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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICKEY BERNARD EVANS, Defendant and Appellant.	A126898 (Contra Costa County Super. Ct. No. 050703165)

Defendant Rickey Bernard Evans was charged with murder, arson, burglary, and related enhancements after he stabbed a man in his bedroom and later set the room on fire. Defendant pleaded not guilty by reason of insanity to the murder charge. A jury convicted defendant of second degree murder and the other charged crimes, and concluded that he was sane at the time he committed murder. Defendant claims on appeal that the trial court erred by (1) excluding proffered expert testimony, (2) declining to give an accomplice instruction, and (3) making coercive comments to the jury after jurors indicated that they were deadlocked following the sanity phase of the trial. He also argues that the prosecutor committed misconduct during closing argument following the sanity phase of the trial, and that insufficient evidence supports the finding that he suffered a previous strike. We affirm the judgment.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In the fall of 2005, Aubrey Hollenbeck, an 18-year-old high school dropout, was living with her boyfriend. The two would spend the day at the Antioch apartment building of the boyfriend's father, but they could not sleep there at night and found other places to stay. They spent the day in the common area of the apartment complex with friends, including Tino Apodaca and Larry "Buddy" Sharp. The best friend of Hollenbeck's boyfriend was 19-year-old Herbert Morean III (the victim), and Hollenbeck and her boyfriend sometimes spent the night at the victim's house in Antioch, where the victim lived with his father and younger brother.

Hollenbeck's boyfriend had met defendant when they spent time in jail together. Hollenbeck met defendant in late August or early September 2005 when defendant began spending time with Hollenbeck and her boyfriend. Defendant also was homeless at the time, and Hollenbeck's boyfriend sometimes would help find defendant a place to stay after the three spent the day together. Hollenbeck's boyfriend introduced defendant to the victim, and the three of them and Hollenbeck sometimes hung out at the victim's house.

On the evening of September 12, 2005, defendant, Hollenbeck, and Hollenbeck's boyfriend spent the night at the victim's house. When Hollenbeck woke up the next morning (on September 13), defendant was gone. Later that morning, Hollenbeck, her boyfriend, and the victim walked to the apartment complex where they usually hung out during the day. When the three arrived at the apartment complex, defendant approached them, and told the victim he needed to talk with him. Defendant and the victim walked away together a little before noon, toward the direction of the victim's house. Hollenbeck's boyfriend later left to sell magazine subscriptions, and Hollenbeck walked to the common area of the apartment complex, where she hung out with Sharp, Apodaca, and others for a few hours.

The prosecution's theory at trial was that defendant stabbed and killed the victim in the victim's bedroom during the time when Hollenbeck was hanging out at the apartment complex. Surveillance video taken that day at a convenience store showed defendant and the victim together. A man who rented a downstairs unit of the victim's home testified that when he arrived home that afternoon, he saw the victim look out a bedroom window at the driveway, something the victim had never done in the three months he had lived there. When the tenant tried to enter the home, he found that the door was locked, which also was unusual because the door was usually unlocked. The tenant knocked on the door, and he was surprised by how long it took the victim to open it. The tenant went downstairs with his girlfriend, who took a nap while the tenant did laundry. They apparently did not see or hear from the victim again.

A few hours later, defendant returned to the apartment complex where he had met up with the victim earlier in the day. He was wearing different clothes, he was carrying a pink pillowcase (like ones the victim's family had at their house), and it appeared that he had been running, because he was sweating a lot. Defendant paced the sidewalk near the outdoor common area of the complex for about 10 minutes, then separately approached Apodaca and Sharp, who walked with defendant behind a fence. Apodaca testified that defendant told the crowd that he "offed" the victim, and that defendant showed him a knife.

Defendant then communicated to Hollenbeck that he wanted to talk with her, and they walked away from the group to a sidewalk. Hollenbeck was nervous and afraid for her safety because of the way defendant "was carrying himself and how much he was sweating and he didn't seem sure of himself." Defendant paced in front of Hollenbeck, said, " 'I did it for the Norteños,' " and told her that he "needed to get rid of the evidence." Defendant used Hollenbeck's phone to call Wes Pruitt (a friend of Hollenbeck's boyfriend and the victim) to ask him for a ride to a convenience store. After defendant finished the call, Hollenbeck called Pruitt back to tell him that defendant had said things that "freaked [her] out," and told Pruitt that when he arrived at the apartment complex, to "just try to not say too much to him [defendant] because he just

looks like he is going to flip out on a moment's notice for anything." When Hollenbeck returned to be with her friends, she noticed that Sharp was "looking at [her] weird," and she sensed that "[s]omething was wrong." While she waited for Pruitt to arrive, "it was just a tense atmosphere," according to Hollenbeck.

About an hour after defendant used Hollenbeck's cell phone to call for a ride, Pruitt arrived. Hollenbeck spoke with him alone, and told him again that there was something wrong with defendant, and that he (defendant) was making her uncomfortable. Defendant said that he and the victim wanted to have a barbecue at the victim's house; Hollenbeck testified that defendant said he wanted to get lighter fluid at a convenience store for the barbeque. Pruitt saw that defendant was pacing back and forth in the lawn area of the common area; he was sweating profusely and appeared to be nervous. Pruitt testified that "[t]he demeanor of everyone there looked uncomfortable. I felt uncomfortable."

