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 REPLY BRIEF

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

On Memorial Day weekend in 1996, Kristin Smart and appellant Paul Flores both attended a college party on Crandall Way in San Luis Obispo. Both drank heavily. When the party ended, they walked back to the freshman dorms together. Smart never made it to her dorm room and has not been seen since, either alive or dead.

In 2021, appellant was arrested and charged with Smart's murder. (17 RT 4843.) At trial, two women – Ro.D. and S.D. – testified about incidents in which they believed appellant had drugged and raped them. Based on their testimony, the prosecutor proceeded on the theory that appellant killed Smart during the commission of a rape or attempted rape – in particular, a rape or attempted rape of an intoxicated person. The jury convicted appellant of first degree murder. (32 CT 9585.)

In his opening brief, appellant raised a series of errors which marred his trial and require reversal or reduction of his first degree murder conviction. Respondent argues that no errors occurred and any that did occur were harmless. Appellant herein replies to these contentions.

ARGUMENT

I.

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

Four times, appellant unsuccessfully asked to have Juror No. 273 removed from the jury. (7 RT 1851-1853; 23 RT 6659, 6661; 28 RT 8291-8292, 8299; 37 RT 10824, 10828.) The first three requests came after the juror interrupted the proceedings with an emotional outburst or to alert the court that she was under distress. In two of those instances, she specifically blamed her distress on the aggressive nature of defense counsel's cross-examination. (7 RT 1847; 28 RT 8287, 8289.) In the other, she had a loud and tearful breakdown during key prosecution testimony about decomposition stains found under Ruben Flores's deck. (23 RT 6634.) At a hearing following this incident, Juror No. 273 admitted speaking to the bailiff about the case and revealing her feelings about the state of the evidence. (23 RT 6655.) Later in trial, she admitted telling acquaintances about her jury service in this high-profile case. (See 37 RT 10820, 10825-10826.)

The foregoing events disclosed, to a demonstrable reality, that Juror No. 273 had developed a pro-prosecution bias and lacked the ability to follow the court's instructions. Appellant, therefore, submits that the trial court abused its discretion by denying his last three requests to discharge the juror. Respondent counters that substantial evidence supported the trial court's ruling. The record shows otherwise.

A. If a juror's bias appears on the record as a demonstrable reality, the trial court commits reversible error by denying requests to discharge that juror.

Respondent initially emphasizes the deferential standard of review which appellate courts employ when the trial court rejects a defendant's motion to discharge a juror for bias. (RB, pp. 54-58.) The California Supreme Court has stated, "'The trial court's decision whether or not to discharge a juror under section 1089 is reviewed for abuse of discretion and will be upheld if supported by substantial evidence; to warrant discharge, the juror's bias or other disability must appear in the record as a demonstrable reality.'" (*People v. Lopez* (2018) 5 Cal.5th 339, 365 (*Lopez*), quoting *People v. Holloway* (2004) 33 Cal.4th 96, 124-125 (*Holloway*).)

Respondent seizes on the "substantial evidence" language used in *Lopez* and *Holloway*. But the high Court's jurisprudence makes clear that, in cases involving the retention or discharge of a juror, the Court envisions something more robust than classic substantial evidence review. Otherwise, it would not have imposed a "demonstrable reality" requirement in the very same sentence in which it spoke of substantial evidence and abuse of discretion review.

The demonstrable reality standard is "more comprehensive and less deferential" than either the abuse of discretion or substantial evidence standard. (*People v. Fuiava* (2012) 53 Cal.4th 622, 712 (*Fuiava*).) To affirm a trial court's ruling under this standard, "the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Ibid.*) This "heightened standard" exists "to protect a defendant's fundamental rights to due process and a fair trial, based on the individual votes of an

unbiased jury." (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71 (*Allen and Johnson*).)

The demonstrable reality test has produced multiple findings of reversible error, following a trial court's decision to retain or discharge a seated juror. (See, e.g., *People v. Armstrong* (2016) 1 Cal.5th 432, 451; *Allen and Johnson*, *supra*, 53 Cal.4th at pp. 71, 79; *People v. Cleveland* (2001) 25 Cal.4th 466, 485; *People v. Barton* (2020) 56 Cal.App.5th 496, 509, 516; *People v. Romero* (2017) 14 Cal.App.5th 774, 781 (*Romero*); *People v. Bowers* (2001) 87 Cal.App.4th 722, 730.) While all of these cases except *Romero* arose following the trial court's decision to discharge a juror, the same standard governs when the trial court opts to retain a seated juror over defense objection. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 807.) In fact, a trial court's decision to retain a biased juror may be worse than an erroneous decision to discharge an unbiased one. In the latter situation, the defendant still receives the benefit of a "unanimous verdict of 12 impartial jurors." (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) In the former situation, he does not. (*Ibid.*; *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111.)

Respondent emphasizes that the jury trial system must "tolerate a certain amount of imperfection short of actual bias." (RB, p. 54, citing *In re Hamilton* (1999) 20 Cal.4th 273, 296.) Appellant does not disagree. But, as will be seen, the record in this case shows more than just "imperfection." It shows actual bias and lack of impartiality.

B. By the time of appellant's last three requests to discharge Juror No. 273, the juror's inability to remain fair and impartial, and to abide by her oath, appeared in the record as a demonstrable reality.

Respondent contends that substantial evidence supported the trial court's belief that Juror No. 273 remained capable of rendering a fair and impartial verdict, following defense counsel's

second, third, and fourth requests to discharge her. (RB, p. 58.) In making this argument, respondent essentially breaks appellant's claim into its component parts, then seeks to rebut each part in isolation. For example, respondent cites case law holding that the trial court has no obligation to discharge a juror simply because that juror: (1) shows emotion or experiences stress; (2) expresses a belief in the defendant's guilt; (3) voices frustration with defense counsel; or (4) fails to follow the court's instructions. (RB, pp. 55-57.) The problem with respondent's analysis is that it fails to address the significance of all these actions occurring in combination and, in some cases, multiple times.

Juror No. 273's difficulties with the case became a recurring theme throughout trial. Those difficulties included a loud and dramatic emotional outburst which defense counsel called the worst he had seen by a juror in his 49 years of trial practice. (23 RT 6645.) They also included two interruptions of trial, two known instances of disobeying the court's orders not to discuss the case, and two anxiety attacks which the juror blamed on the manner of defense counsel's questioning. Taken together, these incidents showed, to a demonstrable reality, that Juror No. 273 had lost the ability to remain fair and impartial and to refrain from discussing the case outside the deliberation room.

1. Juror No. 273's statements and actions throughout trial manifestly refuted her claims that she could remain fair and impartial.

Respondent places considerable weight on Juror No. 273's own assertions that her emotional state would not prevent her from keeping an open mind. (RB, p. 58, citing 7 RT 1847; 23 RT 6634-6636; 28 RT 8287.) Relying on *Lopez*, *supra*, 5 Cal.5th at p. 365, and *People v. Beeler* (1995) 9 Cal.4th 953, 972 (*Beeler*), respondent argues that the trial court could rely on the juror's own statements that she still had the ability to serve. Both *Lopez* and *Beeler* are distinguishable from appellant's case.

In *Lopez*, the juror requested a private audience with the court in the midst of prolonged deliberations during the penalty phase of a death penalty case. (*Lopez*, *supra*, 5 Cal.5th at pp. 361-363.) The juror told the court that the trial was causing her "intolerable stress," that she woke up "crying at night because of the gravity of the case," and that the stress of the trial had affected her performance at work. (*Id.* at p. 363.) Because of these difficulties, the juror asked to be removed from the case. (*Ibid.*) The prosecutor, but not defense counsel, joined in the juror's request. (*Ibid.*) The court declined to dismiss her but said it would do so if the issue arose again – which it did not. (*Ibid.*)

In *Beeler*, *supra*, 9 Cal.4th at pp. 965, 972, the juror called the court clerk a few days before the guilt phase of a death penalty case. During the call, she broke down crying and told the clerk she did not know if she could serve as a juror because of the case's upsetting nature. (*Id.* at p. 972.) When the court brought the juror in for questioning several days later, the juror apologized for her earlier phone call and said, "I know I could be fair." (*Id.* at pp. 973-974.) The trial court allowed her to remain on the case. (*Id.* at p. 972.)

Lopez and *Beeler* differed from appellant's case in at least three key ways. First, both cases arose from but a single incident. Appellant's case involved three separate incidents, plus another hearing where the juror implicitly admitted to violating the court's orders by telling others of her jury service in this case. (See 37 RT 10820, 10825-10826.) With each additional incident, it becomes increasingly difficult to dismiss a juror's statements or actions as an isolated and momentary expression of emotion. Moreover, with each additional incident, it becomes increasingly difficult to give credence to the juror's continued claims of impartiality. The trial court in *Lopez* recognized as much, stating

that it would dismiss the juror if another problem arose. (*Lopez*, *supra*, 5 Cal.5th at p. 363.)

Second, the jurors in *Lopez* and *Beeler* were emotional but not in a way which suggested favoritism toward one side. The *Lopez* juror attributed her stress to "the gravity of the case." (*Lopez*, *supra*, 5 Cal.5th at p. 363.) In *Beeler*, the juror expressed doubt about her abilities to serve due to the "[n]ature of the case." (*Beeler*, *supra*, 9 Cal.4th at p. 972.) Both comments could just as well have referred to either the gravity of the alleged crime or the gravity of having to vote on a literal question of life and death.

No such ambiguity existed in appellant's case. Juror No. 273's anxiety attacks did not occur at random. The juror came from a family of law enforcement officers (7 RT 1848) and the timing and explanations for her attacks, plus her comments to the bailiff, revealed a decidedly prosecution-friendly theme to those attacks. The juror's emotional breakdown occurred during key prosecution testimony which, if accepted, suggested that Smart's body had once been buried underneath Ruben's deck. Her two other anxiety attacks stemmed, not from any grisly details about the case, but from the mere fact of defense counsel trying to do his job by vigorously cross-examining prosecution witnesses. (7 RT 1846-1847; 28 RT 8287, 8289.)

A third key difference between this case and the *Lopez* and *Beeler* cases is that the jurors in those cases never questioned their own ability to remain fair and impartial if they remained on the jury. In fact, the juror in *Beeler* stated, in no uncertain terms, "I know I could be fair." (*Beeler*, *supra*, 9 Cal.4th at p. 972.)

By contrast, Juror No. 273 equivocated on this issue at least twice. The first time occurred during a conversation with the bailiff, when she openly questioned her own ability to remain neutral. (23 RT 6640, 6655.) Later, following the third incident, the court pointedly asked Juror No. 273 if the events which gave

rise to her anxiety attack had hindered her ability to remain neutral and keep an open mind. (28 RT 8287-8289.) Rather than answer the question, Juror No. 273 demurred, asking for "a second to think about it." (28 RT 8289.) The court replied, "Sure," at which point the juror changed the subject to complain about defense counsel's "repetitive" and "aggressive" questioning of witnesses. (28 RT 2829.) Afterwards, the court asked Juror No. 273 if "anything about that . . . has caused you to form an opinion." (28 RT 8289.) Only then did the juror say she had not. (28 RT 8289.) But she never actually answered the court's original question: whether the day's events, or other previous events, had caused her to lose her neutrality. (28 RT 8288-8289.)

In his opening brief, appellant cited *Romero*, *supra*, 14 Cal.App.5th at p. 782, for the proposition that the trial court must look beyond the juror's own claim that she can remain fair and impartial. (AOB, p. 48.) Respondent characterizes *Romero* as a "unique" case with an improbable fact pattern – a juror who had a previous teacher-student relationship with the complaining witness and who still retained a positive impression of that witness. (RB, p. 60; *Romero*, at p. 779.) But *Romero*'s unusual facts are beside the point. The case's significance stems from its recognition that a juror's self-serving claim of impartiality cannot, by itself, overcome strong evidence to the contrary. (*Id.* at p. 782.)

