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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. FAHIM ANTHONY MULTANI, Defendant and Appellant.	B270411 (Los Angeles County Super. Ct. No. GA093728)

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

Law Offices of Beles and Beles, and Robert J. Beles, Paul McCarthy, Manisha Daryani, and Joe Ryan, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

The People charged appellant, Fahim Anthony Multani, in a single information, with various crimes of domestic violence against two former girlfriends, Georgina A. and Jennifer P. They alleged that Multani tortured Georgina while the couple dated and cohabitated in the late 1980's and early 1990's, and that Multani tortured Jennifer and committed other crimes against her while they were cohabitating in 2012. At the trial, the People offered evidence that Multani also committed uncharged acts of domestic violence against a third woman, M.M., with whom he had a romantic relationship and cohabitated from 1998 to 2000.

At the conclusion of the trial, the jury acquitted Multani of the count involving Georgina. He now appeals from the judgment entered following his convictions on the following counts involving Jennifer: count 2 – torture (Pen. Code, § 206),[1] count 6 – corporal injury to a fellow parent (§ 273.5, subd. (a)), and three counts of battery against a fellow parent (§ 243, subd. (e)(1), as lesser offenses of counts 7, 9 & 10).[2]

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

[2] The jury acquitted Multani on count 1 – torture (§ 206) (involving alleged victim Georgina) and acquitted him on the following counts (involving alleged victim Jennifer): count 3 – criminal threats (§ 422, subd. (a)); counts 4, 7, 9, and 10 – corporal injury to fellow parent (§ 273.5, subd. (a)); count 5 – assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)); and count 8 – assault with a deadly weapon (a knife) (§ 245, subd. (a)(1)).

ISSUES

Multani raises the following contentions on appeal:

(1) Insufficient evidence supported his torture conviction (count 2);

(2) The trial court erroneously failed to give a unanimity instruction regarding count 2;

(3) The trial court erroneously admitted M.M's testimony about domestic violence under Evidence Code section 1109, subdivision (a);

(4) Georgina's testimony was inadmissible as domestic violence evidence with respect to the alleged crimes against Jennifer;

(5) The prosecutor committed *Brady*[3] error;

(6) The trial court erroneously excluded testimony of a late-designated defense expert, Dr. Pietruszka;

(7) The trial court erred in its in limine rulings pertaining to religion;

(8) The trial court abused its discretion by admitting evidence Multani tried to obtain a gun;

(9) A delay during jury deliberations violated Multani's rights to due process and a fair trial;

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[3] *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

(10) Multani was unlawfully subjected to visible restraints in the jury's presence;

(11) Multani was unfairly made to appear in jail clothing in the jury's presence; and

(12) Cumulative prejudicial error occurred.

We begin with a summary of the evidence pertinent to the issues raised by Multani. After reviewing the evidence, we examine each of these issues. Because we conclude that none merit reversal, we affirm.[4]

FACTUAL AND PROCEDURAL SUMMARY

1. People's Case.

a. *Georgina's testimony.*

Multani and Georgina began dating around 1987, when she was 16 and he was 18. During the relationship, Multani became verbally and physically abusive. Multani often hit her in the same places where she had been bruised, and told her no one could see the bruises beneath her clothing. The more she protested, the more severe or prolonged the assault would be.

On one occasion, Georgina was so bruised she could not lift her arms. On more than one occasion, Multani threatened to hurt her family if she reported his abuse. Multani physically

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[4] On April 17, 2017, appellant filed a petition for writ of habeas corpus (case No. B281936) and, on April 28, 2017, this court ordered that this appeal and the petition be considered concurrently. We deny the petition in a separate order.

prevented Georgina from leaving their home and going to her place of worship. When she refused to go to his place of worship, he assaulted her. Multani gave Georgina severe beatings when they disagreed about how to celebrate religious holidays. By 1992, Multani had become more violent.

b. *Jennifer's testimony.*

(1) *Events from September 1 through October 10, 2012.*

About September 1, 2012, Multani, Jennifer, and her daughters drove to visit her family in Chula Vista. While Jennifer drove, Multani asked if she went to a former boyfriend's wedding. She replied yes, and Multani, using his fist, repeatedly hit her right shoulder and upper thigh while insulting her. He threatened to hurt her family if she did not change.

On September 2, 2012, Multani, Jennifer, and her daughters were driving to Ventura. While Jennifer was driving and the children were asleep, Multani punched Jennifer's upper right arm and right thigh. He said there was a demon in her because she constantly lied to him. He also said he was going to hit or get rid of the demon, even if it meant killing Jennifer. He hit her several times in the same places. Jennifer did not tell anyone about the abuse that occurred up to that time, because Multani would have given her a worse beating and he threatened to take the girls away and render her homeless. She believed Multani had far more money than she did and knew many attorneys.

On September 3, 2012, Multani choked Jennifer at home until she was nearly unconscious. She told him she saw black, and he said it was the demon.

On September 11, 2012, Multani and Jennifer went to the Arcadia mall with the children, who were asleep. As Jennifer drove, Multani punched her on the right shoulder and forearm, and on her thigh. He asked how many men she had slept with, how many times, and whether it occurred in random hotels. At the mall, Jennifer endured the pain and said nothing.

Multani told Jennifer that if she did not do what he said, he would kill her mother. He said he would stick a knife in her mother's stomach and turn it to cause a slow, painful death. (Count 3.)[5] Multani and Jennifer went home, and Multani got drunk. He indicated his previous girlfriends, including Gina and M.M., were better than Jennifer. Multani asked Jennifer about her former boyfriends and repeatedly punched her thighs.

Around September 12, 2012, while Jennifer was in the kitchen, Multani approached her with a piece of paper containing the names of her family members he said he would kill.

On September 13, 2012, Multani told Jennifer to show him where two of her former boyfriends lived. Multani, Jennifer, and the girls entered the car and Multani drove. Multani talked about Jennifer's former boyfriends, punched her twice on her left thigh (where he had hit her numerous times on September 3, September 11, and September 12, 2012), and demanded that she tell him about her "whorish" life.

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[5] During jury argument, the prosecutor correlated the evidence with the counts alleged. We include reference to this correlation here because it is germane to Multani's contention (discussed later in this opinion) that the trial court erred by not giving a unanimity instruction.

Jennifer directed Multani to one apartment and he exited the car and appeared to look in the apartment's windows. He returned and hit her in the left thigh. Multani told her to tell him where another former boyfriend lived. They went there and Multani looked around near the apartment's windows. He returned and hit her again in the left thigh. Jennifer experienced shooting pain in her leg. This seemed to make Multani happy. That day, Multani hit Jennifer more than twice on the left thigh, and perhaps 10 times. The next morning, she walked with a limp. (Count 4.)

From September 13 through September 20, 2012, Multani repeatedly asked Jennifer about her former boyfriends, and hit her. Once during that week, Multani said things as she exited the shower. When she turned her back, Multani kicked her in the lower back with a shod foot. She fell, hitting the toilet seat with her stomach. She later saw blood spots in her underwear. (Count 5.) During that week, Multani also made her bend over, then struck her buttocks with a belt.

Jennifer testified that "up to" September 20, 2012, and after Multani had punched her, kicked her, hit her with a belt, and threatened her family, she felt fear but did not report the abuse. She also testified that, "these times" when Multani would punch her in the arm and thigh, hit her buttocks with a belt, and kick her, she sustained bruises on her upper arms, thighs, and buttocks. She covered her bruises by wearing long-sleeved shirts, or pants. She did not report the abuse because she was afraid Multani would kill her mother and family, and take away her daughters.

On September 26, 2012, Multani and Jennifer were at home when Multani found on Jennifer's phone a text message reflecting she had gone out with a female friend in 2011. Jennifer explained, but Multani was not satisfied with the explanation. He repeatedly slapped Jennifer's head and punched her upper arms for about 10 minutes. As a result, she had bruises and was always in pain. She did not sleep that night, and Jennifer testified she "had not slept throughout this ordeal" because Multani would keep her up for hours at night. Multani also hit Jennifer's left ribs on that occasion. (Count 6.) Jennifer could not sleep on her left side because her ribs hurt.

On October 5, 2012, Multani gave her the worst beating. Multani and Jennifer were in the kitchen and he asked her about former boyfriends. Multani made her sit and, using the bristle ends of a broom, Multani stabbed her thighs (count 7), knees, and arms. He repeatedly did this for perhaps 30 minutes. Jennifer was wearing pants. Multani said she was stupid and a whore, and he would get the demons out of her.

Multani grabbed a knife, put it against Jennifer's right wrist, and told her she should kill herself because she was worthless. He then put the knife against her throat and called her names. Multani poked her knee with the knife (count 8), cutting her and leaving a scar she still had at the time of the trial. She was terrified and thought she was going to die.

Multani made Jennifer enter a bedroom. He made her watch pornographic videos and asked her about a former boyfriend of hers. Multani asked, "Where do you want it?" Jennifer understood Multani to be asking where he was going to hit her. She pointed to the top of her left thigh, but he punched her left side near her ribs (count 10) and punched her wrist and

head. As a result of Multani hitting her left ribs, she felt extreme pain and was paralyzed. Multani repeatedly called her name and said, "Oh, shit." He put ice on her side and she "woke up." Multani told her she had "died." He said he was going to call 911, but he did not want the paramedics to see the bruises and have authorities take the daughters. She had numerous bruises resulting from Multani hitting and punching her during the preceding weeks. The bruises were on her arms, upper body, side, thighs, and top of her legs.