Pruitt drove defendant, Hollenbeck, Apodaca, and Sharp to a convenience store. Hollenbeck, Sharp, and defendant entered the store, and Apodaca and Pruitt remained in the car. Surveillance video of the store later revealed that defendant stole a container of lighter fluid by hiding it under his shirt. Hollenbeck and Sharp purchased drinks, and eventually they all returned to Pruitt's car. Pruitt then drove defendant toward the victim's house at defendant's request, but Pruitt stopped before getting to the victim's house and asked defendant if he had any gas money. When defendant said that he did not, Pruitt told him that he was not going to drive defendant any farther. Defendant got out of the car and started walking toward the victim's house, while Pruitt and his passengers drove to another store to buy cigarettes.

Meanwhile, the victim's 13-year-old brother arrived around this time at the victim's house, where he also lived. He tried to enter his brother's room to retrieve some of his things, but the door was locked, and no one responded when he knocked. The brother then had a snack, watched television, and fell asleep in his bedroom, which was next to the victim's bedroom. He woke up a short time later to "a loud crashing noise," which sounded like a door getting kicked in or someone punching a hole in the wall. The

victim's brother got up, opened his door, and saw defendant carrying lighter fluid and walking backward out of the victim's bedroom. Defendant turned around, saw the victim's brother, and said in a stern voice, "Don't tell anybody; Get back in your room; Don't make this a big scene; And when it gets big, just run and don't try to put it out." The victim's brother saw defendant run down the hallway, and then he looked into the victim's bedroom, where there was "a glow," followed by thick smoke. He ran to a neighbor's house and told his neighbors to call 911.

Around this time, Pruitt and his passengers drove back toward the victim's house after they shared with each other what defendant had told each of them in their private conversations with him. As they drove toward the house, they saw "big, black, billowing smoke" coming from the victim's bedroom window, and the entire room was in flames. They saw defendant, and defendant walked quickly toward the vehicle after Pruitt stopped the car. Defendant, who seemed agitated and was speaking rapidly, got in the car, then said that "there is a little kid there, but all he saw was me in the smoke." He said that he needed to retrieve a paycheck in Pittsburg, but Pruitt wanted defendant out of his car and so told defendant to take a bus instead, and defendant got out of the car.

After defendant left, Pruitt started yelling and said he wanted to "go to the police." He first dropped off Apodaca and Hollenbeck at the apartment complex where they had met earlier, then drove with Sharp back to the victim's house, where they spoke with police. Pruitt, Apodaca, and Hollenbeck all eventually gave multiple statements to the police. They testified that they at first were not truthful or entirely forthcoming for various reasons, because they did not want to be labeled snitches, because they did not want to get into trouble for having associated with defendant on the day of the murder, and because they were generally afraid of speaking with police.

Firefighters who extinguished the blaze at the victim's house found the victim on the bed in his bedroom, his body burned beyond recognition. An autopsy revealed that the victim died from a stab wound to the neck before the fire. A fire inspector later concluded that the fire had been deliberately set.

The day of the murder, defendant called a woman who he had met a few years earlier at Seneca House and told her that he had gotten into an altercation and cut someone in the neck, and he kept saying, "he is gone." The woman called police a few days later after reading in the newspaper about the murder, and told them about defendant's phone call.

Defendant was arrested and charged with murder and various other crimes, and he pleaded not guilty by reason of insanity. A jury found that defendant was competent to stand trial. Defendant thereafter was charged in an amended information with murder (Pen. Code, § 187[1]—count one), with a personal use of a deadly weapon enhancement (§ 12022, subd. (b)(1)); arson of an inhabited structure (§ 451, subd. (b)—count two);[2] and first degree residential burglary (§§ 459, 460, subd. (a)—count three), with an enhancement allegation that a non-participant was present during the commission of the offense (§ 667.5, subd. (c)(21)).[3] The amended information further alleged a strike prior (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)(1)). A jury convicted defendant of second degree murder and the other charged crimes and enhancements, and the trial court found true the strike allegation and the prior serious felony conviction allegation.

At the sanity phase of the trial, various witnesses testified about defendant's history of mental health issues that he suffered throughout his troubled childhood and into adulthood, including abandonment by his mother in a motel room when he was 22 months old, multiple suicide attempts (including one about a month before the murder), multiple involuntary psychiatric holds because of severe emotional disturbance as a child

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

2 The information alleged an arson caused by accelerant enhancement (§ 451.1, subd. (a)) as to count two, but the trial court dismissed the enhancement on the People's motion at trial.

3 During the sanity phase of the trial, defendant withdrew his plea of not guilty by reason of insanity as to the arson and burglary charges, leaving only the murder charge subject to the plea.

and adult, and auditory hallucinations (such as when he was working at a discount store about a month before the murder and told co-workers that a box was talking to him).

The jury also heard from witnesses who evaluated defendant after his arrest. A psychiatrist diagnosed defendant with a bipolar schizoaffective disorder, and he testified that this was a "major mental illness" that would make it difficult for someone to relate to the world in a realistic way. A forensic and clinical psychologist diagnosed defendant as schizoaffective/bipolar type, with "episodic dyscontrol," and he opined that defendant was insane at the time of the murder and did not know the difference between right and wrong when he committed the crime. A psychiatrist and a psychologist testified for the prosecution, and both concluded that defendant was not legally insane at the time of the murder. The jury found that defendant was sane at the time he committed the murder.

