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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. ERIC ALLEN EARLE, Defendant and Appellant.	B260545 (Los Angeles County Super. Ct. No. PA072411)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden Zacky, Judge. Affirmed.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, Joseph P. Lee, and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Eric Allen Earle (defendant) appeals from his murder conviction. In eight assignments of error, defendant contends: that the trial court failed to initiate competency proceedings; that the court refused the defense attorney's use of hypothetical questions to the medical examiner during cross-examination; that the prosecutor committed misconduct in closing argument; that the trial court erred in admitting evidence of uncharged acts of domestic violence; that the court erred in admitting hearsay which violated defendant's constitutional rights under the confrontation clause; that the court allowed improper impeachment with uncharged acts of violence; that defense counsel rendered ineffective assistance by failing to object to evidence of defendant's behavior while in police custody; and that the trial court improperly limited defense counsel's final argument. We find all defendant's contentions to be without merit, and affirm the judgment.

BACKGROUND

Defendant was convicted by a jury of the first degree murder of Karla Brada (Brada), in violation of Penal Code section 187, subdivision (a).[1] Defendant admitted a prior felony conviction for which he served a prison term within the meaning of section 667.5, subdivision (b). On October 27, 2014, the trial court sentenced defendant to 25 years to life in prison plus one year pursuant to section 667.5, subdivision (b), for a total of 26 years to life. The court awarded 1,013 actual days of presentence custody credits, imposed mandatory fines and fees, and ordered direct victim restitution, stipulated at a later hearing to be the sum of $2,018.

Defendant filed a timely notice of appeal from the judgment.

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

Prosecution evidence

Brada died on September 1, 2011, sometime between 1:00 a.m. and 5:00 a.m., due to asphyxia caused by mouth and neck compression applied by force. When paramedics and sheriff's deputies arrived between 7:40 and 8:00 that morning, they found Brada's dead body, lying in bed.

Defendant and Brada met in early 2011 at an Alcoholics/Narcotics Anonymous (AA/NA) meeting. Defendant left his residential alcohol and drug treatment program at Eden Ministries to move in with Brada about two months after their meeting. A few months later, they were engaged. Brada's friends Tonia Walsh (Walsh) and Mayra Aguilar (Aguilar) noticed a change in her after defendant moved in. Normally an upbeat and independent person, Brada became quieter and reluctant to leave defendant for social activities.

Walsh testified that she had shared Brada's two-bedroom condominium from January 2011, until shortly after defendant moved in. Thereafter she continued to live in the same neighborhood. Once, sometime before August 5, 2011, Brada invited Walsh and her boyfriend to dinner. Defendant showed up late, was drunk, angry, and confrontational. He was mean to Brada and displayed aggressive body language toward Walsh's boyfriend.

On August 5, 2011, at approximately 6:00 p.m., Walsh received a call from her daughter Sage. Sage was upset, said that Brada had come to the house saying defendant had beaten her. When Walsh saw Brada a short while later, she looked as if she had been beaten; she had blood on her face, she was crying, and her clothes were wet and bloody. Brada said that defendant held a knife close to her eyes and had cut her with it, that he hit her in the face and would not stop, and that he had held her head under water in the sink until she thought she was going to die.

Brada repeated over and over that she had never been beaten so badly by him. Walsh and her roommate Sarah, accompanied Brada home where Walsh found defendant lying on the bed. She told him that he needed to leave, that it was Brada's house. Defendant sat up right away, said he did not have to leave, and put his hand on the knife in his belt when he asked whether Walsh was going to make him leave. Although Walsh could not tell whether defendant was under the influence of alcohol, he seemed different. Walsh went downstairs and she or Sarah called 911.

Los Angeles County Sheriff's deputies soon arrived. Deputy Gabriel Barlow testified that when he spoke to Brada, she seemed afraid and visibly shaken. There were red marks on her face, forehead, and neck, a long, deep cut on her left eye that appeared to need stitches, and a smaller cut on her right eye. Brada refused medical treatment. Defendant appeared to Deputy Barlow to be under the influence of alcohol: his eyes were bloodshot, watery, and glossy; he emitted a strong odor of alcohol on his breath and person; and he was extremely agitated and angry. Defendant yelled at the deputies and seemed out of control. He was handcuffed and placed into the back of a patrol car, where he continued to yell while banging his head on the window. In response to loud thumping coming from the patrol car, Deputy Barlow turned, and saw defendant moving his body left to right, shaking the car. When asked what he was doing, defendant said was he trying to kick out the window of the patrol car, and that he did not want to be there. When Deputy Barlow told him to stop kicking the car or he would be pepper sprayed, defendant replied, "Fuck you. Do it, tough guy." Deputy Barlow resumed his investigation, but several seconds later, he saw defendant lying on his back, kicking the patrol car window with both feet. Deputy Barlow opened the door, sprayed for one or two

seconds with pepper spray, and defendant stopped kicking. By then defendant had kicked the window out and bent its frame.

As he was about to be taken to jail, defendant said he had extreme hypertension, so he was first taken to an emergency room, where he was verbally abusive toward the deputy, saying such things as, "Fuck you. I'll fuck you up." Defendant also threatened the deputy, telling him, "Wait until I catch up with you out here," and "I bet you have family out here." They had to wait for medical attention outside the hospital, because defendant would not remain seated, and continued to be verbally abusive with expletives and threats, laughing in between them. As the nurse was applying a blood pressure cuff, Deputy Barlow had to repeatedly push defendant back down to a sitting position.

John Dos Santos (Dos Santos) was a roommate of defendant's at Eden Ministries in 2011. He testified that they became friends, went to meetings and to the gym together, and enjoyed talking about motorcycles and sports. Dos Santos met Brada around the same time as defendant, at an NA meeting held at the facility. Defendant lived at the facility for four months, did not use alcohol or drugs during that time, and was nice, respectful, humorous, and easy to get along with. Dos Santos visited defendant and Brada a few times after they moved in together. Sometime after August 5, 2011, Brada asked Dos Santos to take her to pick up defendant from jail, where he had been taken on a domestic violence charge. When Dos Santos saw Brada a few days later at an NA meeting, she told him that defendant had beaten her, and showed him her injuries: a bruised eye and a cut over her eye. She told Dos Santos that she had raised bail for defendant because she loved him and would not file charges against him. Dos Santos accompanied her to the jail. Later, defendant called to thank him for his help, and asked

Dos Santos not discuss the matter with anyone, as it was no one's business.

Defendant tried to reach Dos Santos on August 31, 2011, leaving a few messages before finally reaching him about 6:00 p.m. Defendant was upset that his domestic violence case had become known, and mistakenly assumed that Dos Santos had talked. Defendant was verbally abusive, calling Dos Santos a "fucker," a "fucking piece of shit," said he would "kick his ass" if he did not shut up, going on and on. After Dos Santos accused defendant of being drunk and told him Dos Santos would call the next day, defendant threatened to come to Dos Santos's home and kick his ass in his own living room. Dos Santos heard Brada in the background saying that he was "fucking drunk"; she then came to the phone and said defendant was drunk. Dos Santos replied that he could tell. Dos Santos suggested that one of them leave the house because it was "going to be all bad." Dos Santos heard Brada calmly ask defendant to leave, and heard defendant reply "no" and "fuck you, bitch." Dos Santos then heard noises that sounded like punches or slaps, three of them; and the phone went dead.

Dos Santos called back but got no answer. At 7:00 p.m. he reached Brada on her personal phone, and again told her that one of them must leave, but she replied that everything was all right, and that defendant was downstairs. Dos Santos then heard defendant in the background saying, "Who the fuck are you talking to?" Brada lied, said that it was her brother, and then Dos Santos again heard sounds like punches and slaps just before the phone went dead. He tried calling back a few times on both their phones and left messages, but never heard from either one again. He did not call the police as he had little confidence in them. In 2004, Dos Santos had been convicted of misdemeanor

indecent exposure, spousal battery, and inflicting corporal injury on a spouse.

Brada's next-door neighbor Louise Willard (Louise) testified that she lived with her husband Joseph Willard (Joseph) and their son in the adjoining condominium.[2] Her bedroom shared a wall with Brada's living room. Between April and the end of August 2011, Louise heard noises from Brada's unit ranging from loud music and television sounds, loud voices, jet engine sounds, screaming, and yelling. Defendant sometimes appeared to be under the influence of alcohol, with slurred speech and a loud tone of voice. He was verbally abusive toward the Willards, calling them "white niggers," and saying that he wanted to kill their dog, that their son was retarded, and that she was fat. Once, defendant told Joseph that if they were in jail he would beat him up. Louise saw defendant walking from the corner 7-Eleven store regularly. Once, after she saw him drop a bottle of alcohol Joseph had swept the glass from the sidewalk.

On August 31, 2011, Louise saw defendant come out of the 7-Eleven store between 3:30 and 4:00 p.m, join the waiting Brada, and walk home. That night, Louise and Joseph were awakened about 12:50 a.m., hearing television noise from Brada's living room. Joseph went to Brada's open front door, called out loudly to turn down the television or he would call the police, with no response. Joseph called the sheriff's department, but the noise stopped about five or ten minutes later, with the exception of defendant's loud exclamation of the single word, "fuck." Sheriff's deputies came but left when told there was no more noise. When Louise went back to bed, she again heard defendant's loud exclamation of "fuck," which was then repeated

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[2] When referring to Louise and Joseph Willard individually, we use their first names only to avoid confusion. We use "Willards" when referring to both of them.

about every 10 or 15 minutes until 2:50 a.m. She heard no other noise, and did not hear Brada's voice. Sometime between 7:10 and 7:40 a.m., Louise heard a sound she described as an elephant landing on the house or an earthquake. It was like nothing she had heard before, and it frightened her. She then heard defendant screaming, "Karla, Karla, Karla," in an unsettling tone that sounded like he was trying to revive someone or "wake the dead." Sheriff's patrol cars arrived between 7:40 and 8:00 a.m.