Respondent asserts that, under California Supreme Court precedent, reviewing courts must defer to the trial court when a juror gives conflicting statements on her ability to remain impartial. (RB, pp. 55, 60, citing *People v. Mickel* (2016) 2 Cal.5th 181, 217 (*Mickel*); *People v. Harris* (2008) 43 Cal.4th 1269, 1304 (*Harris*).) *Mickel*, however, involved an unsuccessful challenge for cause toward four prospective jurors. (*Mickel*, at pp. 213-216.) As one appellate court has recognized, the demonstrable reality standard does not apply to such rulings; it applies only to rulings

regarding the removal or retention "of jurors who have already been sworn to decide the case and who have heard evidence." (*People v. Merced* (2001) 94 Cal.App.4th 1024, 1029-1030 (*Merced*).) This distinction is important because, as previously discussed, the demonstrable reality standard accords the trial court considerably less deference than in traditional abuse of discretion analysis. (*Fuiava*, *supra*, 53 Cal.4th at p. 712.)

Harris is also inapposite. There, the juror's father received a threatening phone call just before the start of the trial's penalty phase. (*Harris*, *supra*, 43 Cal.4th at p. 1300.) While the juror requested that the court provide protection for his family, he consistently denied that the threat would impact his neutrality of his ability to deliberate. (*Id.* at pp. 1300-1302.) Hence, unlike appellant's case, the juror made no conflicting statements. With no conflict in the juror's statements, and no basis in the record for finding the juror had lost the ability for impartiality, there is nothing remarkable about the fact that the trial court credited the juror's own, uncontradicted statements on this point. It does not follow that an appellate must defer to the trial court's finding when, as here, the record convincingly demonstrates the juror had lost the ability for impartiality.

2. The totality of Juror No. 273's conduct revealed that she had lost the ability to be fair and impartial, or even to follow the trial court's orders.

Respondent cites a series of cases for the principle that a juror does not violate her oath by forming midtrial opinions about the defendant or about the case's strength or weakness. (RB, pp. 56, 58, citing *Allen and Johnson*, *supra*, 53 Cal.4th at pp. 72-73; *People v. Kipp* (1998) 18 Cal.4th 349, 366 (*Kipp*); *People v. Goldberg* (1984) 161 Cal.App.3d 170, 192 (*Goldberg*); *People v. Franklin* (1976) 56 Cal.App.3d 18, 25-26 (*Franklin*).) Indeed, respondent calls it "unrealistic to expect jurors not to think about

the case during the trial." (RB, p. 56, quoting *People v. Ledesma* (2006) 39 Cal.4th 641, 729.) So long as the juror's "mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations," the juror remains in compliance with her duties. (RB, p. 56; *Allen and Johnson*, p. 73.)

In this case, Juror No. 273's statements and actions belied her ability to remain an impartial arbiter. A juror who could fairly evaluate the case would not have suffered a dramatic emotional breakdown in response to prosecution evidence, or suffered from anxiety attacks simply because defense counsel had tried to do his job. Nor would she have openly questioned her own neutrality, as Juror No. 273 did during her conversation with the bailiff. (23 RT 6655.) While the juror later insisted she had not yet come to any conclusion (23 RT 6655-6656), the trial court questioned her again on this topic some 11 days later, after she again complained of anxiety. (23 RT 8287-8289.) Instead of giving a straight answer to the trial court's question, Juror No. 273 filibustered, then launched into another complaint about defense counsel's questioning. (23 RT 8288-8289.)

Juror No. 273's actions also revealed, to an absolute certainty, that she was either unwilling or unable to follow the court's orders. At the start of trial, the court ordered jurors not to discuss the case with anyone until deliberations began. (1 RT 15-16.) It gave similar orders throughout the entire trial, reminding jurors before nearly every break to refrain from discussing the case. (See, e.g., 2 RT 306-307, 356; 6 RT 1567; 8 RT 2214; 12 RT 3315, 3335, 3439; 21 RT 6045, 6104; 22 RT 6341.) The court gave that same order immediately after Juror No. 273 interrupted Cindy Arrington's testimony to demand a break. (23 RT 6634.) Yet, the juror just as immediately violated the order by proceeding to speak to the bailiff during that break. (23 RT 6640.)

Juror No. 273 later violated the court's orders a second time by telling acquaintances of her jury service in appellant's case. (37 RT 10820, 10825-10826.) Respondent downplays this violation – attributing it to the "laudable" motive of ensuring that nobody talked to Juror No. 273 about the case. (RB, p. 59, citing 37 RT 10820.) In fact, there would be no reason for anyone to discuss the case with her in the first place unless she had told them of her presence on the jury.

In any case, Juror No. 273's comments revealed that she did not just tell others about the fact of her jury service in this case. During an in-court hearing about whether she had received information from outside the courtroom, the juror stated, "everybody knows that I like had a hard time one day." (37 RT 10820.) Such comments were an obvious reference to the juror's emotional breakdown during Arrington's testimony. Moreover, the context made clear that the word "everybody" did not refer to the participants at trial, but to her other acquaintances who had tried to discuss the case with her. (37 RT 10820.) If Juror No. 273 told friends of her emotional breakdown at trial, it stands to reason that she also told them of the testimony which led to that breakdown – and of the impressions that testimony left on her.

The recurring and multifarious nature of Juror No. 273's problems set this case apart from those relied on by respondent. All of those cases arose from a single, isolated incident. In *Kipp*, the juror criticized the defendant's appearance during voir dire. (*Kipp*, *supra*, 18 Cal.4th at p. 366.) On appeal, the defendant complained for the first time that the trial court should have removed the juror for cause. (*Id.* at pp. 364-365.) The Court found the issue forfeited, but found no abuse of discretion even if it was not. (*Id.* at p. 366.) There was no indication that the issue of the defendant's appearance ever came up again at trial.

Similarly, in *Franklin*, *supra*, 56 Cal.App.3d at pp. 23-25, a juror who had once been drugged sought to disqualify herself during deliberations, after hearing the defense's argument that the accused had involuntarily ingested LSD. In *Goldberg*, the juror asked to be discharged after she overheard other jurors discussing news coverage of the case. (*Goldberg*, *supra*, 161 Cal.App.3d at pp. 191-192.) In both *Franklin* and *Goldberg*, the jurors later professed their ability to put the improper influence out of their minds and, in both cases, the issue never came up again. (*Franklin*, at p. 25-26; *Goldberg*, at p. 192.)

Kipp, *Franklin*, and *Goldberg* all involved a trial court's decision to allow a juror to remain on the jury. Conversely, in *Allen and Johnson*, the trial court removed a juror after learning of his mid-deliberation comment that, "[w]hen the prosecution rested, she didn't have a case." (*Allen and Johnson*, *supra*, 53 Cal.4th at p. 70.) The trial court took this statement to mean the juror had prejudged the case before hearing the defense evidence, jury instructions, and closing arguments. (*Id.* at p. 72.) Our state's high Court reversed, emphasizing that it had found no case "in which a juror was discharged for prejudgment based solely on comments made during deliberations." (*Id.* at p. 73.) The Court also found the juror's remarks more equivocal than the trial court had believed them to be. In the high Court's view, the comments merely indicated the juror's "state of mind at a single point during the trial;" they did not suggest any "intention to ignore the rest of the proceedings." (*Ibid.*)

If anything, *Allen and Johnson* serves as a good example of the demonstrable reality standard in action. After all, the high Court did not defer to the trial court's interpretation of the juror's remarks or to its exercise of discretion in removing the juror. Instead, it drew its own conclusions about the meaning and significance of the juror's comments and whether they warranted

his removal. And the conclusion it drew was that a passing, ambiguous remark during deliberations did not justify the juror's removal.

In appellant's case, the incidents did not occur during deliberations, but during the evidentiary phase of trial. Taken together, those incidents afford this Court no basis for confidence that Juror No. 273 retained the ability to be fair and impartial by the time of appellant's second request to discharge her – let alone, his third and fourth requests. (See *Fuiava*, *supra*, 53 Cal.4th at p. 712.) The incidents also provide no basis for confidence that Juror No. 273 could follow the court's instructions to not discuss the case outside the deliberation room. In fact, quite the opposite is true. The record makes plain that Juror No. 273 could **not** follow this order, since she violated it at least twice – including once immediately after the court had given it. (23 RT 6634, 6640.)

Respondent cites a series of cases for the proposition that, absent deliberate misconduct, a trial court need not remove a juror for failing to adhere to one of its instructions. (RB, p. 57, citing *Holloway*, *supra*, 33 Cal.4th at pp. 124-125; *People v. Daniels* (1991) 52 Cal.3d 815, 864; *People v. Stewart* (2004) 33 Cal.4th 425, 510.) But Juror No. 273 never denied that she acted in deliberate violation of the court's instructions. Indeed, such a claim would have defied credulity. Not a day of trial passed by without the court ordering jurors to refrain from talking about the case. No juror could reasonably have believed that discussing a witness's testimony with the bailiff was outside the purview of these orders. The case, thus, differs from *Holloway*, in which the juror quite plausibly maintained that he did not know it violated the court's orders to tell other jurors he had asked the bailiff for a photograph of the victim while alive. (*Holloway*, at pp. 123-125.)

Daniels and *Stewart* are also of no help to respondent. In *Daniels*, the trial court did remove the juror for having multiple

pre-deliberation discussions about the case and expressing opinions on the defendant's guilt. (*Daniels*, *supra*, 52 Cal.3d at pp. 863-864.) The California Supreme Court affirmed, citing the juror's "serious and wilful misconduct" and repeat violations. (*Id.* at pp. 863-864.) Juror No. 273 engaged in the exact same conduct as the discharged juror in *Daniels*. And, like the *Daniels* juror, she did so on more than one occasion.

In *Stewart*, *supra*, 33 Cal.4th at pp. 509-510, the defendant brought a motion for new trial after learning that a juror had encountered a female defense witness outside the courtroom and commented on the witness's good looks. The juror admitted the encounter but denied that it affected her impartiality. (*Id.* at p. 510.) While the California Supreme Court found the juror's actions constituted misconduct, it called the violation "trifling" since it had nothing to do with "the merits of the case." (*Ibid.*) The same cannot be said of Juror No. 273's discussion with the bailiff.

Finally, respondent argues that a trial court need not discharge a juror just for expressing frustration with defense counsel. (RB, pp. 56-57, citing *People v. Kaurish* (1990) 52 Cal.3d 648, 694; *People v. Zemek* (2023) 93 Cal.App.5th 313, 337-338.) Again, that is not what happened here. In both *Kaurish* and *Zemek*, the jurors made passing remarks near the end of long trials. (*Kaurish*, at p. 694; *Zemek*, at pp. 334-335.) Here, Juror No. 273's actions involved multiple interruptions and anxiety attacks, multiple violations of the court's orders, and one loud and dramatic emotional breakdown.

By denying appellant's last three requests to discharge Juror No. 273, the trial court abused its discretion and violated appellant's right to the unanimous verdict of 12 fair and impartial jurors. Because such errors are structural, this Court must reverse appellant's conviction. (*Gray v. Mississippi* (1987) 481 U.S. 648, 668.)

II.

Because there was no evidence that appellant sexually assaulted Smart, the trial court abused its discretion and violated due process by admitting two uncharged rape incidents.

Under Evidence Code section 1108, the prosecutor called two female witnesses – Ro.D. and S.D. – whose testimony implied that appellant had drugged and raped them after meeting them in bars. The women's testimony transformed the case, enabling the prosecutor to argue that appellant had done the same to Smart, though no independent evidence supported this theory. By presenting this theory in his closing argument, the prosecutor was able to fashion a motive for an otherwise inexplicable crime. He was also able to obtain a conviction for not just murder but first degree felony-murder in the commission of a rape or attempted rape.

Respondent argues that, because the charging document included allegations of felony-murder in the commission of a rape, the trial court correctly admitted Ro.D. and S.D.'s testimony. (See 1 CT 126-127.) They further argue that, even if the trial court abused its discretion by admitting the testimony, the error was harmless. This Court should reject these contentions.

