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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JANOS KULCSAR,

Defendant and Appellant.

B239837

(Los Angeles County
Super. Ct. No. YA077647)

APPEAL from a judgment of the Superior Court for Los Angeles County,
Mark S. Arnold, Judge. Affirmed.

Mark W. Fredrick for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle
and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

In a cold case prosecution, defendant Janos Kulcsar was found guilty of first degree murder (Pen. Code,¹ § 187, subd. (a)) with a personal use of a deadly weapon (§ 12022, subd. (b)(1)) for the 1985 stabbing death of Archie McFarland, the husband of the woman with whom defendant had been having an affair. He appeals from the judgment sentencing him to a term of 26 years to life in prison, arguing that (1) the 25-year delay in charging him violated his due process rights; (2) there was insufficient evidence to support his conviction; (3) he received ineffective assistance of counsel at trial; and (4) the prosecutor committed misconduct. We affirm.

BACKGROUND

A. Archie and Mary Ann McFarland Meet and Get Married

Archie and Mary Ann McFarland² met in the early 1950s, when they both worked at Pitney Bowes. Mary Ann was 18 years old at the time; Archie was nine years older. Mary Ann was married to a man who was in the service. She and Archie were platonic friends.

At some point, Mary Ann moved back to Michigan (where she grew up) and lived there with her husband. They had a daughter, Linda, in 1960. When Mary Ann was 26, she and her husband divorced. One day, she found an old Christmas card list with Archie's name at the top, and sent him a Christmas card. Archie responded. They started corresponding, and eventually Archie went to Michigan for a visit. After he got back home, Archie wrote to Mary Ann and invited her and Linda to come to Los Angeles. They did, and shortly thereafter Archie and Mary

¹ Further undesignated statutory references are to the Penal Code.

² We will refer to the members of the McFarland family by their first names to avoid confusion.

Ann married. Archie helped raise Linda and, in 1965, he and Mary Ann had a son, Gary. In 1976, they bought a house on 184th Street in Torrance, where Mary Ann continues to live.

B. *Mary Ann and Defendant Begin Their Relationship*

Mary Ann became dissatisfied with her marriage to Archie. He was not cruel, or mean, or violent, but Mary Ann felt he did not pay any attention to her. In 1982, she went with a girlfriend to Alpine Village in Torrance to have dinner. There she met defendant, who was 15 years younger than she (almost 25 years younger than Archie). They danced, and defendant asked her for her telephone number. She gave it to him, although she told him she was married. He began calling her, and eventually she agreed to have dinner with him. She had dinner with him a few times, and told Archie about it.

Defendant and Mary Ann started a sexual relationship. Mary Ann's son, Gary, began to realize that his mother was having an affair, and saw that his father knew as well. To Gary, his father seemed powerless to stop it. Gary could see his father was hurt; Archie often had tears in his eyes when Mary Ann would say she was going out with friends.

When Gary was around 19 years old, he and Mary Ann got into an argument, and Archie took Gary's side. Mary Ann stormed out of the room and into her bedroom, and 30 seconds later the phone rang. Archie looked unhappy, and said, "That guy is calling." Gary went into Mary Ann's bedroom, and told her to get off the phone. She told Gary to get out of her room, but Gary went over to her, grabbed the phone and said into it, "Don't ever fucking call here again, I swear to God." He hung up the phone. The phone rang again, and Gary answered it. He told the caller, "Do you have any idea what you're doing to my family? Don't ever call here again." After he hung up the phone, Mary Ann announced, "That's it.

I'm outta here." As she was throwing some things into a suitcase, Gary was yelling at her to go, while Archie was trying to stop him and calm him down. Mary Ann left, and moved in with defendant.

Mary Ann and defendant lived together in Long Beach for about a year and a half. To Mary Ann, Archie appeared to be passive about her moving in with defendant, but he was clear that he wanted her to move back.

C. *Mary Ann Breaks Up With Defendant*

After a while, Mary Ann decided to move back home. She was tired of the drama, and was worried about the age difference between defendant and herself, fearing that defendant eventually would leave her. She concluded she would have more financial security with Archie. When Archie told Gary that Mary Ann was moving back and they were going to try to work things out, Gary told him that he should just move on with his life. Archie told Gary that he still loved Mary Ann, and asked Gary to treat her with respect.

Defendant did not want Mary Ann to leave him. He told her that if she left, he "would skin [her] alive." After she moved back in with Archie and Gary, defendant called her continually. He made threats to try to get her to come back to him, saying that if she did not come back, there would be consequences.

On December 2, 1985, Mary Ann overheard a telephone conversation Archie was having. She heard Archie say, "Go fly a kite," and hang up the phone. Archie told her he was speaking to defendant. The phone rang again, and they let the answering machine pick it up. They heard defendant say something like, "You better call me back or I'm going to get you" in an angry tone.

The next day, defendant came to the McFarlands' house. When Gary saw defendant at the door, he turned and walked away, and heard his father say, "Why did he come here?" Gary saw defendant, who was acting "a little deranged," shake

Archie's hand, and Archie and defendant sat down. Mary Ann, who was in the shower when defendant arrived, walked into the room and saw them sitting there. She was shocked. Defendant saw her and said, "Darling, come sit over by me." She did. Defendant told Archie, "As you know, I've been seeing your wife." He said that Mary Ann "belonged" to him and that he was "good for her." Archie responded that he had been married to her for 28 years, that defendant did not have a claim on her, and that the affair was over because Mary Ann was with him now. When defendant said he wanted to hear it from Mary Ann, she told him that it was over. Defendant stood up and asked to use the bathroom.

When defendant left the room, Mary Ann grabbed a case that defendant had set down on the cocktail table in front of him. She opened it and saw there was a gun inside. She had never known defendant to own a gun.³ She took the gun and case out to the backyard and threw it under the bushes. When defendant came out of the bathroom, she asked defendant why he had brought a gun to her house and told him to leave. Defendant left, and Mary Ann followed him outside. She asked him what he was trying to do. He said he had planned to kill himself on her front lawn. She told him that he was young and she was too old for him, and that he should find someone else and have a life. He was crushed, telling her that she was "the one." He said that he would kill himself if she did not come back to him by Christmas.

