns would be offered to show that it was highly unlikely Beatrice would have been alone with him in a room with a loaded gun on April 17 and to explain Beatrice's firm decision to divorce him.

Defendant, nonetheless, complains that the prosecutor did not explain that the testimony of the witnesses other than Diana could be used only as circumstantial evidence of state of mind. Defendant suggests that this constituted misconduct because the prosecutor was, in effect, arguing that the evidence could be used to prove the abuse occurred and therefore constituted improper propensity evidence.

First, trial counsel's failure to object constitutes a forfeiture of this claim. (*People v. Millwee*, *supra,* 18 Cal.4th at p. 137.)

Second, we reject the argument that the failure to object constituted ineffective representation of counsel. The record suggests a reasonable tactical basis not to object: to avoid giving the evidence more emphasis because then the trial court would have given the jury a detailed explanation of the evidence's (limited) purpose. Trial counsel's failure to object, in turn, allowed him to focus on his two key arguments: (1) none of the circumstantial evidence of Beatrice's state of mind was relevant because none of the witnesses actually saw the alleged acts of abuse; and (2) Beatrice exaggerated, if not fabricated, the claims of abuse

to cover up her affair with Curley, the real reason for her decision to divorce defendant.

Third, any failure to object was not prejudicial. For one thing, the jury was instructed several times that counsel's statements were not evidence. The jury is presumed to have followed those instructions. (See *People v. Dennis* (1998) 17 Cal.4th 468, 519.) Further, as explained in part "B" of our Discussion ("Exclusion of Beatrice's Statement to Defendant"), the evidence of defendant's guilt is overwhelming. Defendant has therefore failed to demonstrate that there is a reasonable probability that had trial counsel objected to the prosecutor's opening statement, the result would have been different. (*People v. Anderson, supra*, 25 Cal.4th at p. 569.) Or stated another way, because abundant evidence of defendant's guilt was presented, we can confidently conclude that defense counsel's failure to object to any portion of the prosecutor's opening statement did not adversely affect the outcome of his trial. (*People v. Waidla* (2000) 22 Cal.4th 690, 719.)

d. *Closing Argument*

Defendant next contends that the prosecutor committed misconduct in her closing argument because she argued that the People had proven a recurring pattern of domestic abuse that escalated and resulted in murder.[17] In other words, he urges that the prosecutor made an improper propensity use of the evidence that was offered only as circumstantial evidence of state of mind. We are not persuaded.[18]

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[17] Defendant does not contend that the prosecutor committed misconduct during her rebuttal argument.

[18] Trial counsel's closing argument reiterated that, with the exception of Diana, none of the witnesses had actually witnessed any acts of abuse. He reminded the jury about

For one thing, it was proper to argue propensity evidence based upon the events testified to by Diana and the jury was so instructed. For another thing, while it is true that the prosecutor, while canvassing the remaining evidence about Beatrice's fear of defendant, claimed that she had proven a history of physical abuse beyond a reasonable doubt, she began that portion of her argument by reminding the jury about the proper reason(s) the evidence was offered. She explained:

> "Now it is important to note why you heard this evidence about Beatrice Hurd, and the reason, let me tell you up front, and you will hear me repeat it again. The reason you heard this evidence is because the People will establish and argue to you that there was no way a woman who was fearful of a gun, no way a woman who was fearful of that man who had abused her for so long, no way she would stand in front of a television set with the defendant pointing a 380 loaded Beretta at her, one to six inches from her, when they were going through a divorce. Slated to meet in court in three days. [¶] Fighting over child custody, fighting over marital support, and fighting over child support. [¶] No way on this earth would she be doing that based upon the evidence you have heard about her state of mind in terms of guns and in terms of fear, of the defendant."

At several subsequent points, the prosecutor emphasized that the evidence about Beatrice's state of mind (fear of defendant and fear of guns) made defendant's claim of an accidental shooting implausible and explained Beatrice's firm decision to divorce defendant.

At the end of her argument, the prosecutor reiterated:

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the court's limiting instruction and why the evidence had been offered. And he attacked Beatrice's credibility, noting that she had hid her affair with Curley from everyone except Marlene Morris.

> "Do you really think, given all the state of mind evidence that you heard, that Bea Hurd would be in that bedroom, standing that close to Dale Hurd, with a loaded firearm?"

Although some of the prosecutor's statements bore a potential for prejudice, they "'were not so extreme or so divorced from the record that they could not have been cured by prompt objections and admonitions.'" (*People v. Dennis, supra,* 17 Cal.4th at p. 521.) As a result, trial counsel's failure to object to these portions of the prosecutor's closing argument constitutes a forfeiture of any claim of misconduct. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1001.) And contrary to what defendant claims, a sound tactical reason appears for trial counsel's failure to object: an objection would have resulted in the trial court explaining to the jury the evidence's exact purpose, thus only drawing further attention to it. (*People v. Stewart* (2004) 33 Cal.4th 425, 509 ["[R]easonable counsel may well have determined that an objection would be unwise . . . because an objection (and possibly an admonition as well) likely would have served to highlight matter that might be unfavorable to defendant."].)[19] Lastly, as explained above, any failure to object was not prejudicial under the standard set forth in *People v. Anderson, supra,* 25 Cal.4th at page 569. Not only is the evidence of defendant's guilt overwhelming, the thrust of the prosecutor's closing argument was clearly proper: the evidence established beyond a reasonable doubt that defendant committed a willful, deliberate and premeditated murder for financial gain and defendant's testimony that the shooting was accidental was not credible.

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[19] As previously noted, trial counsel did object to a portion of the prosecutor's argument about the testimony of Pincus, the domestic violence expert. This fact further "defeats any contention that counsel was asleep at the switch or otherwise ineffective [during closing argument]." (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 78.)

e. *CALJIC No. 2.50.02*

Defendant contends that trial counsel's failure to ask the trial court to modify CALJIC No. 2.50.02, the propensity instruction about domestic violence, to make it clear that it applied only to the events witnessed by Diana constitutes ineffective assistance of counsel.

The record supports the contrary conclusion. During a discussion of jury instructions, trial counsel rejected the trial court's offer to modify the pattern limiting instruction (CALJIC No. 2.09) to indicate that it referred to the circumstantial evidence demonstrating Beatrice's state of mind (fear of defendant and fear of guns). He explicitly stated that he did so because it would put too much emphasis on the evidence. It is reasonable to assume that he made a similar tactical decision not to request modification of CALJIC No. 2.50.02: the modification would place too emphasis on Diana's testimony.

In any event, the failure to request the modification was not prejudicial. There is no reasonable probability that defendant would have received a different result if the instruction had been modified as suggested on appeal given the overwhelming evidence of guilt. (*People v. Anderson, supra*, 25 Cal.4th at p. 569.)

I. CUMULATIVE ERROR

Lastly, defendant contends that the cumulative effect of multiple errors requires reversal. We disagree. "The few errors that may have occurred during defendant's trial were harmless whether considered individually or collectively. Defendant was entitled to a fair trial, not a perfect one. [Citation.]" (*People v. Box, supra,* 23 Cal.4th at p. 1214.) Defendant was fairly tried and convicted of a willful, deliberate and premeditated murder committed for financial gain.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.