Deputy Arin Davidian testified that he arrived on the scene at 8:47 a.m., after other deputies and Fire Department personnel, and confirmed that defendant was the person who had called 911. While they talked, Deputy Davidian observed that defendant was intoxicated. Defendant was angry, belligerent, yelling, screaming, and slurring his words, but he was not crying. Deputy Davidian saw Brada's body lying on the bed, and observed bruising on her arm and side, as well as a little blood on the bed near her mouth.

Defendant was taken to jail. Jailer, Lelah Aliabadi testified that defendant was brought in apparently intoxicated; his speech was slurred, he was belligerent and aggressive, and he berated her with insults and threats. Aliabadi considered defendant a safety risk, so she had him placed in a holding cell by himself. The cell had a mesh screen through which she could monitor him and he could see out. Defendant would sit for a moment, then stand up and slam on the screen until he tired, then sit down, take a break, and repeat the same behavior over and over. He shouted insults through screen, such as "dumb bitch," "fucking bitch," ordered her to get him out of here, and threatened her life. Video monitors in the cell recorded defendant's conduct, but not the sound. Portions of the recording were played for the jury. Defendant continued to act in an angry and belligerent manner for four hours, until six deputies arrived

to take him from the cell. After the deputies explained they had a Taser, defendant was cooperative as he was removed from the cell.

The crime scene was investigated and evidence was collected. Coroner's investigator Robert Fierro took photographs of Brada's body and observed small cuts on both hands, facial trauma, injuries to the interior side of her lip and mouth, as well as bruising on the torso and extremities, including her feet, legs, the front of her thighs, and her hands. Fierro observed petechiae on the eyes and face consistent with compression to the neck or face. All of Brada's injuries appeared to have been inflicted prior to death.

The September 3, 2011 autopsy was performed by Deputy Medical Examiner Pedro Ortiz who observed petechia, or ruptured capillaries in the skin and eyes that indicate death by asphyxia. He determined that the cause of death was asphyxia due to mouth and neck compression. The contusions on the mouth and neck indicated a direct application of force. Though Dr. Ortiz observed blunt force trauma to the body, he did not think it contributed to the death. Dr. Ortiz concluded that Brada's death was a homicide, and estimated the time of death to have been sometime between 1:00 and 5:00 a.m. on September 1.

The toxicology report showed the presence of an antidepressant at a therapeutic level in Brada's system. It was not toxic, and would have had a minimal effect on the heart at that level. Also found was a small amount of methamphetamine and a small amount of inert marijuana metabolite. Methadone was found in a significant amount, what Dr. Ortiz considered a toxic level but not lethal. He explained that as an opiate, methadone had a depressive effect on heart, brain, and lungs, and high levels could stop the breathing and thus cause death by asphyxia. However, methadone was not the cause of death in

this case. Methadone was a remote contributing factor, in the sense that it would have made Brada more prone to die from the compression of her mouth and neck.

Physician and medical toxicologist Cyrus Rangan, expert on chemical and other toxic exposures, reviewed the autopsy report and photographs, Brada's drug treatment records from 2008 and 2011, as well as relevant medical literature, and testified to his opinion regarding the nature and effects of the drugs found in Brada's system. He explained that methadone is an opioid (as are morphine, heroin, codeine, and oxycodone), used to treat addiction because it is less dangerous than heroin, and patients could gradually stop using. Brada's methadone levels were .46 micrograms per milliliter in the heart blood sample and .38 micrograms per milliliter in the femoral blood sample. Dr. Rangan explained that although the levels of methadone in blood samples taken soon after death would resemble the levels prior to death, the longer the drug stayed in the system, the higher the values would go, increasing every few hours.

Dr. Rangan concluded that .38 micrograms of per milliliter could have been inaccurate, or it could have indicated a therapeutic or even a subtherapeutic level, but it was not the level at which Dr. Rangan would expect death to occur. He concurred with the coroner's conclusion that methadone was a remote contributing factor, as it would not have caused death, but could have made Brada less able to react or fend off danger. The other drugs in her system were at low levels and would not have contributed to death.

Defendant's estranged wife, Jennifer Mertell (Mertell) testified that she met defendant in 1994, married him in December 1995, and they separated in 2001. They have a 19-year-old son and a 15-year-old daughter. From 1995 to 2000, they lived in Utah. Thereafter, they moved to his parents'

apartment in Canoga Park, then to Lancaster, and then to Washington state, where the family lived with friends, and another couple. Defendant worked as an electrician when he could keep a job. He drank three or four bottles of vodka five or more days per week when he could, and always became verbally and physically abusive when he drank. During their time together they both occasionally used methamphetamine. Although defendant was violent and abusive when he was drunk, he was nice, pleasant, charming, and good with the kids when sober. When defendant abused Mertell, he would push her, slap her on the head, hit and grab her arms, leaving bruises, put her in a choke hold, throw her onto the bed, sit on top of her, and put a pillow over her face until she could barely breathe and thought she would die. He would also grab the front of her neck and hold her up against the wall until she could not breathe and thought she would pass out. Mertell weighed about 120 pounds. Defendant weighed 220 to 300 pounds, and it was impossible for her to fight him off. Defendant used the pillow almost every time they fought, and told her she deserved it and that it was her fault. When they lived in Utah, Mertell told her neighbors to call the police if they ever heard them screaming or fighting. One time they called and defendant was arrested.

Similar emotional and physical abuse continued after they moved to Lancaster. Defendant continued to use the pillow, slapped Mertell in the face and once gave her a black eye. Another time, when defendant was very drunk, he chased her around the house holding a knife and said if she divorced him, he would kill her and their children. The children were in their bedroom on that occasion, but once, while their son was in the room, defendant said he would like to see his son with his throat split. When Mertell's parents came to take her and her children away, defendant threatened her father and punched a hole in the

wall with his fist. Mertell and the children lived in a domestic violence shelter for 30 days before she returned to live with defendant in his parents' Canoga Park apartment. Defendant resumed his behavior of pushing her, hitting her in the head, throwing her on the bed, and using the pillow. He called her "cunt," "whore," and "bitch," and told her this was her fault. Once after defendant injured Mertell, she was taken to the hospital with scratches on her arm and neck and bleeding from the ear. She returned to defendant because he had stopped drinking, she thought he would change, and she was afraid to leave him. About a week after they moved to Washington, defendant got drunk, verbally abused everyone in the house, and frightened the children. He called Mertell a "piece of shit" and a "bitch"; and expressed anger about the hospital visit in Canoga Park. The police were called and defendant was removed from the property. Defendant did not return and Mertell stayed in Washington.

Defense evidence

Defendant testified that he met Brada in February 2011, at an Eden Ministries NA meeting which he attended due to his addiction. Defendant admitted he would get into fights and arguments when drunk, and that he became angry, belligerent, and nasty when he drank too much vodka. Defendant left Eden Ministries in April 2011 after living there for 90 days, while still working daily as an electrician. Defendant loved Brada and wanted to be with her every day. He moved in with her at the end of April. They attended meetings together almost daily after work, and did not drink alcohol or take drugs. Defendant proposed to Brada in July, gave her a ring, and they talked about getting married in October 2012.

On August 5, 2011, defendant began drinking alcohol in the afternoon as soon as he came home from work. He started with

sangria and then went to the 7-Eleven store for two pints of vodka. He drank one pint, passed out in a chair, and woke up after Brada read an email alert on his phone, and reacted by jumping on top of him. He claimed that she "bashed [his] face in" with closed fists, hit him on the arm and stomach, bit him, and cut and broke his nose. Defendant also claimed that he pushed her hand away, causing her hand to hit her face and her engagement ring to cut her on the left eye. Defendant then ran upstairs and locked the door, but Walsh (who was about five feet two inches tall, and weighed 110 pounds) kicked in the door and asked him to leave. Defendant denied pointing to his utility knife, which was clipped to the inside of his pocket and not visible, and he denied asking whether she was going to make him leave. He planned to leave after he got dressed, but the police arrived before he was ready. Defendant denied taking the knife out of his pocket that day, threatening anyone with it, or using it to cut anyone.

Defendant denied that he resisted the police when he was arrested and handcuffed, and claimed to have started kicking in the patrol car only after one of the officers kept grabbing Brada, telling her to shut up and go back inside. Defendant claimed he and Brada were trying to apologize to each other. Though he was still drunk, he remembered saying "Fuck you. Do it, tough guy" when the deputy told him to stop kicking the window or he would be pepper sprayed. Defendant only vaguely remembered kicking and being sprayed. Defendant did not remember saying he had high blood pressure or going to the emergency room. Brada bailed him out, they continued to go to meetings together, and they discussed the incident in a meeting.

On August 31, 2011, defendant arrived home at 3:30 or 4:00 p.m., had two glasses of vodka and orange juice, and watched television. Brada did not drink. They had dinner, went

to a Lowes store to order a replacement window, stopped at liquor store on the way home to get wine and a pint of vodka, and arrived home about 8:30 or 9:00 p.m. At some point in the evening, either before or after going out, defendant found a bag of methamphetamine in the bathroom, which he flushed. He then talked to Brada and telephoned Dos Santos to tell him to stop selling drugs to Brada. Defendant and Dos Santos also had words about Dos Santos "running his mouth" about the August 5 incident. Defendant could not recall that Brada got on the phone and said that he was drunk, or that she screamed in the background. Nor did he remember saying to Brada that he was not going anywhere or "Fuck you, bitch." He denied fighting or arguing with Brada that night.

Defendant did recall going upstairs to watch television and finishing the vodka by drinking straight from the bottle, after returning from Lowe's. Defendant then fell asleep watching television without finishing his second bottle of vodka. Defendant did not think that he drank a lot or "that much" that night. He "drank a pint, went to sleep," and then woke up to fumbling or shuffling noises in the spare room. Still half asleep, he thought Brada was gathering laundry, because he heard cabinet doors being opened and noises in the closet. Defendant then heard a sound like someone running on the stairs, which turned out to be Brada tumbling down the stairs carrying a basket full of clothes. When Brada screamed and called his name, he got up, looked for her in the spare room, and then saw her at the bottom of the stairs. He helped her up and to the kitchen to get ice and rinse the blood from her mouth. He offered to call 911, but she said she was fine and went to bed.