A. A bare allegation of rape or attempted rape, with no holding order and no judicial finding on the allegation's merit, is insufficient to justify the admission of uncharged offense evidence under Evidence Code section 1108.

In any case in which "the defendant is accused of a sexual offense," the prosecution may introduce character evidence of his prior or subsequent sexual offenses. (Evid. Code, § 1108, subd. (a).) The California Supreme Court has found Evidence Code section 1108 applicable in felony-murder cases with a sexual offense as the target crime. (*People v. Story* (2009) 45 Cal.4th 1282, 1294 (*Story*); *People v. Avila* (2014) 59 Cal.4th 496, 515

(*Avila*).) Respondent contends that these cases settle the issue. Because the information alleged that the murder occurred in the commission of a rape or attempted rape, respondent argues that the prosecution could introduce evidence of appellant's other sexual offenses. (RB, pp. 63-64; see 1 CT 126-127.)

The issue is not as straightforward as respondent perceives it to be. If it were, it would allow the prosecutor to use otherwise inadmissible character evidence to create a sexual motive that no admissible evidence actually shows. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 225-226 (*Albarran*).) It would also create an incentive for prosecutors to charge factually unsupported felony-murder allegations as a mere pretense for introducing devastating character evidence.

It bears mention that this state's law includes no mechanism for weeding out pretextual or meritless felony-murder allegations before trial. In this respect, California law treats meritless felony-murder allegations differently than meritless charges on substantive crimes. The latter may be dismissed after the preliminary hearing or grand jury process, or by way of a motion to dismiss under Penal Code section 995. Conversely, once a prosecutor charges a felony-murder allegation, the defense has no way to challenge the allegation's merits until trial.

In a murder case, the magistrate at a preliminary hearing must find probable cause to hold the defendant for trial on murder. (See generally *People v. Slaughter* (1984) 35 Cal.3d 629, 636-637.) But the magistrate need not make any finding as to the degree of murder. (*People v. Buckley* (1986) 185 Cal.App.3d 512, 520-523.) As such, when the first degree murder allegation rests on a felony-murder theory, the trial court does not need to find probable cause regarding the target felony. The magistrate at appellant's preliminary hearing recognized as much, declining to make any finding on the prosecution's felony-murder allegation.

(20 CT 5825.) That, in turn, meant appellant could not later seek dismissal of the allegation under Penal Code section 995.

With courts having no way to screen out unsupported felony-murder allegations before trial, the prosecutor enjoys complete and unilateral discretion to bring such allegations to trial. But that does not mean prosecutors should have this same unilateral discretion to decide if Evidence Code section 1108 applies. Yet, that is essentially what respondent argues. Under respondent's view, the prosecution in a murder case could trigger an exception to the usual rule against character evidence just by declaring their intent to proceed on a theory for which character evidence is admissible. It would not matter that the theory had no basis in evidence, since the admissibility of the character evidence would derive from the bare fact of the prosecutor's felony-murder allegation.

To prevent such a scenario, the introduction of uncharged sex offense evidence in a felony-murder case must hinge on the prosecution's ability to establish a threshold level of evidentiary support for the felony-murder sexual offense allegation. This threshold showing should be at least as rigorous as the probable cause standard which exists at a preliminary hearing or grand jury proceeding. (*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026.)

Respondent asserts that "none of the section 1108 cases cited by appellant contained any suggestion that the prosecution was required to satisfy a 'threshold showing' beyond the existence of a qualifying accusation contained in a charging document." (RB, p. 67.) But nothing in any of those cases suggested that the issue ever came up at trial or on appeal. As discussed in appellant's opening brief, every one of those cases involved considerable evidence of a killing in the commission of a sexual offense. (See AOB, pp. 56-58, citing *Avila*, *supra*, 59 Cal.4th at p.

515; *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 824; *People v. Baker* (2021) 10 Cal.5th 1044, 1099-1100; *People v. Loy* (2011) 52 Cal.4th 46, 62.)

In other contexts, our courts have required a threshold showing of relevancy before a party may introduce otherwise inadmissible evidence. In his opening brief, appellant gave the examples of third party culpability evidence, gang evidence, and evidence of a murder victim's violent character. (AOB, pp. 59-60.) In each of these examples, the relevancy of the proffered evidence rests on a preliminary fact or showing. For third party culpability evidence, the preliminary showing requires the existence of evidence linking the third party to the crime's perpetration. (*People v. Hall* (1986) 41 Cal.3d 826, 833.) For gang evidence, the case's facts must inherently suggest the presence of a gang motive. (*Albarran*, *supra*, 149 Cal.App.4th at p. 227.) And, for evidence of the victim's violent character, the defendant must demonstrate "some evidentiary support" for his self-defense theory. (*People v. Hoyos* (2007) 41 Cal.4th 872, 912-913.)

In none of the foregoing scenarios do the courts permit the introduction of generally inadmissible evidence based on nothing more than the proponent's stated intent to proceed on a theory for which that evidence would be admissible. Just as a defendant must establish the foundational fact of relevancy when seeking to introduce third party culpability evidence or evidence of the victim's violent character, the prosecution must make this same showing when seeking to introduce uncharged sex offense evidence in a felony-murder case. And, just as a defendant cannot establish relevancy simply by announcing his intent to proceed on a theory of third party culpability or self-defense, the prosecution should not be permitted to establish the relevancy of uncharged offense evidence simply by declaring their intent to pursue a felony-murder theory based on a sexual offense.

To be sure, even if a bare felony-murder allegation were sufficient to trigger Evidence Code section 1108, the trial court would still wield discretion to exclude uncharged sex offenses as substantially more prejudicial than probative. (*Story*, *supra*, 45 Cal.4th at pp. 1294-1295; Evid. Code, § 352.) But defendants should not have to rely on the trial court's "broad discretion" under Evidence Code section 352 to exclude character evidence which proves nothing that the remaining evidence places at issue. (*People v. Anderson* (2018) 5 Cal.5th 372, 402.) If the prosecution lacks sufficient evidence to place felony-murder at issue, then Evidence Code section 1108 simply never comes into play. Instead, the uncharged sex offenses are inadmissible under this state's general prohibition on character evidence. (Evid Code, § 1101, subd. (a).)

B. The prosecutor made no threshold showing that appellant committed a sexual offense against Smart.

Respondent next contends that, even if the prosecution had to make a threshold showing to trigger Evidence Code section 1108's application, they made that showing in this case. (RB, pp. 68-70.) The magistrate, however, found differently – denying the prosecutor's motion to add two rape charges to the complaint after finding that the evidence of those charges would not be cross-admissible on the murder count. (5 CT 1324-1332.) The magistrate elaborated that the prosecution's offer of proof showed "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.)

Respondent nonetheless argues that the non-character evidence gave rise to "an inference that appellant drugged and/or took advantage of an unconscious or semiconscious" Smart. (RB, p. 65.) In support of this contention, respondent largely rehashes

the contentions made by the prosecutor in the trial court. (RB, pp. 68-70.) As appellant has already addressed those contentions in Argument II.E, at pp. 60-65, of his opening brief, there is no need to repeat those arguments at length. Suffice it to say, the fact that appellant had a romantic interest in Smart, helped walk her home, hugged her and rubbed her arms when she became cold, and behaved boorishly with other women at the Crandall Way party (RB, pp. 68-69), does not constitute evidence that he sexually assaulted Smart. Nor does the fact that, when talking to police, he contradicted others' statements by denying any attraction to Smart and denying that he tried to kiss any women at the party. (35 CT 10325, 10373, 10389-10390.)

Respondent also emphasizes Jennifer Hudson's testimony that appellant once referred to Smart as a "dick tease" and claimed to have buried her underground in Huasna. (RB, pp. 69-70; see also 14 CT 4139-4140 [Hudson's preliminary hearing testimony]; 26 RT 7558 [Hudson's trial testimony].) Even if appellant made such comments, they merely suggested that he desired some type of sexual activity and Smart did not. (See AOB, p. 62.) The comments provided no clue about what, if anything, appellant had actually done to try to initiate sexual activity – let alone, sexual intercourse itself. They also did nothing to suggest that appellant used force or tried to initiate sexual activity when Smart was unconscious. Finally, they revealed nothing about when the sex – or attempt at sex – occurred. This is no small point because, without knowing when it happened, there is no way to know whether Smart remained too intoxicated to consent.

Even under the relatively low probable cause standard used at a preliminary hearing, the non-character evidence failed to establish that appellant killed Smart in the commission of an actual or attempted rape of any type. The magistrate correctly recognized this lack of proof by denying the prosecution's motion

to join appellant's murder case with two additional charges of rape by intoxication. (5 CT 1324-1332.) By admitting Ro.D. and S.D.'s testimony for character purposes, despite the lack of evidence that appellant sexually assaulted Smart, the trial court abused its discretion and violated appellant's due process rights. (*Estelle v. McGuire* (1991) 502 U.S. 62, 75 (*Estelle*).)

C. The trial court further abused its discretion by admitting the uncharged offense evidence for non-character purposes under Evidence Code section 1101, subdivision (b).

The trial court not only admitted Ro.D. and S.D.'s testimony for character purposes under Evidence Code section 1108. It also admitted that same testimony to show intent and common plan or scheme under Evidence Code section 1101, subdivision (b). (6 Aug. RT 1599.) In his opening brief, appellant argued that this ruling constituted an additional abuse of discretion. (AOB, Argument I.F, pp. 65-68.) Respondent addresses this argument in cursory fashion, asserting that, because Ro.D. and S.D.'s testimony was admissible under Evidence Code section 1108, this Court need not address its admissibility for non-character purposes. (RB, p. 70.) For reasons discussed in the previous subsection, appellant disagrees.

Respondent cites *People v. Balcom* (1994) 7 Cal.4th 414, 423, for the principle that other acts are admissible to prove common scheme and plan when those acts contain "'a concurrence of common features," such that they appear to be "individual manifestations" of a "general plan." (RB, p. 70.) They additionally cite *People v. Ewoldt* (1994) 7 Cal.4th 380, 402, for the principle that uncharged offenses are admissible to prove intent so long as they bear sufficient similarity to the charged acts to support the inference of common intent. (RB, p. 70.) Respondent, however, does not elaborate on why the acts described by Ro.D. and S.D. met these criteria. (RB, p. 70.) As such, appellant has nothing

more to add beyond the contentions already made in Argument I.F of his opening brief.

D. This Court must reverse appellant's conviction, or reduce it to second degree murder, due to the trial court's erroneous admission of highly inflammatory uncharged offense evidence.

Respondent next argues that, even if the trial court erroneously admitted the uncharged offense evidence, there is no reasonable probability appellant would have achieved a better outcome in the error's absence.[1] (RB, p. 71, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Their argument lacks merit.

Respondent characterizes the evidence of appellant's guilt as "compelling," even without Ro.D. and S.D.'s testimony. (RB, p. 71.) Their argument, to some extent, rests on the same evidence they cited in arguing that there was threshold evidence of a sexual assault. (RB, pp. 71-72.) Appellant, thus, reiterates the same arguments he made in response to those contentions. (See Argument II.B, *supra*, pp. 31-33.)

As additional circumstantial evidence of guilt, respondent points to "appellant's appearance and conduct after Smart went missing." (RB, p. 72.) For instance, they note that appellant: (1) gave differing explanations for his black eye (35 CT 10349-10350; 10 RT 2832, 2878; 9 RT 2412); (2) joked to his roommate Derrick Tse that Smart was currently having lunch with his mother (8 RT 2245-2247); (3) "lowered his head," and fell quiet when Karen Hall jokingly asked what he had done with Smart (14 RT 4016-4017); (4) did not respond when his mother, Susan, urged him to

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[1] To avoid repeating his previous arguments, appellant proceeds on the assumption that *Watson* applies for Arguments II through V (as respondent contends). Appellant nonetheless stands by his arguments that the applicable standard is the one set forth in *Chapman v. California* (1967) 386 U.S. 18, 24.

listen to the podcast and see if they could "punch holes" in it (21 RT 6038-6039); and (5) chased off his then girlfriend, A.C., when she began walking toward the avocado trees in Ruben's backyard. (RB, p. 72; 18 RT 5230-5233.)

