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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE YEARNELL CONRAD, Defendant and Appellant.	B266604 (Los Angeles County Super. Ct. No. VA128106)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Conditionally reversed and remanded with directions.

H. Russell Halpern for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

In December 2012, defendant Ronnie Yearnell Conrad tortured his 19-year-old girlfriend. He stands convicted of torture, mayhem, corporal injury, methamphetamine possession, possession of cocaine base for sale, firearm possession by a felon and ammunition possession. (Pen. Code,[1] §§ 206, 203, 273.5, subd. (a), 29800, subd. (a)(1), 30305, subd. (a)(1); Health & Saf. Code, §§ 11378, 11351.5.) The jury also found true firearm, deadly weapon, and great bodily injury infliction allegations. (§§ 12022, subds. (b)(1), (c), 12022.5, subd. (a), 12022.7, subd. (e), 12022.53, subd. (b).) Defendant admitted prior conviction and prison term allegations. (§§ 667, subds. (a)(1), (b)-(i), 667.5, subd. (b), 1170.12; Health & Saf. Code, § 11370.2, subd. (a).) The trial court sentenced defendant to two life terms plus twenty years.

This is the second appeal in this matter. Previously, the trial court granted defendant's new trial motion. The trial court found defendant's attorney, Chad Calabria, had a conflict of interest that was presumptively prejudicial. We reversed the new trial order on appeal and remanded for an assessment whether the conflict of interest resulted in actual prejudice to defendant. (*People v. Conrad* (Feb. 6, 2015, B256866) [nonpub. opn.].) On remand, the trial court relitigated and denied the new trial motion and sentenced defendant to state prison. Defendant appeals from the order and judgment. We conditionally reverse the new trial denial order and remand for further proceedings.

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[1] Further statutory references are to the Penal Code except where otherwise noted.

We further conclude the trial court committed errors in sentencing defendant.

II. BACKGROUND

On December 27 and 28, 2012, defendant tortured his girlfriend, 19-year-old Tania Garcia, for three to six hours. The assault occurred in a motel room. Defendant repeatedly struck and burned Ms. Garcia with objects including a hot clothing iron, a metal broom handle or pipe with jagged edges, a toilet plunger, and a hair straightening iron.

Law enforcement officers were alerted to a possible hostage situation by a "WeTip" phone call. When sheriff's deputies entered the motel room, they found the injured victim tied to defendant. They also found two loaded semi-automatic handguns, live ammunition , large amounts of methamphetamine and cocaine base, digital scales, several items of drug paraphernalia and $926 in currency. The handguns were on a nightstand closest to defendant. Defendant's fingerprints were on one of the guns. Ms. Garcia showed Deputy Shelby Martin and Detective Michael Garfin the different weapons defendant had used on her, including a clothing iron, pipe, hair straightening iron and toilet plunger. The tangible items were seized and introduced at trial together with photographs of the narcotics and drug paraphernalia on the motel nightstand and dining table.

Ms. Garcia told four people she had been assaulted by her boyfriend: an emergency room nurse, David Geary; an emergency room nurse practitioner, William Worth; Deputy Martin; and Detective Garfin. Mr. Geary, Mr. Worth and Deputy Martin observed and photographically recorded the victim's injuries. The photographs were introduced in evidence.

Ms. Garcia subsequently was uncooperative. She had been in a relationship with defendant for five years, beginning when she was 14. She was dependent on him. Defendant, who was in county jail, and Ms. Garcia spoke by telephone on December 31, 2012, and January 2 and 3, 2013. In those conversations defendant urged Ms. Garcia to deny the assault and to take responsibility for the weapons and drugs. Defendant and Ms. Garcia repeatedly professed their love for one another. Between the December 27, 2012 assault and the March 5, 2013 preliminary hearing, Ms. Garcia repeatedly requested the charges against defendant be dropped. Also during that time, Ms. Garcia had defendant's name tattooed on her face.

Ms. Garcia testified at the March 5, 2013 preliminary hearing, but denied defendant had harmed her. She said she had been in a fight with someone other than defendant. She claimed ownership of the guns, narcotics and drug paraphernalia found in the motel room. Ms. Garcia repeatedly denied telling Deputy Martin defendant was responsible for her injuries. Much later, in connection with a new trial motion, Ms. Garcia filed a declaration. Ms. Garcia stated she had lied to Deputy Martin about defendant causing her injuries. Ms. Garcia declared Deputy Martin threatened her with imprisonment for narcotics possession.

The prosecution was unable to locate Ms. Garcia at the time of trial. The trial court found she was unavailable. Her preliminary hearing testimony was admitted in evidence. A person identifying herself as Ms. Garcia telephoned the courtroom during the trial. She told the clerk "that she wanted to speak to the court to inform the court that everything that's being said is not true and . . . nothing happened and that it's all a lie." She also said "that she did not want to come in because every time she comes in people tell her she lies."

