Court of Appeal, Second Appellate District
Eva McClintock
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

THE PEOPLE,	**Case No. B329873**
Plaintiff and Respondent,	**Superior Court No. 22CR003712**
v.	**(Monterey County)**
PAUL RUBEN FLORES,	
Defendant and Appellant.	

APPELLANT'S OPENING BRIEF
(Public – Redacts material from sealed record)

Appeal from the Superior Court of Monterey County
The Honorable Jennifer O'Keefe, Judge Presiding

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Under Appointment by the Court of Appeal
(Sixth District Appellate Program – Independent Case)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PAUL RUBEN FLORES, Defendant and Appellant.	]]]]]]]]]	Case No. B329873 Superior Court No. 22CR003712 (Monterey County)

INTRODUCTION

In 1996, Kristin Smart went to a college party, became intoxicated, and disappeared forever. Appellant Paul Flores went to the same party and was the last person seen in her company. Nearly 25 years later, prosecutors charged appellant with Smart's murder. At trial, the prosecutor argued that appellant killed Smart during the commission or attempted commission of a rape. The jury convicted of first degree murder.

A series of errors marred appellant's trial. First, the court repeatedly denied appellant's requests to discharge a juror who: (1) had an emotional midtrial outburst during key prosecution testimony; (2) had two other midtrial anxiety attacks which she specifically blamed on defense counsel; (3) discussed the case with the bailiff and friends; and (4) revealed to the bailiff that her neutrality had begun to waver. As a result of the court's rulings, appellant did not receive a trial by 12 fair and impartial jurors. The error requires per se reversal of his conviction.

Second, though there was no evidence appellant sexually assaulted Smart, the trial court admitted highly prejudicial testimony from two women who claimed he had drugged and raped them. The court later compounded its error by allowing a

lay witness to testify, without adequate foundation, that Smart's behavior at the party reminded him of his own experience after being given a date rape drug. The prosecutor compounded the error even further by using an especially inflammatory photograph to portray appellant as a sexual predator – though the court did not admit the photograph for character purposes.

For the same reasons there was no evidence to justify admission of the uncharged offense evidence, there was also no evidence to support a felony-murder verdict based on rape or attempted rape. The prosecution, likewise, presented no evidence to show a premeditated murder of Smart. With no substantial evidence to show any form of first degree murder, appellant's conviction must be reduced to second degree murder.

Finally, the trial court gave two erroneous instructions on attempted rape of an intoxicated person – used by the prosecutor as a target crime for his first degree felony-murder theory. The misinstructions had the effect of removing the specific intent element of attempt and allowing jurors to find an attempted rape of an intoxicated person so long as a reasonable person would have known Smart was too intoxicated to resist.

The above-described errors deprived appellant of the fair trial to which due process entitled him. He, therefore, asks this Court to reverse his murder conviction or, alternatively, reduce the crime to second degree murder.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment after a jury trial and is authorized by Penal Code section 1237.[1]

STATEMENT OF THE CASE

On April 14, 2021, the San Luis Obispo County District Attorney filed a criminal complaint charging appellant with murder (§ 187, subd. (a)) and his father, Ruben Flores (Ruben), with accessory after the fact to murder (§ 32). (1 CT 126-127.) The complaint further alleged that the murder occurred during the commission or attempted commission of a rape (§ 189, subd. (a)). (1 CT 127.) The District Attorney later filed an information with the same charges and allegations. (10 CT 2867-2869.)

After appellant successfully moved for a change of venue, the case was transferred to Monterey County. (22 CT 6368-6390; Supp. CT [Dec. 12, 2023 augmentation]: 85, 87.) Appellant and Ruben had a single trial with separate juries. (See 1 Aug. RT 38.) The court swore appellant's jury, plus eight alternates, on June 28, 2022. (29 CT 8662, 8664.)

The jury retired for deliberations on October 4, 2022. (32 CT 9561-9562.) Deliberations lasted four full days plus parts of three others. (32 CT 9562-9564, 9579, 9581, 9583-9584, 9586.) On October 18, 2022, the jury found appellant guilty of first degree murder. (47 RT 13805.) Ruben's jury found him not guilty of accessory after the fact. (34 CT 10171.)

Appellant filed a motion for new trial. (33 CT 9816-9863.) The trial court denied the motion on March 10, 2023. (49 RT 14480.) It entered judgment that same day, sentencing appellant to 25 years to life in prison. (49 RT 14531.)

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[1] All statutory references are to the Penal Code unless otherwise stated.

Appellant filed a timely notice of appeal on April 10, 2023. (35 CT 10285.)

STATEMENT OF FACTS

On Memorial Day weekend in 1996, appellant and Kristin Smart both drank to excess at a San Luis Obispo college party. Afterwards, appellant accompanied Smart on the walk back to the dorms. Smart never made it home and her body has never been found. The prosecutor theorized that appellant drugged Smart at the party, took her back to his dorm room, sexually assaulted and killed her, and buried her body under his father's home in the nearby town of Arroyo Grande.

A. Kristin Smart goes missing

During the 1995-1996 school year, appellant was a freshman at Cal Poly San Luis Obispo. (13 RT 3700-3701.) He lived with Derrick Tse in room 128 of Santa Lucia Hall dorm. (8 RT 2233-2235.) When not at school, appellant stayed with his father, Ruben, at 710 White Court in Arroyo Grande. (9 RT 2459, 2480-2481.) Appellant's mother, Susan, also lived in Arroyo Grande at a different address. (9 RT 2462-2464.) The drive from Cal Poly to Arroyo Grande takes some 30 minutes. (13 RT 3668.)

Kristin Smart also began her freshman year at Cal Poly in the fall of 1995. (2 RT 341.) In early 1996, she moved to Muir Hall where she shared a room with Crystal Calvin (now Teschendorf).[2] (6 RT 1587-1589.) Muir and Santa Lucia both belonged to Cal Poly's red brick dorm complex. (6 RT 1511-1513.)

Margarita Campos lived next door to Smart and became close friends with her. (4 RT 923, 925.) Vanessa Brinley (now Shields) also lived on the same floor and was friends with Smart. (3 RT 684-686.) Neither Campos nor Brinley ever saw appellant

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[2] Because witnesses at trial referred to each other by their 1996 surnames, appellant uses the 1996 surnames in this brief.

at Muir Hall. (3 RT 699-700; 4 RT 971.) However, they both knew of him and had seen him staring at Smart. (3 RT 689-691; 4 RT 949-950.) Smart told Brinley she had no interest in appellant. (3 RT 693.)

Steven Fleming moved to Muir Hall in early 1996. (6 RT 1638, 1679-1680.) Fleming played on the Cal Poly basketball team. (6 RT 1639.) He bonded with Smart because she was around 6 feet tall and they were both struggling in school. (6 RT 1641, 1662-1663; see 2 RT 310.) On five or six occasions, Fleming noticed appellant inside Smart's dorm room. (7 RT 1859.) One time, he saw appellant standing in front of the open door, blocking Smart's way out. (6 RT 1667, 1669.) Smart looked "uncomfortable," as if she did not want him there. (6 RT 1667.)

In 1996, Memorial Day fell on Monday, May 27. (8 RT 2217.) On Friday, May 24, many students left town for the long weekend. (4 RT 928.) Tse went home that evening, informing appellant he would not return until Tuesday. (8 RT 2236-2238.) That same night, Smart attended a party at 135 Crandall Way. (10 RT 2709, 2733.) She never made it back to Muir Hall. (8 RT 2203; see also 6 RT 1597-1599.)

Campos and Calvin noticed Smart's disappearance and discussed it with Jennifer Phipps (now Medeiros), another student at Muir Hall. (8 RT 2200, 2202-2204.) Phipps called Cal Poly police, who told her to call back on Tuesday if Smart had still not returned. (8 RT 2205.) When Phipps called again on Tuesday, campus police came and took a formal report. (8 RT 2206-2207.)

Fleming did not provide any information to police after Smart went missing. (6 RT 1677.) In a 1999 interview with the FBI, Fleming referred to Smart as a "casual friend[]" and said they had a class together. (6 RT 1677-1678; 7 RT 1876.) He assumed that Smart and appellant were dating. (6 RT 1683.) After college, Fleming joined the military, then became a police

officer. (6 RT 1640-1641.) He did not speak to law enforcement again until July 9, 2021, when two officers showed up at his home. (6 RT 1684; 7 RT 1887-1888.) During the interview, Fleming referred to appellant as a "fucking creep." (6 RT 1686.)

B. The Crandall Way party

Before going to the Crandall Way party, Smart went to a different off-campus party, along with Campos and several other women from Muir Hall. (4 RT 929-930.) One of the women drove the group in her truck. (4 RT 930.) Smart wore black shorts, a gray short-sleeved shirt, and red shoes. (4 RT 937-938.) Campos described the shorts as Roxy brand vinyl "board shorts." (4 RT 967-968.) Smart often used the nickname Roxy. (4 RT 968.) She would later identify herself by that name throughout the Crandall Way party. (See, e.g., 3 RT 739; 7 RT 1931, 1952.)

At the first party, Smart and Campos each drank one beer. (4 RT 931.) After a few hours, the group returned to the truck and headed back to Muir Hall. (4 RT 932.) On the way, Smart requested that she and Campos be let out so they could walk home. (4 RT 932.)

Campos wanted to walk back to Muir Hall via the shortest route. (4 RT 934-935.) Smart preferred a less direct path in the hope they might find another party. (4 RT 934-935.) Unable to agree, they went separate ways. (4 RT 936.) Campos last saw Smart sometime between 10:30 and 11:00 p.m. (4 RT 968.) Smart appeared sober. (4 RT 937.)

Both appellant and Smart ended up at the Crandall Way party – along with some 60 to 70 others. (10 RT 2711, 2733; see 4 RT 1022.) One guest described the attendees as "shoulder to shoulder." (4 RT 1008.) Some people, including appellant, played pool in the front room. (10 RT 2711-2712, 2773.) The home had a kitchen and a bar area with keg beer. (3 RT 728; 4 RT 1009-1010.) Many people drank heavily. (10 RT 2735.) Timothy Davis, a

friend of the hosts, saw people engaging in beer-drinking races. (10 RT 2709-2710, 2735.) Davis did not personally drink hard liquor but believed others had it. (10 RT 2794.)

Kendra Koed did not know appellant but the two struck up a conversation after she asked if he had any gum. (3 RT 730.) In the midst of the conversation, appellant suddenly kissed her. (3 RT 730.) Koed pushed him away, stating that she only wanted gum. (3 RT 730.) Later, appellant tried to kiss her again only for Koed to again push him away. (3 RT 731.)

Matthew Toomey went to the party with his roommate Ross Ketcham. (7 RT 1907.) Smart approached them and conversed with Ketcham. (7 RT 1907-1909.) Smart had a drink in her hand and her speech was slurred. (4 RT 1015; 7 RT 1927.) Ketcham noticed appellant looking at her. (4 RT 1013.) While speaking with Toomey, appellant commented on Smart's good looks and asked about her relationship with Ketcham. (7 RT 1909-1911, 1925.)

Several times, Davis observed appellant and Smart together near the bar. (10 RT 2736.) Appellant looked drunk. (36 RT 10513.) Ketcham saw him with his arm around Smart. (4 RT 1012.) A short time later, Smart fell off the washing machine or sink while sitting on it. (4 RT 1012.) Ketcham looked over and saw Smart on the ground. (4 RT 1022.) Davis also heard the fall, then saw both Smart and appellant on the ground, laughing. (10 RT 2735-2736.)

Smart introduced herself to Trevor Boelter and kissed him on the mouth. (7 RT 1952.) Afterwards, she grabbed Boelter's hand and took him to the bathroom, where she stood in front of the mirror and smoothed over her makeup. (8 RT 2108-2109.) Boelter did not smell alcohol on her breath. (8 RT 2109.)

When Boelter later left the bathroom, a man walked up and asked what he had done "with her in the bathroom." (8 RT 2110-

2112.) Boelter replied, "Nothing," and the man laughed. (8 RT 2111.) At trial, Boelter identified the man as appellant. (8 RT 2111-2112.) In a 2004 e-mail, he professed uncertainty about the man's identity. (8 RT 2154.)

As the evening progressed, Boelter noticed that Smart appeared "more and more out of it." (8 RT 2113.) She became "spacey" and could not stand straight – as if on drugs. (8 RT 2115-2116.) Boelter was once "Roofied" at a bar. (8 RT 2161.) He initially became happier and more talkative than usual, but later passed out and had to be carried home. (8 RT 2162.) Smart's behavior reminded him of his own experience. (8 RT 2162-2163.)

Boelter left the party between 12:00 and 12:30 a.m. (8 RT 2121.) Some 5 or 10 minutes before then, Smart kissed him again in the backyard. (8 RT 2114-2115.) This time, Boelter pushed her away. (8 RT 2116.) Boelter could not recall if her breath smelled of alcohol. (8 RT 2116.)

C. The walk home from the Crandall Way party

Toomey and Ketcham left the Crandall Way party around midnight. (7 RT 1913-1914.) Soon afterwards, they saw Smart lying on the lawn of a nearby house as if trying to sleep. (7 RT 1913-1915, 1931-1932.) The two men offered to walk her home but Smart did not want to leave. (7 RT 1914-1915.)

The party broke up between 2:00 and 2:30 a.m. (4 RT 1039.) Davis agreed to walk his friend, Cheryl Anderson (now Manzer), back to her dorm. (10 RT 2741-2742.) On the way, he saw Smart lying on the lawn. (10 RT 2741-2742.) Davis lifted her up and told her she had to leave. (10 RT 2744, 2747.) Davis, Anderson, and Smart then began walking toward the dorms. (10 RT 2748-2749.) Smart walked slowly, with Davis supporting her at the waist. (10 RT 2748-2749.)

Appellant soon joined the group. (10 RT 2750-2751, 2755.) At trial, Davis claimed that appellant appeared "out of the

darkness" – coming through the door which led from 135 Crandall to the home's backyard. (10 RT 2750-2751.) In a 1996 interview, Davis said appellant was with a group outside a fraternity house, across the street from 135 Crandall. (36 RT 10510-10511.)

After a short distance, appellant offered to walk Smart home. (10 RT 2756.) Davis turned her over to appellant, who put his hand around her waist to keep her upright. (10 RT 2757-2758.) Davis left. (10 RT 2756-2758.) Anderson testified that Smart was "wobbly" and had to stop several times. (4 RT 1046-1047.) Each time, appellant told Anderson she could continue walking and he would look after Smart. (4 RT 1046.) Anderson replied that she did not want to walk alone. (4 RT 1046.) The Crandall Way home was around a half-mile from the red brick dorms. (6 RT 1547.)

At the intersection of Perimeter and Grand, Anderson separated from appellant and Smart and veered off toward her own dorm building. (4 RT 1054-1057.) Appellant assured Anderson that he would safely take Smart "back to her dorm room." (4 RT 1055-1056.) He then asked Anderson for a kiss. (4 RT 1055.) When she declined, he requested a hug which she also declined. (4 RT 1055-1056.)

D. The events following Smart's disappearance

Phone records showed that appellant placed a 50-second call to Ruben at 9:47 a.m. on Sunday, May 26. (14 RT 4023.) That same day, Ruben picked up appellant and drove him to Arroyo Grande for the rest of the weekend. (13 RT 3625-3626.)

On Sunday evening, appellant visited his friend Jeromy Moon (Jeromy). (10 RT 2831-2832.) Jeromy noticed that appellant had a black eye. (10 RT 2832.) Appellant told Jeromy he had woken up with the injury. (10 RT 2832.) The next day, Jeromy and appellant played basketball together. (10 RT 2832.) In a 1996

statement, Jeromy said he first saw appellant's injury on the weekend after Memorial Day. (10 RT 2849, 2863.)

On May 28, Cal Poly police officer Robert Cudworth spoke to appellant at the campus store where he worked. (12 RT 3414, 3424.) Appellant denied talking to Smart during the party but admitted joining her, Davis, and Anderson as they headed back toward the dorms. (12 RT 3415.) Smart needed help walking. (12 RT 3415.)

Also on May 28, Detective Lawrence Kennedy showed up at appellant's dorm room. (10 RT 2870, 2872-2873.) Kennedy mentioned Smart's name but appellant said he did not know her. (10 RT 2881-2882.) Later, he clarified that he knew her as Roxy. (12 RT 3310.) Appellant was breathing heavily and seemed "nervous." (10 RT 2874.) He explained that he thought Kennedy had come to arrest him on a traffic warrant which he had cleared up the previous day. (10 RT 2875, 2904.)

Kennedy observed a bruise under appellant's right eye. (10 RT 2876.) Appellant attributed the injury to a weekend basketball game. (10 RT 2878.) A few days later, Mario Garcia saw the same injury. (9 RT 2411-2412.) Appellant told Garcia that someone had pushed him. (9 RT 2412.)

Tse joked that appellant had probably done something with Smart since he was the last person seen with her. (8 RT 2245-2246.) Appellant facetiously replied that she was "at my mom's house right now." (8 RT 2246-2247.)

Cal Poly's school year ended on June 8, 1996. (1 Aug. CT 135, 137; 8 RT 2230.) Custodial staff cleaned up appellant's old dorm room and campus police placed yellow and black tape over the door, with a sign permitting police entry only. (12 RT 3377-3379.) On June 24, Deputy Richard Neufeld, a crime scene investigator with the Sheriff's office, processed the room. (12 RT

3375-3376.) A person who visits a crime scene may inadvertently transfer trace evidence from other crime scenes. (14 RT 3924.)