On October 6, 2012, Jennifer went to King Taco with Multani and her daughters. A video showed her holding one of her daughters. She could not show she was in pain in public, and Multani told her to pick up the child.

On October 8, 2012, Multani made Jennifer and their eldest daughter kneel and stand about three times.

Later that evening, Multani had Jennifer bend over a bed and he hit her buttocks with a wooden plank. (Count 9.) Multani struck her with more force than when he spanked her during sex.[6] She was sore, bruised on her buttocks for two days, and could not sit. (Count 2; this count was based on all the foregoing events occurring from September 1, 2012, to October 8, 2012.)

Jennifer had an appointment scheduled with Dr. Thacker, a gynecologist, in September or October 2012. Jennifer asked Multani how she would explain her bruises. Multani replied, "You're not. You're just going to wear a sports bra and not say a

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[6] Jennifer had to buy clamps and clips for use on her nipples during sex, otherwise Multani would have hit her. Multani spanked her without consent during sex.

word." At Dr. Thacker's office, Jennifer hid her bruises under her gown.

(2) *Additional pertinent facts.*

Jennifer did administrative work for a violence intervention program. On October 10, 2012, Jennifer went to work and wore a short-sleeved sweater. A coworker asked Jennifer about bruises on her arms. Jennifer, afraid, said she had bumped into a wall. Dr. Asdrid Heger, a pediatrician and the program's director, later approached Jennifer. Jennifer told Dr. Heger everything.

On October 11, 2012, Jennifer told Dr. Heger that Multani had guns in the house, and Dr. Heger called the authorities. Later that day, police interviewed Jennifer. Jennifer testified a female officer took photographs of Jennifer's numerous bruises on multiple parts of her body. The photographs were admitted into evidence.

On October 12, 2012, Jennifer went to urgent care due to pain on her left side resulting from Multani's October 5, 2012 blow to her rib. Jennifer found out her rib was broken. She had pain on that side for one or two weeks after she went to urgent care. She could not pick up her youngest daughter or sleep on her left side.

Multani was six feet tall and weighed 200 pounds. He had several firearms in his house, including two rifles and two

handguns.[7] Jennifer testified that Multani used her Amazon account to purchase firearm accessories.

c. *Dr. Heger's Testimony.*

Dr. Heger testified that on October 10, 2012, she approached Jennifer. Dr. Heger saw bruises on the "shoulder and middle arm area, upper arm area" of Jennifer's arms. Dr. Heger asked Jennifer to talk privately and, when Jennifer did, she began crying. Dr. Heger had two administrators join them. Jennifer, very frightened, said her husband had beaten her. Jennifer said she was absolutely terrified that if Dr. Heger called the police, Jennifer would be killed and something would happen to her daughters. Jennifer showed additional bruises to Dr. Heger. Jennifer had bruises and injuries on her shoulder, back, arms, thighs, and knees, and Dr. Heger had photographs taken of them.

d. *Law Enforcement Testimony.*

Alhambra Police Detective Felix Huezo testified as follows. On October 12, 2012, Huezo went to Jennifer's residence. When he arrived, she was hysterical. Police found in the house three rifles, two pistols, and ammunition. The pistols belonged to

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[7] Jennifer had made intentional misrepresentations in connection with job applications and misrepresentations in resumes. While working for the county, she was investigated for taking a county camera for personal use and she returned it. Jennifer was given immunity for her testimony, with the understanding she told the truth to police and investigators in that matter.

Jennifer. On November 2, 2012, Huezo interviewed Jennifer and she was frightened. She provided additional details.

On October 16, 2014, Donald Warren told Huezo that Multani was seeking to purchase guns to kill the mother of his children. That day, Huezo met with Warren and another officer to call Multani about his intent to buy guns. During a recorded telephone call, Multani asked Warren, "what does he have?" Warren replied, "I told you a 9 and a 45." Department of Homeland Security Special Agent Aaron Zephir testified he was present during the above call. He testified a "9" and a "45" were a 9-millimeter gun and a .45 caliber handgun, respectively.

Los Angeles Police Officer James Hammond testified that on October 17, 2014, he conducted a stop of the car Multani was driving. Police found in the car an envelope containing $1,500 in hundred dollar bills. Multani had about $600 in his wallet. Police arrested him after finding the money in his wallet, apparently believing Multani intended to use the money to purchase weapons.

e. *Testimony of Donald Warren.*

Warren testified he had known Multani about 12 years. In about February or March 2014, Warren met with Multani and Multani indicated he wanted to get a gun. Warren said he would look for one. Multani had court papers with him and said the mother of his children was wrongly accusing him, and his child support payments were too high. Warren ultimately did not look for a gun. In October 2014, Warren contacted Huezo and told him Multani was trying to buy a gun.

f. *Uncharged misconduct: M.M.'s testimony.*

M.M. dated and cohabitated with Multani from about 1998 to 2000. After they became engaged, Multani became more controlling. He sometimes wanted M.M. to dress more conservatively. Multani also wanted M.M. to discipline her children more firmly. Multani and M.M. had different religious beliefs. Multani disparaged her place of worship and wanted her to attend his place of worship.

Multani frequently asked M.M. about her previous boyfriends and was jealous. He was verbally abusive. On one occasion when Multani was involved in a confrontation with M.M.'s relative, Multani said if M.M. sided with the family, "it's going to get worse."

On one occasion when he had an altercation with M.M.'s brother and brother-in-law, Multani entered her car and yelled at her brother, "I'm going to kill you." Multani drove home. He obtained a gun, closed the shades, and paced around holding the gun. M.M. was terrified but Multani prevented her from leaving. When she tried to leave, Multani threw her over a coffee table, damaging it. She suffered bruising on her back and arm, and was sore for probably a week and a half.

Multani threatened to hurt M.M.'s family if she left him. M.M. felt angry, afraid, and trapped.

On one occasion, M.M. found in Multani's garage a photograph depicting him having sex with another woman while he had a painted picture of a donkey on his head. Multani told M.M., "That's me having sex with what's her name " and "That's what she gets for leaving me." He said he sent the photograph to the woman's family, coworkers, and others, because "that's what she gets." M.M. was upset Multani could be that cruel.

Multani told M.M. that all of his former girlfriends had left him. M.M. twice went to the sheriff's department for help, but received none. At the end of the relationship between Multani and M.M., Multani told M.M.'s brother that Multani was going to kill him. On May 22, 2000, M.M. sought a temporary restraining order against Multani.

g. *Domestic violence expert Gail Pincus's testimony.*

Gail Pincus, a licensed clinical social worker and a domestic violence expert, testified domestic violence is more common than people generally believe, and victims have a difficult time leaving abusive relationships. Domestic violence involves a pattern of coercive behavior. The pattern can involve a cycle of violence. Abusive relationships become tense and escalate to physical violence. Abuse can be emotional, including continual criticism. Abusers often isolate the victim from friends, family, and supportive males.

The domestic violence leads to battered women's syndrome, or "intimate battering," during which the victim accommodates coercive control and abuse. Abusers will often tell victims they are not as good sexually as the abuser's previous partners. Abusers intimidate through violence, and often use a victim's children to control. Victims often minimize abuse.

2. Defense Case.

a. *Multani's testimony.*

Multani testified in his own defense. He denied ever assaulting or battering Georgina, Jennifer, or M.M.. Multani also denied telling M.M. how to dress. He said he got along well with everyone in Jennifer's family except her brother.

In December 1998, Multani, at a gathering of M.M.'s family, had a disagreement with her brother. Multani was injured, went home, and expected a further confrontation. He did not insist that she stay, nor did he retrieve his handgun, push her, or fling her by the arm. Multani denied M.M. found a photograph of him having sex with another woman. Multani and M.M. broke up in October 1999.

Multani denied calling Jennifer a whore. He stated he never had Jennifer drive him to locations where her former boyfriends lived, and he was not jealous.

Multani denied touching Jennifer en route to Chula Vista. He also denied punching her right arm en route to Ventura and denied having any physical altercation with her returning from Ventura. Multani denied that on September 11, 2012, at the mall, he threatened to stick a knife in the stomach of Jennifer's mother. He also denied punching Jennifer in the leg on that date.

On September 19, 2012, according to Multani, he and Jennifer had broken up. That night, he testified, he had a date with another woman. After he came home, Jennifer accused him of cheating and was hitting him. He was blocking her punches and laughing. Jennifer hit him with a shoe horn.

On September 25, 2012, according to Multani, he saw on Jennifer's phone a text message from her sister. He began uncontrollably laughing. Jennifer repeatedly hit him, and he continued laughing uncontrollably. Jennifer struck him a few times with a pipe. He fell and she began kicking him. He still laughed. Multani was nearly unconscious. He eventually left.

Multani said his sister took photographs of his injuries and one depicted him holding a newspaper bearing the date

September 25, 2012.[8] Multani did not go to a hospital, he said, because he was afraid Jennifer would tell authorities that she caught him molesting her daughter and Jennifer would have his daughters taken away.

Multani denied that on October 5, 2012, he pointed a knife at Jennifer, touched her with one, punched her stomach, chest, or rib area, or ordered her to watch pornography. He said he never poked her knee with a knife. Multani denied seeing various bruises on her in October 2012. He also denied hitting her on October 8, 2012, with an object and denied ever spanking her with a wooden plank.

