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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN WALKER JONES,

Defendant and Appellant.

B278717

(Los Angeles County  
Super. Ct. No. BA437106)

APPEAL from the judgment of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Affirmed.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant and appellant Kevin Walker Jones of the second degree murder of his girlfriend. He was sentenced to a term of 15 years to life. Defendant claims error in the denial of his pretrial motion to suppress evidence, the admission of prior acts of domestic violence, the admission of evidence he refused to be fingerprinted, and the giving of an instruction on consciousness of guilt.

We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On August 25, 2015, defendant was charged with one count of second degree murder (Pen. Code, § 187, subd. (a)). It was further alleged defendant had suffered a prior prison term within the meaning of section 667.5, subdivision (b), and a prior serious felony within the meaning of the “Three Strikes” law (§ 667, § 1170.12). The testimony and evidence at trial demonstrated the following material facts and events.

In 2015, Zakiyyah El’Amin was 60 years old and a petite 4 feet 11 inches tall. She had two adult children: her son Quran Gillie (with whom she shared an apartment), and her daughter Aqueelah Dixon. She also had two minor grandchildren (Ms. Dixon’s daughters). She had close relationships with her children and grandchildren, and saw them as often as her work schedule permitted.

Ms. El’Amin had been dating defendant, on and off, for over a decade. She often stayed overnight at defendant’s apartment on East 7th Street in downtown Los Angeles, because it was closer to her work than her own apartment. Ms. El’Amin was a certified nursing assistant and had been working as a health care aid for Allpoint Home Health since 2012.

On the morning of March 23, 2015, Mr. Gillie spoke with his mother while she was getting ready to leave for an appointment. She was acting normally and said “I love you” when she left for the day. Ms. El’Amin customarily left home with her purse, a bag with her laptop in it, and a small dark-colored roller suitcase. On that morning, she left the apartment with all three of those bags. Mr. Gillie never saw his mother again.

Barbara Allen, the property manager for an apartment complex near Exposition Park, testified she met with Ms. El’Amin on the morning of March 23, 2015. She recalled that Ms. El’Amin seemed very interested in renting one of the vacant units in the complex. At the meeting, Ms. El’Amin completed an application and paid \$35 for a credit check. When Ms. Allen attempted to follow up with Ms. El’Amin after their meeting, she was unable to reach her and never heard back from her.

Rosa Carrillo, Ms. El’Amin’s supervisor at work, spoke with her by phone on March 23, 2015. Ms. El’Amin was not scheduled to work that day but she called Ms. Carrillo and told her she was applying for a new apartment. She asked Ms. Carrillo if she would fax over documents verifying her employment status, and Ms. Carrillo did so. At no time did Ms. El’Amin tell Ms. Carrillo she needed time off or had any intent to quit her job. Ms. Carrillo considered Ms. El’Amin to be a good, reliable employee with “perfect attendance.” She could not recall Ms. El’Amin ever failing to show up for work without an explanation. When Ms. El’Amin failed to show up on March 24 and again on March 25, Ms. Carrillo was concerned because it was so out of character for her. Ms. Carrillo told her boss and they attempted to reach Ms. El’Amin by phone, to no avail. Her boss then called

the police and made a report because they were worried. Ms. El'Amin never came back to pick up her last check, and Ms. Carrillo never heard from Ms. El'Amin again.

Ms. Dixon spoke with her mother early in the afternoon of March 23, 2015. They talked about the application Ms. El'Amin had submitted for the new apartment. She did not say anything out of the ordinary during their conversation. Ms. Dixon never heard from her mother again.

After her brother told her the police had contacted him about their mother not showing up for work for two days, Ms. Dixon went to defendant's apartment to see if she was there. She persuaded the building manager, Mattie Riggs, to let her look at the surveillance video in the building. Footage from one of the cameras showed her mother going into defendant's apartment with defendant, but not coming out. Ms. Dixon then spoke with the police, and told them about a prior domestic violence incident between her mother and defendant.

