Filed 5/18/18 P. v. Howard CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES HOWARD, Defendant and Appellant.	B271373 Los Angeles County Super. Ct. No. LA070782

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

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant James Howard appeals from the judgment after a jury trial in which he was convicted of the premeditated murder of his live-in girlfriend, Sharilit Matthews. The victim's body was discovered eight days after the murder, lying on the bed in her apartment with her throat slit. During the time between the murder and the discovery of the body, defendant visited with friends, contacted other women to arrange sexual liaisons, smoked a lot of marijuana, attended at least one party, and visited the apartment on several occasions (apparently undeterred by Matthews's decomposing body) to gather Matthews's possessions in order to pawn them.

Primarily, defendant argues no substantial evidence supports the jury's finding of premeditation and deliberation. Although defendant admitted killing Matthews, he asserted he did so in a fit of rage after Matthews, who defendant believed was pregnant with his baby, purportedly told him she had an abortion. He therefore urged the jury to convict him of the lesser offense of voluntary manslaughter. We conclude the evidence, particularly the nature of the killing and defendant's conduct afterward, adequately supports the first degree murder conviction.

Defendant also contends the court erred by admitting an exhibit containing all text messages sent from and received by his cell phone around the time of the murder. Defendant identifies specific messages containing explicit sexual content, as well as other messages relating to his frequent search for marijuana and generally idle lifestyle, and contends these messages should have been excluded. Because the objected-to messages were not read to the jury, and the most explicit content was redacted, we conclude

any error in the admission of the evidence was not prejudicial. We also reject defendant's contention that the court erred in admitting limited evidence regarding Matthews's relationship with her friend's young son.

Finally, defendant raises two constitutional challenges to his sentence, neither of which is availing. We reject defendant's invitation to apply Eighth Amendment jurisprudence concerning juvenile offender sentencing here because defendant was 21 years old at the time of the murder. We also conclude Penal Code section 3051,[1] which provides most youth offenders with a mandatory parole hearing during their incarceration but excludes recidivist offenders (including defendant), does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. Accordingly, we affirm the judgment.

PROCEDURAL BACKGROUND

By information, defendant was charged with one count of murder. (§ 187, subd. (a).) The information further alleged defendant used a deadly weapon in the commission of the crime. (§ 12022, subd. (b)(1).) In addition, the information alleged defendant suffered a previous robbery conviction (§ 211), which was further alleged as a strike prior (§ 1170.12), a serious-felony prior (§ 667, subd. (a)(1)), and a prison prior (§ 667.5, subd. (b)). Defendant entered a plea of not guilty and the cause proceeded to a jury trial.

The first trial took place in 2013 and resulted in defendant's conviction on the premeditated murder charge. We reversed that conviction and remanded for a new trial, based on

---

[1] All undesignated statutory references are to the Penal Code.

the cumulative prejudicial effect of prosecutorial misconduct and the erroneous admission of highly prejudicial evidence. (*People v. Howard* (Feb. 2, 2015, B253031) [nonpub. opn.].)

The second trial took place over the course of eleven days in 2015. As in the first trial, defendant testified and admitted to killing Matthews. He claimed, however, that he killed her in a fit of rage after she informed him that she aborted their unborn fetus. Defense counsel urged the jury to convict defendant on the lesser offense of voluntary manslaughter.

After just over four hours of deliberation, the jury found defendant guilty of first degree murder and found the deadly weapon allegation true. Defendant subsequently waived trial on the prior conviction allegations and admitted them. The court sentenced defendant to a term of 25 years to life, doubled (§ 1170.12), plus one year for the dangerous weapon (§ 12022, subd. (b)(1)) and an additional five years for the serious-felony prior (§ 667, subd. (a)(1)), totaling 56 years to life.

Defendant timely appeals.

FACTUAL BACKGROUND

Defendant and Matthews met in late 2010 at a Thanksgiving Day celebration held in the apartment complex where Matthews's sister was living. Defendant was 19 years old and Matthews was about 40. Matthews kept in touch with defendant during his subsequent incarceration on a robbery charge and upon his release in August 2011, defendant moved in with Matthews.

The relationship started to sour a few months later. In late 2011 and early 2012, neighbors frequently heard loud arguments between a man and a woman emanating from Matthews's apartment. The fights occurred three to four times a week and

neighbors often heard the woman crying, or saying "Stop." The man used profanity and demeaning language, such as "Fuck you, motherfucker," and "You are a bitch." At times, neighbors heard thumping and crashing noises that caused them to suspect objects were being thrown or that the fight was becoming physical. Defendant admitted arguments became physical sometimes, but claimed it was because Matthews would attempt to hit or push him and she would end up falling. One neighbor, however, heard the woman say during the arguments, "Stop hitting me," or "Stop beating me." During at least one of the arguments, the couple fought over money and Matthews repeatedly asked defendant to leave.

On two occasions, the neighbors in the unit directly below Matthews's unit became concerned and called the police. Although Matthews apparently denied abuse, one of the officers observed she was crying, nervous and had scratches on her cheek surrounded by redness. One of Matthews's coworkers observed bruises on Matthews's face covered by thick makeup and found her explanation for the bruises implausible. At one point, a friend saw Matthews with marks on her cheeks and a large scratch running from her temple down her cheek.

