Filed 2/14/19 P. v. Reagan CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT REAGAN, Defendant and Appellant.	B285199 (Los Angeles County Super. Ct. No. YA092768) ORDER MODIFYING OPINION AND DENYING REHEARING [No Change in Judgment]

THE COURT:

The opinion filed on January 24, 2019, is ordered modified as follows:

At page 28, insert the following footnote after "IV. DISCUSSION":

> In a petition for rehearing, defendant asserts that our opinion contains material factual errors and omissions and contends that we have failed to address all of his arguments on appeal. We disagree with most of

> defendant's assertions and contentions. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263-1264) ["In order to state the reasons, grounds, or principles upon which a decision is based, the court need not discuss every case or fact raised by counsel in support of the parties' positions"].)

At page 33, insert a footnote at the end of the only full paragraph on that page:

> Defendant also argues that the court was required to deliver an involuntary manslaughter instruction because "[t]he evidence supported the inference that [defendant's] act of disarming [the victim] could be construed as an assault with a deadly weapon." Even assuming, without deciding, that an involuntary manslaughter instruction can be based on an assault with a deadly weapon—an inherently dangerous felony—the evidence did not support an inference that defendant committed such a felony assault. As noted, defendant's testimony described an act of self-defense resulting in a tragic accident; but it was contrary to the position he argues on appeal, that he intentionally assaulted the victim with the knife, regardless of whether he acted with or without malice.

Defendant's petition for rehearing is denied. There is no change in judgment.

KIM, J. BAKER, Acting P. J. MOOR, J.

Filed 1/24/19 P. v. Reagan CA2/5 (unmodified opinion)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT REAGAN, Defendant and Appellant.	B285199 (Los Angeles County Super. Ct. No. YA092768)

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

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Idan Ivri, Deputy Attorney General, and Michael J. Wise, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Robert Reagan guilty of second degree murder, finding that he intentionally stabbed his girlfriend to death in their bedroom while their five-year-old son slept in the next room. On appeal, defendant contends the trial court erred: (1) by refusing to instruct the jury on involuntary manslaughter; (2) when it admitted evidence of defendant's motive; (3) when it allowed the prosecutor to ask a hypothetical question based on speculation; and (4) by instructing the jury on the relevance of defendant's failure to explain or deny adverse evidence. Defendant also argues that the prosecutor engaged in prejudicial misconduct by failing to introduce certain evidence until rebuttal.

We hold the evidence did not warrant an instruction on involuntary manslaughter; the trial court did not abuse its discretion by admitting evidence of motive or by allowing the prosecutor to ask the challenged hypothetical question; and defendant forfeited his challenge to the failure to explain instruction and his prosecutorial misconduct claim. We therefore affirm the judgment.

II. FACTUAL BACKGROUND

A. *Prosecution's Case-in-Chief*

1. Responding Officers

On July 22, 2015, at approximately 7:16 a.m., Redondo Beach Police Department Sergeant David Christian responded to

a "911 call of unknown trouble" at a residence on Nelson Avenue (Nelson Avenue residence). He waited in a car outside the residence. After "a minute or two," he observed defendant drive his car into the driveway of the Nelson Avenue residence. Defendant got out of the car and walked toward the front door. Sergeant Christian called to defendant, who stopped. The sergeant asked, "'What's going on?'" Defendant replied, "'I had a struggle with my girlfriend with a knife, and she is in the bedroom.'" The sergeant said, "'What?'" and defendant pointed to the back of the house and said, "'She is in the bedroom.'"

By this time, the sergeant and defendant were joined by two officers, who had been looking for defendant. One officer stayed with defendant and took several photographs of him to document his physical condition and clothing. Defendant did not complain about any injuries and the officer did not notice any bleeding wounds. But he did observe cuts on defendant's left hand and wrist, scratches on his back, and red marks on the left side of his cheek. Defendant also had an injury inside his mouth on his inner lip.

Sergeant Christian and the other officer went to the bedroom, where they discovered a body underneath a comforter. The body was that of a woman, Loredana Nesci (victim). The skin on the victim's face was "very ashen grey in color." The sergeant "recognized fairly quickly that the [victim] was deceased and had been probably for quite some time."

Detective Clinton Daniel responded to the crime scene at around 8:10 a.m. that morning. Detective Daniel first made

contact with defendant[1] at the scene at around 8:45 a.m. Defendant appeared "upset" and "would vacillate from seemingly calm and talking normally [to almost] being upset and appearing to cry."

As part of his investigation, Detective Daniel obtained two recordings of 911 calls, one made by defendant to the police and the second a return call from the police to defendant. During the second call, defendant told the dispatcher his first name and that he was driving down Nelson Avenue on the way to his house. According to Detective Daniel, the first 911 call was made "just after" 7:00 a.m.

2. Responding Criminalists

Cristina Gonzalez, a senior criminalist assigned to the biology section of the Los Angeles County Sheriff's crime laboratory, responded to the Nelson Avenue residence at 12:50 p.m. that day. She conducted a "walk through" of the house. In the master bedroom, where the victim was located, Gonzalez collected or photographed various items of evidence. She testified about numerous photographs taken at the crime scene, including in the master bedroom and bathroom. She also testified about several "graphic" photos of the victim depicting her injuries, including photos showing the extent of the fatal injury to her abdomen.

Gonzalez reviewed photos of the victim at the scene depicting her tank top and sports bra and noted that the bra was

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[1] The detective estimated that defendant was six feet, two inches tall and weighed 200 pounds.

pulled up, above her breasts. Other photos depicted cuts on the victim's left and right breasts. Neither the victim's bra nor her tank top "had a corresponding line or cut to them that would match [the] wound[s] to her breast[s]."

Gonzalez inspected the master bathroom and noticed bare footprints and blood on the floor, a pair of bloody men's underwear, blood in one of the sinks, and blood inside the shower. It appeared from the sink and the shower that someone had used them to clean off blood.

Near the body of the victim, Gonzalez observed a knife. She also observed a sheath next to the vanity. The knife was 14.5 or 14.7 inches in total length, with a nine-inch blade. She observed blood on the blade and handle. DNA testing showed that the blood on the blade matched the victim's blood. There was insufficient DNA obtained from the knife handle to generate a profile, but it was blood from a male.

Robert Lio, a forensic identification specialist for the Sheriff's Department assigned to the chemical processing unit of the latent fingerprint section, responded to the Nelson Avenue residence on July 22, 2015, as part of a criminalist team. Among other things, he took photographs of the scene. He also observed a knife that was found at the scene and conducted a fingerprint analysis of it back at the lab. He examined a palm print found on the blade and it was run through the automated fingerprint identification system, but "[t]here were no hits." He did not, however, compare the palm print to the victim's.

Lio also made a physical examination of the knife handle, but determined it was not suitable for print processing "because of the texture" of the "thread-like wrap around the handle." In addition, he examined the knife sheath recovered at the scene

and determined it was an unsuitable surface for print processing "[b]ecause it ha[d] textures and [it was] kind of like fake material which [was] not conducive for fingerprints."

3. Defendant's Sister and Brother

According to defendant's sister, Joan Hilgeman, defendant and the victim had been dating for seven years before her death. They had a five-year-old son named Rocco. On July 22, 2015, at 3:55 a.m., defendant called Hilgeman on her cell phone while she was sleeping. After speaking with defendant, Hilgeman called her brother Dan Reagan, dressed, and picked Dan up in her car. They then drove from San Diego to the Nelson Avenue residence. Hilgeman entered the living room of the house, but did not go into any other rooms. Defendant woke up Rocco, brushed his teeth, and dressed him. Defendant then placed items and one of his two dogs in Hilgeman's car. Her brother Dan took Rocco and defendant's other dog with him in defendant's truck. Hilgeman did not see any blood on the dogs as they were being loaded into the vehicles. They then drove Hilgeman's car and defendant's truck back to Hilgeman's house in San Diego.