Ms. Riggs testified that defendant's apartment was on the second floor of the building. Since he had moved into the building, Ms. Riggs knew defendant to "always" wear a fedora. Defendant had regularly paid his monthly rent in person up through March 2015. However, he was not seen at the building after the early morning on March 24, 2015, and he never paid for his April 2015 rent. Defendant did not give notice he was moving out or make any other arrangements regarding his tenancy. After being contacted by the police about Ms. El'Amin's disappearance, Ms. Riggs reviewed the video footage from the building's surveillance cameras with the officers. There was footage showing Ms. El'Amin entering defendant's apartment on March 23, but no footage showing her leaving the apartment at

any time thereafter. She provided copies of the video footage to the officers.

Detective Maria Guevara of the Los Angeles Police Department (LAPD) initially led the missing person investigation prompted by the phone call from Ms. El'Amin's employer. She received permission from Ms. El'Amin's children to issue a press release about her disappearance. She left repeated messages for defendant on his cell phone asking for a return call but never received any response. Detective Guevara viewed the surveillance video from defendant's apartment building showing defendant taking numerous items from his apartment and, at one point, pushing a cart with a large suitcase on it down the hallway. She and a partner conducted a welfare check at defendant's apartment to see if Ms. El'Amin was there, and found no one inside.

Ms. El'Amin's car, a red PT Cruiser, was located in a parking lot at Los Angeles International Airport (LAX). Surveillance video from the security cameras at the airport showed the car entering the lot after 3:00 a.m. on March 24, 2015. There was no footage from the area of the parking lot where the car had been parked. Ms. El'Amin's son and daughter said their mother did not travel and did not have a passport. Inquiries were made to determine if Ms. El'Amin appeared on any flight manifests. It was determined she had not taken a flight from LAX.

On April 4, 2015, Detective Guevara obtained and executed a search warrant for defendant's apartment. No blood was located in the apartment. She turned the investigation over to detectives in the robbery homicide division.

Detective Salaam Abdul, and his partner Joshua Byers, of the LAPD's robbery homicide division, attested to their efforts to find Ms. El'Amin, including contacting coroners in multiple counties to determine whether there were any unidentified bodies that matched Ms. El'Amin's description, conducting searches for remains in the area of defendant's apartment, and reviewing Ms. El'Amin's financial information for signs of activity in other locales.

The detectives verified the surveillance video from defendant's apartment building showing Ms. El'Amin entering defendant's apartment on March 23, 2015, but never leaving, and defendant leaving later in the day with large suitcases. They also looked at footage from several days after Ms. El'Amin's disappearance and saw a different man and woman going into and out of defendant's apartment and leaving with several items. The footage was released to the media as depicting persons of interest in the investigation.

Detectives Abdul and Byers eventually spoke with Lillian Sanders, who told them she and her son were the people in the video entering and leaving defendant's apartment. She cooperated with the detectives and met with them at the station on May 13, 2015. Ms. Sanders explained she was friends with defendant, that he came by her apartment on March 23, 2015 and told her he was going to New York for a family funeral, that he left his keys with her and had asked her to collect his mail and a few items from his apartment. Ms. Sanders said defendant told her several days later that he was going to be away longer than he originally expected and that she could have whatever she wanted from his apartment. Ms. Sanders gave the items she had

taken from defendant's apartment to Detective Byers, including a black "shoulder" bag.

Detectives Abdul and Byers looked through the black bag and found various items, including jewelry, makeup, and a woman's purse. The purse contained Ms. El'Amin's wallet, her driver's license, various credit cards bearing her name, and a prescription bottle and some paperwork bearing her name, among other personal items.<sup>1</sup>

Detectives Abdul and Byers also obtained video footage from the security cameras on the building next door to defendant's apartment building. A portion of that footage showed a man wearing a fedora matching defendant's physical description pushing a large cart down the street around 1:00 a.m. on March 24, 2015. They obtained additional surveillance footage from a 7-Eleven store just south of defendant's apartment building showing a man in a fedora using the ATM around 6:00 p.m. on March 23, 2015. Records indicated that Ms. El'Amin's bank debit card was used at that time and location to withdraw money from her account.

A search of Ms. El'Amin's PT Cruiser did not reveal any blood. However, her bank debit card from Chase Bank was found loose (not in a wallet) in the center console of the car. A canine unit from the Los Angeles County Coroner's Office searched the car. The dog, trained to detect the scent of human remains, showed interest near the center console but ultimately did not

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<sup>1</sup> Before trial, defendant moved to suppress the black bag and all of its contents. The motion was denied in its entirety. We reserve a more detailed discussion of the facts related to the motion to part 1 of the Discussion below.

give the handler a final alert. The search was considered inconclusive. Detectives Abdul and Byers never located Ms. El'Amin's body.

