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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CAMERON BROWN, Defendant and Appellant.	B267336 (Los Angeles County Super. Ct. No. BA255206)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli, Judge. Affirmed as modified.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

In 2015, a jury found defendant and appellant Cameron Brown guilty of the first degree murder of his four-year-old daughter, Lauren Key. The jury found true the special circumstance allegations that the murder was intentional and carried out for financial gain, and that it was committed by means of lying in wait. Brown had been tried twice before. The two previous proceedings resulted in mistrials due to deadlocked juries.[1]

On appeal, Brown contends the third trial was barred by the prohibition against double jeopardy. He further argues the judgment must be reversed because of erroneous trial court evidentiary rulings, prosecutorial misconduct, and ineffective assistance of counsel. We strike the parole revocation fine but otherwise find no reversible error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

Brown and Sarah Key met and began dating in November 1995.[2] Brown was a baggage handler for an airline. After around one month of dating, Key-Marer learned she was

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[1] At the first trial in 2006, the jury was divided with two jurors voting for manslaughter, two for first degree murder, and eight for second degree murder. As discussed in further detail below, at the second trial in 2009, the jury was again divided with votes for involuntary manslaughter, second degree murder, and first degree murder.

[2] Key married in 1997 and changed her name to Sarah Key-Marer. For clarity, we hereinafter refer to her by her married name.

pregnant with Brown's child. Brown wanted Key-Marer to have an abortion. She refused. Brown would not discuss the pregnancy. In February or March 1996, the two stopped seeing each other. Key-Marer, a British citizen, was working in the United States without authorization. In or around April 1996, Brown told Key-Marer he had called immigration services to have her deported.

Brown told several friends and acquaintances about Key-Marer's pregnancy and his request that she have an abortion. He also told several people he had tried or would try to have Key-Marer deported and he did not want to be responsible for the child. An acquaintance overheard Brown saying "he didn't want to pay child support. He wanted to know how he was going to get out of this. He didn't want the child. He just wanted to be done with it."

In August 1996, Key-Marer gave birth to Lauren Key. Key-Marer did not contact Brown and did not hear from him. Key-Marer feared that if she contacted Brown he would try to get her fired. A human resources officer at her job had told her previously that the company received an anonymous telephone call accusing Key-Marer of stealing from the company. Key-Marer recognized the telephone number—it was for Brown's grandmother's house.

In April 1997, Key-Marer requested child support from Brown through the Orange County District Attorney's office. In February 1999, the family law court ordered Brown to pay over $1,000 per month in child support. His wages were garnished. Brown was upset at having to pay child support and did not "like the amount he was going to have to pay."

By July 1999, Brown had neither met almost three-year-old Lauren nor expressed interest in having any contact with her. However, around that time he filed for joint legal custody, visitation, and a reduction in his child support obligation. Brown told a friend he had learned that to reduce his child support payments he should try to get visitation with Lauren. In November 1999, Brown began having supervised visits with Lauren.

Brown told a work acquaintance that as long as he was paying child support he might as well " 'go get the kid.' " The acquaintance understood this to be a "jab" at Key-Marer, or a way to "torture" her. The two men commiserated about paying child support. Around three times Brown told this acquaintance, "wouldn't it be nice if we could just get rid of the kid–kids." Brown appeared to be serious. The acquaintance distinctly remembered these statements because "most men talk about killing the mother, rarely do they talk about killing the kid. . . . Nobody talks about getting rid of the kid. Getting rid of the mother, I've heard; but getting rid of the kid? After about the third time, you're like, oh, wow. . . . " The acquaintance and Brown "tried to come up with some scenarios to get rid of the kids." Although the acquaintance would agree " 'it would be kind of nice to get rid of the child support, get rid of the kids,' " he was actually thinking, " 'Really? Are you really saying that?' " and he "thought [Brown] was crazy."

When Brown began visitation with Lauren, Key-Marer told Brown she wanted Lauren to get to know Brown's mother. Brown angrily said his mother was "a bad lady" and opposed Lauren visiting her. When Brown and Key-Marer were dating, he told her he hated his parents. Key-Marer contacted Brown's

mother on her own and arranged for Lauren to visit her. Although Brown's mother and Lauren appeared to develop a loving relationship, Brown made negative comments about his mother in Lauren's presence, such as that she was a "bad lady" and a liar. Brown and Key-Marer argued because she asked him not to make such comments in front of Lauren. The relationship between Brown and Key-Marer grew more tense.

In January 2000, a court temporarily reduced Brown's child support obligation to $250 per month, based on Brown's sworn testimony that he was not working. In February 2000, Key-Marer spoke with Brown about the possibility of her husband adopting Lauren. Key-Marer told Brown the adoption would relieve him of any further financial obligation for Lauren. Brown agreed. He later told Key-Marer he intended to move north with his girlfriend, Patricia Kaldis, and he wanted the adoption completed in one month. Brown said if the adoption did not happen within a month it would not happen. Around one month later, Brown married Kaldis.

During a visit with one of Brown's friends, Kaldis said she and Brown were going to try to get full custody of Lauren because Key-Marer had abused her. Brown did not say anything or make eye contact with the friend. The friend found the situation odd. A few months later, Brown called the friend and told him he and Kaldis would be moving to Utah. Brown seemed happy and excited. He explained that Key-Marer's husband was going to adopt Lauren so he would no longer have child support obligations.

At the time, Brown's request for a reduction in child support was pending. Key-Marer's response to the request included a declaration in which she stated Brown showed little

interest in Lauren, he did not have a good relationship with his parents, and Brown had agreed that Key-Marer's husband could adopt Lauren. In March 2000, the court reinstated the full child support amount based on documentation indicating Brown was still earning $4,000 per month.

After the hearing on the child support reduction request, Brown angrily confronted Key-Marer in the courthouse hallway. Brown told Key-Marer: "What goes around comes around," "I'll get you for this," and that she was just like his mother. Key-Marer was scared. Brown told her not to speak to him. From that point on, Brown no longer spoke to Key-Marer when he dropped Lauren off after his visits. His demeanor toward Key-Marer was angry and aggressive. Around this time, Lauren told Key-Marer: " 'You're going to jail. You're stealing money from [Brown].' " Lauren also told a family friend and babysitter: " 'My Papa Camy [Brown] is going to put my mommy in jail.' "

In June 2000, Lauren began having overnight visits with Brown and Kaldis. On one occasion, Kaldis arrived at Key-Marer's home to pick up Lauren for a visit. When Key-Marer asked where Brown was, Kaldis "knelt down on one knee and put her arms out and said to Lauren 'Come to Mommy.' " At some point, Kaldis wrote Brown a note, instructing him to ask for sole legal and physical custody of Lauren. She wrote: "If they tell you that you don't have a good chance of getting it, tell them you want to go for it any way."[3] After overnight visits began, Brown

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[3] The prosecution argued Kaldis was too old to have children of her own and "wanted Lauren for herself." The prosecution theory was that Brown wanted the adoption to occur before he married Kaldis, and he was angry about Key-Marer's declaration because, at that point, Kaldis knew about the adoption and

accused Key-Marer of physically abusing Lauren. The Department of Children and Family Services determined the abuse allegations were unfounded.

In June 2000, Brown again filed a request for a reduction in child support and a 50 percent custody timeshare. Key-Marer grew concerned for Lauren's safety. When Key-Marer conveyed a message to Brown from his mother, he responded "with something to [the] effect that he wanted to go to [his mother's] funeral, he didn't care if she died." This caused Key-Marer "concern for Lauren's safety because he was so abusive in his speech about his mother." After unsupervised visits began with Brown, Key-Marer noticed that Lauren was more upset, anxious, and withdrawn around the time of the visits. Lauren repeatedly told Key-Marer she did not want to go on the visits.

An employee of the preschool Lauren attended noticed that when Brown arrived at the school to pick Lauren up, she would hide behind the teachers. The employee observed Brown tell Lauren, "Come on, let's go," in a loud, angry voice. She also observed Brown grabbing Lauren by the hand or arm in a forceful way. The employee suggested to Brown that pickup might go more smoothly if Brown brought a toy or candy. Brown responded that the employee was not Lauren's mother and she should not tell him what to do.[4]

Brown was "stuck." He "knew that there was no way that [Kaldis] was going to agree to give up Lauren and allow her to be adopted."

[4] On cross-examination, this witness admitted she had previously told a detective there were times Brown picked Lauren up from school and everything was fine.

November 8, 2000

On November 8, 2000, Brown picked Lauren up from preschool for a regularly scheduled visit.[5] Lauren had cried all morning and was "frantic" all day. Brown picked her up a short time after noon. He took Lauren to a beach area in Rancho Palos Verdes. When they arrived at a parking lot area, Lauren was sitting in the front seat of the car and was not wearing a seat belt or any other safety restraint. The employee at the parking lot booth noticed Lauren was "extremely still," in contrast to most children the employee had seen who were excited to be at the beach. The employee wondered if Lauren was being kidnapped.

Individuals in the area saw Brown and Lauren on trails leading to Inspiration Point. Lauren was walking several feet behind Brown. To one witness, Lauren seemed tired and out of breath. She was dragging behind Brown. Witnesses testified they had never seen a child on the trails near or on Inspiration Point before; one indicated he himself had only hiked the point once because he found it "loose" and "unstable." One witness recalled that 30 to 45 minutes after he saw Brown and Lauren on the trail, he heard a faint scream coming from the Inspiration Point area that he thought may have been the cry of a seagull.

Jeremy Simmons was sitting on the beach when he heard Brown calling out, asking if anyone had a cell phone. Brown said his daughter had fallen or slipped off the cliff. Brown seemed upset but not frantic. Simmons let Brown use his phone.

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[5] The internet browsing history from computers seized from Brown and Kaldis's residence suggested that while Brown was picking Lauren up from preschool on the day of the incident, Kaldis was visiting websites regarding the custody rights of fathers.

Simmons noted Brown's eyes were wet but his voice was "casual" as he called 911.[6] Simmons began to wonder whether Brown was engaging in a scheme to take Simmons's belongings. Eventually, Brown returned the phone and went back up the trail.

Firefighters and paramedics responded to the call. Brown led them to Lauren's body, which was lying on a picnic table near an archery range. Although Brown said he had been performing CPR on Lauren, the responding fire captain did not see blood or biological material on Brown's facial hair. Brown seemed dazed, calm, and detached. Lauren was pronounced dead at the scene.

Brown's Statements on the Night of the Incident

1. Statement to Fire Captain

The fire captain asked Brown what happened. Brown said he was on Inspiration Point with Lauren, she was throwing rocks, he turned around, and when he turned back she was gone. Brown reported he yelled for help, then he looked over the cliff and saw Lauren in the water. He left the point to find a phone to call 911. After making the call, Brown took a trail out to the cliff and saw Lauren in the water next to rocks. He picked her up, carried her to a picnic bench, started CPR, and waited for help. The fire captain noted Brown did not appear upset. He had never seen a parent react in this way to the loss of a child.

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[6] On cross-examination, Simmons testified that when he listened to the 911 call, he thought Brown seemed less frantic in the recording than Simmons remembered. The jury heard a recording of the 911 call. At one point during the call, Brown told people nearby they might want to get dressed—the beach was a nude beach—because emergency personnel would be arriving soon.

2. Statements to Sheriff's Deputy and Lieutenant

When Los Angeles County Sheriff's deputies arrived, they too asked Brown what happened. Brown told Deputy Jessica Brothers when he and Lauren arrived at the beach area, she played on swings at a playground for around 20 minutes, then they hiked toward Inspiration Point. Brown reprimanded Lauren for throwing rocks on the trail and going close to the edge of the cliff. When Brown and Lauren arrived at Inspiration Point around 15 minutes later, she was throwing rocks, then "suddenly she was gone." Brown did not see her go over the cliff. After finding a phone and calling 911, Brown went to the other side of Inspiration Point, stripped to his underwear, and retrieved Lauren's body from the water. He placed Lauren's body on some rocks, removed his wet underwear, and re-dressed. He then carried Lauren over his shoulder to a picnic table and attempted CPR. There was no blood on Brown's facial hair, but Brothers saw blood and "biological material" on the back of his shirt.

Los Angeles County Sheriff's Department Lieutenant Richard Erickson testified he asked Brown to walk him to the scene and explain what happened. Brown told Erickson what he told Brothers, with minor variations. Brown told Erickson that when he and Lauren got to the top of Inspiration Point, he sat on a rock to rest while Lauren continued to walk toward the edge of the cliff and began to play around, throwing rocks off the cliff. Brown warned Lauren to get away from the edge of the cliff. However, he turned his gaze away from her so she was out of view and "at some point he heard some sort of shuffling that sounded like loose gravel, and at that point he turned and noticed that she was no longer visible." Erickson found Brown to be unusually calm as he recounted what happened. The only

emotion Erickson observed was after their walk. Brown sat on the picnic table, put his head in his hands, and let out a heavy sigh.

As Brown spoke to the deputies, his demeanor was matter of fact. Brown volunteered that Lauren had been enjoying herself. He tried to give Deputy Brothers a disposable camera with pictures he had taken that day. When media helicopters began flying overhead, Brown said he did not want to be filmed. He asked that someone call his wife to let her know he would be late. He did not want Kaldis to find out about what happened on television, but he did not express concern that Key-Marer might find out that way. Brown did not attempt to approach Lauren's body or say goodbye. He put his head in his hands two or three times and appeared to sob, but Brothers saw no tears. Brown complained about his boots being wet. He also asked Brothers if she knew who had won the presidential election.

3. Statement to Detective Leslie

Detective Jeffrey Leslie interviewed Brown. At the scene, Brown appeared indifferent. When Leslie asked Brown to go to the Lomita police station, Brown agreed but expressed concern that he would be seen by the media and that a surfboard on top of his car would be stolen if he left the car parked where it was.

Brown described the incident to Leslie as follows. Lauren played at the playground at Abalone Cove for around 20 minutes. Then she wanted to go on a hike. Lauren had so much energy that Brown struggled to keep up with her. She led the way to Inspiration Point while Brown followed. Lauren went out to the end of Inspiration Point toward the ocean.

Brown then gave three different versions of what happened next. First, Brown said he and Lauren were four feet from the edge of the cliff. Brown was seated. As Brown was looking to his left, he heard a nervous "ah," and when he looked to the right, Lauren was gone. She had been off to his right side. The second time, Brown said he was looking off to his left, Lauren was on his right, he heard an "oh," and he looked back in time to see her going over the cliff head first. He saw her feet going over. The third time, Brown said he was pointing off to the left, he heard a nervous "oh-oh," and when he looked back he saw Lauren with her arms going forward. He saw the left side of her body and back as she went over the edge of the cliff. Brown displayed no emotion as he recounted the incident.

Brown told Leslie he could not see Lauren when he looked over the edge of the cliff, contradicting what he told the fire captain at the scene. He did not tell Leslie he heard a slipping or sliding sound. He told Leslie that after calling 911, he ran back up the west side of Inspiration Point, but the detective noted there were no physical indications Brown had done so, such as cuts, abrasions, or scuff marks on his clothes. Brown said he was running as hard as he could but was also watching his step. Brown explained he took the time to remove his clothes before going into the water after Lauren because he had seen it on *Baywatch*, and he did not want to be cold or wet later on. He told Leslie he performed CPR on Lauren for around one minute, then removed his wet boxer shorts and put his dry clothes back on. He picked Lauren up, placed her over his shoulder, ran back toward the archery range, placed her body on a table, and "straightened her up."

