IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ERVEN R. BLACKSHER,** Defendant and Appellant.	**CAPITAL CASE** S076582

Alameda County Superior Court No. 125666
The Honorable Larry J. Goodman, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Erven Blacksher ruthlessly murdered his nephew and his sister after becoming angry over what he viewed as his nephew's disrespectful behavior towards himself and his mother, and his sister's refusal to do anything about her son's behavior. In the days leading up to the murders, appellant told several family members about his frustration with his nephew and his intention to kill him. He said he would kill his sister as well if she interfered with his plans. Three days before the murders, appellant's sister had him arrested for threatening her son's life with a baseball bat. After appellant was released from jail, he obtained a gun and the keys to his mother's home, where his sister and nephew were staying.

On the morning of the murders, appellant waited for his brother-in-law to leave for work before entering his mother's home. After speaking briefly with his mother in her bedroom, he walked into his nephew's bedroom and shot him in the back of his head while he slept. When appellant's sister heard the gunshots, she ran into her son's room and asked appellant what he had done. When she realized appellant intended to shoot her as well, she raised her hand up to her head in a futile attempt to protect herself from appellant's bullet.

Appellant shot her in the head and fled the scene. After calling two relatives and concocting a story about seeing two masked men enter his mother's home, appellant left on a bus to Reno, where he disposed of his clothes and gun. In his statement to police two days later, appellant continued to claim that masked men committed the murders.

At trial, appellant maintained his story about the masked men. He argued in the alternative that he was unable to form the requisite intent for murder due to symptoms of paranoid schizophrenia. The jury rejected both of these defenses and convicted appellant of the first degree murder of his nephew, the second degree murder of his sister, and found true a multiple-murder special circumstance. During the sanity phase, the jury rejected appellant's claim that he was insane at the time of the murders. The jury thereafter imposed the death penalty.

On appeal, appellant raises various challenges in connection with each phase of trial. Most of appellant's claims, however, have not been preserved for appellate review. Even if considered on their merits, the claims are unpersuasive. A brief summary of each of these claims is set forth below.

Appellant raises three "global issues" in connection with the criminal proceedings against him. His first claim is that he was tried while incompetent in violation of his federal constitutional rights. The record shows, however, that the trial court ordered three different doctors to conduct competency evaluations of appellant, and that two of those doctors found appellant competent to stand trial. The trial court thereafter found appellant competent based on the opinion of one of those two doctors.

Appellant's second claim is that he was denied his right to be present on 17 different occasions during trial. The proceedings in question, however, all involved hearings between the court and counsel conducted outside the presence of the jury, in which procedural or legal matters were discussed.

Because appellant had no right to be present at such proceedings, his constitutional and statutory rights were not violated.

Appellant's third claim is that the prosecutor had a discriminatory purpose in using his peremptory challenges against two Black prospective jurors. Appellant's attempt to establish a prima facie case of discrimination in the trial court, however, was woefully inadequate. Nor does the record on appeal reveal any such discriminatory purpose on the part of the prosecutor.

Appellant also raises numerous challenges to the guilt phase verdict, beginning with an attack on the introduction of certain hearsay statements made by his mother after the murders. The majority of the statements introduced at trial concerned statements his mother made at the scene of the murders while she was still in a state of distress. The trial court properly admitted those statements under the spontaneous statement exception to the hearsay rule. The trial court also properly admitted appellant's mother's statement to police the day after the murders to impeach her preliminary hearing testimony. Although appellant's mother was found incompetent to testify as a witness at trial, appellant's confrontation rights were not violated by the introduction of her statement to police as appellant had a prior opportunity to cross-examine her about the statement at the preliminary hearing.

Appellant also objects to the court's admission of hearsay statements made by his mother two days before the murders while she was on her way to the courthouse to obtain a restraining order against him. Again, because such statements were admissible to impeach his mother's preliminary hearing testimony, the court did not err in admitting the statements. Moreover, because the statements were admitted for purposes of impeachment only, their admission did not violate appellant's confrontation rights.

Appellant next argues that he was precluded from introducing evidence to impeach the testimony of his family members who denied knowledge of his

mental health problems. The record shows, however, that appellant was afforded ample opportunity to impeach such testimony, and was only prevented from introducing testimony that took the form of inadmissible hearsay.

Appellant also asserts that the prosecutor's cross-examination of a defense witness exceeded the limited purpose for which such testimony was admitted. However, because appellant opened the door to such questioning on direct examination, the trial court properly found that the prosecutor's cross-examination did not exceed the scope of direct examination.

Next, appellant contends that the court gave jurors the impression that it was aligning itself with the prosecution and against the defense by making comments that were sarcastic and disparaging of defense counsel. The record shows, however, that the comments were well-deserved reprimands prompted by defense counsel's improper conduct.

Appellant also argues that the five autopsy photographs of the victims admitted by the trial court were irrelevant, inflammatory, and a violation of his federal constitutional rights to due process and a fair trial. Contrary to appellant's assertions, the photographs were relevant as they clarified the coroners' testimony regarding the cause of death, and were probative of appellant's malice, deliberation, and premeditation in murdering his victims. Additionally, while the photographs were admittedly unpleasant, they were not unduly inflammatory.

Appellant next brings several challenges to the trial court's instructions during the guilt phase. The first involves the trial court's instruction on the presumption of sanity. Because this Court has previously rejected an identical challenge to such instruction, appellant's claim necessarily fails.

The second claim of instructional error involves the trial court's instruction that an intent to kill was a necessary element of the lesser included offense of voluntary manslaughter. Although the trial court's instruction was

consistent with then-current law, this Court has subsequently disapproved of such an instruction. We submit, however, that the error was harmless on the facts of this case.

Appellant next contends that the trial court erred in rejecting defense requested instructions on spontaneous statements and giving a "severely modified version" of such instructions instead. However, because appellant stipulated to the modification, he cannot now challenge it on appeal. In any event, because the court's modified instruction was a correct statement of law, appellant's challenge to the instruction fails.

Appellant also argues that the trial court improperly rejected a defense "pinpoint" instruction on the jury's consideration of mental state evidence. But because, as the trial court expressly found, this instruction was duplicative of the standard instruction on the subject, appellant was not entitled to the requested instruction.

Appellant next raises two challenges to the sanity phase verdict. First, he contends that the trial court erred in allowing the prosecutor to cross-examine a defense witness about her change of opinion concerning her diagnosis of appellant 20 years earlier. However, because the witness's change of opinion was relevant to the issue of appellant's sanity, the prosecutor was entitled to cross-examine her on the subject.

Next, appellant contends that the trial court issued inconsistent rulings during the testimony of a defense expert, and that the trial court allowed the prosecutor to exploit an earlier discovery violation during the expert's testimony. The trial court, however, properly allowed the prosecutor to ask questions calling for admissible evidence while precluding the defense from asking other questions calling for speculation. Moreover, there is no support for appellant's contention that the prosecutor committed a discovery violation and was later allowed to exploit such violation.

Appellant next raises several issues in connection with the penalty phase, beginning with his assertion that the prosecutor committed misconduct in his penalty phase opening statement by referring to the expected testimony of an expert witness who was not ultimately called. Because the prosecutor relied on a tentative ruling by the trial court in referring to such testimony, however, no misconduct is shown. Also, we note that after the court reassessed the relevance of such testimony, it instructed the jury to disregard the prosecutor's comments. Any error resulting from the prosecutor's remarks was therefore cured by the trial court's subsequent admonition.

Appellant also makes a broad attack on victim impact evidence in general, and the victim impact evidence admitted in his case in particular. His broad attack on victim evidence in general is foreclosed by decisions of this Court and the United States Supreme Court which have repeatedly upheld the constitutionality of such evidence. His attack on the specific evidence introduced in his case also fails. The evidence here was brief, focused, relevant, and well within the guidelines set forth by this Court and the United States Supreme Court.

Appellant next contends that he was precluded from presenting certain mitigation evidence during the penalty phase. Appellant, however, was afforded ample opportunity to present mitigation evidence during the penalty phase, and was only prevented from presenting evidence that did not meet the standards for admission.

Appellant also takes issue with the trial court's failure to re-instruct the jury on how to evaluate the credibility of witnesses during the penalty phase. Following the reasoning of previous decisions of this Court, we submit that any error in the omission of such instructions was harmless.

The remainder of appellant's challenges to the penalty phase verdict consist of standard objections to California's death penalty statute and penalty

phase instructions. All of these claims have been rejected by this Court and appellant provides no basis for this Court to reconsider its prior decisions.

Appellant also claims numerous instances of prosecutorial misconduct during the prosecutor's closing arguments in the guilt, sanity, and penalty phases. Most of his claims, however, were not preserved for appellate review. Even if considered on their merits, the claims are unpersuasive. The prosecutor conducted himself in a professional manner and committed no acts that denied appellant due process.

Appellant next contends that the trial court failed to make a finding concerning his competency before sentencing him, and erred in refusing to appoint a third attorney to represent him on the issue of his competency. However, because the trial court never declared a doubt as to appellant's competency or instituted formal proceedings pursuant to Penal Code section 1368, the court was not required to make an express finding of competency before proceeding with the sentencing hearing. Nor was the court required to appoint a third attorney to represent appellant simply because he disagreed with his attorneys on his competency to be sentenced.

Finally, we note that none of the errors claimed by appellant, whether considered individually or cumulatively, resulted in any prejudice. Consequently, the judgment and sentence in this case should be affirmed.

STATEMENT OF THE CASE

The Alameda County District Attorney filed an amended information charging appellant, Erven R. Blacksher, with two counts of first degree murder (counts one, two—Pen. Code, § 187),[1/] and one count of possession of a firearm by a felon (count three—§ 12021). (CT 416-417.) The information further

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1. All further statutory references are to the Penal Code unless otherwise noted.

alleged firearm-use enhancements as to the murder counts (§§ 1203.06, 12022.5), a multiple-murder special circumstance (§ 190.2, subd. (a)(3)), and seven prior felony convictions, three of which were alleged to have resulted in prison terms (§ 667.5, subd. (b)). (CT 416-420.) Appellant pleaded not guilty. (CT 72.)

The jury trial was divided into three phases: guilt (during which the prior-conviction allegations were severed from the charged offenses for purposes of trial), sanity, and penalty. At the conclusion of the guilt phase, the jury found appellant guilty of first degree murder as to count one (victim Torey Lee), guilty of the lesser included offense of second degree murder as to count two (victim Versenia Lee), and found true the firearm-use enhancements and the special-circumstance allegation. (CT 1316-1318.) As a result of an oversight, the jury did not return a verdict on count three, and the court granted the prosecutor's motion to dismiss the count. (CT 1223.) After the jury found appellant was sane at the time of the murders (CT 1430), appellant admitted all seven prior-felony-conviction allegations. (CT 1495.) The jury thereafter returned a verdict of death. (CT 1559.)

On February 9, 1999, the court sentenced appellant to death, staying the sentences on the firearm-use enhancements and the prior-prison-term enhancements. (CT 1640.4.) Appellant filed a notice of appeal on February 19, 1999. (CT 1640.18.)

STATEMENT OF FACTS

GUILT PHASE

In May of 1995, appellant's mother, Eva Blacksher, lived in a single family residence at 1231 Allston Way in Berkeley. She shared her home with her daughter, Versenia Lee, Versenia's husband, Sammie Lee, and Versenia and Sammie's 19-year-old son, Torey Lee. Appellant lived alone in a cottage

behind his mother's home. On the morning of May 11, 1995, appellant entered his mother's house and shot his sister and nephew to death. The following is a summary of the events established at trial leading up to the murders, the murders themselves, and events occurring after the murders.

The Living Arrangements At 1231 Allston Way And Appellant's Relationship With His Mother

Appellant moved in with his mother immediately after his father's death in 1989. (RT 2114, 2121, 2294.) After his father died, appellant's older sister, Ruth Cole, came over on a daily basis to help out her mother. (RT 2122-2123.) Although appellant was living in the house at the time, he did nothing to help his sister. (RT 2123.) Ruth eventually stopped coming over to her mother's house when appellant told her he did not want her in the house or around their mother. (RT 2123-2124.) Appellant said that he wanted to take care of everything on his own. (RT 2123.) Appellant demanded that his mother tell his older brothers, James and Artis Blacksher, to stay away from the house as well. (RT 2123-2124, 2394-2395.) Eva told James and Artis that they should stay away to keep down the confusion. (RT 2394-2395.) Both men stopped going over to their mother's house during the time that appellant lived there. (RT 2394-2395.)

Eva and appellant got along for the most part. (RT 1850, 2129-2130.) Appellant was the baby of the family and Eva's favorite son. (RT 2117, 2218.) Appellant had a lot of influence over Eva; she gave him anything he wanted, and did everything for him. (RT 2129-2130, 2222, 2393-2394.) Appellant was very controlling; at times his mother seemed afraid of him and tried to stay away from him, and other times she complained about him. (RT 1850, 2218, 2222, 2393-2394.) Appellant did not work from the time he began living with his mother up until the time of the murders. (RT 2129-2130, 2341-2342.) He did not pay for food, clothes, or rent. (RT 2394.)

Eventually, Eva became sick and frail and moved in with Versenia and her family, who were living in an apartment in Oakland. (RT 2124-2125, 2217-2218.) Appellant continued living in his mother's house while she lived in Versenia's apartment. (RT 2124-2125.) After a few months, appellant's older siblings decided that their mother should be living in her own home. (RT 2125.) In 1990, Eva moved back into her home with Versenia, Sammie, and Torey, so that Versenia could continue taking care of her. (RT 2125, 2128, 2292-2294, 2340-2341.) Eva and Versenia had a good relationship during the time they lived together. (RT 2128-2129.) Versenia, Sammie, and Torey lived with Eva for about five years before Versenia's and Torey's deaths. (RT 2128.)

Appellant moved into the back cottage when his mother returned home with Versenia's family. (RT 2126-2127, 2294, 2395.) He took most of his mother's furniture with him when he moved. (RT 2126-2127.) Appellant seemed jealous of Torey because Torey got to live in the main house with Eva. (RT 2393.)

May 7, 1995—Appellant Tells Family Members That He Is Going To Kill Torey And That He Will Also Kill Versenia If She Gets In His Way

On Sunday, May 7, 1995, around 1:00 a.m., appellant went to visit his older brother, Elijah Blacksher, at Elijah's home in Oakland. (RT 2472-2473.) Appellant was angry at the time. (RT 2473.) He told Elijah that Torey had been "messing" with him and that he wanted to get a gun and kill him. (RT 2473-2482.) When Elijah asked why, appellant said that Torey and his friends had threatened him and thrown rocks at his car. (RT 2482, 2519.) Appellant also said that Torey was disrespecting Eva by dealing cocaine in front of her house and bringing people into her house. (RT 2485.) When appellant asked Elijah if he would get a gun for him, Elijah said no. (RT 2475-2476.) Elijah tried to reason with appellant, reminding him that Torey and Versenia were his

family. (RT 2479.) Appellant said he did not care, that he was "fed up" with Torey and that Torey had "messed" with him for the last time. (RT 2478, 2481-2482.) Appellant said that as soon as he found a gun, he was going to kill Torey. (RT 2482-2483.) Elijah tried to calm appellant down and get him to stay the night, but appellant left to go find a gun. (RT 2483-2484.)

Elijah spoke with appellant on the phone later that morning. (RT 2486.) Appellant told Elijah that Torey was still "messing" with him. (RT 2486.) Elijah told appellant to calm down and stay away from Torey. (RT 2489.) Elijah asked appellant to come stay with him, but appellant refused. (RT 2489.)

Elijah saw appellant again later that day. (RT 2489.) Appellant repeated that Torey was "messing" with him and that he was going to hurt him. (RT 2489-2491.) Appellant complained that he was also having trouble with Versenia, that she was always taking Torey's side, and that no one wanted to listen to what appellant had to say. (RT 2492.) Appellant told Elijah he was still trying to find a gun. (RT 2490.) Elijah reminded appellant that Versenia was his sister and tried to calm him down. (RT 2493.) Elijah eventually decided to enlist the help of his eldest brother, James Blacksher, in calming appellant down. (RT 2493-2496.)

Elijah and appellant drove separately over to James's house. (RT 2493, 2499.) Both James and his wife, Frances, were home at the time. (RT 2295, 2342, 2493.) Elijah told James and Frances about the things appellant had been saying to him. (RT 2494-2496.) Appellant was still upset and angry. (RT 2295, 2342-2343.) He paced across the floor and would not calm down. (RT 2295, 2342-2343.) Appellant kept repeating that he was going to kill Torey, and that if Versenia got in his way, he would kill her too. (RT 2296-2298, 2343-2345.) Appellant complained that Versenia was always protecting Torey and standing by him no matter what he did. (RT 2298.) Appellant said he was going to use a baseball bat to "knock [Torey's] brains out." (RT 2298-2299,

2322, 2343, 2345.) When Frances asked appellant why he would want to hurt Torey, appellant said Torey was "messing" with him and that he did not want Torey in Eva's house. (RT 2297.) Elijah begged appellant not to hurt Torey, again reminding him that Torey was his "flesh and blood." (RT 2498.) Frances also tried reasoning with appellant, reminding him that he was Versenia's favorite brother and that Versenia was his best friend. (RT 2298.) Appellant would not listen; in a harsh tone, he insisted that he was going to get a gun and shoot up "the whole place." (RT 2348-2349.) James warned appellant not to go through with it, pointing out that he would just end up destroying his own home. (RT 2348-2349.) James advised appellant to go home, get some rest, think over the things he had been saying, and to leave Torey alone. (RT 2344.) James had no trouble understanding appellant during their conversation. (RT 2349.) Once James realized appellant was being serious, he told him to get out of his house. (RT 2349.) Elijah and appellant walked out of James's house together. (RT 2499.) Before they left, appellant told Elijah he was going to go buy a gun on the street. (RT 2499.) Appellant then got in his car and drove away. (RT 2499.)

Elijah called appellant later that night because he was concerned about him; he had "never seen [appellant] like that before." (RT 2499-2500.) When Elijah asked appellant how he was feeling, appellant told him he still felt the same way. (RT 2500.) Elijah again asked appellant to come stay with him. (RT 2500.) When appellant declined, Elijah told him to "chill" in the back cottage and stay away from Torey. (RT 2500.)

May 8, 1995—Appellant And Torey Argue Outside Eva's Home

Early in the evening on May 8, 1995, appellant and Torey got into a verbal argument in Eva's driveway. (RT 1821-1822.) They were arguing about appellant trying to run Torey and his friends over with his car, and Torey

and his friends hitting appellant's car with bricks after he attacked them. (RT 1822, 1865-1866.) Both men sounded angry. (RT 1822-1823.) The argument finally ended when Versenia went outside and convinced Torey to come inside with her. (RT 1823-1825.)

Eva spoke with Elijah and told him that "all hell had broke loose." (RT 2501.) Elijah went to talk to appellant. (RT 2501.) He told appellant to stay in the back cottage and keep away from Torey. (RT 2501.) Appellant said that he was going to continue looking for a gun, and that as soon as he found one, he was going to kill Torey. (RT 2501-2502.) He said, "Man, I done thought about it and thought about it, I'm going to kill him." (RT 2501-2502.) Appellant seemed fed up. (RT 2505.) Elijah begged him to stop talking like that. (RT 2505-2506.)

Around 11:00 p.m. that evening, Versenia called the police. (RT 2274-2276.) She was nervous and shaking when Officer Luis Mesones arrived. (RT 2275.) She told Officer Mesones that appellant had threatened to kill Torey by "bash[ing] in [his] head." (RT 2276, 2278.) She also told informed him that appellant was schizophrenic and had stopped taking his medication. (RT 2286-2288.) She said that appellant sometimes became angry at people for no apparent reason. (RT 2287.) Because appellant was not at home, Officer Mesones had Versenia sign a citizen's arrest form before he left. (RT 2276-2278.) He told her to call him back if appellant returned home that night. (RT 2278.)

May 9, 1995—Versenia Has Appellant Arrested

Sometime between 1:00 a.m. and 2:00 a.m. on May 9, 1995, Versenia woke up after hearing a noise in the living room. (RT 2135.) When she entered the room, she found appellant sitting in the dark with a baseball bat. (RT 2134-2135.) When she asked him what he was doing, he told her he was waiting for Torey to come home so he could kill him. (RT 2134-2136.)

Versenia called the police. (RT 2136.) Versenia was nervous and shaking when Officer Mesones arrived. (RT 2278-2279.) She told him that appellant was inside the house. (RT 2279.) When Officer Mesones asked appellant if he had threatened to hurt his nephew, he did not respond. (RT 2281.) When Officer Mesones asked him again, appellant responded angrily that Torey had "disrespected my mother by bringing his friends in the house." (RT 2282-2283.) Appellant was somewhat incoherent and rambling when Officer Mesones spoke to him, and he stared straight ahead the whole time instead of looking at the officer. (RT 2283, 2287-2288.) Officer Mesones arrested him and took him to jail. (RT 2282-2283.) He did not appear to fit the criteria for involuntary civil commitment under Welfare and Institutions Code section 5150 at the time he was arrested. (RT 2285.)

At approximately 3:00 a.m., appellant called his sister, Ruth Cole, from jail. (RT 2132-2134.) He explained why he was in jail and asked her to bail him out. (RT 2134-2138.) Appellant gave her specific instructions on how to bail him out. (RT 2137-2138.) Ruth had no difficulty understanding what appellant was saying while they talked on the phone. (RT 2138-2140.) Two or three times during the conversation appellant said that he wanted to kill Torey. (RT 2136.) Appellant said he was upset with Torey because he was being disrespectful towards Eva and bringing people by her house. (RT 2266-2267.) Although appellant had a serious tone when he was talking about wanting to kill Torey, Ruth did not take him seriously. (RT 2138-2140.)

Versenia And Eva Obtain A Restraining Order Against Appellant

Later that morning, Ruth went to her mother's house to find out if what appellant had told her was true. (RT 2138, 2140.) When she pulled up in front of the house, Ruth saw Versenia and her mother getting ready to go somewhere. (RT 2141.) She drove them to the courthouse to get a restraining

order against appellant. (RT 2141-2143.) Eva and Versenia discussed the restraining order in the car on the way to the courthouse. (RT 2144-2147.) When Ruth asked them why they were getting a restraining order, Eva told her that they were afraid because of appellant's actions earlier that morning. (RT 2144-2147.) Eva said that appellant was in the living room with a baseball bat threatening to kill Torey. (RT 2154-2156.) At the courthouse, Versenia filled out the paperwork for a restraining order and her mother signed it. (RT 2157-2176.)[2/]

Appellant Gets Out Of Jail; Eva Gives Him The Keys To Her House

When appellant returned home from jail later that day, he demanded that his mother kick Versenia and her family out and give him the keys to her house. (RT 2233-2234, 2264, 2327, 2369, 2385.) Eva told Versenia to give appellant her keys so he could go make a copy. (RT 2385.) Versenia was upset that Eva gave appellant the keys to her house. (RT 2328.) She "tried to talk Eva . . . into evicting [appellant] because she was afraid, but Eva told Versenia that [Versenia's family] would be the ones evicted." (RT 1862, 2385, 2533.) Versenia told her mother that she would move because she did not want any problems. (RT 2370.) Versenia thereafter made arrangements to move her family out of her mother's house by the first of the month. (RT 1859, 2320, 2328-2329, 2370.)

Later that afternoon, Ruth received a call from appellant. (RT 2182-2183.) He told her he wanted to come by and talk to her. (RT 2182-2184.) Ruth was home alone when appellant arrived. (RT 2186-2187.) He told her that he knew she and Versenia had obtained a restraining order against him. (RT 2187-2188.) Appellant showed her the keys to Eva's house and told her

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2. The restraining order was found on a dresser in Versenia and Sammie's bedroom after the murders. (RT 1792-1795.)

that Eva had given them to him after Versenia told him about the restraining order. (RT 2191-2192, 2264-2265, 2326.) He said at least three times that he was going to kill Torey. (RT 2188-2190.) He said he wanted to kill Torey because he was disrespectful towards Eva and his friends were always "in and out of the house." (RT 2188-2190.) Eva had no trouble understanding appellant during their conversation. (RT 2190.) Ruth defended Torey and reminded appellant that he was old enough to be Torey's father, that he was Torey's uncle, and that he "needed to give Torey support if there was a problem." (RT 2189-2190, 2195.) While Ruth took appellant seriously "up to a point," she could not believe what he was saying. (RT 2191.)

Ruth's husband, Willie Cole, returned home from work while appellant was still talking to Ruth. (RT 2199, 2419.) Appellant told Willie that he was going to kill Torey. (RT 2420.) Willie had no trouble understanding appellant during their conversation. (RT 2420.) When Willie asked appellant why he wanted to kill Torey, appellant took him outside and showed him where Torey had hit his car with a brick. (RT 2421.) Appellant pointed out a small dent on the left, rear fender of the car. (RT 2421.) Appellant told Willie that Torey and his friends had threatened "to get him." (RT 2428-2429.)

May 10, 1995—Appellant Makes Up His Mind To Kill Torey And Buys A Gun

On the afternoon of May 10, 1995, appellant stopped by Elijah's house. (RT 2506.) He said he was fed up with Torey, that Torey would not leave him alone, and that his mind was made up: he was going to kill him. (RT 2506-2507.) Elijah asked appellant to come inside his house and stay with him. (RT 2507.) Appellant said he had to leave, that he was going to buy a .357 Magnum from a "guy" on the "east side" at 7:00 p.m. (RT 2507-2508, 2510.) Appellant told Elijah that he had already withdrawn money from the bank, and that he did not care how much the gun cost. (RT 2508.) Elijah asked appellant to give him

the money. (RT 2508-2509.) Appellant refused; he said he was going to get the gun and hurt Torey. (RT 2509-2510.)

May 11, 1995—Appellant Shoots Torey And Versenia

On May 11, 1995, around 5:40 a.m., Sammie left for work. (RT 1825-1826.) Before leaving, he saw Torey asleep in his bed, which was set up in the dining room. (RT 1825-1826.) Versenia accompanied Sammie to the front door and kissed him goodbye. (RT 1826-1827.)

Around 6:30 a.m. or 6:45 a.m., Elijah called appellant. (RT 2510.) Elijah asked appellant if he had calmed down. (RT 2510-2511.) Appellant told Elijah that he had bought the gun, and that he still felt the same way. (RT 2510-2511.) Elijah begged appellant to stay in the back cottage until he could get there. (RT 2511.) He told appellant to think about their mother; that she was old and it would kill her if appellant killed Torey. (RT 2511.) Because appellant sounded so angry, Elijah tried to hurry up and get over to the house. (RT 2515.)

At approximately 6:30 a.m. to 6:45 a.m., Eva's next-door neighbor, John Adams, went outside to trim his lawn. (RT 1928, 1946.) He did not use any motorized equipment that day. (RT 1929.) Around 7:00 a.m., he went inside his house to wake up his niece for school. (RT 1929, 1947.) After a couple of minutes he went back outside to work in his yard. (RT 1929, 1947.) About ten to fifteen minutes later, he saw appellant back his car down the driveway towards the street. (RT 1929-1931, 1947.) Appellant stopped the car and got out. (RT 1932.) He had on a black cap and a black leather jacket. (RT 1934.) Adams said hello and asked appellant how he was doing. (RT 1932, 1935.) Appellant said okay, and walked inside his mother's house. (RT 1932, 1935.)

Appellant went into his mother's bedroom and asked her about supper. (CT 755-756.)[3] After speaking with his mother, appellant walked down the hallway and turned into the dining room. (RT 2587-2588.) Within seconds, Eva heard two gunshots. (*Ibid.*) She did not hear any voices before hearing the gunshots. (*Ibid.*) From where she was in her bedroom, she had a direct view down the hallway to the door of Versenia's bedroom. (RT 2588-2589.) She saw Versenia come out of her bedroom. (RT 2588-2589.) Versenia called out to her mother that she had "heard a gun shoot and she was going through the house." (CT 756-757.) Eva saw Versenia turn into the dining room and say something like "what are you doing?" or "what is wrong with you?" (RT 2588-2589.) Eva then heard a single gunshot. (CT 756-757; RT 2588-2589.) Eva got out of bed and made her way to the dining room. (CT 756-757; RT 2589-2590.) She saw Versenia in a standing position with blood coming out of her head. (RT 2589-2590.) Versenia slumped to the ground and cried out, "Mother, mother." (CT 756-757; RT 2589-2590.) Eva ran out of the house. (CT 756-757.) She did not see appellant or anyone else in the house when she left. (CT 758-759.)

Approximately five to 10 minutes after seeing appellant go into the house, Adams heard a pop coming from inside the front part of Eva's house. (RT 1935-1936.)[4] From the time appellant entered the house to the time Adams heard the pop, he did not see appellant leave the house or anyone else

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3. The jury was informed that Eva had been found incompetent to testify due to both physical and mental incapacity, namely dementia, Alzheimer's Disease, and diabetes. (RT 1867-1868.) A transcript of Eva's preliminary hearing testimony was then read to the jury (RT 1868; see also CT 755-769.) Her statement to Inspector Bierce the day after the murders was also introduced to impeach her preliminary hearing testimony. (RT 2583-2590.)

4. An evidence technician testified that the dining room was in the front portion of the house. (RT 1769-1770.)

enter it. (RT 1935, 1939.) Adams continued working in his yard until he heard another pop approximately 25 to 30 seconds later, along with what sounded like an "ah" coming from the same area as the pop. (RT 1937.) The "ah" sounded like a female voice, and the pop sounded like a pistol. (RT 1937-1938.) About a minute later, Adams heard another pop. (RT 1938-1939.) Alarmed, Adams went inside his house and called 911 from a cordless telephone. (RT 1939-1940.) He walked over to a window facing Eva's home and saw Eva standing outside in a nightgown. (RT 1939-1941.) Her feet were bare and there was a red substance on them that looked like blood. (RT 1941-1942.) She was hysterical. (RT 1941.) She walked towards his house and called out in an excited voice, "Jim, help me. Help me, Jim." (RT 1941-1942.)[5/] He went to his front door to let her know that he had 911 on the line. (RT 1942.) She said, "They've been shot, they've been shot. Beanie and Torey have been shot." (RT 1942.)[6/] It also sounded as if she said that appellant had shot Versenia and Torey and then shot himself. (RT 1943-1944.) Although Eva was excited, he understood her clearly. (RT 1943-1944.) He tried to reassure her, but she remained hysterical. (RT 1943.) She was still hysterical when the police arrived. (RT 1944.)

Sara Winter lived across the street from Eva. (RT 1985.) She was still in bed around 6:30 to 7:00 a.m. when she heard two or three loud bangs in quick succession coming from outside. (RT 1989-1992.) Not long after hearing the unusual sounds, Winter got out of bed. (RT 1991.) As she walked downstairs, she paused for a moment on the stairwell landing and looked out the window. (RT 1991-1992, 1994.) She saw appellant standing on the porch of Eva's home. (RT 1991-1992, 1994.) When she first saw appellant, he had

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5. Adams testified that everyone in the Blacksher family called him "Jim."

6. Beanie was one of Versenia's nicknames.

his back to her, and it looked as if he had just come out of the house and was closing the front door behind him. (RT 1991-1994.) He then turned so he was facing her and hurried down the stairs of the front porch. (RT 1994-1995.) He moved at a quick pace as if he was in a rush to leave the house and go somewhere. (RT 1994-1995.) He was wearing a dark jacket. (RT 1992.) Winter did not hear any more sounds after seeing appellant on the porch, nor did she see anyone else on the porch or outside the house. (RT 1991-1994, 1997-1998.)

Brian Burke and Teresa Gensler, Eva's other next-door neighbors, were awakened around 7:00 a.m. by three gunshots. (RT 2079-2080, 2089.) There was a pause between the first gunshot and the last two. (RT 2079-2080, 2089.) The shots sounded as if they were coming from Eva's dining room. (RT 2080, 2090.) Gensler heard what sounded like moaning at the end of the shots. (RT 2090.) The moaning sounded female. (RT 2090.) Gensler then heard a car pull away from Eva's home. (RT 2091-2092.) The car sounded as if it was coming from the end of the driveway. (RT 2091-2092.) Burke got out of bed and looked out a window towards Eva's driveway, but did not see anyone. (RT 2080.) Gensler also got out of bed and looked out a front window. (RT 2091.) She saw Eva, Adams, and the police standing outside Adams's home. (RT 2091, 2094.) Eva appeared distressed, confused, and excited. (RT 2095.)

At approximately 7:20 a.m., Berkeley police officers Nicolas Neilsen, Gary Larsen, and Larry Queen were dispatched to Eva's home to investigate a possible homicide. (RT 1869, 1744-1745.) As Officer Neilsen walked towards the house, he saw Eva standing with Adams on the sidewalk in front of Adams's home. (RT 1870-1872.) Eva was wearing nightclothes and no shoes. (RT 1872.) She was distraught, excited, agitated, and concerned. (RT 1872-1873, 1884-1885.) Eva looked anxious to talk to him, as if something serious had just happened. (RT 1872-1873.) Officer Neilsen stopped to talk to her and

"find out what information she had." (RT 1872.) He was "trying to determine what had just happened in the house so that the police could take appropriate action." (RT 1874.) Eva spoke to him first and told him that "her daughter and her daughter's son had just been shot" and that she thought they were both dead. (RT 1873, 1883.) Eva said that appellant had come into her house, spoken to her briefly, and then argued with his sister before shooting her and her son. (RT 1882.) Eva did not know where appellant got the gun, and she did not see the gun when appellant had come into her bedroom to speak to her that morning. (RT 1882-1883.) When Officer Neilsen asked her if appellant was still in the house, she said she did not know. (RT 1882.) Eva said that appellant was wearing a gray shirt and a black leather jacket. (RT 1883.)

While Officer Neilsen talked to Eva outside, Officers Larsen and Queen entered her residence through the front door. (RT 1745, 1747.) From the doorway, Officer Larsen could smell gunpowder and saw Versenia's legs on the dining room floor. (RT 1746.) As he approached her body, he saw that she was lying motionless on her right side and that there was a large pool of blood underneath her head. (RT 1747.) Her right index finger, which appeared to be partially severed, was also surrounded by a large amount of blood. (RT 1776-1777.) After searching the rest of the house, Officer Larsen returned to the dining room where he also discovered Torey's body lying on a bed against the wall. (RT 1748.) Torey's head was resting on a pillow covered in blood, and he was lying motionless on his right side facing the wall. (RT 1748, 1777.) A blanket was partially covering his body. (RT 1777.) Torey's and Versenia's bodies were approximately 12 feet apart. (RT 1773.) The room itself measured approximately 13 feet by 11 feet. (RT 1770.) The doors located at the back of the house were locked from the inside. (RT 1788-1791.)

After Officer Neilsen finished speaking with Eva, he let her sit down in an unmarked police vehicle at the scene. (RT 1876, 2441.) Homicide

investigator Alan Bierce spoke with Eva in the backseat of the car, but did not take a statement at that time because of Eva's distressed state. (RT 2584-2585.)[7] Inspector Bierce requested that a mental health worker be dispatched to the scene to assist Eva. (RT 2584-2585.) Daryl Brand, a family crisis counselor with the Berkeley City Mental Health Department, showed up at the scene in response to the call. (RT 2440.)

Brand met with a police officer at the car. (RT 2442.) He told her that there had been a death in the family, and asked her to take care of Eva. (*Ibid.*) Brand got into the car with Eva. (*Ibid.*) Eva appeared to be in shock and did not look well; she was quiet and in a state of denial. (RT 2442, 2444.) Brand called in the paramedics because she was concerned about Eva's physical health; Eva kept talking about her high blood pressure and was having trouble with her concentration and memory. (RT 2444.) While she was with Eva, Brand did not ask her any questions about what had happened in the house. (*Ibid.*)

It was later determined that both Torey and Versenia died of gunshot wounds to the head. (RT 2055-2056, 2403.) Torey was shot in the back of the head. (RT 2403.) A bullet passed through the mid-back, left side of his head, into his brain, and then out the top-front, right side of his head. (RT 2403-2406.) A bullet also passed through a pillow lying less than one foot from Torey's head before hitting the wall next to his bed. (RT 1778-1787.) There was blood on both sides of the pillow, and "a slight bit of fiber" in the hole in the wall. (RT 1782-1785.) The bullet that passed through the pillow appeared to have been shot at a downward angle from the center of the room. (RT 1780-1781.) Versenia was shot on the right side of her head above her right ear. (RT 2057.) A bullet passed through her right index finger before hitting her in the

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7. As noted above, Inspector Bierce took a formal statement from Eva the next day. (RT 2585.)

head, leading the coroner to conclude that her finger was very close to her head at the time she was shot. (RT 2057, 2060-2061.) The bullet passed through the right, front part of her head and lodged into the right, back part of her brain. (RT 2062.)

The coroner who performed Torey's autopsy noted the presence of an old shotgun injury to his arm and surgical scars on his abdomen. (RT 2408-2410.) The coroner also detected traces of morphine, codeine, cocaine, and methamphetamine in his bloodstream, although their presence did not contribute to his death. (RT 2407.) Three cellophane wrapped bundles containing suspected rock cocaine and a total of twelve dollars were found in Torey's sock. (RT 1811-1812, 1814, 1818-1819.) According to Elijah, Torey was a drug dealer who sustained the injuries to his arm and abdomen when other dealers retaliated against him for stealing their drugs. (RT 2520-2521.)

It was determined that bullet fragments recovered from Torey's bed and Versenia's head made up two separate bullets that were fired by the same gun. (RT 1778-1779, 1785-1787, 2062-2064, 2570, 2573-2575.) The bullets were fired by either a .357 Magnum or a .38 Special revolver. (RT 2576-2577.)

Appellant's Flight From The Scene And His Calls To Family Members

Around 7:40 a.m. on the morning of the murders, Frances received a telephone call from appellant. (RT 2299.) He sounded nervous. (RT 2300.) When he asked to speak to James, Frances told him James had already left for work. (RT 2300.) He then asked Frances to go check on his mother. (RT 2300.) When Frances asked what was wrong, appellant said that he had heard gunshots in the house. (RT 2300.) Frances told appellant she had no way of getting over to his mother's house. (RT 2300-2301.) She suggested that he go inside the house to check things out for himself since he was already there. (RT

2300.) Appellant said he did not want to be a witness to whatever had happened inside the house. (RT 2301.)

After hanging up with appellant, Frances talked to James and told him about her conversation with appellant. (RT 2351.) James went over to his mother's house and found her sitting in the car with Brand. (RT 2351-2352.) His mother was hysterical and upset, and was "screaming and hollering." (RT 2351-2352.) When he asked her what was happening, she told him that appellant had killed Torey and shot Versenia. (RT 2352-2353.) She said that after Versenia was shot, she fell down into Eva's arms and said, "Mama." (RT 2353.)

Frances had some friends drive her over to Eva's house. (RT 2301.) When she arrived at the scene, Eva was sitting inside the car with Brand. (RT 2301.) Eva had blood all down the front of her housecoat and on her shoes. (RT 2304.) Eva looked upset. (RT 2305-2306.) When Frances asked her what had happened, Eva told her that appellant had shot Torey and Versenia, and then he "went down the street just as fast as he could that way." (RT 2306-2307.) Eva said that appellant shot Torey while he was sleeping, and that he shot Versenia in the head. (RT 2306-2307.) Eva told Frances that Versenia fell into her arms after she was shot. (RT 2306-2307, 2310-2311.) Blood was streaming from her head, and it got all over Eva's clothes. (RT 2310-2311.) Eva said that she and Versenia had heard gunshots and that when they ran into the dining room, Eva saw appellant shoot Versenia. (RT 2331-2332.) Eva remarked that appellant did not have to shoot Versenia and Torey. (RT 2306-2307.)

Around 7:45 a.m. that morning, Ruth was in bed and Willie was sitting in the kitchen when the phone rang. (RT 2199, 2423.) They both picked up the phone at the same time. (RT 2423.) Appellant was on the line. (RT 2199, 2423-2424.) He told Ruth that he was worried about their mother. (RT 2425.)

He said, "I heard gunshots at the house. There's a lot of noise and a lot of hollering and screaming and you need to come see about mama." (RT 2200, 2423-2425.) Appellant sounded serious. (RT 2201.) He told her that he saw two men wearing ski masks on the steps of the front porch. (RT 2201, 2423-2424.) He asked her to call the police and report what he had told her. (RT 2202.) When Ruth asked appellant where he was, he told her that he had left in his car and driven to a friend's house in Oakland. (RT 2203, 2206, 2426.) He would not be more specific when she asked him which friend. (RT 2203.) When Ruth asked appellant why he did not just call the police himself, he said that he was afraid they would question him. (RT 2204, 2424.) After hanging up with appellant, Ruth and Willie went over to Eva's house and found out that Versenia and Torey were dead. (RT 2206, 2433.)

Appellant Purchases A Bus Ticket To Reno

Later that same day, appellant went to a travel agency and purchased a bus ticket to Reno and made a room reservation for one night at Harrah's Reno. (RT 2016-2018, 2036-2038.) He listed his address as 3045 Belfast Way, Richmond, California (RT 2016-2017, 2038), which was Ruth's address. (RT 2113, 2131.) The bus left at 12:55 p.m. that day. (RT 2036-2038.)

May 13, 1995—Appellant Turns Himself In To Police

At approximately 2:30 a.m. on May 13, 1995, Berkeley police officer Martin Heist was sitting in his patrol car outside the police station writing a report when he looked up and saw appellant standing next to the front door of the police station. (RT 2543-2544.) The front door was closed at the time. (RT 2543-2544.) Appellant walked over to Officer Heist's patrol car and said something like, "I believe you're looking for me," or "are you looking for me?" (RT 2546.) When Officer Heist asked him who he was, appellant said, "Erven Blacksher." (RT 2546.) The officer recognized the name and knew that appellant was wanted. (RT 2546.) He searched appellant and handcuffed him.

(RT 2546.) Appellant had a small paper bag with him containing toiletries. (RT 2547-2548.) He was wearing a t-shirt with the words "Reno, Nevada" on the front, and a new pair of blue jeans. (RT 2444-2445.)

Defense Case

The defense played a tape of John Adams's 911 call on the morning of the murders. (RT 2619-2620; see also CT 662-664.) Adams told the 911 dispatcher that a person had just been killed at 1231 Allston Way. (CT 662.) He stated that he had heard gunshots, and that the mother living in the house had told him that her son had shot her daughter. (CT 662.) When the dispatcher asked if the son was still there, Adams consulted with Eva and stated, "Erven's dead too. Oh, she says the guy who did the shooting supposedly has shot himself and he's also shot her daughter." (CT 662.) When the dispatcher asked where the shooting took place, Adams again consulted with Eva and responded, "the dining room." (CT 663.) The dispatcher then asked if both the bodies were in the dining room and Adams responded, "Both are in the dining room, she said." (CT 663.) In response to the dispatcher's inquiry of whether the son shot the daughter in the head and then shot himself, Adams replied, "Well, he did, supposedly he shot her in the head and . . . shot himself." (CT 664.) When the dispatcher asked if there had been an argument that morning, Adams said, "I also think he's had a case of mental illness . . . over the years." (CT 664.) Adams later told a police officer at the scene that appellant had some kind of mental illness. (RT 1945-1946.) Eva had one time mentioned to him in passing that appellant had a mental problem. (RT 1976.)

The defense also introduced evidence that appellant had applied for Social Security Income Disability payments on four occasions. (RT 2624.) The first time, in September 1979, appellant's application was denied for medical reasons. (RT 2624.) The second application was approved in November 1979,

with payments beginning in February 1980, and ending in October 1982 when appellant began living in a public institution. (RT 2624.) A third application filed in July 1984 was denied for medical reasons. (RT 2624.) A fourth application was approved in October 1986, with payments beginning in December 1986, and ending in January 1996 when appellant began living in a public institution. (RT 2624.) Appellant had been found eligible to receive Social Security Income payments based on a disability of paranoid schizophrenia. (RT 2623-2624.) All payments were sent directly to appellant. (RT 2624-2625.) Because appellant's Social Security Income folder was not available at the local regional office, the defense had no information concerning appellant's medical condition or the names or addresses of his treating or diagnostic physicians. (RT 2624.)

Sammie, Ruth, James, and Willie all denied knowing that appellant had a mental illness (RT 1842-1845, 2215, 2244-2247, 2397-2398, 2435), while Elijah Blacksher said that he was aware of his brother's mental illness (RT 2516-2517, 2523, 2526, 2528, 2534, 2541-2542). Elijah said that his mother was protective of appellant because of his disability. (RT 2528.) To impeach the testimony of Sammie, Ruth, James, and Willie, appellant introduced the testimony of clinical psychologist Gerald Davenport, who detailed appellant's history of mental illness.

Dr. Davenport testified that he examined appellant in 1984 and again in 1996. (RT 2638-2639.) During his examinations of appellant, he documented appellant's history of mental illness. (RT 2639.) He obtained such information through the records of the Criminal Justice Mental Health Unit. (RT 2647.)[8/] In 1975, appellant was hospitalized at Napa State Hospital for suicidal ideations. (RT 2641-2642.) He was again hospitalized in 1977 and tentatively

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8. Elijah testified that appellant had been in and out of jail for most of his life. (RT 2539-2540.)

diagnosed with schizophrenia and chronic alcoholism. (RT 2642.) In 1981, he was hospitalized at Herrick Hospital for multiple episodes of psychotic depression. (RT 2642-2643.) In 1984, he was hospitalized at Highland Hospital for 36 days due to a progression of symptoms, which included religious delusions and the belief that "people were plotting against him." (RT 2642-2644.) As a result of the 1984 hospitalization, appellant was prescribed antipsychotic medications, which he stopped taking once he was released from the hospital. (RT 2644.) Dr. Davenport opined that appellant probably regressed to a psychotic state once he stopped taking his medications. (RT 2644.) In 1986, appellant was hospitalized at Walnut Creek Hospital for two days and diagnosed with chronic, paranoid-delusional schizophrenia. (RT 2644-2645.) Appellant's medical records from 1987 indicated that he was using a tremendous amount of energy to keep his psychotic symptoms under control, and that his diagnosis was schizophrenia differentiated with psychotic features in remission. (RT 2679.) In all, appellant received mental health treatment on eight different occasions during the period from 1986 to 1996. (RT 2689-2690.) Assuming that appellant had been diagnosed with paranoid schizophrenia on 10 to 15 prior occasions, Dr. Davenport would suspect that appellant actually had the disease. (RT 2679.)

During Dr. Davenport's 1984 examination of appellant, he diagnosed appellant with paranoid schizophrenia in remission, and concluded that appellant did not have a psychiatric disorder that rendered him incompetent to stand trial. (RT 2663, 2675-2676.) At that time, appellant was oriented in all spheres, did not manifest any overt signs of psychosis or mental illness, had an intact memory, was of average intelligence, and was capable of rational thought. (RT 2663-2664.) During the 1996 examination, appellant was oriented in all spheres, understood the charges against him, and vehemently denied responsibility for the murders of his sister and nephew. (RT 2661-

2662.) Although Dr. Davenport did not give appellant a diagnosis at that time, he felt that appellant was schizophrenic based on his behavior during the interview. (RT 2639, 2676.) Appellant was somewhat guarded and suspicious, agitated, hyperactive, and unable to sit still. (RT 2641, 2644, 2676.) He moved around a lot, spoke loudly, and became overly involved in his thoughts. (RT 2677, 2679.) He had bizarre verbiage, his thinking was loose and tangential, he had delusions of persecution, and he seemed to be responding to internal stimuli. (RT 2677-2678.) He was also euphoric, laughing loudly for no apparent reason. (RT 2678.) Like most mentally ill persons, appellant denied that he had a mental illness or that he was experiencing any hallucinations, delusions, or suicidal or homicidal ideations. (RT 2660-2661, 2677.)

At the conclusion of Dr. Davenport's testimony, the following two stipulations were read to the jury: (1) that the court had reviewed two media videotapes taken of Eva on the morning of the murders and did not observe any blood on her person from the mid-thigh upward (RT 2632-2633); and (2) Frances Blacksher never told the defense investigator that Eva told her she actually observed the shooting of Versenia (RT 2690).

SANITY PHASE

Defense Case

Appellant's Mental Health Treatment While An Inmate At Santa Rita Jail In 1978, 1980, And 1981

In 1978, 1980, and 1981, appellant was an inmate at the Santa Rita Jail. (RT 3043, 3048.) Sophie Miles, an unlicensed mental health specialist at the jail, treated appellant there in 1978 and 1981. (RT 3007-3009, 3033.) During their first meeting in January 1978, appellant had a flat affect, was mildly depressed and anxious, and was having trouble sleeping. (RT 3010.) Appellant reported past heroin use, but stated that he had not done so for two years. (RT

3011.) According to Miles, chronic abusers of heroin can suffer from auditory or visual hallucinations. (RT 3011.) At the same time, many people with a mental illness who suffer from hallucinations or psychotic symptoms self-medicate by using heroin or alcohol. (RT 3011-3012.) Appellant was given a diagnosis of depressive reaction and alcohol abuse, and prescribed the antipsychotic drug, Mellaril. (RT 3012, 3056.)

While appellant appeared to have improved by his second visit, he seemed depressed again on his third visit. (RT 3014-3015, 3021-3022.) He complained that he had been having nightmares that caused him to wake up sweating, and reported feeling helpless and hopeless about his situation. (RT 3022-3023.) Although he had a sad affect, it was appropriate and he was speaking clearly. (RT 3022-3023.) Approximately 10 minutes into the visit, his mood changed and he became more positive. (RT 3022.) On his fourth visit, he was continuing to feel depressed. (RT 3026.) He felt rejected by his family because he had not heard from them in three weeks. (RT 3026.) Miles explained that patients need support from their families and can become more depressed if such support is lacking. (RT 3026-3027.)

Miles later saw appellant as a voluntary commitment when he turned in a request slip to see her. (RT 3030, 3048.) He was given a diagnosis of psychotic depressive reaction and continued on Mellaril. (RT 3030.) Miles explained that the term "psychotic" meant that appellant was hearing or seeing things, not making sense when he was talking, or that his mind was "just not all there." (RT 3030.)

Jail officials eventually sent appellant to Highland Hospital for 72 hours of involuntary mental observation. (RT 2974, 2976, 3005.) Ruth Gades, a licensed social worker with a master's degree in psychology, conducted an intake evaluation of appellant at the Inpatient Criminal Justice Unit. (RT 2974, 2976.) At the time, Gades had just begun working for the inpatient unit, and

appellant "was probably the first, if not one of the first, people [Gades] saw." (RT 2974-2975, 2979.) Since then, Gades had seen "hundreds" of patients. (RT 2979.)

Appellant complained that he was having trouble sleeping, hearing voices, seeing a little man, and feeling suicidal. (RT 2977.) He stated that he had been seeing the little man intermittently for the past two years, and that the hallucination had recently become more severe. (RT 2981.) Appellant was so bothered by the hallucination that he no longer cared about living. (RT 2981.) Despite having suicidal thoughts, appellant expressed confidence in his ability to control himself and to seek help from staff if he felt he was going to injure himself. (RT 2982-2983.)

When Gades asked appellant about his medical history, he reported only one prior hospitalization—a three-day stay at Napa State Hospital for suicidal thoughts, which ended in his voluntary discharge before he had received any treatment. (RT 2978-2979.) Appellant also reported receiving head injuries at ages 10 and 16, and abusing alcohol on a daily basis for two to three months prior to his incarceration. (RT 2978-2979, 2985-2986.) Gades testified that in her experience it was not uncommon for mental patients to deny their mental illness, but "certainly" not as common as "people acknowledging their mental illness." (RT 2979-2980.) Gades noted that it depended on the "setting." (RT 2979.) Gades also testified that mentally ill persons sometimes self-medicated with alcohol or drugs, and that drug or alcohol abuse could contribute to both visual and auditory hallucinations. (RT 2980.) As Gades did not have access to any of appellant's mental health records outside the Criminal Justice Unit, she had to rely entirely on the information appellant reported to her in evaluating his condition. (RT 2984-2985.) Gades gave appellant a diagnosis of psychotic depression with auditory and visual hallucinations and suicidal ideation. (RT 2984.) He was prescribed Mellaril and voluntarily discharged

from the hospital. (RT 2981.) Appellant did not appear manipulative to the doctor who treated him. (RT 3003.)

Gades saw appellant again in 1980 when he was sent back to the hospital by jail authorities for another 72 hours of involuntary mental observation. (RT 2988-2989, 3003.) Appellant was moody and depressed, and his affect was flat. (RT 2987, 2990.) He complained of hearing voices and feeling suicidal. (RT 2988-2991.) He reported that he had been seeing a physician at Berkeley Mental Health prior to his incarceration, and that he had been prescribed Mellaril. (RT 2988.) Gades's clinical impression of appellant was that he was psychotically depressed and suicidal. (RT 2988, 2990.)

On cross-examination, Gades testified that in looking over her records of appellant, she no longer agreed with her previous diagnosis. (RT 2993.) Gades explained that at the time she saw appellant, she believed everything he told her and relied entirely on the information provided by him in making her diagnosis. (RT 2992.) After 20 years in the field, Gades would approach the situation differently and question some of the things appellant told her. (RT 2993-2994.) For instance, Gades would be more skeptical of appellant's claimed hallucination of a little man and question whether he was exaggerating his symptoms in order to attain some secondary gain such as admittance to a mental health facility. (RT 2993-2994.) That type of hallucination was not something she had "seen since," and she would expect appellant to be more agitated by it. (RT 2994-2995.) Gades explained that in the criminal justice setting "you need to look at these things very closely"; that sometimes there is a "degree of manipulation" involved. (RT 2994.)

Also on cross-examination, Gades noted that appellant had a history of drug and alcohol consumption, and that he had been using drugs before his admission to Napa State Hospital. (RT 2997-2998.) Because appellant appeared to be suffering from the temporary effects of alcohol abuse when she

saw him, the doctor gave him a diagnosis of "other alcohol psychosis" upon discharge. (RT 2996-2997.) The doctor ruled out "secondary alcohol abuse" at that time because appellant did not appear to be suffering any permanent effects of alcohol abuse. (RT 2998.) Gades acknowledged that she had not been asked in either 1978 or 1980 to render an opinion as to whether appellant was legally insane. (RT 2992.) Gades also noted that depression is not the same as legal insanity, and that psychotic depression is not the same as paranoid schizophrenia. (RT 2992.) She never gave appellant a diagnosis of paranoid schizophrenia. (RT 2999.)

Appellant was arrested and sent back to jail in 1981. (RT 3054-3055.) Psychiatrist Jeffrey Weiner conducted an intake evaluation of appellant at that time. (RT 3054-3055.) Appellant complained of hearing voices and having trouble eating and sleeping. (RT 3056.) Appellant said that he had lost 10 to 15 pounds as a result of his lack of appetite. (RT 3058.) Appellant reported a history of multiple episodes of psychotic depression, and a recent two-week hospitalization for attempting suicide by taking an overdose of sleeping pills. (RT 3057-3058.) Appellant told Dr. Weiner that he had been taking Mellaril before he was arrested, but that he had not received his medication since being in jail. (RT 3056.) Appellant said that he wanted to be restarted on the Mellaril. (RT 3056.) He also asked if he could see therapist Sophie Miles on an ongoing, outpatient basis. (RT 3058.)

Dr. Weiner noted that appellant showed little emotion and had a constricted affect during the examination, and that his symptoms were consistent with depression. (RT 3058.) He gave appellant a diagnosis of recurrent major depressive episodes with psychotic features, and restarted him on Mellaril. (RT 3057, 3059.)

On cross-examination, Dr. Weiner acknowledged that incarcerated persons commonly suffer from depression and that appellant was not psychotic

when the doctor examined him. (RT 3060-3061.) Dr. Weiner also acknowledged that he was not asked to give an opinion as to whether appellant was legally insane at the time he examined him. (RT 3060.)

Miles saw appellant again during his incarceration in 1981. (RT 3033.) He was depressed, anxious, and angry with his mother-in-law, whom he felt was responsible for dissension between him and his wife. (RT 3033, 3036.) He dealt with his problem in a calm and realistic way, and appeared to have good impulse control. (RT 3037.) He was given a diagnosis of psychotic depressive reaction and prescribed Thorazine for his psychotic symptoms and Flurazepam for his anxiety. (RT 3030, 3033.) The Flurazepam was eventually discontinued. (RT 3037-3038.)

On cross-examination, Miles acknowledged that she had not been asked to give an opinion on appellant's sanity at the time of the murders, and that she had no opinion or evidence as to his sanity at that time. (RT 3040.) Miles noted that if a person suffering from paranoid schizophrenia stopped taking his medications for seven or eight years, he would probably call attention to himself and end up in a psychiatric ward. (RT 3041-3042.) For instance, the person would begin talking to himself or hear voices telling him to do things like hit innocent people on the street. (RT 3041.) It would be unusual for a person to go for such a long period of time without medication and not show any symptoms. (RT 3041.) On the occasions Miles saw him appellant was able to communicate clearly. (RT 3045.) He was not delusional and he did not show any signs of being psychotic or out of touch with reality. (RT 3044.) He was never diagnosed with paranoid schizophrenia during the time she saw him. (RT 3046.) Miles acknowledged that appellant was in jail for committing various crimes at the time that she saw him, and that he had to turn in a request slip to see her. (RT 3043, 3048.)

Appellant's Mental Health Treatment In 1986

In 1986, appellant's parents became alarmed when appellant began insisting that he was a woman. (RT 3103.) They took him to see his parole officer who questioned him about his delusion. (RT 3103.) Appellant was then sent to Highland Hospital for an evaluation. (RT 3100.) After it was determined that appellant was in need of psychiatric care, he was involuntarily admitted to Walnut Creek Hospital, a private psychiatric facility, pursuant to section 5150. (RT 3098-3100.) Dr. Michael Levin, a staff psychiatrist at Walnut Creek Hospital, was appellant's treating physician. (RT 3097-3098, 3100.)

