Filed 2/22/11 (reposted 2/23/11 to correct file designation)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDDIE ALFONSO BROWN, Defendant and Appellant.	F058350 (Super. Ct. No. VCF0081158-01) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lloyd G. Carter and Leanne LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the section entitled "Additional Facts" and parts II, III, IV, V, VI, VII, and VIII.

INTRODUCTION

Appellant/defendant Eddie Brown (defendant) was charged and convicted of first degree murder (Pen. Code, § 187, subd. (a)) in the homicide of his former girlfriend, Bridget Colmore (Bridget).[1] Bridget disappeared on September 11, 2001. She was last seen entering defendant's apartment. Her body was found one month later, buried in a cornfield. Defendant admitted to his half sister that he strangled Bridget, but claimed he had to defend himself because she attacked him with a hammer. At trial, defendant again claimed Bridget attacked him with a hammer, but asserted that she died accidentally when he pushed her away and she flipped over a couch.

During trial, the superior court granted the prosecution's motion to introduce evidence about the prior acts of domestic violence that defendant committed against Bridget and against four other girlfriends in the years prior to his relationship with Bridget. In so ruling, the court relied on Evidence Code[2] section 1109, subdivision (a), which states that "in a criminal action in which the defendant is accused *of an offense involving domestic violence*, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Italics added.) The court found that the instant murder prosecution was for an "offense involving domestic violence" within the meaning of section 1109. The court also made extensive findings that the evidence was more probative than prejudicial under section 352.

In the published portion of this opinion, we conclude the superior court properly admitted defendant's prior acts of domestic violence under section 1109, and we agree with the court's observation that "murder is the ultimate form of domestic violence"

---

[1] We will refer to the victim and several witnesses by their first names for clarity and ease of reference; no disrespect is intended.

[2] All further statutory references are to the Evidence Code unless otherwise indicated.

under the facts and circumstances of this case. In the nonpublished portion of this opinion, we reject defendant's other evidentiary and instructional contentions, and his arguments about alleged prosecutorial misconduct. We will affirm.

FACTUAL SUMMARY

As of 2001, Bridget had dated defendant for two years. She was a petite woman and weighed about 112 pounds. Defendant was five feet nine inches tall, and weighed 195 pounds. Defendant had two years of training in taekwondo, and his family and friends knew he was into martial arts. He had a felony conviction for selling drugs in 1998.

At some point between November 2000 and March 2001, Bridget told her coworker, Margarita Ibarra, about an argument she had the prior evening with her boyfriend, "Eddie." Bridget told Ibarra that "Eddie" choked her during the argument, and she demonstrated how "Eddie" put his hands around her neck. Bridget said her neck still hurt and Ibarra could see discoloration on her neck. Bridget said she could not believe that "Eddie" put his hands on her. Bridget said that as he choked her, she told him to leave her alone, and she either kicked or pushed him away.

Around July 2001, Bridget and defendant were in the mall together. George Ybarra, who previously dated Bridget, was walking nearby and saw the couple. Ybarra smiled at Bridget and tried to greet her, but Bridget shook her head and looked very uncomfortable. A few days later, Bridget told Ybarra that she could not say hello to him because " 'it would have been harmful for me and possibly for you.' "

During the summer of 2001, Bridget told Margaret Ibarra that she was no longer seeing "Eddie." Bridget's family believed they broke up a few months before she disappeared. However, defendant kept calling her home telephone and cell phone, and members of her family testified that she tried to screen her calls to avoid speaking with him.

In July or August 2001, Bridget met Patrick McKinnie and they started dating. Shortly before Bridget disappeared, McKinnie was spending the weekend at Bridget's house when defendant unexpectedly arrived. Bridget and McKinnie were outside, defendant walked up to Bridget, and she told McKinnie that defendant was " 'Eddie,' " her former boyfriend. Defendant told Bridget that he needed to talk to her. Defendant said, " 'What is this[?] What is this[?]' " McKinnie asked what the problem was. Defendant replied, " 'You know what the problem is.' " McKinnie said he didn't know. Bridget told defendant she was going to call the police, and defendant left. When McKinnie drove away from her house the next day, defendant drove very close behind and then alongside McKinnie's car, and motioned for McKinnie to pull over. McKinney ignored defendant and drove past him.

A few weeks before her death, Bridget spoke to another former boyfriend, Jesse Gutierrez. Bridget was concerned and said defendant threatened her life because she broke off their relationship. Bridget said that defendant said he was going to kill her and whoever was with her.

About a week before she disappeared, Bridget drove her children to a restaurant for dinner, and her young son noticed that defendant was following them in his car.

On the afternoon of September 10, 2001, Bridget was at her mother's house when defendant called her cell phone about four times. Bridget's mother answered three of the calls, and each time she "cursed [defendant] out and said that Bridget is through or Bridget is done or she doesn't want you. Leave her alone." Bridget's mother testified defendant kept calling back, and Bridget finally answered the fourth call and spoke to defendant.

Around 5:00 p.m. on September 10, 2001, Bridget called George Ybarra. She said she had met a new man and she was excited about their relationship. Ybarra had recently seen Bridget with defendant, and he asked why she was still dating defendant because that relationship was not healthy. Bridget said she had to go to defendant's house that

evening and pick up some things. Ybarra urged Bridget not to go, but advised her to take her sister if she did.

Bridget's disappearance

Around 5:00 p.m. on September 11, 2001, Bridget received a call while she was cooking dinner for her family at her Visalia home. Her 14-year-old niece heard Bridget refer to the caller as "Eddie," and say, " 'Eddie, what do you want[?]' " Bridget was upset but she stayed on the telephone, went into her bedroom, and closed the door.

When Bridget emerged from the bedroom, she was very upset. She told her niece to finish cooking dinner and said she would be right back. Bridget walked out of her house and her family never saw her again. It was daylight when she left.

Bridget was later seen walking into defendant's Visalia apartment, just before it was dark. Her car was parked in front of his apartment. Defendant's neighbors recognized Bridget and her car from her prior visits. Defendant's neighbors shared a common wall with defendant's apartment, and they never heard any sounds of a disturbance that night. Sometime after 10:00 p.m., one of defendant's neighbors realized that Bridget's car was no longer parked at the curb.

Bridget was never seen alive again, and her car could not be found. Bridget's niece, who lived with the family, testified defendant never again called the house after Bridget disappeared.

The investigation

On September 13, 2001, investigators from the Tulare County Sheriff's Department interviewed defendant and asked if he knew of Bridget's whereabouts. Defendant said she had briefly stopped by his apartment around 6:00 p.m. on September 11, 2001, but she left and he had no idea where she was. An officer asked defendant if he had called Bridget and asked her to come over. Defendant said he did not recall. The officer asked if he called Bridget at any time on September 11, 2001, and defendant said he might have done so.

Defendant had a fresh bruise above his right eye. Defendant said he received the bruise a few weeks earlier during a fight at a gas station. Defendant's head was shaved and he did not have any other injuries. At the officer's request, defendant removed his shirt, and the officer did not see any injuries on his upper body. Defendant did not say anything about Bridget inflicting any injuries on him.

At a later point in the investigation, defendant called the officers and complained that they were following him. He also told the officers that he was just as concerned about Bridget as they were.

Marilyn Davis's statement

Marilyn Brown Davis, defendant's half sister, initially told officers that she did not have any information about Bridget's disappearance. As the investigation continued, however, Davis contacted investigators and disclosed information about defendant's activities on the night of September 11, 2001. Davis said she was driving on Highway 99 when defendant called her, drove beside her car, and asked her to follow him. Davis followed defendant as he drove a car from Visalia to Fresno and left it in a parking lot. Davis then drove defendant back to his Visalia apartment.

Davis said that later that night, defendant asked Davis to get into his car and drop him off someplace. Defendant drove his car and Davis sat in the passenger seat. Defendant stopped the car at a remote cornfield in the Matheny Tract, an area south of Tulare. It was dark and no one was around. Defendant got out of the car, Davis moved over to the driver's seat, and defendant opened the car's rear hatchback. Davis did not see whether defendant took anything out of the car.

Defendant told Davis that he needed to take care of something, and directed her to leave and then return in 15 or 20 minutes. Davis drove away and left defendant in the dark cornfield. Defendant kept calling Davis and said he needed more time. About an hour later, Davis picked up defendant by the cornfield.

Davis told investigators that as she drove away from the cornfield, defendant told her that Bridget came over to his apartment that night, he was "going to let her go," and Bridget hit him in the head with a hammer. Defendant told Davis that "he grabbed her and choked her and killed her." Defendant told Davis that he had buried Bridget's body in the cornfield.[3]

Defendant's cousin told the investigators that defendant said he argued with Bridget, and strangled and killed her, but he did not mean to do it.[4]

Discovery of Bridget's body and forensic evidence

Davis directed investigators to a cornfield in the Matheny Tract where she had left defendant on the night of September 11, 2001.

On October 2, 2001, Bridget's decomposed body was found buried in that cornfield.[5] Her car had been abandoned in a motel parking lot in Fresno.

There was a red stain on the bathroom floor in defendant's apartment, against the backboard and under a cabinet. A criminalist believed someone attempted to clean the stains by mopping the bathroom floor. The red stain was blood, and the blood contained a mixture of DNA from both Bridget and defendant.

Dr. Gary A. Walter, the pathologist, testified there was no evidence that Bridget died from stab or gunshot wounds. Bridget's body showed signs of moderate decomposition. Dr. Walter listed strangulation as the probable cause of death, based on the autopsy and the information he received from the investigating officers. There was some swelling and bruising around Bridget's neck, including the right thyroid gland

---

[3] At trial, Davis denied telling the officers that defendant admitted he killed Bridget or that he buried her.

[4] At trial, defendant's cousin denied making these statements and claimed he never heard defendant say anything about killing Bridget.

[5] An investigator later attempted to replicate the act of using a shovel to dig a grave in the same cornfield at the same time of year. It took 40 to 46 minutes to dig a grave with the same dimensions as the one in which Bridget's body was found.

which encircles the trachea below the larynx (voice box). This area was in the vicinity of the right cricoid cartilage, the first cartilage ring of the trachea just below the larynx. There was evidence of free blood within the thyroid gland and in the soft tissue of the trachea cricoid cartilage. Dr. Walter explained it was abnormal to find blood in the tissue and outside of the blood vessels. There was enough free blood in the thyroid gland and neck cartilage areas to support a conclusion of pressure and possible manual strangulation which could have resulted in suffocation. The trauma was only on the right side.

Steve Long's statements

At the time that Bridget disappeared, Steve Long, defendant's friend since high school, worked at a medical supply house. During the investigation, two of Long's coworkers contacted the police and reported that Long made statements to them that seemed to be about the case, and he talked to them before they read about Bridget's disappearance in the newspaper.

James Meeks, one of Long's coworkers, testified that on the afternoon of September 11, 2001, Long asked Meeks if he heard about anyone missing or something happening to a woman. Meeks thought Long meant someone who was missing in that morning's terrorist attacks in New York. In the following days, however, Long continued to discuss the topic with Meeks. Long told Meeks that he had a discussion with someone about hitting a person over the head and what he would do with that person. Long said that "all you would have to do is hit them over the head. Just take them to a field and get rid of the car" in Fresno. Long told Meeks he was checking the newspaper every day. Meeks was shocked by Long's statements because they were "just straight out of the blue."

Long told another coworker, Flora Lopez, that he was scared of his friend "Eddie," and he would never testify against him. Long said that if something like that happened to him, he would dump the car in Fresno. Long said the body would be somewhere in a

cornfield near Tulare, where no one could find it, because "the corn would grow and the machines were so big … that it would probably, they probably would never find it."[6]

When Meeks read the newspaper stories about Bridget, he thought "it was really weird and shocking because [he] felt like [he] kind of already knew all of this and for it to be in the paper it was really weird." [7]

The trial

Defendant was charged with first degree murder. During a lengthy jury trial, the prosecution moved to introduce evidence pursuant to section 1109, that defendant committed prior acts of domestic violence against Bridget and four other girlfriends. The court granted the prosecution's motion and held the evidence was admissible. The court found that murder was an offense "involving domestic violence" within the meaning of section 1109, and that murder was "the ultimate form of domestic violence." The court held an extensive evidentiary hearing to evaluate the proposed testimony pursuant to section 352, excluded some of the evidence, and held the vast majority of the evidence was probative and admissible.

The four women who previously dated defendant separately testified about a series of domestic violence acts that defendant committed against them. They testified that he followed them when they were out with other people. They testified about specific incidents when defendant beat, kicked, choked, and threatened to kill them. They

---

[6] The prosecutor primarily relied on Long's statements as evidence to support the lying-in-wait special circumstance. The prosecutor argued that defendant told Long ahead of time how he was going to dispose of Bridget's body and her car, and the evidence raised the inference that defendant already dug the grave in the cornfield before he lured Bridget to his apartment. The court rejected that argument and dismissed the lying-in-wait special circumstance for insufficient evidence. However, the court found the inferences from Long's statements were relevant for premeditation and deliberation.

[7] At trial, Long testified he only made statements about the case after it was reported in the newspaper and on television, and he denied making the specific statements claimed by Meeks and Lopez.

testified the incidents occurred both during and after they were involved in relationships with defendant, and often as a result of arguments when he was jealous and accused them of seeing other men.[8]

At trial, defendant testified he was still dating Bridget at the time of her death, and insisted he never touched Bridget except on the night that she died. Defendant claimed Bridget unexpectedly arrived at his apartment that night, attacked him with a hammer, he pushed her away, she flipped over his couch, and she died by accident. He admitted that he buried her body in the cornfield and disposed of her car. He obtained a shovel from his mother's house and Davis drove him to the cornfield. Defendant claimed he did these things because he had a panic attack and did not think the police would believe his story.

Defendant denied committing the domestic violence acts described by his previous girlfriends and claimed he was never jealous of their relationships with other men. Defendant admitted that he was involved in several altercations with some of the women and their boyfriends but claimed he only intervened when he was concerned about the safety of the children he had fathered with those women.

After a lengthy jury trial, defendant was convicted of first degree murder and sentenced to 25 years to life.

ADDITIONAL FACTS*

We now discuss additional facts which are relevant to the resolution of the other issues in this case.