During this time, family and friends observed changes in Matthews's demeanor. She had less contact with them and became withdrawn. One close friend stayed with Matthews and defendant in late 2011. She observed defendant calling Matthews "fat," "stupid," and "bitch." On one occasion, Matthews came home from work and was tired. Defendant greeted her by telling her "to get her fat ass in the kitchen and make him something to eat." That friend also observed defendant behaving aggressively toward Matthews, grabbing her and pushing her even when she

told him to stop. This friend became angry with defendant "about him giving advice to my child's father on how to put hands on me." According to this friend, defendant told her he keeps the nails on his pinky and ring finger sharp "so when a bitch get out of line he can grab her by her neck and make her sit the fuck down." Defendant also bragged about a time when police came to Matthews's apartment after a fight and even though she had a black eye, she denied that defendant hit her.

As it turned out, defendant was also seeing several other women. But in January 2012, Matthews told two family members she was pregnant with defendant's baby. She was reportedly happy, but nervous due to prior miscarriages. Defendant continued to contact other women about sex.

On the evening of February 2, 2012, Matthews returned home from work sometime after 5:00 p.m. According to defendant, he was standing at the sink washing dishes when Matthews confronted him about another woman who had been at the apartment that day. Defendant became frustrated and decided to leave the apartment—or perhaps the relationship. He went into the bedroom, grabbed a duffle bag, and started to pack clothing and other items from his dresser drawers. Matthews followed and approached him, closing his dresser drawer with her leg. When defendant said he was leaving, she responded that he "wasn't about to go anywhere." Defendant turned to face Matthews and realized she had a knife in her hand. As they continued to argue, defendant grabbed the knife from Matthews and she slumped backwards, sitting on the corner of the bed. He told her to chill out because it wasn't good for the baby. Then she said "There is no baby ... [I] got an abortion, [and] killed the baby." Defendant then "lashed out" and "cut her." He professed

not to remember any of the other details of the killing but did recall he took the knife to the sink, rinsed it, resumed packing his things, and then left the apartment. He also said he hadn't thought about killing Matthews prior to the argument and that he didn't intend to kill her.

According to the medical examiner, the wound on Matthews's neck was a little over four inches in length. The cut extended from one side of the neck to the other and penetrated the trachea, larynx and neck muscles. The force required to inflict the wound was similar to the force required to cut through the cartilage that separates a chicken thigh and drumstick. Further, due to the force required, some support of the head from behind was necessary, making it likely the wound was inflicted by someone standing behind Matthews. Swabs taken from under Matthews's fingernails matched defendant's DNA.

The wound would have caused blood and other fluids to flow into Matthews's windpipe, eventually causing her to suffocate. Although the medical examiner concluded Matthews was alive when the wound was inflicted, he was unable to say how long it took her to expire, due to the degree of decomposition of the body. She could have died immediately or the process could have taken several hours. Matthews was not pregnant at the time of her death, and the medical examiner found no evidence of a recent miscarriage or abortion.

Just after 8:00 p.m., defendant (who was still in the apartment complex) began texting friends. He first texted R.R., with whom he had a sexual relationship. He exchanged the following series of text messages with R.R. over approximately 20 minutes:

D: WHATS GOOD MA???

R.R.: Hey daddy i miss u so much boo

D: I KNOW MA I MISS YOU TOO…WHAT WOULD U SAY IF I TOLD U I'LL BE COME'N OUT THERE FOSHO MAYBE LIKE IN 2 DAYS??? ;)

R.R.: I will be very happy daddy

D: [HOW] LONG U WANT ME TO STAY OUT THERE WIT U MA???

R.R.: Forever daddy

D: U SURE U WANT THAT MA…CAUSE IM WILLING TO MAKE THAT MOVE RIGHT NOW

[¶] ... [¶]

R.R.: Yeah daddy i would want that but i want to have a place of my own. Then it will become our place daddy.

D: I FEEL THAT MA...I WANT THE SAME…I JUST WANT TO BE WIT U ASAP

R.R.: I want us asap aw well boo. I will be on u like kids on candy daddy

D: I LIKE THAT

R.R.: I knew u would boo boo

After concluding that series of messages, defendant started looking for more immediate accommodations. He contacted long-

time friend Joshua D. Defendant told Joshua D. and another friend, Christopher B., he'd gotten into a fight with Matthews and needed a place to stay. Eventually, defendant drove Matthews's car to Joshua D.'s house and they "chill[ed], played a [video] game, [and] smoked" marijuana. Defendant spent the night at Joshua D.'s house on February 2. Christopher B. said defendant was "acting cool, acting normal." When defendant arrived, he had a duffle bag and a backpack. Although he left Joshua D.'s home the next day, he left the two bags behind. Police later confiscated the bags, which contained men's clothing and shoes, a fake Louis Vuitton valise, and Matthews's cell phone.