Bank records established that the last activity on Ms. El'Amin's checking account at Chase Bank occurred on March 23 and 24, 2015, and resulted in her account being overdrawn. After the bank received no response to its efforts to contact Ms. El'Amin, her account was closed in May 2015.

Cell phone records established that Ms. El'Amin had two phones, a Samsung phone ending in 5509, and a second phone ending in 7924. The last outgoing call on the phone ending in 5509 was at 3:52 p.m. on March 23, 2015. Thereafter, all incoming calls went directly to voicemail. Ms. El'Amin's second phone, ending in 7924, was used in the Philadelphia area on March 27, 2015, and in the Niagara Falls area during the month of April 2015.

Jorge Ochoa, a terminal manager for Greyhound, testified that defendant purchased a bus ticket on March 24, 2015, departing from San Bernardino, with the final stop being Philadelphia, Pennsylvania.

Officer Kristina Zell of the Niagara Falls Police Department worked with Detectives Abdul and Byers in locating and detaining defendant. After it was determined defendant was staying in the apartment of a friend, Officer Zell went to the apartment with several other officers. They knocked and announced their presence, but received no response. While several officers stayed and ensured defendant did not leave the apartment, Officer Zell sought and obtained an arrest warrant. When she returned, they entered the apartment and found defendant lying face down between the mattress and the box



spring of one of the beds. Defendant was arrested and returned to California. Ms. El'Amin's cell phone ending in 7924 was found in the apartment and turned over to Detectives Abdul and Byers.

The prosecution sought to admit three prior acts of domestic violence pursuant to Evidence Code section 1109: (1) an assault against Ms. El'Amin in 2005; (2) another incident involving Ms. El'Amin in 2013; and (3) an incident involving Courtenay Thierry in 2012. Defendant opposed. The court concluded the evidence was more probative than prejudicial and ruled the prior acts were admissible.

Defendant was convicted of an assault on Ms. El'Amin in 2005. Pursuant to stipulation, the testimony of Ms. El'Amin from the preliminary hearing in June 2005 was read to the jury. On April 30, 2005, Ms. El'Amin said she was at defendant's apartment and had gone to the bathroom. Defendant, who was angry, came in and hit her multiple times in the face and on her arms. At one point, he knocked her over backwards into the bathtub. Defendant kicked her and eventually dragged her into the living room. He continued to chase her around the apartment, hitting her, as she tried, unsuccessfully, to escape. Ms. El'Amin received two black eyes, as well as numerous bruises and scratches on her body.

Officer Jesus Garcia, of the LAPD, responded to the scene on April 30, 2005. He attested to seeing and photographing Ms. El'Amin's injuries. He said she appeared "fearful," and had numerous bruises, lacerations, and "red marks" on her neck. Defendant, who was "verbally abusive," was taken into custody.

Malonya Lee, a custodian at defendant's building, attested to the second incident involving Ms. El'Amin. In October 2013, she was vacuuming the hallway outside defendant's apartment.

Even though the vacuum was quite loud, she could hear screaming coming from inside the apartment. After a short while, Ms. El'Amin came running out of the apartment, naked except for a sweater. Ms. Lee said Ms. El'Amin looked very scared as she ran down the hallway. Defendant, who was visibly intoxicated, chased after Ms. El'Amin and caught up with her before she could get on the elevator. Defendant grabbed her and "slung" her around. Defendant then dragged Ms. El'Amin back to the apartment. Ms. Lee ran down the stairs at the other end of the hallway, and called security from the manager's office. When security went up to defendant's apartment and knocked, defendant refused to answer.

Courtenay Thierry testified she briefly dated defendant in late 2012. On December 5, 2012, she was at defendant's apartment. Around 11:00 p.m., after they had a few drinks and had engaged in consensual sex, Ms. Thierry told defendant she was going home. Defendant was "loaded" and got very "aggressive" with her. She said she would like to leave, but defendant blocked the door and told her "You're not going anywhere."