III. DISCUSSION

A. Unavailable Victim-Witness

Defendant argues admitting Ms. Garcia's preliminary hearing testimony violated his Sixth Amendment confrontation rights under the United States Constitution. Defendant asserts the prosecution failed to secure contact information for a known uncooperative witness and failed to exercise due diligence to locate her.

A criminal defendant has a federal and state constitutional right to confront prosecution witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15; *People v. Herrera* (2010) 49 Cal.4th 613, 620-621.) The right is not, however, absolute. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295; *People v. Herrera, supra,* 49 Cal.4th at p. 621.) An exception exists where an unavailable witness has testified at a prior judicial proceeding against the same defendant and was subject to cross-examination. (Evid. Code, § 1291, subd. (a)(2); *People v. Herrera, supra,* 49 Cal.4th at p. 621.) It is undisputed Ms. Garcia testified

at defendant's preliminary hearing and was subject to cross-examination. The question here is whether she was unavailable.

Our Supreme Court has explained: "A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at the trial. (*Barber v. Page* (1968) 390 U.S. 719, 724-725 (*Barber*).) The United States Supreme Court has described the good-faith requirement this way: 'The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists . . . , "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." [Citation.] The ultimate question is whether the witness is unavailable despite good faith efforts undertaken prior to trial to locate and present that witness.' (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, disapproved on another point in *Crawford v. Washington* (2004) 541 U.S. 36, 60-68.) [¶] Our Evidence Code features a similar requirement for establishing a witness's unavailability. Under section 240, subdivision (a)(5) . . . , a witness is unavailable when he or she is '[a]bsent from the hearing and the proponent of his or her statement has exercised *reasonable diligence* but has been unable to procure his or her attendance by the court's process.' (Italics added.) The term '[r]easoanble diligence, often called "due diligence" in case law, "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character."'" (*People v. Cogswell* (2010) 48 Cal.4th 467, 477.) Considerations relevant to the due diligence inquiry 'include the

timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were completely explored.' (*People v. Wilson* (2005) 36 Cal.4th 309, 341 [relying on [*People v.*] *Cromer* [(2001)] 24 Cal.4th [889,] 904.) In this regard, 'California law and federal constitutional requirements are the same.' (*People v. Valencia* (2008) 43 Cal.4th 268, 291-292.) [¶] . . . [¶] As indicated, to establish unavailability, the prosecution must show that its efforts to locate and produce a witness for trial were reasonable under the circumstances presented. (*Ohio v. Roberts, supra,* 448 U.S. at p. 74; *People v. Smith* (2003) 30 Cal.4th 581, 609 (*Smith*).) We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard ([*People v.*] *Cromer, supra,* 24 Cal.4th at p. 902), and independently review whether the facts demonstrate prosecutorial good faith and due diligence (*id.* at pp. 902–903)." (*People v. Herrera*, *supra,* 49 Cal.4th at pp. 622-623.)

On January 15, 2013, Ms. Garcia met with the district attorney and others to discuss the case. She sought to have the charges dropped. Ms. Garcia was present in court on April 22, 2013, and was ordered to return on May 24. She appeared on May 24 and was ordered to return on June 7. She first failed to appear in court on June 7, 2013. The court issued a body attachment but held it until July 25, 2013. On July 25, at the prosecution's request, the body attachment was issued in the amount of $50,000.

Carlos Barragan, an investigator with the District Attorney's office, testified at a Wednesday, July 31, 2013 due diligence hearing. He had received a subpoena for Ms. Garcia on July 3, 2013, together with her Mexican birth certificate. He consulted two databases for information about her—the Department of Motor Vehicles and "TLO," a county database containing residence information. He also consulted the Department of Motor Vehicle's database for information on Ms. Garcia's mother, but, she did not have a driver's license. He searched another database, "JADIC," for driver's license or warrant information on Ms. Garcia's father but found no information.

On July 17, 2013, Mr. Barragan went to an Orange Avenue apartment and spoke with the managers. He learned Ms. Garcia had lived there with her mother but had moved away. The managers thought the mother might have moved to Rialto. One of the managers gave Mr. Barragan the name of a Mexican restaurant where the mother might be employed. Mr. Barragan went to a restaurant on Figueroa Street in Los Angeles. The restaurant's manager said the mother worked at the Gardena location. Mr. Barragan went to the Gardena restaurant. The manager said the mother had worked there four years ago but not since. He thought she might have moved to Fresno. Mr. Barragan visited a second address associated with Ms. Garcia, on West 168th Street in Gardena. He knocked on the door but no one answered.

Mr. Barragan heard a rumor Ms. Garcia might be with defendant's mother, Walterine Conrad. He discovered several addresses for Ms. Conrad in Mississippi as well as a telephone number. He did not find any Mississippi addresses for Ms. Garcia. Mr. Barragan called the telephone number. A female answered. When Mr. Barragan identified himself as an investigator, the female hung up.