As the prosecutor did at trial, respondent's argument largely substitutes innuendo for actual evidence. That appellant engaged in dark humor with his roommate added nothing to the prosecution's case except to make appellant look callous. In a similar vein, the incident with A.C. had little, if any, inherent relevancy. The inference which the prosecutor drew from the incident was that appellant and Ruben redirected A.C. from the avocado trees because they did not want her to see what they had buried underneath the deck. (See 39 RT 11471-11472.) That inference made little sense.

If appellant had concerns about what A.C. might see, he would never have brought her out to the backyard in the first place. (See 18 RT 5230.) Moreover, the avocado trees were in the opposite direction of the deck. (See 2 Aug. CT 598-599; 3 Aug. CT 899-900; 18 RT 5235-5236.) Besides, how would A.C. have seen something which, according to the prosecution's own theory, was buried some two to four feet underground? (See 23 RT 6668; 39 RT 11475-11476.)

Respondent similarly overstates the importance of appellant's conversations with Karen Hall and Susan Flores. When Hall asked appellant what he had done with that "missing girl," appellant instantly replied, "Nothin'." (See 35 CT 10398.) What more could he have said to deny his involvement? If he felt uncomfortable discussing the subject further, it would hardly come as a surprise since he had only recently been subject to relentless police questioning on this very same topic. (10 RT 2872; 12 RT 3413-3414, 3418; 14 RT 4015.)

Appellant's phone call with Susan also had little significance. The call constituted but one of 9,587 intercepted phone calls, obtained during a month-long wiretap operation. (21 RT 6024, 6029.) No other call came into evidence, save for the 20-minute conversation in which Susan did almost all the talking, with appellant chiming in only to give the occasional one-word response. (21 RT 6034-6035, 6044.) It speaks volumes of the prosecution's case that the single most incriminating call they could come up with was one in which appellant merely made no response to his mother's ramblings.

Appellant did give differing accounts about how he came to suffer a black eye. (35 CT 10349-10350, 10390-10391; 9 RT 2412; 10 RT 2832.) But such evidence fell far short of proving guilt – either by itself or in combination with other evidence obtained during the more than 20 years following Smart's disappearance. If that evidence had established guilt, the prosecution would not have waited until 2021 to charge appellant with Smart's death.

As additional evidence of guilt, respondent cites the human remains dog searches at the Santa Lucia dorm building and underneath Ruben's deck. (RB, pp. 72-73.) They also point to the follow-up investigation at Ruben's home, in which ground penetrating radar revealed that an area under the deck had been dug up and refilled. (RB, p. 73; see 22 RT 6367-6370.) Further testing purportedly revealed that the soil in that area contained blood, as well as fibers consistent with the clothes Smart wore to the Crandall Way party. (RB, pp. 73-74; 23 RT 6613-6614; 26 RT 7515; 30 RT 8708, 8713-8714, 8727-8728, 8732, 8734, 8737-8738.)

Appellant has already addressed this evidence at length in his opening brief. (AOB, pp. 69-70 [dog alert evidence]; p. 73 [addressing blood results from HemDirect test kit].) It is unnecessary to repeat those arguments at this time, except to address respondent's critiques of his arguments.

With regard to the HemDirect, respondent asserts that neither defense expert identified any specific instance of the HemDirect producing a false positive. (RB, p. 76.) Dr. Elizabeth Johnson did, however, testify that the literature has shown the HemDirect does not "work well or [doesn't] work at all on degraded samples." (33 RT 9973-9974.) She also explained that blood degrades quickly in an outdoor environment – with one study finding "significant degradation" after just four weeks. (33 RT 9773, 9784.) Dr. Johnson did not need to provide the date, time, and location of any particular false positive in order to make clear that the HemDirect is unreliable when used to detect blood allegedly left in a soil specimen some 25 years earlier.

In his opening brief, appellant pointed out that Ruben's jury acquitted him of being an accessory after the fact. (34 CT 10171.) Its verdict suggests that the jury had reasonable doubt whether the soil samples actually contained human blood. If the samples did contain blood, Ruben's jury would almost assuredly have convicted him since the evidence suggested no innocent explanation for the presence of human blood in the soil.

Respondent argues that the jurors may have acquitted Ruben because they sympathized with his desire to protect his son or, alternatively, because they had reasonable doubt he helped appellant to bury Smart under his deck. (RB, p. 74, citing *People v. Partee* (2020) 8 Cal.5th 860, 867-896 (*Partee*).) Both explanations seem vanishingly unlikely.

It is difficult to believe that jurors would have acquitted a man out of sympathy, despite believing he had helped his son hide the body of a murder victim. And, if Ruben did allow Smart to be buried under his deck, then he also must have helped transport her body from appellant's dorm room to the White Court home. Appellant had no means to drive there himself, since

he left his own car in Arroyo Grande when he moved to San Luis Obispo. (13 RT 3667-3668.)

The act of moving the body from the Santa Lucia dorm to Arroyo Grande would rise far above the type of "passive" assistance which our state's high Court has found insufficient for accessory liability. (*Partee*, *supra*, 8 Cal.5th at p. 871.) It, thus, stands to reason that the jurors acquitted Ruben because they had reasonable doubt about the HemDirect results and, hence, reasonable doubt that Smart's body was hidden underneath Ruben's deck. And if Ruben's jury had such doubts, appellant's jury would have likely harbored these same doubts.

It is also unremarkable that police found red, black, and light-colored fibers underneath Ruben's deck. (26 RT 7515; 30 RT 8732.) The prosecutor argued that the red and black fibers were consistent with Smart's red shoes and black shorts and the colorless ones were consistent with her gray shirt. (39 RT 11479-11480; see 4 RT 937-938, 1081.) But the police also found brown and blue fibers, consistent with none of Smart's clothing. (26 RT 7515.) That suggests the fibers came from a different source.

Respondent disputes appellant's contention that the 25-year delay in prosecution reveals the weakness of the non-character evidence. (RB, p. 74; see AOB, pp. 68-70.) It was not until May, 2020 – some 24 years after Smart's disappearance – that the uncharged offense evidence first surfaced. (2 CT 469; 10 RT 2871.) Around 11 months later, in April, 2021, the prosecutor finally filed a criminal complaint. (1 CT 126-127.)

Respondent observes that the uncharged offenses were not the only new evidence which came to light in the last year before appellant was charged. (RB, p. 74.) During this same time period, the investigation also revealed the previously discussed soil anomalies and blood evidence underneath Ruben's deck. (RB, p. 74; see 22 RT 6363; 23 RT 6624.) That is true, but it does not

undermine appellant's point. While not the only new evidence, the uncharged offense allegations still constituted a key piece of new evidence which helped convince the prosecution to bring murder charges they had not previously brought.

Respondent asserts that the failure to bring earlier charges may have reflected nothing more than "a conservative and patient prosecutorial agency." (RB, p. 74.) Perhaps so, but there was a reason for this "conservative and patient" approach: before the other accusers came forward, the prosecution had no motive to explain why appellant would kill Smart. Ro.D. and S.D.'s testimony filled this evidentiary gap by allowing the prosecution to allege a sexual motive. By doing so, it also enabled them to charge the case as not just murder, but first degree murder.

Respondent next dismisses the significance of the jury's lengthy deliberations. (RB, p. 75; see AOB, pp. 72-73.) They assert that harmless error analysis should not focus on the length of deliberations, but "on the strength of the evidence." (RB, p. 75.) Respondent provides no citation for this proposition and the case law contradicts it.

Harmless error analysis, by its nature, looks to "the effect of the error on *this* jury, not some hypothetical jury." (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1430, fn. 10, original italics.) To make this assessment, the reviewing court must look for clues about how *this* jury viewed the case. That the reviewing court regards the evidence as strong reveals nothing about how the jury regarded it. By contrast, the length of deliberations provides an important clue that the jury viewed the case as close. (See *In re Martin* (1987) 44 Cal.3d 1, 51.)

Finally, in arguing that the error was harmless, respondent ignores two critical points raised in appellant's opening brief. First, they fail to address the impact of the prosecution's heavy reliance on Ro.D. and S.D.'s testimony throughout closing and

rebuttal arguments. (39 RT 11440-11441, 11490-11497; 41 RT 12096-1209.) For reasons discussed in appellant's opening brief, that heavy reliance significantly increased the chances that jurors would place great weight on that same evidence. (AOB, pp. 70-72; *People v. Cruz* (1964) 61 Cal.2d 861, 868 (*Cruz*).)

Second, while respondent makes an extensive harmless error argument with regard to the substantive murder charge, they ignore appellant's alternative claim: that there is a reasonable probability Ro.D. and S.D.'s testimony affected the jury's verdict on the degree of homicide. (AOB, Argument I.H, pp. 74-75.) Respondent addresses this argument in conclusory fashion, asserting that the non-character evidence "was strong on both the murder charge and on the allegation that appellant committed the homicide during the commission or attempted commission of a rape." (RB, p. 75.) They do not elaborate on why the evidence was strong on the felony-murder allegation.

If respondent had elaborated, there was little they could have said. Absent Ro.D. and S.D.'s testimony, the evidence provided no basis for inferring that appellant killed Smart in the commission of either an actual or attempted rape. That left only one very weak theory of first degree murder: willful, deliberate, and premeditated murder. (35 CT 10431-10432; see AOB, pp. 89-90.) The prosecutor seemingly recognized the weakness of this theory, for he made only passing mention of it during closing argument. (39 RT 11487.)

In a trial without Ro.D. and S.D.'s testimony, there is a reasonable probability that one or more jurors would have voted to acquit appellant of murder. And even if they did not, there is at least a reasonable probability that one or more jurors would have rejected the felony-murder allegation and, by so doing, rejected a verdict of first degree murder. Accordingly, this Court must

reverse appellant's murder conviction or reduce the crime to second degree murder.

III.

The trial court committed reversible error by allowing Trevor Boelter to opine that Smart looked like she had been "roofied" and to repeat hearsay he had read about in a newspaper article.

The prosecutor theorized that appellant killed Smart in the commission of a rape or attempted rape. (39 RT 11441, 11490-11491; 41 RT 12097-12098.) Though no direct evidence supported this theory, the argument became stronger after the court allowed Trevor Boelter to testify that Smart's behavior at the Crandall Way party reminded him of his own behavior after someone had "Roofied" his drink. (8 RT 2162-2163.) This testimony lacked foundation since Boelter was not an expert and did not explain how he knew his drink had been spiked. Moreover, the trial court compounded its error, and gave further credence to Boelter's claim, by allowing him to testify about a newspaper article on the common phenomenon of women being "roofied" at college parties.

Respondent argues that appellant has forfeited this argument, that the argument lacks merit, and that any error is harmless. Respondent is wrong.

A. Appellant made a timely objection that Boelter's opinion testimony lacked adequate foundation.

Respondent argues that, by objecting too late, appellant forfeited his argument that Boelter lacked foundation to opine on Smart's possible roofie usage. (RB, pp. 79-80.)

During the prosecutor's direct examination, Boelter brought up the issue of Smart's possible drug use. He testified that, as the evening progressed, Smart became "spacey," as if "tripping on something." (8 RT 2115.) Boelter explained, "it didn't seem like drunk. It just seemed like, I don't know, druggie." (8 RT 2115.) He then added, "you could say that's drunk or you could say it's – she

had drugs. I mean, she just seemed not on her feet, not stable." (8 RT 2116.)

On cross, defense counsel elicited that Boelter had never mentioned the possibility of drug use until an interview with police some 16 years after Smart's disappearance. (8 RT 2124, 2130-2132, 2135-2136, 2158.) The prosecutor followed up on redirect by asking Boelter to explain his belief that Smart was on drugs. (8 RT 2160-2161.) Boelter replied by bringing up the newspaper article and, later, by referencing his own purported experience being "roofied." (8 RT 2161-2163.) Defense counsel made a series of objections, including an objection that Boelter's opinion lacked foundation. (8 RT 2161-2163.)