Defendant returned to Matthews's apartment on February 3 with Christopher B. and took Matthews's laptop computer and a home theater system (which was still in the box). He pawned the items later that day. That evening, he went to a party and reconnected with an old friend, K.R., who he called "Lady Slim." Defendant met her for lunch on February 5 and slept at her place "a lot" after February 2.

Defendant and Christopher B. went back to the apartment a few days later on February 6, 2012, to remove Matthews's television, which defendant later exchanged for an ounce of marijuana. At some point during these ventures, defendant told Christopher B. and K.R. he caught Matthews having sex with another man in their apartment, so he had broken up with her. Defendant also reportedly said he "slapped his girl up" before he left.

A cousin spoke with Matthews on February 1, 2012. After trying unsuccessfully to reach her for several days, the cousin called defendant's cell phone. When defendant answered, she asked where her cousin was. He hung up on her and then texted

back, "Who is this? I have no service." Her subsequent text messages went unanswered.

Officers responded to Matthews's apartment on February 10, 2012, in response to calls for a welfare check from Matthew's friend, Victor J. Matthews's body was on the bed, partially covered by a comforter. Officers observed no signs of a struggle and nothing seemed out of place in the bedroom. The dresser drawers on the right side were full of women's clothing; the drawers on the left were empty. A serrated knife was found in the kitchen sink.

DISCUSSION

Defendant contends: (1) no substantial evidence supports the jury's finding that he killed Matthews with premeditation and deliberation; (2) the court erred in admitting minimally redacted phone company records documenting his incoming and outgoing text messages; (3) the court further erred in admitting limited testimony about Matthews's close relationship with her friend's son and a photograph of Matthews with the child; (4) his sentence of 56-years-to-life violates the Eighth Amendment's prohibition against cruel and unusual punishment; and (5) section 3051, subdivision (h), violates the equal protection clause of the Fourteenth Amendment because it excludes youth offenders sentenced under the Three Strikes law from the mandatory parole hearing requirement of the statute. We consider, and reject, each argument in turn.

1. The first degree murder conviction is supported by substantial evidence.

1.1. Standard of Review

In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*)

In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard applies where the conviction rests primarily on circumstantial evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) We may not reweigh the evidence or resolve evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) And we may not reverse for insufficient evidence unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

1.2. Analysis

As noted, defendant admitted killing Matthews. He challenges only the jury's finding that he acted with the mens rea required for murder in the first degree. Accordingly, we focus our discussion on that element of the offense.

"Murder is the unlawful killing of a human being with malice aforethought. [Citation.] Malice may be either express or implied. Express malice exists when there is a deliberate intention unlawfully to take away the life of a fellow creature. [Citation.] It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart." (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1263 (*Boatman*).)

A murder which is "willful, deliberate, and premeditated," is murder of the first degree. (§ 189.) " 'By conjoining the words "willful, deliberate, and premeditated" in its definition and limitation of the character of killings falling within murder of the first degree the Legislature apparently emphasized its intention to require as an element of such crime *substantially more reflection* than may be involved in the mere formation of a specific intent to kill.' [Citation.]" (*Boatman, supra*, 221 Cal.App.4th at p. 1264.) Deliberation " ' "means careful consideration and examination of the reasons for and against a choice or measure." [Citation.]' [Citation.] Premeditation 'means "To think on, and revolve in the mind, beforehand; to contrive and design previously." [Citation.]' [Citation.]" (*Ibid.*) " ' "[T]he true test is not the duration of time as much as it is the extent of the reflection." ' [Citation.]" (*Ibid.*)

In considering whether circumstantial evidence is sufficient to support a finding of premeditation and deliberation, courts consider three factors first set forth in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*). These factors are: (1) planning activity; (2) motive; and (3) manner of killing. Traditionally, courts uphold findings of first degree murder when there is evidence of all three types, or extremely strong evidence of type (1), or evidence of (2)

combined with (1) or (3). (*People v. Sanchez* (1995) 12 Cal.4th 1, 32, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) However, the *Anderson* factors simply set forth guidelines for analysis; this is not a strict test. (*Ibid*.) If the *Anderson* factors are not present, a finding of premeditation and deliberation can still be upheld based on substantial evidence from which rational jurors could have found that the killing was the result of preexisting thought and the careful weighing of considerations. (*Boatman, supra*, 221 Cal.App.4th at p. 1270.)

We begin by considering the *Anderson* factors. There is the greatest amount of evidence of the third factor: the manner of killing. The manner of killing can constitute evidence of premeditation when the manner demonstrates "the particular and exacting execution of [a] helpless victim[ ]." (*People v. Crandell* (1988) 46 Cal.3d 833, 868.) Here, the medical examiner stated that the force needed to inflict the wound on Matthews's neck required her head to be supported from behind. In his opinion, Matthews was most likely killed by someone standing behind her, supporting her head. The scratches on defendant's left hand and knuckles were consistent with this scenario: if defendant grabbed Matthews from behind with his left hand so that he could use the knife with his dominant right hand, she could have scratched his left hand during the (apparently brief) struggle. Defendant had the remnants of a scratch on his left hand at the time of his arrest and his DNA was found under Matthews's fingernails. Alternatively, given the position of Matthews's body, the jury may have concluded defendant killed Matthews while she was lying on the bed, relaxing, after coming home from work. She had removed her shoes but was still wearing her work uniform. Under this theory, defendant would

most likely have had to lift Matthews's head and tilt it back, exposing her neck to him, in order to exert the force necessary to cut through her trachea. In either case, Matthews would have had little chance to avoid the single, fatal wound. And defendant's approach, either from behind or from above while Matthews lay on the bed, would have required some consideration in advance.