Appellant reported that a "terrible mistake" had been made and that he was raised as a man when he was really a woman. (RT 3103.) Appellant was so agitated that he had to be injected against his will with Haldol, a potent antipsychotic medication. (RT 3104.) Appellant was confined to a locked unit of the hospital for three days, during which time he remained delusional. (RT 3105, 3124-3127.)

Appellant was given a diagnosis of schizophrenia, paranoid type, chronic and delusional, and was prescribed Mellaril. (RT 3106-3107.) Against the advice of Dr. Levin and the wishes of his family, appellant refused to remain in the hospital voluntarily. (RT 3105-3106.) Appellant remained unimproved upon his discharge from the hospital; his degree of impairment was severe, and his prognosis was poor. (RT 3105.)

Dr. Levin explained that Mellaril is an antipsychotic medication that is prescribed to people with major mental illnesses, like schizophrenia, who are experiencing psychotic symptoms. (RT 3106-3107.) People with schizophrenia are often isolated from the rest of the world; they keep to themselves and are unable to maintain normal social functions. (RT 3109.) They are unable to maintain jobs, and those with severe disorders are unable to

maintain marriages or long-term relationships. (RT 3109.) It is not a good idea to confront a person who is in a psychotic state. (RT 3122-3123.) Even though symptoms may only occur episodically and can often be treated with newer medications, schizophrenia is a lifelong disease. (RT 3110, 3115.) Dr. Levin would not change his opinion about appellant's diagnosis even if it could be shown that appellant had a history of drug and alcohol use. (RT 3113.) He had no opinion, however, on whether appellant was sane on May 11, 1995. (RT 3130-3131.)

Expert Testimony On Appellant's History Of Mental Health Treatment And His Mental State At The Time Of The Murders

Dr. William Pierce, a clinical psychologist, testified as an expert witness for the defense. (RT 3068, 3073.) Dr. Pierce was contacted by defense counsel in 1995 and asked to conduct a psychological evaluation of appellant. (RT 3073.) Dr. Pierce examined appellant in 1995 and again in 1997. (RT 3079.)

Dr. Pierce observed a pattern emerge when appellant was speaking that was indicative of thought disorder, a symptom of psychosis and schizophrenia, which can interrupt one's concentration, attention span, and psychological functioning. (RT 3081, 3184-3185.) Appellant had loose associations with fragmented and tangential thinking, while his speech was pressured, rambling, bizarre, and sometimes incoherent. (RT 3081, 3184-3185.) Dr. Pierce conducted some tests and noted that it took appellant an inordinate amount of time to finish some of the tasks, which revealed the extent of his internal preoccupation. (RT 3184-3185.)

Appellant had a history of drug abuse and juvenile delinquency, which is not unusual for someone with a mental health history. (RT 3088, 3091-3093.) During appellant's commitment to the Youth Authority, he admitted being depressed and having suicidal thoughts. (RT 3094.) During appellant's

last juvenile commitment, he was referred for a 90-day psychiatric evaluation, which did not result in a diagnosis. (RT 3093.) During the evaluation, appellant scored in the retarded range on an IQ test. (RT 3094-3095.) However, the version of the test taken by appellant was later criticized as racially biased. (RT 3094-3095.) During Dr. Pierce's own evaluation of appellant, he scored in the low-normal range on the updated version of the IQ test. (RT 3094-3095.)

Appellant's mental illness first came to light in 1975, when appellant was 21 years old. (RT 3095.) During a meeting with his probation officer, appellant appeared disorganized, confused, withdrawn, and depressed. (RT 3095.) Appellant was using heroin and having problems with his parents at the time. (RT 3095.) He was sent to Highland Hospital and then to Napa State Hospital as a self-commitment. (RT 3095, 3138-3139.)

Appellant was again referred to Highland Hospital in 1977, while he was incarcerated at Santa Rita jail. (RT 3140-3141.) In 1978, while appellant was receiving treatment through the jail's mental health unit, he was once again referred to Highland Hospital. (RT 3142-3144.) In 1979, while appellant was out of custody and being seen at Berkeley's Mental Health Clinic, he was admitted to Highland Hospital pursuant to section 5150. (RT 3144-3147.) His diagnosis at that time was schizophrenic reaction, residual type. (RT 3144-3147.) In 1980, while incarcerated at the Santa Rita jail, appellant was again admitted to Highland Hospital pursuant to section 5150. (RT 3148-3150.) Afterwards, he was seen in follow-up visits at the Criminal Justice Mental Health Program at Fairmont Hospital. (RT 3150.) In 1981, appellant was hospitalized at Herrick Hospital after taking an overdose of sleeping pills. (RT 3151-3153.)

Dr. Pierce noted that appellant had no psychiatric records from October 1981 to June 1984. (RT 3153.) Then, in 1984, while appellant was on parole,

his girlfriend brought him in for emergency psychiatric services. (RT 3153-3154.) Appellant had been unable to sleep for five days and was experiencing increased religious preoccupation. (RT 3154.) Appellant was sent home after being prescribed Mellaril. (RT 3155.) After taking an overdose of Mellaril, appellant was admitted to Highland Hospital pursuant to section 5150. (RT 3155.) He was depressed and paranoid, and exhibiting bizarre behavior. (RT 3155-3156.) A couple of months later, appellant's mother and sister-in-law called the Berkeley Police Department and reported that appellant was behaving strangely. (RT 3156-3157.) He was disoriented, agitated, belligerent, paranoid, hearing voices, displaying loose associations, talking incoherently, had increased motor activity, and his speech was rambling and tangential. (RT 3156-3157.) Appellant was admitted to psychiatric emergency services pursuant to section 5150, was given Mellaril, and sent home. (RT 3156-3158.)

That same year, appellant's parole was revoked after he started acting strangely at home again. (RT 3158-3159.) After being evaluated by a therapist at the jail, he was sent to Highland Hospital pursuant to section 5150. (RT 3158-3159.) Appellant was having paranoid thoughts and auditory and visual hallucinations, and was diagnosed with bipolar disorder mixed with psychotic features. (RT 3161-3163.) He was treated with several different psychotropic medications in an effort to curb his symptoms. (RT 3161.) Appellant received follow-up treatment from the Criminal Justice Mental Health Program. (RT 3165.) During his follow-up treatment, appellant stopped taking Mellaril and Lithium after complaining of their side effects. (RT 3165.) Appellant was eventually incarcerated at the California Medical Facility (CMF), where he gained the attention of staff psychologists. (RT 3165-3166.) At some point in 1984, appellant was evaluated for his competence to stand trial. (RT 3176.) Although both doctors found him competent, one doctor questioned whether he had a long-standing delusional system and a psychotic character structure,

while the other gave him a primary diagnosis of schizophrenia paranoid type in remission. (RT 3176.)

In 1986, the Board of Prison Terms referred appellant for a psychological evaluation. (RT 3166.) Appellant was diagnosed with schizophrenia, undifferentiated with paranoid features in remission, mixed substance abuse, episodic, and antisocial personality disorder. (RT 3166.) That same year, appellant's parents took him to see his parole officer. (RT 3168.) Appellant had the delusion that he was a woman, and was displaying intense religious preoccupation. (RT 3168.) He was admitted to psychiatric emergency services pursuant to section 5150, and was eventually transferred to Walnut Creek Hospital for treatment of his delusion. (RT 3168-3169.) In December 1986, appellant's fourth application for Supplemental Social Security Income payments based on a disability of paranoid schizophrenia was approved. (RT 3179.)

From 1987 to 1988, appellant was incarcerated at CMF. (RT 3170-3174.) He claimed he was homosexual and asked to be placed in administrative segregation. (RT 3170-3174.) Appellant exhibited strange behavior while at CMF, and was given the diagnosis of probable paranoid schizophrenia. (RT 3170-3174.)

Dr. Pierce noted that appellant had no mental health treatment or intervention records after January 1988, although he opined that there were sufficient grounds for a "5150 commitment" on May 8, 1995, the date Versenia had appellant arrested for threatening to kill Torey with a baseball bat. (RT 3174-3176.) On that date, Versenia told police that appellant was schizophrenic, that he was not taking his medication, that he often became angry at random people for no apparent reason, and that he had carried out threats of violence in the past. (RT 3174-3175.)

In 1996, appellant was again evaluated for his competency to stand trial. (RT 3177.) One doctor found him incompetent, while a second doctor found him competent. (RT 3177-3178.) A third doctor brought in "to break the tie" found appellant competent, although he found that appellant had a chronic mental illness, namely, schizophrenia, paranoid type. (RT 3177-3178.)

After reviewing appellant's mental health records, conducting interviews with appellant's family and friends, and examining appellant, Dr. Pierce's diagnostic impression of appellant was schizophrenic reaction, paranoid type. (RT 3185.) Appellant had a severe thought disorder, a high potential for exhibiting impulsive and emotional behavior, a poor ability to control a vivid fantasy life, and difficulty in separating internal experience from external reality. (RT 3185.) Based on the May 8, 1995, police report, Dr. Pierce opined that appellant was having a paranoid or psychotic episode when he killed his sister and nephew three days later. (RT 3185.)

On cross-examination, Dr. Pierce acknowledged that appellant gave him contradictory stories about where he was on the morning of the murders. (RT 3191-3192.) Although he initially denied being in his mother's house, he eventually admitted being there and speaking with her. (RT 3191-3193.) Appellant told Dr. Pierce that after he told his mother he was hungry, he heard someone at the front door. (RT 3193-3194.) He went into the bathroom and heard gunshots. (RT 3193-3194.) After calling his sister and sister-in-law and telling them to call 911, he took a bus to Reno. (RT 3193-3194.) Appellant told Dr. Pierce that he could have changed his name and left the country, but that he came back and went to the Berkeley Police Station instead. (RT 3194.) Appellant denied being involved in the murders of his sister and nephew. (RT 3195, 3199.) When Dr. Pierce asked appellant why he called his sister and sister-in-law, appellant claimed that he had become worried that someone in the house had been hurt because he had seen two men with ski masks on the front

porch. (RT 3196.) Dr. Pierce did not believe everything appellant told him; he thought appellant was lying about some things and minimizing other things. (RT 3196-3197.)

Dr. Pierce described some of the symptoms appellant would have experienced during a psychotic episode, including significant disruptions to his cognitive functions. (RT 3200.) Dr. Pierce then went on to testify that appellant's behavior before, during, and after the murders showed some level of cognitive functioning. (RT 3200-3202, 3223-3228.) Based on the testimony of appellant's brothers and sisters, Dr. Pierce was of the opinion that appellant could probably distinguish between right and wrong at the time of the murders, and that he intended to kill Torey. (RT 3204-3205, 3211.) Dr. Pierce admitted that he could not know for sure what appellant's mental state was on the day of the murders. (RT 3249.)

Testimony Regarding Appellant's Mental State And History

The parties stipulated that the jury could consider the following guilt-phase evidence during the sanity phase: (1) The testimony of John Adams regarding appellant's mental state and history, his knowledge of appellant's history, and the incident involving the female stranger appellant challenged to a fight, as well as Adams's statements on the 911 tape; (2) Elijah Blacksher's testimony regarding appellant's mental state and history; and (3) Officer Mesones's testimony regarding statements Versenia made to him about appellant's mental state and history. (RT 3259.)

Prosecution Case

Appellant's Comments To Family Members About "Beating The System"

Appellant's older brother, Artis Blacksher, testified that he was about 15 years older than appellant, and that he moved away from home when appellant

was about 5 years old. (RT 3312.) Appellant was the youngest child in the family. (RT 3312.) Their father was a strict disciplinarian who whipped the children when they did not obey him. (RT 3310.) Their father treated appellant no differently than the rest of his children. (RT 3313.) Their mother, on the other hand, let appellant get away with things because he was her favorite child. (RT 3313.)

Artis saw appellant on an irregular basis when appellant was in his teens and a young adult. (RT 3314.) Appellant used to brag that he was not going to work for a living. (RT 3315.) Artis told appellant that he could not beat the system; that he had to work for a living like everyone else. (RT 3314.) Appellant told Artis that he was stupid for working and that he was merely a "flunky for the white boy." (RT 3315.)

After their father died, appellant moved into the back cottage behind his mother's home. (RT 3315.) Artis would come over to his mother's house to help in the yard. (RT 3315.) Appellant would sit on the porch and laugh at Artis while he worked in the yard. (RT 3315.) When Artis lectured appellant about not working, appellant told Artis that he was crazy and that working was not his "thing." (RT 3315.)

Up until the time of the murders, Artis thought he knew appellant pretty well. (RT 3316.) To Artis's knowledge, neither of his parents and none of his siblings had ever needed psychiatric care. (RT 3316.)

Appellant's older sister, Ruth Cole, testified that appellant was the same age as her daughter. (RT 3375-3376.) Ruth lived with her parents until her daughter was three years old. (RT 3375-3376.) During that time, appellant and her daughter were "brought up together." (RT 3375-3376.) Ruth kept in touch with appellant on and off while he was a teenager. (RT 3376.)

Appellant used to say that he was "not going to work for whitey." (RT 3377.) Ruth told him that he needed to work to get along in life. (RT 3377.) Appellant told her that he was going to "beat the system." (RT 3377.)

When appellant was still in his teens, his mother became disabled while working. (RT 3377-3378.) Appellant was put on Social Security Disability Income along with her. (RT 3377-3378.)

When appellant became a young adult, Ruth continued to talk to him about the need to work for a living. (RT 3378.) Appellant's response was always the same: he told her he did not want to work, that he was not going to work, and that he did not have to work—that he could always rely on women to take care of him. (RT 3378.) He told Ruth she was crazy to work. (RT 3379.)

A month after the murders, appellant wrote his mother a letter. (RT 3379.) In his letter, he referred to Torey as a "punk." (RT 3382.)

Appellant's Interview With The District Attorney's Office Two Days After The Murders

Richard Moore, a Deputy District Attorney with the Alameda County District Attorney's Office, interviewed appellant on May 13, 1995, two days after the murders of Torey and Versenia. (RT 3280-3283.) During the interview, appellant was agitated, annoyed, and hostile. (RT 3287.) Appellant did not cry at any point during the interview. (RT 3287.) A tape of the interview was played for the jury. (RT 3287.)

Appellant told Moore that at approximately 7:00 a.m. on the morning of the murders, he walked out of his house, backed his car down the driveway, exchanged pleasantries with his next-door-neighbor, and entered his mother's house through the front door. (Exhibit 111 at 3, 6.) After entering the house, he walked past the door to Versenia's bedroom, which was closed at the time, and entered Torey's bedroom. (*Id.* at 6-7.) As he walked through Torey's

bedroom to the back of the house, he noticed Torey asleep in his bed. (*Ibid.*) Torey appeared to be alive at the time; he was "smiling" in his sleep and appeared to have no injuries or blood on his person. (*Id.* at 7.) Appellant walked into his mother's bedroom and spoke with her briefly. (*Id.* at 6, 9.) While he was talking to his mother, he heard a door open and close. (*Ibid.*) He asked his mother if Versenia was in her room, and she told him she believed so. (*Ibid.*) Appellant then walked down the hallway to Versenia's bedroom and saw that Versenia was lying in bed. (*Ibid.*) He did not see Sammie in the bedroom. (*Id.* at 9.) Appellant returned to his mother's bedroom and told her that he was going to use the restroom and then leave. (*Id.* at 6, 9.) He went to the bathroom and then walked back through Torey's bedroom to the front door. (*Id.* at 6, 10.) As he passed through Torey's room, he noticed that Torey was still asleep. (*Id.* at 6.) When he opened the front door, two men wearing masks were standing on the front porch. (*Id.* at 6, 10-13.) One of the men entered the house while the other one motioned for appellant to "go ahead." (*Id.* at 6, 17.) Appellant looked at the man as he walked out onto the porch. (*Id.* at 6.) The man was watching him to see what he "was doing." (*Ibid.*) Appellant walked down the steps of the porch to his car. (*Ibid.*) As he looked back toward the porch, he saw the second man enter the house and close the door behind him. (*Id.* at 17.) As he got into his car, he heard two loud noises that sounded like gunshots. (*Id.* at 6, 18.) After hearing the gunshots, appellant drove away. (*Id.* at 18.)

When appellant first saw the men, he thought that they were friends of Torey's who were about to play a prank on him. (*Id.* at 11-12, 15-16.) When he saw that one of the men was carrying a gun, however, he "knew something was going on" and that the men were not Torey's friends. (*Id.* at 15, 17.) Based on what he knew about his nephew, appellant figured that the men were there for Torey, not for Eva or Versenia. (*Id.* at 18.) Appellant believed that

the men would leave his mother and sister alone if he did not interfere, so he decided that it would be best if he left. (*Id.* at 15, 18.) Appellant denied taking any drugs that morning, denied that he was mentally ill, denied imagining the masked men on his mother's front porch, and denied murdering his nephew and sister. (*Id.* at 16, 31, 34-35.) Although appellant admitted to past drug and alcohol use, he claimed that he had not taken any drugs or drunk any alcohol since 1983. (*Id.* at 16.)

Appellant did not call the police after seeing the masked men on his mother's porch because he did not want to jeopardize his mother's safety. (*Id.* at 17-18, 20.) Instead, he drove directly to a Carrows Restaurant located approximately 20 minutes from his mother's house. (*Id.* at 18-19.) Once there, he called his sister Ruth, told her what happened at his mother's house, and asked her to call the police. (*Id.* at 18-20.) He then sat down and ordered a breakfast of french toast, eggs, bacon, and coffee. (*Id.* at 19-20.) He ate only part of his meal because his "appetite was somewhat ruined from what happened." (*Id.* at 20.) After he was finished with his breakfast, he went to a gas station to buy cigarettes and then got on a bus to San Francisco. (*Ibid.*) He had the "sense" to leave his car behind at Carrows; he did not want the police to pull up behind him and start "blasting." (*Id.* at 21.) Once he arrived in San Francisco, he sat down and had a cup of coffee and thought about whether he should go back home or just leave. (*Ibid.*) He decided to go to Reno because he did not want to face the "reality" that "[s]omething could have happened to [his] mother." (*Ibid.*)

Appellant took a bus to Reno and stayed at Harrah's for two nights. (*Id.* at 21-22.) He did not call and check on his mother because he "had a sense" that his mother knew to stay in her room and out of the way of the masked men. (*Id.* at 22.) Appellant bought new clothes while he was in Reno and left his old clothes behind in his hotel room. (*Id.* at 33-34.) A leather jacket was among

the items he left behind. (*Id.* at 33.) Appellant got rid of the jacket because the inside lining was torn, not because it had blood on it. (*Ibid.*) Appellant said that it would not have made much sense for him to go into a restaurant with blood on his jacket. (*Ibid.*) The other clothes he left behind because they were "raggedy." (*Id.* at 34.)

Appellant claimed that he had a "beautiful relationship" with Versenia, that Torey was his favorite nephew, and that he was Torey's favorite uncle. (*Id.* at 4, 8.) Although appellant admitted having problems with Torey in the days before the murders, he denied threatening Torey's life or being mad at Versenia for siding with Torey. (*Id.* at 8, 22-23, 29-31.) Appellant said that he had "better sense" than to threaten his own nephew's life. (*Id.* at 23.) Appellant claimed that he told Ruth, Elijah, James, and Frances that he wanted to hurt Torey, not kill him, and that his siblings were lying if they said otherwise. (*Id.* at 23-31.) Appellant said that in the end, he took Elijah's and James's advice to leave Torey alone. (*Id.* at 28, 31.) Although appellant admitted talking to Elijah on the morning of the murders, he denied telling him that he had a gun and was going to kill Torey. (*Id.* at 30-31.)

At the conclusion of the interview, appellant asked why he was being held. (*Id.* at 35.) After learning that he was being charged with the murders of his sister and nephew, appellant asked, "Will I beat it?" (*Ibid.*)

Appellant's Lack Of Mental Health Treatment Since The Murders

On May 13, 1995, appellant was arrested for the murders of his nephew and sister and booked into jail. (RT 3329.) At the time, appellant reported that he had no diseases, that he was not on any medication, that he was not under the care of either a doctor or a psychiatrist, and that he was not feeling suicidal. (RT 3333-3334.) The only items in appellant's possession at the time he was booked into jail was a wallet, $170.74 in cash, miscellaneous papers, keys, a

watch, a ring, a necklace, three earrings, a belt, shoe laces, a tooth brush, toothpaste, deodorant, body lotion, cigarettes, and a comb. (RT 3336-3337.) There was no record of appellant receiving any mental health treatment or medication while in jail from May 13, 1995, to May 27, 1998. (RT 3260-3261.)

From May 1995 to August 1995, and again on February 24, 1996, appellant was housed in the section of jail reserved for homosexual inmates. (RT 3349-3350.) Once jail officials realized that there was no indication in appellant's records that he was homosexual, they decided to transfer him to mainline housing. (RT 3350-3351.) When appellant refused to go to mainline housing, he was written up and transferred to administrative segregation. (RT 3350-3351.)

During periodic checks on appellant in his cell in administrative segregation, he never mentioned any mental health problems. On May 31, 1996, he reported that he was fine. (RT 3352.) On June 24, 1996, he refused to speak to the officer. (RT 3352-3353.) On July 11, 1996, he stated that he was fine, continued to insist that he was homosexual, and noted that he liked being in administrative segregation where he did not have to deal with the pressures of mainline housing. (RT 3353.) Appellant reported no problems on July 24, 1996. (RT 3353.) On August 1, 1996, he said he was fine, and joked that the officer would probably be retired by the time he got out of jail. (RT 3354.) During checks from August 1996 to September 1996, he said he was fine and happy with his housing. (RT 3353-3355.) On October 7, 1996, he reported having a bad headache, but did not ask for medication or to see a doctor. (RT 3355.) He was back to reporting no problems on October 15, 1996, October 24th, November 4th, and November 22nd. (RT 3355-3356.) On his birthday on December 5, 1996, he appeared to be in good spirits and stated that he was happy with his housing and glad he did not have to deal with "all

the stuff going on in mainline." (RT 3356.) He continued to report that he was fine and content with his housing during regular contacts with jail personnel from January 1997 to November 1997. (RT 3265-32, 3356-3358.) During these routine checks, appellant never asked for medication or to see a psychiatrist. (RT 3269, 3358.) He never threatened to commit suicide, and never complained of hearing voices or seeing things that were not there. (RT 3269, 3358.) Although appellant occasionally yelled and screamed at other inmates, he attributed his outbursts to his bad temper, and cited this as the reason why he did not want to go to mainline housing. (RT 3268, 3364-3365.)

Testimony Regarding Appellant's Behavior Before The Murders

The parties stipulated that the jury could also consider Elijah Blacksher's guilt-phase testimony regarding appellant's "need for a gun to kill Torey, anger at Torey, threats to kill Torey, obtaining a .357 caliber handgun and choice not to follow Elijah's advice to stay away from Torey." (RT 3404-3405.)

PENALTY PHASE

Aggravating Factors

October 10, 1984—Appellant Assaults A Fellow Inmate In A Holding Cell

On October 10, 1984, appellant was being kept in a holding cell with other inmates while he waited for his turn to be called into court. (RT 3619.) Appellant was in a jovial mood before being called into the courtroom. (RT 3620.) Upon returning from the courtroom, however, his mood changed; he was angry and tense. (RT 3620-3621.) He began pacing inside the holding cell and pushing anyone who got in his way. (RT 3621-3622.) He hit a white inmate in the back of the head with an open hand and said, "[W]hitey will speak when whitey is told to speak." (RT 3622-3623.) He then walked towards

another white inmate who was sitting down. (RT 3618-3619, 3623.) The inmate was significantly smaller in stature than appellant. (RT 3618, 3620.) As the inmate began to rise to his feet, appellant punched him in the face above the eyebrow with a closed fist. (RT 3623-3624.) The inmate spun around and hit the wall, and then sank to his knees. (RT 3624.) He was badly cut, and started bleeding from his eyebrow and nose. (RT 3625.) Appellant continued pacing around the cell after punching the other inmate. (RT 3624.)

January 25, 1988—Appellant Assaults A Fellow Inmate In The Showers

On January 25, 1988, Darrell Carver was working as a correctional officer at the California Medical Facility when he observed appellant getting ready to enter the shower area. (RT 3648-3650.) He watched as appellant exchanged words with another inmate and they both took a combative stance. (RT 3650.) The other inmate was smaller in stature than appellant. (RT 3651.) Appellant punched the inmate in the face with a closed fist. (RT 3651.) Appellant struck the other man with such force that he was knocked to the floor. (RT 3651.) The inmate suffered swelling around the eye as a result of the attack. (RT 3652.)

January 5, 1989—Appellant Threatens His Dying Father With A Butcher Knife

In January 1989, appellant was living with his parents. (RT 3569, 3575.) On the morning of January 5, 1989, appellant's sister Ruth went over to her parents' house to help her mother take care of her father, who was dying of stomach cancer at the time. (RT 3568-3570.) When she arrived, she heard appellant arguing with his father in the kitchen. (RT 3568-3571.) They were arguing about appellant's failure to pay any rent for the past two months. (RT 3575.) Ruth walked into the kitchen and saw her father sitting on a chair at the kitchen table. (RT 3571.) Appellant had a butcher knife in his hand and was

standing approximately four to five feet away from his father. (RT 3571-3573.) Appellant rocked from side to side as he held the knife in front of him at waist level and moved the blade up and down. (RT 3573-3575.) Appellant alternated between pointing the blade straight ahead and pointing it at his father. (RT 3574.) Appellant was angry and told his father he was going to kill him. (RT 3571, 3575-3576.) Ruth could see that her father was nervous and shaking; he just sat there because he was too sick to defend himself. (RT 3576.) Ruth and her mother asked appellant to put the knife away, but he refused. (RT 3576-3577.) Ruth helped her father up and shielded him with her body as she walked him out of the room. (RT 3577-3578.) Ruth's mother followed them out of the room and tried to keep appellant away from his father. (RT 3577-3578.) Once Ruth got her father into his bedroom, she shut the door behind them and called the police. (RT 3579.) Ruth could hear appellant outside the door threatening to kill his mother if she did not get out of his way. (RT 3580.) Appellant left the house after the police arrived. (RT 3580-3581.)

Two months later, appellant's father died. (RT 3582.) Appellant continued to live with his mother after his father died. (RT 3582.) Ruth's relationship with appellant deteriorated over the next year. (RT 3581.) Whenever Ruth went over to her mother's house, appellant would try to provoke her and intimidate her. (RT 3581.)

February 17, 1990—Appellant Threatens His Brother With A Butcher Knife

On February 17, 1990, Ruth arranged for her brother Artis to meet her at her mother's house because she was afraid to go by herself. (RT 3582.) When Ruth and Artis arrived at the house, appellant and Artis got into an argument in the kitchen. (RT 3582-3583, 3681.) Appellant told Artis that he had no business being there. (RT 3583, 3682.) Artis eventually walked out of the kitchen and sat down in the dining room to watch television. (RT 3583,

3682.) Appellant walked into the dining room with a butcher knife in his hand. (RT 3584, 3682-3683.) He paced back and forth while holding the knife at shoulder level and pointing the blade at a downward angle. (RT 3585.) While he paced, he kept telling Artis that he did not want him in the house. (RT 3584.) He was about 10 to 12 feet away from Artis at the time. (RT 3585, 3683-3684.) When Artis saw the knife, he picked up the chair he had been sitting in and held in front of him. (RT 3585, 3683.) As appellant walked towards Artis, Ruth tossed her umbrella towards Artis. (RT 3586, 3684.) Artis put down the chair and picked up the umbrella. (RT 3586, 3685.) When Artis grabbed the umbrella, appellant stopped walking towards him. (RT 3586, 3685.) Ruth and her mother asked appellant to put the knife away, but he would not listen to them. (RT 3586, 3684.) Appellant's mother finally called the police. (RT 3586, 3685.) Appellant got rid of the knife right before the police arrived. (RT 3586-3587.) He then told his mother that she was going to have to make a decision; he told her that he did not want Ruth or Artis in the house, and that she was going to have to choose between them and appellant. (RT 3587.) Eva told Ruth and Artis to leave; she said she would come visit them. (RT 3587-3588.)

July 10, 1991—Appellant Assaults A Teenage Boy On A Bus

On July 10, 1991, Timothy Windsor was working as an Alameda County Deputy Sheriff when he responded to a call of a disturbance on a bus. (RT 3634-3635.) When he arrived at the scene, the bus driver told him that he wanted appellant removed from the bus. (RT 3635-3636.) Deputy Windsor walked up to appellant in the rear of the bus and asked him to step off the bus. (RT 3636.) Appellant began telling the officer about a problem he was having with a woman on the bus. (RT 3636-3637.) The deputy had no trouble understanding appellant. (RT 3637.) The deputy interrupted appellant and asked him to step off the bus. (RT 3637.) Appellant ignored the deputy and

walked to the rear of the bus where he leaned over and said something to a young woman. (RT 3637.) He then turned and started walking back towards the deputy. (RT 3637.) On the way, he hit a teenage boy in the face underneath the eye with a closed fist. (RT 3637-3639.) The boy and his three friends jumped up and went after appellant. (RT 3639.) The deputy tried to keep everyone apart, but was knocked to the ground, where he injured his wrist. (RT 3639-3640.) After getting up, the deputy followed appellant off the bus with the boys right behind them. (RT 3640.) Appellant called the boys "wimps" and motioned with his hands for them to come get him. (RT 3641.) The deputy drew his baton and told everyone to get back. (RT 3641.) He then handcuffed appellant and took him into custody. (RT 3641.)

Easter Sunday, April 16, 1995—Appellant Assaults And Rapes His Girlfriend

Sometime in August or September of 1994, LaDonna Taylor met appellant and began dating him. (RT 3696-3698.) On Easter Sunday, April 16, 1995, Taylor returned home from a weekend trip to Los Angeles. (RT 3699.) Appellant picked her up from the airport and asked her if she wanted to go with him to his sister Ruth's house. (RT 3699-3700.) When Taylor told appellant she wanted to go home, he got quiet and drove her to his house instead. (RT 3701.) At the time, appellant was living in a cottage behind his mother's home. (RT 3700.) They went inside his house and appellant made something to eat while Taylor sat down on his bed. (RT 3701-3702.) Appellant eventually sat down beside Taylor and started "jumping" on her. (RT 3703.) He hit her forcefully in the face with a closed fist and accused her of having an affair. (RT 3703-3704.) Appellant hit her numerous times with his fist until she fell on the floor. (RT 3704-3705.) Once she fell on the floor, he started kicking her. (RT 3705.) Taylor screamed at appellant to stop. (RT 3706.)

At some point, appellant's nephew Torey came to the door of the cottage and told appellant to leave Taylor alone. (RT 3706.) Appellant told him to mind his own business. (RT 3706.) Appellant then told Taylor she could not go home until she took her clothes off. (RT 3706-3707.) Taylor told appellant she was scared and that she wanted to go home. (RT 3707.) When appellant would not let her leave, she took off her clothes. (RT 3707.) Appellant took off his clothes and had sex with her against her will. (RT 3707-3708.) Afterwards, he acted as if nothing had happened and took her home. (RT 3708-3709.) Taylor felt sick and scared the entire ride home. (RT 3709.) She visited her doctor the next day because she was still feeling sick. (RT 3709.) Although she told her godmother about what happened, she did not call the police because she was concerned about her family and her job. (RT 3709-3710.) Although appellant continued to call her after the rape, she never saw him again. (RT 3710.)

At the time Taylor began dating appellant, she was in a recovery program for heroin addiction. (RT 3710-3711.) Taylor began using drugs again towards the end of her relationship with appellant. (RT 3711.) At the time of trial, she was no longer using drugs. (RT 3711.) When Taylor was addicted to heroin, she worked as a prostitute and did other "things" in order to pay for her drugs. (RT 3710.) Some of the things she did landed her in jail. (RT 3710.) During the time Taylor dated appellant, he would sometimes act "crazy" in order to scare her and intimidate her. (RT 3719.)

Appellant's Prior Felony Convictions

The parties stipulated that appellant had been convicted of seven prior felonies, including five burglaries, one assault, and one incident of possessing narcotics for sale. (RT 3559.)

How Family Members Were Affected By The Deaths Of Torey And Versenia

Ruth testified that she had been devastated when she heard the news that Versenia and Torey had been murdered. (RT 3590.) After their bodies were removed from her mother's house, Ruth walked through the house with a police officer. (RT 3590-3591.) There was blood everywhere in the dining room. (RT 3591.) Ruth could not deal with the sight of the blood; she threw a towel over the bloodstains and left the house. (RT 3591.) Ruth did not allow herself to feel the full impact of Versenia's and Torey's deaths until she saw their bodies at the mortuary; it was difficult for her to face the fact that they were really gone. (RT 3594.) Ruth incurred expenses for her sister's and nephew's funerals, and for replacing the carpet in her mother's home. (RT 3591-3592.) Every year on Versenia's birthday, Ruth feels the loss of her sister. (RT 3592.) After Versenia died, Ruth began seeing her mother on a daily basis. (RT 3592.) Eva was devastated by Versenia's and Torey's deaths. (RT 3592.) She cried a lot, and told Ruth how much she missed them. (RT 3593.) She constantly asked Ruth to take her to the cemetery to visit their graves. (RT 3593.) She would walk around their graves and cry, and say, "Why did he do it. He didn't have to do it." (RT 3593.)

Sammie testified that a police officer visited him at work on the morning of the murders and informed him that his wife and son had been shot and that they were both dead. (RT 3669-3670.) When he heard the news, he "went off"; his supervisor had to grab him because he was "fixing to run outside and scream and holler." (RT 3670.) He threw his hands in the air and said, "No, no, you're lying. . . . I just left them this morning." (RT 3670.) Sammie testified that the loss of his wife and son had affected his "mind"; "all kind of stuff was running in his mind," and he could not "think right." (RT 3670.) He could not believe what had happened. (RT 3670.) After awhile his job

performance started to suffer, and he eventually lost his job. (RT 3670.) His sister-in-law Ruth let him stay with her until he could face going back to Eva's house. (RT 3671.) When he moved back in with Eva, he had trouble sleeping. (RT 3671.) He kept looking at pictures of his wife and son, and began drinking heavily. (RT 3671.) When he lost his job, Ruth told him to get into a program and straighten up. (RT 3670.) If it were not for Ruth, he would be in trouble or on the streets by now. (RT 3670.) He and Eva did not talk about the murders; both of them tried blocking out what had happened. (RT 3672.)

Artis testified that he had a difficult time accepting that his sister and nephew were dead when he first heard the news. (RT 3687-3688.) Artis said that he felt like he had "been hit with a stick, run over by a train." (RT 3688.) After hearing about the murders, he "went looking for [appellant]" to hurt him, but he never found him. (RT 3688.) Instead of coping with the deaths of his sister and nephew, he used work to "keep it off [his] mind." (RT 3689.)

The Clothes Torey And Versenia Were Wearing At The Time Of Their Murders

The clothes Torey and Versenia were wearing at the time of their murders was displayed to the jury. (RT 3560-3562.)

Mitigating Factors

The Testimony Of Appellant's Brother, Elijah Blacksher

When Elijah was still living at home, his parents asked his sister Ruth to help them buy a house. (RT 3800.) His parents had bad credit at the time, and Ruth had good credit. (RT 3800.) They let Ruth put the house in her name. (RT 3800.) When Ruth married Willie, she evicted her family from the house, saying she needed a bigger house to live in with her new husband, even though she had already been living with Willie before they got married. (RT 3800, 3805.) Elijah's parents were shocked and hurt by Ruth's actions. (RT

3801.) After they were evicted from their home, the family moved to a two-bedroom house where the five children who were still living at home had to share a bedroom for six months. (RT 3804.) The family eventually moved to the house on Allston Way after Elijah gave his parents some money. (RT 3800, 3804.)

Ruth had been married once before, to a man named Sam Jones, with whom she had a daughter. (RT 3801, 3803.) The marriage ended when Jones caught Ruth with another man. (RT 3801-3803.) After the divorce, Ruth's parents took in Ruth's daughter and raised her alongside appellant. (RT 3805.) Ruth was not living with her parents at the time. (RT 3805-3806, 3812-3813.) Ruth's daughter was 13 by the time Ruth finally took her back. (RT 3813.)

Ruth later owned a store along with her daughter and her daughter's husband. (RT 3822.) Elijah heard that they sold the store after Ruth's daughter caught her mother "messing with the money." (RT 3822.) Elijah also heard that Willie was selling cocaine out of the store. (RT 3823.)

Appellant's father was an alcoholic; sometimes the family would not see him for weeks. (RT 3806-3807.) Sometimes he wasted entire paychecks on alcohol and prostitutes. (RT 3807, 3810.) Whenever he got drunk, he would become physically abusive towards his wife if she refused to give him money. (RT 3807.) He slapped her around, and sometimes pulled a knife on her. (RT 3807.) His children were scared of him; he beat them if they would not give him their money. (RT 3808-3812.) One time the older brothers in the family "jumped" their father and told him to leave their younger siblings alone. (RT 3809.) Their father was known for "cutting people" with knives. (RT 3807-3808.) Once, he cut Elijah's Uncle Bob on the shoulder. (RT 3808.) Appellant tried to intervene whenever his father hit his mother. (RT 3829.)

Appellant's mother always tried to protect appellant because she knew there was something wrong with him. (RT 3813.) Appellant talked to himself

all the time. (RT 3819.) Eva told everyone in the family about appellant's disability, but no one wanted to accept that something was wrong with him. (RT 3813-3814, 3827.) There were other cases of mental illness in the family. (RT 3814-3816.)

Sometimes unusual things would happen when appellant was in school; he would get lost or wind up in the girl's bathroom. (RT 3817.) Appellant tried working, but he got fired from his jobs. (RT 3818-3819.) He tried working for the Teamsters, but could not do the work; he would walk off or wind up where he was not supposed to be. (RT 3819.) He tried working as a cook in a restaurant, but was fired after the kitchen caught on fire. (RT 3818.) Appellant did nothing to put out the fire; he just stood there and laughed as he watched a pan catch on fire. (RT 3818.) Appellant's mind often wandered while you were talking to him. (RT 3828.) Sometimes it seemed as if he were talking to somebody who was not there. (RT 3828.) He was always getting lost and winding up in the women's restroom, and doing things that were not "called for." (RT 3827-3828.)

Eva put Versenia's and appellant's names on her house before Versenia died. (RT 3820-3821.) She also put appellant, Versenia, and Elijah in her will. (RT 3821.) Eva put appellant's name on her house because she wanted him to have a place to stay if something ever happened to her; she knew he was not capable of holding down a job. (RT 3827.)

There was always a division in the family among the older and younger siblings. (RT 3825.) Ruth, Artis, and James sided against Elijah, Georgia, Versenia, and appellant. (RT 3825.) The older siblings visited their parents infrequently, and then, only when they needed money. (RT 3825.) Eva did not like the way her older children treated appellant. (RT 3826.) They always "messed" with him and insisted that nothing was wrong with him. (RT 3826.)

Eva had pictures of appellant in her bedroom and living room; she did not have any pictures of her older children in her bedroom. (RT 3845.)

Appellant was the only member of Elijah's family who visited him. (RT 3842.) Elijah's wife and children all loved appellant. (RT 3842.) Appellant used to take Elijah's children for rides in his car, and he gave clothes to Elijah's eldest son. (RT 3843.)

In Elijah's opinion, appellant should not be put to death. (RT 3831.) Appellant has been in and out of prison his whole life; many times his parole was revoked after his older siblings called his parole officer and reported him. (RT 3829-3830.) Appellant also has a mental disability. (RT 3830.) If appellant were put to death, it would not bring back Versenia or Torey, it would just take away another member of the family. (RT 3831.) In addition, Elijah does not believe appellant killed Versenia because appellant was close to Versenia and would not do anything to hurt her. (RT 3830.) Elijah believes that Torey had a contract out on his life because he did not pay for his cocaine. (RT 3832-3833.) Elijah also believes that Ruth, Artis, and James all lied on the stand about appellant. (RT 3834-3835.) They do not like appellant and do not want people to know about his condition. (RT 3834.) Also, Ruth stands to benefit from appellant's death by inheriting her mother's house. (RT 3835.) Elijah figures Artis is lying because Ruth has "something on him," and James just wants "his take so he can buy . . . another truck." (RT 3835.)

The Testimony Of Appellant's Sister, Georgia Hill

Georgia Hill is one of appellant's sisters and among the younger siblings in the family. (RT 3735-3736.) When she and appellant were children, they lived with their parents and some of their siblings in a home in Berkeley. (RT 3737.) Their sister Ruth helped her parents acquire the home. (RT 3738.) When Ruth got married, she told her parents that she wanted them to move out so she could live in the home with her husband. (RT 3738.) The family moved

to a two-bedroom apartment where the children were all forced to share a room. (RT 3738.) Ruth's decision to force her family out of their house had remained a source of division and friction within the family. (RT 3739.)

With Elijah's help, the family was eventually able to buy the house on Allston Way. (RT 3739.) Other than the times when their eldest brother James would move back home when he was experiencing alcohol-related problems in his job or marriage, the older siblings were never around when the younger siblings were growing up. (RT 3741.) The family was not close; there was a division among the older and younger siblings. (RT 3742, 3745.) The older siblings, including Ruth, Artis, and James, were jealous of Georgia and appellant. (RT 3745, 3747.) They hated appellant in particular because he was their mother's favorite, and because he never worked. (RT 3745-3747.) Eva was protective of appellant because "he was born with some abnormalities." (RT 3747-3748.) The older siblings always said negative things about appellant because they did not understand him. (RT 3746.) They always "wished to kill" him, even before he was put on trial for the murders of Versenia and Torey. (RT 3764.)

When Georgia had a disabled child, none of her older siblings, including Ruth, who was a registered nurse, did anything to help her out. (RT 3743-3744.) Georgia and Ruth did not get along and were in a legal dispute over the care of their mother. (RT 3759-3760.) Georgia felt that Ruth was not taking proper care of their mother. (RT 3761-3762.)

Appellant was often teased as a child because he was obese. (RT 3742.) The teasing humiliated and embarrassed him. (RT 3742.) As a child, appellant often socialized with younger children. (RT 3742.) Appellant had a close relationship with Versenia. (RT 3752-3753.)

Georgia began noticing a change in appellant's behavior after he witnessed the police kill his cousin. (RT 3753.) He started seeing things that

were not there, talking about his own interpretations of the Bible, and laughing out loud for no apparent reason. (RT 3749, 3754.) The first time Georgia learned that appellant had a mental problem was when he was admitted to the hospital for trying to commit suicide by taking an overdose of pills. (RT 3748.) Another time, appellant was living with Georgia when he began having delusions that he was a woman. (RT 3748.) He went into the ladies restroom at church and had to be forcibly removed. (RT 3749.) She took appellant to a psychiatric ward and was told that he would never be the same again. (RT 3748.) Georgia discussed appellant's mental problems with her siblings. (RT 3752.) Appellant was not the only member of the family with mental problems. (RT 3750-3752.)

Appellant's father was not a positive male role model or a good father. (RT 3754.) He was an alcoholic who spent all his money on alcohol, was strict and abusive, and ran around with other women. (RT 3754-3757.) His children feared and resented him. (RT 3754-3757.) When he was dying of cancer, none of his children helped take care of him. (RT 3759.)

Appellant has a son of his own. (RT 3758.) He was very involved in his son's life, and was a good father. (RT 3758.) In Georgia's opinion, appellant should not be put to death because he deserved proper treatment for his mental problems. (RT 3764.)

The Testimony Of Georgia's Ex-Husband, Ronald Hill

Ronald Hill used to be married to appellant's sister, Georgia. (RT 3877.) Ronald and Georgia had a disabled child together. (RT 3877-3878.) No one in Georgia's family ever helped them out with their child. (RT 3878.)

Appellant has "never been all there mentally." (RT 3878.) Everyone in the family had talked to Hill about appellant's mental problems. (RT 3879-3881.) Hill himself has observed appellant's strange behavior, like appellant "seeing bugs," saying inaccurate things about the Bible, claiming that people

were talking to him, and talking and laughing to himself. (RT 3879.) There were other members of the family who also suffered from mental illness, and many family members who were alcoholics. (RT 3882-3883, 3887-3888.)

There was a division in the family among the older and younger siblings. (RT 3881.) Appellant's older siblings did not like him. (RT 3879.) They always thought that appellant was spoiled and got away with things. (RT 3880.) The younger siblings were more compassionate towards him and understanding of his condition. (RT 3880.) Appellant had a loving relationship with his mother, who always took care of him and did things for him. (RT 3880.)

Appellant had a good relationship with Versenia. (RT 3881.) Hill was shocked and hurt when he heard what happened to Versenia. (RT 3881.) He still found it hard to believe that appellant killed her. (RT 3881.) In Hill's opinion, appellant should not be put to death because he has a mental disability; because Hill was not convinced appellant committed the murders; and far too many family members had already been lost to death and sickness. (RT 3883.)

The Testimony Of Georgia's Friend, Clarence Burrell

In the early 1990s, Clarence Burrell was working as a correctional officer at San Quentin State Prison when he met appellant's sister, Georgia. (RT 3765-3766.) He used to accompany her on visits to her mother's house, where he met appellant. (RT 3766.) Appellant seemed to be living in the past; he not only talked about the past, but had a hairstyle reminiscent of the 1960s. (RT 3767-3768.) Georgia used to discuss appellant's mental problems with Burrell. (RT 3768-3769.) One time appellant himself said something about feeling "crazy" or the world being "crazy." (RT 3769-3770.) Another time Burrell saw appellant sitting on the front porch "looking up at the air." (RT 3770.) When Burrell approached him, they began talking. (RT 3770.) Appellant's conversations were often "offbeat." (RT 3770.) He would be

talking about one thing when all of a sudden he would "switch gears" and start talking about something entirely different. (RT 3770.)

The Testimony Of Georgia's Friend, Alisa Nelson

Alisa Nelson, an associate governmental analyst with the California Department of Alcohol and Drug Programs and former peace officer with the California Youth Authority, had known appellant's sister Georgia for 13 years. (RT 3783-3785, 3792.) Nelson became acquainted with appellant over the years at Georgia's house and at various family gatherings. (RT 3785.) Before Nelson met appellant, Georgia warned her that he "wasn't all there at times" and she should just ignore him. (RT 3792-3793.)

When Nelson first met appellant, she thought he was nice. (RT 3785.) After awhile she realized he had a mental disorder. (RT 3786.) She started noticing that his eyes would dart around, his conversation would change abruptly, he would lose his train of thought, and he would pace around. (RT 3785-3786.) Sometimes he would start talking and she would ask him if he were talking to her, but then she would realize that he was not really speaking directly to her. (RT 3786.) He also said things about the Bible that she knew were not accurate. (RT 3788-3789.) He usually treated her "okay" except for one time when he became verbally abusive towards her for no reason. (RT 3786.) She was sitting at the table in his mother's kitchen when he walked through the back door and gave her a piercing look, like a stare or a glare. (RT 3787.) She knew immediately something was wrong by the way he was looking at her. (RT 3787.) He pointed his finger at her and started talking to her in a verbally abusive manner. (RT 3787.) She had never seen him behave like that before and she thought it was very strange. (RT 3787.) She "knew that there was a split in his personality" because that was not how he normally behaved around her. (RT 3787.) When she asked him what he was doing, "he

snapped out of it and realized it wasn't the person who he thought he was talking to," then walked out of the kitchen. (RT 3788.)

Appellant was proud of his car. (RT 3789.) He had a nice, fully loaded Cadillac. (RT 3795.) He was also proud of his youngest son. (RT 3789.) Nelson thought appellant had two other children with different women, but she had never met them. (RT 3794.) She did know that two of his sons were named after him. (RT 3795.) Appellant got along well with his mother, which caused some jealousy and resentment among his siblings. (RT 3790.) For instance, his mother would protect him if something happened and his siblings would tell her "this isn't right." (RT 3790.) In all the time Nelson has known appellant, she has never known him to have a job. (RT 3796.)

Nelson helped out with the arrangements for Versenia's and Torey's funerals; she believed Ruth handled the financial costs related to the funerals. (RT 3791-3792.) In Nelson's opinion, appellant should not get the death penalty because he was young, he had a mental disability, and he had a son who deserved to know his father. (RT 3792.) She believed the family had seen enough tragedy. (RT 3792.)

The Testimony Of Versenia's Ex-Husband, Robert Ruffin

Robert Ruffin was married to Versenia for three months in 1992. (RT 3776.) Ruffin visited Versenia several times at her mother's home, where he also became acquainted with appellant. (RT 3777-3778.) Ruffin's impression of appellant was that he had a split personality. (RT 3778.) Sometimes you could have a conversation with him and other times you could not. (RT 3779.) One time he saw appellant sitting in the backyard talking to himself. (RT 3779.) Versenia and appellant got along; Versenia was always able to talk to appellant and calm him down. (RT 3778-3781.) Appellant also had a good relationship with his mother. (RT 3782.)

The siblings in Versenia's family did not get along. (RT 3780.) Ruffin met Versenia's sister Ruth once; he described her as "different." (RT 3781.) Ruffin gave Versenia's brother James his car; although James was supposed to pay Ruffin for it, he never did. (RT 3781.) Appellant was the only member of Versenia's family to give Ruffin and Versenia a wedding gift. (RT 3779.) Ruffin gave Versenia a wedding ring when they were married. (RT 3782.) When she died, her sister took the ring off her finger. (RT 3782.)

The Testimony Of Appellant's Ex-Girlfriend's Mother, Patricia White-Brown

Patricia White-Brown got to know appellant while he was dating her daughter, Tracy Daniels. (RT 3891.) He was nice and respectful to her and her husband, and he treated her daughter well. (RT 3892.) She never noticed anything unusual about his behavior. (RT 3893.) In White-Brown's opinion, appellant did not deserve to die because he was a good father and a kind person. (RT 3894.)

The Testimony Of Appellant's Mother's Neighbor, Diane Marks

Diane Marks lived on the same block as appellant's mother and was friends with appellant. (RT 3729-3730.) Appellant always treated her with respect. (RT 3731.) He helped take care of her dog, and offered to work in her yard. (RT 3732.) Sometimes it appeared as if appellant were talking to himself. (RT 3731.) Eva told Marks that appellant sometimes became angry when he did not take his medicine. (RT 3733.) In Marks's opinion, appellant did not deserve to be put to death because he had a good heart and was not a mean person. (RT 3733-3734.)

ARGUMENT

GLOBAL ISSUES

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING APPELLANT COMPETENT TO STAND TRIAL

Appellant contends that he was tried while incompetent in violation of his federal due process rights. (AOB 65.) Appellant claims that the trial court failed to exercise its discretion in finding him competent, or alternatively, the court abused its discretion in making such a finding. (AOB 65.) However, because the court properly exercised its discretion in finding appellant competent, appellant's due process rights were not violated.

A. Competency Proceedings

On April 19, 1996, defense counsel questioned appellant's mental competence to stand trial. (RT [4/19/96] 1.) The trial court suspended proceedings pursuant to section 1368 and appointed licensed clinical psychologist Gerald Davenport and psychiatrist Joel Fort to examine appellant. (CT 298; RT [4/19/96] 1.) In reports filed with the court, Dr. Davenport concluded appellant was incompetent, while Dr. Fort concluded he was competent. (CT 313-317.)

On May 23, 1996, the court noted for the record that the reports filed by Dr. Davenport and Dr. Fort were "at opposite ends of the opinion scale." (RT [5/23/96] 1.) The court appointed psychiatrist Fred Rosenthal to conduct a third competency examination of appellant. (CT 304; RT [5/23/96] 1.) In his report, Dr. Rosenthal concluded appellant was competent. (CT 318-320.)

On July 3, 1996, the parties submitted the issue of appellant's competency on Dr. Rosenthal's report. (CT 308, 310; see also CT 18327-

18328 [Engrossed Settled Statement, ¶ 1]; RT [6/2/03] 10 [hearing to augment and settle the record on appeal].) The court found appellant competent and reinstituted criminal proceedings. (CT 308, 310.)

B. The Trial Court Exercised Its Discretion In Finding Appellant Competent

Appellant contends that the trial court failed to consider the substance of the reports filed by the appointed experts and instead based its competency finding "on a quantitative toting up of the psychological evaluations, i.e., two out of three meant appellant was 'competent.'" (AOB 76.) Appellant, however, mischaracterizes the basis of the court's ruling.

"'The term [judicial discretion] implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [Par.] To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791.)

Contrary to appellant's contentions, the trial court did not take a quantitative approach to deciding appellant's competency, but rather made an informed and intelligent decision based on the contents of Dr. Rosenthal's report. As noted above, the parties submitted the issue of appellant's competency on Dr. Rosenthal's report. (CT 308, 310; see also CT 18327-18328 [Engrossed Settled Statement, ¶ 1]; RT [6/2/03] 10 [hearing to augment and settle the record on appeal].) The court then made the following ruling: "Based upon the *contents* of the report, the court will find that the defendant is competent and the criminal proceedings will be reinstituted." (CT 310, italics added.) It is therefore clear from the court's ruling that its competency finding was based on a reasoned consideration of the substance of Dr. Rosenthal's

report. Accordingly, there is no support in the record for appellant's claim that the court failed to "consider the material facts" and "simply count[ed] up the 'best out of three' of the reports of the experts." (AOB 76.)

Appellant contends the trial court's actions in appointing a third expert rather than basing its decision on the first two experts' reports demonstrates that the court "relinquished its duty to exercise judicial discretion to a 'majority vote' by the three appointed experts." (AOB 76.) Not so. Rather, the court's actions show that it took its duty of exercising its discretion quite seriously. When the court discovered that the first two competency evaluations were "at opposite ends of the opinion scale," it appointed a third expert to assist in its determination. As noted above, once the third competency evaluation was filed with the court, the matter was submitted on the contents of that report alone. Thus, despite appellant's protestations to the contrary, the record clearly shows that the court based its decision on the contents of Dr. Rosenthal's report rather than on a simple majority vote.

C. The Trial Court's Competency Finding Was Supported By Substantial Evidence

Alternatively, appellant contends that the trial court abused its discretion in finding him competent to stand trial. (AOB 65.) However, Dr. Rosenthal's report alone provided substantial evidence to support the trial court's finding of competency. (See *People v. Lawley* (2002) 27 Cal.4th 102, 135 [single expert report supported trial court's finding of competency].)

The "trial of an incompetent defendant violates an accused's right to due process." (*People v. Weaver* (2001) 26 Cal.4th 876, 903; accord, *Medina v. California* (1992) 505 U.S. 437, 448.) In *Dusky v. United States* (1960) 362 U.S. 402 (*per curiam*), the United States Supreme Court defined competence to stand trial as a defendant's "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'" and "'a rational as

well as factual understanding of the proceedings against him.'" (*Ibid.*) In accord with federal law, California provides that a person is incompetent to stand trial "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).) A defendant is presumed competent to stand trial unless the contrary is proven by a preponderance of the evidence. (§ 1369, subd. (f).) "On appeal, the reviewing court determines whether substantial evidence, viewed in the light most favorable to the verdict, supports the trial court's finding." (*People v. Lawley, supra,* 27 Cal.4th at p. 131.)

As part of his competency evaluation, Dr. Rosenthal interviewed appellant in jail. (CT 318.) Appellant was cooperative and responsive during the interview (CT 319), and provided Dr. Rosenthal with background information about himself, including his psychiatric history. (CT 318.) Appellant reported that he had been hospitalized several times in the past for paranoid delusions and auditory and visual hallucinations. (CT 318.) Although appellant became "somewhat rambling" at times during the interview and showed some signs of paranoid thinking with respect to his legal situation, he appeared "to be fairly rational." (CT 319.) In addition, while he had "a somewhat distorted, self-justifying attitude about his current problems," he "seemed to maintain his hold on reality to some extent." (*Ibid.*) He denied having any auditory hallucinations, and there was no indication he was "internally preoccupied." (*Ibid.*) He was "oriented in all spheres," his recent and remote memory appeared intact, and there was no indication he suffered from any other severe cognitive deficits. (*Ibid.*) He remained calm and in control throughout the interview and did not appear to be in any acute distress. (*Ibid.*)

In addition to discussing appellant's background, appellant and Dr. Rosenthal also discussed appellant's involvement in the incidents leading to his arrest and the charges against him. (CT 319-320.) Dr. Rosenthal found that appellant was able to understand the charges against him and discuss the elements of his legal situation in a coherent manner. (CT 320.) Although appellant demonstrated some paranoid thinking with respect to his belief that he was being falsely accused, he was able to discuss his legal situation in a fairly reasonable manner. (*Ibid.*) He indicated that he was willing to cooperate and work with his attorney because his attorney believed in his innocence. (*Ibid.*) Dr. Rosenthal concluded that "while Mr. Blacksher clearly has a serious mental disorder and tends to resist acceptance of any mental disturbance, he remains sufficiently in contact with reality to be considered mentally competent to stand trial." (*Ibid.*)

Dr. Rosenthal's report provided a sufficient basis for the trial court to conclude that appellant was competent to stand trial. First, there was substantial evidence that appellant had a rational understanding of the proceedings against him. Appellant appeared rational and in touch with reality during his interview with Dr. Rosenthal. He was cooperative and responsive, calm and in control, oriented in all spheres, his memory appeared to be intact, and he was not internally preoccupied. He was able to discuss his involvement in the incidents leading to his arrest and understand the charges against him. Although he demonstrated some paranoid thinking, he was still able to discuss the situation in a fairly reasonable and coherent manner.

