In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **DAVID ALAN WESTERFIELD,** **Appellant.**	**CAPITAL CASE** Case No. S112691

San Diego County Superior Court Case No. SCD 165805
The Honorable Michael D. Wellington, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On February 26, 2002, the District Attorney of San Diego County filed a criminal complaint charging appellant David A. Westerfield with murder and other offenses committed on or about and between February 1, 2002, and February 22, 2002. (1 CT 1-3.) Westerfield had been placed under arrest on February 22, 2002. (5D RT 1680.)

On March 22, 2002, the District Attorney of San Diego County filed an information charging Westerfield in Count 1 with the murder of Danielle Van Dam. (Pen. Code, § 187, subd. (a).) A special circumstance was alleged that the murder was committed during a kidnapping. (Pen. Code, § 190.2, subd. (a)(17).) Westerfield was additionally charged in Count 2 with the kidnapping of Danielle Van Dam, a child under the age of 14 (Pen. Code, §§ 207/208, subd. (b)), and in Count 3 with possession of child pornography, a misdemeanor (Pen. Code, § 311.11, subd. (a)). (1 CT 174-175.)

On March 28, 2002, Westerfield entered a plea of "not guilty" and denied the allegations in the information. (14 CT 3386.)

Jury selection began on May 17, 2002. (14 CT 3413; 5 RT 2165.) The jury was sworn on May 30, 2002. (8 RT 2951.) Jury deliberations began on August 8, 2002. (14 CT 3487; 44 RT 9692.)

On August 21, 2002, the jury returned a verdict, finding Westerfield guilty on all charges, and finding the kidnapping special circumstance to be true. (14 CT 3498-3502; 53 RT 9816-9822.)

The penalty phase began on August 28, 2002. (14 CT 3506; 57 RT 9943.) Penalty phase deliberations began on September 4, 2002. On September 16, 2002, the jury determined the appropriate penalty is death. (14 CT 3520; 67 RT 10606-10608.)

On January 3, 2002, Westerfield was sentenced to death for the special circumstance murder of Danielle Van Dam.[1] (14 CT 3525.)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution's Case

On the night of February 1, 2002, Damon Van Dam put his two sons and seven year-old daughter, Danielle, to bed while his wife, Brenda, enjoyed a girls' night out. Damon and Brenda awoke the next morning, made breakfast, and went about their typical routine. Two children from a neighboring home arrived for a visit that morning, and as Danielle had not come downstairs yet, Brenda went to her room to wake her up. Danielle was gone.

Two days later, the Van Dams' neighbor from two doors down, David Westerfield, arrived at a neighborhood dry cleaner's shortly after the business opened on a very cold morning. He was wearing a thin T-shirt, thin shorts similar to boxer shorts, no shoes, and no socks. He brought with him two comforters, other bedding, and a jacket. The jacket contained Danielle's blood. A comforter contained the hairs of the Van Dam family dog.

Prior to showing up at the dry cleaner's, Westerfield embarked upon a weekend journey in his motor home that could hardly be described as a vacation. He traveled from his home in Sabre Springs, to the western reaches of San Diego County at Coronado Beach, to the sand dunes of

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[1] On Count 2 (Pen. Code, §§ 207/208, subd. (b)), Westerfield was sentenced to a term of 11 years, which the trial court stayed pursuant to Penal Code section 654. As to Count 3, (Pen. Code, § 311.11, subd. (a)), Westerfield was given credit for time served. (14 CT 3535.)

Glamis near the Arizona border, to the desert in Borrego Springs, back to Coronado, and home over the course of about two days.

Danielle's blood was found on the motor home's carpet between the bathroom and the closet; her fingerprints were on a cabinet above the motor home's bed. Hairs with a mitochondrial DNA profile matching Danielle were found in the bathroom of Westerfield's motor home. Hairs with a mitochondrial DNA profile matching Danielle were found in Westerfield's washing machine, dryer, and on the bedding from his master bedroom.

Danielle's badly decomposed body was discovered off the side of a road in a remote part of San Diego County on February 27, 2002. It had been dumped among trash. Her mummified remains had been ravaged by animals, such that no sexual assault testing could be conducted and no cause of death determined.

The facts and circumstances surrounding Westerfield's kidnapping and murder of seven year-old Danielle Van Dam in February 2002 are detailed below.

Danielle is Missing

Brenda and Damon Van Dam lived in the San Diego County neighborhood of Sabre Springs with their three children — Derek (age 10 at the time of trial), Danielle (age 7), and Dylan (age 6). (12 RT 3561; 13 RT 3775-3776.) The morning of February 2, 2002, a Saturday, Brenda woke up and went downstairs, awaiting the arrival of two neighborhood children whom she was supposed to watch that day. (13 RT 3832.) When she went downstairs, Dylan was there and Damon was making breakfast (13 RT 3833); Derek was downstairs as well (12 RT 3625). The doorbell rang around 9:30 a.m. (11 RT 3423; 13 RT 3833.) As Danielle had not come downstairs yet, Brenda went upstairs to wake her up. (13 RT 3833-3834.) The last time Brenda observed Danielle's door the previous night, it had been closed. It was open now. (13 RT 3834.) Brenda walked into her

daughter's room only to find an empty bed. Danielle was not in the bathroom or any closet and she did not respond when her mother called her name. (12 RT 3627; 13 RT 3834.) Damon checked the entire house, went outside, and ran up and down the street yelling Danielle's name. (12 RT 3627.) Brenda called 911 and all of the neighbors, frantically reporting that her daughter was missing. (12 RT 3630; 13 RT 3835.)

The Neighbor

Neither Brenda nor Damon really knew Westerfield, other than his name, but they knew he lived on their street, two doors down across a side street. (12 RT 3566; 13 RT 3778-3779.) They had to drive past his house to get in and out of their neighborhood. (12 RT 3568; 13 RT 3778-3779.) They never socialized with him or invited him into their home. (12 RT 3568-3569.)

On Friday, January 25, 2002, Brenda was at a local bar, "Dad's" with two girlfriends – Denise Kemal[2] and Barbara Easton. (13 RT 3794.) When they arrived, Westerfield was at the bar as well. Brenda did not even know his name at that point, but knew he was her neighbor. (13 RT 3795.) Westerfield said "hello," asked Brenda if he could buy her a drink, and did so. (13 RT 3795-3796.) Brenda thought she may have casually spoken to Westerfield one or two other times that night, but did not recall anything about the conversations, as she was there to spend time with her girlfriends. (13 RT 3796.)

The following Tuesday, the week Danielle was taken, Brenda accompanied Danielle as she sold Girl Scout cookies in the neighborhood; her brother Dylan came as well. (13 RT 3779-3782.) When they arrived at

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[2] Kemal gave an account about the first encounter with Westerfield at Dad's consistent with Brenda's, but acknowledged she was "toasted." (14 RT 4002-4008.)

Westerfield's house, he invited them inside while he filled out the order form to purchase cookies. (13 RT 3782.) While Brenda and Westerfield were in the dining room, Danielle asked if she could go look at Westerfield's pool. Brenda asked Westerfield if that was okay, and he said "yes." (13 RT 3784.) Danielle and Dylan went into the backyard where they played for a few minutes. (13 RT 3785.)

Meanwhile, Westerfield mentioned having seen Brenda and her friends the previous Friday. Westerfield mentioned that he was very interested in her girlfriend, Easton, and asked Brenda to tell Easton she had a rich neighbor who had expressed interest in her. (13 RT 3785-3786.) Brenda mentioned that the same two girlfriends were trying to persuade her to go Dad's the upcoming Friday, February 1st, but her husband was going to be out of town, and she would have to find a babysitter. (13 RT 3786.) Eventually, Brenda and Westerfield went out front where the children were then playing. (13 RT 3788.) While at Westerfield's home, Danielle and Dylan never went upstairs. (13 RT 3789.)

Night Out At Dad's

Damon Van Dam had plans to take his son, Derek, to Big Bear to go snow boarding the weekend of February 1, 2002. (12 RT 3574.) The original plan was to leave on Friday, February 1st, but midweek the plan changed such that they were going to leave on Sunday, February 3rd instead. (12 RT 3574-3575.) Since he was going to be home on Friday night, Brenda made plans to go out with her girlfriends, Kemal and Easton. (12 RT 3576; 13 RT 3799, 3801.)

Kemal and Easton arrived at the Van Dam home around 8:00 p.m. that night. The three women went into the garage and smoked marijuana. (13 RT 3803; 14 RT 4011.) Damon came into the garage at some point as well, took "a couple of puffs of marijuana," and went back into the house; he had had two beers with the pizza he had for dinner earlier. (12 RT 3578,

3593; 13 RT 3803.) While in the garage, someone had opened the side door to let the smoke out. Brenda was uncertain whether anyone had closed it. (13 RT 3803.) Kemal recalled closing the door, but not locking it. (14 RT 4013.) The Van Dams had reversed the locking mechanism on the garage door leading into their house to prevent the children from entering the garage when the door was locked; they would need a key to unlock the door from the inside. From inside the garage, however, one could freely lock or unlock the door to the house. (12 RT 3622-3623.) The three women left for Dad's around 8:30 p.m. (13 RT 3803.)

After the women left, Damon played video games with the boys while Danielle read a book and wrote in her journal. Shortly before 10:00 p.m., Damon asked the children to go upstairs and get ready for bed. (12 RT 3595.) He followed about five to ten minutes later and put the kids to bed for the night, leaving their bedroom doors cracked open. (12 RT 3596-3597.) Damon watched television downstairs for 20 to 30 minutes, and then got into bed where he continued to watch television with the door closed. (12 RT 3608-3609.)

When the women arrived at Dad's, Westerfield was already there. (13 RT 8806; 14 RT 4182-4183.) Brenda had told Easton beforehand that Westerfield wished to meet her; Easton walked up to Westerfield and introduced herself. (13 RT 8806.) The three women sat at the bar, Westerfield said, "Ladies don't buy their own drinks," and threw money down on the bar. (13 RT 3807.) Over the course of the night, Brenda consumed three cranberry and vodka drinks, a shot of tequila, water, a Red Bull, and perhaps a Diet Coke. (13 RT 3820.)

At some point after 9:00 p.m., the Van Dams' friends Rich Brady[3] and Keith Stone arrived. (13 RT 3813; 14 RT 4095-4096.) Brady and Stone joined the three women in conversation; Westerfield was not part of the group. (13 RT 3813-3815; 14 RT 4017-4018.) Westerfield had two friends with him. (13 RT 3813.) Kemal recalled being introduced to Westerfield's friend, Garry. (14 RT 4015.) At some point Brenda's group decided to play pool, and Westerfield's two friends asked if they could join; Westerfield did not play with them. (13 RT 3815-3816; 14 RT 4018, 4186.) Later in the evening, Brenda, Kemal, and Easton returned to Brenda's car where they smoked more marijuana. (13 RT 3817-3918.) Brady and Stone joined them (13 RT 3818; 14 RT 4104-4105); it was around 10:30 or 11:00 p.m. at this point. (14 RT 4146.) When they went back inside the bar about 10 minutes later, the group started dancing. Westerfield was still inside the bar. (14 RT 4024.) Brenda never danced with Westerfield. (13 RT 3819.) The group left Dad's at closing, shortly before 2:00 a.m., and all went back to the Van Dams' home. (13 RT 3822-3823.) Brenda was unaware whether Westerfield was still at the bar when they left.[4] (13 RT 3822.)

When she entered her house, Brenda noticed a red blinking light on the alarm monitor, indicating there was a window or door open. (13 RT 3824.) She began looking for the open window or door, and went upstairs to ask Damon to come down as they had guests. (13 RT 3825.) Brenda found the open door — it was the side garage door that leads to the side yard they had opened earlier that night. (13 RT 3825; 14 RT 4029-4030.)

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[3] On cross-examination, defense counsel elicited that Brady was the Van Dams' marijuana supplier. (14 RT 4128-4129.)

[4] Garry Harvey met Westerfield at Dad's that night and Harvey left the bar at one point. When Harvey returned around 12:30 a.m., he did not see Westerfield there. (14 RT 4182-4183, 4189-4192.)

Meanwhile, Easton had made her way upstairs, got into bed with Damon, where they were "snuggling" and kissing.[5] (12 RT 3613.) When she came in from closing the side door to the garage, Brenda went back upstairs and found Easton lying in bed with Damon; she told them they were being rude to the people downstairs. (12 RT 3614; 13 RT 3826.) Brenda did not check on the children, but closed their doors due to the noise downstairs. (13 RT 3827, 3829.) Everyone convened downstairs in the kitchen where they ate pizza. Twenty minutes later, the guests left. (12 RT 3615; 13 RT 3830; 14 RT 4033.) Damon and Brenda locked up the house, and went to bed around 2:30 a.m. (12 RT 3615; 13 RT 3830.) Danielle was not with the group when they left. (12 RT 3616.)

At some point during the night, Damon woke up and noticed a red light flashing on the alarm monitor in their bedroom. He went downstairs and noticed that the sliding glass door to the backyard was open six to ten inches. (12 RT 3619.) He closed the door, did not check outside, made sure all the doors were closed, including the side garage door, and checked the alarm panel. (12 RT 3620.) Damon went back to sleep without checking on the children. (12 RT 3624.)

Westerfield's Story

After Danielle was reported missing from her bed, the San Diego Police Department set up a "command post" on the Van Dams' street. (15 RT 4243.) Detective Johnny Keene arrived at the command post, and was assigned to contact all of the neighbors and obtain statements as to whether

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[5] The defense made much of the Van Dams lifestyle. In response to cross-examination on this topic Damon Van Dam testified that he had had sex with Kemal in the presence of Kemal's husband and Brenda Van Dam. (12 RT 3678-3679.) Kemal acknowledged the same. (14 RT 4040-4041.) Brenda testified that she had had a sexual encounter with Kemal. (13 RT 3873-3874.)

they had any information about the abduction. (15 RT 4243-4244.) Detective Keene knocked on Westerfield's door, which was just two doors down from the Van Dams' home, and received no answer. (15 RT 4246.) The following morning, Detective Keene went back to Westerfield's home upon learning that Westerfield had returned, and other officers were speaking with him in his driveway. (15 RT 4248-4249.) His partner, Detective Maura Parga, met him there. (15 RT 4243, 4401.)

Detective Keene explained that officers were speaking to all of the neighbors in an effort to gather information, and Westerfield indicated he had no problem assisting the effort. (15 RT 4252.) Detective Keene asked about his activities that weekend. Westerfield stated that he woke up on Saturday around 6:30 a.m., took a shower, and left home around 7:45 a.m. He drove to an area of northeast Poway he referred to as "High Valley" to retrieve his motor home. High Valley was eight and a half miles from Westerfield's home. He claimed to have just decided that morning that he wanted to go to the desert. (15 RT 4254.) He drove his black 4-Runner to the storage location, left it there, and drove the motor home back to his house where he stocked it with groceries and filled the water tank using the hose in his front yard. (15 RT 4255-4256.) Detectives Keene and Parga observed that the hose had been stretched out to the sidewalk, double up, and tossed back across the front yard. They found this strange as they later observed that Westerfield's home was immaculate; nothing in or around it was so carelessly strewn about. The way the hose was left made it appear that Westerfield had left in a hurry. (15 RT 4257, 4289, 4398-4399, 4403-4404.)

Westerfield stated that he left home about 9:50 a.m. and drove to the Silver Strand in Coronado. (15 RT 4257-4258.) While he originally intended to go to the desert, when he got into the motor home, he realized he did not have his wallet, and therefore did not have enough money to go

any place but the Silver Strand. (15 RT 4258.) Westerfield claimed to have embarked upon the 30 mile trip to the Silver Strand on his own. (15 RT 4260-4261.) When he arrived he filled out a registration envelope, placed money inside, and parked the motor home. He thought he placed $24 inside the envelope — the cost for three nights stay. (15 RT 4261.) After he parked, a ranger came by and told him he had overpaid by $30, apparently placing a $50 bill in the envelope thinking it was $20. (15 RT 4262.) After the encounter with the ranger, Westerfield did not stay long, though, claiming it was too cold. Instead, he decided to return home to find his wallet. Westerfield did not explain how he paid for the three nights stay at the Silver Strand without his wallet. (15 RT 4261.)

He thought he arrived back home around 3:30 p.m., and saw news vans and police activity on the street. (15 RT 4262.) His neighbor, Mark Roehr, told him about the missing little girl, and Westerfield decided he had better go check his house. (15 RT 4263-4264.) After doing a walk through of his home and checking his pool, Westerfield locked up the house and left again; he also claimed to have looked for his wallet, which he did not find. (15 RT 4265.) Upon deciding he must have left his wallet in the 4-Runner at High Valley, he drove back there, found the wallet, and went to a gas station to fill up his motor home. (15 RT 4266-4267.) At that point Westerfield just felt like going to the desert. He drove the "back way" to Glamis — a sand dune area in Imperial County about 160 miles from Westerfield's home. (15 RT 4267-4269.) He did not arrive to his destination until 10:00 or 10:30 p.m. (15 RT 4269.) Westerfield did not take any "sand toys" (vehicles to drive around the sand dunes) with him, despite owning some. (15 RT 4270.) He pulled into a spot for the night, and claimed that because the area was noisy, he pulled in further, and got stuck in the sand. (15 RT 4270.) He spent the night there, and began trying to dig himself out in the morning. (15 RT 4271.) Eventually, someone

came by the following morning and towed him out of the sand. The man charged him $150, but Westerfield only had $80. He wrote down the man's information and promised he would mail the remainder when he returned home. (15 RT 4271-4272.)

Once he was out of the sand, Westerfield left Glamis and drove to a location called Superstition Mountain, claiming he wanted to see if the area was a place he wanted to take his son on an upcoming three-day weekend. He did not like the location, stopping for only 20 minutes, and then continued on to Borrego Springs. (15 RT 4273.) Once in Borrego Springs, he turned down a small road, and got the motor home stuck once again. It took him about an hour to dig himself out. He believed he left Borrego Springs about 6:00 p.m. that evening. (15 RT 4274.)

Westerfield's journey did not stop there. From Borrego Springs, he drove all the way back to the Silver Strand, arriving just after 7:00 p.m., but the gates were already locked for the night. (15 RT 4276.) Rather than going home, he claimed to have parked the motor home across the street in a parking lot at the Coronado Cays, an upscale residential neighborhood (18 RT 5110), for the night. (15 RT 4267-4277.) He woke up around 4:00 a.m. on Monday February 4, 2002, drove back to High Valley and arrived about 7:00 a.m. He thought it was too early to park the motor home and retrieve his 4-Runner, fearing he might wake someone up, so he slept there for another hour. (15 RT 4278.) Then, he claimed to have driven straight home where the police arrived a short while later. (15 RT 4279.)

When asked about his night out at Dad's on Friday, February 1st, Westerfield stated that he had had several rum and cokes that night. (15 RT 4280-4281.) He mentioned seeing Brenda there and that she told him her daughter Danielle had a father/daughter event that week, which her husband

was not happy about as he felt their daughter was growing up too quickly.[6] Then, Westerfield paused and said, "I could have sworn she said she had a babysitter. I didn't know her husband was home with the kids." Detective Keene had not asked a question to prompt such a response. (15 RT 4282.) Westerfield believed he left Dad's around 11:00 or 11:30 p.m. that night, drove himself home, and went to bed. (15 RT 4282-4283.)

During this conversation outside of his house, Westerfield was sweating profusely despite it being about 50 to 55 degrees outside. (15 RT 4286-4287, 4403.)

Then Detective Keene asked Westerfield if he would be willing to sign a consent-to-search form so that the detectives could look inside his house for any indication Danielle might have been there. (15 RT 4287.) Westerfield signed it. (15 RT 4288-4289.) Inside the home, Detective Keene observed that the master bed did not have a comforter on it, but was otherwise made with the sheets. (15 RT 4297.) During the walk through, Westerfield was "overly cooperative." He pointed out areas in the home he believed the detectives should look in or walk through. (15 RT 4298-4299.) Detectives Keene and Parga also looked at Westerfield's Toyota 4-Runner, which was parked in the garage. It was very clean inside and out (15 RT 4300-4301, 4409), although Westerfield had not mentioned cleaning the SUV as part of his weekend adventure (15 RT 4279). Also in the garage, Detective Parga detected the smell of bleach. (15 RT 4409.)

Detective Keene asked Westerfield if he would be willing to show him the motor home. Westerfield continued to be very cooperative, and signed a separate consent-to-search form for this purpose. (15 RT 4302.) Westerfield drove his own vehicle to High Valley, and Detective Keene and

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[6] In her trial testimony, Brenda did not recall making such a statement, but did not deny that she might have. (13 RT 3821.)

several other detectives followed. (15 RT 4302-4303.) Unsolicited, Westerfield unlocked all of the storage compartments on the outside of the motor home to show the detectives what was inside. (15 RT 4309.) He pointed out that they failed to check a smaller compartment and suggested that they do so. (15 RT 4310, 4412.) Just as in Westerfield's home, the motor home bed had no comforter, but was otherwise made with the sheets. (15 RT 4313.) At the site where he parked his motor home, Westerfield also had a trailer containing his sand toys — a dune buggy, quads, and other equipment. (15 RT 4316-4317.)

Following this conversation with the detective, Westerfield consented to be interviewed[7] by Paul Redden at the police station. (15 RT 4468-4469.) The interview was audio recorded, and the recording was played for the jury at trial. (16 RT 4488-4489; Exh. 59.) During the interview, when he described the portion of his trip to Superstition Mountain, Westerfield told Redden, "this little place that *we*, where *we* were was just a little small turn type place." (8 CT 2033-2034, emphasis added; 16 RT 4488.)

Westerfield's Odd Behavior

Keith Sherman owned the property where Westerfield stored his motor home; Westerfield paid him $100 a month to keep it there. (16 RT 4553-4556.) The weekend of February 1, 2002, Sherman's granddaughter went outside to get the newspaper around 8:00 a.m. and saw Westerfield standing outside his motor home. (16 RT 4547-4549.) He waved, and she

[7] This interview was, in fact, a polygraph examination. As discussed in Argument VIII, the recording of the interview played for the jury (Exh. 59) and the transcript distributed to the jury during the playing of the audio recording (Exh. 59A) were redacted such that the jury was never informed of the true nature of the interview, or the fact that Westerfield failed the polygraph examination as is discussed in Argument VIII. (See, 8 CT 2012-2053; 16 RT 4488-4489.)

waved back. (16 RT 4550.) She told her grandfather that she saw Westerfield; Sherman went outside to tell him he would move his truck, which was blocking Westerfield's trailer containing the "sand toys," but Westerfield was already pulling away. (16 RT 4560-4562.) Westerfield left his 4-Runner parked on the property, which was unusual. Typically, when he came for motor home, he would bring his son, so that one could drive the motor home and the other the 4-Runner. (16 RT 4570.) He had never seen Westerfield arrive alone. (16 RT 4570.) Also, Westerfield would normally take his trailer, but not this time. (16 RT 4571.)

At the Silver Stand, several other visitors noticed Westerfield's motor home on Saturday February 2, 2002. When the motor home pulled into a spot, someone immediately closed the front curtains across the windshield; all of the curtains on the motor home were closed. (17 RT 4784, 4802, 4838, 4850.) There was no activity at Westerfield's motor home — no chairs, awning, or carpet had been set up outside — it was as though no one was there. (17 RT 4786, 4802, 4851.) Despite Westerfield's description to the contrary, other visitors described that Saturday as a nice, sunny, cool, but comfortable, day. (17 RT 4785, 4803, 4839.)

Westerfield did not emerge from the motor home until State Park Ranger Brian Neill knocked on his door. (17 RT 4894.) Ranger Neill too noticed that the curtains were drawn so that he could not see inside, and nothing was set up outside the motor home. (17 RT 4893-4894.) When Ranger Neill knocked, he waited about one minute, believed no one was inside, and began to move back toward his vehicle. (17 RT 4895.) Then Westerfield emerged. (17 RT 4896.) And when he did, he immediately shut the door behind him. (17 RT 4787, 4804-4805, 4851-4852, 4896.) The state park ranger had noticed that when Westerfield filled out his registration envelope, indicating he had placed $24 inside, he actually had placed $54 inside. (17 RT 4867-4868.) Ranger Neill informed him as

much, and Westerfield insisted he had not overpaid. (17 RT 4896-4897.) Ranger Neill returned the extra $30 to Westerfield and walked back to his vehicle. Westerfield remained outside while he did so. (17 RT 4897.)

Minutes after the ranger left, Westerfield drove off in his motor home; he had only been there about three hours. (17 RT 4789, 4839, 4853.) Westerfield approached a volunteer who worked at the Silver Strand, and continued to insist he had not overpaid. (17 RT 4916-4918.) He pulled out his wallet, which he told Detective Keene he had left at home, and showed the volunteer he only had $20 bills, and thus could not have placed a $50 bill in the envelope. (17 RT 4918.)

In Glamis, other visitors also observed Westerfield's motor home. Westerfield arrived overnight, and other visitors noticed that he was stuck in the sand the following morning, which was Sunday. (18 RT 4976-4977.) It was unusual for someone to drive a motor home that far off the road and so close to the sand dunes. (18 RT 4952, 5003, 5077.) The back end of the motor home was completely in the sand, quite obviously stuck. (18 RT 4935, 4978, 5042.) Westerfield approached a neighboring site, and asked the occupant, Joseph Koemptgen, to help tow him out. (18 RT 4979.) Koemptgen explained his truck would not be able to tow a motor home of that size. Westerfield was "persistent" that it would not take much effort. Westerfield further stated that he had had a bad weekend. (18 RT 4980.) When that effort failed, Westerfield approached a second person, Ryan Strathrearn, for help around 8:30 a.m. (18 RT 5014-5016, 5020.) Strathrearn and a friend drove a Ford Bronco over to the motor home and attempted to pull Westerfield's vehicle out of the sand. The Bronco got stuck too. (18 RT 5017.) Strathrearn returned to his site, retrieved his truck, and was able to pull out the Bronco. (18 RT 5017-5018.) In the midst of this effort, Westerfield told Strathrearn and other people that had

gathered that his trailer had a flat tire and he had to leave it in El Centro. (18 RT 5019, 5045.)

Dan Conklin, a Glamis resident, arrived at Westerfield's motor home around 10:00 a.m., to assist in towing him out of the sand. (17 RT 4930-4932.) He informed Westerfield he charged $150 for the tow service, and there was no further discussion as to how or if Westerfield could pay him. (17 RT 4937.) Conklin successfully pulled Westerfield out of the sand, at which point Westerfield told him he did not have all of the money to pay him, he only had $80. Conklin wrote down his name and address on a piece of paper so that Westerfield could send him the rest. (17 RT 4940-4941.) Then, Conklin went to retrieve Westerfield's ramps and the shovel they had used in the towing process, but since Westerfield left immediately after being towed and had already returned to the road he left his shovel and ramps behind. (17 RT 4942, 4953; 18 RT 4983-4984, 5003, 5047, 5072, 5082.)

Around 2:43 a.m., on Sunday February 4, 2002, Coronado Police Officer Michael Britton responded to a call from a security guard about a motor home parked in violation of posted signs at the Coronado Cays community. (18 RT 5105-5110, 5114.) It was not Westerfield's motor home. (18 RT 5115-5116, 5119.)

Westerfield forgot to mention his trip to the dry cleaner in his recounting of the events of his weekend to Detective Keene. (15 RT 4277-4278.) Julie Mills worked at Twin Peaks Dry Cleaners in Poway, and knew Westerfield as he was a longtime customer. (18 RT 5128, 5130.) He arrived on Monday February 4, 2002, between 7:00 and 7:30 a.m. (18 RT 5129-5130.) It was very cold that morning. He was wearing very thin shorts, like boxer shorts or perhaps jogging shorts, a very thin T-shirt, no shoes, and no socks. (18 RT 5131.) Mills had never seen him arrive to the store dressed in such a manner. Additionally, while Westerfield was

typically very talkative and friendly, on this occasion, he appeared tired, would not look Mills in the eye, and did not want to talk much. (18 RT 5132.) He also arrived in his motor home, which Mills had never seen him do before. (18 RT 5133, 5139.) Westerfield had brought a sport jacket, a couple of comforters, and some other bedding to be cleaned. (18 RT 5134-5136.)

Westerfield also forgot to mention a second trip to the dry cleaner's that same day around 1:40 p.m. (18 RT 5156-5158.) This time he arrived in his 4-Runner and dropped off a sweater, pants, and a t-shirt. (18 RT 5158.) He, again, acted differently than usual; he was not smiling and talkative as he typically was. He asked to have the clothes back the same day, but he had dropped off the clothing too late for same day service. Westerfield had never requested same-day service before. (18 RT 5160.)

Westerfield's Child Pornography Collection

San Diego Police Department Forensic Examiner James Watkins examined the images on the hard drives and other media located in Westerfield's home. (34 RT 6282, 6300.) He discovered 85 images and 39 movies that he deemed "questionable," meaning they depicted children under the age of 18 in sexual acts and thus might constitute child pornography. (23 RT 6302, 6305-6306, 6414, 6434-6424.) In his collection, Westerfield also had two "cartoon" drawings, or "anime," containing drawings of a young girl being attacked and raped. (24 RT 6394-6396.)

The Discovery

Volunteers formed a search party to looked for Danielle. (11 RT 3440-3441.) On February 27, 2002, they found the body of a young girl, laying on her back in the dirt off the side of Dehesa Road. (11 RT 3440, 3472, 3450-3451, 3477-3478.) It was a desert-type area were there was open space, and no businesses or residences nearby. (11 RT 3500.) The

body was 15 yards off the road, up an embankment beneath a tree. (11 RT 3501.) Portions of the body were missing, and the body was badly decomposed. She was laying out in the open in area where people had been dumping trash. (11 RT 3465-3466, 3481.) The volunteers could discern that she had blond hair, but her skin was very dark brown. She had a shiny earring on her left ear, and a "choker" style necklace around her neck. (11 RT 3478; 12 RT 3712-3713.)

The body was identified as that of Danielle Van Dam based on her dental records. (12 RT 3524-3525, 3529.)

San Diego County Medical Examiner Dr. Brian Blackbourne, M.D., arrived at the Dehesa Road location the night of February 27, 2002. (12 RT 3705-3706, 3708-3709.) He observed the body of a young girl in a state of marked decomposition. Her body had been extensively fed upon by animals, such that much of her body tissue was missing. Her skin was mummified. (12 RT 3710.) Much of the tissue from her collar bone down was missing due to animal activity. The tissue on her thighs was gone, exposing bare bone. Her left foot was missing. (12 RT 3711.) Danielle's genital area was gone. (12 RT 3712.) There was no clothing on Danielle's body, and none in the immediate area. (12 RT 3713.) At the autopsy the following day, Dr. Blackbourne attempted to determine a cause of death. (12 RT 3725.) He ruled out stabbing, gun shot, blunt force trauma, strangulation, and disease, but could not rule out suffocation. (12 RT 3726-3728, 3730.) It was clear that Danielle had been deceased for some time — ten days to six weeks by Dr. Blackbourne's estimation. (13 RT 3751-3752.) Dr. Blackbourne also attempted to discern whether Danielle had been sexually assaulted. (13 RT 3752-3753.) Because there was nothing to examine, as her genital organs were gone, he could not reach a conclusion. (13 RT 3754.) Dr. Blackbourne determined that the manner of death was homicide. (13 RT 3755.)

The Scientific Evidence

Jeffrey Graham, a latent fingerprint examiner for the San Diego Police Department, had a difficult time obtaining known prints from Danielle's mummified fingers. (20 RT 5581, 5590.) He had to remove her hands and submerge them in embalming fluid to rehydrate them. It took one week before he could make an identification. (20 RT 5591.) He compared her prints to a set that had been lifted from Westerfield's motor home. (20 RT 5426, 5593.) One print matched Danielle. (20 RT 5595-5596.) It was a left handprint that showed four fingers, two of which matched Danielle; the other two fingers in the print had no ridge information for comparison. (20 RT 5598.) The print had been lifted from a cabinet 10 inches above the bed in the motor home. (20 RT 5598-5560.) It was apparent from the way the print had been left that Danielle was moving when it was made — her hand did not simply make the print and then lift back up. (20 RT 5597.)

Jim Frazee, a volunteer canine handler from the San Diego Sheriff's Department, and his trained "trailing dog" Cielo, were called upon to search Westerfield's motor home. (24 RT 6493-6495.) Cielo "alerted" to the first storage compartment behind the passenger's door, and when the door was opened, showed "interest" in a shovel and lawn chair that were inside. (24 RT 6513-6516.)

San Diego Police Department Criminalist Sean Soriano examined stains on the jacket Westerfield had taken to the dry cleaners. (20 RT 5688, 5695-5697.) Three stains on the jacket presumptively tested positive for the presence of blood. Those stains were on the middle of the right lapel, underneath the right shoulder area, and the back of the collar. (20 RT 5697.) San Diego Police Department Forensic Biologist Annette Peer also looked for biological material in Westerfield's motor home, and located a stain on the floor between the bathroom and closet which presumptively

tested positive for blood. (21 RT 5763-5765.) Peer conducted DNA testing in this case and first observed that the DNA profile on the stain from the shoulder area of Westerfield's jacket and the stain on the carpet of the motor home was the same. (21 RT 5780.) Using a portion of Danielle's rib bone, Peer was able to generate her DNA profile. (21 RT 5779.) Danielle's DNA profile matched the profile of the blood on the jacket and the motor home carpet. (21 RT 5780-5785, 5842; 24 RT 6470-6471.)

Catherine Theisen conducted mitochondrial DNA analysis on several hairs discovered during the search of the motor home. Theisen explained that mitochondrial DNA is not uniquely identified as it is inherited only from the maternal parent, meaning that siblings from the same mother will all have the same mitochondrial DNA. She further explained that the chance that two people at random would have the same mitochondrial DNA was very low. (21 RT 5844, 5850.) Hair is an item that has very little nuclear DNA, and thus mitochondrial DNA testing can provide results where nuclear DNA testing cannot. (21 RT 5852.) Here, she could not exclude Danielle as the source of hairs that been recovered from the bathroom rug of Westerfield's motor home. (21 RT 5863.) Forensic scientist Mitchell Holland conducted nuclear DNA testing on a hair from the sink drain in Westerfield's motor home bathroom, and obtained a partial profile that matched Danielle's. (24 RT 6465-6466.) He also conducted mitochondrial DNA testing on hairs found in Westerfield's washing machine, dryer, pillow case from his master bedroom, master bedroom fitted sheet and flat sheet. All of the hairs contained the same mitochondrial DNA profile as Danielle. (24 RT 6480-6481.)

San Diego Police Department Criminalist Tanya Dulaney collected trace evidence in this case. Among the materials she found were many orange and blue fibers all over clothing that had been found on top of, and inside of, Westerfield's washing machine and dryer, as well as orange

fibers on the pillow cases from his master bedroom. (22 RT 5960-5961.) She also located fibers that appeared to be similar to the Van Dams' carpet on the motor home carpet by the driver's side nightstand (22 RT 5960), in the motor home hallway (22 RT 5970), on the motor home bath mat (22 RT 5978). A comparison of these fibers with the Van Dam's carpet showed all of the fibers were consistent. (22 RT 5989-5990.) To confirm these results, Dulaney took the fibers to a laboratory in Sacramento to view them under a spectrophotometer. (22 RT 5992.) Using that equipment, Dulaney formed the opinion that the fibers were consistent with the Van Dams' carpet, and were inconsistent with Westerfield's home carpet and motor home carpet. (22 RT 5997, 6001; 23 RT 6271.) Additionally, dog hairs that Dulaney had lifted from Westerfield's dryer lint (22 RT 5965), motor home carpet (22 RT 5970), comforter that had been taken to the dry cleaner's (22 RT 5977-5978), and motor home bath mat (22 RT 5978), were microscopically similar to the hair from the Van Dams' dog (22 RT 6004, 6008; 23 RT 6273.) Subsequent mitochondrial DNA testing on the dog hairs showed that four of the collected hairs matched the profile of the Van Dams' dog completely, and the dog could not be excluded as the source of any. (26 RT 6862, 6869, 6878.) Dulaney also discovered 31 blue fibers on the kitchen bench seat, 11 on the upholstered headboard, 3 on the couch, and 1 on the front passenger seat in Westerfield's motor home. (29 RT 7701-7705.) Chemical analysis with the spectrophotometer revealed that all of the blue fibers in the motor home were consistent with fibers discovered on the sheet used by the medical examiner to wrap Danielle's body before placing it in the body bag for purposes of collecting any potential trace evidence that fell off the body when it was removed from the Dehesa Road location. (12 RT 3714; 29 RT 7706-7707.)

San Diego Police Department Criminalist Jennifer Shen also noticed orange fibers in various items she handled, including a long orange fiber in

the necklace on Danielle's neck at the time her body was found (23 RT 6172-6173), one orange fiber on Danielle's head (23 RT 6196.) 20 to 30 orange fibers in the clothing in side of Westerfield's washing machine, 50 to 100 orange fibers on the clothing on top of the dryer, and 50 to 100 on the clothing inside the dryer. (23 RT 6193.) Subsequently, in Westerfield's SUV, she found an orange fiber in the front passenger seat, several on the rear seat and rear passenger arm rest, and several on a towel inside a laundry bag in the car. (29 RT 7753-7758.) These fibers were all microscopically similar.[8] (23 RT 6179-6182, 6277.) There were also blue or gray fibers in the laundry and bedding items that were also located in the vegetation collected from the site where Danielle's body was recovered as well as in clothing recovered from Westerfield's laundry. (23 RT 6173-6174, 6195, 6205-6206.) These items were also similar and could have come from a common source. (23 RT 6200-6201.) Shen explained that fiber evidence becomes all the more significant when different types of fibers are found in multiple locations; it becomes much less likely that the fibers are from a random source. (23 RT 6204.)

2. Defense

Several of Westerfield's Sabre Springs neighbors testified to his habits and customs regarding his motor home. Neighbors and acquaintances testified that Westerfield would leave his motor home unlocked when he was loading and unloading before or after a trip. (26 RT 6928, 6954; 29 RT 7652.) However, when preparing for a trip, he would typically park the motor home along side his house for a day or several days at a time. (26 RT 6925, 6954.) The weekend of February 1, 2002, however, the neighbors did not see Westerfield preparing for a trip, and the

[8] Two fibers discovered in the SUV were inconsistent. (29 RT 7760-7761.)

motor home was only outside of his home for a very short time the morning of February 2nd. (26 RT 6944, 6988.)

Susan L. testified that she dated Westerfield for some time and lived with him for one year. (30 RT 7867-7869.) She described camping trips where Westerfield would take her and her children to places such as the Silver Strand, Borrego Springs, and Glamis. (30 RT 7872.) She recalled leaving the Silver Strand because the weather was bad and going to Borrego Springs instead on an occasion. (30 RT 7872-7873.) But they never went to the Silver Strand, Glamis, Borrego Springs, and Superstition Mountain all in the same weekend. (30 RT 7886.) She also recalled that when they filled the motor home with water in preparation for a trip, they would simply throw the hose on the front lawn when finished. (30 RT 7876.) At the time of her testimony, Susan L. still cared about Westerfield. (30 RT 7892.) But there were times when the relationship was not good, causing her to move out of his home on two occasions. (30 RT 7883-7884.) She had broken off the relationship by the time she learned that Westerfield was a suspect in Danielle's disappearance. (30 RT 7893.) The break-up was difficult for Westerfield. (26 RT 6946-6947; 27 RT 7261.) Susan L. last saw Westerfield before Danielle disappeared -- about three weeks prior to her being interviewed by law enforcement officers on February 5, 2002, and learning on television that he was a suspect. (30 RT 7893.) On that occasion she had gone out on a particular evening with a male friend who walked her to her door at the end of the evening and kissed her on the cheek. (30 RT 7893-7894.) Susan L. told law enforcement officers that she "found [Westerfield] sitting outside" that evening and that he called her the following day. (30 RT 7900.) She did not feel comfortable with Westerfield at that time. (30 RT 7900-7901.) She additionally opined that Westerfield became forceful when he drank alcohol. (30 RT 7922.)

Christina Gonzales, Susan L.'s daughter, similarly testified that she would help load or unload the motor home before and after trips. It was unlocked during this process. Westerfield would typically park the motor home on the side of the house the day before they left on a trip and the day following. (29 RT 7634-7636.) Susan L.'s other daughter, Danielle L., testified that as to the trips she, her mother, and Westerfield would take to the desert — they would ride sand vehicles in the dunes every time. (29 RT 7678.)

A good friend of Westerfield's, Dave Laspisa, testified that he had been to Glamis with Westerfield on many occasions.[9] (28 RT 7436.) It was tradition to go on Super Bowl weekend, which was February 3, 2002. (28 RT 7446.) The Laspisas did not go to Glamis for Super Bowl weekend in 2002, however, and had not been there on Super Bowl weekend for three years. (28 RT 7479, 7480.) And, he could remember only one occasion where Westerfield arrived in Glamis without his trailer of sand toys five years prior. (28 RT 7439.) Laspisas wife recalled no such occasion. (28 RT 7503.) Dave Laspisa had never been to the Silver Strand with Westerfield, much less the Silver Strand, Glamis, Borrego Springs, and Superstition Mountain all in the same weekend. (28 RT 7487.)

Glennie Nasland was at Dad's on February 1, 2002. She claimed to have seen Brenda Van Dam dancing with Westerfield, but not too close to Westerfield. (27 RT 7238; 28 RT 7306.) She also observed Westerfield to be "drunk" that night. (27 RT 7243.) Another Dad's patron, Patricia Le

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[9] Laspisa winked at Westerfield when he took the witness stand. (28 RT 7463.)

Page, testified that Brenda Van Dam was dancing with Westerfield, but appeared to be rubbing herself all over him.[10] (28 RT 7323-7324.)

Glen Seebruch, who had a working relationship with Westerfield, testified that Westerfield came to his office the morning of February 1, 2002, to drop off some parts, and told him he planned to take his "ATV" to the desert that weekend. (28 RT 7425.) Westerfield failed to mention anything about the Silver Strand. (28 RT 7429.)

Marcus Lawson, a computer forensics expert testified that he found pornographic images on Neal Westerfield's computers, Westerfield's son. These images were found on a desk top computer in Neal's bedroom in Westerfield's house as well as on Neal's laptop. Additionally, advertisements from pornographic websites had been sent to Neal's email address, and then those websites were accessed. (27 RT 7027, 7070-7079.) Some of the images and websites linked to Neal's email address were of the animated variety. (27 RT 7090.) Lawson explained that it would require speculation to say that Neal created any files on any of the media or computers in Westerfield's home, but the location of the loose media in Westerfield's home office was significant in determining who was the responsible party for downloading the images. (27 RT 7136-7137, 7148-7151.)

Beginning around 9:00 a.m. on Monday February 4, 2002, Westerfield was in virtually constant contact with the police. (26 RT 6999-7003; 30 RT 7814-7817, 7925-7926.) In light of this fact, the defense

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[10] Through this testimony, Westerfield was apparently attempting to establish that fibers could have been transferred from Brenda to Westerfield by virtue of this close dancing. (23 RT 6216-6217; 29 RT 7770.) On rebuttal, the prosecution called a witness who testified that Le Page mentioned in the bathroom prior to her testimony that she was taking Vicodin for back trouble and needed to take more. (25 RT 8422-8425.)

attempted to present forensic evidence suggesting that Westerfield could not have killed Danielle because her body was dumped at the Dehesa Road location sometime after the police surveillance commenced. To this end, the defense called forensic entomologist David Faulkner. (30 RT 7940.) Faulkner attended Danielle's autopsy where he collected insects from her remains and later went to the Dehesa Road scene to assess insect activity. (30 RT 7945-7946.) In his expert opinion, based upon insect material, as well as the known temperature and weather conditions at the time, he estimated that the first opportunity Danielle's body could have been infested with insects would have been 10 to 12 days prior to the recovery of the body on February 27, 2002, meaning the body was first available for infestation between February 16 through 18, 2002. (30 RT 7968-7978.) Faulkner explained, however, that he could not estimate with any degree of scientific certainty the maximum interval the insects could have deposited eggs on body; he could only express an opinion as to the minimum interval. (30 RT 7982.) Thus, he could not rule out the possibility that the body had been there for a longer period of time. (30 RT 8007-8009, 8024-8025.) He further noted that mummification could delay the onset of insect activity as the dried out condition of the body does not attract insects in the same manner a moist environment would. (40 RT 7988-7990.)

The defense also called forensic entomologist Neal Haskell, who opined based upon the insect material he received from Faulkner, Faulkner's trial testimony, as well as data regarding weather conditions at the time, that the window of time in which the body would have been available for insect activity was between February 14 and 21, 2002. (33 RT 8116-8117.)

3. The Prosecution's Rebuttal

Neal Westerfield was 19 years old at the time of trial and testified that he would typically accompany his father to High Valley where they

would retrieve the motor home together; Westerfield would drive the motor home and Neal would drive the 4-Runner from that point. (35 RT 8431, 8435-8436.) Typically, they would take the trailer with sand toys to the desert because the trip would be significantly more fun than if they just sat in the motor home. (35 RT 8438, 8440.) They never went to the beach and the desert in the same trip. (35 RT 8448.) Neal had been at his mother's house and a friend's house the weekend of February 1, 2002, through February 4, 2002. (35 RT 8451-8461, 8497-8500, 8502-8505.) He testified that his father told him the week prior he was going to go to Borrego Springs, but did not ask him to go along. (35 RT 8462.) Neal had accessed pornography at his father's house before by using links to websites that had been emailed to him or by using search engines. (35 RT 8474-8475.) He knew that Westerfield had downloaded pornography because he saw it on the various computers and disks in Westerfield's home office. (35 RT 8470, 8480.) Neal copied some of the pornography from the media in Westerfield's office to the computer in his bedroom. (35 RT 8485-8486.) All of the pornography Neal accessed appeared to involve adult women. (35 RT 8489.)

Forensic anthropologist William Rodriguez specialized in assessing human skeletons in difficult cases, such as where the body was burned or decomposed, in effort to identify the deceased as well as determine the manner and cause of death. (36 RT 8642.) He had reviewed the autopsy report, Faulkner's report and testimony, Haskell's report and testimony, weather condition data, and had been to the scene where Danielle's body had been dumped. (36 RT 8667-8669.) Of import to Rodriguez was the fact that Danielle's body was mummified to a high degree, which can happen very quickly with the body of a small child. (36 RT 8676-8677.) He observed that insects would not have been able to penetrate her mummified skin. (36 RT 8678.) He further observed, assuming she had

been transported in a motor home for 24 to 36 hours, insects would have been unable to reach her during that period as well. (36 RT 8689.) Rodriguez explained that because so many variables are involved in the decomposition process — insects, weather, sunlight — it is difficult to estimate accurately how long the individual had been dead. (36 RT 8690.) Based on his review of all the material, however, Rodriguez opined that Danielle had been deceased four to six weeks, or at least sometime earlier than February 6, 2002. (36 RT 8703-8704.) He was aware that she was alive six weeks prior to the discovery of her body, but looking at her state of decomposition, that state was what he would expect to see after four to six weeks. (36 RT 8789-8790.)

Finally, Dr. Madison Lee Goff, an expert in forensic entomology, explained that information from insects was useful to determine the minimum amount of time the insects could have been feeding on the body. (38 RT 8942, 8952.) Determining how long a body had been deceased was not possible with forensic entomology. (38 RT 8952.) Dr. Goff read the reports and testimony of Faulkner and Haskell, had reviewed the autopsy report, the weather reports, and had spoken to Dr. Blackbourne on the telephone. (38 RT 8958-8960.) Based on the information he reviewed, Dr. Goff opined that the minimum date the body would have been available for insect activity was February 12, 2002, and there was no way to determine the maximum date. (38 RT 8968-8971.)

4. The Defense's Surrebuttal

Forensic entomology expert Robert Hall reviewed the same information as the other experts and opined that the insect activity on Danielle's body occurred no later than February 23, 2002, and no earlier that February 12, 2002. (39 RT 9082-9083.) Insect activity would begin almost immediately upon the body being dumped in that location. (39 RT

9088-9089.) Hall taught, lectured, and published articles over the course of nine years with defense expert Haskell. (39 RT 9101-9102.)

B. Penalty Phase

1. Prosecution's Case in Aggravation

Lewd Act Upon Jenny N.

When Jenny N. was about seven years old, she attended a family event at Westerfield's home. (57 RT 10009.) Jenny's father's sister, Jackie, was Westerfield's wife at that time. (57 RT 10008.) Jenny and her younger sister were put to bed upstairs on the floor of Westerfield's daughter's bedroom while the adults remained downstairs. (57 RT 10011.) At some point she recalled waking up because Westerfield had put his fingers in her mouth and was playing with her teeth. She pretended to be asleep. But when Westerfield put his fingers in her mouth a second time, she bit down as hard as she could. Westerfield stopped, adjusted his shorts, and left the room. (57 RT 10011-10012.) Jenny pretended to be asleep because she "was too freaked out about it" and "didn't understand what was going on." (57 RT 10012.) She did not say anything to Westerfield because she was scared. (57 RT 10014-10015.)

Impact Of Danielle's Murder On Her Family And The Community

Danielle's kindergarten and first grade teacher, Ms. De Stefani, testified that she was a sweet, polite, hard-working girl who enjoyed school; she described Danielle as very caring and noted how she always wanted to make sure everyone felt included. (57 RT 9958-9959.) Similarly, Danielle's second grade teacher, Ms. Puntenney, testified that Danielle enjoyed doing school work and got along well with all of the children. (57 RT 9968.) Ms. Puntenney recalled the other students packing up Danielle's belongings from her desk to give to her parents after her body was discovered. (57 RT 9977.) As Danielle went missing in the middle of

the year from her class, Ms. Puntenney noted on a personal level that not a day went by that she did not think of her young student, that she missed Danielle, and that the other children at school missed her too. (57 RT 9977-9978.)

Danielle's father recalled how she loved to help him when he was working on their cars by bringing him the tools he would request, and how she helped him make a birdhouse for Brenda for Mother's Day. (57 RT 9984-9985.) Danielle loved to cook with her mother. (57 RT 10065.) Damon and Danielle had a fondness for the father/daughter dance at school for which they would get dressed up, and Damon would get his daughter a corsage. (57 RT 9985.) They were supposed to go to a father/daughter dance the week after Danielle disappeared. (57 RT 9986.) Damon remembered reading to Danielle in bed at night, and teaching her to read in the process. (57 RT 9989-9990.) When she became good at it, Danielle started reading to her younger brother in bed. (57 RT 9990.)

Dylan, who was six at the time of trial, reacted to his big sister's death by reverting to more infant-like behavior. He stopped reading, started wetting the bed, and needed to sleep with his parents. (57 RT 9991, 10069.) Derek and Dylan slept in the same room, despite having their own rooms, because they were afraid. (57 RT 9991.) Derek, Danielle's older brother, became more introverted and would have emotional outbursts on occasion. (57 RT 9991-9992, 10068.) The family went to therapy together, and the boys went to individual therapy sessions too. (57 RT 9992.)

When she was asked what she wanted to be when she grew up, Danielle would say she wanted to be a "mommy," a teacher, and after the family got a dog, a veterinarian. (57 RT 9993-9994, 10068.)

The jury was shown a video depicting Danielle's life, including the family's last Christmas together, a trip to Disneyworld, and pictures from Halloween. (57 RT 10073-10075.)

The community set up a memorial in front of the Van Dams' home, where people left notes, flowers, stuffed animals, and many angels. (57 RT 9998.) The same was true of the site where Danielle's body was discovered. (57 RT 10000.)

At the time of trial, Brenda would still sit in her daughter's room, try to feel her, try to smell her, and cry. (57 RT 10078.)

2. Defense's Case In Mitigation

In mitigation, Westerfield presented evidence of his professional accomplishments as a design engineer. (58 RT 10131-10144, 10168.) Family, friends, and neighbors testified on his behalf, expressing their support and care for him, and recalling times he had been helpful. (See, e.g., 58 RT 10249A-10251; 59 RT 10306, 10320-10322, 10333-10335, 10340-10342, 10354-10355; 60 RT 10469-10472, 10476-10479.)