The trial court sentenced defendant to a total of 39 years and four months to life, calculated as follows: 15 years to life on the murder count, doubled because of the strike, plus one third the midterm on count two (three years and four months), plus five years pursuant to section 667, subdivision (a)(1), plus one third the midterm (one year) for an assault count for which defendant was on probation at the time of the charged offenses.[4] Defendant timely appealed.

II.
DISCUSSION

A. Exclusion of Proposed Expert Testimony.

1. Background

During the guilt phase of trial, defendant sought, over the prosecution's objection, to call an Antioch police officer as an expert in the behavior of people who shoplift. Defendant sought to elicit opinion testimony from the officer that when defendant stole lighter fluid from the convenience store, he was working in tandem with the two people who entered the store with him (Hollenbeck and Sharp), and his companions knew that defendant was going to commit theft. At a hearing held outside the presence of the jury

[4] The trial court also imposed a concurrent eight-year sentence on count three and stayed the enhancement on that count.

pursuant to Evidence Code section 402, the officer testified that he had been an Antioch police officer for 13 years and a reserve officer for Walnut Creek for five-and-a-half years. Before he became a police officer, he had worked for three years in loss prevention for a large retail store, where he had observed approximately 450 to 500 thefts and arrests, and he had personally arrested hundreds of shoplifters. The officer testified that he was very familiar with shoplifters' habits and methods of operation, including the way they sometimes worked in tandem to steal items while other people were posted as lookouts.

The officer testified that he had reviewed surveillance video taken of defendant, Hollenbeck, and Sharp in the convenience store when defendant stole a container of lighter fluid, and he concluded, based on their body language, that Hollenbeck and Sharp knew that defendant was stealing the lighter fluid and were working in tandem with him. Specifically, the officer observed that defendant walked directly to the lighter fluid after he walked into the store and left the store soon thereafter, and Hollenbeck completely ignored defendant when he was leaving. Defendant also briefly walked in the direction of Sharp when Sharp was standing at the soda fountain before leaving the store. The officer testified that "[t]o me, that doesn't appear to be normal behavior in the fact that how many times have you walked into a store with someone, a friend, your wife and completely ignored everybody that you walked into the store with and then exited out of the store?" He also noted that defendant was in the store less than a minute, another sign that it was obvious that he had taken something without paying. Based on his prior experience and the number of arrests that he had made, it was the officer's opinion that Hollenbeck and Sharp knew that defendant was going to steal lighter fluid. He acknowledged, however, that this was "probably . . . speculation on my part because I don't know what they are thinking." He also acknowledged that Hollenbeck was not yet actually in the store when defendant took the lighter fluid, that Sharp could not see what defendant was doing when he took the lighter fluid, and that defendant spoke briefly with Sharp after taking the lighter fluid. The officer also testified that he did not observe Hollenbeck or Sharp doing anything to assist defendant commit theft.

The trial court excluded defendant's proposed testimony, for three reasons. First, expert testimony on the issue was unnecessary because the officer's evaluation of the surveillance video was "simply common sense," as any juror could evaluate whether defendant, Hollenbeck, and Sharp were working together. Second, the officer was not familiar with Hollenbeck's negative feelings toward defendant, which would better explain her behavior at the time the surveillance video was taken. Third, the officer did not provide a sufficient reason why he concluded that Sharp was working with defendant.

2. Analysis

Defendant renews his argument on appeal that the trial court should have admitted the proposed expert testimony, and he argues that the failure to do so violated his federal and state constitutional due process right to present a complete defense. Opinion testimony is generally inadmissible at trial, and expert opinion may be admitted only in circumstances where it will assist the jury to understand the evidence or a concept beyond common experience. (Evid. Code, §§ 800, 801, subd. (a) [expert testimony admissible if "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"]; *People v. Torres* (1995) 33 Cal.App.4th 37, 45.) "[E]xpert testimony is generally inadmissible on topics 'so common' that jurors of ordinary knowledge and education could reach a conclusion as intelligently as the expert." (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) "In determining the admissibility of expert testimony, 'the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury.' " (*Ibid.*; Evid. Code, § 801, subd. (a).) We review the trial court's determination whether to admit expert testimony for abuse of discretion (*Lindberg* at p. 45), and find no abuse of discretion here.

Defendant argues that the Antioch police officer "easily met" the qualifications to testify as an expert (Evid. Code, § 720, subd. (a), (b)), and that his proffered testimony was relevant. However, the trial court did not exclude the officer's testimony based on the fact that the officer was unqualified as an expert or that the testimony was not relevant. Instead, the court ruled that the officer's proffered testimony was not

appropriate expert testimony, because it was not sufficiently beyond a juror's common experience. (Evid. Code, § 801, subd. (a); e.g., *People v. Smith* (2003) 30 Cal.4th 581, 628 [credibility issues generally not subject of expert testimony]; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207 [no abuse of discretion to exclude expert testimony regarding confessions because jury could understand and evaluate all trial evidence without assistance of expert]; *People v. Torres*, *supra*, 33 Cal.App.4th at p. 47 [jury competent to determine from evidence and instructions whether particular crime was committed].) Defendant offers no legal argument in his opening brief as to why this conclusion was incorrect, and he argues only in passing in his reply brief that the police officer's testimony was appropriate under Evidence Code section 801, subdivision (a). "Generally, a contention may not be raised for the first time in the reply brief." (*People v. Lewis* (2008) 43 Cal.4th 415, 536, fn. 30.)