On February 19, 2014, Multani asserted, someone left in a trash bag at his front door a dead cat with its throat slashed. In his statements to the police, Multani never mentioned a dead cat.

In February or March 2014, Multani spoke to Warren about getting a firearm because, Multani said, he was afraid. In October 2014, Multani continued, he met with Warren and told him he wanted a gun because he was being threatened. Multani had his family law file with him and complained about it to Warren. Multani testified that in July 2014, he had been diagnosed with a serious illness and was considering suicide. He did not want to harm Jennifer, he said.

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[8] At trial on May 7, 2015, Huezo presented a photograph bearing the date October 14, 2008, and depicting him holding a newspaper bearing that date. However, he testified the photograph was taken a week before May 7, 2015. The prosecutor had given the newspaper to Huezo, the prosecutor had taken the photograph, and the whole process took less than five minutes.

Multani acknowledged the October 16, 2014 conversation with Warren during which Warren told Multani that a person was there with a ".45 and a nine." Warren asked which Multani wanted and Multani replied, "Man, don't say it on the phone, brother." Multani did not want Warren to talk about it on the phone because a protective order prohibited Multani from having a gun. Multani was not planning to buy the gun on October 16, 2014. According to Multani, on October 17, 2014, Warren pressured him to go to a location to meet a person. Multani testified he did not want a firearm but went to the location to meet the person and leave. Multani was arrested the same day.

b. Testimony of Dr. Tara Thacker.

Dr. Tara Thacker, a physician, testified Jennifer's X-ray showed an apparent left rib fracture on the eighth rib, not the sixth rib. Ribs could be difficult to count in X-rays because ribs wrap around each other. The distance between the sixth and eighth ribs was only about an inch.

3. Procedural Background.

The information alleged Multani committed count 2 on or between September 1, 2012, and October 8, 2012, and count 6 on or about September 26, 2012. Counts 7, 9, and 10 each alleged corporal injury to, inter alia, a co-parent (§ 273.5, subd. (a)) occurring on or about October 5, October 8, and October 5, 2012, respectively. Jennifer was the alleged victim of the crime alleged in each of these five counts. The jury convicted Multani on

counts 2 and 6.[9] The jury convicted Multani on three counts of battery against fellow parent (§ 243, subd. (e)(1)), as lesser offenses of counts 7, 9 and 10, respectively.

DISCUSSION

1. Sufficient Evidence Supported the Torture Conviction.

Multani contends there is insufficient evidence to support his conviction for the torture of Jennifer (count 2). He argues, "the alleged acts were a series of disconnected garden-variety domestic assaults, none of which were individually so brutal that the jury could infer that [Multani] intended to inflict the level of extreme pain required to convict him of torture." We reject Multani's contention.

The crime of torture has two elements: "(1) a person inflicted great bodily injury upon the person of another, and (2) the person inflicting the injury did so with specific intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (*People v. Baker* (2002) 98 Cal.App.4th 1217, 1223.) The offense does not require that the defendant act with premeditation and deliberation, nor does it require intent to inflict prolonged pain. (*People v. Massie* (2006) 142 Cal.App.4th 365, 371-372.) The attack may be brief. The length of time over which the alleged offense occurred, and the severity of the wounds inflicted, are relevant, but not necessarily determinative, factors. (*Id.* at

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[9] The jury found not true the section 12022.7, subdivision (e) personal infliction of great bodily injury allegation pertaining to count 6.

p. 371.) Torture "focuses on the mental state of the perpetrator and not the actual pain inflicted" on the victim. (*People v. Hale* (1999) 75 Cal.App.4th 94, 108.) The requisite specific intent may be established by the circumstances of the offense. (*People v. Burton* (2006) 143 Cal.App.4th 447, 452.)

"Great bodily injury" means a significant or substantial physical injury. (*People v. Cross* (2008) 45 Cal.4th 58, 64.) Abrasions, lacerations and bruising may constitute great bodily injury. (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.) The victim need not be permanently disabled or disfigured. (*Ibid.*) While no single act in the defendant's course of conduct may result in great bodily injury, where the cumulative result of the course of conduct is great bodily injury, and the requisite intent is present, the crime of torture is established. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412,1429 (*Hamlin*).)

In a sufficiency of the evidence inquiry, "[o]ur power as an appellate court begins and ends with the determination whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) The test on appeal is not whether we believe the evidence at trial established the defendant's guilt beyond a reasonable doubt, but whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.)

We recited the pertinent facts concerning count 2 above, and we will not repeat them here in detail. Rather, it is sufficient to note that we identified substantial evidence that during the period in question, i.e., a little over a month, Multani repeatedly struck Jennifer on various parts of her body, frequently in the

same place. He choked her until she was nearly unconscious. He kicked her with a shod foot and she fell, sustaining injury. Multani cut Jennifer with a knife, and later punched her near her ribs, causing her extreme pain and apparently rendering her nearly unconscious. He hit her buttocks with a wooden plank, causing soreness for two days that prevented her from sitting.

On October 10, 2012, a coworker and the program director where Jennifer worked observed bruises on Jennifer. The next day, police took photographs of her bruises. Jennifer identified to police bruises Multani inflicted on her in September and October 2012. On October 12, 2012, Jennifer went to urgent care and it was determined one of her left ribs was fractured. She testified it resulted from Multani hitting her in the rib on October 5, 2012.

We conclude there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that Multani's conduct during the relatively brief period in question had the unlawful goal or effect and cumulative outcome of inflicting great bodily injury upon Jennifer with the requisite intent, and that Multani tortured Jennifer (count 2). None of the cases cited by Multani compels a contrary conclusion.

2. No Unanimity Instruction Was Required on Count 2.

Multani contends the trial court erroneously failed to give a unanimity instruction (e.g., CALCRIM No. 3500) regarding the torture charge (count 2). He argues that a unanimity instruction was required because there were multiple assaults from September 1, 2012, through October 8, 2012 (the period alleged in the information), and the jury could have treated one or more, but not all, of them as a basis for torture. Some of the assaults were charged as separate counts, as to which the jury did not convict, as noted in our Factual Summary.

We reject Multani's contention. It is well settled that where, as here, the crime of torture is charged and tried as a course of conduct, occurring between two dates, and resulting in great bodily injury, " '[t]he issue before the jury [i]s whether the accused [is] guilty of the course of conduct, *not whether he . . . committed a particular act on a particular day*.' [Citation.]" (*Hamlin*, *supra,* 170 Cal.App.4th at pp. 1427-1428, italics added.) Because the jury reasonably could have concluded that Multani's acts of abuse constituted a course of conduct, "no unanimity instruction [was] required." (*Id.* at 1451.) See also *People v. Jenkins* (1994) 29 Cal.App.4th 287, 290, 292, 297-298, 300 (where this division concluded the trial court was not required to give a unanimity instruction on either of two counts of torture, where each count was based on multiple acts of assaultive conduct that occurred on a separate day, and both days were part of a six-month period of abuse). None of the cases cited by Multani compels a contrary conclusion.

3. The Trial Court Did Not Abuse Its Discretion by Admitting M.M.'s Domestic Violence Testimony.

a. Additional Pertinent Facts.

In the trial court, the prosecutor filed a motion to admit evidence of Multani's prior acts of domestic violence against M.M. The motion argued the evidence was admissible as domestic

violence evidence pursuant to Evidence Code section 1109,[10] relevant as evidence of intent, motive, and common plan and scheme pursuant to Evidence Code section 1101, subdivision (b), and not excludable under Evidence Code section 352.

The prosecutor acknowledged that the evidence related to events slightly more than 10 years earlier than the charged offenses against Jennifer, and that Evidence Code section 1109, subdivision (e), makes such acts inadmissible unless the court determines that the admission of this evidence "is in the interest of justice." (Evid. Code § 1109, subd. (e).) But, the prosecutor argued, the exception was met because, among other reasons, the abuse against M.M. was only slightly more than 10 years old, and

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[10] Evidence Code section 1109, subdivision (a)(1), states, in relevant part, "Except as provided in subdivision (e) . . . , in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 1109, subdivision (d), states, in relevant part, "As used in this section: [¶] . . . [¶] (3) 'Domestic violence' has the meaning set forth in Section 13700 of the Penal Code." Section 13700, subdivision (b), states, in relevant part, " 'Domestic violence' means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." Section 13700, subdivision (a), states, " 'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another."

was sandwiched between the abuse alleged against the other two women, showing a pattern of nearly continual abuse. At the same time, Multani filed a motion to exclude various evidence under Evidence Code section 352, including portions of the evidence relating to M.M.

At the hearing on the prosecutor's motion, the court discussed Evidence Code section 1109, then stated, "In this case, . . . this is right down the center, but for . . . the age of the incident." The court indicated that acts committed before the 10-year period specified in Evidence Code section 1109, subdivision (e), would be inadmissible absent a good cause finding. It observed the People were arguing the evidence was admissible despite its age because it pertained to events occurring between the events involving Georgina and Jennifer, and involved acts not much over 10 years old. The court indicated it was concerned about that issue.