On cross-examination, Hilgeman stated that defendant was not a violent person and that he was not capable of committing murder. On redirect examination, Hilgeman admitted she told police that defendant had "a temper."

On July 22, 2015, at 4:15 a.m., defendant's brother, Dan, received a call from his sister, Hilgeman. Hilgeman picked him up, and they drove to defendant's house. They arrived at defendant's house "a little after" 6:00 a.m. When defendant came to the front door, Dan did not notice any injuries or blood on him.

Dan entered the living room and remained there for 25 or 30 minutes. He sat on the couch and petted the dogs; he did not see any blood on either of them. He and defendant then packed defendant's truck with a number of musical instruments, a bicycle, and various personal items for Rocco. Dan also took one of defendant's dogs with him in defendant's truck. In addition to the items packed in the truck, defendant gave Dan his laptop computer and a $3,200 check to be delivered to defendant's two older sons, Gavin and Ramsey. Defendant told Dan not to tell defendant's ex-wife, Vivien, about the check.

Dan described defendant's divorce from Vivien as "not amicable." He told police their divorce had been "'really bitter'" and that "it turned out to be really messy and cost [defendant] a lot of money." He also told police that defendant "got mad at [Dan] and [his] family for having contact with Vivien."

On cross-examination, Dan stated that before he arrived at defendant's house, he told defendant that he should consider calling a lawyer. Dan did not call the police himself. According to Dan, defendant was not "a violent guy" and was not the kind of person who would commit murder.

On redirect examination, Dan admitted that defendant had "a temper," but not a "bad temper." He also told police that defendant was "not exactly a 'sweetheart of a guy'. . . ." Dan was aware of a past incident between defendant and Vivien while they were married during which she called 911.

4. Coroner Pena

On July 23, 2015, Los Angeles County Coroner Louis Pena conducted an autopsy on the victim. Prior to and during the

autopsy, photographs were taken of the victim's body. Pena concluded that the victim died of multiple stab wounds to the abdomen.[2]

During his physical examination, he observed "a large . . . , gaping wound, to the left side of [the victim's] abdomen." The injury was a seven and a quarter inch "scalloping wound" with "skin tag[s]."[3] Dr. Pena described his understanding of the significance of a wound with skin tags and opined that their presence in this wound was evidence of "multiple stab wounds." Dr. Pena discussed two photos of the large abdominal wound and concluded the wound was inflicted by four separate knife cuts. He explained that "when a knife enters a body a single time, there is a different kind of wound" and not the "scalloped version of the wound" depicted in the photos. According to Dr. Pena, the skin tags indicated that the knife was "plunged in [to the victim's body] at different points and probably pretty close in time to each other . . . ." He had seen similar skin tags in multiple stab wound cases. In his experience, in single stab wound cases, skin tags are not present.

Dr. Pena also identified and explained a photo of another "puncture wound" located on the victim's right lower abdomen near the bottom of the large wound. That wound happened before the other stabbing wounds, as indicated by the "red discoloration" around the wound, and was typical of a "flinching" wound a victim receives when trying to avoid someone wielding a knife. That wound was inflicted before death.

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[2] The victim was five feet, five inches tall and weighed 117 pounds.

[3] Dr. Pena circled four skin tags on a photo of the wound.

In addition, Dr. Pena observed a separate one-inch wound with its own knife track from the top of the large wound in a left to right direction. Dr. Pena summarized his reasons for concluding that there were multiple stab wounds: "[T]he skin tags, the puncture wound, . . . the one-inch hole at the top of the abdomen wound . . ." and "those trail-off marks both at the upper end and the bottom part [of the large wound] near the belly button area."

Dr. Pena also detailed the injuries to the victim's internal organs. Dr. Pena observed two cuts to the small intestine and separate cuts to the ascending and transverse sections of the colon. Because, unlike the small intestine, the large intestine does not coil, the two cuts to the colon could not have been caused by a single knife thrust. In addition, he saw multiple cuts to the mesentery, that were consistent with multiple stab wounds with a knife. The injuries to the renal artery and vein suggested the victim would have died quickly, in no more than a minute.

The external and internal injuries that Dr. Pena observed were not consistent with the victim being impaled by a knife as she fell on a bed with someone on top of her. Moreover, the deepest wound to the victim's body was one that exited the skin on her back. That wound was approximately five and three-quarters inches deep, but the length of the blade to the guard was nine inches, which indicated that "the knife was not plunged completely into the body" as one would expected if the victim had been impaled with the knife.

Dr. Pena explained that once the knife was plunged into the victim, she could not have pulled it out by herself. She would have been in shock and weak. And extracting the knife would have been "very painful."

In addition to the external injuries relating to the gaping abdominal wound and the injuries to the victim's internal organs, Dr. Pena also observed an abrasion to the bridge of the victim's nose and a cut or scratch to the left side of her face near her mouth. Neither of those injuries was caused by a knife.

Dr. Pena noted that the victim's left breast had a three-and-a-half inch "trail-off" wound that was superficial and caused by the knife being extracted from the top part of the large abdominal wound. The right breast had a four-inch superficial knife wound, but it was a "separate cut," not a trail-off wound from a knife thrust to her body.

The victim's right hand did not have any injuries.[4] But her left hand had significant cuts to the fingers and palm, the deepest of which was one-half inch. Dr. Pena described the wounds to her left hand as "defensive" wounds because the victim was likely "grabbing the knife . . . at some point." She also had several "classic" defensive wounds to the back of her right wrist. Those wounds indicated that the victim was not holding a knife in her right hand when they were inflicted; someone else would have been "holding the knife and wielding it at her in order to get those cuts." Dr. Pena opined based on the defensive wounds that at no point was the victim holding the knife.

Dr. Pena also observed an abrasion on the victim's right kneecap and numerous bruises on the lower part of that leg. The abrasion was not caused by a knife, but rather was consistent with the victim scraping her knee on a hardwood floor or rug. In addition, her left leg had a diagonal cut consistent with a knife wound which indicated she likely received it while in a defensive

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[4] The parties stipulated that the victim was right handed.

posture "on her back on the ground kicking at somebody that ha[d] a knife." She also had an abrasion just below her left knee and bruising to her lower left leg. The coloration of the bruising to the victim's lower legs and the fact that the bruises were "all grouped together" indicated that "[s]omeone [was] putting pressure and grabbing the legs tightly."

Dr. Pena's work on this case was peer reviewed by the chief medical examiner at the time, Dr. Mark Fajardo, and Dr. Christopher Rogers, who was currently the chief of forensic medicine. Dr. Pena's supervisors wanted the peer review because they thought it was a "difficult case" and a "close call" on whether there were multiple stab wounds. Following the review, there were no conflicts of opinion concerning Dr. Pena's work that needed to be resolved.

Dr. Pena attended a second autopsy conducted on the victim on July 30, 2015, by defense witness Dr. Joseph Cohen. Dr. Pena did not believe a second autopsy would be medically helpful because he had cut up the internal organs to do his own measurements and document the injuries. Dr. Cohen was thus only able to examine the cavity of the body. Also, due to the passage of time, the body had decomposed "[a] lot" and the scalloped wound that Dr. Pena examined, photographed, and described would not be apparent to Dr. Cohen.

B. *Defense Case*

1. Defendant

Defendant testified on his own behalf. Defendant had three sons: Gavin, age 20; Ramsey, age 18; and Rocco, age seven.

Gavin and Ramsey were Vivien's sons born during defendant's marriage to her. Defendant met and began dating the victim, an attorney, in April 2008. Soon after, she moved in with him and the two lived together continuously until her death.