In any event, defendant's argument lacks merit. We agree with the trial court that opinion testimony about whether defendant was working in tandem with his companions was not appropriate, because the expert was in no better position than jurors were to evaluate the evidence. (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 293 ["Absent unusual facts, it must be presumed that jurors are capable of deciding a party's motive for themselves without being told by an expert which finding on that issue the evidence supports."]; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [expert's beliefs as to knowledge and intent of gang members irrelevant].) Any testimony by the expert would have created an unacceptable risk that the jury would pay unwarranted deference to the officer's expertise (*Kotla* at p. 293), despite the fact that he acknowledged he was speculating on the subjects' motives, and he did not know that Hollenbeck had in fact testified that she did not like defendant.

Moreover, any error in excluding the evidence was harmless, because it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Kotla v. Regents of University of California*, *supra*, 115 Cal.App.4th at p. 294.) Defendant's counsel was permitted to argue to the jury that defendant was working together with Hollenbeck and

Sharp when he shoplifted lighter fluid, telling jurors: "We're talking about somebody stealing a bottle of lighter fluid which is maybe somewhere about half that size or—and concealing it from these people that nobody knew nothing [*sic*] about—nobody knew nothing from nothing about lighter fluid. But yet they are all in the store in tandem to *anyone who is reasonable and understands what the petty theft procedure is for these people*. Somebody is going to steal a bottle of lighter fluid, and they [presumably, Hollenbeck and Sharp] have no idea what's going on?" (Italics added.) Counsel asked jurors to look at the pictures taken from the surveillance video, then argued that they should "think of it this way, everybody knew Mr. Evans had no money. What is he going to the store with them for? Why are the three of them going to the store? They disclaim any knowledge of what was going on." Counsel argued that defendant's companions had lied to police and worked with defendant to conceal the crime: "They are covering up, and they are covering up. And they knew—they knew he had lighter fluid. *They knew he stole the lighter fluid*. They knew it was a fire because they went back and who are they talking to? You are reasonable people. *Use your common sense*." (Italics added.) Jurors rejected counsel's argument when they convicted defendant of the charged crimes. It is thus not reasonably probable that the admission of expert testimony to make the same point would have led to a different result, especially in light of the overwhelming evidence supporting defendant's guilt, as discussed in further detail below. (*Post*, § II.B.)

B. Accomplice Jury Instruction.

Defendant next argues that the trial court committed reversible error in failing to instruct the jury, at defendant's request, with CALCRIM No. 334, which provides that if the jury determines that a witness was an accomplice to a crime, the jury may not convict defendant based solely on the testimony of that witness and should view the witness's testimony with caution. For purposes of the instruction, an accomplice is "one who is liable to prosecution for the identical offense against the defendant." (§ 1111; *People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Howard* (1992) 1 Cal.4th 1132, 1173.) "In order to be an accomplice, the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact (§§ 32, 33). [Citation.] An aider and

abettor is chargeable as a principal, but his liability as such depends on whether he promotes, encourages, or assists the perpetrator and *shares* the perpetrator's criminal purpose. [Citation.] It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose. [Citations.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1227, original italics.) "Accomplice status is a question of fact for the jury unless the evidence permits only a single inference. [Citations.]" (*Id.* at pp. 1227-1228.)

Section 1111 is, by its terms, offense specific, which means that where a witness is an accomplice to only one of multiple crimes, the corroboration requirement applies only to that single offense. (*People v. Felton* (2004) 122 Cal.App.4th 260, 273 [testimony of possible accomplice to felony child endangerment did not require corroboration as to attempted criminal threat, for which witness was the victim]; *People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546 [testimony of defendant's accomplice in first burglary did not require corroboration as to additional burglaries, in which witness did not participate].) Here, there was no evidence that any witness who testified at trial was even aware of the victim's murder before its commission, let alone that the witness could have been charged as a principal with the crime. (Cf. § 1111; *People v. Sully*, *supra*, 53 Cal.3d at p. 1227.) It was therefore not necessary to instruct the jury that they could not base defendant's murder conviction solely on the testimony of Hollenbeck and Apodaca,[5] or that jurors should view their testimony regarding the murder with caution. (CALCRIM No. 334.)

As for the arson, defendant argues that there was "substantial evidence" that Hollenbeck, Apodaca, and Sharp (who did not testify at trial, *ante*, fn. 5) were accomplices to the crime. Defendant points to no evidence presented at trial that any of them was charged in connection with arson (or any other crime).[6] His argument apparently is based on the fact that the three accompanied defendant to the convenience store where he purchased the lighter fluid used to set the victim's room on fire, and he

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5 Defendant argues that Sharp was an accomplice; however, Sharp did not testify at trial, and defendant does not point to any statement by Sharp that was admitted at trial.