As defendant was leaving, he asked to see her again. She told him she would come see him in a few days, because she wanted to make sure he did not kill himself. She then called him and told him that she could not come because her car was broken; she lied because she did not want to see him. On Friday, December 6,

³ The parties stipulated at trial that the gun was registered to defendant. He had bought the gun in early November 1985, and picked it up on November 27, 1985, the first day after the mandatory 15-day waiting period.

defendant unexpectedly showed up at Mary Ann's house when Archie was not there. Mary Ann made breakfast for him. Defendant told Mary Ann their relationship was not over yet, and that maybe there was a reason why she took the gun from him and stopped him from killing himself.

D. *Archie is Murdered and Defendant is Arrested*

On the evening of Sunday, December 8, 1985, Archie told Mary Ann and Gary that he was going to be getting up earlier than usual the next morning. Usually, he did not leave for work until 6:00 a.m., and would knock on Gary's door when he got up to make sure Gary was getting up, because Gary was supposed to get to work by 5:30 and had a habit of turning off his alarm. On December 9, Mary Ann heard Archie knock on Gary's door at around 4:30 a.m.; Archie stuck his head into Gary's room to tell him to get up because he was leaving earlier than usual, and would not be able to wake him up later. Gary got up and took a shower. After his shower, he got a phone call from work, at around 5:10 or 5:15, asking him to bring a saw to work to cut some branches off the Christmas tree. As he was leaving the house, Gary hit the button near the front door to open the garage door. It was pitch black outside. He started walking down the front steps and saw what he thought was someone sleeping in the driveway; he thought it was a homeless man. The garage door shed a little light as it opened, and as Gary got closer, he recognized his father's clothing and heard his father's car running.⁴ He called out "Dad, Dad" while walking over to him, and pushed Archie's shoulder. Archie did not respond. He thought Archie had suffered a

⁴ Archie usually warmed up his car before driving; he would go out and start it, then go back into the house to get his coffee and belongings while it was running.

heart attack; he did not see any blood. He ran back into the house, calling for his mother and telling her to call 911.

Mary Ann had heard the garage door opening and heard her son yelling “Dad.” Gary came running into the house and told her that Archie was lying on the driveway and he could not get him up. She and Gary ran outside. She saw Archie lying on his side with his hand across his body, and saw his car, with the driver’s door open and the motor running. She thought Archie had had a heart attack. Their neighbor Terry came out of his house, ran over, and told Mary Ann to get a comforter. Terry turned Archie over onto his back, and they all saw blood on his chest. Gary immediately turned to his mother and said, “I can’t believe that mother fucker.” Mary Ann responded, “I’m so sorry. I’m so sorry. I can’t believe he would do this. I’m so sorry. I’m so sorry, son.”

Torrance Police Officers Pete Velis and Juan Devalle were the first officers to arrive at the scene, at 5:40 a.m. Paramedics had already arrived, and were treating Archie. The officers spoke to Mary Ann, who told them, “I’m sorry, sorry, I know who did it. It was Janos Kulcsar.” She gave them defendant’s address, a description of his car, and a photograph of him. She told them that defendant was her ex-boyfriend. Officer Velis notified dispatch and alerted Long Beach Police Department. Mary Ann also told Officer Velis that defendant had brought a gun to her house, and that he was constantly calling her, saying he wanted their relationship to continue and threatening to kill himself. She gave the officer the gun and case; there were two magazines with 13 rounds in the case.

Officer Velis and his partner took Mary Ann to the hospital because she was in shock. While there, she and Officer Velis learned that Archie was dead on arrival. Officer Velis saw that Archie had multiple stab wounds, including one that was close to the groin. While at the hospital Officer Velis interviewed Mary Ann’s daughter, Linda. Linda brought up defendant and her mother’s affair with him.

Linda told the officer, among other things, that her mother told her that defendant had said that he would get even, and that Mary Ann would pay for his grief.

Officer Velis also went through Archie's personal effects at the hospital. Archie's wallet was there, with \$287 in it. Nothing appeared to be missing.

In the meantime, Long Beach Police Officer David Frazier and his partner, Tommy Steinboerner, were dispatched to defendant's address (330 Orizaba) in Long Beach. They also were given the make, model, and license plate number of defendant's car, a black Volkswagen. They arrived at defendant's address at 6:04 a.m., and saw defendant's car parked in front of 326 Orizaba. They got out of their patrol car and began to feel the hoods of cars parked in the area. It was 39 degrees outside, and none of the hoods was warm. Officer Frazier touched the rear of defendant's car (where the engine was), and it was very hot. He recorded the time in his report; it was 6:10 a.m. He notified his sergeant, and his sergeant began to set up a perimeter around 330 Orizaba.

Officer Frazier saw a man matching defendant's description exit the residence and walk toward the Volkswagen at 6:27 a.m. The man did not have anything in his hands. The man went to the driver's side, opened the door, and got in. Officer Frazier notified his supervisor, ran over to the car with his gun drawn, and ordered the man to get out of the car. The officer asked for the man's name, and he told the officer his name was Janos Kulcsar and that his I.D. was on the seat of the car. When Officer Frazier looked inside the car, he saw a laundry basket on the passenger seat. Officer Frazier told defendant he was under arrest for murder.

Torrance Police Detective Gilbert Kranke had been called to the scene of the stabbing at around 5:50 a.m. When he arrived, the field supervisor told him to respond to a location in Long Beach where they had a possible suspect's vehicle under observation. As he and his partner, Detective Steve Monson, were driving to that location, they were told that officers were detaining the suspect. They also

were told of the circumstances surrounding his detention, the condition of his car, and the outside temperature.