There is also some evidence of motive, the second *Anderson* factor. During an earlier fight, a neighbor heard Matthews and defendant fighting about money and heard Matthews tell defendant, over and over, to leave. And defendant told police Matthews had kicked him out of her apartment. If the jury believed this evidence, it could reasonably have concluded that defendant killed Matthews because she would no longer provide for him.

Moreover, other evidence may support a finding of premeditation, even when the *Anderson* factors have not been established. For example, evidence of the defendant's conduct after the killing may constitute evidence of premeditation. Specifically, we may consider evidence "inconsistent with a state of mind that would have produced a rash, impulsive killing." (See *People v. Perez* (1992) 2 Cal.4th 1117, 1128.) Here, defendant failed to obtain assistance for Matthews while she lay on the bed gasping for air. Instead, he packed up his belongings and then spent 20 minutes exchanging text messages with a woman with whom he had a sexual relationship, arranging to see her in the coming days. He stayed with friends that night, behaving normally (i.e., playing video games and smoking marijuana), and went to a party the following night. He also returned to the apartment twice during the following week, retrieving

Matthews's possessions so that he could pawn or sell them. That conduct, and the fact that defendant was evidently undisturbed by Matthews's corpse during his visits to the apartment, does not suggest defendant acted rashly and impulsively.

Considering the evidence of two *Anderson* factors, as well as the evidence of defendant's behavior after the crime, we conclude substantial evidence supports the jury's finding of first degree premeditated murder.

2. The admission of defendant's text messages relating to infidelity was not erroneous; any error in admitting other text messages was not prejudicial.

Defendant complains the court erred in admitting phone company records setting forth all incoming and outgoing text messages on his cell phone during the period before and after the murder. Specifically, he contends certain messages containing sexual content or overtones, references to smoking marijuana and socializing, and threats of violence should have been redacted or excluded under Evidence Code section 352. To the extent defense counsel failed to specifically object to the admission of these messages, defendant argues counsel rendered ineffective assistance.

2.1. Standard of Review

Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." " 'Evidence is prejudicial within the meaning of Evidence Code section 352 if it " 'uniquely tends to

evoke an emotional bias against a party as an individual' " [citation] or if it would cause the jury to " ' "prejudg[e]" a person or cause on the basis of extraneous factors' " [citation].' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1331.)

We review a trial court's admission of evidence for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547; *People v. Avitia* (2005) 127 Cal.App.4th 185, 193.) The erroneous admission of evidence requires reversal only if it is reasonably probable that defendant would have obtained a more favorable result had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) " 'Ordinarily, even erroneous admission of evidence does not offend due process unless it is so prejudicial as to render the proceeding fundamentally unfair.' [Citations.]" (*People v. Covarrubias* (2011) 202 Cal.App.4th 1, 20.)

2.2. Prior Opinion

In the appeal after defendant's first trial, we held the wholesale admission of text messages was erroneous because many of the messages were sexually explicit, crude and/or offensive, and had little or nothing to do with the disputed issues in the case, most notably defendant's relationship with Matthews and his state of mind at the time of the murder. We provided some detail about the messages in order to illustrate their shock value and focused particularly on text messages regarding contemplated sex acts with a transgender woman. We concluded: "That defendant was unfaithful with multiple women was undisputed. That he planned to be unfaithful with [Regina,] a man that identified as transsexual added nothing. The particular details of planned mutual fellatio, the possible involvement of a third person, and defendant's thoughts on the relative merits of

giving and receiving anal penetration are relevant to no issues in this case. Moreover, the evidence is clearly prejudicial and likely to evoke an emotional bias against defendant. At a minimum, the cumulative evidence of defendant's graphic sexual exploits or desires took the jury's focus away from the question of what happened and put it squarely on defendant's character. The court abused its discretion in admitting the details of the text messages with Regina." (*People v. Howard*, *supra*, B253031, fn. omitted.)

2.3. Proceedings Below

Before the second trial, defendant brought a motion to exclude all evidence of his infidelity on the ground that "[e]vidence of the defendant's bad character does not prove motive, planning or deliberation concerning the events which occurred on February 2, 2012 but instead proves that the defendant is a lazy, loathsome and despicable ex-convict of low moral character." Focusing on defendant's text messages, the court stated it believed defendant's text messages around the time of the killing were relevant to undermine his claim that he killed Matthews in a heat of passion. In the court's view, the messages, which reflect that defendant was unfaithful with multiple partners and even sought to arrange a sexual liaison immediately after killing Matthews, cast serious doubt on defendant's story. The court agreed that, consistent with our prior opinion, references to sexual liaisons with a man or a transgender woman as well as messages that were "too explicit" should be redacted. The prosecution stated those redactions had already been made. The court indicated to defense counsel that it would be willing to redact additional content from the text messages as irrelevant, explicit, or offensive, and invited counsel to review the prosecution's redacted version and make additional

requests for exclusion or redaction under Evidence Code section 352.