---

[8] In the nonpublished portion of this opinion, we address in greater detail the testimony of these four women, particularly as to the facts and circumstances of the prior acts of domestic violence committed by defendant against each of them. We also address the trial court's determinations as to whether this evidence was admissible pursuant to section 352, and reject defendant's appellate arguments that the admission of the evidence was prejudicial.

* See footnote, *ante*, page 1.

1. Defendant's postarrest statements

At some point prior to trial, defendant was held in custody in a cell next to inmates Ivan Davis and Delbert Miller. In June 2008, Ivan Davis, who had six prior felony convictions, told an investigator that he heard a conversation between defendant and Miller when they were in adjoining cells. Defendant asked Miller to acquire a weapon to take care of a witness who was a female relative.[9]

2. The autopsy

Dr. Gary A. Walter, the pathologist who conducted the autopsy, testified there was no evidence that Bridget died from stab or gunshot wounds. Bridget's body showed signs of moderate decomposition. There was desiccation, or drying of the skin on the hands and feet. There was also skin slippage on the superficial skin layers of the face, neck, and head. The underlying fat and muscle had dried out on the face and neck. The skin was no longer connected with the underlying tissue, so that the bone structure could be seen. There was no evidence of insect or maggot activity, which meant the body had been buried and protected from the air within a short time after death.

As a result of the decomposition, Dr. Walter was unable to determine if there was bleeding or injury to Bridget's face. There was discoloration on Bridget's face which appeared consistent with bruises. Dr. Walter conducted a microscopic inspection and could not confirm the existence of facial bruises. He could not rule out any facial injuries or bleeding because of the level of decomposition and skin drying.

Dr. Walter testified that he listed strangulation as the probable cause of death, based on the autopsy and the information he received from the investigating officers. In general, manual strangulation may be inflicted by hand pressure around the neck, which cuts off oxygen or compresses the carotid arteries. There was no evidence of soft tissue hemorrhages in the carotid area of Bridget's body. There was some swelling and

[9] At trial, Ivan Davis denied he spoke to an investigator, and denied that he heard any conversation between defendant and Miller about a weapon or a witness.

bruising around Bridget's neck, including the right thyroid gland which encircles the trachea below the larynx (voice box). This area was in the vicinity of the right cricoid cartilage, the first cartilage ring of the trachea just below the larynx. There was no damage to the cartilage or trachea.

However, there was evidence of free blood within the thyroid gland and in the soft tissue of the trachea cricoid cartilage. Dr. Walter explained it was abnormal to find blood in the tissue and outside of the blood vessels. There was enough free blood in the thyroid gland and neck cartilage areas to support a conclusion of pressure and possible manual strangulation, which could have resulted in suffocation. The trauma was only on the right side rather than the left side.

Dr. Walter explained the amount of pressure required to kill someone by manual strangulation depended on the size of the victim. The assailant would need to apply a moderate amount of pressure for several minutes to cut off oxygen and render the victim unconscious. It was difficult to determine if there were external injuries or bruises on Bridget's neck skin consistent with strangulation because of the body decomposition.

Dr. Walter reviewed Bridget's medical records and learned she had a nodule on her right thyroid, but she had not complained about it since 1999. The autopsy did not reveal a diseased thyroid, and the nodule would not have contributed to her death.

3. Defendant's prior acts of domestic violence

As we will discuss extensively in sections II and III, *post*, the court permitted the prosecution to introduce the following evidence in its case-in-chief, pursuant to section 1109, about defendant's prior acts of domestic violence committed against other girlfriends.

A. Mary Anaya

Mary Anaya testified she started dating defendant in 1989 or 1990. In July 1992, Anaya found out defendant was seeing other women, so she decided to date other men. Around that time, defendant arrived at her apartment at 2:00 a.m. and said she looked like

a prostitute. They argued, and defendant grabbed her hair from behind and threw her on the floor. Defendant kicked her and threw her in his car. Defendant beat her in his car as he drove down the freeway. Defendant also threatened to kill her. Defendant drove Anaya to his mother's house in Tulare. Anaya suffered a black eye and bruises all over her body. Defendant would not let Anaya leave the house for several days, until the bruising on her eye went down. Defendant told Anaya she was responsible for her own injuries and she made him do it to her.

Rita Dominquez, Anaya's friend, testified she saw Anaya shortly after this incident. Dominquez testified that Anaya had been badly abused, and she was bleeding all over her clothes. Anaya had a bloody lip and nose, and black eyes.

In July 1993, Anaya gave birth to defendant's child. In September 1993, defendant arrived at Anaya's apartment in the daytime and asked who she was messing around with. Anaya refused to answer, they argued, and defendant left. Defendant returned around 4:00 a.m. and argued about who she was seeing. Defendant punched her in the stomach and slapped her in the face. Anaya's older son tried to intervene, and defendant told Anaya that she "better get him or something else worse would happen.…"

In April 1994, defendant again appeared at Anaya's house and demanded to know who she was dating. Anaya said she was not dating anyone. Defendant pulled a gun and held it at Anaya's head until she answered his questions.

Anaya testified that she still dated defendant during this time. She never reported his threats to the police because she was afraid of him. Anaya also testified that she still loved him, and "[h]e was a person that didn't let me go."

Anaya testified that in July and August 1996, defendant repeatedly threatened to kill her. Defendant said he would " '[b]low my face off and stick a gun in my mom's mouth.' " Anaya finally called the police because defendant threatened her mother. She obtained a restraining order and tried to stop defendant from having visitation with their child.

B. Ramisse Rhodes

Ramisse Rhodes testified that she started dating defendant in 1993 or 1994, and their child was born in 1995. Rhodes knew defendant was also seeing Arlene James and Mary Anaya at the same time. Rhodes testified about an incident that occurred when she was at a nightclub with other friends. Defendant arrived while Rhodes was dancing. Defendant took her outside and tried to force her into his car. They argued and started pushing each other. Defendant shoved her against the wall.

In June 1999, Rhodes drove to a parking lot to meet defendant and exchange their child for a visit. Defendant and Rhodes argued about the visitation. Defendant pushed Rhodes against the car, put his hands around her neck, and started to choke her. After the police arrived, defendant told Rhodes in "a mute mouth" that he would kill her, and Rhodes could read his lips.

In July 1999, Rhodes and defendant were again exchanging the child. Defendant said he was going to kill her. Rhodes called the police and asked them to enforce her restraining order against defendant.

Rhodes broke up with defendant later in 1999. After they broke up, defendant told Rhodes that he would kill her if he found her with another man. Rhodes conceded that some of their disputes were based on defendant's belief that his child was being molested by Rhodes's new boyfriend, Theon Mims. Rhodes testified defendant's allegations against Mims were not true.

4. Defense evidence

The defense theory of the case was that Bridget went to defendant's apartment, attacked him with a hammer, he shoved her away from him, and she accidentally died during the confrontation.

Jesse Gutierrez testified for the defense that he used to date Bridget and they had a child together. Gutierrez testified Bridget usually was not a violent person except for two incidents. In July 1998, Bridget and Gutierrez argued about their child's haircut. A few

weeks later, Gutierrez dropped off something at Bridget's house, and she started to argue about the haircut again. Gutierrez tried to leave but Bridget stood in his way. Gutierrez testified he physically lifted Bridget out of his way and placed her on top of the washing machine. Bridget grabbed a small crescent wrench, swung it at Gutierrez, and threw it at him. Gutierrez thought she was just trying to scare him because it missed. As Gutierrez left Bridget's house, she said she was going to call the police. Gutierrez decided to turn himself in to the police department and explain the situation. Gutierrez testified that on another occasion, he argued with Bridget about something and Bridget bit his arm.

Elouise Brooks (Elouise), defendant's mother, testified defendant suffered panic attacks which required trips to the emergency room because he would have breathing problems and his heart would race.

Elouise testified she was present when defendant and Ramisse Rhodes met in the parking lot in June 1999 to exchange their child. Elouise testified they argued because Rhodes was going to take the child on a trip with her current boyfriend. Defendant was upset and said the boyfriend had inappropriately kissed the child. Rhodes and Elouise exchanged words, and Elouise walked back to her car. Rhodes tried to jump Elouise, defendant grabbed Rhodes to protect Elouise, and he never tried to choke Rhodes.

John Havenhill, defendant's ex-brother-in-law, testified about a dispute between Bridget and defendant's half sister, Davis. In July 2001, Davis threw a surprise party for defendant's mother, Elouise. Bridget had to leave early and ran into Elouise. Bridget greeted Elouise and told her to have a pleasant surprise party. Davis was upset because Bridget ruined the surprise. Davis yelled at Bridget, they ran at each other, and they started fighting like it was "a hockey fight."

A. <u>Defense expert</u>

Dr. Marvin Pietruszka, a board certified clinical pathologist, testified to his opinion that manual strangulation was not Bridget's cause of death. He explained there should have been more hemorrhaging through her head, neck, and chest cavity from the

compression pressure required to strangle her. He disputed Dr. Walter's belief that there was trauma on the side of her neck, and believed Dr. Walter only saw the effects of decomposition rather than trauma.

Dr. Pietruszka testified the primary cause of Bridget's death was from an accidental fall which resulted in a pontomedullary tear at the base of the brain. Such a tear could occur from a rapid movement of the head, and the person would go into a coma and die right away. It was impossible to identify the tear because the brain was liquefied at the time of the autopsy. He believed the injury was consistent with defendant's description of flipping her over the couch. He conceded there was no visible evidence to support his opinion. He also conceded such brain injuries were more common from the force of a person's head snapping back during a motor vehicle accident.

Dr. Pietruszka conceded that Dr. Walter found hemorrhaging around her thyroid. However, he believed the bleeding was from Bridget's pre-existing thyroid goiter, and it was consistent with defendant's account that he held her neck over the thyroid gland, and she flipped over the couch.

5. <u>Defendant's trial testimony</u>

Defendant testified at trial that he was still dating Bridget as of September 2001, and they had not broken up. Defendant also testified they had an open relationship and were free to see other people.

Defendant disputed Margaret Ibarra's testimony, that Bridget claimed he choked her. Defendant testified he never had any physical altercations with Bridget, he never tried to choke her, and he never touched her prior to her death.

Defendant admitted that he knew about Patrick McKinnie, Bridget's new boyfriend, and he showed up at her house when McKinnie was there. Defendant had "a few words" with McKinnie and left. Defendant denied that he followed McKinnie on the freeway.

Defendant conceded his cell phone records showed that he repeatedly called Bridget multiple times on September 8, 9, and 10, 2001. Defendant kept calling Bridget because she was not home and he was getting the answering machine. Defendant admitted Bridget's mother kept telling him that they were through. He denied that Bridget did not want to talk to him, and claimed she was always coming around to his apartment.

A. Defendant's testimony about Bridget's death

Defendant testified that he spoke to Bridget around noon on September 11, 2001. He did not call Bridget or speak to her again in the evening.

Around 6:00 p.m., Bridget unexpectedly showed up at his apartment. Defendant let her in and they had a casual conversation. Defendant testified Bridget was upset because he sided with his sister, Davis, when she argued with Bridget at his mother's birthday party.

Defendant testified Bridget was sitting on the living room couch. Defendant had left a hammer on that couch. He had just obtained the hammer at a swap meet, and he used it to hang mirrors in his apartment.

Defendant testified that after about five minutes, he asked Bridget to leave his apartment. He got up to open the door. Bridget walked behind him, and hit him in the back of the head with the hammer. He turned around and she hit him under his eye. Defendant testified he grabbed Bridget around the neck, shoved her "real hard" off him, and she flipped over the couch.

Defendant testified he was dazed and bleeding from the head injuries. He went into the bathroom and cleaned the blood from his head.[10] He closed the door so Bridget

---

[10] On cross-examination, defendant conceded he always kept his head closely shaved, the officers looked at his head shortly after the homicide, and they did not see any injuries. Defendant claimed the officers did not see anything because he always wore a baseball hat. Defendant testified he had "a little knot on [his] head" from the hammer blow, and it was bleeding "[j]ust a little, not much." Defendant further admitted

wouldn't bother him, and talked to Bridget from behind the closed door. She did not respond. After a few minutes, he walked out of the bathroom and found that she was still lying on the floor. Bridget was not bleeding. He had a panic attack, but tried to stay calm and performed CPR. She was still unresponsive and he realized she was dead.

Defendant considered calling the police, but he decided against it because he did not trust the police and thought they would treat him as the aggressor. Defendant believed Tulare police officers were racist based on the experiences of his family members and other African-Americans in the community.[11]

Defendant testified that instead of calling the police, he called Marilyn Davis, his half sister, and told her to meet him at Plaza Park because he needed to talk to her. Defendant initially testified that he drove his white Ford to Plaza Park to meet Davis. As his testimony continued, however, he changed his story and said he drove Bridget's car to the park.

Defendant met Davis at the park and told her what happened. They decided to drive Bridget's car to Fresno. Defendant drove Bridget's car and followed Davis on Highway 99, and he left Bridget's car at a Fresno motel.

Defendant testified they drove back to Tulare in Davis's car, they discussed what to do with Bridget's body, and they decided to bury her. Davis dropped off defendant at his apartment and drove away in her own car. Defendant backed up his white Ford to his

---

that he lied to the officers when he claimed he suffered the eye injury during a fight at a gas station.

[11] In support of this assertion, defendant introduced the testimony of his two cousins. Anthony Brooks (Anthony) was a guard for the California Department of Corrections at San Quentin. He lived in Tulare from 1972 to 1993 and continued to have contact with his relatives there. Cornell Wilkin (Cornell) was a deputy with the Los Angeles County Sheriff's Department. He lived in Tulare from 1988 to 1992. Both Anthony and Cornell testified to their opinions that the Tulare Police Department had a bad reputation in the African-American community, and within their own family, for discriminating against African-American men and treating them unfairly. They described various incidents when officers mistreated African-American men without cause.

door. His neighbors were outside and defendant waited until they left. He carried Bridget's body out of the apartment and placed it in the hatchback trunk of his car.

Defendant drove to his mother's house in Tulare and picked up Davis. Davis went into her mother's backyard, handed a shovel over the fence to defendant, and defendant put the shovel into his white car. Defendant told Davis to drive his car into the country. Davis drove around for about 30 minutes and pulled to the side of the road. Defendant carried Bridget, the shovel, and a flashlight into the field, and Davis drove away. He cleared away some cornstalks with the shovel, dug a hole, and buried the body. He called Davis and said he needed more time. Davis eventually picked him up and they drove back to Tulare. Defendant returned the shovel to Davis over their mother's back fence because they did not want their mother to know what happened.