Smart's disappearance generated widespread publicity which continued for years. (8 RT 2185; 12 RT 3384.) Billboards about Smart went up throughout the county. (8 RT 2185-2186; 9 RT 2439.) Television shows like Dateline, True Crime, and Unsolved Mysteries aired features on the case. (7 RT 1940; 8 RT 2135-2136, 2141.) A blogger named Dennis Mahon established a website called Sonofsusan.com – a reference to appellant. (28 RT 8210, 8232; 36 RT 10558.) Podcaster Chris Lambert aired a multi-part podcast called "Your Own Backyard." (3 RT 753.) Many segments focused on appellant and his family, including one episode entitled "The Only Suspect." (21 RT 6033.)

Smart's father, Stan, went to San Luis Obispo County to conduct his own investigation. (2 RT 309, 429-430.) While there, he distributed flyers which offered a $10,000 reward and showed appellant's name, photograph, and home address. (1 Aug. CT 122; 3 RT 635-636.) Stan once went to Ruben's home uninvited. (2 RT 431-432, 450.) When Stan identified himself, Ruben told him "to leave or someone might get shot." (2 RT 432.)

Around late June, 1996, the San Luis Obispo County Sheriff took charge of the investigation. (12 RT 3360-3361.)

E. Appellant's statements to law enforcement

Appellant gave recorded statements to Detective Kennedy and Officer Cudworth on May 30 and to District Attorney Investigator William Hanley on June 19, 1996. (12 RT 3337; 13 RT 3636; see 35 CT 10320-10394.) He also met with Investigator Hanley on May 31. (13 RT 3612-3614.)

Appellant said he had "too much" to drink on the night of the Crandall Way party. (35 CT 10366.) He had originally planned to visit his sister, Ermelinda, who went to Cal Poly but lived off campus. (35 CT 10374-10375; 10 RT 2888.) Before

leaving his dorm, he drank 20 and 22 ounce beers. (35 CT 10366, 10379-10382.) While walking to his sister's, he saw the ongoing party and decided to stop in. (35 CT 10374.) He never made it to Ermelinda's house. (35 CT 10374.)

At Crandall Way, appellant drank seven to eight cups of beer from the keg. (13 RT 3680.) Smart briefly introduced herself to him but he had no other interaction with her during the party. (13 RT 3617-3618.) Smart seemed intoxicated but appellant did not elaborate on the degree of her impairment. (13 RT 3617.)

Appellant did not recall how he ended up joining Smart's group on the way home. (13 CT 10367, 10388.) Smart appeared to be "walking just fine," albeit slowly. (35 CT 10365, 10389.) She did not need to lean on appellant for support. (35 CT 10389.) Appellant's only physical contact with Smart was to give her two hugs after she complained of being cold. (35 CT 10365, 10367, 10389.) He denied that he found Smart attractive. (35 CT 10325, 10373.) He also denied asking Anderson for a hug or kiss when she left. (35 CT 10389-10390.)

Smart and appellant eventually separated in front of Sequoia Hall, one of the red brick dorm buildings. (35 CT 10376-10379; see 6 RT 1513.) When asked why he did not walk Smart all the way to her dorm room, appellant replied, "I didn't even think about it." (13 RT 3622.)

Appellant threw up after returning to Santa Lucia. (35 CT 10366.) Around 5:00 a.m., he took a shower. (35 CT 10371.) He saw someone on his way to the bathroom but could not remember who it was. (35 CT 10370.) Detective Kennedy urged appellant to find that person so the police could speak with him. (10 RT 2885-2886.) Kennedy never located the person. (10 RT 2887.)

In his May 30 interview, appellant again blamed his eye injury on a basketball game. (35 CT 10390-10391.) In his June 19 statement, he said he struck his head on the steering wheel while

uninstalling a car stereo on Memorial Day. (35 CT 10349-10350.) When pressed about his differing explanations, appellant said he did not think it mattered and that he made up the basketball story so he would not sound like a "klutz." (35 CT 10350, 10355.)

F. The dog searches at Santa Lucia dorm

In 1996, Adela Morris, Wayne Behrens, and Gail LaRoque worked as dog handlers, training dogs in human remains detection. (15 RT 4239-4240; 16 RT 4559, 4567-4568; 18 RT 5108-5110.) Dog trainers use a reward system to teach their dogs to alert only on human remains, but not animal remains or live human scent. (15 RT 4250-4252, 4254; 18 RT 5117-5118.) Morris used bones, teeth, and blood to train her dogs on the target scent. (15 RT 4250, 4252-4253.) She used animal carcasses, food, baby diapers, and semen to train for negatives – that is, scents the dogs were not supposed to alert on. (15 RT 4250-4252.) Behrens and LaRoque employed similar training techniques. (16 RT 4567-4568; 18 RT 5116-5117.)

To initiate a search, the trainer uses a specific command which the dog understands as an instruction to search for human remains. (15 RT 4282; 16 RT 4580; 18 RT 5124.) Different dogs register an alert in different ways, such as by jumping on their trainer. (See 15 RT 4282-4283; 16 RT 4575-4576.)

The California Rescue Dog Association has developed proficiency standards and a certification process for human remains dogs. (15 RT 4242-4244; 16 RT 4570.) In 1996, Morris had two dogs certified in human remains searches: Cholla and Cirque. (15 RT 4271-4272, 4278, 4280.) Behrens's dog, Sierra, and LaRoque's dog, Torrey, were also certified to search for human remains. (16 RT 4569-4570; 18 RT 5118.)

In 1998, Morris co-wrote an article which expressed concerns that the handler's behavior may influence the dog's. (15 RT 4351-4352.) The article also warned against the practice of

"cross-training" dogs to detect more than one type of scent. (15 RT 4342-4343, 4353-4354.) Cholla, Cirque, and Torrey all certified at detecting not only human remains but also live human scents. (15 RT 4343; 16 RT 4565, 4603.)

On June 29, 1996, Morris, Behrens, and LaRoque brought their dogs to Santa Lucia dorm for human remains searches. (15 RT 4276, 4279; 16 RT 4579-4580; 18 RT 5131.) Behrens and Sierra went first. (16 RT 4627.) Sierra initially searched the area outside the building. (16 RT 4579-4580.) She did not alert but she did put her paws up on the window sill outside room 128. (16 RT 4580-4581, 4595.)

A deputy allowed Behrens to enter the dorm building with Sierra. (16 RT 4586-4588.) Sierra showed no change of behavior in the dorm's common area. (16 RT 4588-4589.) When she reached the hall, she sniffed at the door to room 128 and put her paws up on it. (16 RT 4589-4590.) The door had a placard on it which other doors did not have. (16 RT 4633-4634.)

Inside room 128, Sierra went to her left, sniffed at the bed, then came back and jumped on Behrens – signaling an alert. (16 RT 4590-4591.) The mattress on the left-hand side was the one which had been used by appellant. (3 Aug. CT 890-892; 8 RT 2239-2240.)

Cholla and Cirque also alerted in front of room 128's door and on the left-side bed. (15 RT 4285-4289, 4309.) Upon learning of the alerts, Deputy Richard Neufeld returned to room 128 and collected the left-side mattress and box spring cover. (12 RT 3447-3448; 14 RT 3970-3971.) Morris later brought Cholla back to the room and she continued to alert on the left-side bed frame. (15 RT 4316-4317.) Cholla did not alert in any other area of Santa Lucia Hall. (15 RT 4303.)

LaRoque brought Torrey to search the residence hall after the mattress had been removed. (18 RT 5131, 5151-5152.) Torrey

alerted in front of room 128. (18 RT 5138-5139.) Once inside, she initially alerted on the room's right-hand side, which still had its mattress. (18 RT 5140.) LaRoque instructed Torrey to continue searching, as her "body language" suggested she had not yet identified the strongest source of scent. (18 RT 5144-5145.) When Torrey reached the bed frame in the room's left-hand corner, she scratched at the carpet, whined, and alerted. (18 RT 5145-5146.) She also picked up a garbage can and dropped it at LaRoque's feet. (18 RT 5146.) LaRoque construed her actions to mean the frame and garbage can constituted the primary sources of scent. (18 RT 5148-5149.)

When Torrey finished in room 128, the detectives placed three similar looking garbage cans at the end of the hall. (18 RT 5149-5150.) Torrey sniffed at the three cans and alerted on one of them. (18 RT 5150.) The detectives later told LaRoque it was the same garbage can which had been in room 128. (18 RT 5151.)

DNA testing on the seized mattress excluded both appellant and Smart at eight different locations. (28 RT 8747.) At the ninth location, neither Smart nor appellant could be included or excluded as contributors. (30 RT 8745.) If one was a contributor, the other could not have been. (30 RT 8792.)

In 1998, Morris and LaRoque returned to Cal Poly for additional searches with Cholla and Torrey. (15 RT 4360.) Although neither dog alerted, they both "showed interest" near a corner of the Performing Arts Center. (15 RT 4360.) Cholla slowed down and began attentively sniffing at a particular area. (16 RT 4524.) Because the building was under construction, Morris could not take Cholla inside for a more thorough search. (16 RT 4523-4524.)

G. Jennifer Hudson and Justin Goodwin come forward

In the summer of 1996, Jennifer Hudson was 17 years old and living in Huasna, a rural area near Arroyo Grande. (26 RT

7552-7554.) Her boyfriend, Brent Moon (Brent), was an avid skateboarder. (26 RT 7555; 34 RT 9985.) Hudson and Brent sometimes went to a San Luis Obispo home where the tenants had set up a backyard skateboarding ramp. (26 RT 7554-7555.) In 2019, Hudson told sheriff deputies that she once encountered appellant at the home and that he admitted killing Smart. (26 RT 7567; 36 RT 10585-10587.)

Although Hudson was color blind, she recalled that appellant arrived at the skateboard home in a green or blue Ford Ranger. (26 RT 7561, 7601-7602.) While Brent used the ramp, Hudson, appellant, and a man known as Red sat in the backyard. (26 RT 7556-7557.) An ad came on the radio urging listeners to call a tip center if they had information about Smart. (26 RT 7557-7558.) When the ad ended, appellant referred to Smart as a "dick tease" and said he had "buried her" under his ramp in Huasna because he was "sick of waiting." (26 RT 7558.) Appellant spoke in a "cold" and non-joking tone. (26 RT 7558.) Hudson never mentioned this incident to Brent. (34 RT 9992, 9994-9995.)

Around two weeks later, Hudson drove two acquaintances to meet a friend for skateboarding. (26 RT 7559-7560.) The friend arrived in a white four-wheel drive pickup truck. (26 RT 7561-7562.) Hudson followed the truck down a dirt road to a skateboarding ramp. (26 RT 7561-7562.) When the driver got out, Hudson realized it was appellant. (26 RT 7561.) She immediately vomited then drove straight home. (26 RT 7561-7563.) Hudson could not remember the names of the two people she drove to the ramp. (26 RT 7607.)

Around 2002, Hudson revealed appellant's comments to her roommate, Justin Goodwin. (26 RT 7564.) She implored Goodwin not to tell anyone but, in 2004, Goodwin sent a tip, via e-mail, to the Sonofsusan website. (28 RT 8208-8209, 8217.) Goodwin testified that he sent the same tip to the FBI, though the

prosecution presented no evidence to corroborate his claim. (28 RT 8210, 8221-8222.) In the e-mail, Goodwin wrote that his ex-roommate used to stay up all night with appellant, who "was involved in methamphetamine." (28 RT 8218-8219.) At trial, Goodwin insisted this was what Hudson told him – though Hudson denied doing so. (26 RT 7579; 28 RT 8220-8221.)

Hudson and Goodwin lost touch for many years. (26 RT 7565-7566.) Goodwin's tip found its way to Chris Lambert. (28 RT 8223.) On October 29, 2019, Goodwin contacted Hudson, revealed that he had placed a tip with her information, and mentioned that the information had been the subject of a podcast. (26 RT 7569; 28 RT 8211, 8233.) At Goodwin's urging, Hudson agreed to meet Lambert. (26 RT 7567-7570.) Goodwin set up a meeting with Hudson and Lambert to try to find the skateboard ramp in Huasna. (26 RT 7583; 28 RT 8212.)

In Huasna, Hudson led the group down a gravel road, later determined to be Cierbo Trail Way. (26 RT 7585-7588; 28 RT 8213, 8235.) The road ended at a gate which they could not drive past. (26 RT 7588.) Hudson did not see the skateboard ramp but she recognized the area behind the gate as the place where it had once been. (26 RT 7588; 28 RT 8259.) Goodwin viewed historical satellite photographs from Google Maps and found that a skateboard ramp had been in the area until 2003. (26 RT 8212-8213.) Lambert instructed Hudson not to tell law enforcement about their trip to find the Huasna ramp. (28 RT 8122-8124.)

On November 14, 2019, Goodwin gave Hudson's name and phone number to Sheriff Detective Clinton Cole. (36 RT 10563.) Cole met with Hudson a few days later. (36 RT 10568.) Hudson mentioned two people named Red. (36 RT 10570.) One went by "Red Dog" and often frequented the skateboarding house. (36 RT 10571.) The other was named Randy but had red hair and may

have gone by Red. (36 RT 10571-10572.) Cole never determined Randy's last name or the identity of Red. (36 RT 10571-10573.)

Law enforcement arranged for two excavations in Huasna. (36 RT 10537-10538.) One excavation, which followed a dog alert, covered an area of 20 feet by 15 to 25 feet. (36 RT 10538-10539.) A second excavation covered a much smaller area. (36 RT 10538.) Neither excavation led to the discovery of any human remains. (36 RT 10538.)

DMV records showed that, in September, 1996, Susan Flores owned a blue or green Ford Ranger. (32 RT 9378-9379.) Records also showed that, in July, 1996, Ruben transferred ownership of a white, two-wheel drive Nissan pickup truck to appellant. (32 RT 9381, 9391.) The truck was reported stolen in 1999. (32 RT 9391-9392.) Neither appellant nor his family has ever owned property on Cierbo Trail Way. (36 RT 10582.) At trial, Brent testified as a defense witness and said he did not know appellant. (34 RT 9992.)

H. Uncharged offense evidence

In 2020 and 2021, S.D. and Ro.D. told police that appellant had sexually assaulted them many years earlier after meeting them at bars. (17 RT 4827; 24 RT 6935-6936.) Both women testified at trial.

1. Ro.D.

In January, 2008, Ro.D. and some friends went to a Redondo Beach bar called the Thirsty Club. (17 RT 4813.) Ro.D. had a few drinks but was not drunk. (17 RT 4819.) Near closing time, she was outside the bar speaking to her friends. (17 RT 4813-4815.) The group planned to go back to Ro.D.'s house. (17 RT 4815.) Appellant rode up on bicycle and spoke to one of the men in the group. (17 RT 4815, 4817-4818.) The man invited appellant to come to Ro.D.'s house. (17 RT 4816.) Appellant accepted the invitation but said he first needed to stop by his

house to get something. (17 RT 4817-4818.) At appellant's request, Ro.D. walked home with him. (17 RT 4818.)

After arriving at his house, appellant went to the kitchen and returned with a glass of water which Ro.D. drank. (17 RT 4819.) Appellant gave her a tour of the house. (17 RT 4822.) Ro.D.'s next memory was of appellant having sex with her in his bed. (17 RT 4822-4823.) Ro.D. was confused and faded in and out of consciousness throughout the night. (17 RT 4823.) One time, she awoke to find appellant sodomizing her. (17 RT 4823-4824.) Appellant asked if she knew his name but Ro.D. could not remember it. (17 RT 4823, 4845.)

During the incident, appellant placed a ball gag in Ro.D.'s mouth, saying he did not want his roommate to hear. (17 RT 4823.) The ball gag was red with black stripes. (17 RT 4824.)

Appellant drove Ro.D. home the next morning. (17 RT 4826.) Ro.D. did not file a police report in 2008, as she could not recall what had happened and did not think appellant would be charged. (17 RT 4826-4827.) In 2021, she read a newspaper article about appellant's arrest in this case. (17 RT 4827, 4843.) The article included a picture of appellant, whom she recognized from the 2008 encounter. (17 RT 4827.) In May, 2021, she reported the incident to law enforcement. (17 RT 4827.)

On cross, Ro.D. revealed that she attended Cal Poly San Luis Obispo in 1995 and 1996. (17 RT 4831-4832.) She knew about Smart's disappearance but had not heard appellant's name mentioned as a suspect. (17 RT 4841.)

2. S.D.

In the spring of 2011, S.D. and a friend went to a San Pedro bar called Crimsin. (24 RT 6912-6913.) The bar had no more than six customers – one of them, appellant. (24 RT 6913-6914.) S.D. and her friend sat at the end of the curved bar. (24 RT 6912, 6914; see also 4 Aug. CT 926-927.) Appellant sat at the other end.

(24 RT 6914-6915.) Several times, S.D. caught him looking in her direction. (24 RT 6914-6915.)

S.D. and her friend went outside to smoke a cigarette, leaving their drinks inside. (24 RT 6915.) When they returned, appellant had moved closer to them. (24 RT 6915.) S.D. made small talk with appellant and asked him to buy her a drink. (24 RT 6916.) S.D. had four or five drinks over a period of four hours. (24 RT 6920.)

When they left Crimsin, S.D. returned to her car with her friend, appellant, and a fourth person. (24 RT 6917-6918.) From that point on, her memory grew "foggy." (24 RT 6918.) S.D. did not recall driving her friend home but did recall parking outside appellant's home on Upland Street. (24 RT 6918-6920.) Once inside, appellant went to the kitchen and returned with a non-alcoholic drink for S.D. (24 RT 6921.)