The next day, prior to jury selection, the court asked whether defense counsel wanted to discuss the text messages. But counsel said he had only "briefly" reviewed the text messages and stated, "I essentially object to all of them." He then repeated his argument that the issue of infidelity was irrelevant. The court noted some of the text messages used a pejorative term ("nigga") and asked counsel to confer about whether that term should be redacted. The court also asked counsel to confer at a break and indicated it would consider other specific requests for redaction from defense counsel.

Prior to trial, counsel advised the court they had agreed to redact "nigga" from text messages sent or received by defendant. Defense counsel indicated he had no other requests concerning the messages.

Ultimately, the prosecution offered two exhibits containing defendant's text messages. The first, Exhibit 17, was a redacted version of the exhibit offered during the first trial, and contained text messages sent and received by defendant between January 22, 2012 and February 12, 2012. The second, Exhibit 115, contained the same information but over a longer period of time, December 1, 2011 to February 12, 2012. The exhibits were 51 pages and 105 pages in length, respectively, and each page contains 50 or more text messages in a very small typeface, along with the date and time the message was sent, and the telephone numbers of the sending and receiving phones. Both exhibits contained redactions, but the specific redactions were not identical between the two exhibits. The court admitted both exhibits into evidence in their entirety.

2.4. Analysis

Defendant has combed through Exhibit 115 and identified text messages that contain sexually explicit language, including references to "dick," "pussy," "girl on girl action," "sexy ass," and suggestions of particular sex acts. The messages he identifies were exchanged both before and after the murder, and involved multiple potential or actual sexual partners. Defendant argues the prosecution "should have sanitized these messages in such a manner that would have met its objective of highlighting appellant's ongoing infidelity, but without demeaning him and exposing every single detail about his sex life, none of which apparently involved Matthews." He also suggests certain messages contained homosexual overtones which had no relevance to any issue in the case. Notably, the court gave defense counsel the opportunity to request additional redaction or exclusion of the text messages. But counsel declined to do so, instead standing on his overarching objection that defendant's infidelity was not relevant. Arguably, therefore, defendant has forfeited the issue.[2] (Evid. Code, § 353, subd. (b).)

In any event, the prosecution did redact almost all of the sexually explicit content identified in our prior opinion. And although a close reading of selected text messages identified by defendant reveals some crude and possibly offensive sexual

---

[2] Defendant contends counsel's failure to object constitutes ineffective assistance of counsel. We reject this claim based on our conclusion, *post*, that any error in admitting the text messages was not prejudicial. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697 [claim of ineffective assistance of counsel may be resolved solely by "examining the prejudice suffered by the defendant as a result of the alleged deficiencies"].)

content, the messages he identifies were never read to the jury. This point is relevant because even if the court erred in failing to redact some particularly offensive language (despite counsel's failure to request that it do so), defendant fails to establish any error was prejudicial. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836 [state law error does not warrant reversal unless defendant demonstrates "it is reasonably probable that a result more favorable to [him] would have been reached in the absence of the error"].)

In analyzing whether the erroneous admission of evidence is prejudicial, we consider whether it is reasonably probable that, but for the error, defendant would have obtained a better result at trial. We conclude here that it is extremely unlikely the identified text messages, which were buried amongst more than 5,000 text messages in an exhibit 105 pages in length, and which were never read to the jury, affected the verdict in this case.

Although Exhibits 17 and 115 contained thousands of text messages, the prosecution used a limited number of those messages during trial. Mainly, the prosecution used the text messages to establish a timeline of defendant's movements. In many instances, the specific content of defendant's text messages was not read to the jury.

For example, the prosecution called defendant's friend K.R. as a witness. She testified she and defendant had been friends when they were younger, lost touch, but then started seeing each other again. K.R. couldn't remember the date or time when she first saw defendant again but recalled it was at a gathering of

friends. K.R. remembered giving defendant her phone number[3] at the party and also recalled getting together with him the next day. The prosecutor then showed Exhibit 17 to K.R., who recognized her sister's cell phone number and testified that she began communicating with defendant via text message on February 4, 2012, which was the day after the party. This evidence established defendant's presence at a party on February 3, 2012, the day after the murder. The prosecution used the exhibits in this manner with multiple witnesses.

The prosecution did introduce the content of text messages in selected instances. For example, as discussed *ante*, a witness read to the jury a series of sexually oriented text messages between defendant and a sexual partner exchanged immediately after the murder. But this evidence, and specifically the sexual aspect of the messages, was relevant to undercut defendant's claim that he was in a loving relationship with Matthews and killed her in a fit of rage after she told him she had an abortion. Further, the text messages indicate defendant's conduct immediately after the murder was entirely consistent with his usual behavior.