6 Pruitt was convicted of accessory to arson after the fact following entry of a plea.

ignores testimony from Hollenbeck that defendant told them he needed it for a barbeque. However, he also provides no legal authority for the proposition that their actions made them chargeable *as accomplices* with arson.

Even assuming arguendo that there was a question of fact as to whether defendant's companions were accomplices to arson and that the trial court therefore erred by failing to give an accomplice instruction, any such error was harmless. "A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] 'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]' [Citation.] The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 370.)

Here, the victim's brother testified that he saw defendant (who he identified at trial) leaving the victim's bedroom with a bottle of lighter fluid shortly before a fire started in the room, and defendant told the brother, "Don't tell anybody; Get back in your room; Don't make this a big scene; And when it gets big, just run and don't try to put it out." This testimony sufficiently corroborated other witnesses' testimonies regarding the arson. Because the corroboration requirement is a matter of state law, the failure to give an accomplice instruction does not violate a defendant's due process rights, as defendant claims. (*People v. Felton*, *supra*, 122 Cal.App.4th at pp. 273-274.) The trial court did not commit reversible error by declining to give an accomplice instruction.

C. Prosecutor's Comments on Evidence.

1. Background

During the sanity phase of the trial, defendant presented evidence that he was the victim of sexual abuse as a child, but the prosecutor challenged the accuracy of those claims. The subject first came up when a woman who ran a group home where defendant lived for two years (starting when he was about seven or eight years old) testified about

various behavioral problems defendant had while in her care. Toward the end of questioning by defense counsel, the following exchange took place:

"[Q.] Was there an incident where Rickey was—you had to bring him to the First Vallejo Hospital because he had been molested?

"A. We didn't know for sure.

"Q. But there was an incident that took place out in the street?

"A. Yes. There was something that took place in the street. We wasn't [*sic*] sure what it was.

"Q. It was a suspected incident of molestation?

"[Prosecutor]: Objection. Leading. Calls for speculation.

"THE COURT: Sustained.

"[Defense counsel]: Q. Was it something that you brought to the hospital's attention?

"A. Yes.

"[Prosecutor]: Objection. Relevance. Can we approach, your Honor?" A discussion was held off the record, and defense counsel dropped this line of questioning.

Defense counsel later asked a therapist who evaluated defendant in 2001 or 2002 if he had discussed with defendant whether defendant had been molested in the past. The therapist testified that defendant was evasive when asked questioned about past sexual abuse. The therapist diagnosed defendant with PTSD; however, he acknowledged on cross-examination that the diagnosis was based on reports that he had read about defendant, as opposed to information that he had learned from speaking with defendant.

Past reports evaluating defendant were the subject of direct and cross-examination of the forensic and clinical psychologist who opined that defendant was insane at the time of the murder. On direct examination, counsel asked the psychologist about whether defendant's PTSD played a role in his diagnosis of defendant. The psychologist testified: "We have a history of Post-Traumatic Stress Disorder. I would make that a secondary diagnosis. Mr. Evans was raped at a very early age while in a placement, and that is the subject of his posttraumatic horrors. When a young child is raped at a very early age, that

induces a great deal of problems. When he is raped repeatedly at an earlier age, the nature of the post-traumatic disorder is very significant. In and of itself, that would be a disabling disorder." The psychologist also referred to "early repeated rapes" toward the end of his direct testimony, when summarizing the factors that supported his opinion regarding defendant's insanity.

On cross-examination, the prosecutor questioned the accuracy of the rape allegations and the PTSD diagnosis. He first questioned the psychologist about a school report prepared when defendant was six-and-a-half years old (in 1992) stating that defendant had PTSD. The psychologist acknowledged that the report did not mention "any sort of sexual traumatization." The prosecutor also asked about a report prepared in 1993 that stated defendant had PTSD, and the psychologist acknowledged that the evaluation likewise did not mention multiple rapes. The prosecutor asked whether it was "possible the whole idea of PTSD based on sexual abuse was something grabbed onto by each subsequent reviewing mental health professional and continued to be a diagnosis even though it was never mentioned that he had been raped multiple times." The psychologist testified that he was "thoroughly unclear as to the question," but that it was theoretically possible that the person who prepared the 1993 report could have been mistaken about the PTSD diagnosis.

The psychologist was questioned—without defense objection—about more than a dozen other reports evaluating defendant over the years, none of which apparently referred to sexual trauma, and some of which did not diagnosis defendant with PTSD. The psychologist maintained, however, that although it was unclear when defendant had been raped, his behavior (such as acting out sexually at an early age) was consistent with the behavior of someone who had been "sexually traumatized." He also testified that acting out sexually at an early age (as defendant had reportedly done) is "the single best indicator of having been sexually molested which is consistent with his own self report as an adult."

In his closing argument, the prosecutor highlighted the absence of evidence that defendant was repeatedly raped as the defense psychologist claimed, and argued that this meant that the psychologist was not a trustworthy witness:

"[Prosecutor:] He [the psychologist] said—this was baffling. He said from the stand that Rickey Evans suffered repeated rapes. Those were his words. And you can see all of that documentation, you can look at all the reports. If there were any caretakers, family members, foster mothers, police officers, anyone that believed that might have been true, you know they would have told the mental health professionals going in and you know they would have documented it. There is some speculation—

"[Defense counsel]: I object at this point. That misstates the evidence, your Honor. There was a point in the trial I tried to introduce it and he objected to it and then you upheld the objection. I think he is misstating the testimony.