When Detectives Kranke and Monson arrived, they took defendant into their custody. Defendant was wearing a beige sweatsuit and light-colored shoes. The detectives spoke with the Long Beach officers about their observations regarding defendant's car.⁵ When Detective Kranke looked inside defendant's car, he saw a basket of laundry; the clothes appeared to be folded and clean. The detectives placed defendant in their car, talked to the manager of the apartment for a short period, then drove back to the Torrance Police Department. While they were driving, Detective Kranke advised defendant of his *Miranda* rights. Defendant waived his rights and agreed to talk. He told Detective Kranke that he had not left his apartment that morning before he was detained. He said that he was going over to his brother's house to change the oil in his car, and that no one else had used his car.

After defendant was booked, Detective Kranke talked to defendant again, and defendant gave a different description of the events of the morning. He told the detective that he had gotten up earlier, drove toward his brother's house, and then realized that he had to go back to get some laundry. He went into his apartment, and when he came back out, he was confronted by the police. Defendant also told him that he had washed some clothes by hand while he was in his apartment. After obtaining a search warrant, Detective Monson entered the apartment and discovered a pair of pants and a shirt hanging in the shower; the clothes were wet and it appeared they were hanging up to dry. The clothes were collected, as well as a knife that was found in the dish drainer and a towel, and

⁵ Detective Kranke testified that he believed defendant was in a position where he could have overheard that discussion.

were provided to a criminalist for examination. There were no obvious blood stains on any of the items, and no blood was found in defendant's car, which also was subject to the search warrant.

Later that day, Detective Kranke had a conversation with Laszlo Kulcsar,⁶ defendant's brother, who had come to the police station after he heard about defendant's arrest. Laszlo told the detective he last saw his brother on Sunday afternoon, the day before the murder, and talked to him on the phone at around 9:30 that night. Laszlo said that defendant told him about a conversation he had had with Mary Ann earlier in the week. Defendant told Laszlo that Mary Ann expressed concern about her future because she would be 60 in 10 years, and said, "if Archie were to drop dead, I would get everything."⁷

After speaking with Detective Kranke, Laszlo was allowed to speak to defendant in custody. They spoke in Hungarian. Unbeknownst to Laszlo or defendant, their conversation was recorded and translated into English. Laszlo began by saying, "What's going on? Did you lose your mind?" Defendant responded, "Why?" Laszlo asked, "What did you do?" When defendant said he did not do anything, Laszlo said, "What do you mean; you didn't do anything. What happened?" Defendant told Laszlo that he wanted to go to Laszlo's house to fix his car and change the oil, but the police stopped him and pointed guns at him. According to Detective Kranke, who was observing the conversation, Laszlo appeared to be surprised at defendant's statement that he was going to go to Laszlo's house that morning. Laszlo asked defendant what time was he planning to come to his house, and defendant responded that he did not know, but it was

⁶ We will refer to Laszlo Kulcsar by his first name to avoid confusion.

⁷ At trial, Laszlo denied making that statement to Detective Kranke.

already getting light. With that, Laszlo said, “Now, you, tell me the truth already! What happened?”

The next day, the day after the murder, Mary Ann went to the police station. She spoke to Detective Kranke, and told him about defendant’s erratic behavior and the threats he had made. She also told the detective that defendant was a very late sleeper and never got up early if he did not have to. She asked to speak with defendant, to see if he would admit killing Archie. Detective Kranke told her she could do so only if he were present. She agreed. Mary Ann’s meeting with defendant was recorded. During the meeting, Mary Ann was confrontational with defendant. She called him “the poorest excuse for a man,” and accused him “stalking” around her house and killing her son’s father, “somebody who’s old enough to be your father.” She told him that if she had known what he was going to do, she would have loaded his gun herself and given it to him to kill himself.

Defendant denied killing Archie. Mary Ann told him to say to her face, “I did not murder your husband. I do not know who did it, either. I did not pay anyone to do it.” Although he responded by saying “I did not kill your husband,” he then said, “But he’s not your husband. I’m your husband. . . . He’s just on the paper.”

E. *Defendant is Released, the Case is Shelved, and Mary Ann Resumes Her Relationship with Defendant*

Defendant was released from custody two days after the murder, on December 11, 1985, after the District Attorney’s office informed Detective Kranke that it would not be filing a case against defendant. After he was released, defendant started calling Mary Ann again, and refused to accept that the relationship was over. On January 2, 1986, Mary Ann contacted Detective Kranke. She told him that defendant had called her and wanted to meet with her to prove to

her that he was not involved in Archie's murder. Mary Ann said that she wanted to meet with defendant while wearing a hidden microphone to record the conversation.

Mary Ann met with defendant at Bob's Big Boy on January 6, 1986. Although defendant said nothing during that meeting to directly incriminate himself, he made some cryptic comments regarding the Friday before the murder, when he unexpectedly showed up at Mary Ann's house. He referred to something Mary Ann said to him as he was leaving, and said, "It never clicked until I came home. Sometimes I'm slow on things, you know, but it never clicked." Mary Ann reminded him that he had told her that day as he was leaving that "this story wasn't . . . over yet and that maybe there was a reason why I took the gun away from you and kept you from killing yourself." Defendant responded, "I believe everything happened for a reason. I made up my mind, and it's not nice to talk about it, you know, because now it's . . . different."

On March 11, 1986, Detective Kranke stopped working on the case. A year or two later, Mary Ann resumed her relationship with defendant and continued seeing him until he was once again arrested for Archie's murder. Although they did not live together, they saw each other two to three times a week. Mary Ann said she did not love defendant, although she admitted they were sexually intimate. He did chores for her; she referred to him as her "indentured servant." When Gary discovered she was seeing defendant again, he refused to have any relationship with her because he believed defendant killed his father. At one point they ran into each other at a grocery store, and Mary Ann told Gary that she did not love defendant, and that she was just using him, having him do things for her, "because of what he did to your father." Eventually, when Gary and his wife had their first child, he and Mary Ann resumed a cordial relationship; they avoid discussing defendant.