Mr. Barragan spoke with Ms. Garcia's cousin at an address on East 70th Street in Long Beach. The cousin said Ms. Garcia's mother lived in Riverside. She told Mr. Barragan that Ms. Garcia had been with defendant's mother somewhere "nearby" and "during court time." Mr. Barragan testified, "She said . . . she's living around the . . . Orange [Avenue] address." The cousin had not seen Ms. Garcia since June 24.

Mr. Barragan then visited defendant's father's home on East 56th Street. There was no answer when he knocked at the door. But he spoke with a Black female who lived on the same block. The woman knew Ms. Garcia and had been in a fight with her two months earlier, sometime in May. The woman did not know where Ms. Garcia was.

On Tuesday, July 30, 2013, the day before the due diligence hearing, Mr. Barragan returned to the East 56th Street address and spoke with defendant's father for 20 to 30 minutes. Defendant's father did not know Ms. Garcia's whereabouts or that of defendant's mother. He had not seen Ms. Garcia since his son was arrested on December 28, 2012.

On Wednesday, July 31, 2013, the day of the due diligence hearing, Mr. Barragan checked the coroner's office, several local hospitals, and Los Angeles, Orange and San Bernardino County jail records. He found no information about Ms. Garcia.

At the due diligence hearing, Ms. Tillson argued: "[Defendant's counsel] is right, we did have awareness that we expected this witness to be difficult, uncooperative. As a result, I ordered her back for virtually every single court date following the preliminary hearing. [¶] She failed to appear on June the 7th. It was my hope that she would reappear and we wouldn't need to release a warrant into the system for her, thereby arresting a domestic violence victim unnecessarily. As a result I asked the court to hold that warrant hoping again that she would reappear. [¶] When it became apparent she was not going to appear, I actually made an effort to contact her counsel, who is Donald Calabria,[2] [defense counsel's] father, and informed him that we were not having positive contact with the victim, and it was my intention potentially to release the warrant into the system. At that time he informed me that he has not had contact with her for over two months; and that conversation was on the 25th of July.[3] At that time I received approval and went to [the

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2 Because the Calabrias share the same last name, we will refer to Chad Calabria as Mr. Calabria and to Donald Calabria as Donald. Chad Calabria is deceased.

3 On February 26, 2014, in connection with defendant's new trial motion, Donald declared: "A day before the trial of [defendant], I received a phone call from Ms. Tilson. This was the first I had heard from her since our initial conversation [after Donald was retained]. She asked for the whereabouts of Ms. Garcia, and I told her that at that moment I did not know and

trial court] to release the warrant into the system. [¶] That having been said, Mr. Barragan was already going out and looking for her . . . ."

The foregoing facts demonstrate prosecutorial good faith and due diligence in attempting to locate Ms. Garcia. Ms. Garcia had appeared in court on March 5, April 22 and May 24, 2013. Ms. Garcia first failed to appear on June 7, 2013. Ms. Tillson reasonably sought not to arrest a domestic violence victim unnecessarily. Ms. Garcia's attorney, Donald, was unable to provide contact information for her. On July 3, 2013, less than a month after Ms. Garcia failed to appear in court, Mr. Barragan commenced his investigation. Between July 3 and July 31, 2013, Mr. Barragan searched multiple databases, visited several locations and spoke to eight individuals in search of information about Ms. Garcia and a means to contact her. It is true, as defendant asserts, that Ms. Garcia sought to have the charges against defendant dismissed. But prior to June 7, 2013, Ms. Garcia had been present at proceedings with respect to defendant's prosecution. She had returned to court as ordered. *People v. Cromer, supra,* 24 Cal.4th 889, on which defendant relies, is distinguishable. There, a formerly cooperative witness disappeared from her neighborhood around June 27, 1997. But the prosecution made no attempt to locate her until December 1997, a six-month delay. Our Supreme Court held efforts to

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had not heard from her in a couple of months. [¶] . . . If I had been contacted by Ms. Tilson within reasonable time I would have been able to make phone calls to persons who could have located Ms. Garcia." This information was not before the trial court when, on July 31, 2013, it ruled on the prosecution's due diligence in attempting to locate Ms. Garcia.

locate the witness were unreasonably delayed. (*Id.* at p. 904.) There was no unreasonable delay in the present case. Mr. Barragan began searching for Ms. Garcia only 26 days after she first failed to appear in court as ordered.