Defendant testified that two days later, when the officers asked him about Bridget's whereabouts, he lied because he did not trust the police. Defendant admitted he later called the police and complained they were following him, and he told the police that he was just as concerned about Bridget as they were.

Defendant testified he dumped Bridget's car and buried her body because he was afraid of the police, he was concerned about what was going to happen to him, and he needed time to get an attorney.

Defendant admitted that after he was arrested, he called Davis from jail and asked what she told the police. Defendant learned that Davis told the police that she drove him into the country and left him there for 40 minutes. Defendant asked Davis if she told the police that he admitted that he choked Bridget, and Davis said no.

Defendant admitted he knew Ivan Davis while they were jail inmates, but insisted he never spoke to Ivan Davis or Delbert Miller about trying to get a weapon to take care of a witness.

Defendant admitted that he knew Steve Long in high school. Defendant testified he talked to Long after September 11, 2001, but he never told Long what happened to Bridget.

B. Defendant's testimony about prior acts of domestic violence[12]

Defendant admitted he dated Mary Anaya, Ramisse Rhodes, and Arlene James at the same time. Defendant insisted he never argued with them about whether they were dating other men. Defendant testified he only confronted them when he believed his children were at risk because of their other boyfriends. Defendant did not trust the police department, but he was willing to talk to the police to protect his children.

Defendant admitted he was in a physical altercation with Mary Anaya when he arrived at her apartment and found other friends were there. Defendant admitted he slapped her. He denied throwing her to the ground or pulling a gun. Defendant might have made "a terrorist threat" to Anaya on another occasion, and he might have punched her during a mutual fight after a traffic accident. He denied hitting Anaya in the back of the head during an argument about a rental car.

Defendant denied choking Rhodes during the child custody exchange in the parking lot. However, he grabbed the back of Rhodes's shirt because she was going after his mother, and that left a "red ring around her neck." He never confronted Rhodes at a club about dancing with other men or shoved her against a car. He never threatened to kill Rhodes.

Defendant admitted having one physical altercation with Rhodes's boyfriend, Theon Mims, because his daughter was uncomfortable around Mims. Defendant filed a complaint against Mims with Child Protective Services.

---

12 As we will explain in section II, *post*, the court reconsidered its initial rulings on the section 1109 evidence in light of defendant's trial testimony, and permitted the prosecution to cross-examine defendant about additional prior acts of domestic violence.

Defendant admitted his relationship with Arlene James might have been physical. James used drugs and defendant drank during that time, and he could not recall many details of their relationship. He might have beaten James, but he claimed James was bigger than he was. He denied that he tackled and punched James to prevent her from calling the police. He also denied kicking James in the head and face, forcing her back into his apartment, vandalizing her room, leaving a butcher knife under her bed, or stalking her and her children.

Defendant admitted he pleaded guilty to a misdemeanor and went to jail because of an incident with James. He attended anger management and a class for batterers.

Defendant testified he knew Katherine Torres, but they did not date. Defendant denied having any altercations with Torres. He admitted throwing a pair of nail clippers at her.

Defendant admitted being involved in a mutual altercation with James McAllister in 1998, and that he swung a chain at him. He also admitted having a mutual altercation with Jeff Howard in 1991, but denied pulling a gun on him.

6. <u>The prosecution's rebuttal evidence</u>

Apriyle Colmore, Bridget's sister, testified about the altercation between Bridget and Davis at the birthday party for defendant's mother in July 2001. Defendant and Bridget argued at the party, and Bridget and Apriyle decided to leave. Defendant's mother arrived and Bridget wished her a happy birthday. Davis came out of the house and was very upset. Bridget got out of the car, and Davis was on top of her on the ground. When Apriyle tried to help Bridget, defendant picked up Apriyle and threw her into the street. Apriyle suffered bruises and injuries on her knees.

Mary Anaya testified that in February 1992, defendant was angry at her because she did not pick him up on time.[13] Defendant grabbed her hair and threw her in the car. In January 1993, she accidentally left their child in her car while it was still running, and the car rolled backwards and hit a wall. When Anaya told defendant what happened, defendant tried to jump her, and their relatives pulled them apart. In March 1993, Anaya was five months pregnant, and she refused to take defendant to pick up a rental car. Defendant swung at her and missed, and then slapped the back of her head. In February 1994, Anaya had been out with a friend, returned home, and went to sleep. She woke up and found defendant standing over her, and realized he had been hiding in the house. Defendant threw a phone bill at her, demanded to know who she was calling, and punched her in the eye.

Ramisse Rhodes testified that in 1997 or 1998, defendant arrived at her house, they argued, he grabbed her by the throat, he choked her, and she blacked out.

Officer Jason Morris testified that he responded to an incident between defendant and Rhodes in June 1999. Rhodes said defendant choked her. Morris saw a slight redness on her chest, above the shirt line. Morris believed the redness was consistent with someone being pushed in the chest. The incident was not serious enough to arrest defendant.

Jeff Howard testified that in April 1991, he accompanied a friend who had a dispute with defendant. His friend intended to settle things and fight defendant. Howard went with his friend and carried a small .22-caliber gun. When they arrived at defendant's house, defendant came out with a pearl-handled silver magnum gun. Defendant's brother emerged with another gun. Howard turned to run away, but either

---

[13] As we will also discuss in section II, *post*, the court permitted the prosecution to introduce additional prior acts of domestic violence in rebuttal, based on the nature of defendant's trial testimony.

defendant or his brother took away Howard's gun, and Howard was hit in the face with a gun.

A. Arlene James

Arlene James testified she dated defendant in the 1980's and early 1990's, and they had six children. James used drugs during that time, and she could not remember if defendant threatened her or whether certain incidents occurred. James admitted she did not want to testify against defendant.

James testified that in June 1985, defendant chased her back to her apartment, he ransacked her apartment, and she suffered a cut under her eye when he hit her in the head with a vase. In July 1999, defendant arrived at her house, started to drink, and refused to leave. James threatened to call the police, they had a "tussle," and James suffered injuries to her head and jaw. As a result of that incident, defendant was convicted of a misdemeanor and had to attend anger management.

James testified she knew Bridget, they lived near each other, and they were friends. Bridget visited James a few days before she disappeared, and said she had broken up with defendant.

Lieutenant Steve Puder testified he interviewed James during the investigation into Bridget's disappearance. James said that on several occasions during their relationship, defendant beat and threatened her, and pulled weapons on her. James was very emotional and said she had been beaten too many times to remember.

B. Katherine Torres

Katherine Torres testified she lived with defendant in the late 1980's and early 1990's. Torres testified defendant "was always hitting me and grabbing me and kicking me and sometimes he was choking me too." In July 1989, Torres had split up with defendant. On one occasion, she returned to her apartment after being gone all night. Defendant had broken into her apartment and he was waiting for her. Defendant tried to beat her but she ran away. Defendant threw a pair of nail clippers at her and cut her

hand. She ran to a neighbor's house and called the police. In November 1990, Torres confronted defendant about seeing another woman. Defendant choked and beat her, and his mother pulled him away from her. In July 1991, defendant and Torres were using drugs and living in his car. Torres had been released from a mental hospital and she was not well. Defendant flipped out, hit her, and inflicted a black eye.

C. Rebuttal expert testimony

In response to the defense expert's testimony, Dr. Walter testified that he would have seen evidence of a pontomedullary tear in Bridget's brain regardless of the decomposition of her body. Dr. Walter explained that such a tear required a considerable amount of force, and rapid flexion and hyperflexion of the neck, usually from roll-over vehicle accidents or falling head-first from a significant height. The vaso artery would also tear and cause significant hemorrhaging. He ruled out such a tear as the cause of death because he did not see blood at or near the brain stem.

DISCUSSION

I. Admission of Prior Acts of Domestic Violence in a Murder Prosecution

Section 1109 provides, in relevant part, that "in a criminal action in which the defendant is accused *of an offense involving domestic violence*, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (§ 1109, subd. (a), italics added.)

As applicable to this case, the court granted the prosecution's motion to introduce evidence that defendant committed prior acts of domestic violence against Bridget in the months prior to her death, and that he committed domestic violence acts against four previous girlfriends in the 1980's and 1990's. The court overruled defendant's objections that section 1109 only permitted the introduction of propensity evidence in a domestic violence prosecution, and found the propensity evidence was relevant and probative in this murder case based on the nature of the relationship between defendant and Bridget.

In doing so, the court agreed with the prosecutor's assertion that murder was "the ultimate form of domestic violence."

We will review the provisions of section 1109, and then address defendant's contentions that prior acts of domestic violence were not admissible in this murder prosecution, and explain why murder is an "offense involving domestic violence" within the meaning of section 1109.

A. Section 1109

"Evidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101.) However, the Legislature has created exceptions to this rule in cases involving sexual offenses (Evid. Code, § 1108) and domestic violence (Evid. Code, § 1109)." (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251.) "[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence." (*People v. Johnson* (2000) 77 Cal.App.4th 410, 420.) Section 1109, in effect, "permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes. [Citation.]" (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024 (*Hoover*); see also *People v. Soto* (1998) 64 Cal.App.4th 966, 979-981 [history of section 1108].) "[I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333-1334, fn. omitted (*Brown*).)

The admission of prior acts as propensity evidence encompasses both charged and uncharged acts. (See, e.g., *People v. Falsetta* (1999) 21 Cal.4th 903, 917-918 (*Falsetta*); *Brown, supra*, 77 Cal.App.4th at pp. 1332-1334; *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1331-1332.) Moreover, evidence of a prior act may be introduced as propensity

evidence even if the defendant was acquitted of criminal charges based upon that act. (See, e.g., *People v. Mullens* (2004) 119 Cal.App.4th 648, 652, 665-668.)

Even if the evidence is admissible under section 1109, the trial court must still determine, pursuant to section 352, whether the probative value of the evidence is substantially outweighed by the probability the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (*Hoover*, *supra*, 77 Cal.App.4th at pp. 1028-1029.) The court enjoys broad discretion in making this determination, and the court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *Brown*, *supra*, 77 Cal.App.4th at p. 1337.)[14]

B. Admissibility of section 1109 propensity evidence in a murder prosecution

Defendant contends that section 1109 only permits the admission of prior acts of domestic violence in a subsequent prosecution for a domestic violence offense. Defendant argues his prior acts against Bridget and his former girlfriends were inadmissible because he was not charged with committing domestic violence in the instant case, he was charged with murder, and murder is not listed in section 1109 as an offense involving domestic violence. Defendant's contentions raise the question of what is "an offense involving domestic violence" within the meaning of section 1109.

---

[14] Defendant renews an argument he raised before the superior court, that the admission of propensity evidence under section 1109 violated his federal constitutional rights to due process and equal protection. As noted by the superior court, and acknowledged by defendant, similar constitutional challenges have been repeatedly rejected, and courts have held the admission of evidence pursuant to section 1109 and its counterpart, section 1108, does not violate a defendant's rights to due process and equal protection. (*Falsetta, supra,* 21 Cal.4th at pp. 917-918; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704 (*Cabrera*); *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096 (*Escobar*); *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1313.)

Section 1109 does not contain an enumerated list of offenses which are defined as those "involving" domestic violence. However, section 1109, subdivision (d)(3) provides some guidance on the question:

> " 'Domestic violence' has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, 'domestic violence' has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense."[15]

We thus turn to Penal Code section 13700, which defines "domestic violence" as "*abuse* committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or *is having or has had a dating or engagement relationship*." (Pen. Code, § 13700, subd. (b), italics added.) Bridget was someone with whom defendant had a dating relationship for two years, and was under the definition contained in Penal Code section 13700, subdivision (b).

Penal Code section 13700 defines " '[a]buse' " as "*intentionally or recklessly causing or attempting to cause bodily injury*, or placing another person in *reasonable apprehension of imminent serious bodily injury* to himself or herself, or another." (Pen. Code, § 13700, subd. (a), italics added) The prosecution's evidence showed that defendant "intentionally or recklessly" caused bodily injury to Bridget, and placed her "in reasonable apprehension of imminent serious bodily injury" when he fatally strangled her. (*Ibid*.)

---

[15] Family Code section 6211 defines domestic violence "more broadly" than the more restrictive provisions of Penal Code section 13700. (*People v. Dallas* (2008) 165 Cal.App.4th 940, 953; *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143-1144 (*Ogle*).) However, section 1109 limits the Family Code's definitions to domestic violence acts which occurred "no more than five years before the charged offense." (§ 1109, subd. (d)(3).) The vast majority of defendant's prior acts against his former girlfriends occurred more than five years before Bridget's homicide in 2001. We will thus focus on the domestic violence definitions contained in Penal Code section 13700. (Cf. *Ogle, supra,* 185 Cal.App.4th at p. 1143.)

The prosecution's theory was that defendant strangled and killed Bridget because he was angry and jealous that she broke up with him and was seeing another man, and that theory was firmly supported by the events leading up to Bridget's death. Bridget told a coworker that defendant tried to strangle her during an argument. Bridget warned a former boyfriend that she could not greet him in public if she was with defendant because it could be harmful for her. Bridget told another former boyfriend that defendant had threatened her life because she broke off their relationship, and defendant said he would kill Bridget and whoever she was with her.

Bridget's family testified that defendant repeatedly and continuously tried to call her in the weeks after they broke up. There was evidence that defendant was watching Bridget because he followed her family when they drove to dinner, and he showed up at her house when she was dating McKinnie and tried to confront Bridget and McKinnie. Defendant also followed McKinnie as he drove away from Bridget's house and signaled that he should pull over; McKinnie ignored defendant and kept driving.

Bridget's niece testified that on the night she disappeared, Bridget had an angry telephone call with "Eddie" and demanded to know what he wanted. Bridget walked out of the house and said she would be right back, but her family never saw her again. Shortly afterward, defendant's neighbor saw Bridget walk into defendant's apartment, and noticed Bridget's car was parked at the curb. Several hours later, however, a neighbor realized Bridget's car was gone.