Respondent's forfeiture argument contains two parts. They initially contend that appellant should have objected during direct examination, when Boelter testified that Smart appeared intoxicated on something other than alcohol. (RB, pp. 79-80; 8 RT 2115-2116.) In fact, defense counsel had no reason to object at this point. It is well established that a lay witness may opine on whether someone appeared to be drunk. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1308; *People v. Garcia* (1972) 27 Cal.App.3d 639, 643.) If a lay witness may give an opinion on whether a person appeared drunk, it follows that he may give an opinion on whether a person appeared more than just drunk. In both cases, the matter is a subject of "common knowledge," which requires no specialized training or expertise to weigh in on. (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547.)

There is a big difference, however, between testifying that a person looked "strung out" (*People v. Williams* (1988) 44 Cal.3d 883, 914) or "on drugs" (*People v. Navarette* (2003) 30 Cal.4th 458, 493-494 (*Navarette*)), and testifying about the specific drug the person had seemingly taken. That is especially true for a drug like roofies. While the effects of widely used drugs like

methamphetamine or cocaine might potentially be matters of common knowledge, the same cannot be said of roofies.

When a witness opines that a person not only looked under the influence, but under the influence of a very specific (and not widely known) drug, the proponent of this testimony must lay a foundation that the witness possesses the ability to recognize that drug's effects. (*Navarette*, *supra*, 30 Cal.4th at pp. 493-494.) Defense counsel made that objection and he made it immediately after Boelter related the incident in which he believed someone had given him roofies. (8 RT 2162-2163.) Counsel had no reason to object any earlier than this, since Boelter's previous testimony spoke only in very general terms – that Smart seemed "druggie," as if "tripping on something." (8 RT 2115.)

Respondent additionally faults defense counsel for not objecting when Boelter first alluded to his "experience with being Roofied at a bar." (RB, p. 81; see 8 RT 2161.) That testimony, however, was not objectionable in and of itself. The testimony which lacked foundation was Boelter's subsequent opinion about Smart's condition – which he based on his own supposed experience with roofies. (8 RT 2162-2163.) Immediately after Boelter gave that opinion, defense counsel objected that it lacked foundation. (8 RT 2162-2163.)

Even if defense counsel might have objected a short time earlier, his failure to do so did not forfeit the issue. The forfeiture doctrine exists "to encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors and provide the defendant with a fair trial." (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.) "An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide." (*People v. Scott* (1978) 21 Cal.3d 284, 290.)

While the defendant's objection must be contemporaneous, it need not be immediate. (*People v. Pitts* (1990) 223 Cal.App.3d

606, 692-693 (*Pitts*); *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101 (*Carrillo*); *People v. Vance* (2010) 188 Cal.App.4th 1182, 1198.) To hold otherwise would be to impose a "draconian rule" which would prevent appellate consideration of meritorious issues fully considered by the trial court. (*Vance*, at p. 1198.) As one court has explained, the forfeiture doctrine must "make[] . . . allowance for defense counsel who may be a little slow to appreciate the thrust of the argument" or evidence before objecting. (*Ibid.*)

In this case, defense counsel may have held off on objecting in order to see if the prosecution could establish the foundation for Boelter's belief that he had been roofied. (See *Pitts*, *supra*, 223 Cal.App.3d at pp. 692-693 ["a lack of contemporaneous objection is excused where the prosecutor asks questions and defense counsel assumes that he is prepared to present evidence on the issue"].) Alternatively, defense counsel may not have immediately realized how the prosecutor would relate Boelter's purported experience with roofies to his beliefs about Smart's behavior at the Crandall Way party. (*Carrillo*, *supra*, 119 Cal.App.4th at p. 101 [addressing issue on merits where defense counsel objected after "catch[ing] the prosecutor's drift and bring[ing] it to the trial court's attention"].)

Regardless, defense counsel did bring the foundation issue to the trial court's attention soon after Boelter began testifying about roofies. (8 RT 2163.) The trial court understood the objection and had an opportunity to rule on it. Had the court found the objection well taken, it was still in position to cure the evidentiary error by striking the just-completed testimony on roofies. To apply the forfeiture doctrine under such circumstances would "exalt form over substance." (*People v. Partida* (2005) 37 Cal.4th 428, 434.) This Court should decline to do so.

B. The prosecution established no foundation to support Boelter's opinion about Smart's possible roofie usage.

Respondent argues that the trial court acted within its discretion in admitting Boelter's opinion testimony on roofies. (RB, p. 80.) Respondent emphasizes that the requisite foundation may arise from the witness's own personal experience with the drug and, hence, his knowledge of its effect. (RB, pp. 80-81.) Appellant does not claim otherwise. But if the witness gives an opinion about possible drug usage, and claims to do so based on his personal experience with the drug, he must also establish that personal experience. The present record leaves no way to tell if Boelter really had his drink spiked with roofies or if he merely believed this to be the case. There was no evidence he saw his drink being spiked, heard about it after the fact, or saw other people spiking drinks with roofies that same night. Quite conversely, Boelter denied that he "saw drugs around" on the night in question. (8 RT 2169.)

Respondent notes that Boelter testified, without objection, to the fact he had been roofied. (RB, p. 81, citing 8 RT 2161-2162.) They argue that, once this evidence came in, it established the foundation for his subsequent opinion that Smart's behavior and symptoms resembled his own. (RB, p. 81.) Appellant has already addressed this forfeiture argument in the previous subsection. Because the evidence established no foundation for Boelter's belief that he was roofied, it also established no foundation for him to relate that experience to Smart's behavior at Crandall Way. The trial court abused its discretion by overruling defense counsel's foundation objection.

C. Boelter's testimony constituted inadmissible hearsay insofar as he related what he had read in the school newspaper.

When the prosecutor initially asked Boelter to explain why he believed Smart might be on drugs, Boelter replied that he had read "a number of stories [in the school newspaper] about girls being Roofied or drunk." (8 RT 2161.) Defense counsel objected to the testimony as hearsay. (8 RT 2161.) The trial court overruled the objection on the ground that Boelter had not "relate[d] anything specifically from the newspaper." (8 RT 2161.)

Relying on the same rationale as the trial court, respondent argues that no error occurred because the prosecutor did not elicit the contents of any newspaper article. (RB, p. 82.) The argument is unpersuasive.

A witness need not read an extrajudicial statement into the record in order to violate the hearsay rule. It is enough that the witness summarize the statement or convey its substance. (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1108; *Ocampo v. Vail* (9th Cir. 2011) 649 F.3d 1098, 1109-1110.) Boelter did just that – making known that the newspaper articles pertained to the frequency of drugging-and-raping incidents at college parties. (8 RT 2161.)

Respondent characterizes Boelter's reference to the newspaper articles as "generic." (RB, p. 82.) They argue that this testimony did not constitute hearsay since it did not come in for its truth, but to explain why Boelter believed Smart was not merely drunk, but on roofies. (RB, pp. 82-83.) The problem with this argument is that the court imposed no such limitation on the testimony. The court did not give any limiting instruction and it did not specify that it had overruled defense counsel's objection because the statement was not being offered for its truth. Rather, the court overruled the objection because it mistakenly believed that, absent more specific information about what the newspaper

articles said, Boelter's reference to them did not constitute hearsay.

D. Boelter's erroneously admitted testimony was prejudicial because it helped the prosecution prove a drugging and raping theory not otherwise shown by the evidence.

Respondent argues that, even if the trial court abused its discretion by admitting Boelter's testimony about roofies, there is no reasonable probability the evidence impacted the trial's result. (RB, pp. 83-84.)

Respondent downplays the importance of Boelter's opinion testimony, calling it "equivocal" in that he left open the possibility that Smart might merely have been very drunk. (RB, p. 84.) While Boelter left open this possibility, he made clear that he found the "drugging" theory more likely. (8 RT 2163.) Besides, respondent's argument ignores the prosecutor's closing argument, which specifically brought up Boelter's testimony about roofies. (39 RT 11489.) By using Boelter's testimony to advance the inference that Smart was roofied, the prosecutor increased the likelihood that the jury would do exactly the same. (*Cruz*, *supra*, 61 Cal.2d at p. 868.)

Respondent also downplays the importance the drugging theory played in the prosecutor's case. They argue that "the evidence of appellant's guilt was compelling whether Smart was heavily under the influence of alcohol, a drug, or both." (RB, p. 84.) They state that, "Contrary to appellant's suggestion, a jury did not need to find that appellant roofied Smart to find that he murdered her during a rape or attempted rape." (RB, p. 84.)

Appellant has never suggested that the jury had to find he drugged Smart in order to convict him of committing a murder during a rape or attempted rape. In fact, he said just the opposite in his opening brief – acknowledging that he "did not have to personally drug Smart in order to commit or attempt a rape."

(AOB, p. 64.) At the same time, the prosecution's case became significantly easier if the jury believed appellant drugged Smart.

It is difficult to conceive of any reason for giving another person roofies except to commit a sexual assault. And, if appellant committed or tried to commit a sexual assault, he would then have a motive to commit murder – either because Smart resisted or because he killed her afterwards to prevent her from going to the police. That would make him guilty of not just murder, but first degree murder in the commission or attempted commission of a rape.

Without Boelter's improper opinion testimony, the prosecution presented no evidence of any sexual assault against Smart – and, thus, no evidence that appellant had any motive to kill her. To be sure, the prosecution presented (erroneously admitted) evidence that appellant had drugged and raped other women. But no evidence existed that he had done the same thing to Smart. Boelter's testimony provided jurors with the evidence they needed to accept the prosecutor's theory that appellant had drugged Smart. From there, it became an almost inevitable inference that he also sexually assaulted and killed her.

Finally, for reasons discussed in Arguments II.B and II.D, *supra*, at pp. 31-33, 34-41, the evidence of appellant's guilt was not nearly as "compelling" as respondent suggests. (RB, p. 84.) Similarly, the evidence that appellant committed a murder in the commission of a rape or attempted rape was weak to nonexistent. In a trial without Boelter's erroneously admitted testimony, there is a reasonable probability at least one juror would have voted to acquit altogether or to convict of only second degree murder. This Court must reverse or reduce appellant's conviction.

IV.

The prosecutor committed reversible misconduct by misusing the ball gag photograph for character purposes.

During a February 5, 2020 search of appellant's San Pedro home, police seized a desktop computer. (32 RT 9375-9376.) The desktop contained videos which the trial court referred to as "graphic" and "shocking." (6 Aug. RT 1600; 32 RT 9415-9416, 9425.) The court initially excluded these videos as unduly prejudicial. (6 Aug. RT 1600-1602.) It later modified its ruling by admitting Exhibit 458 – a still photograph obtained from one of the videos. (32 RT 9415-9416, 9424-9426.) The photograph showed a woman lying on a pillow with a red ball gag in her mouth. (32 RT 9415-9416, 9425-9426; 4 Aug. CT 1071-1072.)

The trial court admitted Exhibit 458 on the ground that it corroborated Ro.D. and S.D.'s claims that appellant used a red ball gag on them. (32 RT 9425-9426.) The court instructed the jurors that they were to consider the evidence only for that limited purpose. (32 RT 9416.) Yet, during rebuttal argument, the prosecutor displayed Exhibit 458 and asked jurors, rhetorically, if the woman depicted appeared to be "having fun?" (41 RT 12095-12096.) Defense counsel unsuccessfully moved for mistrial, arguing that the prosecutor had improperly used Exhibit 458 for character purposes and to inflame the jurors' passions. (41 RT 12120-12122, 12124, 12128.)

Respondent argues that the prosecutor did not misuse the ball gag photograph and that, even if he did, the misconduct was fleeting and caused appellant no prejudice. Respondent is mistaken.