The trial court stated Evidence Code section 1109 did not require identical conduct; "it just requires the court to find that it's relevant," and the evidence was relevant and involved conduct sufficiently similar to the charged offenses. There was "good cause" to allow some of the testimony. The court stated it was not inclined to admit certain specific testimony, but "the substance of [M.M.'s] testimony about her relationship with the defendant and violence committed against her" was relevant and there was good cause to admit it despite the fact "it is outside the 10-year period."

b. *Analysis.*

Multani does not in his opening brief expressly dispute the evidence was admissible as domestic violence evidence under Evidence Code section 1109, subdivision (a)(1), and as against an

Evidence Code section 352 objection. He concedes "[Evidence Code] [s]ection 1109 might have allowed the prosecution to present evidence of the coffee table pushing incident." Multani claims the trial court abused its discretion, however, by admitting M.M.'s testimony under the "interest of justice" exception of Evidence Code section 1109, subdivision (e). We reject this contention.

"Under [Evidence Code section 1109,] subdivision (a)(1) and [Evidence Code] section 352, evidence may be excluded only where its probative value is 'substantially outweighed' by its prejudicial effect." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539 (*Johnson*).)

"[Evidence Code section 1109, subdivision (e)] sets a threshold of presumed inadmissibility, not the outer limit of admissibility. It clearly anticipates that some remote prior incidents will be deemed admissible and vests the courts with substantial discretion in setting an 'interest of justice' standard." (*Johnson*, *supra,* 185 Cal.App.4th at p. 539.) "[T]he 'interest of justice' exception is met where the trial court engages in a balancing of factors for and against admission under [Evidence Code] section 352 and concludes, . . . that the evidence was 'more probative than prejudicial." (*Id.* at pp. 539-540.) *Johnson* also noted, "we . . . do not hold this is the only means by which the 'interest of justice' finding may be justified." (*Id.* at p. 540.)

When ruling on an Evidence Code section 352 issue, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) We review for abuse of

discretion a trial court's ruling that the admission of evidence is "in the interest of justice" within the meaning of Evidence Code section 1109, subdivision (e). (*Johnson*, *supra*, 185 Cal.App.4th at p. 539.) We also review the trial court's admissibility ruling as of the time it was made. (Cf. *People v. Fruits* (2016) 247 Cal.App.4th 188, 208; *People v. Hernandez* (1999) 71 Cal.App.4th 417, 425.) Here, the trial court was aware of the applicable standards and considered the relevant factors. We perceive no abuse of discretion.

To the extent Multani claims M.M.'s testimony was inadmissible on a ground(s) other than the Evidence Code section 1109, subdivision (e), we reject the claim because he makes it for the first time in his reply brief. (Cf. *People v. Thomas* (1995) 38 Cal.App.4th 1331, 1334; *People v. Jackson* (1981) 121 Cal.App.3d 862, 873.)

Moreover, there was strong evidence of Multani's guilt. Any error was not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

4. Appellant Failed to Meet His Burden of Demonstrating the Court Admitted Georgina's Testimony as Propensity Evidence that He Committed Offenses Against Jennifer.

As noted above, the prosecutor filed a motion to admit evidence of Multani's acts of domestic violence against M.M. The written motion did not seek to admit evidence of Multani's acts against *Georgina* as domestic violence evidence admissible to prove the counts pertaining to *Jennifer*. Multani's motion to exclude various evidence under Evidence Code section 352, filed on March 23, 2015, referred to anticipated evidence from Georgina, Jennifer, and M.M., but did not expressly argue the People were proffering evidence of Multani's acts against

Georgina as domestic violence evidence admissible to prove the counts pertaining to Jennifer.

During the hearing, the court observed, "there's a People's motion to admit evidence" regarding the testimony of "[M.M.]" under Evidence Code section 1109. The court and counsel subsequently discussed the admissibility of M.M.'s testimony (but not Georgina's testimony) as domestic violence evidence, including Multani's argument that M.M.'s testimony was cumulative.

Later, in a brief, garbled exchange with the trial judge, defense counsel stated, "And what the People have done, they also introduced a case [the case involving Georgina] in excess of 20 years [old] as its own torture claim. And what they could have done in this case and chosen not to and could have opted to use a far less standard in order to not to be pejorative, but poisoned the minds of the jurors against Mr. Multani." (*Sic*.) After telling defense counsel, "Move on from that . . . . They filed a claim," the trial court added, "They don't have a statute of limitation. Let's just focus on the 1109 issue." Defense counsel then replied, "that goes to the cumulative element."

That nearly incomprehensible colloquy is the closest that Multani came to raising with the trial court the issue he now asks this court to address: whether the trial court abused its discretion in permitting evidence of Multani's abuse of Georgina to be used as domestic violence evidence to prove his alleged offenses against Jennifer. It is not enough. It was Multani's burden to show error by an adequate record. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102 (*Kathy P.*).) He could have asked for a limiting instruction, or even a ruling that the charges involving the two women be tried to separate juries, but he did not.

Because Multani never secured a ruling on whether Georgina's testimony should not be considered as domestic violence evidence offered to prove the alleged offenses against Jennifer, there is, on that issue, no ruling we can review. (Cf. *People v. Rowland* (1992) 4 Cal.4th 238, 259.) We therefore must reject Multani's claim of error.

5. No *Brady* Error Occurred.

At some point after Multani was arrested, Georgina began working in Multani's old job. How or why that happened is not in the record that has been provided to this court. Nor, apparently, did the defense know of this fact when Georgina testified, although it was known to the People. Multani contends the failure of the prosecution to disclose that information to the defense constitutes *Brady* error. We disagree.

a. *Pertinent Additional Facts.*

(1) Background.

Multani was arrested on October 17, 2014. During February 2015 pretrial proceedings, the court, parties' counsel, and Huezo discussed items recovered during the execution of a search warrant on October 17 and 25, 2014, apparently at Multani's place of employment. Multani asserted certain items listed in the warrant return contained privileged information. The prosecutor suggested Multani was referring to documents protected by the attorney-client privilege.

(2) April 1, 2015 Sidebar Conference.

On Wednesday, April 1, 2015, outside the presence of prospective jurors, the prosecutor indicated she wanted a sidebar conference on a matter "so I can let counsel know." During the

ensuing conference between the prosecutor and trial judge (to which defense counsel was not a party), the prosecutor informed the trial court of a recent telephone conversation she had with Georgina, for the purpose of explaining to Georgina a previous trial court in limine ruling.

The prosecutor told the court that – in the telephone conversation – Georgina said "she took over [Multani's former] position," "she actually works in the same office" that Multani once occupied, and "she has access to his [previous] work." The prosecutor said her only concern was Multani had a history of claiming that "what was recovered from the defendant's [former place of employment]" was protected as "attorney-client work product." The prosecutor also said, "we spent a lot of time litigating that."

The prosecutor denied knowing "if the emails [Georgina] has access to in the course of her employment taking over the defendant's older position ha[d] anything to do with" his personal matters or anything previously recovered pursuant to the warrant. The prosecutor denied "it's . . . [Multani's] personal computer" and stated, "it's kind of the way she said it, it's kind of through the job."

The prosecutor said Georgina had not disclosed anything else to her. The prosecutor then stated, "but I wanted to let the court know . . . [if] . . . the court feels that that's something that should be disclosed to counsel or if [Georgina] should be questioned about that before she testifies, because if there is anything – I don't know that there is. I'm not representing that. I don't think there is, but if there is, I do not want something to come out on the stand. And so, I wanted to put that before the court at this time." The prosecutor denied pursuing the topic

further with Georgina, denied "ask[ing] her anything about what the emails say, if she looked at them," and said, "[Georgina] has access to them."

The prosecutor said she did not know if the court wanted Georgina to explain anything during an Evidence Code section 402 hearing, "but I did want to make the court aware of" the issue. The court later thanked the prosecutor but took no further action on the matter.

(3) Multani's Motion for a New Trial.

In November 2015, Multani retained new counsel and filed a motion for a new trial. One contention was there was newly discovered evidence Georgina had an undisclosed motive, bias, or interest in the present case. The motion included Multani's counsel's initial unsworn statement of facts, which supported later separate arguments that (1) the court should grant a new trial based on newly discovered evidence and (2) the "withholding of [Georgina's] employment" was a *Brady* violation. Additional unsworn facts accompanied each argument.

The initial unsworn statement said, "Upon Defense's closing and prior to the jury verdicts, Defense investigator Matthew Giaba, who was provided copies of the telephone records of [Jennifer's] cellular records including the relevant time periods of September 2012 through November 2012, was researching the telephone numbers that [Jennifer] had made [*sic*] both prior to and after Defendant's arrest on October 10, 2012 [*sic*]."

The statement of facts also indicated Jennifer regularly called Multani's work telephone number. For the past six years, Multani had worked as a director of credit and collections for Gursey-Schneider (Gursey), an accounting firm. Giaba called what had been Multani's phone number and determined it was

now Georgina's phone number and she held Multani's former position as a director.

Another unsworn statement of facts by Multani's counsel accompanied the motion's later argument that the court should grant a new trial based on newly discovered evidence. That statement indicated Gursey formally terminated Multani "in January 2015 when [Georgina] was hired."

The motion's later *Brady* argument was supported by the following unsworn statement of facts by Multani's counsel: "The fact that Detective Huezo generated several reports prior to and up to the beginning of trial and the fact that [Georgina's] testimony had evolved from her preliminary hearing to trial testimony to match that of [Jennifer's] testimony is of great significance when coupled with the fact that [Georgina] . . . had Defendant's job."