Defendant's half sister, Davis, told the officers that defendant said he argued with Bridget at his apartment that night, he was "going to let her go," but "he grabbed her and choked her and killed her."

Based on the prosecution's evidence, defendant was alleged to have "intentionally or recklessly" caused bodily injury to Bridget, and placed her "in reasonable apprehension of imminent serious bodily injury," within the scope of the statutory language, when he fatally strangled her. (Pen. Code, § 13700, subd. (a).) Defendant was

thus "accused of an offense involving domestic violence" within the meaning of section 1109 when he was charged with the first degree murder of Bridget, and the court properly found that his prior acts of domestic violence were admissible as propensity evidence in this case.

We find support for this conclusion in the legislative history of section 1109:

> "[T]he legislative history of the statute recognizes the special nature of domestic violence crime, as follows: 'The propensity inference is particularly appropriate in the area of domestic violence *because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity*. Without the propensity inference, the escalating nature of domestic violence is likewise masked. If we fail to address the very essence of domestic violence, *we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner*. Since criminal prosecution is one of the few factors which may interrupt the escalating pattern of domestic violence, we must be willing to look at that pattern during the criminal prosecution, or we will miss the opportunity to address this problem at all.' (Assem. Com. Rep. on Public Safety (June 25, 1996) pp. 3-4.) Moreover, the special nature of domestic violence cases is legislatively recognized in enactments such as the Law Enforcement Response to Domestic Violence, sections 13700 through 13731.
>
> "Based on the foregoing, the California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence." (*People v. Johnson, supra*, 77 Cal.App.4th at p. 419, italics added.)

The policy reasons for the admission of propensity evidence under section 1109 were also addressed in *People v. Poplar* (1999) 70 Cal.App.4th 1129 (*Poplar*), where defendant was convicted of the forcible rape of his girlfriend. He argued that his prior acts of domestic violence were improperly admitted at trial because the rape prosecution was not an offense involving domestic violence, and section 1109 and Penal Code section

13700 " 'refer to the classic kind of pushing, shoving, hitting, slapping, punching' and not to 'a specific sexual offense such as rape.' " (*Poplar* at p. 1138.)

Poplar rejected defendant's argument and held that section 1109's "definition of domestic violence/abuse ('reasonable apprehension of imminent serious bodily injury to … herself') encompasses the definition of rape ('fear of immediate and unlawful bodily injury on the person'). Defendant was charged with an offense involving domestic violence, that is, rape. As the prosecutor argued, *rape is a higher level of domestic violence, a similar act of control*." (*Poplar, supra,* 70 Cal.App.4th at p. 1139, italics added.)[16]

As applied to the instant case, the facts and circumstances of defendant's relationship with Bridget were indicative of defendant's " 'larger scheme of dominance and control' " which he attempted to exercise over Bridget, as he became angry, watched her activities, followed her, and tried to prevent her from having any other relationships. (*People v. Johnson, supra*, 77 Cal.App.4th at p. 419.) Defendant's prior acts of domestic violence, committed against the four women he dated before Bridget, were also indicative of "cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner." (*Ibid*.)

Given the legislative history and the language of section 1109, we agree with the trial court's observation in this case that murder is "the ultimate form of domestic

---

16 A series of cases have held that the admission of prior acts of domestic violence pursuant to section 1109, in prosecutions for murder, attempted murder, and rape, did not violate the defendants' rights to due process. (See, e.g., *People v. Johnson, supra,* 77 Cal.App.4th 410, 419-420 [admission of defendant's prior acts of domestic violence in prosecution for first degree murder of his wife did not violate due process]; *Escobar, supra,* 82 Cal.App.4th at pp. 1094-1097 [same]; *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120 [admission of prior acts of domestic violence in prosecution for attempted murder of former boyfriend did not violate due process].) In reaching these conclusions, however, the courts did not specifically address whether the charged offenses were within section 1109's definition of "domestic violence."

violence," and that defendant's prior acts of domestic violence were admissible based on the nature and circumstances of his relationship with and conduct toward Bridget. Defendant was charged with first degree murder based on strangling Bridget, his former girlfriend, after a lengthy period in which he tried to intimidate her because she chose to break up with him. He was clearly "accused of an offense involving domestic violence" within the meaning of section 1109.

Defendant contends that prior acts of domestic violence are not relevant for any purpose in a murder prosecution because such acts do not permit an inference as to malice or any particular mental state. However, a defendant's propensity to commit domestic violence against a former girlfriend who was murdered, and other prior girlfriends who were assaulted, is relevant and probative to an element of murder, "namely, [defendant's] intentional doing of an act with malice aforethought that resulted in the victim's death." (*Smith v. Roe* (C.D.Cal. 2002) 232 F.Supp.2d 1073, 1088, fn. 12.) A defendant's pattern of prior acts of domestic violence logically leads to the inference of malice aforethought and culpability for murder.

C. *Walker, Story*, and section 1108

Defendant acknowledges the statutory definitions contained within section 1109, but still asserts that prior acts of domestic violence are not admissible in a murder prosecution because murder is not listed as a crime involving domestic violence in either section 1109, Penal Code section 13700, or Family Code section 6211. Defendant relies on *People v. Walker* (2006) 139 Cal.App.4th 782 (*Walker*) and *People v. Story* (2009) 45 Cal.4th 1282 (*Story*) in further support of these arguments.

As we will explain, however, *Walker* and *Story* interpreted section 1108, which is the counterpart to section 1109. Section 1108 provides in relevant part:

> "In a criminal action in which the defendant is accused of *a sexual offense*, evidence of the defendant's commission of *another sexual offense or offenses* is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a), italics added.)

While sections 1108 and 1009 have been described as "virtually identical" (*People v. Johnson, supra,* 77 Cal.App.4th at p. 417; *People v. Johnson* (2008) 164 Cal.App.4th 731, 739), there are important statutory distinctions relative to defendant's definitional arguments in this case.

As we have explained, section 1109 provides for the introduction of propensity evidence in a prosecution for an offense "involving domestic violence," by reference to the definitions in Penal Code section 11370 and Family Code section 6211. (§ 1109, subd. (a).) Neither the Penal Code nor the Family Code contain a list of enumerated domestic violence offenses. (See e.g., Fam. Code, § 6203; Pen. Code, § 13700, subd. (a).)

In contrast, section 1108, subdivision (a), provides for the introduction of propensity evidence when a defendant is accused of "a sexual offense." Section 1108, subdivision (d)(1) "defines 'sexual offense' as a crime under the law of a state or of the United States involving *either conduct proscribed by a series of enumerated Penal Code sections* or nonconsensual sexual contact. It also includes in the definition, in [section 1108,] subdivision (d)(1)(E), any crime that involves '[d]eriving sexual pleasure or gratification *from the infliction of death,* bodily injury, or physical pain on another person.' " (*Walker, supra,* 139 Cal.App.4th at pp. 797-798, italics added.)

Given this background, the defendant in *Walker* was charged with the murder of a prostitute. The parties stipulated there was no medically-valid way to determine whether the sexual contact between defendant and the victim was consensual. At defendant's murder trial, the court relied on section 1108 and permitted the prosecution to introduce evidence of defendant's prior sexual assaults on other prostitutes. (*Walker, supra,* 139 Cal.App.4th at pp. 789-792.)

Walker reversed defendant's murder conviction and held: "Section 1108, subdivision (a), limits the statute's scope to criminal actions in which the defendant is 'accused of a sexual offense'; and subdivision (d)(1) defines 'sexual offense' to mean a

'crime ... that *involve[s]' certain categories and enumerated types of sexual misconduct*. In ordinary usage these terms connote that the requisite sexual transgression must be an element or component of the crime itself without regard to the evidence establishing a specific violation. [Citations.]" (*Walker, supra,* 139 Cal.App.4th at p. 800, italics added.) *Walker* held that "whether a crime involves deriving sexual pleasure or gratification from inflicting physical pain should … be determined from the elements of the offense alone and not from the evidence establishing a particular violation of the law." (*Ibid.*)

In *Story,* defendant was convicted of first degree felony murder for strangling his coworker based on the underlying offenses of rape and burglary. (*Story, supra*, 45 Cal.4th at pp. 1285-1288.) The trial court admitted evidence under section 1108 that defendant committed four other sexual assaults prior to and following the murder. (*Story, supra*, at pp. 1285-1288.) The appellate court reversed defendant's conviction and held the section 1108 propensity evidence was improperly admitted because defendant was not " 'accused of a sexual offense' " within the meaning of section 1108, since murder " 'is not found in any of the enumerated Penal Code sections nor does it include as a necessary element nonconsensual *sexual* conduct.' " (*Story*, *supra*, at p. 1291, italics in original.)

The California Supreme Court in *Story* disagreed with the appellate court's conclusions and affirmed defendant's murder conviction. *Story* declined to address whether *Walker* was properly decided, but held that *Walker* was distinguishable since it did not involve or discuss "the question whether an open murder charge prosecuted as first degree murder on a rape-felony-murder theory is a sexual offense under section 1108." (*Story*, *supra*, 45 Cal.4th at p. 1292.) *Story* further held that even under *Walker*, the defendant had been charged with first degree felony murder with rape as an underlying felony, which meant he was accused of a sexual offense within the meaning of section 1108. (*Story* at p. 1292.)

Story held it was particularly probative for the jury to learn about defendant's history of sexual assaults in determining what happened in the victim's home the night the defendant strangled her. (*Story, supra*, 45 Cal.4th at p. 1293.) *Story* found support for this conclusion in *People v. Pierce* (2002) 104 Cal.App.4th 893, which held that assault with the intent to commit rape was a crime involving conduct proscribed by the sex offenses listed in section 1108, although it was not specifically listed as a sexual offense under section 1108. (*Story, supra,* at p. 1293.) *Story* concluded "that section 1108 applies at least when the prosecution accuses the defendant of first degree felony murder with rape (or another crime specified in § 1108, subd. (d)(1)), or with burglary based on the intent to commit rape (or other sex crime), [as] the underlying felony." (*Story, supra*, p. 1294.)

While *Story* and *Walker* are based on section 1108, and *Story* held the propensity evidence was properly admitted, defendant contends the reasoning of those cases is equally applicable to section 1109. Defendant asserts that prior acts of domestic violence cannot be introduced in a murder case pursuant to section 1109 "because murder is not designated as an offense involving domestic violence which by analogy to [*Story* and *Walker*] is required.… [I]t is clear that by not designating murder in … section 1109, murder is excluded."

Walker and *Story* do not support defendant's arguments. First, *Walker* is inapplicable to this case since the language in section 1108 is not as broad as that used in section 1109. Section 1108, subdivision (a), permits the admission of propensity evidence when the defendant "is accused of a sexual offense," whereas section 1109, subdivision (a) provides for the admission of propensity evidence when the defendant "is accused of an offense *involving* domestic violence."

Second, section 1109 does not contain the same list of enumerated offenses as in section 1108, which was partially the basis for *Walker's* conclusions. Instead, section 1109, subdivisions (a) and (d) define a prosecution "involving" domestic violence by

reference to definitions contained in Penal Code section 13700 and Family Code section 6211, neither of which contain an enumerated list of offenses. Third, *Story* actually supports the introduction of the propensity evidence in this case, given its determination that *Walker's* interpretation of section 1108 was overly restrictive.

We conclude that the court properly found that defendant's prior acts of domestic violence were admissible under section 1109 in this murder prosecution.[17]

II. The Probative Value/Prejudicial Impact of the Propensity Evidence*

Defendant next contends that even if prior acts of domestic violence were admissible in this murder case, the trial court failed to properly conduct the balancing process required by section 352, to determine whether defendant's multiple prior acts of domestic violence were unduly prejudicial and too remote. Defendant also argues the court admitted too many prior acts, and the jury was likely to be confused by the number of prior domestic violence incidents.

A. The court's pretrial rulings

The prosecutor's pretrial motion sought admission of defendant's prior acts of domestic violence committed against Bridget and his prior girlfriends: Mary Anaya, Ramisse Rhodes, Katherine Torres, and Arlene James. The motion set forth, in great detail, 35 separate acts of domestic violence that defendant allegedly committed against these women, supported by police and investigatory reports about the prior acts.

---

[17] As we have explained, even if the evidence is admissible under section 1109, the trial court must still exercise its discretion pursuant to section 352 and determine whether the probative value of the evidence is substantially outweighed by the probability the evidence will consume an undue amount of time, or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (*Hoover*, *supra*, 77 Cal.App.4th at pp. 1028-1029.) In the nonpublished section of this opinion, we address the trial court's specific and detailed section 352 rulings in this case, and find the court properly admitted the evidence.

* See footnote, *ante*, page 1.

Defendant objected and argued that some of the prior acts did not involve domestic violence, and the evidence was remote and inherently prejudicial.

The court conducted an extensive pretrial hearing on the admissibility of defendant's prior acts of domestic violence. The court found such evidence was relevant and admissible under section 1109. The court held that "defendant's prior attacks on women, and that he had a relationship with or had children with, and especially attacks that are of a choking nature given the cause of death in this case is strangulation, certainly appear to be very probative." However, the court excluded certain prior acts listed in the prosecution's motion, because the incidents involved property crimes or assaults that were not probative of defendant's relationship with Bridget or his prior girlfriends.

Defense counsel argued the evidence of murder was very weak in this case, and the jurors were likely to be confused by "all this prior domestic violence" and they would convict defendant simply because they disliked him. The court replied:

> "But assuming I exclude some or all of that [evidence], aren't we painting a false picture to the jury and giving, if he has a history of violence with women, and the jury is not made aware of that, isn't the jury being misled then as to his, his nature with regards to dealing with women that cross him?
>
> "I mean in this particular instance, she has, the victim in this case has broken up with him. Involved herself in a relationship with another man. He has a history of when that happens, he attacks those women. And if I exclude that evidence, I think then he's given a false sense of—to the jury that he's, he's a good guy when he isn't a good guy."

Defense counsel argued defendant's prior acts against other girlfriends were not similar to the instant case because defendant had children with the other girlfriends and his prior acts were disputes about his children's safety. The instant situation was different because he did not have any children with Bridget, she went to defendant's house on the night of the homicide, and defendant did not confront her at her house.