F. *The Case is Reexamined as a Cold Case*

In 1999, the Torrance Police Department started looking into open homicide cases, i.e., cold cases; there were approximately 30 cold cases, and six homicide detectives. Each detective took one case to work on when he or she had free time, but they all had such heavy caseloads they did not have much time to work on cold cases. Finally, in 2006 or 2007, the department formed a full-time team to work on cold cases.

In 2002, Detective Walt Delsigne was evaluating which cold cases he should focus on, and contacted Gary. Although Gary continued to believe that defendant killed his father, little more was done on the case until Detective James Wallace assigned Detective Delsigne and Sergeant Keith Fornier to reinterview defendant in November 2009.

Detective Delsigne and Sergeant Fornier taped their interview with defendant. Defendant denied making threats to Mary Ann or Archie, or threatening to kill himself when Mary Ann moved back in with Archie. In fact, he said he felt no hostility toward Archie, and had no reason to kill himself because he knew that women would “come and go” in his life. When asked about the morning of the murder and where he was going when he went to his car, defendant said he remembered that day well, and then gave a version of events that was different than either of the versions he gave the day of the murder. He said: “I was gonna go to my brother. I, I remember it very good because the baby sitter who was babysitting for the kids. . . . The kids, she had to go to school also, so I had to go get over there early enough so the kids get ready going to school, because my brother was working night time.” He said that he and Laszlo had made the plans for him to babysit in advance, and he could babysit that day because he had the day off from work. He got up that morning, showered, and when he walked out to his

car, the police were there. He said his laundry basket was in the car because he planned to do laundry while at his brother's house.

A couple of months later, Detective Wallace and the prosecutor, John Lewin, interviewed Mary Ann, at the same time that Detective Delsigne and Sergeant Fornier interviewed Laszlo. They interviewed Mary Ann and Laszlo at the same time, in different locations, to prevent them from contacting each other to discuss the case. Both interviews were surreptitiously recorded.

Mary Ann told Detective Wallace and the prosecutor that she had a very good memory, and that it did not matter that a lot of time had passed since the murder. She gave a detailed account of her past marriage, how she met and married Archie, her dissatisfaction with her marriage to Archie, and her affair with defendant. She also detailed defendant's threats when she left him, and discussed the gun incident and making defendant breakfast the Friday before the murder. She recalled that at her meeting with defendant at Bob's Big Boy after the murder defendant had said that something "clicked" after defendant left her on the Friday before the murder, and she believed defendant may have meant by that that he realized he did not need to kill himself, because if Archie were killed he could be with her. Discussing the murder, Mary Ann said she did not believe someone was trying to rob Archie, that defendant was the only one with a motive to kill Archie, and that she thought at the time that defendant was the person who killed him. She admitted that she was still seeing defendant, and did not want to believe he killed Archie because she would feel responsible, but thought it was probable that he was the murderer.

When Detective Delsigne and Sergeant Fornier approached Laszlo and told him they wanted to speak to him about a murder from 1985, Laszlo initially said he had no idea what they were talking about. When asked if he remembered speaking to defendant while defendant was in custody, he claimed he had no memory of

that. They asked him whether defendant used to babysit for his children in 1985.⁸ He told them that defendant would babysit with Mary Ann. When they did, it was planned in advance, and they would come over to his house the night before and sleep over, since he worked nights. He did not remember whether defendant had made plans with him to come over to his house the morning of the murder.⁹

G. *Defendant is Tried for Murder*

Defendant was arrested, and on September 27, 2010, he was charged by information with one count of murder (§ 187, subd. (a)), with a special allegation that he personally used a deadly weapon in the commission of the offense (§ 12022, subd. (b)(1)).

1. *Prosecution*

At trial, the prosecutor called Mary Ann to testify. Although she was a difficult witness and often claimed not to remember details she had remembered clearly when she was interviewed a year before (when questioning her, the prosecutor played several clips from that interview, as well as her two recorded encounters with defendant after the murder), she confirmed that defendant had made numerous threats after she moved back in with Archie, although she attempted to minimize them. She also testified that she did not know anyone, other

⁸ In 1985, Laszlo lived in a house in Garden Grove with his two daughters, who were born in 1973 and 1980. He worked the graveyard shift, from 10:30 p.m. to 7:00 or 7:30 a.m.

⁹ When Detective Delsigne and the prosecutor went to Laszlo's house to speak with him the following week, Laszlo told them he could not speak with them at that time. Although he said he would call to arrange a time to speak with them the next week, he failed to do so, and subsequently refused to talk to the police.

than defendant, who had any issue with Archie. Recordings of Mary Ann's meeting with defendant in custody the day after the murder, and their meeting at Bob's Big Boy were played for the jury.

Gary also testified, and confirmed that defendant called his mother constantly, wanting her to come back. He also testified that his mother had told him about defendant's threats at the time they were made. Both Gary and his sister Linda testified that Archie had no enemies that they were aware of.

In addition to the various peace officers involved with the investigation at the time of the murder and when it was reopened as a cold case, the prosecution presented testimony from criminalists involved with testing performed on the evidence, the chief deputy medical examiner, and a Volkswagen mechanic.

Criminalist Victor Wong received from Detective Monson the pants and shirt he collected from defendant's apartment, and examined defendant's car. He performed a Luminol test on the car, and it was negative. He explained that Luminol is a chemical test used to look for blood in a dark environment, and that it can give false positives. If there is a positive under the Luminol test, a Kastle-Myer test (or KM test) can be used to determine if blood is present on a stain. The Luminol test is much more sensitive but less exacting, and the KM test is less sensitive but much more exacting. The prosecutor posed a hypothetical to Wong, asking him to assume that an individual got a small amount of blood on a pair of pants and used a cleaning solvent to get the blood off. The prosecutor asked whether it would be consistent with that scenario if the pants tested positive under the Luminol test but negative under the KM test. Wong testified that it would be consistent. Wong also testified on cross examination that it is possible to get a positive under the Luminol test if someone simply washes clothes in certain types of detergent or uses a product such as Shout.

