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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES DUANE GRZESLO, Defendant and Appellant.	B278205 (Los Angeles County Super. Ct. No. SA079092)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elden S. Fox, Judge. Affirmed.

James Duane Grzeslo, in pro. per; and David Andrew Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted James Duane Grzeslo (defendant) of first degree murder of his girlfriend Cathy Ann Carrasco-Zanini (Cathy)[1] (Pen. Code, § 187, subd. (a)).[2] The jury found true the allegation that defendant personally used a knife in the commission of the murder. (§ 12022, subdivision (b)(1).) The trial court sentenced defendant to 25 years to life in state prison for the murder conviction, plus a one-year enhancement term for use of the knife.[3] Defendant filed a timely notice of appeal.

Appellate counsel contends the trial court erred in failing sua sponte to hold a hearing on whether defendant was competent to continue to represent himself. Counsel also contends the trial court abused its discretion in admitting (1) statements defendant made to his co-workers about slitting the throats of enemy soldiers in Vietnam (enemy statements); and (2) the opinion of the prosecution's crime scene expert, Paul Delhauer, concerning the manner in which Cathy was killed. Specifically, he contends the enemy statements were irrelevant, supporting only speculative inferences and unduly prejudicial even if relevant, and the expert's opinion that Cathy was killed in a "blitz" attack was also mere speculation.

For the reasons set forth below, the record does not raise a reasonable doubt as to defendant's competency to represent

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[1] We refer to the victim, Cathy Carrasco-Zanini, by her first name for convenience and ease of reference. We intend no disrespect.

[2] Further undesignated statutory references are to the Penal Code.

[3] The trial court also ordered defendant to pay a restitution fine of $10,000. (§ 1202.4, subd. (b).)

himself; the trial court thus did not err in failing to hold a competency hearing. We conclude defendant's enemy statements were relevant to show intent and premeditation and not unduly prejudicial, nor was the expert's opinion on the physical mechanism of Cathy's murder speculative. We thus affirm.

FACTUAL BACKGROUND

Cathy began dating defendant in 2010. In the spring or summer of 2011, defendant began visiting anger management counselor Martin Brenner (Brenner). At some point, Cathy accompanied defendant at these counseling sessions. Brenner described the relationship between the couple as "volatile." He explained they both "said derogatory stuff to each other." Brenner described Cathy as "very verbal and aggressive" in his office. Brenner also said defendant had a history of verbally and sometimes physically attacking Cathy and that was why defendant had come to see Brenner.

The defendant told co-worker Michelle Dorch Carte (Carte) that he went to a counselor for anger management and that Cathy wanted to go to counseling with him before they would move in together. According to Carte, defendant moved out of his apartment, expecting to live with Cathy. He gave much of the furniture in his apartment to coworkers because "[h]e didn't want to take anything with him." After defendant moved out of his apartment, Cathy refused to live with him because "she wanted a ring first and wanted to get married." Defendant was angry and upset. Carte believed this happened in September or October of 2011.

In the early evening of October 25, 2011, Cathy met her girlfriend Jamie Grauman (Grauman) to work out, as was their habit on Tuesdays. As usual, they had dinner together

afterward. Unusually, Cathy was not wearing makeup. She looked tired and drawn. She did not want to discuss what she and defendant had done the previous weekend. Grauman thought Cathy seemed depressed.

At about 9:00 p.m., Cathy called her long-time friend Linda Cherry (Cherry). Cherry said Cathy sounded very tired and a little depressed. The two women spoke for about two hours, which was an unusually long conversation. Cathy was sad and very concerned about her relationship with defendant.

On October 26, 2011, about 8:18 a.m., video from a security camera in a building near Cathy's apartment recorded a car driving past the building in the direction of Cathy's apartment. Although the video did not show the car's license plates, the car had many of the same distinctive features as defendant's car. At about 8:33 a.m., the camera showed the same car driving past the building and away from Cathy's apartment.

Although the video did not show any details of the car's driver, cell phone data placed defendant in the vicinity of Cathy's apartment at that time. Those records showed defendant called his brother, Thomas Grzeslo (Thomas)[4], at 8:33 a.m.; defendant's cell phone used a tower near Cathy's apartment. Thomas testified that defendant said, "I need help," and then, "I just killed somebody." Thomas asked defendant, "What do you mean you just killed somebody?" Defendant replied, "I just broke it off with Cathy for good." Defendant then said, "I killed her." Thomas replied, "I couldn't deal with that" and hung up the phone.

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[4] We refer to defendant's relatives by their first names only for clarity and ease of reference. We intend no disrespect.

Thomas soon called defendant back and tried to convince defendant to turn himself in to the police. Defendant replied, "No, they are going to kill me." Thomas asked defendant what he had done. Defendant's response was garbled. Thomas heard "I" then the consonant "t" and then "her head off." Thomas "assumed" that defendant had shot Cathy. The conversation ended.

Several hours later, Thomas called defendant back and again tried to convince him to turn himself in to the police. Defendant replied that he was going to see his therapist.

Defendant also called his sixteen-year-old son, Travis Grzeslo (Travis)[5], who lived in North Carolina. They spoke sometime between 11:00 a.m. and 1:00 p.m. Defendant sounded "distressed." He said that he had been relieved from his job and his relationship with Cathy was over. Defendant said "[t]here was no fixing things and that . . . he had made a mistake he couldn't go back on." Defendant also said, "Let's put it this way, it's eternal." Travis was confused, but defendant said they would talk about it later. That was the end of their conversation.

In between speaking with Thomas and Travis, defendant called his counselor Brenner. They spoke at about 9:00 a.m. Defendant said, "'I did something bad. I had a dream. I think I hurt my girlfriend or fiancé at the time." Defendant added, "I think I killed her, and I just thought it was just a dream." Brenner agreed to see defendant at 1:45 p.m.

When defendant arrived for his appointment with Brenner, he "[h]ad no affect. He was white. He looked like he just saw a ghost." Brenner testified defendant said, "I think I did a bad

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[5] See footnote 4.

thing" and asked Brenner to call his girlfriend. Brenner asked, "Why?" Defendant replied, "I had a dream. I think I killed her." Brenner called Cathy but there was no answer. Brenner then asked defendant to take everything out of his pockets. Defendant complied. One of the items defendant took out was a pocket knife. He also removed some keys from his pocket.

Brenner called the police because he wanted defendant to be placed on "a psychiatric holding, 5150, based on his demeanor." Brenner testified that he did not believe "something was wrong in terms of a criminal act." He was concerned about defendant's mental health. Brenner gave police Cathy's address. Police arrived at Brenner's office within 15 minutes.

Beverly Hills Police Department (BHPD) Officer Gary Castaldo was among the officers who went to Brenner's office. Officer Castaldo handcuffed defendant and patted him down. A small pocket knife fell out of defendant's pocket. Officer Castaldo sat down next to defendant and conversed with him for about 11 minutes to build rapport.

Defendant told the officer that he had a girlfriend but they were having relationship problems. He used to live with her, but no longer did. The past weekend had been good between them. On Tuesday night, she went out with some girlfriends and defendant became upset. She "berated" defendant because he did not have any friends to go out with and that caused a little fight. Sometime around 8:00 a.m. the next morning (October 26), defendant used his key to enter her apartment. They got into an argument and "she threw some items at him, a vase and some photos." Defendant said, "I think I killed my girlfriend." He then added, "I think I cut my girlfriend's throat with a knife."

Defendant also said it was like a nightmare and it was foggy. He was not sure what happened.

Defendant was taken to the Beverly Hills jail. There, BHPD forensic specialist Segalit Oz (Oz) photographed defendant. The photographs showed fresh cuts on the index finger and thumb of defendant's right hand, a scratch and a red mark on his left hand, and a fresh scratch on his right forearm. Oz testified that the cuts appeared to have been "sliced open."