ARGUMENT

I. AS EACH SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE THE TRIAL COURT PROPERLY DENIED WESTERFIELD'S MOTION TO SUPPRESS; ALTERNATIVELY, THE TRIAL COURT PROPERLY DETERMINED WESTERFIELD CONSENTED TO THE SEARCHES

Westerfield contends that the trial court improperly denied his motion to suppress the evidence obtained pursuant to five search warrants, alleging that the search warrants were not supported by probable cause. Westerfield claims that the basis for the first search warrant, which served as the predicate for all subsequent warrants, was his failure of a polygraph examination, and because polygraph evidence is inadmissible at a criminal trial, it should not have been considered by the judge issuing the search warrant. Westerfield further alleges that without the polygraph results, there was insufficient probable cause to issue the first warrant, and therefore the four warrants that followed. Finally, Westerfield contends

that the trial court erred in determining that even if the search warrants were deficient, he consented to the first search in any event. (AOB 60-116.) Contrary to Westerfield's allegations, the trial court properly denied his motion to suppress as the search warrants were supported by ample probable cause to believe a search of the locations described therein might yield critical information relating to Danielle's abduction and that Westerfield, as the owner of the items to be searched, might be involved. Even if the warrant was not supported by probable cause, the trial court properly denied the motion to suppress as the law enforcement officers executing the warrant operated under good faith reliance on its validity, and Westerfield provided written consent for the search.

In reviewing the propriety of a magistrate's issuance of a search warrant, this Court asks " 'whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.' " (*People v. Carrington* (2009) 47 Cal.4th 145, 161, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1040, citing *Illinois v. Gates* (1983) 462 U.S. 213, 238-239 [76 L.Ed.2d 527, 103 S.Ct. 2317].) " 'The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" (*People v. Carrington, supra,* 47 Cal.4th at p. 161, quoting *Illinois v. Gates, supra,* 462 U.S. at p. 236.) A magistrate's determination of probable cause is accorded "great deference" by the reviewing court. (*Illinois v. Gates, supra,* 462 U.S. at p. 236; see also *People v. Carrington, supra,* 47 Cal.4th at p. 236.)

A. The Probable Cause Supporting The Search Warrants

1. Warrant No. 27818

At 2:00 a.m. on February 5, 2002, Detective Randy Alldredge testified under oath in an effort to procure a telephonic search warrant form Judge Cynthia Bashant. (4 CT 747.) He described the locations to be searched, which included Westerfield's home, 4-Runner, motor home, and trailer; the warrant also sought the collection of biological samples from Westerfield himself. (4 CT 747-748.) Detective Alldredge then described the information he had gathered from other San Diego police officers from speaking with them and from reading their reports about the investigation into the abduction of Danielle Van Dam. (5 CT 749.)

After describing the circumstances of Danielle's parents discovering that she was missing (4 CT 749-750), Detective Alldredge discussed the facts supporting probable cause for the search warrant. Shortly after Danielle's family reported her missing, police officers responded to the neighborhood and conducted a door-to-door search of the neighbors' homes looking for the young girl. Westerfield was not home. (4 CT 750.) He lived two houses west of the Van Dams' home. (4 CT 760.) Detective Alldredge had interviewed Brenda Van Dam prior to preparing the search warrant. Brenda Van Dam told the detective that about one week prior to Danielle's disappearance, on January 25, 2002, she had been at a neighborhood bar called "Dad's" with girlfriends and happened to see Westerfield. Recognizing him from the neighborhood, she said "hi" to him, he said "hi" in response, and no further conversation took place. Brenda further told Detective Alldredge that days prior to Danielle's disappearance, on January 30, 2002, she, Danielle, and her son, Dillon, walked through the neighborhood selling girl scout cookies as Danielle was a "Brownie." (4 CT 750.) They went to Westerfield's house where Brenda and Westerfield chatted for 10 to 15 minutes, including the topic of seeing each other at

Dad's. Meanwhile, Danielle and Dillon had entered his house, played in the living room, and went outside to look at the pool. (4 CT 751.) Brenda saw Westerfield at Dad's bar again on February 2, 2002, the night before Danielle was discovered missing. (4 CT 750.) Brenda told Detective Alldredge that she did not discuss her children with anyone at the bar that night. (4 CT 751-752.)

The police conducted a second "canvas" of the neighborhood on February 3, 2002. Westerfield still was not home. (4 CT 752.)

By 8:00 a.m. on February 4, 2002, the police began watching Westerfield's house, waiting for him to arrive home, which he did sometime around 8:30 a.m. (4 CT 752.) The police contacted Westerfield and obtained his written consent to look through his home in search of the missing girl. He also gave written consent for the officers to search his motor home, which was parked in Poway on Skyridge Road. Additionally, Westerfield consented to have dogs search his home to see if they could detect Danielle's scent. While the dog search of the interior of Westerfield's home revealed no significant information, the dog "displayed an interest toward the garage door." Detective Alldredge explained that an "interest" is not considered an "alert." (4 CT 752.) During the search, Westerfield offered to searching officers that Danielle had recently been in the house including the living room, upstairs, the garage, and looked at the pool, while selling Girl Scout cookies, which might explain the dog's interest in the garage. (4 CT 752-753.) Brenda Van Dam had told Detective Alldredge that her children never went upstairs and never went into the garage. (4 CT 753.)

The officers searching Westerfield's motor home noticed that he displayed "an unusual amount of cooperativeness by opening drawers, lifting cushions, and pointing out . . . areas missed by detectives." (4 CT 753.)

Detective Alldredge also participated in a phone conversation with FBI agents who specialized in profiling abductors. The FBI agents noted that "it is a distinct action of a person involved in abductions to want to help or display overly [sic] amount of cooperativeness." (4 CT 753.) The profilers further noted that according to a 10-year study, most abductors are male and live close by the victim's residence, or are acquainted with the victim's family. The profilers believed that it was highly unlikely a complete stranger had abducted Danielle because of the high risk of entering an unknown residence to take a victim. Thus, the profilers believed the perpetrator was someone familiar with the inside of the Van Dam's home. (4 CT 754.)

In an interview with Detective Keene, Westerfield discussed seeing Brenda Van Dam at Dad's on February 2, 2002. But contrary to Brenda's characterization of the encounter, Westerfield stated that Brenda had discussed her daughter, Danielle, and mentioned a father/daughter dance coming up at school. Westerfield commented that Brenda "told him about a new blouse she had purchased for Danielle, and how Danielle's father is concerned about how fast his little girl is growing up." (4 CT 755.) An officer recontacted Brenda who confirmed that she had not told anyone about the father/daughter dance other than immediate family members and a neighbor, not Westerfield. (4 CT 755.) Additionally, in the interview with Detective Keene, Westerfield stated, "out of the clear blue sky" that Brenda had told him a babysitter, and not her husband, was watching her children. (4 CT 755-756.) Detective Keene knew that Damon Van Dam had been watching the children that night. (4 CT 756.)

Westerfield also told detectives about an elaborate trip he took the weekend of Danielle's disappearance. On February 2, 2002, at 7:30 a.m., he drove his 4-Runner to Poway were his motor home was parked, and drove his motor home back to his house where he filled it up with water.

Officers noticed that although his house was "immaculate," Westerfield left the hose strewn across the plants, as if he had left in a hurry. (4 CT 756.)

After packing up his motor home, Westerfield stated he drove to the Silver Strand in Coronado where he paid for several nights of camping. Westerfield also told Detective Keene that he had forgotten his wallet and was low on gas. Detectives had spoken to a park ranger at the Silver Strand, who stated he knocked on Westerfield's motor home door for several minutes before he answered. (4 CT 756.) Then, Westerfield opened the door, stepped outside, and immediately closed the door behind him; the ranger noticed that the blinds were closed as well. (4 CT 756-757.) The ranger told Westerfield he had overpaid and returned $30 to him. Westerfield did not go back inside his motor home, but rather remained outside until the ranger drove away. (4 CT 757.) Westerfield told detectives that it was too cold at the Silver Strand and that he decided to go home to retrieve his wallet. (4 CT 757.) When he returned home, he realized that was not where he had left his wallet, but rather his wallet was in his 4-Runner, which was parked at the location where he had picked up the motor home in Poway. He drove the motor home back to that location and found his wallet. (4 CT 758.)

Then, Westerfield decided he wanted to go to Glamis — a "dune area" located 120 miles east of San Diego near the Arizona border. Westerfield stated that at some point after he arrived, he got his motor home stuck in the sand dunes and he spent the night there. He had to be pulled out of the sand. He eventually went to Borrego Springs where the motor home got stuck once again. After digging the motor home out, Westerfield stated, "we drove back to Silver Strand." When questioned as to why he said "we," Westerfield responded it was "just a slip."

Detective Alldredge next testified about Westerfield's having completed, and failed, a polygraph test. (4 CT 758-759.) During the

polygraph examination, Westerfield was asked whether he was involved or responsible for the disappearance of Danielle Van Dam. (4 CT 761-762.) Although he answered "no" to each question, the polygraph examiner, Paul Redden, found Westerfield had been deceptive in each response.[11] (4 CT 762.)

Based on the information provided by Detective Alldredge, Judge Bashant directed that a search warrant issue based upon probable cause. (4 CT 764.) The warrant was issued at 2:28 a.m. on February 5, 2002. (4 CT 765.)

2. Warrant No. 27802

Detective Alldredge prepared a second affidavit in support of a search warrant later on February 5, 2002, the same day the first warrant was issued and executed. (4 CT 772-779.) The search envisioned by the second warrant was one pertaining to a particular computer and its files that had been discovered in the first search, as well as computer disks and other forms of media "depicting nudity and/or sexual activities, whether real or simulated, involving juveniles, juveniles with juveniles, and juveniles with adults." (4 CT 772.)

Detective Alldredge declared during the course of the first search of Westerfield's home computer forensic examiners saw "in plain view" three CD disks and three computer diskettes. The items were marked by the letters "X" and "XO," which based on the examiners' prior investigations, indicated they may contain pornographic material. Based on the form Westerfield had signed providing consent to search his entire residence and all of its contents, the examiners inserted the disks and diskettes into their

[11] Redden showed his findings to another polygraph examiner, Tim Hall, who concurred that Westerfield had been deceptive in all responses. (4 CT 758-759.)

own computers, which they had brought to the scene. (4 CT 774.) They discovered "possible child pornography with minors engaged in sexual activity with each other and adults." (4 CT 774.) Based on the items discovered, the examiners had reason to believe that Westerfield's computer might have child pornography stored on it as well. (4 CT 775.)

Upon a finding of substantial probable cause, this second search warrant was issued on February 5, 2002, at 1:35 p.m. (4 CT 770-771, 779.)

3. Warrant No. 27809

On February 6, 2002, Detective Johanna Thrasher applied for a third search warrant requesting Westerfield's cell phone records, including the location from which calls were made and received between February 1 and February 4, 2002. (4 CT 788.) In her affidavit, Detective Thrasher explained that Westerfield had provided his cell phone number to detectives during his interviews on February 4, 2002. (4 CT 789.) Westerfield stated that he used his cell phone at various times throughout the weekend to contact his son and ex-wife about his plans and activities. (4 CT 789.) Detective Thrasher relied on the facts demonstrating probable cause for the first and second search warrants, as well as the results of the search in which forensic examiners found child pornography in Westerfield's home. (4 CT 789-799.) Judge Bashant issued the warrant during the afternoon of February 6, 2002. (4 CT 784-785, 793.)

4. Warrant No. 27813

On February 7, 2002, Detective Terry Torgersen requested a fourth search warrant to search for any clothing and bedding Westerfield had taken to Twin Peaks Cleaners. (4 CT 804.) Detective Torgersen presented the same factual basis for probable cause as was presented in the prior search warrant affidavits. (4 CT 805-806, 812-813.) He further noted that during a search of one of Westerfield's vehicles, a detective located dry cleaner receipts. (4 CT 806, 814.) Westerfield told detectives that he had

taken items to Twin Peaks Cleaners on the morning of February 4, 2002, and described the items as "bedding." (4 CT 806-807.) An employee at Twin Peaks Cleaners told Detective Torgersen that Westerfield had, in fact, come to the business on February 4, 2002. (4 CT 807.) He had been a customer there for six to eight years. That particular day, he came to the business much earlier than he normally would have and asked for "same day service," which he had never done before. (4 CT 807-808.) Westerfield was dressed in short pants, a shirt, and no shoes. The employee commented to Westerfield about his unusual dress because it was quite cold that morning. Westerfield replied he had just returned from the desert. (4 CT 808.) Judge Bashant issued this warrant on the afternoon of February 7, 2002. (4 CT 811, 801-803.)

5. Warrant No. 27830

On February 13, 2002, Detective James Hergenroeather requested a fifth and final warrant for a more extensive search of Westerfield's home. (4 CT 821-822.) The detective incorporated the affidavits from the previous search warrants in his request, as well as the results of the search revealing the child pornography in Westerfield's home. (4 CT 822, 826-827, 832-834.) Judge Bashant issued this search warrant on the evening of February 13, 2002. (4 CT 818-819, 831.)

B. As The Magistrate Issued The First Warrant Based Upon Probable Cause, That Search Warrant, And The Subsequent Four, Were Valid

The parties agree that the first search warrant, and the probable cause in support of it, was the touchstone upon which the subsequent four warrants depended. (AOB at 72.) Westerfield contends that Judge Bashant improperly relied on his failure of the polygraph examination in issuing the first search warrant, as he claims that such evidence is inadmissible for any purpose. (AOB 73-89.) He further claims that without the evidence of his deception, the remaining information provided to Judge Bashant in support

of the first warrant amounted to no more than coincidental circumstances and suspicious behavior falling short of probable cause. (AOB 89-94.) And, he asserts that if insufficient probable cause supported the first warrant, then that warrant along with the other four that depended upon it should have been suppressed by the trial court. (AOB 95.) Contrary to Westerfield's assertion, the magistrate properly relied upon his failing the polygraph examination as one of many factors demonstrating probable cause to issue the search warrant. Even excluding the polygraph results however, there was ample probable cause to believe Westerfield was involved in Danielle's abduction and that a search of the various locations and items listed would reveal evidence pertinent to the investigation. Accordingly, the trial court properly denied the motion to suppress.

First, it was entirely appropriate for Judge Bashant to consider Westerfield's having failed a polygraph examination in issuing the first search warrant. It is true that the results of a polygraph examination are inadmissible at a criminal trial. Evidence Code section 351.1, subdivision (a) provides (emphasis added):

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence *in any criminal proceeding*, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

By its terms, Evidence Code section 351.1 applies to criminal *proceedings*, not events that proceed criminal proceedings such as an investigation. In this case, at the time Judge Bashant considered Detective Alldredge's affidavit and testimony in support of the telephonic search warrant in the early morning hours of February 5, 2002, there were no criminal proceedings pending against Westerfield. He faced no criminal charges, he

had not been arrested. The criminal complaint was not filed until February 26, 2002. (1 CT 1-3.) Thus, no criminal proceedings had been instituted and Evidence Code section 351.1 did not operate to preclude the magistrate's consideration of the polygraph results. (See *People v. Superior Court (Laff)* 25 Cal.4th 703, 716 [search warrant often issued before any criminal proceeding commenced]; see also *People v. DePriest* (2007) 42 Cal.4th 1, 33 [right to counsel does not exist "until the state initiates adversary judicial criminal proceedings, such as by formal charge or indictment"].)

Second, the rationale for excluding the results of polygraph examinations from trial does not apply in the context of a magistrate determining whether there is probable cause to believe that evidence of a crime will be found in a particular place. This Court has addressed this notion in *People v. Lara* (1974) 12 Cal.3d 903, 909, where the defendant complained that the arresting officer had improperly relied upon polygraph examination results to establish probable cause for his arrest. This Court disagreed, reasoning, "But whatever may be the rule on the admissibility of the *results* of the polygraph test as evidence of *guilt* — a question we do not reconsider today — we are cited to no authority holding such collateral use of the test for investigative purposes to be improper." (*Ibid.*, original emphasis.) While Westerfield characterizes this Court's statement as dictum "so casual that it is obviously not intended to provide future guidance or authority" (AOB 77), it is difficult to surmise why this Court would have included such a statement in the opinion without intending it to provide guidance. Moreover, this Court's reasoning is sound in that there is no reason to preclude law enforcement officers from using polygraph examinations as an investigative tool in determining who might be a suspect in a crime and, for that matter, who might not. Just as this is one tool among many that law enforcement officers may use, so is it one

consideration among many that a magistrate may use in determining whether probable cause merits the issuance of a search warrant.

Courts have widely accepted the premise that polygraph results are unreliable for evidentiary purposes. Courts across the country also have accepted, however, that establishing evidence of deception at trial through polygraph results is quite a different matter than establishing probable cause for a search warrant or an arrest. For instance, in the Fifth Circuit, the Federal Court of Appeals has specifically recognized that in federal criminal cases, polygraph results are inadmissible at trial because they have not been accepted as a scientifically reliable method of determining deception. (*Bennett v. Grand Prairie* (5th Cir. 1989) 883 F.2d 400, 405 (*Bennett*).) While the court in *Bennett* summarized the risks inherent in admitting polygraph-test-result evidence at trial, the court also summarized the lack of risk in presenting this evidence to a magistrate as evidence of probable cause in support of a warrant:

> The fear that a jury may overestimate the probative value of such evidence when considering an individual's guilt or innocence — the factor that led some courts to limit the use of polygraph exams as evidence at trial — is absent when a magistrate relies on such an exam to determine whether there is probable cause to issue an arrest warrant. Unlike a lay jury, a magistrate possesses legal expertise; when determining probable cause, he is unlikely to be intimidated by claims of scientific authority into assigning an inappropriate evidentiary value to a polygraph report or to rely excessively on it.
>
> A magistrate, moreover, may determine probable cause from evidence inadmissible at trial to determine guilt. The preliminary nature of the probable-cause determination, as well as the magistrate's expertise in evaluating the evidence to reach that decision, permits the issuance of an arrest warrant on much less evidence than is required to convict an individual. Thus, probable cause may be founded upon hearsay or upon information received from informants — evidence circumscribed at trial — if the information put forth is believed or appropriately accepted by the affiant as true.

(*Ibid*, internal quotation marks and footnotes omitted.) Other state and federal circuit courts have adopted this viewpoint. (See, e.g., *Gomez v. Atkins* (4th Cir. 2002) 296 F.3d 253, 264 & fn. 7 [reasonable officer may consider polygraph results in determining probable cause]; *Craig v. Singletary* (11th Cir. 1997) 127 F.3d 1030, 1046 ["Indications of deception on a polygraph examination may be taken into account in determining whether probable cause exists."]; *State v. Henry* (Kan. 1997) 263 Kan. 118, 128 [use of polygraph test results does not invalidate search warrant where totality of circumstances demonstrates probable cause]; *Oregon v. Coffey* (Ore. 1990) 309 Ore.342, 346-348 [judge considering application for a search warrant may consider opinion of polygraph examiner to establish reliability of information from unnamed informant]; *State v. Cherry* (Wash. 1991) 61 Wn. App. 301, 304-405 [concerns over admitting polygraph evidence at trial not present in search warrant proceeding]; cf. *Cervantes v. Jones* (7th Cir. 1999) 188 F.3d 805, 813, fn.9 [recognizing Illinois has created absolute bar against use of polygraph evidence for all purposes including determination of probable cause].)

Moreover, even if the magistrate improperly relied upon Westerfield's failure of the polygraph examination, there was more than sufficient probable cause established by virtue of the information in Detective Alldredge's testimony before Judge Bashant independent of the polygraph information. Although reviewing courts should resolve even doubtful or marginal cases in favor of the law's preference for warrants (*People v. Weiss* (1999) 20 Cal.4th 1073, 1082-1083), Westerfield's was not a doubtful or marginal case. What Westerfield describes as a series of "coincidences" in the days surrounding Danielle's disappearance (AOB 90-92) provided more than a fair probability that evidence related to her abduction would be found in Westerfield's home and vehicles.

While Westerfield suggests that a lengthy series of coincidences provided only suspicion as to his involvement in Danielle's disappearance, he fails to consider that the totality of those circumstances amount to a great deal more than coincidence. The existence of probable cause for issuing a search warrant is measured by a "totality-of-the-circumstances approach." (*Illinois v. Gates, supra,* 462 U.S. at p. 230.) "[P]robable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules." (*Id.* at p. 232.) "Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' [Citations.]" (*Id.* at p. 235.)

Here, independent of Redden's opinion as to Westerfield's deceitfulness on the polygraph examination, Judge Bashant possessed substantial information that the two people missing from the immediate area surrounding the Van Dam home on the weekend in question were Danielle and Westerfield. (4 CT 775, 752.) Westerfield lived in close proximity to Danielle — just two doors down. (4 CT 760.) The dog, trained to search for Danielle's scent, was interested in Westerfield's garage door, though the dog did not give a trained "alert." Westerfield was quick to point out that Danielle had been in and around his home recently (4 CT 750-751), selling Girl Scout cookies, which would conveniently explain any scent the dog tracked. (4 CT 752-753.) However, Brenda Van Dam told law enforcement officers that Danielle never entered Westerfield's garage that day. (4 CT 753.) Additionally, Judge Bashant had information regarding Westerfield's overly cooperative behavior — opening doors and

pointing out locations that the detectives had failed to search. (4 CT 753.) A reasonable person could interpret such cooperation as an effort to prove to the police that he had nothing to hide, knowing that he very well did.

Additionally, there was the encounter at Dad's. In Westerfield's version of the event, Brenda Van Dam discussed with him the upcoming father/daughter dance and her husband's concern over Danielle's growing up too quickly. (4 CT 755.) Westerfield also volunteered that Brenda had told him a babysitter, and not her husband, was watching the children. (4 CT 756.) Brenda told the detectives that no such conversation ever took place. (4 CT 751-752.)

Even assuming that these facts viewed together only made Westerfield's behavior seem suspicious, then his description of the events of the weekend to detectives clearly elevated that suspicion to probable cause. Westerfield's travels between February 2, 2002, and February 4, 2002, were hardly a "vacation." (AOB 90.) Driving from his home, to where his motor home was stored, back to his home, to the Silver Strand in Coronado, to Glamis near the Arizona border, to Borrego Springs, back to the Silver Strand, and then back to his home in the span of two days could not reasonably be construed as a planned, innocent vacation in light of the simultaneous happenings in Westerfield's Sabre Springs neighborhood. (4 CT 752, 756-758.) There was Westerfield's odd behavior at the Silver Stand, where the ranger knocked on his motor home door, which had all of the curtains closed, and Westerfield emerged only after several minutes, and once Westerfield stepped outside, he immediately closed the door behind him. (4 CT 756-757.) And, there was Westerfield telling Redden that "we drove back to Silver Strand," when he claimed to have made the trip alone and then explaining that inconsistency as a "slip." (4 CT 758.)

The foregoing demonstrates that the affidavit before Judge Bashant provided ample probable cause to support the belief that Westerfield was

involved in Danielle's abduction and that evidence of the crime would be in his home and vehicles. The affidavit sets forth strong evidence showing Westerfield's proximity to the Van Dam home, his belief that Danielle's parents were out of the home and that she was being watched by a babysitter, his evasive and bizarre behavior spanning many miles for a claimed "weekend getaway," his overly cooperative behavior, and his "slip" in which he revealed he was not alone. One did not need the results of a polygraph examination to doubt the credibility of Westerfield's self-serving explanation for where he had been the weekend Danielle disappeared. Thus, even without his complete failure of the polygraph examination, the totality of the circumstances supported Judge Bashant's probable cause finding and issuance of the search warrant.

C. The Detectives Executing The Warrant Relied Upon Its Validity In Good Faith

Even if this Court deemed the first search warrant invalid as unsupported by probable cause, the law enforcement officers executing the warrant operated under good faith reliance on its validity. Thus, the trial court's denial of the motion to suppress was proper under this alternate ground.

Where law enforcement officers obtain evidence by reasonably relying on a search warrant issued by a detached and neutral magistrate, such evidence will not be excluded under the Fourth Amendment even if a reviewing court finds the warrant lacked probable cause. (*United States v. Leon* (1984) 468 U.S. 897, 900 [104 S.Ct. 3405, 82 L.Ed.2d 677]; *People v. Willis* (2002) 28 Cal.4th 22, 30.) To the contrary, suppression remains the appropriate remedy where an affidavit in support of a search warrant is " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " (*United States v. Leon, supra,* 468 U.S. at p. 923, quoting *Brown v. Illinois*, 422 U.S. 590, 610-611 [95 S. Ct. 2254;

45 L. Ed. 2d 416] (Powell, J., concurring in part; *People v. Willis, supra,* 28 Cal.4th at p. 32.) The question is whether "a well-trained officer should reasonably have *known* that the affidavit failed to establish probable cause (and hence that the officer should not have sought a warrant)." (*People v. Camarella,* (1991) 54 Cal.3d 592, 596, original emphasis.) Certainly, an officer seeking a search warrant must exercise reasonable professional judgment and must be reasonably aware of what the law prohibits. (*Id.* at p. 604; *United States v. Leon, supra,* 468 U.S. at p. 920, fn. 20.) " 'The government bears the burden of establishing 'objectively reasonable' reliance [citation] . . . ." (*People v. Willis, supra,* 28 Cal.4th at p. 32, quoting *People v. Camarella, supra,* 54 Cal.3d at p. 596.)

In support of his contention that the good-faith exception is inapplicable here, Westerfield relies on isolated comments by law enforcement officers in the initial stages of investigation into Westerfield's participation in Danielle Van Dam's abduction and argues that they equate to an "official position of law enforcement itself that there was a lack of probable cause as of the early morning hours of February 5, 2002 to arrest, and therefore (by necessary implication) to search." (AOB 101-102.) Contrary to Westerfield's assertion, the record supports no such "official position" on behalf of law enforcement, and he misconstrues the type of evidence necessary to procure a search warrant as opposed to arrest an individual. Even if this Court were to find that the affidavit lacked sufficient indicia of probable cause to support issuance of the first search warrant for Westerfield's home and vehicles, it cannot be said that "the affidavit was so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable." (*Leon, supra,* 468 U.S. at p. 923.)

As a preliminary matter, it should be noted that Westerfield does not contend that Detective Alldredge provided information he knew or should have known was false and thereby misled the Judge Bashant into issuing

the first search warrant. As Westerfield acknowledges, this issue was litigated in the trial court in a motion to traverse the warrant. (AOB 96, fn. 63.) At the conclusion of the presentation of evidence on the motion, Judge Mudd explicitly found, "The Court has no trouble whatsoever with the credibility of [] Detective Alldredge and the efforts he made in this case." (5E RT 1850.) The trial court concluded that no false statements or statements with reckless disregard for the truth had been made in seeking the warrant. (5E RT 1850.) Thus, the only basis for the good faith exception *not* applying in this case is whether the affidavit was so lacking in probable cause that the officers executing the warrant could not rely in good faith on its issuance. (*Leon, supra,* 468 U.S. at p. 923.)

In arguing that the affidavit was completely deficient in its showing of probable cause such that reliance on the warrant was objectively unreasonable, Westerfield again raises the argument that the polygraph evidence was inadmissible even for a probable cause determination, and that the law enforcement officers knew it was inadmissible. (AOB 96-102.) He argues that without the polygraph failure, the remaining information in the affidavit was insufficient for a showing of probable cause and thus, the officers could not have relied on the warrant in good faith. First, as discussed above, even without Westerfield's failure on the polygraph examination, the remaining information in the affidavit supplied more than probable cause for issuance of the search warrant. Second, as discussed above, the magistrate issuing the search warrant could properly rely on the polygraph failure in support of probable cause, and therefore, the officers executing the warrant could do so as well. Finally, there is no evidence to support Westerfield's claim that law enforcement officers knew, based on some official policy, that the polygraph evidence could not be considered as one indicia of probable cause in support of the warrant.

Westerfield points to the testimony of Paul Redden who administered the polygraph examination. (AOB 98-99.) Redden testified on cross-examination that polygraph examinations are used by the San Diego Police Department an investigative tool. This question and answer followed:

> Q. And one of the things you're trying to develop or may develop as a result of the administration of the polygraph could be probable cause, isn't that right?
>
> A. Generally probable cause, the polygraph is generally not used as probable cause.

(5A RT 1181.) From this answer, Westerfield jumps to the conclusion that this "seems to establish the existence of a policy of practice *not* to use polygraph evidence to establish probable cause." (AOB 99.) It is unclear from where Westerfield draws this conclusion. First, the fact that Redden qualified his response with "generally," is an acknowledgement that sometimes polygraph evidence is used to establish probable cause. Second, the question and answer appear to speak to whether polygraph evidence *alone* without any other evidence of wrongdoing would be used to establish probable cause, to which Redden appropriately answered it would not. The broad sweeping rule that Westerfield claims was San Diego Police Department policy regarding polygraph evidence simply was not established by Redden's testimony.

Equally unavailing is Westerfield's contention that Detective Jody Thrasher somehow vitiated any good faith reliance on the first search when she told him he could not be arrested based upon polygraph evidence alone. (AOB 99-100.) After Westerfield failed the test, Detective Thrasher had been sent into the interview room to watch Redden's equipment. (5A RT 1104.) While she made conversation with Westerfield, she did not interrogate him as Westerfield suggests. (AOB 101.) In fact, Judge Mudd

specifically determined that she was not part of the interviewing team; she had only been sent into the room to "babysit." (5E RT 1886.) Nonetheless, while she was in the room Westerfield expressed concern that he had failed. (48 CT 11136, 11138, 11139, 11142.) Ultimately, the following colloquy occurred:

> WESTERFIELD: So I'm asking what you're, what the thought process is. Can they arrest me on that kind of information? And if they can, then I need ah ...
>
> DETECTIVE THRASHER: On the basis ... a basis you failed the test alone?
>
> WESTERFIELD: Yeah.
>
> DETECTIVE THRASHER: No.

(48 CT 11144.) Again, Detective Thrasher's response to Westerfield conveyed only accurate information that he could not be arrested solely based upon his polygraph failure, and in no way implicates some grander police department policy that polygraph failures could not be relevant to a probable cause determination.

The same can be said for Westerfield's interaction with Detective Kramer in which she told him that the police do not heavily rely on polygraph examinations as "[i]t's not something that can be used in court." (48 CT 11155.) In no way from this detective's representation to a potential suspect can one infer that the law enforcement officers involved in Westerfield's case understood that polygraph evidence was unreliable and therefore could never support a finding of probable cause. (AOB 98-100.) If Westerfield were correct, then there would have been no benefit to conducting a polygraph examination in the first instance.

Finally, Westerfield makes much of Sergeant Holmes's testimony providing context surrounding the time that he directed Detectives Keyser and Ott to interview Westerfield at his home after he had been released

from the police station following his failure of the polygraph examination. (AOB 100-101.) Holmes testified that Westerfield was a potential suspect at that point:

> Well, the information we were given at the briefing, the trip to the desert seemed not to make a lot of sense. The Silver Strand trip where he went down there originally going to the desert, then the Silver Strand, then he left the Strand because it was cold, and drove back home to the desert, all that didn't seem to make a lot of sense. And then the fact that he failed the polygraph on being involved in Danielle Van Dam's disappearance.

(5D RT 1705.) The defense objected to the mention of the polygraph as being inadmissible in this pretrial proceeding, and the court overruled the objection finding the polygraph failure relevant to the motivation behind the investigating officers' conduct. (5D RT 1705-1706.) Then, when asked whether he directed Detectives Keyser and Ott to arrest Westerfield, Sergeant Holmes, responded, "No, sir. We didn't have enough to arrest him." (5D RT 1706.) From this statement, Westerfield suggests that if investigating officers knew there was insufficient probable cause to arrest, then necessarily there was also insufficient probable cause for the search warrant, and thus there could be no good faith reliance on the magistrate's issuance of the search warrant. (AOB 101-102.)

While the phrase "probable cause" has the same meaning whether it is being used in the search warrant or arrest context (*People v. Kraft, supra,* 23 Cal.4th at p. 1041), what law enforcement officers must have probable cause to believe is different in each context. "Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime." (*People v. Kraft, supra,* 23 Cal.4th at p. 1037.) Probable cause for a search warrant, however, exists where " 'there is a fair probability that contraband or evidence will be found in a particular

place.' " (*People v. Scott* (2011) 52 Cal.4th 452, 483, quoting *Illinois v. Gates, supra,* 462 U.S. at p. 238.) Stated another way, a reasonable search of a particular location does not require that the person occupying the location be suspected of committing a crime. Rather, a reasonable search requires probable cause to believe that the item sought will be found in that location.

Accordingly, Sergeant Holmes's statement that he did not order his detectives to arrest Westerfield because law enforcement did not believe they had gathered sufficient information to arrest him was not inconsistent with a belief on behalf of law enforcement of probable cause that a search of Westerfield's home and vehicle would result in evidence relevant to Danielle's disappearance. Thus, Sergeant Holmes's belief that there was insufficient probable cause to arrest Westerfield based on the information known in the early morning hours of February 5, 2002, in no way establishes that the detectives executing the search warrant were objectively unreasonable in relying on that warrant because Detective Alldredge had provided more than probable cause for its issuance. Based on the totality of the information presented to the magistrate, it cannot be said that the affidavit was so lacking in probable cause that the officers executing the warrant could not rely in good faith on its issuance. (See *Leon, supra,* 468 U.S. at p. 923.)

D. Even If The Search Warrant Was Invalid, The Search Of Westerfield's Home And Vehicles Was Justified By His Knowing And Voluntary Consent

Westerfield contends that he did not voluntarily consent to the search of his home or vehicles, arguing that the consent was obtained following continuous police "constraint" for the better part of a day. He suggests that the increasingly accusatory atmosphere caused him to sign the consent form unwillingly. (AOB 102-115.) Contrary to Westerfield's

contention, the trial court properly found that even if the warrant was defective, his consent to search was knowing, intelligent, and voluntary.

Certainly, the Fourth Amendment protects one's reasonable expectation of privacy against unreasonable government searches and seizures. (*Florida v. Jimeno* (1991) 500 U.S. 248, 250-251 [111 S.Ct. 1801, 1803-1804, 114 L.Ed.2d 297]; *People v. Jenkins* (2000) 22 Cal.4th 900, 971-972.) The Fourth Amendment proscribes only unreasonable searches, however, and warrantless searches may be reasonable where the defendant consents to the search. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219 [93 S.Ct. 2041, 36 L.Ed.2d 854]; *People v. Memro* (1995) 11 Cal.4th 786, 846-947.) "Where, as here, the prosecution relies on consent to justify a warrantless search or seizure [or search pursuant to an invalid warrant], it bears the burden of proving that the defendant's manifestation of consent was the product of his free will and not a mere submission to an express or implied assertion of authority." (*People v. Zamudio* (2008) 43 Cal.4th 327, 341, internal quotation marks and citations omitted.) "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." (*Schneckloth v. Bustamonte, supra,* 412 U.S. at p. 227.) Whether a defendant's consent is voluntary is left to the trial court's determination in the first instance: "The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court." (*People v. James* (1977) 19 Cal.3d 99, 107.) "On appeal all presumptions favor proper exercise of that power, and the trial court's findings — whether express or implied — must be upheld if supported by substantial evidence." (*Ibid.*, internal quotation marks and citations omitted.)

Westerfield alleges that the almost continual contact between himself and police from the time he returned home on the morning of

February 4, 2002, until the time he signed the consent-to-search form with Detectives Ott and Keyser "took its toll" on him such that "his signing of the consent-to-search form at that point was little more than an expression of helpless acquiescence and submission to the apparent authority of an inevitable search warrant that he had been informed was on its way." (AOB 103.) It is true that law enforcement maintained nearly continual contact with Westerfield from their first encounter with him until the time he signed the consent-to-search form, but the record shows nothing other than an absolutely willing and voluntary agreement on his part to search his home and vehicles. During the course of the motions to suppress evidence, to quash and traverse the search warrant, and to suppress statements pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S. Ct. 1602; 16 L. Ed. 2d 694], the following facts were developed:

On the morning of February 4, 2002, various San Diego police officers, including Sergeant John Wray, were called to the police substation for a briefing regarding Danielle Van Dam's abduction; Westerfield was identified as a person with whom the police wished to speak. (5A RT 1023-1025.) Sergeant Wray went to Westerfield's home around 8:30 a.m., parked across the street, and watched his house for activity. (5A RT 1026-1028.) When Sergeant Wray saw Westerfield exit the home, he drove his car closer, indentified himself, and said he would like to speak with Westerfield. (5A RT 1029-1030.) Westerfield asked if the request had anything to do with the missing little girl, and Sergeant Wray responded that officers were speaking to all of the neighbors to find out if anyone had any information. (5A RT 1031.) Westerfield was cooperative and agreed to speak. (5A RT 1031.)

Meanwhile, when it was discovered that Westerfield was now home, Detectives Keene and Parga were assigned to go speak with him. (5A RT 1063, 1067.) They arrived at his home in separate cars. Sergeant Wray and

Detective Mark Tallman were already present, standing with Westerfield in the driveway, and Detectives Morris and Stetson were also present, either in the driveway or on the sidewalk. (5A RT 1068, 1070, 1125.) Detectives Keene and Parga conveyed to Westerfield that they were speaking with all of the neighbors, and asked him if they could talk to him about his whereabouts that weekend. Westerfield agreed and the three had a 30 to 40 minute conversation on Westerfield's porch. (5A RT 1070-1071.) They talked about his night out at Dad's and his encounter there with Brenda Van Dam the night before Danielle was discovered missing. (5A RT 1072.) He then proceeded to recount the details of his trip to Poway to pick up the motor home, back to his home in Sabre Springs, to the Silver Strand in Coronado, back to his home where he observed the police and media activity, out to Glamis, to Superstition Mountain, to Borrego Springs, back to the Silver Strand, back to Poway to return the motor home, and back to his house the morning of February 4, 2002. (5A RT 1079-1086.) Westerfield was not restrained in any way during this conversation, was laughing at times, and was volunteering information. (5A RT 1087.)

The detectives asked if they could look at his home and his vehicles; they explained that they had walked through other neighbors' homes to make sure Danielle was not inside. (5A RT 1071, 1087.) Detective Keene showed him and read to him a consent-to-search form and explained that Westerfield was under no obligation to sign it. Westerfield agreed, stating the detectives could look through anything he owned. He signed the form. (5A RT 1087-1088.) Detective Parga obtained a written consent to search Westerfield's vehicles. (5B RT 1457.) Westerfield then opened the door to his home, allowed Detectives Keene and Parga inside, asked if he could walk with them, to which they responded he could. (5A RT 1089.) The detectives opened items like cabinets that were large enough to contain a child. (5A RT 1089.) It was at this point that Westerfield became "overly

cooperative," opening doors the detectives had not, suggesting they look inside, and even providing Detective Keene a ladder so that he could look inside the attic. (5A RT 1089-1090.)

Following the search of his home, the detectives asked if they could see Westerfield's motor home, to which he responded "absolutely." (5A RT 1091.) The detectives road together and followed Westerfield who drove his own car on the 20 to 25 minute ride. (5A RT 1091-1092.) Westerfield's overly cooperative behavior continued; he began opening storage compartments at the bottom of the motor home without any prompting and pointed out one compartment that the detectives missed. (5A RT 1092-1093, 1095.) The detectives were at the motor home a total of 15 minutes and inside of it about 10 minutes. (5A RT 1094-1095.) Also present at the motor home were Sergeant Wray and Detectives Morris and Stetson. (5A RT 1139.) At the conclusion of the search, Detectives Keene and Parga got into their vehicle and Westerfield into his and all had intended to go their separate ways. (5A RT 1095.)

On their return trip from the motor home, however, Detectives Keene and Parga learned that the scent dogs had just become available to go through Westerfield's house as they had done with other neighbors. (5A RT 1096.) Accordingly, they drove back to Westerfield's house, informed him about the dogs, to which he indicated there was no problem with taking the dogs through the house, and opened the door for that purpose. (5A RT 1096.) The dog handlers had advised that everyone had to remain outside while the dogs did their work. (5B RT 1463.) Westerfield remained on the porch with Detective Parga for the 10 to 15 minute search of his home with the dogs. (5A RT 1097; 5B RT 1463.)

Detectives Keene and Parga left following the dog search, but returned to Westerfield's home around 2:30 p.m. and inquired whether he would be willing to go to the police substation to take a polygraph

examination, telling him "some parts of his story didn't make a whole lot of sense." (5A RT 1099-1101.) After expressing some distrust about the mechanics of a polygraph test, Westerfield agreed to go, but asked if he needed an attorney. (5A RT 1101-02.) Detective Keene responded that he could not give legal advice, but informed Westerfield he was certainly free to have an attorney present if he desired. (5A RT 1101-1102; 5C RT 1500.) Westerfield thought about it for 10 seconds, and said he did not need an attorney. He followed the detectives in his own vehicle to the police station. (5A RT 1102.) The detective allowed him to drive his own car because he was not under arrest, told him as much, told him he did not have to take the polygraph, and told him he was free to leave at any time especially since he had his own car. (5A RT 1102, 1161.)

At the police station, Westerfield was introduced around 3:20 p.m. to Paul Redden, the San Diego Police Department's interview and interrogation specialist who conducted the polygraph examination. (5A RT 1167.) Redden informed Westerfield that the test was entirely voluntary, and that he could stop it at any time. (5A RT 1170.) Westerfield read a consent form to himself and signed it indicating he would like to proceed; he expressed no hesitancy or reluctance in doing so. (5A RT 1171.) During the interview, Westerfield stated that he had not eaten that day, and had had little sleep. (46 CT 10835, 10844, 10846.) He mentioned having asked Detective Keene about having an attorney and Redden responded, that he could not advise him, but it was up to him whether he wanted an attorney present. Redden assured Westerfield that he was not a suspect, and that the case was still in the investigative stages. (46 CT 10840.) Westerfield denied being involved in Danielle's disappearance. (46 CT 10941, 10947-10948, 10952-10953.) At the conclusion of the test Redden informed Westerfield he had failed and that he believed Westerfield was involved in Danielle's disappearance with 99 to 100% certainty. (5A RT

1173; 46 CT 10966-10968.) Following this revelation, Westerfield asked Redden, "Well if I failed the test, I should get a lawyer don't you think?" Redden again stated he could not offer advice. (46 CT 10976.)

Then Redden left the room, and Detective Parga entered. (46 CT 10989; 48 CT 11125.) During their brief conversation, Westerfield mentioned wanting someone to tell him what his rights were, to which Detective Parga responded that this was simply part of an ongoing investigation. (48 CT 11127.) Westerfield offered to show her where he got stuck in Borrego. (48 CT 11132.) Around 7:00 p.m., Detective Johanna Thrasher entered the room and Detective Parga exited. Westerfield complained about how hot it was in the room. (48 CT 11136; 5C RT 1517, 1519-1520.) He asked if he could call his son, and Detective Thrasher stated he could in "a bit" when Detective Parga returned. (48 CT 11138.) He asked the detective whether he could leave, and Thrasher responded, "not right now" as she was just a "worker bee" taking her directions from the other detectives; her assignment was simply to keep an eye on Redden's polygraph equipment. (48 CT 11144; 5C RT 1520.) Westerfield asked Detective Thrasher whether she thought he needed a lawyer to which the detective responded he was not under arrest and she could not give legal advice. (48 CT 11142.)

Detectives Parga and Kramer came into the room, (48 CT 11149.) Westerfield offered to take the test again. (48 CT 11152.) He also asked to call his son again. (48 CT 11152.) The detectives brought a phone into the room and permitted Westerfield to call his son, but the call did not go through. (48 RT 11177.)

As the interviewing continued with various detectives present, Detective Parga told Westerfield that he would be going home that night. (48 CT 11246.) Westerfield continued to ask whether he should get an attorney. (48 CT 113119-11320.) She offered to let him try calling his son

again, but Westerfield declined, indicating he wanted to continue with the interview. (48 CT 11246; 5C RT 1504.) Later, Westerfield asked the detective once again if he could retake the test. (48 11246, 11331.) He stated that he wanted to help and would be glad to do so in any way he could. (48 CT 11331.) When Detective Parga told him he was free to leave, Westerfield asked whether there was anything more he could help with and whether she had any more questions he could answer. He offered to drive with her to the desert the following day. (48 CT 11332.) He offered to take her "to every little place [he] went." (48 CT 11333.) Detective Parga told him to go home, get some rest, and they could discuss it the following day. (48 CT 11332.) It was approximately 11:30 p.m. when Detective Parga escorted Westerfield from the police station to his car in the parking lot (5B RT 1470); he left in his own car (5C RT 1506-1507.)

Meanwhile, around midnight, Detective Richard Maler had been advised to go to Westerfield's home because Westerfield was just leaving the police station. (5B RT 1358-1359.) Detective Maler was not to allow Westerfield into his home because the search warrant was being prepared. (5B RT 1359.) Two other detectives were assigned the same task. (5B RT 1359-1360.) He saw Westerfield driving down the street, with two other vehicles following him. When Westerfield pulled into his driveway, Detective Maler stepped in front of the car, and put his hand up, directing him to stop. (5B RT 1362.) The detective advised Westerfield that he could not enter the home as a search warrant was being prepared. (5B RT 1362.) The detective told him he was free to remain outside or go any place else he liked. (5B RT 1363.) Westerfield asked if he could speak to his son who was inside the house. Detective Maler knocked on the door, and explained the situation to Westerfield's son who exited the house, spoke with his father, and then left. (5B RT 1364-1365.) Westerfield left as well, and returned about 45 minutes later, parking his car in front of his

house. (5B RT 1366.) It appeared he went to sleep in his car. (5B RT 1367.)

Around 2:00 a.m., Detectives Keyser and Ott arrived. Detective Maler tapped on the car window, Westerfield got out of the car, and Detective Maler introduced Westerfield to Detectives Keyser and Ott. (5A RT 1198; 5B RT 1367-1368; 5C RT 1552, 1570.) Detective Maler walked away, and Detective Keyser told Westerfield he and Detective Ott wished to speak with him in reference to Danielle's disappearance. Westerfield agreed. Detective Keyser suggested they sit in Westerfield's 4-Runner as it was cold. Westerfield again agreed. He sat in the driver's seat, Detective Ott in the front passenger's seat, and Detective Keyser in the back seat on the passenger's side. (5A RT 1199; 5C RT 1562.) Westerfield was cooperative and friendly and said that he understood the detectives were just doing their jobs in trying to find Danielle. (5A RT 1201.) They began discussing Westerfield's weekend trip and the detectives asked whether he could prove where he had been. Detective Ott calmly told Westerfield he believed he was involved in Danielle's disappearance.[12] Westerfield said that in his house he had gas receipts as well as a piece of paper with the individual's name who had towed him out of the sand on Sunday. (5A RT 1202.) Detective Ott stated that they would need to see the documents and presented Westerfield with a consent-to-search form. Westerfield noted his familiarity with the form, which he signed once again without hesitation, although he did express concern as to why his home had to be searched again in light of the earlier dog search; he found it surprising the dogs did

[12] While Westerfield notes that Detective Ott conceded that he became aggressive at times and used profanity (AOB 113), it is clear from Detective Ott's testimony that the more aggressive behavior occurred during the subsequent trip through the desert after Westerfield signed the consent form, and not while sitting in Westerfield's vehicle. (5C RT 1564.)

not find anything as Danielle had been in his house recently. (5A RT 1202-1203, 1206.) But throughout his contact with Detectives Keyser and Ott, Westerfield maintained that he wished to do all he could to help the police. (5A RT 1206.) He opened the front door for the detectives, gave them the documents they requested, and offered them something to drink. (5A RT 1204.) While seated at Westerfield's dining room table, Detective Jim Tomosovic knocked on the door and presented a search warrant. (5A RT 1207.) Detective Ott gave Westerfield the warrant, and after reading it, Westerfield stated he would like to remain in the house while the search was being conducted. (5A RT 1207-1208.) Then Detective Keyser told Westerfield that he wanted to get to the "bottom of this," accused him of taking Danielle, and stated his desire to know where she was so that she could be returned to her family. (5A RT 1209.) Eventually, after being permitted to change his shirt and being told he could not stay in the house, Westerfield agreed to accompany Detectives Keyser and Ott to show them the route he had taken that weekend. (5A RT 1211-1212.)

At the conclusion of the parties' presentation of evidence and arguments, in ruling on Westerfield's Fifth Amendment motion to suppress his statements, the trial court found all of his statements to be admissible up until the point that Detectives Keyser and Ott became involved in the investigation, i.e. around 2:00 a.m. on February 5th. (5C RT 1570; 5E RT 1883-1887.) Judge Mudd's ruling was based on the premise that when the two detectives appeared at his residence, all of the officers were aware that a search warrant was being issued, that Westerfield could not enter his house, he was not truly free to leave, and no reasonable person faced with such circumstances would have felt free to leave. Judge Mudd ruled that the detectives should have admonished Westerfield of his constitutional right to remain silent at that point in time, and that therefore, all of

Westerfield's subsequent statements to Detectives Keyser and Ott were involuntary. (5E RT 1888-1891.)

As to Westerfield's Fourth Amendment motion to suppress the evidence uncovered in the various searches, however, Judge Mudd explicitly rejected Westerfield's argument that he involuntarily provided consent to Detectives Ott and Keyser, noting the following:

> Having said [sufficient probable cause supported issuance of the warrant], even assuming, for purposes of argument, that the warrant is defective in some way, the court finds that there was a meaning[ful] and a knowing and intelligent waiver signed by the defendant. And the reason this might — this might look like well, it's pretty inconsistent with the court's ruling on the statements [obtained during Detective Ott and Detective Keyser's participation], I don't see it that way at all.
>
> At the time Officers Keyser and Ott arrived and meet Mr. Westerfield, he's already been stopped in his driveway. He's already been told in no uncertain terms you can't go in your house because we're getting a warrant. He knows a warrant's on the way. He doesn't have to say hey, why do I have to sign a consent. You guys are getting a warrant.
>
> At this point in time that appears to have been generated by a desire to go inside the house to accomplish a couple things; namely, as I recall, brush the teeth, change his shirt, something. And when you look at that in the total global perspective of these two officers and how much time they spent, I don't have any trouble finding that he voluntarily signed that consent form.

(5E RT 1921-1922.)

The record supports the trial court's denial of the motion to suppress the evidence pursuant to Penal Code section 1538.5 based on Westerfield's voluntary consent to search. It is undisputed that from the time he returned home on the morning of February 4, 2002, Westerfield was under nearly constant police surveillance. But the testimony elicited at the hearing on

the motion to suppress evidence and statements and to traverse the search warrants, shows nothing other than Westerfield's complete cooperation with no coercive behavior on the part of the police. He voluntarily let Detectives Keene and Parga into his home and motor home, opening doors and compartments that they otherwise would not have. Westerfield drove himself to the police station for the polygraph examination, and while he remained for a number of hours, he drove himself home. In fact, Detective Parga had to persuade him to go home; Westerfield wished to stay, answer more questions, and retake the polygraph test. At no time was Westerfield placed in handcuffs or restrained in any way. He was repeatedly told he was not under arrest. He never demanded a lawyer, but rather asked whether officers thought he needed one. When Westerfield returned home, but was told he could not enter, his movement was not otherwise restricted. Indeed, he left and returned home 45 minutes later.

When introduced to Detectives Keyser and Ott, Westerfield maintained the same cooperative attitude. That Deputy Ott conveyed his belief that Westerfield was involved in Danielle's disappearance did not transform the atmosphere into a coercive one. Westerfield wanted the detectives to enter his home so that he could show them the receipts establishing where he had been that weekend. He wanted to go inside to change his shirt. This is what motivated him to sign the consent form, and not any undue influence from the detectives. As Judge Mudd observed, Westerfield had been told, truthfully, that a search warrant would be arriving momentarily. Thus he had no reason to sign the consent form if he did not wish to do so. And the fact that he was asked to sign the consent-to-search form "carrie[d] with it the implication that the person can withhold permission for such an entry or search." (*People v. James* (1977) 19 Cal.3d 99, 116.) In any event, Westerfield's motivation from the outset of the investigation appeared to be to show the officers that he was beyond

cooperative, and that he too wanted to find Danielle and wanted to help them in any way he could in an effort to show that he could not possibly be involved. Of course,

> [T]here may be a number of "rational reasons" for a suspect to consent to a search even though he knows the premises contain evidence that can be used against him: for example, he may wish to appear cooperative in order to throw the police off the scent or at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile. Whether these or any other reasons motivated defendant in the case at bar was at most a matter for the trial court to consider in weighing this factor with all the others bearing on the issue of voluntariness.