S.D.'s next memory was of appellant having sex with her in his bedroom. (24 RT 6921-6922.) She felt "out of it" and confused. (24 RT 6922.) S.D. remembered screaming and repeatedly saying, "No." (24 RT 6923.) Appellant grabbed a red ball from a drawer and tried shoving it into her mouth. (24 RT 6923-6924.) S.D. resisted and appellant eventually gave up. (24 RT 6923-6924.) Later, S.D. took a shower to wake up. (24 RT 6922.) Appellant went with her and again had sex with her in the shower. (24 RT 6922-6923.)

The next morning, S.D. and appellant did not speak to each other. (24 RT 6924.) When she left, appellant tried to say goodbye. (24 RT 6925.) S.D. replied, "when somebody tells you 'no,' it means 'no.'" (24 RT 6925.) Appellant looked down and said, "okay." (24 RT 6925.)

S.D. did not report the incident because she was confused about what had happened. (24 RT 6927.) In 2020, the Los Angeles

police contacted her on behalf of San Luis Obispo. (24 RT 6935-6936.) S.D. told them about the 2011 incident. (24 RT 6936.)

DMV records showed appellant's 2011 address as 938 West Upland in San Pedro. (24 RT 6952.) He still lived there in 2020, when sheriff deputies searched the home. (9 RT 2483; 32 RT 9375-9376.) During the search, police seized a computer with a video on it. (32 RT 9375-9376, 9415-9416.) A photograph from the video showed a woman with a red ball gag in her mouth. (32 RT 9415-9416, 9425-9426.) The photograph was lodged under seal with this Court. (4 Aug. CT 1070-1072.)

I. The January, 2020 wiretap

In January, 2020, the Sheriff Department obtained permission to tap phone lines belonging to appellant, Ruben, Susan, and Ermelinda. (21 RT 6022-6023.) The wiretap operation lasted around a month and resulted in 9,587 intercepted calls, including 3,447 involving appellant. (21 RT 6024, 6029.) Around this same time, the department purposefully leaked information to Chris Lambert in the hopes of stimulating the suspects to discuss the podcast. (21 RT 6033-6034.)

In one 20-minute call, Susan told appellant to listen to the ongoing podcast "so we can punch holes in it." (21 RT 6025, 6034-6035, 6038-6039.) She then added, "Maybe we can't . . .You're the one that can tell me." (21 RT 6038-6039.)

J. The investigation focuses on 710 White Court

The property at 710 White Court was once an avocado orchard. (20 RT 5720, 5726-5727.) In 1991, Edward Chadwell built a home there and sold it to Ruben and Susan. (20 RT 5717-5718.) The home had a backyard deck with a lattice portion underneath. (20 RT 5734; 25 RT 7215; 3 Aug. CT 613-614.) A gate in the lattice allowed entry to the area under the deck. (20 RT 5807-5808; 2 Aug. CT 502-503.) The gate did not have a lock. (20 RT 5805.)

Around 2004, appellant went to Ruben's house with his then girlfriend, A.C. (18 RT 5226-5228.) In the backyard, A.C. began walking toward the avocado trees. (18 RT 5230-5231.) Ruben and appellant made known that they did not want her there and redirected her to a different area. (18 RT 5232-5233.)

Between 2010 and 2020, David Stone rented a room from Ruben. (20 RT 5774.) Stone once placed two 55-gallon plastic drums of chemicals underneath the deck. (20 RT 5784, 5800.) When Ruben learned about them, he became angry that Stone had put them there without seeking permission. (20 RT 5799-5800.) Ruben asked Stone to remove the drums. (20 RT 5805.)

On another occasion, a plumber needed to go under the deck to fix a leak. (20 RT 5783-5784.) Ruben told the plumber to forget it. (20 RT 5783.) Appellant may have eventually fixed the leak, as he often did repairs for Ruben. (20 RT 5804-5805.)

On February 5, 2020, sheriffs executed a warrant at 710 White Court. (20 RT 5812; 21 RT 6009.) In the master bedroom, they found newspaper articles, letters, and flyers about the Kristin Smart case. (20 RT 5816.)

Jamilyn Holman lived within eyesight of Ruben's home and heard about the February 5 search from social media. (20 RT 5830, 5844-5845.) After sunset on February 9, 2020, Holman heard yelling at Ruben's house and saw Ruben, Susan, and someone named Mike standing in the driveway. (20 RT 5831-5832.) An enclosed cargo trailer had pulled up to the right of the home in a grassy area next to the driveway. (20 RT 5834, 5852-5853.) Holman also saw a camper-style travel trailer, a white van, and a red SUV. (20 RT 5831.) The vehicles remained at the house the next morning, with the cargo trailer in the same position. (20 RT 5834, 5853.) The cargo trailer belonged to Mike McConville – described in the prosecutor's opening statement as Susan's

boyfriend. (25 RT 7260; 8 Aug. RT 2139.) Holman did not see anyone put anything inside the cargo trailer. (20 RT 5853.)

Holman reported her observations to Chris Lambert but did not tell law enforcement until March, 2021. (20 RT 5845-5846.) On March 15, 2021, sheriff deputies arranged for two human remains dogs to perform searches at 710 White Court. (21 RT 6070.) Both dogs searched throughout the backyard and underneath the deck. (21 RT 6072-6075; 22 RT 6331-6332.) Neither dog alerted but both displayed what their handlers construed to be changes in behavior in the area to the left of the lattice gate. (21 RT 6074-6078, 6082; 22 RT 6323, 6331-6337.)

That same day, as well as the next one, an archaeologist named Phillip Hanes used ground penetrating radar (GPR) to search Ruben's property. (22 RT 6353, 6363.) GPR technology uses radio waves to look for underground anomalies – that is, areas in the soil which differ from their surroundings. (22 RT 6353, 6355.) Hanes's GPR unit has an antenna which sits atop a three-wheeled cart and is wired to a computer. (22 RT 6357-6358; see 2 Aug. CT 552-553.) The cart travels across a grid and creates an image which enables Hanes to determine the presence and location of soil anomalies. (22 RT 6357-6359.)

When soil is removed and redeposited, it exposes the soil to air and can create an anomaly. (22 RT 6356.) Such anomalies may be indicative of burial locations, but may also be caused by other activities such as grading, construction, and the removal of a tree by the root ball. (22 RT 6356, 6400, 6402-6403.) During construction on Ruben's home, there was "extensive digging" in the area underneath the deck. (20 RT 5744.) In addition, the contractor removed several avocado trees by their root balls. (20 RT 5713, 5742, 5759.)

Before the GPR search, Hanes and his partner Cindy Arrington set up 11 different grids at various locations on the

property. (22 RT 6363, 6365-6366; 23 RT 6625; see also 2 Aug. CT 550-551.) Using the GPR device, Hanes found anomalies in four of the grids – grids 1, 3, 6, and 10. (23 RT 6367.) Of the four, only grids 1 and 3 were underneath the deck. (22 RT 6366-6367.)

The anomaly in grid 1 was 6 feet high, 4 feet wide, and 3.5 to 4 feet deep – similar in size to what Hanes had previously observed at clandestine burial sites. (22 RT 6368-6370.) The anomaly went from surface to depth, suggesting the area may have been dug out and refilled. (22 RT 6368-6369.) Hanes could not take his GPR unit to the area immediately to the left of grid 1 because the deck did not provide enough clearance space in that area. (22 RT 6381; 2 Aug. CT 546-547; see also 23 RT 6695-6696.)

At Hanes's recommendation, sheriff deputies excavated all four grids which contained anomalies. (22 RT 6371.) Excavation area 2 corresponded with the anomaly in grid 1. (22 RT 6372; 23 RT 6626.) In this area, Arrington saw staining which appeared darker than the surrounding soil. (23 RT 6614-6615, 6627, 6631.) The staining indicated to Arrington that a decomposing body had once been present. (23 RT 6613-6614.) When an unwrapped body decomposes, it emits fluids which form an oval shaped stain around the body. (23 RT 6613-6614, 6673.) Other organic material may cause similar staining. (23 RT 6675.) Arrington equated the stains to bathtub ring stains in that they leave a ring around the body. (23 RT 6673, 6675.)

The staining in excavation area 2 began around two feet down and continued to just below the four-foot mark. (23 RT 6628, 6668.) The staining was jumbled, rather than continuous. (23 RT 6627-6628.) Arrington interpreted this to mean the soil had been dug out, then put back. (23 RT 6628, 6675-6676.) The absence of mechanical marks suggested the hole had been dug manually. (23 RT 6630.) Arrington saw no staining in the other three excavation areas. (23 RT 6681-6682.)

Sheriff deputies found no human bones in excavation area 2. (23 RT 6670.) Arrington acknowledged that, if a body were placed directly in the ground, it would be unusual to find no bones or other human remains at the burial site. (23 RT 6688.) At trial, Arrington posited that the body could have been wrapped in a tarp with a small hole in it – allowing fluids to leak out while the bones remained encased in the tarp. (23 RT 6670-6671, 6689.) Arrington previously told Detective Cole that plant material may have caused some of the staining, since she noticed roots coming through the walls of the excavated areas. (23 RT 6686, 6699.) The excavations yielded no evidence of any tarp. (23 RT 6689.)

On April 13 and 14, 2021, sheriff deputies returned to 710 White Court to do additional work on grid 1, excavation area 2. (25 RT 7224.) This time, they removed part of the deck, enabling them to excavate the previously inaccessible area. (25 RT 7224.) Hanes ran his GPR machine over that area and determined that the anomaly did not continue into it. (22 RT 6398.)

At trial, the prosecutor argued that appellant and Ruben buried Smart's body under the deck, but moved it after the February 5, 2020 search. (39 RT 11440, 11471-11473.)

K. Testing on soil specimens from White Court

Shelby Liddell, a forensic specialist with the Sheriff Department, took soil specimens from the different excavations at White Court. (25 RT 7210, 7231-7234, 7268-7271.) In excavation area 2, Liddell focused on the portions of soil which had the darkest stains. (25 RT 7217-7218, 7220, 7235.)

Some soil specimens contained red, blue, brown, and black fibers. (26 RT 7515; 30 RT 8732.) The black fibers, and some of the blue ones, appeared to be cotton. (26 RT 7516, 7524, 7527.) Other fibers appeared to be a synthetic fabric like polyester. (26 RT 7516.) There were also light colored fibers which could have originally been white. (26 RT 7525.)

The HemDirect is a test used to detect hemoglobin, a protein contained in human blood. (28 RT 8280.) Angela Butler, a forensic DNA analyst, used the HemDirect to look for hemoglobin in the soil specimens. (28 RT 8265, 8280; see, e.g., 30 RT 8713-8714, 8728, 8732, 8734-8735.) She obtained positive or weak positive results on 13 specimens – all from excavation area 2. (30 RT 8708, 8713-8714, 8727-8728, 8732, 8734, 8737-8738; see also 25 RT 7218, 7221, 7230, 7242-7243.) Some specimens from this same area tested negative. (30 RT 8714, 8732, 8734-8735.)

Dr. Elizabeth Johnson, a forensic DNA consultant who testified for appellant, believed the HemDirect results were unreliable. (33 RT 9743, 9796-9797.) No known studies have looked at the HemDirect's accuracy when applied to soil samples. (33 RT 9778, 9791.) In addition, blood degrades quickly when exposed to the elements – with one study showing significant degradation after just four weeks. (33 RT 9773, 9784.) The HemDirect works poorly on degraded samples. (33 RT 9773-9774.) The pH level of the sample may also affect the test's accuracy. (33 RT 9792.) In this case, the pH level from the soil specimens was not obtained. (33 RT 9793.)

The defense also called Dr. David Carter, a professor of forensic sciences who has taught at the University of Nebraska and Chaminade University in Hawaii. (33 RT 9611-9616.) Carter's principle area of focus lies in forensic taphonomy – the study of decomposition. (33 RT 9611, 9614-9615.) Carter viewed photographs taken during the excavations at 710 White Court. (33 RT 9634.) He found the soil stains inconsistent with what he had seen at burial locations, but consistent with a natural formation known as lamellae. (33 RT 9667.) Carter saw no indication that a decomposing body had once been present underneath the deck. (33 RT 9642.)

L. Mike McConville's cargo trailer

In April, 2021, sheriff deputies seized Mike McConville's cargo trailer and applied a chemical called BlueStar to its interior. (25 RT 7249-7253, 7260.) BlueStar causes a blue glow when blood is present. (25 RT 7252.) Paint and bleach with chlorine in it may produce a false positive. (25 RT 7255.)

The Bluestar reacted positively to an area near the trailer's side door. (25 RT 7254.) Sheriff detectives cut out a section of plywood from that area. (25 RT 7256.) A presumptive blood test yielded negative results on all but one very small portion of the plywood. (30 RT 8739-8740.) DNA testing on the blood excluded appellant, Ruben, and Smart. (30 RT 8741-8742.) McConville was included as a possible contributor. (30 RT 8742.)

ARGUMENT

I.

The trial court violated appellant's Sixth and Fourteenth Amendment right to the unanimous verdict of 12 impartial jurors by repeatedly declining to remove a juror who had lost her ability to remain neutral and abide by her oath.

During key prosecution testimony, Juror No. 273 had a dramatic emotional outburst causing other jurors to rush to console her. Afterwards, she told the bailiff she had begun to view appellant as guilty. On two other occasions, the same juror told the court she was experiencing anxiety due to defense counsel's aggressive questioning of prosecution witnesses. Despite these incidents, the trial court denied appellant's repeated requests to discharge Juror No. 273. Its actions deprived appellant of the unanimous verdict of 12 fair and impartial jurors. The error requires per se reversal of appellant's conviction.

A. Background

1. Juror No. 273 expresses anxiety after defense questioning of Steven Fleming

During a break following the defense lawyers' cross-examination of Steven Fleming, Juror No. 273 asked the bailiff if she could speak with the court. (7 RT 1846.) The juror informed the court that she was experiencing anxiety and tension which she attributed to the "aggressiveness" and repetitiveness of the questioning. (7 RT 1847.) Juror No. 273 volunteered that both her parents were in law enforcement but she denied any bias and denied that her concerns were directed at any particular person. (7 RT 1847-1848.)

Appellant's counsel requested Juror No. 273's removal. (7 RT 1851-1852.) He noted that the juror's parents worked in law enforcement and that her anxiety arose during his "aggressive questioning" of Fleming, a former police officer. (7 RT 1851-1852.) The prosecutor and court characterized Juror No. 273's demeanor as "cordial" and "pleasant" – with the prosecutor adding that she was smiling while speaking with the court. (7 RT 1852-1853.) The court found no evidence of bias and declined to remove the juror. (7 RT 1853.) However, it urged Juror No. 273 to alert the court if her anxiety again caused her difficulties. (7 RT 1848.)

2. Juror No. 273's emotional outburst

Around a month after Fleming's cross-examination, Cindy Arrington testified for the prosecution. (31 CT 9044, 9285.) On direct examination, Arrington described the "decomposition ring" which a dead body produces when it releases fluids into the surrounding soil. (23 RT 6634.) Juror No. 273 interrupted to say, "Your Honor, I need a break." (23 RT 6634.) The court took an immediate recess at 11:43 a.m. (23 RT 6634-6635.)

Outside the jury's presence, the court stated that Juror No. 273 had been "audibly crying" and gave a "gasp and cry" after

Arrington's most recent answer. (23 RT 6635.) Defense counsel referred to the juror's actions as "a major, major disruption" which drew the attention of other jurors. (23 RT 6645.) Several tried to comfort Juror No. 273. (23 RT 6645, 6659.) Counsel said that, in 49 years of doing jury trials, he had never seen a larger "emotional outburst" than Juror No. 273's. (23 RT 6645.)

After the lunch break, the courtroom bailiff related that he had spoken to Juror No. 273 during the recess. (23 RT 6640.) The juror told him she had been "completely neutral" until Arrington's testimony but now "felt for the first time that there could be guilt." (23 RT 6640, 6655.)

Around 1:15 p.m., Juror No. 273 returned to the courtroom for a hearing outside the presence of other jurors. (23 RT 6635, 6646-6647.) The trial court told Juror No. 273 it was "not unusual . . . to have an emotional response to things that happen during trial." (23 RT 6647.) It then admonished her to, among other things, "keep an open mind throughout the trial" and not be influenced by bias or sympathy. (23 RT 6648.) Juror No. 273 proclaimed that she could render a fair, impartial, and unbiased verdict based on the evidence and arguments. (23 RT 6650-6652.)

Juror No. 273 admitted telling the bailiff that the evidence had begun to "affect [her] emotional state." (23 RT 6653.) She also told the bailiff that, after Arrington's testimony, she now felt "there could be an opening for [guilt]." (23 RT 6655.) However, Juror No. 273 insisted she remained unbiased, had not come to any decision, and still believed "a person is not guilty until proven guilty." (23 RT 6653-6656.)

Defense counsel again asked to have Juror No. 273 discharged. (23 RT 6643, 6658-6659.) The trial court denied the request, stating that it found the juror honest and believed she was trying her "best to do a good job here." (23 RT 6658-6659,

6661.) The court concluded that Juror No. 273 remained "able to keep an open mind." (23 RT 6661.)

3. Juror No. 273 again asks for a break

Later in trial, Juror No. 273 submitted another note which asked for a "short break" due to anxiety. (36 CT 10584.) At a follow-up hearing, Juror No. 273 cited the defense's "aggressive" questioning of a female witness as the cause of her distress. (28 RT 8287, 8289.) Jennifer Hudson was the only female witness subject to defense questioning that day. (See 32 CT 9373-9374.)