When Brada changed for bed, she threw her clothes on the floor. Defendant picked up the clothes, put them in the laundry basket, which he had brought back upstairs. They went to sleep

and defendant woke up to the alarm clock at 7:30 a.m. Defendant denied yelling "fuck" repeatedly during the early morning hours. When defendant got up at 7:30 a.m., he used the bathroom, went downstairs to start coffee, and then went to wake Brada. When he could not wake her, he screamed her name "a bunch of times," but she was dead, stiff and cold. He ran, crying, downstairs to find a phone, and his nose started bleeding. He called 911 and Brada's parents to have them come immediately. Defendant denied beating Brada that night or causing the bruises on her arms, which he attributed to her fall. He denied holding either a pillow or his hand over her face, and claimed that all her injuries were from the fall. He did not know what caused the scleral hemorrhaging in her eye. By the time defendant called 911, it was 8:38 a.m.

A recording of the 911 call was played for the jury. Defendant said to the 911 operator: "I woke up this morning and my girlfriend is passed away." Asked whether she had been sick, defendant replied, "No, and she's got, like, bruises, like, down the side of her . . . [¶] . . . I don't know if she fell last night. She did drink and she's been taking some pills." Defendant explained that when he made the 911 call, he was assuming that Brada got up to drink after he had gone to bed. When he told the 911 operator that he did not know if Brada had fallen that night, he did not know what he was saying; he was frantic. Defendant testified that he had not in fact seen Brada drink or take drugs or anything that might have adversely affected her, but he explained that when she fell, she did seem to be "on something."

Defendant said he did not go upstairs with the paramedics, instead he sat in a chair on the porch drinking the rest of the vodka as he waited for the police. Defendant testified that as soon as they arrived, the deputies started roughing him up and accusing him of murder. He told them he wanted his lawyer and

said nothing else to them. Defendant denied ever talking to Deputy Manskar. He denied telling the deputy that he covered Brada at 2:30 a.m. or that he woke up later and found her dead. He did not mention a laundry basket because he never talked to that deputy. Defendant also testified that the deputies started roughing him up when they saw the bloody tissue he used for his nose, and did not listen when he tried to explain. On the one hand defendant testified that a deputy asked him how he did it, but also testified that he did not remember what he was asked by the deputies. He testified that he was unable to stand up when told to do so by the deputies because he was in shock. He denied resisting the deputies or walking away from them. Defendant could not recall the events after his arrest, including insulting and threatening the jailer or banging on the screen over a four-hour period.

Defendant denied ever having said anything abusive to the Willards, and claimed that the Willards, Walsh, Aguilar, and Dos Santos all lied in their testimony. Defendant admitted he frequently got drunk and fought with his wife; that he sat on Mertell and put a pillow to her face so she could not breathe; that he strangled her by placing his thumb and fingers on either side of her throat and throwing her against a wall; that he punched a hole in the wall; and that he did some of these things in front of his children. He admitted calling Mertell names, but denied ever threatening to kill her. Defendant admitted he was convicted of misdemeanor corporal injury to a spouse in 2000, that in 2001, he was convicted of inflicting injury on an elder adult, his mother, and that in 2007, while drunk, he hit his mother in the face with a telephone when she said she was going to call the police. Defendant also admitted that when he was arrested for hitting his mother, he angrily banged his head against the plastic partition in the police car, resulting in the need for stitches. In

2008, he was convicted of felony evading a police officer with disregard for the safety of others, in violation of Vehicle Code section 2800.2.

Prosecution's rebuttal

Deputy Barlow testified that he did not grab Brada on August 5, 2011, when she approached the patrol car as defendant was inside yelling. Because the car was not locked, Deputy Barlow walked toward Brada, told her to stand back from the vehicle out of concern for her safety, and did not threaten her with arrest. She was cooperative and moved away. Deputy Barlow also testified that defendant did not appear to have a broken nose and could not recall any other injury. Defendant did not tell Deputy Barlow or hospital staff that he had a broken nose or other injuries, and none were mentioned in hospital records.

Deputy Allen Hodge testified that he was one of the first to arrive at the condominium on September 1, 2011. When he went into the living room, he saw defendant coming down the stairs speaking to a firefighter. They went into the kitchen, where defendant took a bottle of pills from a drawer, told the firefighter that it appeared to have about 25 pills missing, and said that he thought his girlfriend might have overdosed on them. As the victim had already been pronounced dead, Deputy Hodge asked defendant and the firefighters to step outside so he could contain the scene. Defendant became very angry and hostile, raised his voice, tried to go back upstairs to retrieve some things, and appeared frantic when Deputy Hodge stood in front of the staircase. The deputy refused to let him go up, and defendant said, "What the fuck? I didn't kill her." Deputy Hodge replied, "I didn't say you did, but we just need to have everybody step outside now. Let's all go to the porch." Defendant said, "Yeah, right. I know how you mother fuckers operate." Defendant appeared extremely upset and angry, but was not crying or acting

concerned that his girlfriend had just died. Defendant said she had been heavily intoxicated and on the way upstairs she fell down and hit her head. She then seemed okay, stood up and went to bed. Deputy Hodge was on the patio where defendant was with the firefighters and other deputies. Deputy Hodge did not speak to defendant or ask him any questions. Defendant continued acting angry, yelling profanities at the deputies, but Deputy Hodge did not see him cry.

Deputy Mark Manskar testified that he arrived at the scene after several other deputies, and spoke to defendant, who needed assistance to stand and appeared to be under the influence of alcohol. Defendant, who had blood around his nose and a small scratch at the base of his neck, explained that he was an electrician and a wire had snapped and hit him in the face. Defendant claimed to have consumed approximately a fifth of vodka between about 3:00 and 10:00 p.m. the day before. Asked whether Brada had been drinking, defendant said no, he believed she that had taken pills, although he did not see her take any. He added that she popped pills like candy. Defendant denied they had been fighting, and said that they had just been having fun, that they went to bed about 10:00 p.m., and that she had fallen down the stairs while he was in bed. He said he heard her fall and called to her to come back up to bed; she then came upstairs, showed him some bruises from the fall, and they went to sleep. Defendant told Deputy Manskar that he woke up at approximately 2:30 a.m., covered Brada, went back to sleep, and when he woke up later, she was dead. Defendant never told Deputy Manskar that Brada had been carrying a laundry basket when she fell.

Although defendant was angry, he seemed to understand the questions he was asked, and Deputy Manskar had no trouble communicating with him. Deputy Manskar never asked

defendant whether he killed his girlfriend. Defendant repeatedly said that he did not like the police, that they were going to have problems, that he had fought with the police, and that he had kicked out a police car window. However, when Deputy Manskar transported defendant to jail, he was quiet in the car and complied with the deputies' commands as he was placed in a cell.

DISCUSSION

I. Competence to stand trial

Defendant contends that the trial court erred in failing to initiate competency proceedings pursuant to section 1367.

"A person cannot be tried or adjudged to punishment . . . while that person is mentally incompetent." (§ 1367, subd. (a).) A defendant's trial while incompetent violates state law and federal due process guarantees. (*People v. Ary* (2011) 51 Cal.4th 510, 513; see *Pate v. Robinson* (1966) 383 U.S. 375, 385.) "A defendant is incompetent to stand trial if he or she lacks '"'a sufficient present ability to consult with his lawyer with a reasonable degree of rational . . . as well as a factual understanding of the proceedings against him.'" [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 846-847 (*Rogers*), quoting *Dusky v. United States* (1960) 362 U.S. 402, 402; see also *Drope v. Missouri* (1975) 420 U.S. 162, 171.)

A court must "suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. [Citations.]" (*Rogers, supra*, 39 Cal.4th at p. 847; §§ 1367, 1368.) The court must act sua sponte if necessary. (*People v. Howard* (1992) 1 Cal.4th 1132, 1163.) "A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial. [Citations.]" (*Rogers*, at p.

847.) An appellate court is generally "'"in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper."' [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 33.)

To demonstrate that the trial court was required to suspend the proceedings, defendant quotes at length from defense counsel's various arguments and representations to the trial court in the several weeks leading up to trial, regarding defendant's need for additional treatment for his multiple sclerosis. Defendant also quotes from defense counsel's declaration in support of his motion to suspend proceedings pursuant to section 1368, filed on September 2, 2014, just before the case was assigned to a trial department. Rather than repeat the eight pages of material quoted by defendant, we summarize the proceedings and paraphrase the relevant argument and representations.

About three weeks before trial, and again one week before trial, the court was notified that defendant's physical condition had deteriorated, and the additional treatment he needed for his multiple sclerosis could not be provided in the jail facility. Defendant asked to be transferred to a particular nonsecure medical facility and that trial be postponed until his treatment was concluded. The trial court denied the requests, finding that due to the nature of the charges, defendant should remain in a secure facility. Defendant agreed to waive time, and trial was continued for a week, to September 2, 2014. On that date, defendant filed a motion to suspend the proceedings, supported only by counsel's declaration, in which he expressed his opinion that defendant was or might be mentally incompetent to stand trial due to his deteriorating mental and physical condition, caused by exacerbation of multiple sclerosis and lack of health

care and rehabilitation. The declaration recounted previous efforts to have defendant moved to an alternate facility for treatment, and described multiple sclerosis as a disease that affected the brain and spinal cord and compromised motor cognitive functions. Counsel further stated:

> "On September 1, 2014, I met with the defendant at the Twin Towers hospital ward. I asked him questions relating to facts in his case that he initially had conveyed to me -- facts which had been discussed on various occasions and as recently as June 19, 2014; he did not comprehend the subject and was unable to recall anything about the subject. He frequently just stared at me and was generally not responsive to specific questions about his case. He complained about pain and repeatedly asked to receive treatment."