BHPD Officer Eric Olson obtained the keys that defendant had surrendered in Brenner's office and went to Cathy's apartment. Officer Olson used one of the keys to unlock one of the doors of the apartment. He immediately saw Cathy lying face down in the kitchen. There was a large pool of blood around her upper torso. Officer Olson summoned paramedics, who entered the apartment and pronounced Cathy dead.

Officer Olson then conducted an inspection of the apartment to make sure no one else was inside. There was no one. Officer Olson did not see any signs of forced entry into the apartment. He did not see any obvious disturbance. When Officer Olson entered the hallway, he saw large smears of blood on the floor, and some blood on the wall as well. The blood went about halfway down the hallway, a distance of 10 to 12 feet.

BHPD forensic specialist Jeannine Cascadden (Cascadden) soon arrived at the apartment. She took numerous photographs to document the condition of the interior of the apartment. There was no sign that the apartment had been ransacked.

In the bedroom, Cascadden observed that one side of the bed appeared to have been slept in. She did not see any blood in the bedroom, living room, or family room. Cascadden did observe blood on the threshold between the bathroom and the hallway

and drops of blood inside the bathroom. She found a broken toothbrush in the bathroom wastebasket.

Cascadden saw a pool of blood in the hallway with a trail of blood leading to the kitchen. She characterized the trail of blood as a "smear" from something blood-soaked being dragged along the floor. Cascadden opined that Cathy dragged herself down the hall, but then acknowledged on cross-examination that she could not tell whether Cathy's body was pulled or whether she pulled herself.

Cascadden saw blood on the wall between the kitchen doorway and the hall closet doorway. At trial, defendant showed Cascadden the photograph Cascadden took of the wall and asked if the blood looked like it spelled out the initials "JG." Cascadden responded, "At the time I took the picture, I did not notice, but this depicts what was there. If you're asking me here and now what I see, I do see a possib[ility] that there's a 'J' and a 'G'."

Cathy's body was still in the kitchen when Cascadden was performing her photographic documentation of the scene. A phone cord was intertwined in her left fist. She had a shoe on her left foot but not her right foot. Cascadden found the right shoe in the hallway towards the bathroom. The kitchen area itself contained a lot of blood. Cascadden observed a knife, spoon, colander, and soap in the kitchen sink. On cross-examination, she acknowledged that she did not see any water or debris on the knife, or any light red or pink liquid around or under the knife.

BHPD Detective Christopher Coulter went to defendant's apartment that afternoon and searched it. He found a still-warm dishwasher with two knives in it. No blood was found on the knives. Detective Coulter found a few items of damp clothing and a towel in defendant's washer and more clothing and a towel in

his dryer. These items tested negative for blood. On cross-examination, Detective Coulter acknowledged that he had never been involved in a case in which a criminal left his clothes in the washer and dryer.

Detective Coulter found band-aids and two towels on a counter in the bathroom. One towel had red stains; the stains were tested and determined to be defendant's blood.

Detective Coulter found a variety of books in defendant's apartment, including a book titled *I Did It* about the O.J. Simpson trial. The detective also found a composition book in the apartment. The book contained handwritten entries dated between July 28, 2011 and September 21, 2011. The entries were mainly about jealousy and control issues in defendant's relationship with Cathy. In a September 13 entry, defendant wrote, "Get out of this relationship. I'm being used." In a September 17 entry, defendant wrote, "Legend has it to dig two graves. One for your enemy, one for yourself. Well, I'm not ready to dig mine." In an entry dated September 21, defendant wrote that Cathy yelled at him over the phone and was verbally and emotionally abusive.

Sergeant Marcia Deanda worked in the Twin Correctional facility that housed defendant. She testified that Detective Coulter asked her to locate and review video of defendant working out at that correctional facility. She testified that the video depicted defendant's "holding on to a towel wrapped around the top rail [of his cell] and using his body weight to exercise up and down." The video was played to the jury. Upon defendant's cross-examination, Sergeant Deanda admitted that she saw defendant use only his left arm to wrap the towel around the bar. She also admitted seeing him walk with a "very slight limp."

Los Angeles County Coroner's Office pathologist Dr. Job Augustine performed an autopsy on Cathy. He observed two superficial incised wounds to her neck and one 7.25-inch-long incised wound that went from left to right across her neck. The wound included a cut to her jugular vein, which was the cause of death. The wounds were consistent with a right-handed person cutting Cathy's neck from behind. Cathy had only minor defensive wounds on her hands and arms, which made it more likely that she was attacked from behind rather than from the front. In the pathologist's experience, a person who is attacked from the front typically has "larger, more extensive areas of injuries to the forearms, large gashes to the wrists. . . . with . . . cuts to the palms and multiple fingers.

At trial, three of defendant's coworkers testified about his behavior in the months before Cathy's murder. All three gave similar accounts of working with defendant. Marcia Lang was a registered nurse at Los Robles Hospital in 2010 and 2011. She worked with defendant, who was a contract nurse in the hospital's cardiac catheter lab. Zandra Miller (Miller) and Carte were registered nurses who worked at West Hills Hospital in 2011. They worked with defendant in the cardiac catheter lab while he was a contract nurse at that hospital in 2011. His duties included sedating patients, administering medications, and making sure patients were stable during cardiac procedures.

Defendant told all three coworkers that he had had a stroke. None of the women noticed defendant having any difficulty performing his job duties. Miller noticed defendant slightly dragging one of his feet, but this did not affect his ability to perform his job duties.

Defendant told Lang that he had a second occupation doing "something forensic—like law." He told Carte that he had a Ph.D. in forensic accounting and had a business that did audits of hospitals and doctors. Defendant said he "helped to bring down Bernie Madoff."

Defendant also told all three coworkers that he had been in a special forces unit in Vietnam. Lang and Miller saw a "Recon" skull and crossbones tattoo on defendant's arm. Defendant told Lang the teeth in the skull represented the people he had killed. When Lang asked defendant if he had shot the people with a gun, defendant replied that he snuck up behind them and slit their throat with a knife." After Miller noticed defendant's tattoo, defendant told her that he was in the special forces in Vietnam and that "he would hide behind the bush or brush and he would turn the enemy to Pez dispensers." When defendant said this, he moved his thumb across his throat and then moved his "head up and down, . . . like a Pez dispenser would open and close, the candy dispenser." Defendant also told Carte that when he was in Vietnam, he "made people into Pez dispensers." He illustrated this statement by drawing his index finger across his throat and flipping his head back. At trial, the prosecutor asked Carte whether she thought defendant was joking or serious when he talked about killing people. Carte replied, "I really don't know. I had no reason to not believe him."

All three coworkers described instances when defendant had displayed jealousy related to Cathy. Lang testified defendant was upset that Cathy displayed photos of her ex-husband and her children. Miller stated defendant did not like it when Cathy went out dancing with her friends. Defendant also mentioned that Cathy had a homosexual friend, and

defendant said he would not have any trouble killing him. Carte testified defendant told her that Cathy had a client who was "pretending to be gay but was not and was trying to get close to" Cathy. Defendant stated he would kill the man if he did not leave Cathy alone. Defendant also said that someone had flirted with Cathy at a family event and that he would have no problem killing him.

Charles Yancy (Yancy) testified that he was Cathy's personal trainer at a gym at which defendant worked out occasionally. Cathy and he were friends and were in contact even after Cathy stopped training with him. Yancy testified that he had opportunity to observe defendant using weight machines at the gym and that defendant "definitely appeared to be fine." He elaborated that defendant was able to use both his arms without favoring one over the other, and was of "moderate" fitness.

Upon cross-examination, Yancy testified that he had not observed defendant using all the available machines and weights, but eschewed seeing defendant "limping or dragging one side of [his] body such as a foot." He also described a meeting at a downtown hotel to have drinks after working out at which he, Cathy and defendant were present. He admitted that he was "more or less there to see Cathy." He denied that Cathy was sitting on his lap. He also admitted being Facebook friends with Cathy. He denied ever stating in an email to Cathy on Facebook that he was " 'unable to keep [his] hands off [her].' "

Cathy had a gay male friend named Tarpon London who worked at a gym Cathy frequented. Defendant also used this gym. London saw defendant working out, and it did not appear to London that defendant had any physical problems preventing him from using the machines or working out.