The court asked Juror No. 273 if the day's events had impaired her ability to remain neutral and keep an open mind. (28 RT 8288-8289.) The juror replied, "Do you mind if I have a second to think about it?" (28 RT 8289.) She then expressed concern about counsel's repetitive questions. (28 RT 8289.) The juror denied that counsel's actions would impact her ability to be fair and impartial. (28 RT 8289-8290.)

Defense counsel argued that the three incidents with Juror No. 273 revealed a pattern of bias against the defense and in favor of law enforcement. (28 RT 8291-8293.) The prosecutor countered that defense counsel had brought on the juror's concerns by engaging in "hostile" questioning even after Juror No. 273 made known that it bothered her. (28 RT 8293.) The court again denied appellant's request to discharge the juror, stating that it found no evidence she "cannot be fair and impartial." (28 RT 8291-8293, 8299.)

4. Juror No. 273's Pinterest page and conversations outside the courtroom

Late in trial, the court learned that Juror No. 273 had a Pinterest page with various home improvement tips, including one on testing soil pH. (37 RT 10807-10808.) Juror No. 273 said

the tips pre-dated her selection as a juror in this case.[3] (37 RT 10812-10813.)

Juror No. 273 denied performing online research about appellant's case. (37 RT 10819.) She volunteered that she knew people who had listened to the podcast but that they understood "they cannot tell me anything and I do not ask anything." (37 RT 10820.) When others had started to tell her about the podcast, the juror made clear she could not talk about it. (37 RT 10820.) Defense counsel referred to the juror's comment as a "red flag" since it showed that she and her friends had at least discussed her presence on appellant's jury. (37 RT 10825-10826.)

Defense counsel once again unsuccessfully requested Juror No. 273's removal. (37 RT 10824, 10828.) In issuing its ruling, the trial court cited Juror No. 273's denial that she had talked to friends about the case or podcast. (37 RT 10826, 10828.) The court expressed the view that this was a long trial, that all jurors had missed extensive work, and that "it would be strange if no one knew why." (37 RT 10826-10827.)

B. Standard of review

When the trial court denies a party's request to discharge a juror, its ruling "is reviewed for abuse of discretion and will be upheld if supported by substantial evidence." (*People v. Holloway* (2004) 33 Cal.4th 96, 124-125.) An abuse of discretion occurs when the ruling "exceeds the bounds of law or reason." (*People v. Bell* (1998) 61 Cal.App.4th 282, 287.) To warrant discharge, "the juror's bias . . . must appear in the record as a demonstrable reality." (*Holloway*, at p. 125.)

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[3] Appellant mentions Juror No. 273's Pinterest activities for background purposes only.

C. If even a single juror lacks the ability to be fair and impartial, the resulting conviction violates the accused's constitutional right to jury trial and requires per se reversal.

Under the Sixth and Fourteenth Amendments, a defendant in a criminal case has a right to a unanimous verdict of fair and impartial jurors. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726 (*Morgan*); *Ramos v. Louisiana* (2020) 590 U.S. 83, 93.) Article I, section 16 of the California Constitution contains a similar guarantee. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 589; *People v. Daniels* (2017) 3 Cal.5th 961, 1018.)

"An impartial juror is someone 'capable and willing to decide the case solely on the evidence' presented at trial." (*People v. Nesler* (1997) 16 Cal.4th 561, 581.) Impartiality also requires an ability to make a dispassionate adjudication of guilt, unaffected by sympathy, bias, or prejudice. (*People v. Tidwell* (1970) 3 Cal.3d 62, 73; § 1127h.) "[I]f even a single juror" lacked the ability to render a fair and impartial verdict, the conviction cannot stand. (*People v. Harris* (2008) 43 Cal.4th 1269, 1303; see also *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973.) Because the right to an impartial adjudicator "goes to the very integrity of the legal system," an infringement of that right "can never be treated as harmless error." (*Gray v. Mississippi* (1987) 481 U.S. 648, 668 (*Gray*); see also *Nesler*, at p. 579.)

Penal Code section 1089 permits a trial court to replace a sitting juror with an alternate upon a showing of "good cause" to believe the juror is "unable to perform his or her duty." When a juror loses the ability to remain fair and impartial, good cause exists for that juror's removal. (*People v. Barton* (2020) 56 Cal.App.5th 496, 508.) Similarly, the court may remove a juror for "actual bias" – a "state of mind . . . in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial

rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C); *People v. Romero* (2017) 14 Cal.App.5th 774, 780-781 (*Romero*).)

D. The trial court abused its discretion by denying appellant's second, third, and fourth requests to discharge Juror No. 273.

During trial, appellant made four separate requests to dismiss Juror No. 273 from the panel. His first request came early in trial, after the juror revealed that counsel's "aggressive[]" and repetitive questioning was causing her anxiety. (7 RT 1847.) The juror did not mention any attorney by name but the only questioning which had occurred that morning was the defense's cross-examination of Steven Fleming. (See 31 CT 9044-9045.) When asked about her anxiety, Juror No. 273 insisted she remained free of bias. (7 RT 1847.)

Appellant assumes without conceding that, on this first occasion, the trial court could reasonably have chosen to take Juror No. 273 at her word rather than immediately discharging her. On the other hand, by the time of the later incidents, it had become readily apparent that Juror No. 273 could not follow the court's orders or serve as a fair and unbiased juror.

Defense counsel's second request to dismiss Juror No. 273 came after her disruptive outburst in the middle of Cindy Arrington's testimony. (23 RT 6634, 6643.) "[A] juror's emotional reaction, while relevant, is not automatically disqualifying." (*People v. Ramirez* (2022) 13 Cal.5th 997, 1057.) Juror No. 273's breakdown, however, went well beyond a natural emotional reaction to graphic or upsetting testimony. According to the court and counsel, the juror let out a gasp, loudly burst into tears, and demanded a break as other jurors came to check on her well-being. (23 RT 6634-6635, 6659.) Defense counsel called the outburst the most dramatic he had seen by a juror in 49 years of trial practice. (23 RT 6645.)

To make matters worse, Juror No. 273 spoke to the bailiff after her outburst and confided that, while she had previously remained neutral, she had now come to believe "there could be guilt." (23 RT 6640, 6655.) Though she later recanted, and professed her ability to remain fair and unbiased (23 RT 6650-6652), the trial court must look beyond the juror's own statement. (*Romero*, *supra*, 14 Cal.App.5th at p. 782.) A juror "could in all truth and candor" believe herself capable of impartiality, yet be very wrong in her self-assessment. (*Morgan*, *supra*, 504 U.S. at p. 735.) Here, Juror No. 273 had the benefit of a roughly 90-minute break in which to gather herself before she spoke to the court and counsel. (23 RT 6635.) Her extemporaneous statements to the bailiff revealed far more about her state of mind than her carefully considered statements to the court.

Moreover, Juror No. 273 did not merely tell the bailiff that she now felt there could be an "opening" for guilt. (23 RT 6655.) She actually drew a contrast between her previous neutrality and her feelings after hearing Arrington's testimony. (23 RT 6655.) The unmistakable implication was that Juror No. 273 believed she had lost the capacity for neutrality as a result of Arrington's testimony. The juror's statements, coupled with the intensity of her outburst, revealed to a demonstrable reality that she had become too emotionally invested in the case to remain dispassionate and free of bias. (23 RT 6650-6652.)

Even if Juror No. 273 had not yet made up her mind on the ultimate issue of guilt, her response to Arrington's testimony revealed that she had at least made up her mind about a key prosecution contention: that the soil stains came from human decomposition fluid. After all, if Juror No. 273 remained open to the possibility of a different explanation, she would have had no reason to react so emotionally or to say that she now saw an opening for guilt.

In point of fact, the two defense experts sharply disputed Arrington's claims that the soil stains came from human decomposition fluids. (23 RT 6613-6614.) Dr. David Carter took explicit issue with Arrington's finding. (33 RT 9667.) Dr. Elizabeth Johnson disputed Arrington's findings implicitly by testifying that the HemDirect blood results could not be trusted when obtained from soil specimens. (33 RT 9743, 9796-9797.) This defense testimony could do little good if one juror had already closed her mind to the possibility that the soil stains derived from something other than human remains.

In addition to showing that she had lost the ability for neutrality, Juror No. 273's statements to the bailiff violated two court orders, both given throughout trial. The first order told jurors not to discuss the case with anyone until deliberations began. The second warned them not to make up their minds "about a verdict or any issue" until deliberation time. (See, e.g., 1 RT 15, 19; 2 RT 306-307, 356; 3 RT 663, 717-718; 4 RT 955, 1004.) Both violations constituted misconduct in their own right and grounds for the juror's discharge. (See, e.g., *In re Bell* (2017) 2 Cal.5th 1300, 1306 [juror misconduct to "discuss[] the case with nonjurors during trial"]; *People v. Weatherton* (2014) 59 Cal.4th 589, 598 [prejudging guilt "constitutes serious misconduct"].) Furthermore, by speaking to the bailiff about the case, Juror No. 273 showed that she could not "be trusted to follow the court's instructions going forward." (*People v. Peterson* (2020) 10 Cal.5th 409, 474; see also *People v. Daniels* (1991) 52 Cal.3d 815, 865.)

As it turned out, Juror No. 273 did discuss the case outside the deliberation room on at least one other occasion. Late in trial, she revealed that she had friends who knew of her presence on appellant's jury. (37 RT 10820.) As defense counsel observed, these friends could not have known this unless Juror No. 273 violated her oath by mentioning it to them. (37 RT 10826.) Yet,

the trial court minimized her violation, implying that it was permissible to tell people which case she was on so they would know why she had missed so much work. (37 RT 10827.) In fact, only the juror's employer needed to know why she had missed three months of work. And even the employer did not need to know the name of the case; they merely needed to know the trial's expected length.

In between her in-court outburst, and her disclosure that she had spoken to friends about her service in this case, Juror No. 273 asked for yet another break due to "anxiety." (36 CT 10584.) This time, she specifically mentioned "the questioning of the Defense" – an apparent reference to counsel's cross-examination of Jennifer Hudson. (28 RT 8287; see also 28 RT 8289 [referring to witness as "her"].) As she had previously done, the juror said her anxiety stemmed from counsel's "aggressive" questioning and from her belief that he kept "ask[ing] the same question over and over again." (28 RT 8287, 8289.)

The prosecutor blamed defense counsel for Juror No. 273's anxiety – faulting him for continuing to engage in combative questioning despite knowing that it bothered the juror. (28 RT 8294.) But to demand that counsel pull his punches in order to lessen Juror No. 273's distress was to demand that he provide less zealous representation than he would provide in a trial without that same juror. The prosecutor's demand only underscored appellant's inability to receive a fair trial with Juror No. 273 on his panel. A juror who experiences serious anxiety simply because defense counsel conducts a withering cross-examination, or because she sees evidence which she believes consistent with guilt, is not a juror who can be trusted to dispassionately evaluate the accused's guilt in a murder case.

Indeed, when asked about her ability to remain neutral following defense counsel's aggressive questioning of Hudson,

Juror No. 273 vacillated and requested "a second to think about it." (28 RT 8289.) Even after doing so, the juror initially avoided answering the court's question – instead complaining about defense counsel's repetitive cross-examination. (28 RT 8289.) Only after the court asked her a second time did the juror assert her ability to remain fair and impartial. (28 RT 8290.)

The picture which emerged from the four incidents was of a juror who grew up in a pro-law enforcement environment, had come to believe that appellant was guilty, and experienced significant anxiety by what she perceived as overly vigorous defense attempts to challenge the prosecution evidence. After the first incident, that picture may still have been fuzzy enough for the court to keep Juror No. 273 on the panel. But, with each additional interruption, it became increasingly clear that the juror's sympathy for Smart, and hostility to the defense, impeded her ability to render a fair and impartial verdict or even follow the court's orders not to discuss the case before deliberations.

By denying appellant's last three requests to dismiss Juror No. 273 from the panel, the trial court abused its discretion and violated appellant's constitutional right to the unanimous verdict of 12 fair and impartial jurors. Its rulings constituted structural error, which requires automatic reversal of appellant's murder conviction. (*Romero*, *supra*, 14 Cal.App.5th at p. 783; *Gray*, *supra*, 481 U.S. at p. 668.)

II.

Because there was no evidence that appellant sexually assaulted Smart, the trial court abused its discretion, and violated the Fourteenth Amendment's due process clause, by admitting inflammatory evidence of two uncharged rapes.

Over objection, the trial court allowed the prosecutor to call two female witnesses to show that appellant had a history of drugging and sexually assaulting women. The court admitted the

women's testimony on the rationale that the prosecution alleged a felony-murder in the commission of rape or attempted rape. But just because the prosecution proceeds on a felony-murder rape theory does not mean they become automatically entitled to bring in uncharged sex offenses. Instead, there must be some threshold showing that a sexual assault actually occurred in the present case. Here, there was none. By admitting this irrelevant and extraordinarily prejudicial testimony, the trial court abused its discretion and committed reversible error.

A. Background

1. Prosecutor's motion to amend complaint

Before the preliminary hearing, the prosecutor moved to amend the complaint to add two counts of rape by use of drugs. (2 CT 466-470, 533-535.) One count arose from the 2011 incident with S.D. (2 CT 469.) The other stemmed from similar allegations made by D.W. (2 CT 469.)

The court denied the prosecutor's motion to amend, finding that the rape incidents were "extremely inflammatory" and would not be cross-admissible on the murder count. (5 CT 1324-1332.) The court contrasted appellant's case with published cases which have found uncharged sex offenses admissible to prove a felony-murder rape allegation. (5 CT 1328-1330.) It noted that, in all published cases, direct or forensic evidence showed that the homicide victim had been sexually assaulted. (5 CT 1328-1330.) In this case, the court found no "evidence of sexual conduct between [appellant] and Ms. Smart, no evidence that he drugged her, no physical evidence of sexual contact, no eyewitness testimony, nothing overheard from the dorm room, and no forensic evidence." (5 CT 1328.)

The judge who ruled on the prosecutor's motion to amend also presided at the preliminary hearing – though not at trial. (5 CT 1292; 10 CT 2873.)

2. Prosecutor's in limine motion to introduce uncharged sex offenses

SEALED MATERIAL (28 CT 8226; 29 CT 8640-8643)

END OF SEALED MATERIAL

The trial court relied on the preliminary hearing record in making its in limine rulings. (See, e.g., 1 Aug. RT 86, 99; 6 Aug. RT 1588.) The court found six uncharged incidents inadmissible for both character and non-character purposes. (6 Aug. RT 1594-1597, 1599-1600.) As to three of the six incidents, the court ruled that the allegations did not meet the definition of a sexual offense even if true. (6 Aug. RT 1594.) The court excluded another incident because the alleged victim was unavailable to testify. (6 Aug. RT 1599-1600.) It excluded two claims of unwanted kissing as more prejudicial than probative. (6 Aug. RT 1596-1597.)

The court admitted the testimony of Ra.D., Ro.D., and S.D. for propensity purposes. (6 Aug. RT 1597.) It elaborated that all three women: (1) were around appellant's age; (2) told police that appellant had isolated them at bars near closing time; (3) claimed to have been drugged or intoxicated to the point of incapacitation; and (4) claimed appellant took them back to his home for nonconsensual sex. (6 Aug. RT 1597-1598.)

The court acknowledged there was no "direct evidence" that Smart was sexually assaulted. (6 Aug. RT 1598.) It nonetheless found that Evidence Code section 1108 applied in "the unique circumstances of this case, where it is impossible to produce

direct evidence of a sexual assault but where the People intend to introduce circumstantial evidence of an assault." (6 Aug. RT 1598.) The court also admitted Ra.D., Ro.D. and S.D.'s testimony under Evidence Code section 1101, subdivision (b) to show intent and common plan or scheme. (6 Aug. RT 1599.) Only S.D. and Ro.D. ended up testifying in front of the jury.

The trial court initially excluded all evidence found on appellant's computer. (6 Aug. RT 1600-1602.) Over objection, it later allowed the prosecutor to introduce one still photo – Exhibit 458 – from the ball gag video. (32 RT 9416-9417, 9420-9426.)

B. Standard of review

"A trial court's decision to admit or exclude evidence is reviewable for abuse of discretion." (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) Such discretion "is by no means a power without rational bounds." (*People v. Rist* (1976) 16 Cal.3d 211, 219.) The concept of judicial discretion requires "the exercise of discriminating judgment within the bounds of reason . . . to [reach] an informed, intelligent and just decision." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

C. Though uncharged offense evidence is generally inadmissible, Evidence Code section 1108 permits its introduction when the defendant is charged with a sexual offense.

Evidence Code section 1101, subdivision (a) codifies the centuries-old rule excluding evidence of an accused's criminal propensity. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 (*Falsetta*).) This rule exists, not because character evidence lacks probative value, "*but because it has too much*." (*People v. Alcala* (1984) 36 Cal.3d 604, 630-631, original italics.) A jury which hears of the accused's past offenses will likely "give excessive weight to the vicious record of crime thus exhibited, and either . . . allow it to bear too strongly on the present charge, or . . . take the proof of it as justifying a condemnation irrespective of guilt of

the present charge." (*People v. Schader* (1969) 71 Cal.2d 761, 772, fn. 6, internal quotations omitted.)

In cases alleging a "sexual offense," Evidence Code section 1108, subdivision (a) "creates a narrow exception" to the general ban on character evidence. (*People v. Cottone* (2013) 57 Cal.4th 269, 285.) That exception permits jurors to consider evidence of the defendant's other "sexual offenses" as "evidence of [his] disposition to commit such crimes." (*Falsetta*, *supra*, 21 Cal.4th at p. 912.) The rationale behind this rule is that propensity evidence is "uniquely probative" in sex cases. (*People v. Britt* (2002) 104 Cal.App.4th 500, 505-506 (*Britt*).) As our state Supreme Court has observed, "a history of similar [sex crimes] . . . shows an unusual disposition of the defendant . . . that simply does not exist in ordinary people." (*Cottone*, at p. 285.)