No other evidence was submitted, but in argument counsel represented that a doctor in the neurology department of County USC Medical Center had indicated that defendant's cognitive functions were being affected to the same extent as his physical functions, which had been compromised to the extent that he could no longer walk.[3]

The court observed that defendant, over the year and a half that his case had proceeded in that court, clearly had multiple sclerosis and was currently in a wheelchair, but that defendant

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[3] Though defendant was in a wheelchair throughout trial, he and other witnesses testified that he was not in a wheelchair during the period from February through August 2011. Dos Santos testified that defendant went to the gym regularly while residing at Eden Ministries, using the stationary bicycle and lifting light weights.

had always been able to communicate with the court, respond to direct questions, and provide waivers. Finding no substantial evidence that defendant was presently mentally incompetent, the court denied the request to suspend the proceedings, and transferred the matter to another department for trial. Later that morning defense counsel informed the trial court of his earlier unsuccessful request to suspend proceedings, and indicated he intended to seek a writ. The parties proceeded with pretrial evidentiary issues. In the afternoon the court noted that defendant was in a wheelchair, but appeared to be perfectly lucid and sound of mind. There had been no outbursts or hallucinations, and the court had seen defendant having whispered conversations with his attorney.

Defendant asserts, referring to the proceedings of September 3, 2014: "Medical documentation was provided by the jail, that [defendant's] 'physical/mental' condition was being affected by his M.S., resulting in bizarre behavior, including ranting and other loud and incoherent behavior on [defendant's] part, witnessed at the jail." Defendant describes that "medical documentation" as a form communication from Dr. Julian Wallace at County USC Medical Center, informing the court that defendant would not be able to come to court due to a medical appointment. The trial court described that form and read into the record the following passage which was check-marked on the form: "'Please take notice that the inmate named above has been assessed/examined and it has been determined that the inmate is medically/mentally unfit to be transported to attend court this date to due to the condition or injury described below. . . . LCMC appointment.'" Defendant now argues that the quoted form noted that he was "'mentally unfit to be transported to court'" and was thus an acknowledgement by medical personnel of the effect of defendant's multiple sclerosis on his mental functioning.

Contrary to defendant's characterization of the quoted communication, the form contained no report on defendant's mental competence or the effects of multiple sclerosis. Nevertheless, the trial court telephoned the medical facility and was told that the appointment was for physical therapy, rather than an emergency. The court demanded that defendant come to court. When the defendant was informed that a patrol car would take him to court, he became angry, and using obscenities and profanities, insisted he would travel to court only in a van. Defense counsel advised the court that defendant's reaction was typical of him and asked the court to revisit the section 1368 issue.

The trial court heard defendant's further argument on the issue the following day, after jury selection had begun. Defendant suggests that his counsel's arguments were substantial evidence of incompetence, when in fact, the arguments were not evidence at all. Defense counsel recounted defendant's multiple sclerosis diagnosis and the need for additional treatment in another facility in order to regain his ability to walk. He then summed up as follows: "[Multiple sclerosis] also affects [defendant's] brain and his cognitive functions so that if his condition is affected physically to this extent, one can surmise that his mental capacity, his cognitive functions, have also been compromised. When I said walk, I also coupled it with and spoke about it in relation to in order to gain appreciation as to where his cognitive functions might be." After noting that counsel said, "surmise," the trial court rejected the arguments as speculative, and noted that the only evidence before the court was its own observation. When the court asked the two bailiffs in the courtroom whether they had any problems communicating with defendant, both deputies replied that

defendant had communicated and had no problems speaking. The case proceeded to trial.

Defendant argues here that below he demonstrated he was "examined by mental health professionals and found to be suffering from a debilitating mental condition that affects cognitive function, and was affecting [defendant's] cognitive functioning prior to trial and at other times relevant." However, defendant submitted neither a declaration from any doctor nor any medical records regarding his mental condition. Like the trial court, we are asked to surmise that defendant might have some cognitive dysfunction that rendered him incapable of assisting in his defense, based on the fact that he had multiple sclerosis, had trouble once recalling something his attorney had said to him two and one-half months earlier, and because he freely expressed his anger with profanities and obscenities.[4]

"A trial court is not required to order a competency hearing 'based merely upon counsel's perception that his or her client may be incompetent.' [Citations.]" (*People v. Avila* (2004) 117 Cal.App.4th 771, 780.) "That defendant may have been somewhat distracted by pain and other symptoms of physical distress does not establish incompetence or mental absence. [Citation.]" (*Ibid.*) Mild memory loss is not substantial evidence of incompetence. (*Rogers, supra*, 39 Cal.4th at p. 849.) Further, angry outbursts, displays of "sheer temper" and "even bizarre statements and actions are not enough to require a further inquiry. [Citation.]" (*People v. Marks* (2003) 31 Cal.4th 197, 220.)

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[4] We decline defendant's invitation to conduct our own medical research by reviewing a *Web*MD article on multiple sclerosis. There is no indication in the record that the article was considered by the trial court.

We conclude that defendant failed to provide substantial evidence of incompetence. We defer to the trial court's decision, after having the opportunity to observe defendant, not to hold a competence hearing. (See *Rogers, supra*, 39 Cal.4th at p. 847.)

II. Cross-examination of medical examiner

Defendant contends that the trial court erred in refusing to permit the defense to pose hypothetical questions during cross-examination of the medical examiner, and that the court further erred in denying a new trial motion based on that ruling. In particular, defendant contends that his trial counsel was precluded from asking hypothetical questions relating to the possibility that the victim sustained her injuries by falling down the stairs.

As respondent observes, the defense was permitted in cross-examination to ask Dr. Ortiz several hypothetical questions regarding injuries that might have been sustained in a fall. During a break in cross-examination the following day, the prosecution objected to further hypothetical questions about falling or about falling down stairs, as there had been no evidence "validating" the defense theory that Brada fell down the stairs. Defense counsel replied: "I didn't ask any hypothetical in that regard to falling. The evidence came out --" The court interrupted with the following comments: "No, you haven't. I agree. You have not. I mean, I think what happened yesterday, I think that [defense counsel] asked the doctor what information he got from the investigator prior to conducting the autopsy. And, yes, that did come out. But any further inquiry about that, we are not going to go into." "I will take up any objections as they come. But certainly there will be no hypothetical regarding that because hypotheticals must track the facts presented in the trial."

"Use of hypothetical questions is subject to an important requirement. '[A] hypothetical question must be rooted in facts shown by the evidence . . . .' [Citations.] . . . '[T]he expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors . . . ."' [Citations.]" (*People v. Vang* (2011) 52 Cal.4th 1038, 1045-1046.) While "courts have traditionally given parties wide latitude in the cross-examination of experts to test their credibility, . . . the trial court must exercise its discretion pursuant to Evidence Code section 352 in order to limit the evidence to its proper uses.' [Citation.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 833-834.) "The trial court, of course, has a 'wide latitude' of discretion to restrict cross-examination and may impose reasonable limits on the introduction of such evidence. [Citation.]" (*People v. Smith* (2007) 40 Cal.4th 483, 513, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) The trial court's control of cross-examination is part of its "clear duty to supervise the conduct of the trial to the end that it may not be unduly protracted . . . . Only a manifest abuse of the court's discretion will warrant a reversal." (*People v. Beach* (1983) 147 Cal.App.3d 612, 628.)

Defendant suggests that there was sufficient evidence of a fall to warrant a hypothetical question during cross-examination because Louise testified to having heard a noise like an earthquake, and Dr. Ortiz testified that a bruise on Brada's foot could have been caused by falling down. However, defendant did not make this argument at the time of the prosecutor's objection. "We review the correctness of the trial court's ruling at the time it was made, . . . and not by reference to evidence produced at a later date. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 739.) Prior to the cross-examination of Dr. Ortiz, there had been no evidence of a fall. Louise had testified that she heard the

earthquake-like noise sometime between 7:10 and 7:40 a.m. Dr. Ortiz testified that Brada had been dead for two hours by that time.

Defendant now also argues that the court's ruling precluded the defense from "squarely" presenting to Dr. Ortiz the question whether, given the nature of the victim's injuries, it was possible or likely that Brada's injuries were the result of a fall down the stairs. We agree with respondent that defendant has not preserved this issue for appeal, as defendant did not propose that or any other specific hypothetical question in the trial court. To preserve a claim that the trial court erroneously excluded evidence, defendant is required to make an offer of proof sufficient to inform the trial court of the "substance, purpose, and relevance of the excluded evidence." (Evid. Code, § 354, subd. (a).) As defendant did not do so, the trial court had no opportunity to allow or preclude defendant from presenting that question.

In reply, defendant contends there was no forfeiture because the trial court explicitly and clearly ruled that any proffered hypothetical question on the subject would be excluded, and thus any objection would have been futile. On the contrary, the record is clear that the trial court would rule on any objections at the appropriate time, and would not allow any hypothetical questions that did not track the facts presented by the evidence at trial. As no specific hypothetical question was ever offered, there was no objection to it, and thus the appropriate time for the court to rule did not arise. The court's comment was not a ruling or an indication that it would sustain the prosecution's objection even if the evidence later supported a

hypothetical question. Thus, the court's comment does not demonstrate futility.[5]

Regardless, had there been the broad ruling defendant describes, and if it had been erroneous, any error would have been harmless beyond a reasonable doubt under the reversible error standard of *Chapman v. California* (1967) 386 U.S. 18, 24, or harmless under the test of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), with no reasonable probability of a different outcome. Defendant contends that prejudice is demonstrated because the evidence "would have been devastating [to] the prosecution because it would have amounted to a statement from the prosecution's own scientific expert that there was reasonable doubt as to defendant's guilt." In denying the motion for new trial, the trial court noted that the defense would have been permitted to call Dr. Ortiz after defendant testified, as there was evidence at that point that Brada fell down the stairs. Defense counsel was aware that he could have called Dr. Ortiz, but as he told the court, for tactical reasons he chose not to. We can thus conclude beyond a reasonable doubt that the trial court's comments or alleged ruling did not contribute to the result in this case.