Defendant also argued that several of the prior acts should be excluded because of remoteness, since section 1109 specifically excluded any prior acts that were more than

10 years old.[18] The court stated section 1109 still permitted the introduction of prior acts which occurred more than 10 years before the charged offense, if the court found the evidence was probative under section 352.

The court reviewed each prior act identified in the prosecution's motion and determined the probative value, prejudice, and remoteness for each incident. The court admitted defendant's prior acts committed against Ramisse Rhodes because the evidence showed defendant's propensity for violence against women, since he threatened to kill her, he tried to choke her (consistent with Bridget's cause of death), and the evidence was more probative than prejudicial. The court found defendant's prior acts against Mary Anaya were admissible because Anaya had been in the "exact same position" as Rhodes:

> "[Rhodes and Anaya] are people the defendant had a dating relationship with, has a child with, so again, it is an ex-girlfriend, significant other of the defendant who he seems to have a quarrel with and again, it shows a pattern. It shows a history. He can't get along with any woman who crosses him. He's going to threaten to kill her. He's going to threaten to do bodily harm to these people if he doesn't get his way. I mean, it shows a pattern of, and a motive of [defendant]."

The court held defendant's assault on Anaya in July 1992 was admissible, where he beat, kidnapped, and threatened to kill her, even though it occurred nine years before the homicide. The court was "a little" concerned about the incident's remoteness, but held the incident was admissible because it involved "an actual assault on a girlfriend when she was physically attacked."

Defense counsel complained that the court was going to admit too many prior acts of domestic violence before the jury. Counsel argued "these incidents are getting older

---

[18] As we will discuss in section III, *post*, section 1109, subdivision (e) states: "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

and older, and they're starting to accumulate and there is an undue prejudice aspect for accumulation."

> "THE COURT: Well, I, I understand that, but your client has no one to blame but himself that he has so many of these prior incidents if they're true. I mean, that will be for the jury to decide …."
>
> "[DEFENSE COUNSEL]: ….Whether … it's [defendant's] fault or not, the court still has to make an objective [section] 352 analysis as expanded by [section] 1109.
>
> "THE COURT: No. I agree. I agree. And in the court's mind, again, it's an incident involving allegations of, of jealousy and a physical assault … on a woman who has a significant relationship with the defendant. And in the court's mind it's much more probative than prejudicial even given the age …."

Defense counsel argued the admission of so many prior acts was prejudicial because of "the accumulation aspect of it." The prosecutor replied that the defense could not limit the section 1109 evidence to one or two incidents, then assert that there was no corroboration for defendant's prior acts and "it obviously isn't in [his] character to do this kind of behavior when he does this break-up, after break-up, after break-up." The court agreed with the prosecutor and rejected defendant's objections.

The court admitted the incident when defendant confronted Rhodes at a club because she was dancing with another man. Defense counsel objected, and argued that given the number of prior domestic violence incidents, the jury would likely believe each incident actually occurred instead of separately evaluating each prior act. Defense counsel argued:

> "I think the court has got to get to the point where the sheer number of these things are gonna [*sic*] make the, the sum of these instances take on a life of their own, and I'm asking the court to please consider the, the fact that so many of them are being allowed in, and the cumulative nature of it is becoming to be very, very important."

The court disagreed:

> "Again, [the act] shows a pattern of violence that the defendant uses against women in which he's involved with, especially when he is under … an impression that another male is involved. It shows a jealous rage on the part of the defendant and he acts out in that rage against the women he's involved with. Hence the prosecution's theory in this case, and for those reasons, I believe it is probative. Much more probative than prejudicial …."

The court initially excluded many of the prior acts listed in the prosecution's motion because they were unduly prejudicial, the prior incidents did not involve acts of domestic violence, and many of the incidents were too convoluted and too remote from Bridget's death. The court excluded all evidence about defendant's prior assaults on Arlene James because the incidents occurred more than 10 years prior to Bridget's death.

While the court excluded many of the prior acts identified in the prosecution's motion, the court clarified that it would reconsider those rulings if defendant testified and claimed "no I never harmed anybody in my life, I never threatened anyone, I'm a man of peace …."

B. Trial evidence

As set forth *ante*, the jury heard the prosecution's evidence about defendant's prior acts of domestic violence committed against Bridget. The jury also heard testimony from Mary Anaya and Ramisse Rhodes about their relationships with defendant and his prior acts of domestic violence committed against them.

In response to this evidence, the defense presented Jesse Gutierrez's testimony about Bridget's violence toward him, and evidence about Bridget's physical altercation with defendant's half sister.

Also as discussed *ante*, defendant testified at trial and claimed Bridget attacked him with a hammer, he pushed her away in self-defense, and she accidentally suffered the fatal injuries. Defendant denied that he committed any acts of violence against Bridget prior to the night of the homicide. Defendant also denied that he committed any prior acts of domestic violence against his previous girlfriends. Defendant admitted that

certain acts may have occurred, but insisted he only engaged in such acts when it was necessary to protect his children from the current boyfriends of his prior girlfriends.

C. The prosecution's request for reconsideration of the evidence

After defendant testified on direct examination, the prosecutor requested the court to reconsider its pretrial rulings as to the admissibility of several of defendant's prior acts of domestic violence. The prosecutor argued defendant's testimony opened the door to the admission of the other prior acts, since defendant claimed he was never violent to any of his prior girlfriends, and the prior incidents only occurred when he was defending his children from their mothers and their boyfriends.

The court found that defendant claimed in his direct examination testimony that he was only violent when he was "a good father" and "trying to protect his children." The court held the prosecutor had "a right to present a full clear picture to the jury on that issue and not have the jury misled." "If there are [prior] acts of violence and none of those come in, and [defendant is] taking the position that I'm only violent when it's necessary to protect my children, that, that completely is unfair in my opinion and that's not going to happen."

The court held the prosecutor could cross-examine defendant about the additional prior acts of domestic violence which the court had previously excluded. The prosecutor sought to introduce every prior act listed in his original motion, plus additional acts identified in a subsequent motion. The court refused to admit every prior act, and held that it would review every incident to determine whether they were unduly prejudicial or remote under section 352.

The court excluded an incident where defendant allegedly threatened to kill Mary Anaya's husband, and an altercation between defendant and Rhodes when Rhodes called defendant a drug dealer, and Rhodes alleged he broke into her house to check on her and steal her welfare check. However, the court decided to permit evidence that defendant constantly called Rhodes, because the calls were "hand in hand with a very violent

relationship with [Rhodes] and yet [defendant] says he, he made numerous phone calls to [Bridget] but there was no violence." The court also admitted evidence that defendant beat Rhodes's boyfriend, Theon Mims.

The court held the prosecutor could introduce the prior acts involving Arlene James since she was available to testify. The prosecutor moved to introduce an incident when defendant assaulted James in 1985, even though it occurred 16 years before Bridget's death, since there was never a break in defendant's pattern of domestic violence against James and his other girlfriends. Defense counsel replied there was a break in defendant's conduct because the domestic violence incidents happened "once every few years," and the 1985 incident was too remote and unrelated to Bridget.

The court stated that if defendant committed domestic violence incidents in 1985, 1990, and then 1999, there would be a strong argument about a break in defendant's pattern of domestic violence, but "if it's a constant one a year or one every other year that tends to me to show a continuing course of conduct." The prosecutor stated defendant assaulted James in 1985, 1986, 1987, and 1988. The court believed the series of incidents showed a continuing course of conduct.

The court acknowledged defense counsel's continuing objections that the number of prior acts resulted in "[a]n accumulative prejudicial nature."

> "THE COURT: And I would agree with [defense counsel] if there was one incident in '85 and that was it, or one incident in 1990 and that was it, but it appears that it happened at least one incident every year that he was with Arlene James. And again, it has some—a great deal of relevance in the court's mind about how [defendant] treats his women."

However, the court excluded evidence that James was pregnant when defendant assaulted her in 1987, since there was no evidence that she was visibly pregnant or that defendant was the father. The court also excluded incidents in 1986 where defendant threatened to kill an individual who was with one of his former girlfriends, an incident in 1988 when defendant fired shots in the air while with James, since there was no evidence

defendant used a gun against Bridget, and an incident with James in 1989 because it involved multiple parties and was "too messy."

Thereafter, defendant returned to the stand and the prosecutor cross-examined him about his prior acts of domestic violence against Rhodes, Anaya, James, and Torres, as set forth *ante*. On rebuttal, the prosecutor introduced direct evidence about these prior acts based upon the testimony of Rhodes, Anaya, James, and Torres.

D. Section 352

Defendant acknowledges that section 1109 propensity evidence has been found to be relevant and probative in other cases involving domestic violence. However, defendant contends the "shear [*sic*] volume" of prior acts in this case was prejudicial, and they were not relevant to any contested issue as to defendant's mental state to commit murder.

In order to protect a defendant's due process rights, evidence admissible under section 1109 is subject to exclusion under section 352. (*Hoover, supra*, 77 Cal.App.4th at pp. 1028-1029; *Escobar, supra*, 82 Cal.App.4th at p. 1096.) "Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s). [Citations.]" (*People v. Rucker, supra*, 126 Cal.App.4th at p. 1119.) Also relevant is the amount of time involved in introducing and refuting the evidence of prior uncharged acts. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

The prejudicial impact of prior acts evidence is necessarily decreased if the prior acts are "no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

> "The prejudice which exclusion of evidence under … section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which

> tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in … section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638; *Poplar, supra*, 70 Cal.App.4th at p. 1138.)

As applied to the instant case, the trial court herein carefully examined each prior domestic violence incident raised by the prosecutor and determined whether the probative value of that incident outweighed the potential prejudice for each act. As we have explained, the court initially excluded numerous prior incidents from the prosecution's case-in-chief because it found certain acts were unduly prejudicial and/or too remote from Bridget's homicide. The court repeatedly explained that certain prior acts were admissible because defendant had displayed a continuing propensity to engage in domestic violence incidents with his girlfriends, particularly when he was jealous or suspected they were not being faithful to him.

While the court excluded certain acts from the prosecution's case-in-chief, it expressly reserved the right to reconsider those rulings if defendant testified and denied engaging in any domestic violence incidents. Indeed, defendant testified to exactly that point, and claimed he only had conflicts with his prior girlfriends when he felt his children were in danger because of the women's inappropriate conduct, or his children's proximity with the women's subsequent boyfriends. The court thus granted the prosecution's motion to cross-examine defendant about additional incidents and introduce direct evidence about those incidents in rebuttal. However, the court refused to permit the prosecution to introduce every single prior act of domestic violence contained in the moving papers, reviewed every prior incident to determine the probative value and prejudicial effect, and excluded several prior acts which were unduly prejudicial or too remote.

We find the court carefully engaged in the balancing process required by section 352, and it did not abuse its discretion when it permitted the prosecution to present direct

evidence of defendant's prior acts of domestic violence committed against his previous girlfriends. The prior acts against the other girlfriends involved physical assaults and were less inflammatory than the charged offense, the strangulation murder of Bridget. (See, e.g., *People v. Ewoldt, supra*, 7 Cal.4th at p. 405.)

Defendant argues the jury in this case would have been tempted to convict him "simply to punish him for the other offenses, and the jury's attention would be diverted by having to make a separate determination whether defendant committed the other offenses." Similar arguments were addressed and rejected in *Cabrera, supra*, 152 Cal.App.4th 695, where the defendant was convicted of multiple offenses arising from a domestic violence incident with his girlfriend. The prosecution introduced the testimony of defendant's two prior girlfriends who had lived with defendant in the years before his relationship with the victim. Both witnesses testified about how their verbal disagreements regularly escalated into situations where defendant physically assaulted them. On appeal, defendant argued the prior acts evidence was unduly prejudicial and should have been excluded under section 352. (*Cabrera* at pp. 704-705.) *Cabrera* rejected this argument:

> "Here, the probative value of [the two prior girlfriends'] testimony is principally in its cumulative nature. Taken together, [their] testimony sets forth a continuous and fairly unbroken pattern of domestic abuse which commenced in 1995 and continued until 2002. The testimony of [the victim] demonstrated the pattern commenced again when [defendant] began dating her. Thus the testimony of [the two prior girlfriends] was highly relevant and probative because it created a strong inference that [defendant] had a propensity to commit the acts [the victim] described." (*Cabrera* at p. 706.)

Cabrera further held the testimony of the two prior girlfriends was not unnecessarily time consuming, and they described incidents which were "in no sense more aggravated or inflammatory than the charged offenses. [Citation.]" (*Cabrera* at p. 706; see also *Poplar, supra*, 70 Cal.App.4th 1129, 1139 [testimony of defendant's two previous prior

girlfriends about his prior acts of domestic violence against them was not unduly prejudicial in a prosecution for forcible rape of another girlfriend].)

As in *Cabrera*, the trial court in this case properly found the domestic violence evidence was particularly probative given defendant's defense theory that Bridget confronted him with a hammer and he was forced to defend himself. Defendant tried to claim that Bridget was the violent person in the relationship and she initiated the fatal confrontation. As the court herein explained, the exclusion of defendant's pattern of prior domestic violence against his former girlfriends would have presented the jury with an inaccurate picture of defendant's conduct: "And if I exclude that evidence, I think then he's given a false sense of—to the jury that he's, he's a good guy when he isn't a good guy."

Moreover, "[a]n individual who engages in domestic violence may have a pattern of abuse that carries over from short-term relationship to short-term relationship." (*People v. Rucker*, *supra*, 126 Cal.App.4th 1107, 1116.) Defendant had an unbroken history of committing acts of domestic violence against a series of girlfriends in the years immediately preceding his relationship with Bridget. He continued to display such conduct with Bridget.

The evidence that defendant had a propensity to commit acts of domestic violence, against Bridget and his other girlfriends, was substantially probative. " 'In the determination of probabilities of guilt, evidence of character is relevant. [Citations.]' [Citation.] Indeed, the rationale for excluding such evidence is not that it lacks probative value, but that it is too relevant. 'It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much.' [Citation.]" (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179.) Such evidence permits the jury to infer that, when a defendant committed a particular act, he did so in conformity with an escalating pattern of abuse, "a larger

scheme of dominance and control," and not in the heat of passion or in self-defense. (See, e.g., *People v. Johnson, supra*, 77 Cal.App.4th at p. 419.)