(*People v. James, supra,* 19 Cal. 3d at p. 114.) Signing the consent to search form with this motivation was entirely knowing and voluntarily, and thus the search was proper as a consensual one as well.

Accordingly, the trial court properly determined that not only were the search warrants valid as they were supported by ample probable cause, but in the alternative, the searches were justified by law enforcement officers' good-faith reliance on the warrants as well as Westerfield's consent.

II. THE TRIAL COURT PROPERLY DENIED WESTERFIELD'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES

Westerfield contends that the trial court erroneously denied him additional peremptory challenges thus resulting in a violation of his right to due process. He claims that the extensive pretrial publicity surrounding his case rendered additional peremptory challenges necessary to ensure a fair

and impartial jury, and that without such additional challenges it was reasonably likely he received an unfair trial. (AOB 117-157.) First, as Westerfield never requested additional peremptory challenges based on the reasoning offered in the instant appeal — pervasive pretrial publicity — he has forfeited the issue. Second, the trial court properly denied Westerfield's request for additional peremptory challenges as he failed to show that the pretrial publicity would prevent a fair trial. Moreover, the trial court imposed pervasive precautions to minimize the effects of the publicity, including voir dire on the topic, imposing gag orders, sealing pretrial hearings, and denying media requests. Even if the extensive measures undertaken by the trial court could be deemed insufficient to guard against the effect of pretrial publicity, Westerfield fails to demonstrate prejudice from the denial of additional peremptory challenges as he fails to establish how such challenges would have rendered his trial any more fair.

"Peremptory challenges are intended to promote a fair and impartial jury, but they are not a right of direct constitutional magnitude." (*People v. Webster* (1991) 54 Cal.3d 411, 438, citing *Ross v. Oklahoma* (1988) 487 U.S. 81, 88-89 [108 S.Ct. 2273, 101 L.Ed.2d 80, 90].) In order to establish a constitutional entitlement to additional peremptory challenges, Westerfield was required to show at least that he was likely to receive an unfair trial before a biased jury without the challenges. (*People v. DePriest* (2007) 42 Cal.4th 1, 23.)

A. Facts Pertaining To The Jury Selection Process

In anticipation of some of jury selection issues raised by Westerfield in this appeal, the trial court questioned the manager of jury services for the San Diego Superior Court at the conclusion of the guilt phase presentation of evidence. (40 RT 9254-55.) The questioning revealed that 5,625 jury summonses were issued for the particular day scheduled for jury selection

to commence in this matter. That number was chosen in an effort to ensure that 350 prospective jurors would appear. (40 RT 9254.) That morning, 611 prospective jurors came to court (40 RT 9255); 1269 failed to appear and the remaining number either submitted lawful reasons to be excused or served on a different date (40 RT 9256). As no other trials were scheduled for that day, all of the prospective jurors that arrived to the courthouse were time-qualified for Westerfield's trial. (40 RT 9354-9255.) Of the 661, 140 people indicated that they could not serve on a lengthy trial. Thus, 471 prospective jurors were left. When the trial court conducted its hardship screening, an additional 207 were excused. Accordingly, 263 potential jurors filled out the questionnaire. (40 RT 9255.)

Prior to jury selection, the defense requested additional peremptory challenges proportional to the number of prospective jurors it estimated had failed to appear in response to the jury summonses. The trial court denied the request. (5 RT 2144.) During jury selection, after having exhausted their 20 peremptory challenges, the defense raised the motion for additional peremptory challenges again due to the court's denial of challenges for cause raised by the defense, particularly the challenge to Prospective Juror No. 19. The trial court again denied the motion and the jury was sworn. (8 RT 2950-2951.) The following day, the defense clarified that what it meant the previous day was that it was dissatisfied with the composition of the jury —specifically Juror Nos. 2, 4, 6, 11, and 12 — and that this was the reason for requesting the additional peremptory challenges. The trial court observed that the request now was belated in that the panel had already been sworn, but even had the request been made in a timely manner, the court would have denied it in any event. (9 RT 3106.)

B. As Westerfield Never Requested Additional Peremptory Challenges Based On The Pretrial Publicity Surrounding His Case, He Has Forfeited The Issue

As Westerfield concedes "peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution." (AOB 119-120, citing *Rivera v. Illinois* (2009) 556 U.S. 148, 158 [129 S.Ct. 1446, 173 L. Ed. 2d 320].) As stated above, because he has no right to peremptory challenges in the first instance, in order to establish a constitutional entitlement to additional peremptory challenges, Westerfield was required to show at a minimum that he was likely to receive an unfair trial before a biased jury without the challenges. (*People v. DePriest, supra,* 42 Cal.4th 1, 23.)

Westerfield makes much of the "without more" language, and suggests the extensive pretrial publicity in his case, provided the "something more" that is necessary to make the denial of additional peremptory challenges a federal constitutional violation. (AOB 119-120.) The problem with this argument is that Westerfield never provided this "something more" to the trial court such as to provide the court with an opportunity to rule on this particular reason for his request for additional peremptory challenges.

The first defense request for additional peremptory challenges came prior to jury selection, and was based upon the number of prospective jurors who failed to appear in response to their summonses, thus lessening the size of the potential venire. (5 RT 2144.) The second defense request came following the jury being sworn when the defense had exhausted its peremptory challenges, and was "because of the challenges for cause that the court had denied." (8 RT 2950-51.) At the time the defense only referenced the challenge to Prospective Juror No. 19 (8 RT 2951), but the

following day the defense extended its dissatisfaction to then-sworn Jurors 2, 4, 6, 11, and 12. (9 RT 3106.)

Thus, the defense never requested additional peremptory challenges to combat the effect of pretrial publicity on the venire as whole, but rather sought them to correct what it perceived to be erroneous denials of challenges for cause as to Prospective Juror No. 19 and Juror No. 2 for cause based on the particular prospective juror's ability to be fair and impartial, and general dissatisfaction with other jurors for whom no challenge for cause was raised. Additionally, the responses of none of these jurors indicated that they had been influenced by pretrial publicity such that the trial court would have been aware that was, even in part, the basis for the request for additional challenges. (18 CT 4385-4386, 4392 [Prospective Juror 19 questioned her ability to be fair in murder case with child victim, but could set aside the information she had learned about Westerfield and the Van Dams from the news and decide the case based upon evidence presented in court]; 15 CT 3637, 3639 [Juror No. 2[13] did not know much about the case from the news, but indicated strong support for the death penalty]; 15 CT 3781-3782; 8 RT 2855 [Juror No. 6 knew basic facts of case, but indicated could decide case based upon evidence presented in court; defense passed for cause]; 15 CT 3589; 6 RT 2459-2460 [Juror No. 4 had heard "very little" about case and would need more information before forming an opinion; defense passed for cause]; 15 CT 3709; 7 RT 2717 [Juror No. 11 had heard "minimal" information about the case; defense passed for cause]; 15 CT 3757; 7 RT 2783 [Juror No. 12 had heard information on the news and from his wife, but indicated he had no

[13] A list correlating the Prospective Juror numbers to their ultimate seated juror numbers can be found at 40 CT 9855.

true knowledge of the case, and could base decision on evidence presented in court; defense passed for cause].)

Thus, having failed to raise the issue of pretrial publicity as a basis for the request for additional peremptory challenges, Westerfield deprived the trial court of the opportunity to rule on these grounds, and grant the relief he now argues was appropriate. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 946 ["Because trial counsel failed to cite occurrences at voir dire as the basis for a renewed motion for change of venue, he afforded the trial court no opportunity to grant the relief that defendant now contends should have been accorded him."].)

C. The Trial Court Properly Denied Westerfield's Requests For Additional Peremptory Challenges

As this Court observed in the context of upholding the denial of a change of venue motion in *People v. Prince* (2007) 40 Cal.4th 1179:

> In exceptional cases, " 'adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed,' [citation] ... ." (*Mu'min v. Virginia* (1991) 500 U.S. 415, 429 [114 L. Ed. 2d 493, 111 S. Ct. 1899], italics added.) "The category of cases where prejudice has been presumed in the face of juror attestation to the contrary is extremely narrow. Indeed, the few cases in which the [high] Court has presumed prejudice can only be termed extraordinary, [citation], and it is well-settled that pretrial publicity itself—'even pervasive, adverse publicity—does not inevitably lead to an unfair trial' [citation]." (*DeLisle v. Rivers, supra*, 161 F.3d at p. 382.) This prejudice is presumed only in extraordinary cases—not in every case in which pervasive publicity has reached most members of the venire. We do not believe the present case falls within the limited class of cases in which prejudice would be presumed under the United States Constitution.

(*Id.* at pp. 1216-1217.)

Westerfield's is not a case so extraordinary that the pervasive pretrial publicity rendered his request for additional peremptory challenges

a constitutional necessity to ensure the fairness of his trial. To be sure, there was a great deal of media attention focused on his case, which Westerfield accurately summarizes. (AOB 123-125.) Judge William Mudd aptly characterized the extensive media coverage as well:

> Based on the extensive — and on this I'm going to draw on my own experience. I've been practicing law, criminal law, in this community since 1970, and I've never experienced a case like this. I've handled numerous death penalty and other high-profile cases, and nowhere have I ever seen what I have experienced thus far both on radio, on television, and in the print media.

(4 RT 703.) Nonetheless, this case does not fall "within the limited class of cases in which prejudice would be presumed under the United States Constitution" (*People v. Prince, supra,* 40 Cal.4th at p. 1217), particularly in light of the significant measures the trial court took to protect against the impact of the pretrial publicity.

On February 27, 2002, Judge Cynthia Bashant ordered the affidavits and exhibits attached to the search warrants sealed over the objection of an attorney on behalf of the media; she only made public the warrants themselves. (2 RT 28-31.) On March 5, 2002, the defense filed a motion for a gag order and attached various articles that had been published about Westerfield, leaking inadmissible evidence such as his having failed a lie detector test. (2 RT 40, 57; 1 CT 47-106.) Attorneys on behalf of the press argued vigorously against the imposition of a gag order. (2 RT 76-84, 93-94.) Judge Ronald Dominitz issued a written gag order on March 8, 2002, prohibiting, primarily, the attorneys and law enforcement officers from furnishing statements for the purpose of influencing the outcome of the trial. (1 CT 142-145.) Following the preliminary hearing, when the matter had been assigned to Judge Mudd for all purposes (4 RT 602), Judge Mudd ordered that the gag order was to remain in effect until the trial's conclusion (4 RT 707), and expanded the order to include courtroom staff (4 RT 713).

Additionally, to prevent inadmissible evidence from being disclosed by the media, the court ruled that pretrial hearings concerning the admissibility of evidence would be closed to the public and media. (4 RT 631, 709-712.) Those hearings included the motion to suppress evidence from the various searches, the motion to suppress Westerfield's statements to law enforcement officers, the motion to traverse the search warrants, the motion regarding evidence of the Van Dams' "lifestyle," and the motion regarding the admissibility of child pornography evidence. (5 RT 995, 1015-1017.) Further, the court ordered that while voir dire would be open to the public, it was not to be filmed, no one entering the courthouse was to be photographed on the day the prospective jurors were to report, and no names would be utilized in the selection process — only numbers. (5 RT 2057-2060.) Thus, the trial court instituted precautions from the case's inception to ensure that the media attention surrounding Westerfield's case would not infect the jury pool such as to deprive him of an impartial jury and a fair trial.

Implicit in Westerfield's argument is the premise that the *only* way to have protected against any negative impact from pretrial publicity was by granting additional peremptory challenges. Significantly there are other ways to protect against the same risks, but Westerfield chose not to avail himself of them. He could have moved to change the venue of his trial. He could have asked for a continuance of the trial to allow the media spotlight to fade. As Westerfield notes (AOB 130, fn. 70), these other options were in conflict with his choice to exercise his constitutional right to a speedy trial. But "[s]ome rights are mutually exclusive . . ., and hard choices are not unconstitutional." (*People v. Frye* (1998) 18 Cal.4th 894, 940, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 [recognizing that inherent tension between right to speedy trial and right to adequately prepared counsel is not an impermissible infringement of

defendant's constitutional rights].) How to balance these options was certainly Westerfield's strategic choice, but the fact that he did not request a continuance or to change the venue are relevant considerations in determining whether the local publicity was so persuasive that unfairness to his proceedings should be presumed.

Westerfield relies on the questionnaire and voir dire responses of the prospective jurors in an attempt to show that the pretrial publicity had rendered it impossible to receive a fair trial. Respondent does not disagree with Westerfield's characterization that nearly every prospective juror was at least aware of the crime. (AOB 131.) Respondent does not disagree with Westerfield's description of the seated jurors' and alternates' responses, indicating they had seen on the news the basic facts of the case, had seen Westerfield, and many of them had discussed it with friends and family. (AOB 132-133.) Respondent's disagreement, however, lies in the fact that Westerfield cannot demonstrate that the jurors' basic knowledge of the case had tainted their impression of him or of the evidence such that he could not receive a fair trial without the grant of additional peremptory challenges.

The response of Juror Nos. 2, 4, 6, 11, and 12, as discussed above evidence that they had formed no opinions about Westerfield or the case, much less opinions they were unwilling to set aside. As to the responses of the jurors not previously described, Juror No. 1 indicated that she had heard information about the case, but "not much" and had not "followed the case closely." She had formed no opinions, and would be able to decide the case exclusively on the information presented at trial. (15 CT 3541-3542.) Juror No. 3's responses were similar, indicating he had seen and read news about the case, but "not too much"; he had formed no opinions about the case and was able to decide the matter based upon the evidence that would be presented in court. (15 CT 3685-3686.) Juror No. 3 had watched the

preliminary hearing and was surprised about things that had happened in the Van Dam home — things that "surprised" and "distressed" him — but reassured he could decide the case based upon the evidence. (7 RT 2697-2698.) Juror No. 5 likewise had heard information but "very little" and further explained that she "was not inclined to believe what the media or others involved in the case have said" "because those things have no bearing on the facts that will be presented in court." (15 CT 3565; see also 6 RT 2454 [able to base decision on what happens in courtroom].) Juror No. 7 had heard basic information in the news, but had formed no opinions about the case, and would be able to base her decision on the evidence presented at trial. (15 CT 3661-3662.) Juror No. 8 was also aware of factual information about the crime and Westerfield's having been charged, and candidly stated that the pretrial publicity had caused her to believe that Westerfield "could possibly be guilty," but further assured that she "could base [her] decision on evidence fairly," and set aside her opinions. (15 CT 3613-3614.) Juror No. 9 had seen information on television, but stated she felt that she understood "the premise of media hype" and further understood that she had to base her "opinion on the evidence presented." (15 CT 3733-3734.) Finally, Juror No. 10 was also aware of the basic facts of the case and accusations against Westerfield from media accounts, but stated his ability to "differentiate between evidence in court and information from outside sources." (15 CT 3805; 8 RT 2897 [indicating he understood talk radio was "a bunch of opinions and everybody's speculating"].) Significantly, Westerfield expressed specific dissatisfaction as to Juror Nos. 2, 4, 6, 11 and 12, he did not do so for the remaining jurors, which is indicative of his impression that these jurors were not tainted by pretrial publicity and that they held no bias against him.

That each juror knew generally about the crime does not equate to pervasive, prejudicial pretrial publicity requiring additional peremptory

challenges to ensure the fairness of the proceeding. As this Court observed in *People v. Davis* (2009) 26 Cal.4th 539:

> We have never required potential jurors to be ignorant of news accounts of the crime or free of "'any preconceived notion as to the guilt or innocence of an accused.'" (*People v. Harris* (1981) 28 Cal.3d 935, 950 [171 Cal. Rptr. 679, 623 P.2d 240], quoting *Irvin v. Dowd, supra*, 366 U.S. at p. 723; see also *People v. Riggs* (2008) 44 Cal.4th 248, 281 [79 Cal. Rptr. 3d 648, 187 P.3d 363]; *In re Hamilton* (1999) 20 Cal.4th 273, 295 [84 Cal. Rptr. 2d 403, 975 P.2d 600].) The mere presence of such awareness on the jurors' part, without more, does not presumptively deny a defendant due process, because to hold otherwise "'would be to establish an impossible standard.'" (*People v. Harris, supra*, 28 Cal.3d at pp. 949–950, quoting *Irvin v. Dowd, supra*, 366 U.S. at p. 723.) In the absence of some reason to believe otherwise, it is only necessary that a potential juror be willing to set aside his or her "'impression or opinion and render a verdict based on the evidence presented in court.'" (*Harris*, at p. 950, quoting *Irvin v. Dowd*, at p. 723; see *People v. Riggs, supra*, 44 Cal.4th at p. 281.)

(*Id.* at 575.) The jurors' responses to questions on the written questionnaires and during oral voir dire regarding their exposure to publicity demonstrate that none held any significant opinion regarding Westerfield's guilt, must less a fixed opinion that he or she would be unwilling to set aside, so as to be unable to decide the case based on the evidence presented at trial.

Similarly, Westerfield's attempt to show that the prejudicial effect of pretrial publicity on the venire from the responses of the non-seated prospective jurors is equally unavailing. (AOB 137-145.) Preliminarily, "[s]tatements by nonjurors do not themselves call into question the adequacy of the jury-selection process; elimination of these venire members is indeed one indicator that the process fulfilled its function." (*United States v. Skilling* (2010) __ US. __ [130 S. Ct. 2896, 2920, fn. 24; 177 L. Ed. 2d 619].) Of the 263 prospective jurors who answered the

questionnaire, Westerfield can only point to seven who had indicated they had formed unyielding opinions about his guilt. First, this very low number demonstrates that the pretrial publicity did not prevent Westerfield from receiving a fair trial in San Diego County. Moreover, as Westerfield concedes, each of these seven jurors was excused by the court or by stipulation of the parties. (AOB 138-142.)

Westerfield points to an additional eight prospective jurors who did not serve on his jury and were also excused by the court or by stipulation of the parties that he believes present "closer calls." Prospective Juror No. 68 was unsure of his ability to be fair based on the information he had learned from the media; he was excused for cause based on a challenge by the defense. (AOB 142; 7 RT 2706-2710.) Westerfield cites to the responses of Prospective Juror No. 3 (6 RT 2251) No. 6 (6 RT 2298), and No. 98 (24 CT 5997-5998), but his complaints have nothing to do with pretrial publicity; each of these prospective jurors doubted his ability to be fair based upon the pornography evidence to be presented. (AOB 142-143, 144.) Prospective Juror No. 19 was unsure of her ability to be fair based upon the nature of the case — the murder of a child — and not because she had formed opinions based upon pretrial publicity. (AOB 143; 18 CT 4383.) While Prospective Juror No. 28 indicated on his questionnaire that he "was devastated by what happened to the little girl" (19 CT 4599), his response in no way indicates that he had prejudged Westerfield's guilt based on media accounts. It simply indicates his honest reaction to the crime, which one would think would be shared by most people. Prospective Juror No. 73 indicated she was aware of the significant media attention to the case, lived close to Sabre Springs and drove to the Van Dams' neighborhood to see how far it was from her own home, but understood that her duty would be to decide the case based upon the evidence presented in the courtroom. (22 CT 5515-5516.) Finally,

Prospective Juror No. 109 was released by stipulation of the parties when Brenda Van Dam brought to the prosecution's attention that he made a memorial contribution to the family after telling her he was a prospective juror. (8 RT 2790, 3030-3032.) Thus, these examples show that the few jurors who were affected by the publicity were removed for cause or by stipulation of the parties. Westerfield's examples do not show such pervasive, inflammatory publicity that rendered impossible for Westerfield to select a fair jury without additional peremptory challenges.

Apparently recognizing just how extraordinary the circumstances must be for pretrial publicity to entitle any defendant to a remedy such as additional peremptory challenges or a change of venue, Westerfield attempts to compare his case to others in which denials of such requests have been upheld on appeal, claiming his case was worse. In *People v. Bonin* (1988) 46 Cal.3d 659, 672-673, relied upon by Westerfield (AOB 148-152), this Court upheld the denial of a change-of-venue motion and a request for additional peremptory challenges finding that there was "no reasonable likelihood that jurors who will be, or have been, chosen for the defendant's trial have formed such fixed opinions as a result of pretrial publicity that they cannot make the determinations required of them with impartiality." (Citing *Patton v. Yount* (1984) 467 U.S. 1025, 1035 [81 L.Ed.2d 847, 856, 104 S.Ct. 2885].) Bonin was convicted of, and sentenced to death for, the murders of 14 people in Orange County and Los Angeles County in what was dubbed the "freeway killings" of 1979 and 1980; he was convicted in Los Angeles first, and raised the change-of-venue motion in his subsequent Orange County trial. (*People v. Bonin, supra,* 46 Cal.3d at pp. 668, 673.) Like Westerfield's venire, most of the prospective jurors in *Bonin* had been exposed, at least to some degree, to publicity about the case particularly in light of the previous Los Angeles trial. (*Id.* at p. 675.) This Court upheld the denial of Bonin's change of

venue motion, finding that despite the "extensive" news coverage surrounding the case and despite the gravity of the crimes, the community in which the case was being tried was large and due to the passage of time since the Los Angeles County conviction, the media attention had diminished. (*Id.* at pp. 677-678.) Thus, this Court concluded that Bonin's speculation about the *possibility* of an unfair trial was insufficient to show that he would be unable to be tried by a fair and impartial jury in Orange County. (*Id.* at 678.) On that basis, this Court upheld the trial court's denial of both the change-of-venue motion and the defendant's request for additional peremptory challenges. (*Id.* at p. 679.)

Westerfield tries to distinguish his case from *Bonin*, suggesting that the murder of a seven-year girl from a "normal," middle-class family and neighborhood necessarily renders the emotional response of the public greater than the murder of 14 people at random. (AOB 151.) If this is true, it is unclear what impact additional peremptory challenges would have had in this case; any number of prospective jurors would have had the same emotional response upon hearing the facts of the case, regardless of their knowledge from pretrial publicity. The only other distinguishing factor to which Westerfield can point is the rapid timeframe in which his case was brought to trial, as compared to the delay between the trials in *Bonin.* (AOB 151-152.) However, as noted above, the speed at which his case was tried was by Westerfield's choosing. Certainly, he could have moved to continue the trial to allow the media focus to diminish, and equally as certain, he could have and did exercise his right to a speedy trial in the midst of the media focus. It was a difficult choice, in which Westerfield had to balance competing interests, but difficult choices are not unconstitutional ones. (See *People v. Frye, supra,* 18 Cal.4th at p. 940.) Moreover, Westerfield did not share the added prejudice inherently present in *Bonin* — the fact that Bonin had already been convicted in Los Angeles

in a trial in which evidence of the Orange County murders had been presented. (*People v. Bonin, supra,* 46 Cal.3d at p. 673.) Thus, Westerfield's comparison of his trial to that in *Bonin* does not advance his position.

Equally unavailing is Westerfield's comparison of his trial to *Skilling v. United States* (2010) __ US. __ [130 S. Ct. 2896; 177 L. Ed. 2d 619].) (AOB 152.) *Skilling* involved the conviction of a former chief executive officer of the Houston-based Enron, a case which garnered tremendous national media attention. (*Id.* at pp. 2911-2912.) A multitude of people in the Houston area were directly or indirectly impacted by the economic effect of Enron's demise, and the news coverage included substantial personal interest stories from individuals expressing their anger toward those involved. (*Id.* at pp. 2907-2912.) The United States Supreme Court affirmed the federal district court's denial of a change-of-venue motion, and concluded that the defendant had failed to establish a presumption of prejudice. (*Id.* at p. 2915.) While Westerfield is correct in that *Skilling* involved corporate crime whereas as his was the murder of his seven-year old neighbor, that does not change the import of the *Skilling* decision. *Skilling* stands for the proposition that even in the face of pervasive media coverage, a fair trial by an impartial jury can be had where the voir dire process, both written and oral "successfully secure[s] jurors who were largely untouched by" pretrial publicity. (*Id.* at p. 2920.) Here, the voir dire process, and the responses of each seated juror described above, ensured that no juror was so affected by pretrial publicity, or that he or she was unwilling to set aside any preconceived opinion and decide case based solely upon the evidence presented at trial.

D. Westerfield Cannot Demonstrate Prejudice From The Lack of Additional Peremptory Challenges

Westerfield relies on federal circuit authority in *United States v. Harbin* (7th Cir. 2001) 260 F.3d 532 (*Harbin*), to suggest that the denial of additional peremptory challenges based on pretrial publicity is an error of constitutional magnitude, subject to reversal per se. (AOB 153-157.) Even if it were authority binding on this Court, *Harbin* does not stand for the proposition Westerfield advances. In *Harbin*, the prosecution was granted the ability to use a peremptory challenge that it had not used during the jury selection process to remove a seated juror based on information discovered mid-trial; the same opportunity was not afforded the defense because the defense had exhausted its peremptory challenges. (*United States v. Harbin, supra,* 260 F.3d at p. 538.) The Seventh Circuit found this to be an error reversible per se because "although peremptory challenges are not constitutionally required, due process may be violated by a system of challenges that is skewed towards the prosecution if it destroys the balance needed for a fair trial." (*Id.* at p. 540.) No such skewing occurred here. Westerfield was entitled to 20 peremptory challenges by statute as was the prosecution. He used them. The result was a jury of twelve unbiased jurors as revealed by their voir dire responses.

While the court believed in *Hardin* that the *procedure* was unconstitutionally unfair, it did not acknowledge any constitutional right to peremptory challenges *themselves*. (*United States v. Harbin, supra,* 260 F.3d at p. 540.) As noted, there is no constitutional right to peremptory challenges. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 88-89.) And, a defendant is not deprived of the state-created liberty interest in 20 peremptory challenges (See Code of Civ. Proc., § 231) because he was required to use peremptory challenges to cure "error" in the trial court's declining to remove a prospective juror for cause. (See Argument III;

People v. Clark (2011) 52 Cal.4th 856, 902, citing *People v. Weaver* (2001) 26 Cal.4th 876, 913, and *People v. Gordon* (1990) 50 Cal.3d 1223, 1248, fn. 4 [use of peremptory challenge to cure "error" in denying challenge for cause does not violate right to fair and impartial jury, citing *Ross v. Oklahoma, supra,* 487 U.S. at pp. 85-88, overruled on other grounds, *People v. Edwards* (1991) 54 Cal.3d 787, 835.) In the context of the loss of a peremptory challenge where the defendant exhausts all of his challenges to cure an erroneous denial of a challenge for cause by the trial court, the loss of the peremptory challenge " 'provides grounds for reversal only if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him.*'" [Citations]. (*People v. Yeoman, supra,* 31 Cal.4th at p. 114.)

Westerfield cannot show actual prejudice in this regard. None of the jurors here had opinions concerning his guilt, let alone fixed opinions any was unwilling to change even if contrary evidence was presented at trial. Moreover, if Westerfield's point is that the media attention was so pervasive that his entire jury pool was tainted, then an infinite number of peremptory challenges would not have been sufficient. If he was seeking a jury of twelve individuals who knew nothing about his case, the task was an impossible one. Westerfield was not constitutionally entitled to an ignorant jury. (See, e.g., *People v. Davis, supra,* 46 Cal.4th 539, 580 [every seated juror had prior knowledge of the case]; *People v. Ramirez* (2006) 39 Cal.4th 398, 434 [11 jurors had prior knowledge of the case]; *People v. Bonin, supra,* 46 Cal.3d at p. 678 [10 jurors with prior knowledge]; *People v. Leonard, supra,* 40 Cal.4th at pp. 1396-1397 [8 jurors].) "The relevant inquiry is . . . whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." (*Patton v. Yount, supra,* 467 U.S. at p. 1035.) Here, every juror affirmed that he or she could set aside any external influence and fairly decide the matter on the evidence

presented in the courtroom. Thus, the voir dire process ensured that Westerfield was tried by a panel of jurors untainted by pretrial publicity.

III. THE TRIAL COURT PROPERLY DENIED THE DEFENSE CHALLENGE FOR CAUSE AS TO VENIREMAN NUMBER 19

Westerfield contends that the trial court improperly denied his challenge for cause as to Prospective Juror No. 19. While he eventually removed Prospective Juror No.19 by using a peremptory challenge, he claims that the purportedly improper denial of his challenge for cause resulted in prejudice because he was forced to accept a biased juror — actual Juror No. 4 — as he exhausted all of his peremptory challenges and the court refused to grant him additional challenges. (AOB 158-179.) First, Westerfield has forfeited his contention as he failed to raise a timely objection to the jury as constituted. Second, the claim fails on the merits as the trial court properly denied the challenge for cause.

Trial courts possess wide discretion in determining whether a juror challenged for cause is qualified to serve, and that discretion is rarely disturbed on appeal. (*People v. Horning* (2004) 34 Cal.4th 871, 896.) A trial court may find a juror to be actually biased where the juror evidences a state of mind concerning the issues in the case of the parties that would prevent the individual " 'from acting with entire impartiality and without prejudice to the substantial rights of either party.' " (*Ibid.*, quoting Code Civ. Proc., § 225, subd. (b)(1)(C).)

A. Prospective Juror No. 19

Prospective Juror No. 19 was a 58 year-old elementary school principal who lived in Poway. (18 CT 4374, 4376.) In response to a questionnaire inquiry as to whether she considered herself to be a good judge of character, Prospective Juror No. 19 wrote, "In my work, I deal with all types of people in many situations. I must often make judgments about a person's character." (18 CT 4378.) She further indicated on the

questionnaire that it would be difficult for her to serve on a lengthy trial as Westerfield's was expected to be given the nature of her work. (18 CT 4378.) Also on the questionnaire, Prospective Juror No. 19 indicated that her views of the criminal justice system caused her to favor neither the prosecution nor the defense prior to hearing the evidence presented. She indicated she would be an impartial juror because her employment required to be impartial with children in disciplinary situations. (18 CT 4382.) She would be "pleased to serve" on a jury, but was "uneasy about [her] work responsibilities." (18 CT 4382.) She also noted, that she would not like to be a juror on this case because she "cannot serve on a case where the victim was a child." (18 CT 4383.) She believed that her objectivity might be "colored," but she continued to consider herself fair. (18 CT 4383.) When asked on the questionnaire about her ability to view pictures of the victim's decomposed body, Prospective Juror No. 19 indicated that this would affect her ability to be fair and impartial because "[c]hildren have been [her] life for 37 years." (18 CT 4383.) Prospective Juror No. 19 indicated that she had basic background information about the case from the news and had formed opinions based on that information that the parents were guilty of neglecting their responsibilities and that Westerfield had acted strangely on his trip to the beach and desert. (18 CT 4385.) When asked whether she could set her opinions aside and decide the case based on the evidence presented in court, Prospective Juror No. 19 checked the box indicating "yes." When asked whether despite anything she had seen, heard, or read, she could be fair to both sides, Prospective Juror No. 19 checked the box indicating "yes." (18 CT 4386.) She indicated that she would not automatically chose either death or life in prison, but would consider all of the evidence in determining the appropriate penalty. (18 CT 4387-4392.) Finally, when asked whether she was willing to serve as a juror on this case, Prospective Juror No. 19 answered she was not because she could not

"fulfill her obligations to her staff and students if [she was] away from school for 12 weeks." (18 CT 4392.) Nonetheless, when asked whether there was any reason why she could not be a fair and impartial juror on this case, Prospective Juror No. 19 checked the box indicating "no." (18 CT 4392.)

When Prospective Juror No. 19 appeared in court, in response to defense counsel's voir dire questions, she reiterated her responses that she believed she would not be fair and impartial. (6 RT 2331.) She believed the fact that the murder victim was a child would "color" her feelings (6 RT 2331.) And she would have "a hard time looking at a defendant" in a child murder case. (6 RT 2332.) Sitting as a juror for two months would create "a great deal" of professional hardship for her. (6 RT 2332.) When answering the prosecutor's questions on voir dire, Prospective Juror No. 19 expressed hesitancy as to whether she could be a fair and impartial juror in this case, but when asked if she were told that she had to make decisions based only upon evidence present in court would she be able to comply, she answered "yes." (6 RT 2334.)

Then, the following colloquy occurred between the court and the prospective juror:

> [THE COURT]: Juror nineteen, you're sort of a rare breed. In reading your questionnaire you're obviously very educated and so forth, but you give what I will describe, as a judge, conflicting messages.
>
> Counsel have each asked you questions from their perspective, and I'm going to ask you point blank and direct.
>
> Knowing everything that you know about yourself, and what you've seen and heard to this point in this case, do you believe that you can be fair and impartial to both sides in this case?

[PROSPECTIVE JUROR 19]: I honestly believe that I am fair and impartial in this particular case. I'm not sure that my beliefs wouldn't color the case.

[THE COURT]: Okay.

[PROSPECTIVE JUROR 19]: I don't know what else to tell you.

[THE COURT]: And I appreciate that. You're just not sure?

[PROSPECTIVE JUROR 19]: Yeah.

(6 RT 2334-2335.)

The trial court denied the defense challenge for cause, observing:

Well, I understand that, but the reason I ask the question is because my own notes show what a dilemma she is. Because of her experience and her training, she has made it quite clear that she's very objective and she's a very fair individual. The answers she's given do not indicate an extreme bias or prejudice that would prohibit her from doing her job. I'll note a challenge to nineteen and it will be denied.

(6 RT 2335-2336.)

B. Juror No. 4 (Prospective Juror No. 34)

On her written questionnaire, Juror No. 4 (then Prospective Juror No. 34), indicated she was 65 years old and was born in Germany (15 CT 3578); German was her native language, but she had no trouble understanding English. (15 CT 3586-3587.) She indicated she had no friends or relatives that were prosecutors, defense attorneys, or judges. (15 CT 3583.) She felt she could be an impartial juror. (15 CT 3586.) She indicated on the questionnaire that she would not like to be a juror on Westerfield's case because she did not feel qualified to make a life or death recommendation. (15 CT 3587.) However, she indicated she would be able to base her decision entirely on the evidence presented in court and

wou'd be able to be fair to both sides. (15 CT 3590.) She indicated she would consider all of the evidence before deciding the appropriate penalty (15 CT 3594), and would not automatically vote for life or death (15 CT 3595). At the conclusion of the questionnaire, Juror No. 4 indicated she was willing to serve as a juror on Westerfield's case and there was no reason why she would not be a fair juror. (15 CT 3596.)

When she appeared in court she reiterated that she could follow the judge's instructions and that she had no preference for one penalty over the other. (6 RT 2546-2547.) She indicated that if called upon, she would be able to make a decision about the appropriate penalty. (6 RT 2459.) Both sides passed for cause. (6 RT 2460.)

The following day the trial court received a note from Juror No. 4, indicating for the first time that it would be impossible for her to serve on a lengthy trial due to her husband's health problems, which were blood pressure related. (7 RT 2615-2616.) The note indicated that "if something were to happen" while she was serving on Westerfield's trial, she would have to be excused from the remainder of service. (40 CT 9924.) The prosecution asked for a further inquiry, and the defense was willing to "submit or stipulate" as to the prospective juror's release. The trial court brought Juror No. 4 into court and confirmed that if her husband did not have a relapse, she would be able to serve. That is, unless and until a medical emergency arose, she would be able to serve. Juror No. 4 responded that that was the case. (7 RT 2616.) Following this further inquiry, the trial court stated:

> No way of knowing whether that would occur or might occur. So from my position it doesn't look like there's cause at this point to discharge her. But if counsel let her on the jury, it would be with the understanding that if there was a relapse she would be coming off. So I'm not going to discharge her for cause at this point in time.

(7 RT 2617.) Neither party objected or voiced any disagreement with this decision.

The day following that conversation, Juror No. 4 submitted another note to the court stating with regard to the questionnaire:

> I misunderstood the question about friend[s] or relatives in law enforcement. I thought the question only applied to police officers. I have a close personal friend whose husband is a retired deputy district attorney. We see each other on a regular basis socially and I have talked to him about the criminal justice system. As a result of this relationship I have formed opinions which are favorable towards prosecutors.

(40 CT 9223.) Juror No. 4 was brought back into court and responded to defense counsel's questioning that now she believed she could no longer be completely objective due to this acquaintance. (8 RT 2936.) The trial court inquired, "Ma'am, what made you change your mind? These relationships existed even though you didn't put it in your questionnaire and you didn't even come close to answering a question like you have today. What changed over night?" (8 RT 2936-2937.) Juror No. 4 responded that she had just seen the friend the night before, and he expressed surprise that she was still on the jury. He asked if she had informed the court of their friendship and she responded that she was not aware she was required to do so. (8 RT 2937.) Then, the following conversation took place:

> [TRIAL COURT]: Ma'am you hadn't given us the information, but what about that changes from I can't be fair to both sides and I'm going to favor the prosecution? You knew these people when you filled out the application, I mean when you filled out the questionnaire. I want to know what overnight changed you from being a fair and impartial juror to one that's going to favor the prosecution and can't be fair to both sides. Please explain that to me.
>
> [JUROR NO. 4]: Okay. My feeling on this is I didn't realize that before. See, I'm not familiar with the justice system the way that everybody else seems to be.

[TRIAL COURT]: No. You know what fairness is, though, don't you? You know in your heart whether you can be fair. Now you can't be fair, is that what you are telling us?

[JUROR NO.4]: I'm not a hundred percent sure. But it seems like I have to explain this to you that I have this connection and we have talked about the judicial system. So that's all I'm trying to say here.

[TRIAL COURT]: No. You've said more than that. You have told Mr. Feldman that you can't be fair to both sides now. That is dramatically different than what you have told us up to this point throughout this process.

(8 RT 2937.)

In response to Mr. Dusek's questions, the juror responded as follows:

MR. DUSEK: And [the former district attorney] told you that you should let us know about him?

[JUROR NO. 4]: Yes, sir, he did. Yes. He said otherwise I would perjure myself.

MR. DUSEK: And you've told us about him.

[JUROR NO. 4]: Yes.

MR. DUSEK: Did he tell you which way you should vote or anything like that?

[JUROR NO. 4]: Absolutely not.

MR. DUSEK: Did he tell you about being fair?

[JUROR NO. 4]: He said I would perjure myself if I would not disclose this.

MR. DUSEK: Okay. So you have told us about it.

[JUROR NO. 4]: Right.

MR. DUSEK: Do you think you would still be able to be fair to both sides even though —

[JUROR NO. 4]: I think —

MR. DUSEK: You knew of him yesterday, didn't you?

[JUROR NO.4]: Yes. I think I can be fair, but the thing is I don't — I did not tell you about this gentleman because I wasn't aware that this is required of me.

MR. DUSEK: Okay.

Now that you've told us and you said you think you can be fair even though you still know the guy.

[JUROR NO. 4] Yes.

MR. DUSEK: Okay.

[TRIAL COURT]: Ma'am, you just told Mr. Feldman you couldn't be fair. I mean are you not understanding the questions or what about this process are you not understanding? I have to make a call as to whether or not you can be fair and impartial to both sides. Mr. Feldman has asked you a series of questions to which you told him you couldn't be fair and impartial, that you would be pro prosecution. And now I ask you, Mr. Dusek has asked you, and you've told Mr. Dusek you can be fair and impartial. Now, what is it, ma'am? Can you be fair and objective to both sides or not?

[JUROR NO. 4]: I don't see any reasons why I can't be, but I am thoroughly confused at this point.

[TRIAL COURT]: So you don't know any reason you can't be fair and impartial?

[JUROR NO. 4]: No, I don't.

Juror No. 4 was momentarily excused from the courtroom while the parties discussed their positions regarding her new responses. Mr. Feldman argued that her answers were unequivocal upon initially inquiry that she could not be fair. He then stated, "[r]espectfully, the court's tone of voice with regard to this juror may have been communicating some frustration to her." (8 RT 2940.) Defense counsel also observed there might be a

"language issue." (8 RT 2940.) The prosecutor responded that Juror No. 4 told him without any pressure that she could be fair. (8 RT 2940.)

The trial court ultimately ruled as follows:

> The language I'm definitely satisfied there's no cause challenge there. She clearly knows and understands. Reading the note would imply that she's given the defense two pieces of information. One, that she knew a person in law enforcement that she didn't disclose who happens to be an L.A. retired deputy district attorney who she happened to see last night. And, two, that she may be pro prosecution as a result of knowing that.
>
> These are people that she's known, I mean, throughout this process. That's what's so confounding about the whole thing. She has known these people that entire time and has represented to the court that she can be fair and impartial. I recognize what she told you, Mr. Feldman, but it doesn't appear to the court that based on language grounds that she is substantially impaired in any way in her ability to be fair and impartial.
>
> I don't see any need to dismiss her.

(8 RT 2940-2941.)

The parties continued exercising peremptory challenges until the defense exhausted the 20 challenges it was permitted. (8 RT 2941-2950.) Before the panel was sworn, the defense made a motion at sidebar for additional peremptory challenges "because of the challenges for cause that were denied." Mr. Boyce stated that the defense was entitled to an additional challenge due to the court's denial of the challenge for cause as to Prospective Juror No. 19 "and also the other challenges for cause that [the defense] made that were denied." The trial court denied the request, and the jury was sworn. (8 RT 2951.) At that time, the defense did not express dissatisfaction with the jury as empaneled.

C. Having Failed To Express Dissatisfaction With The Jury At The Time It Was Empaneled, Westerfield Forfeited The Issue

To preserve an objection to the trial court's alleged failure to excuse a juror for cause, "a defendant must (1) exercise a peremptory challenge against the juror in question, (2) exhaust all peremptories, and (3) express dissatisfaction with the jury as finally empanelled." (*People v. Bonilla* (2007) 41 Cal.4th 313, 339-340.) Here, Westerfield exercised a peremptory challenge against Prospective Juror No. 19 and exhausted his peremptory challenges, but failed to express dissatisfaction with the jury at the time it was sworn. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1239-1240; *People v. Carasi* (2008) 44 Cal.4th 1263, 1290.) His attempt to state dissatisfaction with the jury as sworn the following day by stating: "I failed to make clear I think for the record that we were dissatisfied with the panel as it was presently constituted and that if we had had those [additional] peremptory challenges, we would be challenging jurors 2, 4, 6 . . . 11 , and 12," did not preserve the issue as it came too late. Thus, while Westerfield satisfied the first two requirements, he failed to satisfy the third, and thus he has forfeited his claim for appellate purposes. (*Ibid.*) "Otherwise, a defendant could challenge denial of a challenge for cause on appeal even if he was satisfied with the overall composition of the jury, and expressed no misgivings to the trial court." (*People v. Carasi, supra,* 44 Cal.4th at p. 1290.)

D. The Trial Court Properly Denied The Challenge For Cause As To Prospective Juror No. 19

Here, applying this deferential standard, the trial court properly exercised its discretion in denying the challenge for cause as to Prospective Juror No. 19. Her voir dire responses did not indicate that she was biased against Westerfield or disqualified to serve for any other reason. There was no indication Prospective Juror No. 19 possessed a state of mind that would

have prevented her " 'from acting with entire impartiality and without prejudice to the substantial rights of either party.' " (*People v. Horning, supra,* 34 Cal.4th at p. 896.) "The trial court is in the unique position of assessing demeanor, tone, and credibility firsthand — factors of 'critical importance in assessing the attitude and qualifications of potential jurors. (*People v. DePriest, supra,* 42 Cal.4th at p. 21, quoting *Uttecht v. Brown* (2007) 551 U.S. 1, 9 [167 L.Ed.2d 1014, 127 S.Ct. 2218, 2224].) " 'When . . . a juror gives conflicting testimony as to her capacity for impartiality, the determination of the trial court on substantial evidence is binding on the appellate court.' " (*Ibid.*, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 675.)

Westerfield attempts to analogize the challenge for cause to Prospective Juror No. 19 to the challenge for cause as to Juror Staggs in *People v. Bittaker* (1989) 48 Cal.3d 1046, 1089-1090. (AOB 166-167.) Juror Staggs worked in a rape crisis center and stated during voir dire that she did not believe she would be impartial in a case involving charges of rape, which Bittaker's was. (*People v. Bittaker, supra,* 48 Cal.3d at p. 1089.) As this Court characterized, "Her voir dire presents no unqualified statement that she actually felt that she could be fair and impartial in the penalty phase of this case." (*Ibid.*) Juror Staggs told defense counsel she would not be able to sit as a fair and impartial juror. (*Id.* at pp. 1089-1090.) The prosecutor was only able to rehabilitate her insofar as obtaining her agreement that she could act impartially at the guilt phase. (*Id.* at p. 1090.) She also stated that she believed it would be difficult for her to listen to all of the evidence. (*Id.* at p. 1090.) Based on her responses, this Court found the trial court erred in denying the defense challenge for cause.

Not so here. Prospective Juror No. 19 initially stated that due to the nature of her employment as a school principal and working with children she did not believe she could be fair and impartial on a case where the

defendant was accused of murdering a child. (18 CT 4383.) She clarified that she believed the nature of the crime and victim might "color" her opinion (18 CT 4383), and that she would have "a hard time" in a case such as this (6 RT 2332). When the prosecution questioned Prospective Juror No. 19, she confirmed that an important aspect of her job as a principal, particularly in disciplinary situations, was to be fair and impartial and to listen very carefully. (6 RT 2333.) She noted that she had "an ability to listen and judge and d[id] an awful lot of judging in [her] line of work [she had] to be impartial." (6 RT 2334.) Then, Prospective Juror No. 19 stated unequivocally that she understood the importance of being impartial as a juror and believed she could do so in this case. She would make decisions based only on the evidence presented in court. (6 RT 2334.) In response to the judge's questions, Prospective Juror No. 19 stated, "I honestly believe I am fair and impartial in this particular case. I'm not sure that my beliefs won't color the case." (6 RT 2335.)

Accordingly, unlike Juror Staggs in *Bittaker*, Prospective Juror No. 19 never unequivocally stated that she could not be a fair juror if seated on Westerfield's trial. Her answers simply indicated that given her life experience it might be difficult for her to be a juror on this case, and that she was concerned about her potential for bias, which is far from declaring that she could not be an unbiased juror. In *People v. Hillhouse* (2002) 27 Cal.4th 469, 488, the trial court denied a challenge for cause of a prospective juror who had said he would try to be impartial, although, if he had to render a verdict that day, he would find the defendant guilty. This Court stated:

> On this record, the trial court could reasonably conclude the juror was trying to be **honest** in admitting to his preconceptions but was also sincerely willing and able to listen to the evidence and instructions and render an impartial verdict based on that evidence and those instructions. Indeed, a juror

> like this one, who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so.

(*Ibid.;* accord, *People v. Kaurish* (1990) 52 Cal.3d 648, 675 [prospective juror said she might give greater credence to testimony of police officers but also said she would " 'try to be an impartial juror' "].) Similarly, here, Prospective Juror No. 19's candid statements reflect her attempt to come to terms with her preconceptions and her desire to be an impartial juror. Indeed, that she voluntarily disclosed her concerns reflects an effort to honestly address the issue. (See *People v. Hillhouse, supra,* 27 Cal.4th at p. 488.)

Finally, at most, one can say Prospective Juror No. 19's responses as to her ability to be a fair and impartial juror were equivocal. Where a "prospective juror's statements are equivocal or conflicting, the trial court's determination of [her] state of mind is binding on appeal." (*People v. Carasi, supra,* 44 Cal.4th at p. 1290.) Thus, this Court is bound by the trial court's assessment that Prospective Juror No. 19 was an objective and fair individual, and that none of her responses indicated an extreme bias or prejudice that would prohibit her from doing her job as a juror. As Prospective Juror No. 19's honesty about her concerns did not render her a biased juror, the trial court properly denied the challenge for cause.

Moreover, Prospective Juror No. 19 was not a member of the jury that decided Westerfield's case because he was excused by Westerfield's exercise of a peremptory challenge after the trial court denied his challenge for cause. Thus, he cannot demonstrate prejudice from any error in denying his challenge for cause of this prospective juror. (*People v. Cunningham* (2001) 25 Cal.4th 926, 976.) The prejudice that Westerfield claims he suffered, however, was the loss of this peremptory challenge to correct

what he claims was an improper denial of the challenge for cause as to Prospective Juror No. 19, which resulted in a jury that was not fair and impartial. This is so according to Westerfield because the trial court also allegedly improperly denied a challenge for cause as to a juror who was seated — Juror No. 4 — and Westerfield could not exercise a peremptory challenge as to this juror as he had exhausted them all. However, to prevail on this claim, Westerfield must show erroneous denials of the challenges for cause as to both Prospective Juror No. 19 and Juror No. 4 — a burden he cannot carry.

Westerfield concedes that Juror No. 4 gave equivocal responses – her note indicated she could not be fair, but her responses to the prosecutor during voir dire indicated she could. (AOB 174-175.) And, where a juror gives conflicting responses, the trial court's assessment of the juror's state of mind is accorded deference on appeal. (*People v. Carasi, supra,* 44 Cal.4th at p. 1290.) Westerfield contends, however, that the trial court's "intimidating tone" in questioning Juror No. 4, contributed to the juror's responses that she could be fair and, therefore, contributed to the trial court's assessment of her state of mind. (AOB 175.) Contrary to Westerfield's contention, there is no indication from the record that anything about the trial court's questions or tone caused Juror No. 4 to state she could be fair.

There is no doubt from the record that Juror No. 4 was confused about her duty to disclose her friendship with a former prosecutor, and the impact of that friendship on her ability to be a fair juror. She stated she was confused. (8 RT 2939.) Certainly, part of the problem was the juror's lack of familiarity with the criminal justice system. (8 RT 2937.) Additionally, it appeared that the juror believed based on her friendship, that the friendship necessarily rendered her incapable of serving as a juror regardless of her ability to be fair. She indicated that the friend told her she

would be committing perjury if she did not disclose the relationship. But, she repeatedly affirmed that despite the friendship she believed she could be fair. (9 RT 2938-2939.) While defense counsel characterized the court's tone of voice "may have been construed as intimidating" (8 RT 2940), the record does not indicate that Juror No. 4 answered any question out of intimidation. The record demonstrates that she was confused and concerned for the fact that she had not disclosed information about a friendship with a prosecutor. But, her answers in no way indicated a bias against the defense that prevented her from acting fairly and impartially. Therefore, the trial court properly denied this challenge for cause.

E. The Loss Of A Peremptory Challenge, In And Of Itself, Does Not Constitute Constitutional Error

Westerfield makes a final argument that even if the trial court properly denied the challenge for cause as to Juror No. 4, he was nonetheless denied his state constitutional right to a fair and impartial jury by virtue of the loss of the peremptory challenge as to Prospective Juror No. 19. (AOB 176-179.) First, Westerfield's argument fails for the reasons previously stated, namely he did not "lose" a peremptory challenge because the trial court's denial of the challenge for cause was entirely proper. Second, the California Constitution does not stand for the proposition advanced by Westerfield, that reversible error exists where a defendant was forced to use a peremptory challenge regardless of whether he would have used the challenge to correct an erroneous denial of a challenge for cause. (AOB 179.)

As previously noted a defendant is not deprived of the state-created liberty interest in 20 peremptory challenges (See Code of Civ. Proc., § 231) because he was required to use peremptory challenges to cure "error" in the trial court's declining to remove a prospective juror for cause. (*People v. Clark, supra,* 52 Cal.4th at p. 902, citing *People v. Weaver, supra,* 26

Cal.4th at p. 913, and *People v. Gordon, supra,* 50 Cal.3d at p. 1248, fn. 4 [use of peremptory challenge to cure "error" in denying challenge for cause does not violate right to fair and impartial jury, citing *Ross v. Oklahoma, supra,* 487 U.S. at pp. 85-88, overruled on other grounds, *People v. Edwards, supra,* 54 Cal.3d at p. 835.)