At some point, London and his partner David went out for dinner with Cathy and defendant. London observed that defendant was not comfortable when the maître 'd started to pull out Cathy's chair and that defendant blocked the man's attempt to assist Cathy.

On another occasion, defendant told London he was a surgeon, but he had injured his hand and was no longer practicing medicine. Defendant showed London a cellular phone photograph of a man dressed in scrubs and a surgical mask standing in a surgical environment. Defendant said he was the man in the photograph and told London, "I know exactly where to cut." Defendant made this statement quietly and in a low tone. London told defendant not to talk to him like that ever again.

The prosecution's final witness at trial was Paul Delhauer, a crime scene reconstruction expert. Delhauer offered opinions in several different areas. First, he opined that Cathy was killed in a "blitz" attack—an attack so rapid and violent that that the victim had little chance to resist. Delhauer opined that the attacker slit Cathy's throat from behind.

Delhauer also opined that the blood evidence in the apartment hallway showed that Cathy survived the attack and dragged herself into the kitchen. On the way, Cathy wrote "JG" on the wall in her own blood. In the kitchen, Cathy tried to pull the telephone down to her, but inadvertently pulled the phone out of the wall jack. Delhauer testified that blood stains in the bathroom indicated that blood was washed off someone or something in that room.

Delhauer further opined that defendant's thumb injury was consistent with defendant being the assailant in a knife attack, and that the knife used to kill Cathy had a serrated edge. The

knife found in Cathy's sink was consistent with its being the murder weapon. He elaborated that the knife "cannot be excluded as the murder weapon," but that he could not "definitively" state that "it is the murder weapon." Delhauer testified that the killer washed the knife to remove the killer's DNA.

Defendant called two forensic experts in his defense. The first expert, David Sugiyama, was a forensic specialist with expertise in physical evidence and interpreting DNA and other laboratory reports. His testimony focused on the absence of defendant's DNA on Cathy's body and the absence of Cathy's blood on defendant's clothing or car. Sugiyama explained there could be a number of reasons for these absences: the DNA/blood was never deposited, the DNA/blood was removed, or the DNA/blood was in quantities too small to be detected or to be useful. Sugiyama also discussed the absence of fingerprint evidence at the crime scene. Sugiyama agreed that in the reports and documents he reviewed, there was no physical evidence linking defendant to the crime scene.

Defendant's second expert was Marc Taylor, a forensic specialist with expertise in DNA analysis. In arriving at his opinions, Taylor primarily reviewed testing reports from other agencies. Taylor testified that the reports demonstrated that no blood was observed on the floor mats or steering wheel of defendant's car. The steering wheel did test "presumptively"[6] positive for blood.

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[6] Taylor explained that a " 'presumptive test for blood' . . . relies on certain characteristics of the hemoglobin molecule that's in blood to give us a reaction." The test is "not terribly specific for blood; it's a very fast sensitive test, but it will

Taylor testified that cars are known to produce a lot of false positives on "presumptive" blood tests. The false positives come from the driver touching batteries, oxidizing agents and other chemical agents associated with motor vehicles. Taylor also testified that the faucet in Cathy's kitchen tested presumptively positive for the presence of blood, but that too could be a false positive result. He explained that a false positive result could come from copper salt, bacteria or similar materials.

Taylor examined a report showing that defendant's DNA was found on a faucet handle in Cathy's apartment. The report characterized the DNA as "touch DNA." Taylor opined that based on the amount of that DNA, it was unlikely to be DNA from blood. Taylor also reviewed a report showing that male DNA found under the fingernails on Cathy's right hand was "very likely" from defendant, but that the level of DNA was low. Taylor elaborated that people who cohabit are known to get each other's DNA under their fingernails just from household interactions. He testified 12 to 15 percent of office workers were found to have another worker's DNA under their fingernails. On cross-examination, Taylor explained that it would be unusual to get a piece of skin that one could identify as skin under a person's fingernail, as opposed DNA from "pok[ing]" a finger in a victim's nose, mouth, or eye. No skin was found under Cathy's fingernails.

Taylor opined that none of the DNA test results in the reports he reviewed provided insight into whether defendant was involved in Cathy's death. Taylor also opined that "no weapon that was found could be identified as the murder weapon."

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react with other things." The presence of other chemicals "can end up causing . . . a 'false positive.' "

DISCUSSION

We divide our discussion into three sections addressing first, appellate counsel's competency argument, and second and third, appellate counsel's evidentiary attacks on admission of defendant's enemy statements and Delhauer's expert opinion.

I. THE RECORD DOES NOT SUPPORT THAT DEFENDANT WAS NOT COMPETENT TO REPRESENT HIMSELF, AND THE TRIAL COURT THUS DID NOT ERR IN FAILING TO HOLD A COMPETENCY HEARING.

Appellate counsel contends although defendant was competent to stand trial, there was substantial evidence that he was not competent to carry out the basic tasks needed to present his own defense without the assistance of counsel. He further contends that based on defendant's statements prior to and during the proceedings in this case, behavior at trial, motions and oppositions to the prosecution's motions, defense strategy, and implementation of that strategy, the trial court should have sua sponte held a hearing to determine whether defendant was competent to continue to represent himself.

Preliminary to our discussion, we note appellate counsel does not specify the point at which the trial court should have conducted a competency hearing. The trial court heard defendant's motion for self-representation on May 27, 2015, and granted that motion on the same day. Appellate counsel does not identify any statements in defendant's moving papers or during the hearing on self-representation that counsel contends would have raised a reasonable doubt as to defendant's competency to

represent himself.[7] The transcript of that hearing demonstrates defendant understood the status of his case, had begun to plan his defense, and was aware of the disadvantages of self-representation. Defendant properly filled out an advisement and waiver of the right to counsel form. Accordingly, we begin our evaluation of defendant's competency to represent himself after the trial court granted defendant's motion to represent himself.[8]

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[7] Appellate counsel contends that the trial court should have been concerned about defendant's competency based on testimony from the preliminary hearing. For example, according to counsel, evidence at that hearing showed defendant had previously made "outlandish" claims about his military service and professional accomplishments, and the record revealed he had anger management problems since childhood. We note that the judge who granted defendant's self-representation motion in May 2015 was not the same judge who presided over the preliminary hearing in November 2013. Appellate counsel has not demonstrated that the trial judge deciding the self-representation motion had read, or was required to read, the preliminary hearing transcript at the time that judge ruled on defendant's motion for self-representation.

Even assuming that the trial judge who granted defendant's self-representation motion had read the preliminary hearing transcript, as we discuss later in this opinion, defendant's anger management issues, statements about his military service and professional accomplishments, and choice of an identity defense do not raise a reasonable doubt about defendant's competency to represent himself.

[8] At oral argument, appellate counsel clarified that the trial court should have doubted defendant's ability to represent himself about at the time motions in limine were heard. We note that the hearing on defendant's self-representation motion

Because the record is prolix and appellate counsel's arguments are several, we discuss each of those arguments in separate subsections. As set forth in detail in those subsections, once defendant began representing himself, he filed numerous pretrial motions. His motions were internally coherent and contained accurate legal citations. Generally, his factual claims were contextually appropriate, that is, if the factual claims were found to be true, then they would have warranted the relief he sought. Defendant engaged the services of two forensic experts to offer relevant testimony in support of his chosen defense.

At trial, defendant made opening and closing statements setting forth his defense theory. He asked questions of the prosecution's witnesses on cross-examination that were designed to negate the prosecution's case and advance defendant's defense that he was not the killer. Defendant questioned his own experts in a manner that highlighted his defense theory. Both before and during trial, defendant was polite and cooperative in the trial court. He also responded readily to suggestions or corrections from the trial court.