Defendant complains that the prosecutor, during her closing argument, invited the jury to review Exhibits 17 and 115 in detail during their deliberations. She also referenced, at several points, the fact that the records show defendant was sexually interested in many other people (but, apparently, not Matthews) and generally spent his days hanging out, smoking pot, and pursuing sexual opportunities.

---

[3] K.R. gave defendant the number for her sister's cell phone, which K.R. was using at that time.

We have two responses on this point. First, it is unlikely the jury combed through Exhibit 17 or 115 line by line during its deliberations, as they deliberated less than five hours. The messages defendant focuses on, as we have said, were not read to the jury but were buried in a lengthy exhibit, Exhibit 115, containing more than 5,000 text messages.

Second, although it may be true, as defendant argues, that some of the text messages tend to paint him as a " 'lazy, loathsome and despicable ex-convict of low moral character' " with no job and who " 'spent his days at home, smoking marijuana, entertaining friends and engaging in sexual relations,' " that fact alone does not justify their exclusion. Instead, we consider whether this evidence was *unduly* prejudicial, such that its negative impact substantially outweighs its probative value. " ' "Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of undue prejudice. Unless the dangers of *undue* prejudice, confusion, or time consumption " 'substantially outweigh' " the probative value of relevant evidence, a section 352 objection should fail. [Citation.] … The prejudice that section 352 " 'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" [Citation.]' " (*People v. Doolin, supra,* 45 Cal.4th at

pp. 438–439, second and final brackets added.) Here, defendant's text messages were relevant to show his state of mind immediately after the killing, as well as his state of mind as it concerned his relationship with Matthews before the killing. His extensive efforts to have sexual relations with people other than Matthews is relevant on that point and is not outweighed by the prejudicial impact of the crude manner in which he made such efforts.

3. The court did not err by admitting limited testimony and one photograph relating to the victim's relationship with a friend's child.

Defendant next argues the court erred in allowing testimony that Matthews had a close relationship with Victor J. and his son, and admitting into evidence a photograph depicting Matthews with the child. He asserts this evidence inappropriately generated sympathy for Matthews and tended to encourage the jury to decide the case on the basis of emotion rather than fact. As noted, we review the admission of evidence under Evidence Code section 352 for abuse of discretion. (*People v. Brown*, *supra*, 31 Cal.4th at p. 547; *People v. Avitia*, *supra*, 127 Cal.App.4th at p. 193.)

The testimony at issue was extremely brief. Victor J. testified that he had a 12-year-old son, D.J. Victor J. and Matthews were romantically involved from 1995 to 2000, and then resumed their relationship in 2003. By that time, D.J. had been born. At this point in Victor J.'s testimony, defense counsel objected to the prosecution's focus on Matthews's relationship with Victor J.'s son on the basis that it tended to garner sympathy for Matthews. The court overruled the objection stating the general relationship was relevant to explain why Victor J.

called the police after he was unable to reach Matthews, but advised counsel to "establish that pretty quickly and then move on to what's relevant." The prosecutor then asked Victor J. about Matthews's relationship with D.J., and Victor J. said she was his "stepmother." Victor J. then briefly explained that in February 2012, he and Matthews had arranged to buy shoes for D.J. and attend his basketball game. He became concerned when Matthews did not meet him as arranged either to purchase the shoes or to attend the game. Victor J. tried to contact Matthews but when she didn't respond, he contacted family members. Eventually, Victor J. contacted law enforcement.

During his testimony, Victor J. identified a photograph of Matthews with his son and a photograph of Matthews's nightstand, which had a framed photo of D.J. on it. It appears the prosecutor displayed the photograph of Matthews and D.J. briefly during closing argument as she explained that friends and family members were unable to locate Matthews during the days after the murder.

We see no error in the court's admission of the limited evidence concerning Matthews's relationship with D.J. The evidence was relevant, as it provided context for Victor J.'s involvement in the discovery of Matthews's body. In any event, the limited nature of the evidence itself and the restrained manner in which it was used by the prosecution make it extremely unlikely that the evidence had a significant impact on the jury.

4. Defendant's sentence of 56-years-to-life does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

4.1. Background Legal Principles

Over the last twenty years or so, the United States Supreme Court and the California Supreme Court have explored the constitutional limits on the government's power to punish juveniles tried as adults. Specifically, these courts considered the degree to which the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution requires states to provide juvenile offenders (youths under the age of 18 at the time of the commission of the offense) a meaningful opportunity to rejoin society after serving a prison term, particularly in light of the increasing awareness that there are fundamental differences between juvenile and adult minds which may in some sense, and in some instances, render juveniles less culpable of the crimes they commit.

In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court held the imposition of the death penalty on a juvenile offender constitutes cruel and unusual punishment, prohibited by the Eighth Amendment. (*Id.* at pp. 568–575.) On the same grounds, the high court subsequently invalidated a sentence of life without the possibility of parole (LWOP) for a juvenile offender convicted of a nonhomicide offense. (*Graham v. Florida* (2010) 560 U.S. 48, 82.) The court later extended *Graham*, holding that a mandatory LWOP sentence on a juvenile offender convicted of murder also violated the Eighth Amendment. (*Miller v. Alabama* (2012) 567 U.S. 460.)