Second, there was substantial evidence that appellant had the ability to assist his counsel in a rational manner. Appellant was cooperative and responsive during his interview with Dr. Rosenthal and was able to rationally discuss his psychiatric history, his involvement in the incidents leading to his arrest, and his legal situation. While appellant displayed some paranoid

thinking with respect to his belief that he was being falsely accused, he stated his willingness to cooperate and work with his attorney because his attorney believed in his innocence. Appellant's ability to communicate with Dr. Rosenthal about his legal situation and his stated willingness to work with his attorney provided a sufficient basis for the trial court to conclude that he had the ability to assist in his defense. In sum, substantial evidence supported the trial court's finding of competency in this case.

Appellant attacks alleged deficiencies in Dr. Rosenthal's report. (AOB 82-83.) For instance, appellant contends that Dr. Rosenthal failed to indicate the length of his interview with appellant, what documentation he may have reviewed, or what "devices, procedures, or protocals" he relied upon to reach his conclusion. (AOB 82.) Appellant also takes issue with Dr. Rosenthal's failure to administer standardized tests or to conduct collateral interviews with appellant's friends, family members, and attorneys. (*Ibid.*) However, because appellant submitted the matter on Dr. Rosenthal's report and did not object to any deficiencies in the report, he cannot attack any perceived shortcomings in the report on appeal. (*People v. Weaver, supra,* 26 Cal.4th at p. 904.)[9/] In any event, appellant fails to demonstrate how such matters were "a necessary prerequisite to [the] formation of an expert opinion on the limited issue presented in the competency [hearing]." (*People v. Stanley* (1995) 10 Cal.4th 764, 811.) During his interview with appellant, Dr. Rosenthal gathered information from appellant regarding his background, psychiatric history, current treatment, and criminal case. (CT 318-320.) Based on this conversation, Dr. Rosenthal was able to diagnose appellant with paranoid

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9. For this same reason, appellant has waived his additional claims, discussed below, in which he asserts that Dr. Rosenthal's report failed to address the question of appellant's ability to assist in his defense (see AOB 82-83), and that the report contained contradictions (AOB 84-86). (See discussion *post.*)

schizophrenia. (CT 319-320.) Further, Dr. Rosenthal's interaction with appellant and his observations of appellant's behavior and responses during the interview provided a sufficient basis upon which to render an opinion on appellant's competency to stand trial. In sum, Dr. Rosenthal's findings supported his conclusion that appellant was competent, and any alleged deficiencies in his report did not undermine the validity of those findings. (See *People v. Lawley, supra,* 27 Cal.4th at pp. 134-135 [rejecting claimed deficiencies in expert's report].)

Appellant further complains that Dr. Rosenthal did not address the question of appellant's ability to assist in his defense. (AOB 82-83.) Appellant is incorrect. Dr. Rosenthal quite clearly addressed this question, finding appellant cooperative, able to discuss his case in a rational manner, and willing to work with his attorney. (CT 320; see *People v. Lawley, supra,* 27 Cal.4th at pp. 134-135 [expert's report not ambiguous on the question of whether the defendant could rationally assist defense counsel].) Appellant also argues that Dr. Rosenthal's report contained contradictory findings regarding appellant's mental state at the time of the interview. (AOB 84-86.) However, the fact that appellant may have shown some signs of his mental illness during the interview was neither unusual nor proof that he did not meet the legal standard of competency. Dr. Rosenthal obviously felt that appellant's mental illness did not prevent him from understanding the charges against him and assisting in his defense, and there was nothing contradictory about such findings. In short, Dr. Rosenthal's report contained sufficient evidence to support the trial court's competency finding.

Although the trial court clearly relied on Dr. Rosenthal's report in making its competency determination, appellant also discusses the reports of Dr. Fort and Dr. Davenport in an effort to demonstrate that substantial evidence did not support the trial court's finding of competency. (AOB 82-91.) As we have

demonstrated above, Dr. Rosenthal's report alone provided substantial evidence to support the competency finding, and was in fact the only report relied upon by the trial court in making its decision. However, in the interest of completeness, we will briefly discuss the claims raised by appellant in connection with the reports filed by Dr. Fort and Dr. Davenport.

As an initial matter, we note that appellant attacks supposed deficiencies and contradictions in Dr. Fort's report much in the same way he attacked Dr. Rosenthal's report. (AOB 82-90.) Again, we submit that because no objection was made to Dr. Fort's report below, these issues have been waived on appeal. (*People v. Weaver, supra,* 26 Cal.4th at p. 904.) In any event, we note that Dr. Fort reviewed "extensive background information" on appellant in addition to examining him. (CT 317.) From these materials, Dr. Fort was able to extract appellant's history of mental illness and substance abuse, his criminal record and chronic unemployment, as well as his living situation. (*Ibid.*) Dr. Fort also reviewed the accounts of numerous witnesses regarding appellant's behavior before and during the murders. (*Ibid.*) Based on these materials as well as his own personal observations of appellant, Dr. Fort was able to render the opinion that appellant was competent to stand trial. (*Ibid.*) Accordingly, appellant cannot show that any alleged deficiencies affected Dr. Fort's formation of an opinion on the subject of appellant's competency. Moreover, Dr. Fort clearly addressed appellant's ability to assist in his defense, finding appellant "cooperative, talkative, oriented, [and] of average intelligence and memory," devoid of hallucinations or delusions, and able to understand the charges against him and participate in tasks related to his defense, i.e., read and approve a lengthy motion and summarize the testimony of witnesses. (CT 317; see *People v. Lawley, supra,* 27 Cal.4th at pp. 134-135 [expert's report not ambiguous on question of whether the defendant could rationally assist defense counsel].)

Next, appellant seizes upon a single sentence in Dr. Fort's report, which he contends contradicts Dr. Fort's finding of competency: Dr. Fort's observation of appellant's circumscribed delusion that he died in 1984 and someone else took control. (AOB 84.) However, as Dr. Fort expressly noted, such delusion did not relate to appellant's crimes and did not affect appellant's general mental state. (CT 317.) Accordingly, Dr. Fort's finding of competency was not "contradicted" by this single circumscribed delusion.

Appellant also contends that Dr. Fort's conclusions were refuted by other evidence. (AOB 86-88.) For instance, appellant contends that Dr. Fort's information regarding appellant's mental history was incomplete, that his focus on the strength of the evidence against appellant was improper, and that his opinion that appellant was of average intelligence and memory was incorrect. (*Ibid.*) However, such alleged weaknesses in the evidence relied upon by Dr. Fort do not undermine his finding of competency. Dr. Fort was well aware of appellant's history of mental illness, which he noted "dat[ed] back to the 1970s" and continued "in[to] the 1980s," as well as the fact that appellant had been previously diagnosed as schizophrenic. (CT 317.) Dr. Fort therefore clearly understood the chronic and serious nature of appellant's mental illness, and any additional evidence on this topic would have only been cumulative. Moreover, appellant does not explain how Dr. Fort's brief reference to the "strong evidence" against appellant was inappropriate. (See AOB 87-88.) Taken in context, it is clear that Dr. Fort was juxtaposing appellant's claim of innocence with the accounts of numerous witnesses, and it was entirely proper for Dr. Fort to take these facts into account in forming his opinion about appellant's mental competency. Finally, the fact that appellant may have tested in the "retarded" range on an intelligence test while an adolescent, and that another doctor previously found him to be in the "low-normal" range of intelligence (see AOB 88), by no means negates Dr. Fort's findings, based on his own personal

observations, that appellant was of average intelligence and memory. (CT 317.) This is especially true considering that the intelligence test taken by appellant as an adolescent was subsequently challenged as racially biased. (See RT 3094-3095.)

Appellant additionally argues that Dr. Fort's finding of competency is further weakened by his "fraud problem," i.e., a 1982 conviction for Medi-Cal fraud. (AOB 88-90.) However, as appellant notes, such evidence was not before the trial court at the time of its ruling. (AOB 89-90.) Because such evidence was not considered by the trial court, it is irrelevant to the Court's inquiry on appeal, and should be disregarded. (*People v. Panah* (2005) 35 Cal.4th 395, 434, fn. 10 [appellate court does not review the propriety of the trial court's competency ruling based on evidence that was not presented to it at the time it made that ruling].) In any event, it is unclear how Dr. Fort's former conviction for Medi-Cal fraud would somehow affect his findings in this case. Dr. Fort's conviction has no relevance to his abilities as a psychiatrist or his impartiality as a court appointed expert. As appellant notes, Dr. Fort was placed "on probation for one year but permitted to continue practicing his profession." (AOB 89.) If the state medical board found him fit to continue practicing medicine, it is unclear why there should be any concern over his professional abilities or the soundness of his medical opinion in this case.

Finally, appellant argues that Dr. Davenport's report, the only report which concluded appellant was incompetent to stand trial, "was superior to those of Dr. Fort and Dr. Rosenthal," and that "[h]ad the trial court scrutinized these reports, instead of just looking for a two-to-one score, it could only have concluded that appellant was incompetent to stand trial." (AOB 91.) However, as set forth above, Dr. Fort's and Dr. Rosenthal's opinions of appellant's competency were supported by their observations and findings, and Dr. Davenport's opinion to the contrary in no way negates those findings, especially

as it appears that Dr. Davenport himself was not entirely convinced that appellant was not faking his symptoms during their interview. (See *People v. Frye* (1998) 18 Cal.4th 894, 1004 [evidence of incompetence presented at competency hearing did not negate reasonable, credible evidence supporting the finding of competence].) As Dr. Davenport noted in his report, "Mr. Blacksher's presentation during the clinical interview was so severe that this clinician questioned if he may have been malingering." (CT 314.) Indeed, appellant's behavior during his interview with Dr. Davenport seems exaggerated in comparison to his demeanor at the time of his interviews with Dr. Fort and Dr. Rosenthal. In light of these marked differences, the court might have understandably placed more stock in the findings and opinions of Dr. Fort and Dr. Rosenthal. (See *People v. Marshall* (1997) 15 Cal.4th 1, 31-32 [value of opinion depends on quality of materials on which opinion is based and reasoning used to arrive at opinion].) In sum, the court was free to weigh the evidence before it in making its decision, and its competency finding was supported by substantial evidence. (See *People v. Lawley, supra,* 27 Cal.4th at pp. 134-135 [sufficient evidence to support competency finding where there were two conflicting reports before the court]; *People v. Frye, supra,* 18 Cal.4th at p. 1004 [competency finding supported by sufficient evidence where two of the three court-appointed experts found the defendant competent to stand trial]; see also *People v. Marshall, supra,* 15 Cal.4th at pp. 31-32 [substantial evidence of competency where experts' unanimous testimony that the defendant was incompetent was contradicted by the testimony of lay witnesses].) Accordingly, appellant's due process claim fails.

II.

APPELLANT'S RIGHTS WERE NOT VIOLATED BY HIS ABSENCE FROM CERTAIN PROCEEDINGS

Appellant contends he was denied his constitutional and statutory rights to be present on 17 different occasions during trial. (AOB 93.) The proceedings in question all involved hearings between the court and counsel conducted outside the presence of the jury, in which procedural or legal matters were discussed. Because appellant had no right to be present at such proceedings, his constitutional and statutory rights were not violated. Moreover, because appellant cannot demonstrate that his absence from these proceedings prejudiced his case or denied him a fair trial, reversal is unwarranted.

A. Summary Of The Proceedings In Question

On August 17, 1995, the court held a pretrial hearing to determine whether the defense was entitled to discovery of appellant's confidential probation records for use in the penalty phase as mitigation evidence. (RT [8/17/95] 19.) When the court inquired as to appellant's whereabouts, defense counsel explained that appellant was unaware of the hearing and that counsel had not requested his presence in court. (*Id.* at pp. 19, 28.) Counsel expressly waived appellant's presence after noting that appellant was not entitled to be present at the hearing. (*Id.* at p. 28.) After conducting an in camera hearing, the court ordered that the defense be provided with certain probation documents. (*Id.* at p. 27.)

At the beginning of a pretrial hearing on October 2, 1995, defense counsel noted that appellant was not present because of a "mixup." (RT [10/2/95] 29.) After suggesting that appellant should "be present at all proceedings," counsel asked for a continuance of the hearing. (*Ibid.*) The court granted the continuance. (*Ibid.*)

At the beginning of a pretrial hearing on September 5, 1997, to assign the matter for trial, the court noted that appellant was not present and asked whether defense counsel wanted a recess in order to locate him. (RT [9/5/97] 1.) Counsel declined, asking instead to reschedule the hearing. (*Ibid.*) The court reset the hearing for January 5, 1998. (*Ibid.*)

During the rescheduled hearing on January 5, 1998, defense counsel noted, "For the record, we were going to pull time for today. Mr. Blacksher is not present." (RT [1/5/98] 3.) When the court asked if appellant's presence was being waived, counsel responded, "I don't know that we can do that." (*Ibid.*) The prosecutor responded, "You don't need to waive his presence, but the time waiver can be withdrawn on his behalf without his presence in court." (*Id.* at pp. 3-4.) Defense counsel suggested that the court assign the matter for trial, and set the next court date for a day when appellant would be present. (*Id.* at p. 4.) The court set the matter for January 13, 1998, and defense counsel withdrew appellant's time waiver. (*Ibid.*) On January 13, 1998, the trial court noted the following in appellant's presence: "The defendant pulled time on January 5th, and the agreed upon date is March 5th, the 60 day time period of running. It's my understanding counsel has agreed that by starting motions on February 17th, that that would be the starting of trial for purposes of the time waiver." (CT 407.) After receiving confirmation from defense counsel, the court asked appellant if he "agree[d] with that." (CT 407-408.) Appellant responded, "Whatever you say is fine with me." (CT 408.)

On February 27, 1998, the court met with counsel in appellant's absence to finalize the jury questionnaire, discuss record corrections, and receive an update on the parties' progress on discovery matters. (RT 25-27.)

On March 6, 1998, the court met with counsel in appellant's absence for record correction proceedings. (RT 193.)

On March 9, 1998, counsel met on the record in appellant's absence to discuss their resolution of discovery issues. (RT 195-198.) Defense counsel specifically waived appellant's presence at the meeting. (RT 195.)

On the morning of March 18, 1998, appellant was present during an evidentiary hearing on the issue of Eva's competency. (RT 339.) At the conclusion of the hearing, the parties submitted the matter. (RT 350.) Before the court could rule, defense counsel asked for a short break. (*Ibid.*) After the break, the court briefly reconvened and defense counsel expressly waived appellant' s presence during a reading of stipulated juror hardship excusals into the record. (RT 350-351.) Afterwards, the court inquired as to how the parties wished to proceed with the competency matter. (RT 352.) When the prosecutor indicated that he was prepared to submit the matter, the court postponed ruling until the afternoon when appellant would be present. (*Ibid.*) The minute order from that date indicates that "all" were present when the court reconvened in the afternoon. (CT 717.) The parties again submitted the matter of Eva's competency and the court found her incompetent to testify. (RT 369-370.)

During the morning session on March 19, 1998, appellant was present in the courtroom when defense counsel expressly waived appellant's presence for the afternoon session. (RT 407, 410.) That afternoon, the court and defense counsel went through a list of exhibits to reconcile the court's rulings with the list. (RT 378-414.)

Defense counsel expressly waived appellant's presence during record correction proceedings on March 20, 1998 (RT 415), March 27, 1998 (RT 637), and April 10, 1998 (RT 1292).

During jury selection on April 14, 1998, defense counsel made a *Batson/Wheeler*[10] motion in chambers. (RT 1358-1359.) The court denied the motion and later restated its ruling in appellant's presence after the jurors were dismissed for the day. (RT 1359, 1365-1366.)

On April 17, 1998, defense counsel met briefly with the court in appellant's absence for record correction proceedings. (RT 1369.)

On May 11, 1998, defense counsel expressly waived appellant's presence during proceedings to discuss guilt phase jury instructions and record corrections. (RT 2553-2565.)

On June 17, 1998, juror number 10 submitted a note to the court requesting the day off on June 25, 1998, so that he could attend a prepaid golf tournament. (CT 1508.) That same day, the juror was asked to stay behind when the rest of the jurors were excused for lunch. (RT 3772.) The court, prosecutor, defense counsel, and appellant were all present in the courtroom. (RT 3771-3772; CT 1509.) The court informed the juror that he would be kept on the jury panel and that if the case was not resolved by the time his golf tournament was to begin, he would be excused from the jury and an alternate would be seated in his place. (RT 3772.) Both the prosecutor and defense counsel agreed with the court's proposed resolution. (RT 3772-3773.) On June 24, 1998, during penalty phase jury deliberations, defense counsel expressly waived appellant's presence before stipulating to the replacement of juror number 10 with an alternate juror. (RT 4010-4015.) The next day in appellant's presence, the court replaced juror number 10 with alternate juror number two. (RT 4012.)

On June 18, 1998, defense counsel expressly waived appellant's presence. (RT 3847.) The court and counsel then discussed penalty phase jury

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10. *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

instructions, the permissible scope of the prosecutor's argument in aggravation, and the prosecutor's use of visual aids in support of his argument. (RT 3847-3872.) Defense counsel withdrew appellant's right of allocution at the conclusion of the hearing. (RT 3872.)

B. Appellant Had No Right To Be Present At The Proceedings In Question

"Broadly stated, a criminal defendant has a right to be personally present at certain pretrial proceedings and at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, section 15 of article I of the California Constitution, and sections 977 and 1043." (*People v. Cole* (2004) 33 Cal.4th 1158, 1230.) However, a criminal defendant does not have the right to be personally present under the Sixth Amendment unless his appearance is necessary to prevent interference with his opportunity for effective cross-examination. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 740, 744, fn. 17; *People v. Waidla* (2000) 22 Cal.4th 690, 741.) Further, such right does not arise under the Fourteenth Amendment unless the defendant finds himself at a "stage . . . that is critical to [the] outcome" and "his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer, supra,* 482 U.S. at p. 745; *People v. Waidla, supra,* 22 Cal.4th at p. 742; see also *United States v. Gagnon* (1985) 470 U.S. 522, 526 [noting that while a defendant's right to be present is rooted largely in the Confrontation Clause, such right may also arise under the Due Process Clause in situations where the defendant is not actually confronting the witnesses or the evidence against him].) Similarly, under the California Constitution, a defendant has no right to be present at hearings that occur outside the jury's presence on questions of law or other matters that do not bear a reasonably substantial relation to the fullness of his opportunity to defend

against the charges. (*People v. Cole, supra,* 33 Cal.4th at p. 1231.) Under sections 977 and 1043, there is no right to be present, even in the absence of a written waiver, where the defendant has no such right under the California Constitution. (*Ibid.*) Lastly, the burden is on the defendant to demonstrate that his absence prejudiced his case or denied him a fair trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357.)

Contrary to appellant's assertions, he had no constitutional or statutory right to be personally present at any of the proceedings in question. All of the proceedings involved hearings between the court and counsel conducted outside the presence of the jury, in which procedural or legal matters were discussed. (See *People v. Cole, supra,* 33 Cal.4th at pp. 1231-1232 [no right to be present at hearings occurring outside the jury's presence on questions of law or other matters that do not bear a reasonably substantial relation to the opportunity to defend].) On every occasion, defense counsel were present who were fully able to represent appellant's interests. On many of these occasions, defense counsel expressly waived appellant's presence. While "[i]t may be that if personal presence truly bears a substantial relation to a defendant's opportunity to defend against the charges, counsel's waiver would not forfeit the claim," the very fact that counsel did not think appellant's presence was necessary "strongly indicates that [his] presence did not, in fact, bear [] a substantial relation" to the fullness of his opportunity to defend. (*People v. Cleveland* (2004) 32 Cal.4th 704, 741.) Further, appellant has made no attempt to show how his attendance at such hearings would have assisted the defense or otherwise altered the outcome of his trial. (See *People v. Benavides* (2005) 35 Cal.4th 69, 89 [failure to show that defendant's presence would have served any purpose]; *People v. Bradford, supra,* 15 Cal.4th at pp. 1357-1358 [defendant failed to show his attendance at hearings would have assisted the defense or altered the outcome of trial]; *People v. Johnson* (1993) 6 Cal.4th 1,

19 [no showing defendant's presence would have assisted his defense in any way]; see also *United States v. Gagnon, supra,* 470 U.S. at pp. 526-527 [the central inquiry in determining whether due process principles entitled a defendant to appear at a hearing is whether the defendant's presence reasonably could have assisted his defense of the charges against him].) Nor could appellant make such a showing, as is evident from a brief review of the proceedings in question.

As an initial matter, it is clear that appellant had no right to be present at two of the hearings at issue (October 2, 1995 and September 5, 1997), as both were immediately continued at the request of defense counsel before anything of substance took place. Nor can appellant seriously claim that his presence was required at ten other proceedings, all of which involved purely routine or legal matters: (1) August 17, 1995 (discovery); (2) February 27, 1995 (jury questionnaires, record corrections, discovery); (3) March 6, 1998 (record corrections); (4) March 9, 1998 (discovery); (5) March 19, 1998 (reconciling exhibits with exhibit list); (6) March 20, 1998 (record corrections); (7) March 27, 1998 (record corrections); (8) April 10, 1998 (record corrections); (9) April 17, 1998 (record corrections); and (10) May 11, 1998 (jury instructions, record corrections). (See, e.g., *People v. Cole, supra,* 33 Cal.4th at pp. 1230-1232 [no right to be present at various proceedings]; *People v. Waidla, supra,* 22 Cal.4th at pp. 741-743 [same]; *People v. Bradford, supra,* 15 Cal.4th at pp. 1355-1358 [same]; *People v. Holt* (1997) 15 Cal.4th 619, 706-707 & fn. 29 [same]; *People v. Johnson, supra,* 6 Cal.4th at p. 18 [listing cases].) Appellant's presence was similarly not required at the remaining five proceedings in question.

On January 5, 1998, defense counsel withdrew appellant's time waiver. (RT [1/5/98] 4.) Appellant was informed of this fact a week later, on January 13, 1998. (CT 407.) When the court asked appellant if he agreed with the

schedule proposed by counsel to meet the time waiver, appellant responded, "Whatever you say is fine with me." (CT 408.) Because appellant was informed of the time waiver before the matter was set for trial and expressly agreed to the schedule proposed by the court, he cannot argue that his absence during the initial time waiver violated his statutory or constitutional rights. (See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 376 [no violation of right to be present when, among other things, trial court explained substance of what occurred in defendant's absence and obtained defendant's consent as to what would be done].) Moreover, appellant has cited no authority, and we have found none, which would require a defendant's personal withdrawal of a time waiver. (See, e.g., *ibid.* [defendant's personal waiver of mistrial not required as such decision lay properly within counsel' s role as "captain of the ship"].)

Turning to the next proceeding in question, on March 18, 1998, the court held an evidentiary hearing on the issue of Eva's competency. Appellant was present at the evidentiary hearing and later when the court announced its ruling. Although appellant contends that he was not present for the court's ruling (AOB 96), his contention is belied by the court's comment that it would wait to rule in appellant's presence, along with the minute order from that date noting that "all" were present during the afternoon session. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 49 [presuming defendant's written waiver of his right to be present was executed in open court based on notations contained in the minute order].) Even assuming appellant was not present when the court ruled, appellant fails to show that his presence would have served any purpose. (*People v. Benavides, supra,* 35 Cal.4th at p. 89 [failure to show that defendant's presence would have served any purpose].) Counsel submitted the matter while appellant was still present in the courtroom (RT 350), and all that remained to be done was to hear the court's ruling. As the court based its ruling on its own observations of Eva during the evidentiary hearing (RT 370), this

was not a situation where appellant had any special knowledge of the facts that would have assisted his counsel or affected the court' s ruling. (*People v. Bradford, supra,* 15 Cal.4th at pp. 1357-1358 [defendant failed to show his attendance at hearings would have assisted the defense or altered the outcome of trial].)

Next, on April 14, 1998, the court ruled on the defense's *Batson/Wheeler* motion in chambers. The court later reiterated its ruling in appellant's presence. Because appellant ultimately heard the court's ruling, he cannot argue that his right to be present during the court's initial ruling was violated. Nor can appellant demonstrate that his presence would have aided defense counsel during the in chambers discussion on the motion. (*People v. Johnson, supra,* 6 Cal.4th at p. 19 [no showing defendant's presence would have assisted his defense in any way].)

During the next hearing at issue, on June 18, 1998, defense counsel withdrew appellant's right of allocution. Appellant contends that the right to allocution is a fundamental right that cannot be waived in a defendant's absence. (AOB 101.) However, this Court has held that the right of allocution does not exist in capital cases "because a defendant has the right to testify at the penalty trial," and so does not have a right to address the court at sentencing without being subject to cross-examination. (*People v. Cleveland, supra,* 32 Cal.4th at pp. 765-766.) Because appellant had no right to allocution, he could not have been prejudiced by counsel's withdrawal of such a "right" in his absence.

Finally, on June 18, 1998, appellant was present when the court questioned juror number 10 about his request to be excused on June 25, 1998, for a prepaid golf tournament. (RT 3772; CT 1509.) Defense counsel agreed with the court's proposed resolution to keep the juror on the panel and excuse him only if the case remained unresolved by the time he had to leave. (RT

3772-3773.) On June 24, 1998, defense counsel expressly waived appellant's presence and stipulated to the excusal of juror number 10. (RT 4010.) The following day, in appellant's presence, the court informed the jury that juror number 10 had been replaced with alternate juror number two. (RT 4012.) Appellant made no objection regarding his absence from the previous day' s hearing or his counsel's stipulation to the replacement of the juror. (*Ibid.*) Considering that appellant was present at the June 17 hearing in which juror number 10 was questioned and the parties agreed to his excusal if the case was not resolved before he had to leave, his right to presence was not violated at the second hearing on June 24th, at which time the court and parties followed through with their previously agreed upon resolution. Moreover, given the nature of the juror's request for excusal, there is no reason to believe appellant's presence at the second hearing would have aided defense counsel or affected counsel's decision to stipulate to the excusal of the juror. Presumably, if the nature of the proceeding was such that appellant's presence would have been beneficial, his counsel would not have expressly waived his presence. Accordingly, appellant had no right to be present at the hearing. (See, e.g., *United States v. Gagnon, supra,* 470 U.S. at p. 527 [no right to be present at in camera hearing on juror's impartiality]; *People v. Johnson, supra,* 6 Cal.4th at pp. 19-20 [defendant's exclusion from in chambers hearing regarding possible discharge of juror was not prejudicial where it was unlikely his presence would have helped him defend against the charges]; *In re Lessard* (1965) 62 Cal.2d 497, 505-507 [no right to be present when judge questioned ailing juror in chambers as to her request to be excused]; *People v. Abbott* (1956) 47 Cal.2d 362, 372 [no right to be present during in chambers discussion on the discharge of a juror and substitution of an alternate].) Moreover, because juror number 10 was replaced with an alternate, prejudice cannot be presumed. (*In re Lessard, supra,* 62 Cal.2d at p. 507; *People v. Abbott, supra,*

47 Cal.2d at p. 372.) As this Court noted in *People v. Johnson, supra,* 6 Cal.4th at p. 20:

> [S]everal cases have observed that if, as a result of the hearing in question, the affected juror is discharged and an alternate juror is picked to replace him, prejudice to the defendant will not be presumed. [Citations.]
>
> As stated in *People v. Dell* [(1991) 232 Cal.App.3d 248], "appellant does not claim she was actually prejudiced from the substitution of jurors nor does it appear she could reasonably make such an argument. Alternates are selected from the same source, in the same manner, with the same qualifications and are subject to the same challenges. Alternates have an equal opportunity to observe the entire proceedings and take the same oath as regular jurors. [Citation.] In this case, appellant had ample opportunity to voir dire the alternates and use her allotted peremptory challenges. [Citation.] Nor is there any allegation the alternates were either incompetent or biased." (232 Cal.App.3d at pp. 256- 257.)

For these same reasons, appellant cannot demonstrate that he suffered any prejudice as a result of his exclusion from the hearing in which juror number 10 was discharged and substituted with an alternate juror.

Appellant admits that his absence during routine proceedings such as "record correction[s], hardship excusals, and jury instruction conferences" was not substantially related to his opportunity to defend (AOB 100-101), but asserts that he included such instances to "show the cavalier attitude of counsel and court to appellant's right to presence." (AOB 102.) However, if, as appellant concedes, he had no right to be present at such routine proceedings in the first place, it is difficult to see how his absence from these hearings demonstrates a "cavalier attitude" on the part of the court and counsel towards appellant's right to be present. Nor does appellant's absence from such routine proceedings have any bearing on whether he had a right to be present on other occasions. Contrary to appellant's assertions, the record as a whole demonstrates that both the court and counsel were sensitive to appellant's right

to be present. For instance, the court routinely inquired as to appellant's whereabouts, and often informed appellant of what took place in his absence. Appellant missed relatively few court dates over the course of three years, and on those few occasions during which the court or counsel thought his presence was required, the matter was continued until such time as appellant could be present in the courtroom. Considering appellant's high attendance rate, there is simply no support in the record for appellant's claim that his absences from the courtroom demonstrate that he "was unable to assist in his defense, and [that] his mental illness made it more convenient to proceed without him." (AOB 102.) In sum, appellant had no right to be present at any of the hearings in question, nor did his absence deny him a fair trial.

III.

APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION IN SUPPORT OF HIS *BATSON/WHEELER* MOTION

Appellant contends that the trial court violated his state constitutional right to trial by a jury drawn from a representative cross-section of the community (Cal. Const., art. I, § 16; *People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277) when it found no prima facie case of discrimination by the prosecutor in the use of peremptory challenges to strike two Black prospective jurors. (AOB 107-108.) Appellant further contends that the trial court's ruling violated his federal constitutional right to equal protection of the laws under the Fourteenth Amendment (*Batson v. Kentucky, supra,* 476 U.S. at p. 89). (AOB 107-108.) Each of these contentions lack merit.

A. Jury Selection Proceedings

During jury selection, the prosecutor used his fourth and eighth peremptory challenges to excuse prospective jurors M.P. and L.W. (RT 1357-1358.) Immediately after L.W. was excused, defense counsel objected on *Batson/Wheeler* grounds, claiming that the prosecutor had excluded M.P. and L.W. because they were black. (RT 1359.) The court found that the defense had failed to make a prima facie showing of racial discrimination, noting that up to that point, the defense had excused one Black prospective juror, the prosecutor had excused two, and there were two remaining in the jury box. (RT 1359.)[11/] After the court made its ruling, the parties proceeded to use their

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11. The defense used their first peremptory challenge against Black prospective juror L.H. (RT 1356; see also CT 7669.) Up until the point the defense brought its *Batson/Wheeler* motion, both parties had repeatedly passed up challenges to the other two Black prospective jurors still remaining in the jury box, P.B., and the juror ultimately seated as juror number five. (RT 1355-1358; see also CT 3281, 16734.)

remaining peremptory challenges and ultimately selected a jury and five alternates. (RT 1359-1363, 1682-1684.) The final jury included six black jurors. (RT 2687, 4053; CT 1205; 2759, 2797, 2835, 2978, 3054, 3281.)

B. Appellant Failed To Make A Prima Facie Showing Of Racial Discrimination In The Prosecutor's Use Of His Peremptory Challenges

"Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial or other cognizable group." (*People v. Young* (2005) 34 Cal.4th 1149, 1172.) "If a defendant believes the prosecution is improperly using peremptory challenges for a discriminatory purpose, he or she must raise a timely objection and make a prima facie showing that jurors are being excluded on the basis of racial or group identity." (*People v. Farnam* (2002) 28 Cal.4th 107, 134-135.) To establish a prima facie case of discrimination, the defendant must: (1) make as complete a record as possible; (2) show that the excluded jurors are members of a cognizable group; and (3) show from all the circumstances of the case that there is a strong likelihood or reasonable inference that such jurors are being excluded because of their group association. (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188 & fn. 7.)[12/]

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12. With regard to the third prong, this Court previously held that in order to establish a "strong likelihood" or "reasonable inference," the defendant "must show that it is more likely than not the [prosecutor's] peremptory challenges, if unexplained, were based on impermissible group bias." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1306.) *Johnson* was recently overruled by the United States Supreme Court, which found *Johnson's* "more likely than not" standard at odds with *Batson's* reasonable inference standard. (*Johnson v. California* (2005) ___ U.S. ___ [125 S.Ct. 2410, 2416, 2419].) We note that the precise standard employed by the trial court in this case is not critical to the resolution of appellant's *Batson/Wheeler* claim, as the facts presented do not give rise to any reasonable inference of discriminatory purpose. (*People v. Gray* (2005) 37 Cal.4th 168, 187; *People v. Cornwell* (2005) 37 Cal.4th 50, 73; *People v. Young, supra,* 34 Cal.4th at p. 1172, fn. 6.)

Appellant failed to show that there was a reasonable inference the prosecutor excluded M.P. and L.W. because they were black. Appellant's entire showing consisted of a recitation of the names of the two Black prospective jurors removed by the prosecutor, an allegation of a strong likelihood the jurors were excluded because of their race, and citations to the general legal principles governing his motion. Appellant failed to set forth any circumstances which supported his motion, such as "the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions." (*People v. Howard* (1992) 1 Cal.4th 1132, 1154.) Appellant's showing offered "little practical assistance to the trial court, which must determine from 'all the circumstances of the case' whether there is 'a strong likelihood' that prospective jurors have been challenged because of their group association rather than because of any specific bias." (*Ibid.*) Like the defendant in *Howard*, appellant's sole reliance on the fact that the prosecutor had challenged two Black prospective jurors was "completely inadequate" to show a prima facie case of discrimination. (*Ibid.*) Moreover, the trial court's observation that the defense had excused one Black prospective juror and that there were two Black prospective jurors remaining in the jury box tended to further weaken appellant's already inadequate showing of discriminatory purpose. (*People v. Snow* (1987) 44 Cal.3d 216, 225 [the passing of minority jurors, though not conclusive, "may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial court to consider in ruling on a *Wheeler* objection"].) In sum, no prima facie case of discrimination appears on the record. (See *People v. Cornwell, supra,* 37 Cal.4th at p. 70 [prosecutor's challenge to one of two Black prospective jurors did not support an inference of bias, especially given that the second Black juror was passed repeatedly and ultimately served on the jury]; *People v. Young, supra,* 34 Cal.4th at p. 1172,

fn. 7 ["Nothing in *Wheeler* suggests that the removal of all members of a cognizable group, standing alone, is dispositive on the question of whether [the] defendant has established a prima facie case of discrimination"]; *People v. Box, supra,* 23 Cal.4th at pp. 1188-1189 [the fact that three Black prospective jurors were challenged by the prosecutor was an insufficient basis for stating a prima facie case of discrimination]; *People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 15 [merely indicating the number and order of minority excusals is insufficient to establish a prima facie case particularly when the final jury contains members of the same minority group].)

Although appellant's showing was clearly insufficient, the inquiry on appeal does not end with his presentation at the time of his motion. (*People v. Howard, supra,* 1 Cal.4th at p. 1155.) "This is because other circumstances might support the finding of a prima facie case even though a defendant's showing has been no more detailed than in the case before us. Nor should the trial court blind itself to everything except defense counsel's presentation." (*Ibid.*) Thus, when a trial court denies a *Batson/Wheeler* motion based on the lack of a prima facie showing of group bias, the reviewing court considers the entire record of voir dire for evidence to support the trial court's ruling. (*People v. Farnam, supra,* 28 Cal.4th at p. 135.) "Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. . . . If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm." (*People v. Howard, supra,* 1 Cal.4th at p. 1155.)

Here, the record indicates grounds upon which the prosecutor might reasonably have challenged M.P. and L.W. For instance, M.P. indicated on her jury questionnaire that her brother had been subjected to racist treatment by police officers in the past, which had prompted a public outcry on her brother's behalf and an eventual apology from the Oakland Police Department. (CT

11921-11922.) M.P. felt that the situation was handled "very poorly to say the least." (CT 11922.) While she believed that the Criminal Justice system in general is "fine," she also noted her view that "people within the system abuse it at times." (CT 11923.) She also indicated that she would apply a different standard in evaluating the testimony of police officers than that of other witnesses because "[s]ometimes they see things differently." (CT 11923.) Based on these responses, the prosecutor might have reasonably suspected that M.P. had a negative view of law enforcement, making her an undesirable juror from the standpoint of the prosecution. (See *People v. Farnam, supra,* 28 Cal.4th at p. 138 ["a prosecutor may reasonably surmise that a close relative's adversary contact with the criminal justice system might make a prospective juror unsympathetic to the prosecution"].)

Moreover, further inquiry into M.P.'s views on the death penalty revealed that she had some reservations about capital punishment based on her religious beliefs. While she indicated on her jury questionnaire that she was willing to impose the death penalty if appropriate (CT 11941), she also gave some contradictory responses that might reasonably have caused the prosecutor some concern. For example, she expressed having ambivalent feelings about the death penalty because of her religious beliefs. (RT 1283-1284; CT 11935.) Although she stated that such feelings would not affect her ability to impose the death penalty, when pressed as to whether she was "sure of that," she could only say that she was "pretty sure." (RT 1284.) In response to an inquiry on the questionnaire asking for her best argument against the death penalty, she indicated "[w]e do not have the right to take a life because the person to[ok] one," and that "[w]e might be playing 'God.'" (CT 11936; see also RT 1284.) When asked during voir dire to explain her response to this question, she replied, "I don't think any human being should take a life, period. In a situation, basically if I am placed to make a moral judgment, then I will be -- I

will be in a participatory role to take a life." (RT 1285.) Although M.P. had not been removed for cause, presumably in light of her claimed willingness to be fair and to impose the death penalty if appropriate, the prosecutor might reasonably have challenged her based upon her hesitation toward doing so. (*People v. Farnam, supra,* 28 Cal.4th at pp. 137-138.)

The prosecutor might have been equally troubled by L.W.'s inconsistent responses regarding the death penalty during the voir dire process. For instance, while L.W. indicated on her jury questionnaire that she was "moderately in favor" of the death penalty (CT 6301, 6303), she indicated during voir dire questioning that neither the arguments for nor against the death penalty were "more reflective of [her] attitude toward the death penalty." (RT 1059-1060.) In addition, although L.W. stated that the death penalty was "the most definitive way to deal with individuals" (CT 6300; see also RT 1059) and "the absolute punishment" (RT 1059), and that life without the possibility of death was "the next and/or closest punishment to death" (CT 6301), she incongruously stated that life without the possibility of parole was worse for a defendant than death (CT 6304). Finally, while L.W. indicated that she could see herself rejecting the death penalty and choosing life without the possibility of parole in an appropriate case, she indicated she could not see herself rejecting life without the possibility of parole and choosing death in an appropriate case. (CT 6306.)

The prosecutor might have also had reservations about L.W.'s ability to fairly evaluate any psychiatric testimony presented at trial given her background as a psychology major. (CT 6281-6282, 6291; RT 1061.) For instance, L.W. seemed to put much stock in the validity of psychology as a science and the testimony of psychologists and psychiatrists in criminal trials. (CT 6291-6293; RT 1062-1063.) Additionally, while she felt that the insanity defense may be "used as a crutch," she also felt that such defense "may be viewed as [the] most

accurate depending on the crime." (CT 6292; RT 1063.) In light of her background and responses during voir dire, the prosecutor may have questioned L.W.'s ability to critically view appellant's insanity defense. (See *People v. Howard, supra,* 1 Cal.4th at p. 1156 [prospective juror's professional training as a nurse "'suggest[ed] grounds upon which the prosecutor might reasonably have challenged'" her]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092 [prosecutor reasonably challenged juror who had studied psychology and admitted that he would "try to be an amateur psychologist" if left on the jury.) Because the record suggests race-neutral reasons why the prosecutor might reasonably have challenged M.P. and L.W., substantial evidence supports the trial court's finding of no prima facie case of discrimination. (*People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

GUILT PHASE ISSUES

IV.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE ADMISSION OF EVA'S HEARSAY STATEMENTS

Appellant contends that the admission of Eva's hearsay statements to John Adams, Officer Neilsen, James and Frances Blacksher, and Inspector Bierce violated his federal constitutional rights to confrontation, due process, and a fair trial. (AOB 114.) More specifically, appellant contends that Eva's statements were inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36, because the statements were testimonial and he did not have a prior opportunity for meaningful cross-examination. (AOB 119-134.) Appellant also attacks admission of the evidence on state law grounds. (AOB 134-146.) Appellant has waived his claims with respect to the admission of Eva's statements to Inspector Bierce. Furthermore, appellant's contentions lack merit. Finally, appellant was not prejudiced by admission of Eva's statements.

A. Proceedings Below

1. Prosecutor's Motion To Introduce Eva's Statements

On February 24, 1998, the prosecutor sought to admit statements made by Eva immediately after the murders under the spontaneous statement exception to the hearsay rule (Evid. Code, § 1240). (CT 552.)[13/] The prosecutor submitted the following offer of proof in support of his motion:

On May 11, 1995, at approximately 7:00 a.m., Eva's next-door neighbor, John Adams, was outside cutting his lawn when appellant pulled up in his car and parked. (CT 554.) Adams and appellant exchanged greetings as appellant

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13. The prosecutor also sought to have Eva declared incompetent to testify as a witness at trial. (CT 560-586; RT 329-330.) The trial court found Eva incompetent in a separate proceeding. (RT 369-370.)

entered his mother's home. (*Ibid.*) At the time, Torey was asleep on a makeshift bed in the dining room, while Eva and Versenia were in their respective bedrooms. (*Ibid.*)

Appellant went into his mother's bedroom and spoke to her briefly. (CT 554.) He then went into the dining room and fired two gunshots at the back of Torey's head, killing him. (*Ibid.*) As Versenia and Eva entered the room, Versenia asked appellant what he was doing. (CT 554-555.) She then turned away from appellant, trying to protect the back of her head with her hand. (CT 555.) Appellant shot her in the back of the head and left. (*Ibid.*) Eva screamed as Versenia fell into her arms and bled to death. (*Ibid.*) When Eva realized Versenia was dead, she ran outside in her nightclothes, hysterical. (*Ibid.*)

Upon hearing the gunshots, Adams went inside his house and called the Berkeley Police Department at approximately 7:18 a.m. (CT 555.) As Adams tried to calm Eva down, she said, "Erven shot B.D. and Torey. He may have shot himself, too. Oh Jim, help me." (*Ibid.*)[14/]

Officers Neilsen, Queen, and Larsen were the first police officers to arrive on the scene at approximately 7:20 a.m. (CT 555.) While Officers Queen and Larsen entered Eva's house, Officer Neilsen joined Adams and Eva outside. (*Ibid.*) Officer Neilsen had not yet asked any questions when Eva, still hysterical and agitated, told him, "Erven came into the house and argued with his sister. He shot her and her son. Both are in the house. I think they are dead. I think he used a handgun. It was concealed. I think he was wearing a black leather coat. I don't know if he's still in the house." (*Ibid.*) After leaving Eva with other law enforcement personnel, Officer Neilsen assisted in a search for appellant at the scene. (*Ibid.*)

Eva was still shaken when she was taken to the vehicle of a Berkeley Mental Health Mobile Crisis Team clinician. (CT 555.) Eva's son, James

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14. "B.D." was another one of Versenia's nicknames. (RT 2119.)

Blacksher, and his wife, Frances, reached the scene immediately. (*Ibid.*) Eva was screaming when she spoke to James and Frances. (*Ibid.*) She told James, "Erven shot Torey and B.D. (Versenia). Why, why, why? He didn't have to do this. She fell into my arms. I laid her down on the floor." (*Ibid.*) She told Frances, "Fran, Erven did it. Erven shot B.D. and Torey. Blood was spurting out of her head, skeeting like a faucet. She fell into my arms." (CT 556.)

The prosecutor argued in his motion that the circumstances surrounding Eva's statements showed that they were spontaneous. (CT 557-559.) The prosecutor also argued that Eva's present incompetence did not affect the admissibility of her statements. (CT 559-560.) Finally, the prosecutor argued that appellant's confrontation rights would not be violated by admission of the statements. (CT 560-563.)

Appellant filed an opposition to the prosecutor's motion, objecting on the following grounds: (1) the prosecutor failed to establish that Eva perceived the events described in her statements; (2) the prosecutor failed to establish that Eva actually made the statements; (3) the statements constituted impermissible opinion evidence; (4) the prosecutor failed to show that the statements were made spontaneously while Eva was under the stress of excitement; (5) the statements were unreliable and violated appellant's confrontation rights under the state and federal constitutions; (6) the statements were unduly prejudicial under Evidence Code section 352; and (7) the statements were untrustworthy and violated appellant's rights to due process and a fair trial under the state and federal constitutions. (CT 634-649.) In support of his opposition, appellant attached a police report by Inspector Bierce memorializing his conversation with Eva on the day of the murders (CT 653-655); an affidavit in support of a search warrant by Officer Nanoguchi (CT 656-658); an affidavit in support of a search warrant by Inspector Bierce (CT 659-661); and a transcript of John Adams's 911 call on the morning of the murders (CT 662-664). The prosecutor

filed a response with the following attachments: John Adams's statement to police (CT 686-688); the transcript of Adams's preliminary hearing testimony (CT 689-705); and Officer Neilsen's police report (CT 706-708).

During the hearing on the prosecutor's motion, the prosecutor offered the following additions to his offer of proof: (1) after killing his sister and nephew, appellant left his mother's house at approximately 7:18 a.m.; (2) Eva went outside and made her statements to John Adams within two to five minutes of the murders—Eva was hysterical and excited at the time she made her statements; (3) Officer Neilsen arrived at approximately 7:23 a.m. and spoke with Eva within 10 minutes of the murders—Eva was still hysterical and agitated when she spoke with Officer Neilsen; (4) because of Eva's distressed state, the police called for a mental health crisis counselor at approximately 7:41 a.m.; (5) the mental health crisis counselor, Daryl Brand, had contact with Eva at approximately 8:00 a.m.—Eva appeared to be in shock at that time, and there was some concern about her overall health and blood pressure; and (6) James Blacksher arrived on the scene between 8:20 to 8:26 a.m.—approximately one hour and 15 minutes after the murders—and spoke with his mother. (RT 1656-1660.) During the hearing, the prosecutor argued that to the extent Eva's statements to Inspector Bierce on the day of the murders differed in substance from her spontaneous statements, such difference went merely to the weight of the spontaneous statements, not their admissibility. (RT 1660.) The defense argued that the statements were inadmissible hearsay, and that their admission would violate appellant's right to confrontation. (RT 1661-1663.) The court ruled as follows:

> Well, it appears to the court, from going through the points and authorities from both sides, that the statements by Ms. Eva Blacksher certainly meet the requirements of 1240; that they purport to narrate or describe an act or events perceived; and she – were spontaneously made when she was under the stress and excitement.

> Certainly seeing her nephew (sic) and daughter killed, and being in an excited and stressful state of mind for a period of time, there is no Confrontation Clause violation because the law recognizes under those circumstances there is little opportunity or incentive to make things up or to speak falsely.
>
> As to any issue of her competency relating to the 1240 motion, the court believes that the authority cited both by Mr. Tingle and also the court, the authority found by the court, that competency of a hearsay declarant under 1240 is not required for the statements to be admissible.
>
> The court is referring – relying on In re Daniel Z[.] at 10 Cal.App.4th, page 1009, People versus Anthony at 5 Cal.App.[4th] 428, and People versus Butler at 249 Cal.App.2d, 799.
>
> And the fact that she didn't recall or restate those objection – observations later when she talked to Officer Bierce also does not affect the admissibility but merely the weight, and that is based upon the holding of People versus Arias at 13 Cal.4th, 92. So the motion to use those statements pursuant to 1240 is granted.

(RT 1663-1664.)

2. Introduction Of Eva's Statement To Inspector Bierce The Day After The Murders To Impeach Her Preliminary Hearing Testimony

On March 24, 1998, the prosecutor filed a motion to introduce an edited transcript of Eva's preliminary hearing testimony at trial. (CT 727-769.) At the hearing on the prosecutor's motion, the defense offered no objections to the introduction of the edited transcript, and the court granted the prosecutor's motion. (RT 1652-1655.) The transcript was thereafter read to the jury. (RT 1868.) Eva's statement to Inspector Bierce the day after the murders was then admitted to impeach her preliminary hearing testimony. (RT 2585-2590; see also RT 2739, 2741, 2841.)

3. Trial Testimony Relating Eva's Hearsay Statements

John Adams testified that Eva appeared to be in good health in May of 1995. (RT 1921.) She could walk without assistance and carry on a conversation in a clear and coherent manner. (*Ibid.*)

On May 11, 1995, Adams was on the phone to 911 when he looked outside his window and saw Eva walking towards his house. (RT 1941.) She looked hysterical and was calling out in an excited voice, "Jim, help me. Help me, Jim." (*Ibid.*) She had on a nightgown and there was a red substance on her feet that looked like blood. (RT 1941-1942.) When Adams went to his front door to let her know he had 911 on the line, Eva told him, "They've been shot, they've been shot. Beanie and Torey have been shot." (RT 1942.)

It also sounded as if she said that Erven shot Beanie and Torey and then shot himself. (RT 1943-1944.) Although Eva was excited and hysterical when she made the statements to Adams, he could clearly understand what she was saying. (RT 1942-1944.) Eva was still excited and hysterical when police officers arrived on the scene. (RT 1944.)

Officer Neilsen testified that he was one of the first officers to arrive on the scene. (RT 1869-1870.) As he walked towards Eva's house, he saw Adams and Eva standing in front of Adams's house. (RT 1870-1872.) He noticed that Eva was wearing her nightclothes without any shoes, and that she appeared distraught. (RT 1872.) Immediately upon seeing her, Officer Neilsen stopped to talk to her to "find out what information she had." (*Ibid.*) Officer Neilsen wanted to determine what had taken place so the police could take appropriate action upon entering the house. (RT 1874-1875.) Officer Neilsen had no intention of taking a formal statement at that time. (RT 1912.) Eva appeared excited, agitated, concerned, and anxious to talk to him, as if something serious had just happened. (RT 1872-1873.) Eva initiated the conversation with Officer Neilsen. (RT 1873.) She told him that her daughter and her daughter's

son had been shot and that she thought they were both dead. (RT 1873, 1883.) She explained that appellant had come into her house earlier that morning and spoken to her briefly. (RT 1882.) He then argued with his sister and shot both his sister and his sister's son. (*Ibid.*) Eva did not see appellant with a gun when he came into her house, and she did not know where he got the gun. (*Ibid.*) When asked if appellant was still inside the house, she said she did not know. (RT 1882-1883.) She said that appellant was wearing a black leather jacket and a gray shirt. (RT 1883.) Officer Neilsen spoke to Eva for approximately ten to fifteen minutes. (RT 1875.) He took notes on a small notepad while she filled him in on what had happened, and he asked her for clarification on certain points during the conversation. (RT 1875-1876.) Eva remained distraught throughout the entire conversation. (RT 1884-1885.)

After their conversation, Officer Neilsen let Eva sit down in an unmarked police vehicle parked across the street from her house. (RT 1876, 2441.) Inspector Bierce, who was assigned to investigate the murders, spoke with Eva in the backseat of the car, but did not take a statement at that time because of Eva's distressed state. (RT 2584-2585.) Inspector Bierce requested that a mental health worker be dispatched to the scene to take care of Eva's mental health needs. (*Ibid.*) Daryl Brand, a family crisis counselor with the Berkeley City Mental Health Department, showed up at the scene in response to the call. (RT 2440.)

Brand met with a police officer at the car. (RT 2442.) He told her that there had been a death in the family, and asked her to take care of Eva and her mental health. (*Ibid.*) Brand got into the car with Eva. (*Ibid.*) Eva appeared to be in shock and did not look well; she was quiet and in a state of denial. (RT 2442, 2444.) Brand called in the paramedics because she was concerned about Eva's physical health; Eva kept talking about her high blood pressure, and she was having trouble with her concentration and memory. (RT 2444.) While she

was with Eva, Brand did not ask her any questions about what had happened in the house. (*Ibid.*) When Eva's son and daughter-in-law, James and Frances Blacksher, arrived on the scene, Frances got into the car with Eva and tried to comfort her. (RT 2446.) Brand did not listen to Frances's conversation with Eva. (*Ibid.*) At some point, James also got into the car with Eva and spoke with her, but Brand did not hear their conversation. (RT 2446-2447.) Brand did not observe any change in Eva's emotional state during the entire time she was with her. (RT 2448.)

When Frances arrived on the scene, she saw Eva sitting in a car with Brand. (RT 2301.) Eva looked hurt, torn, nervous, upset, and angry. (RT 2304-2306.) When Eva saw Frances, she rolled down her window. (RT 2301.) Frances asked her what had happened and Eva replied that appellant shot Torey while Torey was sleeping, and that he also shot Versenia in the head. (RT 2306-2307.) Eva said that Versenia fell into Eva's arms after she was shot, and that blood was streaming from her head. (RT 2310-2311.) Eva told Frances that Versenia's blood got all over her clothes. (*Ibid.*) Frances could see blood all down the front of Eva's housecoat and house shoes. (RT 2303.) When Frances asked Eva where appellant was Eva said, "He went down the street just as fast as he could that way." (RT 2306.) Eva told Frances that she and Versenia had heard gunshots and that when they ran into the dining room, Eva saw appellant shoot Versenia. (RT 2331-2332.) Eva remarked that appellant did not have to shoot Versenia and Torey. (RT 2306-2307.)

James also testified that Eva was in a car with Brand when he arrived at the scene. (RT 2351-2352.) Eva was hysterical and upset at the time; she was screaming and "hollering." (*Ibid.*) When he asked her what had happened, she said that Erven killed Torey and shot Versenia. (RT 2352-2353.) She said that after Versenia was shot, she fell down into Eva's arms and said, "Mama." (RT 2353.)

Eva's preliminary hearing testimony was read to the jury. (RT 1868.) Eva testified that appellant came into her bedroom on the morning of the murders and asked her about supper. (CT 755-756.) The next thing she remembered after appellant left her bedroom was hearing Versenia calling out to her that she had "heard a gun shoot and she was going through the house." (CT 756-757.) Eva then heard a single gunshot. (*Ibid.*) She jumped up "to run to, to catch hold of" Versenia. (*Ibid.*) When she got to the door, Versenia fell. (*Ibid.*) When Eva saw that Versenia was bleeding, she stepped over her head and ran out of the house. (*Ibid.*) She denied hearing Versenia say anything before she was shot. (CT 757.) Although she admitted speaking to the police afterwards, she denied telling them that she heard Versenia say "what is wrong with you, what are you doing." (*Ibid.*) When shown her statement to Inspector Bierce (see RT 2585-2586), Eva admitted that her signature appeared on the bottom of both pages of the statement, but she did not remember signing it or reading it. (CT 758-759.) She did not see appellant or anyone else in the house when she left. (CT 758-759.) She also denied knowing how much time had passed from the time she spoke to appellant to the time she heard Versenia calling out to her. (CT 758-759.) Finally, she denied telling the police that she heard two gunshots that morning. (CT 759.)

Inspector Bierce testified at trial that he took a written statement from Eva the day after the murders. (RT 2585.) Inspector Bierce filled out the statement before reading it to Eva and then having her sign it. (RT 2585-2586.) Eva's signature appeared at the bottom of both pages of the statement. (RT 2586.) Eva told Inspector Bierce that after appellant left her bedroom on the morning of the murders, he walked down the hallway, turned into the dining room, and within seconds she heard two shots. (RT 2587-2588.) She did not hear any voices before hearing the gunshots. (*Ibid.*) From where she was in her bedroom, she had a direct view down the hallway to the door of Versenia's

bedroom. (RT 2588-2589.) She saw Versenia come out of her room and turn into the dining room. (*Ibid.*) She heard Versenia say something like "what are you doing?" or "what is wrong with you?," and then she heard a single shot. (*Ibid.*) After hearing the shots, Eva got out of her bed and made her way to the dining room. (RT 2589-2590.) She saw Versenia in a standing position with blood coming out of her head. (*Ibid.*) Versenia slumped to the ground and cried out, "Mother, mother." (*Ibid.*)

B. Appellant Has Waived His Challenge To The Admission Of Inspector Bierce's Testimony On Appeal

A defendant must object to the admission of evidence below in order to preserve the claim for appeal. (Evid. Code, § 353; *People v. Cain* (1995) 10 Cal.4th 1, 28.) Similarly, a claim based on a purported violation of the Confrontation Clause must be asserted at trial or it is waived on appeal. (*People v. Hines* (1997) 15 Cal.4th 997, 1035.)

Here, appellant did not object to the introduction of Eva's statement to Inspector Bierce on either state or federal law grounds. Accordingly, he has waived any challenge to the admission of Inspector Bierce's testimony on appeal. Nor can appellant claim that his failure to object on confrontation grounds was excusable because *Crawford* had not yet been decided. (See, e.g., *People v. Rincon* (2005) 129 Cal.App.4th 738, 754-755 [defendant's failure to make a specific Sixth Amendment objection did not forfeit the claim that admission of out-of-court statements violated the Confrontation Clause under *Crawford*]; see also *People v. Turner* (1990) 50 Cal.3d 668, 703 ["Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change"].) *Crawford* was merely an application of the Confrontation Clause, it was not a new constitutional right which was not in existence at the time of appellant's

trial. (But see *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400 [*Crawford* stated new rule on effect of Confrontation Clause on hearsay in criminal cases].) Thus, if appellant had wished to challenge the admission of Eva's statement to Inspector Bierce on confrontation grounds, he could have done so even before *Crawford* was decided, as he did with respect to Eva's statements to John Adams, Officer Neilsen, and James and Frances Blacksher (see CT 634-649; RT 1661-1663). (See *People v. Baylor* (2005) 130 Cal.App.4th 355, 365-367 [defendant waived *Crawford* claim where he objected only on state hearsay grounds below].) In sum, because appellant expressed no objections to Eva's statement to Inspector Bierce on either state or federal law grounds, he has waived any challenge to the admission of the statement on appeal.