In support of this contention, Westerfield relies on this Court's decision *Bittaker*, and particularly, the following language:

> The denial of a peremptory challenge to which defendant is entitled is reversible error when the record reflects his desire to excuse a juror before whom he was tried. [Citation.] Since the erroneous denial of a challenge for cause compels the defense to use a peremptory challenge, a similar analysis applies to denial of a challenge for cause. [Citation.] Defendant must show that the error affected his right to a fair and impartial jury. [Citation.]
>
> Thus, defendant must show that he used a peremptory challenge to remove the juror in question, that he exhausted all of his peremptory challenges [citation] or can justify his failure to do so [citation], and that he was dissatisfied with the jury as selected. But if he can actually show that that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different.

(*People v. Bittaker, supra,* 48 Cal.3d at pp 1087-1088.) In *Bittaker*, to determine whether the defendant had been prejudiced, this Court analyzed the alleged impartiality of the prospective jurors the defense unsuccessfully challenged for cause but for whom the defense used a peremptory challenge (like Prospective Juror No. 19 in this case), and not the alleged impartiality of the jurors ultimately seated after the defense exhausted its peremptory challenges (like Juror No. 4 in this case). (*Id.* at 1088.) From the quoted language and this Court's concern only with the prospective juror challenged for cause, Westerfield argues that *Bittaker* requires reversal so

long as a defendant can show he was required to use a peremptory challenge to cure an erroneous denial of a challenge for cause, that he exhausted his peremptory challenges, and that he was subsequently unable to peremptorily challenge a juror who ultimately sat on his case without having to show that the juror was incompetent. (AOB 177-179.)

More recently, however, in *People v. Yeoman, supra,* 31 Cal.4th 93, this Court clarified the showing a defendant must make to demonstrate prejudice. First, this Court observed:

> The harm to defendant, if any, was in being required to use four peremptory challenges to cure what he perceived as the trial court's error. Yet peremptory challenges are given to defendants subject to the requirement that they be used for this purpose. [Citation.] While defendant's compliance with this requirement undoubtedly contributed to the exhaustion of his peremptory challenges, from this alone it does not follow that reversible error occurred. An erroneous ruling that forces a defendant to use a peremptory challenge, and thus leaves him unable to exclude a juror who actually sits on his case, provides grounds for reversal only if the defendant "can actually show that his right to an impartial jury was affected . . . ." [(Citing to *People v. Bittaker, supra,* 48 Cal.3d at pp. 1087-1088.)]. In other words, the loss of a peremptory challenge in this manner " 'provides grounds for reversal only if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him.*'" [Citations].

(*People v. Yeoman, supra,* 31 Cal.4th at p. 114, original emphasis.)

Accordingly, it appears that in *Yeoman* this Court impliedly disapproved *Bittaker* to the extent that it might have been interpreted in the manner suggested by Westerfield — that a defendant is entitled to reversal simply by showing that he wanted, but was unable, to challenge a juror who ultimately sat on his trial regardless of whether the juror was competent to sit because he had exhausted his peremptory challenges to remedy erroneous denials of challenges for cause. Now, under the Court's analysis in *Yeoman* and subsequent cases, a defendant can only show that his right

to an impartial jury was violated where he can show that he exhausted his peremptory challenges, and the trial court erroneously denied a challenge for cause as to a juror ultimately seated. (*People v. Yeoman, supra,* 31 Cal.4th at 114; see, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 340 [applying *Yeoman*, Court declined to address defendant's claim of error as to prospective jurors who did not sit on jury as record did not show any seated juror was challenged for cause].)

Here, applying the principles of *Yeoman*, as discussed above, Westerfield has not demonstrated that Juror No. 4 was an incompetent juror forced upon him. And, therefore, his assertion of reversible error fails.

IV. GIVEN THE EXTENSIVE MEASURES TAKEN TO ENSURE THE JURY WOULD NOT BE AFFECTED BY THE PUBLICITY SURROUNDING THE TRIAL, THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO SEQUESTER THE JURY

Westerfield contends that the publicity and public sentiment surrounding his case intensified as the trial progressed such that it was not only an abuse of discretion for the trial court to have declined on multiple occasions to sequester the jury, but also a violation of his right to due process. He cites to the many instances throughout the trial evidencing the potential for undue influence of the jury from outside sources, including the media, the Van Dams, and two reports of individuals "stalking" some of the jurors. (AOB 180-224.) There is no doubt that there was extensive media attention to this trial, particularly in light of the fact that it was televised, and no doubt that the kidnapping of a seven year-old girl from her own home while her family was sleeping, her murder, and the dumping of her body evoked a strong emotional reaction. But this was far from lost on the trial judge. Judge Mudd took extensive and serious measures to protect the jury from outside influences, including barring individuals from his

courtroom when they did not abide by his orders, that rendered the extreme burden to the jurors of sequestration unnecessary. Additionally, the admonitions Judge Mudd gave to the jury to disregard the news and attention to the case were specific, constant, and more than adequate to ensure that the jury was protected from the influence of any source beyond the evidence presented at trial.

Penal Code section 1121, makes clear that issue of jury sequestration rests within the sound discretion of the trial court:

> The jurors sworn to try an action may, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. Where the jurors are permitted to separate, the court shall properly admonish them. Where the jurors are kept in charge of a proper officer, the officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof.

This Court has ruled that the discretion to sequester a jury is no less in a capital case. (*People v. Morales* (1989) 48 Cal.3d 527, 563; see also *Estes v. Texas* (1965) 381 U.S. 532, 546, fn.3 [85 S.Ct. 1628; 14 L.Ed.2d 543] [observing that most states leave decision as to whether to sequester jury to discretion of trial court].)

Despite the statutory language indicating the appropriate standard of review as to whether a trial court properly declined an invitation to sequester the jury is the deferential abuse-of-discretion standard, Westerfield argues that United States Supreme Court precedent dictates that this Court must review such a claim *de novo*. Specifically, Westerfield relies on language in *Sheppard v. Maxwell* (1966) 384 U.S. 333, 362-363 [86 S.Ct. 1507; 16 L.Ed.2d 600], stating:

> Due process requires that the accused receive a fair trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of

> effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If the publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.

The statement regarding independent review in *Sheppard* is dicta, and appears to stand as an admonition to ensure that trial courts take the necessary precautions to protect against the influence of publicity. But Westerfield further suggests that because the standard of review for the denial of a change-of-venue motion is *de novo*, the same standard should apply to the denial of a request to sequester a jury. (AOB 187-188.) There are other contexts that are seemingly "mixed" questions of law and fact in which rulings regarding the effect of pretrial publicity warrant deferential review. The denial of a motion for mistrial is one such area. A mistrial should be granted based upon inflammatory publicity only where a party's opportunity to receive a fair trial has been irreparably damaged. (*People v. Panah* (2005) 35 Cal.4th 395, 453, *People v. Burgener* (2003) 29 Cal.4th 833, 873.) The question of whether mistrial or sequestration are appropriate are both based on factual and circumstantial criteria, of which the trial court stands in the best position to evaluate. (See *People v. Ruiz* (1988) 44 Cal.3d 589, 616.) A change-of-venue motion requires a legal determination of whether a defendant can receive a fair trial with fair jurors at all in a particular location. Sequestration is a tool the trial court possesses, after the selection of a fair and impartial jury, to ensure that public pressures do not tamper with that fair and impartial jury.

Sequestration places a significant burden on the lives of jurors. The trial judge is best suited to know the jurors and the risks involved in a particular case in determining whether such a measure is warranted. (*People v. Ruiz* (1988) 44 Cal.3d 589, 616.)

For that reason it seems, in codifying Penal Code section 1121, the Legislature clearly intended for trial courts to have discretion as to whether jury sequestration is necessary in any particular trial, and absent a constitutional violation, this Court cannot substitute its judgment as Westerfield urges it to do. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1219.) Westerfield has pointed to no authority suggesting a right to a sequestered jury, the violation of which would amount to constitutional error. (See *Ibid.*)

Here, the trial court exercised its discretion appropriately, choosing to admonish the jury frequently and thoroughly about its duty to avoid the publicity surrounding Westerfield's trial. Even under *de novo* review, in light of all of the precautions taken by the trial court, it is not reasonably likely Westerfield did not receive a fair trial based on the denial of his sequestration requests. Moreover, as Westerfield has shown no actual prejudice from the trial court's denial of his requests to sequester the jury, his claim must be rejected.

A. The Defense Requests To Sequester And Other Relevant Events

Prior to trial, on April 22, 2002, the defense filed a "Motion to Sequester Jury After Panel is Sworn in Lieu of Motion for Change of Venue" in light of the pretrial publicity surrounding the case (3 CT 581-586.) In open court, the defense requested the trial court take the matter under submission until the parties and court could assess the degree to which publicity had affected the venire. (5 RT 975.) The court responded that it was not inclined to warn the venire about the potential for

sequestration, believing it would add "one more problem to our efforts to find a community jury to listen to this." (5 RT 976.) The court did not deny the defense motion, and agreed that it might become apparent at some point during the trial that sequestration was warranted. (5 RT 976-977.)

In its initial charge to the jury prior to opening statements, the trial court warned that there was a great deal of misinformation being reported about the trial: "It is misinformation that if you listen to and incorporate in this trial does a grave disservice to both sides in this case. All eighteen of you have agreed and these lawyers have selected you because you have agreed to make your decisions in this case based solely on what you see and hear in this courtroom." (11 RT 3341.) The court informed the jury that of the many options available to it to prevent the publicity from influencing the jurors, it was going to institute a practice of "self-policing," meaning that the jurors were to take it upon themselves not to view or listen to any publicity about the trial. (11 RT 3341-3342.)

The defense renewed the motion to sequester following the delivery of the prosecutor's guilt phase opening statement. After the jury left the courtroom, Judge Mudd admonished members of the audience that their wearing of buttons containing a picture of Danielle was unacceptable, and they would not be permitted back into the courtroom wearing them. (11 RT 3390-3391, 3393.) The renewal of the defense motion was based upon people outside the courtroom handing out those buttons, as well as the substantial number of people outside the courtroom with newspapers thus potentially exposing the jury to headlines about the trial. (11 RT 3392.) The court reassured counsel that it would not permit any sort of jury intimidation in his courtroom. (11 RT 3392-3393.)

As an example of the trial court's diligence in admonishing the jury to disregard the publicity surrounding the case, Judge Mudd said the following on June 5, 2002:

All right. In all seriousness, ladies and gentlemen, as the shepherd of this flock, it's my job among other things to monitor the media coverage and to bring to your attention potential things that we need to talk about, especially in light of the fact that the trial has now started.

We mentioned three primary areas: radio, print media, and television. In terms of radio, I see absolutely no problems in our self-policing method. Other than two major stations on the A.M. from San Diego and one in L.A., it appears that between A.M. and F.M. stations you can find plenty of things to listen to without listening to this case. So self-policing is working.

As to the print media, it is probably one of the easiest types of things to avoid because you know right away when there is an article about the case. And, for example, the "San Diego Union" this morning it was all over the front page. So self-policing is going to work because you're obviously going to be able to avoid reading the articles because you were here, you knew what happened, and you can avoid that.

Now, I didn't go into my local Albertson's to determine whether or not, you know, the other media, and whether or not any aliens were involved in this case. Apart from those types of trash types of papers, self-policing is still going to work.

That brings us to probably the hardest part of your job, and that's television. Short of the national media coverage of the events of 9/11, I have never seen anything on local television like this case. Now, what I am going to tell you to do is going to take a great deal of courage on your part, but I'm going to tell you a way to avoid the television media coverage. Become a Padre fan. And the reason for that is you watch a baseball game and for a period of two and a half or three hours you're not going to hear a thing about this case. You may not be watching good baseball either, but the fact is that you won't be hearing anything about the case. If baseball's not your thing, we've the NBA finals going. We've got World Cup Soccer. And for those of you that have cable television, you're in luck because you've got movies and you've got other things.

> How are we going to handle this, ladies and gentlemen, because I now have seen the media covering the media, which, when it gets to that point, you know how extensive the coverage is. I have very few choices when we stop doing self-policing. Self-policing is going to require a good deal of courage on your part. It's going to mean, for example, if you don't have cable T.V. and all you have is access to our local major stations. That you're not going to be able to watch your television. You're going to have to become familiar with your neighborhood library brand and learn how to read perhaps again.
>
> The bottom line is very simple. Right now, between radio and television, every lawyer that ever practiced criminal law in this city and in this county is an expert. And they are giving opinions. And they are talking about the things you've seen and heard. They are not going to make the decision; you folks are. So it's very important that as to television coverage, extensive as it is, that you avoid it at all costs. Continue to do the self-policing. I only bring to your attention because of the extent of the coverage I saw last night virtually going into the early evening and late evening if you watch the late news.
>
> So just find something else to watch on T.V. And, if necessary, unplug it during your stay here. And in that way we can guarantee your decision will be based solely on what you see and hear in the courtroom.

(12 RT 3515-3517.) The court reminded the jury of this responsibility frequently (See, e.g., 14 RT 3999 [trial made it to editorial page in the form of a cartoon; court reminds jury to self-police and disregard]; 20 RT 5440-5442 [self-policing with media and not discussing case with spectators in court]; 26 RT 6799-6800 [court emphasizes disregarding publicity particularly in light of information being reported incorrectly].)

An issue arose on June 6, 2002, when it came to the trial court's attention that a "guest character artist" was attempting to draw likenesses of the jurors; the faces were blank. (13 RT 3864-3865.) The judge informed the bailiff to be on the lookout for such material, to confiscate it, and to

bring it to the court's attention just as he had this time. (13 RT 3865-3866.) The same day, apparently there was what the trial court vaguely described as a protest of some sort by an individual in front of the jurors that left Juror. No. 13 "kind of shaken up." The trial court advised the jury that the incident had nothing to do with the task the jury was to perform, nothing to do with the lawyers in the case, and was "just one more form of the kinds of publicity or bias that you have been selected to overcome." (13 RT 3867.) Also that day, the court was made aware that the county probate office had received a number of phone calls after the newspaper had published the occupations of the jurors — Juror No. 7 was a probate examiner. There were only seven probate examiners in the office, and it would not be difficult to ascertain which was serving on Westerfield's jury in light of her altered work schedule. The probate office appeared to work out an arrangement to minimize any undue pressure on Juror No. 7 from coworkers or the public (13A RT 3738-3741; 14A RT 4224-4227.)

On June 11, 2002, during the prosecution's guilt phase presentation, the defense notified the court of the previous day's newspaper advertisements for a radio station broadcasting the trial live, and made certain that it had preserved its request for sequestration. (15 RT 4235-4236.) The trial court noted the advertisement and told the defense its motion for sequestration had been denied without prejudice and could be revisited at any time. (15 RT 4236.)

On June 13, 2002, the jury sent Judge Mudd a note indicating that it believed Brenda Van Dam was "glaring or staring" at them. The judge addressed the matter with the jury in a closed session. (17B RT 4822.) No juror indicated he or she felt intimidated by Mrs. Van Dam. (17B RT 4822.) The court inquired as to whether any juror felt Mrs. Van Dam's presence in the courtroom would affect his or her ability to be fair and impartial to both parties. No juror indicated that it would. (17B RT 4822-

4823.) The court assured the jury that the prosecution would speak with both Brenda and Damon Van Dam. (17B RT 4826.) Any issue was apparently resolved as the jury expressed no further concern for the trial's duration.

On June 24, 2002, however, outside the jury's presence when Westerfield was brought into the courtroom by the bailiff, Damon Van Dam was "peering in the window." The bailiff asked if he needed anything, and Mr. Van Dam responded, "I just want to let him know I'm here." The court noted a similar incident when Westerfield was in the transportation area and also noted Mr. Van Dam's facial expressions in court. (22 RT 6021.) The court excluded Mr. Van Dam from the proceedings and from being in the courthouse for the remainder of the guilt phase.[14] (22 RT 6021-6022.) Following this exchange and prior to the jury being excused for the evening, the prosecution brought to the court's attention at sidebar the likelihood that Mr. Van Dam would be speaking to the media about his being excluded from the court despite the prosecution's warnings to him not to do so. (22 RT 6136.) The trial court informed the jury that the court had made some rulings that day outside the jury's presence that were likely to make the news, and therefore the jury should continue to self-police and not read or watch any publicity about the case. (22 RT 6137.)

The defense renewed the sequestration motion on June 27, 2002, in light of additional media attention, most significantly false reports of the number of child pornography images in Westerfield's collection. (25 RT 6561-6563.) The trial court responded that it was not going to sequester the

[14] Judge Mudd reconsidered his ruling and allowed Mr. Van Dam to return to the courtroom on July 11. (31 RT 8053.)

jury as it had no reason to believe that it was disregarding the court's order to pay no attention to the publicity. (25 RT 6568.)

Prior to leaving for a vacation, Judge Mudd issued the following advice to the jury on July 10, 2002:

> Okay, ladies and gentlemen, before I give you your evening dose of the daily admonition, I just want to remind you that the shepherd's going to be away from the flock for a while and what I need for you to do is to guard against, in the utmost way possible, reading or listening to, because I suspect, based on my experience over the 4th of July, that next week when there's nothing live there will be something contrived.
>
> I'm not a poet but that just seemed to flow right out. They're going to have synopses, all of the talking heads will be out there just to keep the interest up until we start again on Monday the 22nd. . . .
>
> The reason I raise these points is that you can be – you can rest assured that whether you're making your best efforts or not, things are going to pop up. I mean, you can be watching a television show on a national network and all of a sudden you're going to see an ad for Dateline and you're going to see this case. So it's very, very important in the interim while we're away from each other that you self-police.

(30 RT 8041-8042.)

On July 22, 2002, following the release to the media of the search warrant affidavits, the defense raised the issue of sequestration again, arguing that damaging information ruled inadmissible by the court had now been made public. Additionally, the information was published prior to the week-long recess in the trial due to the judge's vacation. The defense argued that media attention had reached a height where it was "inescapable." In addition, the story of the kidnap, sexual assault, and murder of five year-old Samantha Runnion in Orange County was in the news; there were tremendous similarities to Westerfield's case, not only in the nature of the crime, but also pornographic images discovered on the

defendant's computer. (33A RT 8071-8072.) The defense acknowledged that the trial court had denied the sequestration motion many times, but that it was now moving for a mistrial based on the degree of media attention. (33A RT 8072.) The prosecution responded that the motion was based upon speculation that the jury had actually seen or heard the publicity and had been influenced by it. (33A RT 8073.) The court denied the motion, finding that the media coverage was no different than what had been occurring throughout the trial, it intended to discuss with the jury its duty to ignore the media focus on the Samantha Runnion case, and that it had every reason to believe the jury was following the order not to pay attention to such matters. (33A RT 8074.) The trial court fulfilled its intention, and informed the jury that the Orange County case had nothing to do with Westerfield's and that it was the jury's obligation to decide this case solely based upon the evidence presented in court. (33 RT 8092.)

Then, on July 25, 2002, the court discussed with the parties in a closed session an incident that had been reported the prior evening. When Juror No. 2 was walking out of the courthouse with two other jurors, he believed someone was following them. (36B RT 8585.) Juror No. 2 parted from the other two jurors, both of whom walked toward the trolley station still wearing their juror badges. The person continued following them, and got onto the trolley with all three jurors. (36B RT 8585-8586.) All three jurors and the person believed to be following them exited at the same stop. Juror No. 2 watched as this individual followed the other two jurors to their cars and watched the man write down their license plate numbers. Juror No. 2 immediately called the court and reported what he saw. (36B RT 8586; 36B 8588-8589.) While the court had no indication who the person was that was following the jurors, the assumption was that it was someone affiliated with the media. (36B RT 8586.)

The court first brought Juror No. 2 into the courtroom, and he reported that the other two jurors involved were Nos. 17 and 18. (36B RT 8597.) Juror No. 2 indicated there was nothing about the experience that would affect his ability to remain fair and impartial. (36B RT 8599-8600.) Next, the court brought Juror No. 17 into the courtroom; he gave an account consistent with Juror No. 2. (36B RT 8601-8603.) When asked whether he felt intimidated by the occurrence, Juror No. 17 responded, "I don't think so. I'm fine with it. I'm not happy with it, but I mean its . . . No. I think I'm fine with it." (36B RT 8605.) Finally, the court brought in Juror No. 18. Juror No. 18 was not aware of the person the other jurors believed was following them. (36B RT 8607.) Juror No 18 indicated that the incident would not affect her ability to be fair. (36B RT 8605-8606.)

The court then addressed the entire jury, and informed the entire group that some jurors may have been followed to their cars the previous evening. (36B RT 8608-8609.) The court told the jury that it was informing it of the incident not to make the jury paranoid, but to encourage the jurors to report any such behavior. (36B RT 8610-8611.) Additionally, the court stated that all security options, including sequestration, were being considered. (36B RT 8611-8612.) Then, the court stated that if any juror believed that the situation was going to cause him or her to become unable to be fair and impartial or was going to cause any concern about his or her safety or well-being, the juror should communicate that by note to the court. (36B RT 8612.) The court received no such notes. The court also arranged to have the jurors meet in a particular location in the courthouse from which they would then be escorted into Judge Mudd's courtroom without having to pass through the hallway where the media and public were gathered. (36E RT 8808-8809.)

On July 29, 2002, defense counsel brought to the court's attention that a show had been aired on television entitled "Body Farm," which dealt

with the science of decomposition (37 RT 8851); a week prior, forensic entomologist Neal Haskell explained to the jury that the Body Farm was a research facility at the University of Tennessee where recently deceased human bodies are used to study decomposition. (33 RT 8230-8231.) Additionally, the media surrounding the Samantha Runnion case had increased, particularly coverage of the fact that the defendant charged with her murder had been acquitted by a prior jury of an earlier crime. The defense was concerned that the jury would draw the connection that if it acquitted Westerfield, then he would kill another little girl. The defense renewed its request for sequestration. (37 RT 8851.) The trial court responded that it would include the Samantha Runnion case and the "Body Farm" show in its admonition to the jury about publicity, but denied the sequestration request, observing:

> Like I told you when we ran into the problems with the jurors being followed, I will continue to consider sequestration as a potential option at the time the jury is deliberating. My preference still remains not to do it. After our private discussions with the jurors they're a hearty group and they don't appear to be intimidated by what occurred and I continue to believe in their integrity. But I will — I'm considering it to the point I'm having the county do a back-up contingency plan just in the event I find it necessary. So that motion is raised and it's denied again.

(37 RT 8851-8852.) When the jurors returned the following day, the trial court informed them that sequestration remained a possibility, although it was not the trial court's plan at that time; the court told the jurors it was taking into account the disruption to their lives and their families if they were to be sequestered. (38 RT 8871-8872.) The judge admonished that while the Samantha Runnion's case appeared similar to Westerfield's, it had no bearing on the issues the jury was to decide in this case. Further, Judge Mudd warned the jury about the "Body Farm," advised it not to watch the show, and advised that the only scientific evidence it was to

consider about decomposition had been provided to it by the experts who testified in court. (38 RT 8872-8873.)

Prior to closing arguments, the trial court noted that it had decided against sequestering the jury for deliberations based on jurors' thoughts about it and the trial court's perception of the jury. (40 RT 9293.) Defense counsel brought to the trial court's attention an article in the newspaper in which information about a psychologist meeting Westerfield in the county jail had been leaked to the press in violation of a court order. (41 RT 9307.) The trial court was aware of the article and had intended to follow up with the Sheriff's Department as to the source of the leak. (41 RT 9308.) The defense asked the court to reconsider the sequestration issue once again, noting a newspaper article over the weekend, criticizing the instructions discussing a defendant's right not to testify, specifically CALJIC Nos. 2.60 and 2.61. There was an additional article in the San Diego Magazine, discussing the Van Dams and Dad's. (41 RT 9329.) The court stated:

> And I intend to once again indicate that by allowing them to not be sequestered, I am expecting them to abide by the court's order.
>
> I think one thing needs to be said because the record is often exceptionally dry, and for any appellate review, this is a hardy group of people. And this court got the very distinct impression when we dealt with the matter of a number of them being followed and efforts to determine who they were through their license numbers, that they don't want their lives disrupted. And that's exactly what sequestration would do.
>
> And, in addition to that, sequestration has its own pitfalls as this local community has already discovered. So I am aware of what the articles were this weekend, and it was just a matter of what was going to be today's topic of discussion.

(41 RT 9330.) The trial court ordered that the jury would begin deliberations without sequestration. (41 RT 9330.) The next time the jury was in session, during the delivery of closing arguments, the trial court admonished them at the day's conclusion that they were to avoid the media speculation that would no doubt occur and "emphasize[d] that it is very critical in order for the court to abide by its commitment to you not to sequester you that I rely on you self-policing. If that changes for any reason, I'm going to have to change my position." (42 RT 9488-9489.)

The defense raised concerns about an article in another San Diego magazine as well as the sheer volume of media trucks outside the courthouse and media personnel in the halls. (44 RT 9670.) The trial court admonished the jury as to the extensive media coverage about the case, particularly in light of the fact that the guilt phase was coming to a close. (44 RT 9672.) In its concluding instruction to the jury, the trial court reminded:

> I didn't sequester you. I know that you are a conscientious group and are going to deliberate conscientiously. If it becomes apparent to you collectively that you cannot do that given the freedom you have to go home each night, I will expect you to alert me to that. I think I have done everything humanly possible to get you to understand how important it is that you make the decision based solely on what you see and hear in this courtroom.
>
> You will now start deliberations. You will now find out if you can do that. If you cannot do that with the outside influences, the day off, the weekend off, going home at night, alert me to that. And if you want to be isolated, I will do that. At this point in time I don't sense that you do want to do that, and I have every confidence you'll be able to do your job without those influences.

(41 RT 9688-9689.)

The same day, the foreman of the jury, Juror No. 10, sent a note to the judge indicating that another juror was being "harassed" at work such

that that juror would prefer to be sequestered. As sequestering would significantly affect the other jurors, the remainder of the jury proposed deliberating all or part of the day on Friday, as they currently were not in court at all on Fridays, such that the juror could avoid going to work. (14 CT 3488.) The previous day, the court had received a note from Juror No. 12 as to increased exposure and conversation among friends, family, and work colleagues. (44A RT 9704.) The court brought the entire jury into the courtroom. (44A RT 9706.) It permitted the jurors to deliberate on Fridays for any amount of time it wished so that they could report to their employers that they were in session those days. (44A RT 9706-9710.) Then, the court and parties spoke with Juror No. 12 privately. Juror No. 12 clarified that it was the people at work, and not the intense media coverage, that was difficult for him to deal with. Therefore, deliberating on Fridays would solve the problem. (44A RT 9711-9712.) The court inquired as to whether anything that he heard at work had affected his ability to be fair and impartial, and Juror No. 12 assured it had not. (44A RT 9712-9713.) The court brought all of the jurors back into the courtroom and confirmed that they did not wish to be sequestered. (44A RT 9716.) For purposes of the media, the trial court stated in open court that the jury would be deliberating on Fridays, but would not disclose the hours. (44A RT 9716-9717; 44 RT 9720.)

On August 13, 2002, the parties discussed an incident wherein an individual called defense counsel's office as well as the court, and reported that he heard from another source that Juror No. 12 had stated "he wasn't going to believe anything Feldman said because he didn't like him." (47A RT 9732-9733.) The defense moved for a mistrial, and renewed the request for jury sequestration. (47A RT 9734.) The trial court found no basis for a mistrial and declined to inquire further of the juror because the allegations were at least hearsay, if not double hearsay. Even assuming it was true, the

statement did not go to the heart of deliberations as the juror did not have to believe anything counsel said, and the statement did not appear to implicate his ability to be fair. (47A RT 9736-9737.)

On August 15, 2002, during deliberations, the trial court heard another request from the defense to sequester the jury, or to at least provide it a designated location to meet during breaks away from the media, due to a Court T.V. article on the television station's website, reporting that the jury had communicated to the court that it was observed by the media every place it went. (49 RT 9778-9779.) The court clarified that contrary to the Court T.V. report, the communication had been between the jury and the bailiff, who then directed the reporters to give the jurors "space," which they did. (49 RT 9782.) The court noted that sequestration would not save the jury from public scrutiny if it rendered a not guilty verdict, and that the media coverage during deliberations was less than during the taking of testimony. The court denied the motion for sequestration, but agreed that the jury would be provided a place to gather during breaks and lunch, so that it would not have to be in the vicinity of the media or public. (49 RT 9782-9783.)

After the penalty phase commenced, defense counsel alerted the court there was a news report of the Westerfield trial and mention of a child molest, presumably referring to Jenny N.'s testimony, during half-time of a televised football game, and accordingly, sports were no longer "safe" on television either as the court had been urging throughout the trial. The defense requested sequestration again, or an admonition at a minimum. The trial court noted that even if the jury heard the report, it had already heard the same evidence in court. When the jury returned to the courtroom, as requested by the defense, the trial court immediately informed them as much. (58 RT 10102.)

The final defense request for sequestration came toward the conclusion of the penalty phase and resulted from an incident entirely unrelated to the proceedings between Juror No. 6 and an acquaintance, but where the juror believed the acquaintance might have followed him to court. Juror No. 6 indicated that the incident would not affect his ability to be fair and impartial. (60A RT 10445-10446; 10459-10461.) Also that day, the court followed up with Juror No. 12, following further defense investigation, on the information about his not liking defense counsel Feldman. Juror No. 12 indicated that in no way did the defense investigation or anything about the incident have any impact on his ability to be fair and impartial. (60A RT 10457-10459.) The court denied both the motion for mistrial and the motion for sequestration. (60A RT 10463.)

The same day an alternate juror reported an incident in which she felt she had been followed; the incident occurred on the trolley and she was with Juror No. 2. Juror No. 2 did not feel the individual was following them. In any event, the alternate juror stated that if she were called upon to deliberate with the jury, which she was not, nothing about the incident would adversely affect her ability to be fair and impartial. Juror No. 2 indicated the same. (49A RT 9766-9776.)

B. The Trial Court Properly Exercised Its Discretion In Declining To Sequester The Jury

As the above discussion shows, and the record is replete with more such instances, at every turn the trial court was aware of and protected against the impact of media and public pressures upon Westerfield's jury. The decision not to sequester was the result of serious thought and consideration. The trial court admonished the jury daily, and sometimes on multiple occasions throughout the day as to the dangers of media accounts about the case. Not only did the trial court have no indication that any juror had violated the court's admonitions, but the record also makes clear that

whenever the jurors had concerns, they brought them to the attention of the trial court. The court then fashioned remedies and assured that no juror's ability to be fair and impartial had been implicated.

As he cannot show that any juror was impacted by the media attention to such a degree that he or she could not be fair and impartial, Westerfield seems to argue that the media attention surrounding the case was of such a degree that Judge Mudd's decision not to sequester the jury must necessarily be an abuse of discretion, which is akin to arguing that prejudice should be presumed. But as noted in *Estes v. Texas, supra,* 381 U.S. at page 542: "[In] most cases involving claims of due process deprivations [the reviewing court] require[s] a showing of identifiable prejudice to the accused." Here, there is no identifiable prejudice as the record contains "no indication that the jurors had violated the court's numerous and strenuous admonitions against reading, watching or listening to anything publicized about the case." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1220.)

Moreover, as this Court has recognized, those cases in which trial publicity and community passions was found to have been presumptively prejudicial, whether the jury was sequestered or not, are far and few between. (*People v. Prince* (2007) 40 Cal.4th 1179, 1216.) Those cases are "exceptional," and it is well-established that even pervasive publicity does not necessarily result in an unfair trial. (*Ibid.*) Westerfield's is not one of the extraordinary cases.

In *People v. Prince, supra,* 40 Cal.4th at page 1217, this Court summarized those cases in which the high Court has found publicity so pervasive as to have rendered the trial presumptively unfair:

> In one case in which the high court reversed a judgment, the critical feature was that a local television station in a relatively small community on several occasions broadcast the entire spectacle of the defendant's jailhouse confession. (*Rideau v.*

> *Louisiana* (1963) 373 U.S. 723, 727 [10 L. Ed. 2d 663, 83 S. Ct. 1417].) Explaining two other cases in which the high court presumed prejudice, the court stated that "[t]he trial in [*Estes v. Texas* (1965) 381 U.S. 532 [14 L. Ed. 2d 543, 85 S. Ct. 1628]] had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, [*Sheppard v. Maxwell* (1966) 384 U.S. 333 [16 L. Ed. 2d 600, 86 S. Ct. 1507]] arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob.

Due to the precautionary measures, constant admonishments, obvious indications that the jurors took their role seriously, and lack of any evidence that the jury had been negatively impacted by the media accounts surrounding his trial, Westerfield's case does not remotely compare to the lynch mob, carnival, or circus atmospheres described above. As the above summary demonstrates, from the outset the trial court warned the jury that there already was, and would continue to be, extensive media coverage about the case that the jury was obligated to avoid; these admonitions occurred daily throughout the trial. (See, e.g., 11 RT 3341-3342; 25 RT 6561-6563; 42 RT 9488-9489.) Additionally, when jurors had issues with pressures from within or outside of the courtroom, they brought it to the court's attention and the court addressed the concern. (See, e.g., 17B 4822-4826 [jury concerned about Brenda Van Dam staring]; 36B 8585-8612 [jurors being followed to cars] 44A RT 9704-9717 [accommodating deliberation schedule such that juror would not have to attend work where he felt pressure from coworkers]. Finally, the court took measures such as providing secure access to the courtroom (36E RT 8808-8809), and providing a room in which the jurors could take breaks and have lunch

during deliberations outside the reach of the media and the public. (49 RT 9782-9783.) The trial judge made clear that it would not tolerate outside influences from effecting the fairness of the proceedings, even banishing the victim's father. (22 RT 6021-6022.) When the trial court denied the defense sequestration motions it did so by recognizing that it had no reason to believe the jury had disregarded its orders and every reason to believe that the jury was abiding by them. (See, e.g., 25 RT 6568; 37 RT 8851-8852.) The trial court took measures in order to ensure that the jury would be able to continue doing so without the added burden of being sequestered.

As the foregoing demonstrates, this record makes abundantly clear that the trial court was well aware of the media attention, well aware of the options available to shield the jury from it, was in the best position to assess what measures should be taken, and exercised its discretion in an appropriate manner to assure that the jury's verdict was based on the evidence and not on any outside pressures or passions.

V. AS IT WAS SUBSTANTIALLY CONNECTED TO THE CRIMES OF KIDNAPPING AND MURDER, THE CHILD PORNOGRAPHY CHARGE WAS PROPERLY JOINED AND THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING WESTERFIELD'S SEVERANCE MOTION

Westerfield contends that count three, the misdemeanor possession of child pornography charge, did not meet the requirements for statutory joinder with the other charges of capital murder and kidnapping as they were not crimes of the same class and they were not connected in their commission. Alternatively, Westerfield alleges that even if count three met the requirements for statutory joinder, then the trial court abused its discretion in denying the defense motion for severance. Contrary to Westerfield's argument, the child pornography charge met the requirements for statutory joinder as it was substantially connected to the murder and

kidnapping — Westerfield's devious sexual attraction to young girls provided the motive for his heinous crime against Danielle. Likewise, the trial court properly denied the severance motion as the evidence would have been cross-admissible even if charged in a separate proceeding, was not unusually likely to inflame the jury, and did not result in a weak case being joined with a strong one. Westerfield has not made the clear showing of prejudice required to demonstrate the trial court abused its discretion in declining to sever the child pornography count.

Penal Code section 954 provides in relevant part:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in the same court, the court may order them to be consolidated. . . . [T]he court in which a case is triable, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . .

A. The Defense Motion To Sever And The Trial Court's Rulings Regarding The Admissibility Of The Pornography Evidence

Pretrial, the defense filed a motion to sever count three — the misdemeanor possession of child pornography charge pursuant to Penal Code section 311.11, subdivision (a).[15] (2 CT 475-481.) The court

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[15] Penal Code section 311.11, subdivision (a) provides:
Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disk, computer hardware, computer software, computer floppy disk, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the

(continued...)

conducted an in limine hearing for the purpose of determining the admissibility of, and appropriate limitations for, the evidence of pornographic materials on Westerfield's computers and computer media discovered in his home. (5E RT 1943.) The prosecution initially offered six video clips each lasting approximately 30 seconds or less, and approximately 25 still images. (5E RT 1944, 1946.) In support of the evidence's admissibility, the prosecution argued that some of the images and movies established the elements of the possession of child pornography charge as they depicted sexual conduct by children under the age of 18, while all of the images and movies were relevant to Westerfield's motive and intent in kidnapping and murdering Danielle pursuant to Evidence Code section 1101, subdivision (b). (5E RT 1950-51.) The six movie clips, which were ultimately admitted at trial as Exhibit 139, graphically depicted forcible sexual attacks on young girls. (5E RT 1953.) A photograph, which became part of trial exhibit Exhibit 138, depicted a young girl having sexual intercourse with an adult male. (5E RT 1954.) Exhibits 138 and 139 were offered to prove the possession of child pornography charges. (5E RT 1953-1954; 5F RT 1996.) Various other images of nude teens and children, and in some cases "very young children," in seductive poses (5F RT 1994-1995), were offered as Evidence Code section 1101, subdivision (b) evidence of motive and intent (Exh. 138), including a cartoon, or "anime," series showing and telling the story

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(...continued)

> matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both the fine and imprisonment.

of a young girl being attacked and raped. (Exh. 147; 5E RT 1948-1949; 24 RT 6394-6396.)

As to all of the pornographic images, whether offered to prove count three or not, the prosecution suggested that the material provided a "rare insight into the reasons for this kidnapping and murder by Mr. Westerfield of Danielle Van Dam. They demonstrate graphically his special attraction to young girls . . . ." (5E RT 1953.) The defense responded that in light of the fact that pornographic images depicting children was only a small percentage of all of the pornography located on Westerfield's computers, the defense might seek to admit all of the photographs to provide the jury with context. (5E RT 1955.) Additionally, the defense argued that the images and movies would not be admissible as to the issues of motive and intent without some explicit connection between them and the victim or the commission of the crime. (5E RT 1956.) Finally, the defense contended that the prejudice emanating from this evidence was overwhelming. (5E RT 1958.)

Prior to ruling, the trial court sought confirmation from the prosecution as to what it believed the evidence would show:

> You're prepared to prove that the body of Danielle was found in a nude state, severely decomposed so that the cause of death could not be determined, and there were no biological samples recognizable or identifiable on the body at the time of the autopsy, at least as far as we know right now.

(5E RT 1960.) The prosecution confirmed this was the state of its case, and added that the evidence would also show that Danielle's fingerprint, blood, and hair were found in Westerfield's motor home. (5E RT 1960-1961.) The court then recalled that the fingerprint was found on a cabinet just above the bed in the motor home. (5E RT 1960.) The court ultimately ruled:

> In order to make a ruling on this motion the court has to consider the totality of the state of the evidence in terms of its relevance to these proceedings. When one looks at a nude body, when one looks at blood, fingerprint, the hair evidence that is currently known, where it's location, especially handprint or the fingerprint in the area of the bed, coupled with this type of material, it becomes highly relevant, highly probative on the issues of motive and intent. I sort of saw this one coming when it was publically announced that the cause of death could not be determined. And as of now no physical samples were there: no semen, no other bodily fluids.
>
> But when one looks at the entire context of what the people's theory on the case is, it becomes almost the only theory that makes any sense when one couples all of these factors together. I realize, as does everyone, the prejudicial nature of these materials, and whether I'm going to allow all of these in or not I'll hear further argument on.[16]
>
> But as to meeting the threshold issue of whether it is relevant and probative on the People's theory of the case, and whether there is sufficient evidence to sustain that theory, the court finds that there is.

(5E RT 1962.)

Revisiting the issue the following day, defense counsel argued that the pictures were inadmissible character evidence suggesting that Westerfield was a pedophile in light of his possession of the pornographic images. As there was no physical evidence of a molest, then in the defense's view there could be no nexus between the images and the charged

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[16] The court prohibited the prosecution from introducing an anime cartoon series depicting sexual assaults on adult women. (5F RT 1992-1994.) However, the series ultimately was admitted into evidence when the defense "opened the door" by misleading the jury during cross-examination of the prosecution's computer forensics expert as to the extent of Westerfield's child pornography collection as discussed in Argument VI. (24A RT 6370-6373; 24 RT 6392-6408; 14 CT 3489.)

offenses. (5F RT 1982-1983.) The trial court essentially reiterated its ruling from the previous day (5F RT 1983-1984), and added:

> But the question that is in front of the court is whether or not this evidence is admissible. Now, in terms of the 352 argument, I had not approached that, and I'll be the first to admit I did not approach it, because we were cut short yesterday. The People's presentation of this is very straight, succinct, and to the point. It can be presented virtually in as much time as it took yesterday sans whatever experts they may call relative to that evidence.
>
> How much time is it going to take to show the other, assuming you want to show this to the jury, which I doubt you will. I don't believe it's going to take that much time because what you will do is say there are a hundred thousand more images or whatever the number is, without showing them to the jury, which is appropriate, because then you can argue out of the twenty thousand or whatever the total number is, there are X number.
>
> I will indicate that the materials that the People have elected to show in this are not only a small percentage of the young people, young girls that I saw in the material, but also are not nearly as inflammatory as some of the photographs they could have elected to use but have not.
>
> So I have, as best I can, balanced the interest of the defendant, the time that it's going to take, the right of the people to present their case and their theory, and I have come to the conclusion that a limited amount of this material is relevant, it is probative, and while it is true that it is inflammatory, the fact is it exists and the fact is there is evidence in this case to sustain the People's theory.
>
> Reasonable minds differ. You [the defense] disagree. That's the way I'm calling it. Everybody's made their record here. Whether the defense elects to respond by showing the material, referencing the material, calling experts, I'll deal with that when and if it occurs. . . .

(5F RT 1984-85.)

After rendering this ruling, the trial court addressed the defense motion to sever the possession of child pornography charge. The defense argued that severance was appropriate because the pornography charge was not of the same class of crime as murder and kidnapping, nor was it connected to the commission of those offenses. (5F RT 1989, 1996.) The prosecutor agreed they were not crimes of the same class, but argued the offenses were clearly connected in their commission. (5F RT 1990, 1996.) After determining the prosecution would be permitted to introduce the six movies of sexual assaults on young girls, the cartoon of the young girl's rape, the still image of the young girl engaged in sexual intercourse with an adult male, and several other still images depicting young, nude girls in seductive poses, (5F RT 1990-1995; Exhs. 138, 139, 147), the trial court denied the motion to sever. (5F RT 1996.)

B. The Child Pornography Charge Was Properly Joined With The Murder And Kidnapping Charges

The law prefers consolidation of charges because it ordinarily promotes efficiency. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*).) A defendant bears the burden to make a "clear showing of prejudice" to prevent consolidation of properly joined charges. (*Ibid.*)

For purposes of Penal Code section 954, crimes are connected in their commission when they are linked by a "common element of substantial importance"; they need not be committed against the same victim or at the same time and place. (*People v. Valdez* (2004) 32 Cal.4th 73, 119; *People v. Mendoza* (2000) 24 Cal.4th 130, 160.) Whether a trial court properly joined offenses in a criminal proceeding is a question of law and is subject to independent review on appeal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984.)

Notably, for purposes of joinder there is no requirement of cross-admissibility of evidence. In drafting Penal Code section 954, the

Legislature chose not to include a requirement that evidence of the joined offenses be cross-admissible, and instead chose the language indicating the offense must be "connected together in their commission and thus, "embraced a broad test." (See *Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1217 [construing similar requirements for joinder of intercounty murder charges under Pen. Code, § 790, subd. (b).] As this Court summarized in *Alcala:*

> Until more than 90 years ago, joinder of criminal charges in a single accusatory pleading had been strictly limited. Former section 954 read: "The indictment ... may charge different offenses, ... under separate counts, but they must all relate to the same act, transaction, or event, and charges of offenses occurring at different and distinct times and places must not be joined." (§ 954, amended by Stats. 1905, ch. 574, § 1, p. 772, italics added.) In 1915, section 954 was amended to read in relevant part as it does today, permitting the joinder of matters "connected together in their commission." (Stats. 1915, ch. 452, § 1, p. 744, italics added.) As Witkin long has observed (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 208, p. 412; see also Witkin, Cal. Criminal Procedure (1963) Proceedings Before Trial, § 207, pp. 194–195), the revised language applicable since the 1915 amendment "is broader" than the former, and "permits the joinder of different offenses not related to the same transaction or event 'if there is a common element of substantial importance in their commission, for the joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant.'" [Citations.]

(*Alcala v. Superior Court, supra,* 43 Cal. 4th at p. 1218.)

Here, at trial, the prosecution properly conceded that possession of child pornography is not a crime of the same class as murder and kidnapping. (5F RT 1990.) What remains is whether the counts were properly joined because they were "connected together in their commission." (Pen. Code section 954.) Thus, the question statutory joinder asks is whether, applying the "connected together in their

commission test" to the special circumstance murder and possession of child pornography, there exists a "common element of substantial importance in their commission." (*Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1219.)

Westerfield suggests that a "common element of substantial importance" must contain some spatial and temporal relationship between the joined offenses. For instance, he argues that no such common element was present in this case because there was no evidence he created the images or viewed them immediately prior to Danielle's disappearance, there was no evidence that any images were of Danielle herself, and there were no images depicting kidnapping and murder of a young girl. (AOB 235.) While any of these factors would have made the evidence all the more damaging to Westerfield, the lack of this kind of "smoking gun" evidence did not diminish the overwhelming nature of the connecting element of substantial importance — Westerfield's prurient interest in young girls being his motivation and intention behind abducting and killing Danielle. "[T]he intent or motivation with which different acts are committed can qualify as a 'common element of substantial importance' in their commission and establish that such crimes were 'connected together in their commission.'" (*Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1219, quoting *People v. Mendoza, supra,* 24 Cal.4th at p. 160; and citing *People v. Kemp* (1961) 55 Cal.2d 458, 476 [citing as common element between crimes occurring two years apart, the "obvious motive was satisfaction of appellant's sexual desires"] & *People v. Poon* (1981) 125 Cal.App.3d 55, 69 ["the offenses joined here share numerous 'common elements'; the most significant being sexual motivation and young girl victims," therefore "the offenses were 'connected in their commission' for purposes of section 954"].)

The evidence seized from computers and computer disks reveals Westerfield's obvious sexual penchant for young girls. While it is certainly true that Danielle's body was found so badly decomposed that no one could determine whether she had been sexually assaulted, her unclothed body, her fingerprint above Westerfield's bed in his motor home, and the images of child pornography including cartoons depicting forcible sexual assaults on young girls provided no rational explanation for this crime other than some unlawful sexual purpose. (See *Alcala v. Superior Court, supra,* 43 Cal.4th 1219 [although victim's body badly decomposed, defendant's having photographed young females wearing bikinis same day near site of victim's disappearance, her unclothed body, and defendant's statements to jail inmates describing her body, there could be no other rational explanation for her abduction than unlawful sexual purpose].)

The cases Westerfield relies upon are distinguishable from the issue before this Court. First, his reliance on *People v. Guerrero* (1976) 16 Cal.3d 719 (*Guerrero*), is entirely misplaced. (AOB 236-238.) In *Guerrero*, the defendant was charged with first degree murder and the prosecutor's theory of the case was that he committed the murder during the course of an attempted rape; the jury was instructed on this theory and premeditated murder. (*People v. Guerrero, supra,* 16 Cal.3d at pp. 722, 726, fn. 2.) The murder victim had been found by a passerby with her blouse above her bra, but her bra in place; there was no evidence of sexual assault. (*People v. Guerrero, supra,* 16 Cal.3d at p. 723.) The trial court admitted evidence from another young woman who testified that the defendant had raped her under similar circumstances six weeks prior to the murder. (*Id.* at pp. 722-723.) As is relevant here, this Court ruled that the trial court improperly admitted evidence of the uncharged rape because the evidence could not be used to show that the defendant killed the murder victim during the course of an attempted rape. (*Id.* at p. 727.) This Court

relied primarily on the fact that the victim was fully clothed and a physical examination revealed no evidence of sexual assault. (*Ibid.*) Ultimately, this Court observed, "the People may not conjure up an attempted rape in this instance in order to introduce evidence of another rape." (*Id.* at p. 728.)

There was no such conjuring in this case. In *Guerrero*, the victim's body was examined and revealed the lack of evidence of a sexual motivation for the crime. Here, Danielle's body could not be examined to determine whether she had been sexually assaulted due to the state of decomposition and the fact that the genital area was missing, apparently due to animal activity. (12 RT 3712, 3752-3754.) That Westerfield was successful in concealing Danielle's whereabouts thus preventing any such examination does not merit his success in keeping from the jury his obvious sexual desire for young girls and that being his motive in committing this crime. Danielle was taken from the bed where she slept in her parents' home in the middle of the night in predatory fashion; she was in Westerfield's motor home in a position permitting her to leave her fingerprint behind on a cabinet above his bed (20 RT 5598-5600); she was killed and dumped with no clothing on her body or near her body (12 RT 3713). Unlike *Guerrero*, the prosecution did not offer the child pornography evidence to prove that Westerfield kidnapped and murdered Danielle in the course of a sexual assault. He was not charged as such. Rather, the child pornography helped to explain why this particular man would chose this particular victim — his sexual desire for young girls like Danielle motivated his criminal actions. This was not conjuring up a theory. Rather, this was using evidence that Westerfield maintained a collection of child pornography in his own home to provide further support to a prosecution theory that was well supported by other evidence.

Westerfield goes on to cite several cases essentially standing for the proposition that a murder victim's unclothed state is insufficient to establish

the specific intent to support a charge of rape. (AOB 239-241, citing *People v. Craig* (1957) 49 Cal.2d 313, 318-319 [evidence that murder victim was found with her clothing ripped, exposing the front of her body, lying on her back with her legs spread apart, insufficient to establish intent to commit rape]; *People v. Granados* (1957) 49 Cal.2d 490 [where murder victim found with skirt pulled up and genitals exposed, but no physical evidence of sexual assault, insufficient evidence of felony murder based on commission of lewd conduct on child under 14]; *People v. Anderson* (1968) 70 Cal.2d 15 [laceration of vaginal area appeared to be randomly inflicted, victim's naked body and defendant's being partially clothed during attack insufficient to prove lewd conduct on child where no evidence of sexual feelings toward victim]; *People v. Johnson* (1992) 6 Cal.4th 1, 39 [where there was no physical evidence of sexual assault, murder victim's being unclothed from the waist down insufficient to establish intent to commit rape] .)

First, Westerfield was not charged with rape or attempted rape, nor did the prosecutor proceed on any felony murder theory based upon rape or attempted rape. Thus, the cases cited above indicating that the lack of clothing on a murder victim is insufficient to provide the specific intent for rape are entirely irrelevant to the issue here, which is whether the child pornography charge was properly joined with the murder and kidnapping charges. The cases cited by Westerfield do not suggest that the state of clothing cannot support an inference of a sexual motive for murder; they only stand for the proposition that this fact alone cannot provide proof beyond a reasonable doubt of specific intent to commit a sexual crime.

Furthermore, as this Court has explicitly reasoned, while the circumstance of a murder victim being found unclothed is "not by itself sufficient to prove a rape or an attempted rape has occurred, such a fact is

not irrelevant and is one of the relevant circumstances." (*People v. Rundle* (2008) 43 Cal.4th 76, 139.) Moreover,

> [U]nlike several of the cases cited by defendant, here there was no evidence tending to show a sexual assault did *not* occur. When a victim is discovered a relatively short time after the crime, it is more likely the crime scene and the victim's body will show evidence of sexual assault—such as trauma to the body or sexual organs, or the presence of the perpetrator's bodily fluids—if such an assault occurred. An absence of such evidence in that type of case may be strong evidence the perpetrator did not have or intend to have sexual contact with the victim, which may tend to outweigh other facts and inferences, rendering the evidence of sexual assault legally insufficient. (See, e.g., *People v. Johnson* (1993) 6 Cal.4th 1, 39 [23 Cal. Rptr. 2d 593, 859 P.2d 673], overruled on another ground in *Rogers, supra*, 39 Cal.4th at p. 879; *People v. Anderson* (1968) 70 Cal.2d 15, 22 [73 Cal. Rptr. 550, 447 P.2d 942]; *People v. Craig* (1957) 49 Cal.2d 313, 317 [316 P.2d 947].) Here, by contrast, the evidence did not tend to eliminate a sexual assault; it simply was inconclusive due to the nature of the crime scene and the advanced state of decomposition of [the victim's] body.