Criminalist David Hong performed tests in 1985 on the pants and shirt collected from defendant's apartment. The Luminol test showed positive areas on the pants, but a KM test done on those areas was negative. The prosecutor posited the same hypothetical he gave to Wong, and Hong agreed that the test results were consistent with the scenario. Like Wong, Hong testified that it would not be surprising to get a positive Luminol result if someone had simply hand-washed a garment using certain cleaning agents, but he said if the pants he examined had been washed, the entire garment would have been positive, rather than just two spots.

In 2002, after the investigation of the murder was reopened, the pants and shirt collected from defendant's apartment were sent to Serological Research Institute (SERI) in Richmond, California, where they were examined by chief forensic serologist Brian Wraxall. Wraxall testified that he noticed staining on the bottom part of the pants legs, not in the area previously marked by criminalist Hong; the staining looked like dirt or mud. He tested that area for blood, and the tests came back negative. When the prosecutor gave him the same hypothetical he had given the other criminalists, Wraxall said, "Blood, particularly freshly deposited blood, is very soluble in just water and other cleaning products. So that would remove any blood fairly easily," so he would expect a positive Luminol from whatever cleaning product was used, even if there no longer was any blood present.

Criminalist John Bockrath, an expert in DNA analysis, examined blood from the driveway of the McFarland residence and fingernail clippings and scrapings taken from Archie's body, using technology that did not exist until 1998 or 1999. All but one of the blood samples he examined had a single source, which was Archie. The other blood sample had a single DNA marker at one locus out of 15 that was foreign to Archie. Bockrath concluded that it was simply background

DNA that was on the driveway before the blood was deposited. Three of the fingernail clippings Bockrath examined showed signs of DNA that was not from Archie. There appeared to be two different sources for the foreign DNA, neither of which were defendant. In Bockrath's opinion, based upon the minimal amount of foreign DNA, it was not related to a close contact struggle between the victim and his assailant.

Chief deputy medical examiner Christopher Rogers was asked to review the complete record of the original autopsy conducted in 1985; he did not perform the autopsy. He testified there were five stab wounds, one in the middle of the chest, one in the left lower abdomen, two on the left side of the chest, and one very high on the inside of the left thigh, near the scrotum. Three of the wounds were fatal. The wound in the middle of the chest would have been rapidly fatal, because it went through the heart and into the aorta; Archie would have lost consciousness very quickly. The other two fatal wounds went into the left lung, with one of them also hitting the edge of the liver; they would not have been as rapidly fatal as the other wound. The wound on the inner thigh was in a very unusual location for a stab wound, and the direction of the wound was straight up. Dr. Rogers opined that given the location and direction of the wounds, the most likely scenario of the stabbing is that Archie received the wounds to his chest and abdomen while he was standing up. The wound to the center of his chest would have caused him to lose consciousness and fall down, and he received the wound to his inner thigh while he was on the ground.

Dr. Rogers noted that, in addition to the stab wounds, there was a wound on the inside of one of Archie's fingers, which he described as a classic defensive wound. Dr. Rogers also noted most of the bleeding from the stabbing was internal; there were almost three liters of blood in the left and right pleural cavities and pericardial sac.

Finally, mechanic Jose Luis Vargas testified as an expert about the heat generated by air-cooled engines found in 1964 Volkswagen Beetles, the kind of car defendant drove in 1985. He testified that if the car had not been driven since the day before, the motor would not be hot in the morning when it is 39 degrees outside. He was asked whether the engine would be very hot to the touch if the car had been driven roughly two miles, for about 15 minutes, on a 39-degree day. He said he would not expect the engine to be very hot under those circumstances, and that it would be very hard to get the engine that hot in a very short period of driving.

2. *Defense*

The defense presented testimony from its own Volkswagen expert, a forensic expert, and the McFarlands' next-door neighbor.¹⁰

Mechanic Horst Warlich was asked whether the hood of a Volkswagen beetle would be very hot to the touch in 39-degree weather if the car had been warmed up before being driven for approximately two miles on surface streets. He responded that it definitely would be warm. He said that if the driver drove at high RPM on surface streets, or if the engine was missing certain parts, it could get hot. On cross examination, Warlich was asked whether a highly skilled mechanic¹¹ with experience with Volkswagens would rev up a cold engine while driving two miles. He responded that such a mechanic would not.

¹⁰ The defense also called Mary Ann to testify that neither she nor Archie had ever discharged the gun defendant brought to their house (which was contrary to Detective Kranke's testimony that Mary Ann told him they had done so).

¹¹ Laszlo testified in the prosecution's case that both he and defendant were trained in auto mechanics.

Forensic scientist Marc Taylor reviewed the blood and DNA evidence and test results. He testified that based upon the amount of blood splatter shown in the photos of the crime scene and the type of defensive wounds on Archie's body, he would expect that the assailant would have gotten blood on his shoes and clothing, and there would have been blood transferred into any car the assailant used to flee the scene. Taylor admitted on cross examination, however, that most of Archie's bleeding was internal, and that he did not know whether CPR had been administered at the scene or whether Archie's body had been moved. He also acknowledged that the blood distribution and splatter could have been caused by the administration of CPR or movement of the body.

Next-door neighbor Terry Savolt testified that he woke up a few minutes before 5:00 a.m. on the morning of the murder because he heard a sound out his front window. He heard a voice screaming or yelling. He then heard someone say "Hey," and the stuttering of feet dragging for a few feet, followed by a thump and feet running away. The thump sounded like a body falling. He looked out his window towards the street, but did not see anything. He went back to bed for a few minutes until his alarm went off at 5:00. He got up, took a shower, and started getting dressed. As he was putting on his tie, he heard Gary yelling "Dad, Dad, Dad." Savolt ran outside and saw Gary by the front door and Archie lying face down in the driveway. He rolled Archie over, called out to Gary, and saw Mary Ann standing at the front door. Both of them seemed to be in shock, so Savolt ran back to his house to call 911. As he put the phone down, he saw blood on the phone and on his hand. He ran back to Archie and tried to feel for a pulse on his neck, but could not feel anything.