In sum, our review of the record leads us to conclude there was no substantial evidence raising a reasonable doubt concerning defendant's competence to represent himself at trial.

A. Applicable Law and Standard of Review

Under the United States Constitution, a defendant in a criminal case has the right to represent himself. (*Faretta v. California* (1975) 422 U.S. 806.) The "autonomy and dignity interests" that underlie this right are not defeated by "the fact or

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occurred in May 2015 and the trial began more than one year later in August 2016.

likelihood that an unskilled, self-represented defendant will perform poorly in conducting his or her own defense." (*People v. Mickel* (2016) 2 Cal.5th 181, 206 (*Mickel*).) A self-represented defendant need not meet the standards of an attorney or even be capable of conducting "an effective defense." (*Ibid.*) The California Supreme Court has repeatedly "accepted that the cost of recognizing a criminal defendant's right to self-representation may result ' "in detriment to the defendant, if not outright unfairness." ' [Citations.]" (*Ibid.*)

A defendant also has the right under the U.S. Constitution not to be to subject to a criminal trial while he is mentally incompetent. Mental competence in this context means that the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and also has "a rational as well as a factual understanding of the proceedings against him." (*Dusky v. United States* (1960) 362 U.S. 402 (*Dusky*).) Some defendants suffer from "a mental condition that falls in a gray area between *Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose," that is self-representation. (*Indiana v. Edwards* (2008) 554 U.S. 164, 172 (*Edwards*).) The United States Supreme Court has held that states may, but need not, deny self-representation to "gray-area defendants"—those defendants who are competent to stand trial but lack the mental health or capacity to represent themselves. (*Id.* at p. 174.)

The California Supreme Court has held that "[c]onsistent with long-established California law," a trial court "may deny self-representation in those cases where *Edwards* permits such

denial." (*People v. Johnson* (2012) 53 Cal.4th 519, 528 (*Johnson*).)[9] As the California Supreme Court made clear, under *Edwards*, *supra*, 554 U.S. 164, competence to represent oneself at trial is best described as "the ability 'to carry out the basic tasks needed to present [one's] own defense without the help of counsel.' [Citation.]" (*Johnson*, *supra*, 53 Cal.4th at p. 530.) The basic tasks needed to present a defense include " 'organization of defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury.' " (*Edwards, supra*, 554 U.S. at p. 176, italics omitted, citing *McKaskle v. Wiggins* (1984) 465 U.S. 168, 174.)

"As with other determinations regarding self-representation, we must defer largely to the trial court's discretion. [Citations omitted.] The trial court's determination regarding a defendant's competence must be upheld if supported

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[9] Appellate counsel states the California Supreme Court observed in *People v. Taylor* (2009) 47 Cal.4th 850 that "[t]he court in *Edwards* did not hold, contra to *Godinez*[*v. Moran* (1993) 509 U.S. 389], that due process mandates a higher standard of mental competence for self-representation than for trial with counsel." (*People v. Taylor*, *supra*, at p. 877.) Counsel contends that even if *Edwards* does not mandate the application of a higher standard of mental competence for self-representation, the California Constitution does. Appellate counsel argues that a trial court's failure sua sponte to hold a hearing when there is reason to doubt a defendant's ability to represent himself competently violates a defendant's state constitutional right to due process and the assistance of counsel. (Cal. Const. Art. 1, §§ 7, subd. (a) & 15.) We need not, and do not reach these issues because we hold there was not substantial evidence raising a reasonable doubt of defendant's competency to represent himself.

by substantial evidence." (*Johnson*, *supra*, 53 Cal.4th at p. 531.) "A trial court reversibly errs if it fails to hold a competency hearing when one is required under the substantial evidence test. [Citation.]" (*Mickel*, *supra*, 2 Cal.5th at p. 195.)

B. Analysis of Appellate Counsel's Asserted Indicia of Defendant's Psychological State and Behavior Meriting a Competency Hearing.

Appellate counsel describes defendant as "polite and fairly articulate, and . . . able to follow courtroom rules." Appellate counsel acknowledges that defendant was able to file "relatively simple uncontested motions involving matters such as requesting funds or to be unshackled during trial." Still, appellate counsel maintains that defendant's statements and behavior, as well as the quality of his more complicated motions constitute substantial evidence, raising a reasonable doubt about defendant's ability to undertake basic tasks necessary to represent himself. Appellate counsel also contends that defendant's choice of an identity defense was a "red flag" and defendant displayed an inability to present that defense properly.

The evidence cited by appellate counsel falls into two categories: (1) evidence that counsel characterizes as demonstrating defendant had "serious psychological problems"; and (2) evidence of defendant's conduct in the trial court that counsel characterizes as providing reason to believe that defendant's psychological issues left him unable to carry out basic defense tasks.

1. Defendant's asserted serious psychological problems did not merit a competency hearing.

Appellate counsel describes three categories of evidence that demonstrate defendant's serious psychological problems: (1) "outlandish" claims defendant made about himself before proceedings began; (2) instances of "bizarre" behavior by defendant before proceedings began; and (3) pretrial motions containing "paranoid-sounding and generally implausible claims about what various people were doing with regard to this case." Here, regardless of how defendant's statements, behavior, and claims are characterized, they do not raise a doubt that he was competent to represent himself.

a. "Outlandish" claims about himself

Appellate counsel argues defendant's claims about his military service and professional and education status were so outlandish that no one would believe them, and a rational person would not make them. Appellate counsel suggests defendant could only have made those claims because defendant was delusional, in other words, he believed the claims. On the contrary, there is ample evidence that defendant did not in fact believe the claims he made about his military service and professional and educational achievement, and that his self-aggrandizing claims, albeit hyperbole, were strategic.

Appellate counsel contends there was evidence that defendant "genuinely believed" the statements he made to coworkers and his brother about having been in a Special Forces unit in Vietnam, where he killed people and had received awards for his service.

As confirmed in military records and by defendant's brother, defendant left high school a year early and enlisted in the Marines in 1974. During a hearing under Evidence Code section 402, when the trial court asked defendant about his military service, defendant acknowledged he had never served overseas. He stated that he had been temporarily assigned to a Special Forces "recon unit," and to other units. While defendant may have been exaggerating about the extent of his military service in the past, he was not delusional in the proceedings in this case; the latter testimony demonstrates that defendant did not in fact believe the claims he had made about serving in Vietnam.

Appellate counsel contends the trial court should have been concerned about defendant's competency because defendant made numerous misrepresentations about his education and professional qualifications. Appellate counsel claims that defendant told "colleagues and others" that he had been a pediatric surgeon, a cardio thoracic surgeon, and a forensic fraud examiner. Appellate counsel also cites a photograph defendant kept on his cellular phone that defendant once claimed showed him performing surgery, and a coworker's testimony that defendant "seemed offended" if he were addressed as a nurse rather than a doctor.

Defendant was a nurse and worked in at least two hospitals. There was no evidence that he told his coworkers there that he was a medical doctor. The record shows that he made his claims about being a surgeon to social acquaintances. Defendant's cellular phone photograph is not evidence of being delusional. Defendant assisted patients during cardiac procedures as part of his work in two hospital's cardiac catheter

labs, and the photograph simply showed defendant dressed in scrubs in what appears to be an operating room. Defendant claimed to have a Ph.D in forensic accounting, and it was for this reason he sought to be called doctor rather than nurse by his coworkers. The most reasonable inference from this evidence is that far from being delusional, defendant was aware that he was not a medical doctor.

Appellate counsel also contends the trial court should have been concerned about defendant's competency because defendant sent a letter to United Airlines in 1999 that caused United Airlines' attorneys to believe defendant was an attorney due to "the way he worded the letters." We fail to see how United Airlines' impressions in 1999 suggest that defendant believed he was a lawyer or that he was delusional during the proceedings in this case.