Relying on these cases, the California Supreme Court, in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*),

invalidated, on Eighth Amendment grounds, a "de facto LWOP" sentence for a juvenile offender in a nonhomicide case—i.e., a determinate sentence so long that the term falls outside the juvenile offender's life expectancy. The court observed:

> "The high court stated that nonhomicide crimes differ from homicide crimes in a 'moral sense' and that a juvenile nonhomicide offender has a 'twice diminished moral culpability' as opposed to an adult convicted of murder—both because of his crime and because of his undeveloped moral sense. (*Graham*, *supra*, 560 U.S. at p[p. 69–70].) The court relied on studies showing that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. [Citations.] Juveniles are [also] more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults.' (*Id.* at p. [68], quoting *Roper v. Simmons* (2005) 543 U.S. 551, 570.) No legitimate penological interest, the court concluded, justifies a life without parole sentence for juvenile nonhomicide offenders. (*Graham*, at p[p. 74–75].)
>
> "Although the state is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, *Graham* holds that the Eighth Amendment requires the state to afford the juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' and that '[a] life without parole sentence improperly denies the

> juvenile offender a chance to demonstrate growth and maturity.' (*Graham, supra*, 560 U.S. at p. [73].) The court observed that a life without parole sentence is particularly harsh for a juvenile offender who 'will on average serve more years and a greater percentage of his life in prison than an adult offender.' (*Id*. at p. [70].) *Graham* likened a life without parole sentence for nonhomicide offenders to the death penalty itself, given their youth and the prospect that, as the years progress, juveniles can reform their deficiencies and become contributing members of society. (*Ibid*.)"

(*Caballero, supra*, 55 Cal.4th at p. 266.)

Most recently, the California Supreme Court extended the reasoning of *Graham* and *Miller* to de facto LWOP sentences in homicide cases: "We now hold that just as *Graham* applies to sentences that are the 'functional equivalent of a life without parole sentence' (*Caballero, supra*, 55 Cal.4th at p. 268), so too does *Miller* apply to such functionally equivalent sentences. As we noted in *Caballero*, *Miller* 'extended *Graham*'s reasoning' to homicide offenses, observing that ' "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." ' (*Caballero*, at p. 267, quoting *Miller, supra*, 567 U.S. at p. 473.) Because sentences that are the functional equivalent of LWOP implicate *Graham*'s reasoning (*Caballero*, at p. 268), and because ' "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile" ' whether for a homicide or nonhomicide offense (*id*. at p. 267, quoting *Miller, supra*, 567 U.S. at p. 473), a sentence that is the functional equivalent of LWOP under *Caballero* is subject to the strictures of *Miller* just as it is subject

to the rule of *Graham*. In short, a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*." (*People v. Franklin* (2016) 63 Cal.4th 261, 276 (*Franklin*).)

Franklin also recognized that many of the concerns at issue in these recent cases were addressed by the Legislature when it enacted Senate Bill No. 260 (Stats. 2013, ch. 312, § 4), which added sections 3051, 3046, subdivision (c), and 4801, subdivision (c), to the Penal Code. According to the Legislature, " '[t]he purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* [(2012) 567 U.S. 460] ... . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.' " (*Franklin*, *supra*, 63 Cal.4th at p. 277, quoting Stats. 2013, ch. 312, § 1.)

Senate Bill No. 260 requires the Board of Parole Hearings to conduct a " 'youth offender parole hearing' " during the 15th, 20th, or 25th year of a juvenile offender's incarceration. (§ 3051, subd. (b).) The date of the hearing depends on the offender's "controlling offense," which is defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (*Id.*, subd. (a)(2)(B).) Although the statute initially applied only to offenders under the age of 18, the

Legislature subsequently amended the statute and associated Penal Code provisions so they now apply to offenders sentenced to state prison for crimes committed when they were under 26 years of age. (Stats. 2015, ch. 471, § 1 [amended to apply to offenders under 23 years of age]; Stats. 2017, ch. 675, § 1 [26 years of age].) As pertinent here, however, the statute excludes several categories of juvenile offenders from eligibility for a youth offender parole hearing, including those who are sentenced under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12). (§ 3051, subd. (h).)

4.2. Defendant's sentence of 56-years-to-life does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Defendant was 21 years old at the time of the murder. Nevertheless, he contends his 56-years-to-life sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment. Defendant cites *Caballero* and asserts his sentence is a de facto LWOP sentence. He then argues "[t]here is no sound reason not to apply the rationale of *Caballero*" in his case. In other words, defendant asks us to extend the reach of the juvenile offender jurisprudence summarized above to persons under the age of 22 (as opposed to 18) at the time of the offense.

As defendant concedes, his counsel did not raise this issue below. In any event, the United States Supreme Court has approved the classification of juveniles as those offenders under the age of 18 years:

> "Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the

> same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."

(*Roper v. Simmons*, *supra*, 543 U.S. at p. 574.)

In light of the high court's conclusion, we decline defendant's invitation to apply the constitutional protections afforded to juvenile offenders under the Eighth Amendment here.