H. *Verdict, Motion for a New Trial, and Sentence*

The jury deliberated for just over two and a half hours before returning with a verdict. It found defendant guilty of murder in the first degree, and found that he personally used a deadly weapon.

Defendant, represented by new retained counsel,¹² filed a motion for a new trial based upon inadequate assistance of counsel and denial of due process due to pre-arrest delay. In denying the motion with regard to the pre-arrest delay, the trial court found “there was no ill will or bad intent on the People’s part in delaying the bringing of this case.” The court also found there was no prejudice to defendant caused by the delay, noting that most of the evidence defendant asserts was not available for trial was never recovered by the police in the first place, and it is speculative that the evidence that was recovered but no longer available would have exonerated defendant. With regard to defendant’s assertion of inadequate assistance of counsel, the trial court stated that it disagreed that counsel’s performance fell below an objective standard of professional norms. In any event, the court found that defendant did not establish prejudice because even if all of defendant’s claimed errors were true, the result would not have been different. The court stated: “I sat up here. I watched the witnesses. I listened to the testimony. And the evidence was overwhelming that the only person in the world who had a motive to commit this crime was the defendant. And he had a very strong motive. He had a huge motive.”

Following the denial of the new trial motion, the court imposed a sentence of 26 years to life in state prison, i.e., 25 years to life for first degree murder, plus one year for the deadly weapon allegation.

¹² Defendant was represented at trial by retained counsel Al Amer; the new trial motion was filed by his counsel in this appeal, Mark W. Fredrick.

DISCUSSION

A. *Pre-arrest Delay*

On appeal, defendant argues he was prejudiced by the delay in prosecuting this case because: (1) defendant's car was no longer available, so it could not be determined whether it had been modified in such a way as to cause the engine to be very hot after driving only two miles; (2) due to the passage of time, there was no way to locate the person who had sold defendant car parts the day before the murder, which would corroborate defendant's statement that he was going to his brother's house to work on his car; (3) the basket of clothes found in defendant's car was no longer available for testing to show they were dirty, which would corroborate defendant's statement that he was going to do laundry at his brother's house; (4) because of the delay, it was impossible to investigate money that was missing from the McFarlands' garage in order show there may have been a burglary; (5) defendant can no longer check phone records to determine if Mary Ann had multiple affairs during her marriage to Archie, which would indicate there were other people with the motive to kill Archie; (6) the victim's clothing was no longer available to test for DNA or other evidence that might identify the perpetrator; (7) the victim's watch, which had a small brown thread imbedded in its wristband, was no longer available for testing to see if the thread matched the thread in a button found at the scene; and (8) defendant's neighbors, who might have heard defendant start his noisy car the morning of the murder, could no longer be located and interviewed. Defendant contends that as a result of the prejudice he

suffered, caused by a delay for which he asserts there was no justification, his right to due process was violated. We disagree.¹³

““[T]he right of due process protects a criminal defendant’s interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.” [Citation.] Accordingly, “[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.” [Citation.]’ [Citation.] [¶] Prejudice may be shown by “loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.” [Citation.] . . . [¶] Under the California standard, ‘negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process. This does not mean, however, that whether the delay was negligent or purposeful is irrelevant.’ [Citation.] Rather, ‘whether the delay was purposeful or negligent is relevant to the balancing process. Purposeful delay to gain advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards

¹³ The Attorney General contends defendant forfeited this issue by failing to raise it before trial. It appears, however, that defendant may have delayed bringing a motion to dismiss at the prosecutor’s request. At the hearing on the new trial motion, the prosecutor rebutted defendant’s showing of prejudice by pointing to the evidence produced at trial, and explained that that was “[t]he reason that I always ask that these [motions asserting due process violations caused by pre-arrest delay] are delayed until after trial.”

finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.’ [Citation.] The justification for the delay is strong when there is ‘investigative delay, nothing else.’ [Citation.]” (*People v. Cowan* (2010) 50 Cal.4th 401, 430-431.)

In this case, the prejudice defendant asserts he suffered was either not caused by the delay in prosecution, or is purely speculative.

For example, defendant points out that the car he drove in 1985 was no longer available, and even if it were, there was no way to prove the condition of the car in 1985. He contends he was prejudiced because the prosecution’s case relied on the fact that the rear hood of the car was very hot to the touch when the Long Beach police officers touched it shortly after 6:00 on the morning of the murder. According to defendant, since both expert mechanics who testified at trial stated that the car could have been hot even after a short drive if certain parts were missing, the condition of defendant’s car at that time was critical. While it is true that neither side could prove whether defendant’s car was missing any of those parts at the time of the murder, the prosecution presented evidence that defendant was an expert auto mechanic, and the defendant’s own expert testified that he would not expect a skilled mechanic to operate a car without those parts. Thus, little if any prejudice was caused by the inability to offer evidence that the car was missing certain parts.

Next, defendant contends that, because of the delay in prosecution, he no longer could locate an assistant manager at a Pep Boys store at which defendant had purchased items for his car on the day before the murder. Defendant contends that this witness could have corroborated his statement that he was on his way to his brother’s house to work on his car when he was detained by the police. But evidence that defendant bought items for his car the day before the murder

(assuming, of course, that the assistant manager would have remembered defendant) has little relevance to show that defendant was going to his brother's house the next day, and even less relevance to show that he did not go to the McFarlands' house earlier in the morning, before attempting to go to his brother's house.