Even if evidence is admissible under Evidence Code section 1108, the trial court must balance its prejudicial effect against its probative value. (*Falsetta*, *supra*, 21 Cal.4th at p. 917; Evid. Code, § 352.) The Fourteenth Amendment's due process clause requires a similar weighing process. (*United States v. Lemay* (9th Cir. 2001) 260 F.3d 1018, 1026-1027.) When evidence gives rise to "*no* permissible inferences" and is "of such quality as necessarily prevents a fair trial," its admission violates due process. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 (*Jammal*), original italics; see *Estelle v. McGuire* (1991) 502 U.S. 62, 75 (*Estelle*) [admission of evidence violates due process when it "infuse[s] the trial with unfairness"].)

D. Although Evidence Code section 1108 may apply in felony-murder rape cases, a prosecutor's bare allegation of rape is insufficient to trigger the statute's application.

Although the information did not directly charge appellant with committing a sexual offense, it alleged a felony-murder in the commission or attempted commission of a rape. (10 CT 2867-

2868.) In *People v. Story* (2009) 45 Cal.4th 1282, 1294 (*Story*), our state Supreme Court held that Evidence Code section 1108 applies to felony-murder cases with a sexual offense as the target crime. The Court has characterized the need for uncharged offense evidence as "especially compelling" in such cases since the sexual assault victim is no longer alive to testify about the incident. (*People v. Avila* (2014) 59 Cal.4th 496, 515 (*Avila*); *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 824 (*Daveggio*); *People v. Baker* (2021) 10 Cal.5th 1044, 1099-1100 (*Baker*); see also *People v. Loy* (2011) 52 Cal.4th 46, 62 (*Loy*) [victim's death made uncharged offense evidence "all the more necessary"].)

The common link between the above cited cases is that, in each one, the felony-murder rape theory rested on more than just a bare allegation. The theory had actual support in the evidence. In *Story*, for instance, the deceased victim was found on her bed wearing only a football jersey but no pants. (*Story*, *supra*, 45 Cal.4th at p. 1285.) The sheet contained a large semen stain and an autopsy showed white discharge, but no sperm, in the victim's vagina. (*Id.* at pp. 1285-1286.) The defendant had received a vasectomy, which would have explained the absence of sperm. (*Id.* at p. 1286.)

Similarly, in *Avila*, *supra*, 59 Cal.4th at p. 500, police found the victim's nude body and an autopsy showed she had been sexually assaulted. In *Loy*, *supra*, 52 Cal.4th at p. 53, an autopsy of the victim's "badly decomposed" body revealed vaginal bleeding and a cause of death which the pathologist described as "the most common sex-associated way of killing people." Other evidence in *Loy* showed the defendant had engaged in sexual touching of the victim on previous occasions. (*Id.* at p. 54.)

In *Daveggio*, *supra*, 4 Cal.5th at pp. 813-814, the victim suffered "deep bruising" to her buttocks and a curling iron, found

in the defendants' van, contained both blood and apparent fecal matter. A swab from the curling iron returned a DNA profile which matched the victim's – suggesting the item had been used for anal penetration. (*Id.* at pp. 813-814.)

Finally, in *Baker*, *supra*, 10 Cal.5th at p. 1060, the victim's body was found in the desert with her pants pulled down and her bra underneath her body. A partial DNA profile from her underwear matched the defendant's profile and several items at the victim's apartment tested positive for semen and for the defendant's DNA. (*Id.* at pp. 1062-1063.)

Also instructive is *Matthews v. Superior Court* (1988) 201 Cal.App.3d 385 (*Matthews*). There, the court admitted two uncharged rapes to prove a special circumstance rape allegation. (*Id.* at pp. 388, 391.) The evidence showed that two years after the killing, police found the victim's bones and a strand of rope. (*Id.* at p. 389.) The defendant told police he was drunk but recalled seeing the victim's nude body and believing he had killed her with a rope. (*Id.* at p. 391.) In a subsequent statement, he claimed he tied up the victim for consensual sex but she accidentally choked to death during the encounter. (*Ibid.*)

The defendant argued that it was error to admit the two uncharged incidents since the evidence showed only a consensual encounter in the charged case. (*Matthews*, *supra*, 201 Cal.App.3d at p. 393.) The Court of Appeal disagreed, finding that the defendant's statements gave rise to an "inference of forced sexual relations" despite his claim that the victim consented. (*Ibid.*)

On the other hand, when no evidence suggests that the defendant committed a sexual offense in the charged case, the uncharged offense evidence loses its "uniquely probative" value. (*Britt*, *supra*, 104 Cal.App.4th at pp. 505-506.) The burden lies with the proponent of evidence to establish its relevancy and to overcome any rule which would generally exclude it. (*People v.*

Morrison (2004) 34 Cal.4th 698, 724.) "When the relevance of proffered evidence depends on the existence of a preliminary fact, the proponent of the evidence has the burden of producing evidence as to the existence of that preliminary fact." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1102.)

In *People v. Hoyos* (2007) 41 Cal.4th 872, 912-913 (*Hoyos*), the defendant shot his victim in the back of the head after she took refuge in the bathroom with her three-year old son. At trial, the defendant sought to introduce evidence of the victim's violent character. (*Id.* at p. 911.) The trial court excluded this evidence because the record showed no possibility the defendant could have perceived the victim as a threat on his life – as required to show any form of self-defense. (*Id.* at pp. 912-913.) The California Supreme Court affirmed, observing that, "even if the murder victim were the most violent person in the world, that fact would not be relevant" without threshold evidence that the defendant acted in self-defense. (*Id.* at p. 913.)

In a similar vein, a defendant who wishes to present third party culpability evidence must make a foundational showing which links the third person to "the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833.) Otherwise, the third party culpability evidence is irrelevant and may not come before the jury. (*Ibid.*)

The same rules apply when the prosecution seeks to bring in generally inadmissible evidence to support the charges or allegations. Prosecutors who wish to introduce such evidence must do more than just declare their intent or desire to proceed on a theory for which the proffered evidence would be relevant. They must demonstrate "some evidentiary support" for that theory. (*Hoyos*, *supra*, 41 Cal.4th at pp. 912-913.)

In *People v. Albarran* (2007) 149 Cal.App.4th 214, 217, Division Seven of this Court reversed the defendant's attempted

murder conviction due to the erroneous admission of gang evidence. The court found no basis for admitting the gang evidence to show motive and intent, since "nothing inherent in the facts of the shooting . . . suggest[ed] any specific gang motive." (*Id.* at p. 227.) Instead, the prosecutor had simply tried to fashion a motive out of the gang evidence itself. (*Ibid.*) The court rejected this attempt to use inflammatory and otherwise inadmissible evidence "to create a motive not otherwise suggested by the evidence." (*Id.* at pp. 225-226.)

Just as gang evidence is inadmissible when the facts do not inherently suggest any gang motive, uncharged sexual offenses are inadmissible when the facts do not inherently suggest the defendant committed any sexual offense in the present case. To paraphrase the discussion in *Hoyos*, even if the defendant were the most habitual sex offender in the world, that fact can give rise to no permissible character inference unless the evidence provides reason to believe that a sexual offense took place in the charged case. Evidence Code section 1108 does not permit jurors in **non-sex** cases to hear evidence of the defendant's propensity to commit sex crimes.

E. As the prosecutor made no threshold showing that appellant committed a sexual offense against Smart, the trial court abused its discretion by admitting the uncharged offense evidence under Evidence Code section 1108.

The prosecutor theorized that, at the end of the Crandall Way party, appellant isolated Smart and took her back to his dorm room for sex after she had drunk or been drugged to the point of incapacitation. (See, e.g., 5 CT 1299-1300; 39 RT 11441, 11488-11496.) The trial court found S.D. and Ro.D.'s testimony probative of this theory since it showed that appellant had a pattern of engaging in similar activity toward young, intoxicated women at bars and social settings. (6 Aug. RT 1597-1598.)

Appellant does not dispute that S.D. and Ro.D.'s testimony was consistent with the prosecutor's case theory. But that does not end the inquiry. The case theory must also have independent factual support. And, aside from S.D. and Ro.D.'s testimony, no evidence supported the theory that appellant raped or attempted to rape Smart. The magistrate who presided at the preliminary hearing made exactly this point when he found the would-be rape charges inadmissible on the murder count. (5 CT 1324-1332.) In doing so, he emphasized that there was "no offer of proof of evidence of sexual conduct between [appellant] and Ms. Smart, no evidence that he drugged her, no physical evidence of sexual contact, no eyewitness testimony, nothing overheard from the dorm room, and no forensic evidence." (5 CT 1328.)

The magistrate's observations occurred before the preliminary hearing but they remained no less true afterwards. The testimony at the preliminary hearing did show that Smart drank to the point of incapacitation. (See, e.g., 14 CT 4064, 4066, 4072-4073, 4131.) It also showed that appellant ended up alone with Smart after Davis and Anderson went home. (11 CT 3163, 3170-3171.) But the prosecution presented no evidence that any sexual contact ever took place between appellant and Smart.

Notably, the magistrate at the preliminary hearing made no probable cause determination as to the rape or attempted rape of Smart. (See *People v. Leon* (2015) 61 Cal.4th 569, 596 [probable cause standard applies at preliminary hearing].) While the complaint included a felony-murder rape allegation (1 CT 126-127), the magistrate expressly declined to decide whether the prosecution presented enough evidence to go forward on that theory. (20 CT 5825.) That sets this case apart from the more typical sex case, where the prosecution actually charges the sex crime and must convince a magistrate they have enough evidence to go forward on the charge. In such cases, a probable cause

finding by the magistrate ensures at least some slight level of evidentiary support for the sexual offense.

The prosecutor here had no burden to demonstrate even the "exceedingly low" level of evidentiary support required at a preliminary hearing. (*Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846.) If he had, he could not have met that burden. Police never recovered Smart's body, so there was no autopsy or forensic testing to determine the presence of semen or other evidence of sexual activity. Similarly, the evidence revealed nothing about the manner of Smart's death or whether it suggested that sexual activity had taken place. (See *Loy*, *supra*, 52 Cal.4th at p. 53.) Finally, the evidence provided no way to know if Smart was naked at the time of the killing. Indeed, the prosecutor, himself, implied that appellant and Ruben buried her in her clothes – thus, explaining the presence of red, black, and light-colored fibers in the soil underneath Ruben's deck. (39 RT 11480; see 4 RT 937-938; 26 RT 7515.)

The only evidence which even vaguely suggested sexual activity was Jennifer Hudson's testimony. At the preliminary hearing, Hudson testified that she once heard appellant refer to Smart as a "dick tease" and imply that he had killed her because he was "done playing with her." (14 CT 4140.) Even if accepted, Hudson's testimony merely showed that appellant desired sexual activity and became frustrated when Smart did not share that desire. Hudson's testimony did not show that appellant tried to initiate sexual intercourse – let alone forcibly.

The trial court recognized that the prosecution possessed no "direct evidence" of any sexual assault against Smart. (6 Aug. RT 1598.) However, the court attributed this evidentiary shortfall to the "unique circumstances of this case," which made it impossible to produce such direct evidence. (6 Aug. RT 1598-1599.) The court concluded that these "unique circumstances," coupled with the

prosecution's intent to introduce circumstantial evidence that Smart was sexually assaulted, made the uncharged incidents admissible under Evidence Code section 1108. (6 Aug. RT 1598.) The court did not identify the circumstantial evidence which it believed indicative of a sexual assault.

Appellant appreciates that this case had "unique circumstances" which made it impossible to either demonstrate or disprove that a sexual assault occurred. (6 Aug. RT 1598.) Nonetheless, unique circumstances do not allow a prosecutor to bypass the usual prohibition on character evidence without any showing that the current charges involved a sexual offense.

During trial, the prosecutor pointed out that Smart was sober when she parted company with Campos around 10:30 p.m. (39 RT 11446; see 4 RT 968.) When Boelter kissed Smart a short time later, he did not smell alcohol on her breath. (39 RT 11447; see 8 RT 2109-2110.) Yet, by midnight, Boelter described her as "out of it." (39 RT 11448; see 8 RT 2113.) Around this same time, Toomey saw Smart lying on the lawn of a neighboring house where she remained until 2:00 or 2:30 a.m. (39 RT 11448-11449; see 4 RT 1039; 7 RT 1913-1914; 10 RT 2741-2742.)

The prosecutor implied that the reason Smart became so badly impaired over a relatively short period of time was that appellant had drugged her. (See 39 RT 11446-11450, 11491; 41 RT 12097-12098.) He argued that appellant went to the party with a "predatory mindset" and that, when the party ended, he sought out Smart while she was "drugged" just as he had previously sought out women near closing hours at bars. (39 RT 11491.) As evidence of this "predatory mindset," the prosecutor cited Koed's testimony that, earlier in the evening, appellant had tried to force himself on her. (39 RT 11447; see 3 RT 730-731.) He also highlighted testimony that appellant had commented on

Smart's good looks and fraternized with her near the bar area. (39 RT 11447-11448; see 4 RT 1013; 7 RT 1911; 10 RT 2736.)

Noticeably absent from the prosecutor's argument was any evidence that appellant committed a sexual assault – or even an unwanted sexual advance – against Smart. Without such evidence, nothing about the charged incident made it similar to the acts alleged by S.D. and Ro.D. That appellant found Smart attractive, walked home with her after the party, and tried to kiss a different woman earlier in the party did not remotely suggest that he tried to rape Smart.

There was also no evidence that appellant drugged Smart or even had the opportunity to do so. To be sure, appellant did not have to personally drug Smart in order to commit or attempt a rape. But there would be no reason to involuntarily drug someone except to commit a sexual assault. Hence, the drugging theory provided a sort of proxy for the direct or forensic evidence of a sexual assault which did not exist. Yet, evidence of drugging also did not exist.

Not a single witness saw appellant hand Smart a drink or pour something into the drink she already had. The prosecution also presented no evidence that Smart left her drink unattended. Besides, the crowded conditions, in which guests stood "shoulder to shoulder," would not have enabled appellant to spike Smart's drink without someone noticing. (4 RT 1008.)

Smart's quick deterioration from sobriety to intoxication did not mean that someone had drugged her. Even in a 90-minute window, it is possible to drink quite heavily. Many of the partygoers did just that. (10 RT 2794.) Some guests even engaged in races to see how quickly they could finish a beer. (10 RT 2735.) With hard liquor likely available at the party, Smart had the means to consume large amounts of alcohol in a very short time period. (10 RT 2794.) Though Boelter smelled no alcohol on

Smart's breath when she first kissed him, he could not recall if he smelled alcohol when she kissed him again later in the evening. (8 RT 2109, 2116.)

If anything, the prosecution's own evidence undercut the theory that appellant drugged Smart. Had he done so, it stands to reason he would have kept watch on her throughout the party. He would, therefore, have seen that she was passed out on the lawn for more than two hours – affording him an easy opportunity to steal off with her while no one at the party was paying attention. (See 4 RT 1039; 7 RT 1913-1914; 10 RT 2741-2742.)

In short, nothing about this case's facts inherently gave rise to an inference that appellant committed a rape or attempted rape of Smart. That makes this case analytically similar to *Hoyos* and *Albarran*. Just as prejudicial character evidence was inadmissible in those cases, it was also inadmissible here. The trial court abused its discretion by admitting the two uncharged incidents under Evidence Code section 1108.

F. The trial court further abused its discretion by admitting the uncharged offense evidence under Evidence Code section 1101, subdivision (b).

The trial court also found S.D. and Ro.D.'s testimony admissible to show intent and common plan or scheme under Evidence Code section 1101, subdivision (b). (6 Aug. RT 1599.) The court offered no additional explanation for its ruling. (6 Aug. RT 1599.) The ruling constituted an abuse of discretion.

"[A] common scheme or plan focuses on the manner in which the prior misconduct and the current crimes were committed, i.e., whether the defendant committed similar distinctive acts of misconduct against similar victims under similar circumstances." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1020.) The missing element in appellant's case was the "similar distinctive act[]" of a sexual assault against Smart. Without this essential ingredient, the charged offense and the

uncharged ones lacked the "high degree of similarity" required to show common scheme and plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

The same analysis applies on the issue of intent. A series of cases has invoked the "doctrine of chances" in upholding the admission of uncharged offense conduct to show criminal intent. (See *Robbins*, *supra*, 45 Cal.3d at pp. 879-880; *Spector*, *supra*, 194 Cal.App.4th at pp. 1379-1380; *People v. Dryden* (2021) 60 Cal.App.5th 1007, 1017-1018 (*Dryden*).) The doctrine of chances recognizes that "multiplying instances of the same result" makes it increasingly less likely that "innocent intent . . . explain[s] them all." (*Robbins*, at p. 879; see also *People v. Erving* (1998) 63 Cal.App.4th 652, 663 [noting the slim likelihood that "through bad luck or coincidence, an innocent person would live near so many arson fires, occurring so frequently, in so many different neighborhoods"].)

In *Robbins*, for instance, the defendant was charged with kidnapping, sodomizing, and murdering a six-year old boy. (*Robbins*, *supra*, 45 Cal.3d at pp. 871-872.) Although the defendant initially admitted the conduct to police, he later claimed he had falsely confessed to the sodomy. (*Id.* at pp. 872-873.) Over objection, the trial court allowed the prosecution to introduce another incident in which the defendant sexually assaulted and strangled a seven-year old boy. (*Id.* at p. 878.) The California Supreme Court affirmed, citing the doctrine of chances. (*Id.* at pp. 879-881.)