C. The Trial Court Properly Admitted Eva's Statements To John Adams, Officer Neilsen, And James And Frances Blacksher Under The Spontaneous Statement Exception To The Hearsay Rule

As noted above, the trial court admitted Eva's statements to John Adams, Officer Neilsen, and James and Frances Blacksher under the spontaneous statement exception to the hearsay rule.[15] Appellant contends that the court erred in admitting the evidence under this exception. We disagree.

1. Applicable Law

Evidence Code section 1240 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

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15. We do not address appellant's contention that Eva's statement to Inspector Bierce the day after the murders was not spontaneous as it is clear that the statement was not admitted under the spontaneous statement exception to the hearsay rule.

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

A statement must meet three requirements in order to be admissible under this section:

> "(1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it."

(*People v. Poggi* (1988) 45 Cal.3d 306, 318, quoting *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468.) It lies within the sound discretion of the trial court to determine whether these foundational prerequisites are met. (*Id.* at pp. 318-319.)

2. Substantial Evidence Supports The Trial Court's Finding That Eva Perceived The Events Described In Her Statements

Appellant first contends that the court's admission of such statements was improper because the prosecution "failed to establish that Eva perceived the events she narrated." (AOB 135.) However, the facts available to the trial court at the time it made its ruling amply justified its conclusion that Eva perceived the events she described. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1007 & fn. 23 [a trial court's ruling on the admission of evidence is reviewed on the basis of the evidence presented to the trial court at the time the ruling was made].) "'It must . . . appear "in some way, at least, and with some degree of persuasive force" that the declarant was a witness to the event to which his utterance relates. [Citation.] Although this does not require direct proof that the declarant actually witnessed the event and a persuasive inference that he did is sufficient, the fact that the declarant was a percipient witness should not be purely a matter of speculation or conjecture. [Citations.]'"

(*People v. Phillips* (2000) 22 Cal.4th 226, 236, quoting *Ungefug v. D'Ambrosia* (1967) 250 Cal.App.2d 61, 68; see also *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 178 ["Although no direct evidence was introduced on the point, there was evidence from which it could be inferred the declarant had witnessed the [startling event]"].)

It is undisputed that Eva was inside the house at the time of the murders. According to the prosecution's offer of proof, appellant came into Eva's bedroom before the shootings and spoke to her briefly. (CT 554.) He then went into the dining room where he shot Torey. (*Ibid.*) As Eva and Versenia entered the dining room, Versenia asked appellant what he was doing. (CT 554-555.) Appellant shot her in the head and she fell into her mother's arms. (CT 555.) When Eva realized Versenia was dead, she ran outside in her nightclothes, hysterical. (*Ibid.*) Immediately after the murders, she told John Adams, Officer Neilsen, and James and Frances Blacksher that appellant had shot Torey and Versenia. (CT 555-556.) The summary of events provided by the prosecution thus established that Eva witnessed the events leading up to, and culminating in, the two shootings. Substantial evidence therefore supports the trial court's finding that Eva personally perceived the events she described.

Appellant contends that the prosecution "did not establish that Eva **saw** appellant shoot and kill the victims." (AOB 135, emphasis in original.) However, it could be inferred from the prosecution's offer of proof that Eva witnessed the events immediately preceding and following appellant's shooting of Torey, and was actually present when appellant shot Versenia. Eva did not have to actually see appellant pull the trigger to perceive that he shot Torey. Rather, Eva's knowledge that appellant shot Torey was based on her own personal perceptions of the circumstances surrounding the shooting. For instance, it can be inferred from the prosecution's offer of proof that Eva heard gunshots coming from the dining room immediately after appellant left her

bedroom, leading her to get out of bed and go into the dining room; when she joined Versenia in the dining room, she saw appellant there (and, from her statements, it can be inferred that she also saw Torey's body); she then saw appellant shoot Versenia. Appellant points to no authority, and we have found none, which holds that a declarant must have actually seen the event described, rather than having acquired knowledge of the event from the surrounding circumstances through the use of his or her senses, i.e., sight, sound, smell, taste, and touch. Section 1240 requires only that a declarant "perceive" the event described, and Evidence Code section 170 defines "perceive" as "acquir[ing] knowledge through one's senses." In sum, the prosecution presented persuasive evidence from which it could be inferred that Eva perceived the shootings.

Appellant compares Eva's observations in this case to those of the declarant's in *People v. Phillips, supra,* 22 Cal.4th 226. (AOB 135.) However, unlike the declarant in *Phillips*, Eva's statements were based on her own personal observations. In *Phillips*, the defendant sought to admit as a spontaneous statement a hearsay statement implicating another person in the murder for which he was charged. (*People v. Phillips, supra,* 22 Cal.4th at pp. 234-235.) The trial court excluded the statement, finding no indication that the declarant had personally perceived the murder. (*Id.* at p. 235.) On appeal, the Court noted that the admissibility of the statement turned on whether the declarant was relating events he saw himself or repeating what he had heard from some other source. (*Id.* at pp. 235-236.) After noting that other witnesses' testimony called into doubt the declarant's presence at the scene of the murder, the Court concluded that the evidence supported the trial court's finding that the declarant could have been repeating what he heard from someone else. (*Id.* at pp. 236-237.)

In this case there was no similar ambiguity as to whether Eva was relating events she perceived herself or merely repeating what she had heard from some other source. It is undisputed that Eva was inside the house at the time of the shootings. Moreover, as Eva, Versenia, and Torey were the sole occupants of the house at the time, there is no possibility that Eva was merely repeating something she heard from someone else.

Instead, the situation here is closer to that in *People v. Brown* (2003) 31 Cal.4th 518. At issue in *Brown* was whether the trial court erred in admitting a spontaneous statement implicating the defendant in a murder. (*Id.* at p. 540.) As in this case, the defendant argued that there was no evidence the declarant was describing an event he actually witnessed. (*Id.* at pp. 540-541.) The Court rejected such argument:

> Evidence indicates [the declarant] was in the driver's seat of the car directly behind the victim's truck when defendant shot her. His view of the scene was as clear as any of the witnesses', and he no doubt saw what other witnesses reported: Defendant went up to the driver's side of the truck and pulled the victim out, her body hitting the street face first. Although [the declarant's] statement ("I know he shot her. I know she is hurt bad") does not unquestionably carry the inference that he spoke from personal knowledge of having actually seen defendant pull the trigger, neither does the statement purport to be a repetition of something [the declarant] had heard from someone else. Although closer than the question of spontaneity, we conclude that, under the circumstances, there is substantial evidence to support the trial court's decision that [the declarant] purported to be describing events he had personally seen.

(*Id.* at pp. 541-542.)

As in *Brown*, there is substantial evidence to support the trial court's conclusion that Eva purported to be describing events she had personally perceived. Even if Eva's statements implicating appellant in the murders of Torey and Versenia did not unquestionably carry the inference that she spoke from personal knowledge of having actually seen appellant pull the trigger,

neither do her statements purport to be a repetition of something she heard from someone else.

The decision in *People v. Riva* (2003) 112 Cal.App.4th 981, is also instructive. There, the defendant argued that a hearsay statement admitted as a spontaneous utterance was unreliable because it was not a statement about "an act, condition or event perceived by the declarant," but rather a statement about the declarant's belief or opinion regarding an act or event he did not perceive because he "ducked." (*Id.* at p. 995.) The Court of Appeal noted that "[o]ur Supreme Court has stated in numerous cases spontaneous declarations may include the declarant's 'actual impressions and belief'" concerning the circumstances surrounding the event. (*Id.* at p. 996, citing *People v. Farmer* (1989) 47 Cal.3d 888, 903; *People v. Poggi, supra,* 45 Cal.3d at p. 318; *Showalter v. Western Pacific R.R. Co., supra,* 16 Cal.2d at p. 468.) As the court noted, "The fact the declarant ducked before the gun was fired does not mean he could not have perceived the shooter's target. If the declarant saw the gun aimed at him, ducked, and heard a bullet whiz over his head he had sufficient information to state the shooter was shooting at him." (*Id.* at p. 996.)

As noted above, Eva similarly possessed sufficient information to state that appellant shot Torey and Versenia. Accordingly, her impressions and beliefs concerning the circumstances surrounding the murders were properly admitted as part of her spontaneous statements.

Appellant contends that there was no evidence "Eva reported having perceived the event." (AOB 136.)[16] However, as noted above, direct evidence is unnecessary, so long as it can be inferred from the evidence that the declarant

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16. In support of his contention, appellant cites to the trial testimony of various witnesses. (See AOB 135-136.) However, because such evidence was not before the trial court at the time of its ruling, it cannot be considered on appeal. (*People v. Jenkins, supra,* 22 Cal.4th at p. 1007 & fn. 23.)

perceived the event. (*People v. Phillips, supra,* 22 Cal.4th at p. 236; *People v. Gutierrez, supra,* 78 Cal.App.4th at p. 178.)

Moreover, the fact that Eva made no mention of actually having seen appellant shoot Torey and Versenia when she spoke with Inspector Bierce (CT 654-655) does not prove she did not perceive the shootings. (See AOB 135.) As both the prosecutor and the trial court noted, the fact that Eva did not repeat her earlier observations to Inspector Bierce merely went to the weight of such evidence, not its admissibility (RT 1660, 1664). (See, e.g., *People v. Arias, supra,* 13 Cal.4th at p. 150 ["if a hearsay statement meets the requirements of spontaneity and lack of opportunity for reflection [citation], it does not become inadmissible because the declarant failed to mention, recall, or confirm it on later or calmer occasions"].) Similarly, just because Adams *thought* he also heard Eva say that appellant shot himself (CT 662-664, 688, 697) does not prove that Eva did not witness the shootings. (See AOB 135.) In short, the evidence presented by the prosecution was more than sufficient to support an inference that Eva witnessed the shootings.

3. Substantial Evidence Supports The Trial Court's Finding That Eva's Statements Were Spontaneous

Appellant also contends that Eva's statements to Officer Neilsen and James and Frances Blacksher were not spontaneous because they were made "long after the shootings, an hour or more in the case of James and Frances." (AOB 137.) However, considering Eva's distressed state at the time she made her statements, there was sufficient evidence that her statements were spontaneous.

"The lapse of time between the described event and the statement, although a factor in determining spontaneity, is not determinative." (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234.) "'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by

questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*'" (*People v. Poggi, supra,* 45 Cal.3d at p. 319, quoting *People v. Washington* (1969) 71 Cal.2d 1170, 1176, italics added in *Poggi.*) "The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant." (*People v. Farmer, supra,* 47 Cal.3d at pp. 903-904.)

Here, Eva's statements to John Adams and Officer Neilsen were made within five-to-ten minutes after she witnessed the murders of her daughter and grandson inside her home. (CT 555; RT 1656-1657.) At the time, she was hysterical and agitated, and blurted out her statements spontaneously. (CT 555.) Given the brief passage of time between the traumatic event and Eva's statements, her distraught mental state and her spontaneous outbursts, it appears that Eva's statements to the two men "were made under the stress of excitement and while the reflective powers were still in abeyance," and were thus admissible as spontaneous statements.

Although Eva's statements to James and Frances Blacksher were made approximately one hour after the murders, they too were spontaneous because they were made while Eva was still under the stress of excitement. The prosecutor's offer of proof showed that Eva remained distraught up until the time that James and Frances arrived on the scene. (CT 555; RT 1657-1660.) Approximately 20 minutes after Eva had finished speaking with Officer Neilsen, a mental health counselor had to be called to the scene because she was still so upset. (*Ibid.*) The mental health counselor arrived only 20 minutes before Frances and James. (RT 1658.) At that time, Eva appeared to be in

shock, and there were some concerns about her blood pressure and overall health. (RT 1659-1660.) When James and Frances arrived, Eva was screaming as she told them what had happened. (CT 555.) Based on the evidence of Eva's continued distress over the murders of her daughter and grandson, it appears that her statements to Frances and James were also "made under the stress of excitement and while the reflective powers were still in abeyance." (See, e.g., *People v. Brown, supra,* 31 Cal.4th at p. 541 [statement made two and one-half hours after murder spontaneous]; *People v. Raley* (1992) 2 Cal.4th 870, 893-894 [statement made 18 hours after rape spontaneous].) Sufficient evidence therefore supports the trial court's finding that the statements were spontaneous.

D. The Trial Court Properly Admitted Eva's Statement To Inspector Bierce The Day After The Murders To Impeach Her Preliminary Hearing Testimony

Appellant next contends that Eva's statements were inadmissible to impeach her preliminary hearing testimony. (AOB 142.) As it appears that the only statement admitted for impeachment purposes was Eva's statement to Inspector Bierce the day after the murders, we will limit our discussion to that statement alone.[17/] Appellant argues that Eva's statement to Inspector Bierce was inadmissible for impeachment purposes under either Evidence Code section 1294 or Evidence Code section 1202. (AOB 143-144.) Although it does not appear in the record what section the trial court admitted the statement under, its decision to admit the statement must be upheld if correct under any legal theory. (*People v. Brown* (2004) 33 Cal.4th 892, 901.) While it appears

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17. As noted above, appellant has waived his challenges to Inspector Bierce's testimony on appeal. For the sake of completeness, however, we address the merit of his claims.

that the statement was inadmissible under section 1294,[18] we submit that it was admissible under section 1202.

Section 1202 provides in pertinent part that "[e]vidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct." In this case, Eva's preliminary hearing testimony was admitted without objection at trial. (RT 1652-1655, 1868.) In her testimony, Eva denied making certain statements to Inspector Bierce the day after the murders. (CT 757, 759.) Her statements to Inspector Bierce were subsequently admitted at trial to impeach her preliminary hearing testimony. (RT 2585-2590; see also RT 2739, 2741, 2841.) Because Eva's statements to Inspector Bierce were

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18. Section 1294 provides in pertinent part:

> (a) The following evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter pursuant to Section 1235 is not made inadmissible by the hearsay rule if the witness is unavailable and former testimony of the witness is admitted pursuant to Section 1291:
>
> (1) A videotaped statement introduced at a preliminary hearing or prior proceeding concerning the same criminal matter.
>
> (2) A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter.
>
> (b) The party against whom the prior inconsistent statements are offered, at his or her option, may examine or cross-examine any person who testified at the preliminary hearing or prior proceeding as to the prior inconsistent statements of the witness.

Section 1294 does not apply in this case because the prosecutor sought to impeach Eva's preliminary hearing testimony through the trial testimony of Inspector Bierce rather than through the transcript of the preliminary hearing.

inconsistent with her preliminary hearing testimony, such statements were admissible under section 1202 to attack her credibility.[19/]

Relying on *People v. Collup* (1946) 27 Cal.2d 829, and *People v. Greenwell* (1937) 20 Cal.App.2d 266, overruled in part by *People v. Collup, supra,* at pp. 838-839, appellant contends that Eva's statements to Inspector Bierce were inadmissible to impeach her former testimony under section 1202 because her statements were made "prior to, rather than after" her preliminary hearing testimony. (AOB 143-144.) Appellant, however, overlooks the plain language of section 1202 in making this argument.

In construing a statute, a court must first "examine the words at issue to determine whether their meaning is ambiguous." (*Sand v. Superior Court* (1983) 34 Cal.3d 567, 570.) If the statutory language is "clear and unambiguous there is no need for construction, and courts should not indulge in it." (*In re Lance W.* (1985) 37 Cal.3d 873, 886, internal quotation marks omitted.)

Applying these principles, there is nothing on the face of section 1202 which indicates or even remotely implies that its application is limited to inconsistent statements made after the hearsay statements already introduced at trial. Indeed, the statute could hardly be clearer: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence is not inadmissible for the purpose of attacking the credibility of the declarant." The language of this section is clear and unambiguous in allowing any inconsistent statement, irrespective of when made, to impeach the credibility of the hearsay declarant. Moreover, the statute is clear that an inconsistent statement is admissible for impeachment purposes

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19. We note that Evidence Code section 1235 does not apply here as it concerns the admission of inconsistent statements to impeach the testimony of a testifying witness. (See Comment to § 1235.)

even though the hearsay declarant "is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct." Further, despite appellant's assertions to the contrary, the Comment to section 1202 does not support his contention that section 1202 is limited by the decisions in *Collup* and *Greenwell*:

> When hearsay evidence in the form of former testimony has been admitted, the California courts have permitted a party to impeach the hearsay declarant with evidence of an inconsistent statement made by the hearsay declarant *after* the former testimony was given, even though the declarant was never given an opportunity to explain or deny the inconsistency. *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946). Apparently, however, former testimony may not be impeached by evidence of an inconsistent statement made *prior* to the former testimony unless the would-be impeacher either did not know of the inconsistent statement at the time the former testimony was given or unless he had provided the declarant with an opportunity to explain or deny the inconsistent statement. *People v. Greenwell*, 20 Cal.App.2d 266, 66 P.2d 674 (1937), as limited by *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946). . . .
>
> Section 1202 substitutes for this case law a uniform rule permitting a hearsay declarant to be impeached by inconsistent statements in all cases, whether or not the declarant has been given an opportunity to explain or deny the inconsistency.

(Emphasis in the original.) Because *Collup* and *Greenwell* are clearly inapplicable to section 1202, there is no support for appellant's contention that prior inconsistent statements may not be admitted under the section.[20/] In sum, Eva's statements to Inspector Bierce were admissible under the provisions of section 1202 to impeach her preliminary hearing testimony.

As one final point, the Comment to section 1202 makes it clear that inconsistent statements may only be admitted for impeachment purposes, and

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20. Even if *Collup* and *Greenwell* did apply, the statements were still admissible, as the prosecution presented Eva with the opportunity to explain or deny her statements at the preliminary hearing. (See Comment to § 1202.)

not for the truth of the matter asserted. In this case, the trial court instructed the jury pursuant to the standard CALJIC instruction that it could consider a witness's inconsistent statements for both impeachment and substantive purposes. (RT 2841.) We note, however, that the defense did not request a limiting instruction cautioning the jury to consider Eva's inconsistent statements for impeachment purposes only. Because appellant failed to request a limiting instruction, the court had no sua sponte duty to instruct the jury on the limited admissibility of such evidence. (Evid. Code, § 355 ["When evidence is admissible . . . for one purpose and is inadmissible as to . . . another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly"]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052 [although a court should give a limiting instruction on request, it has no sua sponte duty to do so].)

E. Eva's Statements Did Not Constitute Improper Lay Opinion

Finally, there is no support for appellant's contention that Eva's statements were inadmissible as improper lay opinion because they were not based on personal knowledge. (AOB 144-146.) To be admissible, the opinion of a lay witness must be rationally based on his or her own perception and helpful to a clear understanding of his or her testimony. (Evid. Code, § 800.) As a threshold matter, we dispute that Eva's statements were statements of opinion rather than what she actually witnessed inside the house. In any event, as section 800 clearly relates only to lay opinions testified to by witnesses at trial, the section is inapplicable to Eva's out-of-court statements. Even if the section were applicable, however, there was sufficient evidence that Eva's statements were based on her own personal knowledge. Personal knowledge is "'a present recollection of an impression derived from the exercise of the witness'[s] own senses.' [Citations.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 356.) As noted above, Eva was present in the house at the time of the murders,

and was a witness to appellant's actions. It is thus apparent that her statements were based on her own personal knowledge.

F. Eva's Statements Were Not Barred Under *Crawford v. Washington*

Appellant next contends that Eva's statements were inadmissible under *Crawford v. Washington*. We disagree.[21/]

1. Summary Of *Crawford v. Washington*

The defendant in *Crawford* was on trial for stabbing a man who allegedly tried to rape his wife. (*Crawford v. Washington, supra,* 541 U.S. at p. 38.) The defendant's wife did not testify at trial because of the state's marital privilege. (*Id.* at p. 40.) The state sought to introduce the wife's recorded statement made to police as evidence that the stabbing was not in self-defense, as the defendant claimed. (*Ibid.*) The defendant objected on the ground that admission of the statement would violate his Sixth Amendment right to confrontation. (*Ibid.*) The state trial court admitted the statement, relying on *Ohio v. Roberts* (1980) 448 U.S. 56, in which the Supreme Court held that the Sixth Amendment does not bar admission of an unavailable witness's statement against a defendant if the statement bears adequate indicia of reliability. (*Ibid.*) *Roberts* concluded that reliability is shown when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." (*Ibid.*) The trial court admitted the wife's statement on the latter ground. (*Ibid.*)

The Supreme Court concluded that admission of the wife's statements violated the Confrontation Clause. (*Crawford v. Washington, supra,* 541 U.S.

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21. Because *Crawford* had not been decided at the time of appellant's trial, the trial court had no occasion to make any rulings in connection with such a claim. Accordingly, in discussing *Crawford*, we will not confine ourselves to a discussion of the evidence before the trial court at the time it ruled on the admissibility of Eva's hearsay statements.

at pp. 68-69.) The Court overruled *Roberts*, and held that where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the Constitution is confrontation. (*Ibid.*) After *Crawford*, the Sixth Amendment right to confrontation in criminal cases prohibits testimonial hearsay evidence unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Id.* at p. 68.) If the declarant testifies at trial, his or her out-of-court statement is admissible. (*Id.* at p. 59, fn. 9.) The Court declined to "spell out a comprehensive definition of 'testimonial,'" but stated that it included, at a minimum, prior testimony at a preliminary hearing, before a grand jury, and at a former trial, and statements made during police interrogations. (*Id.* at p. 68.) The Court explained that it was using the term "interrogation" in "its colloquial, rather than any technical legal, sense." (*Id.* at p. 53, fn. 4.)

2. Eva's Statements To John Adams, Officer Neilsen, And James And Frances Blacksher Were Not Testimonial

Appellant contends that the admitted statements were testimonial in nature, and thus inadmissible under *Crawford v. Washington*. Although it appears that Eva's statement to Inspector Bierce the day after the murders was testimonial, we disagree that her statements to John Adams, Officer Neilsen, and James and Frances Blacksher were similarly testimonial in nature.

It is clear that Eva's statements to John Adams were nontestimonial under *Crawford*, and appellant does not attempt to argue otherwise. Eva made her statements spontaneously to Adams, her next-door neighbor, minutes after the murders, while she was still under the stress of excitement. Eva made her statements while seeking assistance from a fellow citizen, at a time when no police officers were present. Under these circumstances, there is no possibility that Eva could have reasonably believed her statements would be available for later use at trial. (See *People v. Butler* (2005) 127 Cal.App.4th 49, 59

[witness's hearsay statements made spontaneously to co-workers when no governmental official was present nontestimonial]; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 173-174 [co-defendant's hearsay statements made to neighbor while seeking medical treatment nontestimonial]; see also *People v. Corella* (2004) 122 Cal.App.4th 461, 468 [hearsay statements made during 911 call nontestimonial where victim initiated the call and was merely seeking to obtain assistance].)

For similar reasons, Eva's statements to James and Frances Blacksher at the scene were also nontestimonial. On this point, appellant disagrees. Appellant contends that Eva's statements to James and Frances were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, and thus more akin to formal statements made to government officials rather than casual remarks made to an acquaintance. (AOB 122-123.) In support of his contention, appellant argues that "[a]t the time her statements were made, Eva was still at the scene of the killings, surrounded by police officers who had put her in the care of a City of Berkeley mental health worker." (*Ibid.*) Appellant, however, paints an inaccurate portrait of the circumstances surrounding Eva's statements to James and Frances.

Contrary to appellant's contentions, there was no evidence that Eva was "surrounded by police officers" at the time she spoke with Frances and James. According to the evidence, Officer Neilsen let Eva sit down in Inspector Bierce's unmarked police car after he spoke with her at the scene. (RT 1876.) Inspector Bierce spoke with Eva in the backseat of the car, but did not take a written statement from her at that time. (RT 2584-2585.) Because of Eva's distressed state, Inspector Bierce called for a mental health worker to come to the scene to take care of her. (RT 2584-2585.) Officer Neilsen "turned [Eva] over" to Daryl Brand once Brand arrived on the scene. (RT 1659, 1876-1877,

1884-1885.) Brand was not a police officer, but a family crisis counselor who had been called to the scene for the limited purpose of taking care of Eva's emotional needs. (RT 1658-1660, 2440, 2442, 2584-2585.) After briefly speaking with Officer Neilsen outside Inspector Bierce's car, Brand got inside the car with Eva. (CT 555; RT 1658-1659, 1876, 2441-2442.) Officer Neilsen then left to go search the back cottage; he had no further contact with Eva at the scene. (RT 1876-1877, 1885.) At some point, Brand became concerned about Eva's health and called in the paramedics to check on her. (RT 2444.) James and Frances Blacksher arrived at the scene while Brand was still in the car with Eva. (CT 555; RT 1658-1659, 2301, 2351-2352, 2446.) Frances got into the car with Eva and tried to comfort her. (CT 556; RT 1659, 2446.) At some point, James also got into the car with Eva and spoke with her. (CT 555; RT 2446-2447.) In all, some four to five members of Eva's family arrived on the scene and stayed with her until she could be taken inside a neighbor's house. (RT 1659, 2444-2447.) Based on this evidence, there is no support for appellant's contention that Eva was surrounded by police officers when she spoke with Frances and James.

In addition, there is no support for appellant's contention that the circumstances under which Eva made her statements to Frances and James would have led her to believe that such statements would be used later at trial. Eva's conversations with her son and daughter-in-law took place privately in the backseat of an unmarked police vehicle. (RT 2446-2447.) Brand did not listen in on the conversations, and there is no indication that Eva believed Brand was listening in. (RT 2446-2447.) At the time Eva spoke with Frances and James, Brand was acting in her limited capacity as a family crisis counselor, not as a police officer, and there was nothing about Brand's behavior or interaction with Eva that would have led Eva to conclude otherwise. Brand did not discuss the murders with Eva or ask her any questions about what had taken

place inside the house that morning. (RT 2444.) Moreover, when James and Frances asked Eva about what had happened, they were not acting on behalf of governmental officials to obtain a formal statement for use at trial, but were merely acting in their capacities as concerned family members trying to find out what had happened in the family home, and there is no indication that Eva believed otherwise. (RT 2306-2307, 2352-2353.) Thus, like her statements to Adams, her statements to James and Frances were nontestimonial in nature.

Eva's statements to Officer Neilsen, although made to a governmental official, were also nontestimonial. Adams called 911 immediately after hearing the gunshots coming from Eva's house, and Officer Neilsen was one of the first police officers to arrive on the scene in response to the 911 dispatch. (CT 555.) At the time Officer Neilsen arrived, Eva was still hysterical and appeared anxious to speak to him. (RT 1872-1873.) Eva spoke to Officer Neilsen first, telling him that her daughter and her daughter's son had been shot and that she thought they were both dead. (RT 1873.) Their entire conversation lasted only 10 to 15 minutes, and Eva remained distraught the whole time. (RT 1875, 1884-1885.) Because Eva made her statements to Officer Neilsen just minutes after the murders while she was still under the stress of excitement, before there was any time for reflection or deliberation, her statements were nontestimonial. (See *People v. Corella, supra,* 122 Cal.App.4th at pp. 468-469 [assault victim's spontaneous statements to police officer at the scene nontestimonial due in part to the fact that they were made without reflection or deliberation while under the stress of excitement].)

The fact that Officer Neilsen took notes and asked follow-up questions did not transform his contact with Eva into a formal police interrogation. (See RT 1875-1876.) Officer Neilsen's stated purpose in stopping to speak with Eva was not to take a formal statement at that time, but rather to gather basic information about what had happened so that the police could take appropriate

action upon entering her house. (RT 1874-1875, 1912.) The circumstances surrounding Officer Neilsen's contact with Eva supports this stated purpose. For instance, Officer Neilsen stopped to speak with Eva immediately upon arriving at the scene, before the police knew what had happened inside her home and before any police officers had entered her home. (RT 1869-1875.) Officer Neilsen's conversation with Eva was informal, taking place outside her next-door-neighbor's home and lasting for only 10 to 15 minutes, just long enough to obtain basic information to assist police officers. Officer Neilsen then acted upon the information provided by Eva to search the back cottage for appellant. (RT 1885.) Officer Neilsen's interaction with Eva did not therefore constitute a formal police interrogation. (See *People v. Corella, supra,* 122 Cal.App.4th at pp. 468-469 [assault victim's statements to police officer at the scene nontestimonial because "[p]reliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation'"]; see also *People v. Morgan* (2005) 125 Cal.App.4th 935, 947 [caller's statements to police officer who answered the defendant's telephone during a search of the defendant's home nontestimonial in light of the informal nature of the statements, the unstructured setting, and the police officer's minimal responses to the caller].)

In sum, because Eva's statements to John Adams, Officer Neilsen, and James and Frances Blacksher were nontestimonial in nature, *Crawford* does not apply. However, the fact that *Crawford* does not apply does not end our Sixth Amendment discussion, because, even after *Crawford*, nontestimonial hearsay statements may still be governed by *Ohio v. Roberts*. (*Crawford v. Washington, supra,* 541 U.S. at p. 68 ["Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny

altogether"]; *People v. Corella, supra,* 122 Cal.App.4th at p. 467 ["After *Crawford*, a 'nontestimonial' hearsay statement continues to be governed by the *Roberts* standard"].) To comply with the Sixth Amendment, a hearsay statement must be admitted under a firmly rooted exception to the hearsay rule or bear particularized guarantees of trustworthiness. (*White v. Illinois* (1992) 502 U.S. 346, 355-357 & fn. 8; *Idaho v. Wright* (1990) 497 U.S. 805, 816-818; *Ohio v. Roberts, supra,* 448 U.S. at p. 66.) "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." (*Ohio v. Roberts, supra,* at p. 66.) The spontaneous statement exception to the hearsay rule is among those "firmly rooted" exceptions that carry sufficient indicia of reliability to satisfy the Confrontation Clause. (*White v. Illinois, supra,* 502 U.S. at p. 355, fn. 8; accord *People v. Brown, supra,* 31 Cal.4th at p. 542.) Accordingly, as the trial court expressly found in this case, the introduction of Eva's spontaneous statements to John Adams, Officer Neilsen, and James and Frances Blacksher did not violate appellant's confrontation rights.

Appellant disagrees, arguing that Eva's statements were unreliable because she was seriously impaired by dementia on the day of the murders. (AOB 138-142, 147-149.)[22/] However, as noted above, because the statements

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22. Appellant acknowledges that the trial court was correct in ruling that Eva's incompetency at the time of trial did not affect the admissibility of her spontaneous hearsay statements. (AOB 139 & fn. 33; see, e.g., *In re Cindy L.* (1997) 17 Cal.4th 15, 31-35; *In re Daniel Z.* (1992) 10 Cal.App.4th 1009, 1022; *People v. Anthony O.* (1992) 5 Cal.App.4th 428, 436; *People v. Butler* (1967) 249 Cal.App.2d 799, 806-807.)

Also, we note that there was no evidence at the time the court made its ruling that Eva was seriously impaired by dementia when she made her statements. On the contrary, as her statements to Officer Neilsen and Inspector Bierce on the day of the murders show, she was able to coherently explain what happened inside the house, as well as the events leading up to the murders, i.e.,

fell within a firmly rooted hearsay exception, they were presumptively reliable. Moreover, even if the statements did not fall within a firmly rooted hearsay exception, the test for reliability does not focus on the hearsay declarant's mental state at the time the statements were made, but rather on whether the statements themselves bear particularized guarantees of trustworthiness. Unlike the hearsay statements at issue in *Sherley v. Seabold* (6th Cir. 1991) 929 F.2d 272 (see AOB 141-142), Eva's statements in this case bore particularized guarantees of trustworthiness. It is undisputed that Eva was present inside the house at the time of the murders, and that she made her statements immediately afterwards while she was still in a state of distress. Additionally, she repeated the same account of what happened inside the house to different people at the scene, i.e., appellant shot Torey and Versenia in the head.[23/] Moreover, the substance of the statements themselves were corroborated by other evidence. For instance, next-door neighbor John Adams saw appellant enter Eva's house shortly before he heard gunshots (CT 555); both he and neighbor Sara Winter confirmed Eva's description of what appellant was wearing that morning (CT 708; RT 1658); Torey and Versenia were later found dead of gunshot wounds inside the house (CT 554-555, 653, 657, 660; RT 1658); and Winter saw appellant leave the house that morning (RT 1658). Considering that Eva appeared to accurately describe the scene witnessed by her inside the house, her

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the friction between Torey and appellant in the days leading up to the murders, appellant's arrest, and Versenia's request that appellant stay out of the house. (CT 653-655, 707-708.) Moreover, the prosecution introduced evidence showing that while Eva's memory problems had begun some years before the murders on May 11, 1995 (CT 559, fn. 1), her mental condition did not begin progressively deteriorating until the year preceding July 15, 1997, at which time she was diagnosed with Alzheimer's type senile dementia. (CT 559, 568.)

23. While Adams may have *thought* he also heard Eva say that appellant shot himself, that was merely his impression of what she said. (CT 697.) Eva never repeated such a statement to anyone else.

statements were sufficiently reliable to be admitted, even if they did not qualify as spontaneous statements. Accordingly, appellant's confrontation rights were not violated.[24/]

3. Because Appellant Had A Prior Opportunity To Cross-Examine Eva, The Introduction Of Her Statements To Inspector Bierce Did Not Violate *Crawford v. Washington*

Because Eva's statements to Inspector Bierce the day after the murders were the result of a formal police interrogation and were admitted for their truth, the statements were testimonial under *Crawford*. However, under *Crawford*, testimonial statements are admissible if the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. (*Crawford v. Washington, supra,* 541 U.S. at p. 68.) Because appellant had a prior opportunity to cross-examine Eva at the preliminary hearing about her statements to Inspector Bierce, the Confrontation Clause did not bar admission of the statements.

At the preliminary hearing, Eva could no longer remember all of the details from the morning of the murders. For instance, while she remembered hearing Versenia calling out to her that she had "heard a gun shoot and she was going through the house" (CT 757), she denied hearing Versenia say anything else right before she was shot (*ibid.*), and denied telling the police that she heard Versenia say "what is wrong with you, what are you doing." (*Ibid.*)

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24. Appellant contends that "other witnesses . . . described [Eva] as confused and so fragile that a mental health worker [had to be] called in to care for her." (AOB 142.) However, the reason why counselor Daryl Brand was called to the scene was not because Eva was confused, but because she was so distraught over the murders of her grandson and daughter. (RT 1658-1659.) Although Eva was confused as well as in shock and denial when Brand met with her, such behavior was to be expected after what she had just witnessed (RT 1659), and did not affect the reliability of her statements, especially in light of the other evidence presented by the prosecution.

Also, while she remembered hearing a single gunshot (*ibid.*), she denied telling the police that she heard two gunshots. (CT 759.) The prosecutor sought to refresh Eva's recollection with Inspector Bierce's police report. When shown her statement to Inspector Bierce (see RT 2585-2586), Eva admitted that her signature appeared on the bottom of both pages of the statement, but she did not remember signing it or reading it. (CT 758-759.) On cross-examination, defense counsel tested Eva's memory about what she saw and heard on the morning of the murders, including what she heard Versenia say and how many gunshots she heard, and specifically asked her whether she was having any problems with her memory at the time she spoke to the police. (CT 760-765.) Defense counsel also questioned Eva about her memory problems in general at the time of the murders. (CT 761-762.)

Appellant contends that he was unable to effectively cross-examine Eva at the preliminary hearing because she "was suffering from dementia and . . . serious memory problems" at the time. (AOB 124.) We disagree. An ineffective cross-examination due to failed memory does not constitute a Confrontation Clause violation. (*United States v. Owens* (1988) 484 U.S. 554, 560.) As the Supreme Court explained in *Owens*, "'[T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."' [Citations.]" (*Id.* at p. 559, italics in original.) "The weapons available to impugn the witness'[s] statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." (*Id.* at p. 560.) "'The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and

expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness'[s] testimony.' [Citation.]" (*Id.* at p. 558.) "It is sufficient that the defendant has the opportunity to bring out such matters as the witness'[s] bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory." (*Id.* at p. 559.)

While Eva may not have remembered every detail from the morning of the murders, she was still able to relate most of what she saw, heard, said, and did that morning. For instance, she testified that appellant came into her bedroom, asked her about supper, and then left (CT 755-756, 760-762); sometime after appellant left her room, she heard Versenia call out to her (CT 756-757, 764); she then heard a single gunshot (CT 757, 763); she jumped out of bed to help Versenia, but by the time she got to the door Versenia had already fallen down (CT 757, 764); she did not see appellant or anyone else in the house or in the room with Versenia (CT 763, 767); when she saw that Versenia was bleeding, she stepped over her head and ran outside (CT 757, 764); she did not see appellant or anyone else as she ran outside (CT 758-759); she stayed outside for awhile until help arrived (CT 764); once the police arrived, she spoke to them outside her house. (CT 764-765.) Thus, despite having some difficulty with her memory, she was able to recollect for the most part the events of that morning. Under these circumstances, Eva's inability to remember every detail did not deprive appellant of the opportunity for effective cross-examination. (See *People v. Perez* (2000) 82 Cal.App.4th 760, 762 ["[A] criminal defendant is not denied the constitutional right to confront a witness when the witness is present at trial and subjected to unrestricted cross-examination but answers 'I don't remember' to virtually all questions"].)

Moreover, the very fact that Eva was experiencing problems with her memory was fully brought out on cross-examination. Through his questioning,

defense counsel was able to demonstrate that Eva could not remember certain details from the morning of the murders. In addition, Eva admitted on cross-examination that she was having trouble with her memory, and that she had been having memory problems for some time even before the murders. In sum, appellant was given a full and fair opportunity to probe and expose Eva's infirmities through cross-examination. As that is all that is required under the Confrontation Clause, Eva's statements to Inspector Bierce were admissible under *Crawford*.

G. Any Error In Admitting Eva's Statements Was Harmless

Assuming that Eva's hearsay statements were improperly admitted, any error was harmless under either the state or federal standard of review. Irrespective of Eva's hearsay statements, the prosecutor presented overwhelming evidence that appellant committed the murders in this case.

In the days before the murders, appellant told several family members that he was going to kill Torey, and that he would also kill Versenia if she got in his way. (RT 2134-2136, 2154-2156, 2188-2190, 2276, 2278, 2296-2298, 2343-2345, 2420, 2472-2484, 2489-2490, 2501-2501, 2506-2507.) Appellant said he was going to use a baseball bat to "knock [Torey's] brains out," or else buy a gun and shoot him. (RT 2134-2136, 2298-2299, 2322, 2343, 2345, 2348-2349, 2475-2476, 2482-2483, 2490, 2499, 2501-2502, 2507-2511.)

Three days before the murders, appellant and Torey had a verbal altercation in Eva's driveway, with appellant accusing Torey of throwing bricks at his car and Torey accusing appellant of trying to run him over. (RT 1821-1822, 1865-1866.) The argument did not end until Versenia intervened and convinced Torey to accompany her inside the house. (RT 1823-1825.)

Two days before the murders, appellant was arrested after Versenia discovered him sitting in the dark with a baseball bat waiting for Torey to come home so he could "bash in [his] head." (RT 2134-2136, 2276-2278, 2282-

2283.) Versenia was so frightened by the incident that she obtained a restraining order against appellant the next day. (RT 2141-2176.) When appellant returned home later that day, Eva gave him the keys to her house even though Versenia asked her to evict appellant because she was afraid. (RT 1862, 2191-2192, 2264-2265, 2326, 2328, 2385, 2533.) Versenia thereafter began making plans to move her family out of her mother's house. (RT 1859, 2320, 2328-2329, 2370.)

The night before the murders, appellant bought a .357 Magnum. (RT 2507-2511.) It was later determined that Torey and Versenia were shot with either a .357 Magnum or a .38 Special. (RT 2576-2577.)

On the morning of the murders, appellant told his brother Elijah that he still felt the same way about Torey. (RT 2510-2511.) Appellant sounded so angry that Elijah begged him to stay in the back cottage until Elijah could get there. (RT 2511-2515.)

After appellant got off the phone with Elijah, neighbor John Adams saw him back his car down the driveway and enter his mother's home. (RT 1929-1935, 1947.) According to Eva's preliminary hearing testimony, appellant came into her bedroom and spoke with her briefly. (CT 755-756.) Sometime after appellant left her room, Eva heard Versenia call out. (CT 756-757.) She then heard a single gunshot. (CT 756-757.) Eva got out of bed and walked into the dining room, where she saw Versenia fall to the ground, bleeding. (CT 756-757.)

Adams and several other neighbors heard the gunshots coming from Eva's house. (RT 1935-1939, 1989-1992, 2079-2080, 2089.) After hearing the gunshots, neighbor Sara Winter looked out a window and saw appellant coming out the front door of Eva's house. (RT 1991-1994.) He closed the door behind him and hurried down the stairs. (RT 1994-1995.) Neighbor Teresa Gensler

heard a car pull away from the end of Eva's driveway after hearing the gunshots. (RT 2091-2092.)

After the shootings, appellant called his sister and his sister-in-law and asked them to check on his mother and call the police. (RT 2200, 2202, 2300, 2423-2425.) He told them that he had seen masked men enter his mother's house and then heard gunshots. (RT 2200-2201, 2300, 2423-2425.) Appellant thereafter bought a ticket for a bus trip to Reno that was leaving the same day. (RT 2016-2018, 2036-2038.)

When appellant turned himself in two days later he was wearing a t-shirt with the word "Reno" on it and a new pair of jeans. (RT 2444-2445.) The only thing in his possession at the time was a small paper bag containing toiletries. (RT 2547-2548.)

Based on the powerful and compelling evidence presented by the prosecution of appellant's guilt, the admission of Eva's hearsay statements implicating appellant in the crimes was harmless beyond a reasonable doubt.

V.

RUTH COLE'S TESTIMONY RELATING EVA'S HEARSAY STATEMENTS ON THE WAY TO THE COURTHOUSE TO OBTAIN A RESTRAINING ORDER AGAINST APPELLANT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends that Ruth Cole's testimony regarding statements Eva made on the way to the courthouse to obtain a restraining order against him violated his federal constitutional rights to confrontation, due process, and a fair trial. (AOB 156-157, 162.) Appellant also objects to the admission of the statements on state law grounds. (AOB 157-162.) Appellant's contentions lack merit.

A. Background Facts

At the preliminary hearing, the prosecutor asked Eva if she went with Versenia to the courthouse a couple of days before the murders to get a restraining order against appellant. (CT 765-766.) Eva denied obtaining a restraining order against appellant, and did not remember writing down on the application that she was afraid of him. (CT 766.) She also denied having any problems with appellant before Versenia died, and claimed to have no knowledge of any problems between appellant and Versenia. (CT 767.) When shown a copy of the application for a restraining order, Eva testified that she had "[n]ever seen this before." (CT 767.) Although she acknowledged that her signature appeared at the bottom of the application, she did not remember signing it. (CT 767-768.) She did not write anything on the application about appellant, nor did she remember asking Versenia to write anything down for her. (CT 768.) When shown the handwriting on the application, Eva testified that it did not belong to her and that she did not recognize the handwriting. (CT 769.)

After Eva was excused as a witness at the preliminary hearing, the prosecutor called her daughter, Ruth Cole, to the stand to impeach her mother's testimony regarding the restraining order. Ruth testified that she accompanied Eva and Versenia to the courthouse to obtain a restraining order. (CT 174.) Eva and Versenia discussed the restraining order in the car on the way to the courthouse. (*Ibid.*) Eva told Ruth they were obtaining a restraining order against appellant because they were afraid of him and they did not want him around the house. (CT 174-175) Eva explained that Versenia "had called the police on [appellant] the night before because he was in the house in the dark and he was threatening to kill Tor[e]y." (*Ibid.*) On cross-examination, defense counsel questioned Ruth further about what happened on the day the restraining order was obtained. (CT 178-182.)

At trial, Eva's preliminary hearing testimony was admitted without any objections by the defense. (RT 1652-1655, 1868.) The prosecutor then called Ruth to the stand. Ruth testified about the circumstances surrounding the restraining order as follows:

The morning after appellant called her from jail, she drove over to her mother's house to find out if what appellant had told her was true, i.e., that he had threatened to kill Torey with a baseball bat the night before. (RT 2132-2140.) As she drove up to the house, she saw her mother and Versenia getting ready to leave. (RT 2140-2141.) After asking them where they were going, she gave them a ride to the courthouse to obtain a restraining order against appellant. (RT 2141-2142.) Eva voluntarily accompanied Ruth and Versenia to the courthouse. (RT 2142-2143.) Eva knew they were going to the courthouse to obtain a restraining order. (RT 2144-2146.) She discussed the restraining order with Versenia in the car, and told Ruth they were getting a restraining order because she "was afraid . . . of what Erven had done the night before"; that appellant had been "in the living room in the dark with the

baseball bat" and "said he was going to kill Torey." (RT 2146-2147, 2154-2156.)

When Ruth testified that Eva and Versenia "went inside the courthouse to see about getting a restraining order," defense counsel objected as "to what they went there to do," arguing, "Unless she did it, it is hearsay." (RT 2141-2142.) The court overruled the objection, noting that it was not hearsay if it explained "her" conduct. (RT 2142.) Ruth went on to add that she accompanied her mother and sister into the courthouse, and that "[w]e went there to inquire about getting a restraining order." (RT 2142.)

When the prosecutor asked if Eva got into Ruth's car of her own freewill, defense counsel objected that the question called for a conclusion. (RT 2142.) The trial court overruled the objection, and Ruth answered the question in the affirmative. (RT 2142.)

The prosecutor then asked Ruth, "To your knowledge, based on your contact with your sister and your mother from the time you left your house until the time you came to the courthouse, did your mother know that she was coming here with Versenia to get a restraining order?" (RT 2144-2145.) Defense counsel objected to the question as calling for speculation and a conclusion. (RT 2145.) Before ruling, the court asked the prosecutor, "Based upon conversations with Eva Blacksher, Mr. Tingle?" (RT 2145.) The prosecutor replied yes, adding that Ruth's testimony would contradict Eva's prior testimony that she did not go to the courthouse to get a restraining order. (RT 2145.) The prosecutor stated he was seeking to introduce the evidence as an inconsistent statement for impeachment purposes and also to explain Eva's conduct. (RT 2145.) The court overruled defense counsel's objections. (RT 2145.) When the prosecutor repeated his question, defense counsel again objected that it called for a conclusion, adding, "Particularly since it is contrary to the statement she testified to." (RT 2146.) The court overruled the

objection, noting, "Well that is what impeachment testimony is all about, Mr. Broome." (RT 2146.) Once Ruth answered the question in the affirmative, the prosecutor asked her what her answer was based upon. (RT 2146.) Defense counsel again objected that the question called for a conclusion, and the court overruled the objection. (RT 2146.) The prosecutor repeated his question, asking Ruth how she knew her mother was aware of the reason for going to the courthouse. (RT 2146.) Ruth replied, "She told me that she was coming [to the courthouse] because she and Versenia were discussing it in the car on the way from Berkeley to Oakland, the restraining order that they were going to get." (RT 2146.) When the prosecutor asked Ruth what Eva had specifically said, defense counsel objected that the question called for hearsay and violated appellant's right to confrontation and cross-examination. (RT 2146-2147.) The court asked defense counsel whether the answer would qualify as an exception to the hearsay rule under Evidence Code section 1250. (RT 2147.) Defense counsel responded that he did not believe so because "her testimony was not to that at all," and that he also did not believe it was proper impeachment. (RT 2147.) The court overruled the objection, finding that the question was proper impeachment and also went to Eva's state of mind. (RT 2147.) Ruth was then allowed to testify as to what Eva said, namely, "[s]he was afraid because of what Erven had done the night before. He was in the living room in the dark with the baseball bat." (RT 2147.) Defense counsel objected again, stating that the answer lacked foundation, was hearsay, and was not impeachment "because the mother never testified to her seeing him with a baseball bat." (RT 2147-2148.) The prosecutor responded that the testimony was offered for impeachment purposes and also to show that Eva had "knowledge of her participation in the process." (RT 2148.) At that point, the court asked to see counsel in chambers. (RT 2148.)

In chambers, the court asked the prosecutor why the testimony was being offered into evidence. (RT 2148.) The prosecutor responded that the evidence contradicted Eva's prior testimony during the preliminary hearing to the effect that: (1) she did not go to the courthouse for a restraining order against appellant and had no memory of doing so; (2) she had no memory of writing on the restraining order that she was afraid of appellant; (3) she did not know Versenia went to the courthouse; (4) the first time she saw the restraining order was at the preliminary hearing; (5) she had no memory of signing the restraining order although she recognized her signature on it; (6) she had no memory of telling Versenia to write certain things down on the restraining order; and (7) she did not recognize Versenia's handwriting on the restraining order. (RT 2148-2149.) The prosecutor stated that because Eva's testimony about the restraining order had already been admitted into evidence, Ruth's testimony that Eva was a willing participant in the restraining order process was proper impeachment evidence. (RT 2149-2150.) Defense counsel disagreed with the prosecutor's offer of proof, arguing that "[t]he totality of the testimony of Eva Blacksher was that, number one, she signed that document but that was the only part of that document that she had anything to do with." (RT 2150.) Defense counsel also argued that the prosecutor was simply asking Ruth to speculate and give conclusions about her mother's state of mind regarding her willingness to obtain a restraining order, which was not proper impeachment evidence. (RT 2150.) Defense counsel asserted that while Ruth could testify about her own state of mind and the conduct of everyone involved that day, she could not testify about her mother's state of mind. (RT 2150-2151.) Defense counsel also objected on the grounds that the defense had no prior opportunity or present ability to confront or cross-examine Eva about the statements she made to Ruth. (RT 2153.) The court rejected defense counsel's objections and

found the statements admissible pursuant to Evidence Code section 1250 to explain Eva's conduct and intent. (RT 2151-2154.)

When direct examination resumed, the prosecutor asked Ruth if her mother said anything in the car on the way to the courthouse "along the lines of her knowing that they were going there to get a restraining order?" (RT 2154.) Ruth answered in the affirmative, explaining that when she asked her mother and sister why they were getting a restraining order, her mother replied that she was afraid, "because Erven was in the living room with a baseball bat, [and] said he was going to kill Torey." (RT 2154-2155.)

Ruth went on to testify that once they arrived at the courthouse, they walked into a room on the first floor. (RT 2156-2157.) Versenia went up to a window and spoke to a county employee while Eva stood beside Versenia and Ruth stood behind them. (RT 2157-2158.) Eva did not say anything or disagree with anything Versenia was saying to the county employee. (RT 2158.) Versenia received some papers and took them to a nearby counter. (RT 2159.) Eva stood beside Versenia at the counter while Ruth stood behind them. (RT 2159-2160.) Versenia read aloud from the papers so Eva could hear what she was saying. (RT 2160.) Versenia continued to talk to her mother while she wrote things down on the papers. (RT 2161.) Eva did not ask Versenia to repeat or explain anything, and she did not object to, or disagree with, anything Versenia said to her. (RT 2161.)

During a hearing outside the presence of the jury, the court revisited the issue on the admissibility of Eva's statements to Ruth. (RT 2163.) The court noted that it had reviewed Ruth's testimony and concluded that Eva's statements were admissible under several theories: (1) as inconsistent statements under Evidence Code sections 1235 and 770, to impeach Eva's preliminary hearing testimony or for substantive evidence purposes; (2) as nonhearsay to explain Eva's conduct; and (3) as a hearsay exception under Evidence Code

section 1250, to show Eva's then existing state of mind or emotion to explain her conduct. (RT 2163, 2167-2168.) The court found Eva's statements relevant because they were inconsistent with her preliminary hearing testimony regarding the restraining order, and there was no objection to such testimony at the time it was introduced. (RT 2163-2165, 2168.) Defense counsel argued that the defense was unable to confront or cross-examine Eva about her statements to Ruth at the preliminary hearing because they did not know about the statements at that time. (RT 2165.) Defense counsel also argued that Ruth's testimony was improper because it consisted of her conclusions of what her mother was thinking. (RT 2166-2167.) After further discussion, the trial court agreed to give the jury a limiting instruction that it could consider Eva's testimony for impeachment purposes only. (RT 2169-2171.)

After reconvening in the presence of the jury, the court instructed the jury as follows:

> Ladies and gentlemen, before we continue with the testimony, at the conclusion of the case, you will be instructed that sometimes evidence is presented to you and you are to consider it only for a limited purpose. And you will be read the instruction at the end of the case that relates to the instructions that you are given during the trial.
>
> I'm going to give you now an instruction that relates to how you are to consider certain testimony that you are now hearing.
>
> The testimony of this witness, Ruth Cole, regarding statements made by Eva Blacksher as they pertain to the obtaining of the restraining order are admissible only as inconsistent statements for impeaching the previously read testimony of Eva Blacksher. And for that purpose only, as it relates to the restraining order.

(RT 2172.) At the conclusion of the guilt phase, the court instructed the jury as follows:

> Certain evidence was admitted for a limited purpose.
>
> Certain parts of the testimony of Ruth Cole and the testimony of Dr. Davenport were admitted for a limited purpose – purposes.

At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

The limiting instructions that pertain to that testimony will be included with the written jury instructions.

Do not consider this evidence for any purpose except the limited purpose for which it was admitted.

(RT 2840-2841.)

B. Ruth's Testimony Was Admissible For Impeachment Purposes

The trial court found Eva's statements to Ruth admissible for purposes of impeaching Eva's preliminary hearing testimony pursuant to Evidence Code section 1235. While appellant generally objected that the statements were inadmissible for impeachment purposes, he did not object on the same grounds now being raised on appeal: that the proponent of the evidence cannot impeach the witness, and that only a testifying witness can be impeached under section 1235. Accordingly, appellant has waived his claims on appeal. (Evid. Code, § 353; *People v. Williams* (1997) 16 Cal.4th 153, 250 [defendant failed to object to the admission of evidence on the same ground raised on appeal].)

Even if appellant has not waived his claims on appeal, his contentions lack merit. While the court was correct in finding Eva's statements admissible for impeachment purposes, it admitted the statements under the wrong section. However, the fact that the trial court did not cite the correct code section when it ruled the statements admissible is inconsequential. When the admission of evidence is right upon any legal theory, the trial court's ruling admitting such evidence will be upheld on appeal. (*People v. Brown, supra,* 33 Cal.4th at p. 901.)

Section 1235 provides that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Section 1235 applies only where the witness who made the prior inconsistent

statement testifies at trial. (Comment to § 1235.) Accordingly, where a witness is unavailable at trial, as Eva was in this case, the prosecution cannot introduce his or her preliminary hearing testimony and then offer statements inconsistent with that testimony under section 1235. (*People v. Williams* (1976) 16 Cal.3d 663, 668-669.)

As noted above in Argument IV, however, Evidence Code section 1202 allows a hearsay declarant—such as one whose prior testimony is introduced, as in the case Eva—to be impeached with inconsistent statements. Eva's statements to Ruth on the way to the courthouse to get a restraining order against appellant were therefore admissible under this section to impeach her previous testimony denying her fear of appellant or her involvement in obtaining a restraining order against him.[25/]

Appellant argues, however, that the prior inconsistent statements of a hearsay declarant can only be introduced by the party against whom the declarant's testimony is offered. (AOB 158-159.) This argument is based on the Comment to section 1202, that "[i]f the hearsay declarant is unavailable as a witness, the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach." Section 1202 has been described as a rule "of fairness to the party *against whom* the hearsay evidence was admitted without opportunity to cross-examine or impeach the unavailable hearsay declarant." (*People v. Ross* (1979) 92 Cal.App.3d 391, 406, emphasis in original.) Citing the Comment to section 1202, *People v. Beyea* (1974) 38 Cal.App.3d 176, 192-194, held that the prosecution could not impeach the favorable, former testimony of its own

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25. We refer the Court to our discussion above in Argument IV rebutting appellant's contention that *prior* inconsistent statements are inadmissible under section 1202. (See AOB 160, fn. 38.)

unavailable witnesses with their prior inconsistent hearsay statements in order to further bolster its case against the defendant.

This case is distinguishable from *Beyea*. Although the prosecutor was the one who sought to introduce Eva's preliminary hearing testimony in this case (CT 727-769), such testimony actually favored the defense rather than the prosecution. (See *People v. Beyea, supra,* 38 Cal.App.3d at p. 192 [noting that the former testimony introduced by the prosecution favored its case against the defendant].) This is evidenced by the lack of objection from the defense to the admission of the testimony (RT 1652-1655); the prosecutor's attempts to impeach the testimony at trial; the prosecutor's closing argument attacking the testimony (see RT 2721-2722, 2725, 2735-2736, 2738-2745, 2749-2750); and the defense's closing argument relying on the testimony (see RT 2772-2786, 2822-2826, 2830). Rather than attempting to use Eva's hearsay statements "to shore up its case, without entirely destroying the credibility of [her] preliminary hearing testimony" (*People v. Beyea, supra,* 38 Cal.App.3d at pp. 192-193), the prosecution sought to discredit that testimony in its entirety. In effect, it was the prosecution, not appellant, who was really the party "against whom" Eva's preliminary hearing testimony was admitted. (*Id.* at p. 193.) Accordingly, the prosecution was entitled to impeach Eva's preliminary hearing testimony under the provisions of section 1202. (See *People v. Ross, supra,* 92 Cal.App.3d at p. 406 [finding that the only means available to the prosecution to attack the credibility of the unavailable hearsay declarant was through the process of impeachment afforded by section 1202]; *People v. Marquez* (1979) 88 Cal.App.3d 993, 998 [noting that section 1202 was drafted to ensure that the unavailability of a hearsay declarant would not prevent introduction of relevant evidence which would be admissible if the declarant were in court].)

Finally, as noted above in Argument IV, section 1202 makes it clear that inconsistent statements may only be admitted for impeachment purposes, and

not for the truth of the matter asserted. Here, the trial court instructed the jury that Ruth's testimony could be considered for impeachment purposes only. (RT 2172, 2840-2841.) Accordingly, because Eva's statements to Ruth were not admitted for the truth of the matter asserted, the admission of such statements did not run afoul of section 1202.