Appellate counsel also points to an incident in the 1980's when defendant told his brother that defendant was a broadcast station engineer. Defendant's brother testified that defendant had only a restricted radio telephone operator's permit. The brother testified that he was the one with the FCC license required to be a broadcast station engineer. Appellate counsel maintains that defendant was [delusional] because defendant "presumably would have known" that his brother was a broadcast engineer and, if not delusional, he would also have known that his misrepresentation would not be believed. This conversation took place in the 1980's and the brother did not provide many details. Nothing in this old and vague conversation is probative about defendant's mental health during the proceedings in this case.

b. Defendant did not engage in "bizarre" behavior raising an inference of incompetency to represent himself

Appellate counsel describes two incidents he contends are indicia of defendant's mental illness. Counsel first cites testimony by one of defendant's coworkers that in 2011, defendant told her and other coworkers they could come to his apartment and take anything they wanted because defendant was moving into a new apartment. Counsel contends defendant was indigent at the time and his behavior was something "one might expect to hear about at a conservatorship proceeding."

There are many possible explanations for defendant's offer of his furniture, none of which would indicate that defendant was incompetent or mentally ill. There was testimony that defendant anticipated moving in with Cathy; she may not have liked his household belongings or have had room for them. Defendant was working as a nurse at the time he made the offer of his household belongings. Thus, it is far from clear that he was indigent, and appellate counsel provides no evidentiary support for defendant's supposed impecunity at the time defendant made his offer.

Counsel also points to statements by defendant's ex-wives about his "bizarre" and violent behavior in the past. The statements identified by counsel are written summaries in the prosecution's unsuccessful motion to introduce the ex-wives' testimony that defendant was physically violent and a liar. Counsel does not point to any actual testimony by the ex-wives on these topics. Also, much of the alleged behavior occurred several decades before the proceedings began. The trial court ruled that the women's accounts of defendant's violent character were not admissible.

Counsel also points to testimony by defendant's brother that defendant displayed anger management problems since he was a child, and to testimony that defendant had been in anger management counseling for several months before Cathy's murder. Even assuming for argument's sake that the accounts were true and that some of the family incidents involved recent behavior, defendant's inability to control his anger against his family members did not raise a reasonable doubt that defendant was unable to perform the basic tasks necessary to represent himself at trial. Appellate counsel does not identify any instances of uncontrolled anger by defendant during the proceedings in this case. Defendant's family members Thomas and Travis testified at trial, and defendant cross-examined both without incident.

2. Defendant's motions did not demonstrate lack of competency to represent himself

Appellate counsel identifies two groups of defendant's motions that counsel characterizes as "paranoid-sounding and [containing] generally implausible claims about what various people were doing with regard to this case." Counsel first points to four miscellaneous pretrial motions, but acknowledges that the claims in those motions might have been simply "self-serving." Counsel then argues that defendant's claims about stand-by counsel and stand-by counsel's wife could not have seemed merely self-serving.[10]

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[10] Counsel compares these motions to the "nonsensical" pretrial motions filed by the defendant in *Johnson*, *supra*. Defendant's motions are not remotely similar to the defendant's motions in *Johnson*. The exemplar motion attached by the

Appellate counsel notes that in one motion, defendant alleged "officers . . . planted evidence, . . . falsified police reports, tampered with witnesses and suborn[ed] perjury" against him. Defendant made these allegations in a *Pitchess*[11] motion seeking discovery of complaints against the police officers involved in this case. These kinds of allegations are typical in *Pitchess* motions. (See, e.g. *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1017 [defense counsel sought complaints against officers for "making false arrests, falsifying police reports, or planting evidence" and for "a long list of other misconduct by the officers" based on defendant's denial that he discarded cocaine as the officer claimed].)

Appellate counsel cites a second motion in which defendant argued that search warrants were "altered or forged." Defendant made these claims in his *Franks*[12] motion, a motion that seeks to challenge a search warrant on the basis that the affidavit contained material omissions or misstatements of fact. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1297.) At the hearing on the *Franks* motion, defendant did identify some potential inaccuracies or inconsistencies in the documents; defendant believed those inconsistencies showed someone had tampered with the documents. Although the trial court denied the motion,

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Johnson court begins: "Efficient proffessional Salutations. As to the chief unparallel tainted tailspin exploition, incomplete concord tactical operation submission of facts." (*Johnson, supra,* 53 Cal.4th at p. 533.) The motions cited by appellate counsel here were internally coherent and contained at least some relevant legal authority.

[11] *Pitchess v. Superior Court* (1974) 11 Cal.3d (*Pitchess*).

[12] *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*).

defendant's bringing that motion does not raise an inference that it was the product of delusions, nor is it substantial evidence supporting reasonable doubt of defendant's competency to represent himself.

Appellate counsel maintains that in a third motion entitled "Motion Against Attorney(s): [¶] Perjury [¶] Subornation of Perjury," defendant claimed the prosecutors suborned perjury from numerous witnesses. This motion was in essence a discovery motion. Defendant believed that the prosecutors falsely claimed under oath to have turned over copies of the search warrants on certain dates. Defendant appears to have believed that subornation occurred because the prosecutors worked together to make these false statements. We fail to see how these arguments support a finding, much less substantial evidence of delusion.

Finally, appellate counsel notes that in a fourth motion, defendant claimed BHPD detectives tampered with witnesses at the preliminary hearing through the detective's "body language, gesturing and other observed elements." This reference was made in defendant's motion to exclude nontestifying witnesses from the courtroom during trial. It is not delusional to suggest that an audience member might try to encourage or deter a witness on the stand during the preliminary hearing by using body language or similar means. Defendant may indeed have been correct in his observations of the officers' body language, but even if he misinterpreted the officers' movements, the motion was not indicative that he was delusional.

We observe that in general, defendant's motions were internally coherent and his legal citations were accurate. His claims were also contextually appropriate, for example, his

claims of police misconduct to support his *Pitchess* motion. His arguments generally aligned with his defense, which was that he was not the killer and that he was being framed. Defendant did not prevail on these motions, but "the fact or likelihood that an unskilled, self-represented defendant will perform poorly in conducting his or her own defense" does not defeat the defendant's right to represent himself. (*Mickel, supra,* 2 Cal.5th at p. 206.)

Appellate counsel relies on defendant's motion involving appointed counsel Jones and two motions involving standby counsel Clark that appellate counsel views as particularly reflective of defendant's delusional beliefs. As to Jones, the motion entitled "Motion Against An Attorney: Violation of Constitution and Misfeasance" was directed at defendant's appointed trial counsel before being relieved, and was made after the trial court granted defendant's motion for self-representation. Appellate counsel argues defendant had "nothing to gain" when he filed this motion except having counsel reported to the state bar and having the court agree that counsel was incompetent.

In fact, part of the motion involved a claim that former counsel had not turned over all discovery in a timely matter. There was some truth to this; counsel had not given defendant some discovery related to defendant's former wife or wives because that discovery needed to be reviewed first by the trial court. Counsel turned it over just prior to the hearing on the motion. Defendant may have been expressing his unhappiness with Jones, but the motion does not create an inference of defendant being delusional.

The two motions regarding Clark related to defendant's attempt to terminate standby counsel and to "restrain" standby

counsel's wife from informally assisting counsel. This was defendant's second attempt to terminate standby counsel; he believed that the trial court was unresponsive to his first attempt. Even assuming defendant's assertion that standby counsel behaved inappropriately and lacked relevant legal experience was unlikely to succeed, those claims can reasonably be understood as exaggerations designed to capture the court's attention. To a degree, this tactic worked. The trial court heard defendant's motion and at one point requested standby counsel to state his experience for the record. The court also instructed standby counsel's wife to stop providing informal assistance to defendant such as delivering documents or clothing for court appearances.