Rocco was born in March 2010, and defendant assisted "in his care and upbringing." From time to time while they lived together, defendant and the victim would engage in arguments, but they were not "physical." By July 2015, the parties' relationship was in a "[b]ad place." In April 2015, defendant had decided to move out of the Nelson Avenue residence[5] where he and the victim had been living, but he did not intend to move until the following September. Defendant planned to move nearby and live with Gavin and Ramsey.

On the evening of July 21, 2015, defendant ate dinner with the victim and Rocco at the Nelson Avenue residence, and he then went to the gym with Ramsey to play basketball. They finished playing at around 10:00 p.m.

Defendant testified that he and the victim engaged in sex, after which the victim hit him in the face with the palm of her hand.[6] The victim "kind of got [defendant] good," causing him to "jump off the bed" and become angry. The victim then hit defendant in the mouth, drawing blood. Defendant responded by hitting the victim on her cheek, with an open hand, which caused the victim to fall over the bench for the vanity.

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[5] The victim owned the Nelson Avenue residence.

[6] One or two months earlier, the victim had slapped defendant in front of Rocco.

Defendant "regretted" hitting the victim "right away," "and . . . ran in[to] the bathroom." The victim chased defendant, but he was able to close and lock the bathroom door. While defendant was locked in the bathroom, he and the victim "were kind of going back and forth for a minute, . . . she was saying . . . "'Get the "F" out . . . you are not "F"ing staying here. You are leaving. I'm going to throw all your stuff outside.'"" Defendant, who was also angry, responded, "'You punched me, and my lip is bleeding,'" but he ultimately apologized and told the victim he would stay in the guest room.

At some point, the victim stopped talking to defendant and it became "quiet outside." Defendant "kept saying things . . . through the door thinking she could hear [him]." He did not know where the victim was, but she was not responding to him.

Defendant put on underwear and his glasses and opened the door to the bathroom, "still saying [he was] going to sleep in the guest room." He saw the victim as he emerged from the bathroom over by her vanity near the foot of the bed. Initially, he did not see anything in her hands. The victim again said, "'Get the "F" out of my house'" and defendant reiterated that he was not leaving and that he intended to sleep in the guest room.

As defendant moved toward "the right center side of [the] rug," the victim "held up this big knife."[7] As she did so, she said in a "blood curdling" manner, "'Get the fuck out of my [house]'" and stepped toward defendant who was about five feet away.

In response, defendant "went at her," and "kind of went to the side, and . . . grabbed ahold of her [right] arm with both of [his] hands." He was concerned for his safety, "scared that she

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[7] Defendant recalled that the victim had been given several knives from the family of a friend who had died.

might stab [him] with [the] knife." Defendant was able to "[get his] right hand over the top of her hand" in an effort "to get the knife away from her." He told her "to let go" and "was kind of pushing [the knife] down and holding it so . . . [he] was next to her." With his body, defendant was "pushing [the victim] back towards the bed" while he tried to turn the knife. Defendant "almost had [the knife]," but the victim then "grabbed [the blade of the knife] with her left hand." She screamed and began hitting defendant with her left hand.

Defendant "got both of her arms" with his right hand over the victim's right hand and pushed the knife about "a foot away from the ground" with the "sharp end of the blade facing up." Defendant was pushing the victim toward the bed with his body. "[T]hen all of a sudden she kind of went up, . . . kind of got a little bit of leverage on [him]." Defendant "reach[ed] around behind [the victim's] body to the left side" and "tried to tackle her onto the bed." Defendant "pulled her . . . trying to get her elbow . . . and [they] went down." They "hit the side of the bed." When they fell on the bed, defendant "believe[d the knife] went into [the victim]." "[S]he made a noise . . . like a scream." Defendant was beside the victim on the bed and she was on her side. He then "grabbed her around the back and took her down to the side of the bed." He was trying to control her right arm. But as they were descending, he lost control of her hand and, at that point, did not know where the knife was. He assumed it was still in her right hand.

On the ground, there was a continued struggle, as the victim "had a lot of strength still. [S]he actually was able . . . [to] kick[] her left leg through . . . ." Defendant "just held on" and said, "'Stop. Let go, . . . Let go of the knife.'" The victim

screamed and struggled with defendant on the floor for "a good 30 seconds."

Eventually, the victim "calmed down slow. And at one point she said, 'I'm dying.'" Defendant "kind of relaxed a little bit to see if she was decoying . . . [him]." But "[i]t was definitely a good minute" before she stopped "moving at all" on the side of the bed.

Defendant "pushed on her chest and . . . even tried to blow air in her mouth." But the victim did not look as if she was alive and it did not appear to defendant that "there was any possible medical intervention that could possibly save her [or] bring her back to life."

Because there was blood "all over" him and the floor, and because he was worried that Rocco may have heard the screaming and would be just outside the door, defendant took a blanket and pulled it over the victim. He then went to the bathroom, saw there was blood all over him, and showered. He noticed the blood stain on the bedroom floor and pulled the blanket over it because he did not want Rocco to see it. After he dressed in clean clothes, he found his glasses and went to Rocco's room. He saw that Rocco was sleeping.

Defendant "knew [he] had to call the police," but he was concerned they would wake Rocco up and that it would be a "traumatic scene." He decided he needed "to get Rocco out of [the house] first." He called his sister at about 4:00 a.m., told her the victim was dead, and asked her to come and pick up Rocco. He believed it would take his sister an hour and 45 minutes to drive from San Diego at that time in the morning and intended to call the police as soon as Rocco left with her.

After defendant ended the call with his sister, he began packing for Rocco. He then went to the garage and spoke on the telephone to his brother, Dan, who told him he was coming to pick up Rocco with their sister. During that conversation, Dan advised defendant to speak with a lawyer. He tried to call a local attorney, but was unable to reach one "right away."

Dan and his sister arrived a little after 6:00 a.m., and stayed for 15 or 20 minutes. Defendant, who "was in shock," asked his sister to take the two dogs and began to put "random things . . . in [his] truck and in [his sister's] car." He eventually awakened Rocco, dressed him, told him his mother was at yoga, and that Dan and his sister were going to give him a ride to San Diego where defendant and the victim would join him later. He told Dan to take his truck because it had Rocco's car seat. Dan and his sister then left with Rocco and the dogs about 10 minutes after Rocco awakened.

After they left at about 6:30 a.m., defendant tried again and was successful in contacting a lawyer who told him to call the police "right away," but advised him not to "say a word to the police." Defendant then called 911, but left the Nelson Avenue residence to deposit a work-related check to cover the personal check he had given to Dan for his sons. He drove back to the house and saw approximately eight police cars already there.

On cross-examination, defendant denied that he told the police that the victim's family knew "she [was] fucking crazy." He also denied telling the police to tell the victim's family that he was "a man." Defendant admitted that he and the victim argued "quite a bit," and that they argued in front of Rocco and other family members and "even argued on TV . . . ."

According to defendant, the victim told him on July 20, 2015, that their relationship was over, but denied that he told her he wanted to reconcile. He insisted that they had reached a "point of . . . no return" by that time and that he intended to move out in September.

Defendant confirmed that he had been married to Vivien C. for 13 and a half years and that she was the mother of his two older sons, Gavin and Ramsey. He admitted that during their marriage, he and Vivien argued, but denied that he ever physically harmed her or became physically aggressive with her. He also denied pushing Vivien against a table for being disrespectful to him while she was pregnant with Ramsey.

Defendant further denied that after he divorced Vivien he ever physically harmed her, threatened to harm her, or became physically aggressive with her. He admitted that on December 19, 2004, before their divorce was final, he went to their home, where Vivien was living with their sons, and argued with her. Vivien began screaming at him in front of their sons who were eating at the kitchen table. Defendant asked Vivien to go to the bedroom so they could talk, put his arm around her, and moved her toward the bedroom. But he denied picking her up by the arms, carrying her to the bedroom, and throwing her down on the bed.