C. Ruth's Testimony Was Admissible To Explain Eva's Mental State

Alternatively, Eva's statements were admissible under Evidence Code section 1250. The trial court ruled that Eva's statements regarding her mental state were also admissible under section 1250 to explain her conduct in obtaining the restraining order. The court found such evidence relevant because it was inconsistent with Eva's preliminary hearing testimony. The court did not err in admitting the evidence under this section.[26/]

Evidence Code section 1250 states in pertinent part:

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.

A prerequisite to introducing evidence under this section "is that the declarant's mental state or conduct be factually relevant." (*People v. Hernandez* (2003) 30 Cal.4th 835, 872.)

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26. Appellant contends the trial court "backtracked" on its ruling pursuant to section 1250. (See AOB 160.) We disagree. While the court expressed disagreement with the prosecutor that such evidence was relevant solely to prove Eva's fear of appellant, it did not retract its earlier determination that Eva's mental state was relevant to explain her conduct in order to impeach her preliminary hearing testimony. (See RT 2169-2171.)

Appellant argues that Eva's statements to Ruth were inadmissible under this section because "Eva's state of mind the day before the killings when she went to the courthouse was not an issue" in the action. (AOB 161.) We disagree, and submit that Eva's statements were admissible for impeachment purposes, as well as to prove Eva's conduct in obtaining a restraining order against appellant. Immediately after the murders, Eva told various people that appellant killed Torey and Versenia. However, by the time of the preliminary hearing, she had become a reluctant witness against her son. For instance, she denied certain key aspects of her statements to police that were incriminating to appellant (CT 757, 759); she denied any knowledge of problems between Versenia and appellant (CT 767); she denied any problems between herself and appellant (CT 767); she denied being afraid of appellant (CT 766); and she denied going to the courthouse to obtain a restraining order against appellant (CT 766-769). At trial, the jury had to decide whether to believe Eva's testimony at the preliminary hearing, or her statements immediately after the murders. The jury was therefore entitled to consider Ruth's testimony concerning Eva's fear of appellant and her intent to obtain a restraining order against him insofar as such evidence impeached Eva's preliminary hearing testimony, and assisted the jury in assessing her credibility. The relevancy of such evidence was made apparent during the parties' closing arguments, with the prosecution arguing that Eva's statements after the murders were entitled to more weight than her preliminary hearing testimony (see RT 2721-2722, 2725, 2735-2736, 2738-2745, 2749-2750), and the defense arguing just the opposite (see RT 2772-2786, 2822-2826, 2830). Eva's fear of appellant was also admissible for another reason: to prove her conduct in conformity with that fear. During closing arguments, defense counsel argued that any suggestion that Eva feared her son or voluntarily participated in obtaining a restraining order against him was just not true. (See RT 2786, 2790, 2817-2818, 2821

[arguing that Eva's attitude towards appellant never changed; she loved him, he never created any problems for her, and the restraining order was "Versenia's doing and not Eva['s]"].) Because the defense disputed Eva's fear of appellant and her voluntary participation in the restraining order process, Eva's statements of fear were relevant to prove she acted in conformity with that fear and voluntarily accompanied Versenia and Ruth to the courthouse to obtain a restraining order against appellant. (See *People v. Ruiz* (1988) 44 Cal.3d 589, 608 ["'a victim's out-of-court statements of fear of an accused are admissible under section 1250 only when the victim's conduct in conformity with that fear is in dispute'"].) In sum, Eva's statements to Ruth were factually relevant and admissible under section 1250.

D. Ruth's Testimony Did Not Constitute Improper Lay Opinion

Appellant contends that "Ruth's testimony amounted to improper lay opinion testimony as to the veracity of Eva's statements." (AOB 161.) However, because appellant did not object on this ground below, he has waived the claim on appeal. (Evid. Code, § 353.) In any event, Ruth's testimony as to Eva's statements did not amount to improper lay opinion.

Lay opinion testimony is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of his or her testimony. (Evid. Code, § 800.) Lay opinion testimony is proper if based on the witness's direct personal observations. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1309.)

As an initial matter, Ruth did not offer her opinion on whether her mother's statements were true, i.e. whether Eva was really afraid of appellant or whether appellant actually threatened to kill Torey with a baseball bat the night before. (See AOB 161.) Rather, she merely recounted the things her mother said and did in the course of obtaining the restraining order. While Ruth did testify that her mother went to the courthouse to obtain a restraining

order against appellant, Ruth's testimony was based on her own perceptions, i.e., her conversation with Eva and her observations of her mother's and sister's actions in the courthouse. For these reasons, Ruth's testimony did not amount to improper lay opinion.

E. Eva's Statements To Ruth Were Not Barred Under *Crawford v. Washington*

Appellant, citing *Crawford v. Washington, supra*, 541 U.S. 36, argues that Ruth's testimony repeating Eva's statements violated his confrontation rights. *Crawford*, however, does not apply for two reasons. First, because Eva made her statements to her daughter while no governmental officials were present, they were nontestimonial in nature. (See *People v. Butler, supra,* 127 Cal.App.4th at p. 59 [witness's hearsay statements made spontaneously to co-workers when no governmental official was present nontestimonial]; *People v. Cervantes, supra,* 118 Cal.App.4th at pp. 173-174 [co-defendant's hearsay statements made to neighbor while seeking medical treatment nontestimonial].) Second, because Eva's statements were admitted for impeachment purposes only, they were not hearsay. (See *id.* at p. 59, fn. 9 [noting that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted].) Accordingly, the introduction of such statements did not violate appellant's confrontation rights.

F. The Admission Of Eva's Statements Was Harmless

Even if the trial court erred in admitting the statements, any error was harmless under either the state or federal standard of review. The jury already had before it competent evidence that appellant had been arrested two nights before the murders when Versenia found him sitting in the dark with a baseball bat waiting for Torey to come home. (RT 2132-2140, 2278-2288.) The jury

also heard how frightened Versenia was by the incident, how she, Eva, and Ruth went to the courthouse the next day to obtain a restraining order against appellant, and how Eva signed the restraining order. (RT 2141-2176, 2278-2288.) In light of this evidence, as well as the overwhelming evidence of appellant's guilt, the admission of Eva's statements to Ruth was not prejudicial.

VI.

THE TRIAL COURT DID NOT PREVENT APPELLANT FROM PRESENTING EVIDENCE TO IMPEACH THE TESTIMONY OF HIS FAMILY MEMBERS WHO DENIED KNOWLEDGE OF HIS MENTAL PROBLEMS

Appellant contends that he was precluded from introducing evidence to rebut the testimony of his family members who denied knowledge of his mental problems. (AOB 166.) Appellant argues that by restricting his ability to rebut their testimony, the trial court violated his federal constitutional rights to due process and to present a defense. (AOB 165.) Contrary to appellant's contentions, he was afforded every opportunity to rebut this testimony, and was only prevented from introducing inadmissible hearsay evidence.

A. Summary Of Proceedings Below

Appellant points out several instances in which he contends the trial court improperly sustained hearsay objections to questions posed by defense counsel to rebut the testimony of appellant's family members who denied knowing about his mental problems. (AOB 166-167.) Each instance is summarized below:

During his cross-examination of Sammie Lee, defense counsel asked whether Sammie had heard other family members refer to appellant as crazy. (RT 1857.) The trial court sustained the prosecutor's hearsay objection. (*Ibid.*)

When questioning Officer Neilsen about his conversation with Eva's next-door neighbor, John Adams, defense counsel asked if Adams had mentioned that he knew appellant had mental problems. (RT 1913.) The court sustained the prosecutor's hearsay objection. (*Ibid.*) Counsel then asked whether Officer Neilsen heard anything over the radio dispatch regarding any mental disabilities of the alleged suspect. (RT 1913-1914.) The trial court sustained the prosecutor's hearsay objection, noting that the question called for

hearsay unless it was being offered to show subsequent conduct. (RT 1914.) After establishing that Officer Neilsen contacted the dispatcher after conducting interviews at the scene, defense counsel asked whether Officer Neilsen told the dispatcher that appellant might have a mental disability. (*Ibid.*) The court overruled the prosecutor's hearsay objection, and Officer Neilsen indicated that neither he nor the dispatcher said anything about a mental condition. (*Ibid.*) Defense counsel then asked Officer Neilsen if he was personally aware of appellant's mental condition based on his prior visits to the Blacksher residence. (*Ibid.*) The prosecutor objected as speculation. (*Ibid.*) The court noted that the question was also irrelevant, and sustained the objection. (RT 1914-1915.)

Next, defense counsel questioned John Adams about his previous contacts with appellant and whether he knew that appellant had a mental problem. (RT 1957.) When Adams replied that appellant's mother had mentioned such problem to him, the prosecutor objected on hearsay grounds and asked that the answer be stricken. (*Ibid.*) The trial court sustained the objection and granted the motion to strike. (*Ibid.*) When counsel asked if Adams had any conversations with Eva about appellant's mental problem, Adams said no. (RT 1976.) Counsel then clarified, "She just mentioned it," and Adams said yes. (*Ibid.*) When counsel asked Adams if other family members had mentioned appellant's mental problem to him, the prosecutor objected as hearsay, and the court sustained the objection. (*Ibid.*)

On cross-examination, Ruth Cole testified that she had seen Officer Mesones's police report on appellant's arrest the night Versenia found him sitting in the dark with a baseball bat waiting for Torey to come home. (RT 2243-2244.) When defense counsel asked whether she noticed that the report referred to appellant as paranoid schizophrenic, the prosecutor objected that the question assumed facts not in evidence and called for hearsay. (RT 2244.) The court sustained the prosecutor's objections. (*Ibid.*)

While cross-examining James Blacksher, defense counsel asked whether appellant became agitated and more difficult when he was not taking his medication. (RT 2361.) When James responded that he had been told this, the prosecutor objected to James's answer as hearsay and asked that it be stricken. (*Ibid.*) The court sustained the objection and granted the motion to strike. (*Ibid.*) Defense counsel also asked James if appellant had acted paranoid that everyone was against him when he visited James's house a few days before the murders. (RT 2398.) The prosecutor objected that the question called for a medical conclusion and the court sustained the objection. (*Ibid.*)

B. Appellant Was Not Prevented From Introducing Evidence To Rebut The Testimony Of His Family Members Who Denied Knowledge Of His Mental Problems

Although a trial court has broad discretion in determining the relevance of evidence, it may not admit evidence that is irrelevant or inadmissible under the hearsay rule. (*People v. Morrison* (2004) 34 Cal.4th 698, 724; Evid. Code, § 1200, subd. (b).) "The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule." (*People v. Morrison, supra,* 34 Cal.4th at p. 724.) "Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence." (*Ibid.*)

The testimony defense counsel attempted to elicit through the above questions consisted largely of inadmissible hearsay. In response to the prosecutor's hearsay objections, defense counsel made no attempt to cite or establish a hearsay exception. Nor did he argue a nonhearsay purpose for the admission of such evidence. Appellant has therefore waived any challenge to the court's exclusion of the hearsay statements on appeal. (*People v. Morrison, supra,* 34 Cal.4th at p. 724; *People v. Ramos* (1997) 15 Cal.4th 1133, 1178.)

In any event, the exclusion of such evidence did not violate appellant's constitutional rights. The trial court did not prevent appellant from presenting evidence that his family was aware of his mental illness, but only evidence in the form of inadmissible hearsay. (*People v. Livaditis* (1992) 2 Cal.4th 759, 780.) Thus, the trial court's rulings did not constitute a wholesale refusal to allow appellant to present a defense, but merely a reasonable rejection of certain evidence concerning that defense. (*People v. Bradford, supra,* 15 Cal.4th at p. 1325.) Appellant was not otherwise prevented from introducing admissible evidence in support of his defense, which is what occurred in this case. For instance, appellant's brother, Elijah Blacksher, was permitted to testify on cross-examination that he was aware of appellant's mental health problems. (RT 2516-2518, 2523, 2525-2526, 2528, 2534, 2541-2542.) Additionally, the defense introduced evidence that appellant had received Social Security disability benefits for a diagnosis of paranoid schizophrenia for many years. (RT 2621-2625.) The defense also presented evidence of appellant's history of mental illness, and the jury was specifically instructed that such evidence was to be considered in evaluating family members' testimony that they did not know appellant had a mental illness. (RT 2633-2645, 2675-2690.) Moreover, on more than one occasion after the court sustained hearsay objections to appellant's questions, appellant managed to eventually get the responses he was seeking. For instance, after being prevented from asking Officer Neilsen whether he heard anything over the radio dispatch regarding any mental disabilities of the alleged suspect (RT 1913-1914), he was permitted to ask Officer Neilsen whether he radioed the dispatcher that appellant might have a mental disability. (RT 1914.) Officer Neilsen not only denied saying this to the dispatcher, but denied having any conversations at all with the dispatcher about appellant's mental condition. (*Ibid.*) Also, after the court struck John Adams's testimony that Eva had mentioned to him that appellant had a mental problem

(RT 1957), appellant later elicited identical testimony from him. (RT 1976.) In short, because appellant was afforded ample opportunity to present other, admissible evidence to rebut the testimony of his family members, his right to present a defense was not infringed and there is no merit to his claim the trial court applied the evidentiary rules unevenly among the parties. (See AOB 171-172.)

Appellant argues that even if the excluded evidence was hearsay, it was relevant to the issues to be decided by the jury, and for this reason alone admissible under both the state and federal constitutions. (AOB 168-171.) "Even if relevant, however, hearsay evidence . . . is inadmissible '[e]xcept as provided by law.'" (*People v. Morrison, supra,* 34 Cal.4th at p. 724.) Despite appellant's suggestion to the contrary (AOB 171), the United States Supreme Court has never suggested that the states are without power to formulate and apply reasonable foundational requirements for the admission of evidence. (*People v. Ramos, supra,* 15 Cal.4th at p. 1178 [discussing *Chambers v. Mississippi* (1973) 410 U.S. 284, *Skipper v. South Carolina* (1986) 476 U.S. 1, 106 S.Ct. 1669, and other United States Supreme Court decisions]; see also *People v. Morrison, supra,* 34 Cal.4th at p. 724; *People v. Phillips, supra,* 22 Cal.4th at p. 238.) Under California law, foundational prerequisites are fundamental to any exception to the hearsay rule. (*People v. Morrison, supra,* 34 Cal.4th at pp. 724-725.) Accordingly, application of the ordinary rules of evidence to the proffered testimony in this case did not impermissibly infringe on appellant's right to present a defense. (See *ibid.*)

Finally, because appellant was not wholly precluded from presenting a defense, the state harmless error standard applies. (*People v. Bradford, supra,* 15 Cal.4th at p. 1325; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) As noted above, appellant presented other evidence to rebut his family members' testimony that they were unaware of his mental problems. Despite this

evidence, the jury still convicted appellant of murder. Accordingly, it is not reasonably probable that appellant would have received a more favorable result even if the trial court had allowed the witnesses to answer the few additional questions at issue on appeal. Moreover, considering the overwhelming evidence of appellant's intent to kill, appellant suffered no prejudice by exclusion of the hearsay evidence.

VII.

THE PROSECUTOR'S CROSS-EXAMINATION OF DR. DAVENPORT DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS

Appellant contends that the trial court violated his federal constitutional rights to due process and a fair trial by allowing the prosecutor to go beyond the limited purpose for which Dr. Davenport's testimony was admitted in the guilt phase. (AOB 175.) Appellant, however, has waived his claim on appeal by failing to object on this same ground below. In any event, appellant's contention lacks merit.

A. Dr. Davenport's Testimony

Dr. Davenport was called by the defense to impeach the testimony of appellant's family members who denied any knowledge that appellant suffered from a mental illness. The jury was given a limiting instruction to this effect before Dr. Davenport's testimony. (RT 2633; CT 1242.) The jury was further instructed not to consider Dr. Davenport's testimony as evidence of appellant's mental state on the date of the alleged crimes, or as evidence to show or negate appellant's capacity to form the requisite mental state. (RT 2633; CT 1242.)

On direct examination, Dr. Davenport testified that he examined appellant in 1984 and again in 1996. (RT 2638-2639.) During the 1996 examination, appellant exhibited signs of schizophrenia. (RT 2639.) He was agitated, hyperactive, and unable to sit still. (RT 2641, 2644.) During his examinations of appellant, Dr. Davenport documented appellant's history of mental illness. (RT 2639.) In 1975, appellant was hospitalized at Napa State Hospital for suicidal ideations. (RT 2641-2642.) He was again hospitalized in 1977, and tentatively diagnosed with schizophrenia and chronic alcoholism. (RT 2642.) In 1981, he was hospitalized at Herrick Hospital for multiple episodes of psychotic depression. (RT 2642-2643.) In 1984, he was

hospitalized at Highland Hospital for 36 days due to a progression of symptoms, which included religious delusions and the belief that "people were plotting against him." (RT 2642-2644.) As a result of the 1984 hospitalization, appellant was prescribed antipsychotic medications, which he stopped taking once he was released from the hospital. (RT 2644.) Dr. Davenport opined that in the absence of any treatment, appellant probably regressed to a psychotic state once he stopped taking his medications. (RT 2644.) In 1986, appellant was hospitalized at Walnut Creek Hospital for two days and diagnosed with chronic, paranoid-delusional schizophrenia. (RT 2644-2645.)[27/]

On cross-examination, Dr. Davenport testified that he obtained the information about appellant's prior hospitalizations through the records of the Criminal Justice Mental Health Unit. (RT 2647.) Dr. Davenport admitted that he had no personal knowledge of the details of appellant's 1975 hospitalization, including the length of appellant's stay, the time of year he was hospitalized, or the circumstances that led to the hospitalization. (RT 2648-2649.) The prosecutor then asked Dr. Davenport some follow-up questions about appellant's refusal to take his medications upon his release from the hospital in 1984. (RT 2650-2653, 2657-2658.) Dr. Davenport reiterated his opinion on direct examination that in the absence of any treatment, appellant probably regressed to a psychotic state once he stopped taking the medications. (RT 2653.) When asked if he had any evidence that appellant had received mental health treatment from 1986 through 1995, Dr. Davenport indicated that he had none. (RT 2653.) He noted that it would have been unusual for appellant to remain symptom-free for such a long period of time without receiving any medication or therapy. (RT 2653-2654.) The prosecutor then posed the

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27. Appellant's claim that "the defense elicited testimony only that Dr. Davenport . . . conducted a Penal Code section 1368 examination of appellant in 1996" is not entirely accurate (see AOB 177, fn. 43), as the above summary of Dr. Davenport's testimony on direct examination shows.

following hypothetical: assuming appellant had not received any mental health treatment between 1986 and the time of trial, would that cast any doubt on his diagnosis of paranoid schizophrenia? (RT 2654.) Dr. Davenport testified that it was possible because the symptoms of paranoid schizophrenia never went away. (RT 2655-2656.) The prosecutor then questioned Dr. Davenport about the meaning of the term "malingering." (RT 2658-2659.)

The prosecutor also briefly inquired about Dr. Davenport's past examinations of appellant. In 1984, Dr. Davenport concluded that appellant did not have a psychiatric disorder that rendered him incompetent to stand trial. (RT 2663.) During that interview, appellant was oriented in all spheres and did not manifest any overt signs of psychosis or mental illness. (RT 2663-2664.) His memory was intact, he was of average intelligence, and he was capable of rational thought. (RT 2664.) During the 1996 examination, appellant denied having any hallucinations, delusions, or any suicidal or homicidal ideations. (RT 2660-2661.) He was oriented in all spheres, understood the charges against him, and vehemently denied responsibility for the murders of his sister and nephew. (RT 2661-2662.)

Towards the end of the prosecutor's cross-examination, the parties met with the court in chambers. (RT 2665.) The prosecutor asked to continue his cross-examination of Dr. Davenport to the following day. (*Ibid.*) Although the court noted that the prosecutor was "getting way beyond" the limited purpose for which Dr. Davenport's testimony was being admitted (RT 2665), it also noted that the defense had opened the door to such questioning by going into the reports on direct examination. (RT 2668.)[28] The court observed that so far on cross-examination, the prosecutor had "raised enough" to argue appellant "was perfectly normal to [Dr. Davenport] so, of course, family members might

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28. The trial court repeated this observation later during a discussion outside the presence of the jury. (RT 2799-2800.)

not know he was crazy." (RT 2666.) The court added, "[m]uch beyond that, we are starting to get into where I don't want to get." (*Ibid.*) The court ruled that the defense would be allowed to rehabilitate Dr. Davenport on redirect, and then both sides would have enough evidence to argue their respective positions to the jury, i.e., the defense could argue "that the family had to know [about appellant's mental illness] if he was in the hospital all these times," and the prosecution could argue that appellant could "act perfectly sane when [] around his family and no one would know" he had a mental illness. (RT 2668, 2670.) The court concluded that it would let in the testimony elicited on cross-examination as the defense had made no in depth objections up to that point, and that it would reinstruct the jury about the limited purpose of Dr. Davenport's testimony. (RT 2671.) Defense counsel noted for the record that he had objected for as long as he could have but that he kept getting overruled. (*Ibid.*)

On redirect, defense counsel questioned Dr. Davenport further about his examinations of appellant. In 1984, Dr. Davenport diagnosed appellant with paranoid schizophrenia in remission. (RT 2675-2676.) Although Dr. Davenport did not give appellant a diagnosis in his 1996 report, he did feel that appellant was schizophrenic at that time. (RT 2676.) During the 1996 examination, appellant was somewhat guarded and suspicious and his motor activity was agitated and hyperactive. (RT 2676.) He moved around a lot, spoke loudly, and became overly involved in his thoughts. (RT 2677, 2679.) He had bizarre verbiage, his thinking was loose and tangential, he had delusions of persecution, and he seemed to be responding to internal stimuli. (RT 2677-2678.) He was also euphoric, laughing loudly for no apparent reason. (RT 2678.) Like most mentally ill persons, appellant denied that he had a mental illness. (RT 2677.) Appellant's medical records from 1987 indicated that he was using a tremendous amount of energy to keep his psychotic symptoms

under control, and that his diagnosis was schizophrenia differentiated with psychotic features in remission. (RT 2679.) After eliciting the above testimony, defense counsel posed the following hypothetical: assuming appellant had been diagnosed with paranoid schizophrenia on 10 to 15 prior occasions, would that cause Dr. Davenport to suspect that appellant might actually be paranoid schizophrenic? (RT 2679.) Dr. Davenport responded in the affirmative. (*Ibid.*)

After Dr. Davenport's testimony was concluded, the court reread the limiting instruction to the jury. (RT 2682-2683; CT 1242.) Outside the presence of the jury, the parties agreed to compare the dates in the prosecutor's hypothetical with appellant's treatment history to see if the hypothetical was factually accurate. (RT 2684-2685.) The parties agreed that a corrective statement would be read to the jury if it was determined that the hypothetical was incorrect. (RT 2685.) The court subsequently informed the jury that the prosecutor's hypothetical was based on a faulty assumption, and that appellant had in fact received medical treatment for a psychiatric disorder on eight different occasions during the period from 1986 to 1996. (RT 2689-2690.)

B. Appellant's Due Process Rights Were Not Violated By The Prosecutor's Cross-Examination Of Dr. Davenport

As a threshold matter, we submit that appellant has failed to preserve his claim for appeal. (Evid. Code, § 353.) During the prosecutor's cross-examination of Dr. Davenport, defense counsel never objected on the same ground now raised on appeal: that the prosecutor's cross-examination of Dr. Davenport was going beyond the limited purpose for which such testimony was being offered. Indeed, the trial court expressly noted the lack of any "in depth" objections by defense counsel raising this point. (RT 2671.) Although defense counsel noted for the record that he had objected for as long as he could have but that he kept getting overruled (RT 2671), the record does not

support such an assertion. Rather, the record shows that defense counsel made six objections during the prosecutor's cross-examination (RT 2648-2649, 2653-2657), none of which raised the same issue now being argued on appeal. Moreover, while it is true that most of the objections were overruled, the second to last objection was actually sustained, belying any claim of futility. (RT 2656.) Because this was not a case in which the trial court acted in a hostile manner towards defense counsel's objections (*People v. Hill* (1998) 17 Cal.4th 800, 820-822), appellant's failure to object on the same ground raised on appeal cannot be excused based on a claim of futility.

Even if the claim has not been waived, it lacks merit. "'Relevant evidence' means 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 admission of evidence violates due process "[o]nly if there are *no* permissible inferences the jury may draw from the evidence . . . . Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'" (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, emphasis in original; accord *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1246 [finding no due process violation where the jury could draw a permissible inference from the evidence].)

Contrary to appellant's contentions, the prosecutor's questions on cross-examination did not exceed the scope of direct examination. The scope of permissible cross-examination extends to the "whole transaction of which the witness has testified, or it may be employed to elicit any matter which may tend to overcome, qualify or explain the testimony given by a witness on his direct examination." (*People v. Dotson* (1956) 46 Cal.2d 891, 898; see also Evid. Code, §§ 761, 773 [the permissible scope of cross-examination is restricted to the scope of the direct examination].) As the trial court expressly noted,

defense counsel opened the door to such questioning by going over the information contained in Dr. Davenport's reports on direct examination. The defense sought to impeach the testimony of appellant's family members that they did not know appellant was mentally ill by establishing that appellant had a long history of mental illness. By exploring some of the details of that history, the prosecutor was able to argue that the details were more consistent with malingering than mental illness. The prosecutor's questions regarding appellant's demeanor during his interviews with Dr. Davenport were also within the permissible scope of cross-examination, as Dr. Davenport had previously testified on direct examination about his 1984 and 1996 examinations of appellant, and his opinion that appellant was exhibiting signs of schizophrenia during his 1996 examination. (RT 2639, 2641, 2644.) As the trial court expressly noted, such evidence tended to undermine the defense's position, i.e., if appellant did not appear mentally ill to Dr. Davenport, then it would be reasonable for family members not to realize he was mentally ill. Because the prosecutor's questions concerned the "whole transaction of which [Dr. Davenport] . . . testified," and tended "to overcome, qualify or explain" such testimony, they were well within the permissible scope of cross-examination. Moreover, by preventing the prosecutor from going further in his cross-examination, the trial court did not allow the prosecutor to improperly expand the limited purpose of Dr. Davenport's testimony.

In short, the testimony elicited by the prosecutor on cross-examination was relevant "to prove or disprove a[] disputed fact . . . of consequence to the determination of the action." (Evid. Code, § 210.) Accordingly, as there were permissible inferences the jury could draw from the prosecutor's cross-

examination of Dr. Davenport, the admission of such evidence did not violate appellant's due process rights.[29/]

Nor was the evidence so prejudicial as to constitute a denial of due process. "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) The prosecution presented overwhelming evidence that appellant formed the requisite mental state to support a finding of murder. The evidence showed that appellant had become increasingly angry with his nephew and his sister in the days before the murders, and that he had run-ins with both of them at his mother's house. Appellant made plans to kill his nephew and discussed those plans repeatedly with several family members. In those discussions, appellant indicated that he also intended to kill his sister if she got in his way. When appellant's brother refused to provide him with a gun, appellant went out and obtained one on his own. Right before the murders, appellant told his brother that he had thought it over, but in the end decided to kill his nephew. After shooting his nephew and sister in the head, he fled. Afterwards, he called two different family members and made up a story about seeing two masked men enter his mother's home. He then boarded a bus to Reno and did not return until the next day. When he turned himself into the police, he no longer had the clothes he had been wearing on the morning of the murders or the gun he had purchased right

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29. Nor was appellant's Fifth Amendment right to remain silent violated (see AOB 180, fn. 46), as he was the party responsible for calling Dr. Davenport to the stand and inquiring into the substance of the competency examination. (See, e.g., *Estelle v. Smith* (1981) 451 U.S. 454, 465 [when a defendant introduces psychiatric testimony in support of his defense, he may not invoke his right to remain silent and deprive the prosecution of the "only effective means it has of controverting his proof on an issue that he interjected into the case"].)

before the murders. Considering the overwhelming evidence that appellant rationally planned and committed the murders of his nephew and sister, and then tried to cover his tracks afterwards, any error in the admission of evidence suggesting that appellant was not mentally ill was harmless.

VIII.

THE TRIAL COURT PROPERLY REPRIMANDED DEFENSE COUNSEL DURING TRIAL

Appellant contends that during trial, the court gave jurors the impression that it was aligning itself with the prosecution and against the defense, thereby violating his federal constitutional right to a fair trial. (AOB 186-187.) In support of his contention, appellant identifies six instances in which he claims the trial court's comments were sarcastic and disparaging of defense counsel. (AOB 187-189.) Appellant, however, has waived his claim on appeal by failing to object below. Even assuming the issue has been preserved for appeal, the trial court's comments did not betray any bias against defense counsel. Rather, the comments were well-deserved reprimands prompted by defense counsel's improper conduct.

A. Appellant Has Waived His Claim On Appeal

As an initial matter, we note that appellant neither objected to the court's comments nor asked that the jury be admonished. Accordingly, appellant has waived the issue on appeal. (See *People v. Fudge, supra,* 7 Cal.4th at p. 1108 [claim that trial court repeatedly disparaged defense counsel waived on appeal by failure to object below]; see also *People v. Wright* (1990) 52 Cal.3d 367, 411 [same].) Even assuming appellant has preserved the issue on appeal, there is no merit to his claim, as set forth in more detail below.

B. The Trial Court's Comments Did Not Give The Impression Of Judicial Bias

Although the trial court has both the duty and discretion to exert reasonable control over the conduct of a trial (*People v. Fudge, supra,* 7 Cal.4th at p. 1108), the court "commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or

create the impression it is allying itself with the prosecution" (*People v. Carpenter, supra,* 15 Cal.4th at p. 353). Even so, "'[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.'" (*People v. Snow* (2003) 30 Cal.4th 43, 78, quoting *United States v. Donato* (D.C. Cir. 1996) 99 F.3d 426, 434.) A reviewing court's role "'is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, [the court] must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.'" (*People v. Snow, supra,* 30 Cal.4th at p. 78, quoting *United States v. Pisani* (2d Cir. 1985) 773 F.2d 397, 402.)

Here, the court was well within its discretion in rebuking defense counsel for engaging in inappropriate behavior. Each instance cited by appellant, when considered in context, shows that the court was simply exercising its discretion to control the conduct of trial when it made its comments. We consider each instance in turn.

Appellant first complains of an instance in which the court made a "sarcastic" remark during defense counsel's cross-examination of Ruth Cole. (AOB 187.) At the time, counsel was questioning Ruth's earlier testimony on direct examination that appellant had called her from jail and asked her to bail him out:

> Q. Now, Erven never called you on May the 9th to bail him out of jail, did he?
> A. He called me when he was in jail, yes.
> Q. As a matter of fact, you know that Erven knew from the time he was placed in custody he was going to be released the next day.
> A. Pardon me?
> Q. You knew he was going to be released the next day.
> A. I never –

MR. TINGLE: Objection, that calls for speculation.
THE COURT: Sustained.
MR. BROOME: It is a question; it is cross-examination, your Honor.
THE COURT: Mr. Broome, we don't throw the rules of evidence out just because you're on cross-examination.
Sustained.

(RT 2224.)

The court's remark was in direct response to defense counsel's nonsensical argument that the question was permissible simply because it was "a question" and it was cross-examination. The court mildly chided counsel for making a patently frivolous argument in response to the prosecutor's objection, and it was well within the trial court's discretion to do so.

Next, appellant complains of three separate remarks made by the court during defense counsel's cross-examination of Elijah Blacksher. (AOB 187-188.) On direct examination, the prosecutor used the transcript from Elijah's taped interview with the police to refresh Elijah's memory on certain points. (RT 2469, 2476-2483, 2486-2492, 2494-2496, 2499, 2501-2505, 2507, 2509-2515.) When defense counsel began her cross-examination of Elijah, she approached the witness stand and, while apparently referring to the transcript that was still in Elijah's possession, stated, "I will get that from you .... We're not going to be restricted to the script." (RT 2516.) When the prosecutor objected to the comment as inappropriate, the court remarked, "That was uncalled for, Ms. Stanley." (*Ibid.*) Considering defense counsel's blatant attempt to insinuate that the prosecutor's direct examination of Elijah was scripted, the court properly exercised its discretion in rebuking her.

Thereafter, while apparently reading from the same transcript used by the prosecutor during direct examination, defense counsel asked Elijah if Eva had told him, "Erven's not all there, he's my baby like Torey is [Versenia's] baby." (RT 2517.) After overruling the prosecutor's hearsay objection, the court asked

defense counsel, "Going back to the script now, Ms. Stanley?" (RT 2518.) Counsel replied, "Hopefully." (*Ibid.*) The court's remark pointing out the hypocrisy of defense counsel's earlier comment regarding the prosecutor's use of the same transcript, while perhaps gratuitous, was hardly prejudicial, especially considering defense counsel's light response to the court's comment, and the fact that the court ruled in her favor.

Later on, after establishing that Elijah had a close relationship with appellant and knew about his mental problems, defense counsel asked, "This is probably the most painful thing you've had to participate in, other than having to go to the house and see your sister and nephew, is that correct?" (RT 2518.) After receiving an affirmative response, defense counsel asked, "As a matter of fact, there are police officers who are here to make sure that you don't leave, is that correct?" (*Ibid.*) The prosecutor objected, stating, "That's really improper." (*Ibid.*) The court sustained the objection, adding, "Please don't make me have to admonish you in front of the jury again." (RT 2518-2519.) The implication in defense counsel's question was that Elijah was being forced to testify against appellant. However, whether Elijah had to be compelled to testify was not a proper consideration for the jury, and counsel's reference to such a matter outside the record was improper. Accordingly, the trial court's reproach of defense counsel was appropriate, especially when considered against the backdrop of her earlier, improper remark regarding the prosecutor's use of the transcript.

Appellant next challenges a single remark by the trial court during the prosecutor's cross-examination of Dr. Davenport. (AOB 188-189.) On cross-examination, Dr. Davenport admitted that he had no evidence that appellant had received any mental health treatment from 1986 through 1995, and that it would be quite unusual for a person with schizophrenia to remain symptom free for such a long period of time without any mental health intervention. (RT 2653-

2654.) The prosecutor then posed the following hypothetical: assuming appellant had not received any mental health treatment between 1986 and the time of trial, would that cast any doubt on his diagnosis as a paranoid schizophrenic? (RT 2654.) Defense counsel objected that there was no foundation for the question (RT 2654-2655), and the following colloquy took place:

> THE COURT: Well, he is posing it as a hypothetical question. A hypothetical question doesn't have to be founded on the evidence that is presented, I suppose.
> MS. STANLEY: However, your Honor, it does have to be founded in truth. And I think it is skirting on misconduct to set up that hypothetical.
> MR. TINGLE: I don't think it is skirting on anything. I have a good faith belief on every item, and I am prepared to prove every one of them to this jury.
> THE COURT: Now that we have that out of the way.
> Ms. Stanley, I don't know how many times I have to ask you not to do that.
> Ladies and gentlemen of the jury, it is improper for the defense team to use that kind of language regarding misconduct in an attempt to persuade you one way or the other about Mr. Tingle's conduct.
> Now, I will ask you not to do it again.
> If this is based on a good faith belief, Mr. Tingle, then the question is appropriate.
> Objection overruled.

(RT 2655.)

Defense counsel's hostile attack on the prosecutor in front of the jury was quite improper, and it was within the trial court's discretion to immediately admonish her in front of the jury, especially considering her earlier misconduct. Appellant contends that the court showed judicial bias by reprimanding defense counsel instead of the prosecutor, who appellant contends was the one committing misconduct by going "way beyond" the permitted scope of cross-examination. (AOB 188-189.) However, at the time the trial court reprimanded defense counsel, it had no basis for believing the prosecutor was committing

misconduct. The court stated its understanding of the prosecutor's good-faith belief in the facts underlying his hypothetical question, and expressed no concerns regarding the scope of the prosecutor's cross-examination at that time. Thus, the trial court had no reason to rebuke the prosecutor at the time it reprimanded defense counsel. In any event, any appearance of bias on the court's part was cured by its subsequent admonishment to the jury that there was no factual basis for the prosecutor's hypothetical question. (RT 2689-2690; see, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 460 [any prejudice stemming from trial court's erroneous ruling on prosecutor's hypothetical questions was cured by a special jury instruction informing the jury that the prosecutor had presented no evidence in support of the questions].)

Finally, appellant takes issue with remarks made by the court during defense counsel's cross-examination of Inspector Bierce. To place the court's comments in context, the entire colloquy is quoted below:

> Q. Okay. And – one of the things Elijah Blacksher told you when you took a statement from him on May 11th, 1995, was that Torey Lee had brought some of his friends there, meaning to 1231 Allston, to quote put Erven in his place, isn't that true?
> A. Is that what Elijah told me?
> MR. TINGLE: I object, this is hearsay.
> THE COURT: Sustained.
> MR. BROOME: To impeach Elijah.
> THE COURT: That's not inconsistent with what he testified.
> MR. BROOME: I don't think he used that terminology.
> THE COURT: It is not inconsistent though; different terminology is not inconsistent. Sustained.
> MR. BROOME: Q. Now, he also complained, did he not, meaning to Elijah, Erven complained that Torey had brought some dope into his mother's house?
> MR. TINGLE: Objection, this is hearsay.
> THE COURT: Sustained.
> MR. BROOME: Also impeachment.
> THE COURT: Sustained.
> Nice try, but –

MR. BROOME: I have to keep trying judge. Then what about the – did he have a conversation about Torey having orgies in the house?

MR. TINGLE: Objection –

MR. BROOME: That's inconsistent.

THE COURT: No, I don't think so.

MR. BROOME: He did not testify –

THE COURT: Because he didn't testify to it, doesn't make it inconsistent, Mr. Broome.

MR. TINGLE: Objection on grounds of hearsay.

THE COURT: Sustained.

MR. BROOME: Okay.

(RT 2613-2614.)

As an initial matter, the trial court properly sustained the prosecutor's hearsay objections to defense counsel's questions. As the court noted, the statements Elijah made to Inspector Bierce were not inconsistent with his testimony at trial, as appellant's own summary of Elijah's testimony clearly shows. (See AOB 189.) Moreover, the court's wry comment of "[n]ice try," was completely innocuous, especially when considered in light of defense counsel's comeback. Furthermore, the trial court treated both parties equally, letting defense counsel respond to the prosecutor's objections before ruling. Contrary to appellant's contentions, the court did not lecture defense counsel, but only explained why it was sustaining the prosecutor's objections. The only time the trial court did not let defense counsel finish his response to the prosecutor's objection was towards the end of the colloquy, after defense counsel had made a third attempt to introduce hearsay, and from the court's response it is obvious it thought it knew where counsel was going with his argument. In any event, counsel made no attempt to correct the court's understanding of his argument. In sum, the court showed no bias in ruling on the prosecutor's objections.

Considered together, the court's comments did not betray any overt bias against defense counsel so as to deny appellant a fair trial. (*People v. Snow,*

supra, 30 Cal.4th at p. 79.) Rather, defense counsel's own misconduct triggered the court's comments, which were not unduly harsh or out of proportion to counsel's behavior. (See *ibid.* [trial court did not berate defense counsel as asserted].) The effect of the court's remarks on the whole did not create the impression that the court was allying itself with the prosecution. (*Id.* at pp. 81-82.) In short, the court's few comments sprinkled throughout the course of a lengthy trial did not deny appellant a fair trial. (*Id.* at p. 81.)

IX.

THE AUTOPSY PHOTOGRAPHS OF THE VICTIMS WERE PROPERLY ADMITTED

The trial court admitted five autopsy photographs depicting the gunshot wounds appellant inflicted on Torey and Versenia. Appellant argues that the photographs were irrelevant, inflammatory, and a violation of his federal constitutional rights to due process and a fair trial. (AOB 191.) Not so.

A. Background Facts

In a motion in limine, the prosecution sought to introduce autopsy and crime scene photographs of the victims in order to show the manner in which they were killed, to illustrate the coroners' testimony about their injuries, and to demonstrate that appellant acted with deliberation and premeditation in committing the murders. (CT 666-667.) The defense moved to exclude any photographic evidence of the victims as cumulative, irrelevant, and prejudicial. (CT 618-626, 721-723.)

During an Evidence Code section 352 hearing to determine the admissibility of the autopsy photographs (RT 378), the prosecutor identified five pictures of Versenia (exhibits 61-65). (RT 400.) Exhibit 61 was a view of the right side of Versenia's head showing the entry wound of the bullet that killed her; exhibit 62 was a view of the left side of Versenia's head; exhibit 63 was a view of her face; and exhibits 64 and 65 showed the injury to Versenia's right forefinger. (RT 400-401.) The prosecutor sought to introduce only two of the photos—exhibit 61 and either exhibit 64 or 65—in order to illustrate the medical examiner's testimony about the specific injuries that caused Versenia's death. (RT 401.)

The defense offered no objection to exhibit 61, and the court ruled that the exhibit would be allowed based on its probative value. (RT 402-403.) However, the defense did object to exhibit 65, arguing that the wound to the

finger appeared exaggerated because of the way the coroner "somewhat opened up that wound to illustrate it," "whereas" exhibit 64 showed the finger "in yet a different form." (RT 401.) Counsel asserted that when exhibits 64 and 65 were considered along with two previously admitted photographs of Versenia's finger at the crime scene, the autopsy photographs, "particularly [exhibit] 65," were "somewhat misleading" and prejudicial. (RT 401.) In response, the prosecutor explained that in exhibits 64 and 65, the coroner was merely attempting to put the finger "back into as an original position as he could to show the nature of the finger at the time the shot was fired." (RT 401.)

The court found that exhibit 64 was "a better picture" of the finger, and pointed out that the photo was being used only to show a defensive wound, as Versenia did not "die of a gunshot wound to the finger." (RT 402.) The court found that exhibit 64, along with the two previously admitted photos from the crime scene, would convey that message. (RT 402.) The court ruled that it would allow exhibit 64 based on its probative value, but that it would exclude exhibit 65 as cumulative. (RT 402-403.) The court then granted the prosecutor's request to withdraw exhibit 62, and granted the defense's request to exclude exhibit 63 as cumulative. (RT 402-403.)

The prosecutor next indicated that there were five autopsy photos of Torey (exhibits 56-60). (RT 403.) The prosecutor sought to introduce only two of the photos—exhibits 57 (view of exit wound) and 58 (view of entry wound)—to illustrate the medical examiner's testimony regarding the cause of death. (RT 403.) The court allowed both photos with no objection by the defense, specifically finding that exhibit 58 was probative as to the cause of death. (RT 403-404.) The prosecutor then withdrew exhibits 56, 59, and 60. (RT 403.) The defense stated that it had no objection to exhibit 56, and requested that the photo remain among the exhibits eligible to be introduced at trial. (RT 403-404.) The court granted the prosecutor's request to withdraw

exhibits 59 and 60, and granted the defense's request to keep exhibit 56. (RT 404.)

During the guilt phase, the coroner who performed the autopsy on Versenia used the two autopsy photos of Versenia (exhibits 61 and 64) to illustrate the nature of her wounds and his opinion that a single bullet passed through her finger before hitting her in the head and killing her. (RT 2055-2061.) The coroner who performed the autopsy on Torey used the two autopsy photos of Torey (exhibits 57 and 58) to illustrate the entrance and exit wounds to his head and her opinion that he died of a gunshot wound to the head. (RT 2403-2404.) The defense did not object to any of the exhibits at the time they were introduced at trial, nor later when they were admitted into evidence. (RT 2628.) Although exhibit 56 was not introduced during trial, it was admitted into evidence without objection by the defense. (RT 2628.) During defense counsel's cross-examination of the coroner who performed Torey's autopsy, defense counsel introduced two photographs: one was an autopsy photograph of Torey depicting a large, visible scar on his right arm (exhibit BB), and the other was a close-up of the scar (exhibit CC). (RT 2408; CT 1577.) Both of these exhibits were later admitted into evidence. (RT 2876.)

B. Appellant Has Waived All But One Of His Claims On Appeal

Although appellant objected generally on state law grounds to the introduction of any photographic evidence of the victims in his motion in limine, he did not make any specific objections to exhibits 57, 58, or 61 at the section 352 hearing. As a consequence, appellant cannot challenge the admission of those exhibits on appeal.

A motion in limine will suffice to preserve an issue on appeal when it satisfies the basic requirements of Evidence Code section 353, namely: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence;

and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*People v. Morris* (1991) 53 Cal.3d 152, 190, overruled on another point by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Here, appellant's motion in limine failed to satisfy the third requirement. The trial court could not consider the admissibility of the photographs until it actually viewed the pictures being offered by the prosecution and heard the parties' specific arguments as to each picture. Because appellant did not offer up any specific objections to exhibits 57, 58, or 61 at the time they were being considered by the trial court, he cannot challenge their admission on appeal. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1172 ["Although defendant may have raised this issue at the outset of trial, his failure to renew the specific objection at the Evidence Code section 402 hearing waives the issue on appeal"].) Moreover, because appellant specifically requested that exhibit 56 be included in the exhibits at trial, and did not object at the time the exhibit was admitted into evidence, he is estopped from challenging the admission of the exhibit on appeal. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139 [doctrine of invited error barred defendant's challenge to court's admission of defendant's prior conviction for impeachment purposes]; *People v. Cooper* (1991) 53 Cal.3d 771, 827 ["Defendant may not now complain that the court did exactly what he insisted upon"].) Finally, we note that appellant did not raise any constitutional objections to the admission of the photographs in either his in limine motion or during the section 352 hearing. Accordingly, such arguments have also been waived on appeal. (*People v. Anderson* (2001) 25 Cal.4th 543, 592.) In short, the only claim appellant has preserved for appeal is his state evidentiary challenge to exhibit 64.

C. The Trial Court Did Not Abuse Its Broad Discretion In Admitting The Autopsy Photographs

Even if this Court finds no waiver, there is no merit to appellant's claims. Appellant contends that the admitted autopsy photographs lacked any probative value because the cause of death was never disputed, photographs of the victims' bodies inside the house were admitted into evidence, and the coroners' testimony regarding the location and nature of the victims' gunshot wounds required no amplification or clarification. (AOB 193.) In sum, he argues that the autopsy photographs did not "'enlighten'" the jury "'one additional whit,'" and that "their only purpose was to inflame the jury's horror, pity and revulsion." (AOB 193.) We disagree.

A trial court has broad discretion in determining the relevance of evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.) 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.) Appellant contends that the photographs had no probative value in this case because the victims' cause of death was never disputed. (AOB 193.) However, just because appellant did not contest the coroners' testimony regarding the cause of death did not make the photographs irrelevant; rather, the photographs tended to clarify that testimony. (*People v. Crittenden, supra,* 9 Cal.4th at p. 132.) The autopsy photographs depicting the gunshot wounds to the victims' heads and Versenia's finger established the manner in which the victims were killed, including the nature and location of the victims' wounds. The photographs were therefore relevant to the question of whether appellant acted with malice, deliberation, and premeditation in murdering his victims (*People v. Welch* (1999) 20 Cal.4th 701, 750-751; *People v. Memro* (1995) 11 Cal.4th 786, 866-867; *People v. Crittenden, supra,* 9 Cal.4th at pp. 132-133; *People v. Clair* (1992) 2 Cal.4th 629, 660), and the jury was entitled to see how

the physical details of the victims' bodies supported the prosecution's theory of first degree murder. (*People v. Crittenden, supra,* 9 Cal.4th at p. 133.)

Appellant argues, however, that the autopsy photographs were irrelevant because the coroners' "detailed testimony needed no amplification or clarification," and because "photographs of the victims' bodies inside the house were admitted into evidence." (AOB 193.) Contrary to appellant's argument, "evidence does not become irrelevant simply because other evidence may establish the same point." (*People v. Smithey* (1999) 20 Cal.4th 936, 973-974.) This Court has repeatedly rejected the argument that victim photographs must be excluded simply because they are cumulative of other evidence in the case. (*Id.* at p. 974.) In sum, the trial court did not abuse its discretion in determining that the photographs were relevant.

Nor did the trial court abuse its discretion under section 352 in finding that the probative value of the photographs was not substantially outweighed by any danger of undue prejudice. A trial court's discretion under section 352 will not be disturbed on appeal unless the probative value of the admitted evidence is clearly outweighed by its prejudicial effect. (*People v. Crittenden, supra,* 9 Cal.4th at pp. 133-134.) The autopsy photographs showing the victims' wounds were highly probative of the manner in which appellant carried out the murders. For instance, the photographs depicting the entrance and exit wounds on Torey's head demonstrated that appellant shot his nephew in the back of the head. Further, the photographs depicting the wounds to Versenia's finger and head tended to show that appellant shot his sister in the head while she was trying to shield herself from his bullet. Such photographs helped illustrate and corroborate the coroners' testimony, and were highly probative of appellant's intent, deliberation, and premeditation in carrying out the murders.

The highly probative value of the photographs was not clearly outweighed by their prejudicial effect. As this Court has noted, the prejudice

referred to in section 352 is that which "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Crittenden, supra,* 9 Cal.4th at p. 134.) Thus, victim photographs must be more than just disturbing or unpleasant to qualify as unduly prejudicial. (*Ibid.*) They must be unduly shocking or inflammatory, or include multiple exposures of very similar views. (*Ibid.*) While admittedly unpleasant, the autopsy photographs admitted into evidence in this case were not unduly inflammatory or duplicative. Accordingly, the trial court did not abuse its discretion in admitting the photographs.

Finally, even if admission of the photographs were error, no reasonable probability exists that the result of the guilt phase would have been different had the photographs been excluded in light of the overwhelming evidence of appellant's guilt. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant disagrees that the *Watson* harmless-error standard for reviewing state evidentiary errors is applicable here. Rather, appellant argues that the court's error rose to a federal due process violation, entitling him to the more stringent harmless-error standard of review articulated in *Chapman v. California* (1967) 386 U.S. 18, 24. However, as noted above, because appellant did not object on federal constitutional grounds below, he cannot raise a federal due process claim on appeal. Even if appellant had preserved this claim for appeal, it is apparent that any alleged error was not of federal constitutional magnitude. Accordingly, the *Chapman* standard does not apply. (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1172, fn. 74.)

X.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE PRESUMPTION OF SANITY DURING THE GUILT PHASE

Appellant contends that the court's presumption of sanity instruction, unaccompanied by the legal definition of sanity, erroneously led the jury to believe it could not consider whether appellant's alleged mental disability precluded him from forming the requisite intent to commit murder, thus unconstitutionally lowering the prosecution's burden of proof. (AOB 196.) By failing to object to the instruction in proceedings below, however, appellant has not preserved his claim for appeal. In any event, because this Court has previously rejected an identical challenge to the presumption of sanity instruction in *People v. Coddington* (2000) 23 Cal.4th 529, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13, appellant's claim necessarily fails.

A. Proceedings Below

During a discussion on jury instructions, the trial court informed the parties that it intended to instruct the jury with CALJIC No. 3.32 ("Evidence Of Mental Disease—Received For Limited Purpose"). (RT 2556-2557.) Defense counsel agreed with the court's proposed wording of the instruction. (RT 2557.)

Later, during closing arguments, a dispute arose between the parties regarding which portions of appellant's mental health history had been introduced into evidence. (RT 2792-2796.) In response to "this difference of opinion," the trial court informed the parties that it intended to instruct the jury on the presumption of sanity contained in section 1026. (RT 2796-2797.)[30/]

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30. Section 1026, subdivision (a), states in pertinent part: "When a defendant pleads not guilty by reason of insanity, and also joins with it another

Defense counsel replied that he did not "have any problem with that." (RT 2797.) The court explained that even though the jury would be given limiting instructions, the court did not "want the jury to be confused as to diminished actuality or lack of actual intent versus lack of capacity to form intent." (*Ibid.*) Defense counsel reiterated that he had "no problem with that." (*Ibid.*)

At the conclusion of the guilt phase, the trial court instructed the jury as follows, in accordance with the presumption of sanity contained in section 1026, and the mental defect instruction contained in CALJIC 3.32:

> In the guilt trial or phase of this case, the defendant is conclusively presumed to have been sane at the time of the offenses—at the time of [*sic*] the offenses are alleged to have been committed.
>
> You have received evidence regarding a mental disease, mental defect or mental disorder of the defendant at the time of the commission of the crime[s] charged in counts one and two or the lesser crimes thereto, namely, second-degree murder and voluntary manslaughter.
>
> You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent, premeditated and deliberated or harbored malice aforethought, which are elements of the crime charged in counts one and two, namely, first-degree murder; whether he formed the required specific intent or harbored malice aforethought, which are elements of the lesser crime of second-degree murder; or whether he formed the required specific intent, which is an element of the lesser crime of voluntary manslaughter.

(RT 2850-2851; see also CT 1269-1270.)

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plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed."

B. The Trial Court's Presumption Of Sanity Instruction Was A Correct Statement Of Law, According To This Court's Decision In *People v. Coddington*

Appellant contends that his murder convictions must be set aside because the presumption of sanity instruction did not allow the jury to consider whether his alleged mental disability precluded him from forming the requisite intent to commit murder. (AOB 196.) As appellant concedes, however, this Court previously rejected the same argument in *People v. Coddington, supra,* 23 Cal.4th 529. (See AOB 196.)

In *Coddington*, this Court rejected an identical challenge to the presumption of sanity instruction for three reasons: First, the Court noted that the defendant could not challenge the instruction on appeal because he had not objected to, nor sought modification of, the instruction at trial. (*Id.* at p. 584.) Second, the Court noted that the instruction correctly stated the law in California. (*Ibid.*) Finally, the Court noted that even if the instruction were invalid, there was "no possibility" that the defendant had been prejudiced by the instruction:

> [T]he prosecutor and defense counsel argued the presence or absence of mental disease during guilt phase closing argument, with defendant reminding the jury that whether [defendant] was mentally ill was for the jury to decide. The guilt phase instructions given shortly thereafter expressly advised the jury that premeditation and deliberation were elements of first degree murder and that evidence that the defendant suffered from a mental illness or defect could be considered in determining if those mental states were present.

(*Id.* at pp. 584-585.)

Coddington is dispositive of appellant's claim. As in *Coddington*, appellant did not object or seek modification of the instruction below. Indeed, the record shows that after being informed of the court's intention to instruct the jury on the presumption of sanity contained in section 1026, defense counsel

expressed "no problem" with the instruction. (RT 2797.) Appellant's claim should therefore be deemed waived on appeal.

Even if the claim has not been waived, it lacks merit. As noted in *Coddington*, the presumption of sanity instruction is a correct statement of law. Even if invalid, however, appellant suffered no prejudice as a result of the instruction. The jury was properly instructed pursuant to CALJIC No. 3.32 that it could consider the evidence of appellant's mental defect or mental disorder in determining whether he formed the requisite specific intent. Moreover, appellant's ability to form the necessary intent was vigorously debated during the closing arguments of both the prosecutor and defense counsel. Additionally, the jury was instructed that the prosecutor carried the burden of proving beyond a reasonable doubt every element of appellant's guilt (RT 2838-2839, 2847-2848, 2851-2852, 2854, 2857-2858, 2860-2862), including the mental state for each charged crime (RT 2849-2854, 2857), and that it had to find that appellant harbored the specific intent to commit the charged crimes (RT 2849-2854, 2857). The jury was therefore well aware of significance of the mental defect evidence presented by the defense and the prosecution's burden of proof.

As further proof that the instruction did not prejudice appellant, there was virtually no evidence presented at trial that appellant's mind was so clouded by mental illness on the morning of the murders that he was unable to form the requisite intent. On the contrary, the evidence was overwhelming that appellant formed the requisite intent and carried out the murders of his nephew and sister in a cold and calculated manner. In the days leading up to the murders, appellant told several different family members that he intended to kill Torey, and that he would also kill Versenia if she got in his way. Although appellant was angry and consumed with thoughts of killing Torey, none of his family members had any trouble understanding him. Moreover, appellant's

disgruntlement with Torey and Versenia was based on reality, not delusion, i.e., appellant was upset at Torey's disrespectful attitude and Versenia's tendency to take Torey's side in his conflicts with appellant. Right before the murders, appellant told his brother that he had thought it over and made up his mind: he intended to go through with his plans to kill Torey. In fact, appellant was arrested just two nights before the murders when Versenia found him waiting in the dark for Torey to come home so he could kill him with a baseball bat. At the time appellant was arrested, the arresting police officer saw no indication that appellant needed to be involuntarily committed to a mental institution. On the morning of the murders, no one noticed anything unusual about appellant; he was able to converse normally on the phone with his brother and in person with his next-door neighbor and mother. Appellant procured a gun before the murders and hid the gun in his jacket before entering his mother's home. He then backed his car to the end of the driveway before going inside. He committed the murders early in the morning, after his brother-in-law had already left for work, and while everyone else in the house was still asleep. Immediately after the murders, he called two different family members and concocted a story about seeing masked men go into the house. He then purchased a bus ticket to Reno and left that same day. Upon his return, he no longer had the gun or the clothes he was wearing on the morning of the murders. In light of the overwhelming evidence that appellant knew exactly what he was doing before, during, and after the murders, there is no possibility that appellant was prejudiced by the court's instruction on the presumption of sanity.[31]

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31. For these same reasons, appellant suffered no prejudice even if the more stringent federal standard of harmless error applies. (See *People v. Roder* (1983) 33 Cal.3d 491, 504 [instructions that improperly relieve the prosecution of its burden of proof are generally reviewed under *Chapman v. California, supra,* 386 U.S. 18].)