III. Prosecutor's closing argument

Defendant contends that twice during closing argument, the prosecutor committed misconduct so egregious that defendant was deprived of his right to due process under the state and federal constitutions.

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[5] In a footnote in the reply brief and without citation to authority, defendant also contends that he preserved the issue by raising it in his motion for new trial. Defendant may not revive a forfeited evidentiary issue by raising it for the first time in a motion for new trial. (*People v. Williams* (1997) 16 Cal.4th 153, 254.)

A prosecutor's improper remark violates the federal constitution if it was so egregious that it infected the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Lesser misconduct violates state law only if the prosecutor has used deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Hill*, *supra,* at p. 819.) "Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide. [Citation.] Harsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) To demonstrate misconduct, defendant must refer to more than just a few phrases or sentences, as we must view the statements in the context of the argument as a whole. (*Ibid*.)

First, defendant contends that the prosecutor improperly argued to the jury that defendant could have, but did not, present expert medical evidence that the victim's injuries were sustained as a result of a fall down the stairs. "[P]rosecutorial comment upon a defendant's failure 'to introduce material evidence or to call logical witnesses' is not improper. [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 263 [failure to adduce expert psychiatric testimony not improper].) Defendant contends that he "in fact had sought leave to present such medical testimony but was precluded from doing so by the trial court," referring to the issue of hypothetical questions during the cross-examination of Dr. Ortiz. Defendant mischaracterizes the court's ruling on hypothetical questions. As we discussed above, the trial court commented that it would not allow hypothetical questions which

were not based on the evidence; however, the court never precluded defendant from calling Dr. Ortiz or other medical experts as his own witness once there was evidence of a fall. Indeed, when defendant later requested a curative instruction with regard to the prosecutor's rebuttal argument, the trial court denied the request, reiterated that the cross-examination regarding the possibility of a fall was limited to facts in evidence; and then the court commented that the defense could have recalled Dr. Ortiz but did not do so.

Defendant also contends that it was misconduct when the prosecutor suggested that the laundry basket Brada held during the fall did not exist, but was a fabrication by defendant, because the prosecutor knew otherwise and knew that the basket had been photographed at the scene by investigators. Defendant has exaggerated the prosecutor's comments. The prosecutor stated in her rebuttal argument: "We never heard about the laundry basket until the very end. And you know what? Why don't we have a photo of the laundry basket? Why didn't they go hunt that down? There were plenty of photos taken." The prosecutor did not say or suggest that the laundry basket did not exist; she asked why defendant did not produce a photograph of the basket. As the prosecutor later explained to the court all the photographs taken by investigators were provided to the defense. A laundry basket appears in one of the photographs taken of the spare bedroom.[6] The basket contained neatly folded clothes, and sits in a corner behind other objects. Photographs were taken from

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[6] As defendant has not caused exhibits be transmitted to this court, we accept the prosecutor's description of the relevant photographs. The photograph of the laundry basket had apparently gone unnoticed by both counsel, as defense counsel stated that he was unaware of it, and the prosecutor commented that she would have used it if she had seen it earlier.

every angle of every room in the condominium, and there was no other photograph of a laundry basket.

There was nothing deceptive about the prosecutor's comment. There was no suggestion of more than one laundry basket, and the photograph of the basket found in the spare room would have been helpful to the prosecution. Defendant testified that after Brada threw her clothes on the floor, he picked them up and put them in the laundry basket. Defendant did not testify that he neatly folded Brada's unlaundered clothes or any spilled clothing before placing them in the basket, or that he placed the laundry basket in a corner behind other objects. A reasonable inference would be that defendant fabricated the story of Brada falling while carrying a laundry basket. This was thus a fair comment on the state of the evidence, not misconduct. (See *People v. Hill, supra*, 17 Cal.4th at p. 819.)

In any event, as respondent argues, defendant was not harmed by the comments, as the trial court instructed the jury that the attorneys' remarks and arguments were not evidence, that the jury was the sole judge of the facts and the credibility of the witnesses, and that it must decide the facts based solely on the evidence. The court further instructed the jury on the factors to consider in making its credibility determinations. We presume the jury followed the court's instructions. (See *People v. Hamilton* (2009) 45 Cal.4th 863, 957.)

IV. Evidence of prior domestic violence

Defendant contends that the trial court erred in admitting evidence of uncharged acts of domestic violence committed against both Brada and Mertell. Specifically defendant urges that the following evidence should have been excluded: (1) 1995 acts of domestic violence against Mertell;[7] (2) the August 5, 2011,

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[7] Defendant refers to the act of placing a pillow over Mertell's face as having occurred in 1995, when Mertell testified that she

domestic violence against Brada; and (3) Dos Santos's testimony regarding the sounds of slaps he heard during the August 31, 2011, telephone conversation with Brada.

Defendant acknowledges Evidence Code section 1109, which permits evidence of other domestic violence when the current charges involve domestic violence, subject to the trial court's discretion under Evidence Code section 352. Defendant also acknowledges that the comparable statute, Evidence Code section 1108, has withstood constitutional challenges. In fact, "the constitutionality of section 1109 under the due process clauses of the federal and state constitutions has now been settled." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310.)[8]

Prior to trial defendant objected to the Mertell testimony on the ground that it was too remote; he objected to the August 5 incident on the ground that it was dissimilar to the cause of death; and he objected to the Dos Santos testimony on the ground that it was speculative. Defendant contends that the trial court should have made a "principled application of [Evidence Code]

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and defendant married in 1995 and the behavior began sometime after that; and that the behavior was repeated at subsequent times during the marriage, which ended in 2001.

8 Nevertheless, relying on authority discussing character evidence at common law, such as *Michelson v. United States* (1948) 335 U.S. 469, 475-476, defendant suggests that Evidence Code section 1109 violates due process under the common law rule excluding propensity evidence because it is *too* probative, creating the danger that the jury will decide the case based solely on defendant's bad character. Defendant's lengthy discussion of the common law rules has no applicability here, as the weighing process of Evidence Code section 352 ensures that section 1109, like section 1108, does not violate due process. (*People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704; see *People v. Wilson* (2008) 44 Cal.4th 758, 797.)

section 352 such as occurred in *Harris*," referring to the factors discussed in *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741 (*Harris*). As more succinctly summarized in *People v. Branch* (2001) 91 Cal.App.4th 274, 282, the *Harris* factors are the following: "(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses. [Citation.]" (*Branch, supra*, at p. 282.)

In fact, the trial court did consider the *Harris*/*Branch* factors as they were applied to Evidence Code section 1109 in *People v. Johnson* (2010) 185 Cal.App.4th 520, 531-539 (*Johnson*); and the court heard lengthy argument by counsel regarding the factors. The trial court then concluded that none of the uncharged acts was more inflammatory than domestic violence resulting in death, that there would be no confusion of the issues or undue consumption of time, and that interest of justice required admission of the Mertell incidents.

Defendant disagrees. First, with regard to the Mertell incidents, defendant notes that since they occurred more than 10 years before the current crime, they were presumptively inadmissible under Evidence Code section 1109, subdivision (e). He argues that the interest of justice did not favor admitting those incidents because they occurred in 1995, and defendant's behavior between 1995 and 2011 was "nonviolent or attributable to alcohol addiction or both," although he fails to point to evidence demonstrating that his interim behavior was nonviolent. Defendant also suggests that because smothering the victim is alleged in both the Mertell incidents and Brada's death, the similarity of the circumstances made the risk of unfair prejudice obvious.

The similarity of the circumstances make the prior incident probative of defendant's propensity to commit domestic violence in that manner. "'Prejudice' in [Evidence Code] section 352 does not refer simply to evidence that is damaging to the defendant. Instead, "'[t]he 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and *which has very little effect on the issues*.'" [Citation.]" (*People v. Smith* (2005) 35 Cal.4th 334, 357.) And defendant does not demonstrate an abuse of discretion by referring to a few facts that merely afford an opportunity for a difference of opinion, as all the circumstances must be considered. (See *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

We observe that the trial court heard the argument that defendant's alcohol addiction was a mitigating factor, and did not find that the Mertell incidents were confined to 1995. The court considered defendant's pattern of violence and anger between 2000 and Brada's death, based upon his continuous violent behavior toward his wife from 1995 to 2001, toward his mother between 2001 and 2007, and toward Brada in 2011. Defendant's misstatement or understatement of the facts considered by the trial court does not demonstrate that the trial court erred in admitting the Mertell testimony pursuant to Evidence Code section 1109, subdivision (e).

Defendant next contends that admission of the August 5, 2011 incident was error because it was too dissimilar to the charged conduct. "'"The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense."' [Citation.]" (*Johnson, supra*, 185 Cal.App.4th at pp. 531-532.) Defendant argues that because the August 5 incident did not involve suffocation with a pillow, it had no tendency in reason to prove the charged offense. Prior acts of domestic

violence must be similar *in character* to be admissible. (*Id.* at pp. 531-532.) The prosecution's offer of proof was that defendant became intoxicated and severely beat Brada on August 5; and that on August 31, defendant became intoxicated and Dos Santos heard sounds of slaps after defendant said, "Fuck you bitch." The trial court found sufficient similarity in the character of those acts of domestic violence, particularly as it was committed against the same victim within a short period of time.

Defendant highlights the perceived dissimilarities on August 5: striking Brada in the face, holding her under water, cutting her with a knife, and not using a pillow to suffocate her. Defendant neglects to show that these facts were presented to the trial court prior to its ruling, and in any event, we do not agree that the August 5 incident was dissimilar in character. Defendant suffocated Brada on August 5, albeit with water not a pillow, and beat her so badly that she was left with visible red marks on her face, forehead, and neck. Defendant may disagree with the trial court, but has not demonstrated that the court acted arbitrarily or capriciously in admitting the evidence.