Ms. Thierry explained that defendant used his body and arms to block the doorway. He repeatedly lurched toward her and she had to dodge away to avoid him grabbing her. At some point, Ms. Thierry was able to get into the bathroom. When she came out, defendant was distracted, and she was able to get past him and out the door. She ran down the hallway and hid in the laundry room. She could hear defendant yelling in the hallway. Ms. Thierry called 911 and stayed hidden in the laundry room until the police officers arrived. She was not physically injured in the incident.

The jury found defendant guilty of second degree murder. The court granted the prosecutor's oral motion to dismiss the prison prior and prior strike allegations. The court sentenced defendant to state prison for a term of 15 years to life.

This appeal followed.

## **DISCUSSION**

### **1. The Motion to Suppress**

In reviewing an order denying a motion to suppress pursuant to Penal Code section 1538.5, we “uphold those factual findings of the trial court that are supported by substantial evidence.” (*People v. Camacho* (2000) 23 Cal.4th 824, 830.) We independently review the question whether the challenged search conformed to constitutional standards of reasonableness. (*Ibid.*) Our review is governed by federal constitutional standards. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8; *People v. Chung* (2010) 195 Cal.App.4th 721, 727.)

At the hearing on defendant's motion, the parties stipulated to allow the court to consider the evidence from the preliminary hearing. Several witnesses also testified. We briefly summarize the testimony.

Ms. El'Amin left the apartment she shared with her son on the morning of March 23, 2015 with the dark-colored bag she always had with her. Video clips showed Ms. El'Amin entering defendant's apartment with defendant on March 23, 2015 and never leaving.

Ms. Riggs, the apartment manager at defendant's building, testified that defendant did not pay his April 2015 rent. On April 11, 2015, the apartment posted notice of abandonment on defendant's door, and two weeks later, Ms. Riggs had the

contents of the apartment disposed of so the apartment could be leased to a new tenant.

Ms. Sanders had been friends with defendant for about six years. On the evening of March 23, 2015, defendant stopped by her apartment, and told her he was going to New York because a relative had died. Defendant left his keys with Ms. Sanders and asked her to collect his mail. A couple of days later, defendant called Ms. Sanders and asked her to go to his apartment and get his computer, his Koran, his phone, and some “important papers” and keep them at her apartment. He told her to go after 5:00 p.m. because the building manager would be gone by then.

Ms. Sanders went to defendant’s apartment with her son. She found the computer, but could not find the Koran or cell phone. She saw a black “shoulder” bag and assumed the “important papers” might be in there, so she took that as well. Ms. Sanders brought the items to her apartment and kept them in her living room. When defendant called her again, she told him she had the items. He asked her to keep them for him at her apartment. Defendant said he was going to be gone longer than he expected, and that she could have anything she wanted from his apartment.

A short time later, when Ms. Sanders was watching the news on television and recognized herself and her son as the people in the video of persons of interest in a missing person case, she contacted the police. On May 13, 2015, she told detectives she had some items from defendant’s apartment at her home, and gave everything to the police.

When the detectives looked through the bag, they determined that all of the items belonged to Ms. El’Amin. None

of the items bore defendant's name, or appeared to be items that would belong to a male.

Defendant contends the black bag the police obtained from Ms. Sanders should have been suppressed, as well as all of its contents. We find no error in the court's ruling admitting the black bag and its contents.

It is fundamental that the Fourth Amendment only protects from unreasonable searches "those areas in which a person has a reasonable expectation of privacy." (*People v. Chavez* (2008) 161 Cal.App.4th 1493, 1499.) "The "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person . . . has a legitimate expectation of privacy in the invaded place." [Citation.] A defendant has the burden to establish a legitimate expectation of privacy in the place searched. [Citations.]' " (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 365 (*Bryant*)). In resolving whether that burden has been met, the reviewing court looks to the totality of circumstances. (*Ibid.*)

The uncontroverted evidence established the black bag belonged to Ms. El'Amin. Nothing indicated that the bag, or any of its contents, ever belonged to defendant. Defendant did not, and cannot, establish a legitimate expectation of privacy in the bag that belonged to his victim.

"[A] 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.' " (*Rakas v. Illinois* (1978) 439 U.S. 128, 143, fn. 12; see also *United States v. Caymen* (9th Cir. 2005) 404 F.3d 1196, 1201 [defendant

had no expectation of privacy in a hard drive from a computer he obtained through fraud].)

Moreover, defendant had abandoned any interest in the bag, and Ms. Sanders had authority to, and did, consent to the search of the bag.