Brown told Leslie he may have called Lauren's name after she went off the cliff but he did not yell for help from the top of the cliff. When Leslie asked why Brown would take his four-year-old daughter to such a dangerous place, Brown said "the whole place is dangerous." Brown's demeanor during the interview was indifferent, unemotional, and matter of fact. Leslie told Brown he was responsible for his daughter; Brown responded: " 'It's not my fault. She's the one who wanted to go out there. I just followed her.' " When Leslie told Brown he found it strange Brown showed no emotion, Brown said he was emotional earlier and had been unable to stop crying on the 911 call. However, Leslie was struck at the lack of urgency in Brown's voice on the 911 call. Brown adamantly denied having any physical contact with Lauren when she went over the cliff.[7]

Brown's Conduct/Statements After the Incident

The day after Lauren's death, one of Brown's friends, Scott Simonson, called Brown. When Brown answered the phone, he addressed Simonson by saying, "Hey dude, what's up." Brown's casual words and tone of voice did not seem right to Simonson. Simonson expressed his condolences; Brown responded: " 'Yes, it was a terrible accident,' and . . . 'I was there with her and I turned around and next thing I know, she's falling off the cliff . . . but, you know, I can't let this ruin the rest of my life, I have to move on.' " Simonson found it strange Brown did not seem upset or concerned about what had happened.

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[7] The interview was not recorded. Leslie testified he and his partner felt pressed for time. Brown's father had indicated Brown's lawyer was en route to the station and the detectives wished to get a statement. No video-recording facilities were available at the Lomita station, thus Leslie went forward with the interview without a recording device.

Although Key-Marer repeatedly called Brown to ask him what had happened, he never returned her calls or gave her any information about how Lauren died. On one call, Brown answered but acted as if he could not hear Key-Marer, repeating, "Hello? Hello?" Key-Marer heard Brown chuckling in the background. In January 2001, Key-Marer went to the parking lot at Brown's workplace, while wearing a recording device provided to her by law enforcement. Key-Marer pleaded with Brown to tell her what happened on Inspiration Point. Brown said he could not talk to her because his lawyer said he could not. As Key-Marer grew increasingly agitated, Brown repeated that he could not talk to her, then he rode away on his motorcycle. Brown subsequently made a false report to police, accusing Key-Marer of threatening to kill him during their interaction.

Additional Evidence at Trial

The People offered evidence regarding Brown's finances. On the day Lauren died, Brown had a total of $96.21 in his three checking accounts, negative credit activities, accounts that had gone to collection agencies, and three tax liens. Kaldis also had past due debts and had been terminated from her employment.[8]

The People also offered the testimony of Freda Clifford, a woman who dated Brown in 1986. Clifford described Brown as controlling, selfish, and manipulative. On one occasion, when Brown was unhappy that Clifford had gone to Denver without him, she returned to find that Brown had thrown her possessions over a cliff that was 20 yards away from the cabin where they were living. He once smashed his car into Clifford's car, damaging it. Clifford was not present, but Brown later admitted

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[8] Kaldis had additional financial resources that were in her name only.

he had damaged her car. Clifford was afraid of Brown and ended the relationship soon after. Brown never confronted Clifford directly with any anger he had towards her; his approach was always indirect. Brown's friend Scott Simonson also testified about incidents in which Brown displayed anger, such as when he made angry comments to his father, insulted a former girlfriend during an argument, and threatened to beat up a neighbor.

Prosecution witnesses testified Lauren was generally obedient, cautious, careful in new and unfamiliar situations, and not adventurous. According to Key-Marer, Lauren did not like walking and still rode in a stroller at four years old. During a church camping trip in August 2000, Lauren refused to go hiking. A friend of Key-Marer's who frequently babysat Lauren testified Lauren once got scared on a seven-foot play structure and would not come down. The witness also recalled Lauren was afraid of the water and wanted to be held on walks to the park or around the mall, even at three and a half years old. After visiting Inspiration Point following Lauren's death, the witness did not believe Lauren would have voluntarily gone there. Key-Marer likewise did not believe Lauren would have initiated a hike to Inspiration Point.

Law Enforcement Investigation

On November 9 and November 10, law enforcement officials returned to Inspiration Point to gather evidence and document the crime scene, including by rappelling over the cliff. They did not locate any blood, biological material, hairs, fibers, or points of impact on the side of the cliff. They also did not discover physical evidence of a person slipping and falling off the cliff, such as twigs rubbed off the hill, slide marks, slips marks, or vegetation or twigs disturbed by the edge of the cliff. They did

discover a set of impressions or depressions near the edge of the cliff, as discussed in greater detail below.

Prosecution Expert Opinions

1. Berkowitz

In March 2001, a group of experts and detectives returned to the scene, including pediatrician Carol Berkowitz, one of the People's expert witnesses, Ogbonna Chinwah, the deputy medical examiner who performed the autopsy, and the then-Coroner for Los Angeles County, Dr. Lakshmanan. Berkowitz and two detectives hiked the route they believed Brown and Lauren took on the day of the incident. Berkowitz, who had run marathons, found the approximately 50-minute hike to be strenuous.

Based on her education, professional experience, training, and experience of doing the hike, Berkowitz found not credible Brown's claim that Lauren led him on the hike at such a brisk pace that he could barely keep up. Berkowitz opined that after 20 minutes of playing at the playground, most four-year-old children would be a little tired. Though the child might go racing off on a hike, it would be difficult for her to sustain that level of energy on such rugged terrain. Berkowitz further noted Lauren had recently returned from overseas, introducing an element of jet lag, and she had been crying that morning, which would have affected her overall energy level. Berkowitz's determination was also based on the terrain and degrees of elevation. She opined even "22 minutes of walking" in the area would be challenging for a four year old.

Berkowitz concluded Lauren would not have initiated the hike and, if she hiked for a short period of time, she would not have had the stamina or interest to complete the hike on her own. Berkowitz opined Lauren would have completed the hike

only with assistance, such as being carried or out of fear or coercion.

2. Chinwah

Dr. Chinwah testified regarding the injuries he found on Lauren's body, which included abrasions, contusions, lacerations, extensive skull fracture, and neck dislocation.[9] He concluded the cause of death was blunt force trauma. Chinwah further opined Lauren's death was a homicide, based on her multiple injuries and the circumstances surrounding the injuries. He testified the injuries were not consistent with slipping and sliding, but were consistent with a drop from a height and "impacting something below."

Chinwah admitted he was unable to make a determination as to the manner of death based on Lauren's injuries alone. As a result, he relied in part on his observations from his visit to the scene. He explained that if someone were to fall from the edge of the cliff, the person's body would sustain significant injuries before the final impact. "Because if you fall, you would make some attempt to – to rescue yourself from falling, and so you would be grabbing on the vegetation, and your clothes would probably be torn and so forth. But there was little or no injury on other parts of the body." Chinwah based this opinion on his observation of the contours of the cliff and the vegetation that was there. Lauren had no such injuries and her clothes were clean. Chinwah also did not see injuries consistent with multiple impacts on the cliff.[10]

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[9] No water was found in Lauren's lungs.

[10] On cross-examination, Chinwah admitted his opinions were based in part on information he received from Leslie and Berkowitz, including that Lauren had been crying the morning of

3. Hayes

The People offered the testimony of Dr. Wilson Hayes, an expert in injury biomechanics. Hayes described injury biomechanics as an understanding of how a fall might produce injuries. We discuss Hayes's testimony in significant detail below. Ultimately, Hayes concluded Lauren's fatal injuries and other factors in the case were consistent with Lauren being thrown from the cliff, and were inconsistent with her slipping or tripping and falling.

Defense Evidence

Defense witnesses testified Brown was adventurous. He liked to be a leader in outdoor activities. Brown's brother testified he was an accomplished outdoorsman who was not money oriented. Brown also offered evidence that he had an "easygoing" personality and held his emotions "close to the vest." One friend testified he could not recall seeing Brown angry or upset. The same friend testified he did not know Brown to be driven by a desire for money or concerned with making a lot of money.

Brown also adduced evidence that he appeared to have a loving relationship with Lauren. Defense witnesses testified Brown appeared to be happy about getting partial custody of Lauren, he appeared happy and proud to have a daughter, and he

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the incident, that she was on the hike only reluctantly, and that the hike was difficult even for Berkowitz. Chinwah also admitted his observations from the visit to the scene included the following: " 'Finally we ended up on top of this area where . . . we finally got to. And looking at that area there, it's, to me, what looked like a God-forsaken place, you know, to take a little child, even to on top of the place. It was very scary. It was scary for me. And then I understood that she was playing there."

also seemed upset about her death. One witness testified he spoke with Brown after the incident. Brown did not look happy. His eyes were "kind of red" and he looked "kind of shaken up." Brown told this witness Lauren had fallen off a cliff and was killed. Brown was shaking and "kind of had tears in his eyes" as he spoke.

Brown's mother testified Lauren was a very active girl. Lauren ran to the water at the beach, jumped on beds, and once ran across a busy bike path, nearly getting hit by a bicycle. According to Brown's mother, Lauren also enjoyed walking long distances on the beach and rarely demanded to be carried. Brown's mother said Lauren and Brown were affectionate with one another. It seemed that Brown took pride in being a father. Brown appeared to be genuinely concerned that Lauren was being abused.

Brown and his mother argued because while she was making an effort to see Lauren, a family court order prevented Brown from seeing Lauren. Brown's mother further testified that she had a good relationship with Brown when he was growing up and they continued to have a strong and close bond. She recalled that both Brown and Key-Marer said negative things about the other parent in Lauren's presence until Brown's mother told both of them to stop.

A family court mediator testified Brown never told her he was not interested in forming a relationship with Lauren. Instead he said he wanted to have more time with Lauren. Brown's emotional demeanor when with the mediator varied

"from calm to angry to . . . frustrated." He also sometimes had a "muted" affect.[11]

Brown also offered testimony of three witnesses who saw him with Lauren on the day of the incident. One witness saw them hiking and thought Lauren looked happy. One recalled seeing Lauren walking a few steps ahead of Brown. A third witness saw Lauren and Brown on a bluff as Lauren ran back and forth to the edge of the bluff and threw rocks over the edge. To this witness, Lauren appeared to be smiling and happy; Brown looked relaxed. Later, the same witness saw Lauren crawling up a narrow strip to Inspiration Point, 10 to 15 feet ahead of Brown. The witness did not hear Lauren scream, cry, or complain, nor did he see Brown push, pull, or force Lauren along.[12]

Defense witnesses also testified that detectives investigating the case seemed biased against Brown. One witness testified the two detectives told him they were going to "take [Brown] down" and ensure he was found guilty. Another witness testified Detective Leslie referred to Brown as a "rotten scumbag."

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[11] On cross-examination, the mediator testified she had concerns about Brown's "emotional stability" and she knew he did not want Lauren to have a relationship with his mother.

[12] On cross-examination, the witness testified Lauren appeared to struggle along the trail to Inspiration Point. Brown was three feet behind her. The witness found it odd the two were not dressed for hiking. As Lauren crawled up the trail, Brown was saying something to the effect of, " 'This way, this way, good girl, good girl.' " Until the witness saw Brown and Lauren, he thought someone was talking to a dog.

Defense Expert Testimony

1. Siegmund

Brown offered the testimony of Dr. Gunter Siegmund, a mechanical engineer and expert in biomechanics. We discuss this testimony in detail below. Ultimately, Siegmund opined possible explanations for Lauren's fall included being pushed or thrown, but also tripping or stumbling near the cliff's edge, sliding on the loose soil slope at the top of the cliff, or overstepping after throwing a rock. In Siegmund's opinion, there was no physical evidence to suggest one explanation was more likely than the other. He could not discern, based on the physical evidence, whether Lauren was thrown or fell.

2. Booker

According to trauma specialist Dr. Kevin Booker, Brown's behavior after Lauren's fall was consistent with post-traumatic psychological shock. Booker explained a component of psychological shock is having a difficult time recalling specific details. A person who has experienced psychological shock may exhibit unconventional behavior. Such unconventional behavior could include the absence of any expressed overt emotion, detachment, and inappropriate affect. Booker opined Brown's tone of voice and statements during the 911 call were consistent with the behavior of a person who has experienced psychological shock.

Verdict

The jury found Brown guilty of first degree murder (Pen. Code, § 187) and found true the special circumstances that 1) the murder was intentional and carried out for financial gain (Pen. Code, § 190.2, subd. (a)(1)) and 2) that Brown intentionally killed Lauren by means of lying in wait (Pen. Code, § 190.2, subd.

(a)(15)). Brown was sentenced to life without the possibility of parole.

I. Double Jeopardy Did Not Bar a Third Trial on First Degree Murder

Brown contends the California Constitutional prohibition against double jeopardy barred his retrial for first degree murder. Brown asserts the trial court failed to give the deadlocked jury an opportunity to enter a partial acquittal on first degree murder at the 2009 trial. We disagree.

A. Background

Brown's second trial took place between July and September 2009. On September 23, 2009, the jury sent the court a note stating: " 'We, the jury, unanimously feel further deliberations will not change us from a non-unanimous verdict.' " The court summoned the jurors and asked the foreperson: "Once before, I believe, the jury indicated to the court that it was deadlocked. Juror 7, as foreperson of the jury, is there a unanimous verdict as to any charge in this case?" Juror 7 answered: "No, sir."

The court asked if further instructions, argument, or anything else might assist the jury to arrive at a verdict. The foreperson indicated the jury was hopelessly deadlocked. The court then asked: "In your considered opinion, sir, is there any reasonable probability that with further deliberations, this jury could reach a verdict on any count or charge in this case?" The foreperson answered: "No." The court then asked a similar question of each juror individually. Each juror indicated the jury was, in fact, hopelessly deadlocked.

The court and the foreperson then had the following colloquy:

"Court: Juror 7, I'll ask you some specific questions. I take it, there is a split of votes?
Juror No. 7: Yes.
Court: There are various permutations in this case.
Juror No. 7: Yes.
Court: I want some numbers.
Juror No. 7: Yes.
Court: I don't want them attached to any tag.
Juror No. 7: Okay.
Court: Are there two numbers, three numbers, four numbers in terms of the split, in terms of which way individual jurors are voting, if you can understand what I'm asking.
Juror No. 7: I don't understand.
Court: All right. The jury has the option of finding the defendant guilty of murder in the first degree, murder in the second degree, involuntary manslaughter, or not guilty of all charges.
Juror No. 7: Right.
Court: Has the jury taken votes on all those permutations?
Juror No. 7: Yes, they have.
Court: Are there numbers which designate one or more splits? There are 12 members of the jury.
Juror No. 7: Yes.
Court: The jury is divided?
Juror No. 7: Yes.
Court: There are certain jurors who have one opinion, others who have a different opinion.
Juror No. 7: Yes.
Court: Are there more than two opinions? Are there three? Are there four?
Juror No. 7: There are two opinions.
Court: Okay. So we are talking about two numbers?
Juror No. 7: Yes.

Court: Now, do those two numbers relate to degrees of murder, or murder versus involuntary manslaughter, versus not guilty?
Juror No. 7: They relate to murder versus involuntary manslaughter.
Court: Without telling me the particular numbers, do the two numbers add up to 12?
Juror No. [7]: Yes.
Court: Give me one number.
Juror No. 7: Six.
Court: And the other number?
Juror No. 7: Six.
Court: May I see counsel."