"The Court: Overruled.

"[Prosecutor]: If there was a young boy that suffered repeated rapes, that documentation would have been replete. It would have been filled with that. That would have been a huge hot button topic for Rickey Evans' analysis. It is not in the reports."

2. Analysis

Defendant argues that the prosecutor's argument quoted above amounted to prejudicial misconduct, because the prosecutor impermissibly argued that defendant failed to introduce evidence that the court had in fact excluded on the prosecutor's motion. " 'The applicable federal and state standards regarding 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.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) However, it is not misconduct for a prosecutor to comment on the defense's failure to introduce material evidence or to

call logical witnesses. (*People v. Ratliff* (1986) 41 Cal.3d 675, 691.) "The prosecution may argue all reasonable inferences from the record, and has a broad range within which to argue the facts and the law." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757.)

Defendant claims that the prosecutor referred to his failure to introduce evidence that was in fact excluded on the prosecutor's motion. (*People v. Daggett, supra*, 225 Cal.App.3d at pp. 757-758 [prosecutor took unfair advantage of trial court's evidentiary ruling when asking jurors to draw inference they might not have drawn had judge admitted relevant evidence].) However, nowhere in defendant's opening brief does he specify what excluded "evidence" was the subject of the prosecutor's argument. When read in context, it is clear that the prosecutor's closing argument was a permissible reference to the absence of rape allegations in the various reports that had been prepared about defendant, a subject of lengthy cross-examination of defendant's key witness at the sanity phase of the trial.

In his reply brief, defendant does not acknowledge the psychologist's testimony regarding the rape allegations. Instead, he refers this court to the trial court's sustaining of the prosecutor's objection to questions regarding an incident when defendant was taken to the hospital after he was possibly molested (as opposed to raped). (*Ante*, Background, § II.C.1.) He claims that "it is apparent that the prosecutor successfully prevented appellant's counsel from inquiring into the subject of appellant being molested and from making any use of records from First Vallejo Hospital." First, defendant directs this court to nothing in the record indicating that he sought to introduce into evidence hospital records regarding molestation allegations, much less tell this court what such records would have revealed. This case is therefore distinguishable from *People v. Varona* (1983) 143 Cal.App.3d 566, which held that it was improper for the prosecutor to base an argument on a " 'lack' of evidence where the defense was ready and willing to produce it," which amounted to the prosecutor "arguing a falsehood." (*Id.* at p. 570.)

Second, the prosecutor's argument concerned the absence of evidence to support allegations of "repeated rapes" (as opposed to molestation allegations) underlying the defense psychologist's PTSD diagnosis. In fact, the prosecutor acknowledged during

closing argument that although there was insufficient evidence to support a PTSD diagnosis, defendant might have been molested:

"[Prosecutor:] And he [the psychologist who testified for defendant] isn't puzzled at all by the fact that the different doctors are coming up with PTSD, but no one mentions what it is based on. Someone mentioned at one point, incorrectly according to [the defense psychologist], because the young boy felt abandoned by his mother so she said he suffers from PTSD. Every single report after that says PTSD but no one explains why. That doesn't bother [the psychologist]. He glosses right over that. He says, no, he was repeatedly raped as a child. *I'm not saying that Mr. Evans wasn't molested. I can't say that.* I don't know. I'm telling you what is in the documentation." (Italics added.) Contrary to defendant's argument, the prosecutor did not base his arguments on evidence that was withheld from the jury. Instead, he acknowledged that defendant might have been molested, but questioned whether he had been repeatedly raped because multiple evaluations of defendant did not refer to such abuse. His argument did not amount to misconduct.

D. Trial Court's Comments to Jury.

1. Background

After deliberating "for about a day," the jury sent a note to the trial court stating, "We have reached an impasse. Nine believe the defendant was sane, three believe the defendant was insane. It is improbable of a move [*sic*], plus or minus one. Need your help or we are done." After conferring with counsel, the trial court gave the jury an instruction consistent with the one approved in *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1122, directing the jury to deliberate further and offering direction regarding how to proceed. After the trial court gave the instruction (which defendant objected to below, but does not dispute on appeal was proper), the court then asked jurors whether there was "anything in particular" that the court could do to assist them, such as elaborate on particular instructions or provide read backs of testimony. The following lengthy exchange then took place:

"JUROR #53: I think bringing up that [the supplemental instruction] and going back into the other room and thinking about—that through, we are looking for evidence that wasn't presented.

"The Court: I see.

"Juror #53: And that is being—that is preventing a—"

"The Court: Well, that is a fair comment.

"Juror #53: But we are not really entitled to evidence that wasn't presented.

"The Court: You are not. But the fact that it wasn't—let me give you a really oversimplified example. Suppose the question is whether somebody ran a red light and there is no evidence presented on that, well, if there is no evidence presented on that, that means the party with the burden of proof failed of proof [*sic*]. But it could well be the other way. If the consideration is whether somebody was hurt as a result of the running red light [*sic*] and there is no evidence of that, then there is no evidence of that. That doesn't necessarily mean that the party with the burden of proof necessarily loses. It means that the party who that evidence would have helped doesn't get the advantage of that evidence. That may well be, in this case, the prosecution. If there is some particular evidence that would have helped the prosecution that he hasn't put on, well, he hasn't put it on and you can't backfill it for him anymore than you can for evidence that you think would have helped the defendant here.