During the hearing on the motion, the trial court stated, "As far as the *Brady* violation, the court would have to find first that the information about Georgina's employment was both material and exculpatory." As to materiality, the court stated, "the jury found the defendant not guilty on the torture claim regarding Georgina, so I don't believe that her employment would have led to any different result in this case." The court then stated, "And I don't see actually how where she worked would have been exculpatory. I understand the credibility arguments that counsel makes, but I think those arguments are a bit of a stretch. The motion is respectfully denied."

b. *Analysis.*

Multani claims the "prosecution withheld *Brady* impeachment evidence of Georgina's bias and motive to lie, . . ." He argues the prosecutor committed *Brady* error by suppressing evidence of Georgina's current employment at Gursey, including the fact she took over Multani's former job there. In particular, Multani asserts, "Georgina told the prosecution that she had gotten [Multani's] previous job . . . . That she had [Multani's] previous job was obvious evidence of bias"; "[a] reasonable juror could have inferred that Georgina believed that [Multani] would probably get his old job back if he wasn't convicted"; and "[h]ad the jury known that Georgina, however coincidentally, had obtained [Multani's] job at [Gursey], it would have had evidence that Georgina had a direct and present financial interest in the outcome of [Multani's] prosecution, . . ."

Multani also claims (with no apparent factual basis) the "prosecution withheld *Brady* impeachment evidence . . . that Georgina had access to information about defense strategy." He argues the prosecutor committed *Brady* error by suppressing (supposed) evidence that because of Georgina's current employment, she had access to Multani's attorney-client communications and therefore to his confidential defense strategy.

In particular, Multani asserts, (contrary to the record) "Georgina told the prosecution that she . . . had access to [Multani's] emails, including attorney client communications"; "the prosecution failed to disclose that Georgina had access to [Multani's] attorney-client communications and therefore to information about confidential defense strategy"; Georgina 'was given free rein to access [Multani's] attorney-client

communications and confidential defense information, with the blessings of both the prosecution and the honorable trial judge herself"; and this court must "presume" "Georgina shared the attorney client communications with Jennifer and [M.M.]" and "Georgina would have provided the information to the prosecutor."

(1) Applicable Law.

" 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citations.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043 (*Salazar*).)

"[E]vidence is favorable if it helps the defense or hurts the prosecution." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132.) Materiality requires a defendant to ". . . 'show a "reasonable probability of a different result." ' [Citation.]" (*Salazar, supra,* 35 Cal.4th at p. 1043), i.e., that the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley* (1995) 514 U.S. 419, 435.)

" 'In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime," [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citations]. In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony," [citation] . . . ;

[citation]; *see also Giglio v. United States* [(1972)] 405 U.S. [150], 154 (new trial not required where newly discovered evidence is merely "possibly useful to the defense but not likely to have changed the verdict").' [Citation.]" (*Salazar, supra*, 35 Cal.4th at p. 1050.)

"If the undisclosed evidence is 'material,' the defendant's conviction must be vacated without a separate harmless error review, because the prejudice determination is subsumed within the definition of the term 'material.' [Citation.]" (*In re Brown* (1998) 17 Cal.4th 873, 903.)

The burden is on Multani to establish each element of a *Brady* claim. (*Salazar, supra,* 35 Cal.4th at p. 1047.) Indeed, in an appeal, the burden is on Multani to demonstrate error from the record and error will not (notwithstanding Multani's suggestion to the contrary) be "presumed." (*Kathy P.*, *supra*, 25 Cal.3d at p. 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) " 'We independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence.' " (*People v. Masters* (2016) 62 Cal.4th 1019, 1067.) We review a trial court's ruling on a motion for a new trial for abuse of discretion. (*People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27.) A trial court does not abuse its discretion by denying a new trial motion based on a nonmeritorious *Brady* claim. (*Id.* at pp. 916-917, fn. 27.)

Finally, "as long as . . . excluded evidence would not have produced a ' " 'significantly different impression' " ' of the witness's credibility, the confrontation clause and related constitutional guarantees do not limit the trial court's discretion"

to exclude irrelevant and collateral impeachment evidence. (*People v. Contreras* (2013) 58 Cal.4th 123, 152.)

(2) Application of the law to this case.

(a) *No suppression occurred.*

First, the record reflects that during the prosecutor's telephone conversation with Georgina, Georgina did not indicate that she had seen confidential attorney client communications and did not indicate that she believed her job would be threatened if the jury acquitted Multani. Thus, there was no basis for the People to believe that Georgina's employment constituted *Brady* information.

Moreover, Multani has failed to demonstrate, and there is no substantial evidence, that Georgina accessed via Multani's emails any privileged information or confidential defense information. Multani's assertion that Georgina communicated any such content, or any other content, of any emails to anyone, including Jennifer, M.M., or the prosecutor, is speculation and is unsupported by the record. Multani has failed to demonstrate suppression of any privileged information or confidential defense information.

(b) *The alleged motive evidence was speculative, and neither favorable nor material.*

Long before Georgina's then current employment, she had a motive to testify about Multani's alleged felonious conduct so he would be convicted and punished. Georgina's comments to the prosecutor about her job and Multani's emails do not demonstrate, as Multani posits, that she had a financial motive to testify to secure his conviction and imprisonment to keep her

job. The trial court did not abuse its discretion when it rejected this speculative conclusion as "a stretch."

Moreover, even if the current employment evidence were relevant as impeachment evidence, Georgina's testimony pertained to count 1, and the jury acquitted Multani on that count. The only counts on which the jury convicted Multani were counts in which Jennifer was the victim, and there was strong evidence of Multani's guilt on those counts, independent of Georgina's testimony. Multani has failed to demonstrate from the record that if the current employment evidence had been disclosed, there was a reasonable probability of a different result. In sum, even if the allegedly suppressed evidence was favorable, we hold it was not material; therefore, no *Brady* error occurred. Moreover, no confrontation clause, or other constitutional error occurred, and the trial court did not abuse its discretion by denying Multani's new trial motion.

Neither the cases cited by Multani, nor his argument, compels a contrary conclusion. This includes *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1255. *Morrow* held the conduct of a prosecutor and her investigator violated federal and state constitutional protections, including the right to due process and the Sixth Amendment right to counsel. (*Id.* at p. 1259.) Unlike in this case, however, in *Morrow*, the prosecutor orchestrated eavesdropping upon privileged attorney-client communications in the courtroom, and acquired confidential information, by telling her investigator to sit next to a holding cell and listen to the conversation between defense counsel and the defendant. (*Id.* at pp. 1255, 1259, 1261.) The circumstances are far from analogous.

6. The Trial Court Properly Excluded Dr. Pietruszka's Testimony Because the Defense Had Neither Timely Designated Him Nor Timely Provided a Report.

a. *Pertinent Additional Facts.*

On March 23, 2015, prior to trial, the People estimated they had six or seven days of proposed testimony. One of Multani's trial counsel, Attorney Christopher Darden, said it would take a "couple of days, I guess" to try the case. Darden suggested he intended to call Dr. Thacker as a witness (although Thacker was on the People's witness list).

On April 2, 2015, the jury and three alternate jurors were sworn. On April 20, 2015, during the defense presentation of evidence, the prosecutor complained she had just received from Darden a statement made by Rahim Multani (Multani's brother) (Rahim) who worked for Darden's firm. The prosecutor complained, "counsel has continually stated, well, maybe this expert or maybe this expert. We have no offer of proof, no statements, no contact information. Mr. Price has been, again, stated again as a potential witness. No offer of proof. No further statements. They've thrown out a lot of different things. Nothing affirmative, nothing specific and this has been just continuing on the entire case." The court replied, "It has." The court later excused an alternate juror who had vacation plans.

Later that day, Multani's other trial counsel, Attorney Christien Petersen, indicated there was a problem because a proposed defense expert witness, Dr. Marvin Pietruszka, did not have Jennifer's X-ray. The prosecutor indicated Multani had to subpoena X-rays properly. The prosecutor suggested Multani had possessed Jennifer's medical records for some time and great bodily injury was a "very major issue" in the case. The prosecutor

stated, "I have a hard time believing that they did not know that they would need to subpoena the X-rays if they needed them."

Darden represented that the defense had subpoenaed the X-ray and it would "possibly" arrive the next day. The court later told Darden, "You've been in this court for four, let me repeat, four weeks. There is nothing that's known now that wasn't known then and for, you know, years before that. So, to call a witness, an expert witness, who has not prepared a report when you are . . . at the last day of trial, . . . it can't happen." Darden inexplicably claimed the problem was police would "show up" when he tried to subpoena something, and suddenly "we get no cooperation."

On April 22, 2015, the prosecutor represented that on April 21, 2015, about 2:38 p.m., the prosecution first received Pietruszka's written report.[11] The court asked Multani for an offer of proof concerning Pietruszka's testimony. Petersen represented that Pietruszka "would ostensibly be able to discuss [ecchymosis, i.e., bruising] with regards to the medical issues that were subpoenaed to court." (*Sic*.) The court replied, "Dr. Thacker could do that also." Petersen replied, "Ostensibly."

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[11] During the December 18, 2015 hearing on Multani's new trial motion, Pietruszka's report was marked as exhibit 1 to the People's filed opposition to the motion. But Pietruszka's report is not part of the record before this court.