Defendant points out that the prosecution presented evidence involving "five prior domestic violence victims" (Bridget plus his four prior girlfriends), and "a total of 21 incidents" which occupied "at least 95 pages" of the reporter's transcript. While the amount of testimony may seem lengthy, it was not unduly lengthy since defendant's jury trial lasted over two months, and the reporter's transcript consists of 26 volumes and over 1700 pages.

The evidence in this case showed defendant's repetitive pattern of dominance and control in all of his prior relationships, up to and including his relationship with Bridget. He committed prior acts of domestic violence in an unbroken chain of events, with the most recent acts against Bridget, and then going back to Rhodes (1993-1999), Anaya (1989-1996), James (1989-1991), and Torres (1985, 1999). The prior acts evidence was prejudicial only in the sense that it constituted relevant and probative propensity evidence. His prior girlfriends were not seriously injured during any of the prior encounters, and the evidence had a significant tendency to prove defendant's propensity to threaten, or engage in, physical violence against women who were trying to break up with him. Moreover, the circumstances of Bridget's death were much more inflammatory than any of his prior incidents with his former girlfriends. There was no danger of the jury confusing defendant's prior assaults on his previous girlfriends with the charged act of premeditated murder of Bridget, followed by her midnight burial in a cornfield.

We conclude the substantial probative value of the prior domestic violence evidence was not outweighed by its prejudicial effect, given the nature and circumstances of defendant's history of domestic violence in light of the charged offense in this case.

III. Remoteness of Propensity Evidence*

Defendant next contends that even if the court did not abuse its discretion under section 352 as to the admission of some of the prior acts evidence, the court should have excluded the prior incidents which occurred 10 years before Bridget's death in 2001. Defendant contends such evidence was presumptively inadmissible under section 1109, subdivision (e), which states:

> "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, *unless the court determines that the admission of this evidence is in the interest of justice*." (Italics added)

The meaning of section 1109, subdivision (e) was recently explored in *People v. Johnson* (2010) 185 Cal.App.4th 520, which rejected arguments similar to those raised by defendant in this case. "Subdivision (e) establishes a presumption that conduct more than 10 years prior to the current offense is inadmissible. But, contrary to defendant's insinuations, it sets a threshold of presumed inadmissibility, not the outer limit of admissibility. It clearly anticipates that some remote prior incidents will be deemed admissible and vests the courts with substantial discretion in setting an 'interest of justice' standard. We therefore review that determination for abuse of discretion. [Citations.]" (*People v. Johnson, supra*, 185 Cal.App.4th at p. 539.)

> "[T]he 'interest of justice' requirement obviously was not intended to present an insurmountable obstacle to admission of more remote prior conduct. Nor do we think subdivision (e) necessitates an inquiry different in kind from that involved in a determination under section 352. The section 352 balancing approach gives consideration to both the state's interest in a fair prosecution and the individual's constitutional rights. We believe this same type of analysis is appropriate for the 'interest of justice' exception under subdivision (e).
>
> "To the extent a higher degree of scrutiny is called for, it is the conclusion drawn from the balancing test, not the process itself, that must change under subdivision (e). Under subdivision (a)(1) and section 352,

---

* See footnote, *ante*, page 1.

> evidence may be excluded only where its probative value is substantially outweighed by its prejudicial effect. Though it reversed the presumption in subdivision (e), we believe the Legislature intended to allow admission of evidence whose probative value weighs more heavily on those same scales.
>
> "Thus, the 'interest of justice' exception is met where the trial court engages in a balancing of factors for and against admission under section 352 and concludes … that the evidence was 'more probative than prejudicial.' While we need not and do not hold this is the only means by which the 'interest of justice' finding may be justified, we certainly find the statutory prerequisite for admissibility was met in this case." (*People v. Johnson, supra,* 185 Cal.App.4th at pp. 539-540.)

"Remoteness of prior offenses relates to 'the question of predisposition to commit the charged … offenses.' [Citation.] In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. However … significant similarities between the prior and the charged offenses may 'balance[] out the remoteness.' [Citation.] Put differently, if the prior offenses are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged offenses." (*People v. Branch, supra*, 91 Cal.App.4th at p. 285.)

As noted above, during the court's pretrial hearing about the admissibility of the section 1109 evidence, defendant argued that certain prior acts were inadmissible because section 1109, subdivision (e) specifically excluded any prior acts that were more than 10 years old. The court rejected defendant's argument and stated section 1109 still permitted the introduction of prior acts which occurred more than 10 years before the charged offense, if the court found the evidence was probative under section 352.

The court correctly overruled defendant's objections because section 1109, subdivision (e) did not presumptively preclude the admission of defendant's prior acts of domestic violence committed 10 years before Bridget's murder in 2001. The court recognized that certain prior acts occurred 10 years before Bridget's murder, but found those acts were admissible because of defendant's continuing pattern of committing acts of domestic violence against his former girlfriends, particularly when they tried to break

up with him. The court was well aware of its discretionary power because it excluded several prior incidents as too remote and/or too prejudicial. We find the court properly conducted the balancing test contemplated by section 1109, subdivision (e), and the prior acts which occurred 10 years before the murder were not presumptively inadmissible.

IV. CALCRIM No. 852*

Defendant next contends that the court improperly instructed the jury with CALCRIM No. 852, as to the consideration of his prior acts of domestic violence in determining whether he was guilty of murder. Defendant contends the instruction should not have been given since section 1109 does not permit the introduction of propensity evidence in a murder prosecution and the instruction is constitutionally infirm.

A. The instruction

The jury herein was instructed with the following version of CALCRIM No. 852, the pattern instruction on the consideration of prior acts of domestic violence as propensity evidence, which included the definitions of domestic violence contained within Penal Code section 13700.

> "The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically all prior assaultive behavior towards Arlene James, Ramisse Rhodes, Katherine Torres, Mary Anaya and Bridget Colmore.
>
> "Domestic violence means abuse committed against an adult who is a spouse or former spouse or cohabitant or former cohabitant or a person with whom the defendant has had a child or a person who has dated or is dating the defendant.
>
> "Abuse means intentionally or recklessly causing or attempting to cause bodily injury or placing another person in a reasonable fear of [imminent] serious bodily injury to himself or herself or to someone else."

---

* See footnote, *ante*, page 1.

CALCRIM No. 852 also stated the statutory definitions for being a "cohabitant," and then explained how the jury could consider the evidence of defendant's prior acts of domestic violence.

> "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant … has, in fact, committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely.
>
> "If you decide that the defendant committed the uncharged domestic violence, you may but are not required to conclude from that evidence that *the defendant was disposed or inclined to commit domestic violence and based on that decision also conclude that the defendant was likely to commit and did commit* ***homicide*** *as charged here*.
>
> "If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of homicide. The People must still prove the charge beyond a reasonable doubt.
>
> "Before evidence of prior domestic violence may be considered in a homicide case, you must determine that the charged homicide involved domestic violence. Do not consider this evidence for any other purpose except for the limited purpose of determining defendant's credibility." (Italics and bold added.)

The court made a slight modification to the italicized phrase in the pattern instruction, and inserted the word "homicide" (as bolded above) at the point where the instruction directs the court to "<insert charged offense[s] involving domestic violence>."

B. <u>Analysis</u>

Defendant raises several challenges to CALCRIM No. 852. First, he relies on his arguments in section I, *ante*, and contends that since prior acts of domestic violence are not admissible in a murder prosecution, the jury in this case was improperly instructed that it could consider his prior acts as propensity evidence to determine whether he

committed a homicide. As we have explained, however, the court herein properly admitted defendant's prior acts of domestic violence because the instant prosecution for murder was for an offense "involving domestic violence" within the meaning of section 1109 and Penal Code section 13700.

Defendant next contends that the general pattern language in CALCRIM No. 852 is constitutionally infirm, violates his right to due process, presents improper presumptions, and improperly permits the jury to find him guilty of the charged offense based upon a preponderance of the evidence instead of beyond a reasonable doubt. As defendant acknowledges, however, similar attacks on CALCRIM No. 852 have been repeatedly rejected by numerous courts, which have held that the instruction correctly states the law about the limited purpose for which the jury may consider prior acts of domestic violence under section 1109, the instruction does not conflict with other pattern instructions, it does not reduce the prosecution's burden of proof, and it does not violate a defendant's due process rights. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009, 1012-1016*; People v. Reyes, supra,* 160 Cal.App.4th 246 at pp. 251-253; *People v. Pescador* (2004) 119 Cal.App.4th 252, 261-262; *Escobar, supra,* 82 Cal.App.4th at p. 1097, fn. 7; *People v. Johnson, supra,* 164 Cal.App.4th 731, 738-740; *Brown, supra,* 77 Cal.App.4th at pp. 1335-1337.) We agree with the reasoning in these cases and reject defendant's constitutional challenges.

Defendant also contends the CALCRIM No. 852 improperly permits the jury to consider evidence of "a general intent crime involving assault to prove propensity to commit a crime involving the intent to kill with either express or implied malice." Defendant argues that since his prior acts of domestic violence were simple assaults and only required general intent, the jury could not rely on those acts to find that he committed first degree murder with malice aforethought, since the prior acts and the charged offense had different mental states.

Defendant's argument is partially based upon the premise that section 1109 only permits the admission of prior acts of domestic violence in a subsequent prosecution for similar acts of domestic violence. As we have explained, however, section 1109 is not as restrictive as suggested by defendant, and a murder is the ultimate form of domestic violence. Defendant's propensity to commit domestic violence against a former girlfriend who was murdered and other prior girlfriends is relevant and probative to an element of murder, "namely, [defendant's] intentional doing of an act with malice aforethought that resulted in the victim's death." (*Smith v. Roe, supra*, 232 F.Supp.2d 1073, 1088, fn. 12.) The jury could logically infer defendant committed the first degree murder of Bridget based on the prior domestic violence evidence, and the jury was correctly instructed in this case.

V. Prosecutorial Misconduct—Manslaughter and Provocation*

Defendant contends the prosecutor committed several acts of misconduct during his closing argument. We begin with his contention that the prosecutor misstated the law on manslaughter and provocation. Defendant acknowledges that defense counsel did not object to this particular portion of closing argument, but argues that any objection would have been futile. He also argues defense counsel was prejudicially ineffective for failing to object.

A. Prosecutorial misconduct in closing argument

We start with the well-settled principles about prosecutorial misconduct. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. 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

---

* See footnote, *ante*, page 1.

or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

It is settled that "a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) However, it is misconduct for the prosecutor to misstate the applicable law. (*People v. Boyette* (2002) 29 Cal.4th 381, 435 (*Boyette*).) When the misconduct claim focuses on 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. (*People v. Samayoa* (1997) 15 Cal.4th 795, 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.' [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Tafoya* (2007) 42 Cal.4th 147, 176.)

As we will discuss, *post*, defense counsel did not object to most of the portions of closing argument which he now claims constitute misconduct. Defendant acknowledges that counsel did not object, but asserts objections were not necessary because they would have been futile. Defendant does not cite to any evidentiary support for such a declaration. We have reviewed the entirety of the record, and there is no evidence the trial court repeatedly overruled valid objections, an objection or request for an admonition would have been futile, or the court otherwise discouraged defense counsel from taking action. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 501-502; *Boyette, supra*, 29 Cal.4th 381, 432.)

In the alternative, defendant argues defense counsel was prejudicially ineffective for failing to make these objections to closing argument. Keeping in mind that "[a]n

attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel," we will examine defendant's alleged points of misconduct. (*People v. Kelly* (1992) 1 Cal.4th 495, 540; *People v. Williams* (1997) 16 Cal.4th 153, 221.)

B. <u>The prosecutor's reference to provocation</u>

Defendant contends the prosecutor misstated the law on manslaughter and provocation in his closing argument. As set forth in the factual summary, defendant testified at trial that Bridget came to his apartment, hit him on the head and in the eye with a hammer, and he grabbed her by the throat and pushed her away to protect himself. The jury was correctly instructed on first and second degree murder, voluntary manslaughter, heat of passion, and provocation.

Defendant's misconduct claim is based on a limited portion of the prosecutor's closing argument, when he discussed defendant's credibility and the elements of voluntary manslaughter. The prosecutor argued defendant's account of the homicide was not credible, he did not present a credible story to support a theory of justifiable homicide, and he kept changing his story to set up a defense theory that would work. In making this argument, the prosecutor spoke to the jury from defendant's alleged perspective of changing his story to fit a defense:

> "Voluntary manslaughter. Okay. I understand maybe you're not going to buy any of that [justifiable homicide]. It's a little far fetched so you know what, I really would like you to consider voluntary manslaughter and I got a couple of theories and in case you don't like one, I got a second one so we're going to start with imperfect self defense. See, she hit me in the head with a hammer and I actually believed I was in imminent danger of being killed and great bodily injury and I actually believed that the immediate use of force was necessary, deadly force was necessary to defend against that danger and at least one of these beliefs was unreasonable.
>
> "Okay. So, so that hammer, you know, is still important for this particular instruction, you know, so it's really too bad that officer missed

seeing that injury to the back of my head because that would have been helpful.

"Oh, well we got voluntary manslaughter, heat of passion. The defendant killed someone because of a sudden quarrel or in the heat of passion. The defendant was provoked. You know, he's a peaceable guy. We all know he cares about his kids so much.

" ....."

"[A]s a result of the provocation the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment. And the provocation would have caused—oh, this is a problem but you might be able to buy it, would have caused a person of average disposition to act rashly and without due deliberation that is from passion rather than from judgment.

"….Of course this means you have to believe the defendant lied on the stand to you about not strangling Bridget at this point and speculate now he's lied about not strangling her but then you have to speculate that she provoked an argument without any evidence except for that same lying statement of his. Oh, and you have to speculate that the provocation would have been enough to provoke an average person of average disposition to ***do the same***." (Italics and bold added.)

Defense counsel did not object to this argument.