The court asked counsel if they believed it should make any additional inquiries of the jurors. Defense counsel argued the court had to inquire whether the jury had reached a verdict on first degree murder. The court responded: "They were given a CALJIC jury instruction which talks about unanimity issues, and it appears as though they are deadlocked. They understand the distinction, and they are told in the jury instruction that they can make a decision on first. And when they do, then they go to second. So they have already been told that issue." After further discussion with counsel, the court stated it would ask if the jurors had reached a unanimous decision on any charged or lesser included crime in the case. The following colloquy ensued:

"Court: Juror 7, I want to clarify in my own mind, in a very cautious way, has the jury reached a unanimous verdict on any charged crime or lesser included crime in this case?
Juror No. 7: No.
Court: And the jury understands that if the jury were to vote and find that the People haven't proven beyond reasonable doubt that Mr. Brown committed first degree

murder, they should vote to find him not guilty of that, then they go to any lesser charge.

Juror No. 7: That's correct.

Court: You are familiar with that procedure?

Juror No. 7: I am familiar.

Court: So with regard to either the charged crime of murder in the first degree or the lesser included crimes of murder in the second degree and involuntary manslaughter, is there any unanimous decision?

Juror No. 7: There is not.

Court: Is that a correct statement of the other members of the jury?

The jurors: Yes.

Court: All indicating in the affirmative." (Italics added.)

At that point, the trial court declared a mistrial. However, the court then asked the foreperson additional questions:

"Court: Juror 7, the six/six split, are the six that you mentioned all for one crime charged or lesser?

Juror No. 7: I don't understand.

Court: You gave me two numbers.

Juror No. 7: Yes.

Court: The first number six stands for what verdict?

Juror No. 7: Murder in the second degree.

Court: And the second figure of six stands for?

Juror No. 7: Involuntary manslaughter.

Court: Did the jury reach any verdict as to the charged crime of murder in the first degree, or is the jury deadlocked on that?

Juror No. 7: No. The jury was not deadlocked on that.

Court: Then I am confused.

Juror No. 7: Okay.

Court: May I see the attorneys, please."

The court told counsel it now did not know if there was an acquittal on first degree murder or whether there was just a split vote, but indicated it did not believe it had jurisdiction to discuss the issue with the jurors any further. The prosecutor agreed. Defense counsel argued the court could inquire and poll the jury as to whether they acquitted Brown of first degree murder. Still, defense counsel agreed that once a mistrial is declared, the court had no further jurisdiction. The court then concluded: "All jurors, including the foreperson, agreed that there was no unanimous decision as to any charged or lesser included crime. There certainly are cases where there is just that type of bargaining that goes on with the jury. That may be the case. But I made inquiry, and I declared a mistrial. That is the current state of affairs. So thank you."

In December 2009, Brown filed a motion seeking either entry of a judgment of acquittal of the first degree murder charge or an order dismissing the charge in the interests of justice. Brown argued the jury expressed its intent to acquit him of first degree murder, thus the prohibition against double jeopardy barred retrial for first degree murder.

In opposition to the motion, the prosecutor offered declarations from seven jurors, each of whom stated: "The final count of votes for the jury before the mistrial was declared was five jurors voting for involuntary manslaughter, six jurors voting for second-degree murder, and one juror voting for first-degree murder." The foreperson additionally declared he made a mistake when he told the court the final vote tally was six jurors

for involuntary manslaughter and six jurors for second degree murder.

The trial court denied Brown's motion. In its ruling, the court explained that, with or without the juror declarations, it would conclude no verdict was reached and there was no unanimous verdict on first degree murder.

Brown challenges this ruling.

B. Applicable Legal Principles

The federal and California constitutions provide a guarantee against double jeopardy. These guarantees protect a defendant's interest in not being subjected to successive prosecutions for the same offense. (*People v. Marshall* (1996) 13 Cal.4th 799, 824 (*Marshall*).) "When a jury indicates it is unable to reach a verdict, double jeopardy rules bar retrial unless the defendant consents to the discharge of the jury [citation], or the trial court determines further deliberations are not reasonably likely to result in a verdict (§ 1140), in which case legal necessity exists for a declaration of mistrial [citation.]" (*Id.* at p. 825.)

In *Stone v. Superior Court* (1982) 31 Cal.3d 503 (*Stone*), the California Supreme Court held "the trial court is constitutionally obligated to afford the jury an opportunity to render a partial verdict of acquittal on a greater offense when the jury is deadlocked only on an uncharged lesser included offense. Failure to do so will cause a subsequently declared mistrial to be without legal necessity." (*Id.* at p. 519.) The court then suggested two procedures a court may use to meet the requirements of the rule:

"When a trial judge has instructed a jury on a charged offense and on an uncharged lesser included offense, one appropriate course of action would be to provide the jury with

forms for a verdict of guilty or not guilty as to each offense. The jury must be cautioned, of course, that it should first decide whether the defendant is guilty of the greater offense before considering the lesser offense, and that if it finds the defendant guilty of the greater offense, or if it is unable to agree on that offense, it should not return a verdict on the lesser offense. [¶] Alternatively, the court may decide to wait and see whether the jury is unable to reach a verdict; if it is, the court should then inquire whether the jury has been able to eliminate any offense. If the jury declares itself hopelessly deadlocked on the lesser offense yet unanimous for acquittal on the greater offense, and the court is satisfied that the jury is not merely expressing a tentative vote but has completed its deliberations, the court must formally accept a partial verdict on the greater offense." (*Stone, supra,* 31 Cal.3d at pp. 519-520.)

In *Marshall*, the court reiterated that the ruling in *Stone* is limited to when the jury is deadlocked only on an uncharged lesser included offense. "Absent some indication of deadlock only on an uncharged lesser included offense, the suggested procedures in *Stone* do not come into play. If the jury, in announcing apparent deadlock, gives such an indication, or if counsel so requests, the trial court, under *Stone*, should inquire further and determine whether any offenses can be eliminated." (*Marshall*, *supra*, 13 Cal.4th at p. 826.)

Thus, in *Marshall*, a case involving murder charges, the jury informed the trial court it was deadlocked, with seven jurors voting to acquit and five to convict. When the jury indicated it could not overcome the deadlock, the court declared a mistrial. The court did not inquire whether the jury was able to reach a partial verdict of acquittal on any of the charged offenses and the

jury did not "hint at such a possibility." (*Marshall, supra,* 13 Cal.4th at p. 824.) As nothing in the jury's comments "hinted they had agreed to acquit defendant of first degree murder and were in disagreement only on lesser included offenses," the court's inquiry before declaring a mistrial was sufficient and the mistrial was a matter of legal necessity.[13] (*Id.* at pp. 826-827.)

In *People v. McDougal* (2003) 109 Cal.App.4th 571 (*McDougal*), the defendant was charged with murder, among other crimes. The jury was provided verdict forms for each count, including forms for any lesser crimes included in the charged crimes. The trial court also instructed the jury with CALJIC No. 8.75, which informed the jury it was to first decide if the defendant was guilty of the crime charged in each count; it could determine the defendant's guilt of a lesser-included crime only if the jurors unanimously agreed he was not guilty of the greater crime; and if they unanimously determined the defendant was not guilty of the greater crime, they were to sign and return the verdict form so stating. (*Id.* at pp. 574-575.) When the jury reported it was deadlocked in an even split on the murder count and six to five on attempted murder, the trial court declared a mistrial and rejected counsels' request that it question jurors on

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[13] The court also rejected the court's suggestion in *People v. Chaney* (1988) 202 Cal.App.3d 1109 (*Chaney*), that " '[e]vidence of an actual implied acquittal is unnecessary to take a declaration of mistrial outside the concept of legal necessity; it is enough if the trial court fails to afford the deadlocked jury with an *opportunity* to render a partial verdict of acquittal.' [Citation.]" (*Marshall*, *supra*, 13 Cal.4th at p. 826, citing *Chaney*, *supra*, at p. 1122.) Brown's reliance on this portion of *Chaney* is therefore misplaced.

whether there were any acquittals or whether the jury had been unable to agree only on the degree of murder. (*Id.* at p. 576.)

Before retrial, another judge granted the defendant's motion to dismiss on double jeopardy grounds, based on the first judge's failure to determine if the jury acquitted the defendant of the greater offenses. The Court of Appeal concluded the dismissal was error. The court noted *Stone* set forth two alternative procedures, one in which the trial court provides the jury with verdict forms of guilty or not guilty as to each offense and instructs the jurors to first decide whether the defendant is guilty of the greater offense before considering the lesser offense. (*McDougal, supra,* 109 Cal.App.4th at p. 578.) The first trial judge in *McDougal* followed this alternative. The court reasoned that since the jury did not sign and return a verdict form reflecting the jurors had reached a unanimous verdict of not guilty on the greater offenses charged, and "[i]n light of the instructions given to them, the inescapable conclusion is that they were unable to reach a unanimous verdict on either charge." (*Ibid.*)

The court rejected the defendant's assertion that the trial court must question the jury about its findings in any case in which counsel asks for that procedure. Instead, reviewing *Stone* and *Marshall*, the court concluded: "Where, as here, the jury has been given verdict forms on the greater and lesser included offenses, and they have been instructed that they must return a verdict of acquittal on a greater offense if they unanimously find the defendant not guilty of the greater offense before they decide whether the defendant is guilty of the lesser included offense, the jury's failure to return any verdict form establishes that the jury *did not* acquit the defendant of the greater offense. To require

the court nonetheless to question the jury further would be pointless, at least in the absence of evidence indicating some confusion on the part of the jury as to its duties." (*McDougal, supra,* 109 Cal.App.4th at pp. 579–580.)

C. Discussion

Brown's essential argument is the trial court erred in failing to reconvene the jury to determine whether there was a partial acquittal. We find no error.

1. The court properly followed the *Stone* procedures

As in *McDougal*, the court in this case followed the first *Stone* alternative.[14]

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[14] The court instructed the jury:

"You will be provided with guilty and not guilty verdict forms for the charged crime of murder in the first degree and for the lesser included crimes thereto. Murder in the second degree is a lesser included crime to that of murder in the first degree. Involuntary manslaughter is a lesser included crime to that of murder in the second degree. Thus, you are to determine whether the defendant is guilty or not guilty of murder in the first degree or of any lesser included crime thereto. . . . [¶] Before you return any final or formal verdict or verdicts, you must be guided by the following:

[¶] . . . [¶]

2. If you are unable to reach a unanimous verdict as to the charged crime of murder in the first degree, do not sign any verdict forms, and you should report to the court your disagreement.

[¶] . . . [¶]

4. The court cannot accept a verdict of guilty of the lesser included crime of murder in the second degree unless the jury also unanimously finds and returns a signed verdict form of not guilty as to the charged crime in the first degree.

In light of these instructions, as in *McDougal*, the "inescapable conclusion" is the jury was unable to reach a unanimous verdict on first degree murder.

Further, while the trial court was not required to also question the jury—the second *Stone* alternative—it did so, and the overwhelming majority of that questioning similarly led to the conclusion that the jury was unable to reach a unanimous

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5. If you unanimously find the defendant not guilty of the crime of murder in the first degree but you cannot reach a unanimous agreement as to the lesser included crime of murder in the second degree, your foreperson should sign and date the not guilty of murder in the first degree form, and you should report to the court your disagreement. Do not sign any other verdict forms.

6. If you unanimously find the defendant not guilty of the crime of murder in the first degree but guilty of the crime of murder in the second degree, your foreperson should sign and date the corresponding verdict forms. Do not sign any other verdict forms.

7. The court cannot accept a verdict of guilty of the lesser included crime of involuntary manslaughter unless the jury also unanimously finds and returns signed not guilty verdict forms as to both the charged crime of murder in the first degree and the lesser included crime of murder in the second degree.

8. If you unanimously find the defendant not guilty of the crime of murder in the first degree and not guilty of the crime of murder in the second degree, but you are unable to agree unanimously as to the lesser included crime of involuntary manslaughter, your foreperson should sign and date the not guilty verdict forms as to both the charged crime of murder in the first degree and the lesser included crime of murder in the second degree, and you should report to the court your disagreement."

verdict on any charged or uncharged crime, including first degree murder. With *Stone* issues in mind, the trial court specifically asked the foreperson if the jury had reached a unanimous verdict "on any charged crime or lesser included crime in this case." The foreperson answered that it had not. The court then confirmed the jury understood that "if the jury were to vote and find out that the People haven't proven beyond reasonable doubt that Mr. Brown committed first degree murder, they should vote to find him not guilty of that, then they go to any lesser charge." The foreperson indicated the jury understood this procedure and again answered there was no unanimous decision on first degree murder, second degree murder, or involuntary manslaughter. The jurors collectively affirmed that the foreperson's statement was correct.

On this record, there was no hint or other indication that the jury required further opportunity to render a partial verdict. The court had instructed the jury to return a not guilty verdict on first degree murder if the jurors unanimously agreed the People did not prove the charge. The jury did not return this verdict. Then, following proper questioning by the trial court, the jurors again stated they had not reached a unanimous verdict on any charged or uncharged crime. At that point, legal necessity existed for declaration of a mistrial.

2. The trial court did not err in failing to reconvene the jury

Brown contends the trial court erred in concluding it had no jurisdiction to inquire further when, after the court had declared a mistrial, the foreperson said the jury was not deadlocked on first degree murder. We agree that the trial court

did not lose jurisdiction and could have made further inquiry of the jurors, but find no prejudicial error.

In general, "if the verdict is incomplete or otherwise irregular, the court retains jurisdiction to reconvene the jury if the jury has not yet left the court's control." (*People v. Kimbell* (2008) 168 Cal.App.4th 904, 907.) " '[*A*]*ny* error in the verdict may be corrected by reconvening the jury, as long as the jurors have not lost their character as jurors by, for example, discharge or receiving information inadmissible in the relevant phase of the proceeding.' [Citation.]" (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1208.)

There was no verdict in this case, complete or incomplete, and the jury had not yet left the court's control, thus the trial court could have reconvened the jury to make further inquiries. However, we disagree that the court was *required* to reconvene the jury under the circumstances of this case. The court had already conducted a thorough inquiry of the entire jury, in which all of the jurors agreed they had not reached a unanimous decision on any crime at issue, including first degree murder. The foreperson's lone statement suggesting the jury was "not deadlocked" on first degree murder did not mandate that the court engage in additional inquiry.

We find instructive *People v. Griffin* (1967) 66 Cal.2d 459 (*Griffin*), a case the *Stone* court distinguished but did not reject. In *Griffin*, the defendant was charged with first degree murder. A first conviction was reversed on appeal. The jury at a second trial could not reach a unanimous verdict and the trial court declared a mistrial. "After the jury was discharged, the foreman disclosed in open court that the jurors had stood 10 for acquittal and 2 for guilty of second degree murder." (*Griffin*, at p. 464.)

The defendant argued these facts established an implied acquittal of first degree murder, thus the third trial that subsequently ensued placed him twice in jeopardy of first degree murder. The *Griffin* court rejected the argument, noting the defendant did not deny the jury was properly discharged pursuant to Penal Code section 1140.[15] The court further reasoned: "We may not infer from the foreman's statement that the jury had unanimously agreed to acquit of first degree murder. There is no reliable basis in fact for such an implication, for the jurors had not completed their deliberations and those voting for second degree murder may have been temporarily compromising in an effort to reach unanimity." (*Griffin, supra,* 66 Cal.2d at p. 464.)