"Now, having said that, it sounds like the 12 of you already understand those principles, so I'm not sure whether that is going to help you any or not. If the evidence is there, you can consider it. If the evidence isn't there, then you can consider the evidence you do have and see whether that arises to meeting the burden of proof that the defendant has here." Juror No. 53 then asked for clarification regarding the preponderance-of-the-evidence burden of proof (applicable in the sanity phase of the trial, CALCRIM No. 3450), and the trial court responded in a way that defendant apparently does not claim was objectionable. Another lengthy exchange then took place:

"[A Juror]: The question about direction, how far or can you give us direction on how should we use our personal experiences in this case because I feel that maybe—we

may be using too much of that in substitution of there is a lot of unanswered questions and when there is a lot of gaps that we have to try to bridge [*sic*].

"The Court: That's an interesting and insightful question, and I understand why you've asked that. I can't answer that with specific reference to any particular thing in part because I don't know what you discussed. Let me address that in very broad terms.

"And I actually raised this with a number of your fellow jurors when we were doing jury selection. The law not only allows you but encourages you to use common sense and everyday experience. What it doesn't allow you to do is to substitute what you are imagining to be true for what the evidence shows, nor does it allow you to substitute any particular expertise that you may have for the evidence.

"Let me give you a couple real-life examples to illustrate the point. Fortunately, they are about as far from the issues in this case as they can be which is good. My wife was on jury duty some years ago. It was a case where somebody was accused of assault in basically a dispute between neighbors. And it was important to the case whether someone was defending his own property or had come off of his property on to the neighbor's property. One of the jurors was a postal delivery person. And he said, you know, look, I see—dogs aren't humans, but I see dogs that will growl at me if I'm on their yard and not on the street. That kind of common sense became part of what the jury was allowed to take into consideration. Now, if he had tried to get into, you know, what the survey was or, gee, why wasn't there an aerial photograph of this or something like that, that would have been going beyond ordinary experience.

"Another example I had was one where a gentleman was used [*sic*, presumably, accused] of basically grabbing and running—grabbing jewelry from a jewelry store and running. His defense was, no, I wasn't there at the time, and I was home watching the NCAA basketball playoffs, March Madness. Nobody introduced evidence as to what the dates were of that tournament. The offense was in the middle of April. And I said to them, look, you are the best judges as to whether you do or don't have common knowledge about when that basketball tournament was. If you don't think you have

common knowledge as members of the community, no one has presented evidence to you about that. If you think you do, you do.

"The example I have is suppose somebody said—suppose somebody asked you, what was—what day of the week was Independence Day 1944. Well, nobody knows that. But if I ask you, what is the date of Independence Day of 1944, everybody knows that. In this case, the NCAA tournament fell in between those two.

"I hope that gives you better illustration of the extent to which you can use common sense and everyday experience." After holding an off-the-record discussion with counsel, the court directed the jury to "go ahead and go back to the jury room and give it another try."

Less than four hours after the trial court spoke with jurors, the jury reached its verdict, concluding that defendant was sane at the time defendant committed second degree murder.

2. Analysis

Although defendant did not object at trial to the trial court's answers to jurors' questions, he argues on appeal that the court's remarks violated his federal and state constitutional rights to a fair trial by a unanimous jury, because they "were at best confusing and at worst served to coerce the three minority jurors into agreeing with the nine jurors who had voted for sanity." (E.g. *People v. Gainer* (1977) 19 Cal.3d 835, 842-843, 850 (*Gainer*) [improper to pressure dissenting jurors to acquiesce in verdict, disapproving *Allen v. United States* (1896) 164 U.S. 492].)

The trial court is authorized to give supplemental jury instructions to a deadlocked jury if it determines in its sound discretion that there is a reasonable probability of agreement by the jury. (*People v. Whaley* (2007) 152 Cal.App.4th 968, 979-980 (*Whaley*).) "However, '[t]he court must exercise its power . . . without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." [Citation.]' [Citations.]" (*Id.* at p. 980.) The trial court is prohibited from (1) encouraging jurors to consider the numerical division or preponderance of opinion of the jury in reexamining their views on the issues

under consideration and (2) stating or implying that if the jury fails to reach a unanimous verdict, the case will necessarily be retried. (*Gainer*, *supra*, 19 Cal.3d at p. 852.)

Assuming arguendo that defendant's objection was not waived by failure to object below, as respondent claims, it lacks merit. Defendant directs this court to nothing in the trial court's comments that could be construed as coercive. In fact, the trial court specifically told jurors not to draw any inferences from its comments regarding how the jury should decide the case, stating: "To put it bluntly, the risk is that if the judge knows [as it did here] that the split is nine to three in one direction or the other and then urges the jury to go ahead and reconsider things and try to come to a result, it could be misperceived that the judge is subtly suggesting that the three join the nine as opposed to the nine joining the three. *I want to stress to you that is not my intention here*. It may well be that the three come around to the point of view of the nine. *It may be that the nine come to the point of view of the three*. It may well be that none of that happens. For all I know, the nine switch over to the other side and the three switch over to the other side. Any of these are possibilities, *and I don't mean to suggest that I'm trying to sponsor any one of those* other than, in effect, trying to sponsor the idea that you give another effort to trying to reach a unanimous verdict in one direction or the other." (Italics added.) Far from coercing the jury to reach a particular verdict, the trial court specifically stated that its comments should not be construed in that way.