C. *Najera*, manslaughter, and provocation

Defendant contends the italicized and bolded section of the prosecutor's argument, as quoted above, misstated the basic law of manslaughter and provocation. Defendant's argument is based on *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*), where the prosecutor misstated the legal standard for provocation and voluntary manslaughter in closing argument. The prosecutor in *Najera* focused on "how" the killer responded to the provocation, and argued that it would not cause an average person to kill. On appeal, *Najera* held the argument was erroneous and improper: "The focus [of a heat of passion defense] is on the provocation--the surrounding circumstances--and whether it was sufficient to cause a reasonable person to act rashly. *How the killer responded to the*

provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*Id.* at p. 223, italics added.)[19]

Najera's discussion of prosecutorial misconduct is based on the long-standing, qualitative standard for reducing murder to manslaughter through provocation--i.e., that the provocation was sufficient to cause an ordinarily reasonable person to act from passion rather than judgment. (*People v. Lee* (1999) 20 Cal.4th 47, 59.) "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively.… '[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.)

D. <u>Analysis</u>

Defendant contends that in this case, as in *Najera*, the prosecutor committed misconduct because he told the jury that "heat of passion requires that an ordinarily reasonable person would have committed murder." In making this argument, defendant solely relies on the italicized and bolded language quoted above. However, defendant's argument is meritless when the highlighted phrases are considered in context of the

---

[19] *Najera* found the prosecutor committed misconduct but defendant forfeited his claim by failing to object at trial. (*Najera, supra,* 138 Cal.App.4th at p. 224.) *Najera* also rejected an ineffective assistance claim for failing to object, and held counsel's failure was necessarily harmless because there was insufficient evidence of provocation to even warrant giving voluntary manslaughter instructions in that case. (*Id.* at pp. 253-254.)

prosecutor's entire argument. As noted by the People, the prosecutor's comments focused on whether there was any credible evidence to support defendant's claims of provocation. The prosecutor correctly stated the law of manslaughter and provocation, but he argued the only evidence of provocation was based on defendant's account of what Bridget did in his apartment, and further argued that defendant completely lacked credibility about the events of that night. In contrast to *Najera*, the prosecutor did not focus on whether defendant's response to Bridget's alleged conduct was reasonable, but whether there was any credible evidence for the jury to find that an average person of average disposition would have acted rashly without due deliberation.

Defendant did not object to this portion of closing argument, and there is no evidence an admonition would not have cured any purported harm. (See, e.g., *Boyette, supra*, 29 Cal.4th 381, 432.) Moreover, the jury was properly instructed on the law of manslaughter and provocation. The jury was also instructed: "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We presume the jury followed the court's instructions on these points. (*People v. Gray* (2005) 37 Cal.4th 168, 217; *Boyette, supra*, 29 Cal.4th 381, 436.)

VI. Prosecutorial Misconduct; Facts Not in Evidence[*]

Defendant next contends the prosecutor committed misconduct in closing argument because he cited to facts not in evidence as to four specific issues. We will review these contentions, mindful of the principle that during closing argument, a party is entitled "both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. [Citations.]" (*People v. Morales, supra*, 25 Cal.4th 34, 44.)

A. Whether defendant called Bridget just before she disappeared

Defendant argues the prosecutor committed misconduct by claiming that defendant called Bridget in the hours just before she disappeared. Defendant notes that

---

[*] See footnote, *ante*, page 1.

the telephone records introduced at trial did not show that Bridget received a call from him on the afternoon or evening of September 11, 2001.

Defendant's argument is based on a section of closing argument when the prosecutor discussed how defendant repeatedly called Bridget after they broke up, and in the days leading to her death. The prosecutor cited the telephone records introduced into evidence, and pointed out that on September 10, 2001, the day before Bridget's death, there were "12 calls to her home phone and 6 calls to her cell phone and this one also goes into [September] 11th and on the 11th there's two calls to the home phone from his cell phone. *I don't think anybody here believes that he only was able to use his cell phone. He couldn't use any other phone*." (Italics added)

Defense counsel objected to this argument as referring to facts not in evidence. The court instructed the jury that it had to decide what the evidence was. The prosecutor continued his point and argued defendant could have used another phone to call Bridget on the day of her death.

Defendant contends the prosecutor committed misconduct because there was no evidence defendant called Bridget on the evening of September 11, 2001. Defendant is correct that the telephone records failed to show that defendant used either his cell phone or home telephone to call Bridget just before she disappeared. However, there was sufficient circumstantial evidence to support the prosecutor's assertion that defendant called Bridget. D.S., Bridget's 14-year-old niece who lived with the family, testified that defendant repeatedly called Bridget after they broke up, Bridget obtained caller identification on the home telephone to screen her calls, and Bridget and the children never answered the telephone if defendant was calling. Bridget's mother testified that defendant repeatedly called Bridget's cell phone on the day before she disappeared, Bridget had her mother answer three calls, and Bridget decided to answer the fourth call herself.

More importantly, D.S. testified about the scene in Bridget's house just before she disappeared—Bridget's phone rang, Bridget answered the phone, she said the name "Eddie," Bridget was very mad and irritated, and Bridget said, " 'Eddie, what do you want[?]' "

The prosecutor's argument was appropriate in light of D.S.'s trial testimony, that Bridget answered the phone and talked to someone named "Eddie" just before she left the house. D.S.'s testimony raised the reasonable inference that since Bridget always checked the caller's identity before she answered her telephones, and Bridget referred to the caller as "Eddie," that defendant could have called Bridget from another telephone number to avoid detection. Such an inference is further supported by Bridget's actions immediately after that telephone call, when she told the children that she would be right back, she left her house, and she was later seen entering defendant's apartment. The prosecutor's argument on this point was based on reasonable inferences from the admissible evidence.

B. <u>Whether Bridget gave defendant a black eye</u>

Defendant next contends the prosecutor relied on facts not in evidence when he asserted that Bridget struggled with him in his apartment, and she inflicted a black eye on him during that struggle. Defendant's argument is based on the prosecutor's discussion about how the investigators observed a black eye on defendant when they interviewed him a few days after Bridget disappeared. The prosecutor noted the investigators looked at the back of defendant's shaved head and had him remove his shirt, they did not see any injuries on his body, and they only saw an injury around his eye. The prosecutor argued:

> "There was a slight black eye [on defendant] and you know what, I'll bet you Bridget did [it]. She was fighting for her life, so I'm sure she did whatever it was that she could but that's all she could do. He is so much bigger, but it wasn't hitting him in the back of the head with a hammer. Just think about it. [¶] Even if Lieutenant Wightman hadn't seen that head, if she would have hit him in the back of the head with a hammer would he only have a small abrasion?"

Defense counsel did not object to this argument.

Defendant now contends the prosecutor relied on facts not in evidence when he asserted that Bridget inflicted the injury to defendant's eye. However, the prosecutor's argument was again based on reasonable inferences from the evidence. When the officers initially contacted defendant, he said he did not know Bridget's whereabouts. When asked about the fresh bruise above his right eye, defendant said he received the injury when some men jumped him at a gas station a few weeks earlier. Defendant did not say anything about Bridget inflicting any injuries on him.

At trial, defendant admitted he lied about the cause of his eye injury when he originally spoke to the officers. Defendant testified that Bridget used a hammer to hit the back of his head and under his eye, and then he grabbed Bridget's neck and flipped her over the couch. Defendant testified he was bleeding from the head injuries and cleaned the blood from his head in the bathroom. Defendant testified that when he returned to the living room, Bridget was lying on the floor and she was not bleeding. However, defendant told his half sister, Davis, that he strangled Bridget.

The criminalist testified that blood was found on the floor of defendant's bathroom, there was DNA from both defendant and Bridget, and the floor appeared to have been mopped.

Based on this evidence, the prosecutor's argument was appropriate and based on the reasonable inference that defendant was lying about how he suffered the black eye. Since the blood of both Bridget and defendant was on the bathroom floor, even though defendant claimed Bridget was not bleeding, it was reasonable to infer that Bridget may have resisted and inflicted some type of injury to defendant's eye during a struggle in his apartment, and he was bleeding from the injury.

C. Whether Bridget was injured in defendant's apartment

Defendant next contends the prosecutor improperly asserted that Bridget was beaten in defendant's apartment, and argues there were no facts supporting the prosecutor's assertion that Bridget was beaten to death.

Defendant's argument is based on the portion of closing argument when the prosecutor summarized the testimony of Long's coworkers, and stated: "Do we have any evidence that [Bridget] may have been hit in the head? Well what about that DNA, that blood DNA from the bathroom floor?" Defense counsel did not object. The prosecutor returned to this topic when he discussed the criminalist's testimony about the blood in defendant's bathroom, and pointed out the DNA "happened to be the same pattern as Bridget," and there was a trail of blood which had been mopped up. "But of course it must have been that massive bleed on [Bridget's] finger that the defendant wants to tell you about rather than blood from being beaten in the head during the course of this assault." Defense counsel did not object.

The prosecutor again discussed the blood evidence as he attacked defendant's credibility:

> "Now you didn't hear from Bridget [in this case] because what happened was witnessed by two people, the self-admitted liar over there and Bridget. What could she have told you? Well she could have told you about how she was beaten. About that blood on the floor in the bathroom."

Defense counsel objected for facts not in evidence. The court conferred with the parties off the record, and the prosecutor continued with his argument, and asserted that Bridget was not able to tell the jury how she fought defendant because he murdered her in his apartment.

Defendant contends the prosecutor's argument was inappropriate because there was no evidence that Bridget was beaten or otherwise injured in defendant's apartment, and points out the pathologist was unable to determine if she suffered any trauma because of the condition of her body when it was recovered from the cornfield.

As we have already explained, however, the criminalist testified that Bridget's DNA was found in the blood that had been mopped around defendant's bathroom floor, raising the reasonable inference that Bridget was somehow injured in the apartment. In addition, the prosecutor's argument was appropriate based on the inferences raised from the testimony of Steve Long's coworkers. They testified that Long talked about a missing girl, his friend "Eddie," hitting someone over the head, taking the body to a cornfield near Tulare where no one could find it, and getting rid of the car in Fresno. Long's coworkers testified he made these statements before they heard any news reports about Bridget's disappearance and death.

Finally, the prosecutor's argument that Bridget was injured in the apartment was also supported by the statements made to officers by defendant's sister, Davis. She said that as she drove defendant around on the night of September 11, 2001, defendant told Davis that "he grabbed [Bridget] and choked her and killed her."

The prosecutor's arguments about Bridget being injured in defendant's apartment were appropriate based on the reasonable inferences from the DNA evidence, Long's statements to his coworkers, and Davis's statement to the officers.

D. <u>Dr. Walter's qualifications</u>

Defendant's final point of prosecutorial misconduct concerns the qualifications of Dr. Walter, the pathologist who testified for the prosecution. Defendant contends the prosecutor improperly described Dr. Walter as a "forensic pathologist" because there is no evidence that Dr. Walter was "a board certified pathologist." Defendant fails to cite to any portion of the record in which this assertion was made.

As noted by the People, defendant's contentions might be based on the prosecutor's rebuttal argument, when he discussed Dr. Walter's testimony about Bridget's cause of death, and stated that Dr. Walter had done "thousands and thousands of autopsies and somehow, and is *a forensic pathologist* that somehow may not even be as qualified as … Pietruszka [the defense expert], who did 12 [autopsies], well he kind of

did 12, well actually only did two autopsies. His group did two autopsies last year …." (Italics added.) Defense counsel did not object.

The prosecutor never described Dr. Walter as "a board certified pathologist." In addition, his description of Dr. Walter as a "forensic pathologist" was appropriate based on Dr. Walter's trial testimony about his qualifications—he was "a medical doctor that is employed with a specialty in pathology," he received special training in his residency in "anatomic and clinical pathology," and "[d]uring those years I did forensic training at the LA County Coroner." Dr. Walter also stated he had testified as an expert in the field of forensic pathology for almost 25 years, and his laboratory had the contract "to do the forensic pathology work" for several counties. The prosecutor's description of Dr. Walter's qualifications was appropriate.

VII. Admission of the Photograph of Bridget's Head*

Defendant next contends the court abused its discretion when it permitted the prosecution to introduce into evidence a photograph of Bridget's head, Exhibit No. 28. Defendant argues the photograph of the decomposed head and skull was gruesome and unduly prejudicial, and lacked any probative value.

A. The court's initial rulings

Prior to trial, the prosecutor moved to introduce several photographs of Bridget's body, depicting the exact manner it was found in the cornfield grave. Defense counsel objected to the photographs as prejudicial, inflammatory, and unnecessary to prove any disputed factual issues. The court examined each photograph to determine the probative value and potential prejudice under section 352. In doing so, the court noted that it had "been involved in a number of these cases," and that photographs were often excluded for being prejudicial or cumulative.

---

* See footnote, *ante*, page 1.

The court reviewed three photographs which showed Bridget's body as it was found in the ground and one photograph which depicted the body in the coroner's office when it was still covered with dirt. Defense counsel argued three of the four photographs were cumulative. The court disagreed and held the four photographs were admissible under section 352, and the probative value outweighed the prejudicial effect, because "these photographs are important to show the manner in which the body was placed in the ground," the depth at which the body was buried, the body was still clothed, and the body "being somewhat in the fetal position." The court also decided to admit Exhibit No. 27, a side photograph of Bridget's decomposed head.

The court was "more concerned" about the frontal photograph of Bridget's decomposed head and skull, Exhibit No. 28, which it described as a "very disturbing photograph." The court stated it needed "a pretty good basis" to admit Exhibit No. 28, and tentatively decided to exclude it.

The prosecutor agreed that Exhibit No. 28 was disturbing, but argued the photograph was probative for the jury to understand why it was "nearly impossible" for the pathologist to determine how or where Bridget "might have been bleeding in the face. That is the reason for it. Quite frankly, I would prefer not to have to show this to the jury, but I have a concern that at some point in time some juror may think … maybe there was some other event or some other time. There was no … shooting, no stabbing. The pathologist said there was no indication of injury to … her skin but when you look at that photograph you can understand why somebody wouldn't be able to find that."

Defense counsel objected and argued that only an expert could look at Exhibit No. 28 and conclude that it was difficult to determine the existence of any injuries. "Whatever relevance that photograph might have just on its face takes an expert opinion to turn into something relevant, and to have the expert testify is much more important than the photograph."

The court stated that it was inclined to exclude Exhibit No. 28 because the photograph was disturbing. The prosecutor agreed with the court's description of the photograph, and explained that he did not intend "actually to publish it to the jury. Rather to have it there for those jurors who feel the absolute need to look at it." The court decided to affirm its tentative ruling and excluded Exhibit No. 28, but it was willing to reconsider the photograph's admissibility "if it becomes an issue in the case" and relevant as a result of trial testimony.