“ [T]he intent to abandon is determined by objective factors, not the defendant’s subjective intent. ‘ “Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts. [Citations.] Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.” ’ ” (*People v. Daggs* (2005) 133 Cal.App.4th 361, 365-366; *People v. Parson* (2008) 44 Cal.4th 332, 345 [hotel guest who departs without making any arrangement for payment raises inference of abandonment even though some personal belongings have been left behind].)

Defendant fled Los Angeles, treated his tenancy as having been abandoned, left his keys with a friend, asked her to collect a few items from his apartment and keep them at her apartment, then told her she could have anything she wanted from his apartment. This evidence substantially supports a finding that defendant had abandoned any interest in the black shoulder bag, and had no expectation of privacy in it at the time the detectives obtained it from Ms. Sanders on May 13, 2015.

The same evidence supports a finding that Ms. Sanders had joint control over the bag and authority to give consent to the detectives to seize it and search its contents. (See, e.g., *People v. Schmeck* (2005) 37 Cal.4th 240, 281, overruled in part on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610,

637 [“ ‘[C]onsent of one who possesses common authority over . . . effects is valid as against the absent, nonconsenting person with whom that authority is shared.’ ”]; accord, *United States v. Matlock* (1974) 415 U.S. 164, 170.)

## **2. Prior Acts of Domestic Violence**

Defendant contends the court erred in admitting three prior acts of domestic violence under Evidence Code section 1109. Defendant argues section 1109 violates both the due process and equal protection clauses, and that the prior acts evidence was prejudicial propensity evidence that should have been excluded because the prior acts were lacking in similarity, and the 2005 incident was too remote.

Defendant forfeited his constitutional claims by failing to specifically raise those objections in the trial court. (See *People v. Partida* (2005) 37 Cal.4th 428, 434-436.) However, even if we considered them, we would reject them.

Our Supreme Court has already rejected a similar due process challenge to Evidence Code section 1108, the analogous statutory provision for admission of prior sexual offenses. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-918 (*Falsetta*)). The logic of *Falsetta* applies with equal force to section 1109. Numerous intermediate courts have so concluded. (See, e.g., *People v. Johnson* (2010) 185 Cal.App.4th 520, 529 (*Johnson*), and cases cited therein.)

*Falsetta* also cited with approval *People v. Fitch* (1997) 55 Cal.App.4th 172 and its rejection of an equal protection challenge to Evidence Code section 1108. Another intermediate court has applied the analysis in *Fitch* to conclude that section 1109 does not offend the equal protection clause. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1311-1312.) Defendant has not persuaded

us there is any sound basis for disagreeing with *Fitch* and *Jennings*.

We also reject defendant's claim the prior acts evidence was more prejudicial than probative. Evidence Code section 1109, subdivision (a)(1), provides in relevant part that "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." "By its incorporation of section 352, section 1109, subdivision (a)(1) makes evidence of *past domestic violence inadmissible only if the court determines that its probative value is 'substantially outweighed' by its prejudicial impact*. We review a challenge to a trial court's decision to admit such evidence for abuse of discretion." (*Johnson, supra*, 185 Cal.App.4th at p. 531, italics added, fn. omitted.)

By enacting Evidence Code section 1109, the Legislature created an express exception in cases involving domestic violence to the general rule that prior criminal acts are inadmissible. "[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence." [Citation.] Section 1109, in effect, 'permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes. [Citation.]' [Citations.] '[I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited.'



[Citation.]” (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232-1233.)

We find the three prior acts of domestic violence were substantially similar. In all three prior incidents, defendant engaged in belligerent and bullying behavior toward women with whom he was intimate. Once the women were in his apartment, he sought to physically intimidate them into submission and prevent them from leaving. In both prior incidents involving Ms. El’Amin, defendant became physically violent and caused her injury. Ms. Thierry was not injured because she was able to escape the apartment and hide in the laundry room until the police arrived.