In *Spector*, *supra*, 194 Cal.App.4th at p. 1342, a witness saw the defendant with a gun in his hand and heard him admit he had just committed a fatal shooting. At trial, the defendant claimed the woman had committed suicide. (*Id.* at p. 1359.) On appeal, the defendant challenged the admission of seven previous gun-related assaults against five different women. (*Id.* at pp.

1354-1358, 1373.) The Court of Appeal found the incidents admissible under the doctrine of chances – emphasizing the "objective improbability" that another gun-related incident had occurred in the defendant's presence, but "this time it was the woman, not Spector," who fired the gun. (*Id.* at p. 1380.)

The doctrine of chances presupposes an evidentiary basis to suggest that "similar results" occurred in the previous cases and the present one. (*Robbins*, *supra*, 45 Cal.3d at p. 880.) The logic behind the doctrine breaks down when there is no evidence the charged case involved the same conduct as the uncharged ones. (*Dryden*, *supra*, 60 Cal.App.5th at pp. 1017-1018; see *State v. Wright* (Or. 2016) 283 Ore.App. 160, 165 ["[i]n order for other acts evidence to be logically relevant under the doctrine of chances, the other act must be similar to the charged act"].)

Here, the doctrine of chances might have applied if appellant had admitted having sex with Smart but claimed it was consensual, or if the evidence showed Smart was drugged or sexually assaulted but appellant denied being the perpetrator. But the evidence showed neither of those scenarios. Under such circumstances, there was no predicate to which to apply the doctrine of chance's "probability-based calculation." (*Spector*, *supra*, 194 Cal.App.4th at p. 1375.) To conclude that appellant must have sexually assaulted Smart because he sexually assaulted Ro.D. and S.D. is simply to treat the uncharged offenses as a "proxy or substitute" for proof of a sexual assault in the charged case. (*People v. Vichroy* (1999) 76 Cal.App.4th 92, 99.)

With no evidence that appellant committed a sexual offense against Smart, the prosecutor failed to establish the preliminary facts necessary to make S.D. and Ro.D.'s testimony admissible for either propensity or non-propensity purposes. Yet, that improper propensity inference was the only one the jury could possibly have drawn from their testimony. By admitting the uncharged

offense evidence, the trial court infused the trial with unfairness and violated appellant's due process rights. (*Estelle*, *supra*, 502 U.S. at p. 75; *Jammal*, *supra*, 926 F.2d at p. 920.)

G. The admission of highly inflammatory uncharged offense evidence requires reversal of appellant's murder conviction.

Because admission of the two uncharged offenses violated due process, the error requires reversal of appellant's murder conviction unless harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Alternatively, should this Court view the error as one of state law only, it requires reversal if it is reasonably probable appellant would have achieved a more favorable result in the error's absence. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Under either test, this Court must reverse appellant's conviction.

Without the two uncharged incidents, there was almost no possible way the jurors had enough evidence before them to find that appellant committed a rape or attempted rape of Smart. And, without a rape or attempted rape, the prosecution's entire case theory fell apart. Appellant would have had no reason to kill Smart unless he did so in the context of some other crime.

There was a reason this case went uncharged for nearly 25 years. Much of the case rested on innuendo, such as the fact that appellant found Smart attractive (7 RT 1911, 1925), pressed Boelter about what he and Smart were doing in the bathroom (8 RT 2110-2112), engaged in boorish behavior with other women during or after the party (3 RT 730-731; 4 RT 1055-1056), was the last person seen with Smart (4 RT 1058-1059), and suffered a bruise over his eye sometime around Memorial Day weekend. (9 RT 2411-2412; 10 RT 2831-2832.) If such facts proved appellant's guilt, the prosecution would have charged him many years ago when they already had all this evidence at their disposal.

Also available since June, 1996 was the knowledge that four human remains dogs had alerted outside and inside appellant's old dorm room. (15 RT 4285-4289, 4309; 16 RT 4589-4591; 18 RT 5138-5139, 5145-5146.) Yet, the prosecution did not charge appellant at that time – no doubt because they recognized what defense counsel would later argue: that a dog alert, unaccompanied by actual human remains, constitutes weak evidence if not an obvious false positive. (40 RT 11726-11729.)

As defense counsel pointed out, a good deal of dog alert evidence rests on the handler's subjective impressions about the dog's body language and behavioral changes. (40 RT 11727-11728; see, e.g., 15 RT 4288; 18 RT 5144-5145, 5147; 21 RT 6076-6078.) Even when the dogs actually alerted, there was no way to know the source of that alert or the extent to which external cues – such as the police placard outside room 128 – might have affected their behavior. (15 RT 4351-4352; 16 RT 4633-4634.) At the time of the dog searches, multiple law enforcement officers had already walked through the room, including a crime scene technician. (12 RT 3375, 3380.) Defense counsel posited that the dogs may have been alerting to human remains evidence inadvertently brought into the room from another crime scene. (40 RT 11731-11733.)

In fact, there were known instances of false alerts in this very case, such as the ones in Huasna and the "show of interest" at the Performing Arts Center. (15 RT 4360; 36 RT 10538-10539; see 40 RT 11716, 11734.) One dog also falsely alerted on the wrong mattress in appellant's dorm room before going to the other side of the room and alerting again. (18 RT 5140, 5145-5146.) Such false alerts largely undermined the evidentiary significance of the supposedly "true" alerts.

Appellant's case still remained uncharged even after November, 2019, when Hudson reported that appellant had admitted killing Smart and burying her under his skateboard

ramp in Huasna. (36 RT 10568, 10586-10587.) Again, the prosecution had good reason for not charging appellant at that time. Hudson was an unreliable witness who waited more than 20 years to come forward. During their investigation, sheriff detectives found no evidence that appellant's family ever owned property in Huasna. (36 RT 10582.) When they nonetheless dug up the area associated with the old Huasna skateboard ramp, no evidence of human remains turned up. (36 RT 10537-10538.)

The prosecution also failed to produce a single witness from San Luis Obispo County's skateboarding community who knew appellant or had seen him at a skateboard ramp. Brent Moon, Hudson's then boyfriend and an avid skateboarder, testified that he had never met appellant. (33 RT 9985, 9992.) In addition, Sheriff deputies could not locate either of the two "Reds" or the two men whom Hudson drove to the Huasna ramp. (25 RT 7607; 36 RT 10571-10573.)

The "other crimes" evidence first surfaced in May, 2020, when S.D. and D.W. told police that appellant had drugged and raped them. (2 CT 469.) Appellant was arrested and charged some 11 months later – in April, 2021. (1 CT 99, 126-127.) In May, 2021, Ro.D. came forward. (17 RT 4827.) The women's disclosures transformed this case – supplying the prosecutor with a sexual motive not otherwise shown by the evidence. They additionally enabled the prosecutor to portray appellant as a sociopathic predator who stalked and sexually assaulted Smart in the same way he had done to Ro.D. and S.D. And that is exactly what the prosecutor argued.

Early in closing argument, the prosecutor commented that no witnesses had seen Smart's killing, just as none saw what appellant had done to S.D. and Ro.D. (39 RT 11440.) Moments later, he added, "S.D. and Ro.D. tell us what Kristin could not,

that she was raped or that Paul Flores tried to rape her. And they speak for Kristin." (39 RT 11441.)

Near the end of his argument, the prosecutor again brought up the uncharged incidents and recounted the details at length. (39 RT 11490-11497.) He likened Ro.D.'s case to this one, asserting that, in both cases, appellant "appeared out of nowhere" at the end of the night. (39 RT 11494-11945.) He then asked, rhetorically, "Sound familiar? Just like what he did to Tim Davis and Cheryl Anderson. He had a scheme to separate Kristin Smart like he did Ro.D." (39 RT 11945.) The prosecutor also likened S.D.'s case to this one, in that appellant had stared intently at S.D. before approaching her – just as several witnesses described with Smart. (39 RT 11495-11496.)

Just before concluding his closing argument, the prosecutor stated:

> These women tell you what Kristin cannot, that Paul Flores raped them. Predators make the pattern, predators are going to prey, and what you have seen is a plan and scheme by Paul Flores to rape women spanning two decades. What I am asking from you is accountability.
>
> Now, how do you do that? Find him guilty of first degree murder by following the law and rendering a truthful verdict.

(39 RT 11497.)

The prosecutor returned to the subject of the uncharged offenses yet again in his rebuttal argument. (41 RT 12096-12098.) He argued that the uncharged offenses showed appellant to be a "serial rapist" and that, "to vote not guilty you would have to believe that a serial drugger, who enjoyed raping drugged women, had Kristin Smart to himself, by himself, feet from his dorm room, and yet let her go." (41 RT 12098.) The prosecutor called such a belief "so absurd as to be ridiculous." (41 RT 12098.)

The prosecutor's heavy reliance on the uncharged offense evidence only heightened its already prejudicial character. (See *People v. Cruz* (1964) 61 Cal.2d 861, 868 (*Cruz*).) When a prosecutor relies on erroneously admitted evidence in this fashion, our state's high Court has found "no reason [to] treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it." (*Ibid.*)

Moreover, even as "bad acts" evidence goes, the two uncharged rapes were uncommonly incendiary. That appellant suffered no conviction for either crime only increased the evidence's prejudicial impact. Even jurors who had reasonable doubt about appellant's guilt in this case might have opted to punish him for S.D. and Ro.D.'s rapes on the theory that he previously escaped punishment for those very serious crimes. (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.)

Admission of the two uncharged offenses also had the ancillary effect of allowing the prosecutor to bring in Exhibit 458 – a still photograph of a woman with a ball gag in her mouth. (See 4 Aug. CT 1071-1072.) The photograph came from a video, found on appellant's home computer. (32 RT 9415-9416.) The trial court referred to that video as "shocking," but allowed the prosecutor to introduce one still photo in order to corroborate S.D. and Ro.D.'s claims that appellant used the same device on them. (32 RT 9424-9426; see also 17 RT 4823; 24 RT 6923-6924.) Without S.D. and Ro.D.'s testimony, that photograph would never have been admissible.

The jury's actions showed it regarded the case as a close one. It deliberated for four full days, half of another, and parts of two others. (32 CT 9562-9564, 9579-9581, 9583-9584, 9586.) Even in a trial of more than two months, deliberations of such length are unusually protracted and indicative of a difficult case. (See *In*

re Martin (1987) 44 Cal.3d 1, 51 [5-day, 22-hour deliberations "practically compel[] the conclusion" of a close case].)

It bears mention that the jurors in Ruben's case found him not guilty as an accessory after the fact. (34 CT 10171.) Their verdict showed that they likely rejected the HemDirect blood test results. Aside from the prosecutor's theory, there was no scenario in the evidence which would have explained the presence of human blood underneath Ruben's deck. And it defies credulity to believe that Smart could have been buried underneath Ruben's deck without his knowing about it.

The two defense experts, however, cast doubt on the HemDirect results. Dr. Carter opined that the stains found in the soil under Ruben's deck were inconsistent with what he has typically seen at burial sites. (33 RT 9667.) Dr. Johnson pointed out that there have been no studies on the HemDirect's validity when testing for blood in soil. (33 RT 9778.) Johnson further noted that any blood in the soil would have probably degraded over time – rendering the HemDirect test ineffective and unreliable. (33 RT 9773-9774, 9796-9797.)

By acquitting Ruben, his jury seemingly sided with the two defense experts and rejected the positive blood results from the HemDirect test. Appellant, of course, was tried by a different jury. But the behavior of one jury may provide insight into the behavior of another jury presented with similar evidence. (See, e.g., *People v. Kelley* (1967) 66 Cal.2d 232, 245 [hung jury at first trial, where disputed evidence was excluded, indicative of prejudice from admitting that evidence at second trial]; *People v. Diaz* (2014) 227 Cal.App.4th 362, 385 [same].) Without spilling needless ink, if one jury had reservations about the validity of the HemDirect blood test results, a different jury would likely have had similar reservations.

In a trial without S.D. and Ro.D.'s testimony, there is a reasonable probability that at least one juror would have voted to acquit appellant. (*People v. Hendrix* (2022) 13 Cal.5th 933, 947, fn. 6 [hung jury "is a 'more favorable' [Citations] outcome for purposes of harmless error review under *Watson*"].) Accordingly, this Court must reverse appellant's murder conviction.

H. Even if admission of the uncharged offense evidence was harmless on the issue of malice murder, it requires reversal of the first degree murder finding.

Under the trial court's instructions, the jurors had to find appellant guilty of malice murder before deciding the degree of that murder. (See 35 CT 10340-10341.) To convict of first degree murder, jurors had to additionally find either that the killing was willful, deliberate, and premeditated or that it occurred in the commission of a rape or attempted rape. (35 CT 10431-10433.)

This Court could potentially find the admission of S.D. and Ro.D.'s testimony harmless on the issue of whether appellant killed Smart and acted with malice. But, at the very least, the error impacted the jury's view of the felony-murder rape allegations. It, therefore, requires reduction of appellant's conviction to second degree murder.

The uncharged offense evidence enabled the prosecutor to prove a rape or attempted rape which he could not otherwise have proven. (See Argument II.E, *supra*, at pp. 60-65.) When it came time for closing argument, the prosecutor discussed those crimes extensively with much of his focus centering on S.D. and Ro.D.'s testimony. (39 RT 11487-11497; see also 41 RT 12096-12098.) While the prosecutor also addressed the theory of premeditated murder, he did so only in passing and without identifying any specific evidence which supported that theory. (39 RT 11487.)

Given the prosecutor's heavy emphasis on the felony-murder theory, and cursory treatment of premeditated murder, at least some jurors likely convicted under a felony-murder

rationale. And, it would be nearly impossible to convict on this theory without relying on S.D. and Ro.D.'s testimony. In a trial without their testimony, there is a reasonable probability at least one juror would have voted to convict of only second degree murder. This Court must, therefore, reverse appellant's conviction and allow the prosecutor to either accept a reduction to second degree murder or retry appellant of first. (See, e.g., *People v. Chiu* (2014) 59 Cal.4th 155, 168 (*Chiu*).)

III.

The trial court violated the Fourteenth Amendment's due process clause by allowing a lay witness to opine that Smart looked like she had been given "roofies."

Over objection, the trial court permitted Trevor Boelter to testify that Smart's behavior at the party resembled his own behavior when he was "Roofied." (8 RT 2162-2163.) Boelter did not explain how he knew he had been drugged. Without that explanation, his lay opinion lacked adequate foundation. In a case where two female witnesses claimed that appellant had drugged and raped them, Boelter's improper testimony injected a strong inference that appellant did this exact same thing to Smart. That inference became even more powerful after the court erroneously allowed testimony that the school newspaper had reported on the common phenomenon of female students being roofied. The error was prejudicial and requires reversal of appellant's conviction.

A. Background

On direct examination, Boelter testified that Smart appeared unstable on her feet and "spacey," as if drunk or on drugs. (8 RT 2115-2116.) Boelter added, "it didn't seem like drunk." (8 RT 2115.)

On cross, defense counsel elicited evidence that Boelter had given a series of statements and interviews over the years, but made no mention of drugs until 2012. (8 RT 2124, 2130-2132,

2135-2136, 2158.) During redirect, the prosecutor asked Boelter to elaborate on his belief that Smart may have been on drugs. (8 RT 2160-2161.) Boelter said he had read articles in the school newspaper "about girls being Roofied or drunk."[4] (8 RT 2161.) Defense counsel objected and moved to strike Boelter's testimony as hearsay. (8 RT 2161.) The trial court overruled the objection subject to a motion to strike, stating that Boelter had not yet "relate[d] anything specifically from the newspaper." (8 RT 2161.)

Boelter next testified that he had once been "Roofied at a bar" after his friend handed him something. (8 RT 2161.) Defense counsel interrupted his testimony with a relevancy objection. (8 RT 2161-2162.) The court did not rule but simply instructed the prosecutor to ask his next question. (8 RT 2161-2162.)

Moments later, the prosecutor asked Boelter if his personal experience with roofies led him to bring up this possibility in his 2012 interview. (8 RT 2162.) Defense counsel unsuccessfully objected on relevancy grounds and under Evidence Code section 352. (8 RT 2162.) Boelter then explained that the roofies initially caused him to become euphoric and energized. (8 RT 2162.) Later, he became sick and passed out and his friends had to carry him home. (8 RT 2162.) Boelter added that the experience reminded him "of that night and seeing Kristin Smart." (8 RT 2163.)

Defense counsel moved to strike Boelter's testimony as lacking foundation. (8 RT 2163.) The trial court overruled the objection. (8 RT 2163.)

During recross, Boelter testified that he did not see any drugs at the Crandall Way party. (8 RT 2168.) On further

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[4] According to the website WebMD.com, being "roofied" means to be "raped or sexually assaulted after being given a substance that made it hard for you to say no or protect yourself." (https://www.webmd.com/mental-health/addiction/date-rape-drugs. [as of Oct. 21, 2024]

redirect, the prosecutor asked if Boelter "saw drugs around" when he was roofied. (8 RT 2169.) Boelter said he did not. (8 RT 2169.) The prosecutor next asked if Smart's behavior was "consistent with having been Roofied." (8 RT 2169.) The trial court disallowed the question. (8 RT 2169.)