B. Dr. Walter's trial testimony

As summarized in the factual statement, Dr. Walter, the prosecution's pathologist, testified that Bridget's body showed signs of moderate decomposition, there was desiccation or drying of the skin on the hands and feet, and skin slippage on the superficial skin layers of the face, neck, and head. The underlying fat and muscle had dried out on the face and neck. The skin was no longer connected with the underlying tissue, so that the bone structure could be seen. There was no evidence of insect or maggot activity, which meant the body had been buried and protected from the air within a short time after death.

As a result of the decomposition, however, Dr. Walter was unable to determine if there was bleeding or injuries to Bridget's face. There was discoloration on Bridget's face which appeared consistent with bruises. Dr. Walter conducted a microscopic inspection and could not confirm the existence of facial bruises. He could not rule out any facial injuries or bleeding because of the level of decomposition and skin drying. On cross-examination, defense counsel extensively questioned Dr. Walter as to his purported inability to determine if Bridget suffered bruises or any pressure on her neck.

C. The court's reconsideration of Exhibit No. 28

After Dr. Walter testified, the court excused the jury and stated that given Dr. Walter's testimony, it was "seriously considering changing my ruling" about whether the

photograph of Bridget's head and neck (Exhibit No. 28) was admissible. The court explained:

> "I think now given [Dr. Walter's] testimony and taken in consideration with the blood that was found at defendant's residence, I think it's very, very important and although as distasteful as Exhibit 28 is, I think it's become very relevant and certainly the relevance at this point exceeds the prejudicial value concerning the issues in this case."

Defense counsel objected and argued there was no evidence the blood on defendant's bathroom floor came from Bridget on the night she died. Defense counsel argued the photograph was only relevant if the court speculated that Bridget suffered some type of facial trauma, because "the face was decomposed and the doctor couldn't tell." The court disagreed because there was evidence that Bridget went to defendant's apartment that night, and defendant admitted to his sister, Davis, that there was an argument, an altercation, and that he either struck or choked Bridget. The court explained:

> "We now have evidence, and that there's very strong evidence that he then disposed of the body that night by taking it out and burying it and we find blood in the bathroom. And assuming she met her demise that night, I think that blood is very relevant that was found. Now certainly you can argue that blood could have been placed there at any time, but that's for the jury to decide."

Defense counsel argued there was no evidence "and no possible way" to determine if the blood came from Bridget that night. The court again replied that it was an issue for the jury.

The court overruled defendant's objections and admitted Exhibit No. 28 into evidence. However, the entirety of the record indicates the prosecutor never presented the jury with Exhibit No. 28, and the prosecutor briefly referred to that photograph in closing argument. "There is a photograph that if you question whether or not [Bridget] may have been bleeding in her face and there's evidence or not evidence [of] the eye, the eye thing, there's a couple of photographs of her face or what's left of it. If you have a

faint stomach, don't look, but there would be no way for a doctor to tell if she had been bleeding from her mouth or her nose or from a laceration under her eye because her skin is—it's just not pretty."

D. Analysis

"Autopsy photographs of a murder victim are always relevant at trial to prove how the crime occurred; the prosecution need not prove these details solely through witness testimony. [Citations.]" (*People v. Carey* (2007) 41 Cal.4th 109, 127.) "We have repeatedly stated that the court has wide discretion in determining the admissibility of photographs of a murder victim. [Citations.] We have previously held that a court may admit even 'gruesome' photographs if the evidence is highly relevant to the issues raised by the facts …. [Citation.] However, when a defendant objects that the proffered evidence is more prejudicial that probative, the record must affirmatively show that the court weighed these factors, in order to allow proper appellate review of abuse of discretion claims. [Citation.]" (*People v. Coleman* (1988) 46 Cal.3d 749, 776.)

"The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 133-134.)

As the California Supreme Court has explained, "victim photographs and other graphic items of evidence in murder cases always are disturbing. [Citation.]" (*People v. Crittenden, supra*, 9 Cal.4th at p.134.) " '[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant ….' " (*People v. Pierce* (1979) 24 Cal.3d 199, 211; *People v. Roldan* (2005) 35 Cal.4th 646, 713.) The court has upheld the admission of "images of dissected tissue and excised organs," even if they duplicate testimony or depict uncontested facts. (*People v. Stitely* (2005) 35 Cal.4th 514, 545; see also *People v. Thompson* (1988) 45 Cal.3d 86, 115-116 [no error in

admitting photographs of victim's head and ear, through which fatal stab wound was inflicted]; *People v. Ruiz* (1988) 44 Cal.3d 589, 612-613 [no error in admitting "mummy-like" photos of victims]; *People v. Ramirez* (2006) 39 Cal.4th 398, 454 [no error to admit gruesome photo of victim with her eyes cut out].)

Victim photographs also may be probative to clarify a coroner's testimony. (*People v. Ramirez, supra*, 39 Cal.4th at p. 453.) "[A] court may admit even 'gruesome' photographs … if the photographs would clarify the testimony of a medical examiner." (*People v. Coleman, supra,* 46 Cal.3d 749, 776; *People v. Ramirez, supra,* 39 Cal.4th at p. 454.) Such photographs are not cumulative "simply because they illustrate evidence presented by other means. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 592.) "We have often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony. [Citation.]" (*People v.* Price (1991) 1 Cal.4th 324, 441; *People v. Perry* (2006) 38 Cal.4th 302, 318.) "[P]rosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case. [Citations.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 624.)

As applied to the instant case, the court and the parties agreed Exhibit No. 28 was a gruesome and disturbing photograph. It depicted the skin slippage, decomposition, and deterioration of the skin and structure of Bridget's head, face, and mouth. Portions of the bony structure of her face are prominent and it is difficult to see the actual structure of her mouth, nose and ears.

However, the photograph of Bridget's decomposed head and face was gruesome because of the manner in which Bridget was killed and buried in a shallow grave, with her body undiscovered for nearly three weeks. As the California Supreme Court has explained, the jury must be "shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome, but the jury cannot be shielded from an accurate

depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors." (*People v. Ramirez, supra,* 39 Cal.4th at p. 454.)

In the instant case, the court carefully reviewed Exhibit No. 28 and initially excluded it because the prejudicial impact outweighed the probative value. After Dr. Walter's trial testimony, however, the court conducted another analysis of the photograph's probative value and determined it outweighed the prejudicial impact because it illustrated Dr. Walter's explanation about the difficulties of determining whether she had been strangled. The trial court was well aware of its duty to weigh the prejudicial effect of the photographs against their probative value, carefully did so, and did not abuse its discretion. (*Ramirez, supra,* 39 Cal.4th at p. 454.)

Defendant relies on two cases in support of his argument that Exhibit No. 28 was unduly gruesome and should have been excluded. In *People v. Marsh* (1985) 175 Cal.App.3d 987, the court held that "seven gory autopsy photographs" should have been excluded because they had "little, if any, additional probative value" since they were offered to show the uncontested location and nature of the victim's injuries. (*Id*. at pp. 998.) In *People v. Cavanaugh* (1955) 44 Cal.2d 252, the court held that photographic evidence of the victim's body, found "in a revolting condition, badly decomposed, much eaten by vermin, and crawling with maggots," was unduly prejudicial because the only purpose for the photograph was to prejudice the jury against defendant, and it served "no useful [or] proper purpose." (*Id*. at pp. 266-268.)

While the photograph in the instant case may have been gruesome and disturbing, it did not show Bridget's body "much eaten by vermin, and crawling with maggots" (*People v. Cavanaugh, supra,* 44 Cal.2d at p. 267), and it was not introduced simply as " 'a blatant appeal to the jury's emotions.' " (*People v. Marsh, supra,* 175 Cal.App.3d at p. 998.) Instead, the court admitted the photograph because it was extremely probative as to the disputed cause of death, and graphically illustrated Dr. Walter's explanation as to

why he could not determine if there was external trauma to her head and neck. (See, e.g., *People v. Price*, *supra*, 1 Cal.4th at p. 441; *People v. Perry*, *supra*, 38 Cal.4th at p. 318.)

VIII. Defendant's Motion for Disclosure of Juror Information*

Defendant contends the court improperly denied his posttrial motion for disclosure of juror information, even though a juror told a defense investigator that the jury discussed martial arts techniques that could have caused strangulation. The People counter that defendant's posttrial motion failed to set forth a prima facie case for good cause for disclosure.

A. Background

After defendant was convicted, he filed a motion for the release of juror information based on a declaration from defense counsel, Michael Cross. Cross declared that the defense mitigation specialist, Pat McGregor, spoke to a single juror. According to Cross, this juror told McGregor that "some of the jurors discussed personal information about martial arts and techniques that could have caused strangulation." Cross declared that McGregor located this juror by looking up the person's name in the telephone book. However, Cross did not identify the juror who made this statement, and the juror did not sign a declaration in support of the motion.

Based on Cross's declaration about McGregor's interview with the unidentified juror, defendant argued that he made a prima facie case for the court to disclose juror identification information. Defendant argued the jury's receipt of "extrajudicial facts" was grounds for a new trial motion based on jury misconduct.

At the hearing on defendant's motion, the prosecutor argued defendant's motion should be denied because it was based on "thirdhand hearsay from an unknown or unnamed juror who apparently wouldn't file or sign any kind of declaration for the defense that there was some discussion of martial arts' techniques." The prosecutor

---

* See footnote, *ante*, page 1.

further argued the unidentified juror's statements did not present good cause for misconduct because jurors are allowed to use their common sense and experience when deliberating.

The trial court denied defendant's motion for disclosure:

> "Even if the information [from the unidentified juror] is true, I don't believe that it's sufficient cause for the court to set aside the verdict, and so therefore I am not going to set this matter for a hearing because I do not believe that a prima [facie] case has been shown for the setting of a hearing, so your request for the release of juror identification information is denied."

B. Code of Civil Procedure section 237

"After a jury convicts a defendant, defense counsel will often wish to interview jurors (or have them interviewed by an investigator). 'It is not uncommon at the conclusion of a criminal trial for the attorneys representing a convicted defendant to attempt to contact jurors to discuss the case with them. This procedure is usually employed in an effort to learn of juror misconduct or other information that might provide the basis for a motion for a new trial.' [Citation.] While counsel may wish to inquire whether misconduct prejudiced their clients, jurors often want to keep their contact information confidential. 'Discovery of juror names, addresses and telephone numbers is a sensitive issue which involves significant, competing, public-policy interests.' [Citation.]" (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 380.)

After the jury returns a verdict in a criminal case, the court shall seal records of the jurors' identifying information until further order of the court. (Code Civ. Proc., § 237, subd. (b).) "A criminal defendant has neither a guaranty of posttrial access to jurors nor a right to question them about their guilt or penalty verdict." (*People v. Cox* (1991) 53 Cal.3d 618, 698-699, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"Any person may petition the court for access to those records. The petition shall be supported by a declaration that includes *facts sufficient to establish good cause* for the

release of the juror's personal identifying information. The court shall set the matter for hearing *if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information*, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure." (Code Civ. Proc., § 237, subd. (b), italics added.) The court's denial of a petition for disclosure is reviewed for an abuse of discretion. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

C. <u>Analysis</u>

The trial court did not abuse its discretion when it denied defendant's motion for disclosure. Even accepting the truth of the unidentified juror's hearsay statements, the jury's alleged discussion of "personal information" about martial arts techniques did not constitute misconduct. As the California Supreme Court has explained:

> "A jury's verdict in a criminal case must be based on the evidence presented at trial, not on extrinsic matters. [Citation.] Nevertheless, jurors may rely on their own experiences in evaluating the testimony of the witnesses. 'Jurors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself. Jurors are expected to be fully functioning human beings, bringing diverse backgrounds and experiences to the matter before them.' [Citation.] 'Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. …[Otherwise,] few verdicts would be proof against challenge.' [Citation.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1414 (*Leonard*).)

"Certainly a juror commits misconduct by asserting a 'claim to expertise or specialized knowledge of a matter at issue.' [Citation.] Yet 'it is not improper for a juror, regardless of his or her educational or employment background, to express, an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work.' [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 161 (*Yeoman*).)

In *Yeoman*, the court held the defendant failed to make a prima facie case for disclosure of juror information based on the alleged misconduct of a juror/nurse. The nurse and other jurors signed declarations that the nurse relied on her expertise and answered jurors' questions about psychological terms, diagnosis, and the definition of the term "sociopath." (*Yeoman, supra*, 31 Cal.4th at pp. 160-161.) *Yeoman* held the declarations did not show that the nurse "offered the jurors any basis for deciding the case other than the evidence and testimony presented at trial. No declaration suggests the juror made any assertion inconsistent with the properly admitted evidence and testimony. Moreover, defendant does not claim, and the declarations do not suggest, that the juror brought reference materials to the jury room, consulted such materials outside the jury room, or spoke with anyone other than jurors about the case. For these reasons we doubt whether the evidence actually establishes that misconduct occurred." (*Yeoman, supra*, 31 Cal.4th at p. 161.)

A similar conclusion was reached in *Leonard*, where the court considered a declaration that one of the jurors told the jury that he had personal experience with handguns, and he knew the murder weapon could be accurately fired under the circumstances of that case. (*Leonard, supra*, 40 Cal.4th at pp. 1413-1414.) Defendant argued the declaration raised a prima face case of misconduct to obtain disclosure of juror identifying information. *Leonard* disagreed: "Here, Juror 7 relied on his personal experience with firearms to form an opinion about the accuracy of the murder weapon,

and he mentioned his experience to the other jurors when expressing his views during deliberations. His comments were a normal part of jury deliberations and were not misconduct. [Citations.]" (*Leonard*, *supra*, 40 Cal.4th at p. 1414.)

In the instant case, the unidentified juror's hearsay statements raised the same situation as addressed in *Leonard* and *Yeoman*. At trial, several witnesses testified that defendant had two years of training in taekwondo, and he practiced martial arts. Defendant's sister told the officers that defendant said he strangled Bridget. If, as defendant claims, "some of the jurors discussed personal information about martial arts and techniques" that could have resulted in Bridget's strangulation, such discussions did not constitute misconduct, and did not present a prima facie case for disclosure of juror identifying information.

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Hill, P.J.

_____
Levy, J.