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Opinion following remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. REYNALDO SANTOS DUNGO, Defendant and Appellant.	C055923 (Super. Ct. No. SF100023A) OPINION ON REMAND

This appeal is back before us on remand from the California Supreme Court to deal with issues not considered in our prior opinion. A jury found defendant Reynaldo Santos Dungo not guilty of first degree murder of Lucinda Correia Pina but guilty of the lesser offense of second degree murder. (Pen. Code, § 187, subd. (a).)[1] The trial court sentenced him to 15 years to life in state prison.

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[1] Further undesignated statutory references are to the Penal Code.

Defendant appeals, contending (1) the trial court erred in denying his *Wheeler/Batson*[2] motion, (2) the trial court erred in allowing a pathologist (Dr. Robert Lawrence) to testify concerning the contents of another pathologist's autopsy report (Dr. George Bolduc), (3) the trial court abused its discretion in allowing Dr. Lawrence to testify without evaluating the reliability of the information upon which his testimony was based, namely Dr. Bolduc's autopsy report, (4) the trial court abused its discretion in admitting photographs of Pina's body taken days after her death, and (5) the prosecutor prejudicially erred by misstating the law on voluntary manslaughter during her rebuttal argument.

In our original opinion, we ruled in defendant's favor on the second ground urged on appeal. We found that the autopsy report was "testimonial" under the United States Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [174 L.Ed.2d 314] and that allowing Dr. Lawrence, who was not present at the autopsy, to testify based on the facts in Dr. Bolduc's report violated defendant's right of confrontation under the Sixth Amendment. (*People v. Dungo* (2009) 176 Cal.App.4th 1388, 1392 (*Dungo I*), revd. by *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo II*).) We further concluded that the error was not harmless and reversed the judgment. (*Dungo I*, *supra*, 176 Cal.App.4th at p. 1392.) Because we reversed the judgment on that ground, we did not address defendant's remaining claims.

The California Supreme Court disagreed with our conclusion and reversed and remanded the matter for further proceedings. (*Dungo II*, *supra*, 55 Cal.4th at p. 621.) The high court found that the facts Dr. Lawrence related to the jury "were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's

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[2] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*).

confrontation right, and criminal investigation was not the primary purpose for recording the facts in question." (*Ibid.*)

Turning our attention to defendant's remaining claims, we shall conclude any error on the part of the trial court was harmless. We shall further conclude the prosecutor misstated the law during her rebuttal argument by telling the jury that to find defendant guilty of voluntary manslaughter it had to conclude an average person would act the same way under the same circumstances by strangling or otherwise killing Pina, and that the prosecutor's error was not harmless.

As we shall explain, after remand, our Supreme Court decided *People v. Beltran* (2013) 56 Cal.4th 935, 938 (*Beltran*), clarifying "what kind of provocation will suffice to constitute heat of passion and reduce a murder to manslaughter." The court reaffirmed the standard it adopted nearly a century ago: "Provocation is adequate only when it would render an ordinary person of average disposition 'liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" (*Id.* at pp. 938-939, 957.) At issue in *Beltran* was the pattern jury instruction on voluntary manslaughter (CALCRIM No. 570 [2006 version; hereafter former CALCRIM No. 570]), the same instruction given in this case. The court found the instruction was not ambiguous "as written," but concluded the prosecutor's argument arguably approached the improper argument condemned in *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*), namely, " ' "Would a reasonable person do what the defendant did? Would a reasonable person be so aroused as to kill somebody? That's the standard." ' " (*Beltran, supra,* 56 Cal.4th at p. 954, fn. 15.) However, the court ruled that the potential ambiguity created by the prosecutor's argument as to the nature of sufficient provocation was harmless because the jury asked for clarification on the standard and the court responded the correct statement of law. (*Id.* at p. 956.) This case is a mirror image of *Beltran*, except that the prosecutor's misstatement of the law on provocation was never corrected by the court, and we find the error prejudicial.