(*Ibid.*, original emphasis.)

It is true that Danielle's decomposed and partially missing body provided no evidence of a sexual assault. However, this does not mean that one did not occur. Moreover, the prosecution was not required to prove that a sexual assault did occur in order to join the child pornography count properly. Rather, the prosecution simply had to establish a common element of substantial importance, which Westerfield's sexual interest in young girls certainly did. Particularly in a case like this where Danielle's badly decomposed, mummified, and animal-ravaged body provided few if any answers as to her final hours, motive was an important part of the crime. And, although motive was not an element the prosecution had to prove, " 'the absence of apparent motive may make proof of the essential elements less persuasive . . . .' " (*People v. Davis* (2009) 46 Cal.4th 539,

604, quoting *People v. Phillips* (1981) 122 Cal.App.3d 69, 84.) Therefore, not only did Westerfield's child pornography collection share a common element of substantial importance with his murder and kidnap of Danielle, it provided an almost necessary component of the prosecution's case where the victim's body provided no clues. That Westerfield was motivated by a deviant sexual interest in young girls provided ample basis for the trial court's joining the child pornography count to the charges related to the capital murder.

C. The Trial Court Properly Denied The Motion To Sever

Where charged offenses are properly joined, a party seeking severance must make a stronger showing of potential prejudice than that under Evidence Code section 352, i.e., the standard required to exclude other-crimes evidence in a severed trial. (*People v. Soper* (2009) 45 Cal.4th 759, 773-774 (*Soper*).) Rather, the prejudice analysis is made in the context of the traditional four factors:

> "(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a stronger case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charge converts the matter into a capital case."

(*Alcala v. Superior Court, supra,* 43 Cal.4th at pp. 1220-1221, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 161.) A trial court's denial of a motion to sever charges is reviewed under the deferential abuse-of-discretion standard. (*People v. Soper, supra,* 45 Cal.4th at p. 774.) In determining whether the trial court properly exercised its discretion under Penal Code section 954, the reviewing court considers the record before the trial court at the time it ruled on the motion. (*Ibid.*, citing *Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1220.)

In *Soper*, this Court summarized the rationale for the "broadly allowed" joinder of criminal cases:

> Article I, section 30, subdivision (a) of the California Constitution provides: "This Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature ... ." As recently described in *Alcala, supra*, 43 Cal.4th 1205, 1218, joint trial has long been prescribed—and broadly allowed—by the Legislature's enactment of section 954. The purpose underlying this statute is clear: joint trial "ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials." [Citation.] "A unitary trial requires a single courtroom, judge, and court attach[és]. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process." [Citations.]

(*People v. Soper, supra,* 45 Cal. 4th at pp. 771-772.) "For these and related reasons, consolidation of charged offenses 'is the course of action preferred by the law.'" (*Id.* at 772, quoting *Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1220.)

Here, applying the four criteria cited above, in light of the facts before the trial court at the time he made his motion to sever, Westerfield fails to establish that the court's denial of his motion was outside the bounds of reason.

1. The Pornography Evidence Would Have Been Cross-Admissible At A Separate Trial On The Murder and Kidnapping Charges

The first consideration in evaluating a motion to sever is the cross-admissibility of the evidence, meaning the extent to which the evidence would have been admissible at a hypothetically separate trial. (*People v. Soper, supra,* 45 Cal.4th at p. 775.) "If the evidence underlying the charges

in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Id.* at pp. 774-775.)

The degree of similarity required for evidence to be cross-admissible depends on the purpose for which its introduction is sought. (*People v. Soper, supra,* 45 Cal.4th at p. 776, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 380.) "The least degree of similarity is required in order to prove intent. [Citation.] . . . In order to be admissible [for that purpose] ; the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.] [Citation.]" (*People v. Soper, supra,* 45 Cal.4th at p. 776, quoting *People v. Ewoldt, supra,* 45 Cal.4th at p. 402.) While motive is not an element of kidnapping or murder, as previously noted "the absence of apparent motive may make proof of the essential elements less persuasive ." (*People v. Davis, supra,* 46 Cal.4th at p. 604, internal quotation marks omitted.) When evidence of other crimes is offered to prove motive, the probative value does not depend on the similarity of the crimes, "so long as the offenses have a direct logical nexus." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.)

Westerfield suggests that the child pornography evidence would not have been cross-admissible at a separate trial on the murder and kidnapping charges as there was "no meaningful point of contact between the pornographic evidence and the evidence of the murder itself." He relies on *People v. Page* (2008) 44 Cal.4th 1, in which the defendant claimed on appeal that the trial court had erred in admitting pornographic magazines to show his motive, intent, and identity in committing a lewd act upon a child. (*Id.* at p. 39.) The trial court had characterized the magazines at issue as being "pseudochild pornography" in that they showed models staged to appear younger than their true age. The trial court concluded that the

magazines were relevant to show that the defendant had an interest in young girls and the victim in particular, and due to the "stunning similarity" between one model and the victim. (*Ibid.*)

This Court did not reach the issue of whether the trial court abused its discretion in admitting the magazines, as it found any error to be harmless given the overwhelming physical evidence the defendant had committed a lewd act upon and murdered his victim. This Court however, cautioned against the admission of pornographic evidence in general, noting that "the propriety or impropriety of admitting evidence of a defendant's pornography will vary from case to case depending on the facts," but "such evidence may threaten to distract jurors from potentially more probative evidence and to consume undue amounts of time" particularly in light of the availability of pornography on the internet. (*People v. Page, supra,* 44 Cal.4th at p. 41, n.17.) This Court compared the images admitted at Page's trial with another case in which pornographic images were admitted and noted that the magazines in *Page*, may have been probative but were less so compared to the images presented in *People v. Memro* (1995) 11 Cal.4th 786 (*Memro*).

In *Memro*, a felony-murder case based upon the commission of a lewd act on a child, the evidence demonstrated that the defendant had a hobby of photographing young, unclothed boys. (*People v. Memro, supra,* 11 Cal.4th at p. 864.) He took the victim to his apartment for that very purpose, but when the victim voiced his desire to leave, the defendant strangled him and attempted to sexually assault his corpse. (*Id.* at pp. 812-813.) At trial, the court admitted magazines and photographs belonging to the defendant depicting sexually graphic images of young boys for the purpose of showing the defendant's sexual attraction to young boys and his intent to act on that attraction in this instance. (*Id.* at pp. 864-865.) This Court upheld the admission of the photographs because "presented in the

context of defendant's possession of them, [they] yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction." (*Id.* at p. 865.)

In comparing the photographs to those admitted in *Memro*, this Court in *Page* found significant the fact that although the models in *Page* were staged to look young, none of them appeared to be as young as the victim. Also, this Court noted that the defendant did not actually photograph young children. And, the acts depicted in the magazines were not particularly similar to the defendant's crime against the victim. (*Id.* at pp. 40-41.)

As this Court observed in *Page*, the propriety of admitting evidence of a defendant's possession of child pornography will vary depending on the facts of the case. (*People v. Page, supra*, 44 Cal.4th at p. 41, n.17.) The facts of Westerfield's case made the admission of the child pornography entirely proper to prove his motive. The evidence demonstrated that he broke into the Van Dam home under the cover of darkness not to take property from their home, but their little girl, sleeping in her bed. Her naked, decomposed body was found miles away many days later. Because the condition of Danielle's body permitted no testing to assist in determining what Westerfield had done to her, the jury naturally would have been left with unanswered questions. The prosecution was entitled to address why Westerfield would abduct and kill Danielle and the evidence of his possession of child pornography tended to prove his motive and intent to sexually assault Danielle. Thus the evidence would have been cross-admissible in a separate trial as Evidence Code section 1101, subdivision (b) evidence of motive and intent. (See *People v. Davis, supra,* 46 Cal.4th at p. 604 ["defendant's kidnapping of Polly, his failure to take items of significant value, the evidence of planning, and his use of the silky bindings and the intricately knotted 'hood' device raised but did not fully

answer questions about defendant's motive"; thus trial court properly admitted evidence of prior sex crimes as evidence of motive to sexually assault Polly].)

Moreover, the evidence presented here was more akin to the evidence presented in *Memro* than in *Page*. First, this was not "pseudochild pornography;" it was child pornography. Six movies depicted sexual assaults on young girls; one still image depicted a young girl engaged in sexual intercourse. (5E RT 1953-1954; 5F RT 1990-1995.) Even the photographs that were not admitted to prove the child pornography charges were probative in that showed young nude, children in sexual poses. (5F RT 1994-1995; 24 RT 6393-6394.) There were 85 of these images on Westerfield's home computers, less than 20 of which were shown to the jury during the presentation of evidence. (24 RT 6414.) In addition to these images, Westerfield possessed cartoons of a young girl who was attacked, bound, and ultimately raped. (24 RT 6394-6396 [describing Exhibit 147].) Moreover, like the defendant in *Memro*, one photograph in Westerfield's collection was of Danielle L., someone he knew.[17] (27 RT 6397-6398; 29 RT 7645.) Although she wearing a bikini, and not offered to prove the child pornography charge but rather his intent

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[17]There were several photographs in Exhibit 146 that provided context as to the subjects of the pictures. The file name of the photograph at issue here was "Danielle." Another photograph in Exhibit 146 contained the file name "Danielle and Susan," and depicted the same juvenile female with an adult female. (24 RT 6397-6398.) Susan L., Westerfield's ex-girlfriend, testified that while she was living with Westerfield, her daughter Danielle L. would come to visit every other weekend. (30 RT 7884.) Susan L.'s other daughter, Christina Gonzales, identified her mother, Susan L., in the photograph labeled "Danielle and Susan." (29 RT 7645.) Additionally, the jury was able to view Danielle L., as she testified at trial; she explained how she stayed at Westerfield's home while her mother lived with him. (29 RT 7960-7961.)

and motivation, Westerfield's collection contained a photograph of Danielle L. on a lounge chair with her legs spread. (24 RT 6397 [describing Exhibit 146].) There is no mistaking the purpose of possessing such a picture of a juvenile – the purpose was Westerfield's sexual interest in young girls. Just as in *Memro*, the evidence of the 85 images depicting children in sexual poses or acts on Westerfield's computers, were relevant to show his sexual attraction to young girls and his intent to act on that attraction with Danielle. (See *People v. Memro, supra,* 11 Cal.4th at p. 865.)

2. The Remaining Factors Of The Prejudice Analysis Support The Trial Court's Discretion In Declining To Sever The Child Pornography Count

The fact that the child pornography evidence would have been cross-admissible at a separate trial on the murder and kidnapping charges is sufficient in and of itself to dispel any notion of prejudice from the trial court's exercise of discretion in denying Westerfield's severance motion. (*People v. Soper, supra,* 45 Cal.4th at pp. 774-775.) An assessment of the remaining three factors — the probability the evidence will unduly inflame the jury, whether a weak case has been bolstered by a strong one, and the conversion of charges into capital charges — also point to the propriety of the trial court's decision. (*Id.* at p. 780.)

First, without question evidence of child pornography has the potential to be particularly inflammatory. Defense counsel noted for the record, and the trial court confirmed, that two jurors were in tears as was an alternate juror when video depicting child pornography was played in court.[18] (24 RT 6435-6436.) Of course, however, the senseless abduction of a 7-year old girl from her home in the middle of the night, her murder,

[18] The defense moved for a mistrial based upon the reaction of these jurors, and the trial court denied the motion. (24 RT 6436.)

and the dumping of her body, were far more disturbing than the possession of child pornography. Moreover, the court took great measures to prevent prejudice emanating from the child pornography evidence by limiting what the prosecution would be able to display to the jury. As will be discussed in detail in the next argument, even when the defense "opened the door" to more evidence in this area than was originally contemplated by the court's pretrial order, not only did the trial court limit the prosecution to describing, rather than showing, most of the items it sought to introduce, but the prosecution acted with significant restraint in the number of items of child pornography even described. The prosecution elicited through forensic examiner Watkins that the pornographic images, adult and child, were contained in two binders comprised of about 8,000 images (24 RT 6392-94.) The defense elicited that of the 8,000, there were 85 that Watkins believed to be child pornography. (24 RT 6414.) Thus, the jury was shielded from much of what could have been presented. And, of course, what they were presented with was far less inflammatory than the evidence of Danielle's abduction, murder, and the condition of her body when discovered.

Second, Westerfield concedes that based on the information before the court at the time of the motion to sever, the court did not have before it a weak case being joined with a strong one. (AOB 248.) The images were seized from media in Westerfield's home office. (5D RT 1735-1737.) Facts known to the trial court at the time of ruling on the admissibility of this evidence included Danielle's DNA being found in Westerfield's motor home and on his clothing, as well as her fingerprint being in his motor home. (5E RT 1960-1961.) Both crimes set forth strong evidence of guilt, such that this was not a situation of a strong case being joined with a weak one, resulting in a spillover effect that might effect the outcome. (See *People v. Soper, supra,* 45 Cal.4th at pp. 780-781.)

As to the remaining factor — whether the joinder of charges converted a case into a capital one —the joinder did not convert Westerfield's into a capital case as, of course, the special circumstance murder of Danielle would have been a capital case if tried independently. (Compare *Williams v. Superior Court* (1984) 36 Cal.3d 441, 454 [where joinder itself gave rise to multiple murder special circumstance thus converting the matter into a capital case].) Westerfield's concern here, then, must arise from the joining of a non-capital charge with a capital one, and the fear that the jury would convict him of a capital homicide based on what he believes to be unduly prejudicial evidence of his possession of child pornography.

The "the joinder of a death penalty case with noncapital charges does not by itself establish prejudice." (*People v. Marshall* (1997) 15 Cal.4th 1, 28; *People v. Lucky* (1988) 45 Cal.3d 259, 277-278.) The concern of prejudice arises in cases where the jury is permitted to hear inflammatory evidence of unrelated offenses that would have been inadmissible at a separate trial. That is not the situation here as the evidence was not remotely as inflammatory as the evidence of Danielle's murder, and, as demonstrated above, the evidence was cross-admissible on the issues of intent and motive. Moreover, the evidence of Westerfield's guilt on the child pornography charges and the special circumstance murder and kidnapping was equally strong such that there was no danger the jury would use the child pornography evidence to fill in any gaps as to the proof of the murder. In capital cases where a non-capital charge is joined, "consolidation may be upheld on appeal where the evidence of each of the joined charges is so strong that consolidation is unlikely to have affected the verdict." (*People v. Lucky, supra,* 45 Cal.3d at p. 277.)

Westerfield seems to suggest there is some inequity in joining a child pornography charge — a misdemeanor offense carrying a maximum

potential punishment of one year in the county jail — with a capital homicide. He asks what purpose it would have served to spend the resources on a capital homicide if the jury had acquitted on the special circumstance murder and convicted him of the misdemeanor count (AOB 248-249); he refers to the joinder as "trivial gain in expedience in the administration of justice." (AOB 253.) Westerfield's point ignores the policy decision that the Legislature has made and the analysis that is relevant to his claim of error. The degree of punishment associated with the various charges is not relevant to reviewing the trial court's exercise of discretion in denying his severance motion. In any event, where the prosecution has reason to believe beyond a reasonable doubt that an individual has committed a crime, be it misdemeanor, felony, or a capital crime, then the prosecution is entitled to charge the individual with that crime and proceed to trial. When the crimes are connected in their commission, no matter where they fall on the spectrum of punishment, the law favors consolidation. (See *Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1220.) Here, the jury would have heard the child pornography evidence, even if the crime had not been charged or joined, as it was admissible under Evidence Code section 1101, subdivision (b). The evidence of that crime was equally as strong, and less inflammatory, than the evidence of Danielle's abduction and murder. Therefore, nothing about the joining of the non-capital offense with the capital one gave rise to prejudice in this case.

Finally, Westerfield suggests that the real danger of joining the child pornography charge with the capital charge arose from the threat the joinder imposed as to the jury's penalty determination, which violated his Eighth Amendment right to a reliable penalty verdict. He argues that this evidence would not have been before the jury in the penalty phase but for the joinder. He also asserts that the jury was improperly permitted to consider this

evidence at the penalty phase in aggravation as a circumstance of the crime (Pen. Code, § 190.3, subdivision (a) (Factor (a))), and as a crime in which Westerfield used force or violence (Pen. Code, § 190.3, subd. (b) (Factor (b))). (AOB 249-253.)

These contentions form the primary basis of Westerfield's Argument XIX, and thus respondent addresses them in detail in Argument XIX herein. To summarize, however, when evidence is offered at the guilt phase under Evidence Code section 1101, subdivision (b) to the relevant facts of motive or intent, "it may also be admissible as part of the circumstances of the commission of the charged crime" at the penalty phase of trial. (*People v. Robertson* (1982) 33 Cal.3d 21, 61.) The child pornography evidence, explaining Westerfield's sexual penchant for young girls, was very much a circumstance of his crimes against Danielle — it provided a window into his mind and his motivation behind taking her in the middle of the night from her parents' home. Further, this Court has explained that the circumstances of a crime for purposes of factor (a) "include guilt phase evidence relevant to 'the immediate temporal and spatial circumstances of the crime,' as well as such additional evidence, like victim impact evidence, that " 'surrounds materially, morally, or logically,' the crime." (*People v. Tully* (2012) 54 Cal.4th 952, 1042, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 833.) Here, Westerfield's possession of the child pornography was inextricably intertwined with his killing Danielle — it was the material, moral, and logical surroundings of his heinous acts. Accordingly, the jury was entitled to consider this evidence as a circumstance of the crime under factor (a).

Contrary to Westerfield's assertion that the jury might erroneously consider such evidence as a crime of force or violence under factor (b), any danger was alleviated by the trial court's instruction under CALJIC No. 8.87 as to the other crimes evidence which the instruction specified were

"battery and/or lewd act with a child under fourteen years, which involved the express or implied use of force or violence." (12 CT 2964.) At no time was the jury instructed to consider the possession of pornography as a crime of force or violence, and it is presumed that the jury followed the court's instructions. (*People v. Thomas* (2011) 51 Cal. 4th 449, 489.)

Considering all of the relevant factors, most significantly the cross-admissibility of this evidence, Westerfield has not carried his burden of making a "clear showing of prejudice" and the trial court acted beyond the bounds reason in denying his motion to sever count three. (*People v. Soper, supra,* 45 Cal.4th at p. 773-774; *Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1220.)

D. Westerfield Received A Fair Trial On The Joined Charges

Westerfield contends that even if the trial court's denial of the severance motion was proper at the time he made the motion, the manner in which the evidence unfolded at trial supposedly created a doubt as to his guilt that only the child pornography evidence could have dispelled, and therefore the joinder resulted in a violation of his state and federal due process rights. (AOB 253-261.) Contrary to Westerfield's assertion, the proper joinder of the charges in no way deprived him of a fair trial as to all of the charges.

If the trial court's joinder ruling was proper at the time it was made, a reviewing court may only reverse a judgment upon a showing the joinder resulted in gross unfairness amounting to a denial of due process. (*People v. Myles* (2012) 53 Cal.4th 1181, 1202; *People v. Avila* (2006) 38 Cal.4th at p. 575.) Even if the trial court abused its discretion in refusing to sever the charges, reversal is unwarranted unless, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Avila, supra,* 38 Cal.4th at p. 575.)

The child pornography was not the focus of the prosecution's case when viewed in the context of the entire trial. While no doubt inflammatory, the images were not significantly inflammatory when compared with Westerfield's senseless conduct. Moreover, any inflammatory impact was limited by the trial court's and prosecution's admission of a relatively small number of the images and motives into evidence. The evidence did not present an " 'intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [Citation].' " (*People v. Lindberg* (2008) 45 Cal.4th 1, 49.)

Westerfield suggests that but for the child pornography evidence he would not have been convicted of Danielle's murder. He characterizes this case as a "battle of forensic sciences" in which the defense experts on forensic entomology presented "substantial, highly credible, and compellingly exculpatory" testimony. (AOB 253-261.) Westerfield utterly fails to establish the gross unfairness amounting to a due process violation that would warrant reversal. (*People v. Myles, supra,* 53 Cal.4th at p. 1202.)

This was not a case about insects and the child pornography evidence did not impermissibly tip the scale in favor of guilt. The defense expert testimony attempting to show when Danielle's body could have been dumped in the dirt based on the insect activity at the time her body was discovered explained very little. First, none of the defense experts even agreed as to the window during which Danielle's body would have been available for the insect activity. Faulkner gave a window of February 16th through the 18th as the earliest point (30 RT 7968-7978.) Haskell gave a window of February 14th through the 21st. (33 RT 8116-8117.) Hall gave a window of February 12th through the 23rd. (39 RT 9082-9083.) Add to that the prosecution's experts, Robert Hall who testified that the degree of decomposition suggested that Danielle had been deceased for four to six

weeks (36 RT 8703-8704), and Dr. Goff who testified that the minimum date Danielle's body would have been available for insect activity was February 12, 2002. (38 RT 8968-8971.) Moreover, Dr. Goff explained that forensic entomology is useful in determining the minimum date that a body would have been available for insect activity *only*, and there is no way to determine the maximum date. (38 RT 8968-8971.) Westerfield's own expert, Faulkner, agreed with this very point. (30 RT 8007-8009, 8024-8025.) Thus, as the bounds of science would not permit either party's experts to accurately determine the maximum date at which Danielle could have been dumped off of Dehesa Road, this testimony in no way made this a close case.

In any event, what is more important is what the forensic entomology evidence could not explain. It could not explain Westerfield's impromptu decision to retrieve his motor home from High Valley on his own when he usually would take his son with him. (15 RT 4254; 16 RT 4570; 35 RT 8435-8436.) It could not explain Westerfield's odd behavior of closing his motor home's curtains at the Silver Strand, and not setting up a single item outside. (17 RT 4784, 4786 4802, 4838, 4850-4851.) It could not explain his odd behavior when the ranger knocked on his door, when he emerged after one minute, closed the door behind him immediately, waited outside until the ranger left, and drove off in his motor home minutes thereafter. (17 RT 4895-4897.) It could explain his lengthy trip to Glamis thereafter where he arrived late at night, pulled so far into the sand that he got stuck, and upon being towed out the following morning again left immediately, leaving behind his shovel and ramps. (15 RT 4267-4269; 17 RT 4942-4943; 18 RT 4952, 5003, 5077.) It could not explain his failure to mention his trip to the dry cleaner, wearing boxer shorts and no shoes or socks, with the jacket containing Danielle's DNA and a comforter containing hairs from the Van Dam family dog. (15 RT 4277-4278, 5131,

5134-5136; 21 RT 5780-5785; 22 RT 5977-5978; 26 RT 6862, 6869, 6878.) It could not explain Danielle's DNA in the bloodstain on the carpet of Westerfield's motor home. (21 RT 5783-5785.) It could not explain Danielle's fingerprints in Westerfield's motor home on the cabinet above his bed. (20 RT 5595-5596, 5598-5560.) It could not explain Danielle's hairs in Westerfield's washing machine, dryer, and bedding in his master bedroom, as well as in his motor home. (21 RT 5863; 24 RT 6480-6481.) It could not explain the orange and blue fibers left in the same places, as well as in Westerfield's SUV, and on or near Danielle's body when discovered. (22 RT 5960-5961; 23 RT 6179-6182, 6277, 6173-6174, 6195, 6200-6206; 29 RT 7753-7758.) It could not explain the Van Dam family dog's hairs in Westerfield's dryer lint (22 RT 5965), motor home carpet (22 RT 5970), comforter that had been taken to the dry cleaner's (22 RT 5977-5978), and motor home bath mat (22 RT 5978). (22 RT 6004, 6008; 23 RT 6273; 26 RT 6862, 6869, 6878.) It certainly could not explain the extensive forensic evidence connecting Danielle to all of these locations — Westerfield's home, SUV, and motor home — and connecting Westerfield to the Van Dam home. (23 RT 6204.)

This was the evidence that proved Westerfield's guilt beyond a reasonable doubt. The child pornography evidence simply provided the reason why he would abduct and kill Danielle. The evidence of guilt was compelling and overwhelming, such that even if the child pornography charge had been severed there is no doubt Westerfield would have been convicted of Danielle's kidnapping and murder.

VI. THE TRIAL COURT PROPERLY ALTERED ITS PRETRIAL RULING LIMITING THE NUMBER OF PORNOGRAPHIC IMAGES AND MOVIES THE PROSECUTION WOULD BE PERMITTED TO PRESENT AFTER THE DEFENSE "OPENED THE DOOR" BY MISLEADING THE JURY AS TO THE EXTENT OF WESTERFIELD'S PORNOGRAPHY COLLECTION

Westerfield expands his previous contention in Argument V and now claims that regardless of whether the child pornography charge was properly joined, the trial court's mid-trial decision to admit substantially more evidence of his possession of child and adult pornography than envisioned pretrial made the prejudicial effect of the consolidation even more significant. The trial court's decision about the admissibility of the additional evidence came following defense counsel Feldman's cross-examination of James Watkins, the prosecution's computer forensic expert. The trial court found that Feldman's misleading questioning had opened the door to the admission of all of the pornography evidence. Westerfield suggests that even if the charges were properly joined, his due process rights were violated in that the actual images themselves — particularly the image of Danielle L. and the cartoon of the child rape — were irrelevant and unduly prejudicial under Evidence Code section 352. Finally, he alleges that prosecutor's use of this evidence in closing argument demonstrates that it was only relevant for the impermissible purpose of character evidence, thus violating his right to a reliable verdict based on relevant and competent evidence pursuant to the Eighth and Fourteenth Amendments. (AOB 262-292.)

Contrary to Westerfield's assertion, the trial court properly ruled that due to the defense having misled the jury as to the extent of his pornography collection, and particularly the extent of his child pornography collection, admission of the entire collection was necessary to provide the

true context. Regardless of the ruling's scope, during the presentation of evidence very few of the images were shown or described to the jury. The evidence was highly probative to correct the misperception, and its prejudicial nature did not substantially outweigh this probative purpose. Accordingly, the trial court properly exercised its discretion in admitting the evidence.

A. Background As To The Defense "Opening The Door" As To The Admission Of Additional Pornographic Images

The pre-trial hearings regarding the admissibility of the pornographic images are described in Argument V, regarding the trial court's proper exercise of discretion in denying the defense motion to sever the properly joined child pornography charge.

During its case-in-chief, the prosecution called San Diego Police Department forensic examiner James Watkins to testify about the items he found on each of the computers in Westerfield's home as well as on two CD-ROMs and three zip disks located in Westerfield's home office. (23 RT 6282, 6285, 6300-6301.) While imaging (or making an identical copy of) Westerfield's hard drives, Watkins was able to "preview" the contents of the loose media, and observed what he believed were "questionable" images —images that in his view were pornographic depictions of children under the age of 18. Having found some questionable images, Watkins took the CDs and zip disks to the laboratory for further examination. (23 RT 6302.) Watkins noticed questionable movies as well. (23 RT 6306.)

The prosecution showed the jury fewer than 20 still images of the anime, or cartoon, variety from one of the zip disks and one of the CDs seized from Westerfield's home office. (23 RT 6312-6314.) Additionally, the prosecution played a movie from one of the CDs (23 RT 6314-6315.)

The prosecution also admitted into evidence still images and a VHS tape of the movies as well. (Exhs. 138 and 139; 23 RT 6135-6136.)

On cross-examination, defense counsel Feldman elicited that on the four computers in Westerfield's home — the two computers in his office, one in his bedroom, and the laptop — there were a total of approximately 100,000 "graphic image files." The number of images contained nude individuals, including adults, was between 8,000 and 10,000. (23 RT 6322.) Then, the following colloquy occurred:

> [Mr. Feldman]: So there was a total of between eight- and 10,000 nudes, that included the looks like about 17 stills that the jury just saw; is that right?
>
> [Mr. Watkins]: Yes, sir.
>
> [Mr. Feldman]: So apparently called [sic] out of a hundred thousand you identified down eight – to 10,000, and then of the eight- to 10, 000 you spotted 14 or so that the jury just saw?
>
> [Mr. Watkins]: Yes, sir.

(23 RT 6322-6323.) Mr. Feldman then inquired whether of the 8,000 to 10,000 pictures and movies there seemed to be a common theme "with a couple rare exceptions" of adults engaged in various sexual acts. Watkins agreed. (23 RT 6323-6324.) The prosecution objected to this line of questioning on best evidence grounds, but the trial court allowed the questioning envisioning that the court and parties would need to discuss the matter further. (23 RT 6323.)

At the beginning of his redirect examination, prosecutor Clarke indicated he wished to mark two binders for identification — the two binders contained all of the pornographic images seized from Westerfield's computers. (23 RT 6354.) The judge then excused the jury and the matter was discussed outside its presence. (23 RT 6354-6355.)

The court informed Mr. Feldman that he, by virtue of his cross-examination, had "put everything in issue." The court stated: "You've represented to this jury, Mr. Feldman, that out of a hundred thousand images there are only 13 that are such that the District Attorney can find against your client. You know, I know, that is not true." (23 RT 6356.) The court referred back to the in limine motion in which it specifically directed the prosecution to pare down the number they intended to use at trial, out of those it could have used at trial — a ruling with which the prosecution complied — for the specific purpose of minimizing Westerfield's exposure to the prejudicial impact of this evidence. (23 RT 6356-6357.)

The defense complained first that it did not believe it had opened any doors, but acknowledged that Watkins's report indicated there were about 80 questionable images. (23 RT 6358.) Next, it complained about the manner in which the objection was raised in that the prosecutor objected on grounds of best evidence, a rule no longer in existence, and that no sidebar had been requested or ordered. (23 RT 6359.) The trial court responded that if the defense had any doubt as to the trial court's position on the matter it could have requested a side bar, but instead "immediately went for the jugular." (23 RT 6359-6360.)

The following day, the conversation continued in a closed session. The defense maintained its position that no doors had been opened, and even if they had, Evidence Code section 352 dictated that the evidence had to be excluded as substantially more prejudicial than probative. The court disagreed, and noted that it need to clarify the record on a point:

> But this record will not reflect your [Mr. Feldman's] demeanor and the way in which you asked the question of the witness regarding the limited number of images that the People presented. It can best be described as set up with a question, well, how many total images did you have. And he says a

> hundred thousand. And you go [indicating]. And what I am doing right now is I'm raising my eyes. I am expressing dismay. And then you said but only thirteen of theses. And, Mr. Feldman, it was intentional. It fits into the pattern of what the defense intends to argue. And it clearly, clearly left a false impression with this jury. And this court was not about to allow that to occur.
>
> You'll be able to cover it in cross-examination. Whether it's 85 images, a hundred images or whatever, the fact that I have allowed the People to mark as exhibits the exhibits I have does not mean that this jury is going to see them. And I can see very valid reasons why the People don't want them to be seen. But they are entitled to clarify what I perceive to be a strategic, arguable position by the defense that has left a false impression.

(24A RT 6370-6371.) The Court then stated that the prosecution would be permitted to establish the number of other questionable images, and that the parties would be able to argue the admissibility of particular images at a later point. (24A RT 6373.) The prosecution explained that it intended to show Watkins several images, including the photographs depicting Danielle L. (Exh. 146), and to have him describe the images without showing them to the jury. (24A RT 6374-6375.) In particular, the court viewed the photograph of Danielle L., which it described as "[t]he photographer who you can actually see the shadow of in one photograph is taking a shot from the base, the bottom of the chaise lounge shooting directly up at the crotch area of the young female." (24A RT 6376.) The court agreed that the prosecution's witness would be able to describe the content of the photograph, but reserved ruling on whether the jury would be permitted to see it. (24A RT 6377.)

When the defense continued to object that the court was "reading his body language as implicating something other than the record," the court responded:

> Mr. Feldman, what I am doing is exactly what these eighteen people did that were watching you at the time. That dry record does not — you know, that's the reason the mountaintop sometimes hammers us as bad as they do because they are going to read your words and they are not going to appreciate exactly how you did it, the theatrics you went through. I had two deputy district attorneys ready to jump out of their socks when they saw the very same thing I saw, Mr. Feldman. And this is the reason we are where we are today.

(24A RT 6379.) Defense counsel Boyce noted that he disagreed with the court's characterization of Mr. Feldman's theatrics. (24A RT 6380.) Prosecutor Dusek described Mr. Feldman's behavior as "expressing aghast, shock, amazement with his facial reactions, with his hand reactions . . . ." (24A RT 6380.)

In the jury's presence, on redirect, Watkins clarified that when he stated there were a total of 100,000 graphic image files, that number included every single image on the computer such as every icon. (24 RT 6390-6391.) The prosecutor showed Watkins the two binders previously marked for identification, which Watkins created. He explained they contained every sexually graphic image he found on Westerfield's computers, zip disks, and CD-ROMs, including photographs of nude women, women engaged in sexual acts and pornographic cartoons. There were approximately 8,000 images in the two binders, the majority of which consisted of adult pornography. (24 RT 6392; Exhs. 144 & 145.) Also contained in the 8,000 pictures in the binders were pictures of children who were nude or partially clothed, some of which the jury had seen the previous day; but there were more images of children than the jury had seen the previous day. (24 RT 6393-6394.) Watkins described for the jury two series of cartoon or anime images, depicting a young girl assaulted, bound, and ultimately raped. (24 RT 6394-6396; Exh. 147.) Watkins also explained that several of the pictures recovered from the computer in

Westerfield's bedroom involved bestiality. (24 RT 6396-6397, 6408; Exh. 148.) Additionally, Watkin's described the "crotch shot" photograph of Danielle L.[19] (24 RT 6397; Exh. 146.) Finally, Watkins noted there were images of characters from the cartoon the Jetsons, some depicting the father in sexual situations with his daughter and Mrs. Jetson unclothed. (24 RT 6408.)

On recross examination, Watkins testified that out of all the images he examined, a total of 85 appeared to be sexually oriented pictures of mostly female juveniles under the age of 18, 15 to 17 of which the jury saw the previous day. (24 RT 6414-6415.) He further noted that there were several images that were "borderline" as to the subject's age, and he did not include those in the 85 he deemed questionable. (24 RT 6415.) Additionally, of the 2600 digital movies Watkins examined, he believed 39 of them depicted juveniles under the age of 18, 2 of which the jury saw the previous day. (24 RT 6423-6424.)

B. As Defense Counsel Opened The Door By Misleading The Jury As To The Number Of Sexually Oriented Images Depicting Children On Westerfield's Computer, The Trial Court Properly Permitted The Prosecution To Correct The Misinformation

Westerfield contends that defense counsel's cross-examination was not improper as it did not contravene any pretrial ruling by the court. (AOB 277.) He further argues that even if defense counsel provided the jury with the inaccurate impression that there were only 13 to 17 questionable images, when he in fact knew that Watson had discovered 85 questionable images, then the representation could have been cured by

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[19] During deliberations, the jury requested to view "all available evidence with pornographic images," which consisted of the two binders and the photograph of Danielle L.; those exhibits were provided to the jury. (Exhs. 144, 145 & 146.) (14 CT 3489.)

redirect examination exposing that fact. He suggests that the number was the only relevant consideration, and that the images themselves were irrelevant. (AOB 273-275.) Once defense counsel misled the jury as to the number of images of child pornography on Westerfield's computers, the prosecution was entitled to respond not only by correcting the number of images, but by correcting the jury's false impression as to the content of Westerfield's collection. The trial court properly exercised its discretion in permitting the prosecution to elicit evidence that would enable the jury to understand the true extent and nature of Westerfield's child pornography collection, permitting the forensic expert to describe some of it, and permitting the jury to view it upon request – which it ultimately did. (14 CT 3489.)

First, it must be remembered that the trial court's rulings regarding the relevance and application of Evidence Code sections 352 and 1101 are subject to the deferential abuse-of-discretion standard. (*People v. Carter* (2005) 36 Cal.4th 1114, 1147 [Evid. Code, § 352]; *People v. Brown* (2003) 31 Cal.4th 518, 577 [relevance]; *People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101].) With regard to the admission of probative evidence, this Court has observed:

> The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. All evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial," The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and *which has very little effect on the issues*. In applying section 352, "prejudicial" is not synonymous with "damaging."

(*People v. Karis* (1988) 46 Cal.3d 612, 638, internal quotation marks omitted.) Evidence is not rendered inadmissible under section 352 unless

its probative value is "substantially" outweighed by the risk of such prejudice. In making this determination, trial courts enjoy broad discretion (*People v. Michaels* (2002) 28 Cal.4th 486, 532), and that discretion will only be disrupted on appeal upon a showing that it was exercised "in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, Westerfield's possession of child pornography was probative not only as to the misdemeanor charge, but also as to his motive and intent from kidnapping and killing Danielle. Contrary to Westerfield's claim that defense counsel's cross-examination was entirely proper (AOB 277), that cross-examination clearly took advantage of the court's pre-trial ruling and left the jury with the false impression that there were 17 or fewer pornographic images on Westerfield's computers depicting children. The trial court properly exercised its discretion in permitting the prosecution then to elicit not only that there were 85 such images, but in permitting Watkins to describe them, and in permitting the jury to view them if it wished. Westerfield makes the point that the fewer images there were depicting children out of the total number of pornographic images, the less likely it becomes that this was a pervasive deviant interest of his, leading to his commission of the crimes against Danielle. (AOB at 274.) That is precisely the point. The defense improperly sought to strengthen its position that the number of child pornography images was such a small number of Westerfield's extensive pornography collection, that it could not possibly supply a motivation and intent that would then suggest he, in fact, committed these crimes. The possession of 85 such images is quite different than the possession of 17 such images. The volume of the material, the fact that it was found in various places (different computers, different disks), is relevant to show that this was not simply a passing interest of Westerfield's or that the images' presence on his computers was

the result of inadvertence. Westerfield possessed 85 images of children that were sexually oriented in nature. The ratio to the adult pornographic images is of no moment. While Westerfield now argues that the percentage of child pornography images was quite low out of the total number of images in Westerfield's collection — regardless of whether that number is based on 17 or 85 — however, that certainly was not the assessment when defense counsel endeavored to mischaracterize the number to the jury in his cross-examination of the prosecution's expert witness. The cross-examination was improper, and the prosecution was entitled to correct the false impression the defense created with the jury.

To accomplish that correction, the trial court properly determined that not only would the jury be permitted to hear the actual number that Watkins described as "questionable" images, but would be permitted to hear the description of some of those images, and to view them if the jury deemed it necessary to their understanding of the nature and extent of Westerfield's child pornography collection. Westerfield's suggestion that the only information the jury needed to correct the false impression, was that there were in fact 85 images depicting children; he claims the pictures themselves should never have been made available to the jury. (AOB 275.) The jury was entitled to view and determine the weight of these images as to the issue of Westerfield's motive and intent, and the trial court did not abuse its discretion in allowing it to do so.

In a different context, the admissibility of photographs over a section 352 objection in murder cases has been noted time and again, " ' " '[m]urder is seldom pretty, and pictures in such a case are always unpleasant' " . . . ' " (*People v. Cowan* (2010) 50 Cal.4th 401, 475, accord *People v. Gurule* (2002) 28 Cal.4th at p. 475; *People v. Pierce* (1979) 24 Cal.3d 199, 211.) Of course, the same is true child pornography pictures. But unpleasant pictures are routinely admitted in criminal trials. (See

People v. Navarette (2003) 30 Cal.4th 458, 496 ("sexually suggestive" photograph of unclothed murder victim necessary for the jury to see as it was the nature of the crime); *People v. Memro, supra,* 11 Cal.4th at pp. 865-866 (trial court did not abuse discretion in admitting pictures of child victims murdered in "ghastly manner"). This does not change the broad discretion afforded a trial court in determining the admissibility of child pornography images.

The content of the images was just as relevant as their number. Given that the prosecution had presented a limited number of images pursuant to the court's pretrial ruling, and given that the defense had created an impression that those were the only such photographs found, once the jury heard that there were in fact 85 such images, it might be left wondering why the prosecution had not shown the additional photographs. Without having the opportunity to see what Westerfield's collection consisted of, the jury was left to speculate. Thus, permitting the jury the opportunity to view the original images and movies it was shown in court in the context of all of the pornographic images possessed by Westerfield was highly probative as to the issue of intent and motive, as it was necessary to correct the incorrect impression created by the defense. It is well established that prosecution "cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (*People v. Salcido* (2008) 44 Cal.4th 93, 147; *People v. Edelbacher* (1989) 478 Cal.3d 983, 1007.) Similarly, the defense cannot compel the prosecution to correct the false impression left by the defense as to photographic evidence by depriving the prosecution of presenting the persuasive and forceful photographs themselves. The trial court acted well-within its discretion in not requiring the prosecution to present its case in the sanitized manner Westerfield now urges. (See *People v. Salcido, surpa,* 44 Cal.4th at p. 147 (prosecution not "obligated to

present its case in the sanitized fashion suggested by the defense").) The jury was entitled to *see* how the pictures advanced, or did not advance, the prosecution's theory of the case; a witness's description in this regard is insufficient to guide the jury in assigning weight to the evidence.

Similarly, although Westerfield now suggests that the matter should have been resolved by an objection, the trial court's sustaining of the objection, and an admonition to the jury, it is not for Westerfield to dictate how the prosecution tries its case in terms of his possession of 85 pornographic images of children. In support of his position, Westerfield cites case law that suggests where a party permits *inadmissible* testimony to be elicited without objection, the party does not then gain the ability to elicit additional *inadmissible* testimony. (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1273.) Here, the number of images of child pornography on his computers was not inadmissible. Rather, the court limited the number of images the prosecution would show to the jury to limit potential prejudice from this relevant evidence. During cross-examination, defense counsel chose to ask questions that suggested the total number of images was less than what was actually recovered. Accordingly, having questioned the nature of the images retrieved as being other than child pornography from Westerfield's computer, it was appropriate for the prosecutor to rebut the inference created by the cross-examination.

In *People v. Cleveland* (2004) 32 Cal.4th 704, 745-746, this Court ruled that questions asked by the prosecutor on redirect examination that elicited evidence the defendant's girlfriend was living elsewhere because of the defendant's "drug business" as opposed to his sanitized description of simply his "business" with no further explanation was appropriate as it supplied the context for the questions posed on cross-examination. A primary purpose of redirect examination is to "explain or rebut adverse

testimony or inferences developed on cross-examination." (*Id.* at p. 746.) Accordingly, the trial court did not abuse its discretion in permitting the prosecution to clarify the extent of Westerfield's child pornography collection on redirect.

Moreover, both the trial court and the prosecution exercised significant restraint insofar as rebutting the incorrect impression left by the defense. This was not "rubbing the jurors' faces in additional images" as Westerfield suggests. (AOB 275.) The prosecution did not display the photos in open court, nor did it pass the binders around for the jury to peruse Westerfield's collection. Rather, the prosecution asked that the photograph of Danielle L. be admitted into evidence, but otherwise asked that the binders simply be admitted into evidence should the jury wish to view them to confirm the truth of the prosecution's analyst's judgment once the defense suggested that the child pornography in his collection was much more limited than the prosecution was contending. This is precisely what the trial court ordered. (25 RT 6559, 6565, 6568.) Thus even after the defense opened the door, the court and prosecution nonetheless minimized the prejudicial impact of the pornography evidence. The fact that the jury did ask to ultimately view the binders (14 CT 3489), does not support Westerfield's claim of undue prejudice. The evidence the jury viewed supported the defense argument that the "theme" of the vast majority of the images showed adult women, the prosecution's position that the minority of the images recovered from the computers showed Westerfield's lewd interest in young girls.

Westerfield contends that the photograph of Danielle L. should not have been admitted because it did not constitute child pornography, but rather the photograph simply captured her "sunbathing." (AOB 282.) Once the defense mischaracterized the number of photographs in Westerfield's collection, the "crotch shot" of Danielle L. was then

probative to refute the defense inference that his collection of child pornography was trivial. Although she was wearing a bikini, Westerfield possessed a photograph of Danielle L. on a lounge chair with her legs spread. (24 RT 6397 [describing Exhibit 146].) There is no mistaking the purpose of collecting such a picture of a juvenile – the purpose was Westerfield's sexual interest in young girls. And this picture was all the more relevant in that it was a girl that Westerfield knew, thus extending his sexual fantasy from strangers on the computer to young women in his life. This picture, as with the evidence of the 85 images depicting children in sexual manners on Westerfield's computers, was properly admitted to show his sexual attraction to young girls and his intent to act on that attraction with Danielle Van Dam. (See *People v. Memro, supra,* 11 Cal.4th at p. 865.)

As to the images depicting acts of bestiality, Westerfield accurately observes that while Watkins briefly testified that he saw several such images (24 RT 6397-6398), the trial court later concluded that the images were irrelevant and would not be provided to the jury even upon request; the trial court did not strike Watkins testimony or admonish the jury to disregard it. (25 RT 6559, 6569-6570.) As the trial court subsequently noted the testimony was relevant to the context of the entirety of the images found on the computers.[20] (33A RT 8083.) Even if the testimony was improperly admitted, there could be no conceivable prejudice as the jury never saw the images and never heard graphic testimony as to what they portrayed. There is no probability, much less a reasonable one, that the jury convicted Westerfield based on the generic description of bestiality images

[20] This statement occurred in a subsequent motion for mistrial based, in part, on the testimony regarding the bestiality photographs.

in his extensive pornography collection. (See *People v. Watson, supra,* 46 Cal.2d at p. 836.)

C. The Prosecutor Properly Argued The Child Pornography Evidence

Finally, Westerfield takes issue with the manner in which the prosecutor argued the child pornography evidence, claiming that the argument demonstrates that this evidence was admitted as improper character evidence. (AOB 284-290.) Contrary to Westerfield's assertion, the prosecutor's summation could not have more effectively demonstrated why this evidence was relevant not only to the possession of child pornography charge, but also to explain the seemingly inexplicable abduction and murder of a seven year-old child by a seemingly docile neighbor with no criminal history.

While he never characterizes the claim as one of prosecutorial misconduct, Westerfield suggests that the joinder of the charges permitted the prosecutor to argue "that Mr. Westerfield was guilty because he was an eclectic sexual pervert." (AOB 290.) Thus, he seems to concede that the prosecutor's argument was a fair comment on the evidence actually presented, but maintains the evidence was inadmissible as it was the result of improper joinder or an improper exercise of discretion as to the motion to sever. He claims had it been excluded, the prosecutor would not have been able to make such a forceful argument about the link between the child pornography on his computer and the abduction and murder of Danielle. (AOB 288-291.) Accordingly, Westerfield's claim appears to be one of judicial error in admitting the evidence, and not one of improper argument by the prosecutor. (See *People v. Riggs* (2008) 44 Cal.4th 248, 325, fn. 40 [where defense objections overruled, prosecutor's use of demonstrative chart in closing argument involves propriety of use of chart in context of judicial error, not prosecutorial misconduct].)

In his opening argument, Mr. Dusek rhetorically inquired, "[W]hy would a regular, normal fifty-year-old guy kidnap and kill a seven-year-old child[?]" (42 RT 9413.) He went on to argue:

> If we go through that, I think we'll see. I think you have to ask yourself why would anyone have this collection in their house at all. The magnitude of it. The types of sex acts that are involved. The people that are with each other. Why would a normal fifty-year-old man have that in his house. Why would an normal fifty-year-old man have pictures of young naked girls. Not on his computer, on his disks that he's provided. Why would he collect that. Why would he save that. You can find it fast enough on the internet. Just go to it. Why do you have to make your own collection of it.

(42 RT 9413.) Additionally, Mr. Dusek argued:

> But he doesn't stop there. Not only does he have the young girls involved in sex, but he has the anime that you saw. And we will not show them to you again. The drawings of the young girls being sexually assaulted. Raped. Digitally penetrated. Exposed. Forcibly sodomized. Why does he have those, a normal fifty-year-old man.
>
> What you didn't see and that were introduced later and will be available for you if you request, if you really need to see, are the anime with the captions, the dialogue between the young girl and the person assaulting her. "No. Oh, don't. Don't rape me." "I'm just a young girl. Please have pity." "Ah, what a sweet little pussy," he says to this little girl. "When I was young, girls like you would not even look at me," as he is getting ready to sodomize her. "Stop screaming. If someone hears you, I'll have to kill you," as he's getting ready to assault her. Why would a normal fifty-year old man have this in his collection. . . .
>
> Those are his fantasies. His choice. Those are what he wants. He picked them; he collected them. Those are his fantasies. That's what gets him excited. That's what he wants in his collection.

(42 RT 9414-9415.)

Finally, on this topic Mr. Dusek stated:

> We do not have adult women in what we're displaying here in consen[s]ual activity. Now when you're engaged in all types of sex with dogs, goats, horses, his fantasies. His fantasies.
>
> And he still doesn't stop with what he like, with what he collects that feed his primal needs. You saw the videos. You had to sit through and watch those. We all did. And saw what they depicted. His fantasies of that young, little girl being assaulted by those men in all ways imaginable. Not only silent movies but the screams that came with it. The screams were in his private collection.
>
> When you have those fantasies, fantasies breed need. He got to the point here it was growing and growing and growing. And what else is there to collect. What else can I get excited about visually, audibly.
>
> That's the man we're dealing with . I you can answer me why an individual, a normal fifty-year-old man would collect and rape — kidnap and kill, I'm sorry, a seven-year-old child. They go hand in hand.
>
> . . . .
>
> When you look at those things, perhaps the reason, the motivation, the intent to this crime becomes clear. Looking wasn't good enough it appears. Listening wasn't good enough. And it explains the obvious of why a fifty-year-old man would take a seven-year-old child to his home, to his bedroom, to his bed, and why he would then take her to the bed of his motor home. We know now why he did it, what drove him to that. And that's the scariest part. That's the scariest part. He was a normal guy right down the street.

(42 RT 9415-9416.)

First, to the extent Westerfield claims the prosecutor improperly provided details of the bestiality images that had not been introduced through the testimony of any witness, he forfeited this contention by failing to lodge an objection at trial. (*People v. Clark* (2011) 52 Cal.4th 856, 960;

People v. Dykes (2009) 46 Cal.4th 731, 774-775.) Moreover, Watkins had defined the term "bestiality" for the jury as meaning "a person having sexual acts with animals." (24 RT 6396-6397.) The prosecutor's singling out of dogs, goats, and horses, is a fair comment on the evidence. (See *People v. Lee* (2011) 51 Cal. 4th 620, 647 [prosecution has wide latitude in closing argument to draw reasonable inferences from the evidence].) In any event, the trial court instructed the jury that the arguments of counsel are not evidence. (10 CT 2490; CALJIC No. 1.02.)

Westerfield argues that the prosecutor's argument evidenced that the child pornography evidence was elicited to invite the jury to draw the impermissible inference that he murdered Danielle because he is a pervert. (AOB 290.) Not so. The prosecutor's closing argument and the totality of the evidence presented at trial invited the jury to draw the permissible inference that Westerfield killed Danielle beyond a reasonable doubt. This was known because the physical evidence dictated that result. What was unknown was why. The child pornography evidence provided a reason, and it was an entirely permissible inference for the prosecutor to argue and for the jury to draw. "The prosecution is given wide latitude during closing argument to vigorously argue its case and to comment fairly on the evidence, including by drawing reasonable inferences from it." (*People v. Lee, supra,* 51 Cal.4th at p. 647; *People v. Gamache* (2010) 48 Cal.4th 347, 371; *People v. Harris* (2005) 37 Cal.4th 310, 345.)