A. The prosecutor committed misconduct by using Exhibit 458 for character purposes and to inflame the jurors' passions.

Respondent argues that the prosecutor did not misuse the ball gag photograph. (RB, pp. 89-90.) They note that, during his own closing argument, defense counsel portrayed the prosecutor's case as "a bunch of conspiracy theories that aren't really backed up by facts." (39 RT 11498-11499; see RB, p. 87.) Counsel added that "conspiracy theories are fun" and that it was "human nature" to try to create or refute them. (39 RT 11499.) But he reminded jurors that their "job is not to buy into a conspiracy theory one way or another, it's to decide whether or not the People have proven the case with evidence." (39 RT 11499.)

Respondent argues that the prosecutor's subsequent reference to Exhibit 458 was "brief" and constituted a fair response to defense counsel's assertion that "conspiracy theories are fun." (RB, pp. 89-90.) Respondent finds it significant that the prosecutor's rhetorical question about the woman in Exhibit 458 was but one in a series of such questions about whether the witnesses in this case appeared to be "having fun." (RB, pp. 87-88.) For instance, the prosecutor posed the same question about S.D., Ro.D., Steven Fleming, Margarita Campos, Jennifer Phipps, and Jennifer Hudson. (RB, pp. 87-88; see 41 RT 12096, 12099.) Respondent asserts that appellant has "tacitly conced[ed]" the propriety of this argument by challenging only the comments about the ball gag photograph. (RB, p. 90.)

Appellant has never contended that the prosecutor committed misconduct by taking aim at defense counsel's characterization of the case as a conspiracy theory. No doubt, the prosecutor had free rein to argue "that there was no grand conspiracy among the numerous prosecution witnesses." (RB, p. 90.) But he did not have free rein to make this point in a way which violated the trial court's previous rulings. (*People v. Lang*

(1989) 49 Cal.3d 991, 1022.) A prosecutor's improper argument does not disappear because it was brief and other parts of his argument were proper.

Respondent argues that the prosecutor's comments advanced a "reasonable inference" which was already "plainly obvious from the photograph itself:" that the woman depicted was not having fun. (RB, p. 90.) Appellant agrees that this inference was obvious, but that did not make it permissible. When a defendant opts not to testify, it also raises an obvious inference that he must have something to hide. In such cases, the United States Supreme Court has deemed it especially important that the prosecutor not do anything to advance this obvious, but impermissible, inference. (*Griffin v. California* (1965) 380 U.S. 609, 615.) As the Court has explained, "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." (*Id.* at pp. 614-615.)

Respondent asserts that, by overruling defense counsel's objection, the trial court found the prosecutor's argument did not violate its ruling about Exhibit 458's limited admissibility. (RB, p. 90, citing 41 RT 12096, 12128.) The issue, however, is not how the trial court ruled, but whether it ruled correctly. In this case, it did not. The court admitted Exhibit 458 for the sole "purpose of establishing, if it does, that [appellant] possessed a red ball gag." (32 RT 9416.) The prosecutor's comments in closing argument had nothing to do with appellant's mere possession of a red ball gag. Instead, the prosecutor displayed the exhibit and commented on the violent and disturbing nature of the act it depicted.

Respondent invokes the principle that trial courts have broad discretion to rule on prosecutorial misconduct claims. (RB, p. 89, citing *People v. Peoples* (2016) 62 Cal.4th 718, 792-793.) Nonetheless, the scope of that discretion "always resides in the

particular law being applied, i.e., in the legal principles governing the subject of [the] action." (*People v. Williams* (2021) 63 Cal.App.5th 990, 1001, internal quotations omitted.) "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion." (*Ibid.*)

Without spilling needless ink, the prosecutor used Exhibit 458 in a way which plainly violated the trial court's earlier ruling. By doing so, he committed misconduct. And, by overruling appellant's claim of prosecutorial misconduct, the trial court abused its discretion. (See 41 RT 12121-12122, 12126.)

B. The prosecutor's misconduct constituted reversible error.

Respondent next argues that, even if the prosecutor committed misconduct, the error was harmless under *Watson*, *supra*, 46 Cal.2d at p. 836. (RB, at pp. 90-91.) They point out that the trial court gave both CALCRIM No. 222 and CALCRIM No. 303. (RB, p. 91; 35 CT 10405, 10414.) The former told jurors that the arguments of counsel do not constitute evidence. (35 CT 10405.) The latter told them that evidence admitted for a limited purpose may be considered for only that purpose. (35 CT 10414.) Respondent asks this Court to apply the presumption that jurors followed these admonitions. (RB, p. 91, citing *People v. Seumanu* (2015) 61 Cal.4th 1293, 1336.)

Even if jurors followed CALCRIM No. 222, and understood that the attorneys' comments are not evidence, that instruction did not speak to the prosecutor's comments in this case. The prosecutor did not cite to facts not in evidence. He inflamed the jurors' passions by taking a photograph already before the jury and commenting upon the abhorrent nature of the acts that photograph depicted. Jurors did not have to treat the prosecutor's comments as evidence in order to find them persuasive.

CALCRIM No. 303 also did little to cure the prosecutor's misconduct. Jurors are not attorneys and will not necessarily realize what does and does not constitute a permissible way to use evidence. Nothing in CALCRIM No. 303 alerted jurors that the prosecutor's comments fell into the latter category and must be disregarded. Quite conversely, by overruling defense counsel's objection, the trial court sent the message that the prosecutor had said nothing improper by commenting on Exhibit 458's shocking and disturbing content. (41 RT 12096.) If the trial court allowed the prosecutor to draw inferences from that shocking and disturbing content, jurors would quite reasonably have believed that they could do the same.

In a trial without the prosecutor's improper comments on Exhibit 458, there is a reasonable probability that at least one juror would have acquitted appellant or convicted of only second degree murder. Accordingly, the misconduct requires reversal or reduction of appellant's murder conviction.

V.

Because there was no substantial evidence that appellant committed any form of first degree murder, this Court must reduce his conviction to second degree murder.

The prosecutor proceeded on two theories of first degree murder: willful, deliberate, and premeditated murder and felony-murder in the commission of a rape or attempted rape. (35 CT 10431, 10435-10439.) As no substantial evidence supported either theory, appellant asks this Court to reduce his conviction from first degree murder to second.

Respondent makes no attempt to argue that there was legally sufficient evidence on the theory of willful, deliberate, and premeditated murder. Instead, they focus their argument on the felony-murder theory. (RB, pp. 93-94.) Relying heavily on Ro.D.

and S.D.'s testimony that appellant drugged and sexually assaulted them, respondent argues that appellant's behavior toward Smart followed this same pattern. (RB, pp. 93-94.) Specifically, they cite evidence that appellant had a romantic interest in Smart and "separated her from other people" when she was in a "semiconscious" state. (RB, p. 93, citing 3 RT 688-693, 705-706; 4 RT 1045-1057; 6 RT 1664-1676; 7 RT 1907-1928; 8 RT 2110-2112.)

Unlike with Ro.D. and S.D., the prosecution presented no evidence that appellant and Smart engaged in any sexual activity or that appellant tried to initiate any. Without this missing ingredient, the evidence provided no basis for inferring that appellant did the same thing to Smart which he had done to Ro.D. and S.D.

Respondent next points to Jennifer Hudson's testimony that appellant had once referred to Smart as a "dick tease" and said he had "buried her" because he was "sick of waiting." (RB, p. 94; see 26 RT 7558.) As previously discussed, such comments did not show any actual or attempted sexual activity. Rather, if taken as true, appellant's comments suggested that he waited Smart out in the hopes of engaging in sexual activity with her. (See Argument II.B, *supra*, at p. 32.)

In his opening brief, appellant pointed out that, even if jurors could infer that he made an attempt at sexual activity, the prosecution presented no evidence he did so forcibly or while Smart was unconscious. And, since the record sheds no light on when any attempt at sex took place, there is no way to know if Smart was still too intoxicated to consent.

Respondent, in a footnote, calls it a reasonable inference that "just as appellant did not wait for R[o].D. or S.D. to regain their full consciousness, he did not wait for Smart to do so either." (RB, p. 94, fn. 16.) This argument, of course, rests on the premise

that appellant actually engaged in, or tried to engage in, sexual activity with Smart – though the prosecution presented no evidence that this ever happened. Besides, Ro.D. and S.D.'s testimony suggested that appellant had personally drugged them. Neither woman drank to excess, yet both later found themselves at appellant's apartment, naked and semiconscious, with no memory of how they got there. (17 RT 4819, 4822-4823; 24 RT 6920-6922.) In both cases, appellant had an easy opportunity to spike the women's drinks. In Ro.D.'s case, he could have done so when he went to the kitchen and returned to hand her a glass of water. (17 RT 4819.) In S.D.'s case, he could have done so when S.D. and her friend left their drinks behind in the bar and stepped outside to smoke. (24 RT 6915.)

By contrast, appellant's interactions with Smart occurred at a crowded party, affording him no opportunity to spike her drink even if he had wanted to. (See 4 RT 1008; 13 RT 3674.) Sure enough, not a single witness testified that they saw appellant hand Smart a drink or pour something into the drink she already had. In fact, no witness even testified to seeing Smart leave her drink unattended.

This case also differed from the uncharged ones in that there was ample evidence Smart became intoxicated by drinking too much of her own volition. Numerous witnesses saw her drinking or described her as drunk. (4 RT 1015-1016, 1067; 8 RT 2138-2139, 2177.) As appellant's interactions with Smart bore little in common with what Ro.D. and S.D. described, the jury had no basis for inferring that the incident with Smart played out in the same fashion.

The case for rape or attempted rape came down to one category of prosecution evidence: Ro.D. and S.D.'s testimony that appellant had drugged and sexually assaulted them. That, in itself, cannot prove that appellant did the same to Smart. (*People*

v. Younger (2000) 84 Cal.App.4th 1360, 1382.) As there was no substantial evidence to show any theory of first degree murder, this Court must reduce appellant's conviction to second degree murder.

VI.

The trial court prejudicially misstated the mens rea element of attempted rape of an intoxicated person, precluding jurors from considering whether appellant actually believed Smart was sober enough to consent.

The jury's simplest path to a first degree murder verdict was through a felony-murder theory based on attempted rape of an intoxicated person. To convict on this theory, the jury did not need to find that appellant used force or fear, that Smart was unconscious, or that any actual sexual intercourse took place. They just had to find that appellant tried to have sex with Smart, that she was too intoxicated to consent, and that he intended she be too intoxicated to consent. (*People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1249 (*Braslaw*).) Unfortunately, the jury instructions made the path to conviction even easier by misstating the intent element of attempted rape.

CALCRIM No. 460 defined attempted rape, including its requirement that the defendant intend to commit a rape. (35 CT 10439.) The instruction then directed jurors to the court's separate instructions on rape "[t]o decide whether the defendant intended to commit rape." (35 CT 10439.) The problem is, the instruction on rape of an intoxicated person set forth a very different mens rea than that required for attempt. (35 CT 10437.) Whereas attempt requires actual knowledge that the other is too impaired to consent, the substantive crime requires only that a reasonable person would have known. (36 CT 10437.) By incorporating the elements of the substantive crime, CALCRIM No. 460 mistakenly imported its negligence standard.

To make matters worse, the court gave a version of CALCRIM No. 625 which erroneously precluded jurors from considering the effect of appellant's own intoxication on his knowledge of Smart's impairment. (35 CT 10434.) This error only reinforced the one in CALCRIM No. 460 by preventing jurors from considering the very evidence which might have negated the intent element of attempted rape of an intoxicated person.

Respondent argues that appellant has forfeited these issues, that there is no reasonable likelihood the jury construed the instructions to require only constructive knowledge for attempted rape, and that any error was harmless. Respondent's contentions lack merit and should be rejected.

A. The trial court had a sua sponte duty to properly instruct on the elements of attempted rape and not to affirmatively misinstruct on voluntary intoxication.

Respondent argues that appellant has forfeited his challenges to both CALCRIM No. 460 and CALCRIM No. 625. (RB, pp. 97, 101.) Contrary to their contention, forfeiture principles have no application to either instruction.

1. Because CALCRIM No. 460 misstated the elements of attempted rape of an intoxicated person, appellant may challenge the instruction for the first time on appeal.