B. Deputy Martin's Testimony

As noted above, Ms. Garcia testified at the preliminary hearing, denied defendant had harmed her, and further denied she had told Deputy Shelby Martin otherwise. At trial, Deputy Martin testified Ms. Garcia told her it was defendant who assaulted her and inflicted injuries. Those statements were inconsistent with Ms. Garcia's preliminary hearing testimony. On appeal, defendant argues: "Absent the preliminary hearing testimony of Ms. Garcia, the People would not have been able to present the testimony of [Deputy] Martin. Without [Deputy] Martin's testimony concerning the inconsistent statements of Ms. Garcia there would not [have] been any evidence to sustain a conviction, it cannot be said that beyond a reasonable doubt the jury would have convicted [defendant] without the prior recorded testimony of Ms. Garcia." As discussed above, admitting Ms. Garcia's preliminary hearing testimony did not violate the confrontation clause. Moreover, Ms. Garcia's statements to Deputy Martin were admissible to impeach Ms. Garcia's preliminary hearing testimony. (Evid. Code, §§ 785, 1202; *People v. Blacksher* (2011) 52 Cal.4th 769, 806-808; *People v. Osorio* (2008) 165 Cal.App.4th 603, 615, 616-617.)

C. New Trial: Ineffective Assistance of Counsel

Defendant challenges the trial court's denial of his new trial motion on ineffective assistance grounds. Defendant asserts his trial attorney, Mr. Calabria, was ineffective as follows: (1) Mr. Calabria's law office represented both defendant and the victim, Ms. Garcia; (2) while representing defendant, including during trial, Mr. Calabria was being actively prosecuted by the Los Angeles County District Attorney; (3) "Mr. Calabria failed to maintain a state of sobriety during [defendant's] trial"; (4) Mr. Calabria did not investigate a potentially exculpatory witness; (5) Mr. Calabria "failed to make timely objections to a number of clearly objection[able] questions and statements by the Deputy District Attorney"; and (6) Mr. Calabria failed to file an evidence suppression motion.

Our Supreme Court has held: "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. . . . If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there

simply could be no satisfactory explanation. [Citation.]' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

We review the trial court's ruling on defendant's new trial motion for an abuse of discretion. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 127; *People v. Navarette* (2003) 30 Cal.4th 458, 526.) In *People v. Delgado* (1993) 5 Cal.4th 312, 328, our Supreme Court explained: "'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (Accord, *People v. Thompson* (2010) 49 Cal.4th 79, 140.) We conclude there is an arguable, unresolved question whether Mr. Calabria was prejudicially ineffective for failing to file a section 1538.5 evidence suppression motion. But in all other respects denial of the new trial motion was not an abuse of discretion.

1. Conflict Issues

The right to effective assistance of counsel includes the right to counsel free of conflicts of interest that may compromise the attorney's loyalty to his or her client. (*Wood v. Georgia* (1981) 450 U.S. 261, 271; *People v. Gonzales* (2011) 52 Cal.4th 254, 309; *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1009-1010; *People v. Doolin* (2009) 45 Cal.4th 390, 417.) As our Supreme Court has explained, "'[S]uch conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his [or her] responsibilities to another client or a third person or his own interests. [Citation.]"' [Citations.]" (*People v. Doolin, supra,* 45 Cal.4th at p. 417.) Further: "[T]o obtain reversal of a criminal verdict, the defendant must

demonstrate that (1) counsel labored under an actual conflict of interest that adversely affected counsel's performance, and (2) absent counsel's deficiencies arising from the conflict, it is reasonably probable the result of the proceeding would have been different. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166 . . . ; [*People v.*] *Doolin, supra,* [45 Cal.4th] at pp. 417-418, 421; see *Strickland v. Washington* (1984) 466 U.S. 668, 687." (*People v. Hung Thanh Mai, supra,* 57 Cal.4th at pp. 1009-1010; accord, *Strickland v. Washington, supra,* 466 U.S. at p. 692; *People v. Rundle* (2008) 43 Cal.4th 76, 169, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) With respect to a failure to act in a certain way, our Supreme Court has explained, "[W]here a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission." (*People v. Cox* (2003) 30 Cal.4th 916, 948–949[, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22].)' ([*People v.*] *Doolin, supra,* 45 Cal.4th 390, 418.)" (*People v. Hung Thanh Mai*, *supra,* 57 Cal.4th at p. 1010.)

a. dual representation

Defendant asserts a prejudicial conflict of interest in that defendant and the victim, Ms. Garcia, were represented by the same law firm. Mr. Calabria represented defendant while his father, Donald, represented the victim. According to the record before us, Donald's representation of the victim was extremely limited. Prior to trial, Ms. Garcia retained Donald to represent her in her role as a witness in this matter. He agreed to accompany her to court and "stand by her" if she was called to testify. On April 16, 2013, he contacted the district attorney concerning immunity for the victim. On July 25, 2013, Donald said he had no means of contacting Ms. Garcia; he had not had any contact with her for the preceding two months. There was no evidence Donald's representation of Ms. Garcia threatened Mr. Calabria's loyalty to defendant. With the exception of Ms. Garcia's statements in the immediate aftermath of the assault, the victim at all times aligned her interests with defendant.[4] Defendant has not shown a prejudicial conflict of interest.