C. The Ninth Circuit's Decision In *Patterson v. Gomez* Is Not Binding On This Court; In Any Event, *Patterson* Is Distinguishable From This Case

Although appellant recognizes that *Coddington* applies to his claim, he nonetheless relies on the Ninth Circuit's opinion in *Patterson v. Gomez* (9th Cir. 2000) 223 F.3d 959, as his primary authority. (AOB 196-198.) *Patterson*, however, is not binding on this Court. (*People v. Bradford, supra,* 15 Cal.4th at p. 1292 ["cases from the federal courts of appeals . . . provide persuasive rather than binding authority" on California courts].) In any event, *Patterson* is distinguishable on its facts.[32/]

In *Patterson*, as in this case, the trial court instructed the jury on the presumption of sanity, but did not define sanity. (*Patterson v. Gomez, supra,* 223 F.3d at p. 964.) Also like the trial court in this case, the trial court in *Patterson* instructed the jury that it could consider evidence of the defendant's mental disease in determining whether he formed the requisite specific intent. (*Ibid.*) In finding the court's instructions unconstitutional, the Ninth Circuit explained:

> The problem with the instruction given in this case is that it tells the jury to presume a mental condition that—depending on its definition—is crucial to the state's proof beyond a reasonable doubt of an essential element of the crime. Under California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of

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32. Appellant cites an unpublished opinion from the Northern District in which the holding of *Patterson* was found applicable to federal habeas proceedings "on the issue of whether the giving of [a presumption of sanity] instruction was error under clearly established federal law." (*Stark v. Hickman* (N.D.Cal. Oct. 21, 2003, No. C 02-290 MMC) 2003 WL 22416409, *7, app. pending, *Stark v. Hickman*, Ninth Circuit No. 03-17241.) What appellant fails to note, however, is that the district court, under facts remarkably similar to those present in this case, concluded that the Court of Appeal's opinion finding the instructional error harmless was not objectively unreasonable. (*Id.* at pp. *7-*9.)

> showing that he did not have the specific intent for the crime. In a first degree murder case, the evidence would be used to show that he did not willfully deliberate and premeditate the killing. If the jury is required to presume the non-existence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for first degree murder, that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant. Whether the jury was required to presume the non-existence of a mental disease, defect, or disorder depends on the definition of sanity that a reasonable juror could have had in mind.

(*Patterson v. Gomez, supra,* 223 F.3d at p. 965, fn. omitted.) The Ninth Circuit concluded that the instructional error was not harmless. In so holding, the court observed that because the defendant's mental state was the "primary issue" in the guilt phase, "[a]ny presumption that would have relieved the state of its burden to prove a crucial element of such mental state necessarily played an important role in the jury's ultimate determination of guilt." (*Id.* at p. 967.) The court went on to find that the instruction "had a substantial and injurious effect or influence" on the jury's verdict for two reasons: (1) in his closing argument, the prosecutor "repeatedly relied on the presumption to tell the jury that [the defendant's] evidence [on his mental condition] was legally irrelevant and must be disregarded," and (2) the same jury that convicted the defendant obviously had some doubts about his sanity, given that it was unable to reach a verdict in the sanity phase of trial. (*Id.* at pp. 967-968.) As the Ninth Circuit observed:

> Because the [legal] definition of sanity is harder to satisfy than the lay definition, it is difficult to escape the conclusion that a jury unwilling to find unanimously that [the defendant] was sane under [the legal definition] would also have been unwilling, if properly instructed, to find that [the defendant] had the mental state necessary for first degree murder.

(*Patterson v. Gomez, supra,* 223 F.3d at p. 968.)

Unlike the prosecutor in *Patterson*, the prosecutor in this case did not tell the jury to disregard appellant's evidence because it was legally irrelevant in light of the presumption of sanity. While the prosecutor did briefly mention the presumption in his closing argument (RT 2700), he never suggested that it foreclosed the jury's consideration of appellant's evidence. Rather, by also emphasizing the mental defect instruction, addressing appellant's evidence regarding his mental illness, and arguing that appellant's actions indicated he formed the requisite specific intent, the prosecutor made it clear to the jury that the defense evidence was properly considered on the subject of appellant's intent. (RT 2693-2694, 2696, 2698-2700, 2709-2711, 2713-2719, 2722-2728, 2730-2735, 2746-2756, 2758-2760, 2833.) Defense counsel reinforced this notion by also emphasizing the mental defect instruction, and arguing that appellant did not form the requisite specific intent because of his mental impairment. (RT 2790-2792, 2810-2815, 2827-2831.) Defense counsel's closing argument, like that of the prosecutor's, clearly indicated to the jury that the presumption of sanity did not preclude it from considering appellant's mental impairment evidence on the issue of whether appellant formed the requisite specific intent.

Appellant contends that the prosecutor gave the jury a commonly understood definition of sanity rather than the legal definition during his closing argument, thus contributing to the prejudicial impact of the court's instruction. (AOB 199.) However, because it was clear from the mental defect instruction and the parties' closing arguments that it was up to the jury to decide whether appellant's alleged mental impairment prevented him from forming the requisite intent, any error in the prosecutor's definition of sanity was not prejudicial.

Additionally, there is no indication in the record that the jury was actually misled or confused by the presumption of sanity instruction. The jury did not request reinstruction on the issue of intent, or ask for clarification on the

interplay between the presumption of sanity instruction and the mental defect instruction. Moreover, unlike the jury in *Patterson*, the jury in this case was not undecided as to whether appellant was legally sane at the time of the murders. In sum, because *Patterson* is clearly distinguishable from this case, it provides no persuasive support for appellant's claim.

XI.

ALTHOUGH THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT AN INTENT TO KILL WAS A NECESSARY ELEMENT OF THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, THE ERROR WAS HARMLESS

Turning to his conviction for the murder of Versenia, appellant contends that the trial court erroneously instructed the jury that an intent to kill was a necessary element of the lesser included offense of voluntary manslaughter. (AOB 201.) We concede the error, but submit that it was harmless.

In accordance with then-current law, the jury was instructed that an intent to kill was a necessary element of voluntary manslaughter.[33/] This Court subsequently found error with such instruction, holding that the mens rea for voluntary manslaughter may be satisfied by proof of *either* an intent to kill *or* a conscious disregard for life. (*People v. Lasko* (2000) 23 Cal.4th 101, 104, 108-111; see also *People v. Rios* (2000) 23 Cal.4th 450, 461, fn. 7 [clarifying the holding of *Lasko*].) In *Lasko*, the Court found that the trial court erred in instructing the jury that voluntary manslaughter required a finding that the killing was done with an intent to kill. (*People v. Lasko, supra,* 23 Cal.4th at p. 111.) The Court nonetheless found such error harmless under *People v. Watson, supra,* 46 Cal.2d 818, citing three grounds in support of its conclusion: (1) the jury was also instructed with CALJIC No. 8.50, which explained that the defendant could not be convicted of murder unless the prosecution proved he had not been acting in the heat of passion; (2) neither party suggested during closing arguments that the defendant was guilty of murder if he unintentionally

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33. The jury was instructed with former CALJIC No. 8.40 as follows: "Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter . . . . [¶] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion." (RT 2854; see also CT 1279.)

killed the victim in the heat of passion; and (3) the evidence strongly suggested an intent to kill. (*People v. Lasko, supra,* 23 Cal.4th at pp. 111-112.) Although the Court did not state that each of these factors must be present to find the error nonprejudicial, they are all present in this case.

As in *Lasko*, the jury here was instructed with CALJIC No. 8.50 as follows:

> The distinction between murder and manslaughter is that murder requires malice while manslaughter does not.
>
> When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.
>
> To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel.

(RT 2857; see also CT 1284.) This instruction therefore made it clear that in distinguishing between murder and manslaughter, the emphasis is on the existence or nonexistence of malice and not on the intent to kill. (*People v. Rios, supra,* 23 Cal.4th at p. 460; *People v. Lasko, supra,* 23 Cal.4th at pp. 109-110.) Here, by convicting appellant of second degree murder, the jury clearly found that the prosecution had met its burden in proving malice and disproving heat of passion. (*People v. Lasko, supra,* 23 Cal.4th at p. 112.)

While it is true that the jury's rejection of an involuntary manslaughter instruction in *Lasko* provided additional evidence that the jury did not believe the defendant killed in the heat of passion, the omission of a similar instruction in this case does not preclude a finding of harmlessness. Unlike *Lasko*, the jury here could not have been instructed on involuntary manslaughter as the evidence did not support such an instruction. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162 [a trial court has no obligation to instruct on theories that lack substantial support in the evidence].) Thus, the only valid options

available to the jury were murder or voluntary manslaughter. Because the jury necessarily found that appellant did not act in the heat of passion by convicting him of second degree murder, any failure to instruct on unintentional voluntary manslaughter was harmless.

Next, neither the prosecutor nor defense counsel suggested that defendant was guilty of murder if he unintentionally killed Versenia in the heat of passion. In fact, the subjects of voluntary manslaughter or heat of passion did not even come up during either party's closing argument. Rather, the prosecutor argued that appellant formed the necessary intent for murder, while defense counsel argued that such intent was lacking due to appellant's mental impairment. Thus, the parties' closing arguments reinforced the notion that appellant could not be found guilty of murder unless the jury found that he acted with the requisite intent.

Further, the evidence strongly suggested an intent to kill. Appellant's comments to various family members in the days leading up to the murders suggested that he was angry with Versenia for always taking Torey's side against him, and that he intended to kill her too if she interfered with his plans to kill Torey. In the days that followed, Versenia tried to thwart appellant's plans to kill her son. For instance, when Versenia caught appellant in the house waiting to ambush Torey with a baseball bat a couple of days before the murders, she called the police and had appellant arrested. The next day, she and her mother obtained a restraining order against appellant. When appellant returned home from jail, she told him about the restraining order. After she found out Eva had given appellant back the keys to the house, she made plans to move her family out of the house the next week. On the morning of the murders, Versenia walked in on appellant right after he shot Torey. When she asked him what he was doing, he shot her in the head. Instead of summoning an ambulance for her, he fled the house. When he finally turned himself into

the police, he no longer had his gun or the clothes he had been wearing on the morning of the murders. On whole, the evidence strongly suggested that appellant intended to kill Versenia. (See *People v. Lasko, supra,* 23 Cal.4th at p. 113 [evidence strongly suggesting intent to kill included threatening to kill the victim a month and a half before the killing, hitting the victim in the head with a baseball bat, not calling an ambulance, and trying to hide evidence].)

Moreover, notwithstanding the trial court's belief that it had to instruct on voluntary manslaughter based on "the testimony about some yelling between [appellant] and Versenia" (RT 2557), the record did not in fact support such an instruction or a finding that appellant acted in the heat of passion. To determine whether a killing amounts to voluntary manslaughter, the killer's reason must be obscured as the result of a strong passion aroused by a provocation sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*People v. Lasko, supra,* 23 Cal.4th at p. 108.) Other than Eva's observation that Versenia walked into the room after appellant shot Torey and asked him what he was doing, there was no evidence of what transpired between Versenia and appellant before appellant shot her. Contrary to the court's belief, there was no evidence of yelling between appellant and Versenia, and no evidence that Versenia said or did anything that would cause an ordinary person to react with homicidal rage. The mere fact that Versenia happened upon the scene and asked appellant what he was doing did not constitute sufficient provocation to reduce the killing from murder to manslaughter. (See, e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 306, disapproved on another ground by *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [finding insufficient provocation where the victim awoke during a burglary and began screaming].) Because such instruction was not justified by the evidence, nor did the evidence support a finding of heat of passion, any

error in the voluntary manslaughter instruction could not have prejudiced appellant.

Finally, there is no merit to appellant's contention that the court's instructional error violated his federal constitutional rights. (See AOB 202-203.) As set forth above, the record strongly suggests that the court's erroneous instruction had no impact on the jury's verdict. (See *People v. Lasko, supra,* 23 Cal.4th at p. 113 [finding no error of federal constitutional magnitude].) Moreover, because the jury here was provided a noncapital third option between the capital charge and acquittal, the principles of *Beck v. Alabama* (1980) 447 U.S. 625, do not apply. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 621 & fn. 3 [applying the *Watson* standard of harmless error to instructional error in a capital case after finding *Beck v. Alabama* inapplicable].) Accordingly, the *Chapman v. California, supra,* 386 U.S. 18, standard of harmless error does not apply. Even if it did, the error was harmless beyond a reasonable doubt for the reasons stated above.[34/]

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34. Appellant asserts that the jury grappled with the issue of "unintentional murder" with respect to the killing of Versenia, as evidenced by its request for clarification, in "laymen's terms," on the difference between first and second degree murder. (See AOB 206, fn. 51.) However, just because the jurors may have been unsure how the intent required for first degree murder was different from that of second degree murder does not mean that they were torn on the issues of unintentional murder, heat of passion, or voluntary manslaughter with respect to the killing of Versenia.

XII.

APPELLANT HAS WAIVED ANY CHALLENGE TO THE COURT'S MODIFIED INSTRUCTION ON EVA'S SPONTANEOUS STATEMENTS BY STIPULATING TO THE MODIFICATION BELOW

Appellant contends that the trial court violated both state and federal law in rejecting defense requested instructions relating to Eva's spontaneous statements, and giving instead a "severely modified version" of such instructions. (AOB 207-215.) Because appellant stipulated to the modification, he cannot now challenge it on appeal. In any event, the court's modified instruction was a correct statement of law.

A. Proceedings Below

Appellant requested the following special jury instructions during the guilt phase:

> The prosecution has the burden of proving by a preponderance of the evidence the existence of the preliminary fact that Mrs. Eva Blacksher was able to perceive the shooting of either Versenia Blacksher [*sic*] or Torey Blacksher [*sic*]. If, and only if, the prosecution meets this burden may you consider any of the statements offered into evidence in which Mrs. Blacksher is alleged to have made implicating Erven Blacksher in the shooting of either Versenia Blacksher [*sic*] or Torey Blacksher [*sic*] in your deliberations. However, you may not rely upon such evidence, in whole or part, to convict the defendant unless the prosecution has proven the existence of the preliminary fact beyond a reasonable doubt.
>
> The prosecution has the burden of proving by a preponderance of the evidence the existence of the preliminary fact that Mrs. Eva Blacksher actually made any statements implicating Erven Blacksher in the shooting of either Versenia Blacksher [*sic*] or Torey Lee. If, and only if, the prosecution meets this burden may you consider any of such statements offered into evidence in your deliberations. However, you may not rely upon such evidence, in whole or part, to convict the

defendant unless the prosecution has proven the existence of such preliminary fact beyond a reasonable doubt.

(CT 1202-1203.)

Pursuant to a stipulation between the parties (CT 1203; RT 2901), the court instructed the jury with the definition of spontaneous statements as contained in Evidence Code section 1240, along with an added modification, in lieu of the defense requested instructions:

> Evidence of statements attributed to Mrs. Eva Blacksher on the date of the crimes were admitted as spontaneous statements.
>
> Spontaneous statements are admissible if the statement:
>
> 1) Purports to narrate, describe or explain an act, condition, or event perceived by the declarant; and
>
> 2) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.
>
> Whether the declarant perceived the events described in the statements and the weight to which these statements are entitled is a matter for you to decide.

(CT 1250; RT 2843.)

B. Appellant Stipulated To The Modified Instruction Given By The Trial Court; In Any Event, The Instruction Correctly Stated The Law

As a threshold matter, appellant stipulated to the modified instruction given by the court. (CT 1203; RT 2901.) Accordingly, he may not challenge the court's instruction on appeal. (*People v. Jones* (2003) 29 Cal.4th 1229, 1258.) In any event, the modified instruction was a correct statement of the law.

Appellant contends that the trial court was required to make two types of preliminary factual determinations before admitting Eva's spontaneous hearsay statements into evidence. The first, he asserts, involved a preliminary determination under Evidence Code section 403, subdivision (a)(2), that there was sufficient evidence of Eva's "personal knowledge" of the events she

described to submit the matter to the jury. (AOB 210-211.)[35] The second, he claims, involved a preliminary determination under Evidence Code section 405, subdivision (a), that Eva's statements were spontaneous and thus admissible under Evidence Code section 1240. (AOB 211-212.)[36] The court's determination as to Eva's personal knowledge, he asserts, "was preliminary" and subject to a final determination by the jury, while its determination as to whether the statements were spontaneous was final. (AOB 212.) Based on these assumptions, appellant challenges the court's rejection of his requested instructions and the modified instruction given by the court on two separate grounds. First, appellant contends that the court should have instructed the jury, as requested by appellant and required under section 403, subdivision (c)(1), to disregard the evidence of Eva's spontaneous statements unless it if found beyond a reasonable doubt that Eva actually perceived the events described in

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35. Section 403, subdivision (a)(2) states:

> (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:
>
> [¶]
>
> (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony.

36. Section 405, subdivision (a) provides:

> With respect to preliminary fact determinations not governed by Section 403 or 404:
>
> (a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

her statements. (AOB 214.)[37/] Second, appellant contends that the court's modified instruction informing the jury that Eva's statements qualified as spontaneous statements was erroneous under section 405, subdivision (b)(1). (AOB 212-214.)[38/] Both of these contentions lack merit.

Prior to the enactment of the Evidence Code, jurors were required to disregard hearsay admitted as a spontaneous statement unless they found beyond a reasonable doubt the existence of the applicable preliminary fact, namely the spontaneity of the statement. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 966, fn. 13.) Now, however, "the determination of the preliminary fact on a hearsay challenge to a . . . spontaneous statement is . . . vested solely in the trial court as opposed to earlier procedures whereby the court first determined the existence of the preliminary fact and, if so found, submitted the matter to the jury with instructions to independently find the existence of the preliminary fact before considering the proffered statement on the merits." (*Ibid.*; see also Comment to § 405 [section 405 substantially changed the law relating to spontaneous statements; whereas before the jury redetermined whether a spontaneous statement was in fact spontaneous, under section 405,

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37. Section 403, subdivision (c)(1) states:

> (c) If the court admits the proffered evidence under this section, the court:
> (1) May, 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 exist.

38. Section 405, subdivision (b)(1) provides:

> (b) If a preliminary fact is also a fact in issue in the action:
> (1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

the judge's ruling on this question is now final].) As this Court has expressly stated, "Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. . . . The determination of the question is vested in the court, not the jury." (*People v. Poggi, supra,* 45 Cal.3d at p. 318.) The question of whether the declarant of a spontaneous statement actually perceived the event described "depend[s] on a determination of preliminary facts by the trial court; such determinations will be upheld if supported by substantial evidence." (*People v. Brown, supra,* 31 Cal.4th at p. 541, citing *People v. Phillips, supra,* 22 Cal.4th at p. 236; see also *People v. Alcala* (1992) 4 Cal.4th 742, 787 [it is up to the trial court, not the jury, to determine the existence of a preliminary fact in assessing the admissibility of evidence].)

One authority has described the interplay between sections 403 and 405 as follows: "Two issues must be resolved in hearsay questions. The first, the identity of the declarant, is considered under § 403 . . . . The second, the reliability of the statement, is considered under § 405. Thus, if a statement is proffered as a spontaneous declaration . . . , the court must decide if the requirements of Evidence Code § 1240 . . . have been met under § 405." (Simons Cal. Evidence Manual (2005 ed.) Relevant Evidence, ch. 1, § 1.42; see also Comment to § 403 [the identity of a hearsay declarant is an example of a preliminary fact determination to be made under section 403]; Comment to § 405 [preliminary fact questions relating to the existence of those circumstances that make hearsay sufficiently trustworthy to be received in evidence, e.g., whether a declaration was spontaneous, are decided under section 405; questions relating to the authenticity of the proffered declaration, e.g., whether the declarant actually made the statement, are decided under section 403].) "Of course, Section 405 does not prevent the presentation of any evidence to the jury that is relevant to the reliability of the hearsay statement."

(Comment to § 405.) However, in presenting such evidence for the jury's consideration under section 405, "the jury's sole concern is the truth or falsity of the facts stated, not the admissibility of the statement." (*Ibid.*) Thus, the jury is not at liberty to treat such evidence as nonevidence by disregarding it; instead, it remains evidence in the case, to be weighed in accordance with the court's instructions. (*People v. Carroll* (1970) 4 Cal.App.3d 52, 61.)

Keeping these general principles in mind, we submit that the trial court's preliminary determination of whether Eva perceived the events she described did not fall within the provisions of section 403, and thus, the court had no duty to instruct the jury in accordance with section 403, subdivision (c)(1), to disregard the evidence of Eva's spontaneous statements unless it found that Eva perceived the murders. Appellant disagrees, seizing upon the phrase "personal knowledge" contained in section 403, subdivision (a)(2), to argue that Eva's perception of the shootings was a preliminary fact subject to a jury determination under this subdivision. (AOB AOB 210-211.) However, in considering the language of the subdivision as a whole, it is apparent that it applies only to the personal knowledge of a testifying witness. (See § 403, subd. (a)(2) [preliminary fact to be decided under section 403 includes "the personal knowledge of a witness concerning the subject matter of his testimony"].) Because Eva was a hearsay declarant and not a testifying witness, her "personal knowledge" was not subject to a jury determination under section 403. Contrary to appellant's assertions, the case law cited above makes it clear that the trial court's determination of whether Eva perceived the events described was governed by section 405, and as such, was not subject to redetermination by the jury. Accordingly, appellant was not entitled to an instruction informing the jury to disregard the evidence of Eva's hearsay statements if its determination of whether she perceived the events described differed from the court's determination of the issue. (See, e.g., § 405, subd.

(b)(2) ["If the proffered evidence is admitted, the jury shall *not* be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact"], emphasis added.)

Nor is there any support for appellant's contention that the trial court erred under section 405, subdivision (b)(1), in instructing the jury that it had already determined that Eva perceived the events described. (AOB 213.) Section 405, subdivision (b), provides that "if a preliminary fact, that is, evidence relating to the admissibility of [evidence], is also a fact in issue in the action, that is, is relevant to the question of guilt or innocence, the jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact." (*People v. Carroll, supra,* 4 Cal.App.3d at p. 60; see also Simons Cal. Evidence Manual, *supra*, § 1.42 ["On occasion, a preliminary fact issue to be decided by the judge under § 405 coincides with an issue involved in the merits of the case. In such a situation, subsection (b)(1) provides that the jury is not to be informed of the court's decision concerning the preliminary fact"].) Assuming Eva's perception of the shootings was relevant to the ultimate determination of guilt in this case, the court's instruction did not explicitly inform the jury that it had already determined this fact to be true. Rather, the instruction merely set out the elements of the spontaneous statement exception, and informed the jury that Eva's statements had been admitted pursuant to this exception. The trial court's instruction did not therefore violate section 405, subdivision (b)(1). (See, e.g., *People v. Carroll, supra,* 4 Cal.App.3d at p. 61 [trial court's instructions did not violate the provisions of section 405 where defendant was able to present evidence of the circumstances surrounding his confession, and the trial court instructed jurors on the definition of a confession, on the general principles relevant to weighing conflicting evidence, and the jurors' duty to weigh the evidence of the defendant's confession].)

Finally, there is no support for appellant's contention that the court was required to instruct the jury that it had to find beyond a reasonable doubt the preliminary fact that Eva perceived the shootings. (AOB 212-214.) Even assuming the jury was entitled to redetermine this issue, the preponderance-of-the-evidence standard applies to preliminary facts, whereas the reasonable-doubt standard applies to the ultimate determination of guilt. (See, e.g., *People v. Reliford* (2003) 29 Cal.4th 1007, 1016 [preponderance-of-the-evidence standard applies to predicate facts such as whether the defendant committed a prior sexual offense]; *People v. Marshall* (1996) 13 Cal.4th 799, 832-833 [jury must find a preliminary fact under section 403 by a preponderance of the evidence]; see also Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Moreover, we note that appellant's originally requested instruction reflected this standard. (CT 1202 ["The prosecution has the burden of proving by a preponderance of the evidence the existence of the preliminary fact that Mrs. Eva Blacksher was able to perceive the shooting of either Versenia Blacksher [*sic*] or Torey Blacksher [*sic*]"].) Accordingly, the trial court had no duty to relate the preliminary fact determination to the reasonable-doubt standard.

C. Appellant's Federal Constitutonal Rights Were Not Violated By The Trial Court's Modification Of His Requested Instructions

Appellant also asserts that the trial court's modification of his special jury instructions violated his federal constitutional right to pinpoint instructions. (AOB 207-209.) We disagree.

Upon request, a defendant is entitled to an instruction that pinpoints the theory of his case. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) "A pinpoint instruction 'relate[s] particular facts to a legal issue in the case or "pinpoint[s]" the crux of a defendant's case, such as mistaken identification or alibi.'" (*People v. Ward* (2005) 36 Cal.4th 186, 214, quoting *People v. Saille*

(1991) 54 Cal.3d 1103, 1119.) Although a trial court must give an instruction that pinpoints the defense theory, it can refuse an instruction that highlights specific evidence and asks the jury to draw certain conclusions from the specified evidence. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) Because the latter type of instruction invites the jury to draw inferences favorable to the defense from specified items of evidence, it is considered argumentative and therefore should not be given. (*People v. Hughes* (2002) 27 Cal.4th 287, 361.)

In addition, a trial court need not give a pinpoint instruction that merely duplicates other instructions or is not supported by substantial evidence. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) "An instruction that does no more than affirm that the prosecution must prove a particular element of a charged offense beyond a reasonable doubt merely duplicates the standard instructions defining the charged offense and explaining the prosecution's burden to prove guilt beyond a reasonable doubt." (*Id.* at pp. 558-559.) The trial court is therefore required to give a requested instruction relating the reasonable doubt standard to a particular element of a crime "only when the point of the instruction would not be readily apparent to the jury from the remaining instructions." (*Id.* at p. 559.)

The trial court properly refused to give the proposed instructions in this case because they did not properly pinpoint a theory of the defense. Rather, the instructions highlighted specific evidence, and did not explain how the evidence related to a theory of the defense. Moreover, by relating specific evidence to the reasonable doubt standard, the instructions were merely duplicative of the court's more general instructions on reasonable doubt. In short, appellant was not denied the right to pinpoint instructions.

D. Even If The Trial Court Erred In Refusing To Give The Defense Requested Instructions, Such Error Was Harmless

Even if the trial court improperly refused to give the defense requested instructions, the error was harmless under either the state or federal standard of review. The court informed the jury that "[w]hether the declarant perceived the events described in the statements and the weight to which these statements are entitled is a matter for you to decide." (RT 2843.) By so instructing the jury, the court recognized appellant's right under state law "to introduce before the trier of fact evidence relevant to weight or credibility." (Evid. Code, § 406; see also Comment to § 405 ["Section 405 does not prevent the presentation of any evidence to the jury that is relevant to the reliability of the hearsay statement"]; *People v. Carroll, supra,* 4 Cal.App.3d at p. 60 [recognizing that "section 405 does not preclude a defendant from placing before the jury evidence relevant to the ultimate issue of guilt"]; Simons Cal. Evidence Manual, *supra*, § 1.42 ["Evidence Code §§ 400-406 do not limit the right of a party to introduce evidence relevant to weight or credibility before the trier of fact"].) The court's instruction thus made it clear that the jury was able to consider whether Eva actually perceived the shootings in weighing the credibility of her statements. Moreover, the trial court made it clear that before the jury could rely on Eva's statements to convict appellant, it had to find that she actually perceived the murders by proof beyond a reasonable doubt. (RT 2838-2839 ["before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt"].) Finally, any error in failing to instruct the jury with the defense requested instructions on Eva's ability to perceive the murders was harmless in light of the other, overwhelming evidence of appellant's guilt.

XIII.

THE TRIAL COURT PROPERLY REJECTED APPELLANT'S REQUESTED MENTAL STATE INSTRUCTION AS DUPLICATIVE OF THE COURT'S STANDARD INSTRUCTION

Appellant next contends that the trial court violated his constitutional rights in rejecting a defense "pinpoint" instruction on the jury's consideration of mental state evidence. (AOB 216.) Because the trial court expressly found such instruction duplicative of CALJIC No. 3.32, appellant's rights were not violated.

A. Proceedings Below

Appellant requested the following special instruction during the guilt phase:

> In considering whether the crimes charged herein are of the first or second degree you must consider the affect [*sic*] of the defendant's mental state at the time of the commission of the crimes. If you find from the evidence introduced at this trial that the defendant suffered from a [mental disease] [mental defect] [or] [mental disorder] and you are not convinced beyond a reasonable doubt that the defendant did not act while under the influence of that [mental disease] [mental defect] [or] [mental disorder], you must give the defendant the benefit of that doubt as to that [mental disease] [mental defect] [or] [mental disorder] and find that he acted while under the influence of that [mental disease] [mental defect] [or] [mental disorder], that the [mental disease] [mental defect] [or] [mental disorder] negated the specific intent required for first degree murder and that the murders charged herein are of the second degree.

(CT 1203-1204.) The court rejected the defense's instruction, finding that the instruction was covered by CALJIC No. 3.32. (CT 1204; RT 2901.) The court informed the parties that it would instruct the jury in accordance with CALJIC No. 3.32, and defense counsel agreed that the instruction would be "sufficient

for the defense's purposes." (RT 2556-2557.) The trial court thereafter instructed the jury pursuant to CALJIC No. 3.32 as follows:

> You have received evidence regarding a mental disease, mental defect or mental disorder of the defendant at the time of the commission of the crime[s] charged in counts one and two or the lesser crimes thereto, namely, second-degree murder and voluntary manslaughter.
>
> You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent, premeditated and deliberated or harbored malice aforethought, which are elements of the crime charged in counts one and two, namely, first-degree murder; whether he formed the required specific intent or harbored malice aforethought, which are elements of the lesser crime of second-degree murder; or whether he formed the required specific intent, which is an element of the lesser crime of voluntary manslaughter.

(RT 2850-2851; see also CT 1269-1270.)

B. The Trial Court Properly Rejected The Defense Requested Instruction On The Significance Of The Mental State Evidence As Duplicative Of CALJIC No. 3.32

Appellant contends that his requested instruction was a correct statement of the law and properly related the reasonable doubt standard of proof to the mental state evidence. (AOB 217-218.) Appellant therefore reasons that he was entitled to the instruction as "pinpointing" the defense theory of the case. (*Ibid.*) We disagree.

While it is true that a trial court may be obligated to give a pinpoint instruction that relates the reasonable doubt standard of proof to particular elements of the crime charged, a court need not give such an instruction if it "merely duplicates other instructions." (*People v. Bolden, supra,* 29 Cal.4th at p. 558.) "An instruction that does no more than affirm that the prosecution must prove a particular element of a charged offense beyond a reasonable doubt merely duplicates the standard instructions defining the charged offense and explaining the prosecution's burden to prove guilt beyond a reasonable doubt."

(*Id.* at pp. 558-559.) "Accordingly, a trial court is required to give a requested instruction relating the reasonable doubt standard of proof to a particular element of the crime charged only when the point of the instruction would not be readily apparent to the jury from the remaining instructions." (*Id.* at p. 559.)

Here, the jury received accurate and complete instructions on the prosecution's burden of proof, the elements of first and second degree murder and voluntary manslaughter, and the purpose for which the mental illness evidence was admitted, i.e., to determine whether appellant formed the requisite specific intent. The instructions as whole therefore "adequately informed the jury that it could consider the evidence of defendant's mental disease or defect in deciding whether the People had carried their burden of proving the mental elements of first degree murder beyond a reasonable doubt." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1249.) The trial court did not therefore err in refusing to give the requested pinpoint instruction.

Appellant contends that CALJIC No. 3.32 "did not state the key point, which is that the mental state evidence could be sufficient to raise a reasonable doubt as to first degree murder." (AOB 218.) Appellant contends that "[t]his was particularly important in this case, because the jury had twice been explicitly instructed [before and after Dr. Davenport's testimony] that the mental state evidence [presented by Dr. Davenport] was admissible **solely to impeach** [appellant's] family members who denied knowledge of appellant's extensive history of mental illness." (AOB 218, emphasis in original.) Appellant, however, did not make this same argument below in support of his pinpoint instruction. Accordingly, as the court's instructions in this case did not affect appellant's substantial rights (see § 1259), appellant's claim should be deemed waived. In any event, appellant's contention lacks merit.

The court's instructions made it clear that Dr. Davenport's testimony relating appellant's history of mental illness could be considered for

impeachment purposes only, and not as evidence of appellant's mental state on the day of the murders or as evidence to negate appellant's capacity to form the requisite intent (RT 2633, 2682-2683; CT 1242), while evidence of appellant's mental state at the time of the commission of the crimes could be considered in determining whether he formed the requisite specific intent to support the charges against him (RT 2850-2851; CT 1270). The court also instructed the jury that the prosecution had to prove every element, including appellant's intent, beyond a reasonable doubt. (RT 2847-2852, 2854, 2857-2858; CT 1261-1262, 1267-1268, 1272, 1279, 1284, 1286-1287.) Defense counsel reaffirmed these principles during his closing argument. For instance, defense counsel argued that Dr. Davenport's testimony relating appellant's history of mental illness impeached the testimony of appellant's family members who claimed no knowledge of such history (RT 2810, 2812-2814), while the testimony of other witnesses regarding appellant's mental state on the day of the murders showed that appellant was unable to form the requisite intent (RT 2790-2792, 2810-2812, 2814-2815, 2827-2831). Defense counsel also emphasized that the prosecution had the burden of proving every element of the charges beyond a reasonable doubt, including that appellant formed the requisite intent. (RT 2761-2762, 2769-2770, 2832.) Under these circumstances, there is no reasonable likelihood that the jury believed it could not apply the evidence of appellant's mental defect on the day of the murders to the specific mental state required for murder or voluntary manslaughter, or that it understood the court's instructions to abrogate the prosecution's burden of proof. (*People v. Kelly* (1992) 1 Cal.4th 496, 525.)

Finally, appellant cites *Francis v. Franklin* (1985) 471 U.S. 307, in support of his argument. In that case, the court's instructions directed "the jury to presume an essential element of the offense—intent to kill—upon proof of other elements of the offense—the act of slaying another," thereby undermining

the jury's duty to find the ultimate facts beyond a reasonable doubt. (*Id.* at p. 316.) Here, however, the court's instructions did not ask the jury to presume an element of the offense in violation of its duty to find every element beyond a reasonable doubt. *Franklin* is therefore inapplicable to this case.

XIV.

NO CUMULATIVE ERROR REQUIRES REVERSAL OF THE GUILT VERDICTS

Appellant argues that even if no single error alleged requires reversal of the jury's guilt phase verdicts, the cumulative effect of such errors compels reversal. (AOB 221-223.) Appellant's argument is unpersuasive.

For the reasons set forth in our responses to Arguments I through XIII, there was only one instructional error in the guilt phase of appellant's trial. Even if some other minor improprieties could be said to have occurred, the errors were harmless whether considered individually or collectively. (See, e.g., *People v. Box, supra,* 23 Cal.4th at p. 1214 ["Defendant asserts that even if the errors alleged above are not in themselves reversible, they are so cumulatively. We disagree. The few errors that may have occurred during defendant's trial were harmless whether considered individually or collectively. Defendant is entitled to a fair trial, not a perfect one"]; *People v. Smithey, supra,* 20 Cal.4th at p. 1007 ["Because we find no instructional error affecting the jury's consideration of mitigating factors, defendant's claim of heightened prejudice from cumulative error is without merit"]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1245 [what few errors occurred at appellant's trial were harmless, singularly or cumulatively]; *People v. Lucas* (1995) 12 Cal.4th 415, 476 ["We have considered each claim on the merits, and neither singly nor cumulatively do they establish prejudice requiring the reversal of the convictions"].)

SANITY PHASE ISSUES

XV.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DEFENSE WITNESS RUTH GADES ABOUT HER CHANGE OF OPINION REGARDING HER EARLIER DIAGNOSIS OF APPELLANT

Appellant contends that the trial court erred during the sanity phase by allowing the prosecutor to cross-examine defense witness Ruth Gades about her change of opinion as to her diagnosis of appellant 20 years' earlier. (AOB 224.) Not so. Gades's change of opinion was relevant to the issue of appellant's sanity, and the prosecutor was entitled to cross-examine her on the subject.

A. Ruth Gades's Sanity Phase Testimony

Ruth Gades, a licensed social worker with a master's degree in psychology, testified as a defense witness during the sanity phase of trial. (RT 2974.) On direct examination, Gades testified that she had conducted two separate intake evaluations of appellant 20 years' earlier while she was working for the Inpatient Criminal Justice Unit at Highland Hospital; one in 1978, and the other in 1980. (RT 2974-2975.) At the time, Gades had just begun working for the inpatient unit, and appellant "was probably the first, if not one of the first, people [she] saw." (RT 2974-2975, 2979.) Since then, Gades had seen "hundreds" of patients. (RT 2979.) Both times Gades saw appellant, he had been involuntarily admitted to the unit by jail authorities for 72 hours of mental observation. (RT 2976, 2989.)

Gades testified about appellant's reported symptoms and medical history, her observations of him, and her impressions of his condition based on the information available to her at the time. Gades did not have access to any of

appellant's mental health records outside the Criminal Justice Unit, so she had to rely entirely on the information appellant reported to her in evaluating his condition. (RT 2984-2985.) When Gades saw appellant in 1978, he reported seeing a little man, hearing voices, and feeling suicidal. (RT 2977, 2981-2982.) The only mental health history he reported was one previous hospitalization for suicidal thoughts. (RT 2979.) He also reported excessive alcohol use in the three months prior to his incarceration. (RT 2979-2980.) Gades diagnosed appellant with psychotic depression with auditory and visual hallucinations and suicidal ideation. (RT 2984.) When Gades saw appellant again in 1980, he reported hearing voices and feeling suicidal. (RT 2988-2991.) Gades's clinical impression of appellant at that time was that he was psychotically depressed. (RT 2988.)

After establishing that Gades had seen hundreds of mentally ill patients over the past 20 years (RT 2979), defense counsel asked her if it was uncommon for patients to deny their mental illness. (RT 2979.) Gades responded that it was not uncommon, but "certainly" not as common as "people acknowledging their mental illness." (RT 2979-2980.) Gades noted that it depended on the "setting." (RT 2979.) Defense counsel also asked her if it was uncommon in her experience to find that mentally ill persons self-medicated with alcohol or drugs. (RT 2980.) Gades replied that "they can," and that drug or alcohol abuse could contribute to both visual and auditory hallucinations. (RT 2980.)

On cross-examination, Gades confirmed that appellant was her main source of information, and at the time she believed everything he told her and took everything he said "at face value." (RT 2992, 2994.) When the prosecutor asked if she had changed her opinion, defense counsel objected as irrelevant. (RT 2992.) The court overruled the objection and Gades answered that she had been new to the criminal justice system and had no experience working with the

inmate population. (RT 2992-2993.) When defense counsel objected to her answer as nonresponsive and irrelevant, the court sustained the objection and struck Gades's answer. (RT 2993.) The prosecutor then asked if Gades still had "the same diagnosis or evaluation [of appellant] now" that she had back then. (RT 2993.) Gades replied, "In reviewing the records, no." (RT 2993.) When the prosecutor asked why she would "view it differently," defense counsel objected for lack of foundation. (RT 2993.) The court overruled the objection, observing, "You asked her what her opinion was, he can certainly cross on that." (RT 2993.) The prosecutor then asked Gades what she based her change of opinion on and Gades responded, "20 years of experience." (RT 2993.) Without any further objections by defense counsel, the prosecutor went on to question Gades about how she would view appellant's reported symptoms and behavior today if she were evaluating him. (RT 2993-2994.) Gades testified that she would be more skeptical of appellant's claimed hallucination of a little man and question whether he was exaggerating his symptoms in order to attain some secondary gain such as admittance to a mental health facility. (RT 2993-2994.) Gades explained that in the criminal justice setting "you need to look at these things very closely" because sometimes there is a "degree of manipulation" involved. (RT 2994.) Gades testified that in looking over appellant's records, she would now "approach the situation differently and question different things" based on her experience. (RT 2994-2995.) For instance, Gades would question appellant more closely about the little man he claimed to be seeing. (RT 2994.) That type of hallucination was not something she had "seen since," and she would expect appellant to be more agitated by it. (RT 2994-2995.)

B. Gades's Change Of Opinion Was Relevant To The Issue Of Appellant's Sanity And Was A Proper Subject For Cross-Examination

Appellant contends that the testimony elicited from Gades on cross-examination was irrelevant and inadmissible. (AOB 226-228.) We disagree.

The scope of cross-examination is limited to the scope of the direct examination. (Evid. Code, §§ 761, 773) The scope of permissible cross-examination extends to the "whole transaction of which the witness has testified, or it may be employed to elicit any matter which may tend to overcome, qualify or explain the testimony given by a witness on his direct examination." (*People v. Dotson, supra,* 46 Cal.2d at p. 898.)

In this case, the prosecutor properly challenged Gades's diagnosis on cross-examination. In his attempt to undermine Gades's 20-year-old diagnosis of appellant, the prosecutor was entitled to explore whether Gades had changed her mind in the years since her diagnosis. The prosecutor's questions were aimed at testing the strength of Gades's prior diagnosis, which was rendered at a time when Gades was inexperienced in the mental health profession and in dealing with the inmate population. Because Gades's diagnosis of appellant relied exclusively on information provided by appellant himself, who was incarcerated at the time, questions challenging the bases for Gades's belief that appellant was honestly reporting his symptoms and her inexperience in dealing with patients in the criminal justice setting were appropriate. (See *People v. Seaton* (2001) 26 Cal.4th 598, 681 [where defense expert's diagnosis relied heavily on information provided by defendant, prosecutor was entitled to challenge the accuracy of that information on cross-examination]; *People v. Coddington, supra,* 23 Cal.4th at p. 613 [when a psychiatric expert's opinion as to a defendant's legal sanity is based in substantial part on a defendant's statements to the expert, inquiry into the basis for the expert's belief that the defendant was honest is permissible].) It was also proper to ask Gades about

her change of opinion in light of her subsequent experience insofar as any previous failure on her part to consider that appellant was falsely reporting his symptoms weakened the basis for her opinion. (See *People v. Coddington, supra,* 23 Cal.4th at p. 614 [prosecutor could properly question experts' knowledge of defendant's past deceitful conduct, since a failure on their part to consider such conduct might make their opinions less persuasive].) Gades's responses to the prosecutor's questions were clearly relevant to the issue of whether appellant was mentally ill or merely faking his symptoms, and the prosecutor was entitled to argue to the jury that Gades's diagnosis should be given less weight because of her inexperience and wholesale acceptance of appellant's reported symptoms at the time she made the diagnosis. In short, the prosecutor's questions tended to undermine Gades's diagnosis, making such inquiry relevant to the issue of appellant's sanity and well within the scope of proper cross-examination.

Appellant contends that Gades's testimony on cross-examination regarding her views of appellant's reported symptoms was improper because she was not testifying as an expert witness. (AOB 227-228.) While it is true that the defense did not offer Gades as an expert witness, the foundation and substance of her testimony was in many respects more like that of an expert than a lay witness. Gades testified on direct examination about her qualifications, experience, and her diagnosis of appellant based on the symptoms he reported to her. Because the defense questioned Gades about her clinical impressions of appellant on direct examination, it was permissible for the prosecutor to challenge the bases for those impressions on cross-examination, irrespective of Gades's status as a "lay" witness.

Appellant also contends that Gades's testimony on cross-examination consisted of improper "'profile' testimony." (AOB 229.) However, unlike the witnesses in the cases cited by appellant, Gades did not testify about the profile

of an "inmate-patient" or her opinion on whether appellant fit such a profile. Rather, she testified that she had learned to be more cautious when evaluating inmates who claimed to be experiencing symptoms of mental illness, and over the years had become more familiar with the symptoms associated with mental illness. After 20 years in the profession and the criminal justice system, she would be more circumspect about the symptoms reported by appellant if she were evaluating him today. Just because Gades drew upon her 20 years' experience in questioning her earlier impressions of appellant does not mean that "her opinion was based on other inmate-patients rather than on the facts surrounding appellant's treatment" as appellant contends. (AOB 229.) Moreover, it is difficult to see how Gades's testimony on cross-examination was any different from her testimony on direct examination, during which defense counsel asked her to draw on her experience in the mental health field in answering questions about whether it was uncommon for mentally ill persons to deny their illness or to self-medicate with drugs or alcohol.

Even assuming the prosecutor's questioning went beyond the scope of permissible cross-examination, there is no reasonable probability the result of the sanity phase would have been different had the court refused to allow the prosecutor to challenge the basis for Gades's previous diagnosis. (*People v. Seaton, supra,* 26 Cal.4th at p. 680.) The prosecutor presented compelling evidence to rebut appellant's claim that he was legally insane when he committed the murders, including evidence of appellant's statements and behavior before and after the murders in which he appeared coherent and rational (RT 3287, 3404-3405; Exhibit 111); appellant's statements to jail personnel after being arrested in which he denied being under a psychiatrist's care or taking any medications (RT 3329-3335); the absence of any medication among appellant's personal effects at the time he was booked into jail (RT 3336-3337); testimony by jail personnel that appellant had not reported any

psychiatric symptoms or made any requests to see a psychiatrist since being in jail (RT 3269, 3358); the absence of mental health records for appellant since being in jail (RT 3260-3261); appellant's manipulative efforts to avoid mainline housing by claiming he was homosexual and then flatly refusing to transfer to mainline housing once jail authorities realized he was lying about his sexual orientation (RT 3350-3353); appellant's past comments to family members about "beating the system" (RT 3314-3315, 3377-3379); and, the testimony of appellant's brother that he had never known any of his siblings to need psychiatric care (RT 3316). Considering the overwhelming evidence presented by the prosecution that appellant was legally sane at the time of the murders, it is not reasonably probable the jury would have returned a different verdict even if the prosecutor had not been permitted to challenge Gades's 20-year-old diagnosis of appellant.

In arguing that the admission of such testimony was prejudicial, appellant appears to acknowledge the relevance of such evidence, noting, "Gades'[s] testimony was highly prejudicial since it went to the heart of the issue before the jury: whether appellant was mentally ill or whether, as the prosecutor argued, appellant's history of mental illness showed only that he was a 'con and a manipulator.'" (AOB 229-230.) The essence of appellant's argument appears to be that even though such evidence was highly relevant, it should nonetheless have been excluded simply because it "struck a fatal blow to the defense." (See AOB 230.) However, the purpose of relevant evidence, as well as cross-examination, is to disprove that which the other party seeks to prove. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1270, overruled on another ground by *People v. Edwards* (1991) 54 Cal.3d 787, 835; see also Evid. Code, § 210 [evidence is relevant when it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"].) Accordingly, evidence that is simply damaging to the defense is not

unfairly prejudicial. (*People v. Smith* (2005) 35 Cal.4th 334, 357.) Instead, evidence is legally prejudicial only if it uniquely tends to evoke an emotional bias against the defendant and has very little effect on the issues. (*Ibid.*) As acknowledged by appellant, Gades's testimony was highly probative to the issues raised in the sanity phase (see AOB 229-230), and it did not tend to evoke an emotional bias against appellant. Such evidence was not therefore prejudicial.

Moreover, contrary to appellant's contentions, *People v. Lindsey* (1988) 205 Cal.App.3d 112, does not stand for the proposition that relevant evidence must be excluded if it strikes at the heart of the defense. (See AOB 230.) Rather, the issue in *Lindsey* was whether the prosecutor's improper comment on the defendant's pretrial silence about his claimed alibi was prejudicial. (*People v. Lindsey, supra,* 205 Cal.App.3d at p. 117.) The court found that because the prosecutor's comment struck at the heart of the defendant's sole defense, and because the prosecution's case against the defendant was not overwhelming, the prosecutor's comment was prejudicial. (*Ibid.*) Here, in contrast, there was nothing improper about Gades's testimony, and such evidence was admissible for the very purpose of rebutting the defense case. (Evid. Code, § 210.)

Finally, we note that for the first time on appeal, appellant claims the trial court's ruling violated his rights to due process and a fair trial pursuant to the Fifth and Fourteenth Amendments to the federal Constitution. (AOB 224.) We submit that appellant has waived his constitutional claims by failing to raise them below and objecting only on relevance grounds. (*People v. Seaton, supra,* 26 Cal.4th at pp. 679-680.) However, even assuming appellant's federal constitutional claims were properly preserved for appeal, the "claims fail on the merits because generally, violations of state evidentiary rules do not rise to the

level of federal constitutional error." (*People v. Benavides, supra,* 35 Cal.4th at p. 90.)

XVI.

THE TRIAL COURT DID NOT ISSUE INCONSISTENT EVIDENTIARY RULINGS OR ALLOW THE PROSECUTOR TO EXPLOIT AN EARLIER DISCOVERY VIOLATION DURING DR. PIERCE'S SANITY PHASE TESTIMONY

Appellant contends that the trial court violated his federal constitutional rights to due process and a fair trial during Dr. Pierce's sanity phase testimony by applying the evidentiary rules inconsistently to the defense and the prosecution, and by allowing the prosecutor to exploit an earlier discovery violation. (AOB 231.) By not raising such concerns in the trial court, however, appellant has waived his claims on appeal. In any event, the claims are meritless.

A. Dr. Pierce's Sanity Phase Testimony

Dr. Pierce, a clinical psychologist, testified as an expert witness for the defense during the sanity phase of trial. (RT 3068, 3073.) Dr. Pierce opined that appellant suffered from paranoid schizophrenia, and that he was having a paranoid or psychotic episode at the time of the murders. (RT 3185.) Dr. Pierce's opinion was based on interviews with appellant, records and reports provided by the defense team, interviews with appellant's family members, and Officer Mesones's guilt-phase trial testimony and police report dated May 8, 1995. (RT 3074-3078, 3185.) Dr. Pierce also reviewed the guilt-phase trial testimony of appellant's family members in preparing to testify. (RT 3078.)

When questioned about Officer Mesones's observations of appellant on the night of May 8th, Dr. Pierce testified that there appeared to be sufficient grounds to involuntarily commit appellant to a mental institution for 72 hours of observation pursuant to Welfare and Institutions Code section 5150. (RT 3175-3176.) Defense counsel then asked, "And if a 5150 had been made, what

would have happened to Mr. Blacksher?" (RT 3176.) The prosecutor objected as speculation, and the court sustained the objection. (RT 3176.)

On cross-examination, the prosecutor sought to challenge Dr. Pierce's opinion as to appellant's mental state at the time of the murders. Thus, the prosecutor posed the following question to Dr. Pierce, who had earlier opined on direct examination that appellant was suffering a psychotic episode during the murders: "Had [appellant] been in the midst of a psychotic episode at the times he committed the murders, how would he have acted?" (RT 3199.) After defense counsel's objection on grounds of speculation was overruled by the trial court, the prosecutor asked, "In what manner would he have displayed symptoms of psychotic behavior at the time of the murders to render him insane in your opinion?" (RT 3199-3200.) Dr. Pierce described some of the symptoms appellant would have experienced during a psychotic episode, including significant disruptions to his cognitive functions. (RT 3200.) The defense did not object when Dr. Pierce went on to testify that appellant's behavior in the immediate aftermath of the murders showed some level of cognitive functioning. (RT 3200-3202.) When the prosecutor asked if Dr. Pierce could "think of a plausible reason, in terms of [appellant's] mental state, why he would go to Reno immediately after committing [the] two murders," defense counsel objected on grounds of speculation. (RT 3202.) The trial court overruled the objection and Dr. Pierce answered "no." (RT 3202.) The prosecutor then asked, "Anything other than to escape arrest and prosecution?" (RT 3202.) Dr. Pierce opined that appellant's behavior could have been a reaction to "what he thought he saw" or "what he thought he did," but also acknowledged that it could have been a reaction "to his own personal knowledge that he had just murdered two people." (RT 3202-3203.)

The prosecutor also challenged the evidentiary basis for Dr. Pierce's opinion that appellant was psychotic during the murders. When Dr. Pierce

indicated that his opinion was based primarily on appellant's psychiatric history rather than any evidence of his behavior during the murders, the prosecutor asked, "Did he intend to kill Torey?" (RT 3210-3211.) Defense counsel objected on grounds that the question called for a legal conclusion. (RT 3211.) The court overruled the objection and Dr. Pierce testified that based on appellant's stated intentions to his siblings, it appeared that appellant did intend to kill Torey. (RT 3211.)

The prosecutor next sought to undermine Dr. Pierce's opinion as to appellant's mental state at the time of the murders by questioning the doctor about appellant's behavior before, during, and after the murders. (RT 3223-3225.) When defense counsel objected to the line of questioning on grounds of lack of foundation, the court overruled the objection, noting that the doctor testified he had "talked to people who were involved" and "read some transcripts." (RT 3225.) When Dr. Pierce testified that a reasonable explanation for appellant's behavior after the murders was that he knew his sister and nephew were dead and that he was trying to protect himself, defense counsel objected to the line of questioning as calling for speculation and conjecture. (RT 3225-3227.) The court overruled the objection, noting that the questioning was appropriate as Dr. Pierce had "been asked to render an opinion." (RT 3227-3228.)

On redirect examination, defense counsel asked, "If Officer Mesones' 5150'd Mr. Blacksher, would we have a clear understanding today of what his mental health status was on that day?" (RT 3255-3256.) The prosecutor objected as speculation, and the court sustained the objection. (RT 3256.)

B. The Trial Court Did Not Apply The Evidentiary Rules Inconsistently To The Parties During Dr. Pierce's Testimony

Appellant complains that the trial court issued inconsistent evidentiary rulings by allowing the prosecutor to elicit speculative evidence from Dr. Pierce

while at the same time preventing defense counsel from doing the same. (AOB 234.) Appellant contends that the trial court's uneven application of the evidentiary rules violated his right to due process. (AOB 233-234.) However, because appellant never objected on this ground below, he has waived his claim on appeal. (See, e.g., *People v. Raley, supra,* 2 Cal.4th at p. 892 [an objection on state law grounds is insufficient to preserve a constitutional objection]; *People v. Smith* (1986) 180 Cal.App.3d 72, 80 ["The failure to object to evidence at trial on the same ground urged on appeal precludes raising that issue on appeal"]; see also Evid. Code, § 353, subd. (a).) Moreover, appellant has failed to establish that inconsistent evidentiary rulings by a trial court violates a defendant's due process rights. Appellant cites *Gray v. Klauser* (9th Cir.2002) 282 F.3d 633, for the proposition that "[t]he asymmetrical application of evidentiary standards has been held to be unconstitutional." (AOB 233-234.) However, the United States Supreme Court subsequently granted certiorari in *Gray*, vacated the Ninth Circuit's decision, and remanded the case for reconsideration. (*Klauser v. Gray* (2002) 537 U.S. 1041.) Consequently, *Gray* has no precedential value. (See also *People v. Bradford, supra,* 15 Cal.4th at p. 1292 ["cases from the federal courts of appeals . . . provide persuasive rather than binding authority" on California courts].)

Even assuming appellant has preserved his claim for appeal and that the inconsistent application of evidentiary rules may constitute a due process violation, appellant fails to show any such defect in this case. The prosecutor's questions to Dr. Pierce did not call for speculation. Contrary to appellant's assertions, the prosecutor did not ask Dr. Pierce to speculate as to why appellant acted the way he did or why he said the things he said. (AOB 234.) Rather, the prosecutor's questions were aimed at testing whether appellant's behavior and mental state before, during, and after the murders, as gleaned from the guilt-phase trial testimony, was consistent with Dr. Pierce's opinion that appellant

was insane at the time of the killings. Thus, the prosecutor sought to establish the symptoms normally associated with psychosis, how appellant's behavior compared to those symptoms, whether his mental state at the time of the murders supported Dr. Pierce's expert opinion, and whether there was any psychiatric explanation for appellant's otherwise rational behavior. Because Dr. Pierce's answers to these questions were based on "his special knowledge, skill, experience, training, and education," as well as matters personally known to him or made known to him at or before the hearing (Evid. Code, § 801, subd. (b)), the trial court's decision to allow such testimony was proper.

By contrast, defense counsel's questions regarding what might have happened had appellant been involuntarily committed pursuant to section 5150 did call for speculation, and appellant does not attempt to argue otherwise. Under these circumstances, there was no inconsistency in the trial court's application of the evidentiary rules, and no violation of appellant's right to due process.

C. Appellant's Assertion That The Trial Court Permitted The Prosecutor To Exploit An Earlier Discovery Violation During Dr. Pierce's Testimony Lacks Any Support In The Record

Appellant also contends that the trial court violated his constitutional rights by allowing the prosecutor to exploit an earlier discovery violation. (AOB 235-237.) Such alleged discovery violation concerned the following: While jury selection was still being conducted in the guilt phase, the prosecutor brought an in limine motion seeking to introduce appellant's statement to the police two days after the murders. (See RT 243, 279.) During an Evidence Code section 402 hearing on the prosecutor's motion, Inspector Bierce testified that he and another officer took a statement from appellant two days after the murders. (RT 282-283.) It also came out that appellant made a separate, tape-recorded statement to an attorney and investigator from the district attorney's

office that same day. (RT 304-305, 309, 314.) The deputy district attorney who interviewed appellant, Richard Moore, was not the same attorney who actually prosecuted the case. (RT 295, 319-320.)

After the section 402 hearing, the prosecutor noted for the record that when Inspector Bierce arrived to testify that morning, he provided the prosecutor with two cassette tapes and a homicide report from the district attorney's office. (RT 319.) The prosecutor explained that the tapes and report were discovered in the property room when the police were looking for something else. (RT 319.) The prosecutor gave the defense copies of the tapes and report. (RT 319-320.) The prosecutor noted that although appellant's statement to the district attorney's office had been "mentioned in the file," it had not been included in the prosecutor's "inventoried" property, but was rather kept "someplace else where [the] inspector found it." (RT 320-321.) The prosecutor indicated that he was not "privy to" the circumstances surrounding the discovery of the statement. (RT 321.)