Defendant claims that two of the examples provided by the court (regarding a case where a defendant claimed that he was watching a basketball championship game at the time of the crime, and another case regarding the running of a red light) involved a failure of proof, and that the impermissible inference here was that defendant had not met his burden to prove that he was insane at the time of the murder. To the contrary, the trial court's example involving a defendant who had claimed to be watching a basketball game at the time of a crime was simply an example of situations where jurors could use their "common knowledge" to decide an issue, which suggested that jurors could use their common sense to decide a particular issue even if neither side had presented evidence on it. When the trial court gave the example regarding running a red light, the

court said that even if there was no evidence to support a fact, "*[t]hat doesn't necessarily mean that the party with the burden of proof* [here, defendant] *necessarily loses*," because it could be that the prosecution had failed to provide evidence helpful to its position. (Italics added.)

Taken together, there was nothing impermissibly coercive or misleading about the trial court's answers to jurors' questions. Although it is true that any departure from standard jury instructions "should be carefully considered in light of *Gainer* and the circumstances of each case" (*Whaley*, *supra*, 152 Cal.App.4th at p. 985), we disagree that the court's remarks here violated defendant's rights to a fair trial and a unanimous verdict.[7]

E. Prior Serious Felony Conviction.

Finally, defendant argues that there was insufficient proof that his prior conviction under section 245, subdivision (a)(1) qualified as a serious felony under the three strikes law. The second amended information alleged that defendant had been convicted of assault by force likely to produce great bodily injury (§ 245, subd. (a)(1)), and that he had personally inflicted great bodily injury on the victim in the commission of the offense, which qualified the conviction as a serious felony. (§§ 667, subds. (b)-(i), 1170.12.) At the court trial on the prior, the court received into evidence (1) an information dated December 7, 2004, charging defendant with assault by force likely to produce great bodily injury (§ 245, subd. (a)(1)), with an enhancement that defendant personally inflicted great bodily injury on the victim in the commission of the offense (§ 12022.7,

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[7] Although we conclude that the trial court's comments do not compel reversal under the circumstances of this case, we stress, as did the concurring justice in *Whaley*, *supra*, 152 Cal.App.4th 968, that "[t]he trial judge is seen by the jury as the central courtroom authority figure [and] the unbiased source of the law . . . ." (*Id.* at p. 985 (conc. opn. of McAdams, J.).) We do not share Justice McAdams's concerns about the supplemental instruction approved in *People v. Moore*, *supra*, 96 Cal.App.4th 1105; however, we agree that there is "the need for *utmost caution*" when addressing the jury, especially after jurors have announced that they are deadlocked. (*Whaley* at p. 985; see also *People v. Rodriguez* (1986) 42 Cal.3d 730, 772 [" '[A] trial court that chooses to comment to the jury must be *extremely careful* to exercise its power "with wisdom and restraint and with a view to protecting the rights of the defendant." ' "]) (Italics added.)

subd. (a)); (2) a plea form showing that defendant pleaded no contest to the charge; handwritten notes state that the plea was to "245(a)(1) P.C. w/ Infliction of Great Bodily Injury"; (3) a felony order of probation showing that defendant received probation; the order states that defendant was convicted of "F PC 245(a)(1) enh PC 12022.7(a)."[8]

A prior serious or violent felony conviction counts as a strike, requiring that the prison sentence for a second felony conviction be doubled. (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1); *People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) A violent felony includes any felony in which the defendant inflicts great bodily injury on any person other than an accomplice, as provided in section 12022.7. (§§ 667, subd. (d)(1), 667.5, subd. (c)(8).) Here, the prosecution provided substantial evidence that defendant previously committed a felony in which he committed great bodily injury, because the evidence showed that he was charged under, pleaded no contest to, and was convicted pursuant to section 12022.7, which requires proof that defendant "*personally inflicts great bodily injury* on any person . . . ." (Italics added.)

Defendant is correct that a felony conviction for violating section 245, subdivision (a), does not necessarily count as a strike, because a defendant may violate the statute in one of two ways. One way (committing an assault with a deadly weapon) qualifies as a serious felony, the second way (committing an assault by any means likely to produce great bodily injury) does not. (*People v. Delgado, supra,* 43 Cal.4th at p. 1065.) Defendant simply ignores his plea to the great bodily injury enhancement that qualified the prior conviction as a strike, which is surprising given the fact that the trial court specifically relied on the enhancement when denying defendant's oral motion for a new trial below. There was sufficient evidence that defendant's prior conviction was for a violent felony, qualifying it as a strike, and that the trial court therefore did not violate defendant's due process rights when it doubled defendant's sentence under the three strikes law.

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8 On July 20, 2010, this court granted defendant's motion to augment the record with the documents introduced at his court trial on the strike prior.

III.
DISPOSITION

The judgment is affirmed.

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Sepulveda, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.