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[4] In a declaration submitted in support of defendant's motion to reopen the new trial hearing for newly discovered evidence, Ms. Garcia stated: she had intended to testify at defendant's trial consistent with her preliminary hearing testimony; but Mr. Calabria told her if she so testified she could be prosecuted for making false statements to law enforcement officers; and as a result of Mr. Calabria's advice, she did not appear at trial; further, Donald, who knew how to contact her, never told her she was needed at trial. The trial court denied the motion to reopen the new trial hearing.

b. Pending felony charges

During trial, and unbeknownst to defendant, Mr. Calabria was subject to criminal prosecution by the Los Angeles County District Attorney's office—the same government agency prosecuting defendant.[5] As a result, an actual conflict existed. (See *People v. Almanza* (2015) 233 Cal.App.4th 990, 1002 [district attorney contemplated possible criminal prosecution of defense trial counsel].) As to prejudice, defendant relies on *Harris v.*

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[5] Mr. Calabria's record was recited into the record as follows. On August 10, 2012, Mr. Calabria was arraigned in case No. LA071672, a "drug case." He pled guilty on October 2, 2012. Entry of judgment was deferred. On January 29, 2013, Mr. Calabria was arraigned in case No. BA407248, alleging forgery in violation of Penal Code section 476. On February 1, 2013, he was charged with a probation violation in case No. BA407248. On March 12, 2013, Mr. Calabria was convicted in case No. LA071672. Mr. Calabria first appeared in this case on March 20, 2013. On April 3, 2013, a complaint was lodged against Mr. Calabria with the State Bar. Between March 2013 and August 28, 2013, the probation violation matter was continued multiple times including on July 24, 2013. Defendant was tried on August 5, 6 and 7, 2013. On August 28, 2013, Mr. Calabria pled guilty in the forgery case. On September 5, 2013, he first appeared in "drug court." He tested positive on September 26, 2013, and was charged with a probation violation. Mr. Halpern represented: "[Mr. Calabria] tested positive for opiates and barbiturates while he was in drug court, and he was violated in drug court, put back into custody, and the negative report remanded him – they were suggesting he be taken out of drug court and put into alternative treatment programs. [¶] So during the pendency of the trial not only was he facing a probation violation, but he was actually with an open unconvicted matter."

Superior Court (2014) 225 Cal.App.4th 1129 for the proposition prejudice is presumed. However, we rejected that argument in defendant's first appeal. We held *Harris* inapplicable in the post-trial conflict of interest context. We concluded defendant was required to demonstrate actual prejudice. (*People v. Conrad, supra,* typed opn. at pp. 3-5; accord, *People v. Almanza, supra,* 233 Cal.App.4th at pp. 1003-1006.)

2. Failure to maintain sobriety

Defendant argues Mr. Calabria stood moot when objectionable evidence was introduced because he was "suffering from an altered mental state due to drug intoxication." We find no substantial evidence Mr. Calabria was under the influence of narcotics during defendant's trial or that any drug use prejudicially affected his representation of defendant.

Deputy Daren Nigsarian testified for the defense at the June 8, 2015 new trial motion hearing. Deputy Nigsarian was the courtroom bailiff during defendant's trial. He sat not more than five feet from Mr. Calabria and defendant. Deputy Nigsarian's memory of defendant's August 2013 trial was "a little foggy." Deputy Nigsarian testified that on three or four occasions, while witnesses were on the stand Mr. Calabria was writing on a yellow legal pad, his pen stopped moving, his eyes closed and his head dropped slowly towards the table until it was three inches from the surface. Mr. Calabria remained in that position with his eyes closed for five-minute stretches. Deputy Nigsarian opined Mr. Calabria's demeanor was consistent with being under the influence of narcotics: "His gait was slow and unsteady. His voice was weak. His speech pattern was . . .

delayed, somewhat strung out. . . . [P]hysically he seemed extremely frail and as if he had a lack of balance, coordination." While the trial was in progress, Deputy Nigsarian heard that Mr. Calabria had "issues" with drug use. But when a motion or an objection was interposed, Mr. Calabria's head would snap back up as if he were waking up. Deputy Nigsarian testified, "I recall him making objections from that state, and I remember him responding to People's objections from that state." During the new trial motion hearing, Mr. Calabria admitted he was experiencing health problems during defendant's trial, but he denied he had a "chemical dependency problem."