That Westerfield not only viewed, but collected, images of young girls engaged in sexual acts and violent sexual acts was tremendously probative of why he would take his neighbor's daughter in the middle of the night and ultimately kill her. Westerfield's sexual penchant for young girls provided the reason behind his criminal behavior. Certainly Westerfield wishes the evidence had not been introduced at his trial because that evidence made his motive for his crime clear. While he was tied to the

abduction and killing by the DNA evidence, fiber evidence, and Westerfield's strange behavior — the pornography prevented the defense from arguing the lack of any reason for Westerfield snatching Danielle from her home. The fact the evidence provided the prosecution with a motive and bolstered the prosecution's case is not a justification to exclude the evidence. The joinder of the child pornography charge was entirely proper as was the trial court's discretionary decision to deny severance. When the defense suggested that there were only a minimal number of questionable images on Westerfield's computer, the trial court properly determined that the entirety of his pornography collection, adult and child, was admissible. The evidence was admissible as evidence of Westerfield's motivation pursuant to Evidence Code section 1101, subdivision (b). At no time did the court or prosecution suggest that the jury could convict Westerfield based on his character, and specifically argue his guilt based on being "an eclectic sexual pervert." (AOB 290.) Finally, the prosecutor's closing argument in no way suggested the jury should convict Westerfield of capital homicide because he possessed child pornography; the prosecutor suggested that the child pornography provided insight as to why Westerfield committed capital homicide as had been established by the other evidence at trial. Accordingly, the trial court properly admitted the pornography evidence, in accordance with Evidence Code section 352, as well as Westerfield's rights to due process and a reliable guilt determination in a capital case.

VII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING WESTERFIELD'S EX-GIRLFRIEND'S EMOTIONAL BIAS, AND THAT HE BECAME FORCEFUL WHEN INTOXICATED

Westerfield contends that the trial court erred in permitting the prosecutor to impeach Susan L., with whom Westerfield had had a prior dating relationship, with evidence about an incident in which Westerfield

made her uncomfortable, tending to show a time she felt negatively about Westerfield in contrast to her testifying favorably for him. He further contends the trial court improperly permitted the prosecutor to elicit through Susan L. that Westerfield became "forceful" when he drank alcohol. He claims that both topics constituted impermissible character evidence, arguing that it was only admitted to establish his propensity for stalking and for violent behavior while intoxicated. (AOB 293-308.) The trial court properly admitted the evidence of the incident following Susan L.'s leaving the relationship, as it was relevant to her credibility and bias toward Westerfield. Likewise, the trial court properly admitted the evidence of Westerfield's behavior while drinking because substantial evidence had been presented that he had been drinking the night of Danielle's disappearance, and Susan L. had first-hand knowledge of his behavior while intoxicated.

Subject to certain exceptions, all relevant evidence is admissible. (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The 'existence or nonexistence of a bias, interest, or other motive' " on the part of a witness ordinarily is relevant to the truthfulness of the witness's testimony (Evid. Code § 780, subd. (f)), and ' "[t]he credibility of an adverse witness may be assailed by proof that he cherishes a feeling of hostility towards the party against who he is called . . . ." ' [Citation.]" (*People v. Williams* (2008) 43 Cal.4th 584, 632-635.) A trial court possesses broad discretion in determining the relevance of evidence, and its rulings are subject to the deferential abuse-of-discretion standard on appeal. (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

A. Susan L.'s Testimony Regarding Her Relationship With Westerfield And His Behavior When Intoxicated

Susan L. was called as a defense witness in the guilt phase primarily for the purpose of establishing Westerfield's habits and practices with his motor home. (30 RT 7867.) She testified that she had met Westerfield about three and a half years prior to her testimony, had a dating relationship with him, and lived with him for close to one year. (30 RT 7869.) She provided favorable testimony to Westerfield, explaining that she and her children would go camping with him often at the Silver Strand, Glamis, and Borrego. (30 RT 7869-7870.) She testified that there were times when they would first go to the Silver Strand and then leave for Borrego because the weather was bad. (30 RT 7872-7873.) Susan L. further explained that when preparing to go camping, Westerfield would park the motor home across the street from or in front of his home a day or two prior to leaving, and he would leave the door open when loading the motor home. (30 RT 7875.) Susan L. would see children on the sidewalk in Westerfield's neighborhood. She also explained that when they filled up the motor home with water, they would just throw the hose on the front lawn when they were finished. (30 RT 7876.)

On cross-examination, the prosecutor established that Susan L.'s relationship with Westerfield was not always good. She moved out two times during the span that she lived with him. (30 RT 7883-7884.) Despite these break ups, Susan L. told the jury she still cared about Westerfield. (30 RT 7892.) In fact, although she had broken up with him at that point, the last time she saw him was about three weeks prior to her learning on television that he was a suspect in Danielle's disappearance, which was around February 5, 2002. (30 RT 7893.)

When the prosecutor's questioning turned to the last time Susan L. saw Westerfield, she began to tell the jury about having gone out on a

particular evening with a male friend who walked her to her door at the end of the evening. (30 RT 7893-7894.) At this point in the testimony, defense counsel objected on grounds of Evidence Code section 352; the trial court overruled the objection. Susan L. continued that at her front door, the male friend gave her a kiss on the cheek. (30 RT 7894.) The prosecutor asked whether she saw Westerfield there when this event occurred; she denied seeing him. (30 RT 7894.) When asked whether Westerfield told her he had been there that evening, the defense objected on the ground of Evidence Code section 352, and the prosecutor asked to approach the bench. (30 RT 7895.)

At the discussion outside the presence of the jury, the prosecutor argued that Westerfield told Susan L. the following day that he had been there that night apparently to tell her about a "business deal." (30 RT 7895.) The defense argued that the inference was that he was stalking her, an inference the defense believed should be excluded as substantially more prejudicial than probative. The prosecutor countered that the relevance of the information was that she was clearly concerned for and cared about Westerfield on the witness stand, despite this incident where he had been there uninvited, which she previously said "freaked her out." (30 RT 7896.) The trial court ruled:

> Well, in terms of — the way I want you to approach it is this. Without getting into what he said, I'm going to allow you to go to her state of mind because it is in conflict with the way she is today. Namely, that she didn't have good feelings for him back on that particular date.
>
> You work it out any way you want, but that's the area I'm going to allow you to get into without the specifics of what he said about what he did the day before. So you hone it in and I'll allow you to get into it.

(30 RT 7897.) The trial court made the limitations of the testimony in this area very clear:

> I want to get to her state of mind without using terminology that has potentially inflammatory overtones.
>
> You're in the leading position, Mr. Dusek. You can lead her right into it. And so that's the reason what I'm telling you is I don't want to hear what he had to say, number one. And I don't want the term "freaked-out" used because it relates directly to the conduct of the defendant. That is all hearsay because she never saw him. If she had seen him it's a completely different ball game, but she never even knew he was there.

(30 RT 7897.) The prosecutor responded that she knew he was there because Westerfield told her he was there, which qualified as an admission and an exception to the hearsay rule. (30 RT 7897.) Nonetheless, the trial court prohibited the prosecutor from eliciting the defendant's statements. (30 RT 7898.)

When cross-examination resumed before the jury, the prosecutor impeached Susan L. with a transcript of her interview with law enforcement officers in which she stated that she "found him sitting outside" and that he called her the following day.[21] (30 RT 7900.) After the discussion she had with Westerfield, the particulars of which were not discussed in accordance the trial court's ruling, Susan L. answered that she did not feel comfortable with Westerfield at that time. (30 RT 7900-7901.)

Susan L. also testified that she was aware Westerfield would drink. (30 RT 7914.) When asked whether she knew if his attitude or personality would change when he drank, defense counsel objected on grounds of Evidence Code section 352 and that the question called for inadmissible character evidence. (30 RT 7914-7915.) The trial court overruled the objection. Susan L. answered that she did notice a change in Westerfield's

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[21] On redirect, defense counsel pointed Susan L. to another portion of the transcript in which she clarified, "I mean he told me that the night he came here he was sitting outside." (30 RT 7918.)

behavior when he drank. When he drank, Westerfield became quiet, "sometimes he would become a little upset," and he would become depressed. That was one of the reasons she left. (30 RT 7915.)

During recross-examination, the prosecutor asked to approach the bench for a conference outside the jury's presence. He explained that he wished to inquire about Susan L.'s statement during an interview with law enforcement officers that when Westerfield drank he became sexually and verbally abusive. The prosecutor clarified that he had no intention of asking about sexual abuse, but simply wished to pose a question to Susan L. as to whether Westerfield became "forceful" when he drank. The defense objected on grounds that the evidence was prejudicial, irrelevant, and beyond the scope of redirect examination. Further, the defense argued that what the prosecutor sought to elicit was a "trait of character that relates to violence," and the defense had not opened the door to evidence of Westerfield's character for violence. (30 RT 7920-7921.)

The trial court responded as follows:

> Let me just say that the evidence in this case is overwhelming that he had been drinking. And we have a percipient witness to how he changes when he's been drinking. It is relevant and probative. His sexual acting out is not involved. The way it's being characterized is certainly within the bounds. And this is not character evidence in the true sense. It is evidence that directly relates to an issue in this matter that the witnesses have all testified to and here's a percipient witness to how he changes.

(30 RT 7921.) The trial court noted and overruled, the defense objections. (30 RT 7921.)

Subsequently the prosecutor asked, "When the defendant would be drinking would he become forceful?" Susan L. responded, "I remember an occasion that he did." (30 RT 7922.)

B. The Trial Court Properly Admitted Susan L.'s Testimony

The trial court properly permitted the prosecutor to elicit evidence that Westerfield had made Susan L. feel uncomfortable in the past as it impeached her testimony on his behalf by exposing her bias. A prosecutor may impeach a witness with evidence that she has previously held an opinion different from her testimony at trial. (See *People v. Price* (1991) 1 Cal.4th 324, 474 [prosecution permitted to ask question designed to show that prior to trial, witness's opinion of defendant was different from the one she had given on direct examination].) Here, while Susan L.'s testimony may have been offered primarily to show Westerfield's habits and customs with his motor home and trips to the desert, the secondary purpose of the testimony was to demonstrate her relationship with Westerfield and the fact that she trusted him to take her family on these excursions. That she was called to support Westerfield's alibi by rationalizing all of his bizarre behavior the weekend of Danielle's disappearance made her credibility important. She painted the excursions she took with Westerfield to be "family" trips, and it was clear from her testimony that she still cared for him. That there were times when she was untrusting of Westerfield and times that he became forceful with her, causing her to break off the relationship, was entirely relevant to impeach Susan L.'s testimony and was highly probative of her credibility. The testimony was relevant to Susan L.'s state of mind as a defense witness and to the veracity of the testimony she was providing in support of Westerfield's alibi defense. Evidence Code section 1101, subdivision (a) prohibits evidence of a person's character when offered to prove conformity with that character on a particular occasion. The evidence of Westerfield's behavior when observing his ex-girlfriend on a date and when intoxicated was offered to discredit Susan

L.'s testimony which suggested that she was perfectly content in the relationship.

Moreover, the prosecutor's closing argument did not suggest that the jury may use the Susan L.'s testimony as propensity evidence :

> What was he going through at that time in his life. We've heard that he had recently broken up with his girlfriend of longstanding Susan L. We heard that through not only himself on the taped interview with Paul Redden, I would describe, didn't want to be by himself that weekend, that type of thing.
>
> We also heard through Glennie Nasland, the lady from Denmark, one of the friend's from Dad's, she had described her knowledge of the breakup. We heard from Mark Roerh, the neighbor who lived across the street, about the breakup and how it was not the easiest of things to go through. We heard from Susan L., herself, how they had broken up and then just a few short days, short while before these events, she had been out with someone, came home with someone at nighttime. He gave her a little kiss on the cheek. And we found out that he was there. The defendant was there that night. That made her uncomfortable. What's going on. What is going on with that.
>
> We know that alcohol plays a role in the defendant's personality, how he behaves, how he acts, that there is a change in character when he's out drinking. Oftentimes he becomes quiet, might become depressed. According to Susan L. he had become forceful. Forceful when he's had too much to drink.
>
> How much did he have to drink that night? We don't know for sure. Glennie Nasland made him sound like he was falling-down drunk. The defendant tried to say that he was so drunk he didn't know even how he got home that night. But he certainly knew enough about what was going on up to his drive home and what was going on after his arrival at home to know that he was not falling down-drunk.

(42 RT 9409-9410.) This argument was geared at portraying the events in Westerfield's life, including the recent end of his relationship with Susan L., which were certainly relevant to the events of the weekend of Danielle's

disappearance. At no time did the prosecutor suggest that Westerfield "stalked" Susan L. and therefore did the same to Danielle or that because he had been forceful with Susan L. while intoxicated, he murdered Danielle after having become intoxicated and forceful. The prosecutor's argument consisted of entirely reasonable inferences drawn from the evidence as to Susan L.'s credibility and the events in Westerfield's life and his state of intoxication leading up to February 2, 2002.

Finally, even if the evidence constituted inadmissible character evidence, the error is not reversible absent a "miscarriage of justice." (Evid. Code, § 353.) The prosecutor's cross-examination of Susan L. and argument about the testimony did not prejudice Westerfield in light of the substantial case against him, including the DNA evidence, fiber evidence, and his own incriminating behavior during, and statements regarding, his impromptu trip that weekend. Thus even if Susan L.'s testimony on cross-examination was erroneously admitted, it is not reasonably probable Westerfield would have received a more favorable result had it not been presented to the jury. (See *People v. Samuels* (2005) 36 Cal. 4th 96, 113 [applying *People v. Watson, supra,* 46 Cal.2d at p. 836, to potentially erroneous admission of character evidence].)

VIII. THE TRIAL COURT PROPERLY RESTRICTED DEFENSE COUNSEL'S CROSS-EXAMINATION OF PAUL REDDEN TO ENSURE THE JURY WAS UNAWARE WESTERFIELD HAD TAKEN AND FAILED A POLYGRAPH EXAMINATION

Westerfield contends the trial court violated his ability to present evidence under Evidence Code section 356, as well his Sixth Amendment right to confront and cross-examine adverse witness Paul Redden regarding Westerfield's mental, physical, and emotional condition at the time of the polygraph examination. (AOB 308-317.) He claims that he should have been able to introduce more of the interview in an effort to show the

context and his state of mind at the time the statements were made. First, as the trial court never precluded the defense from introducing additional portions of the interview, Westerfield has forfeited his claim on appeal. In any event, the trial court's restrictions as to the cross-examination of Redden were intended to protect Westerfield's rights by preventing the jury from learning of the damaging, prejudicial evidence that the interview with Redden was, in fact, a polygraph examination, which Westerfield thoroughly failed. Accordingly, the trial court properly exercised its discretion in controlling the examination of this witness.

As previously discussed, Evidence Code section 351.1, subdivision (a), prohibits the results of a polygraph examination or the opinion of a polygrapher from being admitted at a criminal trial. However, subdivision (b) of that section permits the admission of otherwise admissible statements made during a polygraph examination.

Additionally, Evidence Code section 356 provides that when one party puts into evidence one portion of a conversation, the remainder of the conversation is admissible provided that the remaining portion has some bearing upon the portion already in evidence and is necessary to the jury's understanding of the statement in evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 419.) "The purpose of [Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 156.) "Further, the jury is entitled to know the context in which the statements . . . were made." (*People v. Harris* (2005) 37 Cal.4th 310, 335.)

However, Evidence Code section 356 "is indisputably ' " subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced." ' " (*People v. Williams* (1975) 13 Cal.3d 559, 565.) A reviewing court considers a trial court's ruling under Evidence Code section 356 under the deferential abuse-of-discretion standard. (*People v. Farley* (2009) 46 Cal.4th 1053, 1103.)

A. The Trial Court's Rulings And Discussion Surrounding The Admissibility Of Westerfield's Statements To The Polygraph Examiner

Evidence of the polygraph examination was presented as part of the pretrial Fifth Amendment motion to suppress Westerfield's statements to law enforcement officers as involuntary and as in violation of *Miranda*. Paul Redden, the polygraph examiner, testified at the motion (5A RT 1167), and the entire transcript of the examination was admitted as Pretrial Exhibit 27A (46 CT 10833-10989.)

At the conclusion of the hearing, the trial court ruled that Westerfield's statements to Redden during the course of the polygraph examination were voluntary. While Westerfield did express concern over the equipment and whether he should have an attorney, he signed a consent form. Significantly, as to the admissibility of the statements during the interview, the trial court ruled:

> The interview is not unduly long. There is quite a repartee between [Westerfield] and Redden throughout the entire time. And again I find that at the point in time when he's confronted with the fact he failed the polygraph, some may argue that that casts some kind of a gloom over the entire interview, but I don't find that.
>
> Here again the tape is the best evidence of his attitude, demeanor, and so forth. So the Redden tape will come in severely excised. And all counsel are well aware that there is going to be some major, major renovation necessary on that

> statement if it's going to be played, number one. But, more importantly, if it's going to be referred to by the witnesses, obviously only the substance of the interview is going to be admissible.

(5E RT 1885.)

Prior to Redden's testimony the prosecutor informed the trial court that the parties had been "going back and forth" as to the content of the redacted interview transcript. The prosecution had a copy of what it intended to present, had provided it to defense counsel, and asked that the court review the transcript to ensure that all references to the polygraph examination had been removed. (14A RT 4228.) Defense counsel indicated he would review the redacted transcript prior to Redden's testimony. (14A RT 4229.)

At trial, the jury heard a redacted audio recording of the interview (Exh. 59), a transcript of which was distributed to assist the jury while the tape was being played (Exh. 59A; 8 CT 2012-2053.) (16 RT 4488-4489.) The redacted interview only contained questioning about Westerfield's whereabouts the weekend of Danielle's disappearance and his prior interactions with Brenda Van Dam and Danielle. The redacted interview removed the lengthy discussion of Westerfield's background, Redden's explanation about how the polygraph instruments worked, and Westerfield's repeated references to his nervousness. (46 CT 10835-10892.) The redacted interview also removed the pointed questions as to whether Westerfield was involved in Danielle's disappearance, his denials that he was, and Redden's informing Westerfield that he had failed the test. (46 CT 10932-10988.)

On direct examination, Redden testified that the interview took place on Monday, February 4, 2002, at the northeast substation. Westerfield was escorted into the room by police officers who left the room when the interview commenced. (15 RT 4469.) At the beginning of the interview,

Redden discussed with Westerfield the importance of being truthful. (15 RT 4470.) During the interview, Westerfield made a telling statement that he was not alone on his motor home trip the weekend of Danielle's disappearance. In describing a stop he made on the portion of the journey that took him to Borrego Springs, Westerfield stated, "this little place that *we*, where *we* were was just a little small turn type place." (8 CT 2033-2034.)

After the jury heard the audiotape of the interview, the following transpired on cross-examination:

> Mr. Feldman: How many hours did you spend speaking with Mr. Westerfield?
>
> Mr. Dusek: Objection. 352, Your Honor.
>
> The Court: Sustained.
>
> Mr. Feldman: How many different times did Mr. Westerfield ask you for counsel?
>
> Mr. Dusek: 352, Your Honor.

(16 RT 4490.) The trial court sustained the objection and asked the parties to approach at sidebar. Outside the jury's presence, the court stated;

> I had made a legal ruling regarding the admissibility of these tapes. You can preserve it if you would like to raise your objection here. But how many times he may have asked for counsel, didn't ask for counsel, is contained in the parts of the tapes that you don't want it. And you're coming dangerously close to opening up this entire interview. I'm just telling you.

(16 RT 4490-4491.) Defense counsel responded that he had a right to demonstrate that Westerfield's statements had not been given voluntarily. The trial court responded that if the defense chose to pursue the topic of voluntariness, the entire recording of the polygraph examination would be played for the jury, and observed, "[b]ecause part of the reason the court made its ruling that it's voluntary is the entire tape." (16 RT 4491.)

Following the sidebar discussion, defense counsel elicited from Redden in front of the jury that there was a heater on in the room, and Westerfield complained about how hot it was. (16 RT 4492.) After eliciting that the interview began around 3:20 p.m., Mr. Feldman asked, "So you were aware that he had been with law enforcement essentially almost continuously without a break since about ten to 9:00 that morning?" (16 RT 4493.) The prosecutor objected on grounds of hearsay and speculation and the trial court sustained the objection. (16 RT 4493.) Then, defense counsel commenced a line of questioning aimed at establishing that Redden built a rapport with Westerfield by asking about his job for instance. (16 RT 4494.) The prosecutor objected that the question sought to elicit hearsay and evidence that went beyond the scope of direct examination. Mr. Feldman responded that Evidence Code section 356 permitted the question, which resulted in the trial court's ordering the parties to approach at sidebar once again. (16 RT 4495.)

At sidebar, the trial court stated:

> Mr. Feldman, I'm having a lot of trouble with where you're headed. The court and the District Attorney have done everything they can do to comply with the court's order to avoid references within the entire interview. When you raise 356, you raise the entire transcript of the entire interview. If you're going to use that objection, then you're opening the door to this entire interview. And while I can give a caveat and I can tell the jury that they're not to consider all these things, I'm just letting you know that you are on the brink of bringing this in.
>
> Now, if this is a strategy move, so be it. But I am very concerned because I made a very specific order and the District Attorney took great lengths to excise all of the references, and you're now telling me you're going to object under 356, which tells me you want the entire interview in. That's what it's telling me.

(16 RT 4495.) Mr. Feldman told the court he did not mean to communicate that. (16 RT 4495.) The trial court also noted that the defense objection was untimely because if there were concerns about the degree the interview would be redacted those concerns should have been resolved prior to the playing of the tape at trial. (16 RT 4497.) Defense counsel additionally argued that because the prosecutor had elicited on direct examination that Westerfield had used the word "we" during a portion of the interview where he was describing the motor home trip he claimed to have made alone, the defense was entitled to explain that statement with evidence suggesting Westerfield was tired, that he had not eaten, and that he had asked for counsel. The trial court ruled that Redden could testify to his observations as to whether Westerfield appeared fatigued. (16 RT 4499.)

In the jury's presence, Mr. Feldman elicited the following from Redden:

> Q. Did you provide Mr. Westerfield any food?
>
> A. I did not, no sir.
>
> Q. Could you tell whether or not — you had not met Mr. Westerfield prior to that date, is that right sir?
>
> A. No, sir. This was the first time.
>
> ...
>
> Q. Did you — then you're not able to form an opinion as to how fatigued he might have been, is that right?
>
> A. Except that I asked him how much sleep he had had.
>
> Q. What did he tell you?
>
> A. Five hours.
>
> Q. And did you ask him when he had last eaten?
>
> A. Yes, sir, I did.

Q. What did he tell you?

A. That he hadn't eaten.

(16 RT 4501-4502.)

B. As The Trial Court Never Prohibited The Defense From Eliciting Additional Portions Of The Interview, Westerfield Has Forfeited The Issue For Appellate Purposes

Despite the trial court's affording him multiple opportunities to elicit additional statements from the polygraph examination, Westerfield declined to do so and thus has forfeited this issue on appeal. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1408.) At no time did the prosecution seek admission of portions of the interview that even remotely suggested this was a polygraph examination. Significantly, the record establishes that the defense participated in redacting the transcript in order to accomplish removal of any hint of the purpose of this interview. (14A RT 4228.) Prior to Redden's testimony, defense counsel indicated he would review the redacted transcript. (14A RT 4229.) At no time prior to Redden taking the witness stand did the defense argue that additional portions of the interviewed should be played and transcribed for the jury. It was only after Westerfield objected that under Evidence Code section 356 he was entitled to have additional portions of the interview admitted that the admission of the polygraph evidence become an issue at trial. Westerfield never argued for the admissibility of the specific portions of the interview he now claims on appeal should have been admitted. (AOB 313, referring to 46 CT 10846; AOB 314, referring to 46 CT 10891; AOB 314-315, referring to 46 CT 10976-10977.) As to the admissibility of these statements, therefore, Westerfield has forfeited the issue. (*People v. Leonard, supra,* 40 Cal.4th at p. 1408.)

Similarly, after the conclusion of Redden's testimony, the defense sought clarification from the court as to its ruling. The trial court stated that it was under the impression that the parties had worked together to redact the transcript. If that was not the case, and the defense wished to introduce portions of the transcript that had been redacted, the trial court stated it would permit the defense to recall Redden. (16 RT 4507-4508.) But, the trial court once again warned that there was a significant risk that if the defense started picking and choosing selective statements, "certainly we are going to reach a point at which the entire statement has to come in in order to understand things." (16 RT 4507.) The trial court further observed, "the context of the Redden interview is the entire interview." (16 RT 4507.)

Further, as the prosecution's case neared its end and the defense case was about to commence, the defense specifically discussed with the trial court calling Redden as a witness. (25B RT 6766-6771.) The trial court ruled that if the defense wished to establish a foundation as to the introductory questions Redden asked in order to make Westerfield feel comfortable in the interview, it would permit the defense to question Redden about asking Westerfield about his children, occupation, and the fact that at the time of the interview, Westerfield had not slept or eaten. (25B RT 6769-6771.)

Thus, the trial court never precluded the defense from recalling Redden as a witness; it simply warned the defense that in doing so the defense might open the door to the entire interview being admitted into evidence. That Westerfield chose not to avail himself of the opportunity, nor did he even attempt to proffer specific statements from the Redden interview to determine whether the admission of those statements would have opened the door to the entirety of the interview being placed before

the jury, he should not be permitted to pursue the issue now on appeal. (*People v. Leonard, supra,* 40 Cal.4th at p. 1408.)

C. The Trial Court Properly Controlled The Cross-Examination Regarding Redden's Interview With Westerfield

Assuming the issue was not forfeited, the trial court's rulings as to the admissibility of statements made during the polygraph examination were proper. Westerfield claims there are three errors with regard to the trial court's rulings during his cross-examination of Redden: (1) while the defense could not resubmit the voluntariness of the statements to the jury, the defense could submit the same factors as relevant to the reliability of the statement; (2) he was entitled pursuant to Evidence Code section 356 to present other portions of the same interview that had not been presented by the prosecution; and (3) he claims the questions he intended to ask sought to illicit relevant evidence, which could never open the door to the purportedly irrelevant polygraph evidence that the trial court ruled might come in if the defense continued to pursue the line of questioning. (AOB 311-312.) Ultimately, according to Westerfield, if the jury had heard other limited portions of the tape, it would have seen evidence of the pressures applied by the police, which might explain his use of the word "we" when describing the trip he claimed to have taken alone the weekend Danielle disappeared. (AOB 313-317.)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time.' [Citation.]" A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion. [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 374.) Prejudicial

evidence is evidence that tends to evoke an emotional bias against the defendant. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118.)

It should be noted that the trial court did not specifically refer to Evidence Code section 352 in ruling on the extent to which the defense could cross-examine Redden about the voluntariness of Westerfield's statements. It is clear, however, that the court admitted the statements not only because they were voluntarily made, but also because they were highly probative and relevant as to Westerfield's activities in the hours surrounding and following Danielle's disappearance. Moreover, the trial court's ruling makes abundantly clear, that it was well-aware and concerned with the potential prejudice of admitting the polygraph evidence. (16 RT 4490-4491, 4495-4499.)

In any event, the statements made by Westerfield without reference to the polygraph were clearly probative and did not tend to evoke emotional bias as Westerfield gave an alibi for his whereabouts the weekend Danielle disappeared. That Westerfield wished to explain why he used the word "we" in describing his trip does not render improper the manner in which the trial court controlled cross-examination. The trial court never precluded Westerfield from demonstrating to the jury that his statements were not made voluntarily as he was tired, hungry, and had been speaking with police for the better part of the day. The trial court simply ruled that if he chose to pursue this explanation, the entire interview, which included significantly more inflammatory information that he had failed the polygraph, might be admitted into evidence. Certainly, if the defense seeks to establish that the statements were involuntary, the prosecution is entitled to show they were voluntary. The entire interview, and not just the isolated statements referred to by Westerfield, shows that he gave his statements voluntarily. The prosecution would be entitled to show that Westerfield's demeanor throughout the entire interview, including after he is told he has

lied, is the same – he is cooperative and repeatedly asks to take the test again. (46 CT 10978, 10982, 10987.) The isolated statements Westerfield wanted to admit in no way demonstrated that he was not participating in this interview of his own free will or that he was too fatigued and hungry to appreciate what he was saying; however, the entire interview demonstrates the contrary.

If the defense had chosen to play the entire interview for the jury, the trial court provided a viable option of giving the jury a limiting instruction. (16 RT 4495.) This Court has found limiting instructions to be sufficient to cure error from erroneously admitted polygraph evidence. (*People v. Cox* (2003) 30 Cal.4th 916, 953; *People v. Price* (1991) 1 Cal.4th 324, 428.) The same should be true here where a defendant elects to have the entire interview played to demonstrate the defendant's state of mind. The trial court could have instructed the jury that Westerfield voluntarily submitted to the polygraph examination and that the results of such tests were unreliable and inadmissible in court, and therefore, the jury was not to consider the results of the test. That Westerfield was forced to make a difficult choice between attempting to explain his reference to someone else being on the motor home by admitting the entire polygraph interview or confining the jury's understanding to the redacted transcript which removed any inflammatory reference to the polygraph examination and his failure of that examination, did not render the trial unfair. (*People v. Frye, supra,* 18 Cal.4th at p. 940. Westerfield made the choice to use the redacted transcript and not inform the jury that Redden believed he had lied about his involvement in Danielle's disappearance.

Moreover, the information Westerfield sought to admit through the Redden interview was elicited in other ways. As Westerfield notes (AOB 312-313), he was able to elicit without objection that Redden did not provide him with any food, that he said he had not eaten, and that he only

had had five hours of sleep the night before. (16 RT 4501-4502.) From this, defense could argue that Westerfield's hunger, fatigue, and general mental state caused him to slip and say "we." Moreover, the defense did not need Westerfield's statements to argue that his mental state was impacted by the presence and attention of law enforcement. (AOB 314, citing 46 CT 10891.) Defense counsel was able to present the same argument through the testimony he had elicited showing that Westerfield was under virtually constant police surveillance beginning around 9:00 a.m. on Monday February 4, 2002. (26 RT 6999-7003; 30 RT 7814-7817, 7925-7926.)

Further, with regard to the portion of the unredacted interview in which Westerfield attempted to explain his use of the word "we," the explanation was inadmissible under Evidence Code section 356 as it added nothing to the redacted portion of the interview admitted by the prosecution. When confronted by Redden by the fact that he twice said "we" in describing the motor home adventure he purportedly embarked upon alone, Westerfield attempted to explain:

> WESTERFIELD: If, if I said that . . . and I'm not gonna . . . I'm not gonna say I didn't say it, it's one of those mix-ups I use in my head.
>
> REDDEN: Freudian slip is what we call it.
>
> WESTERFIELD: Well no, it's just that it . . . you know, I . . . it sounds like a lie, but it's not.

(46 CT 10977.)

To the extent Westerfield argues that this portion of the interview was necessary for the jury to be given a "true and complete picture" of the statement, he is incorrect. The purpose of section 356 is to prevent statements in a conversation from being taken out of context by one party so as to create a misleading impression of the entire conversation. (*People*

v. Arias, supra, 13 Cal.4th at p. 156.) Here, the redacted version of the Redden interview did not violate the principals of completeness set forth in section 356 because there was no misleading impression created by the redaction. Whether appellant later "explained" his use of the word "we" does not make the explanation necessary to understand the fact that he said it. Moreover, his explanation, that it was slip, was obvious. Of course it was a "slip" given his alibi that he took a motor trip by himself. And, of course, the parties would attribute different significance to the slip in any event. Westerfield's later explanation in the Redden interview was not necessary to the jury's understanding of the earlier statement. Finally, if the defense had admitted Westerfield's "explanation" for using the word "we," the prosecution was entitled to elicit the context for his giving the explanation, which was of course, Redden's confronting Westerfield with his failure of the polygraph examination.

The admission of the isolated portions of the interview that Westerfield now claims should have been admitted under the guise of seeking to present a "complete picture" would have allowed him to enter into evidence self-serving hearsay statements not otherwise admissible while avoiding cross-examination on the issue. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1257-1260 [trial court properly prohibited defendant from introducing his videotaped statements to police at penalty phase of trial as statements were inadmissible hearsay].) Westerfield's remedy was to offer the explanation himself by taking the stand in his own defense, or by admitting the entire polygraph interview. Accordingly, the trial court did not abuse its discretion in controlling the cross-examination.

Finally, any error was harmless as Westerfield fails to demonstrate a reasonable probability that had the jury heard the additional self-serving statements he made in the interview, he would have achieved a more favorable verdict. (See *People v. Arias, supra,* 13 Cal.4th at pp. 156-57

[applying *Watson* harmless error standard to Evid. Code, § 356 question].) First, as noted above, the defense elicited through Redden that Westerfield had not eaten or slept much, thus preserving the ability to argue he was fatigued, thus explaining his "slip" in stating "we." Moreover, in light of the overwhelming evidence of his guilt, consisting of DNA and fiber evidence placing Danielle in his home and motor home, as well as his own statements about his whereabouts the weekend she disappeared, it cannot be said that had the jury heard any additional portions of the interview, he would not have been found guilty of Danielle's murder.

IX. THE TRIAL COURT PROPERLY PROHIBITED THE DEFENSE FROM PRESENTING THE ANONYMOUS PHONE CALL TO BRENDA VAN DAM AS IT WAS INADMISSIBLE HEARSAY

Westerfield contends the trial court erred in excluding evidence of a phone call from an unknown person to Brenda Van Dam on February 15, 2002, in which the caller stated that Danielle was still alive, but that she had been abused. He claims the statement made by the unknown caller was a declaration against penal interest pursuant to Evidence Code section 1230, and that it should have been admitted as a matter of due process. (AOB 318-321.) Contrary to Westerfield's contentions, the trial court properly excluded the phone call as it was entirely unreliable, untrustworthy hearsay from an unknown declarant, and did not qualify for admission under any exception to the hearsay rule.

Evidence Code section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in

> the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

At the core of this exception to the hearsay rule is the fundamental trustworthiness of the statement. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251.) In determining whether a statement was truly made against a declarant's interest within the meaning of Evidence Code section 1230, and therefore is sufficiently trustworthy to be admissible, the court may take into account not only the words, but the circumstances under which they were uttered and the potential motivation of the declarant. (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) As this Court has observed,

> " 'The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human being actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.' [Citation]."

(*People v. Frierson* (1991) 53 Cal.3d 730, 745.) Accordingly, a reviewing court may only reverse a trial court's findings regarding the trustworthiness of a statement where the trial court abused that discretion. (*Ibid.*)

A. The Evidence And Proceedings Related To The Anonymous Phone Call

At trial, defense counsel asked Brenda Van Dam whether she had received a phone call around February 16, 2002, concerning her daughter. The prosecution objected on grounds of hearsay, and the trial court further heard from the parties at sidebar. Defense counsel proffered that on or about February 16, 2002, Brenda Van Dam received a phone call in which the unidentified caller said something to the effect of, "Ma'am, your daughter is safe. She's been abused." (13 RT 3852.) Brenda immediately contacted law enforcement officers who were unable to trace the phone call, realizing that the "phone tap" that they had in place for the Van Dam

phone had expired. The defense argued that the phone call was a declaration against the caller's interest, and that it tended to prove Danielle Van Dam was alive at the time the call was made, particularly because David Faulkner, the entomologist, had testified that this was a possibility. If that were the case, Westerfield could not have been her killer because he was under constant police surveillance at that time. Finally, defense counsel asserted that the phone call should be admitted as a matter of due process as it was Westerfield's right to present an affirmative defense that he could not have committed the murder. (13 RT 3853-3854.)

The trial court rejected these arguments, observing:

> It's classic hearsay. It's denied for that reason in terms of declaration against penal interest. One of the criteria is an aura of credibility or reliability, and there's no such finding in this case because we don't even know who the person was. So the objection is sustained.

(13 RT 3854.)

Subsequently, the defense filed a written motion, asking the trial court to reconsider its previous ruling. (9 CT 2200-2204.) Attached to the motion was a portion of what counsel represented was a sworn affidavit from Detective Alldredge seeking a search warrant for the purpose of placing a "trap and trace" on the Van Dam's phone. (9 CT 2205-2206.) The attachment indicated that the phone call at issue was placed on February 15, 2002, at 4:00 p.m. And the unidentified male caller asked Brenda if she wanted her daughter back; the unidentified male stated "Danielle had been abused but was alive." (9 CT 2205.) In the motion, the defense repeated the arguments made in open court, and added that the fact that the police took the phone call seriously enough to request the search warrant, indicating that they believed the statement was trustworthy. (9 CT 2202.) After providing the parties the opportunity to argue the matter once again (33A RT 8074-8077), the trial court denied the motion again:

> The prior rulings of the court were basically that it was classic hearsay evidence, that this was not a declaration against penal interest, because, for one thing, we don't know who made the call; we don't know where they made the call from. We all are aware of crank calls and the publicity that this case had generated at the time that this call was made.
>
> I believe, if I didn't, I will once again assert, that this does not have an aura of credibility about it. And at this point in time I'll abide by the earlier ruling. I don't see that there's been any change in the state of the evidence as it relates to the bug evidence that has come in. So the motion to once again admit that phone call evidence will be denied.

(33A 8077-8078.)

B. The Trial Court Properly Exercised Its Discretion In Excluding Evidence Of The February 15, 2002, Phone Call

The trial court properly determined that the unidentified caller's statement was hearsay, requiring exclusion as it was unreliable, untrustworthy, and thus inadmissible under the exception for a declaration against interest pursuant to Evidence Code section 1230. The trial court was faced with an anonymous statement by an unknown declarant, who was avoiding the possibility of identification and potential prosecution, and whose information was thus inherently unreliable. The essence of the exception for declarations against interest is that the declarant must believe the statement could actually subject the declarant to liability. (Evid. Code, § 1230.) This is what establishes the trustworthiness of the statement. Here, by remaining anonymous, the unknown declarant could not reasonably have believed he could be subjected to any criminal liability as a result of the phone call.

Moreover, the substance of the phone call does not even point to criminal liability on the part of the declarant. The voice stated that Danielle had been abused, but was alive. This was not a confession that the caller

had participated in wrongdoing, but merely a statement that the caller purported to have knowledge of her whereabouts. The defense proffer for admissibility was not that the caller had abducted Danielle, but rather that the information the caller conveyed supported the defense that Danielle was still alive on February 15th, and therefore someone other than Westerfield must have killed her. Accordingly, even if the declarant were known, the statement was not sufficiently against the caller's interest, to render it trustworthy, so as to qualify under the exception detailed in Evidence Code section 1230.

Westerfield suggests that the high publicity in his case, and the awareness of the community that a widespread and thorough investigation was being conducted in order to find Danielle, would have made people suspect that the Van Dams' phone was being monitored by law enforcement officers. He argues that in a case with such intense media and law enforcement attention, it would have been against anyone's penal interest to place such a phone call, and that therefore the statement was trustworthy. (AOB 319.) Westerfield fails to acknowledge that in a case such as his that is particularly newsworthy, it is also common knowledge, as Judge Mudd recognized (33A RT 8077-8078), that victims' families routinely receive false confessions and other false information from individuals for a variety of motives. Westerfield's theory would seemingly lead to the admission of inherently unreliable statements from unidentified callers in these high publicity cases — an outcome that is not allowed for by any exception to the hearsay rule nor mandated by any constitutional provision.

Finally, Westerfield's contention that he had a federal due process right to present evidence of the phone call to the jury, relying on *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038; 35 L.Ed.2d 297] (*Chambers*) is likewise unavailing. In *Chambers*, a state trial court in a

murder case prevented the defendant from questioning a witness about having heard another individual admit to the murder. The trial court found the evidence constituted inadmissible hearsay evidence under state law. The United States Supreme Court, however, ruled that the exclusion of the testimony was a denial of due process. It determined, "The testimony rejected by the court . . . bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." (*Id.* at p. 302.) The Court also found the testimony was critical to the defense. (*Ibid.*) While the Court noted, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," the Court further explained "[i]n the exercise of this right, the accused . . . must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Ibid.*)

Here, in contrast, the testimony rejected by the court bore *no* assurances of trustworthiness, much less persuasive ones. The established rules of evidence made it quite clear that the phone call was inadmissible hearsay. Every indication supported the statements made by the unidentified caller, who would not be a witness at trial and who would not be subject to cross-examination, were entirely untrustworthy. Accordingly, their exclusion in no way jeopardized the fairness and reliability of Westerfield's trial required by the Eighth Amendment. (See AOB 320, citing *Beck v. Alabama* (1980) 447 U.S. 625, 628 [100 S.Ct. 2382; 65 L. Ed.2d 392]; *People v. Cudjo, supra,* 6 Cal.4th at p. 623.)

" '[A] defendant does not have a constitutional right to the admission of unreliable hearsay statements.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 269.) "California has an interest 'in ensuring that reliable evidence is presented to the trier of fact in an criminal trial.' " (*Id.* at p. 270.) Consequently, courts may excluded unreliable or untrustworthy statements,

particularly where the statements' admission would not be accompanied by the person who made them and there is no opportunity for cross-examination or clarification. (See *People v. Friend* (2009) 47 Cal.4th 1, 48 [trial court properly exercised discretion in excluding records and speculative testimony to explain their potential relevance as evidence would have been time consuming and confusing].) Certainly, "[t]he routine and proper application of state evidentiary law does not impinge on a defendant's due process rights." (*People v. Riccardi* (2012) 54 Cal.4th 758, 809.)

Accordingly, given the unreliability of the information in the anonymous February 15, 2002, phone call to Brenda Van Dam, the trial court properly excluded the evidence as hearsay, and there can be no constitutional violation from the trial court's proper application of state evidentiary law.

In any event, any error in excluding this evidence was harmless given the overwhelming evidence of Westerfield's guilt as compared to the obvious weakness of this third-party culpability "evidence." Accordingly, any error in the trial court's application of state Evidence Code section 1230 must "be dismissed as harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836-837 [], the standard applicable to state law error in the admission of hearsay. (*People v. Duarte* (2000) 24 Cal.4th 603-618-619.)

X. CALJIC NO. 2.16 PROPERLY ADVISED THE JURY THAT IT COULD NOT CONVICT WESTERFIELD BASED ON DOG-SCENT EVIDENCE ALONE

Westerfield contends the trial court erred in failing to sua sponte instruct the jury to view with care and caution the dog-scent evidence of Cielo's "alert" to the motor home compartment and "interest" in the shovel and lawn chair. (AOB at 322-341.) While this Court has not addressed the propriety of CALJIC No. 2.16, the instruction the court provided in

Westerfield's case, the First Appellate District, Division Three has explicitly rejected Westerfield's argument in *People v. Malgren* (1983) 139 Cal.App.3d 234 (*Malgren*), and its reasoning is sound. This Court should adopt the reasoning of *Malgren* and hold that Westerfield's jury was properly instructed that it could not convict on the dog-scent evidence alone, and nothing more was required.

The trial court instructed the jury with the language of CALJIC No. 2.16, which provides:

> Evidence of dog tracking has been received for the purpose of showing, if it does, that the defendant is the perpetrator of the crimes of kidnapping and murder. This evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of kidnapping and murder. Before guilt may be inferred, there must be other evidence that supports the accuracy of the identification of the defendant as the perpetrator of the crimes of kidnapping and murder.
>
> The corroborating evidence need not be evidence which independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking.
>
> In determining the weight to give to dog-tracking evidence, you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the tracking in question.

(10 CT 2500; 42 RT 9439.)

Here, Westerfield argues that in addition to the above, the trial court possessed a sua sponte duty to instruct the jury to view this evidence with care and caution. Certainly, even in the absence of a request, the trial court must instruct on general principles of law closely and openly related to the evidence before the jury, which are essential to the jury's understanding of the case. (*People v. Najera* (2008) 43 Cal.4th 1132, 1136.) In *People v. Malgren, supra,* 139 Cal.App.3d at pages 240-242, the court of appeal

specifically held that there is no sua sponte duty to instruct a jury to view dog-scent evidence with care and caution so long as the instruction conveys that this form of evidence cannot alone form the basis for conviction and must be supported by other evidence at least as to its reliability.

As Westerfield observes, three cases from the courts of appeal address the admissibility of dog-scent evidence and the requisite jury instructions about it. (AOB 330-334.) First, in *People v. Craig* (1978) 86 Cal.App.3d 905 (*Craig*), the court discussed the admissibility of "dog trailing" evidence in general, observing that it was not a variety of evidence subject to the *People v. Kelly* (1976) 17 Cal.3d 24, 37-40, foundational test for reliability as it was not a newly developed scientific technique. Dogs, unlike machines or testing apparatus, are individual beings each with different capabilities. (*People v. Craig, supra,* 86 Cal.App.3d at p. 915.) Thus, the abilities and reliabilities of each individual tracking dog must be established before the results of the dog's efforts are admissible at trial. (*Ibid.*) Accordingly, the *Craig* court observed that a trained dog's ability to trail a human must be proven by expert testimony on a case-by-case basis, unlike the general acceptance of an inanimate scientific technique. (*Ibid.* at pp. 915-916.)

The court in *Craig* also addressed the propriety of the jury instruction given about the dog-trailing evidence, which stated;

> Testimony of dog trailing has been presented in this case. Such dog trailing evidence must be viewed with the utmost of caution. Such evidence must be considered, if found reliable, not separately, but in conjunction with all other evidence in the case. Dog trailing evidence alone is not sufficient to warrant conviction. In determining what weight to give such evidence you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the training in question.

(*People v. Craig, supra,* 86 Cal.App.3d at p. 917.) The defendant argued that the instruction also should have informed the jury that dog trailing evidence "is of slight probative value." (*Ibid.*) The reviewing court noted that the instruction as given "treat[ed] the dog trailing evidence the same as any other evidence by allowing the weight given to it to be left to the discretion of the finder of fact. (Evid. Code, § 312.)" (*Id.* at p. 918.)

Dog-scent evidence was next addressed by the courts of appeal in *People v. Malgren, supra,* 139 Cal.App.3d 234. In *Malgren*, the court agreed with the holding in *Craig*, finding dog-scent evidence admissible so long as the dog's ability met foundational requirements, but, looking to the foundational requirements in other states, held that the list of foundational requirements should include the following:

> (1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated.

(*Id.* at p. 238, citing *State v. Socolof* (1981) 28 Wn.App.407 [623 P.2d 733, 734]; *Cook v. State* (Del.Sup. 1977) 374 A.2d 264, 270; *People v. Sands* (1978) 82 Mich.App. 25 [266 N.W.2d 652, 657].)

The defendant in *Malgren* complained that the trial court erred in failing to instruct, sua sponte, in the language authorized by *Craig*, "that such evidence should be viewed with caution, and is not alone sufficient to warrant conviction." (*People v. Malgren, supra,* 139 Cal.App.3d 234.) The *Malgren* court agreed with the defendant that "[t]he principle that dog trailing evidence alone is not sufficient to warrant conviction was unquestionably a principle openly and closely connected with the facts before the court. The court disagreed, however,

> that the court was obligated to instruct that dog trailing evidence is of little probative value. Unlike accomplice

> testimony, dog tracking evidence is not inherently suspect because of a self-interested source. [Citation.] The notion that such evidence must be viewed with caution stems at least in part from a fear that a jury will be in awe of the animal's apparent powers and will give the evidence *too much* weight. [Citation.] In light of the stringent foundational requirements which must be met before such evidence is admissible at all, however, we see no reason to categorize that evidence thereafter as inferior or untrustworthy, and instruct that it be given *less* weight than other evidence. The *Craig* court itself suggested that what the law in this state actually requires is not that dog trailing evidence be viewed with caution, but that it be treated as any other evidence, with its weight left to the trier of fact.
>
> We hold, then, that the trial court should have instructed *sua sponte* that (1) when dog tracking evidence is used to prove the identity of a defendant, there must be some other evidence, either direct or circumstantial, which supports the accuracy of that identification evidence; and (2) in determining what weight to give such evidence, the jury should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the trailing in question.

(*Id.* at pp. 241-242.)

Finally, in *People v. Gonzales* (1990) 218 Cal.App.3d 403, 407 (*Gonzales*), the defendant complained that although the trial court instructed the jury with the factors as set forth in *Malgren* to guide the jury in determining the weight to assign to the dog-tracking evidence, it did not instruct that dog-tracking evidence required corroboration. The Fifth Appellate District agreed, holding that a jury must be required to find other evidence supporting the accuracy of the dog-tracking evidence. (*Id.* at p. 408.) It clarified, however, that "the corroborating evidence needed to support dog-tracking evidence need not be evidence which independently links the defendant to the crime; it suffices if the evidence merely supports the accuracy of the dog tracking." (*Ibid.*)

Against this backdrop, it is clear that CALJIC No. 2.16 incorporates all of the concerns expressed in *Craig, Malgren,* and *Gonzales* and thus properly guides jurors as to how to consider dog-scent evidence. But Westerfield suggests that more is required. He argues that the problem with dog-scent evidence is that it is not foolproof and requires human interpretation, but has aura of trustworthiness about it, such that a jury might place too much emphasis on a dog's findings. (AOB 326-327, 334-335.) And thus, he attempts to analogize dog-scent evidence with other types of evidence as to which jurors receive instructions to view with caution — accomplice testimony, informants, and oral confessions — due to the risk that jurors will place too much emphasis on such testimony, the credibility of which is inherently suspect. (AOB 325-326, 336-337.) He further suggests that dog-scent evidence is all the more susceptible to this risk as it is difficult to impeach.

As to this last concern, Westerfield's trial is a perfect example of the degree to which such evidence can very well be impeached. Here, the defense provided the jury with reasons to discredit the dog-scent evidence, particularly Jim Frazee's testimony that the first time he told anyone Cielo had alerted to the motor home on February 6, 2002, was on February 22, 2002, after he learned that blood had been found and after Westerfield had been arrested. Moreover, the first person he told was the dog's breeder and not a law enforcement officer. (24 RT 6529-6530; 26 RT 6801-6803, 6808-6809.) This impeachment alone would certainly have dispelled any aura of infallibility about such evidence. Additionally, the instruction given advised the jury that it was to consider the appropriate weight to assign such evidence. That the evidence is not infallible goes to the weight the jury should assign the evidence — that is, whether the evidence was substantial to merit a conviction. And the jury instruction addresses that concern. Because the evidence is not infallible and subject to

interpretation, jurors are not permitted to base a verdict on that evidence alone:

> The difficulty is that we want to assure ourselves the dog did not err either in picking up the scent of the person who handled [a particular item] or in following that scent to the person found. It is not a question of trustworthiness, it is a question of substantiality — while the evidence might be trustworthy, we are not willing to rest our verdict on that evidence alone. We want other evidence that will validate its veracity.

(*People v. Gonzales, supra,* 218 Cal.App.3d at p. 412.)

Moreover, dog-scent evidence is in no way akin accomplice testimony, which jurors are instructed to view with caution:

> "'The rationale for requiring corroboration of an accomplice is that the hope of immunity or clemency in return for testimony which would help to convict another makes the accomplice's testimony suspect, or the accomplice might have many other self-serving motives that could influence his credibility.' [Citation.] For these reasons, 'the evidence of an accomplice should be viewed with care, caution and suspicion. . . .' [Citation.]"

(*People v. Gonzales, supra,* 218 Cal.App.3d at pp. 410-411, quoting *People v. Belton* (1979) 23 Cal.3d 516, 525.) There is no such concern with a dog. (*People v. Gonzales, supra,* 218 Cal.App.3d at p. 411; *People v. Malgren supra,* 139 Cal.App.3d at p. 241.) That is why dog scent-evidence is more akin to evidence of possession of recently stolen property. CALJIC No. 2.15, addressing the inferences a jury may draw from a defendant's possession of recently stolen property also requires corroboration, but does not state that a jury should view such evidence with care and caution. (See Argument XI.) Dogs and property do not lie, unlike accomplices and informants. Rather, the concern with dogs and property is that there may be an innocent explanation for the dog's behavior just as there may be an innocent explanation for the defendant's possession of stolen property.

This concern, however, is alleviated by the jury instructions for both dog-scent and recently-stolen-property evidence, which require corroboration. (See *People v. Najera* (2008) 43 Cal.4th 1132, 1138[22] [uncorroborated evidence of possession of recently stolen property is insufficient on its own to establish guilt as there may be an innocent explanation].)