The parties and the court then discussed some of the problems the parties had been encountering in connection with discovery. (RT 321-328.)[39] The prosecutor suggested that the parties try to resolve their problems by getting together and comparing the contents of their respective discovery files. (RT 325-326.) The court indicated that the parties could resolve their discovery disputes either with or without the court's intervention. (RT 328.) Before recessing to give the parties a chance to discuss their options, the court noted for the record:

> I don't think there's an indication of bad faith by [the prosecutor]. I understand his concerns about being in the case late, but I'm also concerned about the fact that all of a sudden

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39. Some of these difficulties stemmed from the fact that the deputy district attorney who ended up prosecuting the case was not the attorney who had originally handled it. (See RT 322.)

> something appears and we're half way through a Miranda motion.
>
> So I'm going to give counsel a couple of minutes to talk among themselves and decide which way they want to do it, because I'm prepared to do it the hard way if that's what it's going to take.

(RT 328.) After a short recess, the parties informed the court that they would settle their discovery disputes without the court's involvement. (RT 329.) The court then indicated that it would wait to rule on the admissibility on appellant's statements to police until after the defense had an opportunity to review appellant's taped-recorded statement to the district attorney's office. (RT 329.)

A few days later, the prosecutor informed the court and the defense that he intended to bring a motion to introduce appellant's tape-recorded statements to the district attorney's office during the sanity phase. (RT 593.) The defense indicated that it had no objection to the prosecutor bringing such a motion. (RT 593.) The prosecutor later informed the court that his motion relating to appellant's tape-recorded statements to the district attorney's office could wait until the guilt phase had concluded. (RT 832.) Before opening statements, the court ruled that appellant's statements to police could be admitted during the guilt phase. (RT 1651-1652; see also RT 2904.)

Before the sanity phase, the prosecutor moved to introduce appellant's statements to the district attorney's office into evidence. (RT 2893-2894, 2904-2906.) After a section 402 hearing, the court ruled that the statements were admissible. (RT 2906-2928.)

During the sanity phase, Dr. Pierce testified on direct examination that he reviewed several materials provided by defense counsel in constructing a psychological profile of appellant. (RT 3073-3078.) He also reviewed the guilt-phase trial testimony of appellant's family members to assist him in testifying. (RT 3078.) His opinion of appellant's mental state near the time of the murders was based on Officer Mesones's police report and guilt-phase trial

testimony. (RT 3185.) On cross-examination, the prosecutor asked Dr. Pierce if, "in [his] consideration of materials relative to [his] opinion," he "ever listen[ed] to a tape-recorded statement [appellant] gave regarding this offense on May 13th, 1995." (RT 3256.) The defense objected that the statement "did not become available to defense counsel until very late in the proceedings when we were already in trial." (RT 3256.) The court overruled the objection and Dr. Pierce indicated that he had not listened to the tape-recorded statement. (RT 3256.) Appellant's statement to the district attorney's office was eventually introduced into evidence by the prosecution. (RT 3280-3287.)

As an initial matter, the defense never made a motion to exclude appellant's statement to the district attorney's office as a sanction for the prosecutor's alleged discovery violation. In fact, at the time the prosecutor asked Dr. Pierce about the statement, it had already been ruled admissible by the trial court. Appellant's claim that the trial court allowed the prosecutor to exploit an earlier discovery violation is therefore without merit.

Moreover, it was not improper for the prosecutor to ask Dr. Pierce about appellant's tape-recorded statement to the district attorney's office given that the statement had been in the defense's possession since the beginning of the guilt phase, and Dr. Pierce testified that he had been provided with transcripts from the guilt phase to assist him in testifying. Also, considering that the defense had provided Dr. Pierce with evidence of appellant's mental state three days before the murders to assist him in forming an opinion as to appellant's sanity at the time of the murders, it was entirely reasonable for the prosecutor to ask Dr. Pierce if he had also listened to appellant's tape-recorded statement to the district attorney's office, which was made just two days after the murders, in forming his opinion. Because Dr. Pierce's failure to consider such evidence tended to undermine the validity of his opinion, the prosecutor's question was within the scope of permissible cross-examination.

Contrary to appellant's contentions, the Ninth Circuit's decision in *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011 has no application in this case.[40] There, the prosecutor withheld material exculpatory evidence from the defense and then deliberately relied on the absence of such evidence to argue that the defendant was guilty. (*Id.* at pp. 1012-1015.) Here, on the other hand, the prosecutor provided the defense with appellant's statement to the district attorney's office well in advance of the sanity phase, and the defense knew before the start of the sanity phase that the prosecutor was going to rely on such evidence to argue that appellant was sane at the time of the murders. Just because the defense chose not to provide Dr. Pierce with the statement in preparation for his sanity-phase testimony did not preclude the prosecutor from asking Dr. Pierce if he had considered it.

Finally, because the prosecutor presented overwhelming evidence of appellant's sanity, any erroneous evidentiary rulings made by the trial court during Dr. Pierce's testimony were harmless.

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40. Nor is the case binding on this Court. (See *People v. Bradford, supra,* 15 Cal.4th at p. 1292 ["cases from the federal courts of appeals . . . provide persuasive rather than binding authority" on California courts].)

XVII.

THE CUMULATIVE EFFECT OF ANY ERRORS IN THE SANITY PHASE WAS HARMLESS

Appellant contends that the above two errors had a cumulative prejudicial impact on the jury's sanity verdict. (AOB 239.) We disagree.

As set forth in our responses to Arguments XV and XVI, there was no error in the sanity phase of appellant's trial. In the event some error may have occurred, any impact was minimal and not prejudicial, whether considered individually or collectively. (See, e.g., *People v. Box, supra,* 23 Cal.4th at p. 1214 ["Defendant asserts that even if the errors alleged above are not in themselves reversible, they are so cumulatively. We disagree. The few errors that may have occurred during defendant's trial were harmless whether considered individually or collectively. Defendant is entitled to a fair trial, not a perfect one"]; *People v. Smithey, supra,* 20 Cal.4th at p. 1007 ["Because we find no instructional error affecting the jury's consideration of mitigating factors, defendant's claim of heightened prejudice from cumulative error is without merit"]; *People v. Jackson, supra,* 13 Cal.4th at p. 1245 [what few errors occurred at appellant's trial were harmless, singularly or cumulatively]; *People v. Lucas, supra,* 12 Cal.4th at pp. 475-476 ["We have considered each claim on the merits, and neither singly nor cumulatively do they establish prejudice requiring the reversal of the convictions"].)

PENALTY PHASE ISSUES

XVIII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN HIS PENALTY PHASE OPENING STATEMENT

Appellant contends that the prosecutor committed misconduct in his penalty phase opening statement by referring to the expected testimony of an expert witness who was not called. (AOB 241.) He contends the claimed misconduct violated his federal constitutional rights to due process, a fair trial, and a reliable sentencing determination. (AOB 241.) Because appellant failed to object to the prosecutor's opening statement or seek a curative admonition, his claim is waived on appeal. In any event, no misconduct or prejudice is shown.

A. Factual Background

During a hearing before the penalty phase, the prosecutor informed the court and the defense that he would be calling Dr. Joel Fort as a witness in the penalty phase. (RT 3502, 3508.) The defense asked for all discovery relating to Dr. Fort's testimony, including "any documentation of his problems before the Board for fraud." (RT 3516-3517.) The prosecutor agreed to provide the materials requested, but argued that Dr. Fort could not be impeached with documentation relating to the suspension of his license. (RT 3518.) The defense disagreed, arguing that it would go to Dr. Fort's truth and veracity and "profession." (RT 3518.) The prosecutor declined to further discuss the matter, noting that he was "not going to fight [] about it," that he would "turn the material over and let it be litigated," and that "if it comes up, it comes up. We'll deal with it." (RT 3519.)

On the morning the penalty phase was to begin, defense counsel indicated, "There were some issues that we wanted to raise with regard to the witnesses that are going to be called. Those are in the afternoon so we can

probably do those this afternoon." (RT 3544.) When the court asked which witnesses the defense had issues with, the defense named four witnesses, including Dr. Fort. Defense counsel specified that the issue relating to Dr. Fort involved the relevance of his testimony as well as the "impeachment issue, which I think we gave you a copy of this morning." (RT 3543.) The court then asked the prosecutor which witnesses he planned to call during the morning session. When it was established that the prosecutor would be calling four different witnesses, defense counsel stated, "we can do those without dealing with these other issues." (RT 3544.) The court then indicated that it would preinstruct the jury with CALJIC No. 8.85 ("Penalty Trial—Factors For Consideration"). (RT 3544.) The parties expressed no objection to the instruction and stated that they were ready for opening statements. (RT 3544.) After the court preinstructed the jury, the parties gave their opening statements. During his opening statement, the prosecutor made the following remarks regarding Dr. Fort's expected testimony:

> In the sanity portion of the trial I mentioned Dr. Joel Fort. I am going to call Dr. Fort tomorrow for sure.
>
> Dr. Fort examined Mr. Blacksher first in 1996, similar to the way Dr. Davenport did to determine his competency to stand trial, and he filed a report with the court.
>
> Since that time, Dr. Fort and I have been working on this case. And I have submitted to him some materials to review. He has an interesting background and he will share that with you.
>
> But in the end, he will focus your attention on the factors that existed before, during and after the crimes and share with you his opinion of the mental state of Mr. Blacksher at the time he committed the acts that you have convicted him of. His opinion will not be in any way related to paranoid schizophrenia.

(RT 3557-3558.) The defense did not object at any point during the prosecutor's opening statement.

At the start of the afternoon session, the defense asked if the court had reached a ruling as to the relevancy of Dr. Fort's testimony. (RT 3507.) The

court noted that although its "initial indication was that there would be a basis for it," after conducting additional research over the lunch hour, it had changed its mind and concluded that Dr. Fort's testimony was irrelevant. (RT 3507.) The court noted, "That puts [the prosecutor] in the predicament having mentioned it, based upon a tentative ruling, so to be – my intention is to tell the jury he did so based upon a tentative ruling that I have since changed and that they're not to draw any inferences one way or the other." (RT 3607.) Defense counsel noted "[t]hat would be desirable" and made no objection to the remedy suggested by the trial court. (RT 3607.) Before the close of the prosecution's case, the trial court instructed the jury as follows:

> Ladies and gentlemen, before Mr. Tingle rests, I need to read to you a statement relating to some statements that Mr. Tingle made yesterday morning.
>
> Yesterday in his opening statement Mr. Tingle indicated he intended to call Dr. Fort during his case in chief in the penalty phase. Mr. Tingle made this statement based upon a tentative ruling I had made earlier that morning.
>
> Since then, I have done additional research which has resulted in my reversing my tentative ruling. Because of this new ruling, Mr. Tingle will not be calling Dr. Fort as a witness in his case in chief.
>
> You are not to speculate as to what Dr. Fort might have testified about nor are you to speculate as to why he will not be testifying in the People's case in chief. You must not discuss this matter nor allow it to enter into your deliberations.

(RT 3720.) The defense did not object to the court's instruction to the jury.

B. The Prosecutor Did Not Commit Misconduct In Relying On The Trial Court's Tentative Ruling When Making His Opening Statement

As a threshold matter, appellant has failed to preserve his claim for appeal. "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured

the harm caused by the misconduct." (*People v. Price* (1991) 1 Cal.4th 324, 447.) There is no exception to this rule for capital cases. (*People v. Frye, supra*, 18 Cal.4th at pp. 969-970.) Appellant neither objected to the prosecutor's reference to Dr. Fort in his opening statement nor requested an admonition. As it cannot be shown that an admonition would have been futile, appellant's claim of prosecutorial misconduct must be deemed waived.

Even if not waived, appellant's claim of prosecutorial misconduct lacks merit. The federal and state standards applicable to a claim of prosecutorial misconduct are well established:

> "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]

(*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

While it is misconduct for a prosecutor to refer to evidence in his opening statement that has been deemed inadmissible in a previous ruling of the trial court (*People v. Crew* (2003) 31 Cal.4th 822, 839), that is not what occurred in this case. Rather, it is clear from the record that at the time the prosecutor gave his opening statement, the trial court had already tentatively ruled that Dr. Fort's testimony would be admissible. It was not until after the prosecutor gave his opening statement that the trial court changed its mind and ruled that it would not permit Dr. Fort's testimony after all. The prosecutor therefore properly relied on the trial court's tentative ruling in making his

opening statement, and his reference to Dr. Fort was not "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted." (*People v. Davenport* (1995) 11 Cal.4th 1171, 1212-1213, overruled on another ground by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Nor can the prosecutor be faulted for relying on the court's tentative ruling in light of the defense's willingness to wait for a final ruling on the relevancy of Dr. Fort's testimony until after opening statements. In short, no misconduct is shown.

Appellant argues that because the trial court's tentative ruling does not appear in the record, this Court cannot presume the existence of such a ruling. (AOB 244-245.) While it is true that all proceedings in a capital case are supposed to be conducted on the record with a court reporter present (§ 190.9, subd. (a)(1)), any failure to comply with such a requirement does not mean that all unrecorded proceedings must be disregarded by the Court on appeal. Rather, so long as there is a sufficient record to address the claim on appeal, a violation of section 190.9 will not result in automatic reversal. (*People v. Frye, supra,* 18 Cal.4th at p. 941.) Here, as demonstrated above, there is a sufficient record to resolve appellant's claim of prosecutorial misconduct. As the trial court expressly noted on the record and in its instruction to the jury, it had tentatively ruled that Dr. Fort's testimony would be admissible before the prosecutor gave his opening statement, and the prosecutor relied on the court's tentative ruling in making his opening statement. Such clear and unambiguous evidence of a tentative ruling should not be ignored by this Court.

Nor is there any support for appellant's contention that the prosecutor ultimately decided not to call Dr. Fort simply to avoid having him impeached. (AOB 241.) Instead, it is clear from the record that the prosecutor was foreclosed from calling Dr. Fort by the trial court's subsequent ruling that Dr. Fort's testimony was inadmissible. Again, no misconduct is demonstrated.

Even if the prosecutor committed misconduct, his brief reference to Dr. Fort's expected testimony was harmless. "A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew, supra,* 31 Cal.4th at p. 839.) The only thing of substance the prosecutor said about Dr. Fort's testimony was that he would share his opinion about appellant's mental state at the time of the murders and that his opinion would not relate in any way to paranoid schizophrenia. The prosecutor's passing reference to Dr. Fort's expected testimony was hardly prejudicial given that the jury had already found appellant sane at the time of the murders, the compelling nature of the evidence introduced against appellant during the penalty phase, and the court's instruction to the jury to disregard the prosecutor's remarks about Dr. Fort. Accordingly, appellant cannot show that he suffered any prejudice as a result of the prosecutor's remarks.

XIX.

THE TRIAL COURT PROPERLY ADMITTED THE VICTIM IMPACT TESTIMONY INTO EVIDENCE

In the penalty phase of trial, the prosecutor offered the testimony of three surviving family members as victim impact evidence. In a broad attack on victim impact evidence in general, and the victim impact evidence admitted in this case in particular, appellant takes issue with the scope of evidence introduced during the penalty phase. (AOB 249-257.) Appellant, however, has waived most of his challenges to such evidence on appeal. In any event, because the victim impact evidence admitted in this case was well within the statutory and constitutional guidelines for such evidence, no error is shown.

A. Factual Summary

Before the penalty phase, the prosecution provided the defense with a list of witnesses it intended to call (RT 3502), and the defense filed a motion to limit and/or exclude victim impact evidence. (CT 1481-1494.) During the hearing on the defense motion, the prosecutor indicated that the victim impact evidence would be limited to the testimony of three of its witnesses. (RT 3513.) The defense indicated that it was not prepared to discuss the admissibility of the victim impact evidence at that time as it had not received any discovery regarding what evidence the prosecutor intended to present. (RT 3508-3513.) The prosecutor promised to provide the defense with a summary of the expected testimony by the next day so that any specific objections to such evidence could be addressed before the penalty phase began. (RT 3513.) Before moving on to other matters, the trial court rejected appellant's broad attacks on victim impact evidence in general, noting that "the law is pretty clear that victim impact evidence is admissible" subject to balancing under Evidence Code section 352 and due process concerns such as duplicative or inflammatory

evidence. (RT 3512.) The issue of the admissibility of the particular victim impact evidence to be introduced by the prosecutor was not thereafter revisited.

During the penalty phase, Ruth Cole testified that she had been devastated when she heard the news that Versenia and Torey had been murdered. (RT 3590.) After their bodies had been removed from her mother's house, Ruth walked through the house with a police officer. (RT 3590-3591.) There was blood everywhere in the dining room. (RT 3591.) Ruth could not deal with the sight of the blood; she threw a towel over the bloodstains and left the house. (RT 3591.) Ruth did not allow herself to feel the full impact of Versenia's and Torey's deaths until she saw their bodies at the mortuary; it was difficult for her to face the fact that they were really gone. (RT 3594.) Ruth incurred expenses for her sister's and nephew's funerals, and for replacing the carpet in her mother's home. (RT 3591-3592.) Every year on Versenia's birthday, Ruth feels the loss of her sister. (RT 3592.) After Versenia died, Ruth began seeing her mother on a daily basis. (RT 3592.) Eva was devastated by Versenia's and Torey's deaths. (RT 3592.) She cried a lot, and told Ruth how much she missed them. (RT 3593.) She constantly asked Ruth to take her to the cemetery to visit their graves. (RT 3593.) She would walk around their graves and cry, and say, "Why did he do it. He didn't have to do it." (RT 3593.)

Sammie Lee testified that a police officer visited him at work on the morning of the murders and informed him that his wife and son had been shot and that they were both dead. (RT 3669-3670.) When he heard the news, he "went off"; his supervisor had to grab him because he was "fixing to run outside and scream and holler." (RT 3670.) He threw his hands in the air and said, "No, no, you're lying. . . . I just left them this morning." (RT 3670.) Sammie testified that the loss of his wife and son had affected his "mind"; "all kind of stuff was running in his mind," and he could not "think right." (RT

3670.) He could not believe what had happened. (RT 3670.) After awhile his job performance started to suffer, and he eventually lost his job. (RT 3670.) His sister-in-law Ruth let him stay with her until he could face going back to Eva's house. (RT 3671.) When he moved back in with Eva, he had trouble sleeping. (RT 3671.) He kept looking at pictures of his wife and son, and began drinking heavily. (RT 3671.) When he lost his job, Ruth told him to get into a program and straighten up. (RT 3670.) If it were not for Ruth, he would be in trouble or on the streets by now. (RT 3670.) He and Eva did not talk about the murders; both of them tried blocking out what had happened. (RT 3672.)

Artis Blacksher testified that he had a difficult time accepting that his sister and nephew were dead when he first heard the news at the scene. (RT 3687-3688.) Artis said that he felt like he had "been hit with a stick, run over by a train." (RT 3688.) Instead of going to Ruth's house after hearing about the murders, he "went looking for [appellant]" to hurt him, but he never found him. (RT 3688.) Instead of coping with the deaths of his sister and nephew, he used work to "keep it off [his] mind." (RT 3689.)

B. Appellant Has Waived Most Of His Claims On Appeal

As an initial matter, appellant has waived his specific challenges to the substance of the victim impact testimony admitted in this case. (AOB 254-255.) In his motion to exclude such evidence, appellant made only broad attacks on victim impact evidence in general. (See CT 1481-1494.) At no time prior to or during the penalty phase did appellant lodge any specific objections to the particular evidence sought to be admitted by the prosecutor. (*People v. Wilson* (2005) 36 Cal.4th 309, 357 [defendant forfeited challenge to witness's testimony by failing to object as exceeding scope of proper victim impact evidence].) As for appellant's broad attacks on victim impact evidence in general, he has preserved only two of his claims on appeal: that victim impact

evidence must be limited to those facts or circumstances known to the defendant at the time he committed his crime (see CT 1487-1488; see also AOB 253-254); and, victim impact evidence must be limited to a single witness (see CT 1489; see also AOB 254). Appellant's third claim—that only those family members who were personally present at the scene during or immediately after the murders may testify as to the impact of the murders on their lives (AOB 252-253)—has been waived by his failure to raise such contention below. Finally, although appellant noted in his motion below that it would be a violation of due process to admit unduly inflammatory or prejudicial victim impact evidence (see CT 1485), he made no attempt to argue why the specific evidence sought to be admitted by the prosecution was prejudicial, nor did he object to the testimony as prejudicial at the time it was introduced. This claim has therefore also been waived on appeal. (See AOB 253; *People v. Roldan* (2005) 35 Cal.4th 646, 732.)

C. The Trial Court Properly Admitted The Victim Impact Evidence

Even if appellant's claims have not been waived they lack merit. Prior to 1991, evidence of a murder's impact on a victim and the victim's family and friends was not admissible in the penalty phase of a capital trial. (*Booth v. Maryland* (1987) 482 U.S. 496, 501-502.) However, the United States Supreme Court reversed itself in *Payne v. Tennessee* (1991) 501 U.S. 808, 825, deciding that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question," and is thus admissible evidence. "[U]nder California law, a court may permit victim-impact evidence and argument in appropriate cases at the penalty phase of a capital trial to show the circumstances of the crime." (*People v. Navarette* (2003) 30 Cal.4th 458, 515.)

Appellant contends that this Court "has not yet defined the appropriate boundaries of victim impact evidence," and argues that such evidence should

be severely limited to the following: (1) the impact of the murder on only those family members who were personally present at the scene during or immediately after the murder; (2) only those circumstances known or reasonably foreseeable to the defendant at the time of the murder; and (3) the testimony of a single witness. (AOB 251-254.) Each of appellant's contentions has already been rejected by this Court. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183.)

Appellant next asserts that the victim impact evidence admitted in this case violated California law. (AOB 254-255.) Not so. The testimony of the victims' family members constituted permissible victim impact evidence. Each family member's testimony concerned the "immediate effects of the murders," and properly showed how the victims' deaths affected each of their lives. (*People v. Wilson, supra,* 36 Cal.4th at p. 357.) Thus, Ruth testified about the financial costs associated with the murders and the loss felt by both her and her mother; Sammie testified about his inability to cope with life after losing his wife and son; and Artis testified about his anger and despair over the killings. Despite appellant's contention to the contrary, it was not improper for Ruth to testify about how the murders affected her mother. "There is no requirement that family members confine their testimony about the impact of the victim's death to themselves, omitting mention of other family members." (*People v. Panah, supra,* 35 Cal.4th at p. 495.) Further, although such testimony undoubtedly had a strong emotional impact, it was not unduly inflammatory. (*People v. Roldan, supra,* 35 Cal.4th at p. 733; *People v. Panah, supra,* 35 Cal.4th at pp. 494-495.) Finally, because there was no error in the admission of the victim impact evidence under California law, appellant's federal constitutional claims fail as well. (*People v. Panah, supra,* 35 Cal.4th at p. 494, fn. 40.)

XX.

THE TRIAL COURT DID NOT PREVENT APPELLANT FROM PRESENTING EVIDENCE IN MITIGATION DURING THE PENALTY PHASE

Appellant contends that during the penalty phase, the trial court prevented him from questioning his sister, Georgia Hill, about his mental problems, which he contends would have impeached the testimony of other family members who denied knowing about such problems. (AOB 259-261.) Appellant also contends that the court precluded him from asking his brother-in-law (Versenia's husband and Torey's father), Sammie Lee, about the effect appellant's execution would have on the family, which he contends amounted to proper victim impact evidence and mitigation evidence. (AOB 261-263.) Appellant contends that the trial court violated his federal constitutional rights in excluding such evidence. (AOB 258-264.) Appellant has waived his claims on appeal by failing to raise them below; if not waived, the claims are meritless.

A. Appellant Was Not Precluded From Questioning His Sister Georgia Hill About His Mental Problems

Appellant points out several instances in which he contends the trial court improperly struck Georgia Hill's testimony concerning his mental problems. (AOB 259.) Each instance is summarized below:

On direct examination, defense counsel questioned Georgia about the division in the family among the older and younger siblings. (RT 3745.) Georgia testified that the older siblings hated appellant and treated him badly because they were jealous of him. (RT 3745-3746.) When she added that they did not understand appellant, defense counsel asked, "What was it about [appellant] that you think that they overlooked or didn't understand?" (RT 3746.) The prosecutor objected that the question called for speculation just before Georgia responded that appellant had "medical and mental problems."

(*Ibid.*) The court sustained the objection and granted the prosecutor's motion to strike the answer. (*Ibid.*)

After establishing that Georgia had spoken to her older siblings about why they did not like appellant, defense counsel asked, "And amongst those discussions, what conclusions did you draw based on those discussions as to why they hated [appellant]?" (RT 3746-3747.) The prosecutor again objected to the question as calling for speculation right before Georgia replied, "Because [appellant] had mental problems." (RT 3747.) The court agreed with the prosecutor's objection, noting, "I'm not sure she's qualified to assess what other people are feeling." (*Ibid.*) The court then granted the prosecutor's motion to strike the answer. (*Ibid.*)

Defense counsel then went on to question Georgia about her own belief that appellant had a mental problem. (RT 3748-3749.) When defense counsel asked Georgia to describe appellant's peculiar behavior, she testified as follows:

> Well, in his conversations, he would see things that I didn't see.
>
> An example, he might recite that your head was on backwards or that he saw horns. Things like that.
>
> Or he might make movements like that (indicating) and there was nothing there.
>
> So it was obvious to me that that behavior was out of schizophrenic and —

(RT 3749.) At that point, the prosecutor objected to the last part of Georgia's answer "as a medical conclusion" that the witness was unqualified to give. (RT 3749-3750.) The court sustained the objection and granted the prosecutor's motion to strike the last portion of the answer. (RT 3750.)

Later on, after establishing that Georgia had observed changes in appellant's behavior after the death of his cousin, defense counsel asked her to describe those changes. (RT 3753.) Georgia replied, "The schizophrenic behavior began." (*Ibid.*) The prosecutor objected on grounds of "medical conclusion," and the answer was stricken. (RT 3753-3754.) Defense counsel

then asked Georgia to describe what she saw "without giving it a label," and Georgia went on to testify about the changes she observed in appellant. (RT 3754.)

As an initial matter, we note that appellant did not argue the admissibility of the evidence at the time the trial court ruled on the prosecutor's objections. Nor did appellant object on constitutional grounds below. Accordingly, appellant has failed to preserve the claims now raised on appeal. (See *People v. Morrison, supra,* 34 Cal.4th at p. 724 ["Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence"].) Even if not waived, however, the claims lack merit.

The trial court properly sustained the prosecutor's objections to Georgia's testimony. Defense counsel's questions concerning what Georgia "thought" her older siblings did not understand about appellant and what "conclusions" she had drawn about the reasons for her older siblings' hatred for appellant called for Georgia to speculate as to the reasons why her older siblings disliked appellant. Moreover, as a lay witness, Georgia was unqualified to draw medical conclusions about whether appellant's behavior was indicative of schizophrenia. Defense counsel appeared aware of this problem when she subsequently asked Georgia to describe appellant's behavior "without giving it a label." (RT 3754.) In sum, because the court correctly ruled on the prosecutor's objections, appellant cannot show an "asymmetrical application of evidentiary standards." (See AOB 261.)[41/]

Nor was appellant denied the right to present a defense or put on mitigation evidence as a result of the trial court's rulings. Aside from the few

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41. As noted above in Argument XVI, appellant has failed to show that an asymmetrical application of evidentiary standards constitutes a due process violation.

objections sustained by the trial court, Georgia was permitted to testify about her older siblings' dislike of appellant, appellant's peculiar behavior and hospitalizations, and her older siblings' knowledge of such hospitalizations. (See RT 3745-3750, 3752-3754, 3764.) The trial court did not therefore prevent appellant from presenting evidence to rebut his family members' testimony that they were unaware of his mental illness, but only evidence that called for inadmissible speculation. (*People v. Livaditis, supra,* 2 Cal.4th at p. 780.) In sum, the trial court's rulings did not constitute a wholesale refusal to allow appellant to present a defense, but merely rejected certain evidence concerning that defense. (*People v. Bradford, supra,* 15 Cal.4th at p. 1325.) For this reason, no prejudice is shown.

B. Appellant's Question To Sammie Lee About Whether The Family Had Seen Enough Death Was Not Proper Victim Impact Evidence Or Mitigation Evidence

Appellant next contends that the trial court improperly excluded relevant victim impact evidence during Sammie Lee's testimony. On cross-examination, defense counsel asked Sammie, "Do you feel that this family has seen enough death?" (RT 3680.) The trial court sustained the prosecutor's relevancy objection before Sammie could answer. (RT 3680.)

On appeal, appellant claims that Sammie's "testimony that the family had seen enough death was . . . relevant victim impact evidence" as well as admissible mitigation evidence. (AOB 262.) Appellant further contends that the court applied the rules of evidence unevenly among the parties by excluding such testimony, while at the same time permitting the prosecution to elicit similar testimony from appellant's brother, Artis Blacksher. (AOB 262.) Appellant, however, did not argue the admissibility of Sammie's testimony or the inadmissibility of Artis's testimony below. Nor did he raise any

constitutional concerns in connection with such evidence. His claims are therefore waived on appeal.

In any event, there is no merit to appellant's claims. Contrary to appellant's contentions, the testimony he sought to elicit from Sammie was not proper victim impact evidence. Victim impact evidence consists of "evidence . . . on the specific harm caused by the defendant, including the impact on the family of the victim." (*People v. Edwards, supra,* 54 Cal.3d at p. 835.) Appellant's question to Sammie, however, did not relate to the specific harm caused by appellant or to the impact of the murders on the family. Accordingly, the question did not constitute admissible victim impact evidence.

Nor did the question consist of proper mitigation evidence. "[E]vidence that a family member or friend wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness." (*People v. Smith, supra,* 35 Cal.4th at p. 367; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 456 [the jury must decide whether a defendant deserves to die, not whether the defendant's family deserves to suffer the pain of a member's execution, but may consider the positive qualities of his background or character that would be illuminated by the impact his execution would have upon his family].) Appellant's question to Sammie did not relate in any way to appellant's character, but only to the impact appellant's death would have on his family. The question was therefore properly excluded by the trial court.

Additionally, there is no support for appellant's assertion that the trial court applied the rules of evidence unevenly among the parties. Unlike defense counsel's question to Sammie, Artis's testimony relating how he found out about the murders (RT 3685-3687), how he felt after finding out that his sister and nephew were dead (RT 3687-3688), and how he reacted immediately afterwards, i.e., went looking for appellant so he could hurt him (RT 3688), was

proper victim impact evidence. Moreover, whereas the prosecutor objected to defense counsel's question to Sammie on relevancy grounds, appellant made no similar objection to Artis's testimony. Accordingly, there is no basis for appellant's claim that the trial court unevenly applied the rules of evidence among the parties.

Finally, we dispute that appellant's inability to ask Sammie this single question prejudiced his case. Appellant was not foreclosed from cross-examining Sammie on how the murders of his wife and son impacted his life, and how he felt about appellant and "what [had] happened." (RT 3674, 3679.) Moreover, appellant was able to elicit testimony from other witnesses relating appellant's character to the impact his death would have on their lives. (RT 3733-3734, 3758, 3764, 3792, 3829-3830, 3842-3843, 3883, 3894.) Accordingly, any error was harmless.

XXI.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT IN HIS CLOSING ARGUMENTS DURING THE GUILT, SANITY, OR PENALTY PHASES

Appellant contends that the prosecutor committed misconduct during his guilt, sanity, and penalty phase closing arguments. Appellant further maintains that these alleged instances of prosecutorial misconduct were prejudicial and in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (AOB 265-288.) However, most of appellant's claims of prosecutorial misconduct were waived by his failure to object or request an admonition at trial. In any event, all of appellant's claims fail on the merits. Further, any misconduct that may have occurred was neither individually nor cumulatively prejudicial.

As noted above in Argument XVIII, the standard of review by which this Court evaluates a claim of prosecutorial misconduct is well settled and may be summarized as follows:

> "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]

(*People v. Samayoa, supra,* 15 Cal.4th at p. 841.)

"To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Price, supra,* 1 Cal.4th at p. 447.) There

is no exception to this rule for capital cases. (*People v. Frye, supra,* 18 Cal.4th at pp. 969-970.) We discuss appellant's individual claims of prosecutorial misconduct below.

A. Guilt Phase

1. The Prosecutor Did Not Improperly Refer To Statements Appellant Made During His Competency Examination

Appellant's first assignment of error concerns remarks made by the prosecutor during his guilt-phase closing argument. Appellant contends that the prosecutor violated his right to silence by referring to statements appellant made during a competency examination. (AOB 266-267.) Appellant's claim concerns the following remarks:

> His story is somebody else did this. His story is: I am not guilty. His story to Dr. Davenport two years ago: he vehemently denied this; the masked men, the masked men came in the house and did this.
>
> MR. BROOME [Defense counsel]: That's not it.
>
> THE COURT: Sustained.

(RT 2730.)

As an initial matter, we submit that appellant has waived his claim on appeal by failing to raise his right to silence as the basis for his objection below. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa, supra,* 15 Cal.4th at p. 841.) Counsel's simple "[t]hat's not it," was hardly sufficient to put to the trial court on notice that appellant was objecting on the ground that the prosecutor's reference to appellant's statements made in the course of his competency examination violated appellant's right to silence. Additionally, because appellant did not ask for a clarifying admonition at the time he objected to the

prosecutor's remarks, he has forfeited any claim of prejudice resulting from the court's failure to give such an admonition. (See AOB 267.) Even if appellant's claim has not been waived on appeal it is meritless.

First, we disagree that the prosecutor engaged in misconduct by referring to appellant's statement to Dr. Davenport in which he "vehemently" denied his involvement in the murders. The following background information is necessary for resolution of this claim: In a report filed with the court on the issue of appellant's competency to stand trial, Dr. Davenport noted that appellant "vehemently" denied responsibility for the murders. (CT 315.) During the guilt phase, the defense called Dr. Davenport to the stand to testify about appellant's history of mental illness to impeach the testimony of appellant's family members who denied knowledge of appellant's mental illness. On direct examination, defense counsel inquired into Dr. Davenport's competency examination of appellant. Dr. Davenport testified that appellant exhibited signs of schizophrenia during the examination. (RT 2639, 2641, 2644.) On cross-examination, the prosecutor questioned Dr. Davenport about references in his report to appellant's seemingly normal behavior during the competency examination, including appellant's "vehement" denial of his involvement in the murders. (See RT 2662.)

Appellant's statement to Dr. Davenport was therefore properly before the jury in the form of admitted evidence. Accordingly, the prosecutor's reference to such evidence during his closing argument was not misconduct. (See *People v. Carpenter, supra*, 15 Cal.4th at p. 380, fn. 4 [finding that the prosecutor did not commit misconduct by arguing properly admitted evidence to the jury].) Moreover, because the defense did not object to such statement coming in at the time of trial, appellant cannot complain on appeal that the

prosecutor's reference to such evidence in his closing argument violated appellant's right to silence.[42/]

Second, in the course of remarking on appellant's statements regarding the masked men, the prosecutor was not referring to statements appellant made to Dr. Davenport, but rather to statements appellant made to family members immediately after the murders. We note that Dr. Davenport's report contains no such statements by appellant. (See CT 313-316.) Rather, such statements were made by appellant immediately after the murders when he called his sister and sister-in-law and claimed to have heard gunshots and screaming inside his mother's home after seeing masked men on the front porch. (See RT 2201, 2300, 2423-2424.) Indeed, the prosecutor's remarks immediately following the passage quoted above makes it clear that he was referring to appellant's statements to his relatives:

> [I]t just totally eliminates the story he made up to his relatives after he is trying to get away about the masked men. [¶] . . . [¶] [Appellant] told his relatives, Frances Blacksher and Ruth Cole, that somebody else went in the house that had masks on their face[s] and they went in the house, and while he was outside in front of the house, he heard screaming, yelling, hollering inside the house.

(RT 2730-2731.) Because the prosecutor's argument was based on evidence presented to the jury, and he made clear the exact source of that evidence, no misconduct is shown.

Even if it were not clear that the prosecutor's remarks about the masked men referenced appellant's statements to family members rather than Dr.

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42. At any rate, it is difficult to see how appellant's rights were violated considering that he was the party responsible for calling Dr. Davenport to the stand and inquiring into the substance of the competency examination. (See, e.g., *Estelle v. Smith, supra,* 451 U.S. at p. 465 [when a defendant introduces psychiatric testimony in support of his defense, he may not invoke his right to remain silent and deprive the prosecution of the "only effective means it has of controverting his proof on an issue that he interjected into the case"].)

Davenport, no prejudice is shown. For one thing, such remarks were hardly damaging considering that the jury had before it evidence of identical comments appellant made to his sister and sister-in-law immediately after the murders. Moreover, the prosecutor made his remarks in the course of a broader discussion in which he was attempting to discredit appellant's defense that an unknown third party entered his mother's house and committed the murders. Because the prosecutor was not discussing Dr. Davenport's testimony at the time he made his remarks, there is no reasonable possibility that the jury misconstrued his remarks as an attack on Dr. Davenport's credibility. (See AOB 267 [arguing that the prosecutor's argument improperly implied that Dr. Davenport's testimony in favor of appellant was less than credible insofar as it was based on appellant's self-reporting to him].)

Appellant also takes issue (see AOB 267) with another remark by the prosecutor concerning appellant's statement to Dr. Davenport:

> And what you see is what I have described based on his conduct in this case, and there's nothing to suggest any diminished level to act with the intents alluded to, because – all we know, among other things we know, is that one of the things he told Doctor Davenport was that he vehemently denied the charges. And I ask you, after you've heard this case and listen to this case, you will tell Doctor Davenport the truth of what he did that day –
>
> MR. BROOME [Defense Counsel]: Same objection.[43]
>
> THE COURT: Same ruling.[44]

(RT 2759.) Again, however, because the substance of appellant's statement to Dr. Davenport "vehemently" denying his involvement in the murders was admissible evidence before the jury, the prosecutor did not commit misconduct in referring to the statement during his closing argument.

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43. Defense counsel's previous objection was "to the form of the . . . statement . . . and the characterization as to where [appellant] was." (RT 2758.)

44. The court overruled defense counsel's previous objection. (RT 2758.)

2. The Prosecutor Did Not Commit Misconduct In Discussing The Inconsistency Between Eva's Statements Immediately After The Murders And Her Testimony At The Preliminary Hearing

Appellant next contends that the prosecutor "argued facts outside the record" in discussing the inconsistency between Eva's statements after the murders and her testimony at the preliminary hearing. (AOB 268-269.) Appellant takes issue with the following remarks by the prosecutor:

> Now, I think that other than the murders of [Versenia] and Torey, the worst thing [appellant] did in this case was put something really heavy on his mother and really bad on his mother. And this ultimate question of respect, I will leave that to you to figure out.

(RT 2735.)

> When we come back after lunch, I am going to wrap this up in about a half hour and get into the things that [Eva] told the police and the things that she told her neighbors and the things that she told her family and leave you with one thing: Mrs. Blacksher was really blown away by this.
>
> MR. BROOME [Defense counsel]: Object to that. I think that is improper.
>
> THE COURT: Overruled.
>
> MR. TINGLE [Prosecutor]: Mrs. Blacksher was really upset because of what she knew her son did. And the things that she saw – first of all, she is not going to lie on him. And after you look at what she said, you know that the only way she could have said the things she did is because she was able to figure out what happened inside the house.
>
> And with that, I wish you a nice lunch.
>
> MR. BROOME [Defense counsel]: I will object. I think that is improper.
>
> THE COURT: Objection overruled.

(RT 2736.)

> Now, as I was saying this morning, you can see from the witnesses outside the house, the circumstances that indirectly prove what happened inside the house. But there is a voice before you on this case, a voice from a woman inside the house,

who saw and heard things that really hamstrings the position the defendant needs to take in this case.

His mother is really torn in this matter. That is why in October, at the preliminary hearing in 1995, she pretty much said, "I didn't really see and hear too much."

MR. BROOME [Defense counsel]: I'm going to object, that is outside the evidence.

THE COURT: Overruled.

MR. TINGLE [Prosecutor]: In the transcript she says, "I didn't see what happened or hear what happened after Versenia – after [appellant] went out of the – out of my room."

Now, we brought Inspector Bierce back at the very end of the case for purposes of impeachment. Mrs. Blacksher is an unavailable witness because of the mental infirmities that we agreed to earlier in the trial. As such, her testimony was read to you and you will be instructed to consider it just as though she were here.

But just as though she was here, the evidence alluded to by her is susceptible to the same rules of evidence as live witnesses; in other words, it can be impeached by prior inconsistent statements.

But before I get to the substance of what she said, we need to take a look at her and look at her realistically, because this is what her son put on her that morning.

John Adams describes her –

MR. BROOME [Defense counsel]: I'm going to object to that.

THE COURT: Overruled, Mr. Broome.

MR. BROOME [Defense counsel]: That was not testified to by the witness.

THE COURT: Mr. Broome, overruled.

(RT 2739-2740.)

As an initial matter, appellant has waived any challenge to the first set of remarks complained of on appeal by failing to object in proceedings below. (RT 2735.) Further, although appellant objected to the second (RT 2736) and third (RT 2739-2740) set of remarks, he did not object to the former on the same grounds now being raised on appeal, i.e., that the prosecutor argued facts outside the record. Accordingly, appellant has also waived any challenge to the

second set of remarks on appeal. In any event, appellant's claims of prosecutorial misconduct lack merit.

Appellant contends that "[t]here was no properly admitted evidence at the guilt phase that Eva's memory problems were directly linked to the killings." (AOB 268.) The prosecutor, however, did not argue that the murders caused Eva's memory problems. Rather, the point of the prosecutor's argument was that Eva's inability to recall facts damaging to her son's case at the preliminary hearing was attributable to her bias as his mother. (RT 2739-2740.) Moreover, the prosecutor's argument was properly based on the record before the jury, i.e., the transcript of Eva's preliminary hearing testimony, and the testimony of family members that appellant was Eva's favorite son and that she would do anything for him. (See RT 2117, 2129-2130, 2218, 2222, 2393-2394.) Moreover, in cautioning the jury to evaluate Eva's preliminary hearing testimony just as though she were a witness at trial (see RT 2739-2740), the prosecutor did not improperly refer to the fact (see AOB 269), already known to the jury (see RT 1867-1868), that Eva's preliminary hearing testimony had been admitted because of her incompetency to testify at trial.

Appellant next contends that "[i]t was also improper for the prosecutor to argue that the jury should consider the statements made by Eva – even though as he admitted she testified that she did not 'see and hear too much' – because Eva was able 'to figure out' what had happened. This argument encouraged the jury to consider Eva's statements even if they were, or precisely because they were, her speculation. Such argument violates the precept against stating or assuming facts not in evidence." (AOB 269.) However, in arguing the credibility of Eva's statements made immediately after the murders, the prosecutor did not rely on facts outside the record. Rather, he relied on the statements themselves to argue that Eva must have witnessed the murders to be

able to describe with such accuracy what went on inside the house. (See RT 2736.)

Finally, the prosecutor's remarks that Eva was "torn" in this matter were not improper. (See AOB 268.) Rather, the prosecution was setting forth an explanation as to why Eva would incriminate her son at the scene of the murders, but not later at the preliminary hearing. The prosecutor argued that at the time of the murders Eva was so distressed about the killing of her daughter and grandson that she had no time to reflect before implicating her son in the murders. Later, however, when it came time for the preliminary hearing, Eva could not bring herself to testify against her favorite son. Because such argument was based on reasonable inferences from the evidence before the jury, no misconduct is shown.

3. The Prosecutor Properly Argued His Interpretation Of The Evidence Of Appellant's Alleged Mental Illness

Appellant next contends that "[t]he prosecutor argued outside the record with respect to appellant's mental illness." (AOB 269.) Appellant's initial assignment of error concerns the following remarks by the prosecutor:

> The testimony of Doctor Davenport is admitted for the limited purpose of the impeachment of family member witnesses who have testified to a lack of knowledge that the defendant Erven Blacksher suffered from a mental illness. Because if you recall, everybody that was asked said: no, I haven't seen anything about him that would suggest he has a mental illness.
>
> MR. BROOME [Defense Counsel]: Object, that's a misstatement of the testimony.
>
> THE COURT: Yeah, there were some people who said yes.
>
> MR. TINGLE: They said he manifested certain traits. I don't think those traits go to a mental illness.

(RT 2754.)

Appellant contends that "[t]he prosecutor's argument was an improper statement of facts outside the record, and the trial court did not sustain the

objection." (AOB 269.) Appellant's assertion is belied by the record. The trial court *did* sustain defense counsel's objection and additionally admonished the jury that "there were some people who said yes" (that appellant did exhibit signs of mental illness). The prosecutor thereafter clarified his earlier remarks, acknowledging the testimony as to appellant's manifestation of "certain traits," but arguing that such traits did not prove appellant was mentally ill. On this record, it is apparent that the prosecutor was not referring to facts outside the record, but was rather arguing his interpretation of the testimony of appellant's family members. (See *People v. Welch, supra,* 20 Cal.4th at pp. 752-753 [the prosecution has broad discretion to state its views as to what inferences may be drawn from the evidence before the jury].) While the prosecutor may not have clearly articulated this point at first, he quickly clarified his meaning after the trial court sustained defense counsel's objection. In light of the court's admonition to the jury and the prosecutor's subsequent clarification of his earlier remarks, it is difficult to see how appellant suffered any prejudice. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1111.)

Appellant next takes issue with the following remarks by the prosecutor:

> The bottom line is, the family doesn't know about this medical history and what he said is, and what is clear and came from the testimony of Doctor Davenport, is that as far as Doctor Davenport could see, from what he said, the medical records that he referred to, which he did not have with him, by the way, all came from when Mr. Blacksher was incarcerated.
>
> MR. BROOME [Defense counsel]: Again, I'm going to object to the form of the question – statement, rather, and the characterization as to where Mr. Blacksher was.
>
> THE COURT: Objection overruled.

(RT 2758.)

Appellant maintains that "the prosecutor improperly mischaracterized the record" by stating that "the family" did not know of appellant's mental illness. Appellant asserts that "Elijah Blacksher testified that he was well aware of

appellant's history of mental illness, and that he had discussed this matter with other family members." (AOB 270.) Appellant, however, did not raise this specific objection in the trial court, and so has waived the claim on appeal. In any event, the prosecutor's remark was not a mischaracterization of the record. At the time, the prosecutor was discussing the limited purpose for which Dr. Davenport's testimony was admitted: to impeach those family members who denied knowing that appellant had a mental illness. In this context, there is no reasonable possibility the jury believed the prosecutor was arguing that all of appellant's family members who testified in the guilt phase denied his mental illness. (See *People v. Frye, supra,* 18 Cal.4th at p. 970 ["[W]e 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements"].) Moreover, any misunderstanding that may have resulted from the prosecutor's passing remark was cured by defense counsel's closing argument pointing out Elijah's testimony to the jury. (See RT 2767, 2792, 2814-2815; *People v. Combs* (2004) 34 Cal.4th 821, 855 [finding that any doubts the jury may have had as to the meaning of a comment made by the prosecutor during his closing argument were clarified by defense counsel's subsequent closing argument and the prosecutor's own rebuttal argument]; *People v. Anderson* (1990) 52 Cal.3d 453, 472 [defense counsel clarified prosecutor's remarks during his own closing argument].) As one further point, we note that just because Elijah claimed to have discussed appellant's mental illness with unidentified family members (see RT 2517, 2528), did not mean the prosecutor was foreclosed from pointing out the testimony of Sammie Lee, Ruth and Willie Cole, and James Blacksher, all of whom denied knowledge of appellant's mental illness.

Finally, there is no support for appellant's contention that the prosecutor improperly argued outside the record that the evidence of the mental health records introduced through Dr. Davenport's testimony "came from when

[appellant] was incarcerated." (AOB 270.) On the contrary, Dr. Davenport testified on cross-examination that he obtained the records from the Criminal Justice Mental Health Unit. (RT 2647.) The prosecutor therefore properly argued that appellant was incarcerated when he received the mental health treatment testified to by Dr. Davenport, which reinforced his argument that appellant's family members were not lying when they testified that they were unaware of appellant's mental health problems.

4. The Prosecutor Properly Commented On The Defense Strategy

Appellant next contends the prosecutor improperly argued outside the record in observing that appellant "wants no part of the special circumstance" because "[h]e knows what it means." (AOB 270-271.) To resolve appellant's claim, the prosecutor's comments must be considered in the context in which they were made:

> A few words about the defense. There is no factual defense to this case. Absolutely none. There are no facts that have either been developed through cross-examination or produced from that chair by the defense that can get him off the hook here.
>
> It was interesting, when I listened to the opening statement and reviewed it, something that you were told that I want to read back to you.
>
> You were told this twice: One, Mr. Blacksher did not commit any crimes. He didn't do anything at all.
>
> But then, if he did, his state of mind is such that these weren't murders in the first degree.
>
> And then at the end of opening statement, again, there is more than a reasonable doubt that he did it. But if he did do it, there was no specific intent to commit the crime. He's not guilty, he's wrongfully charged. He's completely innocent.
>
> But if he did it, the special circumstance is not true.
>
> Mr. Blacksher wants no part of the special circumstance. He knows what it means.
>
> So basically, I don't really think the defense, at this point, is going to try to argue to you that Mr. Blacksher didn't do it.

MR. BROOME [Defense counsel]: I'm going to object, what the defense might argue.

THE COURT: Sustained.

(RT 2752-2753.)

Appellant contends that "[a]lthough the trial court sustained appellant's objection . . . the jury was not admonished." (AOB 271.) Appellant, however, did not object to the prosecutor's comments that appellant wanted "no part of the special circumstance." Rather, appellant objected only to the last portion of the prosecutor's argument regarding "what the defense might argue." Accordingly, appellant has failed to preserve his claim on appeal, i.e., that the prosecutor improperly argued outside the record regarding appellant wanting no part of the special circumstance. Even assuming appellant properly objected to the prosecutor's comment, he cannot fault the trial court for failing to admonish the jury when he did not request that the jury be admonished.

In any event, there is no support for appellant's position that the prosecutor argued outside the record. In remarking that appellant wanted "no part of the special circumstance," the prosecutor did not suggest that he knew something the jury did not know, or that he was referring to evidence outside the record. Rather the prosecutor was merely pointing out that appellant's overarching goal in the case was to avoid the death penalty, a fact that would have been abundantly clear to the jury. The prosecutor then used this fact to explain the defense strategy to the jury. (See RT 2752-2754.) Considered in context, the prosecutor's comment was not improper.

5. The Prosecutor Did Not Engage In Misconduct By Pointing Out That Appellant Had Failed To Produce All Of His Social Security Records

Appellant next contends the prosecutor misstated the record when he argued that the evidence submitted by the defense concerning appellant's

history of social security disability payments did not contain information about appellant's medical condition. (AOB 273.) We disagree.

The following background information is necessary for a proper discussion of appellant's claim. During the guilt phase, the parties stipulated that appellant had applied for social security income disability payments on four different occasions. (RT 2624.) On two of those occasions—in 1979 and again in 1986—appellant's applications were approved and he thereafter received disability payments. (RT 2624-2625.) Appellant was found eligible to receive such payments based on a disability of paranoid schizophrenia. (RT 2624-2625.) However, because appellant's social security income folder was not available at the local regional office, there was no information concerning appellant's medical condition or the names or addresses of his treating or diagnostic physicians:

> Mr. Blacksher's S.S.I. folder is not available locally. It was sent to the federal records center in Wilkes-Barre, Pennsylvania, W-I-L-K-E-S, dash, B-A-R-R-E. If it has not already been destroyed, it would take two to three months to locate it. Therefore, we have no information available concerning his medical condition or the names or addresses of his treating or diagnostic physician.

(RT 2624.)

During the prosecutor's closing argument, he argued as follows:

> Now, I know when the defense introduced the social security evidence the other day, that there was some unsettling among the members of the jury, because the social security evidence –
>
> MR. BROOME [Defense counsel]: I'm going to object to the form of that argument, that's improper.
>
> THE COURT: Sustained.
>
> MR. TINGLE [Prosecutor]: There is – Mr. Blacksher's social security folder is not locally available. It was sent –
>
> MR. BROOME: I –
>
> THE COURT: Mr. Broom[e], you introduced it, he can refer to it.
>
> MR. BROOME: If he's going to introduce it –

MR. TINGLE: Mr. Blacksher's SSI folder is not available locally. It was sent to the federal records center in Wilkes-Barre, Pennsylvania. If it has not already been destroyed, it would take two to three months to locate; therefore, we have no information available concerning his medical condition or the names or addresses of his treating or diagnostic physician.

What that means is, this case is three years old. And two to three months in that time frame is a very short period of time. But that evidence has not been produced for you. And there's no evidence that the records do not exist. It's just hanging there. What you are told –

MR. BROOME: Object, this is improper, what's – that there's no records produced?

THE COURT: I'm not sure where this is going, Mr. Tingle. Do you want to step into chambers out of the presence of the jury.

(RT 2755-2756.)

In chambers, the prosecutor explained that the defense had presented evidence that appellant had received social security payments on the basis of a medical disability, but that they had presented no documentation in support of that medical disability. (RT 2757.) The prosecutor stated that he was entitled to comment on the absence of such evidence. (RT 2757.) Defense counsel argued that "the information ha[d] been automated and computerized," that only the "raw data, particularly the names of the physicians" was unavailable, and that such records were ordinarily destroyed in the course of business. (RT 2757.) The court remarked that the prosecutor's argument was "confus[ing] the hell out of everybody, including me," and that there was no need for the prosecutor to go any further in his argument. (RT 2757-2758.) The court noted that although it had not been entirely convinced the social security evidence was "relevant in the first place," it came in at trial without any objection. (RT 2757-2758.) That being said, the court observed, "[A]t this point, I don't see where it's accomplishing anything, unless it is referred to by the defense argument."

(RT 2757-2758.) The prosecutor did not refer to the social security evidence again when he resumed his closing argument. (RT 2758-2760.)

Appellant argues that "[t]he prosecutor's argument that 'there was no information available concerning [appellant's] medical condition' was a misstatement of the record." (AOB 273.) Although it is misconduct for a prosecutor to misstate the facts (*People v. Boyette, supra,* 29 Cal.4th at p. 435), it is difficult to see how the prosecutor misstated the record in this case when he quoted the stipulation read to the jury verbatim: "[W]e have no information available concerning [appellant's] medical condition." (RT 2624.) Moreover, the prosecutor properly commented on the defense's failure to present such evidence in the course of arguing the weakness of the social security evidence. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1277 [prosecutor may properly comment on the defense's failure to present material evidence].)

Finally, there is no merit to appellant's claim that the prosecutor committed misconduct in remarking that there was some "unsettling" among the members of the jury at the time the defense presented the social security evidence. (AOB 273 & fn. 64.) Because defense counsel cut the prosecutor off before he could complete his sentence, it is not clear what the prosecutor even meant by his comment, let alone whether the comment constituted misconduct. It is thus difficult to see how any prejudice could have resulted from the remark.

B. Sanity Phase

1. The Prosecutor Properly Offered An Explanation To The Jury As To Why He Did Not Present The Expert Witnesses Promised In His Opening Statement

Appellant next complains of several instances of purported prosecutorial misconduct during the prosecutor's sanity-phase closing argument. Appellant's first assignment of error concerns the following remarks by the prosecutor:

> You know, I told you something in opening statement that I want to clean up a little bit now, because I really thought I was going to call two psychologists and two psychiatrists. But after I listened to Dr. Pierce, because I watched. It may not seem like it, but I do. After I watched you on Tuesday falling asleep, shuffling, waiting for him to close that book and stop this mess and come on up here and get real in 1998 instead of flashing back in the past in 1978, I said, man, if I put on any psychiatric testimony these people are going to kill me.
>
> MS. STANLEY [Defense counsel]: Your Honor, I will object to this as inappropriate and irrelevant.
>
> THE COURT: Overruled. It is all right.
>
> MR. TINGLE [Prosecutor]: They will have my head. I mean, the doctor is reading. He is not looking at anyone. He is just, you know, throw the text down there and let you do it. So I said no.
>
> I don't think Dr. Pierce had anywhere to go, so I cut the case short and deal with him on the basis of his own testimony because he didn't get there.

(RT 3457-3458.)

Appellant contends that the prosecutor improperly argued outside the record by suggesting that he had psychiatric evidence unfavorable to appellant that he chose not to present because he did not want to bore or annoy the jury. (AOB 275.) Again, however, because appellant did not object to the prosecutor's remarks on this same specific ground below, he has waived his claim on appeal. In any event, there is no merit to appellant's claim.

In making the above remarks, the prosecutor was simply explaining to the jury why he did not end up presenting the expert witnesses he had promised in his opening statement. While he noted that he had initially planned on calling "two psychologists and two psychiatrists" to give "psychiatric testimony," he did not go into any further detail regarding the expected testimony. Accordingly, it cannot be said that the prosecutor improperly argued facts outside the record.

Appellant cites *People v. Boyette, supra,* 29 Cal.4th at p. 452, for the proposition that "[i]t is misconduct to suggest during closing argument that there was evidence that was not presented just to save the jury time." (AOB 275.)[45/] The situation in *Boyette*, however, was very different from that present in this case. In *Boyette*, the prosecutor asked the defense expert a series of hypothetical questions based on facts that were never admitted at trial. (*People v. Boyette, supra,* 29 Cal.4th at pp. 449-452.) Later, during closing argument, the prosecutor suggested that she had evidence that supported her line of questioning, but simply chose not to present it in the interest of saving the jury time. (*Id.* at p. 452.) The Court found that while the prosecutor committed misconduct in "[s]uggesting that she had witnesses who would have testified to certain facts when she did not call such witnesses," the trial court's instructions to the jury cured any potential prejudice. (*Ibid.*)

Unlike *Boyette*, the prosecutor here was not trying shore up his case by suggesting that there was additional favorable evidence he had not presented to the jury. Rather, the prosecutor was merely explaining why he did not end up calling certain witnesses promised in his opening statement (see RT 2967, 2971-2972) in response to defense counsel's argument pointing out such failure on his part (see RT 3438, 3448). Under these circumstances, no misconduct is shown.