The foregoing evidence did not establish Mr. Calabria was under the influence of narcotics during defendant's trial. Moreover, there was no evidence any such drug use prejudiced defendant's case. It does appear, as discussed above, that Mr. Calabria had criminal charges pending against him during the trial and that at least some of those charges involved drug offenses. And Deputy Nigsarian did observe conduct he opined was consistent with being under the influence of narcotics. But Deputy Nigsarian also testified Mr. Calabria responded to what was happening in the courtroom. Deputy Nigsarian testified, "I recall him making objections from that state, and I remember him responding to People's objections from that state." Moreover, we have reviewed the record of the trial and do not find that Mr. Calabria's representation of defendant fell below an objective standard of reasonableness. We also do not find any prejudice to defendant.

3. Failure to locate witness

At the preliminary hearing, Ms. Garcia testified she was "gang affiliated" and she sustained her injuries during a fight with "a girl" a few days before defendant's arrest. Mr. Garcia said: "I had got in a fight with a girl on Tuesday; and then when I seen her again on Thursday, we went at it again. I was mad because she had given me a purple eye, so I wanted to get her back for it, so I went back . . . I just jumped out [of Ronnie's car] and run to the girl. So about the time [Ronnie] got to go park the car, the girls had jumped me." As noted above, Ms. Garcia was missing at the time of trial. During a due diligence hearing held after Ms. Garcia went missing, Mr. Barragan, the investigator from the District Attorney's office, testified he spoke to a woman who lived near defendant's father's residence. The woman thought Mr. Barragan was there to investigate a fight she had with Ms. Garcia at a Food for Less market sometime in May 2013. In connection with defendant's new trial motion, Mr. Calabria testified he was aware of the woman but could not find her. He did not retain an investigator to look for her. Mr. Calabria further testified nothing in the discovery he received, including police reports, indicated the police had a witness who had been involved in a fight with Ms. Garcia. On appeal, defendant argues Mr. Calabria, who was present at the due diligence hearing, was ineffective for failing to interview this material, potentially exculpatory witness.

Ms. Garcia described two altercations with a girl or girls, one on Tuesday, December 25, 2012, and the other on Thursday, December 27, 2012. The woman who spoke to Mr. Barragan said she had a fight with Ms. Garcia in May 2013. The likelihood that these events were related was remote at best. Moreover, Ms. Garcia's injuries included multiple burns. There was no evidence Ms. Garcia had been burned during the December 2012 or May 2013 fights with a girl or girls. Further, the injuries Deputy Martin observed on December 28, 2012 appeared to be fresh and getting worse as the night progressed. Defendant has not shown an outcome more favorable to him was reasonably probable had Mr. Calabria located and interviewed the unidentified woman. Defendant has not established Mr. Calabria's conflict of interest with respect to his own criminal matters contributed to his failure to locate the woman.

4. Failure to interpose objections

Defendant lists multiple points at which he contends Mr. Calabria should have objected and failed to do so. He lists these items in a cursory fashion, with only infrequent citation to the record, without developed argument, and with almost no citation to authority. For that reason, and consistent with established authority, we decline to address these claims. (Cal. Rules of Court, rules 8.204(a)(1)(C), 8.360(a); *People v. Gidney* (1937) 10 Cal.2d 138, 142-143, disapproved on another point in *People v. Hutchinson* (1969) 71 Cal.2d 342, 347-348; *People v. Webber* (1991) 228 Cal.App.3d 1146, 1166, fn. 4; *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1123; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283; *People v. Murphy* (1973) 35 Cal.App.3d

905, 924; *People v. Woods* (1968) 260 Cal.App.2d 728, 731; *People v. Wilson* (1965) 238 Cal.App.2d 447, 464; *People v. Meyer* (1963) 216 Cal.App.2d 618, 635; *People v. Seals* (1961) 191 Cal.App.2d 734, 737.) Moreover, even were we to consider the merits, defendant has not shown ineffective assistance or that he suffered prejudice. Whether to object to evidence admission is a tactical decision; failure to object will seldom establish ineffective assistance. (*People v. Williams* (1997) 16 Cal.4th 153, 215.) Moreover, the record sheds no light on why Mr. Calabria chose to act or not to act in the challenged instances. (*People v. Michaels* (2002) 28 Cal.4th 486, 526.) Defendant's claims are more appropriately raised, if at all, in a habeas corpus proceeding. (*People v. Johnson* (2016) 62 Cal.4th 600, 653; *People v. Michaels, supra,* 28 Cal.4th at p. 526.)

5. Evidence suppression motion

Defendant asserts he was prejudiced by Mr. Calabria's failure to file an evidence suppression motion based on the warrantless entry into the motel room. The failure to so move deprived defendant of the opportunity to adjudicate the admission in evidence of the items discovered there including the implements defendant used to torture Ms. Garcia, the loaded handguns, narcotics and drug paraphernalia.