Defendant denied that, at the beginning of his divorce, there was a "very bitter custody battle" over his sons. He also claimed that he "didn't spend a dime on legal fees" relating to his divorce from Vivien.

Defendant denied that after December 19, 2014, Vivien refused to speak to him directly about the children, insisting instead that all communications about the divorce be made

through lawyers. He also denied that because of Vivien's refusal to speak with him, the divorce "got very expensive." He further denied that he was bitter or angry at Vivien in July 2015. He admitted, however, that he was "not happy" about all the money that Vivien spent on attorneys. He also admitted texting Vivien on July 12, 2015, stating, "'You fought me tooth and nail spending $100,000 on lawyers and would only provide me $400 a month. That was ridiculous.'"

Defendant admitted that ending his relationship with the victim would mean there would be another custody battle in the future over Rocco which he did not want. He expected that he and the victim "could have figured something out" regarding custody of Rocco, but he "would not want to do battle with her because she [was] a lawyer." He also admitted the victim had more money than he did for a "fight in court" and that "getting into a custody battle with a lawyer who ha[d] more financial resources than [him was] not something he wanted to do . . . ." He denied, however, that his argument with the victim on the morning she was killed was caused by a conversation with her about custody of Rocco.

2. Defense Experts

Paul Delhauer was an independent consultant on criminal investigations and a crime scene reconstruction expert. Based on his review of photos of the victim's hands, he did not believe the injuries to the victim's right wrist were defensive injuries because the size of the knife would have produced deeper, more serious injuries than the relatively superficial wounds shown in the photos. He also did not believe the cuts to the victim's left palm

and fingers were defensive wounds because, although they were consistent with injuries from the blade of a knife, they were not as "severe" as he would expect from someone wielding a knife of that size. The injuries to the victim's left hand were more consistent with a person grabbing the blade during a struggle over control of the knife.

According to Delhauer, the blood spots and stains on the lower portion of the bed and nightstand were consistent with "bleeding injuries and blood on [the victim's] hands," but not with "blood that is running off something . . . as large as that knife blade." The blood on the top and side of the bed was consistent with "blood that [was either] being projected from an injury" or blood being deposited in a large volume, referred to as a "gush"' wound.

Based on the "swipe marks [of blood]" in the "area between [the victim's] legs," Delhauer concluded that "her legs [were] moving after she sustained the injury to her torso." He disagreed with Dr. Pena's opinion that once the knife was inserted into the abdomen of the victim, she would not have been capable of moving "or really doing much of anything after that point."

Delhauer also concluded that the injury to defendant's right index finger was not caused by a slip of his hand past the guard of the knife, as Dr. Pena had opined, but rather was more consistent with an injury sustained while defendant had his hand on top of the victim's hand trying to disarm her.

Based on his review of the crime scene evidence, Delhauer did not see any signs of "cast-off" blood that would support the theory that defendant inflicted four individual stab wounds to the victim's torso. He had never seen a case in which four individual stab wounds resulted in one large defect in the body of the victim.

Delhauer did not agree that the blood smears on the sliding glass door and the abrasions on the victim's knees were consistent with the victim crawling to the door to try and open it after her left hand had been sliced, but before the wounds to her abdomen had been inflicted. The amount of blood on the door was not consistent with the amount of blood he would expect from the injuries to the victim's left hand.

Dr. Joseph Cohen performed a second autopsy on the victim. He described the large wound to the victim's abdomen as having characteristics of both an incised and a stab wound. He had never seen or heard of a case in which the victim had suffered four individual stab wounds "incorporated into one defect such as [can be seen] here." He described the large wound as having "a scalloped appearance meaning that it does not look like a typical stab wound because the margins are somewhat either scalloped or a bit irregular with edges or skin tags." He disagreed with Dr. Pena's report identifying a potential "guard mark" wound on the victim because the blade of the knife was nine inches, and the deepest wound in the victim was five and three-quarter inches. A guard mark would suggest that "the knife was plunged all the way into the body," but that would not make sense in this case because there were no wounds nine inches deep.

According to Dr. Cohen, he believed "the knife went in once and there was movement, either rotation [or] some vertical movement from down/up or up/down sort of in a ratcheting mechanism, [which] cause[d] the separate skin tags." He believed the movements of defendant and the victim during the brief struggle after the knife was plunged into the victim were

"enough to cause this knife to move in and out and cause this damage."

Dr. Cohen explained that Dr. Pena did not follow the accepted practice of identifying the individual tracks of each of the four stab wounds he identified and the injuries associated with each such wound. Instead, "[h]e lumped together the internal injuries, described it as a single stab wound even though his [conclusion was] that there [were] multiple stab wounds."

Although Dr. Pena testified that the mesentery did not fold like the small intestine, Dr. Cohen explained "that the mesentery is freely foldable and moveable . . . ." Therefore, "even with one stab wound . . . there would be at least three or four holes because of the folded nature of the mesentery[, v]ery folded and very movable

Dr. Cohen conceded that wounds to the palm of the victim's hand were "consistent with [her] being in a defense posture while being attacked with a knife." But he also believed "they could . . . occur during a scuffle . . . by grabbing the knife."

Dr. Cohen did not agree that the injuries to the victim's right wrist were defense wounds inflicted by someone wielding a knife. They were surface abrasions, not the type of sharp force injury, either a cut or incise wound, that he would expect to see if a person were stabbed by a knife.

According to Dr. Cohen, he did not find the surface abrasions to the victim's knees or the bruises to her legs to be significant. The abrasions were "really nonspecific" and could have been caused by "anything." And he could not speculate about what caused the bruises or how old they were.

Dr. Cohen conceded that the separate wound to the lower right of the large wound—which Dr. Pena described as a

"flinching" wound—"could be from the tip of a knife." "[A]t some point during the scuffle, the tip of the knife could have just scraped that area." But there was "no way to tell that from [the photograph of the wound]."

Dr. Cohen described the injury to defendant's torso as "a superficial . . . wound consistent with . . . the blade of a knife or [a knife tip]." He believed the injury "could be a defense injury." Defendant's injuries, as depicted in the photographs taken by police at the scene, were "consistent with being involved in a scuffle."

In cases involving victims of domestic violence in which a knife is used, Dr. Cohen "typically would see multiple stab wounds to the chest, neck, [and] perhaps incised wounds to the neck." He did not observe any such injuries in this case.

Dr. Cohen opined that the cause of death in this case was sharp force injuries. But he believed the findings did not reflect multiple stab wounds. Instead, he concluded that the physical evidence was consistent with defendant's explanation of how the victim fell on the knife during a struggle in which defendant was trying to disarm her.

James Kent, a forensic kinesiologist, was retained by the defense to analyze "the biomechanics and pathomechanics of the injury pattern." Based on his review of the available information from the crime scene and Dr. Pena's autopsy, he concluded it was "more likely than not [that the victim's large abdominal wound was caused by] a single penetration [of the knife] followed by movement."

Kent opined that the abdominal injuries he analyzed were consistent with the explanation of events that defendant provided which described "the joint fall forward on the edge of the bed and

[a] subsequent fall on the floor immediately adjacent to the bed." Defendant's version of the events was "consistent with [Kent's initial] impressions about it being one point of entry[ ] [a]nd [was] consistent with the location of the initial blood pool on the mattress and on the platform below the mattress." Kent also concluded that Dr. Pena's conclusions about multiple stab wounds to the abdomen causing the large wound were "biomechanically unreasonable."

3. Character Witnesses

Pamela Willis dated defendant from October 2004 to November 2005. After the two stopped dating, they maintained a business relationship and worked on business projects together for at least another year or so. According to Willis, defendant was not a violent person. He was not the type of person who could ever commit murder.

Cassidy Harrison had known defendant for over 20 years. The two were "good friends" "and hung out and did a lot of stuff together." Harrison stated that defendant was not a violent person and not the type of person to commit murder.