Moreover, we disagree the 2005 assault on Ms. El’Amin was too remote and should have been excluded on that basis. Subdivision (e) of Evidence Code section 1109 provides that “[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.” Trial courts are vested with broad discretion to consider the probative value of prior acts of domestic violence that are more than 10 years old, and to conclude that such acts are nonetheless admissible in the interests of justice. “Indeed, ‘[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible.’ [Citation.]” (*Johnson, supra*, 185 Cal.App.4th at p. 535, italics added; accord, *People v. Branch* (2001) 91 Cal.App.4th 274, 284.)<sup>2</sup>

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<sup>2</sup> Cases discussing Evidence Code section 1108 similarly have concluded there is no set time limit defining what prior acts are too remote and that even a prior act from 20 years earlier is

In *People v. Culbert* (2013) 218 Cal.App.4th 184 (*Culbert*), the court rejected a defendant's challenge to the admission of evidence pursuant to Evidence Code section 1109. The defendant was charged with making a criminal threat with the use of a firearm against his minor stepson. The trial court allowed the prosecution to present evidence that the defendant, 11 years earlier, had threatened to kill his former wife, but had not used a weapon in doing so. (*Culbert*, at pp. 187-188.)

*Culbert* held the prior incident was properly admitted, despite being factually dissimilar and more than 10 years old. The court explained the "prior offense had probative value. Appellant threatened to kill [his former wife]. Regardless of whether appellant was armed when he broke into the apartment and made the threat, his conduct was relevant to show his intent that his statements be understood as threats, his propensity to make threats to family members and the reasonableness of [his stepson's] fear after the threat was made." (*Culbert, supra*, 218 Cal.App.4th at p. 192.) The court further explained that the prior incident was not unduly inflammatory as it did not involve more extreme or violent conduct, there was no risk the jury would be confused by the separate incident, and the incident did not require a lengthy amount of testimony so there would be no undue consumption of time. (*Id.* at pp. 192-193.)

Similarly here, the prior acts testimony was not more inflammatory than the current charge of murder, did not consume an undue amount of time, and was not likely to confuse the jury. The trial court acted well within its discretion in

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not per se inadmissible. (See, e.g., *People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395.)

concluding the evidence was more probative than prejudicial and was properly admitted in the interests of justice.

### **3. Consciousness of Guilt**

Defendant contends the court committed error in allowing the prosecution to present evidence he refused to be fingerprinted, and in instructing the jury with a modified version of CALCRIM No. 371 that such conduct could be considered evidence of his consciousness of guilt. We disagree.

During trial, outside the presence of the jury, defendant refused to be fingerprinted. The court allowed defendant to speak with his attorney about the issue and explained that if defendant continued to refuse, it would instruct the jury that his refusal could be considered by them as evidence of consciousness of guilt. Defendant refused to be fingerprinted and the court allowed brief testimony on the issue by Detective Abdul.

When jury instructions were being discussed, defendant objected to the giving of CALCRIM No. 371 in its entirety. Defendant argued, however, that if the court was inclined to give the instruction, then it should be modified to be specific about the conduct in question, namely defendant's refusal to have his fingerprints taken. The balance of the instruction pertained to other conduct by defendant and is not challenged here.

The court instructed with a modified version of CALCRIM No. 371 as follows: "If the defendant did not comply with a fingerprint roll during the case, that conduct may show that he was aware of his guilt. If you conclude that the defendant failed to comply with the fingerprint roll, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If someone other than the defendant tried to conceal or destroy evidence, that conduct may

show the defendant was aware of his guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself."

Generally, a defendant's refusal to provide an exemplar (e.g., blood, fingerprints, handwriting sample) may be considered as evidence of consciousness of guilt. " "[T]he refusal of a defendant to provide an exemplar in violation of a court order is admissible evidence of the defendant's consciousness of guilt." [Citations.]' " (*People v. Ramirez* (2006) 39 Cal.4th 398, 456 [defendant's refusal to remove sunglasses in court so witnesses could identify him]; accord, *People v. Farnam* (2002) 28 Cal.4th 107, 153.)

Defendant does not dispute this general principle. He argues that his refusal to be fingerprinted was not relevant to the charge for which he was being tried, but only related to establishing his conviction on the 2005 prior. We disagree. Proof that defendant had been convicted of domestic violence against Ms. El'Amin in 2005 was relevant to prove his propensity to commit another violent crime against her resulting in her murder.

In any event, any conceivable error was harmless by any standard. The testimony was not even mentioned in closing argument. It was insignificant when compared with the strong evidence leading to the ineluctable conclusion that defendant murdered Ms. El'Amin, disposed of her body, and then fled to New York.

**DISPOSITION**

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.