4.3. Section 3051, subdivision (h), does not violate the equal protection clause of the Fourteenth Amendment.

Defendant's final (and very brief[4]) argument is based on the equal protection clause of the Fourteenth Amendment, which guarantees to all persons equal protection under the law. As noted, section 3051 now provides most youth offenders who were under the age of 26 at the time they committed their criminal offense with a parole eligibility hearing after a maximum of 25 years of incarceration. (§ 3051, subd. (b).) But the Legislature excluded several categories of offenders from the statute's

---

[4] Defendant's opening brief, which is 122 pages in length, devotes a mere four pages to this broad constitutional challenge.

mandatory parole hearing provision including offenders who, like defendant, are sentenced under the Three Strikes law. (§ 3051, subd. (h).) Defendant argues this exclusion violates the equal protection clause because it treats differently persons he contends are similarly situated—youthful offenders convicted of the same underlying offense—based on the presence or absence of a prior strike conviction.

In order to succeed on his equal protection claim, defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836; *People v. Bell* (2016) 3 Cal.App.5th 865, 876, review granted Jan. 11, 2017, see Cal. Rules of Court rules 8.1105(e)(1)(B) and 8.1115(e) [212 Cal.Rptr.3d 134] (*Bell*).) The People assert defendant fails to meet that threshold burden here, inasmuch as a youth offender with a prior strike conviction is, by definition, not similarly situated to a youth offender with no prior conviction(s). In support of that argument, the People cite *People v. Jacobs* (1984) 157 Cal.App.3d 797 (*Jacobs*), in which the Court of Appeal concluded recidivist offenders are not similarly situated to first-time offenders. But there, the court considered a constitutional challenge to section 667—a statute designed to protect public safety by " 'discouraging persons who commit serious felonies from doing [so] again.' " (*Jacobs*, at p. 803) Thus, with respect to the stated purpose of that statute, the two classes were not similarly situated. Here, by contrast, defendant challenges a statute designed to provide youth offenders with an opportunity to demonstrate whether they should rejoin society after an extended term of imprisonment. With reference to that purpose, it would appear all youth offenders (recidivist or not) are

similarly situated. We therefore conclude defendant met his threshold burden.

We disagree with defendant, however, concerning the appropriate standard of review to be applied. Relying on *People v. Olivas* (1976) 17 Cal.3d 236, defendant contends we must apply the highest level of scrutiny—strict scrutiny—which requires a showing that the classification bears a close relationship to a compelling state interest, is necessary to achieve the state's goal, and is narrowly drawn to reach that goal by the least restrictive means possible. (See *Bell, supra*, 3 Cal.App.5th at pp. 876–877.) But as our colleagues in Division Eight of this court explained, the deferential rational basis test is applicable to legislative sentencing choices. (*Ibid*., citing *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*) [applying rational basis test where defendant challenged statute requiring mandatory rather than discretionary sex offender registration for his offense].)

"When applying the rational basis test, ' "we must accept any gross generalizations and rough accommodations that the Legislature seems to have made." [Citation.] "A classification is not arbitrary or irrational simply because there is an 'imperfect fit between means and ends,' " [citation], or "because it may be 'to some extent both underinclusive and overinclusive.' " [Citation.]' (*Johnson, supra,* 60 Cal.4th at p. 887.) 'At bottom, the Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses.' (*Ibid.*)" (*Bell, supra,* 3 Cal.App.5th at p. 878.)

Although defendant half-heartedly asserts "there is no legitimate state purpose" in treating recidivist youth offenders differently than first-time youth offenders, he concedes "punishment and incapacitation to prevent recidivism are

compelling state interests that may serve as a basis for the infliction of disparate penalties on similarly situated groups of offenders." (E.g., *People v. Leng* (1999) 71 Cal.App.4th 1, 14, ["The well-recognized purpose of the three strikes law is to provide increased punishment for current offenders who have previously committed violent or serious crimes and have therefore not been rehabilitated or deterred from further criminal activity as a result of their prior imprisonment"].) Moreover, in *Bell*, the Court of Appeal rejected an equal protection challenge to the exclusion of One Strike offenders from section 3051, noting that "the threat of recidivism gives rise to a rational basis for the Legislature's decision to exclude one strike offenders from section 3051." (*Bell, supra*, 3 Cal.App.5th at p. 879.) The court also surmised the Legislature "had recidivism in mind" because the statute excludes Three Strikes offenders. (*Ibid.*) We agree with our colleagues and conclude defendant has not demonstrated that his disparate treatment runs afoul of the equal protection clause.

We acknowledge defendant's general point, however. The fundamental principles underlying section 3051—the recognition that offenders who are not yet neurologically developed at the time they commit a criminal offense should have a reasonable opportunity to demonstrate rehabilitation after an extended period of incarceration—sit in some tension with the unavailability of that opportunity for a recidivist youth offender. The characteristics of youth that counsel in favor of providing a mandatory parole hearing would be present whether the offender commits one—or more than one—offense during his or her youth. The Legislature could reasonably consider whether the opportunity for a hearing (at which the circumstances of the prior convictions would be considered) might be appropriate in all

youth offender cases. But as we have often noted, that is a question best left to the Legislature's sound discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.