Here, the jury did not clearly favor acquittal on first degree murder; instead the opposite was true. As in *Griffin*, in this case there was no reliable basis for the trial court to suspect the jury had a final intent to acquit Brown of first degree murder. Further, the foreperson's statement made after the court declared a mistrial contradicted the statements of the entire jury made only moments before. In this context, the foreman's statement did not represent the jury's unequivocal unanimous intent to acquit Brown of first degree murder, since the jury had already collectively indicated it *had not* reached a unanimous decision on first degree murder. Thus, as in *Griffin*, the trial court properly

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[15] Penal Code section 1140 provides: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

concluded that, despite the foreperson's statements made after the court had declared a mistrial, the court still had no reliable basis to suspect the jury had come to a unanimous decision of not guilty as to first degree murder.

3. The juror affidavits are admissible and confirm there was no unanimous agreement to acquit on first degree murder

Moreover, the affidavits of several jurors provided in opposition to Brown's dismissal motion confirm the jury's collective statement, made prior to the mistrial declaration, that there was no unanimous decision on any crime.

We reject Brown's argument that the juror affidavits were inadmissible. Under Evidence Code section 1150, subdivision (a), only certain facts may be proved to impeach a verdict. As our high court explained in *People v. Hutchinson* (1969) 71 Cal.2d 342, 350, section 1150 limits "impeachment evidence to proof of overt conduct, conditions, events, and statements . . . . This limitation prevents one juror from upsetting a verdict of the whole by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, [are] those open to sight, hearing, and the other senses and thus subject to corroboration. . . . Admission of jurors' affidavits within the limits set by section 1150 protects the stability of verdicts, and allows proof by the best evidence of misconduct on the part of either jurors or third parties that should be exposed, misconduct upon which no verdict should be based." (*Id.* at pp. 349–350.)

Assuming Evidence Code section 1150 applies to this situation, the affidavits offered in this case do not run afoul of the rule.[16] The affidavits referred only to the final vote reached by the jurors—five voting for voluntary manslaughter, five voting for second degree murder, and one juror voting for first degree murder. The jurors did not make statements regarding mistaken beliefs, any juror's reasons for a vote, or other " 'subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . .' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.) Thus, the jurors' affidavits did not violate section 1150's limitations on proof. (Cf. *Chaney, supra,* 202 Cal.App.3d at p. 1121 [juror declaration, that she personally believed defendant was guilty of first degree murder but voted for lesser included offense in an effort to reach a verdict, was inadmissible as it disclosed juror's personal beliefs and mental thought processes, not the nature and course of jury deliberations].)

Based on the unequivocal indications the jurors collectively made before the trial court declared a mistrial, and the affidavits confirming the validity of those statements made at trial indicating no unanimous decision had been reached on any charged or uncharged crime, we conclude that even if the trial

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[16] We note section 1150 is concerned with the stability of verdicts and limitations on how verdicts may be impeached. Although this case involves juror affidavits, there was no verdict. Further, the juror affidavits were offered not to impeach the ultimate conclusion the jurors reached and collectively stated in court—that they had not reached a unanimous decision on any charged or uncharged crime. Instead, the affidavits *affirmed* that ultimate conclusion.

court could have reconvened the jury after the foreperson's unclear statement, it did not err by failing to do so. The trial court followed both *Stone* procedures and allowed the jury ample opportunity to enter a partial acquittal. The jury clearly indicated it could not eliminate any offense. The foreperson's statement following the declaration of mistrial did not, under the circumstances of this case, trigger a requirement that the trial court reconvene the jury and engage in another round of *Stone* inquiry.

Finally, we reject Brown's argument that our decision should be informed by *People v. Aranda* (2013) 219 Cal.App.4th 764 [superseded by grant of review Dec. 18, 2013, S214116] (*Aranda*). In *Aranda*, the jury gave an indication that the jurors may have reached a unanimous decision on first degree murder, and were deadlocked only on lesser included offenses. The jury had not been provided with not guilty verdict forms for each charged and uncharged crime. The trial court refused to give the jurors a not guilty verdict form for first degree murder so that they might enter an acquittal and instead declared a mistrial. A second trial judge granted a motion to dismiss the subsequent prosecution for first degree murder, based on *Stone*.

The issue in *Aranda* was whether *Blueford v. Arkansas* (2012) 566 U.S. 599, abrogated the *Stone* requirement that the jury be allowed to enter a partial acquittal when there is a suggestion that it is deadlocked only on uncharged lesser included offenses. In *Aranda*, the People argued the California Supreme Court's analysis in *Stone* was based only on the federal constitution, and since *Blueford* held the Fifth Amendment did not require a partial acquittal rule, *Blueford* implicitly overruled *Stone*. The People do not make a similar argument here and the

issue does not affect the outcome of this case. Assuming the *Stone* partial acquittal rule survives *Blueford*, we have concluded above that the trial court's actions were consistent with *Stone*.

II. Expert Evidence

A. Issues Regarding the Biomechanics Expert Evidence

1. Background

The parties presented competing testimony from biomechanics experts. We describe the testimony in detail.

a. Prosecution expert Hayes

Hayes reviewed materials such as police reports, autopsy reports and photographs, aerial photographs of the cliff, and a detailed analysis of cliff topography prepared by a surveying firm. He also visited Inspiration Point in 2002 and again in 2005.

At trial, Hayes identified three significant issues that informed his conclusions. The first was "the anatomy of [Lauren's injuries] . . . it's about how that anatomy could have interacted with the cliff to produce the injuries that we see. And the fundamental question there is how many impacts occurred, how many substantial impacts occurred." Based on his review of autopsy photographs and the reports of a pathologist, the deputy medical examiner, and a radiologist, Hayes opined Lauren "went off the cliff at sufficient speed to clear the top of the cliff, to hit the cliff once, and go into the water." In Hayes's view, there was no evidence of multiple impacts. The injuries also indicated to Hayes that Lauren did not slip and fall backwards, she did not run off the cliff, and she did not slide on the cliff.

The second significant issue was the topography of the cliff, which Hayes determined based on aerial photographs and the aerial topographic map of Inspiration Point an engineering firm

produced in 2003. Hayes identified possible "points of departure," based on the evidence provided to him and the fact that Lauren's body ended up in the water. He considered Brown's various statements about where he and Lauren were on the point when she went off the cliff, and a law enforcement report. Hayes isolated a potential area of departure of approximately 8 by 12 feet.

The third factor was the "fall biomechanics." Hayes's analysis involved "the laws of physics that apply to the motion of a projectile." Hayes explained the parabolic trajectory of a projectile's center of gravity. The prosecutor asked: "Now, in order to predict how a body, whether be center of gravity or a tennis ball, would move through space, are there certain things you need to know?" Hayes answered: "Yes, and they're not very complicated. You actually need to know the speed at which you launch the body, and you need to know the direction."

Hayes conducted "backyard experiments," intended to determine a starting point speed if Lauren were thrown from the cliff. Hayes's associate threw a 40-pound weight "as far and as fast as possible." Hayes testified: "[T]here was a single purpose for the backyard experiments, and that was to determine how fast . . . a person who's reasonably fit can launch a weight of approximately Lauren's weight. So we needed to determine a velocity, it's called, or the speed of a 40-pound weight going from a person's hand."

From the "backyard experiments," Hayes settled on a launch speed of 15 feet per second. He explained: "It was important to know this information because we were about to conduct a set of analyses – the fancy word for it is 'trajectory,' which means the path of motion from the top of that cliff – to

examine how that path of motion would relate to the geometry of the cliff. We needed a starting point for that analysis . . . . We learned from the backyard experiment where we have to start those studies, so we picked 15 feet per second, or 10 miles an hour, as an initial examination of the path, or trajectory of this motion."

With this information, Hayes and his team calculated "fall trajectories, predicted on the basis of the fundamental physics of projectile motion, for cases in which [Lauren] slipped and/or tripped and fell with those in which she was forcefully launched." Based on these calculations, Hayes opined: 1) If Lauren had slipped or tripped, she would have hit the cliff at the top, almost immediately. Because Hayes did not see scraping, abrasions, or lacerations on Lauren's body, and law enforcement found no evidence of anyone tripping or sliding at the edge of the cliff, Hayes ruled out that scenario. 2) If Lauren were thrown at 10 feet per second, 4 feet from the edge of the cliff, her body would have hit the cliff once, bounced off the cliff shelf, and gone into the water.

Hayes thus concluded: "Lauren Key-Marer had to have been assisted from the top of Inspiration Point to sustain the injuries she did, and could not have tripped, slipped, or run off the cliff and produced the injuries and position of rest where she was found." These conclusions were reflected in an initial 2003 report.

Hayes and his staff subsequently conducted additional experiments in 2005.[17] At Inspiration Point, Hayes and his staff

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[17] Hayes conducted the additional experiments in response to issues the trial court raised in 2005. According to the supplemental report: "[T]he Court questioned whether our

used a "pelican box"—a rigid plastic box filled with 45 pounds of weights. They did not use a dummy because:

"We were interested in what's called the trajectory of the center of gravity . . . it's between your belly button and your spine, about halfway between, where you can consider all of your body weight to be concentrated. So, if I'm falling through the air, the one thing that we can be absolutely certain of is that, no matter what you do with your arms, your legs, your head, anything else . . . that point in your body called the center of gravity follows a very predictable and simple motion. That motion is called a parabola, but just think of it as a gentle curve. . . . We were interested in the path of that arc as opposed to what was happening with Lauren's arms and legs. We could predict with high precision these motions . . . it's called projectile motion . . . . All that physics is exquisitely well known and quite predictable. . . . We can't say usually what happens to people's arms and legs, but the center of gravity, we can say where it's going to go, and if it hits, what's going to happen eventually afterwards."

Hayes explained the pelican box experiment at Inspiration Point provided him an opportunity to "check the physics" of one of the launch scenarios he had previously calculated and included in the 2003 report. Hayes found, in "checking the physics" of his earlier conclusions: "That it matched, that Isaac Newton was

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earlier experiments to determine the launch velocity and angle necessary for Lauren to have cleared the top of the cliff, impacted the cliff once, and then ended up in the water, were applicable to the launch conditions at Inspiration Point itself. To address this question, we returned to Inspiration Point, identified the point of departure, and used the same experimental subject to launch a 45 lb weight from the top of the cliff."

right, that the laws of projectile motion work. And, in fact, it predicted exactly where between those two [velocities], 10 and 15 [feet per second] that we had looked at, would be expected to hit the cliff, and it hit the cliff."

Hayes, describing a video of the pelican box experiment, narrated: "So [the pelican box] clears the top, we can see the case here, it's coming in the direction of the inlet, strikes on the shelf that is part of that particular contour, bounces off the shelf to impact the inlet some 40-plus feet below." He further testified: "So that launch velocity and angle at the point of departure reproduced the facts surrounding Lauren's fatal descent on November 8, 2000."

The prosecutor then asked: "Now, Dr. Hayes, thus far we've been talking about the path of Lauren's center of gravity until impact with the cliff; is that correct?" Hayes agreed: "That is. We looked at the projectile motion predictions, or the trajectory predictions, based on fundamental physics."

Hayes then explained he used other, more sophisticated modeling approaches, to simulate the interaction of Lauren's body with the cliff face in greater detail than "just simply the path through the air." He testified: "We have other kinds of modeling approaches that let us use all of the information we had about the contours of the cliff, and actually start looking at not just Lauren's center of gravity, but at what happens to the rest of her body. For instance, I said with simple projections, with simple trajectories from fundamental physics, we couldn't predict how Lauren would have bounced, if she bounced off the cliff face, or how she would have interacted at the top if she were slipping or sliding down the top of the cliff."

The remainder of Hayes's testimony concerned the "multi-link simulation of human motion" computer modeling he conducted to consider possible descent scenarios. A computer "slip" or "trip" simulation indicated Lauren's body would not have gone over the cliff based on the variables used in the model. A "launch" simulation indicated Lauren would have a massive impact on the cliff shelf, face in, head down, then her body would fall into the water.

Hayes thus opined "Lauren sustained her fatal injuries by being launched forcefully from the point of departure, impacting the cliff face once, and then landing in the water of the inlet."

b. Defense expert Siegmund (2015 trial)

Defense biomechanics expert Siegmund also reviewed materials such as photographs, the autopsy reports, and police reports, as well as Hayes's reports and prior testimony. Siegmund pointed out injuries on Lauren's body that did not appear in Hayes's demonstrative exhibits, including injuries on the side and back of Lauren's shoulders. He testified portions of the topographical map Hayes used were inaccurate.

Siegmund pointed out that in Hayes's trajectory analysis for a slip/trip scenario, the path plotted out in Hayes's materials was unrealistic because it stopped at the intersection with the cliff. Siegmund testified a body hitting the cliff after a trip or slip would not stop; instead it "would be redirected by the cliff interaction, and if it bounces enough to come off the cliff, we would then get another projectile motion, another parabolic arc, until it interacted with either the bottom or the cliff face again, at which point it would either slide along the cliff or bounce off again, and then there would be another trajectory, another parabolic arc . . . ."

According to Siegmund, Hayes's conclusions did not take into account all possible scenarios involving Lauren slipping or tripping. Using Hayes's spreadsheet, Siegmund testified that if additional numbers had been included, they would have shown that a trip/run scenario could have led to a single impact on the portion of the cliff that Hayes indicated could only be reached by a throw.

Siegmund also conducted an experiment with two girls around Lauren's size to evaluate their body movements when throwing golf balls, as a means to plot a fall trajectory resulting from overstepping or stumbling at the cliff's edge. Using the data gathered from this experiment, and entering those numbers into Hayes's spreadsheet, which contained the "fall equation," Siegmund plotted an additional trajectory. The resulting graphs showed it was possible for Lauren to run, stumble, and strike the cliff face in the region Hayes opined she struck, without contacting the upper portion of the cliff.

Siegmund's experiments thus informed him that overstepping after throwing a rock could explain the single impact and was therefore another scenario in which a slip, trip, or stumble at the top of the cliff could explain Lauren's impact with the cliff shelf. He further opined that departure points closer to the cliff edge would allow Lauren to move at slower initial speeds and still clear the cliff and strike the cliff shelf.

According to Siegmund, Lauren's injuries could also have resulted from her hitting the cliff face more than once. Abrasions on her abdomen, shoulders, knees and thighs could have been caused by interaction with the top of the cliff face. Siegmund explained it was possible Lauren struck her head and chest during an initial contact with the cliff face but those injuries

"were then obliterated by the large impact that occurred on the shelf." He did not believe injuries on the back of Lauren's shoulders occurred at the same time as her face and chest injuries.

Siegmund therefore disagreed with Hayes's conclusion that Lauren's injuries were inconsistent with a "slip/trip and fall." Siegmund concluded possible explanations for Lauren's fall included being pushed or thrown, but also tripping or stumbling near the cliff's edge, sliding on the loose soil slope at the top of the cliff, or overstepping after throwing a rock. He agreed that Lauren could have been thrown from the cliff in the manner Hayes proposed. But in Siegmund's opinion, there was no physical evidence to suggest one explanation was more likely than the other and he could not discern, based on the physical evidence, whether Lauren was thrown or fell.

c. Siegmund (2009 trial)—the rescue dummy experiments

In the 2009 trial, Siegmund testified in part based on experiments he conducted with "water rescue dummies." The dummies were approximately Lauren's height and weight. Siegmund testified the purpose of the experiments with the dummies was to "see how an object fell down the cliff and interacted with the cliff on the way down." He was "interested in whether a fall could explain Lauren's injuries and death. So in order to demonstrate that, I chose to use a dummy and run experiments as opposed to computations."