The problems Westerfield notes with dog-scent evidence in general speak to whether this evidence is trustworthy and reliable. These issues are resolved by the trial court prior to admitting dog-scent evidence in determining as to each particular dog in each particular case whether the foundational requirements for trustworthiness have been met. (*People v. Gonzales, supra,* 218 Cal.App.3d at p. 413.) That these requirements are not difficult to meet in Westerfield's eyes, is of no moment. They are stringent requirements and it is the trial court's obligation to ensure they are met. Once the foundation has been satisfied, the jury is not instructed in any manner that the evidence is inherently reliable. To the contrary, the first sentence of the instruction informs the jury that dog-scent evidence is insufficient to warrant a guilty verdict. The instruction goes on to inform the jury that it must find other corroborating evidence that supports the

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[22] This Court in *Najera* determined that there is no sua sponte duty to instruct pursuant to CALJIC No. 2.15 that a jury cannot convict based solely on the defendant's possession of recently stolen property. *(People v. Najera, supra,* 43 Cal.4th 1132, 1136.) Significantly, although perhaps not rising to the level of a tacit approval, this Court compared the lack of a sua sponte instructional requirement with regard to possession of recently stolen property to situations in which sua sponte instructions have been required, including the *Malgren* court's requirement for sua sponte instruction on dog-scent citing to *Malgren*. (*Id.* at p. 1137, n. 2.) This Court noted "[t]he theory underlying the sua sponte duty . . . mirrors that discussed in the text above — i.e., not that the jury needs assistance in performing its assigned role of evaluating the sufficiency of the evidence under the legal rules provided elsewhere in the instructions, but that an extrinsic legal rule renders insufficient what would otherwise be evidence sufficient to sustain a verdict of guilt." (*Ibid.*, citing *People v. Gonzales, supra,* 218 Cal.App.3d at pp. 412-413 [requiring corroboration for dog-scent evidence due to concerns over reliability and inability to cross-examine].)

accuracy of the dog-scent evidence. In light of these admonitions, no specific admonition to view the evidence with care and caution was required.

Finally, even if the jury had been instructed to view the dog-scent evidence with care and caution, Westerfield would have been found guilty nonetheless. This was not a case dependent on dog-scent evidence. (Compare *People v. Gonzales, supra,* 218 Cal.App.3d at pp. 405-407 [dog smelled pillowcase found in path where man had been seen running from a burglarized home; dog led officers to defendant lying prone in tall grass a short distance away; instructional error prejudicial under *Watson* standard].) As noted above, the defense exposed the limits and credibility of the dog-scent testimony such that the jury had plenty to consider when assigning weight to this testimony. The dog-scent was one factor among many pointing to Westerfield's guilt, and it was far from the most compelling. In light of the DNA evidence, fiber evidence, and Westerfield's bizarre travels and behavior the weekend Danielle disappeared, there is no probability, much less a reasonable one, that had the jury been instructed to view the dog-scent evidence with care and caution, Westerfield would have achieved a more favorable outcome.

XI. CALJIC No. 2.16 DOES NOT LESSEN THE PROSECUTION'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT

Westerfield contends that CALJIC No. 2.16 is erroneous in that it lessens the prosecution's burden of proof to establish guilt beyond a reasonable doubt by telling the jury that dog-scent evidence is sufficient to establish guilt so long as other evidence supports the accuracy of the dog-scent evidence. (AOB 342-347.) No reasonable juror would construe the instruction in the manner suggested by Westerfield, particularly considering

the court's entire charge to the jury which included numerous directives as to how to consider the evidence and the burden of proof.

This Court has repeatedly rejected a similar challenge to a similar jury instruction, CALJIC No. 2.15, which addresses the inferences a jury may draw when a defendant is found in possession of recently stolen property. CALJIC No. 2.15 provides in relevant part:

> If you find the defendant was in conscious possession of recently stolen property, the fact of such possession is not by itself sufficient to permit and inference that the defendant is guilty of the crime of robbery or burglary. Before guilt may be inferred, there must be corroborating evidence tending to prove the defendant's guilt. However, this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt.

This Court observed,

> The instruction does not create a mandatory presumption that operates to shift the People's burden of proof to the defense, for the instruction merely permits, but clearly does not require, the jury to draw the inference described therein. [Citation.] Perhaps more to the point, there is nothing in the instruction that directly or indirectly addresses the burden of proof, and nothing in it relieves the prosecution of its burden to establish guilt beyond a reasonable doubt. [Citation.] In any event, given the court's other instructions regarding the proper consideration and weighing of evidence and the burden of proof, there simply "is 'no possibility' CALJIC No. 2.15 reduced the prosecution's burden of proof in this case." [Citation.]

CALJIC No. 2.16 is no different; it merely describes a different kind of evidence. It too states that before guilt may be inferred, the accuracy of the dog-scent evidence must be supported by other evidence. That the instruction permitted the jury to draw an inference of guilt from evidence that dogs detected Danielle's scent in Westerfield's motor home "did not create a permissive presumption that violated due process, because 'reason and common sense' justified the suggested conclusion" that he was

involved in her kidnap and murder. (*People v. Parson* (2008) 44 Cal.4th 332, 354-358, citing *People v. Yeoman, supra,* 31 Cal.4th at p. 131.) Reason and common sense does not justify Westerfield's suggested conclusion that the jury would understand CALJIC No. 2.16 to permit it to find him guilty based upon dog-scent evidence alone so long as it found evidentiary support for its accuracy. To the contrary, the instruction explicitly informed the jury "[t]his evidence is not by itself sufficient to permit an inference that the defendant is guilty. . . ." (CALJIC No. 2.16; see also *People v. Parson, supra,* 44 Cal.4th at p. 356.)

For the same reason, the instruction does not create an improper permissive inference under the federal Constitution. "The federal due process clause 'prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." (*People v. Moore* (2011) 51 Cal.4th 1104, 1131, quoting *Francis v. Franklin* (1985) 471 U.S. 307, 313 [85 L.Ed.2d 344, 105 S.Ct. 1965].) "Because permissive inferences, as opposed to mandatory inferences, do not *require* that the jury reach a certain finding based on a predicate fact, the prosecution's burden of persuasion is improperly diminished only if the permissive inference is irrational." (*People v. Moore, supra,* 51 Cal.4th at pp. 1131-1132, original emphasis, citing *Yates v. Evatt* (1991) 500 U.S. 391, 402, fn.7 [114 L.Ed.2d 432, 111 S.Ct. 1884] ["A permissive presumption merely allows an inference to be drawn and is constitutional so long as the inference would not be irrational."].) Drawing a connection between a dog picking up the scent of a murder victim in the defendant's property and guilt is not irrational. The evidence tended to establish that Danielle was in the storage compartment of Westerfield's motor home at some point close in time to her abduction and murder. From that, it would not have been irrational for the jury to draw an inference of Westerfield's

guilt so long as other evidence corroborated the accuracy of the dog-scent evidence.

Westerfield makes much of the fact that the CALCRIM instruction on the possession of recently stolen property — the replacement for CALJIC No. 2.15 — has added a concluding sentence stating, "Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." (CALCRIM No. 376.) CALCRIM No. 374 — the current instruction on dog-scent evidence — does not include this concluding sentence. Westerfield suggests the addition to the possession-of-stolen-property instruction should cause this Court to reconsider its position on CALJIC No. 2.15, and therefore to find CALJIC No. 2.16 erroneous. (AOB 342-344.) In an effort to guess why the CALCRIM committee added the cautionary sentence to the property instruction and not to the dog-scent instruction, Westerfield posits that the property instruction informs that jury that only "slight" corroboration is required. (AOB 343-344.) This may very well be the reason, and it is one that is not of concern with either the CALJIC or CALCRIM instruction on dog-scent evidence as neither informs the jury that only slight corroboration is required. Regardless of whether additional cautionary language was added to the possession-of-stolen-property instruction, however, the common sense interpretation of CALJIC No. 2.16 remains unchanged. The jury would not have understood the instruction, as suggested by Westerfield, to mean that it could base a guilty verdict exclusively on dog-scent evidence so long as other evidence supported its accuracy. Rather, CALJIC No. 2.16 made clear to any reasonable juror that the dog-scent evidence was not to be considered in isolation, but together with all of the evidence for the purpose of reaching

the ultimate conclusion of whether Westerfield was guilty beyond a reasonable doubt.

In *People v. Moore, supra,* 51 Cal.4th 1104, this Court addressed the propriety of CALJIC No. 2.15 in relation to a murder case where the defendant was found with the murder victim's stolen property. This Court's reasoning in *Moore* is entirely applicable to the dog-scent instruction here:

> The instruction in no way altered the trial court's proper instructions concerning the elements of murder that the prosecution was required to prove beyond a reasonable doubt. The jury was instructed it could draw merely "an inference of guilt" from the fact of possession with slight corroboration, which any rational juror would understand meant he or she could consider this inference in deciding whether the prosecution has established the elements of murder (and the other offenses) elsewhere defined in the court's instructions. The instruction purported to explain to the jury its proper consideration of a particular item of circumstantial evidence in reaching a verdict on the charges; it did not alter the defining elements of those charges.

(*Id.* at p. 1131.) Here, the jury was instructed that each fact or circumstance upon which an inference necessarily rests must be proven beyond a reasonable doubt (CALJIC No. 2.01; 10 CT 2494); the jury was instructed as to the presumption of innocence and the prosecution's burden of proving Westerfield guilty beyond a reasonable doubt (CALJIC No, 2.90; 10 CT 2515); the jury was instructed it had to find the specific intent to commit kidnapping beyond a reasonable doubt in order to find Westerfield guilty of felony-murder (CALJIC No, 8.21, 10 CT 2523); the jury was instructed the special circumstance must be proven beyond a reasonable doubt for a true finding (CALJIC No. 8.80.1; 10 CT 2524).

In any event, even if erroneous, there is no reasonable probability that had the instruction referred, once again, to the burden of proof beyond a reasonable doubt, Westerfield would have received a more favorable

verdict. (See *People v. Moore, supra,* 51 Cal.4th at p. 1133, applying harmless error standard under *People v. Watson, supra,* 46 Cal.2d at p. 836.) The dog-scent evidence was far from the most compelling evidence against Westerfield. As explained in the previous argument, the defense significantly impeached the value of this evidence. It was the other evidence of Westerfield's guilt that was overwhelming. Even if erroneous, this instruction would have had no impact on the outcome of Westerfield's trial. In light of the weight of the evidence of Westerfield's guilt independent of the dog-scent evidence as well as the " 'panoply of other instructions that guided the jury's consideration of the evidence'" (*People v. Moore, supra,* 51 Cal.4th at p. 1133, quoting *People v. Coffman, supra,* 34 Cal.4th at p. 101), any error in instructing the jury with the language of CALJIC No. 2.16 necessarily was harmless.

XII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON MOTIVE PURSUANT TO CALJIC NO. 2.51

Westerfield contends that the trial court improperly rejected his request to clarify CALJIC No. 2.51 — the instruction on motive — with language indicating that motive alone was insufficient to establish guilt and that its weight and significance were for the jury to decide. (AOB 348-350.) As this Court has repeatedly rejected similar arguments, finding that the standard jury instruction adequately addresses the very concern Westerfield raises, his contention is meritless.

The trial court instructed the jury with CALJIC No. 2.51, which provides:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(10 CT 2506; 42 RT 9351.) The defense requested that the following be added to the standard instruction: "However, motive is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." (10 CT 2298.) At the jury instruction conference, Mr. Boyce explained the request for the clarification:

> . . . Our proposed instruction makes it clear that motive alone may not be used to convict the defendant, although the jury may consider the presence of motive as tending to show that the defendant is guilty and also that they may consider the absence of motive as tending to show that the defendant is not guilty.

(40 RT 9262.) The trial court rejected the additional language and ruled that the standard instruction would be given:

> Frankly, this is one of those that strikes me a little bit as not truly a defense instruction in that it spends more emphasis on the issue of motive than it appears to me is warranted.
>
> The jury is clearly told in no uncertain terms it's not an element of the crime. And, frankly, I find 2.51, if I'm sitting in the perspective of putting on a defense hat, as a better instruction. It doesn't prohibit the amount of argument that can be made on it. And it clearly shows that the jury is not being focused in on that particular issue.

(40 RT 9262-9263.)

This Court has repeatedly rejected Westerfield's argument that the jury might infer from the standard instruction that motive in and of itself would be sufficient to support a guilty verdict:

> "If the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of murder. When CALJIC No. 2.51 is taken together with instruction on the concurrence of act and specific intent (CALJIC No. 3.31) and the instruction outlining the elements of murder and requiring

> each of them to be proved in order to prove the crime (CALJIC No. 8.10), there is no reasonable likelihood [citation] it would be read as suggesting that proof of motive alone may establish guilt of murder." [[23]]

(*People v. Livingston* (2012) 53 Cal.4th 1145, 1168, quoting *People v. Snow* (2003) 30 Cal.4th 43, 97-98.) Because this Court has held there is no reasonable likelihood that a juror would interpret CALJIC No. 2.51 any other way, Westerfield's proposed instruction was merely duplicative of the instruction actually given.

Westerfield argues that his case is different in that the prosecution's theory for his kidnapping and murdering Danielle was to sexually assault her, evidence of which was found in the graphic child pornography images. He argues that given the inflammatory nature of this evidence, a jury might convict based on proof of motive alone. Despite the clear language in CALJIC No. 2.51 that evidence of motive was not an element of the crime, Westerfield asks this Court to speculate that the jury might have misunderstood the instruction.[24] This Court should decline the invitation. In addition to the clear language in the motive instruction itself, this Court must view the instructions as whole to determine whether there is a reasonable likelihood the jury understood the instruction in a manner that

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[23] Westerfield's jury also received as instructions CALJIC No. 3.31 (10 CT 2517) and CALJIC No. 8.10 (10 CT 2522).

[24] Westerfield makes the further argument that in his case proof of motive was a "necessary fact in a chain of inferences" that "had to be measured ultimately against the overall standard of proof beyond a reasonable doubt. (AOB 349.) There is simply no legal support for such a contention. Elements of crimes must be proven beyond a reasonable doubt and motive is not an element of any crime. The jury was free to reject the prosecution's theory of Danielle's abduction and murder being motivated by sexual assault, was free to acquit as to the child pornography count, was free to conclude that it could not determine any motive for the crime, and nonetheless convict Westerfield of a special circumstance murder. That is precisely what CALJIC No 2.51 permitted the jury to do.

violated Westerfield's rights. (See *People v. Huggins* (2006) 38 Cal.4th 175, 192-193.) When viewed in conjunction with all the instructions given in this case as discussed in the previous argument, and in the context of the overarching principal set forth in CALJIC No. 2.90 that the jury could not find Westerfield guilty of any crime unless it was convinced of his guilt beyond a reasonable doubt, there is no doubt that the jury construed CALJIC No. 2.51 correctly and understood that the presence or absence of motive is merely one circumstance that may be considered in deciding the truth of the charges.

In any event, there is no reasonable probability that had the trial court given Westerfield's proposed instruction as modified, the jury would not have found him guilty of capital murder. Motive evidence was not the only evidence of his guilt. Rather it was the scientific evidence and his own statements and behavior that established his guilt beyond a reasonable doubt. The evidence of his sexual motive for the crimes simply provided the jury with a potential explanation for Westerfield's crimes against Danielle.

XIII. THERE WAS SUBSTANTIAL EVIDENCE FROM WHICH A REASONABLE TRIER OF FACT WOULD FIND THE FORCIBLE ASPORTATION OF DANIELLE NECESSARY FOR A KIDNAPPING CONVICTION

Westerfield contends insufficient evidence supports his conviction for kidnapping, and that because his murder conviction was based solely on the theory of felony-murder committed during the course of a kidnapping, the murder conviction too is supported by insufficient evidence. Specifically, he suggests that lacking from the evidence presented to the jury was any evidence that he took Danielle from the bed where she slept in her parents' home by force or by instilling fear. (AOB 351-358.) As there is no reasonable explanation for a stranger being able to remove a seven

year-old girl from the bed where she slept in her parents' home without her making a sound by any means other than force or instilling fear, ample evidence supported the jury's verdict for kidnapping and felony-murder based upon kidnapping.

The principles governing a claim of insufficient evidence are well settled. " 'When considering a challenge to the sufficiency of the evidence to support a conviction, [appellate courts] review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1322, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27; see also *People v. Kelly* (2007) 42 Cal.4th 763, 787-788; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) The existence of every fact the jury could reasonably infer from the evidence is presumed by this Court. (*People v. Lindberg, supra,* 45 Cal.4th at p. 27; *People v. Ramirez, supra,* 39 Cal.4th at p. 463.) Reversal is "not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Valdez, supra,* 32 Cal.4th at p. 104.) A reviewing court does not reweigh the evidence or re-evaluate the credibility of witnesses in reviewing a claim of insufficiency of the evidence. (*People v. Guerra, supra,* 37 Cal.4th at p. 1129.) " 'The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*People v. Castaneda, supra,* 51 Cal.4th at p. 1322, original emphasis, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed. 2d 560, 99 S.Ct. 2781]. " 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the

jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]' " (*People v. Castaneda, supra,* 51 Cal.4th at p. 1322, quoting *People v. Kraft, supra,* 23 Cal.4th at pp. 1053-1054.)

The crime of kidnapping as defined in Penal Code section 207, subdivision (a), with which Westerfield was charged in the instant case, provides:

> Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county is guilty of kidnapping.

To prove kidnapping, then, the prosecution must establish: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance.[25] (See CALJIC No. 9.50; 10 CT 2530-2531; 42 RT 9361.)

But this Court has recognized that when it comes to the crime of kidnapping, child victims are different, and has grappled with degree of force necessary to support a finding of guilt for the kidnapping of a child. After the conclusion of Danielle's trial, this Court decided *In re Michele D.* (2002) 29 Cal.4th 600, 6160. *In re Michele D.* involved the kidnapping of an infant, where the defendant did not use "force" as it is conventionally understood to accomplish the crime; the juvenile defendant simply pushed

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[25] Westerfield notes that an alternative provision, Penal Code section 207, subdivision (b) eliminates the force or fear requirement, but requires that the jury find the purpose for the kidnapping was to commit lewd and lascivious conduct on a child under the age of 14. As Westerfield observes, he was not charged with that provision and the jury was not instructed on its elements. (AOB 352-353.) Thus, respondent does not address its applicability here.

the infant away from the mother in a stroller and did not return. (*In re Michele D., supra,* 29 Cal.4th at pp. 603-604.) Recognizing that, this Court observed:

> [I]t is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. . . . [Citation.] The fact that the Legislature may not have considered every factual permutation of kidnapping, including the carrying off of an unresisting infant, does not mean the Legislature did not intend for the statute to reach that conduct.

(*Id.* at p. 606.) This Court then addressed the "quantum of force necessary to establish the force elements of kidnapping in the case of an infant or small child" and held that it "is simply the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." (*Id.* at p. 610.) Subsequently, the Legislature codified this very holding in what is now Penal Code section 207, subdivision (e).

Prior to *In re Michele D.*, the only case law addressing the unique situation of the kidnapping of a child victim was *People v. Oliver* (1961) 55 Cal.2d 761 (*Oliver*) — a case involving a two year-old child who went "willingly" with the defendant. In *Oliver*, the jury was instructed that " 'there must be a carrying, or otherwise forcible moving, for some distance of the person who, against his will, is stolen or taken into the custody or control of another person. . . .' " (*Id.* at p. 764.) This Court acknowledged that under the plain meaning of the instruction, as long as the defendant moved a child against her will, where she was unable to consent, the act would qualify as kidnapping without any consideration for the defendant's motive or purpose. (*Id.* at pp. 765.) Therefore, a person could be convicted of kidnapping for simply moving a child between locations without any wrongful purpose. (*Ibid.*) Accordingly, in *Oliver* this Court construed the requirements of Penal Code section 207 " 'as applied to a person forcibly

taking and carrying away another, who by reason of immaturity or mental condition is unable to give his legal consent thereto, . . . [to constitute] kidnapping only if the taking and carrying away is done for an illegal purpose or with an illegal intent.' " (*In re Michele D., supra,* 29 Cal.4th at p. 607, quoting *People v. Oliver, supra,* 55 Cal.2d at p. 768.)

At the time of her abduction, Danielle was seven-years old. While *In re Michele D.* dealt with an infant and *Oliver* a two year-old, the rationale applies to young children as well, and a child of seven certainly qualifies as a young child. Westerfield had not been invited into the Van Dam home. He had not been invited into Danielle's room. Brenda and Damon Van Dam had not given Westerfield permission to take their child from her bed while she slept. And Danielle did not walk out of her parents' home of her own volition with a man who for all intents and purposes was a stranger. Westerfield came into her bedroom and took her. Whether he did so by conventional "force" or by instilling fear admittedly is unknown because Westerfield killed Danielle. Under the guidance of *In re Michele D.*, however, whether Westerfield used conventional force or fear is immaterial. All that is required is that the evidence demonstrate the taking was for an illicit purpose. Westerfield did not enter the house in the middle of the night to take Danielle on a camping trip with her parents' knowledge and consent. He did not take Danielle from her house to save her from a fire. Westerfield broke into the Van Dam's home in the middle of the night, entered Danielle's room, and took her away without being detected. The next time she was seen her badly decomposed body was lying with trash off the side of the road far from her home. There can be no other reasonable interpretation of the evidence that shows, or remotely suggests, Westerfield took Danielle for a lawful purpose. And this is all that the law requires.

Westerfield suggests that because he was not charged with, and the jury was not instructed in the language of, Penal Code 207, subdivision (e), that this lesser quantum of force for child victims cannot apply in his case. First, presumably the jury was not instructed with language of Penal Code section 207, subdivision (e) — the instructional equivalent of CALJIC No. 5.97 — because it did not exist at the time of his trial. But more importantly, the code section and instruction also did not exist at the time of *In re Michele D.* or *Oliver*, which did not impact this Court's rulings as to the sufficiency of the evidence for kidnapping in those matters. Rather, those decisions have made clear that, as a matter of law, where the evidence shows the taking of child who is unable to consent for an illegal purpose, the elements of kidnapping, including force, have been satisfied. The only additional element the jury would have had to find had it been instructed with the language of Penal section 207, subdivision (e) pursuant to CALJIC 5.97, was that the moving of the child was for an unlawful purpose. Under the facts of this case that element is necessarily satisfied. There could be no explanation that Danielle had been moved for a lawful purpose, particularly given that she was killed following, or during, the movement. Moreover, there was no suggestion at trial that Westerfield lawfully took Danielle; he claimed not to have taken her at all.

Finally, even assuming the relaxed standard of force applicable in child-victim kidnapping cases did apply to Danielle because the jury was not instructed in that language, the evidence nonetheless amply supports a finding that Westerfield forcibly stole her from her bed, or at the very least instilled fear in her to accomplish the task. While Westerfield points to other interpretations of the evidence that suggest he was not involved in Danielle's abduction at all (AOB 355-358), he ignores the fact that it is not for this Court to re-evaluate the evidence (*People v. Guerra, supra,* 37 Cal.4th at p. 1129), but rather to determine whether *any* rationale trier of

fact could have found the elements of kidnapping beyond a reasonable doubt. (*People v. Castaneda, supra,* 51 Cal.4th at p. 1322.)

Westerfield points to the absence of a commotion or physical disturbance, and the lack of trace evidence linked to Westerfield, in the Van Dam home as evidence tending to suggest that Danielle was not taken by force or threat. (AOB 355-356.) That this evidence could possibly be reconciled with the finding Westerfield suggests does not render the evidence insufficient to support the jury's verdict. (See *People v. Valdez, supra,* 32 Cal.4th at p. 104.) Moreover, there is no way to reconcile the *totality* of the evidence with the finding Westerfield suggests. No rationale trier of fact would believe that Danielle left her bedroom in the middle of the night of her own volition. The fact that a young girl was awakened from her sleep by a strange man in her room and did not disturb her family most rationally points to the inference that the abductor used force to subdue her or threatened her with harm if she screamed. Furthermore, even if the jury was not instructed as to the lesser quantum force for a child kidnapping, it is simply common sense that the comparative age, physical, and mental capacities of the victim and the perpetrator, as well as the circumstances surrounding the taking are relevant considerations when it comes to force. Obviously, the force necessary for a grown man to remove a sleeping seven year-old from her bed is substantially less than the force necessary to move a resisting adult.

Additionally, Westerfield's attempt to show that the various witnesses who observed him and his motor home following Danielle's disappearance at the Sky Ridge Road storage facility, the Silver Strand, outside his residence, and in Glamis, did not see anything amiss is equally unavailing. (AOB 356-358.) He claims that the evidence did not provide any basis to believe that if Danielle was alive inside the motor home at any point during that trip, she was being moved forcibly. (AOB 357.) Viewed

in the light most favorable to the jury's verdict, the reasonable inference from these witnesses not having seen anything amiss rests with Westerfield's great efforts to ensure that was so. Various witnesses at the Silver Strand saw Westerfield's motor home completely closed up — curtains drawn and no activity. (17 RT 4781-4786, 4837-4839, 4850-4851, 4893-4894.) When the ranger knocked on the door, he did not get an immediate response. (17 RT 4894.) Various witnesses at the Silver Strand saw the ranger knock on the door of the motor home, and Westerfield emerge only to immediately close the door behind him. (17 RT 4804-4805, 4851-4852, 4896.) As the ranger was leaving, Westerfield remained outside the motor home. (17 RT 4897.) Shortly after the encounter with ranger, Westerfield left the Silver Strand. (17 RT 4853.)

Westerfield's guarded behavior as to what, or who, was inside his motor home continued when he arrived at Glamis. Witnesses observed that the location in which Westerfield had stopped his large motor home was unusual in that it was far off the road. (18 RT 5003, 5077 Again, he set up nothing outside of the motor home as most people would when they go camping for the weekend. (18 RT 4979.) When the individual who pulled Westerfield's motor home out of the sand and went to retrieve Westerfield's shovels and leveling ramps, he discovered Westerfield had already driven off, leaving the equipment behind. (17 RT 4942, 4952; 18 RT 5072, 5082.) He also left at a fast rate of speed. (18 RT 5047.)

Assuming Danielle was alive in the motor home,[26] the fact that no one ever saw or heard her speaks to Westerfield's ability to keep her

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[26] Certainly, Danielle did not have to be alive in the motor home for the crime to have qualified as a special circumstance felony-murder. Even if Westerfield removed Danielle from her home to his home — a substantial distance — and then drove motor home for days with her body (continued...)

concealed. Her fingerprints on the cabinet above the bed in the motor home indicated that Danielle was moving at the time she left them. (20 RT 5597.) Where, subsequent to the taking, the defendant " 'restrains his victim's liberty by force and compels the victim to accompany him further,'" a kidnapping has occurred. (*People v. Morgan* (2007) 42 Cal.4th 593, 614, quoting *People v. Alcala* (1984) 36 Cal.3d 604, 622.) As Westerfield was virtually a stranger, the jury could reasonably conclude that Danielle did not remain inside the motor home of her own accord and voluntarily accompany Westerfield on his excursion. (See *People v. Morgan, supra,* 42 Cal.4th at p. 615 [where victim had just met defendant that night, jury could infer she did not voluntarily accompany defendant once he forced her to move across parking lot].)

In *People v. Alcala* (1984) 36 Cal.3d 604, 622 (abrogated on other grounds as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911), evidence at trial established that the 12 year-old victim was a responsible young girl who always arrived on time for her afternoon ballet class. She never arrived for that class one afternoon, and was seen by another witness in the defendant's presence 40 miles away from her home and the dance studio. (*Ibid.*) The defendant was a "virtual stranger" to the young victim. Based on these facts, this Court found sufficient evidence of forcible kidnapping, observing that a jury could reasonably infer that the victim had not accompanied the defendant voluntarily. Further, this Court observed, "[i]mprisonment for any substantial distance in a moving vehicle is forcible asportation." (*Ibid.*)

(...continued)
hidden in the motor home, the crime was still a homicide during the commission of a kidnapping. (CALJIC Nos. 8.10, 9.50.)

Here, instead of missing a ballet class, Danielle was missing from her bed. Instead of being seen by a witness 40 miles away, she left her presence in Westerfield's motor home through her blood and hair, and her decomposed body was discovered miles from her home. Westerfield was a virtual stranger to Danielle. And if Danielle were alive in the motor during part or all of Westerfield's journey to the reaches of San Diego County and beyond, the only reasonable explanation as to why no one ever saw Danielle or anything amiss was because Westerfield had restrained her or threatened her not to emerge. If she was alive for part of the motor home journey, then Westerfield had imprisoned her for a substantial distance in a moving vehicle, and a jury could reasonably infer she was not there of her own accord. (See *People v. Alcala, supra,* 36 Cal.3d at p. 622.)

The evidence presented at trial established beyond a reasonable doubt that Westerfield kidnapped Danielle under the relaxed meaning of "force" as applied to the kidnapping of a young child, and under its conventional meaning of as well. But this Court does not have to be convinced beyond a reasonable doubt in any event. All this Court must find is that "*any* rationale trier of fact" could find the elements of kidnapping had been proven. (*Jackson v. Virginia*, 443 U.S. at pp. 318-319.) The evidence presented in this case amply supports such a determination.

XIV. AS THE PROSECUTION PROCEEDED ON THE SOLE THEORY OF FELONY-MURDER, THE TRIAL COURT HAD NO OBLIGATION TO INSTRUCT ON SECOND DEGREE MURDER OR INVOLUNTARY MANSLAUGHTER AS LESSER INCLUDED OFFENSES

Westerfield contends that the trial court erred in failing to instruct, sua sponte, on second-degree murder and involuntary manslaughter as lesser included offenses of first degree felony-murder. (AOB 359-366.)

Contrary to his assertion, the trial court had no such duty and the evidence did not support giving either instruction.

In capital matters, the federal due process clause compels the giving of instructions on lesser included offenses where warranted by the evidence. (*Beck v. Alabama* (1980) 447 U.S. 625, 637 [100 S.Ct. 2382, 65 L.Ed.2d 392]; see also *Hopper v. Evans* (1982) 456 U.S. 605 [102 S.Ct. 2049; 72 L. Ed. 2d 367]; *People v. Redd* (2010) 48 Cal.4th 691, 733; *People v. Moon* (2005) 37 Cal.4th 1, 27.) Where there is no substantial evidence supporting an instruction on a lesser included offense, *Beck v. Alabama* is not implicated. (*People v. Castaneda, supra,* 51 Cal.4th 1292, 1327-1328; *People v. Romero* (2008) 44 Cal.4th 386, 404. California similarly requires a court to instruct *sua sponte* on lesser included offenses if the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. (*People v. Foster* (2010) 50 Cal.4th 1301, 1342; *People v. Guiterrez* (2009) 45 Cal.4th 789, 826.) This Court has observed:

> [T]he existence of any evidence, no matter how weak will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is substantial evidence to merit consideration by the jury. Substantial evidence in this context is evidence from which a jury composed of reasonable persons could conclude that the lesser offense but not the greater offense was committed.

(*People v. Romero* (2008) 44 Cal.4th 386, 403, internal quotation marks & citations omitted.)

A particular offense is "lesser included," and therefore subject to the trial court's *sua sponte* obligation to instruct, if it satisfies one of two tests. The "elements test" is satisfied where the statutory elements of the greater offense include all of the elements of the lesser offense, such that one

cannot commit the greater offense without committing the lesser." (*People v. Bailey* (2012) 54 Cal. 4th 740, 748.) The "accusatory pleading test" is satisfied where the facts alleged in the accusatory pleading include all of the elements of the greater offense, such that the greater offense cannot be committed without committing the lesser. (*Ibid.*) On appeal, this Court reviews independently whether the trial court improperly declined to instruct on a lesser included offense. (*People v. Castaneda, supra,* 51 Cal.4th at p. 1328.)

Prior to the close of evidence, the prosecution filed a written motion declaring that it was only proceeding on a first degree felony-murder theory, and not on premeditation or any other theory of homicide. Accordingly, the prosecution requested the trial court not instruct on premeditation or any lesser included offenses. (9 CT 2217-2223.) The defense filed a written motion, arguing that "there is evidence supporting an instruction of murder based on premeditation and deliberation notwithstanding the prosecution's representation it is relying upon a separate theory of conviction." (9 CT 2258-2262.) When the parties were discussing jury instructions, the defense requested an instruction on premeditation and deliberation, but did not request any lesser-included-offense instructions. (37 RT 8819.) The prosecution argued against the giving of such an instruction, stating that the sole theory of homicide supported by the evidence was felony-murder during the course of a kidnapping. (37 RT 8819.) The defense responded that the prosecution was unfairly presenting the jury with an all-or-nothing choice of convicting of a special circumstance felony murder, or letting Westerfield walk free. (37 RT 8819-8820.) The trial court stated "what is being proposed by the defense is not a lesser, included offense, it's a different theory of homicide. And in this case there is only one theory that there is any evidence on, and that is that this homicide occurred during the course and scope of the

kidnapping. The jury either believes that or they don't believe it. But there is no other theory that the prosecution has proffered." (37 RT 8821.) The trial court indicated that its ruling was tentative and would be reconsidered should evidence be presented during rebuttal that suggested premeditation and deliberation. (37 RT 8821.)

The defense continued to argue its position that there was no evidence as to how Danielle was taken; the defense proffered that someone could have asked her if she wanted to go camping for the weekend or she could have been killed in her bedroom. (37 RT 8822.) The trial court disagreed:

> That may be the case, but on the key issue of whether or not she went willingly, there is evidence. The parents have indicated no one had permission to take their child out of that house. That is a kidnapping. That is a precursor to the child even, assuming that the evidence is believed, being in proximity to your client. So — and the prosecution is not required — we seem to be arguing this, and I'm sure you will argue that there is no proof of how this all occurred. And that may very well be the case. But there is proof that she was home; there is proof that no one had a right to be in that house other than the family. And there is proof that the parents didn't give anyone permission to take their child, that's kidnapping.

(37 RT 8822-8823.)

During the final jury instruction conference, the parties discussed the premeditation and deliberation issue once more. The defense explained that it was requesting the instruction on the alternate theory that even if the jury believed Westerfield killed Danielle, it did not have to believe that he was the kidnapper. By proceeding on the prosecution's sole theory of felony-murder, the defense could not present this alternate theory. (40 RT 9264.) The court declined to give an instruction on premeditated murder reiterating that the evidence did not support it, the evidence only supported the felony-

murder theory, and added that giving an instruction on lesser related homicide theories would only confuse the jury. (40 RT 9265-9266.)

A. As Second Degree Murder And Involuntary Manslaughter Are Not Lesser Included Offenses Of First Degree Felony-Murder, The Trial Court Had No Sua Sponte Duty To Instruct On These Alternate Theories Of Murder

Murder is the "unlawful killing of a human being . . . with malice aforethought." (Pen. Code, § 187, subd. (a).) "Malice" is defined in Penal Code section 188, and may be express or implied. By statute, all murder perpetrated by certain methods not pertinent here, "any other kind of willful, deliberate, and premeditated killing," and any killing "committed in the perpetration of, or attempt to perpetrate" certain specified felonies (including kidnapping) is murder of the first degree. (Pen. Code, § 189.) "All other kinds of murders are of the second degree." (Penal. Code, § 189.) Under this statutory definition, killings in the commission of the specified felonies are murder of the first degree under what is generally referred to as the felony-murder rule.

Westerfield alleges that this Court's discussion regarding the doctrine of second degree felony-murder in *People v. Chun* (2009) 45 Cal.4th 1172, amounted to a holding that second degree felony-murder is a form of malice-aforethought murder. With this characterization of the Court's decision *Chun*, he argues, by implication, first degree felony-murder must too be a form of malice murder. (AOB 360-361.) The discussion in *Chun* relevant to this issue is the following:

> Even conscious-disregard-for-life malice is nonstatutory in the limited sense that no California statute specifically uses those words. But that form of implied malice is firmly based on statute; it is an interpretation of section 188's "abandoned and malignant heart" language. Similarly, the second degree felony-murder rule is nonstatutory in the sense that no statute specifically spells it out, but it is also statutory as another

> interpretation of the same "abandoned and malignant heart" language. We have said that the "felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree felony murder." [Citation.] But analytically, this is not precisely correct. The felony-murder rule renders irrelevant conscious-disregard-for-life malice, but it does not render malice itself irrelevant. Instead, the felony-murder rule "acts as a substitute" for conscious-disregard-for-life malice. [Citation.] It simply describes a different form of malice under section 188. "The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life." [Citation.]

(*People v. Chun, supra,* 45 Cal.4th at p. 1184.)

From this language, Westerfield asserts that this Court has recognized felony-murder is simply a different form of malice-aforethought murder. (AOB 362-364.) He suggests that when the prosecution proceeds on a theory of "first degree felony murder, but the jury has a reasonable doubt as to the elements of the underlying felony, that doubt negates the first degree element, but not the malice aforethought. According to Westerfield, one cannot commit first degree felony-murder without necessarily committing second degree murder.

As Westerfield acknowledges, since he was charged with the statutory language of murder of Penal Code section 187, subdivision (a), there are no facts alleged such that the accusatory pleading test for lesser included offenses can be used. Thus Westerfield must show that the elements of first-degree felony murder include the elements of second degree murder and involuntary manslaughter. (AOB 364-365.)

It is true that this Court has not explicitly "determined whether second degree murder is a lesser included offense when, as where, the prosecution proceeds solely on the theory that the killing is first degree

murder under the felony-murder rule and does not argue that the killing is first degree murder because it is willful, deliberate, and premeditated." (*People v. Romero* (2008) 44 Cal.4th 386, 402 [declining to decide question because evidence did not support instruction], citing *People v. Valdez* (2004) 32 Cal.4th 73, 114, fn.7 [same].) The fact that this Court has declined to make such an explicit determination, in of itself, signifies that the trial court had no duty to instruct on second degree murder as a lesser included offense of first degree felony-murder.

In any event, this Court has repeatedly observed following the discussion in *Chun*, that "felony-murder liability does not require an intent to kill, or even implied malice, but merely an intent to commit the underlying felony." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654; see also *People v. Friend* (2009) 47 Cal.4th 1, 75-76; *People v. Dykes* (2009) 46 Cal.4th 731, 802.) As this Court has explained:

> " 'The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.' [Citation.] The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof." [Citation.]

(*People v. Farley* (2009) 46 Cal.4th 1053, 1121.)

From this Court's repeated expressions that felony-murder does not require a jury to find malice, coupled with the legislative intent behind this variety of murder, Westerfield's argument that felony-murder and malice murder are the same such that second degree murder is a lesser included

offense of both must fail. Thus, the language in *Chun* that the intent to commit the underlying felony acts as a substitute for the conscious-disregard-for-life malice required for first degree murder (*People v. Chun, supra,* 45 Cal.4th at p. 1184), should not be interpreted to mean that malice is an element of first degree felony-murder. Rather, the fact that felony-murder involves "a different form of malice" does not mean that felony-murder requires a jury to find malice-aforethought. The felony-murder doctrine requires the jury to find a different intent altogether, that is, the intent to commit the specified felony, which the *Chun* court described as "a different form of malice." Thus, the crime of felony-murder depends upon the jury's finding beyond a reasonable doubt the intent to commit the underlying felony, not malice aforethought, and therefore, second degree implied malice murder cannot be a lesser included offense.

B. No Evidence Supported Instructions On Second Degree Murder Or Involuntary Manslaughter

Moreover, even assuming the trial court had a duty to instruct on these lesser theories of homicide, the trial court did not violate it as no reasonable jury could have concluded from the evidence that Westerfield committed any crime other than first degree felony-murder by kidnapping. Contrary to Westerfield's contention (AOB 361-362), for the reasons explained in the previous argument, substantial evidence supported that the abduction was a kidnapping – there was no substantial evidence to the contrary, and thus no basis "from which a jury composed of reasonable persons could conclude that the lesser offense but not the greater offense was committed." (*People v. Romero, supra,* 44 Cal.4th at p. 403.) Most significantly, that the jury found Westerfield guilty of kidnapping as a substantive offense obviates his claim that there was a substantial basis from which the jury might have believed the abduction was something other than a kidnapping or that someone else took Danielle. As the trial

court observed (37 RT 8822-8823), there was absolutely no evidence that Danielle voluntarily walked out of her home the night she was last seen alive, and thus her killing was necessarily first degree murder committed during a kidnapping.

Likewise, Westerfield's assertion that there was a "factual basis" warranting an instruction on involuntary manslaughter is meritless. Involuntary manslaughter is "the unlawful killing of a human being without malice" during "the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Cod, § 192, subd. (b).) In support of his argument for this instruction Westerfield simply comments, "given the absence of any clear evidence as to the manner of death, a jury could find that there was a reasonable doubt as to the intent to kill or even as to a conscious disregard for life in the death of Danielle." (AOB 362.) This speculative "factual basis" is weak at best, and as previously stated "the existence of any evidence, no matter how weak, will not justify instructions on a lesser included offense." (*People v. Romero, supra,* 44 Cal.4th at p. 403.)

XV. AS THERE WAS NO EVIDENCE TO SUPPORT IT, THE TRIAL COURT PROPERLY REJECTED WESTERFIELD'S REQUEST FOR A JURY INSTRUCTION OF FIRST DEGREE PREMEDITATED MURDER

Westerfield contends that the trial court erred in denying his request for an instruction on first-degree premeditated murder. His argument is essentially another way of getting the result he seeks in Argument XIV — had the jury been instructed on first degree premeditated murder, then instructions on second degree murder and involuntary manslaughter would have warranted as lesser included offenses. (AOB 367-370.) For the same reasons stated hereinabove in Argument XIV, however, there was no

evidence to support such an instruction and accordingly, the trial court properly denied the request.

In support of the theory of premeditated murder, Westerfield suggests, "The jury *could have found* that Danielle's abductor *had to have acted* with a good deal of care, caution, and precision in order to effect her abduction from her own house" without causing a disturbance and to dispose of her body. (AOB at 368, emphasis added.) Westerfield speculates that the jury could have found that there must have been a plan, absent any evidence as to what that plan was. Again, as in the previous argument, this speculative "factual basis" is weak at best, and "the existence of any evidence, no matter how weak, will not justify instructions on a lesser included offense." (*People v. Romero, supra,* 44 Cal.4th at p. 403.) Therefore, as there was no evidence remotely supporting an instruction on premeditated murder, the trial court properly denied the defense request.

XVI. THE TRIAL COURT PROPERLY ADMITTED WESTERFIELD'S FORCIBLE LEWD CONDUCT AGAINST JENNY N. AS AN AGGRAVATING FACTOR UNDER PENAL CODE SECTION 190.3, SUBDIVISION (B)

Westerfield contends that the trial court abused its discretion in admitting evidence that in 1990 he inserted his finger into seven year-old Jenny N.'s mouth while she slept, causing her to be afraid and to bite down on his finger to make him stop. He claims that the event amounted to no more than a simple battery lacking sufficient force or violence to qualify as an aggravating factor under Penal Code section 190.3, subdivision (b) ("factor (b)"). Finally, he argues that the erroneous admission of this evidence was prejudicial in that its characterization as a molestation likely "tipped the scales in favor of death" (AOB 386-403.) Contrary to Westerfield's assertion, the trial court properly admitted the evidence of his

forcible act of lewd conduct against a child as it constituted a crime involving the use of force or violence under factor (b).

In arriving at a penalty determination, factor (b) permits a jury to consider facts of a defendant's prior criminal activity involving force or violence. (*People v. Moore* (2011) 51 Cal.4th 1104, 1135.) Factor (b) evidence must demonstrate the commission of an actual crime and satisfy the elements of that crime. (*Ibid.*) The prosecution bears the burden of proving these other crimes beyond a reasonable doubt. (*Ibid.*)

Here, the prosecution filed a supplemental notice of evidence in aggravation on June 28, 2002, indicating that it intended to present evidence concerning, "the defendant's use and threatened use of force during an assault and battery upon Jenny N., a seven year-old child in 1990." (9 CT 2054-2055.) In a subsequent written motion, the prosecution summarized the proffered evidence. (11 CT 2582-2583.) Jenny N. contacted the District Attorney's Office on June 26, 2002, and provided a statement. (11 CT 2582.) Jenny N.'s father was the brother of Westerfield's then-wife. In 1990, when she was seven years old, Jenny N. and her family went to Westerfield's home for a family party. Eventually, Jenny N. and the other children were put to bed; Jenny and her sister slept on the floor in Westerfield's daughter's bedroom. She fell asleep and was awakened when Westerfield inserted his fingers into her mouth and played with her teeth. He did this twice. The first time, Jenny N. pretended to be asleep. The second time, she bit him. Jenny N. immediately reported to her mother that Westerfield had acted "weird and had scared her." Westerfield claimed that she was restless and he was simply comforting her. (11 CT 2583.) The investigative report submitted with the prosecutor's written motion contained the same information. (11 CT 2592-2593.)

The defense filed a written opposition, arguing in part that the incident did not qualify as aggravating factor (b) evidence because it "at best constitutes a technical battery" and not a crime of force or violence. (10 CT 2447-2448.) The prosecution replied that the incident with Jenny N. constituted an assault under Penal Code section 240, a battery under section 242, and lewd conduct against a minor under section 288. (11 CT 2585-2586.)

At a hearing on the matter, the defense argued that the evidence was unduly inflammatory and that if the incident had been charged at the time, it would not have been charged as a sexual crime. Rather, the prosecution was using what the jury was now aware of, having sat through the guilt phase, with regard to Westerfield's sexual penchant for children and impermissibly used that information to transform a 12-year-old simple battery into a sexual incident. (54A RT 9854-9855.) Essentially, according to the defense, the prosecution was trying to "spin" the incident as a child molestation. (54A RT 9865.) The prosecutor responded that the crime was an act of force or violence — a battery or an assault upon a child. The degree of force or violence involved, the prosecutor argued, would be a matter of the weight that the jury assigned to the evidence. The jury would be able to hear the testimony, the cross-examination, and any explanation the defense wished to offer. (54A RT 9858.) Ultimately, the trial court ruled that the Jenny N. incident constituted a crime of force or violence that the jury could consider under factor (b). (54A RT 9861.)

At the penalty phase trial, Jenny N. testified consistent with the prosecutor's offer of proof. She explained that when she was about seven years old, she attended a family event at Westerfield's home. (57 RT 10009.) Jenny's father's sister was Westerfield's wife at that time. (57 RT 10008.) Jenny and her younger sister were put to bed upstairs on the floor

of Westerfield's daughter's bedroom while the adults remained downstairs. (57 RT 10011.) She recalled:

> Waking up and my Uncle Dave had his fingers in my mouth, and he was kind of playing with my teeth. And then I was still pretending I was asleep. And he went around to where my sister was sleeping. She was to the right of me. And I kind of rolled over to see what he was doing over there. But I don't remember seeing him doing anything.
>
> And then he came back over to where I was and did it again. So I bit him really hard for as long as I could. And then he went to the head of [his daughter's] bed. And I rolled over to see if he was doing anything over there, and he kind of adjusted the sides of his shorts and then left the room.

(57 RT 10011-10012.) Jenny pretended to be asleep because she "was too freaked out about it" and "didn't understand what was going on." (57 RT 10012.) She did not say anything to Westerfield because she was "scared." (57 RT 10014-10015.) Even years later, when her mother asked her about the incident after having been contacted by detectives in connection with Danielle's disappearance, Jenny told her mother she did not remember any details of the incident because she was afraid she would upset her family. (57 RT 10017-10018.) Eventually, Jenny came forward and told the District Attorney's Office what Westerfield had done to her. (57 RT 10020.)

At the very least, this evidence established the requisite force or violence to qualify under factor (b), as it established the crime of battery under Penal Code section 242 — the "willful and unlawful use of force or violence upon the person of another" — or assault under Penal Code section 240 — "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (*People v. Moore* (2011) 51Cal.4th 1104, 1136.) While Westerfield agrees, as he did in the trial court, that Jenny N.'s testimony was sufficient to constitute a

"technical battery" (AOB 388), he suggests that there was insufficient evidence of force or violence such as to constitute a crime qualifying under factor (b).

This was not an act of "the slightest offensive touching," qualifying solely under the technical definition of battery. (See AOB 391.) As for Westerfield's thorough explanation as to the proper definition of "force or violence" and the significance of the use of the disjunctive, it is unnecessary to go down this path. (AOB 391-393.) Whether one calls it "force or violence," "forcible violence," or "violent force," this Court has clearly spoken as to the degree of force required. "For the purpose of admissibility under section 190.3, factor (b) ' "[T]he 'force' requisite . . . does not mean bodily harm but the physical power required in the circumstances to overcome [the victim's] resistance." ' " (*Ibid.*, quoting *People v. Jennings* (1988) 46 Cal.3d 963, 983.) The comparative size and age of the defendant and his victim are relevant to the requisite physical power. (*People v. Raley* (1992) 2 Cal.4th 870, 907; *People v. Jennings, supra,* 46 Cal.3d at pp. 982-983.)

Inserting one's finger into a sleeping child's mouth is a forceful act. While Westerfield takes issue with the seriousness of the act and whether it showed the degree of force or violence to have assisted jurors in determining whether death was the appropriate penalty, "[w]hether those acts were serious enough to be given weight in the penalty determination is a matter for the jury to decide." (*People v. Smith* (2005) 35 Cal.4th 334, 344, 368-369 [defendant's holding 12 year-old boy to a wall and threatening to hit him with a ball if he ran constituted false imprisonment and was admissible factor (b) evidence; act of choking a five or six year-old boy and releasing him when he cried when defendant was teenager constituted battery and was also admissible factor (b) evidence].) Westerfield's relative size and age compared to Jenny N. is relevant to the

consideration of force. Moreover, the fact that Jenny N. pretended to be asleep and ultimately bit Westerfield to make him stop, shows that she was not a willing participant in the encounter, and further establishes a reasonable inference that Westerfield in fact overcame her will.

In *People v. Thomas* (2011) 51 Cal.4th 449, 504, the defendant complained that an act of either kissing or pinching a woman on the neck, leaving a mark, was inadmissible as factor (b) evidence because " 'it is not the sort of violent criminal activity that authorizes or warrants the death penalty.' " The victim of the incident testified that she left work, the defendant followed her to her car, leaned into the car, and "sucked on her neck" leaving a bruise. (*Ibid.*) As Westerfield does here, the defendant in *Thomas* conceded that the act was a battery " 'and thus involved the use of force in a strict legal sense.' " (*Ibid.*) This Court disagreed, finding the act admissible as criminal activity involving the use of force or violence. This Court concluded that the crime by itself would not warrant a juror choosing the death penalty, but the jury was entitled to consider the attack on a coworker in determining the appropriate penalty. (*Id.* at pp. 504-505.) Westerfield's action was no less an "attack" on sleeping Jenny N., than was Thomas's on his coworker. Thus, the trial court did not err in admitting this evidence.

Furthermore, this evidence was sufficient to establish the elements of a lewd act on a child as set forth in Penal Code section 288, subdivision (a), that is a touching of the body of a child under the age of 14, with the intent of arousing or appealing the lust of the child or the defendant. (*People v. Raley, supra,* 2 Cal.4th at p. 907.) There is no requirement that the touching must be of a sexual organ. (*Ibid.*)

Here, Westerfield touched Jenny N., who was about seven years old at the time, with the intent of arousing his sexual desire. This is evident from the predatory, clandestine manner in which he attempted to

accomplish the act. He approached the child when she was sleeping, inserted his finger into her mouth, and only stopped when she bit him. No purpose other than sexual gratification is apparent from Westerfield's conduct. The defense's concerns, both at trial and now on appeal, that this evidence would be perceived as child molestation are well-taken. This was child molestation. The evidence showed that a grown man took advantage of a vulnerable young child from a position of advantage as a family member and from a position of her disadvantage while she was sleeping. The only reasonable inference from the evidence was that Westerfield committed the act for his sexual gratification. The act was forcible and lewd satisfying the elements of Penal Code section 288, subdivision (a), and there is no other reasonable explanation.

That it was a molestation for purposes of sexual gratification was further proven by Westerfield's own statement to Redden in the polygraph interview, evidencing his consciousness of guilt; this portion of the interview was played for the jury at the penalty phase. (57 RT 10052.) When asked whether he could think of why someone would suggest that he was involved in Danielle's disappearance, Westerfield responded that there was something he had done in 1993 or 1994 at a party at which his sister-in-law, Jeanne, and her children were present. He explained that after the children had been put to bed, he went upstairs and saw the youngest girl kicking her sister. He claim the girl's foot got caught in her sister's pajamas, so he reached down, took her foot out, pulled her pants up, and told the girl to go see her mother as she was upset. (12 CT 2930.) About a week later, Jeanne confronted him and accused him of molesting her daughter. (12 CT 2930-2931.) Westerfield believed the incident must not have been reported as law enforcement officers never talked to him about it. (12 CT 2931.) For Westerfield to have reached back to this incident in 1993 or 1994 when asked whether he could think of someone who might

suggest he was involved in the abduction of Danielle is telling of his consciousness of guilt, and telling that he did not touch Jenny N. in the innocuous manner he described to Redden.