Gavin, defendant's oldest son, was 20 years old at the time of trial. He had lived with his father "on occasion throughout [his] life," including for a three year period when Gavin's mother was living in Europe. Defendant had "always been a pacifist, . . . not a violent person." He was not the type of person who would commit murder or who would murder the mother of one of his children.

Defendant's son Ramsey also testified. He described playing basketball with defendant on the evening before the

victim's death and described his father as loving. He further testified defendant would never murder the mother of one of his sons.

C. *Prosecution's Rebuttal*

1. Defendant's Relationship with Former Wife

Christa Foley was Vivien's best friend. She knew Vivien's children and defendant. On the night of December 19, 2004, she received a call from Vivien who was "scared and nervous." She was "panicky" and told Foley that she needed her to come "right away" and pick up the children. Vivien told Foley she and defendant had a fight during which "he had picked her up by [her] shoulders and threw her on the bed . . . ." Foley drove to Vivien's house and saw defendant there. Vivien looked "[v]ery nervous, very scared, and she really just wanted [Foley] to get the boys out of there quickly," which she did. Foley had never seen defendant engage in a physical argument with Vivien. But defendant had a temper which she described as not "common" but also not "uncommon."

Vivien testified that she and defendant were married in 1991 and separated in 2004. She filed for divorce in September of that year. One time before the December 2004 call to 911, defendant pushed Vivien during an angry argument against a kitchen table while she was pregnant with Ramsey.

Concerning the December 2004 call to 911, Vivien confirmed that defendant came to her house, confronted her in front of her children in the kitchen, and aggressively told her that he needed to speak with her "now." When she refused to speak to

him, he became more aggressive and she asked him to leave. Defendant "grabbed [her] by the arm roughly and in front of [her] children and brought her from the kitchen to the bedroom. [She pushed] all [her] force and strength against him," but he lifted her and pushed her toward the bedroom. Defendant brought her to the bedroom and threw her on the bed. She called 911.

After the 911 incident, Vivien refused to speak with defendant directly. During the divorce, both parties were represented by counsel and both parties made motions for attorney fees. During the course of the divorce, defendant made a false claim to the Department of Children and Family Services (DCFS) that Vivien was abusing the children. DCFS investigated and cleared Vivien of the claim. Long after her custody disputes with defendant were over, she received a July 12, 2015, text from him complaining about how much money she spent on lawyers during those disputes and complaining about how little she paid him monthly for child support. He sent her more than one text.

Detective Daniel testified that on the day of the killing, he found a check book ledger on a bench in the garage of the Nelson Avenue residence and two checks—one dated January 3, 2012, made out to Rebecca Wood with a note on the memo line stating, "'Family law case;'" and one dated January 5, 2012, made out to the Law Offices of James Neavitt with a note on the memo line that stated, "'motions to compel.'"

2. Defendant's Prior Statement

Detective Daniel recorded his interview with defendant the day of the killing. When the detective told defendant that he was going to call the victim's family to explain what had happened,

defendant said, "'They know she is fucking crazy.'" The detective reiterated to defendant that he needed to explain to the family how the incident occurred, and defendant said, "'Tell them I am a fucking man.'"

3. Henry Yang

Henry Yang testified about a knife he had seen at defendant's house before the killing. Yang was friends with both the victim and defendant. In about October 2014, Yang was at the Nelson Avenue residence meeting with the victim who was representing him in a court case. Defendant and Rocco were also there. During a discussion about firearms, defendant went into the bedroom and came back with a hunting or "Bowie style knife." It looked "pretty similar" to the knife recovered from the scene. Defendant described the knife "as what they had for home defense and [said he] didn't have a firearm."

4. Criminalist

Criminalist Gonzalez was recalled to the stand and testified in rebuttal to certain testimony from defendant's experts and elaborated on some of the crime scene evidence. She also testified about the blood stains on the sliding glass door and responded as an expert to certain hypothetical questions concerning that and other blood and injury evidence.[8]

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[8] The details of her testimony concerning the bloodstains on the sliding glass door and her response to the challenged hypothetical question are set forth below in the discussion section analyzing defendant's objection to the hypothetical question

D. *Defendant's Surrebuttal*

Officer Joe Charbonneau was called by defendant to testify about the December 2004 call to 911. Officer Charbonneau responded to the scene that night and wrote a report of the incident in which he reported that Vivien told him that defendant had "firmly grabbed" her by the arm. He also reported that no party to the incident was injured. He did not make an arrest as result of the incident.

III. PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendant with murder in violation of Penal Code section 187, subdivision (a).[9] The District Attorney alleged that defendant personally used a deadly weapon, a knife, in the commission of the offense within the meaning of section 12022, subdivision (b)(1).

The jury found defendant guilty of second degree murder and found the deadly weapon allegation true. The trial court sentenced defendant to a term of 15 years to life, plus an additional one-year term pursuant to the true finding on the deadly weapon allegation.

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posed to Gonzalez about a possible explanation of how the victim was killed.

[9] All further statutory references are to the Penal Code unless otherwise indicated.

IV. DISCUSSION

A. *Involuntary Manslaughter Instruction*

Defendant contends that the trial court erred when it failed to instruct the jury on the lesser included offense of involuntary manslaughter. According to defendant, there was substantial evidence in the record from which a reasonable juror could have found that he killed the victim without malice aforethought and without the intent to kill.

1. Background

During the jury instruction conference, defense counsel requested CALCRIM No. 580, stating: "The reason why I think that an involuntary manslaughter instruction is appropriate here is because that would require a showing that the defendant committed either a crime or a lawful act in an unlawful manner with criminal negligence and that the acts caused the death of another person. [¶] I think that the jury could find that one or more than one of [defendant]'s actions constituted either a crime or a lawful act done in an unlawful manner. [¶] So specifically just to point out one of them, if they found that they were in a struggle over the knife and he shoved her with his body on the bed, that could either be a battery, or it could be a lawful act done in an unlawful manner and he had no intent to kill. That could lead the jury to a finding that this was an involuntary manslaughter. So, you know, and they could find that he acted with criminal negligence. [¶] I mean they could find that instead of trying to disarm her, which would have been a lawful act, he

should have retreated into the bathroom. But trying to disarm her might have been a lawful act conducted in an unlawful manner. So that's why I think this instruction should be given. [¶] The Court: The second paragraph of [CALCRIM No.] 580 says, 'The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful agent with full knowledge and awareness that the person is endangering the life of another and done in conscious disregard of that risk is voluntary manslaughter or murder.' [¶] For someone not to know that there—to argue that the defendant was not aware that his actions created a higher risk of harm or death, it defies credulity. So it's not an involuntary manslaughter. I'm not going to give you involuntary manslaughter."

Although the trial court did not instruct the jury about involuntary manslaughter, it delivered instructions on: first and second degree murder, self-defense, excusable homicide: accident, voluntary manslaughter, and voluntary manslaughter: imperfect self-defense.

2. Legal Principles

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132.) The court's failure to instruct on a

lesser included offense is reviewed under a de novo standard of review. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

An instruction on involuntary manslaughter as a lesser included offense of murder is required whenever there is substantial evidence defendant acted without malice. (*People v. Abilez* (2007) 41 Cal.4th 472, 515; *People v. Brothers* (2015) 236 Cal.App.4th 24, 35.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Here, defendant was charged with murder, an unlawful killing of a human being committed with malice aforethought. (§ 187, subd. (a)) "Involuntary manslaughter is 'the unlawful killing of a human being without malice aforethought and without an intent to kill.'" (*People v. Rogers* (2006) 39 Cal.4th 826, 884.)