Finally, defendant contends that the trial court should have excluded the Dos Santos testimony that he heard what sounded like slaps while he was on the telephone with Brada as speculative. The only authority cited to support this position is *People v. Kunkin* (1973) 9 Cal.3d 245, 250, which held that "'[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction.'" As defendant does not claim that no substantial evidence supported the judgment, his cited authority is inapplicable. As the trial court observed, a lay witness may give an opinion that is rationally based on the witness's perception and helpful to a clear understanding of his testimony. (Evid. Code, § 800.) Thus, a witness may testify that he heard noises and give his opinion of

what they sounded like to him. (See *People v. Deacon* (1953) 117 Cal.App.2d 206, 210 [angry-sounding voices].)

We conclude that defendant has failed to demonstrate that the trial court erred in admitting any of the three categories of evidence pursuant to Evidence Code section 1109. Further, defendant's burden under Evidence Code section 352 was to demonstrate not only that the ruling was erroneous, but also that the error resulted in a miscarriage of justice (see *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; Evid. Code, §§ 352, 354; Cal. Const., art. VI, § 13) under the standard set forth in *Watson*, by showing that, after an examination of all the evidence, there appears a reasonable probability that the result would have been different without the challenged evidence. (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 524.) Defendant merely argues that the defense theory was that Brada died from a methadone overdose, and although no evidence was presented to that effect, the jurors might have had a reasonable doubt had they not known about defendant's prior conduct.

In making this argument, defendant disregards the evidence establishing that he and Brada lived together and were together the night of her death, that the cause of death was homicide by asphyxia, that the time of death was sometime between 1:00 and 5:00 a.m., and that Louise heard defendant loudly exclaim "fuck" every 15 minutes between 12:50 and 2:50 a.m. Defendant also disregards the absence of evidence that anyone other than defendant was with Karla between 1:00 and 5:00 a.m., when she died. Finally, defendant disregards overwhelming evidence demonstrating that defendant was intoxicated the night of August 31 to September 1, and that when defendant was intoxicated, he became angry, belligerent, aggressive, and threatening, even with law enforcement officers, male friends, nurses, jailers, and his mother.

We discern no reasonable probability that the result would have been different absent evidence of defendant's prior acts of domestic violence. Moreover, if we accepted defendant's assertion that the proper standard of review was the standard for federal constitutional error under *Chapman*, the same evidence would lead us to conclude beyond a reasonable doubt that admission of the evidence was harmless.

V. Hearsay and *Crawford*

A. Issues

Defendant contends that the trial court erred in admitting, over his hearsay objections, evidence of out-of-court statements attributed to Brada. In particular, he contends that the trial court should have excluded statements made by Brada and Walsh in the August 5, 2011, 911 call; statements Brada made to Walsh and Sage; and statements made on August 31 to Dos Santos. Defendant further contends that the erroneous admission of hearsay statements by Brada and Sage violated his federal constitutional right of confrontation and due process, under the reasoning of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

Respondent contends that the trial court's rulings were not an abuse of discretion, that defendant forfeited the *Crawford* issue, and that defendant's *Crawford* contention is without merit, as the statements of Brada and Sage were nontestimonial. We agree with respondent and further observe that defendant also forfeited the state law hearsay objections to the statements of Brada, Walsh, and Sage.

B. August 5 statements

Defendant's objection was made during the pretrial hearing on motions in limine. The trial court ruled that Brada's statements were admissible as spontaneous, contemporaneous, or excited utterances.

"Evidence Code section 1240 provides: 'Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) was made spontaneously while the declarant was under the stress of excitement caused by such perception.'" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) "'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*Ibid.*, quoting *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468.)

In making its ruling with regard to the August 5 incident, the court explained:

> "On the August 5th incident, when [Brada] ran over to her friend and said that the defendant just, you know, beat her and it was the worst beating she has ever had in her life, she is bloody, she is crying, it's immediately after the incident. And I believe that that statement is admissible as a spontaneous and/or contemporaneous statement and/or excited utterance."

Referring to the testimony ultimately given at trial regarding the challenged evidence, defendant contends that the August 5 statements did not qualify as spontaneous, contemporaneous, or excited utterances, because the evidence at

trial did not show that Brada had no opportunity to contrive, reflect or fabricate before uttering them, or that Brada was sufficiently upset, traumatized, or distraught at the time. However, defendant did not renew his objections to Walsh's testimony or the 911 call when that evidence was introduced at trial. As respondent observes, defendant did not object to Sage's statement at all, either during motions in limine or at trial.

"We review the correctness of the trial court's ruling at the time it was made, . . . and not by reference to evidence produced at a later date. [Citations.]" (*People v. Welch*, *supra*, 20 Cal.4th at p. 739.) A judgment may not be reversed by reason of the erroneous admission of evidence "unless [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353.) To satisfy the requirement of section 353 that an objection to evidence must be specific, a challenge to the admissibility of evidence must be reviewed in context of the evidence or offer of proof before the trial court at the time of the ruling. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-435.)

Sometimes a motion in limine is sufficient to allow the trial court to rule on a specific objection to particular evidence; however, in other cases, "it may be difficult to specify exactly what evidence is the subject of the motion until that evidence is offered. Actual testimony sometimes defies pretrial predictions of what a witness will say on the stand. Events in the trial may change the context in which the evidence is offered to an extent that a renewed objection is necessary to satisfy the language and purpose of Evidence Code section 353." (*People v. Morris* (1991) 53 Cal.3d 152, 188-190, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Here, it cannot be determined whether the motion in limine did or did not supply sufficient factual context in which the challenged evidence was offered, as the facts relevant to the alleged hearsay statements were set forth in the prosecutor's trial brief, which has not been made part of the record on appeal. In addition, although the trial court indicated that it would listen to the recording of Walsh's 911 call before ruling, the 911 recording is also not in the record on appeal.[9]

"It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal. [Citations.]" (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.) "[I]t is settled that: 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Under the circumstances, defendant's contentions regarding the August 5 incident must be deemed forfeited pursuant to Evidence Code section 353. If we were to reach the issue, however, we would reject it as meritless, as we presume that the prosecutor's trial brief set forth sufficient facts to support the trial court's findings, and that the 911 recording supported the trial court's implied conclusion that the utterances were sufficiently spontaneous, contemporaneous, or excited.

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9 The absence of the trial brief was noted in respondent's brief, but defendant did not move to augment the record. As defendant did not request transmittal of exhibits to this court, the record contains only the transcript of the 911 call.

Moreover, as respondent argues, the admission of Brada's statements, if error, was harmless. We apply the *Watson* standard of harmless error to state law error in the admission of hearsay. (*People v. Reed* (1996) 13 Cal.4th 217, 231; *Watson, supra*, 46 Cal.2d at p. 836.) Walsh could still have testified that Brada looked like she had been recently beaten, that she had blood on her face, she was crying, and her clothes were wet and bloody. She could still have testified that after she told defendant to leave, he put his hand on his knife and asked whether she was going to make him leave. Deputy Barlow would still have been able to testify that when deputies arrived about two minutes after the 911 call, Brada seemed afraid and visibly shaken, and that he observed red marks on her face, forehead, neck, a large cut on her left eye, and smaller cut on her right eye. Deputy Barlow could still have testified that defendant appeared to be under the influence of alcohol, and that he was extremely agitated, angry, and violent inside the patrol car. The jury would still have little doubt that defendant beat Brada badly, that he was intoxicated when he beat her, and that alcohol had the tendency to make defendant violent and aggressive. We conclude that there is no reasonable probability of a different result had Brada's statements been excluded.

C. August 31 statements

During the motion in limine, and again at trial, defendant objected to Dos Santos's testimony regarding Brada's statement that defendant was drunk. The court held that the statement was admissible, as it was a "contemporaneous statement."

"The standard of review for the court's ruling, along with its determination of issues concerning the hearsay rule, is abuse of discretion. [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 590.) "A trial court's ruling on admissibility implies whatever finding of fact is prerequisite thereto . . . .' [Citation.] 'We review

the trial court's conclusions regarding foundational facts for substantial evidence. [Citation.] We review the trial court's ultimate ruling for an abuse of discretion [citations], reversing only if "'the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" [Citation.]' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 320-321.) A miscarriage of justice occurs when it appears that a result more favorable to the appealing party would have been reached in the absence of the alleged errors. (*Watson, supra*, 46 Cal.2d at p. 836; see Cal. Const., art. VI, § 13.)

Defendant does not contend that Brada's statement failed to narrate or describe an event as she was perceiving it, or that it was not spontaneous. Instead, defendant argues that although the statement was spontaneous, there had been no evidence of an occurrence startling enough to produce an unreflective utterance under Evidence Code section 1240. We disagree. The evidence showed that defendant's intoxication often produced a startling event, and defendant was already showing signs of belligerence and aggressiveness during his conversation with Dos Santos. Dos Santos knew what defendant's intoxication could mean, as demonstrated by his advice to Brada that one of them should leave the house because was it "going to be all bad." Brada, who knew from the August 5 incident what defendant's condition could mean, did not simply state that defendant was drunk, she exclaimed that he was "fucking drunk" loud enough that Dos Santos heard her in the background. Defendant has failed to show that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner.

Moreover, defendant has not demonstrated a miscarriage of justice, as he has not shown the reasonable probability of a different result absent any error in the court's ruling under

Evidence Code section 1240. In addition to a circular argument that the statement was prejudicial because it was erroneous, defendant argues that the evidence that he was drunk that night, when combined with evidence of his tendency toward violence when drunk, amounted to unfair propensity evidence. There was ample other evidence of defendant's drunkeness that night. As respondent observes, Dos Santos knew defendant was drunk. Before he heard Brada's statement in the background, Dos Santos told defendant he was drunk and should go to bed, and his reply to Brada was that he could tell. Moreover, defendant admitted to Deputy Manskar that he had consumed approximately a fifth of vodka between about 3:00 and 10:00 p.m. the preceding day and night. Under such circumstances, there was no reasonable probability of a different result absent Brada's exclamation.