Petersen then suggested Pietruszka's testimony would pertain to ecchymosis and Jennifer's use of various drugs, as those matters related to whether her wounds were self-inflicted "or less than abuse of conduct [*sic*]."[12] Petersen indicated this testimony would provide an alternative explanation of the cause of her "otherwise dramatic appearing bruises."

Petersen also said Pietruszka would testify that, after reviewing an X-ray, he concluded Jennifer's eighth rib had been broken, not her sixth rib as an earlier witness, Copeland, had testified. The distinction, he said, was pertinent to Jennifer's claim Multani struck her on "October 5th" and another date. The defense asserted the proposed testimony would impeach Jennifer's testimony concerning when, and the manner in which, she was struck.

Petersen also said Pietruszka would testify concerning the aging and color of Jennifer's bruises as evidence of when they were inflicted, to impeach Jennifer's testimony concerning *when*, and the manner in which, she suffered those injuries. But the court observed Pietruszka's report said, " 'after a careful [review] of all of the photographs, I believe that an opinion regarding the dating of the various bruises is not possible for many reasons.' " Petersen then claimed Pietruszka would testify there were "no clinical agreements [*sic*] that will date a particular bruise" and this would rebut the assumption "bruising could happen with *any* particular timeframe." (Italics added.)

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[12] Respondent suggests the quoted phrase meant "minor abusive conduct."

The prosecutor argued there was insufficient time to prepare for Pietruszka's testimony. Moreover, the prosecutor argued that, in violation of healthcare laws, Multani's counsel's subpoena for Jennifer's X-rays caused them to go directly to Pietruszka instead of first to the court. The prosecutor did not have a copy of the X-rays.

The court indicated the subpoena was invalid and violated the Health Insurance Portability and Accountability Act (HIPAA). The court then stated, "For that reason and just a whole host of other reasons, I'm going to exclude the testimony of Dr. Pietruszka. Primarily, that the late discovery of an expert opinion that really goes to the heart of many of the issues in this case, cannot be produced on the day that the witness is going to testify. I cannot afford to grant any further continuances for the People to investigate this matter. . . . This would require finding an expert witness, briefing them [*sic*] – . . . and getting them ready to testify in the next two days, that is an unfair burden. You're in violation of Penal Code section 1054 blatantly. And I've told you when you were talking about this expert two days ago that I was not likely to allow him or her to testify since they hadn't at that time been turned over in terms of a report or an opinion. That it was turned over on April 21st, we're now in the . . . fifth [*sic*] week of this trial. It's too late."

Darden argued the court's ruling was fundamentally unfair. Darden indicated he had experienced problems obtaining the X-ray and had thought Copeland was going to bring it to trial. The court asked Darden, "You can't rely on getting a copy of it from the witness anyway, right?" Darden replied he was relying on getting a copy from Copeland, Darden "assumed" a competent doctor would come to court, offer an opinion, and "bring with him

the necessary things," and Darden did not know "people were playing these little backdoor games." Darden asserted he obtained Pietruszka's report as soon as Pietruszka had reviewed the X-ray.

The court said it wanted to "back up a little bit" and talk about when, "in the ordinary course" of business, the X-ray should have been subpoenaed. The court also said, "[concerning] the conference with an expert witness, I venture to think, it has always been a plan of the defense to produce some evidence to rebut the origin of these bruises or to have some way to explain the bruises, because let's face it, it's the most damaging evidence in the case. So I would not believe you if you said this just came up when we started trial. And even if it did come up, you don't get to spring this four weeks into the trial."

Darden said a report had indicated Jennifer's sixth rib was injured. Darden claimed when Copeland testified, Copeland acted like he did not know anything about the injury, that made Darden suspicious, and he sought Pietruszka's opinion.

Darden later said, "I even mentioned on the record it's hard to tell when bruises occur. I said that in one of the discussions we had about [Pietruszka]." Darden later said, "what really mattered to me was the rib issue." Darden indicated the rib issue was critical because (1) Copeland erroneously had testified Jennifer's sixth rib was injured and (2) no bruising was associated with the rib fracture.

The court later stated, "I have the obligation to make sure that the rules are followed and particularly when one side or the other is substantially prejudiced by a violation of the discovery rules. I have been, in my view, quite forgiving about other issues because I believed that the People, as competent and as together

as they are, were able to work around it, but this is different. This is not something that they can fairly respond to in the time remaining in this trial and that is why 1054 requires you to turn this over 30 days before trial." Darden, arguing Pietruszka should be allowed to testify, conceded a physician or radiologist "ought to be able to tell us where the fracture is and which rib."

The prosecutor said that when she received Pietruszka's report the preceding night, she scrambled to review the issues and, at her request, Thacker reviewed the report. Thacker disagreed with the report for many reasons, except on reviewing the X-rays, agreed with Pietruszka that Jennifer's eighth rib, not her sixth, was fractured. The prosecutor said she would need sufficient time to obtain an expert to review thoroughly the rest of the report.

The prosecutor and court agreed the solution was for Thacker to testify. The prosecutor added that only a portion of Pietruszka's report dealt with the X-ray issue, and the rest dealt with the issues of (1) Jennifer's drug usage as it related to her increased risk of bruising and (2) the cause of her bruises. According to the prosecutor, these were matters Darden would have known about before he had Jennifer's X-ray.

Darden argued he did not "have to deliver information . . . paragraph by paragraph." He asserted he decided to call Pietruszka as a witness only after Darden received Pietruszka's report. Darden also argued he had referred to specified drugs during opening statement, so the prosecutor could not claim surprise.

The court later stated its ruling stood. The court subsequently added it would exclude Pietruszka's entire report because it was not turned over at least 30 days before trial and

instead was turned over during the fifth week of trial. The court indicated Darden intended to call Thacker as a witness to testify the eighth rib was injured. The court also told Darden, "Your comment was, that is the most critical thing for them to know because the rest of the bruising stuff is like, let's face it, . . . with five doctors you probably get five different opinions, but on the simple issue of the broken rib, you said let me just put the doctor on for that. You have a doctor [Thacker] that you're calling and she's prepared to testify that Dr. Copeland was incorrect, that it was actually the eighth rib and not the sixth rib. You can ask her where that exists, et cetera, and make all the arguments you want."

Darden later moved for a mistrial. The court denied the motion. Darden subsequently asked if the court's ruling was he could only ask Thacker "is it the eighth rib or the sixth rib." The court replied, "You can ask all you want about what she thinks of the bruising or whatever." The court noted the prosecutor already had repeatedly reviewed Thacker's records. Later that day, the court excused a juror because he knew Thacker. On April 24, 2015, Thacker testified as described in our Factual Summary.

In November 2015, Multani filed a motion for a new trial. Multani's reply, filed on December 15, 2015, contained a declaration from Pietruszka. The declaration indicated, inter alia, a nondisplaced rib fracture results from blunt force or compression of the rib cage against a hard surface, and Jennifer's rib fracture was not associated with hematoma and was not displaced, therefore, it was "probably" not the result of a violent blow but more consistent with compression of the rib cage. The declaration also indicated a King Taco video of October 6, 2012,

depicted Jennifer repeatedly picking up a young child with Jennifer's arms extended. The declaration also said the video depicted Jennifer (1) carrying a large purse and the child in Jennifer's left arm, (2) carrying food trays with her arms, and (3) using her body as would a normal woman of Jennifer's reported age. On December 18, 2015, the court denied Multani's new trial motion.

In February 2016, Multani filed a reconsideration motion with a declaration of his brother Rahim, and a new declaration from Pietruszka. Rahim's declaration asserted he was Multani's brother and a paralegal and law clerk for Darden. The declaration said that after Rahim caused Pietruszka to send his written opinion to Darden, Pietruszka told Rahim that Pietruszka could confidently testify Jennifer's rib fracture "occurred more than likely on the same day that it was diagnosed." Pietruszka's declaration says nothing about what Rahim's declaration says Pietruszka told Rahim. Later in February 2016, the court denied the reconsideration motion.

b. *Analysis.*

Multani claims the trial court's exclusion of Pietruszka's testimony violated Multani's due process right to a fair trial and compulsory process right to present a defense. We disagree.

Section 1054.3 states, in relevant part, "(a) The defendant and his or her attorney shall disclose to the prosecuting attorney: [¶] (1) The names and addresses of persons, . . . he or she intends to call as witnesses at trial, together with any relevant . . . reports of the statements of those persons, *including any reports or statements of experts made in connection with the case*, . . . which the defendant intends to offer in evidence at the trial." (Italics added.) "The phrase 'intends to call' includes 'all

witnesses [a party] reasonably anticipates it is likely to call . . . .' [Citation.]" (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201 (*Jackson*).)

Section 1054.7 states, in relevant part, "The disclosures required under this chapter shall be made *at least 30 days prior to the trial*, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred." (Italics added.)

If the People have complied with the informal discovery procedure of section 1054.5, subdivision (b), and a defendant has not complied with section 1054.3, the court may impose sanctions even absent a prosecutorial motion to compel discovery. (*Jackson*, *supra,* 15 Cal.App.4th at pp. 1202-1203.) Here, there is no dispute the People complied with section 1054.5, subdivision (b).

Section 1054.5, subdivision (c), states, in relevant part, "The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted." "The statutory duty to exhaust all other sanctions requires a trial court to consider these endorsed sanctions before imposing a preclusion sanction." (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1264-1265.)