Finally, the remainder of the aggravating evidence in this case — the circumstances of the crime and the impact of the crime on Danielle's family (Pen. Code, 190.3, factor (a)) — was overwhelming. Westerfield points to the fact that jury initially stated it was unable to reach a penalty verdict, returned from lunch and stated it would like to continue deliberations, and ten minutes later arrived at a death verdict, and speculates that what must have "tipped the scales" in that short amount of time was the Jenny N. incident. (AOB 402-403; 67 RT 10604.) The facts of the crime alone were akin to a horror movie. At the penalty phase, the jury heard about the reality of that horror from the perspective of Danielle's parents. Under these circumstances, this Court would have to improperly speculate, as Westerfield does, in order to conclude that any error in admitting Jenny's N.'s testimony under factor (b) affected the penalty phase verdict and tipped the scales in favor of the death penalty. (See *People v. Belmontes* (1988) 45 Cal.3d 744, 809 [error in admitting factor (b) evidence harmless in that properly admitted evidence consisting of circumstances of the crime was overwhelming].)

The trial court properly admitted the evidence of Westerfield's molestation of Jenny. N, and even if improperly admitted, any error was harmless given the remaining properly admitted evidence at the penalty phase.

XVII. THE TRIAL COURT PROPERLY LABELED THE JENNY N. UNADJUDICATED CRIME AS A LEWD ACT ON A CHILD UNDER 14 IN ITS INSTRUCTIONS TO THE JURY

Westerfield contends the trial court prejudicially erred in describing the Jenny N. factor (b) evidence as not only a "battery," but also as a "lewd

act with a child under 14 years." He argues that the label of "lewd act" was irrelevant and inflammatory, and therefore the trial court abused its discretion in providing the term in the jury instruction. He further alleges that the description violated his rights under the Eighth Amendment in that it undermined the reliability of the jury's penalty phase verdict. (AOB 404-408.) Contrary to Westerfield's assertion, the trial court properly exercised its discretion in labeling the factor (b) crime a lewd act upon a child under the age of 14 because that is precisely the crime that was committed.

Penal Code section 288, subdivision (a) provides:

> Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

When the parties discussed the penalty phase jury instructions with regard to the factor (b) evidence, the defense requested an instruction regarding battery, and the prosecution requested an additional instruction on lewd act on a child within the meaning of Penal Code section 288. (59 RT 10386, 10408.) The trial court tentatively noted that instructions as to the elements of both offenses would be appropriate. (59 RT 10410-10411.) The defense indicated that insofar as the court's tentative ruling was predicated upon the defense request for an instruction on the elements of battery, it would withdraw that request. (59 RT 10412.) Later, the court stated that in looking at the use note to CALJIC No. 8.87, and having previously found that the act described by Jenny N. amounted a violation of Penal Code section 288, involving force or violence, the instruction would name the two crimes of battery and lewd acts, but it would be the choice of

the defense whether the trial court should instruct on the elements of the two crimes. (59 RT 10425.) Ultimately, the defense requested that the court not instruct the jury on the elements of either offense, and maintained its position that Penal Code section 288, subdivision (a) was not a crime that should ever be alleged as a 190.3 factor (b) crime, and therefore the court should not even mention it. (60A RT 10446.)

The court instructed the jury pursuant to CALJIC 8.87 as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: battery and/or lewd act with a child under fourteen years, which involved the express or implied use of force or violence. Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(12 CT 2964.)

The trial court properly labeled the crime a lewd act pursuant to Penal Code section 288, subdivision (a). The evidence substantially demonstrated that Westerfield touched the body of Jenny N. — a child under the age of 14 — with the intent of arousing or appealing to his own sexual desires. (*People v. Raley, supra,* 2 Cal.4th 870, 907.) As described in the previous argument, Westerfield's predatory behavior in taking advantage of a sleeping child and forcing his finger into her mouth causing her first to pretend to remain asleep because she was afraid, and then to bite him to make him stop, is without question a lewd act for purposes of Westerfield's sexual gratification. That he was a grown man, and a family

member, taking advantage of this vulnerable young child further demonstrates that Westerfield committed the act for his sexual gratification.

Westerfield makes the point, citing this Court's precedent, that "[t]he proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on his character, rather than on the labels to be assigned the past crimes . . ." (AOB at 405, citing *People v. Cain* (1995) 10 Cal.4th 1, 73; see also *People v. Collins* (2010) 49 Cal.4th 175, 219.) Respondent agrees. And these facts spoke for themselves. Whether the trial court labeled it lewd conduct or not, the act that Jenny N. described was, in fact, lewd conduct. Westerfield continues to attempt to discredit, as he did at trial, Jenny N.'s credibility and whether the incident occurred in the first place (AOB 406-407), but that is a matter entirely unrelated to the trial court's discretion in labeling the conduct a violation of Penal Code section 288, subdivision (a). If the jury disbelieved Jenny N., as the defense argued it should (60 RT 10540-10541), then it did not matter whether the instructions described the touching as a battery, lewd conduct, or any other offense. Labeling the offense a "lewd act" would not have distracted the jury for it merely described precisely what the conduct Jenny N. described as a matter of law. "[T]here was no error, because there was substantial evidence that [Westerfield] violated section [288, subdivision (a)] and, as a matter of law, simply providing the definition of an offense supported by substantial evidence cannot unduly inflame a trier of fact." (*People v. Memro, supra,* 11 Cal.4th at p. 881 [no error where trial court denied defendant's request that it instruct on "assault" rather than "cruel or inhuman bodily injury on a child."]

XVIII. CALJIC No. 8.87 IS A PROPER STATEMENT OF LAW; WESTERFIELD FORFEITED HIS CLAIM BY FAILING TO OBJECT IN THE TRIAL COURT

Westerfield contends that CALJIC No. 8.87 improperly removes from the jury's consideration the foundational fact of whether the factor (b) criminal act involved the use or threatened use of force or violence. He argues that the "force-or-violence" aspect of factor (b) evidence falls within the purview of Evidence Code section 403's "statutory mandate," requiring submission of this preliminary fact to the jury. He further suggests the instruction was prejudicial and requires reversal of the death penalty. (AOB 409-412.) These same arguments have previously and repeatedly been rejected by this Court.

Prior to the close of the penalty phase evidence, the defense filed a memorandum in which it noted its proposed penalty phase jury instructions and objections to other instructions. (11 CT 2770-2795.) Included in the document was a discussion of CALJIC No. 8.87, in which the defense requested the trial court modify the standard instruction to include a requirement that the jury find beyond a reasonable doubt that Westerfield committed the crime against Jenny N., but also that the jury find beyond a reasonable doubt that the crime involved force or violence. (11 CT 2785-2786.) When the parties discussed the giving of CALJIC No. 8.87 during the jury instruction conferences, however, the request to modify the instruction was not mentioned. Instead, the only issue raised by the defense was whether the crime of lewd act on a child was sufficient under factor (b) such that the instructions should characterize the crime as a such, and if they did, whether the jury should receive instructions as to the elements of the crimes established by Jenny N.'s testimony — that is battery (Cal. Penal Code, § 242) and lewd act on a child (Cal. Penal Code, § 288, subd. (a).) (59 RT 10408-10412, 10424-10426; 60A RT 10446-10451.)

Westerfield's raising the issue in a written motion was insufficient to preserve it for appellate purposes as he failed to pursue the issue once the parties discussed it in open court. The trial court never ruled on the modified instruction proposed in the defense motion, which addressed the issues he raises in the instant appeal. As failure to pursue a ruling has the same effect as a failure to object, Westerfield has forfeited the matter. (*People v. Kaurish* (1990) 52 Cal.3d 648, 680.)

In any event, Westerfield's claim fails on the merits. Westerfield's argument that the foundational facts of force or violence should be submitted to the jury and found beyond a reasonable doubt was rejected by this Court in *People v. Nakahara, supra,* 30 Cal.4th at pp. 705, 720: "CALJIC No. 8.87 is not invalid for failing to submit to the jury the issue whether the defendant's acts involved the use, attempted use, or threat of force or violence." This Court has repeatedly confirmed that the characterization of other crimes as involving express or implied use of force or violence or the legal threat thereof, is a legal question properly resolved by the trial court. (*People v. Streeter* (2012) 54 Cal.4th 205, 266; *People v. Burney* (2009) 47 Cal.4th 203, 259; *People v. Loker, supra,* 44 Cal.4th at p. 745.)

Further, Westerfield's contention that Evidence Code section 403 should cause this Court to reconsider its prior decisions is equally meritless. Evidence Code section 403, subdivision (a)(1) provides that when a party offers evidence dependent on the existence of a foundational fact, the party offering the evidence must provide to the court sufficient evidence of that foundational fact. (Evid. Code, § 403, subd. (a)(1).) Subdivision (c)(1) states that if the court admits evidence pursuant to this code section, the court "[m]ay, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does not exist." The section is

geared toward the admissibility of evidence where there is a dispute as to relevance, personal knowledge, or authenticity, e.g., the identity of the declarant of a statement or the authenticity of a writing. Penal Code section 190.3 factor (b) is a sentencing factor, the applicability of which in any particular trial is for a judge, and not the jury, to determine. (*People v. Ochoa* (2001) 26 Cal.4th 398, 453.) Even if Evidence Code section 403, subd. (c)(1) applied to factor (b) evidence, its very language makes plain that a court has no sua sponte duty to instruct on preliminary facts, but rather must only do so on the request of a party. Here, Westerfield does not contend that he made such a request.

Finally, as explained in the previous arguments, even if erroneous, Westerfield was not prejudiced by instruction with CALJIC No. 8.87, as there was ample evidence from which the jury unquestionably would have found the requisite force or violence for factor (b) evidence. (See *People v. Lewis* (2001) 26 Cal.4th 334, 363-64 [no ineffective assistance where defendant could not show prejudice from counsel's failure to request instruction on foundational facts of witness's capacity to perceive and recollect].) Contrary to Westerfield's assertion (AOB 412), there was no reasonable possibility of a more favorable penalty verdict had the jury been instructed with a modified version on CALJIC No. 8.87.

XIX. AS IT WAS PART AND PARCEL OF THE CIRCUMSTANCES OF THE CRIME, THE JURY WAS ENTITLED TO CONSIDER WESTERFIELD'S POSSESSION OF PORNOGRAPHY AT THE PENALTY PHASE

Westerfield contends that his death sentence must be reversed because the prosecutor improperly urged the jury to consider his possession of adult and child pornography in rendering its penalty decision. After reiterating his belief that it was improperly admitted at the guilt phase, Westerfield now complains that the error was compounded at the penalty

phase by the prosecutor's argument that the jury could consider the circumstances of the crime and special circumstances in reaching its decision, including the circumstances of the murder, kidnapping, and possession of child pornography. He claims the prosecutor's argument misrepresented the scope of what the jury may consider under factor (a), and constituted prosecutorial misconduct. He further argues that the prosecutor encouraged the jury to consider the pornography evidence under factor (b) as well. (AOB 413-418.) Contrary to Westerfield's assertions, the child pornography was very much a circumstance of the crime as it provided the motivation behind his kidnapping and murder of Danielle. The jury was entitled to consider this evidence under factor (a), and the prosecutor never urged the jury to consider the evidence under factor (b).

Penal Code section 190.3, subdivision (a), specifically permits the jury to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." Generally, this Court has " 'assumed that factor (a), though it speaks in the singular of the "crime" of which defendant was currently convicted, covers the "circumstances" of *all* offenses, singular or plural, that were adjudicated in the capital proceeding,' " but has declined explicitly to resolve the issue. (*People v. Thomas* (2012) 53 Cal.4th 771, 821, original emphasis, citing *People v. Montiel* (1993) 5 Cal.4th 877, 938, fn. 33; *People v. Rogers* (2006) 39 Cal.4th 826, 909; *People v. Sanchez* (1995) 12 Cal.4th 1, 70.) While this Court could dispose of the assignment of prosecutorial error with an explicit resolution of that issue, it is also clear that this case is not one in which the possession of child pornography was simply charged and adjudicated in the same proceeding. The pornography evidence was very much a circumstance of the capital crime — it was the motivation for it.

Here, the prosecutor argued with regard to factor (a):

> The first one is fairly simple. It's basically the crime that we were here before talking about. The circumstances of the crime for which the defendant was convicted and the existence of any special circumstances. The pornographic charge, the kidnapping charge and the murder charge, the crimes that we are here that you folks returned the guilty verdicts on.

(60 RT 10500-10501.) Defense counsel objected that the argument misstated the law, and the trial court overruled the objection. (60 RT 10501.)

This Court has explained that the circumstances of a crime for purposes of factor (a) "include guilt phase evidence relevant to 'the immediate temporal and spatial circumstances of the crime,' as well as such additional evidence, like victim impact evidence, that " 'surrounds materially, morally, or logically,' the crime." (*People v. Tully* (2012) 54 Cal.4th 952, 1042, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 833.) Here, Westerfield's possession of pornography, and the child pornography in particular, was inextricably intertwined with his killing Danielle — it was the material, moral, and logical surroundings of his heinous acts. The evidence seized from computers and computer disks reveals Westerfield's obvious sexual penchant for young girls. While it is certainly true that Danielle's body was found so badly decomposed that no one could determine whether she had been sexually assaulted, her unclothed body, her fingerprint above Westerfield's bed in his motor home, her hair on the bedding from his master bedroom, and the images of child pornography including cartoons depicting forcible sexual assaults on young girls provided no rational explanation for this crime other than some unlawful sexual purpose. Westerfield's motivation and purpose for abducting Danielle for a sexual purpose and then killing and dumping of her body, contributes to the heinousness of his behavior.

Additionally, contrary to Westerfield's assertion (AOB 415-416), the prosecutor never suggested that the child pornography evidence, or adult pornography evidence for that matter, was admissible for the jury's consideration as a crime of force or violence under factor (b). The prosecutor argued:

> Jenny had no reason to lie. You saw her testify here. She told the story to both sides. You heard her tell the truth. She got in here and told you the truth. He did that act. Factor "b", beyond a reasonable doubt.
>
> And here is what that act means, how you work that in this was the beginning stages of his fantasies, at least the beginning stages that we know about. We have young Jenny, either at seven or five, the defense raised the question it could have been one or two years earlier. That's who she was. That's who he did this to.
>
> His fantasies then continued, that we know about, with these books and these pictures and these images and the videos and the screens. And it concludes with Danielle. We have a history, a progression. That tells us what this means. That tells us what he likes, what he wants, what he gets, every single one. Also tells us something else. It also tells us that he did this crime. What he did to that child gives us that added confidence. The deed that he did, this crime, the lingering doubt that I suppose you'll hear about, he did that crime. He did this crime. He is not the saint he has been portrayed.

(60 RT 10516.)

Westerfield argues that the prosecutor's argument encouraged the jury to conflate the factor (b) evidence of the Jenny N. molestation with the child pornography, and thus consider the pornography evidence under factor (b). First, in no way did the prosecutor suggest the pornography was factor (b) evidence. Rather, the prosecutor simply argued that the factor (b) evidence of the lewd conduct against Jenny and the factor (a) possession of child pornography both, evidenced Westerfield's desire and need to victimize children, ultimately culminating in Danielle becoming his final

victim. Moreover, any risk that the jury would consider the pornography evidence under factor (b) was alleviated by the trial court's instruction under CALJIC No. 8.87 as to the other crimes evidence which the instruction specified were "battery and/or lewd act with a child under fourteen years, which involved the express or implied use of force or violence." (12 CT 2964.) At no time was the jury instructed to consider the possession of pornography as a crime of force or violence, and it is presumed that the jury followed the court's instructions. (*People v. Thomas, supra,* 51 Cal. 4th at p. 489.) Westerfield was not entitled to have the jury ignore evidence of the motive for his crimes against Danielle simply because it involved possession of child pornography.

Even if the reference to Westerfield's disturbing pornography collection were improper at the penalty phase, there is no reasonable possibility he would have received a verdict other than death had the pornographic evidence been excluded from consideration. (*People v. Thomas, supra,* 53 Cal.4th at p. 821.) The child pornography offered an explanation for a crime that was otherwise inexplicable. Even if there was a lack of explanation for Westerfield's crimes against Danielle, there is no reasonable possibility Westerfield would have enjoyed a more favorable penalty verdict.

XX. THE PROSECUTOR PROPERLY REBUTTED WESTERFIELD'S MITIGATION PRESENTATION OF HIS GOOD CHARACTER, WITH SUSAN L.'S GUILT PHASE TESTIMONY AS TO HIS FORCEFULNESS WHEN DRINKING

Westerfield contends that the allegedly erroneous admission of Susan L.'s guilt phase testimony regarding her negative feelings for him at times during their relationship and his forcefulness at times while under the influence of alcohol, was improperly used during the prosecutor's penalty phase argument to rebut the mitigating evidence of Westerfield's good

character. The true nature of Westerfield's claim is unclear. While he refers to the testimony as "rebuttal evidence," the prosecutor's argument merely referred the jury back to Susan L.'s guilt-phase testimony. Westerfield suggests neither that it was prosecutorial misconduct nor that the trial court erred in permitting this argument. He simply argues that the "evidence" of Susan L.'s opinion was presented as a factor in aggravation, the prejudicial impact of which outweighed its probative value. (AOB 419-412.) Westerfield has forfeited his contention by failing to object to the prosecutor's argument. His allegation is meritless in any event, as the prosecutor was entitled to place Westerfield's penalty phase presentation of his good character into context.

The defense called Susan L., Westerfield's former girlfriend, as a penalty phase witness. She testified Westerfield had been helpful with funeral arrangements for her father, he provided her financial support, he bought her a car, and she still cared about him. (58 RT 10249-10251.) Her daughter, Christina Gonzales, testified that Westerfield took her and her son into his home where her mother was living at the time, after she left an abusive relationship. (58 RT 10255-10256.) During his penalty phase argument, the prosecutor stated the following:

> Other family and friends. Susan L. and her daughter, Christina Gonzales. We heard from them I think yesterday. Obviously still had feelings for the defendant. And he had opened up their home — his home to Christina Gonzales and let her move in there for a few months. But again, how much is that worth? He's describing events, things that he did for them. And we have heard the opposite side back in the other part of the trial from Susan. We heard about how the defendant behaves when he has too much to drink, that he's forceful. We heard her describe the event after she broke up with him and had been out with some fellow and had come home and he gave her a little kiss and her encounter with the defendant.

> We heard from Christina Gor zales, that she did not stay in that home after her mother left. She got out, too. She left. If he's such a big hearted guy, why leave? In fact, if he's such a saint, why should she leave? Why should she turn her back on him, on multiple occasions it sounded like, And why didn't Danielle [Susan's other daughter] live there? Why didn't she live in the house? Alternate back and forth every other week or so. When you determine how much weight to give that testimony, you have to look at the total picture.

(60 RT 10509-10510.)

First, perhaps the reason Westerfield does not specify whether he believes this was trial court or prosecutorial error, is because he failed to raise any objection to the comment when the prosecutor made it during argument. (60 RT 10509-10510.) Whether he wishes to characterize it as misconduct (*People v. Martinez* (2010) 47 Cal.4th 911, 963), or as trial court error (*People v. Cain* (1995) 10 Cal.4th 1, 28), his failure to raise a contemporaneous objection forfeits the issue on appeal.

In any event, the prosecutor's argument was entirely permissible. Generally, the prosecution is only permitted to present aggravating evidence related to the statutory factors listed in Penal Code section 190.3. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 92, abrogated on other grounds in *People v. McKinnon, supra,* 52 Cal.4th 610; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) Evidence offered to rebut evidence present by the defense in mitigation, however, is not subject to the same requirement. (*People v. Hawthorne, supra,* 46 Cal.4th at p. 92; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 209.) In this sense, a prosecutor may show that the evidence in mitigation offered by the defendant "fails to carry extenuating weight when evaluated in a broader factual context." (*People v. Hawthorne, supra,* 46 Cal.4th at p. 92.)

In *People v. Cunningham* (2001) 25 Cal.4th 926, 1023-1024 (*Cunningham*), the defense had presented evidence of the defendant's

claimed religious devotion, including that he was a Sunday school teacher, as mitigating evidence at the penalty phase of his trial. In argument, the prosecutor referred to this testimony and noted that "the thought of defendant teaching children, 'scared the daylights out of her.'" (*Id.* at p. 1023.) She further questioned what the defendant could possibly have to offer those children by way of religious education due to "his description of himself as a pimp, murderer, adulterer, thief, and gambler." (*Id.* at p. 1024.) Finally, the prosecutor referred to the evidence that the defendant kept a photograph of Jesus in the same box as he a kept photograph of his murder victim and rhetorically asked how a person who claimed to be so religiously devoted could do such a thing. (*Ibid.*)

On appeal, the defendant argued that these comments constituted misconduct because the prosecutor in her argument had used testimony offered in mitigation as a circumstance in aggravation. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1023.) This Court rejected that argument, finding that at no time did the prosecutor ask the jury to consider the facts in aggravation, and the remarks were an appropriate comment on the defendant's testimony as to his good character and religious devotion. (*Id.* at p. 1024.) "A defendant who offers evidence of his or her good character widens the scope of the evidence of bad character that may be introduced in rebuttal." (*Ibid.*, citing *People v. Noguera* (1992) 4 Cal.4th 599, 644 [requirement that rebuttal evidence relate to particular character trait offered in mitigation satisfied where good character evidence rebutted by evidence defendant induced a witness to provide false testimony].) " 'The scope of rebuttal legitimately embraces argument by the prosecutor "suggesting a more balanced picture of [the accused's] personality." [Citation.]' " (*People v. Cunningham, supra,* 25 Cal.4th at p. 1024, citing *People v. Noguera, supra,* 4 Cal.4th at p. 644.)

The same is true in this case. Westerfield offered in mitigation evidence of his good character, consisting in part of his willingness to help financially Susan L. and her daughter, Christina. In response to this evidence, the prosecutor was entitled to remind the jury that there had been times when Westerfield was not quite so helpful such as when he became aware, or suspected, she had gone on a date with another man and when he consumed alcohol. Because Westerfield chose to present evidence of his good character, he opened the door to the prosecutor arguing his bad character from the testimony of the same witness at the guilt phase of trial. Contrary to Westerfield's assertion (AOB 420), the prosecutor did not remotely suggest that his behavior upon observing Susan L. with another man or his behavior when intoxicated were factors to be considered in aggravation. Likewise, the evidence did not need to rise to the level of a crime to permit the prosecutor's comment (AOB 420); the prosecutor did not present it as an aggravating factor. Rather, the prosecutor argued that the jury should assign little weight to Susan L.'s mitigation testimony because the same witness also described occasions when she did not hold the same opinion of Westerfield's character, causing her to leave him on several occasions. (58 RT 10254.) The prosecutor's argument simply reminded the jury that there was another side to Westerfield presented by the very same witness, and invited the jury to consider this more balanced picture of his personality. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1024.) Thus, where the defendant introduced evidence of his good character, it was proper to admit evidence of his bad character upon seeing his ex-girlfriend with an other man and upon drinking, and it was proper for the prosecutor to comment on it in argument.

Finally, even if somehow improper, any error on the trial court's behalf in "admitting the evidence" at the penalty phase, or on the prosecutor's behalf in arguing it, was harmless. Penalty phase error is

prejudicial under state law if there is a "reasonable possibility" the error affected the verdict. (*People v. Gonzales* (2006) 38 Cal.4th 932, 961.) This standard is identical to the federal harmless-beyond-a-reasonable doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18 [17 L. Ed. 2d 705, 87 S. Ct. 824].) (*People v. Gonzalez, supra,* 38 Cal.4th at p. 961.) There is no reasonable possibility that the jury was diverted from returning a life sentence by the prosecutor's argument about Westerfield's forceful behavior with Susan L. The mitigating evidence offered by the defense could not begin to compare with the heinous nature of Westerfield's kidnap and murder of seven year-old Danielle, and dumping of her body in the dirt. Even if the jury had not heard the prosecutor's isolated comment on Susan L.'s guilt phase testimony, there is no possibility, much less a reasonable one that the jury would have returned a verdict less than death.

XXI. AS THERE ARE NO ERRORS TO CUMULATE, WESTERFIELD'S CUMULATIVE-ERROR CLAIM FAILS

Westerfield contends that any combined prejudice from the alleged errors related to the factor (b) evidence of his lewd conduct upon Jenny N., the instructions to the jury about that conduct, the admission of child pornography evidence, and Susan L.'s testimony regarding feeling uncomfortable around Westerfield and his being forceful when drinking warrants reversal of the death judgment. (AOB 422-423.) No error occurred, and even if error is assumed, Westerfield has failed to show prejudice. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1316; *People v. Abilez* (2007) 41 Cal.4th 472. 523.)

XXII. [27] THE TRIAL COURT PROPERLY ADMITTED THE VICTIM-IMPACT TESTIMONY OF TWO OF DANIELLE'S SCHOOL TEACHERS AS IT WAS RELEVANT TO THE EFFECT OF HER MURDER ON THE COMMUNITY

Westerfield contends the trial court erred in permitting two of Danielle's school teachers to testify at the penalty phase of trial as to the impact of her murder on the community. (AOB 424-425.) Contrary to his assertion, the testimony was properly admitted.

Victim-impact evidence is admissible during the penalty phase of a capital trial because Eighth Amendment principles do not prevent the sentencing authority from considering evidence of "the specific harm caused by the crime in question." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825, 829 [111 S.Ct. 2597, 115 L.Ed.2d 720].) Under state law, Penal Code section 190.3, subdivision (a) permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." Factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on the impact on the family of the victim. (*People v. Edwards* (1991) 54 Cal.3d 787, 833-836; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063; *People v. Pinholster* (1992) 1 Cal.4th 865, 959, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.) The prosecution has a "legitimate interest" in rebutting defense mitigating evidence "by introducing aggravating evidence of the harm

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[27] Opposing counsel inadvertently numbered two arguments "XXI". Respondent continues the sequential numbering with XXII here.

caused by the crime, 'reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to [her] family.' " (*People v. Prince* (2007) 40 Cal.4th 1179, 1286, quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].) Unless the evidence "invites a purely irrational response," evidence of the "effect of a capital murder on the victim's loved ones and the larger community is admissible under section 190.3, factor (a) as a circumstance of the crime." (*People v. Scott* (2011) 52 Cal.4th 452, 494; *People v. Brady* (2010) 50 Cal.4th 547, 574; *People v. Burney* (2009) 47 Cal.4th 203, 258; *People v. Bramit* (2009) 46 Cal.4th 1221, 1240.) Similarly, "[t]he federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.' " (*People v. Hamilton* (2009) 45 Cal.4th 863, 927, citing *Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

Prior to the commencement of the penalty phase, Westerfield moved to limit the scope of the victim-impact testimony proffered by the prosecution. Specifically, he moved to preclude any victim-impact testimony that did not discuss the impact of Danielle's murder on an immediate family member who was personally present during or immediately following the murder. (10 CT 2423.) Westerfield argued that the testimony of Danielle's teachers was irrelevant, inflammatory, and unduly prejudicial. (10 CT 2433; 54A RT 9839, 9842.) The trial court disagreed, observing that permissible victim-impact evidence included the effect of the crime on the community, of which Danielle's teachers were a part as they had had personal dealings with the young girl. (54A RT 9843.)

Here, the trial court's admission of victim-impact testimony from two of Danielle's school teachers comported with both the state and federal standards. Westerfield argues that the victim-impact testimony in his case was particularly prejudicial because Danielle was a young girl, who lived in

a good community, and came from a good home. (AOB 424-425.) That this was the life of the victim he chose, and a loss to the community of the victim he chose, in no way precludes the prosecution from admitting this type of testimony. This is precisely the type of evidence that *Payne v. Tennessee, supra,* 501 U.S. 808, ruled was "relevant to the jury's understanding of the harm caused by the crime." (*People v. Dykes* (2009) 46 Cal.4th 731, 781-782.)

Moreover, there was nothing unduly inflammatory about the teachers' testimony. Danielle's kindergarten and first grade teacher, Ms. De Stefani, testified that she was a sweet, polite, hard-working girl who enjoyed school; she described Danielle as very caring and noted how she always wanted to make sure everyone felt included. (57 RT 9958-9959.) Similarly, Danielle's second grade teacher, Ms. Puntenney, testified that Danielle enjoyed doing school work and got along well with all of the children. (57 RT 9968.) Ms. Puntenney recalled the other students packing up Danielle's belongings from her desk to give to her parents after her body was discovered. (57 RT 9977.) As Danielle went missing in the middle of the year from her class, Ms. Puntenney noted on a personal level that not a day went by that she did not think of her young student, that she missed Danielle, and that the other children at school missed her too. (57 RT 9977-9978.) The teachers' testimony was no different than testimony previously found admissible by this Court. (See *People v. Dykes, supra,* 46 Cal.4th at pp. 779-780 [child victim's teacher testified to popularity in school].) It was relevant to the jury's understanding of Danielle and the impact of her murder on those close to her, it was not unduly prejudicial, and properly admitted under the state and federal guidelines. (*Id.* at p. 786.)

Finally, even assuming the trial court erred in admitting Danielle's school teachers' testimony, reversal is not required. Erroneous admission of victim-impact evidence is subject to harmless error analysis. (*People v.*

Johnson, supra, 3 Cal.4th at p. 1246.) Here, there is no reasonable possibility that Westerfield would have enjoyed a more favorable outcome, absent the testimony of Danielle's teachers. (*People v. Gonzales, supra,* 38 Cal.4th at pp. 960-961 [explaining test for state law error at penalty phase is whether there is a reasonable possibility the error effect the verdict, which is the equivalent of *Chapman's* beyond-a-reasonable-doubt standard].) The testimony of both teachers was very brief, particularly in contrast to the mitigation testimony Westerfield presented. Further, the trial court instructed the jury not to be swayed by prejudice against Westerfield. (CALJIC No. 8.84.1; 12 CT 2956.) The trial court also instructed the jury it was "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." (CALJIC No. 8.88; 12 CT 2974.) The jury is presumed to have followed these instructions (*People v. Thomas, supra,* 51 Cal. 4th at p. 489.)

In light of the brevity of the teachers' testimony, and the nature of the other evidence in aggravation, it is clear the admission of the testimony in no way undermined the fundamental fairness of the penalty determination. Even if the victim-impact evidence had been excluded, the outcome would have remained the same. Westerfield's death sentence was not the product of unduly prejudicial victim-impact evidence; rather, it was direct result of the circumstances of his senseless, unconscionable crime of abducting a sleeping child from her home, killing her, and dumping her body on the side of the road.

XXIII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO SEQUESTER THE JURY AT THE PENALTY PHASE

Westerfield contends the trial court's purported error in declining to sequester the jury at the guilt phase resulted in prejudice at the penalty

phase, or that declining to sequester the jury at the penalty phase was prejudicial error in and of itself. (AOB 426-430.) He adds little to the claim from what was previously discussed in Argument IV. For the same reasons expressed in that argument, Westerfield's claim fails.

First, Westerfield continues to maintain that the appropriate standard for reviewing his contention is whether the publicity surrounding the trial rendered it substantially likely that the trial court's decision not to sequester the jury resulted in the possibility of an unfair trial. (AOB at 426, citing *Sheppard v. Maxwell, supra,* 384 U.S. at p. 362.) Contrary to his assertion, the appropriate standard of review is the deferential abuse-of-discretion standard as clearly expressed in Penal Code section 1121. (See *Estes v. Texas, supra,* 381 U.S. at p. 546, fn.3 [decided one year before *Sheppard*, and observing that most states leave decision as to whether to sequester jury to discretion of trial court].) In any event, the trial court properly exercised its discretion and there is no likelihood of an unfair penalty phase absent sequestration.

Respondent summarized the most significant events regarding the media and public sentiment in Argument IV and thus does not repeat them here. The only additional events in the penalty phase referenced by Westerfield were the media's having captured a group of some 85 to 200 people cheering outside the courthouse in response to the jury's guilt verdict, the chief of police giving a televised statement following the guilty verdict, which was characterized by the defense as "complimenting his troops," and a still photograph from inside the courtroom capturing the reaction of the Van Dams and other spectators. (54A RT 9836-9837.) The court noted that the cheering outside the courthouse was inappropriate, but believed that most community members would feel the same way. (54A RT 9836.) As to the police chief's statements, the court contemplated issuing an order to show cause in light of the trial court's order prohibiting

comments about the case, and thought the statements unfortunate, but noted that the chief simply discussed the handling of the matter by the police department, and thus his statements were quite limited. (54A RT 9837.) With regard to the photograph, the trial court brought the photographer into court, excluded him for the remainder of the trial, and ordered generally that there be no still photography on the floor of the courthouse where Judge Mudd's courtroom was located. (56 RT 9914-9921, 9926-9927.)

For the reasons discussed in Argument IV, Westerfield has not established that the publicity and public sentiment during the guilt phase had a spillover effect to the penalty phase that rendered the trial court's decision not to sequester the jury an abuse of discretion. Additionally, the incidents described above prior to and during the penalty phase were insignificant and unlikely to have had any effect on the jury's penalty phase decision. Moreover, just as it did in the guilt phase the trial court continued to ensure the jury would not be impacted by the media, as was evidence by the trial court's ruling prohibiting still photography. Finally, the court continued to remind the jurors that it was to avoid media accounts of the case. (See, e.g., 58 RT 10102.)

Thus, just as it did in the guilt phase, the trial court properly exercised its discretion based upon the circumstances known to the court in taking appropriate measures to avoid the jury's being influenced by outside pressures. Even under the higher standard Westerfield advances, there is no likelihood the publicity surrounding the trial rendered it substantially likely that the trial court's decision not to sequester the jury resulted in the possibility of an unfair penalty phase. There is no indication the jury decided Westerfield's guilt or penalty based upon anything other than the evidence presented in the courtroom.

XXIV. THE TRIAL COURT PROPERLY DENIED WESTERFIELD'S CHALLENGE FOR CAUSE AS JUROR NO. 2 DID NOT EXPRESS VIEWS ON THE DEATH PENALTY THAT SUBSTANTIALLY IMPAIRED HIS PERFORMANCE AS A JUROR

Westerfield contends that the trial court improperly denied his challenge for cause as to Juror No. 2 based upon his views of capital punishment. Additionally, he notes that the allegedly improper denial resulted in prejudice in that he had exhausted all of his peremptory challenges due, in part, to the trial court's allegedly improper denial of his challenge for cause as to Prospective Juror No. 19. He claims that the purported error requires reversal of the penalty phase. (AOB 431-434.) First, for the reasons stated in Argument III, the trial court properly denied Westerfield's challenge for cause as to Prospective Juror No. 19. Second, because Juror No. 2 did not express views during the voir dire process that would prevent or substantially impair his performance as a juror, the trial court properly denied this challenge of cause as well.

The Sixth Amendment right to an impartial jury is protected when the standard utilized for excusing a prospective juror for cause based on his or her views regarding capital punishment is "whether the [prospective] juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841] (*Witt*); *People v. Clark* (2011) 52 Cal.4th 856, 895.) The *Witt* standard superseded one requiring that it be "unmistakably clear" that the prospective juror would "*automatically* vote against imposition of capital punishment without regard to any evidence that might be developed at the trial of the case." (See *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776].) Certainly, a criminal defendant has a right to an impartial jury, meaning one "that has not been tilted in favor of capital

punishment by selective prosecutorial challenges for cause," but equally as certain "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [167 L.Ed.2d 1014, 127 S.Ct. 2218].) Thus, "to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible." (*Ibid.*)

On appeal this Court must affirm the trial court's rulings where they are supported by substantial evidence. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1328-1329.) Where a juror makes conflicting or ambiguous statements about his or her views on capital punishment, a reviewing court is bound by the trial court's findings as to the prospective juror's true mental state, so long as those findings are fairly supported by the record. (*Id.* at p. 1328.) " 'The trial court is in the best position to determine the potential juror's true state of mind because it has observed firsthand the prospective juror's demeanor and verbal responses.'" (*Id.* at p. 1328, quoting *People v. Clark, supra,* 52 Cal.4th at p. 895; see also *Uttecht v. Brown supra,* 551 U.S. at p. 9 ["Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."].)

A. Juror No. 2's Voir Dire Responses

On his questionnaire, Juror No. 2 (then Prospective Juror No. 51 (15 CT 3626)), indicated he strongly supported the death penalty, and that his views regarding it were "a life for a life." He further indicated that regarding life without the possibility of parole he "could live with [himself] if [the defendant] is guilty." (15 CT 3639.) In response to the question asking, "If you are in favor of the death penalty, would your opinion

substantially impair your ability to perform as a juror such that you would only vote for the death penalty, regardless of the evidence?", Juror No. 2 checked the box indicating "No." (15 CT 3641, original emphasis.) Also on the questionnaire, Juror No. 2 indicated he was willing to weigh and consider all of the aggravating and mitigating evidence before deciding upon the appropriate punishment. (15 CT 3642, 3643.) In response to the question asking, "Do you have such conscientious opinions in favor of the death penalty that regardless of whatever evidence might be presented during a penalty phase of the trial, should we get there, you would automatically vote for a verdict of death in a case involving these charges and special circumstances?", Juror No. 2 indicated he would not. (15 CT 3643, original emphasis.) He further indicated he would not automatically vote for the death penalty no matter what evidence was presented at the penalty phase. (15 CT 3643.)

When Juror No. 2 was brought into court for voir dire, he had the following conversation with defense counsel, Mr. Boyce:

> [MR. BOYCE]: On the death penalty you stated that you favor the death penalty; is that correct?
>
> [JUROR NO. 2]: Yes, I do.
>
> [MR. BOYCE]: And you stated that you believe in a life for a life?
>
> [JUROR NO. 2]: Yes, I do. Well, yes if you — in a way that if there's absolutely no doubt that that person took that life, yes, I do believe in a life for a life.
>
> [MR. BOYCE]: Well, sir, if we reach a penalty phase in this case, that means that Mr. Westerfield will have been found guilty of murder, of taking a life, in other words?
>
> [JUROR NO. 2]: Right.
>
> [MR. BOYCE]: So based on your beliefs, then would you automatically impose the death penalty at a penalty phase?

[JUROR NO. 2]: No.

[MR. BOYCE]: Can you explain?

[JUROR NO. 2]: It has to be — to me, I have to hear all the evidence, and it has to be proven beyond a reasonable doubt that the defendant actually did it. If not, you know, if — circumstantial evidence is kind of tough for me to have somebody get the death penalty.

[MR. BOYCE]: But we're already going to be past that stage if we get to a penalty phase.

[JUROR NO. 2]: Right. I have to hear everything first. I just can't say right now which way I would go.

[MR. BOYCE]: And I know it's a difficult question.

[JUROR NO. 2]: Right.

[MR. BOYCE]: Because, like the judge said, we're putting the cart before the horse. But what we're asking you is that, assume you've already found Mr. Westerfield guilty, you've already considered all the evidence and you have found him guilty beyond a reasonable doubt, and now we are in a penalty phase.

[JUROR NO. 2]: Oh, okay.

[MR. BOYCE]: Okay? Based upon your belief that a life for a life, you would automatically impose the death penalty then, would you?

[JUROR NO. 2]: Yes.

[MR. BOYCE]: And you're pretty strong about that belief, too, aren't you?

[JUROR NO.2]: Well, I do believe — I think a life is precious you know.

[MR. BOYCE]: How long have you held that belief, do you think?

[JUROR NO. 2]: It's hard to say. Actually, all my adult life.

[MR. BOYCE]: And so — and you've thought about it quite a bit, I assume?

[JUROR NO. 2]: Well, I don't think about it every day, no, but I mean — yeah, I've thought a lot and I probably still think about it now. It would be a hard decision to make and —

[MR. BOYCE]: But if Mr. Dusek stood up here in five minutes, he's not going to change your opinion, is he?

[JUROR NO. 2]: He might. I can't tell.

[MR. BOYCE]: But as you sit there your opinion is a life for a life, is that right?

[JUROR NO. 2]: On yes, yes, The bottom line is yes.

(7 RT 2561-2563.)

When Mr. Dusek questioned Juror No. 2, he elicited the following:

[MR. DUSEK]: And how about at the penalty phase where more evidence might be coming in, good things the defendant may have done or things that explain what he did and, you know, if we have anything else we may give you some negative stuff.

Is that stuff you'd listen to also?

[JUROR NO. 2]: If it's evidence, yes. If it's not, no.

[MR. DUSEK]: Well, if it comes from here it will be evidence. It will be your job to decide is it worthwhile, do I believe it, how much weight do I give it.

[JUROR NO. 2]: Right.

[MR. DUSEK]: Is that something you can do?

[JUROR NO. 2]: Sure.

[MR. DUSEK]: Is that something you're willing to do before you make up your mind or are you going to make up your mind first and then listen to the evidence?

[JUROR NO. 2]: I'll listen to it first.

(7 RT 2566.)

The defense challenged Juror No. 2 for cause, believing that his answers indicated he would automatically vote for death if the case reached a penalty phase (7 RT 2566-2567), and the trial court ruled as follows:

> All right. I believe that Juror [No. 2] has given us a straightforward set of answers. In addition to that, I believe that the questionnaire is clear and unequivocal, that he can be fair and impartial. And I don't believe that one question couched in such a way as to change the ground rules in my humble opinion is going to make him have cause to create an inability not to follow the law. The challenge for cause is denied.

(7 RT 2567.)

B. The Trial Court Properly Denied The Challenge For Cause As To Juror No. 2

Applying the *Witt* standard, nothing about Juror No. 2's responses on the written questionnaire or in open court suggested that he would be anything other than a fair and impartial juror, much less that his views on the death penalty would substantially impair his obligations as a juror. While Juror No. 2 expressed a preference for the death penalty, expressing such a preference or indicating an inclination to impose the death penalty under certain circumstances, does not render a prospective juror impartial.

In *People v. McKinzie, supra,* 54 Cal.4th at pages 1343-1344, the defense challenged a prospective juror for cause who indicated on a written questionnaire strong support for the death penalty, he believed that first-degree murder offenses warranted the death penalty, and stated that he could remain open-minded about the penalty "only if innocent." This Court upheld the trial court's denial of a defense challenge for cause, noting that during voir dire the prospective juror stated multiple times that he would not automatically choose death, he remained open-minded as to the penalty,

and that he would consider the aggravating and mitigating circumstances. (*Id.* at p. 1346.) Further, this Court agreed with the trial court's assessment that the prospective juror's statements about imposing the death penalty in first degree murder cases appeared to be based on ignorance of the law rather than bias toward capital punishment. (*Ibid.*)

In support of the decision in *McKinzie*, this Court pointed to its prior similar precedents in *People v. Crittenden* (1994) 9 Cal.4th 83 (*Crittenden*) and *People v. Farnam* (2002) 28 Cal.4th 107 (*Farnam*). (*People v. McKinzie, supra,* 54 Cal.4th at p. 1346.) In *Crittenden*, this Court upheld a trial court's denial of two challenges for cause, the first as to a prospective juror who stated the death penalty should be imposed for first degree murder regardless of the defendant's background, and the second as to a prospective juror who gave conflicting answers as to whether he would automatically choose the death penalty. (*People v. Crittenden, supra,* 9 Cal.4th at p. 122.) This Court upheld the denial of both challenges, observing that both potential jurors also stated they would consider the evidence, consider both penalties based on the evidence presented and the appropriate factors, and not automatically impose the death penalty. (*Id.* at pp. 122-123.) In *Farnam*, where a prospective juror indicated that all first degree murderers should receive the death penalty, but also stated that he could set his general belief aside and would be willing to impose a life sentence if the evidence persuaded him to do so, this Court again upheld the trial court's denial of a defense challenge for case. (*People v. Farnam, supra,* 28 Cal.4th at pp. 133-134.)

Likewise, in the matter before this Court, substantial evidence supports the trial court's decision that Juror No. 2 could remain fair and impartial. Although he expressed a belief in a life for a life (7 RT 2562-2563), Juror No. 2 repeatedly affirmed on his questionnaire and in oral voir dire that he would need to hear all of the evidence before making a penalty

determination and that he would not automatically vote to impose death. (15 CT 3642, 3643; 7 RT 2562, 2565, 2566.) Juror No. 2's statements regarding a life for a life appear to convey the opinion that a murder proven beyond a reasonable doubt might "tip the balance in favor of death," but his further responses showed that he had not foreclosed the possibility of imposing a life term if he believed the evidence warranted that punishment. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1240-41 ["In context, [Prospective Juror's] statements appear to convey his view that the premeditated murder of an unresisting victim presents, in the abstract, a collection of aggravating circumstances that tip the balance heavily in favor of death. [Prospective Juror] did not rule out a different result, however, if mitigating circumstances were also taken into account."]; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1199 [prospective jurors modified their "initial strong stance in favor of the death penalty in the abstract with the willingness to consider the particular circumstances of the case, and to follow the applicable law, at the penalty phase."].)

Based on all of his voir dire and questionnaire responses, as well as the deference this Court must give to the trial court's credibility determination that the prospective juror had provided "straightforward" answers, the trial court's exercise of its discretion in denying the defense challenge for cause should be affirmed.

XXV. THE TRIAL COURT'S PROPER DENIAL OF WESTERFIELD'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES DID NOT RENDER PENALTY PHASE FUNDAMENTALLY UNFAIR

Westerfield contends that even if he had no constitutional entitlement to peremptory challenges, and even if he has failed to show that the trial court's denial of additional peremptory challenges rendered his guilt phase fundamentally unfair in light of the pretrial publicity, then the denial of additional peremptory challenges nevertheless rendered his

penalty phase unfair thus requiring reversal of the penalty phase. (AOB 435-439.) This argument fails for the same reasons expressed in Argument II.

Again, "[t]o establish a constitutional entitlement to additional peremptory challenges, [Westerfield] must at least show that he is likely to receive an unfair trial before a biased jury if the request is denied." As explained in Argument II, Westerfield has failed to satisfy this burden and nothing about his argument as to the penalty judgment changes that analysis. He recounts the voir dire responses of three prospective jurors, none of whom sat on his jury, in an effort to show that jury selection in this case was particularly challenging in light of the crime — the murder of a child amid allegations of a motive of sexual assault. Negative feelings generated by such a crime does not render it constitutionally necessary to provide more peremptory challenges whenever a child has been murdered and the motive could be sexual. Westerfield also makes a general speculative assertion that the jury would not be able to critically evaluate the penalty phase testimony in light of the atmosphere in which the case was tried. (AOB 438-439.)

But contrary to Westerfield's speculative assertion, the jury was instructed not to be swayed by bias, prejudice, or public opinion against him and that it was to consider only the evidence presented (CALJIC No,. 8.84.1; 12 CT 2956), that the evidence of other criminal activity against Jenny N. had to be proven beyond a reasonable doubt (CALJIC No. 8.87; 12 CT 2964), and that ultimately its task was to determine whether the aggravating factors were so substantial in comparison to the mitigating factors that a death sentence was warranted (CALJIC NO. 8.88; 12 CT 2974-2975.) There is no indication in the record to overcome the fundamental presumption that the jury followed the trial court's instructions. (*People v. Thomas, supra,* 51 Cal. 4th at p. 489.) Finally, as

discussed in Argument II, if Westerfield's point is that the pretrial publicity was so pervasive at the time he proceeded to trial exercising his speedy trial right and declining to move for a change of venue, then an infinite number of peremptory challenges was not going to assist him. Westerfield was not entitled to a jury who knew nothing about his case. He was entitled to jurors who were willing to set aside any opinions they had formed, willing to consider only the evidence presented in court, and willing to follow the court's instructions as to how to decide guilt and penalty. That is precisely what Westerfield received.

XXVI. CALIFORNIA'S DEATH PENALTY SCHEME APPROPRIATELY NARROWS THE CLASS OF DEATH-ELIGIBLE OFFENDERS

Contrary to Westerfield's assertion (AOB 440-442), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.) This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the class of persons eligible for the death penalty. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Schmeck* (2005) 37 Cal.4th 240, 304; *People v. Wilson* (2005) 36 Cal.4th 309, 361-362; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Welch, supra*, 20 Cal.4th at p. 767; *People v. Arias* (1996) 13 Cal.4th 92, 187.) Statistical analysis based on published appeals from murder convictions has not persuaded this Court previously that California's death penalty statute fails to narrow the class of death-eligible defendants, and thus Westerfield's statistical analysis is unavailing. (*People v. Viera* (2005) 35 Cal.4th 264, 303; *People v. Frye* (1998) 18 Cal.4th 894, 1029, overruled on other grounds, *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

Westerfield's claim fails because he gives no justification for this Court to depart from its prior rulings on this subject.

XXVII. JURORS NEED NOT APPLY THE BEYOND-A-REASONABLE DOUBT STANDARD WHEN DETERMINING THE APPROPRIATE PUNISHMENT

Westerfield contends that jurors should be required, under the Eighth Amendment, to determine that death is the appropriate penalty under the beyond-a-reasonable-doubt standard. (AOB 443.) As Westerfield acknowledges, however, this Court has repeatedly rejected this argument and should do so again here. (See AOB 443, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Trial courts need not instruct the jury it must find any fact in aggravation true beyond a reasonable doubt. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1319.) The statutory factor that renders a defendant found guilty of first degree murder eligible for the death penalty is the special circumstance. The special circumstance thus operates as the functional equivalent of an element of the greater offense of capital murder. The jury's finding beyond a reasonable doubt of the truth of a special circumstance satisfies the requirement of the Sixth Amendment that a jury find facts that increase a penalty of a crime beyond the statutory minimum. (*People v. Lewis* (2008) 43 Cal.4th 415, 521.) Accordingly, there was no error.

XXVIII. JUROR UNANIMITY REGARDING AGGRAVATING FACTORS IS NOT CONSTITUTIONALLY REQUIRED

Westerfield contends that the failure to require jurors to unanimously agree on the factors warranting the death penalty violated his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 445, citing 12 CT 2954.) As Westerfield acknowledges, however, this Court has repeatedly rejected this argument and should do so again here. (See AOB 445, citing, e.g., *People*

v. Bolin (1998) 18 Cal.4th 297, 335-336.) There is no requirement under state or federal law that the jury unanimously agree on the aggravating circumstances that support the death penalty, since aggravating circumstances are not elements of an offense. (*People v. Jackson* (2009) 45 Cal.4th 662, 701; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Stanley* (2006) 39 Cal.4th 913, 963.) As such, Westerfield's claim fails.

XXIX. INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED

Westerfield contends that the failure to conduct intercase proportionality review violates the Sixth, Eighth and Fourteenth Amendments to the Constitution because capital proceedings are conducted in an arbitrary, capricious, and unreliable manner. (AOB 446.) As Westerfield acknowledges, however, this Court has repeatedly rejected this contention and should do so again here. (See AOB 446, citing *People v. Clark* (1993) 5 Cal.4th 950, 1039, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [regarding conflict-free counsel].) Intercase, or comparative, proportionality review is not required by the federal Constitution, and this court has consistently declined to undertake it. (*Pulley v. Harris* (1984) 465 U.S. 37, 43-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Gonzales* (2011) 51 Cal.4th 894, 957; *People v. Lindberg* (2008) 45 Cal.4th 1, 54; *People v. Cook* (2007) 40 Cal.4th 1334, 1368.) Intercase proportionality review is not required for due process, equal protection, the prohibition against cruel and unusual punishment, or the guarantee to a fair trial. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *People v. Foster* (2010) 50 Cal.4th 1301, 1368; *People v. Hoyos* (2007) 41 Cal.4th 872, 927.) Therefore, there was no error.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the judgment be affirmed in its entirety.

Dated: October 8, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 84,867 words.

Dated: October 8, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Poeple v. Westerfield**
Case No.: **S112691**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 8, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 8, 2012, at San Diego, California.

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Declarant

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