In a subheading, respondent asserts that "appellant is precluded from" challenging CALCRIM No. 460 for the first time on appeal. (RB, p. 96.) Respondent does little to elaborate on this contention in the ensuing argument – except to say that, in the absence of a request, "[a] trial court has no sua sponte duty to revise or improve upon an accurate statement of law." (RB, p. 97, citing *People v. Jackson* (2016) 1 Cal.5th 269, 336; *People v. Simon* (2016) 1 Cal.5th 98, 143.)

Respondent's argument would be sound if CALCRIM No. 460 contained "an accurate statement of law." (RB, p. 97.)

Appellant's entire point, however, is that it did not. An accurate statement of law would make clear that attempted rape by an intoxicated person requires a specific intent to have sex with a person the defendant knows to be "incapacitated by intoxication." (*Braslaw*, *supra*, 233 Cal.App.4th at p. 1249.) Instead, CALCRIM No. 460's intent element erroneously imported the "reasonable person" standard used for actual rape of an intoxicated person. Because the instruction misstated the elements of attempted rape of an intoxicated person, the issue may be raised for the first time on appeal. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

Respondent asserts that, in *People v. Dillon* (2009) 174 Cal.App.4th 1367 (*Dillon*) – a case relied on by appellant – the Court of Appeal found the defendant had forfeited an argument similar to the one made here. (RB, p. 100.) But the forfeiture finding came only after the court had rejected the defendant's argument that the instructions omitted an essential offense element. (*Dillon*, at pp. 1378-1380.) Having found no omitted element, the Court of Appeal then treated the defense's argument as a request for additional clarifying language – an issue which it deemed forfeited. (*Id.* at p. 1380; see generally *People v. Kaihea* (2021) 70 Cal.App.5th 257, 265 ["When an instruction as given is correct in law, it is incumbent on defendant to request clarifying language, and his failure to do so forfeits the issue"].)

Unlike the instructions in *Dillon*, the ones in this case did misstate and omit a key aspect of the specific intent element of attempt. The reason the court found no omitted offense element in *Dillon* was because the target crime already included the "lack of consent" element that the assault instruction omitted. (*Dillon*, *supra*, 174 Cal.App.4th at pp. 1377, 1379.) As a result, a juror who read the two instructions in combination would have understood that the intent required for an assault included the intent to commit a nonconsensual penetration. (*Id.* at p. 1379.)

The same cannot be said in this case since the instruction on rape of an intoxicated person set forth a constructive knowledge standard, whereas attempted rape of an intoxicated person requires actual knowledge and intent.

Because the instructions in this case omitted and misstated the intent element of attempted rape, whereas the ones in *Dillon* did not, the forfeiture finding in *Dillon* has no application to this case.

2. CALCRIM No. 625 may be challenged on appeal because it affirmatively misstated the law on the proper use of voluntary intoxication evidence.

Respondent argues that appellant has forfeited any challenge to CALCRIM No. 625 because he specifically requested that instruction and the trial court gave it "in the exact format that appellant requested." (RB, p. 101, citing 38 RT 11155.)

Respondent overstates what the record actually shows. Appellant did submit a written list of requested jury instructions, as well as an amended list a few days later. (32 CT 9377-9379, 9440-9442.) He included CALCRIM No. 625 on both lists. (32 CT 9379, 9442.) However, defense counsel did not attach a proposed version of the instruction, as he did with other requested instructions. (See 32 CT 9380-9392, 9443-9455.) When the topic later came up in court, the court itself did all the talking – stating, "We will move on to 625, which is Voluntary Intoxication. And all counsel requested this. I gave the instruction." (38 RT 11155.) There was no in-court discussion about the "format" of the instruction or the specific ways for which the jury could use the voluntary intoxication evidence.

The form version of CALCRIM No. 625 specifies that the jury may consider voluntary intoxication on the issues of premeditation, intent to kill, and unconsciousness – the three issues for which the court allowed it to be used in this case. (35 CT 10434.) After listing those three specific issues, the form

instruction includes a bracketed statement which says, "or the defendant _____ <*insert other specific intent required in a homicide charge or other charged offense*>." (CALCRIM No. 625, original italics.) In this case, no on-the-record discussion took place about what those other specific intents might be.

In any event, the California Supreme Court has stated that, even where the trial court has no sua sponte duty to instruct, it has a duty not to misstate the law when it does instruct. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015 (*Castillo*).) If it does misstate the law, the issue may be raised on appeal even if defense counsel did not object. (*Ibid.*)

As it happens, *Castillo* involved the same instructional error at issue here: a misinstruction on the permissible uses of voluntary intoxication evidence. (*Castillo*, *supra*, 16 Cal.4th at pp. 1014-1015.) The instruction in *Castillo* told jurors they could "consider defendant's voluntary intoxication in determining whether he had the specific intent or mental state required for the charged crime." (*Id.* at p. 1014.) The Court of Appeal found the instruction defective because, by failing to specify that premeditation was a "mental state," it erroneously precluded jurors from considering the defendant's intoxication on this issue. (*Id.* at pp. 1014-1015.) Since defense counsel had not requested these changes, the Court of Appeal treated the issue as one involving ineffective assistance of counsel. (*Id.* at p. 1015.)

The California Supreme Court ultimately disagreed with the Court of Appeal's view that the instruction prevented jurors from considering intoxication on the issue of premeditation. (*Castillo*, *supra*, 16 Cal.4th at pp. 1015-1016.) But the Court acknowledged that, if the instructions **had** suffered from this flaw, "the issue would not solely be one of ineffective assistance of counsel;" it would also "implicate the court's duty to give legally correct instructions." (*Id.* at p. 1015.)

Appellant contends that CALCRIM No. 625 improperly prevented jurors from considering the voluntary intoxication evidence on the issue of his specific intent to commit rape of an intoxicated person. Should this Court agree, then the error is of the exact same type discussed in *Castillo*. It should, therefore, be cognizable on appeal as a misstatement of the applicable law.

B. The reasonable likelihood standard does not apply for instructions which affirmatively misstate the law.

Respondent next argues that claims of instructional error are subject to the "reasonable likelihood" standard. (RB, pp. 96-97.) Under that standard, reviewing courts do not view the challenged instruction in "artificial isolation," but must consider it "in the context of the instructions as a whole and the trial record," including the arguments of counsel. (*People v. Lemcke* (2021) 11 Cal.5th 644 655, internal quotations omitted; see also *People v. Stone* (2008) 160 Cal.App.4th 323, 331.) To find error, the appellate court must find "a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

The reasonable likelihood standard is subject to a caveat: it only applies to ambiguous instructions. (*Estelle*, *supra*, 502 U.S. at p. 72; *Boyde v. California* (1999) 494 U.S. 370, 380.) It does not apply "when the disputed instruction is erroneous on its face." (*People v. Lewelling* (2017) 16 Cal.App.5th 276, 296, quoting *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 592; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1321.)

Both CALCRIM Nos. 460 and 625 were erroneous on their face. The latter was erroneous because evidence of a defendant's voluntary intoxication is admissible to show he lacked the specific intent required to commit an attempted rape of an intoxicated person. (*Braslaw*, *supra*, 233 Cal.App.4th at p. 1250.) Yet,

CALCRIM No. 625 expressly prohibited jurors from considering appellant's intoxication for this purpose. (35 CT 10434.)

CALCRIM No. 460 was not facially erroneous in and of itself, but it became facially erroneous when read in combination with CALCRIM No. 1002 – one of the three rape instructions it expressly incorporated. (35 CT 10439.) By incorporating that instruction, it incorporated the wrong mens rea – one based on a reasonable person standard rather than actual knowledge. (35 CT 10437.) An instruction which sets forth the wrong mens rea is not merely ambiguous, but affirmatively wrong. As a result, the reasonable likelihood standard does not apply.

C. Even if the reasonable likelihood standard applies, appellant has demonstrated instructional error under that standard.

Even if this Court subjects CALCRIM Nos. 460, 1002, and 625 to the reasonable likelihood test, appellant has demonstrated error under that test.

Respondent argues that CALCRIM No. 460 merely tracks the statutory definition of attempt – set forth in Penal Code section 21a. (RB, p. 98.) Under that definition, attempt "consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (Pen. Code, § 21a.) Since CALCRIM No. 460 sets forth these same two elements, respondent characterizes it as a correct statement of the law. (RB, p. 98.)

If CALCRIM No. 460 ended after setting forth attempt's two elements, the instruction would be unobjectionable. Instead, it continues – referring jurors to the substantive rape instructions "[t]o decide whether the defendant intended to commit" that crime. (35 CT 10439.) Respondent argues that this part of the instruction just informed jurors that the intent to commit rape could be satisfied by an attempt to commit any of the three types

of rape described in other instructions. (RB, p. 98.) This argument ignores CALCRIM No. 460's plain language.

CALCRIM No. 460 did not say, "An attempt to commit rape may be satisfied by an attempt to commit any type of rape described in this court's other instructions." Likewise, it did not say, "For the definition of rape, please refer to the separate instructions that I will give you on that crime." It said, "**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, emphasis added.) Such language conveyed that the intent required to commit attempted rape was the intent set forth in the other rape instructions. A juror who read this instruction, in combination with CALCRIM No. 1002's instruction on rape of an intoxicated person, would understand that a defendant intends to commit that crime if he intends to have sex with a person who he reasonably should know is too intoxicated to consent. (35 CT 10437, 10439.)

Respondent resists this reading of the instructions, arguing that it would allow CALCRIM No. 1002's "reasonably should have known" standard to "override" CALCRIM No. 460's requirement that the defendant "intended to commit rape." (RB, p. 98.) The problem with this argument is that it presupposes the phrase "intended to commit rape" has a simple and self-evident meaning. In the case of rape of an intoxicated person, it does not. A lay juror would likely understand that the intent required for this crime includes an intent to have sex with someone who is, in fact, too intoxicated to consent. But it is far from obvious that the intent element additionally encompasses the fact of the other's intoxication. And it becomes even less obvious when the attempt instruction specifically refers jurors to a different instruction, which carries only a "reasonably should have known" standard.

Respondent argues that, if this Court accepts appellant's argument, it would "create error . . . in every case for which the offense attempted requires a general criminal intent or even no intent at all." (RB, p. 100.) Not so.

Appellant does not take issue with CALCRIM No. 460 because it incorporated the instructions on a general intent crime. He takes issue with CALCRIM No. 460 because it incorporated the instructions on a crime which has no intent requirement at all. Rather, rape of an intoxicated person requires nothing more than negligence about the other person's intoxicated state.

The analysis in *Dillon* is instructive, since the case involved the very scenario which respondent brings up: a specific intent crime (assault with intent to commit forcible sexual penetration) whose instruction incorporated the elements of a general intent crime. (*Dillon*, *supra*, 174 Cal.App.4th at pp. 1378-1380.) In finding no error, the court reasoned that the assault instruction would reasonably be understood to incorporate all elements set forth in the instruction it referenced. (*Id.* at pp. 1378-1380.) In other words, if an attempt instruction directs jurors to the forcible rape instruction "[t]o decide whether the defendant intended to commit rape," jurors would understand that the intent must exist as to each element set forth in the forcible rape instruction. If jurors understand this, then there has been no misinstruction on the mens rea element of attempt.

Dillon's logic breaks down, however, when the instruction on the substantive crime does not merely set forth a series of acts but also its own mens rea based on a negligence standard. A defendant can logically intend all the elements required to commit a general intent crime like forcible rape. But he cannot logically intend to harbor a specific mens rea – least of all, a mens rea which, itself, includes no requirement of intent. Faced with two instructions which set forth very different mens rea

requirements, the jurors would have been forced to choose one or the other. Logically, it made more sense to choose the negligence standard set forth in CALCRIM No. 1002, since CALCRIM No. 460 specifically pointed them to that instruction to decide whether appellant intended to commit rape. (35 CT 10439.)