D. Crawford

Defendant contends that hearsay statements made by Brada and Sage were testimonial statements admitted without an opportunity to cross-examine the declarants, thus amounting to *Crawford* error in violation of his constitutional right of confrontation. In *Crawford,* the United States Supreme Court held that the Sixth Amendment bars the "admission of testimonial statements of a [declarant] who [does] not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford, supra*, 541 U.S. at pp. 53-54, 68.)

In his opening brief defendant argues: "As to those speakers, the only issue regarding the applicability of *Crawford* to this case is the question whether Aguilar's [*sic*] statements were 'testimonial' within the meaning of *Crawford*"; and, "The trial court therefore erred in admitting Aguilar's [*sic*] statements pursuant to [Evidence Code] section 1240." While there was

testimony by Aguilar, there was no hearsay or *Crawford* objection or discussion directed to her testimony. Although defendant does not clarify this obvious error in the reply brief or elsewhere, we assume that he meant to refer to Brada's statements.

Respondent contends that defendant has forfeited a confrontation claim, as he did not object on this ground at trial. A failure to raise a confrontation clause claim in the trial court forfeits the issue on appeal, and a hearsay objection does not preserve a confrontation clause claim. (*People v. Redd* (2010) 48 Cal.4th 691, 730.)[10] Defendant counters that because the trial court raised and ruled on the issue itself, there is no forfeiture. After hearing arguments on the motions in limine and ruling that the 911 call was admissible under Evidence Code section 1240, the trial court added its own comment that there was no *Crawford* violation because the 911 call was not testimonial. Assuming that the court's *Crawford* ruling on its own motion excuses a failure to object to the 911 call on *Crawford* grounds, defendant has failed to demonstrate *Crawford* error.

A victim's statement to a 911 operator is nontestimonial when made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington*

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[10] We reject defendant's contention that a confrontation clause violation is not waived by failure to object. He cites *People v. Welch* (1993) 5 Cal.4th 228, 237-238, for such proposition; however, we found no such holding or any mention of the confrontation clause in that case.

(2006) 547 U.S. 813, 822 (*Davis*), fn. omitted; see also *People v. Thomas* (2011) 51 Cal.4th 449, 496.)

Defendant argues that the statements made in the 911 call were testimonial simply because there was a description of a past event: defendant's assault on Brada a short time before the call. Defendant's argument suggests that under *Davis*, the 911 call would have been nontestimonial only if Brada had spoken to the 911 operator as defendant was beating her. That is not the test of what is or is not testimonial. The 911 call was nontestimonial because the circumstances objectively indicate that there was an ongoing emergency, as Walsh told the operator that defendant had just beaten Brada and would not leave, and Brada told the operator that he was inside her home while she was outside. As there was no police interrogation meant "to establish or prove past events potentially relevant to later criminal prosecution," the call was nontestimonial. (See *Davis, supra*, 547 U.S. at pp. 822, 826-828.) The trial court did not err.

VI. Impeachment

Defendant contends that trial court erred by permitting the prosecution to challenge defendant's credibility with evidence that he struck his mother in 2001 and 2007, apparently while he was drunk, and that the error resulted in a violation of his state and federal constitutional rights to a fair trial and due process.[11] Defendant contends that the evidence was more prejudicial than probative, because it involved misdemeanor, rather than felony conduct. He also contends that the evidence should have been

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[11] The prosecution's written offer of proof is not in the appellate record, and argument regarding impeachment did not include a discussion of evidence that defendant was drunk at the time that he struck his mother. In his testimony, defendant volunteered that he was drunk at the time. The prosecutor then questioned him further about his intoxication and violent behavior in the patrol car after the 2007 incident.

excluded under Evidence Code section 352 because the incidents were remote, and when combined with the evidence that defendant was drunk at the time, were so similar to the charged offenses as to be unduly prejudicial. He concedes that both offenses involved moral turpitude.

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931, fn. omitted.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion. [Citations.]" (*Clark*, *supra*, at p. 932.) It "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

"When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify. [Citations.]" (*People v. Clark, supra*, 52 Cal.4th at p. 931; see also *People v. Beagle* (1972) 6 Cal.3d 441, 453.) Defendant challenges the trial court's discretion with regard to remoteness and similarity, but not the effect the prior misdemeanor conduct would have on his decision to testify.

Defendant argues that the 2001 misdemeanor conviction for elder abuse presents a limit for excessive remoteness. There

is no 10-year limit on impeachment with convictions. (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1496.) Remoteness is important when the offense was followed by a legally blameless life, which is not the case here. (*People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590.) In 2007, six years after this conviction, defendant again struck his mother and was arrested. Defendant also suggests that the 2007 offense was too remote, though it was just four years before the charged offense. Neither six years nor four years is too remote. (See *People v. Lewis* (1987) 191 Cal.App.3d 1288, 1296-1297.)

Defendant also complains that the assaults on his mother while drunk were so nearly identical to the charged crime that they should have been excluded as nothing more than propensity evidence, which was more prejudicial than probative. Defendant relies on an inapplicable case involving evidence offered under Evidence Code section 1101, subdivision (b), to show motive and identity. (See *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) Section 1101 does not apply to impeachment evidence. (See Evid. Code, § 1101, subd. (c).)

Contrary to defendant's argument that the use of similar crimes for impeachment was "blatantly improper," the fact that the impeaching offenses were identical to the crime charged does not automatically compel their exclusion; it is just one factor to consider. (*People v. Green* (1995) 34 Cal.App.4th 165, 183.) And it is not an abuse of discretion to permit impeachment with identical offenses if excluding them would allow the defendant a "'false aura of veracity,'" as the trial court found here. (See *People v. Tamborrino, supra*, 215 Cal.App.3d at p. 590, quoting *People v. Beagle, supra,* 6 Cal.3d at p. 453.)

To be sure, crimes of violence are less probative of a readiness to lie than crimes involving dishonesty. (*People v. Castro* (1985) 38 Cal.3d 301, 315.) On the other hand, the

systematic occurrence of prior misconduct demonstrates a pattern that is relevant to credibility and has greater probative value for impeachment. (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 646-647.) Intervening convictions are more probative of credibility than remote priors. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 926.) The trial court did not exercise its discretion in an arbitrary, capricious, or patently absurd manner by finding that excluding the intervening misconduct would give defendant a ""false aura of veracity."" [Citation.]" (*Muldrow*, at p. 647.)

Moreover, defendant has not demonstrated that the impeachment evidence resulted in a miscarriage of justice. He argues merely that prejudice is inherent, as the conduct would permit the jury to conclude that he was a "bad man" deserving of punishment. Defendant conceded the misdemeanor conduct involved moral turpitude. Crimes involve moral turpitude when they reveal a "'general readiness to do evil,'" "'bad character,'" or "moral depravity." (*Castro, supra*, 38 Cal.3d at pp. 306, 315.) These characteristics are what makes the prior conduct admissible for impeachment purposes, subject to the trial court's exercise of discretion under Evidence Code section 352. (*People v. Clark, supra*, 52 Cal.4th at p. 931.) Defendant's prejudice argument -- essentially that evidence of a crime of moral turpitude is inherently prejudicial -- begs the question whether the court's ruling resulted in a miscarriage of justice.

We agree with respondent that admission of defendant's misdemeanor assaults upon his mother did not result in a miscarriage of justice, as a different result was not reasonably probable without the challenged misconduct. (*Watson, supra*, 46 Cal.2d at p. 836.) There was no evidence to corroborate defendant's account that Brada fell down the stairs; the only evidence of cause of death was homicide by asphyxia;

overwhelming evidence demonstrated that defendant was intoxicated that night; and without evidence of the attacks upon his mother, other overwhelming evidence demonstrated that when defendant was intoxicated, he became violent. It is not reasonably probable, absent evidence of the attacks on defendant's mother, that the jury would have believed his claim that he and Brada did not fight on the night she died and that he did not cause her death.

VII. Effective assistance of counsel

Defendant contends that trial counsel rendered ineffective assistance by failing to object to evidence of defendant's unruly and violent behavior while in police custody on August 5 and on September 1, 2011. In particular, defendant contends that counsel should have objected, as irrelevant and inadmissible propensity evidence, to the evidence that following his August 5 arrest, defendant kicked the window of the police vehicle and while in a holding cell on September 1, he banged on the screen and was abusive toward the jailer.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1126.)

Defendant has failed to show that counsel's representation fell below an objective standard of reasonableness. As respondent has observed, defense counsel did not fail to object to evidence of defendant's behavior at the jail on September 1, 2011. During pretrial discussions of motions in limine regarding defendant's behavior in the jail, the prosecutor asked to present evidence that defendant was abusive toward the jailer, as well as a 10-minute video showing defendant banging on the cell window. Defense counsel objected under Evidence Code section 352, arguing that it was unfair propensity evidence and that showing the entire four hours of video would involve an undue consumption of time. The trial court agreed that showing the entire video would take undue time, and deferred ruling until it could review the proposed 10-minute clip of the video.

After viewing the video the trial court heard further argument. The prosecutor argued that evidence of the behavior on September 1 and August 5 was relevant to show defendant's strength and capability to strangle the victim, in contrast to his physical condition at the time of trial.[12] Also, the prosecutor argued that the evidence would show a pattern of conduct, an exception to the inadmissibility of character or propensity evidence under Evidence Code section 1101, subdivision (b). The trial court gave a tentative ruling allowing the evidence, deferring a final ruling until defense counsel had an opportunity to view the video. The court rejected the prosecutor's argument

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[12] Defendant was in a wheelchair throughout trial, and apparently testified either from his wheelchair or was placed in the witness chair before the jury entered the courtroom. Just before defendant testified, defense counsel described defendant as "obviously impaired" and expressed concern that defendant's pain medication was affecting his memory.

regarding pattern and accepted her argument regarding physical capability. The court stated:

> "I don't really consider it an [Evidence Code section] 1101(b) issue. I consider it more of a relevancy issue. Is the defendant's conduct and behavior in the jail cell, being drunk, hostile and angry, relevant to an issue in the case and the fact that he wouldn't allow the deputies to take photographs of him and was uncooperative with them? . . . [T]hat may be construed as consciousness of guilt. In addition, the fact that he was hostile, angry, banging the interior of the door I think is relevant to his general attitude and behavior that occurred, you know, hours before, presumably. And in addition, it shows that he was physically capable and able to carry out the crime for which he is charged."