B. Standard of review

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) A trial court abuses its discretion when its ruling "transgresses the confines of the applicable principles of law." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

C. There was no foundation to support Boelter's opinion that Smart looked like she had been given roofies.

A lay witness may give an opinion only on matters of "such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547, quoting *People v. Cole* (1956) 47 Cal.2d 99, 103.) The admission of improper opinion testimony violates due process where it renders the trial fundamentally unfair. (*Estelle*, *supra*, 502 U.S. at p. 67.)

A lay witness may give an opinion that a person appeared drunk. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1308.) The same rule applies to drug-induced intoxication provided "the party eliciting the evidence establishes a foundation." (*People v. Navarette* (2003) 30 Cal.4th 458, 493.) To establish this foundation, the proponent of the evidence must show that the witness is "sufficiently knowledgeable" about the drug in question to render an opinion that someone was under the influence of it. (*Id.* at p. 494.)

Here, the trial court sustained defense counsel's objection when the prosecutor asked Boelter if Smart's behavior was "consistent with having been Roofied." (8 RT 2169.) Yet, only a short time earlier, the court permitted Boelter to testify that Smart's behavior reminded him of his own experience with roofies. (8 RT 2163.) There is no practical difference between testifying that someone's behavior was "consistent with having been roofied" and testifying that someone's behavior was reminiscent of one's own experience on roofies. In each instance, the testimony constitutes an opinion whose admissibility turns on the witness's familiarity with roofies and their effects.

A lay witness who has, in fact, been "roofied" could perhaps render an admissible opinion on whether another person's behavior resembled his own. But Boelter provided no information about how or why he came to believe he had been roofied. Without such information, his conclusory assertion lacked adequate foundation. (See *Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1270.)

Boelter claimed to have personal experience with someone handing him a roofie-spiked drink at a bar. (8 RT 2161-2162.) But he did not explain how he knew that roofies had been placed in his drink. For instance, he did not say that he personally saw someone spike the drink or that someone told him the drink had been spiked. He did not even say that he left his drink unattended or saw other patrons at the bar with roofies. In fact, when asked if he saw drugs around on the night he was roofied, he said he did not. (8 RT 2169.)

Finally, Boelter offered no explanation for why someone would have given him date rape drugs. He did not claim, for example, that he woke up to find someone sexually abusing him. He simply testified that he "felt really happy and . . . wanted to dance" but later passed out and had to be carried home. (8 RT

2162.) That is hardly enough to support an inference of involuntary drugging, as opposed to voluntary drunkenness.

A defendant who seeks an involuntary intoxication instruction must do more than just assert a belief that he was drugged. (*People v. White* (Ill. 1970) 131 Ill.App.2d 652, 654, 656 [no substantial evidence of involuntary intoxication where the defendant briefly left his glass unattended at a bar and expressed a belief he had been drugged]; *People v. Vargas* (Ill. 1992) 224 Ill.App.3d 832, 835-836 [involuntary intoxication instruction not warranted where defendant said he did not remember anything after finishing his last drink and believed someone may have spiked it].) If a defendant's unsupported assertion of drugging does not establish involuntary intoxication, then a witness's unsupported assertion of drugging does not establish the personal experience necessary to give an opinion on another's intoxication with the same drug.

By eliciting improper opinion testimony from Boelter, the prosecutor succeeded in planting an insidious idea in jurors' minds: that appellant had drugged and raped Smart in the same way he had done to Ro.D. and S.D. Furthermore, the insidious idea was the very point behind the prosecutor's questioning. Boelter had already described Smart as "out of it," "spacey," unable to stand straight, and seemingly more than just drunk. (8 RT 2113, 2115-2116.) His opinion on possible involuntary roofie use added nothing which he had not already conveyed through his own descriptions of her behavior. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 40 [lay opinion admissible only when the witness "cannot adequately describe his observations without using opinion wording"].) By injecting a toxic inference, not otherwise shown by the evidence, Boelter's testimony infused the trial with unfairness and violated appellant's Fourteenth Amendment due process rights. (*Estelle*, *supra*, 502 U.S. at p. 67.)

D. Boelter's testimony about what he read in the school newspaper was inadmissible hearsay.

In addition to lacking foundation, Boelter's testimony constituted inadmissible hearsay insofar as he related stories in the school newspaper about women being "roofied." (8 RT 2161.) The trial court overruled appellant's hearsay objection on the ground that Boelter had not recited the article's contents. (8 RT 2161.) But a witness need not recite the out-of-court statement verbatim in order to violate the hearsay rule. It is enough that the witness relates the substance of that statement. (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1108 [summary of hearsay statement is still hearsay]; *Ocampo v. Vail* (9th Cir. 2011) 649 F.3d 1098, 1109-1110 [hearsay rule applies to statements which "convey . . . .the substance of an" extrajudicial statement].)

The jury did not need to hear more to understand that the stories in the school newspaper concerned college women being drugged and sexually assaulted. And it would be difficult to conceive of a more quintessential form of hearsay than a newspaper article. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 83.) The trial court abused its discretion by overruling appellant's hearsay objection.

E. Boelter's erroneously admitted testimony requires reversal of appellant's conviction, or a reduction to second degree murder, since it enabled the prosecution to prove an otherwise unprovable sexual assault.

Because the admission of Boelter's opinion and hearsay testimony violated due process, the error requires reversal unless harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) Even under the state court harmless error test, however, there is a reasonable probability the jury would have reached a more favorable verdict in a trial without the error.

Appellant incorporates by reference his previous discussion about the weakness of the evidence, the importance of the uncharged offense evidence, and the jury's difficulties with the case. (Argument II.G, *supra*, pp. 68-74.) Boelter's testimony enabled the prosecutor to pursue his theory that appellant drugged and sexually assaulted Smart just as he had done to S.D. and Ro.D. (See 39 RT 11441, 11488-11496.) Without Boelter's improper opinion on roofie usage, the evidence provided no basis for this conclusion. No witness except Boelter attributed Smart's intoxication to anything other than alcohol.

Boelter's testimony overcame this evidentiary gap by showing that Smart was acting exactly as a person on roofies acts. Boelter's inadmissible hearsay only lent further credence to his improper opinion by showing that, at the time, administering roofies to women was so common that even the school newspaper published stories on the phenomenon.

The prosecutor recognized the importance of Boelter's testimony and relied on it in closing argument. When discussing the allegation that appellant committed a rape or attempted rape of an intoxicated person, the prosecutor specifically brought up Boelter's testimony. In this regard, he stated:

> And remember what else [Boelter] said? He said, You know, I thought about this because in 2012 I was Roofied. Everyone remember that? And he said, I thought back and that's exactly what I saw in Kristin.

(39 RT 11489.)

The prosecutor's argument only increased the likelihood that the jury would rely on Boelter's improper testimony that Smart was given roofies. (*Cruz*, *supra*, 61 Cal.2d at p. 868.) And, given S.D. and Ro.D.'s testimony, there could be no great mystery about who gave her those roofies. Nor could there be any mystery about his motives for doing so. There would be no reason to

"roofie" someone except to commit a sexual assault – especially for someone like appellant who, according to two other witnesses, had done just that in the past. Thus, if the jury found that appellant drugged Smart, it was tantamount to finding that he raped or attempted to rape her. From there, it was but a short leap to finding that he also killed her.

It is one thing to be the last person in Smart's company while on a public road. It is quite another to be the last person in Smart's company when sexually assaulting her after drugging her at a party. The latter scenario provides a motive and opportunity to kill which is not present in the former. It provides a motive because killing a sexual assault victim prevents her from going to the police. It provides an opportunity because sexual assaults almost invariably occur in private. In addition, Boelter's drugging testimony gave rise to a powerful character inference: that someone violent enough to drug and rape Smart would also be violent enough to kill her.

Finally, even if Boelter's testimony was harmless on the murder charge, it requires reduction of the charge from first degree murder to second. As discussed in Argument II.H, *supra*, at pp. 74-75, it is reasonably probable that some, if not all, jurors relied on the felony-murder theory of first degree murder. Boelter's testimony substantially bolstered that theory by providing otherwise missing evidence to show that Smart was drugged and, therefore, sexually assaulted.

For these reasons, admission of Boelter's hearsay and improper opinion testimony requires reversal of appellant's murder conviction or a reduction of the charge to second degree murder.

IV.

The prosecutor committed misconduct, in violation of the Fourteenth Amendment's due process clause, by misusing the ball gag photograph for character purposes.

Despite a strenuous defense objection, the trial court allowed the prosecutor to introduce a photograph from appellant's computer which showed a woman with a ball gag in her mouth. The court admitted the photograph solely to corroborate S.D. and Ro.D.'s claims that appellant used a similar device on them. During rebuttal argument, however, the prosecutor used the photograph for improper character purposes and to inflame the jurors' passions. His actions constituted prejudicial misconduct.

A. Background

As discussed earlier, the trial court allowed the prosecutor to introduce Exhibit 458 – a photograph of a woman with a red ball gag in her mouth. (32 RT 9415-9416, 9424-9426.) The court overruled appellant's objections, allowing the exhibit to come in to corroborate S.D. and Ro.D.'s testimony. (32 RT 9420-9422, 9424-9426; 37 RT 10878-10879.) The court explained that the prosecutor had presented it with six still photographs from the video found on appellant's computer. (32 RT 9415-9416, 9425.) Of the six, it believed Exhibit 458 to be the "least inflammatory." (32 RT 9425-9426.) Defense counsel had offered to stipulate that police found a red ball gag at appellant's home. (32 RT 9423.)

The prosecution introduced Exhibit 458 through forensic computer specialist Christopher Fitzpatrick – the last witness in their case in chief. (32 RT 9415-9416.) The trial court admonished the jury that it could consider the photograph "only for the limited purpose of establishing, if it does, that Mr. Paul Flores possessed a red ball gag." (32 RT 9416.)

During closing argument, defense counsel characterized the prosecution's case as "basically a bunch of conspiracy theories

that aren't really backed up by facts." (39 RT 11498-11499.) He called such conspiracy theories "fun" but emphasized the need for actual evidence instead of just theories. (39 RT 11499.)

In his rebuttal, the prosecutor ridiculed defense counsel's argument – stating:

> And then Counsel said, [c]onspiracy theories are fun. Okay, maybe you think it's possible that everybody, the dogs, are in on it. Did it look like the woman with the ball gag in her mouth was having fun in this conspiracy theory?

(41 RT 12095-12096.)

Defense counsel immediately objected but the trial court overruled the objection. (41 RT 12096.) During the next break, counsel moved for mistrial. (41 RT 12120-12122.) Counsel elaborated that the photograph had been admitted solely to corroborate S.D. and Ro.D., but the prosecutor had instead used it to inflame the jurors' passions. (41 RT 12121-12122.) The trial court denied the mistrial motion. (41 RT 12124, 12128.)

Defense counsel later filed a motion for new trial based on, among other things, prosecutorial misconduct in connection with Exhibit 458. (33 CT 9816, 9827-9828.) In the motion, he represented that, during an in-chambers discussion about the exhibit's admissibility, the prosecutor declared that "he was a 'professional' and could be trusted" not to use the photograph beyond its limited purpose. (33 CT 9828.) The trial court denied the motion for new trial, finding that the prosecutor had merely tried to highlight what he believed to be the "absurdity" of the defense's argument. (49 RT 14466, 14480.)

B. The prosecutor committed misconduct by misusing limited purpose evidence to advance an improper character inference.

Prosecutorial misconduct involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or

the jury." (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) To demonstrate reversible misconduct, the defendant need not show that the prosecutor acted intentionally or in bad faith. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) He need only show that his "right to a fair trial was prejudiced." (*People v. Vargas* (2001) 91 Cal.App.4th 506, 569.) When a prosecutor's misconduct infects the trial with unfairness, it deprives the accused of his Fourteenth Amendment right to due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 (*Donnelly*).)

The prosecutor committed misconduct during rebuttal argument by "urging use of [the ball gag photograph] for a purpose other than the limited purpose for which it was admitted." (*People v. Lang* (1989) 49 Cal.3d 991, 1022.) The prosecutor did not merely cite the photograph as corroboration of S.D. and Ro.D.'s testimony – as the court's ruling permitted. (32 RT 9424-9426.) Rather, he displayed Exhibit 458 and asked, rhetorically, if "the woman with the ball gag in her mouth" looked to be "having fun." (41 RT 12096.)

The not-so-subtle point behind the prosecutor's argument was to call the jury's attention to the disturbing nature of the act depicted in Exhibit 458. That argument both exceeded the scope of the court's limiting order and advanced an impermissible character inference – effectively urging the jurors to convict because of the heinous acts captured on the photograph. (See *People v. Hovey* (1988) 44 Cal.3d 543, 576 [a prosecutor may not use a photograph "solely to invoke a sympathetic reaction"].) Relatedly, the argument also implied the existence of a third sexual assault victim in addition to S.D. and Ro.D. – namely, the woman shown in Exhibit 458.

In *United States v. Brown* (9th Cir. 2003) 327 F.3d 867, 868, the defendant was charged with 28 counts of wire fraud for overcharging a client by two percent. The trial court admitted the

defendant's other acts of dishonesty to show knowledge and intent and to rebut the defendant's claim that the charges had been orchestrated by "a disgruntled employee." (*Id.* at p. 870.) During closing argument, the prosecutor mused that, "if a man is willing to cheat a little bit over here, wouldn't he be willing to cheat just a little bit over here?" (*Id.* at p. 871.) The Ninth Circuit found reversible misconduct, observing that the prosecutor's remarks "were clearly designed to show [the accused's] criminal propensity." (*Id.* at p. 872.)

The prosecutor here did the same thing as the one in *Brown*. If anything, the misconduct here was considerably more egregious since the act of overcharging a client by two percent pales in comparison to the act depicted on Exhibit 458.

If the prosecutor believed that defense counsel had trivialized the case's seriousness, he was, of course, free to respond. But he was not free to misuse limited-purpose evidence to portray appellant as a person of violent character. The prosecutor's actions constituted misconduct which infected the trial with unfairness and violated the Fourteenth Amendment's due process clause. (*Donnelly*, *supra*, 416 U.S. at p. 643.)

C. The prosecutor's misconduct constituted reversible error.

Whether viewed as a federal constitutional violation, subject to the "harmless beyond a reasonable doubt" standard (*Chapman*, *supra*, 386 U.S. at p. 24), or state court error subject to the "reasonable probability" standard (*Watson*, *supra*, 46 Cal.2d at p. 836), the prosecutor's actions require reversal of appellant's murder conviction.

Appellant again incorporates by reference his previous discussion about the weakness of the evidence and the jury's difficulties with the case. (Argument II.G, *supra*, pp. 68-74.) In addition, for the same reasons the uncharged offense evidence

had the "capacity . . . . to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged," so too did the prosecutor's misuse of Exhibit 458. (*Old Chief v. United States* (1997) 519 U.S. 172, 180.) The exhibit came from a video which even the trial court referred to as "shocking." (32 RT 9425.) Defense counsel used the same word when describing the still photograph depicted in Exhibit 458. (32 RT 9421.) While the court called Exhibit 458 "the least inflammatory" of the six photographs submitted by the prosecutor, that does not mean it was not highly inflammatory. (32 RT 9425-9426.)

Even without the prosecutor's comment, the ball gag photograph already possessed an inherent capacity to inflame jurors or lead them to convict based on appellant's character, rather than the evidence at trial. But, as the Supreme Court has observed, there is a big difference between improper inferences the jury may draw on its own and improper inferences which have been "solemnize[d]" by the prosecutor or court. (*Griffin v. California* (1965) 380 U.S. 609, 614.) That is precisely what the prosecutor did by misusing the ball gag photograph. And it is precisely what the court did by overruling defense counsel's counsel's objection to the prosecutor's actions. (41 RT 12096.)

But for the prosecutor's improper comments, there is a reasonable probability at least one juror would have voted to acquit altogether – or at least to absolve appellant of the rape or attempted rape which elevated the crime to first degree murder. For these reasons, this Court should reverse appellant's conviction or reduce it to second degree murder.

V.

As there was no substantial evidence to support any theory of first degree murder, appellant's conviction for that crime violates the Fourteenth Amendment's due process clause.

If a jury convicts a defendant even when "no rational trier of fact could find guilt beyond a reasonable doubt," the verdict offends the Fourteenth Amendment's due process clause and article I, section 15 of the California Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317; *People v. Berryman* (1993) 6 Cal.4th 1048, 1083.) In assessing a sufficiency of the evidence claim, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Here, the trial court instructed on two theories of first degree murder: willful, deliberate, and premeditated murder and felony-murder in the commission or attempted commission of various types of rape. (35 CT 10431, 10435-10439.) When the court instructs on multiple legal theories, the verdict will be upheld if substantial evidence supports any one of those theories. (*People v. Sandoval* (2015) 62 Cal.4th 394, 424.) In this case, it did not.

As discussed in Argument II.E, *supra*, at pp. 60-65, the prosecution presented no evidence that appellant committed or attempted an act of sexual intercourse against Smart. Appellant's previous argument focused on the evidence presented at the preliminary hearing. But the only thing which changed at trial was that the prosecutor called S.D. and Ro.D. and the court allowed Boelter to testify that Smart's behavior resembled his

own behavior after being "Roofied." (8 RT 2161-2163.) Even with those additions, no substantial evidence showed either an attempted or actual rape of any type.

Uncharged offense evidence, standing alone, is insufficient to establish that a sex crime occurred in this case. (*People v. Younger* (2000) 84 Cal.App.4th 1360, 1382; CALCRIM No. 1191A.) And opinion testimony "is only as good as the facts and reasons on which it is based." (*People v. Valdez* (1997) 58 Cal.App.4th 494, 510.) When opinion testimony rests on an inadequate foundation – as Boelter's did – it does not constitute legally sufficient evidence to support a conviction. (See *In re Leland D.* (1990) 223 Cal.App.3d 251, 259 [expert testimony based on hearsay did not constitute substantial evidence].)