Respondent asserts that the prosecution did not rely on the negligence theory of attempted rape of an intoxicated person. (RB, p. 99.) For instance, the prosecution called Ro.D. and S.D. to testify that appellant "roofied and raped" them. (RB, p. 99.) Later, during closing argument, the prosecutor portrayed appellant as a "serial drugger," who knew full well of Smart's impairment. (RB, p. 99, citing 39 RT 11494; 41 RT 12098.) Respondent contends that, by specifically emphasizing appellant's knowledge of Smart's intoxication, the prosecutor reduced any chance that the jury would regard a negligence standard as sufficient. (RB, p. 99.)

While the prosecutor argued that appellant knew of Smart's intoxication, he never explained that such knowledge was necessary in order to convict of felony-murder based on attempted rape of an intoxicated person. He also did not make clear that the "reasonably should have known" standard set forth in CALCRIM No. 1002 only applied to rape of an intoxicated person, but not attempted rape. Far from disavowing the "reasonably should have known" standard for attempted rape, the prosecutor actually read the standard into the record during closing argument – and did so while discussing the elements of attempted rape of an intoxicated person. (39 RT 11488-11489.) As a result, jurors had no reason to believe this standard did not apply to attempt.

Finally, in asserting there was no reasonable likelihood of jury confusion, the prosecutor ignores the compounding effect of the court's misinstruction on voluntary intoxication. If the court had properly instructed on the knowledge element of attempted rape of an intoxicated person, jurors would have understood the

inquiry was a subjective one which necessarily compelled them to consider the effect of appellant's own intoxication. Instead, the court instructed jurors that the standard was an objective one, based on what appellant "reasonably should have known." (35 CT 10437.) The trial court only reinforced that message by precluding jurors from considering appellant's own subjective intoxication on the attempt count.

As shown, there is a reasonable likelihood the jurors construed the instructions to mean that a defendant commits attempted rape of an intoxicated person if he attempts to have sex with a person he reasonably should have known to be too impaired to consent. By replacing attempt's actual knowledge and specific intent requirement with a negligence standard, the trial court misinstructed on the essential offense elements.

D. Voluntary intoxication evidence is admissible to show that appellant lacked the specific intent required for attempted rape.

Respondent argues that the trial court correctly instructed on the permissible uses of voluntary intoxication evidence. (RB, p. 101.) In this regard, they point to Penal Code section 29.4, subdivision (b), which states that voluntary intoxication evidence "is admissible solely on the issue of whether or not the defendant actually formed a required specific intent." (RB, p. 101.) The statute prohibits "the admission of voluntary intoxication evidence on the issue of whether or not the defendant met the knowledge requirement of a general intent crime." (RB, p. 101, citing *People v. Suazo* (2023) 95 Cal.App.5th 681, 702-703; *People v. Berg* (2018) 23 Cal.App.5th 959, 969.)

Respondent's point is neither here nor there, since attempted rape of an intoxicated person is not a general intent crime. The crime requires both a specific intent to have sex with a person and to do so while she is too intoxicated to consent. (*Braslaw*, *supra*, 233 Cal.App.4th at p. 1249.) When appellant

speaks of the crime's knowledge "element," he is simply making shorthand reference to the requirement that a defendant specifically intend to have sex with someone too intoxicated to consent. A defendant cannot very well possess this intent if he does not know of the other's intoxication in the first place.

Respondent next argues that the trial court had no need to relate voluntary intoxication to the specific intent element of attempt because the record contained no substantial evidence that appellant's intoxication rendered him unable to discern Smart's impairment. (RB, p. 101.) By that logic, the court should not have instructed on voluntary intoxication at all, since appellant also presented no specific evidence that his intoxication rendered him unconscious or prevented him from premeditating or forming the intent to kill. Yet, the trial court still allowed jurors to use the voluntary intoxication evidence on these issues.

By allowing jurors to consider voluntary intoxication on other issues related to specific intent, the trial court recognized that alcohol's effects – including impaired judgment – are a matter of "common knowledge." (*People v. Stiteley* (2005) 35 Cal.4th 514, 550; see *Rice v. Alcholic Beverage Control Appeals Board* (1981) 118 Cal.App.3d 30, 37 ["[c]ommon knowledge" that alcohol impairs judgment].) Unlike with other substances, a defendant need not present specific evidence that his judgment was clouded by alcohol in order to receive an instruction on voluntary intoxication. He need only testify that he was drunk. (See *People v. Cox* (1990) 221 Cal.App.3d 980, 989 ["Where the voluntary intoxication instruction is sought in a situation not involving alcohol . . . it must be supported by evidence advising the manner in which ingestion of the nonalcoholic drug affects the mind of the user"].)

Here, appellant told police he drank to excess, both before and during the Crandall Way party. (35 CT 10366, 10379-10381;

13 RT 3680.) In fact, he drank so much that he threw up soon after returning to Santa Lucia Hall. (35 CT 10366; 13 RT 3623.) That, alone, gave rise to an inference that his perception would have been clouded.

As it turned out, appellant did present specific evidence that he mistook Smart's level of impairment. In one interview, he told police that Smart was "walking just fine" on the way home from the party. (35 CT 10389.) In another, he speculated that she may have walked to Taco Bell with a friend, since the restaurant stayed open all night. (35 CT 10320.) When asked by the police if she could have walked that far in her state, he answered in the affirmative – stating, "I don't remember her stumbling or anything." (35 CT 10321.)

Appellant's statements suggested that he did not perceive Smart to be severely intoxicated – despite the objective signs of impairment described by other witnesses in the case. The jury could reasonably have inferred that appellant's own alcohol intake was the reason he mistook Smart's level of intoxication. The trial court erred by precluding jurors from considering appellant's intoxication on this issue.

E. The instructional errors require reduction of appellant's conviction from first degree murder to second.

Respondent argues that, if the trial court did misinstruct, the applicable harmless error test is the "reasonable probability" standard for state law errors. (RB, p. 102; *Watson*, *supra*, 46 Cal.2d at p. 836.) Their argument treats the attempted rape instructions as ambiguous and conflicting, but not an actual misstatement of the offense elements. (RB, p. 102; see *People v. Beltran* (2015) 56 Cal.4th 935, 955 [ambiguous instructions that do not violate the federal constitution are subject to *Watson*].)

For reasons previously discussed, the instructions were not merely ambiguous, but wrong on their face. (See Argument VI.B,

supra, pp. 61-62.) Ultimately, however, it does not matter. Even if they were just ambiguous, that ambiguity created a reasonable likelihood that the jury would believe "constructive knowledge" sufficient to satisfy attempt's specific intent requirement. (See Argument VI.C, *supra*, pp. 62-66.) When an ambiguity produces a misinstruction on the elements, it implicates due process and is subject to *Chapman*. (*Neder v. United States* (1999) 527 U.S. 1, 8-10, 15 (*Neder*).)

Respondent, likewise, treats the erroneous voluntary intoxication instruction as a failure to give a pinpoint instruction – an error of state law. (RB, p. 102; *People v. Pearson* (2012) 53 Cal.4th 306, 325 [applying "reasonable probability" test for failure to instruct on voluntary intoxication].) That characterization would be correct if the court had not instructed on voluntary intoxication at all. But it affirmatively misinstructed on the issue – and did so in a way that deprived appellant of a key defense. That, too, violated due process. (See AOB, Argument VI.D, p. 95.) And, even if it did not, the erroneous voluntary intoxication instruction exacerbated the prejudicial effect of the erroneous instruction on attempt's specific intent element. Since the latter error implicated due process, *Chapman* applies when considering the two errors' combined effect. (*People v. Woods* (2006) 146 Cal.App.4th 106, 117.)

Respondent argues that the instructional errors were harmless because the jury could not reasonably have concluded that appellant's own intoxication caused him to misjudge Smart's level of impairment, which "was plain to all." (RB, pp. 102-103.) Respondent even disputes appellant's "self-serving" claim that he drank to excess. (RB, p. 102.)

There was nothing "self-serving" about appellant's claim that he drank too much. (RB, p. 102.) The police, not appellant, brought up the subject of alcohol – asking appellant how much he

had to drink that night. (35 CT 10366.) Appellant just answered the question. At the time, he had no reason to suspect that his intoxication had any legal significance to murder charges which had not been filed or attempted rape allegations which the police never even hinted at.

While Smart's impairment may have been "plain" to others at the party, that did not make it plain to appellant. The evidence showed that appellant did not know Smart had been passed out in the neighbor's lawn. When the police mentioned this to him during one of his interviews, appellant responded with surprise, asking, "She was passed out on the neighbor's lawn?" (35 CT 10345.) Elsewhere in this brief, appellant took note of his own equivocal statements about Smart's level of impairment. (35 CT 10320-10321, 10389.)

Respondent speculates that, if appellant were as drunk as he claimed, he could not have physically supported Smart during the walk home. (RB, p. 102.) The argument constitutes sheer conjecture. Alcohol may affect different people in different ways, and it may alter perception well before it causes a loss of physical coordination. Appellant could have been drunk enough to have his perceptions badly altered, but still able to walk home and assist Smart in doing so.

Citing Ro.D. and S.D.'s testimony about being "roofied and raped," respondent calls it "inconceivable" that jurors would have found he did not know Smart was too impaired for consensual sex. (RB, p. 103.) But those incidents had minimal relevance, since the prosecution presented no evidence that appellant "roofied" Smart. Furthermore, both incidents happened more than a decade after Smart's 1996 disappearance. (See 17 RT 4813 [incident with Ro.D. happened in 2008]; 24 RT 6912-6913 [incident with S.D. happened in 2011].) They, therefore, provided

little insight into appellant's state of mind on one specific night some 12 and 15 years earlier.

By emphasizing the supposed strength of the evidence, respondent focuses on the wrong question. When the trial court misinstructs on an offense element, harmless error analysis asks whether "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. 19.) If the record contains such evidence, the error requires reversal – even if the reviewing court believes the evidence of guilt to be strong.

Here, the evidence showed that appellant drank to the point of intoxication. Alcohol impairs perception and appellant's own statements suggested he may well have failed to discern the level of Smart's intoxication. Under such circumstances, the instructional errors cannot be found harmless beyond a reasonable doubt. As a result of the errors, this Court must reduce appellant's conviction to second degree murder or remand for a retrial on first degree murder.

VII.

The errors discussed in Arguments II, III, IV, and VI caused appellant cumulative prejudice and require reversal of his conviction or reduction to second degree murder.

In his opening brief, appellant argued that the errors raised in Arguments II, III, IV, and VI caused him cumulative prejudice even if no one error was prejudicial in its own right. (AOB, Argument VII, pp. 99-100.) Respondent makes no substantive counter-argument – except to state that appellant received a fair trial and that, since no errors occurred, cumulative prejudice does not apply. (RB, p. 103.) Appellant has shown otherwise – both in his previous arguments and in the cumulative prejudice discussion in his opening brief. Because the cumulative effect of

the court's errors cannot be found harmless beyond a reasonable doubt, this Court must reverse or reduce appellant's murder conviction.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in appellant's opening brief, appellant respectfully requests that this Court reverse or reduce his murder conviction and remand his case for retrial.

DATED: July 7, 2025

Respectfully submitted,

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

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

I, Solomon Wollack, counsel for appellant Paul Ruben Flores, certify pursuant to the California Rules of Court, that the word count for this document is 17,768 words, excluding the tables and this certificate. This document was prepared in Wordperfect 21, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Pleasant Hill, California on this 7th day of July, 2025.

By: /s/ Solomon Wollack
Solomon Wollack

PROOF OF SERVICE

I, SOLOMON WOLLACK, declare that I am at least 18 years old, an active member of the State Bar of California, and not a party to this case. My business address is P.O. Box 23933, Pleasant Hill, California, 94523. My e-mail address is sol@wollack.com. On the date shown below, I served the within:

APPELLANT'S REPLY BRIEF

to the parties on the attached service list by:

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__X__ **BY MAIL** – Placing a true copy of the foregoing, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasant Hill, California, addressed to:

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Mr. Paul Flores
(Defendant/Appellant)

I declare under penalty of perjury the foregoing is true and correct. Executed this 7th day of July, 2025 at Pleasant Hill, California.

/s/ Solomon Wollack