Siegmund explained his experiments were an alternative to the computer simulations Hayes conducted. In describing the benefits and weaknesses of using a rescue dummy as opposed to a computer model, Siegmund testified: "First of all, I should point

out that neither one of these two models is Lauren. So neither the computational model nor my rescue model is Lauren on that cliff falling, so they are both imperfect models." Still, he explained he chose to do an experiment because, unlike a computer model, "when you run an experiment you know that all of the laws of physics are right through." Further, he could have the exact amount of friction relevant for the incident, rather than a friction coefficient "based on a comparison with grass, concrete and asphalt," that might not take into account different materials on different portions of the cliff.

Siegmund described five tests he conducted with rescue dummies. The first simulated a forward fall, the second and third attempted to mimic the path and speed of a body after tripping and stumbling, and the fourth and fifth involved releasing the dummy as if it had tumbled or gone into a somersault. Siegmund explained he was "translating the dummy up the slope," or moving the dummy, because: "The dummy doesn't have muscles. It can't actually hold itself up while it stumbles, so I'm trying to create that motion."

The jury saw a video of the experiments. In the first experiment, which was intended to recreate Hayes's computer simulation of a fall, the dummy interacted with the cliff three times. The head and face of the dummy hit the cliff on the first impact, the head and shoulder hit the cliff on the second impact, and the entire body, including the face, interacted with the cliff on the third impact. Siegmund pointed out where the body of the dummy hit the cliff on each impact. He explained that each time the dummy hit the cliff, "to use Dr. Hayes' trajectory or projectile motion thing, there is a new set of initial conditions for new trajectory hits."

When defense counsel asked if the test with the dummy would seem to demonstrate that Hayes's opinion that the chest and face injuries were due to only one impact was incorrect, the prosecutor objected. The prosecutor argued there was no evidence the water rescue dummy had been scientifically validated to show injuries to a human being. He objected to the use of the dummy as the basis of an opinion about "the impacts to Lauren." The court sustained the objection. Still, the court allowed Siegmund to testify about "impacts on this object."

Siegmund testified about the other four experiments conducted with the dummies and the dummies' interactions with the cliff. Siegmund found that in four of the five tests he ran, there would be "minor interaction at the top [of the cliff] followed by a single impact and then into the water[.]" This was in contrast to Hayes's opinion that "a single impact without minor interaction at the top of the cliff would require her to be thrown."

Siegmund ultimately opined: "I cannot with a reasonable degree of scientific certainty distinguish between Mr. Brown throwing Lauren off the cliff or Lauren accidentally falling off that cliff . . . . I don't think based on the evidence that we have in this case that it is possible to be definitive on whether it is a throw or a fall. Both, in my view, are possible."

On cross-examination, the following colloquy ensued:

> "Q: Now, the water rescue dummy, has that been validated as a human surrogate in the study of falls from great heights?
>
> A: No. I thought I was really clear when I explained that this was not Lauren. This is a dummy without muscles, without a lot of things that humans have. It is a mass basically that we were releasing off the cliff. It has a human like form more so than, say, a pelican box, but it is

not – I'm not holding it out as a Biorid representation of human, a living human, going off Inspiration Point.

Q: In fact, it has never been validated as a human surrogate for the study of falls, for example?

A: Not that I'm aware of, no. I wasn't holding it out as that. I thought I was clear.

Q: It certainly doesn't simulate how a human being would bounce and slide off of a cliff?

A: It shows how a limp human shaped object might interact with the cliff.

Q: But assuming that you have a living, breathing human being as opposed to a limp human shaped object, it does not represent how a living human, breathing human being, would interact with the cliff?

A: There is no dummy that I could use that does that."

On redirect, Siegmund testified he believed the water rescue dummy experiments, among other things, showed possibilities that refuted Hayes's theory that Lauren could only have been thrown from the cliff.[18] When asked if the water rescue dummy is "a better representation" than a pelican box with respect to falling and impacts, Siegmund answered:

> "The center of mass of the rescue dummy is going to follow the same path as center of mass of the pelican box. Where the dummy differs from the pelican box is it has its mass distributed in a way that is more human than 45 pounds inside a plastic box. That mass distribution is

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[18] Siegmund explained: "What Dr. Hayes is trying to do is show that only one thing is possible. That is throwing. In order to prove that, you need to show that every other thing is impossible. So if you can show that any other thing is possible, you refute Dr. Hayes' conclusion that only a throw can explain Lauren's fall."

important when it comes to rotation. It is not important when it comes to just its linear motion. That is its translation. But as soon as you get into rotation, the distribution of the mass is very important. So having the mass distributed in human-like manner is better than the pelican box."

d. Motion to exclude the rescue dummy experiment evidence in the 2015 trial

At the 2015 trial, during the defense case, but before Siegmund's testimony, the prosecutor moved to exclude evidence of the water rescue dummy experiments, invoking *Kelly*, *Frye*, *Daubert*, relevance rules, and Evidence Code section 352.[19] The prosecutor argued the water rescue dummies had not been validated as a human surrogate for studies of falls off cliffs, thus the experiment using the dummies was irrelevant to suggest any interaction Lauren had with the cliff when she went over the edge. The prosecutor further argued if the purported relevance was to show the interaction of a water rescue dummy with the face of the cliff, that was also irrelevant since Brown was not charged with throwing a water rescue dummy off the cliff.

Defense counsel asserted the prosecutor's objection went to the weight of the evidence, rather than admissibility. He asserted that if there was an argument that the water rescue dummy "is not replicative of Lauren's interaction, . . . that's an argument that should be made based upon whatever counsel thinks are the distinguishing features [from the pelican box] that turn this into an issue."

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[19] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye v. United States* (1923) 293 F. 1013 (*Frye*); *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (*Daubert*) (1993) 509 U.S. 579.

The court asked the prosecutor to differentiate between the Siegmund dummy experiments and the Hayes pelican box experiment. The prosecutor argued:

> "The difference is that Dr. Hayes . . . used the pelican box to simulate projectile motion through space. [¶] If Dr. Siegmund had thrown this water rescue dummy weighing 44 pounds and approximately Lauren's height off of the cliff and used it to simulate Lauren's motion through space, that would have been one thing, because physics and projectile motion will tell us what an object of that weight at that launch velocity and angle will do as it travels through space. That's not what this is being offered to do. This is being offered to show interaction with the cliff, which it cannot do, just like I could not roll a bowling ball off of the cliff and say this is how Lauren would interact with the cliff. It's never been validated for that."

The court ruled as follows: "There is a different commitment by the experts here. One is the dynamics and interaction of that object as it travels through space. This one is -- if your expert is prepared to state that it replicates Lauren and how she would have -- or the object is meant to show how it interacts with the cliff, that's different. If he commits to the latter, then it's not relevant. If he's introducing it for purposes of dynamics in space, as Dr. Hayes did, that's different."

The court and parties revisited the issue after defense counsel consulted with Siegmund. In subsequent argument, defense counsel asserted the use of the pelican box and the use of the dummies were equally imprecise since neither contained all of the factors of a human body. Defense counsel further stated Siegmund's view was that Hayes's simulation was flawed because once an object hit the cliff face, the second arc is independent of the first, and the dummies demonstrated that idea.

The prosecutor countered that once there is interaction with the cliff, neither the pelican box nor the dummy offered an accurate representation of what would happen. The prosecutor thus argued: "What Dr. Siegmund proposes to testify about, and what his entire video is about, is what happens to the dummy after it impacts the cliff and how many impacts it has and where it impacts. . . . And so it's not being offered to show the path of the dummy through space. It's being offered to show the interaction of the dummy with the cliff and what the dummy does after it interacts with the cliff. . . ."

Defense counsel responded:

> "Once it impacts the cliff, there's a separate projectile motion. And in Dr. Hayes's simulation . . . he had a simulation where he had that stiff stick figure . . . with the arms that don't move, and then it hits the cliff . . . and then the figure continues down. Those are . . . inaccurate, as well, in a way that the dummy demonstrates. And the stick figure there is not in any way representative of an actual human body, and that was admitted by Dr. Hayes, but he nonetheless used it in order to try to demonstrate . . . what he claimed was going to be the arc and then the impact on the cliff and the continuing fall to the water. And what Dr. Siegmund will do with the dummies is show that actually you have . . . two independent arcs . . . each of them a projectile motion . . . that is distinct . . . as compared to . . . the claimed consistent forward motion without there being any accounting for what the impact on the cliff actually does."

The prosecutor again argued Siegmund's justification for using the dummies was not that they more accurately simulated

projectile motion through space and Siegmund did not throw the dummies off the cliff in the manner Hayes used the pelican box.

The court expressed its view that Siegmund was "trying to somehow get this in through the back door. He is only allowed to argue with respect to the projectile motion through space, and it seems to me that he is trying to get through the back door . . . how Lauren's body would have reacted once it left the cliff, had impact with the cliff, and how it reacted after that. . . . And the court has already ruled on that, the parameters that were set on this matter."

The prosecutor further argued comparing Siegmund's dummy experiment with Hayes's computer simulations was inaccurate. The court offered a final comment:

> "We've already talked about *Kelly-Frye* and *Daubert* with respect to the scientific community recognizes the dynamics of a dummy and it never has been recognized. And he, by his own admission in his prior testimony, stated he was not offering it for that purpose, and that no dummy could re-create the dynamics of a human body versus the dummy, and so there is going to be a real problem with his testimony if that is the characterization of his proposed testimony."

Defense counsel indicated that "unless there's something that Dr. Siegmund does want to say about projectile motion," the defense would eliminate the film of the dummy experiment from the defense presentation of evidence. Siegmund did not testify about the rescue dummy experiments.

2. The trial court did nor err in excluding evidence of the Siegmund rescue dummy experiments

On appeal, Brown contends the trial court erred in excluding evidence of Siegmund's rescue dummy experiments. Brown argues that since evidence of Hayes's pelican box experiment was admitted, evidence of Siegmund's rescue dummy experiment should have been admitted as well. He contends this error violated his federal and state constitutional rights to due process and to present a defense. We find no error.

a. Applicable legal principles on experimental and scientific evidence

The trial court has broad discretion in determining whether to admit expert opinion testimony.[20] (*People v. Son* (2000) 79 Cal.App.4th 224, 241.) Similarly, the admissibility of experimental evidence " 'is largely a matter of discretion with the trial court, and such a test is merely a circumstance to be considered in connection with other evidence in the case.' [Citation.]" (*DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1232.)

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[20] "[A] decision . . . which concerns the admissibility of evidence, is subject to review for abuse of discretion. This is especially so when, as here, the evidence comprises expert opinion testimony. [Citations.] Underlying determinations, of course, are scrutinized pursuant to the test appropriate thereto. The conclusion that a certain legal principle, like the *Kelly-Frye* rule, is applicable or not in a certain factual situation is examined independently." (*People v. Rowland* (1992) 4 Cal.4th 238, 266.)

When a party seeks to introduce evidence based on a new scientific procedure or novel method of proof, three foundational elements must be met, under *Kelly, supra,* 17 Cal.3d 24. (*People v. Hood* (1997) 53 Cal.App.4th 965, 969.) The first element is that the proponent of the evidence must establish the reliability of the method is generally accepted by recognized authorities in the relevant scientific field. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 122.) The proponent of the evidence must also show the witness testifying about the method is a properly qualified expert on the subject and that the person performing the method in question used correct scientific procedures. (*People v. Jackson* (2016) 1 Cal.5th 269, 315 (*Jackson*).)

Further, "[e]xperimental evidence has long been permitted in California trial courts . . . . [¶] 'Admissibility of experimental evidence depends upon proof of the following foundational items: (1) The experiment must be relevant (Evid. Code, §§ 210, 351); (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence [citation]; and (3) the evidence of the experiment will not consume undue time, confuse the issues or mislead the jury [citation]. [¶] In the case of experimental evidence, the preliminary fact (see Evid. Code, § 403, subd. (a)(1)) necessary to support its relevancy is that the experiment was conducted under the same or similar conditions as those existing when the accident took place.' " (*People v. Roehler* (1985) 167 Cal.App.3d 353, 385.)

In this case, Siegmund admitted at the 2009 trial that the use of a water rescue dummy to replicate how a human body might interact with a cliff during a fall had not been recognized as scientifically valid. He suggested use of the dummy was more useful than a pelican box in showing how a human-shaped mass

would interact with the cliff and rotate during a fall and impacts. But he also testified that the dummy could not demonstrate how a living human body would interact with the cliff during a fall.

When presented with this testimony, the trial court was well within its discretion to exclude evidence of the rescue dummy experiments as offered to support Siegmund's opinion regarding how Lauren's body may have interacted with the cliff during a fall and whether that interaction could have caused the injuries she sustained. To the extent the issue necessitated an analysis under *Kelly* because it involved a new scientific technique, the defense did not meet its burden on the very first requirement: that the reliability of the method must be established, usually by expert testimony.[21] (*People v. Dellinger* (1984) 163 Cal.App.3d 284, 294 (*Dellinger*).) Siegmund testified the use of the dummy had not been scientifically validated to serve as a human surrogate to analyze falls. The trial court properly excluded this evidence.

Similarly, when considered as experimental evidence, Siegmund's 2009 testimony undermined the foundational elements necessary for admission of the evidence. Siegmund admitted a rescue dummy was not comparable to a human body in evaluating interaction with the cliff, thus Brown did not meet his burden to show the experiment was relevant, or that it was

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[21] *Kelly* only applies to a technique, process, or theory which is new to science. (*Jackson, supra,* 1 Cal.5th at p. 316.) The prosecutor invoked *Kelly* and the *Dellinger* case from 1984, which noted that, at that time, no California case had considered the use of anthropomorphic dummies. Defense counsel did not argue that use of the dummies is not "new" to the law or science, or that *Kelly* did not apply for other reasons. Nor does Brown advance such an argument on appeal.

conducted under substantially similar conditions as those of the actual occurrence.

Indeed, on appeal, Brown fails to argue the rescue dummy experiment evidence was independently admissible. He instead contends only that the court should have admitted the evidence because it admitted the Hayes pelican box evidence. However, the foundation laid for the pelican box experiment was that it was confirmation of trajectory calculations based on fundamental Newtonian physics. The foundation for the Hayes computer simulations was Hayes's testimony that the simulations incorporated physics principles, were widely used and validated under many circumstances, and had been used for the study of falls.

Brown did not challenge the adequacy of this foundation. He further did not establish a similar foundation for the rescue dummy evidence. While "projectile motion" may have been one aspect of the rescue dummy experiment, Siegmund testified that the dummies were useful in observing rotation, and they allowed him to observe how an object fell down the cliff and interacted with the cliff. But unlike the foundational testimony that preceded the Hayes's computer simulations, there was no clear argument or evidence establishing that using a water rescue dummy as Siegmund did was a scientific procedure of sufficient reliability to be relevant to the question of what may have happened had Lauren tripped, slipped, or stumbled off the cliff in the same fashion. There was also no testimony establishing the rescue dummy experiments were a reasonably accurate

demonstration of a conclusion Siegmund had reached through other means.[22]

The water rescue dummy experiments were offered to show something different and more complex than the pelican box experiment. A proper, independent foundation for this evidence was required. The trial court did not abuse its discretion in concluding that foundation was not laid. (Compare *Dellinger, supra,* 163 Cal.App.3d at pp. 292-296 [proper foundation not laid under *Kelly* for scientific conclusions based on tests conducted with anthropomorphic dummy to determine amount of force needed to sustain injury to child victim's head from a fall down stairs] with *People v. Roehler, supra,* 167 Cal.App.3d at pp. 388-390 [evidence of testing and conclusions from tests involving anthropomorphic dummy properly admitted; extensive preliminary testimony supported reliability of the method, which was used only to corroborate pathologist's conclusions].)