Even if the prosecutor's argument constituted misconduct, appellant suffered no prejudice in light of the brevity of the remarks and the trial court's instructions that the jury's decision should be based on the "evidence received in the trial and not from any other source," and that "statements made by the attorneys during the trial are not evidence." (See RT 3417-3418; *People v.*

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45. We note that appellant's pinpoint citation to page 437 of the *Boyette* opinion is incorrect. As noted above, the correct page number is 452.

Boyette, supra, 29 Cal.4th at p. 453; see also *People v. Wrest, supra,* 3 Cal.4th at p. 1111 [jury presumed to follow court's instructions].)

2. The Prosecutor Did Not Engage In Misconduct In Referring To Ruth's Testimony That Appellant Was Put On Social Security Disability Income Along With His Mother

Appellant next contends that the prosecutor improperly argued outside the record with respect to appellant's receipt of Social Security Disability Income. (AOB 276.) The following remarks are at issue:

> Now, this is a case about personal accountability and personal responsibility. It is not about delusions or all that other psycho babble that has nothing to do with the issues before you. This is a con man. I will give you a couple examples on the evidence.
>
> You find out yesterday that his hook into Social Security was his mother's disability of some kind.
>
> MS. STANLEY [Defense counsel]: Objection, your Honor. Lack of foundation.
>
> THE COURT: Overruled.
>
> MR. TINGLE [Prosecutor]: That is what Ruth Cole said. Mom got him in. That is not paranoid schizophrenia, is it?

(RT 3458-3459.)

By specifically relying on Ruth's testimony in support of his argument (see RT 3377-3378), the prosecutor did not improperly argue facts outside the record. Nor was the prosecutor's argument inconsistent with the Social Security evidence presented earlier during the guilt phase. Ruth's testimony that appellant was first put on Social Security as a teenager because of his mother's disability did not conflict with the records introduced by the defense showing that appellant also received benefits as a young adult as the result of his own disability. Moreover, the prosecutor properly used appellant's early experience with the Social Security Administration in support of his argument that appellant knew how to "work" the system. Just because the prosecutor stipulated to the fact that appellant received Social Security benefits for a disability of paranoid schizophrenia did not preclude the prosecutor from

arguing that appellant was faking his symptoms of mental illness. Again, no misconduct is shown.

3. The Prosecutor Did Not Commit Misconduct In Attacking The Basis For Dr. Pierce's Opinion And Urging The Jury To Disregard Appellant's Courtroom Demeanor In Evaluating The Evidence

Appellant next contends that the prosecutor improperly invaded the province of the jury at various points during his closing argument. (AOB 276-278.) The following remarks are at issue:

> So when you throw lies into the mix of the information that [appellant] gave [Dr. Pierce], the doctor comes to court and says, this is my opinion based in part o[n] what he told me, and then the underpinnings for the doctor's opinions are suspect, that is why the doctor looked ridiculous and didn't make any sense to you. Because the premise is not the doctor himself, but the premises were entirely false.

(RT 3463-3464.) Appellant contends that the prosecutor's comment that "the doctor looked ridiculous and didn't make any sense to you," was an improper expression of the "prosecutor's belief regarding how the jury assessed Dr. Pierce's testimony." (AOB 277.) Because appellant did not object to the prosecutor's remarks, however, he has failed to preserve his claim on appeal. Even if the claim has not been waived, it lacks merit.

In making the above comments, the prosecutor properly argued a reasonable inference to be drawn from the evidence before the jury. Thus, the prosecutor argued that Dr. Pierce looked "ridiculous" and "didn't make any sense" because his opinion was based in part on information provided by appellant. Because the prosecution has broad discretion to state its views as to what inferences may be drawn from the evidence before the jury, the prosecutor's argument did not constitute misconduct. (See *People v. Welch, supra,* 20 Cal.4th at pp. 752-753.)

Appellant also takes issue with the following passage:

> [Dr. Pierce] couldn't tell you about the facts of the case. Notice what he reviewed? He nibbled around the edges. When I went to the core, I got a lot of "I don't know," "I am not sure," because he doesn't know about the facts. And the reason he doesn't know about the facts is because the predicate for not guilty by reason of insanity plea is an admission at some point some level of responsibility for the acts.
>
> With an admission it could be said, well I killed them and I ate their flesh and I drove stakes through their hearts because voices told me this is what I was supposed to do, something like that.
>
> With a denial, he has to stay away from it. That is why he can't tell you anything. Denial.
>
> What was even worse was, you know, as a prosecutor, I do have the opportunity to sit closer to you and I got the glares and the looks. I don't like the way it invaded your province when he sat in court and laughed. I had to take a look at you because I wondered if anybody heard that during Dick Moore's cross-examination when Dick Moore was establishing, hey, this man was hostile, this man was intense and agitated.
>
> The man sat up here and laughed. And I know you heard it. And that is cold and that is wrong. Because B.D. and Torey ain't laughing. The family members you have seen aren't laughing. This was hard.
>
> You see a man like Artis come in here and get broken down by this process, have to deal with these insinuations about his family. Ain't nothing to laugh about. This ain't no joke. But it was funny to him. I'm glad you saw it.

(RT 3478.)

Again, because appellant did not object to the prosecutor's argument, he has waived his challenge to the argument on appeal. Appellant disagrees, contending that his failure to object should be excused for two reasons. First, appellant appears to suggest that he was somehow prevented from objecting because of the trial court's earlier request during the prosecutor's guilt-phase opening statement that defense counsel keep objections to a minimum. (AOB 277, fn. 66; see RT 1705.) We fail to see how such a request by the trial court, made in direct response to defense counsel's repeated objections to the

prosecutor's guilt-phase opening statement, in any way prevented defense counsel from raising valid objections during the prosecutor's sanity-phase closing argument. In fact, such a contention is belied by defense counsel's numerous objections to the prosecutor's guilt-phase closing argument.

Second, appellant contends that it would have been futile for defense counsel to object because the trial court had already overruled a number of counsel's valid objections. (AOB 277, fn. 66.) Defense counsel, however, had made only two objections up to that point (RT 3457-3459), and the fact that the court had overruled both objections provided no grounds for believing that any further objections would be futile. As this was hardly a case in which appellant's obligation to object was excused due to extreme circumstances (*People v. Hill, supra,* 17 Cal.4th at pp. 820-821), the general waiver doctrine applies. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.)

In any event, appellant's challenge to the above comments by the prosecutor fails. Contrary to appellant's contentions, the prosecutor did not "assert[] that appellant was 'in denial' about the killings which was why 'he can't tell you anything.'" (AOB 277.) Far from commenting on appellant's failure to testify (*Griffin v. California* (1965) 380 U.S. 609, 613-615), the prosecutor was merely pointing out to the jury that appellant denied any involvement in the murders when speaking to Dr. Pierce, which was why Dr. Pierce could not tell the jury "anything" about the facts of the case when discussing his opinion of appellant's sanity at the time of the murders. Because the prosecutor made his comments in the course of discussing Dr. Pierce's testimony, "[t]he comments cannot fairly be interpreted as referring to defendant's failure to testify." (*People v. Young, supra,* 34 Cal.4th at p. 1196.)

Moreover, the prosecutor did not invade the province of the jury by imploring jurors not to let appellant's behavior during the testimony of certain prosecution witnesses affect their evaluation of such testimony. (*People v.*

Boyette, supra, 29 Cal.4th at p. 434 [to the extent the prosecutor was urging the jury to disregard the defendant's demeanor, there was no misconduct]; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1058-1059, overruled on other grounds by *Stansbury v. California* (1994) 511 U.S. 318 [prosecutor's exhortation to the jury to ignore the defendant's demeanor and decide the case on the basis of evidence is not misconduct].) The prosecutor did not express his "belief" as to what jurors saw, but rather his own personal observations of jurors, whom he saw watching appellant as he engaged in inappropriate behavior. Knowing the jurors observed appellant's demeanor, it was entirely proper for the prosecutor to address the topic during his closing argument.

C. Penalty Phase

1. The Prosecutor Properly Commented On Appellant's Lack Of Remorse

Appellant also raises several challenges to the prosecutor's penalty phase closing argument. As his first assignment of error, appellant contends that "[t]he prosecutor's argument as to appellant's supposed lack of remorse was not based on record evidence," but rather on appellant's demeanor during the trial. (AOB 282.) Because it is not misconduct to comment on the defendant's demeanor in the context of his lack of remorse, however, appellant's claim lacks merit. In arguing that appellant did not deserve the jury's sympathy, the prosecutor made the following statements:

> Is this a man where sympathy is worthwhile?
>
> Not on what is before you.
>
> A moral balancing to evaluate one, evaluate the other. Which is right? Death, life. Which is right?
>
> Nonchalant man. No emotion. Sat up here through a horrible trial, horrible proof, terrible, terrible things. A lot said about him, but just what he did. Heart of ice.
>
> MR. BROOME [Defense counsel]: Object to that characterization. He is talking about lack of remorse and that isn't proper.

THE COURT: Overruled.

(RT 3938-3939.) Although appellant objected to the prosecutor's argument, he did not object on the same ground now being raised on appeal: that the prosecutor improperly relied on appellant's courtroom demeanor in arguing lack of remorse. Accordingly, the claim is waived on appeal. In any event, there is no merit to the claim. The prosecutor properly referred to appellant's courtroom demeanor in arguing that he was not entitled to the jury's sympathy. During the penalty phase, appellant placed his own character in issue as a mitigating factor. The jurors were therefore entitled to rely on their observations of him in the courtroom in deciding whether he was deserving of their sympathy. (*People v. Heishman* (1988) 45 Cal.3d 147, 197; see also *People v. Navarette, supra,* 30 Cal.4th at p. 519 [finding no misconduct in prosecutor's penalty-phase argument that the defendant showed no remorse through his courtroom demeanor].) Accordingly, the prosecutor did not commit misconduct in referring to appellant's courtroom demeanor in the context of responding to appellant's plea for sympathy.

Appellant also contends that to the extent the prosecutor's argument was based on evidence that appellant ate a big breakfast immediately after the murders, such argument improperly invited the jury to "weigh as aggravating evidence the fact that appellant performed necessarily bodily functions." (AOB 282.) The prosecutor, however, did not engage in misconduct in referring to such evidence.

In a statement to the district attorney's office two days after the murders, appellant said that he drove directly to a Carrows Restaurant immediately after the murders and ate a breakfast of eggs, bacon, french toast, and coffee. (Exhibit 111 at 18-20.) The prosecutor cited this evidence in support of his argument that appellant showed no signs of remorse after murdering his sister and nephew. (RT 3941-3942.) According to appellant, the prosecutor could

not rely on the fact that he "continued to live, breathe and eat after the crimes" to show a lack of remorse. (AOB 283.) The prosecutor's argument, however, did not focus on appellant's ability to go on living in the general sense after his crimes. Rather, the prosecutor pointed out appellant's specific behavior immediately after the murders. (See *People v. Crittenden, supra,* 9 Cal.4th at p. 147 [prosecutor properly referred to the defendant's callous behavior after the killings in arguing that the defendant showed a lack of remorse].) The fact that appellant was able to stomach a full breakfast immediately after the murders showed a callousness on his part that was indicative of a lack of remorse, and as such, was properly considered by the jury. (See *People v. Pollock, supra,* 32 Cal.4th at p. 1185 [whether the defendant's actions after the murders showed a lack of remorse was a factual issue for the jury to decide].)

Appellant also contends that the prosecutor improperly argued to the jury that it could consider his lack of remorse as an aggravating factor. (RT 282.) The prosecutor did no such thing. Instead, as the record demonstrates, the prosecutor emphasized to the jury that it could consider appellant's lack of remorse only to the extent it showed an absence of mitigation. (RT 3943.) Accordingly, the prosecutor's argument was proper. (*People v. Pollock, supra,* 32 Cal.4th at p. 1185 [when evidence of postcrime remorselessness has been presented, the prosecutor may stress that remorse is unavailable as a mitigating factor].)

Nor did the prosecutor improperly refer to appellant's failure to testify in discussing his lack of remorse. (*People v. Combs, supra,* 34 Cal.4th at p. 867.) Appellant takes issue with the following remarks by the prosecutor:

> This is Erven Blacksher. This is what lies in the heart of Erven Blacksher.
>
> I got to have my eggs.
>
> I got to have my coffee.
>
> I got to have my sausage.
>
> I have to have my french toast.

They can bleed to death.
They can die.
They can do whatever they want to do.
They can drop dead, I won't care.
I am hungry and I have to have something to eat so I can go to Reno and hide for a couple days.
That is your man, ladies and gentlemen. That is the man that you are asked to judge who can stop and say I did all this, the deed is done, but I have to have a bite to eat.

(RT 3941-3942.) Appellant contends that such remarks by the prosecutor "suppl[ied] for the jury testimony which appellant never gave, which call[ed] attention to the fact that he did not testify." (AOB 283.) It is not reasonably likely, however, that the jury construed the prosecutor's remarks as a comment on appellant's failure to testify. Rather, it is apparent that the prosecutor was referring to imagined musings by appellant in making his point that appellant appeared more concerned with his own well-being than that of his sister or nephew in the immediate aftermath of the murders. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1303, fn. 48 ["The imagined statements by [the defendant] were no more than sarcastic hyperbole identifying what the prosecutor believed to be the weakness in the defense explanation of the events"].) As such, the prosecutor's obvious hyperbole did not improperly call attention, either directly or indirectly, on appellant's failure to testify. (*People v. Combs, supra,* 34 Cal.4th at p. 867.)

Finally, appellant takes issue with the following arguments by the prosecutor:

This is an absence of mitigation. No sorrow for his victims. No expression of anything.
When you're going to hear him in a few minutes describe his relationship with his sister, this is what he tells you: that him and [Versenia] have a beautiful relationship; Torey was his favorite nephew and Torey was smiling in his sleep.
This came two days after he had gone to Reno and came back. This is what he had to say about the lives he took. This is an absence of mitigation, ladies and gentlemen, and it shows you

> deeply in his heart what he felt about what he did and what he felt about the people he did it to.
>
> MR. BROOME [Defense counsel]: I'm going to object; that's a misstatement as to the law, what he has on the board, as it pertains to the law of mitigation.
>
> THE COURT: Overruled.

(RT 3943-3944.)

> On page 2, this whole statement is an absence of remorse by this man as he talks about the quality of his relationship with the victims . . . Torey was his favorite nephew and he was his favorite uncle; how Torey was asleep and smiling at the time he did this; no mental problems.
>
> And then the whole idea at the end . . . when the prosecutor, Mr. Moore, has really had enough of all these lies and he turns on him and says: look, man, this is your favorite nephew, this is your mother, this is nothing unusual?
>
> No. And he calls everybody that he contacted a liar. They're all lying on him. And you know that is not true.

(RT 3953-3954.) Appellant argues that his statements that he had good relationships with Versenia and Torey "showed sympathy for and empathy with his sister and nephew," and could not be legitimately used by the prosecutor to argue lack of remorse. (AOB 283.) Having failed to raise this same specific objection below, however, appellant has waived his claim on appeal. In any event, the claim fails on the merits. The point of the prosecutor's argument was that appellant lied to authorities about having good relationships with his sister and nephew in order to deflect suspicion from himself as their murderer. Appellant's calculated deception showed that he was more preoccupied with protecting himself than feeling remorse for what he had done. As this was a reasonable inference to be drawn from such evidence, the prosecutor did not engage in misconduct by arguing it to the jury. (See *People v. Pollock, supra,* 32 Cal.4th at p. 1185 [whether the defendant's actions after the murders showed a lack of remorse was a factual issue for the jury to decide].)

2. The Prosecutor Properly Argued The Lack Of Mitigation Evidence

Appellant next contends that the prosecutor improperly argued the absence of mitigating evidence in this case. (AOB 283-285.) We disagree.

As appellant notes, the prosecution may argue that the lack of mitigating factors weighs against leniency, so long as there is no suggestion that the absence of mitigating evidence weighs in favor of the death penalty. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1034.) Although appellant recognizes this well-established rule, he argues that the prosecutor was not entitled to argue the absence of mitigating factors in his case because "it was simply not true that there was an absence of mitigating evidence." (AOB 284.) Appellant argues that the "record is replete with evidence that appellant suffered from a serious and debilitating mental illness." (AOB 284.) The prosecutor, however, obviously disagreed with this view, and was thus entitled to argue his own interpretation of the evidence to the jury. Moreover, such argument was not improper or unfair given defense counsel's opportunity to assert contrary argument and analysis. (*People v. Ruiz, supra,* 44 Cal.3d at p. 620.)

Appellant next asserts that the prosecutor improperly argued the lack of mitigating evidence in general rather than focusing on the absence of specific mitigating factors in particular. (AOB 284.) Assuming for the sake of argument that a prosecutor may not argue the absence of mitigating evidence in general, that is not what occurred in this case. Rather, the prosecutor discussed the specific evidence before the jury in arguing the absence of mitigating factors. (See RT 3929-3944, 3953-3954.) Accordingly, there is no support for appellant's argument that the prosecutor argued facts outside the record. (See AOB 285.)

3. The Prosecutor Did Not Encourage The Jury To Double Count Appellant's Prior Convictions

Appellant's next assignment of error concerns the prosecutor's argument on appellant's prior, violent behavior. (AOB 285.) In the course of discussing appellant's prior felony convictions, the prosecutor referred to the specific facts underlying one of those prior convictions—appellant's assault on another inmate in a holding cell—in arguing that appellant had engaged in prior violent criminal activity. The prosecutor then noted:

> I'm not going to comment on this again, because I've already referred to it as a prior felony conviction and you can't double count.
>
> MR. BROOME [Defense counsel]: I'm going to object to that, your Honor, he's doing it as he speaks.
>
> THE COURT: Objection overruled.
>
> MR. TINGLE [Prosecutor]: You can't double count. I'm asking you to consider this one time and that's all.

(RT 3947.) Appellant contends that the prosecutor made use of an improper rhetorical device—paraleipsis—in making the above argument. (AOB 285.) Appellant asserts that even though the prosecutor warned the jury not to double count appellant's prior convictions, his argument was phrased in such a way to suggest just the opposite. (AOB 285.) Appellant cites *People v. Wrest, supra,* 3 Cal.4th 1088, in support of his assertion.

In *Wrest*, the prosecutor repeatedly argued that he was not going to discuss certain evidence, but then proceeded to do just that. (*People v. Wrest, supra,* 3 Cal.4th at pp. 1105-1106.) Here, on the other hand, after discussing appellant's prior convictions and the specific facts underlying one of those prior convictions, the prosecutor simply reminded the jury that it could not double count that particular prior conviction. Far from encouraging the jury to double count, the prosecutor sought to clear up any confusion that may have resulted from his argument, i.e., that he was referring to two separate offenses.

Appellant contends that the prosecutor used this "same tactic" in pointing out to the jury that Artis was so angry at appellant that he wanted to kill him, but then informing the jury that anger was an improper basis for its decision. (AOB 286.) To properly evaluate appellant's claim, the prosecutor's remarks must be considered in context. In the course of arguing that appellant was not the kind, loving person the defense had made him out to be, the prosecutor pointed out appellant's violent behavior towards his own, ailing father, and his girlfriend, LaDonna Taylor. After going over the details of appellant's beating and rape of Taylor, the prosecutor made the following remarks:

> Ladies and gentlemen, animals in the jungle treat each other with more dignity than that. This was a woman who had been with him a number of months, but he was aroused by what he did to her, it made him feel good, he wanted some, so he took it. She was angry with him, Artis was angry, both said under different circumstances, they were mad enough to kill him.
>
> MR. BROOME [Defense counsel]: Objection, that's a misstatement of the evidence.
>
> THE COURT: I don't remember about Artis, I remember as to the other one. Objection –
>
> MR. TINGLE[Prosecutor]: Artis – excuse me, let me address it like this. When Artis left the scene of the crimes, he was looking for his brother. He was going to do his brother in and that's the basis of the inference.
>
> MR. BROOME: Objection; that's a misstatement of the evidence.
>
> THE COURT: Overruled.
>
> MR. BROOME: He did not say that.
>
> THE COURT: Overruled.
>
> MR. TINGLE: Moving past that, I am not asking you to base your decision on anger. It's not fair.
>
> They were mad at him then, they had a right to be. I'm asking you to reason it and evaluate the evidence as you have said you would do, that's all. Anger is not an appropriate basis for any decision in this case.

(RT 3950-3951.)

As an initial matter, appellant has waived his challenge to the prosecutor's remarks on appeal by failing to object on the same ground below. In any event, there was nothing improper about the prosecutor's remarks. Rather, the prosecutor was merely pointing out the effect appellant's vile behavior had on those closest to him in emphasizing the heinousness of his acts. The prosecutor then clarified that such anger was relevant to the jury's decision only to the extent it reflected on appellant's character. Because a reasonable inference could be drawn from such evidence, the prosecutor did not engage in misconduct in pointing this out to the jury.

4. The Prosecutor Did Not Commit Misconduct In Urging The Jury To Return A Verdict Of Death

Finally, appellant contends that the prosecutor improperly urged the jury to return a verdict of death "based on his own experience that death was the proper penalty in this case" and would provide a deterrent effect on the rest of society. (AOB 286-287.) We address both of these contentions in turn. The first claim concerns the prosecutor's opening remarks in his penalty-phase closing argument:

> I am going to ask you to bear with me this morning and into the afternoon. When I sit down today I do not want to leave any stone unturned as I construe this evidence for you to show that what you are essentially asked to deal with is a man who is absolutely evil in this court and totally cold and heartless and has demonstrated those propensities long before he took the lives involved.
>
> I have been a prosecutor for a long time, been in the eye of the storm for many, many years. One thing about this process, it teaches you a lot of humility, because what you are and what you stand for is readily apparent to everyone. Any effort and insincerity transparency is readily seen by everyone and will come back to bite real hard anyone who tries that.
>
> What this teaches you most of all is humility and restraint. In that regard, I would like to say one thing at the outset.

> As you worked your way through the sanity and the guilt phases of this case and resolved them against Mr. Blacksher, now that we are here, I in no way assume by any stretch that you will do as I ask. There is no such assumption present in me because everyone's work is cut out for them.
>
> What I ask you to do is start with even and give me the chance I need to give you what you need, the direction you need on this evidence to come back with the punishment I am asking you. But it is not based on an assumption, because I have too much respect for this process.

(RT 3909-3910.) First, because appellant failed to object to the above remarks, he has waived his claim on appeal. Second, it is not reasonably probable that the jurors misconstrued the prosecutor's remarks to mean that he was urging them to impose the death penalty "based on his own experience that death was the proper penalty." (See AOB 287.) Far from urging jurors to return a verdict of death based on his assurances that death was the proper penalty, the prosecutor informed jurors that experience had taught him not to presume they would simply do as he asked, and that he took their role as neutral arbiters very seriously. The prosecutor then asked jurors to have patience with him while he attempted to assist them with their difficult decision by going over all the evidence before them. Nothing in the prosecutor's argument could be fairly construed as a request for the death penalty based on factors unrelated to the evidence presented at trial. Instead, the challenged remarks were part of a broader discussion in which the prosecutor emphasized the gravity of the jurors' decision and their duty to consider all of the evidence before reaching a decision. The argument was therefore proper. (*People v. Millwee* (1998) 18 Cal.4th 96, 154-155.)

Appellant also takes issue with the following remarks made by the prosecutor:

> The death penalty is not a deterrent. And I suggest to you this is what it is, and the true purpose of this law – I always go back

to the sense of community and I've done that throughout each stage of this case.

You start with the notion that when you are out there in the community you are going to act a certain way. And we exist because we embody that principle as to ourselves and each other. It is called respect. Very simple. It says, we may disagree, but I respect your right to disagree with me. I respect your right to make your own decisions. I may not like it. I may hate it. I may not like what you do, but I respect your right to do it.

And in doing that, we find ourselves rising to a plane above the beast in the jungle because we coexist based on that principle. That principle is our community. We learn it in the family. We take it to the work place, to our relationships. But it binds us as one because without that, ladies and gentlemen, we don't have anything.

. . .

So that when Erven Blacksher shoots his people to death, the statement resounds far beyond 1231 Allston Way; it touches and permeates the very essence of what holds us altogether, regardless of where we live, where we are from in this community. It gets so bad you got to bring the people forward and you got to bring the people forward to say, look, establish the boundaries here.

The boundaries have taken a beating in this case. We have suffered a wound as a body. And it must be addressed in the most serious way possible.

Looking evil straight in the eye is difficult. It is distasteful. It is unpleasant. But it has got to be done because he is so far beyond the norm that binds us all that there is nothing else to do.

A pronouncement of death to Erven Blacksher says: the intolerable nature of the evil acts you have perpetrated, based on the quality of man that you are, must be punished to the maximum. It is a cleansing and it is a catharsis that restores in some vital sense, order and continuity to what we have.

Erven can make choices. For all you've heard about him, I haven't seen anything that affects his ability to choose and select options.

It is that very humanity of his, and the ability to make moral choices, that now requires Erven Ray Blacksher to accept the full consequences of these crimes for the murders of his sister and nephew. That is the key to the process. You measure him by what he is and what he's done. And I think your choice is clear.

> The idea of death as a just verdict is not something that just emerged yesterday. One of the instructions that you got closes by saying you must neither be influenced by bias or prejudiced against the defendant nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously and reach a just verdict.
>
> So justice works both ways. The question is: what is just for him? What is fair for him?
>
> This is a very personal statement from you to him about the quality of what he did and the quality of what he does.
>
> It is not about deterrence, because Erven has to spend a lot – he is too old. He is not going to change. What you see here is a finished product. And that is what he always will be. He is explosive and he is dangerous and he just does not care.

(RT 3915-3918.) Appellant contends that the above argument by the prosecutor "was a thinly veiled argument for deterrence and was thus improper." (AOB 287.) Not so. The point of the prosecutor's argument was that appellant's actions in murdering his own kin were so outside the bounds of behavior considered acceptable by society that the only just punishment was death. The prosecutor even emphasized that the point of returning a verdict of death was not for purposes of deterrence. It is thus not reasonably likely that the jury misconstrued the prosecutor's remarks as an "argument for deterrence." (See AOB 287.)

D. Appellant Suffered No Prejudice As A Result Of The Prosecutor's Arguments

Finally, appellant's claims of cumulative prejudice also fail. (See AOB 274, 278-279, 287-288.) "The ultimate question to be decided is, had the prosecutor refrained from the conduct, is it reasonably probable that a result more favorable to the defendant would have occurred." (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) "[I]n the absence of prejudice to the fairness of a trial, prosecutor[ial] misconduct will not trigger reversal." (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Here, there was either no misconduct at all or the misconduct was minor enough that no prejudice arose from it. Thus, whether considered separately or cumulatively, the challenged conduct to which appellant points does not establish prejudicial misconduct. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1220-1221 [finding that only "extreme instances of prosecutorial misconduct" warrant reversal].) Accordingly, appellant's claims of cumulative misconduct should be rejected.

XXII.

ANY ERROR IN THE COURT'S FAILURE TO RE-INSTRUCT THE JURY ON THE CREDIBILITY OF WITNESSES DURING THE PENALTY PHASE WAS HARMLESS

Appellant contends that the trial court's failure to re-instruct the jury during the penalty phase on the applicable principles of evaluating the credibility of witnesses violated his federal constitutional rights to due process and a reliable sentencing determination. (AOB 289.) We submit that any error in the omission of such instructions was nonprejudicial.

At the conclusion of the penalty phase, the trial court instructed the jury with CALJIC No. 8.84.1 ("Duty Of Jury—Penalty Proceeding"), as follows: "You will now be instructed as to all the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial." (RT 3896.) The court did not instruct the jury on the criteria to be used to evaluate the credibility of the penalty-phase witnesses. (See RT 3895-3906, 4006-4008.)

A "trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.) In *Carter*, however, this Court found no prejudice in a situation identical to the one presented in this case: where the trial court instructed the penalty jury to disregard the guilt phase instructions and then failed to re-instruct the jury with instructions relating to the credibility of witnesses. (*Id.* at pp. 1218-1220.) As in *Carter*, any alleged instructional error here was harmless. For instance, "the jury expressed no confusion or uncertainty . . . and never requested clarification" "as to how to evaluate [the]

testimony" of the penalty-phase witnesses. (*Id.* at p. 1221; see also *People v. Holt, supra,* 15 Cal.4th at p. 685 [jury "surely" would have requested further explanation of the reasonable doubt standard had it been confused as to the meaning of reasonable doubt during the penalty phase].) Moreover, appellant "fails to suggest how the jury, lacking [applicable guilt-phase instructions], might have misunderstood or misused that evidence." (*People v. Carter, supra,* 30 Cal.4th at p. 1221.) Although appellant asserts "various other evidentiary instructions were applicable on the facts of this case . . . he does no more than speculate that their absence somehow prejudiced him." (*Ibid.*) "In the absence of anything in the record indicating the jury was confused or misled by the court's failure to reinstruct [on guilt phase instructions during the penalty phase] . . . defendant's argument must be rejected." (*People v. Danielson* (1992) 3 Cal.4th 691, 722, overruled on another ground by *Price v. Superior Court, supra,* 25 Cal.4th at p. 1069, fn. 13; see *People v. Hamilton* (1988) 46 Cal.3d 123, 153 ["Having reviewed the record of the penalty phase in its entirety, we are of the opinion that in the absence of the claimed [instructional] error the outcome would have been the same"].)

Also, we note that the jury was instructed that, "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case." (RT 3896.) In addition, the jury was instructed to "assign" "weights" and "value" to the applicable aggravating and mitigating factors in making this determination. (RT 4007.) The jury presumably had the common sense to accomplish this task. (See *United States v. Scheffer* (1998) 523 U.S. 303, 313 ["Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men'"]; *Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [jurors

are "presumed to be intelligent" and "capable of properly assessing the evidence" since "'[a] juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box'"].) Accordingly, "[t]here is no realistic possibility that jurors were misled about how to evaluate the testimony of penalty phase witnesses, or that the absence of general instructions at the penalty phase induced arbitrary and capricious deliberations." (*People v. Melton* (1988) 44 Cal.3d 713, 758.) Any instructional error was therefore harmless.

XXIII.

THE TRIAL COURT PROPERLY REJECTED APPELLANT'S REQUESTED INSTRUCTION CAUTIONING THE JURY AGAINST DOUBLE COUNTING THE SPECIAL CIRCUMSTANCE

Appellant contends that the trial court violated his constitutional rights to due process and a reliable sentencing determination by refusing to give his requested instruction cautioning the jury against double counting the special circumstances. (AOB 295-299.) However, because the court's standard jury instructions did not inherently encourage the jury to double count the special circumstances, the court was not required to give the instruction requested by appellant.

A. Background Facts

Appellant requested that the following instruction be given to the jury during the penalty phase:

> You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crimes for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors.

(CT 1519.) Appellant cited *People v. Melton, supra,* 44 Cal.3d at p. 768, as authority for his requested instruction. (*Ibid.*) The court refused the instruction, noting that *Melton* did not stand for the proposition being cited by the defense. (RT 3847; see also CT 1519.) The court instead instructed the jury pursuant to CALJIC No. 8.85 ("Penalty Trial—Factors For Consideration") as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereinafter instructed. You shall consider, take into account and be guided by the following factors if applicable:

A, the circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstance found to be true; . . .

(RT 3896-3897; see also CT 1587-1588.)

B. The Trial Court Properly Refused Appellant's Requested Instruction

In *People v. Melton, supra,* 44 Cal.3d at p. 768, this Court recognized that the language of factor (a) "presents a theoretical problem . . . since it tells the penalty jury to consider the 'circumstances' of the capital crime *and* any attendant statutory 'special circumstances.'" Because "the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.'" (*Ibid.*) While *Melton* observed that it would be preferable for a trial court to admonish the jury against double counting if such instruction were requested by the defendant, it concluded that there was little danger of prejudice if such an instruction were not given. (*Ibid.*) Similarly, in *People v. Barnett* (1998) 17 Cal.4th 1044, 1180, the Court concluded that CALJIC No. 8.85 "do[es] not inherently encourage the double counting of aggravating factors," and that "the absence of an instruction cautioning against double counting does not warrant reversal in the absence of any misleading argument by the prosecutor." Because the prosecutor in this case did not suggest to the jury that it could double count the special circumstances, nor does appellant point to any improper argument on the part of the prosecutor, reversal is unwarranted. (See also *People v. Young, supra,* 34 Cal.4th at pp. 1225-1226 [same]; *People v. Ayala* (2000) 24 Cal.4th 243, 289-290 [same].)

Appellant argues that his case is distinguishable from *Barnett* because he requested a clarifying instruction whereas the defendant in *Barnett* did not. (AOB 297.) However, this is a distinction without difference. This Court has followed the reasoning of *Barnett* in cases such as this, where the defendant

specifically requested a clarifying instruction. (See *People v. Young, supra,* 34 Cal.4th at pp. 1225-1226; *People v. Ramos* (2004) 34 Cal.4th 494, 531; *People v. Ayala, supra,* 24 Cal.4th at pp. 289-290.) There is thus no support for appellant's argument that *Barnett* does not apply.

Finally, assuming appellant has preserved his constitutional claims for appeal (*People v. Young, supra,* 34 Cal.4th at p. 1226), they fail on the merits. This Court has repeatedly rejected constitutional challenges to CALJIC No. 8.85. (See *ibid.* [finding the defendant's constitutional claims "meritless because we have concluded the language of CALJIC No. 8.85 is not erroneous and does not unduly encourage the double or multiple counting of aggravating factors"]; *People v. Barnett, supra,* 17 Cal.4th at pp. 1180-1181 [no unconstitutional skewing of the weighing process in the California scheme].) There is thus no basis for reversing the judgement of death.

XXIV.

THE TRIAL COURT PROPERLY REJECTED TWO MITIGATING FACTORS INCLUDED IN A DEFENSE REQUESTED INSTRUCTION THAT WERE ALREADY COVERED BY THE "CATCHALL" PROVISIONS OF SECTION 190.3, FACTOR (K)

Appellant contends that the trial court violated his right to present a defense under the Sixth Amendment and his right to a reliable sentencing determination under the Eighth Amendment by refusing to read two mitigating factors included in a defense requested instruction listing the types of mitigation evidence the jury could consider in determining appellant's penalty. (AOB 300-310.) Because the two factors were already covered by the trial court's standard instruction pursuant to section 190.3, factor (k), the trial court properly omitted them from the defense requested instruction.

A. Background Facts

Appellant requested that the court give a special instruction meant to augment the court's standard instruction pursuant to section 190.3. (CT 1521-1524.)[46/] The requested instruction specified 21 types of mitigation evidence that the jury could consider in addition to those factors listed under section 190.3, including the following two factors:

> 1) Whether or not the offenses were committed while the defendant was under the influence of any mental or emotional disturbance, regardless of whether the disturbance was of such a degree as to constitute a defense to the charges, and regardless of

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46. Section 190.3 lists several factors the jury may consider in determining the appropriate penalty in a capital case, all of which relate to the characteristics of the defendant and the circumstances underlying his capital crimes. The last factor listed under this section, factor (k) (commonly referred to as the "catchall provision"), permits the jury to take into account "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

whether there is a reasonable explanation or excuse for such disturbance[;]

[¶] . . . [¶]

6) Whether or not at the time of the offenses or at any other time the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, regardless of whether the capacity was so impaired as to constitute a defense to the charges, and regardless of whether the impairment caused him to commit the crimes.

(CT 1521-1522.) The court agreed to read a modified version of the instruction, which contained all but five of the factors listed in the original instruction. (CT 1525; see also RT 3898-3900.) Factors one and six were two of the factors omitted from the instruction. (See CT 1521-1522; RT 3898-3900.)

At the conclusion of the penalty phase, the trial court read CALJIC No. 8.85 to the jury, which lists the factors contained under section 190.3. (RT 3896-3898.) Following this standard instruction, the court read the modified version of appellant's requested instruction to the jury. (RT 3898-3900.)

B. The Trial Court Properly Rejected The Two Portions Of The Defense Requested Instruction At Issue On Appeal

On appeal, appellant contends that the court erred in refusing to instruct the jury on factors one and six listed above. (AOB 303-310.) Appellant, however, cites cases and makes arguments which were not raised in proceedings below. He has therefore failed to preserve his claims for appeal. Even if not waived, the claims lack merit.

Appellant contends that section 190.3's inclusion of only "extreme" mental or emotional disturbances under factor (d) prevented the jury from considering evidence of nonextreme mental or emotional impairments, thus entitling him to the clarifying pinpoint instruction set forth above as factor one.

(AOB 303-309.)[47] However, this Court has previously rejected such a notion, specifically finding that section 190.3 "does not unconstitutionally preclude the jury from considering mental or emotional disturbances that are not 'extreme.' Rather, the 'catchall' provisions in section 190.3, factor (k), 'referring to "[a]ny other circumstance which extenuates the gravity of the crime," allow consideration of nonextreme mental or emotional conditions.'" (*People v. Turner* (1994) 8 Cal.4th 137, 208, overruled on another ground by *People v. Griffin, supra,* 33 Cal.4th at p. 555, fn. 5.)

Such reasoning applies with equal force to appellant's argument that he was entitled to the instruction set forth above as factor six, which would have informed the jury that it could consider any mental impairment that may have affected appellant's capacity to appreciate the criminality of his conduct, regardless of whether such impairment caused appellant to commit his crimes or constituted a defense to the charges. Appellant contends that the jury was precluded from considering such evidence as a result of factor (d)'s limiting language. (AOB 309-310.) As this Court has noted, however, factor (d) does not prevent the jury from considering mental impairments that do not influence the commission of the crime or constitute a legal excuse. (*People v. Jenkins, supra,* 22 Cal.4th at p. 1055; see also *People v. Jones* (1997) 15 Cal.4th 119, 190, overruled on another ground by *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.) Because "factor (k) is adequate for informing the jury that it may take account of any extenuating circumstance . . . there is no need to further instruct the jury on specific mitigating circumstances." (*People v. Vieira* (2005) 35 Cal.4th 264, 298-299.) In sum, appellant's constitutional rights were not violated as a result of the trial court's rejection of factors one and six from

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47. Factor (d) allows the jury to consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (See RT 3897.)

appellant's proposed instruction. (See *People v. Brown, supra,* 31 Cal.4th at pp. 569-570 [finding no constitutional error in the trial court's refusal of defense requested instructions on mitigating factors].)

XXV.

THE COURT HAS PREVIOUSLY REJECTED ALL OF APPELLANT'S ATTACKS ON THE CONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY LAW

Appellant contends that many features of California's capital sentencing scheme, alone or in combination with each other, violate the federal Constitution. (AOB 311-391.)

> Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

(AOB 311.)

We will briefly set forth below the previous decisions of this Court which have essentially rejected all of appellant's challenges. We also cite cases in which this Court has already declined to reconsider its previous rejections.

A. This Court has repeatedly rejected appellant's contention (AOB 313-318) that California's death penalty law fails to adequately narrow the class of murderers eligible for the death penalty. (*People v. Bolden, supra,* 29 Cal.4th at p. 566; *People v. Barnett, supra,* 17 Cal.4th at p. 1179; *People v. Arias, supra,* 13 Cal.4th at p. 187; *People v. Stanley, supra,* 10 Cal.4th at p. 842; *People v. Wader* (1993) 5 Cal.4th 610, 669.)

B. This Court has repeatedly rejected appellant's contention (AOB 318-326) that factor (a) of section 190.3 ("circumstances of the crime") has no limitations and thus permits arbitrary and capricious imposition of the death penalty. (*People v. Osband* (1996) 13 Cal.4th 622, 703; *People v. Medina* (1995) 11 Cal.4th 694, 780; *People v. Sanders* (1995) 11 Cal.4th 475, 563;

People v. Turner, supra, 8 Cal.4th at pp. 137, 208, overruled on another ground by *People v. Griffin, supra,* 33 Cal.4th at p. 555, fn. 5.)

C. This Court has repeatedly rejected the ten arguments appellant makes in support of his contention (AOB 326-377) that California's death penalty law violates the Sixth, Eighth, and Fourteenth Amendments because it contains no safeguards against arbitrary and capricious sentencing and deprives defendants of the right to a jury trial on each element of a capital crime.

(1) Contrary to appellant's view (AOB 328-352), even after *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296, there is no constitutional requirement that aggravating factors (other than prior criminality) be proven beyond a reasonable doubt, or that the jury unanimously find that death is the appropriate penalty beyond a reasonable doubt. (*People v. Cornwell, supra,* 37 Cal.4th at pp. 103-104; *People v. Ward, supra,* 36 Cal.4th at pp. 221-222; *People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Ochoa* (2001) 26 Cal.4th 398, 453-454; *People v. Barnett, supra*, 17 Cal.4th at p. 1178.)

(2) Contrary to appellant's view (AOB 352-357) even after *Apprendi*, *Ring*, and *Blakely*, there is no constitutional requirement that aggravating factors be proven to outweigh mitigating factors beyond a reasonable doubt. (*People v. Cornwell, supra,* 37 Cal.4th at pp. 103-104; *People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Ochoa, supra*, 26 Cal.4th 398, 453-454; *People v. Barnett, supra*, 17 Cal.4th at p. 1178.)

(3) and (4) Contrary to appellant's view (AOB 357-360), there is no constitutional requirement that aggravating factors be proven by at least a preponderance of the evidence, that aggravating factors be proven to outweigh mitigating factors by at least a preponderance of the

evidence, or that the jury find that death is the appropriate penalty by at least a preponderance of the evidence. "'Because the determination of penalty is essentially moral and normative [citation], and therefore different in kind from the determination of guilt,' the federal Constitution does not require the prosecution to bear the burden of proof or burden of persuasion at the penalty phase." (*People v. Sapp* (2003) 31 Cal.4th 240, 317, citing *People v. Hayes* (1990) 52 Cal.3d 577, 643; accord, *People v. Bemore* (2000) 22 Cal.4th 809, 859.)

(5) Contrary to appellant's view (AOB 360-363), there is no constitutional requirement that the trial court instruct the jury that there is no burden of proof at the penalty phase. Indeed, because the California death penalty statute does not specify any burden of proof, except for prior-crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Holt, supra,* 15 Cal.4th at pp. 682-684; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.)

(6) Contrary to appellant's view (AOB 363-367), California's death penalty law is not unconstitutional because it fails to require that the jury base any death sentence on written findings regarding aggravating factors. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Belmontes* (1988) 45 Cal.3d 744, 805; *People v. Jackson, supra,* 28 Cal.3d at pp. 316-317; *People v. Frierson* (1979) 25 Cal.3d 142, 178-180; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 750; *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, vacated and remanded on other grounds, *Pulley v. Harris* (1984) 465 U.S. 37.)

(7) Contrary to appellant's view (AOB 368-373), California's death penalty law is not unconstitutional because this Court does not

require intercase proportionality review. (*People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Barnett, supra*, 17 Cal.4th at p. 1182; *People v. Crittenden, supra,* 9 Cal.4th at p. 156; *People v. Mincey* (1992) 2 Cal.4th 408, 476; *People v. Hayes, supra*, 52 Cal.3d at p. 645.)

(8) Contrary to appellant's view (AOB 373-374), California's death penalty law is not unconstitutional because it permits the jury to consider unadjudicated offenses as aggravating evidence (*People v. Ward, supra,* 36 Cal.4th at pp. 221-222; *People v. Bolin* (1998) 18 Cal.4th 297, 335; *People v. Samayoa, supra,* 15 Cal.4th at p. 863), and does not require that this particular aggravating factor be found true by a unanimous jury (*People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Ward, supra,* 36 Cal.4th at pp. 221-222; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1061; *People v. Hart* (1999) 20 Cal.4th 546, 649; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245). This is so even after *Apprendi, Ring*, and *Blakely.*

(9) Contrary to appellant's view (AOB 374) the use of restrictive adjectives in the list of potential mitigating factors (e.g., "Whether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance" (§ 190.3, factor (d), emphasis added), does not impermissibly act as a barrier to consideration of mitigation by a penalty jury. (*People v. Jones, supra,* 15 Cal.4th at p. 190; *People v. Davenport, supra,* 11 Cal.4th at p. 1230; *People v. Turner, supra*, 8 Cal.4th at pp. 208-209; *People v. Wright, supra,* 52 Cal.3d at pp. 443-444; *People v. Morales* (1989) 48 Cal.3d 527, 567-568; *People v. Ghent* (1987) 43 Cal.3d 739, 776.)

(10) Contrary to appellant's view (AOB 375-377), failure to instruct that section 190.3's statutory mitigating factors were relevant

solely as potential mitigators does not constitute constitutional error. (*People v. Medina*, *supra*, 11 Cal.4th at p. 781; *People v. Sanders*, *supra*, 11 Cal.4th at p. 564; *People v. Zapien* (1993) 4 Cal.4th 929, 990; *People v. Danielson, supra,* 3 Cal.4th at p. 718.)

D. This Court has repeatedly rejected appellant's contention (AOB 378-388) that California's death penalty law deprives capital defendants of equal protection because it does not guarantee some sort of disparate sentence review that was in the past given to noncapital convicts under the Determinate Sentencing Act. (*People v. Boyette, supra,* 29 Cal.4th at p. 466, fn. 22; *People v. Keenan* (1988) 46 Cal.3d 478, 545; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) Furthermore, capital defendants are not similarly situated with noncapital defendants, and as this Court has held, the first prerequisite to a successful equal protection claim "'is a showing that the "state has adopted a classification that affects two or more similarly situated groups in an unequal manner."'" (*People v. Massie* (1998) 19 Cal.4th 550, 570-571.)

E. Appellant's final contention (AOB 388-391) is that "California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency," and also violates the Eighth and Fourteenth Amendments. As this Court stated in *People v. Hillhouse, supra,* 27 Cal.4th at p. 511, however, "had defendant shown prejudicial error under domestic law, we would have set aside the judgment on that basis, without recourse to international law. . . . [¶] . . . International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (See also, *People v. Jenkins, supra,* 22 Cal.4th at p. 1055; *People v. Ghent, supra*, 43 Cal.3d at pp. 778-779 (maj. opn.); *id.* at pp. 780-781 (conc. opn. of Mosk, J.).)

SENTENCING ISSUES

XXVI.

THE TRIAL COURT WAS NOT REQUIRED TO MAKE AN EXPRESS FINDING OF COMPETENCY BEFORE SENTENCING APPELLANT TO DEATH

At the conclusion of the penalty phase, defense counsel expressed some concern as to appellant's competency and asked that appellant be seen pursuant to section 1368. The trial court granted counsel's request and stayed proceedings so that appellant could be evaluated by two doctors. After appellant refused to be interviewed by the doctors, the court reinstituted proceedings and sentenced him to death. For the first time on appeal, appellant contends that the court was without jurisdiction to sentence him after having failed to make an express finding of competency on the record. (AOB 392.) By failing to raise such a concern in the trial court, however, appellant has waived his claim on appeal. In any event, because the trial court never declared a doubt as to appellant's competency or instituted formal proceedings pursuant to section 1368, the court was not required to make an express finding of competency before proceeding with the sentencing hearing.

A. Factual Background

On November 2, 1998, after the penalty phase but before sentencing, defense counsel requested that appellant be seen pursuant to section 1368. (RT 4029.) Defense counsel explained that appellant had not appeared to understand what was going on in his last two meetings with defense counsel. (*Ibid.*) The court stayed the proceedings and referred appellant to Drs. Larry Wornian and Paul Good for section 1368 evaluations. (*Ibid.*) The court noted that "if the 1368 comes back that he is competent, then we will proceed with the motion to modify and sentencing that day." (*Ibid.*)

On December 7, 1998, the court noted for the record that it had received reports from Drs. Wornian and Good indicating that appellant had refused to be interviewed by either of them. (RT 4032.) The court noted that it had conferred with counsel, and, "in an abundance of caution," it would allow the parties to submit pleadings on the question of whether the court could proceed with sentencing. (*Ibid.*) Before the court adjourned for the day, defense counsel noted for the record that appellant disagreed with his counsel about his competency, and for that reason defense counsel would also be filing papers on the issue of whether a conflict should be declared and a third attorney appointed to represent appellant. (RT 4032-4033.) Appellant was then allowed to address the court. (RT 4033.) Appellant indicated that his attorneys had not clearly explained the consequences of his pleas, that he disagreed with some of the court's pretrial evidentiary rulings, and that he was upset with the prosecutor's argument during trial that he was a malingerer. (RT 4033-4039.)

On January 25, 1999, the court denied the defense motion to declare a conflict and appoint a third attorney to represent appellant. (RT 4043.) Appellant was thereafter sentenced on February 9, 1999. (RT 4068-4070.)

B. The Trial Court Had Jurisdiction To Sentence Appellant To Death

As an initial matter, we submit that appellant has failed to preserve his claim for appeal. Despite the trial court's express invitation to the parties to submit pleadings on the issue of the court's ability to proceed with sentencing (RT 4032), appellant never raised any concerns with regard to the court's jurisdiction to sentence him. Accordingly, appellant cannot now complain on appeal that the court was required to make an express finding of competency before it could sentence him. Even if appellant is not foreclosed from challenging the court's jurisdiction on appeal, however, his challenge fails on the merits.

Appellant contends that "[t]he trial court's failure to find appellant competent after having set the matter for a hearing deprived the court of jurisdiction to sentence appellant to death." (AOB 397.) Appellant argues that the trial court in effect expressed a doubt about his competency and ordered the matter suspended pending a full competency hearing, thus divesting the court of jurisdiction to proceed pending an express determination of competence. (AOB 397-398.) We disagree. The record clearly shows that the court did not express a doubt as to appellant's competency. (§ 1368, subd. (a) [if a doubt arises in the judge's mind about a defendant's mental competence, the judge must state that doubt in the record].) Although the court suspended proceedings and appointed two experts to evaluate appellant in response to defense counsel's concerns, the record does not suggest that the court intended to initiate formal competency proceedings. (*People v. Danielson, supra,* 3 Cal.4th at p. 728 [court's preliminary expression of concern about competence does not require formal hearing]; *People v. Price, supra,* 1 Cal.4th at pp. 396-397 [same].) Rather, it appears that the court's order appointing experts was merely preliminary to its consideration of whether there was any doubt as to appellant's competence. Because appellant did not thereafter present any evidence to substantiate defense counsel's belief as to his incompetence or file any pleadings on the question of the court's ability to proceed with sentencing, the court rightly considered the matter settled.

Nor was the court required to hold a competency hearing in this case. "Once a defendant has been found competent to stand trial, a second competency hearing is required only if the evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant's competence. [Citations.]" (*People v. Medina, supra,* 11 Cal.4th at p. 734.) Appellant contends that "his own lengthy statement at the hearing on December 7, 199[8]" met the standard

for a second competency hearing, as his "remarks made it clear that he had no rational understanding of the proceedings against him." (AOB 400.) We disagree that appellant's remarks disclosed a substantial change of circumstances or cast serious doubt on the prior finding of competence. Rather, appellant's comments demonstrated an understanding of the defense strategy at trial, an ability to work with his attorneys even though he disagreed with them, a comprehension of the interplay between his pleas and the different phases of trial, and his belief, based on subsequent events, that counsel had misinformed him about the consequences of his pleas. (RT 4033-4036.) Appellant's remarks also showed that he had a firm grasp of the evidence against him, knowledge of the court's pretrial evidentiary rulings, and an understanding of the prosecutor's argument during trial that he was a malingerer. (RT 4036-4039.) Even if some of appellant's comments could be characterized as "bizarre," such comments alone do not establish a substantial change in circumstances requiring a second competency hearing. (*People v. Marshall, supra,* 15 Cal.4th at p. 33 [evidence that the defendant has engaged in bizarre actions or made bizarre statements is not sufficient to raise a doubt as to his competency].) Appellant's claim accordingly fails. (See *People v. Kelly, supra,* 1 Cal.4th at pp. 495, 542-543 [counsel's doubts as to the defendant's competency not enough to justify a second competency hearing]; *People v. Jones* (1991) 53 Cal.3d 1115, 1153-1154 [general assertion of defendant's worsening condition and inability to cooperate with counsel inadequate to justify second hearing].)

XXVII.

THE TRIAL COURT DID NOT ERR IN REFUSING TO APPOINT A THIRD ATTORNEY TO REPRESENT APPELLANT ON THE ISSUE OF HIS COMPETENCY

Appellant next contends that the court erred in failing to appoint a third attorney to represent him on the issue of his competency. (AOB 402.) We disagree.

A. Factual Background

In the course of expressing concern about appellant's competency prior to sentencing, defense counsel informed the court that appellant disagreed with counsel's assessment of his mental condition. (RT 4032-4033.) Counsel indicated that he would be filing a pleading with the court on the question of whether a third attorney should be appointed to represent appellant on the issue of his competency. (*Ibid.*) Counsel thereafter filed a declaration of conflict stating that appellant and his counsel had a difference of opinion as to appellant's competency, and asking that a third attorney be appointed to represent appellant's interests with regard to the competency issue. (CT 1635-1637.) The prosecutor filed an opposition to the request, arguing that the appointment of a third attorney was not required under *People v. Stanley, supra,* 10 Cal.4th 764. (CT 1639-1640.) The court relied on *Stanley* in finding no conflict and declining to appoint a third attorney. (RT 4043.)

B. The Trial Court Did Not Err In Finding No Conflict And Declining To Appoint A Third Attorney

Appellant asserts that despite the trial court's finding to the contrary, *Stanley* required the appointment of a third attorney in this case. (AOB 402-405.) Not so.

In *Stanley*, the trial court appointed a second attorney to represent the defendant in competency proceedings. (*People v. Stanley, supra,* 10 Cal.4th at

p. 803.) On appeal, the defendant objected that such a procedure violated his right to due process because it resulted in two lawyers representing him in conflicting ways. (*Id.* at pp. 803- 804.) In rejecting this claim, the Court stated, "In appointing separate counsel to represent defendant's point of view, the trial court acted to resolve a conflict, not create one. In so doing it permitted the jury to hear every side of the issue of defendant's competence, thereby assuring defendant a fair trial. In the circumstances, defendant perhaps got more than he was entitled to. But we are unable to conclude he thereby was denied due process." (*Id.* at pp. 806-807, fns. omitted.) There is nothing in *Stanley* that suggests, let alone holds, that the appointment of separate counsel is required under such circumstances. *Stanley* simply held that such a procedure did not violate the defendant's due process rights in the case before it. Appellant's reliance on *Stanley* is therefore misplaced. (See *People v. Jernigan* (2003) 110 Cal.App.4th 131, 135-136 [rejecting the notion that *Stanley* requires the appointment of a second attorney whenever a defendant and his attorney differ on the central issue of his competency].)

Appellant contends that the trial court's ruling in this case "placed defense counsel in an impossible situation, and deprived appellant of his rights to due process and effective representation with respect to his competency to be sentenced." (AOB 405.) As noted in *Jernigan*, however, a defendant is not deprived of his due process rights or the effective assistance of counsel simply because his counsel seeks to prove his incompetence over his objections:

> Nor do we view the opposite positions of client and counsel in this case as a conflict bearing upon counsel's ability to represent her client. The sole purpose of competency proceedings is to protect the accused. [Citation.] Counsel's interest in seeking to prove that defendant is incompetent is presumably based upon her judgment that it is in his best interest to do so. Certainly there is nothing in the record to suggest otherwise. Thus, although there is a conflict between client and counsel as to how to proceed, there is no actual conflict affecting

> counsel's ability to advocate for her client's best interests and no necessity to appoint an additional attorney to argue the opposite position.

(*People v. Jernigan, supra,* 110 Cal.App.4th at pp. 136-137.) Such reasoning applies in this case. Appellant's disagreement with defense counsel on the issue of his competency did not prevent counsel from advocating appellant's best interests. As this Court has noted, "Whether or not the client objects, counsel must be allowed to do what counsel believes is best in determining the client's competence." (*People v. Masterson* (1994) 8 Cal.4th 965, 973.) The trial court's ruling did not therefore violate appellant's rights to due process or to effective representation.

Alternatively, appellant argues that the court should have instituted the procedure set forth in *People v. Bolden* (1979) 99 Cal.App.3d 375. By failing to request that the *Bolden* procedure be followed, however, appellant cannot now complain that the procedure was not employed by the trial court. In any event, there is no support for appellant's claim. In *Bolden*, counsel's solution to a similar conflict was to let his client testify to his belief that he was competent to stand trial, and then offering psychiatric testimony to the contrary. (*Id.* at p. 378.) However, while such a procedure may be appropriate where the defendant has expressed the desire to testify that he or she is competent, in the present case there was no evidence that appellant ever expressed such a desire. (*People v. Jernigan, supra,* 110 Cal.App.4th at p. 136, fn. 3; *People v. Harris* (1993) 14 Cal.App.4th 984, 993-994.) Accordingly, the trial court did not err in failing to follow such a procedure in this case.

XXVIII.

APPELLANT WAS NOT DEPRIVED OF A RELIABLE SENTENCING DETERMINATION

Finally, appellant contends that the errors alleged on appeal violated his Eighth Amendment right to a reliable sentencing determination. (AOB 406-408.) However, as shown above, any errors that occurred at trial, whether considered individually or collectively, did not deprive appellant of a reliable sentencing determination. (*People v. Carter, supra,* 30 Cal.4th at p. 1231 [no violation of right to reliable sentencing determination where two errors that occurred at trial were nonprejudicial considered either individually or cumulatively].) Reversal is therefore unwarranted.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: November 3, 2005

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 90307 words.

Dated: November 3, 2005

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Erven Blacksher**

No.: **S076582**
CAPITAL CASE

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; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On November 7, 2005, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, 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 November 7, 2005, at San Francisco, California.

C. Crisostomo
Declarant

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Signature

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