Similarly, defendant contends that if the laundry basket found in his car when he was detained on the morning of the murder had been available at the time of trial, the clothes could have been tested to determine whether they were dirty; if the test showed the clothes were dirty, it would have corroborated his statement that he was going to do laundry at his brother's house. Defendant's statement that he was going to do laundry, however, was not a key issue at trial. The key issue regarding his laundry was whether defendant, rather than having driven to the McFarlands, committed the murder and returned to his apartment, was telling the truth when he said that he had started to drive to his brother's house when he realized that he was going to do laundry there, and so he drove back to his apartment to pick up his laundry. The police officer who responded to defendant's apartment at 6:04 a.m. on the morning of the murder testified that the rear hood of the car was very hot at 6:10, and that no one approached the car until 6:27, when defendant walked to the car without anything in his hands. In other words, even if the clothes were dirty (although Detective Kranke testified they appeared to be clean and were folded), that fact would not tend to prove that defendant had not driven to the McFarlands' house, committed the murder, and then returned to his apartment.

Defendant's next assertion of prejudice caused by delay is related to a box containing Archie's "mad money." Defendant notes that Mary Ann told police on December 11, 1985 that the box was missing, and Gary confirmed that it was missing when he was interviewed in 2002. Defendant asserts that the missing box

was not investigated, and argues he was prejudiced by the delay in prosecution because it was impossible to investigate now. There is no evidence, however, as to when the box disappeared. Defendant's suggestion that Archie could have been murdered "when he unexpectedly walked out of his home and stumbled upon someone stealing his money from his garage" not only is pure speculation, it is contrary to the evidence. The evidence showed that the garage door was closed at the time of the murder – Gary testified that he pressed the button to open it, and it was pitch black outside until the garage door began to open and shed some light.¹⁴

Also speculative is defendant's assertion that he was prejudiced by the delay in prosecution because he could not investigate whether Mary Ann had other affairs during her marriage to Archie. He argues that there may have been other men who had a motive to kill Archie because they were involved with his wife. Once again, defendant's speculation is contrary to the evidence. Mary Ann testified that there was no one else with whom she had a sexual relationship near the time of the murder other than defendant. Moreover, all of the members of Archie's family testified there was no one who had any issue with Archie.

Defendant's assertion that he was prejudiced by the delay because Archie's clothes were no longer available for DNA testing makes little sense. Had defendant been charged in 1985, he could not have tested the clothes for DNA because those tests were not available at that time. Thus, he suffered no prejudice caused by the delay.

Defendant also cites to the unavailability of Archie's watch as prejudice caused by the delay. He notes that a brown thread was found in the wristband of the watch, and a button was collected at the crime scene that had a similar brown

¹⁴ In addition, Mary Ann, who heard Archie knock on Gary's door at 4:30 that morning, and also heard the garage door open just before Gary found Archie, did not mention hearing the garage door opening or closing any other time that morning.

thread. Neither of the items was tested for forensic evidence, and the watch was returned to Gary. Defendant also notes that the clothing found in defendant's apartment on the day of the murder did not match the thread found in the watch or on the button, and no buttons were missing from that clothing. Defendant fails to explain, however, what forensic testing could have been done on the watch in 1985 that might have assisted defendant's defense.

Finally, defendant argues that his neighbors at the time of the murder no longer can be identified or located, and therefore he was prejudiced by his inability to interview them to see if anyone heard him start his car that morning and, if so, what time it was started. Once again, this asserted prejudice is both speculative and contrary to the evidence. Detective Kranke testified that he contacted the apartment manager and anyone who was in the area of defendant's apartment to see if there were any witnesses, but could not find anyone. It is purely speculative that there was a neighbor who was not contacted by the police who heard defendant start his car that morning.

Because defendant failed to show any prejudice caused by the pre-arrest delay, his due process claim necessarily fails. (*People v. Cowan, supra*, 50 Cal.4th at p. 430 [“A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay”].)

B. *Sufficiency of the Evidence*

Defendant argues there was insufficient evidence to support his conviction, because there was no physical evidence to tie him to the murder, there was no blood found on his clothes or his car, he had no scratches, bruises, or other marks on his body, and he had no reason to know that Archie would be leaving his house so early on that morning. Our review of the record, however, leads us to conclude

that the evidence, although circumstantial, was more than sufficient to support defendant's conviction.

First, the evidence showed that defendant was both distraught and angry that Mary Ann moved back in with Archie, and that he made several threats to Mary Ann and/or Archie. Although he had never shown any interest in guns previously, he bought a gun shortly after Mary Ann moved out. Twice in the week before the murder, defendant showed up unexpectedly at the McFarlands' house. The first time, he brought his newly-purchased gun, and told Archie that Mary Ann "belonged" to him. The second time, on the Friday before the murder, defendant told Mary Ann that their relationship was not over, and maybe there was a reason why she took his gun away from him. Defendant later told Mary Ann (after the murder) that something "clicked" for him that Friday, which Mary Ann believed meant that defendant realized that if he killed Archie, Mary Ann would come back to him. Mary Ann's interpretation was reinforced by evidence that defendant told Laszlo the evening before the murder that Mary Ann told him she went back to Archie for financial security, and that if Archie died, she would get everything.

Second, the evidence indicated that the stabbing did not occur in the context of a robbery, because nothing was missing from Archie's person. Archie still had his watch and his wallet, with almost \$300 dollars in it, and his car was there with the motor running.

Third, the evidence showed that the only person who had a motive to kill Archie was defendant; there was no one else who had any issues with Archie. Both Mary Ann and Gary immediately concluded that defendant had committed the murder.

Fourth, the evidence that the rear hood of defendant's car was very hot to the touch at 6:10 a.m. on the morning of the murder, combined with expert testimony from which a reasonable trier of fact could conclude that the car must have

recently been driven for more than 15 minutes, supports the prosecution's theory that defendant drove from Torrance to Long Beach after committing the murder.

Fifth, wet clothes were found hanging in the shower at defendant's apartment on the day of the murder, and testing indicated that areas on the pants had been spot-cleaned. Although defendant told Detective Kranke that he had washed some clothes in his apartment that day, not only was defendant's statement inconsistent with his statement that he was going to do laundry at his brother's house, but a criminalist who examined the pants testified that there were dirt or mud stains on them, and another criminalist testified that the entire garment would have tested positive under the Luminol test if the entire garment had been washed.