In California, there are three types of involuntary manslaughter, two statutory and one nonstatutory. "One commits involuntary manslaughter either by committing 'an unlawful act, *not amounting to a felony*' or by committing 'a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b).)" (*People v. Cook* (2006) 39 Cal.4th 566, 596, italics added.) Involuntary manslaughter may also occur when a noninherently dangerous felony is committed without due caution and circumspection. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006-1007 (*Butler*).)

"The performance of an act with criminal negligence supplies the criminal intent for involuntary manslaughter, regardless whether the conduct underlying the offense is a misdemeanor, a lawful act, or a noninherently dangerous felony. That is, when a defendant commits a misdemeanor in a manner dangerous to life, the defendant's conduct 'qualifies as gross negligence,' and culpability for involuntary manslaughter is warranted because the defendant has performed an act "'under such circumstances as to supply the intent to do wrong and inflict some bodily injury.'" [Citations.] Similarly, when a defendant commits a lawful act or a noninherently dangerous felony with criminal negligence, the defendant is presumed to have had an awareness of, and conscious indifference to, the risk to life, regardless of the defendant's actual belief." (*Butler, supra*, 187 Cal.App.4th at p. 1008.)

3. Analysis

Defendant first argues, based on his testimony, that there was sufficient evidence to support an involuntary manslaughter instruction on the "misdemeanor manslaughter" form of involuntary manslaughter. According to defendant, a reasonable juror could have inferred from his testimony that defendant committed either a misdemeanor battery or trespass and that he did so with a conscious disregard for the risk to the victim's life that his conduct posed.

Contrary to defendant's assertion, his testimony did not support an inference that he committed misdemeanor battery. Defendant testified that the victim came at him in the bedroom with a 14.5-inch knife with a nine-inch blade as he emerged from

the bathroom. Defendant said that he feared for his safety and was concerned he would be stabbed. Thus, even if defendant pushed the victim, causing her to fall on the knife while attempting to disarm her, no reasonable juror could have inferred under the circumstances that such act was criminally negligent. Defendant's actions in defending himself against an assailant with a knife in a confined space, including pushing the assailant, were not an unreasonable response to the risk posed to him, i.e., there was insufficient evidence that he pushed the victim without due caution or circumspection. To the contrary, a reasonable juror would have inferred that defendant's act of pushing the victim during the struggle to disarm her and protect himself was a reasonable response to the threat posed to defendant by the knife-wielding assailant.

Defendant also argues that his testimony supported an inference that he committed misdemeanor trespass without exercising due caution or circumspection. According to defendant, the victim's repeated demands that defendant leave her house, together with his refusals to leave, supported an inference that he was occupying her home without her consent as owner. Even assuming that defendant's refusal to vacate the residence after he had been repeatedly told by the victim to leave constituted a criminal trespass,[10] there was insufficient evidence that defendant acted without due caution and circumspection in committing that trespass. Again, according to defendant, his

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[10] Section 602, subdivision (m) provides: "[E]very person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor: [¶] . . .[¶] (m) Entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession."

attempts to disarm the victim came only after she came at him in the bedroom with a knife and were a reasonable response to the threat posed by the knife. Therefore, even assuming defendant's alleged trespass provoked the victim into arming herself and attacking him, it was not unreasonable for him under those circumstances to defend himself, his initial trespass notwithstanding.

The trial court concluded that the evidence, including defendant's testimony, supported delivery of instructions on excusable homicide based on accident and self-defense, either of which was a complete defense to the murder charge. Those affirmative defenses were supported by defendant's testimony which, fairly read, suggested that he was, at best, an innocent victim who was guilty of no more than legitimately trying to defend himself against a determined aggressor armed with a knife and, at worst, unwillingly caught up in a tragic accident. As explained, however, that same testimony did not support an inference that he was criminally negligent and, in fact, was inconsistent with any suggestion that he harbored the requisite criminal state of mind for involuntary manslaughter, i.e., that he acted without due caution and circumspection in responding to the victim's aggression. Thus, the trial court did not err by failing to instruct on involuntary manslaughter.

B. *Admission of Motive Evidence*

Defendant maintains that the trial court abused its discretion when it allowed the prosecutor to present evidence beyond that necessary to show defendant had a prior domestic violence incident with Vivien in 2004 under Evidence Code section 1109. According to defendant, the trial court erroneously

allowed the prosecutor to submit further evidence concerning defendant's divorce from Vivien, including subsequent, contested child custody proceedings, presumably under Evidence Code section 1101, subdivision (b), to show defendant's purported motive for murdering the victim, i.e., to avoid another bitter and costly custody battle with the victim over their son Rocco.

1. Background

Prior to opening statements, the trial court and counsel engaged in the following colloquy about the admission of evidence from Vivien: "[The Prosecutor:] Your Honor, defense counsel had raised during our in-chambers conference that he had [an Evidence Code section] 402 motion regarding the evidence from the defendant's ex-wife. And the Court had indicated that it would not be admissible in the People's case in chief but that should the defendant testify that he was peaceful or present character evidence that the People then could bring it in [ ] rebuttal? [¶] The Court: That is correct. [¶] [The Prosecutor:] I had a point of clarification. [¶] Would the Court allow the People on cross-examination of the defendant to impeach him with that moral turpitude conduct, technically a [section] 243 [subdivision] (e)(1) [battery of a spouse or cohabitant]—because I do have the witness available and under subpoena for purposes of rebuttal, and I would be able to prove up the underlying facts. [¶] The Court: I don't know. See how it goes. Maybe yes; maybe no. But when it comes time to cross-examine him, ask to approach before you bring that up. [¶] [The Prosecutor:] I will. Thank you. [¶] The Court: And depending on what he says on direct, maybe he will. You could ask him about it. Maybe not." Thereafter,

during his case, defendant, his son, and his acquaintances testified that he was a nonviolent person.

During her cross-examination of defendant, the prosecutor attempted to elicit testimony about defendant's divorce from Vivien, and specifically about her refusal to communicate directly with him during those proceedings. "[The Prosecutor:] Vivien never lost custody of Gavin and Ramsey after you filed your claim of child abuse; correct? [¶] [Defendant:] Correct. [¶] [The Prosecutor:] Isn't it true, sir, that the reason your custody battle with Vivien got expensive is because, after this December 19, 2004, [911 call], Vivien refused to communicate with you directly or be alone with you? She wanted it to all be done through lawyers; right? [¶] [Defense Counsel]: Objection. [¶] The Court: Sustained. [¶] Go onto something else. [¶] [The Prosecutor:] May we approach, Your Honor. [¶] The Court: Yes. [¶] (The following proceedings were held at the bench:) [¶] [The Prosecutor:] I believe that he has evidence that he had a bitter custody battle with Vivien and that the motive for the crime against [the victim] is . . . that he wasn't about to get into another custody battle with her for Rocco after having such a horrible experience with Vivien. [¶] [Defense Counsel:] That's so speculative that even if there was any probative value the timing it would take to explore that is consuming. It's prejudicial. I mean it's just pure speculation. [¶] The Court: Evidence of motive is admissible. The jury can put whatever weight they want, if any. [¶] You expect this to be long? [¶] [The Prosecutor:] I have about ten more questions. [¶] The Court: All right."

The prosecutor proceeded to question defendant about the child custody battle with Vivien, but defendant denied that it was

either bitter or costly. The prosecutor then attempted to link defendant's experience with Vivien during their custody battle to the potential custody battle with the victim defendant might face over Rocco. In response, defendant admitted that he did not want to go through another custody battle with the victim and that, because she was a lawyer with superior financial resources, any such dispute with her would have been difficult for him.

2. Legal Principles

Evidence Code section 1101, subdivision (a), provides that character evidence is inadmissible to prove a defendant's character or disposition. "Except as provided in this section and in [Evidence Code] [s]ections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence or specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Evidence Code section 1101, subdivision (b), however, provides an exception to that general rule of exclusion: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act."