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[22] In the 2006 trial, the defense offered the testimony of a different biomechanics expert, Dr. Gary Yamaguchi. Yamaguchi did not testify he conducted experiments with crash test dummies while physically at Inspiration Point. Instead, using anthropomorphic crash test dummies, he created a series of computer simulations with MADYMO, described as "probably the most well-accepted program in the industry for simulating high speed impacts of humans and crash test dummies in realistic environments. MADYMO has been used to create hundreds of publications that are in the literature."

b. Brown has not established defense counsel's failure to object to evidence of the Hayes pelican box experiment was ineffective assistance of counsel

Brown contends on appeal that if the trial court properly excluded the evidence regarding the Siegmund dummy experiments, his counsel should have sought to exclude evidence of Hayes's pelican box experiments because they were equally invalid to show interaction with the cliff. We conclude Brown has not established his counsel's failure to object constituted ineffective assistance of counsel.

i. Applicable legal principles

"The constitutional standard for determining whether counsel has failed to provide adequate legal representation is by now well known: First, a defendant must show his or her counsel's performance was 'deficient' because counsel's 'representation fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Second, he or she must then show prejudice flowing from counsel's act or omission. [Citation.] We will find prejudice when a defendant demonstrates 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.' [Citations.] 'Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.' [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 610–611.)

ii. Analysis

Brown's argument focuses solely on the trial court ruling excluding the Siegmund rescue dummy evidence to the extent offered to illustrate or replicate Lauren's interaction with the cliff. Brown contends the Hayes pelican box evidence was also offered to show how Lauren would have interacted with the cliff, thus defense counsel should have objected to the Hayes pelican box evidence as exceeding the court's in limine ruling.[23] He also asserts defense counsel alternatively should have requested a jury instruction limiting the jury's consideration of the pelican box evidence to showing the path of the object through space.

As an initial matter, we note Brown has not established, or even argued, that the pelican box evidence was independently inadmissible, except as it related to the trial court's ruling on the Siegmund rescue dummy evidence. Still, we acknowledge the prosecutor conceded the pelican box experiment was relevant only to show "projectile motion through space," and that it could not legitimately be offered to show interaction with the cliff. Yet, some of Hayes's testimony regarding the pelican box appeared to, in fact, concern "interaction with the cliff," in that he narrated how the box hit the cliff, then bounced off and landed in the inlet.

We need not decide whether defense counsel's failure to seek exclusion of this portion of the pelican box experiment evidence was deficient performance. Assuming evidence of the

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[23] The court's in limine ruling occurred after the People's case-in-chief, after Hayes had already testified, but before Siegmund's testimony in the defense case. Although on appeal Brown addresses defense counsel's failure to "object" to the Hayes testimony, defense counsel's only option was to move to strike the testimony that had already been given and to object to any rebuttal testimony.

pelican box "interaction" with the cliff should have been excluded, Brown has not demonstrated a reasonable probability that, but for counsel's failure to seek to strike that portion of Hayes's pelican box experiment evidence or to request a limiting instruction, the result of the proceeding would have been different. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008) [reviewing court may examine prejudice without first determining if counsel's performance was deficient, citing *Strickland v. Washington* (1984) 466 U.S. 668, 697].) Several times in Hayes's testimony, he indicated the pelican box experiment was intended to illustrate only the trajectory of the center of gravity of a 44-pound weight up to the point of impact. He acknowledged that with the "simple projections" the pelican box experiment illustrated, he could not predict how Lauren would have bounced off the cliff.

Further, the fundamental question in the case was whether Lauren accidentally fell or was thrown. The pelican box experiment evidence played only a minor role in Hayes's opinion on the question because it started from the conclusion that she was thrown and her body hit the cliff once. Hayes reached that conclusion by analyzing Lauren's injuries and the topography of the cliff. Although Hayes insisted all phases of his analysis mattered, he described the injuries "as the signature or the fingerprint to what has happened. That's the key that tells us, along with the other factors, what happened." Well before performing the pelican box experiment, Hayes had, through other means, concluded Lauren did not slip, trip, or stumble then fall down the cliff, and that her injuries resulted from a single high-velocity impact with the cliff, because in his view her injuries were inconsistent with more than one cliff interaction. The

pelican box confirmed Hayes's launch scenario, but the other portions of Hayes's process and testimony concerned the second, critical conclusion—that Lauren did *not* accidentally fall. Hayes came to this conclusion based on his initial analysis, calculations, and computer simulations, not because of the pelican box experiment.

This point was illustrated during the direct examination of Siegmund, when he testified: "Dr. Hayes's third opinion is that Lauren's injuries are consistent with being launched at between 10 and 15 feet per second from point of departure. I agree. This is one scenario of how Lauren sustained her injuries. She could have been thrown from the cliff. There is nothing in my analysis that rules that out. It is a possibility just like slipping and tripping is a possibility."

Even if defense counsel had objected and succeeded in moving the court to exclude the portions of Hayes's testimony regarding the path of the pelican box at or after impact, it is not reasonably probable that the result of the proceeding would have been different. Thus, we find no ineffective assistance of counsel with respect to defense counsel's failure to attempt to exclude Hayes's pelican box experiment evidence to the extent it exceeded the trial court's in limine ruling.

B. Exclusion of Criminalist Schliebe's Testimony Regarding Shoe Impressions

1. Background

Detective Leslie testified that on November 9, 2000, he observed depressions or impressions in the soil on a particular area of Inspiration Point. He could tell "it was some kind of disturbance . . . something had disturbed the dirt there," but he could not get close enough to discern what they were.

Los Angeles County Sheriff's deputy Dale Falicon returned to the crime scene to collect evidence on November 10, 2000, two days after Lauren's death. He was a member of the Sheriff's Department's scientific services division. At trial, he testified he saw what he believed were five shoe impressions on Inspiration Point, four of which were in a straight line, and one of which was close to the edge of the cliff. There was no detail in the impressions. They appeared to be similar to the impressions he himself was making as he walked back and forth in the area. Falicon marked and photographed the impressions. He also took a casting of four of the impressions. Falicon did not use the photographs when evaluating whether the impressions were shoeprints; instead based on his training, education, and experience, the depressions appeared to him to be footprints.

On cross-examination, Falicon admitted his expertise was not, and had never been, shoeprints. His job was to gather evidence and document the scene; another group of experts examined and analyzed the evidence. Sheriff's Department senior criminalist Steve Schliebe was one person who, as part of his job, would review photos of what Falicon believed were shoe impressions, to determine what the photographs depicted. Falicon agreed he was "not the person with the expertise to say with any degree of certainty or probability . . . to say this is or is not a shoeprint . . . ."

In the 2006 and 2009 trials, Brown countered similar Falicon testimony with that of Schliebe. At the 2009 trial, Schliebe testified that in 2004 he reviewed Falicon's photographs of the impressions. Schliebe testified: "From my examination of the photo, I couldn't absolutely determine that it was a shoe that made the depression as opposed to maybe an unshod foot or a

knee or a hand or something. Something got pressed into the soil. I don't know what it was." Schliebe told Detective Leslie the soil on the hillside was dry and loose and, in such conditions, it is nearly impossible for a shoe impression to retain any size or shape. On cross-examination, Schliebe testified he only looked at photographs and did not visit the crime scene.

Before the 2015 trial, the People moved to exclude Schliebe's testimony. The People characterized Schliebe's testimony as limited to a statement that, based on photographs, he did not know if the impressions at the scene were footprints. The People argued this testimony had no tendency in reason to prove or disprove any disputed fact of consequence to the determination of the case. Brown opposed the motion.

The trial court excluded the Schliebe testimony. The court initially ruled Schliebe's testimony was irrelevant and would be excluded unless the prosecution presented evidence "for the proposition that indeed shoe or other impressions were found on scene . . . ." The court explained Falicon had testified that he was unable to say for a fact that the impressions were footprints. The court further explained: "Now, if he takes the stand and says 'I felt they were footprints, they looked to me to be footprints, but I wasn't sure that they were, but still based on my experience I felt they were footprints,' now, that may open the door to this witness testifying."

After this initial indicated ruling, the argument turned to the distinction between Falicon's opinion based on what he saw at the scene, and Schliebe's observations based on the photographs alone. Defense counsel argued the photographs were pristine, Falicon took them as part of his job, and, in the normal course, Schliebe or someone in the same division would

analyze the evidence based on the photographs. The prosecutor's position was that Schliebe was not at the scene and could not offer any relevant evidence because he could only testify from the photographs. The court indicated it would stand by its initial ruling.

At trial, Falicon testified as described above. Hayes testified he considered Falicon's report in determining the region of departure: "[Falicon] had looked in great detail at a series of impressions that were—wasn't certain as to what they came from, could not, in my view, be connected with particular kinds of footprints, but were impressions leading in a fairly straight line down to this same region."[24] In closing argument, the prosecutor argued the physical evidence, including the alleged shoeprint evidence, contradicted Brown's claim that Lauren was running around, throwing rocks, and fell:

"And there were also the footprints that Deputy Falicon and Detective Leslie saw. At the U-shaped area, the part that slopes down, next to the bush that the defendant pointed out to Deputy Brothers . . . the projection that he described to Sergeant Erikson as they stood at the base, where the defendant pointed up, part of only a limited area where Lauren could have gone off the cliff and ended up in the water, Detective Leslie and Deputy Falicon saw five footprints, just like Deputy Falicon was making when he was walking up and down the side of the slope.
[¶] There is no physical evidence whatsoever that Lauren was walking or running around in that area on that slope, just these five footprints that were just like Deputy Falicon's. He doesn't

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[24] Hayes further testified he considered Falicon's report that there was no evidence of sliding, slipping, or disturbed rocks at the edge of a sloped portion of the cliff.

find any other footprints. He doesn't find any evidence near the edge of that cliff that Lauren slid off."

2. Discussion

"The principles governing the admission of evidence are well settled. Only relevant evidence is admissible (Evid. Code, §§ 210, 350), 'and all relevant evidence is admissible unless excluded under the federal or state Constitutions or by statute. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).)' [Citation.] 'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' . . . . [¶] The trial court has broad discretion in determining the relevance of evidence. [Citation.] We review for abuse of discretion a trial court's rulings on the admissibility of evidence." (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

On appeal, Brown contends the trial court erred in excluding the Schliebe testimony. He asserts the testimony that Schliebe could not say whether the photographs depicted shoe impressions was relevant, given the prosecution's burden to prove guilt beyond a reasonable doubt. He further argues Schliebe's ability to testify based only on the photographs did not render the evidence inadmissible.

We agree that the trial court erred in excluding the Schliebe testimony. Falicon testified his job was to take photographs and collect evidence for analysis by others, including criminalists like Schliebe. There was no evidence that the photographs Falicon took in this case were somehow unsuited for that purpose. That Schliebe did not see the impressions in person at the scene affected the weight of the testimony, but not its admissibility. Schliebe's testimony that he could not tell

whether the impressions depicted in the photographs were shoeprints undermined the testimony of Falicon–not an expert in shoeprint evidence–when he indicated the impressions appeared to him to be shoeprints. Moreover, Schliebe's prior testimony included his statement to Detective Leslie that it was typically very difficult for a shoe impression to retain any size or shape in soil like that found on Inspiration Point. This was relevant to disprove the inference the prosecutor sought to draw, which was that there were shoeprints–likely Brown's–that led up to the edge of the cliff, and no other shoeprints.

However, we conclude the error was harmless. It is not reasonably probable that the outcome would have been more favorable to Brown had the court allowed the Schliebe testimony. Falicon admitted he was not a shoeprint evidence expert and he did not definitively testify that the impressions he observed were shoeprints. Instead, he offered only the weaker, non-expert opinion that the impressions appeared to be shoeprints to him. The defense effectively cross-examined Falicon, revealing the weaknesses in his testimony. Further, there was no evidence actually identifying the shoeprints as probably coming from Brown's shoes.

While Hayes indicated he read Falicon's report and considered it in mapping out the possible point of departure for Lauren's descent, the majority of his point of departure analysis was based on Brown's own statements and the topography of the point and the cliff. Far more damaging than Falicon's non-expert testimony about possible shoeprints was his unrelated, and unchallenged, testimony that he did not see any evidence of slipping or sliding at the edge of the cliff. We acknowledge that the prosecutor argued the absence of other footprints in the area.

Nevertheless, we conclude it is not reasonably probable that, absent the court's error with respect to the Schliebe testimony, Brown would have received a more favorable outcome. Moreover the error did not render the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

III. Ineffective Assistance of Counsel

A. Counsel Was Not Ineffective for Failing to Call Dr. Ophoven or Consult With Another Forensic Pathologist

1. Background

a. Prior trials

At the 2006 and 2009 trials, the defense offered the testimony of Dr. Janice Ophoven, a forensic pathologist with special training and experience in pediatric forensic pathology. At the 2009 trial, Ophoven's testimony on direct examination challenged Hayes's testimony. For example, Ophoven questioned the validity of biomechanics as a useful tool in understanding blunt force trauma. She opined, based on an examination of the autopsy, that the number of impacts on the cliff could not be determined conclusively, and she disagreed with Hayes's opinion that Lauren must have only impacted the cliff once. She criticized Hayes's failure to examine ways a 46-pound object could go off the cliff other than being thrown, and critiqued the Hayes analysis in that only the throwing theory was examined at the cliff. She opined so many elements of the case were unknown that the factors Hayes used "were not necessarily specifically correct or verified or validated by the experiments."

Ophoven's testimony also contradicted that of Dr. Chinwah, the deputy medical examiner. Ophoven testified about a contusion on Lauren's back that appeared to be caused by an

impact. Chinwah did not note the contusion in the autopsy report. Ophoven opined there were blunt force injuries to the right side of Lauren's body that were not consistent with an impact to the face or upper chest. The injuries she saw were consistent with multiple impacts with the cliff. In Ophoven's opinion, a forensic analysis could not determine how Lauren went off the top of the cliff.

However, on cross-examination the prosecutor minimized or discredited Ophoven's expertise and was effective in making her appear defensive and biased in favor of the defense. She admitted she is not board certified in pediatric pathology and conducted no autopsies between 1989 and 2001. As Ophoven tried to rehabilitate herself, she volunteered answers the prosecutor was then able to suggest were inflated descriptions of her work.[25] The prosecutor asked Ophoven about her testimony in 2006, in which she disagreed with Berkowitz's assessment that the hike to Inspiration Point was extremely arduous. Ophoven admitted that although she had testified she found the hike

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[25] For example, after Ophoven testified she performed no autopsies between 1989 and 2001, the prosecutor asked if she began conducting autopsies again in 2001. Ophoven answered: "Yes. I started doing full-time forensic pathology, including adults, in 2001." The prosecutor then established that while Ophoven characterized her work as "full-time forensic pathology," she was actually serving as a part-time deputy medical examiner, on call one week per month. Ophoven testified that for the previous five years she had been on call two weeks each month, only to have the prosecutor return to the fact that at that time, she was on call only one week per month. Ophoven answered: "That's right. I am cutting back. I get to."

nowhere near as arduous as Berkowitz's report suggested, she did not hike the route as Berkowitz had.