3. Defendant's Conduct in Court Demonstrates That He Was Competent to Represent Himself

Appellate counsel contends defendant's opposition to two key prosecution motions were "riddled with unexplained nonsequiturs and disparagement of witnesses and the prosecution" and evidenced that defendant's psychological issues left him unfit to represent himself in a case involving a potential life sentence. Appellate counsel also contends that defendant's choice of an identity defense was a "red flag" and his failure to present that defense effectively demonstrated defendant was "unconnected from reality and unable to present a defense."

a. Defendant's opposition to the prosecutor's motions did not evidence incompetency to represent himself

Defendant opposed the prosecutor's motions to (1) introduce evidence of defendant's violent behavior with his former wives, and (2) to introduce defendant's statements to coworkers about killing the enemy in Vietnam. One of defendant's oppositions was successful and one was not.

Appellate counsel contends defendant's responses to the prosecutor's motion under Evidence Code section 1109 to introduce evidence of defendant's prior violent conduct against his ex-wives "had no relevance to the admissibility of the evidence but sought to impugn the integrity of his ex-wives in sometimes bizarre ways." The statements cited by appellate counsel attacked the wives' credibility either by showing that they had lied in the past or that they had a motive to lie about defendant.

Defendant's response did not directly address whether the incidents of domestic violence alleged in the prosecution's motion, if true, were relevant and admissible to any issues in the current proceedings. This was understandable given the prosecution's shifting and somewhat illogical relevancy arguments. At the hearing on the motion, the court noted that there were two motions, one "described as [an] 1101(b)" motion and "a motion identified also under the authority of 1109." The court asked the prosecution to clarify the relevance of the ex-wives' evidence. The trial court stated, "You indicated it would have to do with issues regarding, quote, 'identity' and also indicating what you described as the issue of coincidence." The prosecution replied, "Intent." The prosecutor added that the prior acts of domestic

violence would also "show that it was not a mistake or accident" that defendant killed Cathy in this case. As the trial court pointed out, the prosecution had identified "one [incident] involving alleged striking or hitting a spouse. You have one that alleged that a child was struck." The other incidents described by the prosecution involved property destruction. Thus, even the trial court had difficulty understanding the prosecution's theory of admissibility.

The trial court found that the ex-wives' testimony was not relevant to the issues of intent or identity. We fail to see how defendant's opposition to the prosecution's confusing and ultimately unfounded motion raised a reasonable doubt as to defendant's competency to present a defense.

Appellate counsel also contends defendant's opposition to the prosecution's motion to introduce evidence of defendant's statements about killing the enemy in Vietnam raised a reasonable doubt as to defendant's competency to present a defense. We discuss the substance of defendant's enemy statements in greater detail *infra*. Here, however, defendant merely attacked the credibility of his coworkers in opposing the prosecution's motion regarding those statements. At the hearing on the motion, when the trial court informed defendant that witness credibility would be an issue for the jury, defendant promptly raised a different argument, thus indicating his understanding of the trial court's reasoning that credibility was a jury question.

Instead, defendant argued that his statements to coworkers were not relevant because he was joking when he made them, or intended to "shock" people at work if they were "lazy." Defendant's argument mirrored a similar one made by

experienced counsel in *People v. Spector* (2011) 194 Cal.App.4th 1335 (*Spector*). There, counsel argued defendant's statement, "These fucking cunts, they all deserve a bullet in their heads," was "meaningless hyperbole" and should not have been admitted because defendant there was not serious in making the threat. (*Spector*, *supra*, 194 Cal.App.4th at pp. 1396-1397.) The fact that defendant here made the same argument previously advanced by experienced counsel in a high-profile case is hardly evidence of defendant's incompetency to represent himself competently.

b. Defendant's decision to defend on the basis of identity was not irrational

Defendant elected to present an "identity" defense; he claimed he was not the killer and was being framed for Cathy's murder. Appellate counsel contends defendant's choice of an "identity" defense should have alerted the trial court to defendant's lack of competency because no rational person would have chosen that defense in this case.

Counsel observes that the trial court stated it too was "quite surprised" at defendant's identity defense. Appellate counsel opines that the evidence was so overwhelming that defendant was the killer, an identity defense could not possibly have been a "meritorious" defense. Appellate counsel claims that under *Johnson*, the question of "whether a defendant can justify his chosen defense with a plausible reason may be a relevant factor in deciding whether [he] is competent." (*Johnson, supra*, 53 Cal.4th at pp. 529-530.)

Counsel miscites *Johnson*. This "factor" appears in a law review article the *Johnson* court quoted as an example of "more specific standards" for determining competency for self-representation than the one set forth in *Edwards*. (*Johnson,*

supra, 53 Cal.4th at pp. 529-530.) To the contrary of endorsing this factor, the *Johnson* court stated, "we . . . think it best not to adopt a more specific standard" than the one adopted in *Edwards*. (*Johnson,* at p. 530.)

Defendant's reliance on an identity defense does not reflect incompetency to represent himself. As the testimony of defendant's experts highlighted, there was no physical evidence linking defendant to the crime. None of Cathy's blood or DNA was found on defendant's clothing or in his car or apartment. Only trace amounts of defendant's DNA was found on Cathy and in her apartment. Defense expert Taylor opined that the low levels of DNA were to be expected because defendant was in a personal relationship with Cathy. Even defendant's anger management counselor did not take defendant's admissions seriously initially. Thus, defendant might have concluded that it was possible to create reasonable doubt in the minds of jurors that he was the killer.

Appellate counsel asserts that defendant should not have chosen an identity defense because defendant had "better options for defending himself." Counsel suggests defendant should have argued that he killed in response to provocation and was thus guilty only of voluntary manslaughter or second degree murder.

A defendant's choice of strategy that could result in imposition of the highest possible penalty is not itself a sign of incompetence. (See *Mickel, supra*, 2 Cal.5th at p. 206 [a self-represented defendant may rationally prefer the death penalty to life in prison without the possibility of parole, and may choose a defense strategy that reflects that preference].) Indeed, a defendant's right to control his defense includes the right to decide to present no defense. (*Id*. at p. 209 citing *People v. Clark*

(1990) 50 Cal.3d 583, 617 ["The defendant has the right to present no defense and to take the stand and both confess guilt and request imposition of the death penalty"].)

Defendant was 59 years old at the time of trial. He could have rationally decided that there was no meaningful difference between the penalty of 15 years to life in prison for second degree murder and the penalty of 25 years to life for first degree murder. Both sentences offered defendant only the possibility of parole, with no guarantee of success. Even with a second degree murder sentence, defendant would have been in his 70's before he would have been eligible for parole consideration. Defendant could have rationally decided to choose a strategy that offered the possibility, however slim, of an acquittal rather than one that offered a chance at parole in his 70's.

It is not clear that a strategy geared to a potential voluntary manslaughter conviction would have been productive given the timing of defendant's visit to Cathy's apartment in the morning, the lack of any evidence of provocation that morning, and defendant's prior statements about slitting the throats of his enemies. Even if successful, a manslaughter conviction would have carried the possibility of imposition of the upper term of 11 years. Someone in defendant's position could have rationally decided to take a chance on obtaining a complete acquittal, rather than going for an unlikely voluntary manslaughter conviction.

Appellate counsel argued defendant's conduct at trial evidenced that defendant was "unconnected from reality and unable to present a defense." Counsel maintains defendant "made no attempt" to suggest an alibi or an alternative suspect, or explain his admissions of the killing.

These arguments are just that. Appellate counsel offers no proffer of what defendant's alibi defense would have been. There certainly is nothing in the record on appeal to suggest that defendant was with another person at the time of Cathy's murder. The same is true for appellate counsel's speculation that defendant could have identified an alternative suspect but failed to do so. In fact, at trial, defendant intimated that Cathy had relationships with other men; another boyfriend could have been viewed as a suspect. Defendant's effort in this regard was unsuccessful.

While appellate counsel may be technically correct that defendant did not make any attempt to "explain" his statements about killing Cathy, defendant did attack the credibility of the witnesses who recounted those admissions. Defendant cross-examined Thomas on financial incentives for incriminating defendant, pointed out that Travis was only a minor when he received defendant's phone call, and asked questions designed to highlight the inconsistencies in Brenner's accounts of defendant's statements. There appears little more defendant could have done without testifying himself.