"We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard. [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

When deciding whether a discovery ruling was an abuse of discretion, we may consider whether the trial court refused to

believe the alleged violating party did not seriously consider producing the discovery earlier, whether the discovery violation was willful, whether the violator hoped to gain a tactical advantage from the violation, whether lesser sanctions were adequate, and the prejudice to the opposing party and adversarial process. (*Jackson, supra*, 15 Cal.App.4th at p. 1203.)

In order to conclude a trial court abused its discretion, we must conclude the court's action was irrational, capricious, or patently absurd (cf. *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1845; *In re Arthur C.* (1985) 176 Cal.App.3d 442, 446) and without even a fairly debatable justification (*People v. Clark* (1992) 3 Cal.4th 41, 111). We cannot do so; here, the trial court's ruling was entirely justified, and well within its sound discretion. (Cf. *Jackson, supra,* 15 Cal.App.4th at p. 1203.)

Nor did the trial court's appropriate enforcement of settled discovery rules violate Multani's due process rights. (Cf. *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1233; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *People v. Boyette* (2002) 29 Cal.4th 381, 414.)

Where a "trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law and is properly reviewed under *People v. Watson, supra,* 46 Cal.2d at page 836. [Citation.]" (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203; *People v. Jones* (2012) 54 Cal.4th 1, 68 [same].)

Multani does not show any real prejudice. Pietruszka's report said an opinion regarding the dating of the various bruises was impossible, so his testimony would not have assisted the defense on that issue. Thacker covered the rib issue, by testifying that Jennifer's X-ray showed an apparent left rib

fracture on the eighth rib, not the sixth rib. Moreover, the court indicated it would give Darden wide latitude when he questioned Thacker. The court stated, "You can ask all you want about what [Thacker] thinks of the bruising *or whatever*." (Italics added.)

Multani argues Pietruszka's testimony would have discredited Jennifer's testimony because Pietruszka would have testified her rib fracture occurred the same day the X-rays thereof were taken, therefore, an assault by Multani could not have caused the fracture. However, Multani did not assert this during the proceedings leading to the court's ruling excluding Pietruszka's testimony, and Pietruszka's declarations supporting the new trial motion and reconsideration motion do not support the argument.

Multani also argues the distribution of Jennifer's injuries and her lack of complaint of pain on October 11, 2012, make it *likely* her injuries were self-inflicted. The prosecutor observed Pietruszka's report said the injuries were on extremities or body parts where they *may* have been self-inflicted. That argument did not require expert testimony.

We have considered all of Multani's arguments and their alleged factual support. In light of the above and what was, at a minimum, strong evidence of guilt, we conclude that even if the trial court's exclusion of Pietruszka's testimony was error, it is not reasonably probable a different result would have occurred absent the alleged error; therefore, there was no prejudice. (Cf. *Watson*, *supra,* 46 Cal.2d at p. 836.)

Finally, the exclusion of Pietruszka's testimony did not violate Multani's compulsory process or due process rights to present a defense. In *Jackson*, the court stated, " 'The Sixth Amendment does not confer the right to present testimony free

from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.' [Citation.]" (*Jackson, supra*, 15 Cal.App.4th at pp. 1203-1204.) There is no constitutional right to fail to comply with mutual discovery obligations.

7. The Trial Court Did Not Err in Its Rulings Pertaining to Religion.

On March 23, 2015, Multani brought a motion in limine "not to mention the defendant's . . . religion." Multani denied he was a Muslim. He asserted the word "Muslim" is inflammatory, however, and – he argued – if evidence were introduced he was a Muslim, he would have to unduly lengthen the trial by presenting evidence he was not a Muslim and did not follow Islamic practices. The court ruled evidence of Multani's religious affiliation was inadmissible.

On March 27, 2015, the court modified its ruling. It ruled that the People's witnesses could testify, inter alia, "they had a disagreement about religion" and Multani "wanted them to practice his religion." Georgina could testify Multani wanted her to go to religious services with him and he would not let her go to her own church.

Before Georgina testified, the court instructed her that, when referring to religious disputes, she had to use the phrases, "his religion, his religious practices, or his place of worship." The

court also told her she could say she wanted to go to church and she and Multani were of different faiths.[13]

At trial, Georgina testified that when Multani assaulted her, it was frequently because she wanted to attend a place of worship he disapproved of, or he wanted her to attend a place of worship she did not want to attend. Jennifer testified that from August 2012 through October 2012, she had issues with Multani regarding religion. She had to practice what he believed, otherwise there would be constant verbal and mental abuse. She could not go to her house of worship and Multani would constantly tell her that her faith was not good. M.M. testified Multani made clear to her the woman he wanted had different forms of worship than M.M.

During the hearing on Multani's motion for a new trial, the court commented on whether the court had prohibited Multani from denying at trial that he was a Muslim. The court stated, "The argument that the court denied the defendant a right to defend himself and explain that he was not a Muslim is just frankly specious. There is no evidence to indicate that the defendant ever had an inclination to talk about being a Muslim or not being a Muslim." The court denied the motion.

Multani claims "[t]he court permitted the prosecution to make defendant's alleged religion an issue by allowing the prosecution [to] insinuate . . . appellant was a Muslim," "the court prevented [Multani] from testifying that he was not a Muslim by barring any explicit references to the Muslim religion," and

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[13] The court later, on Multani's motion, declared a mistrial to permit voir dire of a new panel on the issue of religion.

"[t]his deprived Multani of his right to a fair trial and to defend himself, in violation of the Fifth, Sixth, and Fourteenth Amendments." Multani also claims "[t]he prosecution explicitly played to religious prejudice by having their witnesses testify that [Multani] interfered with their attending 'church', a Christian institution, and tried to impose his unspecified religion on them." We reject the claims.

As we have previously noted, the burden is on Multani to demonstrate error from the record; error will not be presumed. (*Kathy P.*, *supra,* 25 Cal.3d at p. 102; *People v. Garcia, supra,* 195 Cal.App.3d at p. 198.) And Multani must support his arguments with citations from the record. (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 (*Grant-Burton*).) Multani has failed to demonstrate with citations to the record that the court permitted the prosecution to make Multani's alleged religion an issue by allowing the prosecution to insinuate Multani was a Muslim. Instead, the court's rulings precluded any such prosecutorial insinuation. And Multani has failed to demonstrate the prosecution insinuated Multani was a Muslim.

Similarly, Multani has failed to demonstrate with citations to the record that the court, by barring explicit references to Islam, prevented Multani from testifying he was not a Muslim. Multani made a motion to prevent the prosecutor from mentioning Multani's religion and the court granted the motion. Multani indicated he made that motion, in part so he would not have to testify he was not a Muslim. The trial court commented Multani never indicated he wanted to present evidence he was not a Muslim.

Finally, Multani has failed to demonstrate with citations to the record that the prosecution explicitly played to religious prejudice by having witnesses testify Multani interfered with their attending "church" and tried to impose his unspecified religion on them. Multani cites no instance in which Georgina, Jennifer, or M.M. used the word "church" in their testimony, and we have found no such instance. The evidence that Multani tried to impose his religion was relevant to prove a motive for being verbally and physically abusive toward Georgina, Jennifer, and M.M., not to play to religious prejudice. Multani has failed to demonstrate error, constitutional or otherwise, occurred.

8. Multani Has Failed to Demonstrate He Ever Raised with the Trial Court the Issue of the Admissibility of Evidence He Tried to Obtain a Gun.

Warren and Huezo testified concerning Multani's efforts to obtain a gun as discussed in the Factual Summary. Multani makes a conclusory claim that (1) the trial court abused its discretion by failing to exclude, under Evidence Code section 352, the evidence of Multani's attempt to obtain the gun, and (2) the admission of that alleged "bad act" evidence violated his due process right to a fair trial.

As always, the burden is on Multani to demonstrate error from the record. (*Kathy P.*, *supra,* 25 Cal.3d at p. 102.) It is not the responsibility of this court to canvass up to 16 volumes of reporter's transcripts for factual support for Multani's claim. (Cf. *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 25; *Grant-Burton, supra*, 99 Cal.App.4th at p. 1379.) It is Multani's responsibility to support his arguments with citations to the record (cf. *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th

1211, 1239 & fn. 16; Cal. Rules of Court, rules 8.204(a)(1)(C) & 8.360(a)) and he has failed to do so.

Multani has failed to demonstrate the issues he now raises were ever raised with the trial court. He also has failed to demonstrate the trial court made a *ruling* we can review on any Evidence Code section 352 or due process issue pertaining to the admissibility of evidence of Multani's attempt to obtain a gun. (Cf. *People v. Rowland*, *supra,* 4 Cal.4th at p. 259.) In any event, the admission of the challenged gun evidence was not prejudicial. (Cf. *Watson*, *supra,* 46 Cal.2d at p. 836.)

9. The Delay During Jury Deliberations Did Not Violate Multani's Right to Due Process.

As noted previously, the parties underestimated the number of days they would take to try the case. On March 23, 2015, the People gave a trial estimate of about seven days and Multani's counsel "guess[ed]" a "couple of days." On March 30, 2015, the trial court gave prospective jurors a trial estimate of 10 to 12 days based on the parties' estimates. On April 2, 2015, the jury and three alternate jurors were sworn.