The prosecutor also asked about three cases in which Ophoven was "wrong." Although Ophoven offered explanations as to each case, including two in which additional information revealed that deaths she believed were accidental were in fact homicides, the prosecutor was still able to ask the question, over a defense objection: "So if this additional information hadn't come out, [the victims' relatives] would have gotten away with murder, correct?"

In 2009, the defense also offered the testimony of Dr. David Posey, a forensic pathologist, in surrebuttal. Based on a review of the autopsy photographs, Posey opined a mark visible on the back of Lauren's body was a contusion or bruise. This undermined Chinwah's testimony that he did not find a large contusion on Lauren's back when he conducted the autopsy. Posey's opinion also contradicted Chinwah's testimony that the mark could have been dirt, mud, blood, or an abrasion.

b. 2015 trial

At the 2015 trial, the defense did not offer Ophoven's testimony. Following the trial, Brown made a *Marsden*[26] motion. One of his arguments was that defense counsel failed to call Ophoven in time to secure her attendance at the third trial, so counsel "blew her off," leaving the defense with no pathologist. Defense counsel responded that he contacted Ophoven six months to a year before she would have testified in 2015. Ophoven was unavailable until months after the trial was scheduled to take place. Before seeking the court's permission to introduce

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[26] *People v. Marsden* (1970) 2 Cal.3d 118.

Ophoven's testimony in an alternative fashion, defense counsel carefully reviewed her prior testimony. He concluded she "went out on a limb, committed herself to something she shouldn't have, and she got trashed by the prosecution because, compared to their expert, it was clear that Ophoven was actually giving too much help to the defense based on too little actual investigation." Counsel further explained he decided not to call Ophoven or make special arrangements for her testimony because he concluded "the witness who was critical to us was the one we did present, and that [Ophoven] was going to be someone who would distract from our defense by allowing her to be attacked by the cross that occurred at the second trial."

2. Failure to offer Ophoven's testimony

We find no ineffective assistance of counsel in defense counsel's failure to offer or attempt to offer Ophoven's testimony at the third trial. The decision was a tactical decision and one a reasonably competent, experienced criminal defense attorney would make. The defense had an expert witness available to counter Hayes's opinion that Lauren's injuries would only have been caused by a single massive impact on the cliff face. Siegmund, a biomechanics expert like Hayes, testified about Lauren's injuries, and offered the opinion that they were consistent with multiple impacts.

Defense counsel could reasonably conclude Ophoven's weaknesses as a witness on cross-examination outweighed the potential support her testimony would give to the defense. " ' " 'Reviewing courts will reverse convictions on direct appeal on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.' " ' [Citation.]" (*People v.*

Vines (2011) 51 Cal.4th 830, 875.) There was a rational tactical purpose for counsel's failure to offer or procure Ophoven's testimony for the third trial. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 567 [no ineffective assistance where counsel concluded expert testimony might not hold sway with jury and did not present the testimony].)

3. Failure to consult or offer the testimony of a different forensic pathologist

We also find no ineffective assistance of counsel arising out of counsel's failure to consult with, or offer the testimony of, another forensic pathologist. Defense counsel had available to him the testimony of two forensic pathologists: Ophoven's testimony from the 2006 and 2009 trials, and Posey's surrebuttal testimony in the 2009 trial. This testimony provided counsel with a sense of what another forensic pathologist could say that would be beneficial to the defense.

Further, the post-trial *Marsden* hearing suggests defense counsel in fact had a rational tactical purpose for not offering the testimony of a defense forensic pathologist. He felt it was Siegmund's testimony that was critical and would cover the same topics. Siegmund did in fact testify about Lauren's injuries and he opined they were consistent with multiple impacts. He pointed out injuries Hayes had overlooked. Siegmund further challenged Hayes's opinion that the injuries necessarily showed a single high-velocity impact to the cliff face. In this case, counsel's decision not to call a defense forensic pathologist, and to instead rely on a defense biomechanics expert to opine on Lauren's injuries, fell within the range of reasonable professional assistance. (*In re Valdez* (2010) 49 Cal.4th 715, 729-730 [reviewing court must indulge strong presumption that the

challenged action might be sound trial strategy; court must "eliminate the distorting effects of hindsight"].)

B. Counsel Was Not Ineffective for Eliciting a Witness's Opinion That Brown Was Guilty

1. Background

On direct examination in the People's case, Brown's former friend, Jon Hans, testified he had known Brown a long time and they had a close relationship. Even after Lauren died, Hans and Brown continued discussing personal matters, but Brown never talked about Lauren's death. Brown also never appeared to be sad, upset, or remorseful about Lauren's death. After Brown was arrested, Hans supported him and continued talking with him by phone. But after learning more details about Lauren's death, looking at photos, and reading the grand jury transcript, Hans changed his mind. Hans testified he had told others he no longer believed Brown was innocent.[27]

On cross-examination, Hans testified he knew that when Brown was in custody he was represented by counsel and was not supposed to discuss details of the incident. Hans admitted he also knew that in the grand jury proceedings, there was no defense attorney present to offer defense evidence. He admitted he looked at websites on which people without any personal knowledge of the incident discussed it.

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[27] This testimony was in the context of Hans's description of his attempt to have a pro-Brown website remove a letter Hans wrote supporting Brown. When the person in charge of the website refused to remove his letter, Hans wrote another website, stating: "I want you to know I no longer support [Brown] now that I know where this happened . . . I just want you to know that they aren't removing my letter and I want you to know that I don't believe he's innocent."

Defense counsel asked if Hans knew Brown was under the advisement of counsel not to discuss the incident, from the very beginning. Hans answered: "Well, the – he had told me that he – or his wife had, that he couldn't discuss the details of the situation. But there was nothing mentioned about anything, even that she had fallen, or what it was, or anything, until she told me the story of how it happened. And then when I saw those photos on the coastal projects—and I know what cliffs are like because I've jumped off of cliffs. When I saw that, it all added up for me. There it was, over and over and over, everything accumulated. I saw those photos and I was totally convinced. I mean, there was – I have kids. I know what it's like. He –"

Defense counsel interrupted: "He committed murder?" Hans answered: "I'm – I'm a hundred percent certain of it, as far as I can be, without actually being there with him."

After a lunch break, the cross-examination continued. Hans testified he had considered Brown to be a very thoughtful person and, when asked by detectives, Hans had to think a long time before he could remember seeing Brown angry. He testified he knew of no situation in which Brown physically assaulted another person or living thing. He wrote a letter of support for Brown when he was accused of murder. Defense counsel suggested Hans felt betrayed because Brown had not told him anything about the incident, leading to the following colloquy:

> "Q: And so . . . part – at a certain point, instead of feeling like you're supporting him, you start to feel like you're being used.
>
> A: The . . . it happened really quickly. Once I read the thing, saw the photos . . . that coastal website, and it was, like, then I . . . came out and finally asked him, point blank,

you know, what was going on. And then he became completely defensive, and that was it. I felt then, like, he won't even say 'Hey, I feel terrible, I didn't do this.' He wouldn't even tell me 'I didn't do this.' That was really – I mean nothing.

Q: He wouldn't talk about the case at all, like on that road trip.

A: Like I would expect my brother to do, yes.

Q: Exactly. That is your expectation of what you would expect your brother to do if he was in jail.

A: Right. I would expect my brother to say 'I didn't do this.'"

2. Discussion

Brown argues his counsel was ineffective because he elicited Hans's opinion that Brown was guilty of murder. We disagree. On direct examination, Hans had already revealed his opinion that Brown was not innocent. Defense counsel's cross examination appeared to be designed to show Hans was biased against Brown because he felt betrayed by Brown's refusal to talk to him openly about the incident. Counsel's question to Hans—"He committed murder?"—was in the context of Hans's admissions that his information all came from the internet and that his conclusion was tied to his personal feelings about Brown's failure to tell him more about Lauren's death. It is apparent this questioning had a rational tactical purpose of illustrating Hans's bias against Brown, and undermining Hans's damaging testimony on direct examination. (*People v. Dennis* (1998) 17 Cal.4th 468, 542 [defense counsel questions resulting in some damaging testimony not ineffective assistance where they

made clearer witness's ill-will toward and probable bias against defendant].) This was not ineffective assistance of counsel.

C. Counsel Was Not Ineffective for Failing to Object to the Medical Examiner's Testimony Regarding Discussions With the Chief Coroner

1. Background

During the direct examination of Chinwah, the following colloquy ensued:

"Q: You also told us that the actual coroner of Los Angeles County, the Chief Medical Examiner, was present at Inspiration Point with you; is that correct?

A: That's correct.

Q: Did you discuss your findings and conclusions with Dr. Lakshmanan, the Chief Medical Examiner for the entire county of Los Angeles?

A: Yes, I did.

Q: Did you review with Dr. Lakshmanan all of your findings with regard to the autopsy that you conducted on Lauren's body?

A: Yes, I did.

Q: Was there anything that the radiologist, the neuropathologist, or the head of the Department of Coroner discussed with you which caused you to in any way doubt or change your conclusion that the manner of Lauren's death was homicide?

A: No."

Defense counsel did not object to this testimony.

2. Discussion

Brown contends the testimony regarding the discussion between Chinwah and Lakshmanan was inadmissible hearsay and its admission violated his confrontation rights. Brown therefore argues he was deprived of the effective assistance of counsel because his attorney did not object to the question regarding Lakshmanan. We disagree because we conclude the prosecutor did not elicit inadmissible hearsay.

"Hearsay may be briefly understood as an out-of-court statement offered for the truth of its content. Evidence Code section 1200, subdivision (a) formally defines hearsay as 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' A 'statement' is 'oral or written verbal expression' or the 'nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.' (Evid. Code, § 225.) Senate committee comments to Evidence Code section 1200 explain that a statement 'offered for some purpose other than to prove the fact stated therein is not hearsay.' [Citations.] Thus, a hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true. Hearsay is generally inadmissible unless it falls under an exception. (Evid. Code, § 1200, subd. (b).)" (*People v. Sanchez* (2016) 63 Cal.4th 665, 674.)

The challenged testimony regarding Lakshmanan was not hearsay. The prosecutor asked Chinwah whether he discussed his findings with Lakshmanan, but did not elicit testimony about any *statements* Lakshmanan made in those discussions. Further, the only follow up question was whether anything Lakshmanan

(or two other doctors) discussed with Chinwah caused him to change his conclusion that Lauren's death was a homicide. This question did not elicit Lakshmanan's statements and concerned only the effect of the discussions on Chinwah. (*Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334, 1348-1349 [testimony that defendants "wanted" items removed was not hearsay because it did not purport to recount a statement or prove what was "stated"].) The testimony did not introduce hearsay, and the Confrontation Clause was not implicated because no out-of-court testimonial statement from Lakshmanan was admitted. (*People v. Sanchez, supra,* 63 Cal.4th at p. 680 [admission of a hearsay statement violates right to confrontation if the statement is testimonial hearsay].) Defense counsel was not ineffective for failing to object to this testimony.

IV. Other Evidentiary Rulings

A. Prior Uncharged Conduct (Freda Clifford)

Brown contends the trial court erred in admitting evidence that, in 1986, he threw his ex-girlfriend's belongings off a cliff and once damaged her car. Brown asserts the evidence was inadmissible under Evidence Code section 1101, subdivision (b), and Evidence Code section 352. We disagree.

1. Procedural background

In advance of trial, the People sought to introduce the testimony of Freda Clifford, Brown's ex-girlfriend, as evidence of prior bad acts under Evidence Code section 1101, subdivision (b). The People argued Clifford's testimony demonstrated a common plan, in which Brown dealt with conflict against women he was dating by indirectly lashing out at them. Brown opposed the motion, arguing the proposed evidence was irrelevant except as inadmissible, speculative character evidence. Brown further

argued the prior acts were remote, there was no nexus between the acts and the charged crime, and the potential prejudice would outweigh any probative value of the evidence.

The trial court granted the People's motion as to Clifford's testimony, concluding the evidence tended to establish a common plan or scheme, and the probative value was not substantially outweighed by its prejudicial effect.

As described above, at trial, Clifford testified Brown threw her belongings off a cliff when he was angry and he smashed his car into hers to damage it.

2. Discussion

"Evidence Code section 1101(b) authorizes the admission of 'a crime, civil wrong, *or other act*' to prove something other than the defendant's character . . . . The conduct admitted under Evidence Code section 1101(b) need not have been prosecuted as a crime, nor is a conviction required. [Citation.] . . . [T]he uncharged act must be relevant to prove a fact at issue (Evid. Code, § 210), and its admission must not be unduly prejudicial, confusing, or time consuming (Evid. Code, § 352). [¶] The relevance depends, in part, on whether the act is sufficiently similar to the current charges to support a rational inference of intent, common design, identity, or other material fact. [Citation.] . . . Greater similarity is required to prove the existence of a common design or plan. In such a case, evidence of uncharged misconduct must demonstrate ' "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." [Citation.]' [Citation.] To show a common design, 'evidence that the defendant has committed uncharged

criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts.' [Citation.]" (*People v. Leon* (2015) 61 Cal.4th 569, 597-598.)

" 'If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant's intent, common plan, or identity, the trial court then must consider whether the probative value of the evidence "is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.)" [Citation.] "Rulings made under [Evidence Code sections 1101 and 352 . . .] are reviewed for an abuse of discretion. [Citation.]" [Citation.] "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" [Citation.]' [Citation.]" (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

The trial court did not abuse its discretion in concluding the Clifford evidence was admissible to show a common design or plan. The Clifford evidence indicated Brown was in a relationship with Clifford, he grew angry with her, but instead of confronting her directly, he engaged in aggressive behavior that would affect her: damaging her car and throwing her possessions off a cliff. The evidence in the instant case indicated Brown had been in a relationship with Key-Marer, he was angry with her, he stopped directly engaging with her and refused to talk with her, and he took several actions that would affect her, such as seeking

visitation with Lauren to "torture" Key-Marer, telling Lauren malicious things she repeated to Key-Marer, and culminating with the fatal incident. The trial court could reasonably conclude the Clifford testimony was relevant to show a common design or plan. (*People v. Prince* (2007) 40 Cal.4th 1179, 1271–1272 [evidence that defendant followed or "stalked" woman of same race and gender as murder victims, who had also been followed, admissible as evidence of common scheme or plan].)

Further, the trial court did not err in concluding the probative value of the evidence outweighed any prejudice. The Clifford testimony was relevant to illustrate Brown's angry yet indirect approach to conflict. (*People v. Thomas* (1992) 2 Cal.4th 489, 519–620 [evidence that defendant liked to sneak up on people was relevant to demonstrate he had the ability to surprise the victims and showed opportunity].) Moreover, in contrast to the charged crime, the Clifford testimony was not particularly inflammatory. Clifford's testimony did not consume a substantial amount of time. (*People v. Leon, supra,* 61 Cal.4th at pp. 599–600.) The jury was also instructed that the prior acts could only be considered for the limited purpose of proving "a characteristic method, plan, or scheme in the commission of an act or acts constituting a crime or crimes similar to the method, plan or scheme used in the commission of the offense in this case." (*People v. Rogers*, *supra,* 57 Cal.4th at p. 332.) The trial court did not abuse its discretion in concluding the Clifford testimony was admissible under Evidence Code sections 1101 and 352.

B. Brown's Comments About his Mother

Brown also argues the trial court erred in admitting evidence that he told Key-Marer he hated his mother, he did not care if she died, and he would not attend her funeral. As we

understand his arguments on appeal, Brown asserts the evidence was irrelevant, inadmissible hearsay, improper character evidence, and was overly prejudicial. We find no abuse of discretion in the trial court's ruling.

Before trial, Brown moved to exclude evidence of his alleged animosity toward his mother. The trial court denied the motion. The court explained it would admit the evidence regarding Brown's mother because it was relevant to Brown's motive for the charged crime, specifically his anger at Key-Marer for establishing a relationship between Lauren and her grandmother. The court further indicated the evidence was relevant to impeach Brown's mother's anticipated testimony that she and Brown had a positive relationship.

We find no abuse of discretion in the trial court ruling regarding the testimony related to Brown's statements about his mother. (*People v. Scott* (2011) 52 Cal.4th 452, 491.) The evidence had a purpose other than to prove the truth of the statements or Brown's character. Evidence of Brown's expressed animosity toward his mother was relevant to illustrate the further deterioration of his relationship with Key-Marer after she initiated contact with Brown's mother and facilitated a relationship between the grandmother and Lauren. The evidence also undermined the credibility of Brown's mother as a witness. Brown's mother testified she and Brown had a good, strong relationship. Brown's statements that he hated his mother and wished to see her dead contradicted this testimony. The evidence was not of a nature likely to inflame the emotions of the jury, remote, or unduly time consuming. (*People v. Scott, supra,* 52 Cal.4th at pp. 490–491.) The trial court did not abuse its discretion in admitting Key-Marer's testimony on this point.

C. Evidence of Brown Destroying His Brother's Car and Threatening to Beat Up His Neighbor

Before trial, Brown moved to exclude Key-Marer's anticipated testimony that Brown's father told her about an incident in which, during an argument with his brother at a family meal, Brown went outside, jumped on top of his brother's car, and destroyed it. Brown contended the evidence was inadmissible hearsay and should be excluded under Evidence Code section 352. The People argued the evidence was not offered for its truth but was admissible evidence of Key-Marer's state of mind. The People asserted the evidence explained why Key-Marer wished to limit Brown's visitation with Lauren. The court denied Brown's motion, concluding the evidence was relevant to Key-Marer's state of mind "regarding her fear with respect to the issue of allowing visitation and unsupervised visits between the defendant and the victim."

We agree the trial court abused its discretion in admitting this evidence. Key-Marer's state of mind regarding Brown's visitation with Lauren was not relevant to any material issue in the People's case. Further, the defense did not raise any issue concerning Key-Marer's state of mind that rendered the evidence relevant to the question of whether Brown killed Lauren. (*People v. Noguera* (1992) 4 Cal.4th 599, 621 [essential requirement of the Evidence Code section 1250 state of mind exception to hearsay is that the declarant's mental state be factually relevant].)

Similarly, there was little or no probative value in the testimony from a former friend of Brown's that he once threatened to beat up another man. Brown objected to this

testimony as irrelevant and inadmissible hearsay. The trial court ruled the evidence was relevant because one of the aspects of the trial was Brown's "alleged anger and behavior."[28] Yet, that Brown made a threatening statement out of anger was not relevant to prove motive, intent, or plan with respect to Lauren's murder. To the extent the defense attempted to establish Brown did not generally show emotion, this was directed to the People's focus on Brown's lack of grief, hysteria, or other typical emotion in response to Lauren's death. Brown's display of *anger* in threatening a neighbor did not shed light on his demeanor immediately after Lauren's death. With no legitimate basis for the court to admit the evidence, and a potential for it to be used for an improper, prejudicial purpose, the court should have excluded the evidence as either irrelevant or unduly prejudicial under Evidence Code section 352.

However, we find the court's error in admitting these two piece of evidence harmless.[29] These portions of testimony were brief, removed from the significant issues in the case, and not overly inflammatory. There was significant evidence against Brown, notably his own statements expressing his desire to

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[28] The trial court overruled the hearsay objection on the ground that there was an adoptive admission of the statements. Brown does not challenge this aspect of the trial court's ruling on appeal.

[29] In his appellate briefing, Brown mentions other evidence related to Brown's past displays of anger or bad behavior: evidence that he called a girlfriend names during an argument and that he once became angry at his father for being late to breakfast. However, Brown did not object to this evidence at trial. Any claim based on this evidence is forfeited. (*People v. Mills* (2010) 48 Cal.4th 158, 194.)

"get rid of" Lauren, his decision to take Lauren to a dangerous outdoor area, and his callous and indifferent attitude after Lauren's death. It is not reasonably probable that, absent the error, Brown would have received a more favorable result. (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1018.) Further, the error did not render Brown's trial fundamentally unfair. (*People v. Partida, supra,* 37 Cal.4th at p. 439.)

V. Prosecutorial Misconduct

Brown contends several of the prosecutor's statements during closing argument constituted misconduct. We disagree.

"A prosecutor engages in misconduct by misstating facts, but enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom." (*People v. Hamilton* (2009) 45 Cal.4th 863, 928.)

" ' "A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] . . . . We consider the assertedly improper remarks in the context of the argument as a whole. [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894.)

It is well established that the defendant must object to prosecutorial misconduct in the trial court to create a basis for relief on appeal. (*People v. Fuiava* (2012) 53 Cal.4th 622, 679-680; *People v. Riggs* (2008) 44 Cal.4th 248, 298.) "A defendant's failure to object and to request an admonition is excused only when 'an objection would have been futile or an admonition ineffective.' " (*Fuiava*, *supra*, 53 Cal.4th at p. 679.)

A. Challenges to the Prosecutor's Comments Regarding Lakshmanan or Siegmund's Work in the Case Were Forfeited for Lack of an Objection at Trial; Neither Situation Constituted Ineffective Assistance of Counsel

1. Comments regarding Dr. Lakshmanan

In his closing argument, the prosecutor argued the jury should credit Chinwah's analysis, asserting: "And [Chinwah] reviewed the information with his boss, the Coroner of LA County, Dr. Lakshmanan. He goes over all of the information with Dr. Lakshmanan, and Dr. Lakshmanan concurs. And Dr. Chinwah explains why, and common sense confirms it."

On appeal, Brown contends the prosecutor committed misconduct because Lakshmanan's opinion that Lauren's death was a homicide was inadmissible hearsay. Defense counsel did not object to the prosecutor's statements at argument, and we do not find the statement was so egregious that it could not have been cured with an admonition. Any objection was forfeited. (*People v. Redd* (2010) 48 Cal.4th 691, 734; *People v. Kegler* (1987) 197 Cal.App.3d 72, 91.)

Brown further asserts defense counsel was incompetent for failing to object. However, the record reveals no explanation for the failure to object. We concluded earlier that Chinwah's

testimony with respect to Lakshmanan did not put inadmissible hearsay before the jury. Thus, at most, the prosecutor could be said to have inaccurately construed the evidence by asserting Lakshmanan "concurred" with Chinwah. Even if this was an improper or misleading statement, the prosecutor's comment was three phrases in a long closing argument. The jury was instructed that the arguments of counsel were not evidence. We cannot conclude there could be no rational tactical basis for not objecting to the statements, or that it is reasonably probable the jury would have reached a different verdict absent these comments. We reject the claim of ineffective assistance of counsel. (*Jackson, supra,* 1 Cal.5th at p. 350.)

2. Comments regarding Siegmund's lack of investigation

In a long critique of Siegmund's qualifications and testimony, the prosecutor argued:

"The defense never has [Siegmund] prepare a report that can be reviewed and critiqued. He first reviews the materials in 2004, but doesn't prepare the PowerPoint until over ten years later, the week before he testifies. [¶] And his PowerPoint is, essentially, just Dr. Hayes' PowerPoint with a couple of circles and some comments written on it. He spends a whole bunch of time critiquing Dr. Hayes' extensive analysis, but he does virtually none of his own. [¶] He does one single trajectory analysis. He presents no evidence that it's valid for a four-year-old. He presents no evidence that it would produce Lauren's injuries. He does no computer simulations. [¶] Although, interestingly, he doesn't critique Dr. Hayes' computer simulations. He, basically, says, Lauren's injuries are consistent

with multiple injuries from the cliff if you drop the apple and it lands in the same place twice."

Defense counsel did not object to this argument.

We again conclude this statement was not so egregious that it could not have been cured with an admonition. Any objection was forfeited. Moreover, we disagree that the comment constituted misconduct. In context, the prosecutor's comments appeared to refer primarily to Hayes's computational analysis, rather than to his experiments. The challenged comment came between the prosecutor's reference to the Hayes PowerPoint, which was largely based on calculations, and a reference to Hayes's computer simulations, which were derived from information other than the pelican box experiment. Further, when Siegmund was allowed to testify about the rescue dummy experiments in 2009, the evidence offered was a video of the dummies falling and impacting the cliff. There was no additional computational analysis relating to the rescue dummies.

As explained above, the pelican box experiment was presented as merely confirming the calculations and analysis Hayes had already performed predicting the trajectory of an object launched from the top of the cliff. The prosecutor's comments regarding Siegmund could reasonably be interpreted as referring not to an alleged lack of experiments, but instead to a lack of trajectory calculations and computer simulations. The statement also drew attention to Siegmund's use of Hayes's calculations as the starting point for his own opinions in the case. This was an acceptable comment on the state of the evidence, even considering the excluded evidence of Siegmund's rescue dummy experiments. Thus, we reject the argument that

counsel's failure to object fell below an objective standard of reasonableness under prevailing professional norms.

B. Comments Regarding the Lack of Evidence That Anyone Had Ever Accidentally Fallen From Inspiration Point

1. Background

During cross-examination, Key-Marer admitted that in February 2001, she made a presentation to the Rancho Palos Verdes City Council in which she asked the council members to install railings and warning signs at Inspiration Point, "so that parents would be made really aware of just how dangerous Inspiration Point was. . . ." Key-Marer admitted she told the council "that in the last two years, there had been two other deaths off Inspiration Point," and that she hoped the safety measures she was advocating "would prevent further – future deaths[.]" On redirect, Key-Marer testified that at the time she made the presentation she did not know whether Lauren's death was an accident or a murder. She also testified that the two deaths off Inspiration Point she knew of were suicides, not people accidentally falling off the point.

In his rebuttal closing argument, the prosecutor argued Brown failed to proffer any evidence establishing there had ever been other accidental falls at Inspiration Point, leading to a defense objection:

> "We also know that there is absolutely no evidence that anyone has ever accidentally fallen from Inspiration Point. And you can bet if there was evidence of that, the defense would have presented it. So here's the defense story.
> [Defense counsel]: I object to that as arguing facts that are not in evidence.

> The Court: All right. Your objection is noted for the record.
> [Prosecutor]: The only person to accidentally fall off Inspiration Point just happens to be Lauren, a little four-year-old girl whose mother the defendant despises, whom he never wanted to be born, who's costing him over $1,000 a month, and whose wife, Patty, is nagging him to adopt.
> [Defense counsel]: Your Honor, I object. That is prosecutorial misconduct to argue facts not in evidence.
> The Court: Overruled, Counsel.
> [Prosecutor]: What an amazing coincidence that the source of all the defendant's problems just happens to be the only person on the planet to ever accidentally fall off Inspiration Point; On the one day a week he has unsupervised visits . . . ."

2. Analysis

"[P]rosecutorial comment upon a defendant's failure 'to introduce material evidence or to call logical witnesses' is not improper." (*People v. Wash* (1993) 6 Cal.4th 215, 263.) The prosecutor's comments here regarding Brown's failure to offer evidence of other accidental falls was a permissible comment on the failure to introduce material evidence or call logical witnesses. Particularly in light of the cross-examination of Key-Marer, in which the defense attempted to show her concern about other fatal falls from Inspiration Point, the prosecution could permissibly argue the defense would have proffered such evidence if it existed.

It is well established that a prosecutor's reference to facts not in evidence is misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 828.) In isolation, the prosecutor's twice-repeated argument

that Lauren was the only person to have ever accidentally fallen off Inspiration Point could appear to be an impermissible suggestion of the existence of facts not in evidence. However, on appeal, we consider the prosecutor's remarks as a whole, and "when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) In light of the immediately preceding statement regarding the defense failure to offer evidence of accidental falls, as well as the court's instruction to the jury that the arguments of counsel were not evidence, we conclude the prosecutor's argument did not constitute prejudicial misconduct.

VI. No Abuse of Discretion in Allowing the Jury to Visit the Scene

Over a defense objection, the trial court allowed the jury to visit the crime scene. On appeal, Brown contends this was an abuse of discretion. Brown contends photographs, video recordings, and a topographical model adequately informed the jury of all aspects of the scene, thus the only purpose of the jury view was to allow the jurors to imagine the horror of a child falling off a cliff. Brown asserts any probative value was outweighed by the potential prejudice. We find no error.

"The trial court may allow the jury 'to view the place in which the offense is charged to have been committed, or in which any other material fact occurred.' (§ 1119.) We review for abuse of discretion a trial court's ruling on a party's motion for a jury view." (*People v. Davis* (2009) 46 Cal.4th 539, 610.) Here, the court ruled a viewing was appropriate to aid the jurors "in better

understanding visually factors such as depth, height, and/or steepness, ruggedness, distances, as well as relevant vantage points where observations may have been made." This ruling was not arbitrary, capricious, or outside the bounds of reason. The evidence adduced at trial was significantly linked to the physical landscape at and around Inspiration Point, such as the difficulty of the hike to Inspiration Point, the location and relative positioning of Brown and Lauren when they were on top of the cliff, and the paths Brown took to get help and to retrieve Lauren's body. Although these issues were the subject of testimony and were illustrated by various visual aids, the trial court did not abuse its discretion in concluding a visit to the scene would further aid the jury. Moreover, the jury had already heard lengthy testimony which allowed them to imagine the "horror of a child falling from the cliff." We disagree that any potential prejudice arising from a visit to the scene outweighed the probative value of the visit.

VII. No Cumulative Error

We reject Brown's claim that the cumulative effect of the trial court error and prosecutorial misconduct rendered his trial unfair and denied him of due process.

"Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable possibility' that the jury would have reached a result more favorable to defendant absent a combination of errors." (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1216.) "A claim of cumulative error is in essence a due process claim and is often presented as such [citation]. 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." ' [Citation.]" (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.)

We have identified only two instances of error: the trial court's exclusion of the Schliebe testimony indicating he could not tell if the photographs from the scene depicted shoeprints and the admission of some of the evidence regarding Brown's past conduct. We have found each of these errors harmless on their own. "Considering them together, we likewise conclude their cumulative effect does not warrant reversal of the judgment." (*People v. Burgener* (2003) 29 Cal.4th 833, 884.) We also have found no ineffective assistance of counsel, either because counsel's performance was not deficient, it may have had a tactical purpose, or it was not prejudicial. "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill, supra,* 17 Cal.4th at p. 844, citing Cal. Const., art. VI, § 13 and *Chapman v. California* (1967) 386 U.S. 18, 24.) On the complete record, the errors we have identified were minor and did not, even when combined, rise to the level of reversible, prejudicial error.

VIII. Parole Revocation Fine is Stricken

Brown argues, and the People concede, that the trial court erred in imposing but staying a parole revocation fine since Brown was sentenced to life without the possibility of parole. We agree and strike the parole revocation fine. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.)

DISPOSITION

The parole revocation fine is stricken. The trial court is directed to prepare an amended abstract of judgment that does not reflect the imposition of a parole revocation fine and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.