Finally, the various explanations that defendant gave to the police about what he was doing on the morning of the murder were inconsistent not only with each other, but also with the evidence. His first explanation, that he was going to go to his brother's house to change the oil in his car but he had not left his apartment before the police detained him, was inconsistent with the evidence that the rear hood of his car was very hot to the touch. His second explanation, that he had started to drive to his brother's house but had come back to pick up laundry that he wanted to do while he was there, was inconsistent with the evidence in several respects: (1) both experts testified it was unlikely that the hood of the car would have been very hot had he driven such a short distance; (2) Officer Frazier testified that he first saw defendant's car at 6:04 a.m., and did not see anyone approach the car until 6:27 a.m., when defendant came out of his apartment without anything in his hands; and (3) Detective Kranke testified that the clothes in the laundry basket in defendant's car were folded and appeared to be clean. Defendant's last explanation about what he was doing that morning, that he was on his way to babysit his brother's children because their babysitter had to leave to go

to school, was inconsistent with Laszlo's testimony that he never had school-aged babysitters, and that when he had defendant babysit, defendant stayed overnight.

In short, we conclude there was sufficient evidence from which a rational trier of fact could find defendant guilty of the murder beyond a reasonable doubt. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263 [“A reviewing court faced with [a sufficiency of the evidence] claim determines “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt””].)

C. *Ineffective Assistance of Counsel*

Defendant contends he received ineffective assistance of counsel at trial because his trial counsel (1) failed to cross examine Detective Kranke regarding his written notes indicating that defendant told him he had driven for about 15 minutes the morning of the murder before going back to his apartment to pick up his laundry; (2) failed to interview the medical examiner who had performed the autopsy of Archie; and (3) failed to present evidence regarding the button and thread found at the scene of the crime. We disagree.

“To prevail on a claim of ineffective assistance of counsel, a defendant “must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.” [Citation.] . . . [P]rejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 389.) The Supreme Court has instructed that a reviewing court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged

deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

We conclude that defendant has failed to establish prejudice by his counsel's purported failures.

While defendant is correct that Detective Kranke testified that defendant told him he had driven around two miles the morning of the murder, and his trial counsel failed to cross examine him about his notes indicating that defendant told the detective that he had driven for around 15 minutes, the prosecutor presented a hypothetical to the Volkswagen expert that asked the expert to assume the car had been driven about two miles for a total of 15 minutes. Thus, the expert had before him the evidence defendant claims was missing when he testified that the rear hood of the car would not be very hot to the touch if driven for such a short period.

Similarly, defendant was not prejudiced by trial counsel's failure to interview and call the medical examiner who performed Archie's autopsy, Dr. Solomon L. Riley, Jr. Defendant asserts that Dr. Riley would have contradicted Dr. Rogers' testimony as to the order in which the stab wounds were inflicted, because Dr. Riley would have testified that the wound to the middle of the chest (which Dr. Rogers referred to as wound number one) could not have been the first wound inflicted. But Dr. Rogers made clear when he testified that the numbers he used to refer to the wounds did not relate to the order in which they were inflicted. Thus, there was nothing to contradict.

Defendant's assertion that trial counsel's failure to address the button found at the crime scene that has a thread that matched a thread found in the wristband of Archie's watch constituted ineffective assistance also fails. There is no reason to believe that the jury would have reached a different outcome had it learned that a

button and thread were found at the crime scene that did not match the clothes found hanging in defendant's apartment.

D. *Prosecutorial Misconduct*

Defendant contends the prosecutor engaged in misconduct in this case by (1) shifting the burden of proof in his closing argument; (2) eliciting testimony regarding defendant's custodial status; and (3) laughing at witnesses and making inappropriate facial gestures while they were testifying. We are not persuaded.

Defendant's assertion that the prosecutor shifted the burden of proof is based upon the prosecutor's numerous statements that Archie had no enemies other than defendant. But those statements did not shift the burden of proof; they were merely comments on the state of the evidence. (*People v. Dykes* (2009) 46 Cal.4th 731, 768 [“[a] prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence”].)

Defendant's remaining assertions do not rise to the level of prosecutorial misconduct.

Although defendant is correct that the prosecutor made some references to the fact that defendant was in custody when the prosecutor was questioning Mary Ann about her contacts with defendant, the court instructed the jury immediately after the first reference as follows: “Ladies and gentlemen, there have been a number of questions regarding [defendant's] status, or custody status. He is in custody. However, it's important that all of you understand that the fact that he is in custody has no bearing on whether he's guilty or not. The fact that he's in custody means that he doesn't have sufficient funds to bail out. Everybody understand that?” The jury answered collectively in the affirmative.

The Supreme Court has instructed that ““when the claim [of prosecutorial misconduct] focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.”” (*People v. Carter* (2005) 36 Cal.4th 1215, 1263.) In light of the trial court’s instruction we conclude there is no reasonable likelihood that the jury construed the prosecutor’s reference to defendant’s custodial status in an objectionable fashion.

With regard to defendant’s assertion that the prosecutor “badgered witnesses, grunted and laughed at them and made inappropriate facial gestures during their testimony,” the record shows that when defense counsel objected during Laszlo’s testimony that the prosecutor was laughing and making gestures after the witness answered some questions, the trial court stated that it had not noticed that conduct. When defense counsel objected a second time, the prosecutor explained that counsel may have been confusing his looks of exasperation and frustration while Mary Ann and Laszlo tried to avoid answering his questions truthfully, but he promised to pay closer attention to his facial expressions. The trial court noted that although it had not heard any laughter or other noises coming from the prosecutor, it did observe him smiling occasionally after a witness responded. The court then asked the prosecutor to try to refrain from any facial expressions, regardless of his frustration. Defense counsel raised no further objections to the prosecutor’s behavior.

““A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the

jury.’””” (People v. Samayoa (1997) 15 Cal.4th 795, 841.) The prosecutor’s conduct in this case was neither egregious, nor deceptive, nor reprehensible.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.