Appellate counsel also suggests defendant's claim that he had a faulty right arm shows defendant was disconnected from objective reality and his cross-examination of Cathy's trainer Yancy was "troubling."

Counsel is correct that there was evidence showing defendant had full use of his right hand and arm. Defendant clearly recognized the existence of this evidence and understood its significance. Much of this evidence involved observations of defendant's exercising, and defendant cross-examined the witnesses who saw him exercising to show that they could not

determine simply from watching him whether he was using both arms equally. Even in the case of the video showing defendant performing pull-ups in jail, defendant succeeded in pointing out that he used his left hand to prepare the pull up bar. Defendant mentioned his asserted right arm weakness only in passing in his closing statement.

The precise goal of defendant's cross-examination of Yancey, Cathy's personal trainer and self-described friend, was not clear. Defendant's cross-examination of Yancy seemed designed to demonstrate that Yancy was more than Cathy's friend. It is true that defendant's questions may inadvertently have provided a motive for defendant to kill Cathy. On the other hand, defendant's questioning could have been intended to demonstrate that Yancy had a motive to kill Cathy for spurning his romantic interests in her.

Overall, defendant presented a coherent defense. Defendant asked questions of the prosecution's witnesses on cross-examination that were designed to negate the prosecution's case and advance defendant's defense theory. Defendant questioned his own experts in a manner that highlighted his defense theory. We conclude defendant's presentation of his defense did not raise a reasonable doubt as to competency to represent himself.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DEFENDANT'S ENEMY STATEMENTS BECAUSE THEY WERE RELEVANT TO HIS CONTEMPLATION OF KILLING CATHY AND THE METHOD FOR DOING SO; THE STATEMENTS WERE NOT UNDULY PREJUDICIAL IN LIGHT OF THE OTHER EVIDENCE OF GUILT.

A. The Enemy Statements Were Relevant.

Before trial, the prosecutor moved to admit the enemy statements, i.e., statements defendant made to his co-workers in the months before Cathy's death about sneaking up from behind to kill enemy soldiers in Vietnam, slitting the enemy's throat, and turning enemies into "Pez dispensers." It was undisputed defendant never served in Vietnam. The prosecutor, however, was not offering the enemy statements to prove the truth of the matter asserted in those statements—that defendant killed enemy soldiers in Vietnam. Instead, the prosecutor proffered the enemy statements to show defendant's intent and premeditation to kill Cathy, and his state of mind as to how to kill her. It was undisputed that the killer cut Cathy's throat from behind. There was also evidence that she did not have time to defend herself before her throat was cut.

Defendant objected that the evidence was not relevant and was too prejudicial in comparison to its probative value. The trial court disagreed and admitted the enemy statements because the evidence was "very probative as to certain issues involving [defendant] and his relationship with the deceased."

We review the trial court's decision to admit the enemy statements for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197.) We are mindful that relevance and prejudice within the meaning of Evidence Code section 352 must

be viewed in the context of the other evidence at trial. This is the lens through which we address the parties' arguments here.

"The test of relevancy is whether the evidence tends, logically, naturally or by reasonable inference to establish a material fact, not whether it conclusively proves it." (*People v. Yu* (1983) 143 Cal.App.3d 358, 376.) In the context of the evidence adduced at trial, we conclude defendant's enemy statements bolstered the prosecution's case that defendant planned to kill Cathy and used a method of killing Cathy that he reserved for his enemies.

Defendant's written statement about digging a grave for his enemies in a journal he kept about his jealousy-riddled relationship with Cathy supports an inference that defendant had come to view Cathy as an enemy. This inference is strengthened by Carte's testimony that defendant was angry and upset when Cathy refused to let defendant move in with her in September or October. Coroner Augustine's testimony described a 7.25 inch incision across Cathy's neck, and many witnesses described the murder weapon as a knife as confirmed by defendant's admissions. There was percipient or expert testimony that there were no signs of forced entry, and that the killer had at some point been behind Cathy when her throat was cut.

Generic threats are relevant to prove intent to kill, premeditation and manner of killing. (*Spector*, *supra*, 194 Cal.App.4th at pp. 1396-1397.) Appellate counsel contends defendant's enemy statements are not generic threats because they were not directed at a group to which Cathy belonged, and the statements involved past rather than future violence.

Appellate counsel's latter argument does not appear to comport with the record. Defendant was not reminiscing about his service in Vietnam when he made the enemy statements to his coworkers. He never served in Vietnam. Instead, the evidence supports the inference that defendant made these statements to coworkers to tell them what he would do if he were threatened by someone whom he perceived as an enemy. As set forth above, there was ample evidence at trial of defendant's perception of Cathy as his enemy.

Generic threats may involve hypothetical situations. They do not have to be directed at the actual victim. (*People v. Karis* (1988) 46 Cal.3d 612 (*Karis*).) The hypothetical threats need not be explicit. A defendant need not state that he would harm the victims or specify the circumstances under which he would cause the harm. (*Spector, supra,* 194 Cal.App.4th at p. 1396 [statement that "cunts, they all deserve a bullet in their heads" constituted a generic threat]; see *People v. Manson* (1976) 61 Cal.App.3d 102, 139 [defendant's statement that community members "had to be willing to kill pigs to help the black people start the revolution" was admissible as a generic threat].) The potentially large size of the targeted group does not necessarily negate the threat's relevance. (*Spector, supra,* 194 Cal.App.4th at p. 1396 [threats against women in general are admissible]; see *People v. Crew* (2003) 31 Cal.4th 822, 842 [defendant's statement that "I think I would like to kill someone, just to see if I could get away with it" was admissible as a generic threat].)

Appellate counsel contends the trial court abused its discretion in admitting defendant's enemy statements because defendant might have been merely joking, delusional, or attempting to gain respect when he made the statements.

Counsel further contends a jury could only have guessed which of these possibilities "motivated" defendant. Because the jury could not have known why defendant made the statements, any inferences from those statements would have to have been speculation.

We disagree. There was no testimony other than defendant's argument during the hearing to admit the enemy statements[13] that defendant made the enemy statements to gain his coworkers' respect or in a joking manner. Defendant did not testify at that hearing or at trial. Defendant acknowledged to the trial court that he did not serve in Vietnam, and so there was no evidence that he delusionally believed he actually killed the enemy in Vietnam. Indeed, during the hearing on the prosecution's motion to admit the enemy statements, defendant appeared clearheaded in detailing his military service in bases in Alabama, Chicago, and near " 'Twentynine Palms' " to name a few.

Because defendant's enemy statements reflected his thoughts, they were admissible statements of his "then existing state of mind [or] emotion" within the meaning of Evidence Code section 1250, subdivision (a).[14] Evidence Code section 1250,

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[13] As set forth *supra*, at the hearing outside the juror's presence on the prosecution's motion to admit the enemy statements, defendant opposed the motion in part by arguing that he was joking when he made them. The trial court responded that whether defendant was joking when he made the enemy statements was an issue of credibility for the jury.

[14] Evidence Code section 1250, subdivision (a) provides: "Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design,

subdivision (a)(2) permits the use of statements to "prove or explain acts or conduct of the declarant. (See *Spector, supra*, 194 Cal.App.4th at p. 1394 ["*Karis*[, *supra*, 46 Cal.3d 612] held this purely hypothetical threat was admissible under section 1250: 'Jefferson explains the relevance of a declarant's statement of intent: "A statement of a declarant's intention to do certain acts or engage in certain conduct is admissible to prove that he did those acts or did engage in that conduct." ' "].)

B. Admission of the Enemy Statements was not Unduly Prejudicial Under Evidence Code Section 352.

Appellate counsel contends the trial court abused its discretion in refusing to exclude the enemy statements pursuant to Evidence Code section 352. He further contends the erroneous admission of this evidence violated defendant's constitutional right to due process.