When the trial court took the matter up again, just before trial began, defense counsel stated he had reviewed the video, asked for a final ruling, and submitted the issue. The court made the tentative ruling final. In sum, defense counsel did not fail to object to the admission of evidence of defendant's behavior.

The prosecutor's argument indicated that the details of the incident of August 5 was included in her written offer of proof which is not in the record, although she did not press for a ruling specific to that incident. However, the trial court's ruling that defendant's behavior was relevant to show physical ability was easily applicable to the August 5 incident. We agree with respondent that the trial court most probably would have overruled a defense objection made on the same grounds.

"Counsel is not required to proffer futile objections. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Further, the record does not reveal the reason that defense counsel did not expressly object to evidence of the August 5 behavior. It is presumed that "counsel's performance fell within the wide range of professional competence . . . . Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Contrary to defendant's suggestion that there could be no satisfactory explanation, we have already determined that the futility of the objection might explain the omission. In addition, defendant's argument that there could be no conceivable strategic or tactical reason for not objecting was contradicted by the trial court's suggestion that after seeing the jail recording, defense counsel might want evidence of intoxication, to which counsel indicated he might change his mind upon reviewing the video. That defense counsel may have been contemplating an intoxication defense to counter evidence of premeditation and malice, is a possible tactic, as this could be a satisfactory explanation given defendant's seemingly uncontrollable behavior when intoxicated. Defendant cannot establish constitutionally inadequate assistance of counsel on this record.

Regardless, defendant has made an insufficient showing of prejudice due to the alleged errors. It is defendant's burden to affirmatively prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at p. 694; see also *People v. Rodrigues, supra*, 8 Cal.4th at p. 1126.) Defendant merely argues that evidence of criminal propensity and disposition is inflammatory and so inherently prejudicial as to undermine confidence in the outcome. Evidence of uncharged misconduct can be very damaging. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1373 (*Spector*).) However, defendant's argument that the evidence was inflammatory begs the question whether the result of the proceeding would have been different. We agree with respondent that the evidence was admissible under several theories and would have been properly admitted over a defense objection.

The prosecutor argued that both incidents, although they collectively demonstrated propensity, were admissible under Evidence Code section 1101, subdivision (b), to show a pattern of assaultive and abusive conduct any time he was drunk. Such evidence may be admissible under section 1101, subdivision (b), when relevant to show that the "'conduct fit a pattern, that is, when confronted with a specific set of circumstances, [defendant] acted in a particular way.'" (*Spector*, *supra*, 194 Cal.App.4th at p. 1392 ["'pattern' of violence and misogyny"].) The trial court chose not to analyze the proffered evidence for that purpose, but more simply as a relevance issue. Of course, admissibility under Evidence Code section 1101 is a relevance issue. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

Evidence Code section 1101, subdivision (b), permits "the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her

disposition to commit such an act." This means that evidence of other misconduct may not be introduced *solely* to prove criminal disposition or propensity; however, "'such evidence may properly be admitted whenever it tends logically, naturally, and by reasonable inference to establish any fact material for the People or to overcome any material matter sought to be proved by the defense.' [Citation.]" (*Spector, supra*, 194 Cal.App.4th at p. 1373, quoting *People v. Montalvo* (1971) 4 Cal.3d 328, 331-332.)

Respondent argues the evidence was relevant and admissible to negate defendant's claim of accidental death. Defendant replies that evidence of other misconduct is inadmissible unless the defense raised was that the *defendant* accidentally killed the victim. Not so; evidence of uncharged misconduct may negate accident when the defendant "'denies committing an actus reus [and] claims that the cause of the casualty was not human agency.' [Citation.]" (*Spector, supra*, 194 Cal.App.4th at p. 1374, fn. omitted.) Evidence showed that defendant's violent and abusive conduct resulting in injury to Brada on August 5 was not accidental. When defendant was arrested for that offense, he was intoxicated and displayed an abusive behavior toward law enforcement. Defendant's intoxication and his violent and abusive behavior toward law enforcement on September 1, tended logically, naturally, and by reasonable inference, to negate defendant's claim that Brada's injuries were accidental.

In addition, evidence of motive is permitted by Evidence Code section 1101, subdivision (b), and evidence of a similar state of mind or motive during a past offense and the current crime may be relevant to prove intent or to negate accident. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1096-1097; see *Spector, supra*, 194 Cal.App.4th at pp. 1374-1384.) ""'Motive is itself a state-of-mind or state-of-emotion fact. Motive is an idea, belief, or

emotion that impels or incites one to act in accordance with his state of mind or emotion. Thus, evidence, offered to prove motive, that defendant committed an uncharged offense meets the test of relevancy by virtue of the circumstantial-evidence-reasoning process that accepts as valid the principle that one tends to act in accordance with his state of mind or emotion." [Citation.]' [Citations.]" (*Spector, supra*, at pp. 1382-1383.)

Defendant contends that evidence of a similar motive or state of mind is admissible only when the uncharged conduct is so similar to the charged crime as to suggest a "distinctive signature." Defendant's contention describes the degree of similarity required when the evidence is offered to prove identity, not motive. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Identity is not an issue where, as here, the defendant denies committing the actus reus and claims that the victim caused her own death by accident. (See *Spector, supra*, 194 Cal.App.4th at p. 1385.) And such a high degree of similarity is not required to show motive or lack of accident. (*People v. Rogers* (2013) 57 Cal.4th 296, 331.) Indeed, the least degree of similarity between the uncharged act and the charged offense is required in order to prove intent or to negate accident. (*People v. McCurdy, supra*, 59 Cal.4th at pp. 1096-1097.)

Defendant's violent and abusive behavior toward law enforcement while intoxicated did not merely demonstrate a propensity or disposition to be violent and abusive while drunk. The two occasions were sufficiently similar to demonstrate a particular set of circumstances that caused defendant to experience an extremely heightened emotional state which seemed to compel him to act violently. The fact that Brada was intentionally injured during the first incident raised the reasonable inference that her injuries were intentionally, not accidentally, inflicted during the second one as well. Under such

circumstances, we discern no reasonable probability that an objection or more specific objection would have resulted in or required the exclusion of the evidence.

VIII. Closing argument

Defendant contends that he was denied his right to counsel during closing argument because the trial court placed a time limit of "ten more minutes" on defense counsel's argument and then admonished counsel to "please just focus in and let's get this finished. . . . I am sure [the jurors] are eager to start deliberating."

"A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. [Citations.] This right is not unbounded, however; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark. [Citation.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 854-855.) "It shall be the duty of the judge to control *all proceedings* during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044, italics added.)

Defendant suggests that the court's discretion to impose reasonable time limits applies only in death penalty cases. He is mistaken. (See, e.g., *People v. Tock Chew* (1856) 6 Cal. 636 [grand larceny].) Defendant also contends that he need not show prejudice. "Where, as here, a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest

miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)[13]

Defendant also contends that this issue is controlled by *People v. Keenan* (1859) 13 Cal. 581, where the trial court was held to have erred in denying a motion for new trial when the motion showed that the time limit imposed by the trial court prevented defense counsel from addressing all the matters of law and evidence embraced by the case, and that the court refused an extension. (*Id.* at pp. 584-585.) *Keenan* is inapplicable here, as defendant has not shown that he raised this issue in a motion for new trial or that he was prevented from addressing any matters of law or evidence.

In any event, the trial court did not cut short defense counsel's argument or refuse any requested extension. Defendant has given an overly abbreviated summary of the proceedings and has failed to mention that counsel had been permitted to argue for almost three hours. Outside the presence of the jury, after noting that defense counsel had been given wide latitude to argue the case and had argued for approximately two hours, forty-five minutes, the trial court stated, "I'd like to give you about ten more minutes, okay?" Defense counsel objected, asked to make a record, and stated that he was entitled to argue point by point. The court replied: "Well, you've got ten minutes." However, after a short recess and before argument resumed, the court asked,

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[13] Defendant cites *U.S. v. Cronic* (1984) 466 U.S. 648, which did not involve limits on defense counsel's final argument, and thus did not hold that any such limit was reversible error without a showing of prejudice. There, the Supreme Court held that although prejudice is presumed under circumstances causing a breakdown of the adversarial process during trial such that counsel was unable to discharge his duties, not every refusal to postpone trial or to permit additional time to prepare presents such extraordinary circumstances. (*Id.* at pp. 657-658, 661-662.)

"How much longer, in good faith, do you have left?" Defense counsel replied that he was about to discuss the law and intended to quote two passages. He agreed with the court that he was "kind of at the tail end" of his argument. Then, apparently withdrawing the 10-minute time limit, the court stated: "If you're going to tell me that in good faith that you're going to wrap it up soon -- I don't know what 'soon' means -- but I'm going to ask that you please just focus in and let's get this finished." Defendant replied, "I will." Counsel was permitted to continue, and he concluded his argument without interruption, although the record does not show how much additional time passed.

Defendant has failed to demonstrate either an abuse of discretion or a miscarriage of justice. He has not shown that three hours of argument was unreasonable under these circumstances, or that argument was curtailed before his counsel could adequately place the issues and law before the jury. Under the circumstances, the trial court's comments were not arbitrary, capricious or patently absurd, and cannot have had any effect on the outcome of this trial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST