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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW HOEFT-EDENFIELD,

Defendant and Appellant.

A128780

(Alameda County
Super. Ct. No. 159202)

In this tragic case, an alcohol-fueled brawl ended in the death of one young man and the imprisonment of another. Defendant Andrew Hoeft-Edenfield and a friend were followed by a group of young men gathered outside a university fraternity house as they walked home from a party early one morning. An angry confrontation ensued. As the confrontation escalated, defendant began waving a pocketknife at the gathering crowd. In an apparent attempt to control defendant, one of the group grabbed him from behind and was fatally stabbed. Defendant was convicted of second degree murder. He raises several grounds for reversal of his conviction, but we find no merit in them and affirm.

I. BACKGROUND

In an information filed June 15, 2009, defendant was charged with murder (Pen. Code, § 187, subd. (a)) with personal use of a deadly weapon (Pen. Code, § 12022, subd. (b)(1)). An allegation of great bodily injury was later stricken.

There was no real conflict at trial about the general outline of events.¹ Defendant, then 20 years old, and his friend Adam Russell were walking home from a Berkeley party very early on the morning of May 3, 2008. Both had been drinking. Russell, in particular, was “obviously really drunk” and “couldn’t walk straight.” As the pair passed by a fraternity house near the University of California (UC) campus, Russell made brief, “friendly” conversation with one of a group of at least six young men standing in front of the house, most or all of them members of the fraternity. Among the group was the eventual victim, Christopher Wootton, a UC honors student. Wootton had been drinking on and off since lunch, and his blood alcohol level was later determined to be 0.21 percent. The conversation ended when another member of the fraternity group rudely told Russell to keep moving.

As Russell and defendant resumed walking, at least five of the fraternity group followed. Russell and defendant eventually turned to face them, and the confrontation escalated into a profane “yelling match.” When other young men swelled the group aligned against the pair, Russell began swinging a bottle of liquor he had been carrying. Defendant pulled out a four-inch pocketknife and vehemently threatened to use it. At the display of the knife, the members of the fraternity group retreated a few feet, and several made conciliatory remarks. Warning Russell and defendant he was calling the police, Wootton phoned 911.

Things might have ended there with the fraternity members’ strategic withdrawal, but a new trio of young men, fresh from a different fraternity party, happened upon the scene. One of the three, Stephen Silveira, barged in and began provoking Russell and defendant, loudly taunting them and goading them to fight. At trial, Silveira acknowledged being “very” intoxicated at the time—so intoxicated that he had little

¹ Because defendant’s arguments do not include a challenge to the sufficiency of the evidence supporting his conviction, in this background section we review only the principal evidence from a lengthy trial. The procedural circumstances and evidence relevant to each of defendant’s appellate arguments are set out individually in subsequent sections.

recall of his conduct and repeatedly referred to the accounts of his conduct provided later by his friends. When Russell and defendant rose to Silveira's provocation, a brawl broke out.

Although Wootton was still on the telephone with the 911 operator when the fight began, at some point he grabbed defendant in a bear hug from behind, apparently trying to subdue him. During the clinch, defendant stabbed Wootton. Wootton collapsed onto the street and died en route to the hospital from a knife wound that pierced his heart.

At trial, defendant contended he acted in self-defense. The jury rejected the argument, convicting him of second degree murder and finding the personal use allegation to be true. Defendant was sentenced to a term of 16 years to life imprisonment.

II. DISCUSSION

A. Defense Counsel's Alleged Conflict of Interest

During trial, it emerged that defense counsel had provided free legal services to two witnesses. Defendant contends these consultations created a conflict of interest for his attorney and argues the trial court's failure to inquire into the potential conflict constituted reversible error.

The first was prosecution witness Christopher Willcox, a friend of defendant and Adam Russell, who became involved in the brawl in an attempt to defend Russell. During cross-examination, Willcox testified he had "contacted [defense counsel] on a couple of occasions [after her retention by defendant] to talk about legal issues that had nothing to do with this case." When asked about the nature of the consultations, Willcox explained he had called defense counsel after a home invasion robbery at his apartment to ask whether he could recover the lease deposit if he moved out immediately. In addition, defendant's attorney had assisted Willcox's girlfriend when she was arrested for shoplifting. Counsel did not charge Willcox or his girlfriend for the services.

The second witness was Russell, called by the defense. As he explained, "I had a problem with a landlord and I asked [defense counsel] for advice on what I should do

with trying to get my deposit back on it, on a rental. [¶] . . . [¶] [S]he just told me I should take it to small claims court.” Again, there was no charge.

“ ‘ “The right to effective assistance of counsel . . . includes the right to representation that is free from conflicts of interest.” ’ [Citation.] While the classic example of a conflict in criminal litigation is a lawyer’s dual representation of codefendants, the constitutional principle is not narrowly confined to instances of this type.” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 309.) “ ‘As a general proposition, such conflicts “embrace all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or his own interests.” ’ ” (*People v. Doolin* (2009) 45 Cal.4th 390, 417.) “A conflict of interest may arise if counsel’s former client is a prosecution witness in the case against the defendant. [Citations.] This is because counsel’s duty not to reveal confidential information acquired during the attorney-client relationship creates conflicting obligations to multiple clients that ‘effectively seal[s] his lips on crucial matters.’ [Citation.] . . . [H]owever, courts have held that no actual or potential conflict of interest arises when the attorney does not possess such confidential information.” (*People v. Clark* (2011) 52 Cal.4th 856, 983–984.)

“When a court ‘ ‘knows or reasonably should know that a particular conflict exists,’ ’ it should inquire into the conflict even in the absence of objection by the defendant or his or her counsel. [Citations.] . . . Although the trial court is required to perform some inquiry once it knows or reasonably should know of a particular conflict of interest, the court may decline to pursue the matter if, in its view, the potential for conflict is too slight.” (*People v. Cornwell* (2005) 37 Cal.4th 50, 75, disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421 & fn. 22.)

Reversal is required only “ ‘if the defendant demonstrates that counsel “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his lawyer’s performance.” ’ [Citation.] . . . [A] defendant is required to show . . . a reasonable probability exists that, but for counsel’s deficiencies, the result of the proceeding would have been different. [Citation.] [¶] . . . [D]etermining whether [defense

counsel's] performance was adversely affected requires us to ask whether he 'pulled his punches,' i.e., whether [counsel] failed to represent defendant as vigorously as he might have, had there been no conflict." (*People v. Gonzales and Soliz, supra*, 52 Cal.4th at pp. 309–310.) A defendant must meet this same standard for reversal as a result of a trial court's failure to fulfill its duty of inquiry regarding a conflict of interest. (*People v. Cornwell, supra*, 37 Cal.4th at p. 76.)

Defendant's contention fails because he has not demonstrated either an actual conflict of interest or an effect on defense counsel's performance of her duties. As noted above, an attorney's prior representation of a witness in an unrelated matter ordinarily creates no conflict of interest for counsel unless the witness imparted confidential information material to the defendant's defense. (*People v. Clark, supra*, 52 Cal.4th at p. 984; see, e.g., *Leveresen v. Superior Court* (1983) 34 Cal.3d 530, 538–539 [error not to relieve counsel representing uncharged witness implicated in the defendant's crime].) Here, defense counsel provided what appears to have been brief landlord-tenant advice to each witness and represented one witness's girlfriend in an unrelated criminal matter. None of these representations was shown to have led to the disclosure by the witnesses of confidential information material to defendant's defense. Nor was there reason to suspect such a disclosure, since defendant was not shown to have been involved in the tenancies or the girlfriend's matter. Accordingly, there was no basis for finding an actual conflict of interest.

Defendant argues a conflict of interest existed because both witnesses had potential criminal liability in connection with the brawl, thereby creating "interests . . . clearly adverse to each other and . . . different and adverse to [defendant]." Defense counsel's brief provision of legal advice to the two witnesses, however, was unrelated to their purported potential criminal liability. Counsel therefore had no reason to pull

punches or otherwise alter the manner of her examination of the witnesses to protect their interests.²

Nor was there any adverse effect on counsel's performance. Defendant does not suggest any way in which counsel's performance was altered as a result of the claimed conflicts. Instead, defendant merely claims the consultations undermined the favorable impact of the witnesses' testimony and permitted the prosecution to "besmirch the entire defense team." This is not the type of detrimental effect the conflict of interest rules were intended to prevent. In any event, defendant greatly exaggerates the potential impact of the consultations. They were too minor to cause the jury to conclude that, as defendant argues, free legal services were provided in return for favorable testimony. Further, the jury already had good reason to view both witnesses' testimony with skepticism because they were acknowledged friends of defendant and were personally involved in the melee. Next to this, defense counsel's provision of landlord-tenant advice on a single occasion to each would have had little or no impact on the jury's perceptions of their credibility.

As there was no showing of an actual conflict of interest, we need not address the trial court's fulfillment of its duty to inquire. We note, however, the nature of the representations was fully explored during the course of testimony without need for the court's intervention. Because the facts as disclosed carried so little risk of potential conflicts of interest, the court was under no duty to inquire further. (*People v. Cornwell, supra*, 37 Cal.4th at p. 75.)

² Defendant argues counsel had an attorney-client relationship with each witness at the time of their testimony, citing *Beery v. State Bar* (1987) 43 Cal.3d 802, 811. Assuming such a relationship ever existed, it was of limited scope, unrelated to the two witnesses' potential criminal liability, and it terminated long before the time of their testimony, since counsel does not appear to have been expected to perform further services after the telephone consultations. *Beery*, which merely addresses the initiation of an attorney-client relationship without discussing its duration or scope, is not to the contrary.

B. Exclusion of Fraternity-related Evidence

Defendant contends the trial court erred in excluding from evidence (1) the “Berkeley Campus Code of Student Conduct” and “ ‘Cal’s Greek Social Code’ ” and (2) a police report of an earlier violent incident involving Wootton and other members of his fraternity (hereafter the Wootton police report).

The prosecution moved in limine to exclude both conduct codes, arguing they were irrelevant and part of a defense attempt to focus the case on the conduct of fraternities generally, or Wootton’s fraternity in particular, rather than on the conduct of the individuals during the brawl. Defense counsel argued that, as UC Berkeley students and fraternity members, the witnesses were required to comply with the codes. As a result of prior violations of the codes by members of Wootton’s fraternity, counsel argued, the members were concerned a further violation would result in the imposition of sanctions. Because their conduct that morning constituted such a violation, they had reason to lie in their statements to police after the brawl.

The court granted the motion, excluding evidence of the conduct codes under Evidence Code section 352. Explaining its ruling, the court noted, “This trial will be of the events that occurred on May the 3rd, 2008, at approximately 2:30 in the morning, and it will not be a trial of the fraternity system at the University of California.”

The Wootton police report concerned a fistfight in front of a Berkeley restaurant six months before the killing. Among the approximately 10 young men involved were Wootton and at least two other members of the fraternity group that initially confronted defendant and Russell. Witnesses told police Wootton and others from his fraternity were standing in front of the restaurant when another group of young men arrived and made remarks insulting to the fraternity. After one of the group shoved Wootton, a fight broke out. One young man was injured by an unidentified male while attempting to break up the fight. Police believed all involved were drunk.

Defense counsel argued the Wootton police report was relevant as evidence “of the decedent’s character for violence” and the tendency of Wootton and his friends to engage in violence when consuming alcohol, particularly if subject to “verbal

provocation.” The prosecution noted Wootton was not reported to be an aggressor in the incident and was not suspected of inflicting injury on the complainant. The trial court ruled the report inadmissible under Evidence Code section 352. As the court noted, “it would probably take as long to litigate what happened [during the incident reflected in the Wootton police report] as it’s going to take to litigate what happened” at the time of the killing.

“A trial court has broad discretion under Evidence Code section 352 to ‘exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ This discretion allows the trial court broad power to control the presentation of proposed impeachment evidence ‘ “to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.’ [Citation.]” ’ [Citation.] On appeal, we evaluate the court’s ruling by applying an abuse of discretion standard.” (*People v. Mills* (2010) 48 Cal.4th 158, 195.) We find no abuse of discretion in the trial court’s decision to exclude the conduct codes and the Wootton police report.

When considering admission of the school conduct codes, it is important to recognize the central disputed issue in the trial: whether defendant’s stabbing of Wootton that night was excusable as self-defense. The critical evidence concerned the conduct of the young men surrounding defendant and Russell on that morning just before and after the brawl broke out. The school conduct codes were of marginal relevance to this issue. While defendant contends the possibility of code violations could have been used to show bias or prejudice by the fraternity member witnesses, it was unnecessary to invoke these codes to demonstrate a motive for these witnesses to lie to police and minimize their aggressive behavior that morning. The incentive provided by the desire to protect their friends and avoid criminal responsibility was already strong. Weighed against this marginal additional probative value was the burden posed by this evidence. As the trial court noted in explaining its ruling, the need to review several years of misconduct by members of the fraternity in order to provide a foundation for the relevance of the

conduct codes would have required substantial court time and created a risk of confusion and prejudice— precisely the harms against which Evidence Code section 352 is intended to protect.

The Wootton police report was similarly of marginal relevance to the central issue in the trial and carried similar risks of burden. The sole reason for introducing the report was to demonstrate the fraternity members, and Wootton in particular, had a tendency toward aggressive conduct when drunk. As to the members other than Wootton, there was no real dispute at trial about the aggressive nature of their behavior on the morning in question. It was perfectly clear some among them behaved like obnoxious drunks. The Wootton police report added little or nothing to this. As to Wootton personally, the police report demonstrated at most that when shoved, he shoved back. There was no evidence Wootton was reacting to this type of personal challenge when he became involved in the brawl. On the contrary, he was on the telephone with the 911 operator when the fight broke out and only became involved after the violence escalated. Further, as the trial court noted, introducing the report would have required a mini-trial about the events it described. Again, we find no abuse of discretion in the trial court’s decision to exclude the evidence under Evidence Code section 352.

Even if the trial court had erred in excluding the evidence, any error was harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (See *People v. Gonzales* (2011) 51 Cal.4th 894, 924 [rulings under Evid. Code, § 352 reviewed under the “reasonable probability” standard of *Watson*].) As discussed above, the conduct codes had no direct bearing on the events that evening, and the type of bias to be demonstrated by the codes was clear to the jury regardless of any risk of school administrative proceedings. Moreover, counsel was permitted to develop essentially the same factual basis for bias during cross-examination of one of the principal members of the group, Zachary James. James acknowledged “[o]ne of the worst things that fraternity members can do is fight in front of a fraternity” and admitted their fraternity “was under scrutiny” by police and the university, had received a noise violation just one week prior,

and would face additional penalties for another violation. Introduction of the conduct codes would have added little to this examination.

Similarly, the Wootton police report was not directly probative of conduct that evening. In addition, counsel was able to develop more effectively Wootton's penchant for violence through other evidence. One witness testified Wootton had been escorted from another fraternity house after becoming involved in an argument, and the trial court permitted defense counsel to read into the record an Internet entry posted by Wootton describing in graphically violent terms his participation in a drunken fight in defense of another member of the fraternity. The more ambiguous police report would have added little to this evidence.

Defendant argues exclusion of this evidence violated his right to confrontation under the Sixth Amendment and his due process right to present a defense. (See, e.g., *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 677–679.) Notwithstanding those constitutional rights, “trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” (*Id.* at p. 679.) As a result, “reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant’s constitutional rights to confrontation and cross-examination.” (*People v. Brown* (2003) 31 Cal.4th 518, 545.) Similarly, “[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense.” (*People v. Dement* (2011) 53 Cal.4th 1, 52.) A defendant’s constitutional right to cross-examine is not violated unless the prohibited “ ‘cross-examination would have produced “a significantly different impression of [the witness’s] credibility.” ’ ” (*Ibid.*) For the reasons discussed above, cross-examination regarding the conduct codes would have had little or no bearing on the jury’s perception of the fraternity members’ credibility. The exclusion of the Wootton police report, again as discussed above, did not prevent defendant from proving Wootton engaged in prior violent conduct. There was

accordingly no denial of the right of confrontation nor infringement of defendant's right to present a defense. In any event, for the reasons discussed above, exclusion of this evidence was harmless beyond a reasonable doubt. (See *Delaware v. Van Arsdall*, at p. 684 [applying standard of *Chapman v. California* (1967) 386 U.S. 18 to confrontation clause violation].)

C. Admission of Defendant's Rap Lyrics

Defendant contends the trial court erred in admitting the quotation of a brief couplet, characterized as a "rap lyric," apparently written by defendant.

A notebook found in defendant's backpack contained handwritten lyrics. One in particular said, " 'I'm quick to cut a snitch, leave his body in a ditch.' " When defendant moved in limine to exclude this line, the prosecutor said she intended to introduce it as rebuttal of anticipated evidence of defendant's good character. Although the court granted defendant's motion to exclude most of the other evidence the prosecution hoped to admit to demonstrate defendant viewed himself "as a player, dealer, thug," the court declined to exclude the lyric, finding it probative of defendant's intent. As the court explained, "Where I have a defendant who is accused of stabbing a man to death with a knife, the lyrics that I just read there . . . I think are relevant . . . to his state of mind, relevant perhaps to a preexisting intent, to use the knife in situations other than self-defense." The lyric was later read into the record by a police officer during the prosecution's case-in-chief.

We are inclined to agree with defendant the case for admitting the lyric as evidence of intent is tenuous, but we need not decide whether admission of the lyric on this theory was an abuse of discretion because the evidence would have been admitted as rebuttal evidence under Evidence Code section 1103, subdivision (b).

" 'As a general rule, evidence that is otherwise admissible may be introduced to prove a person's character or character trait. [Citation.] But, except for purposes of impeachment [citation], such evidence is inadmissible when offered by the opposing party to prove the defendant's conduct on a specified occasion [citation], unless it involves commission of a crime, civil wrong or other act and is relevant to prove some

fact (e.g., motive, intent, plan, identity) *other than a disposition to commit such an act.*” (People v. Fuiava (2012) 53 Cal.4th 622, 695 (Fuiava).) Under People v. Ewoldt (1994) 7 Cal.4th 380 (Ewoldt), superseded by statute on other grounds as stated in People v. Britt (2002) 104 Cal.App.4th 500, 505–506, evidence of prior uncharged conduct to prove intent is admissible only if “the uncharged misconduct [is] sufficiently similar [to the charged conduct] to support the inference that the defendant ‘probably harbor[ed] the same intent in each instance.’” (Ewoldt, at p. 402.)

Because the composition of a rap lyric bears little resemblance to a stabbing, the lyric was weak prior conduct evidence of defendant’s intent. Even assuming the composition of a song lyric is a reliable indication of an author’s intent to act in the real world, rather than a product of artistic imagination, the circumstances described in the lyric fragment, revenge against a “snitch,” are not particularly similar to those seen here. There was little basis for admission of the lyric under *Ewoldt*.

That said, there are exceptions to the general rule precluding the use of conduct evidence to prove acts consistent with disposition. Relevant here is Evidence Code section 1103, subdivision (b), under which “if the defendant has offered ‘evidence that the victim had a character for violence or a trait of character tending to show violence,’ the prosecution is permitted to offer ‘evidence of the *defendant’s* character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct)’ in order ‘to prove conduct of the defendant in conformity with the character or trait of character.’ [Citation.] In other words, if . . . a defendant offers evidence to establish that the victim was a violent person, thereby inviting the jury to infer that the victim acted violently during the events in question, then the prosecution is permitted to introduce evidence demonstrating that (1) the victim was not a violent person and (2) the defendant was a violent person, from which the jury might infer it was the defendant who acted violently.” (Fuiava, *supra*, 53 Cal.4th at pp. 695–696, italics added by Fuiava.) As noted above, defendant elicited testimony on more than one occasion about prior violent conduct by Wootton. The prosecution was therefore entitled under section 1103, subdivision (b) to offer evidence of defendant’s

violent temperament in rebuttal. Composition of a rap lyric expressing an apparent willingness to kill by stabbing is some evidence of a violent temperament.³

Although the lyric came into evidence prior to defendant's introduction of any evidence of Wootton's character, and therefore was not introduced as rebuttal evidence, we find no prejudice to defendant in its premature introduction because defendant had already announced his intent to offer Evidence Code section 1103 evidence. "[T]he operation of section 1103[, subdivision] (b) is dependent upon a choice made by the defendant, in much the same way that other strategic choices made by the defense during a trial will make admissible evidence that otherwise would have been excluded." (*Fuiava, supra*, 53 Cal.4th at p. 698.) Defendant made clear his intention to introduce Wootton's Internet entry, in which Wootton described the fight in defense of his fellow fraternity member, during in limine hearings, prior to any mention of the lyric. At that time, the trial court provisionally admitted the Internet entry under section 1103, subdivision (a). The court expressly noted in warning to defense counsel: "If that comes in, . . . [t]hat opens the door and that door is extraordinarily wide. The door is this: The People can then prove the defendant's character for violence pursuant to Evidence Code section 1103[, subdivision] (b)." Defense counsel acknowledged her awareness of the consequences. Defense counsel then confirmed her intention to introduce evidence of Wootton's violent character in her opening statement, telling the jury Wootton "was not a stranger to violence" and reading the graphic Internet entry. Because defendant had made clear his intention to introduce section 1103, subdivision (a) evidence independent of the prosecution's decision to introduce the lyric, there was no prejudice to defendant in

³ Defendant argues the trial court should have excluded the evidence under Evidence Code section 352 as more prejudicial than probative. Because defendant opened the door to the admission of this evidence under section 1103, subdivision (b), it is not clear it was subject to a typical section 352 analysis. In any event, we find no abuse of discretion in the trial court's decision not to exclude the evidence under section 352. (*People v. Mills, supra*, 48 Cal.4th 158, 195 [applying abuse of discretion standard].)

the out-of-order introduction of the lyric.⁴ (See Evid. Code, § 320; *People v. Alvarez* (1996) 14 Cal.4th 155, 207 [order of proof is a matter for trial court's discretion].)

Defendant also contends admission of the evidence constituted a violation of his constitutional right to due process. Our Supreme Court has recently rejected such an argument with respect to Evidence Code section 1103, subdivision (b) evidence. (*Fuiava, supra*, 53 Cal.4th at p. 698.)

Even if introduction of this evidence had been error, we find it to have been harmless under *Watson, supra*, 46 Cal.2d 818. The lyric was introduced without fanfare during a police officer's redirect testimony, and defense counsel promptly pointed out through cross-examination that "snitch" and "ditch" were little more than a convenient rhyme. A subsequent witness testified defendant considered the lyrics "poetry" and the pairing of "snitch" and "ditch" was a couplet that "lots of famous rappers have used." Further, in demonstrating a violent temperament, this evidence paled in comparison with the evidence of misbehavior by defendant at school, which is discussed below. In light of the substantial additional evidence of defendant's temperament, it is not reasonably probable a different verdict would have resulted had the lyric not been admitted.

D. *The Court's Instruction Regarding Dr. Gabaeff*

Defendant contends an instruction given by the court to the jury regarding certain statements made during the testimony of an expert witness, Dr. Steven Gabaeff, wrongly branded Gabaeff a liar and resulted in an unfair trial.

The defense presented Gabaeff, a physician, to opine defendant suffered head injuries sufficient to cause reflexive movements and to counter prosecution evidence regarding the forcefulness of Wootton's stab wound. During cross-examination, the prosecutor asked Gabaeff whether she had e-mailed him a request for a list of his recent expert work. He responded, "Yes. I thought that dealt with the judge. I was told to

⁴ The situation might have been different if defendant's decision to introduce evidence of Wootton's character was made *in response* to the prosecution's introduction of the lyric. Defendant has made no such argument, and the record is wholly to the contrary.

disregard the letter by Ms. Huang. So that letter came before the judge, who ruled that the letter was out of order. That was my understanding.” When the prosecutor expressed surprise, Gabaeff clarified, “Well, I was told to disregard the letter. So normally that’s not going to happen unless the judge is involved.”

Somewhat later, the prosecutor questioned Gabaeff’s use of the term “stomping out,” commenting he had used it repeatedly during his direct testimony and noting the only use of the term in the record was in defendant’s statement to the police. Gabaeff explained, “I was instructed to rely on the defendant’s statement and the use of terms in the way I described the events, so that’s why I used that term, because of instructions from the judge.” At this, the court addressed Gabaeff directly, asking whether they had ever spoken. Gabaeff clarified, “No, no. [Defense counsel] told me that. [¶] . . . [¶] [T]hat’s what she wanted me to do.”

Shortly thereafter, the court called a recess to speak with counsel and the witness. Under questioning by the court, Gabaeff explained he had forwarded the prosecutor’s request for information to defense counsel, who told him she would raise it with the court and instructed him to disregard the request “for the time being.” Because he was ultimately told by defense counsel to disregard the letter, Gabaeff assumed the issue had been resolved by the court. The court also questioned Gabaeff about his claim to have relied on defendant’s statement because of instructions from the judge. Gabaeff said: “[M]y understanding was that you did not want me to testify about the conflicting statements that all the different people made . . . [¶] . . . [¶] And I thought what you were saying was more or less an extension of a ruling saying you have to limit your commentary about the facts of the case.” In response to the court’s expression of concern that the jury was given the impression there had been a ruling the prosecutor’s request was improper and a judicial instruction to Gabaeff to rely on defendant’s statement, defense counsel acknowledged Gabaeff’s statements were “incorrect” and suggested a “prophylactic instruction.”

Without objection, the court thereafter told the jury: “[O]n cross-examination Dr. Gabaeff testified that he had received a letter request from the district attorney . . . that he

review certain materials. Dr. Gabaeff testified that the defendant's attorney . . . informed him that the judge had ruled that this request was improper and out of line, and he should disregard this request. [¶] This is wholly and entirely incorrect. I have at all times been the trial judge in this matter. I never at any time ruled that the discovery request by the district attorney to Dr. Gabaeff to which the witness has referred was either improper or out of line, nor have I ever informed [defense counsel] to inform Dr. Gabaeff that he could or should disregard such request. [¶] Later in his testimony on cross-examination, Dr. Gabaeff testified that the judge had instructed him concerning what materials he could rely upon in forming his opinion. The fact is this: I had never met Dr. Gabaeff prior to him coming into court today. I have never been in any form of communication with Dr. Gabaeff. I had never communicated with him, and he has never communicated with me, in writing, by e-mail, by fax, by telephone, in person, or by any other means. We have not spoken a single word with each other in any form or format. [¶] Therefore, any representation that this Court has communicated any information to Dr. Gabaeff on the subject of his potential testimony is also wholly and entirely incorrect.”

Defendant criticizes the court's instruction for “tak[ing] sides” in the trial, “misstat[ing]” the events, labeling Gabaeff a liar, and “invit[ing] the jury to conclude that the defense was based on deceit when in fact any inaccuracy was based on incorrect representations by trial counsel and not on the part of the witness.” In doing so, he argues, the court conveyed that it did not believe Gabaeff's testimony, rendering the trial unfair.

Defendant waived this argument by not asserting a timely objection to the instruction. (E.g., *People v. Sanders* (1995) 11 Cal.4th 475, 531 [“ ‘[d]efendant's failure to object at trial . . . particularly where (as here) such action would have permitted the court to clarify any possible misunderstanding resulting from the comments, bars his claim of error on appeal’ ”].) Further, we find no merit in defendant's contention his failure to object was excused because the trial court's instruction was so intemperate it violated his “substantial rights.”

Even if the argument had not been waived, we would find no merit in it. Under Penal Code section 1044, the trial court has a duty to control criminal trial proceedings. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Our Constitution permits a trial judge to comment on the evidence and witness credibility, so long as such comments are “ ‘accurate, temperate, nonargumentative, and scrupulously fair.’ ” (*People v. Sturm* (2006) 37 Cal.4th 1218, 1232.) “ ‘The trial court may not . . . withdraw material evidence from the jury’s consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury’s ultimate factfinding power.’ ” (*People v. Harris* (2005) 37 Cal.4th 310, 350.) The exercise of the power of comment does not alone demonstrate bias. (*People v. Guerra*, at p. 1111.) We review the exercise of this power “ ‘on a case-by-case basis, noting whether the peculiar content and circumstances of the court’s remarks deprived the accused of his right to trial by jury.’ ” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 823.)

Assuming the court’s instruction constituted a comment on the evidence for purposes of the Constitution, we find no abuse of discretion because the instruction was accurate, temperate, nonargumentative, and fair, and it did not take from the jury the determination of any material issues bearing on defendant’s criminal liability. Contrary to defendant’s characterization, the trial court did not misstate the events or invite the jury to conclude the defense was based on deceit. Gabaeff told the jury the court had ruled the prosecutor’s request “out of order” and had given him “instructions” regarding defendant’s statement, exactly as stated in the court’s admonition. In fact, the court had done neither of these things. While the court correctly informed the jury Gabaeff had made incorrect statements, the court did not label Gabaeff a “liar” or otherwise characterize the intent behind his statements. Instead, the court characterized them merely as “incorrect,” which they were. Finally, the court neither stated nor implied “the defense was based on deceit.” The court’s comment did not address the basis of the defense. The instruction addressed two statements made by Gabaeff about procedural matters, not the substance of his expert testimony.

Further, contrary to defendant's argument, the instruction neither stated nor implied the court did not believe Gabaeff's testimony. The instruction said Gabaeff made two incorrect statements to the jury regarding the trial court's conduct. It did not suggest the substance of Gabaeff's expert testimony should not be believed, nor was that a natural inference from the instruction. Mistakes happen, and the jury had heard Gabaeff's explanation for his mistakes. The jury was entitled to decide whether those mistakes had any bearing on the credibility of the remainder of Gabaeff's testimony.⁵

Defendant compares this instruction with one given by the court in striking part of the testimony of a police officer who characterized another witness as a "liar," contending the difference illustrates prosecution bias by the trial court. The court instructed the jury to disregard that portion of the officer's testimony because one witness is not permitted to opine about the truthfulness of another witness's testimony, but it "emphasize[d]" the officer "did nothing wrong here. He was simply answering a question he was asked, and that's what witnesses do. But if there's fault here, it's mine in not reacting quickly enough." Defendant claims the instruction "told the jury, in essence," the officer's "answers were valid, and he was an honorable and credible witness."

The officer's testimony was substantially different because (1) it was not necessarily false, but merely inadmissible lay opinion; (2) it was invited by the prosecutor, rather than given on the witness's own initiative; and (3) it did not purport to describe the conduct of the court itself. The instruction, which was in part an apology by the court for failing to recognize the inadmissible nature of the testimony at the time it was given, was therefore appropriately different in content and tone. Further, contrary to defendant's exaggerated characterization, the instruction did not constitute an affirmation

⁵ Defendant claims the court's instruction was prejudicial because it permitted the prosecutor to argue in closing that Gabaeff had "testified falsely." It was not the court's instruction that permitted this argument; it was Gabaeff's incorrect testimony about the court's conduct. The impact of the trial court's instruction cannot be conflated with the impact of Gabaeff's testimony.

of the officer's testimony. It merely told the jury the officer did not commit misconduct by answering a question posed by the prosecutor. The difference in the court's treatment of the two incidents does not suggest it favored the prosecution.⁶

The trial court's instruction had no direct bearing on the credibility of Gabaeff's opinions, which were left to stand or fall on their factual support and the reasoning underlying them. Even if the trial court had abused its discretion, the instruction was not reasonably likely to have affected the jury's verdict and did not deprive defendant of due process, a fair trial, or his right to trial by jury.

E. Cross-examination Regarding William Harris

Defendant contends the trial court should have excluded under Evidence Code section 352 the prosecutor's cross-examination of a defense investigator about William Harris.

The prosecutor questioned several witnesses about purported attempts to manipulate their testimony by persons acting for the defense team. The defense responded by calling its chief investigator, Keith McArthur, as a witness. On cross-examination, McArthur was asked whether William Harris had ever worked for him.⁷ McArthur denied employing Harris, although he acknowledged consulting with Harris "regularly" because "he has a great deal of experience in the field. He's done a lot of investigation for a lot of years for a lot of well-respected attorneys." Following an unreported conference with the court, the prosecutor listed several serious felony convictions suffered by Harris, including murder, and asked McArthur whether he was

⁶ Defendant's argument is based in part on the premise that, to be fair, the court should have accepted Gabaeff's explanations for his misstatements and repeated those explanations to the jury. Because the court did not purport to address the motivation for Gabaeff's misstatements, but merely corrected them, even-handedness did not require a repetition of Gabaeff's explanations.

⁷ During pretrial proceedings, the prosecutor claimed that Harris, a man who came to public attention for his 1970's criminal participation in the Symbionese Liberation Army, had conducted a witness interview for the defense team in a manner that appeared to be intended to influence the witness's testimony. The witness felt threatened by Harris.

aware of them. McArthur said he was aware of Harris's "colorful past of the 70s." Under further questioning, McArthur denied Harris had interviewed any witnesses, although he acknowledged Harris "may have been present" during one interview.

During a subsequent break in proceedings, the court explained it permitted the questioning about Harris's prior convictions because McArthur praised Harris's "experience [and] judgment." Further, because McArthur was equivocal in acknowledging the exact nature of Harris's prior convictions, the court took judicial notice of the records of the convictions and instructed the jury on the nature of the convictions.

Defendant waived any challenge to this evidence by not objecting to the questions about Harris, his convictions, or the taking of judicial notice. (E.g., *People v. Samuels* (2005) 36 Cal.4th 96, 113.)

Even assuming defendant's objection was not waived, the trial court did not abuse its discretion by allowing testimony and taking judicial notice regarding Harris's prior convictions.

Defendant complains Harris's criminal convictions were relevant only to the issue of the judgment of an investigator retained by defense counsel, a marginal issue. Because Harris participated in only one witness interview, had played no role in the defense team, and was not shown to have any personal connection to defendant or the killing, defendant argues, his criminal convictions had no relevance to the primary trial issues.

We disagree. The trial court has broad discretion to determine the admissibility of evidence, and its ruling will be reversed on appeal only for abuse of that discretion. (*People v. Brown, supra*, 31 Cal.4th 518, 534.) We find no abuse here. At least four witnesses had called into question the techniques of McArthur and another investigator working with him, both of whom the witnesses believed had attempted to influence their testimony.⁸ McArthur's stated regard for Harris, whom he considered to be an excellent

⁸ The witnesses in question were Zachary James, Christopher Luu, Stephen Silveira, and Molly Niffenegger.

source of investigative tactics, was relevant to the credibility of his testimony that his investigative techniques were ethical and not intended to influence witnesses. The testimony consumed relatively little trial time, and there was no attempt by the prosecution to prejudice defendant directly by tying him to Harris.

Even if we were to find error, it was not prejudicial. The testimony occurred during the cross-examination of a secondary witness, a defense investigator rather than a witness to the crime. As noted, the prosecution made no attempt to tie Harris directly to defendant. Neither Harris nor his convictions had any connection to the primary issues in the case, and the prosecution did not argue otherwise. It is not likely the jury's decision would have been different in the absence of this testimony. (*Watson, supra*, 46 Cal.2d at p. 836.)

Defendant also criticizes the trial judge for failing to disclose he prosecuted a different member of the Symbionese Liberation Army in the 1970's. Because defendant did not object to the testimony, there was no occasion for such disclosure. Further, the trial judge did not prosecute Harris, but only an associate, and given the marginal nature of this issue and the long lapse of time since the prosecution, we see no potential basis for disqualification of the trial court and no reason to question its impartiality on these grounds. We also find meritless defendant's contention the admission of this evidence indicated judicial bias.

F. Defendant's School Records

Defendant contends the trial court should have suppressed his school records and all evidence relating to his school conduct because the records were originally obtained through improperly issued subpoenas. Although a search warrant was later used to obtain the same records, defendant argues the warrant did not remove the taint of the earlier erroneous subpoenas and was based on an improper affidavit.

The prosecutor subpoenaed defendant's school records from the Berkeley Unified and Alameda Unified School Districts. In violation of Penal Code section 1326, subdivision (b), however, the subpoenas required delivery of the documents to the prosecutor, rather than the court. (See, e.g., *People v. Superior Court (Barrett)* (2000)

80 Cal.App.4th 1305, 1315.) In response to defendant's motion to quash, the trial court announced its provisional conclusion the subpoenas were legally deficient. The court deferred a formal ruling, however, because the prosecutor said the records would be sought by search warrant, thereby mooting defendant's motion.

Within the day, the prosecutor announced the same school records had been obtained by search warrant. The affidavit supporting the application for the search warrant outlined the circumstances of the killing and noted defendant's school records had already been obtained by subpoena duces tecum. According to the affidavit, they revealed defendant had a "longstanding history of anger issues and violence while at school." It explained the search warrant had been prepared "to remedy any legal issues that might arise as a result of my obtaining school records through the subpoena process."

Soon after, defendant filed a motion to quash and traverse the search warrant and to suppress the school records. He argued probable cause was lacking because the documents were sought only as character evidence and had no relation to the killing. In addition, defendant contended the affidavit was based on misrepresentations because it failed to make clear the subpoenas were not in compliance with the law. The court denied the motion, finding probable cause and concluding the affiant "did nothing wrong whatsoever."

We review the trial court's factual findings for substantial evidence and its application of the law to those facts de novo. (*People v. Brendlin* (2008) 45 Cal.4th 262, 268.)

The failure of the subpoena to comply with state law did not alone provide a basis for excluding the school records. "With the passage of Proposition 8, we are not free to exclude evidence merely because it was obtained in violation of some state statute or state constitutional provision. ' "Our state Constitution . . . forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court." ' ' " (*People v. McKay* (2002) 27 Cal.4th 601, 608.) "[T]he United States Supreme Court has never ordered a state court to suppress evidence that has been

gathered in a manner consistent with the federal Constitution but in violation of some state law or local ordinance. To the contrary, the high court has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law.” (*Id.* at p. 610, fn. omitted.) Because Penal Code section 1326 is a state law, its violation does not support exclusion of the school records.

Defendant argues the prosecutor violated his federal constitutional rights to due process and privacy when she failed to comply with Penal Code section 1326. Ordinarily, however, the issuance of a subpoena to a third party to obtain records of that party does not violate the federal constitutional rights of a criminal defendant. (*United States v. Miller* (1976) 425 U.S. 435, 444 (*Miller*)). Defendant’s due process claim is based on *Kling v. Superior Court* (2010) 50 Cal.4th 1068, in which the Supreme Court held the prosecution has a due process right under the California Constitution to disclosure of the identity of the subpoenaed party and the nature of records sought by a defendant pursuant to a subpoena duces tecum under Penal Code section 1326. (*Kling*, at p. 1078.) The decision fails to support a federal constitutional claim here for two reasons. First, *Kling* was premised on the due process provisions of the state Constitution, not the federal Constitution. Second, the *Kling* court did not hold that a party has a constitutional right to have subpoenaed documents of another party produced to the court, rather than to the subpoenaing party, the violation complained of here. *Kling* holds only that, once the documents have been delivered pursuant to that procedure, the parties have certain due process rights to participate in subsequent court proceedings. Defendant cites no decision, and we are aware of none, holding the procedure for handling subpoenas duces tecum specified by Penal Code section 1326 is mandated by the Constitution, state or federal. Accordingly, the prosecution’s original violation of Penal Code section 1326 did not constitute a violation of defendant’s federal due process rights.

In his opening brief, defendant cites no authority and makes only a conclusory argument regarding his right to privacy. In the court below, he relied on *Burrows v. Superior Court* (1974) 13 Cal.3d 238, which found a violation of a right to privacy under the California Constitution when bank records were obtained without legal process.

(*Burrows*, at pp. 242–243.) The federal constitutional rule is to the contrary. (*Miller*, *supra*, 425 U.S. at p. 444 [disclosure of bank records not protected by federal right to privacy].) In his reply brief, defendant argues school records are protected from disclosure by state and federal statute, but the only federal constitutional authority he cites is *Griswold v. Connecticut* (1965) 381 U.S. 479, 484, a classic birth control case. *Griswold* provides no basis for concluding school records are entitled to any greater protection under the federal Constitution than the bank records considered in *Miller*.

Defendant does not repeat his contention in the trial court that probable cause was lacking, but he argues the facts on which probable cause was based were derived from the subpoenaed documents themselves, thereby requiring suppression under the “fruit of the poisonous tree” doctrine. Because the prosecution’s use of an invalid subpoena to obtain the documents did not constitute a violation of defendant’s federal constitutional rights, however, the use of information derived from the documents as a basis for probable cause provided no grounds for suppressing the school records under the “poisonous tree” doctrine.⁹ (E.g., *People v. Mayfield* (1997) 14 Cal.4th 668, 760.)

Defendant argues the search warrant was invalid because the affidavit failed to inform the magistrate it was being sought as a result of the invalidation of the earlier subpoena. (See *People v. Scott* (2011) 52 Cal.4th 452, 484 [warrant invalid if the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth or an intentional or reckless omission of material information].) Because there was nothing improper in the use of a search warrant to remedy the invalid subpoenas, any such omission would not invalidate the warrant. In any event, the affidavit adequately disclosed this point. The affidavit stated the records sought by the search warrant had already been obtained by subpoena and the warrant was being

⁹ We recognize there is an element of bootstrapping in the use of documents produced pursuant to an invalid subpoena to establish probable cause for a subsequent warrant seeking the same documents. Because Proposition 8, The Victims’ Bill of Rights, limits exclusion of evidence to federal constitutional violations, California courts are prohibited from using the exclusionary rule as a remedy for this type of state statutory violation.

requested “to remedy any legal issues that might arise as a result of my obtaining school records through the subpoena process.” There would have been no “legal issues” needing to be “remed[ied]” unless the subpoena had, in some manner, been invalid.

Defendant also argues the trial court’s deferral of a ruling on the motion to quash the subpoenas while the prosecutor sought the records by search warrant demonstrated bias. The premise for the argument is faulty. The trial court’s deferral was not done to allow the prosecutor to obtain the records by warrant. A ruling the subpoenas were invalid would not have prevented the prosecutor from seeking the records by warrant.¹⁰ Rather, as the trial court made clear at the time, it deferred ruling because the validity of the subpoenas made no difference to the prosecution’s ability to use the documents once a warrant had been obtained—a conclusion with which defense counsel concurred. For that reason, the deferral does not even suggest, let alone demonstrate bias.

G. Testimony by Tina Koeberl About Defendant’s “Anger Management”

Defendant contends the trial court erred in admitting testimony of a high school teacher regarding defendant’s difficulty in controlling his anger during his school years.

Pursuant to Evidence Code section 1103, subdivision (b), the trial court admitted the testimony of Tina Koeberl, a former high school teacher of defendant for two or three years. Asked by the prosecution whether she had formed “an opinion about his character for anger management,” Koeberl said, “He has anger, yeah.” Relying on a report she had prepared in 2004, Koeberl explained defendant had “behavioral problems” during his school years, including “ ‘threaten[ing] the safety of others on several occasions and tr[y]ing to intimidate adults and other students with verbal abuse and physical threats such as hitting windows and pushing chairs and desks in anger.’ ” As a result of defendant’s behavior, Koeberl was at times concerned for her safety and the safety of other students.

¹⁰ Nor did the court defer ruling at the request of the prosecutor. She told the court she was “ready to give up on this issue and have [the court] quash the subpoena,” after which she would have the warrant served.

As discussed above, Evidence Code section 1103, subdivision (b) permits admission of “the defendant’s character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) . . . if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant.” We review a trial court’s decision to admit evidence for abuse of discretion. (*People v. Booker* (2011) 51 Cal.4th 141, 170.)

Defendant argues, in essence, that because anger and violence are not the same thing, Koeberl’s opinion defendant had difficulty controlling his anger was admissible under Evidence Code section 1103 only if “it was introduced in a broader context of physical assaults upon teachers or other students that Koeberl had personally witnessed.” We do not read subdivision (b) of section 1103 so narrowly. The statute permits the introduction of evidence of “character for violence or trait of character for violence.” One “trait of character for violence” is difficulty in controlling one’s temper.¹¹ The phrases “difficulty in controlling one’s temper” and “poor anger management” are actually euphemisms for the tendency in a person to allow anger to escalate into violence. Often that violence is merely verbal, but the very loss of control creates the risk it will become physical. Given her reference to “behavioral problems,” it is clear Koeberl understood the prosecutor’s question about “anger management” to refer to such a tendency to lose control. To illustrate her conclusion, Koeberl provided examples of defendant’s violent behavior, including his threatening the safety of others on several occasions. The trial court did not abuse its discretion in concluding poor anger management was a trait of character for violence whose admission was authorized by section 1103, subdivision (b).

¹¹ The trial court had the same understanding, ruling, “[T]he subject of defendant’s difficulty in controlling his anger is entirely relevant.”

As noted above, defendant's argument that admission of this evidence constituted a violation of his constitutional right to due process was recently resolved against him in *Fuiava, supra*, 53 Cal.4th at page 698 (admission of evidence of a defendant's propensity for violence pursuant to Evid. Code, § 1103, subd. (b) does not violate due process).

Defendant also contends the trial court demonstrated bias by admitting evidence of defendant's character for violence while excluding evidence of the fraternity members' past violent acts. Judicial rulings alone rarely constitute a valid basis for finding bias. (*People v. Guerra, supra*, 37 Cal.4th 1067, 1111–1112.) Further, the situations are sufficiently different that they do not even suggest bias. As discussed above, evidence of defendant's character was made admissible by defense counsel's conscious choice to invoke Evidence Code section 1103, subdivision (a), thereby making evidence of defendant's character for violence admissible under subdivision (b). There was no similar Evidence Code provision requiring admission of evidence about the fraternity members' character or past conduct. In any event, as also discussed above, the trial court did allow cross-examination of at least one fraternity witness about past acts of violence and, of course, permitted defendant to admit evidence of the victim's character for violence, as required by section 1103, subdivision (a).

H. Testimony by Jeff Knoth About Defendant's Disciplinary Records

Defendant argues defense counsel provided ineffective assistance of counsel when she failed to object to the testimony of Jeff Knoth regarding defendant's school discipline problems.

As discussed above, the prosecution obtained defendant's records from local school districts. When their admissibility was first challenged during in limine motion hearings, the trial court ruled the records presumptively admissible as business records, assuming a proper foundation was made, and held they were not subject to *Crawford v. Washington* (2004) 541 U.S. 36.

The issue arose again near the end of the prosecution's case-in-chief, when defendant renewed his motion to exclude the records. Defense counsel argued the documents had been misrepresented by the prosecution during the in limine hearing as

having been “done contemporaneous with the event,” when in fact “most of these contain opinion, evaluations, conclusions, based on many, many sources of information.” The court “grant[ed] the defendant’s motion,” finding “that these are not appropriate business records as such. I’m going to require that a live person come into the courtroom and testify. [¶] . . . [¶] The fact that the defendant has anger management problems, has difficulty controlling his anger, and that this has been the subject of personal observation by teachers, other school personnel is entirely a thing to address. But I am going to require that a person come in here, sit in this stand, and testify to that and then can be cross-examined.” In response to a question by the court, the prosecutor confirmed “ ‘there will be witnesses who will come into this courtroom . . . who personally observed the incidents that give rise to [defendant] having problems controlling his anger.’ ”¹²

Notwithstanding the trial court’s ruling, Knoth was called to testify as “the custodian of school records” for the Alameda Unified School District. Speaking generally, he stated there was “a requirement” records be kept on students and the records are “made at or near the time of the events that are documented” by “the administrator at the school.” With this meager foundational testimony and no pretense of personal knowledge, Knoth testified, without objection, about incidents of violence during defendant’s school years, relying entirely on the documents and at times reading directly from them. In particular, he testified about disciplinary events in December 1998 (physical threat to a teacher), May 1999 (throwing rocks at passing vehicles), March 2001 (slapping a student), April 2001 (slapping a student), December 2001 (possession of a pocketknife), October 2003 (physical threat to a teacher), and February 2004 (punching his fist through a window). At the time of these events, defendant ranged

¹² The trial court reiterated its decision in discussing rebuttal of the testimony of Kimberly Chamberlain, a character witness for defendant. In holding Chamberlain’s testimony had opened the door to proof of various measures by which the school district attempted to address defendant’s learning disabilities, the court noted, “I’m still not going to allow this to come in by way of business records. . . . [I]t should come in only through the testimony of live witnesses who have some personal knowledge in this case of what the school did, what efforts the school made.”

from ages 11 to 16. The school records themselves were neither moved nor admitted into evidence.

The Attorney General argues Knoth's testimony did not violate the trial court's ruling and was proper under rules governing hearsay. We cannot agree. The court was unequivocal in ruling the school records could not be introduced as evidence of the events reflected in them and requiring a person with actual knowledge of the disciplinary events to testify. Because Knoth had no personal knowledge of the events reflected in the school records, and because the trial court had ruled the school records were not admissible under the business records exception to the hearsay rule, his testimony regarding the contents of the records constituted a violation of the court's ruling.

Putting aside the court's order, we find no basis for finding Knoth's testimony admissible under the rules governing hearsay. First, even assuming, as the Attorney General argues, the school records could have been admitted under a hearsay exception, they were not, in fact, admitted. Knoth's testimony about the content of the records therefore constituted hearsay. Further, it is unlikely the documents could or would have been admitted into evidence, had such a motion been made. Under Evidence Code section 1280, a document created by a public employee is admissible as an official record if it was "made as a record of an act, condition, or event," was made at or near the time of the act, condition, or event, and has sufficient indicia of trustworthiness.¹³ (E.g., *People v. Martinez* (2000) 22 Cal.4th 106, 119–120.) While a trial court "has broad discretion in determining whether a party has established these foundational requirements" (*id.* at p. 120), it is difficult to imagine the trial court finding Knoth's conclusory foundational testimony adequate, particularly since the court had carefully examined the records and found them wanting. According to defense counsel, much of the information contained

¹³ Although the parties at trial consistently referred to the "business records" exception, these documents are better viewed as "official records," having been prepared by public employees rather than created by a business. It makes no practical difference here, since the rules governing admission of the two types of records are generally the same. (*People v. Beeler* (1995) 9 Cal.4th 953, 980.)

within the records did not constitute a “record of an act, condition, or event” but instead was inadmissible analysis and opinion, and the trial court seemed to agree with that characterization. (See *People v. Beeler*, *supra*, 9 Cal.4th at pp. 980–981 [doctor’s diagnosis admissible as business record only if it is based on the doctor’s direct observations, rather than an analysis of various factors].) The accounts of the disciplinary events related by Knoth were presumably drawn from different records prepared at different times, under different circumstances, and by different people. Yet his foundational testimony did not consider the documents individually, let alone acknowledge or address the different types of information contained within them. There was virtually no attempt to demonstrate trustworthiness by explaining the manner of the documents’ creation. For all these reasons, the record before us is inadequate to lay a foundation for the admission of the school records as official records.

In light of the trial court’s ruling, the lack of adequate foundational testimony, and the failure of the prosecutor to move the school records into evidence, defense counsel could have objected successfully to Knoth’s testimony. Nonetheless, defense counsel may have decided it was less harmful to defendant to permit this form of testimony about his school disciplinary problems than to require testimony by a parade of teachers who actually witnessed or, worse, were victimized by the behavior. (See *People v. Gray* (2005) 37 Cal.4th 168, 207.)

Regardless, it is unnecessary for us to address the possibility of ineffective assistance of counsel because we find no reasonable probability that, but for the admission of Knoth’s testimony, the jury’s decision would have been different. (See *In re Crew* (2011) 52 Cal.4th 126, 150 [“[i]f a claim of ineffective assistance of counsel can be determined on the ground of lack of prejudice, a court need not decide whether counsel’s performance was deficient”]; *People v. Davis* (2005) 36 Cal.4th 510, 551 [standard for prejudice].) Knoth’s testimony was, to some extent, cumulative of the testimony of Tina Koeberl and two of defendant’s high school teachers, Diane Colborn and Eileen Jacobs, who directly experienced defendant’s at times emotional behavior and corroborated in general terms the character traits demonstrated by the incidents in

Knoth's testimony. Further, Knoth's information concerned largely remote events. Only two of the disciplinary incidents occurred after defendant passed the age of 13, more than six years before the events in question. It therefore had limited relevance to defendant's character at the time of the killing. Even if Knoth's testimony had been excluded, there is no reasonable probability the jury's decision would have been different.

I. *Cross-examination of Kimberly Chamberlain*

Defendant contends his attorney was deficient in failing to object to the manner of the prosecutor's cross-examination of Kimberly Chamberlain.

Defendant called Chamberlain, who had known defendant since he was an infant, as a character witness. Based on her personal experience with defendant, Chamberlain testified generally that he "never had a violent personality" and was "a good kid." She denied defendant had "anger management problems" and attributed his misbehavior in school to frustration because he was not given appropriate help for his dyslexia.

The prosecutor, without objection, challenged Chamberlain on the basis of disciplinary incidents described in the school records. All of the prosecutor's questions were in the form, "Are you aware [that a particular disciplinary incident occurred]?" Defendant contends the questions should have been phrased, "Have you heard [about the disciplinary incident]?"

There appears to be some legal uncertainty about the proper form of the questions. When a character witness testifies to a defendant's good *reputation*, "Have you heard?" questions are required. (See *People v. Marsh* (1962) 58 Cal.2d 732, 745–746; *People v. Qui Mei Lee* (1975) 48 Cal.App.3d 516, 526.) "Are you aware" questions may be permitted, however, when the character witness gives a personal opinion as to the defendant's character, as Chamberlain did. In *People v. Hempstead* (1983) 148 Cal.App.3d 949, the court held, "When, as here, a witness is called to express an opinion as to the good character of the defendant, the prosecution must have the opportunity to let the jury test the validity of the opinion or the weight to be given to it by asking whether the holder of the opinion has knowledge of events or acts which have indisputably occurred." (*Id.* at p. 954.) Although the prosecutor's actual questions in

Hempstead were in the “have you heard” form (*id.* at pp. 952, 954), the Supreme Court has accepted “are you aware” questions in this context, without directly addressing the proper form of the question. (*People v. Holloway* (2004) 33 Cal.4th 96, 147.)

We decline to decide the proper form of the questions or whether defense counsel’s failure to object constituted ineffective assistance of counsel because we are convinced any error was harmless. (*People v. Marsh, supra*, 58 Cal.2d at p. 746; see *In re Crew, supra*, 52 Cal.4th at p. 150; *People v. Davis, supra*, 36 Cal.4th at p. 551.) The questions were asked in good faith, backed by the school records. They did not constitute mere “rumors of defendant’s misconduct.” (*People v. Marsh*, at p. 746.) The only purported error was in the phrasing of the questions. It is inconceivable the jury’s decision would have been different if the prosecutor had phrased her questions differently.¹⁴

J. CALJIC No. 5.13

Defendant contends the trial court erred in instructing the jury with CALJIC No. 5.13 because the instruction included references to the victim’s intent and to a “forcible and atrocious crime.” We apply the de novo standard of review when assessing whether jury instructions correctly stated the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

The trial court instructed the jury on self-defense using CALJIC Nos. 5.12 and 5.13. The former states, generally, a killing in self-defense is not unlawful if the defendant actually and reasonably believed there was imminent danger “the other person will either kill him or cause him great bodily injury” and “force or means that might cause” death was necessary to prevent death or great bodily injury. The latter states a “homicide” in self-defense is not unlawful if the defendant “actually and reasonably believe[d] that the individual killed intended to commit a forcible and atrocious crime.”¹⁵

¹⁴ We note defendant makes no genuine argument for prejudice, stating only, “Appellant was prejudiced by counsel’s failure.”

¹⁵ The full instruction of CALJIC No. 5.13, as read by the court, stated: “Homicide is justifiable and not unlawful when committed by any person in the defense

Defendant consented to the giving of CALJIC No. 5.12, but he proposed two alternative instructions to CALJIC No. 5.13, each a hybrid between CALJIC No. 5.13 and the relevant CALCRIM instruction, No. 505.¹⁶ Explaining the purpose of her proposed alternatives, defense counsel argued: “CALJIC 5.13 as currently written has an internal contradiction, and that is that the focus becomes the decedent’s intent, whereas I believe the law is very clear that self-defense is focused on the Defendant’s genuine belief and his action based upon that genuine belief and then the secondary issue is reasonableness upon that belief. [¶] . . . [W]hen you have a statement that says that there has to be knowledge or belief of the specific intent, then I think that that is confusing and misstates the law, which is what CALCRIM has rectified.” The trial court declined to give either of defendant’s alternatives, concluding, “I’m satisfied that . . . [t]he package of instructions that is contained in CALJIC is an appropriate and correct statement of the law.”

Although defendant repeats a version of counsel’s argument, he also raises the somewhat different argument that the use of both CALJIC Nos. 5.12 and 5.13 created an internal inconsistency, requiring the jury to find, on the one hand, that defendant reasonably believed Wootton intended to commit a forcible or atrocious crime (CALJIC No. 5.13) and, on the other hand, that defendant reasonably believed the danger presented by Wootton would result in his death or great bodily injury unless he acted in self-

of himself if he actually and reasonably believes that the individual killed intended to commit a forcible and atrocious crime, and that there was imminent danger of that crime being accomplished. A person may act upon appearances, whether the danger is real or merely apparent.”

¹⁶ The first proposed alternative deleted the language quoted above and substituted, “actually and reasonably believed that [he] was in imminent danger of being killed or suffering great bodily injury [¶] [and] [t]he defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger.” The second, which retained more of the CALJIC instruction, deleted the language quoted above and substituted, “actually and reasonably believed that [he] was in imminent danger of suffering a forcible and atrocious crime.”

defense (CALJIC No. 5.12). He contends the prosecutor “exploited” the contradiction by focusing on Wootton’s presumed lack of criminal intent during closing.¹⁷

The two CALJIC instructions are not internally inconsistent. Rather, they state two alternative justifications for a killing in self-defense: where the defendant reasonably fears either imminent death or great bodily injury (CALJIC No. 5.12) *or* the imminent accomplishment of a “forcible and atrocious” crime. Because either finding is sufficient, the jury was not asked to make inconsistent findings.

In any event, as given by the trial court, there was no practical difference between the two instructions. As defined in CALJIC No. 5.16, a “forcible and atrocious” crime is either (1) one that threatens death or great bodily injury or, more specifically, (2) murder, mayhem, rape or robbery. Because the trial court mentioned only the first of these two definitions when giving CALJIC No. 5.16, referring only to death or great bodily injury, CALJIC Nos. 5.12 and 5.13 were rendered virtually identical in meaning. That is, the jury was required to find either that defendant reasonably feared the imminent infliction of death or great bodily injury or the imminent commission of a crime involving death or great bodily injury. While the two are phrased differently, it is difficult to envision a difference in practice. Certainly, contrary to defendant’s claim, the two instructions were not in conflict.

Defendant’s claim at trial that CALJIC No. 5.13 forces the jury to focus on the victim’s intent, rather than the belief of the defendant, is a criticism of the law, not the instruction. The instruction is derived from Penal Code section 197, which states, in part: “Homicide is also justifiable when committed by any person . . . [¶] . . . [¶] . . . in defense of . . . person, against one who manifestly intends or endeavors, by violence or surprise,

¹⁷ This new argument was forfeited when defendant did not raise it below. As mentioned, defendant requested both instructions without ever contending they were internally inconsistent in this manner. We also find no merit in defendant’s claim his “theory of the case never indicated that he was defending against ‘a forcible or atrocious crime.’ ” The claim is inconsistent with defense counsel’s specific request for an instruction under CALJIC No. 5.13, which addresses this defense.

to commit a felony.”¹⁸ (Pen. Code, § 197, subd. (2).) In other words, under section 197, it is the “manifest” intent of the victim to commit a felony that excuses a killing in self-defense. The manifestation, of course, must be sufficient to give rise to the defendant’s reasonable belief. (See *People v. Ceballos*, *supra*, 12 Cal.3d at pp. 477–478, 482.) Accordingly, CALJIC No. 5.13 is a correct statement of the law.¹⁹ (*People v. Thomas* (2007) 150 Cal.App.4th 461, 466–467.)

While this is sufficient to affirm the trial court’s use of this instruction, we briefly address defendant’s underlying complaint. Contrary to defendant’s claim, the focus of CALJIC No. 5.13 (and Penal Code section 197) is the defendant’s belief, not the victim’s intent. The instruction requires the jury to acquit if it finds the defendant “actually and reasonably believed that the individual killed intended to commit a forcible and atrocious crime, and that there was imminent danger of that crime being accomplished.” While the instruction includes a mention of the victim’s intent, it does not require the jury to make any finding about the victim’s intent, nor does it require the victim to have had any particular intent. Rather, the jury is instructed to determine only whether the defendant

¹⁸ Through judicial interpretation, the reference to a “felony” in Penal Code section 197 has been limited to a forcible and atrocious crime. (*People v. Ceballos* (1974) 12 Cal.3d 470, 478.) As the court noted in *People v. Jones* (1961) 191 Cal.App.2d 478, “[w]e must look further into the character of the crime, and the manner of its perpetration [citation]. When these do not reasonably create a fear of great bodily harm, . . . there is no cause for the exaction of a human life.” (*Id.* at p. 482.)

¹⁹ Following oral argument, defendant requested leave to submit a supplemental brief arguing subdivision (2) of Penal Code section 197 is inapplicable to his case because it applies only to the defense of habitation. Because subdivision (2) was cited in the respondent’s brief to demonstrate CALJIC No. 5.13 was a correct statement of the law, defendant waived this new argument when he did not raise it in his reply brief. (*Curtis v. Santa Clara Valley Medical Center* (2003) 110 Cal.App.4th 796, 803, fn. 4.) In any event, we find no basis for so limiting subdivision (2), since the subdivision states it applies “[w]hen [a homicide is] committed in defense of habitation, property, or *person*” (Pen. Code, § 197, subd. (2), italics added.) The subsequent clause specifically addressing defense of habitation is stated in the alternative. Defendant’s supplemental brief cites no contrary authority. Accordingly, it is unnecessary for the Attorney General to respond to defendant’s supplemental brief.

“actually and reasonably believed” the victim had such an intent. Accordingly, the instruction’s focus is the belief of the defendant, not the actual intent of the victim.

Further, any difference between CALCRIM No. 505, which does not mention the victim’s intent, and CALJIC No. 5.13 is more apparent than real. CALCRIM No. 505 combines the substance of CALJIC Nos. 5.12 and 5.13. Regarding the fear of a forcible and atrocious crime, the instruction reads: “The defendant reasonably believed that [he] was in imminent danger of being killed or suffering great bodily injury [or was in imminent danger of being (raped/maimed/robbed/ _____ < *insert other forcible and atrocious crime*>)].” (CALCRIM No. 505.) While this language does not include an express reference to the victim’s intent, it is difficult to conceive how a defendant would reasonably come to believe he or she was in imminent danger of suffering a forcible and atrocious crime, as required by the instruction, unless the victim had manifested the intent to commit such a crime. In other words, while the two instructions differ in their language, their practical import is virtually identical.²⁰

Defendant’s claim the prosecutor attempted to exploit the instruction is unsupported by the record. Although defendant claims the prosecutor argued self-defense was unavailable unless he believed Wootton intended to commit a forcible or atrocious crime against him, foreclosing the option in CALJIC No. 5.12, in fact the prosecutor argued both during her rebuttal closing: “[T]he Defendant had to believe [Wootton] was going to cause him great bodily injury or an atrocious crime on him. And factually, how could he? All’s [*sic*] [Wootton] did was come in, grab him off of somebody and throw him down [¶] How is that . . . action possibly going to create fear of great bodily injury . . . ? It isn’t. And it wouldn’t in a reasonable person, either.” While the prosecutor did mention Wootton’s state of mind, it was done in the context

²⁰ To the extent the CALCRIM approach is preferable in avoiding confusion through a reference to the victim’s intent, we do not find the CALJIC phrasing to be prejudicial, particularly in light of the prosecutor’s argument, quoted in the text. (See *People v. Thomas, supra*, 150 Cal.App.4th at pp. 466–467 [holding that although the organization and language of CALCRIM No. 505 may be preferable to CALJIC Nos. 5.12 and 5.13, the CALJIC instructions are correct statements of the law].)

permitted by Penal Code section 197, to illustrate the meaning communicated by Wootton's conduct in grabbing defendant from behind. Her argument was consistent with the jury instructions and the law.

K. Prosecutorial Misconduct During Closing Argument

Defendant contends his attorney provided ineffective assistance in failing to object to prosecutorial misconduct committed during closing argument when the prosecutor commented on defendant's lack of remorse and purportedly mentioned facts not in evidence.

1. Comment on Lack of Remorse

During her rebuttal argument, the prosecutor stated: "Also, something that you can consider is the complete lack of remorse. If this was self-defense, as opposed to just a cold-blooded murder, surely there's going to be some remorse. Especially right after you've taken the life of another human being." She then recounted three telephone calls made by defendant from the police station soon after the killing, arguing none demonstrated the type of attitude toward the loss of life one might expect had he killed in self-defense.

Defendant contends it is impermissible for a prosecutor to argue a defendant's lack of remorse during the guilt phase of a trial and the prosecutor's argument was impermissible comment on his invocation of the right to silence (*Doyle*²¹ error) and his failure to testify at trial (*Griffin*²² error).

The Supreme Court has rejected defendant's argument that lack of remorse cannot be argued as evidence during the guilt phase of a trial. "Defendant's contention that remorse or the absence of remorse is inadmissible at the guilt phase overstates the law. Absence of remorse is irrelevant to prove that a defendant committed a homicide, but it may be relevant, because it sheds light on the defendant's mental state, in determining the degree of the homicide or the existence of special circumstances." (*People v. Michaels*

²¹ *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

²² *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

(2002) 28 Cal.4th 486, 528.) Here, the prosecutor argued defendant’s lack of remorse as evidence of his mental state, claiming he did not display the attitude one would expect from someone who had been forced to kill in self-defense. (E.g., *People v. Burden* (1977) 72 Cal.App.3d 603, 620 [lack of remorse in statements to police following killing relevant as evidence of a an “abandoned and malignant heart” for purposes of second degree murder conviction].) The case on which defendant relies, *People v. Fierro* (1991) 1 Cal.4th 173, disapproved on other grounds in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 205–207, holds only that lack of remorse is relevant to the penalty phase of a capital prosecution, without discussing its use in the guilt phase.

Doyle error consists of a prosecutor’s “use [of] a defendant’s postarrest silence following *Miranda*^[23] warnings to impeach the defendant’s trial testimony.” (*People v. Collins* (2010) 49 Cal.4th 175, 203.) Defendant’s argument for *Doyle* error is based on *People v. Hollinquest* (2010) 190 Cal.App.4th 1534 (*Hollinquest*), in which the prosecutor presented evidence that the defendant, during telephone calls with a friend from jail, discussed his case without ever mentioning the murder that occurred or his relationship with a confessed participant in the killing. (*Id.* at pp. 1545, 1554.) Although *Doyle* error is ordinarily associated with comment on a defendant’s silence in the face of police questioning, the *Hollinquest* court held that *Doyle* error could cover comment on a defendant’s silence with a private party if the circumstances suggested the silence arose primarily from a conscious exercise of the defendant’s constitutional rights. (*Hollinquest*, at p. 1556.) Because the defendant had been told his calls were being monitored and had been given his *Miranda* rights, the *Hollinquest* court found his otherwise unexplained silence on these issues “indicative” of an exercise of constitutional rights. (*Id.* at p. 1557.)

The critical element of *Doyle* error, comment on a defendant’s postarrest *silence*, was missing here. Rather, the prosecutor’s argument was directed at defendant’s attitude during the telephone calls, which she described as “cold-blooded.” With his friend,

²³ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

defendant adopted a casual attitude and discussed the continued police presence at the friend's house. With his father, defendant—far from being silent—denied having stabbed anyone and described the forces he faced with Russell.²⁴ Speaking with his mother, defendant did acknowledge the stabbing, saying: “Basically, fucking I stabbed some dude and he died.” The prosecutor did not argue defendant's failure to say any particular thing during these conversations as proof of his guilt. Instead, she argued the tone and general content of each showed an absence of the regretful attitude one would expect if the killing had been done reluctantly, in self-defense.

More importantly, there were no circumstances suggesting defendant was exercising his constitutional right to silence during these telephone calls. The telephone calls were taped surreptitiously. Unlike *Hollinquest*, in which the defendant was warned his telephone calls from jail were being monitored, defendant had not been told his calls were monitored and was alone in the police interview room when he made them. In addition, although defendant was given the *Miranda* warnings prior to making the calls, he had waived his right to silence and agreed to talk to police before making the first two calls. It was not until an hour and 40 minutes into the police interview, just prior to the call with his mother, that he invoked his right to silence by requesting an attorney. Perhaps most indicative, none of the conversations featured the type of reticence—a failure to comment where one might expect a comment or a hesitance to talk about aspects of the crime—suggesting a conscious exercise of the right to silence. (See *Hollinquest, supra*, 190 Cal.App.4th at pp. 1556–1557.)

Because there was no *Doyle* error to which defense counsel could have objected, her failure to object did not constitute ineffective assistance of counsel. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 75 [where defendant fails to identify

²⁴ Defendant claims that during the call with his father he “state[d] that he is not guilty of the crime and that he did not want to talk about the incident.” In fact, defendant gave his father a long, exculpatory account of the fight that runs to over two pages of text, before saying he did not want to discuss the fight anymore. There was neither silence nor an invocation of his right to silence.

meritorious grounds for exclusion of evidence, there can be no ineffective assistance for failing to seek exclusion].)

We find no substance in defendant's claim of *Griffin* error, which occurs when a prosecutor argues a defendant's failure to testify at trial or other invocation of the right against self-incrimination as evidence of guilt. (*Griffin, supra*, 380 U.S. 609, 615; *People v. Carter* (2005) 36 Cal.4th 1114, 1191–1192.) Defendant does not explain how the prosecutor's discussion of his attitude during telephone calls with a friend and his parents constituted a comment on or reference to his failure to testify at trial, and we see no connection.²⁵

Even if these comments had constituted prosecutorial misconduct, the failure to object was harmless beyond a reasonable doubt. (*People v. Brady* (2010) 50 Cal.4th 547, 566 [prejudice standard for *Griffin* error]; *People v. Coffman and Marlow, supra*, 34 Cal.4th 1, 119 [prejudice standard for *Doyle* error].) Each of the conversations had been admitted into evidence already. As noted, the prosecutor focused on defendant's attitude, rather than any particular aspect of the substance of the conversations. The calls themselves did not feature substantively incriminating comments. Accordingly, there is no reasonable probability that, but for the failure of counsel to object, the jury's decision would have been different. (See *In re Crew, supra*, 52 Cal.4th 126, 150.)

2. The Prosecutor's Reference to Her Knowledge

Defendant also contends the prosecutor committed misconduct by referring to facts not in evidence on four occasions when she said, "I know." These are quoted below with the purportedly objectionable portion in italics:

"Now, I don't know if Kim Chamberlain or Matthew Anderson were outright lying to you [in giving positive character testimony for defendant]. That's not my call to

²⁵ Defendant notes the trial court expressed concern that a portion of *defense counsel's* argument allowed an inference that defendant had been prevented from testifying. Defense counsel's argument was unrelated to defendant's postdetention telephone calls and, in any event, would not constitute prosecutorial misconduct.

make. . . . *But I do know* that everything about the Defendant's history is inconsistent with . . . having character for being a peaceful person." (Italics added.)

Again, in discussing the character evidence: "I didn't make character an issue. *But I'm not going to sit here knowing what I know* and let you guys be misled into believing that the Defendant is somebody that he's not. And there is overwhelming evidence that the Defendant is a violent, explosive person with anger management issues his whole life." (Italics added.)

Following an extended discussion of defense counsel's comments in her opening statement about the sequence of 911 calls and the relevant evidence concerning the calls: "[Counsel's comments] didn't make sense. It was an attempt to, I don't even know, but *it wasn't the truth. I do know that.* And the truth is that the first call, the very first call for help, . . . was not the Defendant. He had a phone on him." (Italics added.)

Discussing alleged intimidation by members of the defense team of a defense witness: "She's a great corroborating witness. Why didn't I call her? Well, there's only so many hours that you guys had to sit and listen to the same testimony over and over. I considered every witness that was called by the defense a good witness with the exception of the Defendant's friends. *And I knew their statements. I knew they had good stuff to say. I wasn't worried about anything that they were going to say.* But a lot of it was cumulative. And also, what did it add?" (Italics added.)

It is prosecutorial misconduct for a prosecutor to refer to purported facts that are not in evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 828.) " 'It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' ' ' (Ibid.)

For this reason, it is improper for a prosecutor to imply to a jury that his or her opinion of the defendant's guilt is based on information not revealed in court. The language employed by the prosecutor ran the risk of making such an improper suggestion to the jury, but we find no actual intent to convey an improper impression. None of the prosecutor's references to her own knowledge cited by defendant, when considered in

context, was an attempt to suggest knowledge of evidence outside the record. Each occurred during the summation of an extended discussion of the evidence on the topic discussed. When the prosecutor spoke of what she “knew,” the context made clear she was referring to her knowledge of the evidence in the record. We do not believe the jury would have construed these comments as referring to additional facts not presented at trial. Because there was no error to which defense counsel could have successfully objected, her failure to object did not constitute ineffective assistance of counsel. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 60, fn. 14.) Further, given the content of these references and secondary nature of the topics to which they were addressed, we conclude any failure to object was harmless. (See *In re Crew, supra*, 52 Cal.4th at p. 150.)

L. Denial of Request for Partial Transcript and a Continuance

Defendant contends his rights to due process and effective assistance of counsel were violated when the court denied his request for partial trial transcripts and a continuance of sentencing to permit the filing of a motion for a new trial.

Five days after the jury rendered its verdict, defendant filed a motion for a continuance of the sentencing date, which was scheduled to occur one month from the date of the verdict. Counsel explained she intended to move for a new trial, which must be heard prior to sentencing, and there was insufficient time to obtain the trial transcripts necessary for the motion. Counsel estimated a minimum of 90 days would be required for production of the transcript. The motion was denied.

Six days later, defendant sought funding for the preparation of portions of the transcript for use in connection with a new trial motion and renewed his request for a continuance. This time, counsel summarized 15 specific issues she intended to address in the new trial motion and sought a continuance of 120 days while the partial transcripts were being prepared. The motions were denied, the court finding “insufficient showing of particularized need or good cause.”

At sentencing, the court inquired whether a motion for a new trial was pending. Counsel said there was none, given the court’s denial of the motion for more time and

partial transcripts. The court then explained its denial of these motions, citing decisions holding there is ordinarily no need for a transcript in the preparation of a new trial motion, given the familiarity of both court and counsel with the trial proceedings. The court then turned to the various proposed grounds for a new trial set out by counsel in the motion for a continuance, citing that motion as proof counsel was able to prepare “an in-depth, well-written and well-analyzed motion” in the time provided. Discussing each ground individually, the court found none sufficient to justify a new trial.

Although an indigent defendant has the right to obtain a trial transcript in connection with an appeal, there is no similar right for the preparation of a new trial motion. As explained in the leading case, “With few exceptions, an accurate trial record, such as a reporter’s transcript, is absolutely essential for the proper disposition of a criminal appeal. An appeal is before a different tribunal and, more often than not, is heard many months after the trial is concluded. On the other hand, a motion for a new trial is generally made by the lawyer who participated in the trial, before the judge who presided, and at a time when the testimony adduced is still fresh in everyone’s mind. Thus, the need for a full trial transcript to argue a motion for a new trial simply does not exist in the ordinary case.” (*People v. Lopez* (1969) 1 Cal.App.3d 78, 82, fn. omitted.) Nonetheless, “since a motion for a new trial is an integral part of the trial itself, a full reporter’s transcript must be furnished to all defendants, rich or poor, whenever necessary for effective representation by counsel at that important stage of the proceeding.” (*Id.* at p. 83.) Each case is decided on its individual circumstances (*ibid.*), with the defendant required to make a showing of a “particularized need” for the transcript. (*People v. Markley* (2006) 138 Cal.App.4th 230, 242.)

We find no abuse of discretion in the trial court’s denial of a transcript. Both defense counsel and the court were intimately familiar with the record. Counsel demonstrated her familiarity by listing various grounds for a new trial in the motion for a continuance, and the trial court demonstrated an equal familiarity by discussing each of these grounds prior to pronouncing sentence. Defendant’s motion for a partial transcript relied largely on the claim that memories of events at trial differ and without the

transcript it would be impossible to settle those differences. Because it was not connected to any particular disagreement, this is not a particularized showing of need; in the abstract, as here, it is an argument that could be made in connection with every new trial motion. Further, while counsel did ask only for portions of the transcript in the second motion, those “portions” involved 13 witnesses, all evidentiary discussions and rulings, and the prosecutor’s closing argument. Given its breadth, this is not a “particularized” request, calculated to address issues in which differences in memory had been demonstrated or in which the exact content of the transcript is particularly important. Defendant makes no present showing how the lack of a trial transcript would have prevented trial counsel from making any of the proposed arguments for a new trial or how the presence of a transcript could have changed the court’s ruling on the new trial motion grounds at sentencing.

When ruling on motions for a continuance of sentencing to permit the filing of a motion for a new trial, “ [b]road discretion must be granted trial courts . . . ; only an unreasoning and arbitrary “insistence upon expeditiousness in the face of a justifiable request for delay” violates the right to the assistance of counsel.’ ” (*People v. Alexander* (2010) 49 Cal.4th 846, 934.) We find no abuse of discretion in the trial court’s denial. As defendant’s motion for a continuance demonstrated in listing various grounds for a new trial motion, there was adequate time for counsel to prepare a motion for a new trial. The continuance was necessary only to permit the motion to be backed up by a trial transcript. Because counsel and the court were sufficiently familiar with the events at trial to permit the making of an effective motion for a new trial, the court did not act in an arbitrary manner in declining the request for a continuance.

M. Cumulative Prejudice

Defendant argues the errors he cites, considered cumulatively, were sufficiently prejudicial to require reversal. As discussed above, the only potential errors we found concerned admission of the rap lyric in the prosecution’s case-in-chief, admission of the Knoth testimony, and the form of cross-examination questions posed to Kimberly Chamberlain. The lyric was properly admissible as rebuttal evidence, and the other two

matters were not even the subject of objection. Yet even if these had constituted error and been preserved, their impact was not of sufficient cumulative significance to have prejudiced defendant, given their peripheral nature and the substantial direct evidence of his guilt. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1099.)

N. *Unfair Tribunal*

In a supplemental opening brief, defendant argues that four instances of conduct by the court—the instruction regarding Gabaeff’s testimony, the admission of William Harris’s crimes, the deferral of a ruling on his motion to quash the school records subpoenas, and the treatment of violent character evidence—illustrate judicial bias that deprived him of a fair trial. As noted above, judicial rulings alone rarely constitute a valid basis for finding bias. (*People v. Guerra, supra*, 37 Cal.4th 1067, 1111–1112.) Further, for the reasons discussed in connection with each individual issue, the court’s actions on these matters do not suggest, let alone demonstrate a bias against defendant.

III. DISPOSITION

The judgment of the trial court is affirmed.²⁶

Margulies, J.

We concur:

Marchiano, P.J.

Banke, J.

²⁶ By separate order filed this date, we have denied defendant’s petition for habeas corpus in case No. A133643.