As discussed above, to establish ineffective assistance, a defendant must show both deficient performance—the representation fell below an objective standard of reasonableness—and prejudice. (*People v. Wharton* (1991) 53 Cal.3d 522, 575.) "Prejudice is shown when there is 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.' (*In re Sixto* (1989) 48 Cal.3d 1247, 1257; *Strickland* [*v. Washington*, *supra,* [466 U.S.] at p. 694.)" (*People v. Wharton, supra,* 53 Cal.3d at p. 575; accord, *People v. Vines* (2011) 51 Cal.4th 830, 875-876.) In the present context, as our Supreme Court has held, "'Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must . . . prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excluded evidence in order to demonstrate actual prejudice.' (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.)" (*People v. Wharton, supra,* 53 Cal.3d at p. 576.)

As noted above, law enforcement officers entered the motel room after receiving an anonymous tip. A "WeTip" caller said a male Black named "Ronnie Conrot" was holding a 17-year-old girl named "Tanya" against her will at the Lucky Lodge Motel in Bellflower, room 108, and was beating her. The caller also said Mr. "Conrot" drove a silver Chevrolet Camaro with the license plate 5JFB122. Upon arrival at the motel, Detective Michael Garfin noticed a silver Ford Mustang with license place 5JFB122 parked in front of room 108. A Department of Motor Vehicles records search revealed the Ford was registered to "Ronnie Conrod." Detective Garfin and his partner, identified only as Deputy Meyers, approached the door to room 108. Both officers observed that the curtains were completely closed and there was condensation on the window. The condensation led Deputy Meyers to believe the room was occupied. The door was closed and locked. Deputy Meyers knocked on the door several times

and announced, "Sheriff's Department." There was no response. Detective Garfin did not hear any movement inside the room. The officers requested back-up.

Deputy Martin responded to the back-up call. Deputy Meyers told her, "[T]here was possibly a barricaded suspect holding a 17 year old hostage" in room 108. Deputy Martin observed the door to the motel room was shut, the blinds were closed, and there was condensation on the inside of the window. The condensation indicated the room was probably occupied.

Detective Garfin contacted the motel manager, John Wu. Mr. Wu said the room was registered to Ronnie Conrad who drove the silver vehicle; further, there was a young female with Mr. Conrod. The girl had been staying with Mr. Conrad for two weeks. Mr. Wu did not believe the girl was in any distress or that she was being held against her will. Mr. Wu believed Mr. Conrad and the young female were in the room at that time because he had not seen them leave. After obtaining a room key from the manager, forming a "crisis entry team to rescue the female," knocking several more times, and listening but hearing no sound, the officers entered the room.

During the May 14, 2014 new trial motion hearing, Mr. Calabria testified he was aware the motel room was searched without a warrant. He considered filing an evidence suppression motion. He did not file the motion because he believed there were exigent circumstances justifying the officers' actions. He recalled someone had reported that an underage girl was being held at the motel. He believed it was a member of the victim's family who had called. He believed it was the victim's mother. Mr. Calabria did not recall any police report stating the tip was anonymous. Mr. Calabria agreed that if there was a warrantless

search based on an anonymous tip he would have "explored" filing an evidence suppression motion. He told defendant why he thought an evidence suppression motion was unwarranted and that, "I thought there were better grounds of fighting this case, and those are the grounds I proceeded on."

In denying defendant's new trial motion, the trial court impliedly determined either Mr. Calabria was not ineffective in failing to seek suppression or defendant was not prejudiced by the motion's absence. A trial court's determination a search did not violate the Fourth Amendment is subject to independent review. (*People v. Troyer* (2011) 51 Cal.4th 599, 605; *People v. Rogers* (2009) 46 Cal.4th 1136, 1157.) In response to an evidence suppression motion, it is the prosecution's burden to establish exigent circumstances or another exception to the warrant requirement justifies a warrantless entry into a motel room such as occurred here. (*People v. Troyer, supra,* 51 Cal.4th at p. 605; *People v. Rogers, supra,* 46 Cal.4th at p. 1156.) As our Supreme Court has explained, """"Exigent circumstances' means an emergency situation requiring swift action to prevent imminent danger or serious damage to property . . . ."""" (*People v. Wharton, supra,* 53 Cal.3d at p. 577.) Under the exigent circumstances exception, the facts known to the officers must amount to an objectively reasonable basis for believing a person inside the motel room is seriously injured or imminently threatened with serious injury. (*Mincey v. Arizona* (1978) 437 U.S. 385, 392; *People v. Troyer, supra,* 51 Cal.4th at p. 605; *People v. Rogers, supra,* 46 Cal.4th at pp. 1156-1157.) There must be "specific, articulable facts indicating the need for "'swift action to prevent imminent danger to life[.]"'" (*People v. Ray* (1999) 21 Cal.4th 464, 472; *People v. Duncan* (1986) 42 Cal.3d 91, 97.) Here, the officers

acted on an anonymous tip that a young woman was being held against her will and was being beaten. The anonymous tip was corroborated by the occupants' failure to come to the door and the deputies' deduction the room was occupied. Further, the deputies knew there was a material consistency between the WeTip information and defendant's presence in the motel. However, the motel manager told the officers the purported victim had been at the motel with defendant for two weeks and did not appear to be in distress or held against her will.