On April 3, 2015, the parties gave their opening statements. Multani was a "medical miss out" on April 6 and May 1, 2015. The People's witnesses testified during the 11 court days from April 3 to April 20, 2015, and the People rested on the latter date. On April 20, 2015, the court excused alternate Juror No. 2.

Multani's witnesses testified during six court days from April 20 through May 7, 2015, and the defense rested on the latter date. On April 22, 2015, the court excused Juror No. 7, who was replaced by alternate Juror No. 1. On May 1, 2015, the court excused Juror No. 6 due to that juror's prepaid travel

arrangements, and the court replaced that juror with the last remaining alternate juror. On May 7, 2015, the parties presented their closing arguments and the case was submitted to the jury.

At 10:18 a.m. on May 8, 2015, jury deliberations began. At 2:00 p.m., the jury sent the court a note indicating that, due to scheduling conflicts, the next available date for jury deliberations was May 27, 2015. Multani declined to stipulate to an 11-member jury (the People were willing to stipulate) and Multani moved for a mistrial.

The court later stated, "I think two weeks ago I indicated to Juror No. 2 . . . that he was going to be allowed to take the trip that he had been planning for many weeks and that he would not be forced to . . . forfeit whatever money he had spent or even his employer had spent and make him miss that trip. I would just remind counsel that . . . this is the end of the sixth week and both counsel were in Department 100 when this case went out to trial and agreed to a 10-day trial estimate. . . . [T]hese jurors have come to court 23 days . . . we had 21 of them with testimony. I don't believe jury service should be an ordeal. I think it already has been an ordeal for this group. I don't believe that to declare a mistrial at this point in time is required. I think the jury has taken this case remarkably seriously."

Petersen conceded "the inconvenience to the jury is substantial" but Petersen represented that Multani had stage 4 lung cancer. The court observed if it declared a mistrial, a retrial would occur in any event. The People observed they too were entitled to a fair trial and the court should maintain the present jury.

During questioning by the court, Juror No. 2 indicated he was leaving town to train 12 to 14 employees during the next two

weeks, except for May 18 and 22, 2015. Juror No. 6 indicated he would unavailable May 18, 2015, because he was attending a graduation in Berkeley with booked hotel reservations. Juror No. 12 indicated he was getting married. Juror No. 9 had a conflicting medical appointment on May 26, 2015. The court, after considering the schedule conflicts and indicating it was considering the interests of everyone, ordered the trial in recess until May 27, 2015.

At 9:34 a.m. on May 27, 2015, jury deliberations resumed and they continued until 3:50 p.m. During those deliberations, the jury sent to the court a note asking about the jury's responsibility to deliberate on lesser offenses if the jury acquitted on a greater offense. The jury also sent a note asking about whether the jury had to acquit on a greater count before the jury could convict on a lesser offense. The court answered the questions. At 9:44 a.m. on May 28, 2015, the jury resumed deliberations and, at 2:20 p.m., the jury announced it had reached verdicts.

Multani claims the delay during jury deliberations violated his rights to due process, an impartial jury, and a fair trial. We disagree. Section 1121, states, in relevant part, "The jurors sworn to try an action may, in the discretion of the court, be permitted to separate . . . ." A "trial court undoubtedly [has] discretion to order . . . a break in deliberations under section 1121." (*People v. Johnson* (1993) 19 Cal.App.4th 778, 792; see § 1044 ["It shall be the duty of the judge to control all proceedings during the trial, . . . with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."].) We review such an order for abuse of discretion. (*Id.* at p. 792.)

And we find none. Nor do we find any violation of any of Multani's constitutional rights.

None of the cases cited by Multani compel a contrary conclusion.

10. The Trial Court Did Not Unlawfully Subject Multani to Visible Restraints in the Jury's Presence.

a. *Pertinent Additional Facts.*

On April 30, 2015, during the prosecutor's cross-examination of Multani, the court recessed for lunch and told the jury to return at 1:30 p.m. The record reflects that towards the end of the lunch recess, a "substitute bailiff" brought Multani into the courtroom while some of the jurors were in the hallway outside. Multani, who was in a wheelchair, had one wrist handcuffed to the wheelchair. Defense counsel, Darden, moved for a mistrial on the grounds that "Mr. Multani was in county jail uniform with one wrist handcuffed to the wheelchair being escorted by two uniformed deputy sheriffs in the courtroom." Darden observed, "all of us have gone through great lengths to make sure the jury does not see Mr. Multani that way in custody, but jurors, apparently, have most, if not all of them, . . . seen him in custody and handcuffed to a chair . . . ."

The court stated it was not going to declare a mistrial but indicated its willingness to question the jurors. Darden later said, "I'm not saying the deputy purposely did anything. That's not my position at all. I'm sure he didn't. I'm sure he didn't know where we were in this case or what to do or not to do as it relates to Mr. Multani."

The court later commented the jurors may not have noticed Multani entering and, even if they did, that did not mean they

saw Multani handcuffed. The court confirmed with the bailiff that just one of Multani's wrists was shackled to the wheelchair, and opined that the jurors would not likely have been surprised Multani was in custody and, if in custody, that he was handcuffed. The court later stated a mistrial was not justified.

The court questioned each of the jurors and the alternate juror. Three jurors did not see Multani enter the courtroom. Nine jurors and the alternate did, but none volunteered that they had seen the restraint (and the court did not specifically ask about the handcuff). A number of jurors noticed Multani was not wearing a suit, but instead was wearing a "brown uniform" or "work clothes" or clothes issued by the legal system. And, some had seen Multani in the hallway before.

After the court had completed the questioning of the jurors, Darden renewed his mistrial motion.

The court stated, "I do believe . . . that in speaking to each one of these jurors, that they are not going to be biased against the defendant because he was seen outside of the courtroom in some other attire. . . . And each one of them assured the court that he or she would not be influenced in any way by the fact that they saw him, those who did see him this afternoon come in the front door." The minute order for April 30, 2015, reflects that the court denied Multani's mistrial motion.

b. *Analysis.*

In a supplemental brief, Multani claims he was unlawfully subjected to visible restraints in the jury's presence, in violation of his right to due process. We disagree.

There is no evidence that any of the jurors, or the alternate, actually saw that Multani's wrist was handcuffed to the chair. But even if there were, a mistrial was not warranted.

In *People v. Jacobs* (1989) 210 Cal.App.3d 1135 (*Jacobs*), this division held that where one or more jurors or prospective jurors merely witness a defendant being transported to or from the courtroom in visible restraints, the trial court has no sua sponte duty to instruct the jury that the physical restraints on defendant have no bearing on the determination of guilt. (*Id.* at p. 1141.) *Jacobs* said, "Mindful of the constitutional right of every accused to trial by a fair and impartial jury (U.S. Const., Amend. VI; Cal. Const., art. I, § 16), we . . . further hold that upon a showing that one or more jurors or veniremen observed defendant in physical restraints being transported to or from the courtroom, *and upon request by the defense*, the trial court must instruct the jury that the physical restraints on defendant have no bearing on the determination of guilt. [Citations.])" (*Id.* at p. 1142, italics added.) The premise of the holding is the instruction given upon request cures any prejudice arising from the observation of the juror(s).

In light of *Jacobs*, we conclude that, *if* the jurors had seen the handcuff, and *if* Multani had asked the court to instruct the jury that the restraint had no bearing on the determination of guilt, the court would have been required to give that instruction. But no such request was made, so no admonition was required.

"[A] trial court should grant a mistrial only if the defendant will suffer prejudice that is incurable by admonition or instruction." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 291 (*Gonzales and Soliz*).) Multani failed to request a physical restraint instruction and such an instruction would have cured any prejudice. Moreover, "brief observations of a defendant in physical restraints by one or more jurors . . . outside the courtroom do not constitute prejudicial error" (*Jacobs, supra*,

210 Cal.App.3d at p. 1141) and, for all the record reflects, any such observations here were brief. The trial court did not abuse its discretion or violate Multani's right to a fair trial by denying Multani's mistrial motion to the extent it was based on Multani's physical restraint.

11. Multani Was Not Unfairly Made to Appear in Jail Clothing in the Presence of the Jury.

In his supplemental brief, Multani, after discussing the previous handcuff issue, claims, "Similar problems arise when a defendant appears in the presence of the jury in jail garb," and the appearance constitutes due process error.

Although experienced counsel arguably might have correctly concluded Multani was wearing jail clothing, no evidence was presented that Multani's clothing bore a jail insignia, logo, or any other writing identifying to jurors the clothing as jail clothing. No juror told the court the juror saw "jail clothing."

In any event, just as Multani did not request a curative instruction about the handcuff, he did not request a curative instruction about jail clothing either. Moreover, as with the handcuff issue, we conclude brief observations by one or more jurors of a defendant in jail clothing outside the courtroom do not constitute prejudicial error.

In sum, we reject Multani's claim for reasons similar to our rejection of his physical restraint claim. The trial court did not abuse its discretion or violate Multani's right to a fair trial by denying Multani's mistrial motion to the extent it was based on Multani's appearance in jail clothing. (Cf. *Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 291; *Jacobs, supra*, 210 Cal.App.3d at pp. 1141-1142.)

12. No Cumulative Prejudicial Error Occurred.

In light of our analysis of Multani's claims in this case, no cumulative prejudicial error occurred.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.*

We concur:

EDMON, P. J.

LAVIN, 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.