In addition, Evidence Code section 1109, subdivision (a)(1), provides that, with certain exceptions, evidence of prior acts of domestic violence generally may be admitted in a criminal action

involving charges of domestic violence "if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352."

Although evidence of prior acts may be admissible under Evidence Code sections 1101, subdivision (b), and/or 1109, the evidence may nevertheless be inadmissible under Evidence Code section 352, which provides: "The court in its discretion may 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." A determination of inadmissibility of evidence under Evidence Code section 352 requires the balancing of the probative value of the evidence against its potential prejudicial effect. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405 (*Ewoldt).*) "On appeal, a trial court's ruling under Evidence Code sections 1101 and 352 is reviewed for abuse of discretion." (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

3. Analysis

Defendant contends that the evidence of the child custody proceedings in his prior divorce was irrelevant to the issue of motive and, in any event, more prejudicial than probative under Evidence Code section 352. In support of his relevance claim, defendant argues that the prosecutor's evidence failed to show that defendant, as opposed to Vivien, spent a significant amount of money on the child custody proceedings and that his July 12, 2015, text to Vivien merely emphasized that it was Vivien, not defendant, who spent $100,000 trying to change the parties' custody arrangement so the couple's sons could live with her in

Europe. In addition, defendant maintains that the evidence of his DCFS child abuse allegation against Vivien was not probative of motive because it did not show an intent to gain custody of his two older sons.

As an initial matter, defendant suggests that the trial court initially, and correctly, allowed only evidence of the December 2004 call to 911 under Evidence Code section 1109 to rebut defendant's evidence that he was not a violent person. The record, however, does not support this assertion. Rather, the trial court reserved ruling on the admissibility of character evidence generally until after defendant testified. And, once defendant testified, the trial court expressly ruled that evidence of the custody battle with Vivien was admissible to show motive, presumably under Evidence Code section 1101, subdivision (b).

Each of defendant's arguments on relevance goes to the issue of the weight to be accorded the motive evidence, not whether the evidence had any tendency in reason to show why defendant murdered the victim. (Evid. Code § 210 ["'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"].) But the weight to be given the prosecutor's motive evidence was an issue within the exclusive province of the jury. The only issue for this court is whether the trial court's ruling that the motive evidence was relevant constituted an abuse of discretion. "'A trial court abuses its discretion when its ruling "fall[s] 'outside the bounds of reason.""" (*People v. Waidla*[*, supra*] 22 Cal.4th [at p. 714] . . . .)" (*People v. Smith* (2018) 4 Cal.5th 1134, 1182.) The evidence of defendant's divorce and subsequent custody battle with Vivien

had some tendency in reason to show why defendant may have killed the victim. Defendant's brother Dan told police on the day of the murder that defendant's divorce from Vivien was "not amicable," "really bitter," "really messy" and "cost [defendant] a lot of money." Vivien testified that the custody battle with defendant was bitter and that defendant had filed an allegation of child abuse against her that was not substantiated. She also confirmed that two days before the victim was killed, defendant texted her about their custody battle and that there were other texts from him on the same subject. That evidence, along with other testimony elicited by the prosecutor, tended to show that defendant had a bitter child custody experience that still bothered him days before the murder. Coupled with his admissions that he did not want a custody battle with the victim, the child custody evidence tended in reason to show why defendant brutally murdered the victim. The trial court therefore did not abuse its discretion by finding the child custody evidence relevant to motive.

Defendant contends that, even assuming the child custody evidence was relevant, it was nevertheless more prejudicial than probative under Evidence Code section 352. We disagree.

The child custody evidence, even if only marginally probative, was not inflammatory or unduly prejudicial, particularly in light of the crime scene and autopsy evidence. To the contrary, when compared with the evidence concerning the charged offense, including the graphic photographs of the wound to the victim's abdomen, the child custody evidence was by no means stronger or more inflammatory. (*Ewoldt, supra*, 7 Cal.4th at p. 405.) Indeed, suggesting that defendant was "bitter" about a prior divorce or custody proceeding had no potential to evoke in

the jury an emotional bias against defendant. Therefore, the trial court did not abuse its discretion by admitting the child custody evidence over defendant's Evidence Code section 352 objection.

C. *Prosecutor's Hypothetical Question*

Defendant argues that the trial court abused its discretion when it allowed the prosecutor on rebuttal to ask the prosecution's criminalist a hypothetical question about the manner in which defendant may have committed the murder. According to defendant, the hypothetical was based solely on speculation and was otherwise unfair and misleading.

1. Background

During her rebuttal testimony, Gonzalez confirmed, among other things, that "[t]here was blood on the sliding glass door on the north end of the bedroom." The stains were from 25 to 35 inches above the floor, just below the handle. But there was no blood on the door handle. One stain on the door was a flow stain and the others were transfer stains. Gonzalez explained that "[a] transfer stain. . . is created when something bloody comes in contact with a surface. . . . [¶] A flow stain is a stain that is created when the volume of blood follows gravity, flows because of gravity or follows . . . the surface that [it is] on." The flow stain on the door was traveling down.

According to Gonzalez, the injuries to the victim's left hand could have caused the flow stain on the door. And, the transfer stains could also have been made by a bleeding hand.

Gonzalez explained that, unlike the bloody footprint trail from the body to the bathroom, there was no trail of bloody footprints between the body and the sliding glass door. There were, however, blood stains on the floor between the victim's body and the sliding glass door. Gonzalez opined that the blood stains on the sliding glass door were "consistent with a struggle having happened once the victim's left hand was cut but before her abdomen was cut."

Gonzalez also confirmed that the victim's bra was "up above her breast line . . . not in a way . . . women normally wear . . . bras." Gonzalez believed that the fact that the victim's bra was out of "normal" position or "disheveled" was consistent with the victim being dragged along the floor.

The prosecutor then asked Gonzalez to assume the following hypothetical set of facts and opine whether they were consistent with a scenario for how the victim was killed: "[The Prosecutor:] Prior to dying from internal injuries that the victim sustained from the knife plunged into her abdomen, she also sustained abrasions to one or both knees; [¶] There was also bruising around her lower legs consistent with someone grabbing her legs; [¶] She had defense wounds that went as deep as half an inch on her left hand; [¶] She had a cut to her lower left leg; a four-inch superficial cut to her right breast; several cuts to the back of her right wrist; and to the right of the massive abdomen wound, she had a one eighth of an inch puncture wound. [¶] Are those facts taken along with what you saw at the crime scene consistent with this following scenario[?]: [¶] During a struggle for the knife, the victim sustained the defensive wounds to her left hand as she tried to deflect the blade coming toward her; [¶] After sustaining those cuts to her hand before the knife

penetrated her abdomen, she attempted to go towards that sliding glass door and made contact with the sliding glass door; [¶] She was on her knees at the time touching the sliding glass door with her bleeding hand, and as she tries to do that, she was grabbed by her legs and dragged back to the south side of the bed where she continued to struggle for her life; [¶] She managed to get into an upright position when she was stabbed in the abdomen and then fell onto the bed making contact where the saturated bloodstain is. [¶] Is that consistent with what you saw at the crime scene and the additional facts I gave you? [¶] [Defense Counsel]: Objection. Improper hypothetical. No foundation. Calls for speculation. [¶] The Court: Overruled. [¶] The Witness: Yes, yes it would be consistent. [¶] The bloodstains on the sliding glass door are at a level where she could be kneeling or at a level maybe upright but where her hand would have to be below the handle to make contact with the door and created those transfers. [¶] The dragging may or may not be because of the—or the clothing. Her bra may be an indication of dragging as well."

2. Legal Principles

"California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*Id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*Id.*, subd. (a).) . . . [¶] Evidence Code section 801

limits expert opinion testimony to an opinion that is '[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . . .' (*Id.*, subd. (b).)

"Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' (1 McCormick on Evidence (4th ed. 1992) § 14, p. 58.) Such a hypothetical question must be rooted in facts shown by the evidence, however. (*Rowe v. Such* (1901) 134 Cal. 573, 576 . . . ; *People v. Castillo* (1935) 5 Cal.App.2d 194, 197-198 . . . ; accord, *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 339 . . . ; see CALJIC No. 2.82.)" (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.)

"[E]ven when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation] has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.' [Citation.] [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must

decide? [Citation.]." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

"A trial court, however, 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' (*People v. Price* (1991) 1 Cal.4th 324, 416 . . . .)" (*People v. Gardeley, supra*, 14 Cal.4th at p. 619.)

3. Analysis

Contrary to defendant's assertion, the prosecutor's hypothetical question to Gonzalez was based on Gonzalez's testimony about the blood stain evidence in the bedroom and the nature and extent of defendant's injuries, including those to her left hand, none of which evidence was speculative. The photographic evidence documented the blood stain evidence that Gonzalez personally examined at the scene the day of the murder. It is undisputed that there was a heavy volume of blood on and around the bed where the victim's body was found. It is also undisputed that there was a blood trail, but no bloody footprints, from the body next to the bed to the sliding glass door. And, it is undisputed that there were blood flow and transfer stains on the sliding glass door just below the handle.

In addition, Dr. Pena documented and testified about the abrasions to both of the victim's knees and the bruising around her lower legs which, according to Dr. Pena, indicated someone had grabbed her tightly around the legs. Finally, the defensive injuries to defendant's left hand, and the fatal stab wound injury to her abdomen, were also well documented and explained by Dr. Pena and other witnesses.

Given those facts, the trial court had broad discretion to allow the prosecutor to utilize them in a hypothetical question designed to elicit from Gonzalez an expert opinion about a plausible explanation for and the significance of that evidence to the manner in which the victim may have been killed. The trial court therefore did not abuse its discretion when it overruled defendant's objection to the challenged hypothetical question.

Defendant argues that the hypothetical assumed that the blood stains on the sliding door came from the victim, but that there was no evidence to support that assumption. The hypothetical, however, did not ask Gonzalez to assume the blood on the door came from the victim, but rather asked her to opine whether the blood and injury evidence supported a reasonable inference that the blood could have come from the victim. That opinion was well within her expertise as a criminalist and served to explain for the jury how the bloodstains may have come to be on the door.

Defendant also speculates that the two dogs may have entered the crime scene at some unspecified point and somehow deposited blood on the door. There was no evidence that the dogs had entered the crime scene. To the contrary, Dan and Hilgeman testified that they did not see any blood on the dogs on the morning after the murder. Defendant also argues that the blood stain evidence was inconsistent with the prosecutor's hypothetical question and Gonzalez's opinion, including, for example, the amount of blood that would be expected to be deposited on the door given the severity of the injuries to the victim's left hand. Finally, defendant maintains that the hypothetical contained too many variables to make an answer based on it reliable or admissible, such as the various

explanations for why the victim's bra was dislocated or how the blood transferred to the sliding glass door if the heavy black curtains were closed.

But each of these arguments goes to the weight to be afforded Gonzalez's opinion, not its admissibility. Defendant was free to argue to the jury that the blood on the door could not have come from defendant's left hand because the stains were not consistent with her injuries.

D. *Instruction on Failure to Explain Evidence—CALCRIM No. 361/ Ineffective Assistance of Counsel*

Defendant contends that the trial court erred by instructing the jury on the relevance of his failure to explain or deny evidence against him because there was insufficient evidence to support the instruction. The Attorney General argues, among other things, that defendant forfeited his challenge to the instruction by failing to object in the trial court.

1. Background

Without any objection from defendant's trial counsel, the trial court instructed the jury concerning the relevance of defendant's failure to explain or deny adverse evidence using CALCRIM No. 361: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating [the] evidence. Any such failure is not enough by itself to prove guilt. [¶] The People must still prove the defendant guilty beyond a

reasonable doubt. If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

2. Forfeiture

"Failure to object to [the giving of an instruction in the trial court] forfeits the issue on appeal unless [giving the instruction] affect[ed the] defendant's substantial rights." (§ 1259; *People v. Battle* (2011) 198 Cal.App.4th 50, 64-65.) Instructing with CALCRIM No. 361 did not deprive a defendant of due process by denying him, for example, a presumption of innocence, raising a presumption of guilt, or reversing or lightening the prosecution's burden to prove his guilt beyond a reasonable doubt. (*People v. Saddler* (1979) 24 Cal.3d 671, 679-680.) To the contrary, the instruction contained express language preserving the presumption of innocence and explaining the prosecution's burden of proof. (See *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1066-1067.) Because the instruction did not affect defendant's substantial rights, defendant has forfeited his argument on appeal.

3. Ineffective Assistance of Counsel

Defendant next contends that if this court concludes he has forfeited the error, he received ineffective assistance of counsel. The principles governing a claim of ineffective assistance of counsel are well established. "A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to *effective* legal assistance. When challenging a conviction on grounds of

ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) "[T]he mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel." (*People v. Boyette* (2002) 29 Cal.4th 381, 443.)

Defendant contends that there is no satisfactory explanation for his trial counsel's failure to object to the use of CALCRIM No. 361, but other than his conclusory statement that there was "no conceivable tactical reason" for failing to object, defendant provides no reasoned argument on this issue. We disagree that there was no legitimate tactical reason for failing to object to CALCRIM No. 361.

During cross-examination, defendant acknowledged that there was blood stain evidence on and around the sliding glass door. He also agreed that the entire struggle, "from beginning to end," took place on the south side of the bed and never went to "the other side of the bed." He therefore conceded that "*there was no reason for there to be any blood on the other side of the bed*," including on or around the door. Given that testimony—and missed opportunity to provide a reason or explanation for the blood stain evidence on the door—defendant's trial counsel could have reasonably concluded that CALCRIM No. 361 was at least arguably supported by the evidence and therefore that an objection would not have been well taken.

E. *Prosecutorial Misconduct/Ineffective Assistance of Counsel*

Defendant argues that the prosecutor committed prejudicial misconduct by failing to introduce evidence of a struggle by the door until rebuttal in an effort to magnify the impact of the evidence on the jury and put the defense at a disadvantage. The Attorney General contends, among other things, that defendant forfeited this challenge by failing to object to the struggle evidence during rebuttal. Defendant responds that if his challenge to the misconduct is forfeited he received ineffective assistance of counsel.

1. Forfeiture

"'To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make

known the basis of his objection, and ask the trial court to admonish the jury.' ([*People v. Brown* (2003) 31 Cal.4th 518,] 553.) There are two exceptions to this forfeiture: (1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct. A defendant claiming that one of these exceptions applies must find support for his or her claim in the record. [Citation.] The ritual incantation that an exception applies is not enough." (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

The record reflects that defendant's trial counsel did not raise any objection to the timing of the criminalist's testimony on rebuttal concerning a struggle by the sliding glass door or otherwise request an admonishment. Defendant does not contend that either of the exceptions to forfeiture applies. Thus, defendant has forfeited the argument on appeal.

2. Ineffective Assistance of Counsel

The legal principles governing a claim of ineffective assistance of counsel discussed above apply equally to this claim of ineffective assistance. (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009.) From our record, we cannot conclude that there was no conceivable tactical reason for not objecting to the timing of the rebuttal evidence of the struggle near the sliding glass door and therefore must presume instead that trial counsel's performance fell within the wide range of reasonable professional assistance. Counsel may have concluded that an objection was unfounded since evidence about blood on the sliding glass door only became relevant after defendant testified about a sequence of events that

was arguably inconsistent with the presence of blood on the sliding door. Like defendant's other ineffective assistance claim, this claim is more appropriately raised, if it is to be raised, in a habeas corpus proceeding.

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.