We conclude a reasonable argument could be made, given the totality of the circumstances and the information known to the officers, that the warrantless motel room entry to protect an occupant was not objectively reasonable. (Compare, *People v. Troyer, supra,* 51 Cal.4th at pp. 607-609; *Tamborino v. Superior Court* (1986) 41 Cal.3d 919, 921-925.) We further conclude the record supports the argument a more favorable outcome was reasonably probable had Mr. Calabria moved to suppress the incriminating evidence officers discovered in the motel room. (*Strickland v. Washington, supra,* 466 U.S. at p. 696; *People v. Carrasco* (2014) 59 Cal.4th 924, 982.) The arguably illegal entry led officers to discover the victim's identity and seize evidence introduced at trial including implements defendant used to torture Ms. Garcia, loaded handguns, narcotics and drug paraphernalia. The tangible items seized substantially corroborated the case against defendant, particularly in light of the victim's recantation.[6] Mr. Calabria's testimony at the initial

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[6] Defendant argues that as a result of the illegal entry, "all physical *and testimonial* evidence discovered . . . must be suppressed." Defendant has not, however, analyzed the relevant

new trial hearing established he had no legitimate tactical reason for refraining from filing an evidence suppression motion. He thought such motion would be unsuccessful because the tip came from the purported victim's family member. He admitted he would have explored filing a suppression motion had he known the tip was anonymous. On the record before us, we cannot say the suppression motion would have been denied—that under the totality of the circumstances, an emergency situation existed sufficient to justify the deputies' warrantless entry into the motel room. In other words, given the opportunity, defendant may be able to prove his Fourth Amendment claim is meritorious, his attorney's performance was deficient, and it is reasonably probable the verdict would have been more favorable to him absent the seized evidence.

On remand, the trial court is to consider this issue. If the trial court finds Mr. Calabria was *not* ineffective in failing to file such motion, or defendant suffered no prejudice, it shall reinstate its order denying defendant a new trial. If the trial court finds Mr. Calabria was ineffective and there is a reasonable probability of a different result had an evidence suppression motion been pursued, it shall issue an order granting defendant a new trial.

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law. (See, e.g., *United States v. Crews* (1980) 445 U.S. 463; *Wong Sun v. U.S.* (1963) 371 U.S. 471; *People v. Teresinski* (1982) 30 Cal.3d 822.) Application of the exclusionary rule to evidence other than the tangible items seized has not as yet been litigated in this case.

D. The Prosecutor's Duty to Notify Defendant his Counsel was being Prosecuted

Defendant contends the district attorney's office had an obligation to notify the trial court that Mr. Calabria faced criminal charges and was "drug dependen[t]." Defendant reasons an informed trial court could have taken steps to ensure defendant had conflict-free, drug-free counsel. As discussed above, however, there has been no showing the pending criminal charges adversely affected Mr. Calabria's representation of defendant or that Mr. Calabria was under the influence of drugs. We find no denial of defendant's fair trial right.

E. Sentencing

As noted above, the jury convicted defendant of torture, mayhem, corporal injury, methamphetamine possession, cocaine base for sale, firearm possession by a felon and ammunition possession. (§§ 206, 203, 273.5, subd. (a), 29800, subd. (a)(1), 30305, subd. (a)(1); Health & Saf. Code, §§ 11378, 11351.5.) The jury also found true firearm, deadly weapon, and great bodily injury infliction allegations. (§§ 12022, subds. (b)(1), (c), 12022.5, subd. (a), 12022.7, subd. (e), 12022.53, subd. (b).) Defendant admitted prior conviction and prison term allegations. (§§ 667, subds. (a)(1), (b)-(i), 1170.12; Health & Saf. Code, § 11370.2, subd. (a).) The trial court sentenced defendant to two life terms plus twenty years.

We asked the parties to brief several sentencing issues. The trial court erred when it imposed two life terms for torture under sections 667, subdivisions (b) through (i), and 1170.12. The trial court should have doubled the minimum 7-year term for a 14-year-to-life sentence. (*People v. Jefferson* (1999) 21 Cal.4th 86, 96-100.) The trial court also erred in failing to impose, impose and stay, or strike multiple enhancements under sections 667, subdivision (a)(1), 667.5, subdivision (b), 12022, subdivisions (b)(1) and (c), 12022.5, subdivision (a), and 12022.7, subdivision (e). (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) On remand, if the trial court again denies defendant a new trial, it shall resentence defendant as discussed above.

IV. DISPOSITION

The judgment and order are conditionally reversed and the matter is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

BAKER, J.