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

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mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

A trial court "need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) "When a matter is left to the discretion of the trial court, on appeal we apply the abuse of discretion standard of review. [Citation.] Under that standard, there is no abuse of discretion requiring reversal if there exists a reasonable or fairly debatable justification under the law for the trial court's decision, or alternatively stated, if that decision falls within the permissible range of options set by the applicable legal criteria." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.)

Here the trial court expressly referred to Evidence Code section 352 during argument, and asked defendant for his input on the application of that section. This is sufficient to demonstrate the trial court's awareness of its duties under section 352 in making its ruling. (See *People v. Taylor, supra*, 26 Cal.4th at p. 1169.)

When evidence is properly admitted under state law, its admission ordinarily does not raise due process issues. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Cowan* (2010) 50 Cal.4th 401, 464.) Even when the admission of evidence is erroneous under state law, that admission results in a due process violation only if it makes the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Appellate counsel argues that the enemy statements were cumulative of other evidence of identity and intent to kill so its probative value was minimal. To compound the problem, the prejudicial potential of the statements was high because the

statements could have caused the jury to view defendant with contempt for lying about his military service.

The enemy statements were not cumulative of other evidence. At trial, there was evidence of defendant's admissions to his brother, son, anger management counselor, and the police that he killed Cathy. These confessions did not admit planning or premeditation. The enemy statements were not cumulative on those elements of a first degree murder charge, nor were they unduly prejudicial in light of the other evidence at trial including evidence of defendant's "volatile" relationship with Cathy, his jealousy of other men's attentions to her, and his admissions.

For all the above reasons, the enemy statements had substantial probative value and little potential for undue prejudice, their admission did not render the trial fundamentally unfair, the trial court did not abuse its discretion in admitting them, and defendant's due process rights were not violated.

III. CRIME SCENE RECONSTRUCTION EXPERT DELHAUER'S TESTIMONY WAS NOT SPECULATIVE.

When the prosecutor asked crime scene reconstruction expert Delhauer if he had formed "an opinion as to how [Cathy] was murdered, . . . and the aftermath, after she was attacked," defendant objected that the question called for speculation. Appellate counsel argues there was no evidentiary support for the expert's opinion that "the assault was a surprise attack, sprung at a moment when [Cathy] was caught unaware." Appellate counsel further contends that the "baseless

opinion . . . implies the defendant waited for an opportune time to attack his unsuspecting victim."[15]

"The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion." (*People v. McDowell* (2012) 54 Cal.4th 395, 426.)

A witness may testify as an expert on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "[A]ssumptions which are not grounded in fact cannot serve as the basis for an expert's opinion." (*People v. Wright* (2016) 4 Cal.App.5th 537, 546.) Inferences based solely on speculation are insufficient support for expert opinion. (*Ibid.*)

The record does not support appellate counsel's description of Delhauer's opinion, to wit, that "the assault was a surprise attack, sprung at a moment when [Cathy] was caught unaware." Nor does the record support counsel's argument that the "baseless opinion . . . implies the defendant waited for an opportune time to attack his unsuspecting victim."

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[15] Appellate counsel also argued that Delhauer's opinion was improper at the time he gave it because Delhauer had not yet been provided any evidence upon which he could base an opinion: "All he had done at that point was describe his qualifications and state in general terms the materials he had considered." Counsel acknowledges that if sufficient foundation for the opinion were subsequently laid, then any error in admitting the opinion would be harmless. Delhauer subsequently described in considerable detail the evidence upon which his opinion was based. Any timing error was thus harmless.

When asked for his opinion about "how" Cathy was attacked, Delhauer replied, "She was attacked in a manner that would be consistent with a blitz assault, meaning something that was sudden and that she had minimal opportunity to defend against. She was on her feet for a very short period of time. She was taken down rapidly. Her throat was slit from a position from behind and above her."

When the prosecutor later asked Delhauer to confirm that it was his "opinion that this attack came from behind and it was a blitz attack," Delhauer replied, "Let me clarify." He explained, "In terms of the knife attack, it was from behind. In terms of the initial contact, it may have started from behind; it may have started frontally, but it was very quickly—it moved. The offender moved in relevant position to a position behind her."

The expert repeatedly used the word "blitz" to describe the attack. He explained that a blitz attack has two components: speed and overwhelming violence. The expert used the word "surprise" only once, and in passing, when he stated: "The blitz assault is characterized as something that happens suddenly. It's by surprise. You may see the person before the attack actually occurs, but you don't necessarily know that the attack is coming. So when it happens, it's, A, very rapid; B, it's typically violent or so violent that the person has very little, if any, chance to defend themselves, and it's overpowering so that they are almost immediately put in a position where they no longer have the ability to defend themselves. That's basically the definition of a blitz attack."

Delhauer's description of a blitz attack was simply a description of a type of attack—one of such speed and overwhelming violence that the victim is unable to defend herself.

At no point during his testimony did Delhauer opine on the thought processes behind a blitz attack, nor did he opine on whether a blitz attacker typically waits for an opportune moment to attack.

Counsel contends that "crucial to Delhauer's surprise attack theory was his belief that the relatively small number of defensive wounds meant [Cathy] had not had time to defend herself. Counsel states, "Underlying this theory was the assumption that, had [Cathy] not been taken by surprise, she would have tried to fight off her attacker and would have suffered more wounds in the process." As set forth above, appellate counsel's argument is based on the false premise that Delhauer opined that the attack was a "surprise."

It is true Delhauer's opinion that Cathy died in a blitz attack was based in part on the small number of defensive wounds on Cathy's body. Accordingly, we consider counsel's argument that there was no way for Delhauer to know whether "the small number of wounds was because [Cathy] had *no time* to fight back or because she *chose* not to." Counsel maintains it would have been more rational for Cathy to "try [to] run away" than to "attempt to fight off her knife-wielding attacker with her bare hands."

First, appellate counsel offers no evidentiary support for the argument that victims of violent attacks behave rationally. To the contrary, the pathologist testified a victim's act of raising her arms in defense as an "existential response," and Delhauer testified that gunshot victims also raise their arms defensively even though their hands cannot stop or deflect a bullet.

Second, Delhauer acknowledged that "[i]n terms of the initial contact, it may have started from behind; it may have

started frontally, but it was very quickly—it moved. The offender moved in relevant position to a position behind her." Appellate counsel does not dispute that the evidence showed that Cathy's throat was slit by a person standing behind her.

Third, Delhauer's opinion that the attack occurred "quickly" was based on more than the lack of "frontal" defensive wounds on Cathy's palms and forearms. Delhauer also relied on evidence showing that Cathy was "taken down rapidly." Delhauer used a crime scene photograph depicting the sole of one Cathy's shoes to support his opinion that she was taken down rapidly. Delhauer pointed out that although there were blood stains on the floor around the shoe, there were no blood stains on the bottom of the shoe. Delhauer explained, this "means at the time that she was upright, she was not stepping in blood. Means there was very little blood, if any, on the floor at the time of the onset, and she didn't remain on her feet long enough to step in blood as blood began to be introduced into the scene."

Delhauer used photographs of Cathy's wound to support his opinion that the attack was rapid and overwhelming. He described the various "incidental" and "secondary" wounds that Cathy had on her hands as consistent with wounds from an attack from behind. Delhauer noted that these defensive wounds were "few" and "very superficial in nature, which is indicative of a minimal period in which she had to defend herself." As Delhauer explained, in knife attacks, "the more pronounced the defense wounds and the greater the number of defense wounds, the longer the time the person has had to defend themselves."

In short, Delhauer's opinion that Cathy died in a blitz attack was based on the lack of *any* significant defensive wounds, regardless of whether from a frontal or rear attack, coupled with the short time she remained standing. Delhauer did not assume that defendant initially approached Cathy from behind; Delhauer expressly disavowed that scenario.

For all these reasons, the trial court did not abuse its discretion in admitting Delhauer's expert testimony.

DISPOSTION

The judgment is affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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