Moreover, even if jurors could infer that appellant had sex with Smart (or attempted to do so), no substantial evidence showed that he did so forcibly or while Smart was unconscious. The record also provided no information about when the actual or attempted sex allegedly happened. Without such information, the jury had no basis for finding that Smart was still too intoxicated to resist. If the incident happened hours after she walked home with appellant, the effects of the alcohol could have dissipated so that Smart no longer lacked the ability to consent.

Likewise, no substantial evidence showed that appellant committed willful, deliberate, and premeditated murder. The California Supreme Court has identified three categories of evidence which are relevant to the issues of premeditation and deliberation: (1) planning activity; (2) motive evidence; and (3) evidence about the manner of the killing. (*People v Anderson* (1968) 70 Cal.2d 15, 26-27.) There was no evidence that appellant engaged in any planning activity. Though the prosecutor argued that appellant "hunt[ed]" Smart in the weeks before Memorial

Day weekend (41 RT 12117), even the prosecutor did not allege that he did so with an eye toward killing her.

Nor did the prosecutor present evidence about motive or the manner of killing. A sexual motive, if one existed, is not a motive to kill. Had there been evidence that appellant actually committed a sex crime, his act of doing so may have supplied a motive to later kill the only witness to that crime. But with no evidence of any sex crime, appellant had no apparent motive to kill Smart. Because no substantial evidence supported any theory of first degree murder, this Court must order appellant's conviction reduced to second degree murder.

VI.

The trial court violated appellant's Fourteenth Amendment due process rights by misstating the mens rea element of attempted rape of an intoxicated person and precluding jurors from considering whether his own intoxication led him to misjudge Smart's ability to consent.

Appellant has previously argued that the evidence provided no basis for finding he had sex with Smart or attempted to do so. But if jurors did find an attempt at sex while Smart was too impaired to consent, they additionally had to find that appellant actually knew the extent of Smart's impairment. Whereas rape of an intoxicated person requires only that a reasonable person would know of the other's impairment, an attempt to commit this crime requires specific intent to have sex with someone too intoxicated to consent. The instructions muddled this concept in two ways. First, the attempted rape instruction erroneously imported the "reasonable person" mens rea for actual rape of an intoxicated person. Second, the instructions precluded jurors from considering the effect of appellant's own intoxication on his assessment of Smart's condition. Without these errors, a juror

may well have rejected a felony-murder finding and, in so doing, rejected a verdict of first degree murder.

A. Background

At issue in this argument are the court's instructions on attempted rape, rape of an intoxicated person, and voluntary intoxication.

The trial court gave CALCRIM No. 460, which defined attempted rape to include: (1) "a direct but ineffective step toward" an actual rape; and (2) an intent to commit rape. (35 CT 10439.) The instruction further stated: "To decide whether the defendant intended to commit rape, please refer to the separate instructions that I will give you on that crime." (35 CT 10439.) One of those "separate instructions" was CALCRIM No. 1002 on rape of an intoxicated person. (35 CT 10437.)

Under CALCRIM No. 1002, rape of an intoxicated person required proof that: (1) the defendant had sexual intercourse with a woman; (2) intoxication prevented the woman from giving legal consent; and (3) "the defendant knew or reasonably should have known" that intoxication prevented the woman from giving legal consent. (35 CT 10437.)

The trial court also gave CALCRIM No. 625 on voluntary intoxication. (35 CT 10434.) That instruction stated, in relevant part:

> You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, the defendant acted with deliberation and premeditation or the defendant was unconscious when he acted . . .
>
> You may not consider evidence of the defendant's voluntary intoxication for any other purpose.

(35 CT 10434.)

B. Standard of review and cognizability

The trial court has a sua sponte duty to correctly instruct on all offense elements, including all elements of any target crime. (*People v. Mil* (2012) 53 Cal.4th 400, 409; *People v. Hughes* (2002) 27 Cal.4th 287, 349.) When the court misinstructs on an element, the error affects the accused's "substantial rights" and may be raised on appeal even without an objection. (§ 1259; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

By contrast, an instruction on voluntary intoxication constitutes a pinpoint instruction which the trial court need not give sua sponte. (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.) But if the court does choose to instruct on the issue, "it must do so correctly." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) If it does not, the issue is cognizable on appeal even without an objection. (*Ibid.*)

Appellate courts apply independent review "in assessing whether [jury] instructions correctly state the law." (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

C. The trial court misinstructed on the elements of attempted rape of an intoxicated person by replacing the crime's knowledge and intent requirement with a constructive knowledge standard.

The Sixth and Fourteenth Amendments guarantee the accused a jury trial based on proof beyond a reasonable doubt of each element of the offense. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-478 (*Apprendi*).) Jury instructions violate these constitutional principles where they omit or misdescribe an essential offense element. (*Neder v. United States* (1999) 527 U.S. 1, 8-10 (*Neder*).)

Here, CALCRIM No. 460 defined attempted rape, including its requirement that "[t]he defendant intended to commit rape." (35 CT 10439.) The instruction provided no further guidance on how to decide if the defendant intended to commit rape. Instead,

it directed jurors to seek that guidance from "the separate instructions . . . on that crime." (35 CT 10439.) The court did not specify which instructions it meant but it instructed on three types of rape: forcible rape, rape of an intoxicated person, and rape of an unconscious person. (35 CT 10435-10438.) Only rape of an intoxicated person (CALCRIM No. 1002) is at issue here.

Rape of an intoxicated person may be based on either actual or constructive knowledge that the other person is too intoxicated to consent. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 71; § 261, subd. (a)(3).) Constructive knowledge exists when the defendant "reasonably should have known" that the other's intoxication "precluded consent." (*Linwood*, at p. 71.) CALCRIM No. 1002 conveyed this concept by requiring the prosecution to prove that the defendant had sex with a woman, the woman was too intoxicated to resist, and "[t]he defendant knew or reasonably should have known" that her intoxication prevented her from resisting. (35 CT 10437.)

The constructive knowledge standard, however, does not apply to the crime of attempted rape of an intoxicated person. Even when the completed crime requires only a general intent or no intent at all, an attempt to commit that crime requires a specific intent. (*People v. Fontenot* (2019) 8 Cal.5th 57, 67-69; see also *People v. Bailey* (2012) 54 Cal.4th 740, 747-750.) For attempted rape of an intoxicated person, the specific intent includes both an intent to have intercourse and to do so "with a person incapacitated by intoxication." (*People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1249.) The instructions here misstated this principle by incorporating the substantive crime's constructive knowledge standard into the instruction on attempted rape. (35 CT 10437, 10439.)

In *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1377-1378 (*Dillon*), the trial court instructed on both forcible sexual

penetration and assault with intent to commit that same crime. The latter instruction included a specific intent element but it referred the jury to the instruction on forcible sexual penetration to decide if the defendant possessed that intent. (*Id.* at p. 1378.) The defendant argued that, by doing so, the assault instruction omitted the requirement of specific intent to not only do the act but do it without the other's consent. (*Ibid.*) The Court of Appeal disagreed, finding that jurors would understand assault's specific intent requirement embraced every element of forcible sexual penetration – including the element that the victim not consent. (*Id.* at pp. 1378-1380.)

As in *Dillon*, the attempt instruction in this case directed jurors to the substantive rape instructions to decide if appellant intended to commit rape. (35 CT 10439.) The difference is that, in this case, the instruction on rape of an intoxicated person did not include all the elements needed for attempt. Even if jurors understood that CALCRIM No. 460's specific intent requirement embraced all elements of CALCRIM No. 1002, the latter instruction included no actual knowledge element for the former to embrace. Jurors who read the two instructions would have understood that attempted rape of an intoxicated person requires a specific intent to have sexual intercourse with someone whose intoxication, in fact, prevented her from consenting. But they would have mistakenly believed attempt's mens rea element to be satisfied so long as a reasonable person would have known of the other's impairment.

By permitting jurors to find the target crime proven if appellant "reasonably should have known" of Smart's condition, the instructions misstated the intent element of attempted rape of an intoxicated person. They, therefore, deprived appellant of his Sixth and Fourteenth Amendment right to a jury verdict

based on proof beyond a reasonable doubt of all essential offense elements. (*Apprendi*, *supra*, 530 U.S. at pp. 476-478.)

D. The trial court exacerbated its error by erroneously precluding jurors from considering appellant's own intoxication on the specific intent element of attempted rape.

In addition to the error discussed in the previous subsection, the trial court made a second key instructional error: it prohibited jurors from considering the effect of appellant's own intoxication on his knowledge of Smart's impairment.

A defendant has a Fourteenth Amendment due process right to show he did not possess the mental state required to commit a charged crime. (*People v. Saille* (1991) 54 Cal.3d 1103, 1116; *Patterson v. New York* (1997) 432 U.S. 197, 215-216.) Section 29.4, subdivision (b) applies this principle by allowing the accused to present evidence that his voluntary intoxication prevented him from "actually form[ing]" the specific intent required for a charged offense. (See also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1128.)

Since attempted rape of an intoxicated person requires actual knowledge of the other's impairment (See Argument VI.C, *supra*, at pp. 92-95), it follows that evidence of the defendant's own voluntary intoxication is admissible to show he lacked this knowledge. (*People v. Clark* (1993) 5 Cal.4th 950, 1021 [voluntary intoxication may negate element of intent to rape required for felony-murder in the commission of a rape].) Yet, CALCRIM No. 625 precluded jurors from considering the voluntary intoxication evidence on this issue or, more generally, on the specific intent element of attempted rape. Instead, it told jurors they could consider appellant's voluntary intoxication only on the issues of intent to kill, premeditation, and unconsciousness but not "for any other purpose." (35 CT 10434.)

By improperly limiting the jury's use of the voluntary intoxication evidence, the trial court prevented appellant from showing he lacked the mental state required for attempted rape of an intoxicated person. The error, therefore, violated appellant's Fourteenth Amendment due process rights.

E. It cannot be said beyond a reasonable doubt that the jury would have convicted of first degree murder in a trial without the two instructional errors.

When jury instructions misstate an essential offense element, the error requires reversal so long as "the record contains evidence that could rationally lead to a contrary finding with respect to the [misstated] element." (*Neder*, *supra*, 527 U.S. at p. 15.)

Because of the misinstruction on the intent element of attempted rape, the prosecution did not have to persuade jurors that appellant actually knew Smart was too intoxicated to consent. He only had to persuade them that a reasonable person would have known. That was an easy showing to make. Multiple witnesses saw Smart lying down on the neighbor's lawn near the end of the party. (7 RT 1913-1915; 8 RT 2175-2177; 10 RT 2741-2742.) Others testified that she was unsteady, slurring her words, and "out of it." (3 RT 780; 4 RT 1046; 7 RT 1927; 8 RT 2113, 2115-2116.) To a reasonable onlooker, such behavior would have clearly signaled that intoxication prevented Smart from consenting.

Smart, however, was not the only one who became intoxicated at the Crandall Way party. Appellant did too. Appellant told police he had "[t]oo much" to drink, including 20 and 22-ounce beers before he left his dorm room, plus another seven to eight beers at the party. (35 CT 10366, 10379-10381; 13 RT 3680.) He became so drunk that he threw up after returning to his dorm. (35 CT 10366; 13 RT 3623.) Timothy Davis corroborated his account, testifying that appellant looked drunk at the party. (36 RT 10513.)

Given appellant's significant alcohol intake, a juror could have had reasonable doubt about his ability to appreciate the extent of Smart's impairment. Appellant, himself, told police Smart was drunk but he did not specify the degree of her intoxication. (35 CT 10373; 13 RT 3617.) In one interview, he said Smart needed help walking on the way home. (12 RT 3415-3416.) In another, he said she was "walking just fine." (35 CT 10389.)

As discussed earlier, the record sheds no light about when appellant's attempt at sex allegedly happened. Appellant, of course, disputes that it happened at all. But if it did, it could have occurred hours later, after Smart had become less noticeably impaired. If so, then appellant's own intoxication could have caused him to honestly but unreasonably believe she had sobered up enough to give legal consent to sexual intercourse.

The erroneous instruction on voluntary intoxication evidence only reinforced that actual knowledge of Smart's condition was not at issue. If it had been, then jurors would have likely understood that it was impossible to consider appellant's actual knowledge without considering the effect of the alcohol on his perceptions. By expressly precluding jurors from considering appellant's voluntary intoxication on the intent element of attempted rape, the court conveyed – again – that his subjective impressions simply did not matter on that offense.

At least one appellate court has found erroneous voluntary intoxication instructions prejudicial even when the jury otherwise received correct instructions on the offense elements. In *People v. Cameron* (1994) 30 Cal.App.4th 591, 594, the court precluded jurors from considering voluntary intoxication evidence on the issue of implied malice – though, at the time, it was admissible on that issue. (*People v. Whitfield* (1994) 7 Cal.4th 437, 450-451.) The Court of Appeal reversed, citing the importance of the

voluntary intoxication evidence to the defendant's imperfect self-defense claim. (*Cameron*, at pp. 601-602.)

The voluntary intoxication evidence was equally important in this case. The obvious nature of Smart's impairment made it difficult to miss – except by a person who, himself, had far too much to drink. By prohibiting jurors from considering appellant's intoxication, the trial court prohibited them from considering the only evidence which could plausibly negate the knowledge component of attempted rape of an intoxicated person.

The jury's verdict does not reveal which first degree murder theory any juror relied on. However, the evidence on the other theories was weak to nonexistent. As discussed in Argument V, *supra*, at p. 88-90, the record contained no evidence of premeditated murder or actual sexual intercourse. It also contained no evidence that appellant attempted to achieve sex forcibly or when Smart was unconscious.

A felony-murder verdict, based on attempted rape of an intoxicated person, required no proof of actual intercourse, no proof of premeditated murder, no proof that appellant used force, and no proof that Smart was unconscious. It, thus, represented the single easiest path to a first degree murder conviction in this case. That path became even easier after the court replaced the crime's actual knowledge standard with one based on constructive knowledge. And it became still easier when the court improperly limited the jury's use of voluntary intoxication evidence. In such circumstances, at least one juror likely convicted of first degree on the rationale that the killing occurred in the commission of an attempted rape of an intoxicated person. As a conviction under that theory rested on incorrect legal principles, this Court must reduce the crime to second degree murder or remand for a retrial on first degree murder. (*Chiu*, *supra*, 59 Cal.4th at p. 168.)

VII.

The errors discussed in Arguments II, III, IV, and VI caused appellant cumulative prejudice which violated his Fourteenth Amendment due process rights.

"The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 290, fn. 3.) A Fourteenth Amendment due process violation occurs when multiple errors, in cumulation, deprived the accused of a fair trial. (*Chambers*, at pp. 302-303; see also *People v. Hill* (1998) 17 Cal.4th 800, 844-845.) If any single error offends due process, cumulative prejudice must be assessed under the "harmless beyond a reasonable doubt" standard. (*People v. Woods* (2006) 146 Cal.App.4th 106, 117.)

The errors discussed in Arguments II, III, and IV caused appellant cumulative prejudice requiring reversal of his murder conviction. S.D. and Ro.D.'s testimony portrayed appellant as a serial predator who drugs and sexually assaults unsuspecting women at bars and parties. The prosecutor used their testimony throughout closing argument to assert that appellant had done exactly this to Kristin Smart – then killed her during the commission of that sexual assault. (39 RT 11440-11441, 11494-11947; 41 RT 12096-12098.)

Boelter's improper opinion testimony, and recitation of hearsay, lent further credence to the prosecutor's theory by showing that Smart's behavior was consistent with someone on date rape drugs. The prosecutor strengthened his theory even further by using the shock value of the ball gag photograph to portray appellant as a violent sexual predator. (41 RT 12095-12096.) In a trial without S.D. and Ro.D.'s testimony, Boelter's

improper testimony, and the prosecutor's misconduct, at least one juror may have had reasonable doubt about appellant's guilt on the murder charge.

In addition, the errors discussed in Arguments II through IV, and the one discussed in Argument VI, were cumulatively prejudicial as to the degree of murder. All four errors spoke to the knowledge and intent element of attempted rape of an intoxicated person. By portraying appellant as a sexual predator, the first three errors implied to jurors that he joined Smart on the way home precisely because he knew she had drunk to excess or because he had personally drugged her. The instructional errors went one step further by making it irrelevant whether appellant knew of Smart's intoxication, so long as a reasonable person would have known. Together, the errors significantly increased the chances of a first degree murder verdict based on attempted rape of an intoxicated person.

Absent the errors discussed above, it cannot be said beyond a reasonable doubt that jurors would have convicted appellant of murder – let alone first degree murder. This Court must reverse appellant's conviction or reduce it to second degree murder.

CONCLUSION

For all of the foregoing reasons, appellant respectfully requests that this Court reverse or reduce his murder conviction and remand his case to Monterey County Superior Court for retrial. (See § 1033, subd. (a); § 1033.1.)

DATED: October 21, 2024

Respectfully submitted,

/s/ Solomon Wollack
SOLOMON WOLLACK
Attorney for Appellant
Paul Ruben Flores

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(Cal. Rules of Court, rule 8.360(b)(1))

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By: /s/ Solomon Wollack
Solomon Wollack

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Mr. Paul Ruben Flores
(Defendant/Appellant)

I declare under penalty of perjury the foregoing is true and correct. Executed this 21st day of October, 2024 at Pleasant Hill, California.

/s/ Solomon Wollack

Court of Appeal, Second Appellate District
Eva McClintock
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