Accordingly, we shall reverse the judgment for second degree murder and reduce the conviction to voluntary manslaughter. We shall direct the trial court to enter judgment of conviction for voluntary manslaughter and resentence defendant accordingly unless the district attorney, within 30 days of the filing of the remittitur, elects to retry him for second degree murder.

FACTUAL AND PROCEDURAL BACKGROUND

I
The Prosecution

Defendant and Pina began dating in December 2005. At the time, both were married but living apart from their spouses.

In April 2006, Pina complained to her mother and friends that defendant was "smothering" her and told her mother that she wanted to end the relationship.

Around that same time, defendant intercepted a telephone call to Pina from Isaac Zuniga, Pina's former lover, and threatened to kill Zuniga if he did not stop calling.[3] Zuniga last spoke to Pina around noon on April 14, 2006. During that telephone call, Zuniga told Pina that he had attempted to telephone her a few weeks earlier, but a male answered and threatened to kill him if he did not stop calling.

On the night of April 14, 2006, defendant and Pina went to the home of Angelique and Felipe Torres to play dominos. Defendant and Pina left the Torres' home at approximately 1:00 a.m. the following morning and went to Pina's house.

Later that morning, defendant went next door to Pina's mother's home and asked Pina's mother if she knew where Pina was. Defendant told Pina's mother that Zuniga had telephoned Pina sometime after 1:00 a.m. that morning, and that Pina had driven to

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[3] Zuniga was certain defendant used the word "kill," however, the officer who interviewed Zuniga indicated in his report that defendant threatened to "call" him. The officer said he would have written "kill" if Zuniga had told him defendant had threatened to kill him.

Tracy "to take care of that situation." Pina's mother reported Pina missing later that day after she was unable to reach Pina on her cell phone.

Defendant repeated the story about Pina leaving to meet Zuniga to detectives investigating Pina's disappearance.

On the morning of April 18, 2006, approximately three days after Pina supposedly went missing, police discovered her body inside her sport utility vehicle (SUV), which was parked in a residential area not far from her home. The detective who discovered the body smelled "decaying flesh" as he approached the SUV. When he opened the rear passenger door, he saw a body on the floor in the back seat, with a blanket tucked neatly around it. Pina was wearing pajamas and no undergarments.

Defendant was arrested the next morning. After waiving his *Miranda*[4] rights, he was interviewed by detectives Craig Takeda and Steven Capps.[5] Defendant initially repeated the story about Pina leaving to meet Zuniga. After Detective Takeda informed him that his story was contradicted by their investigation, defendant admitted it was false and that he had "[c]hoked [Pina] to death." He said that after he and Pina returned from the Torres' home, they got into an argument that turned physical. Pina punched him in the chin and threw objects at him, and he grabbed her by the throat and choked her. He did so while straddling her as she was on her back on the floor. He stopped choking her once he saw that she had stopped breathing.

Defendant described Pina's death as an "accident" and told the detectives that "[i]t was like I couldn't control my strength at the moment. . . . I didn't know what I was

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

[5] The interview was videotaped, and the relevant portions of the videotape, i.e. those portions where defendant was being questioned, were played for the jury and admitted into evidence. The jury also was provided with a transcript of the interview, which was admitted into evidence.

doing. I was a different person." He demonstrated how he strangled Pina on Detective Takeda -- placing four fingers from each of his hands on the sides of Detective Takeda's neck and his thumbs over Detective Takeda's Adam's apple. After he realized Pina was dead, he immediately thought about how he was going to cover up what he had done. He carried Pina's body to her SUV, laid it on the floor, covered it with a blanket, and drove around for a while before parking the SUV where it was ultimately found.

Dr. Lawrence testified as to the cause of Pina's death. He did not perform the autopsy on Pina's body; rather, he based his opinion on the autopsy report prepared by his colleague Dr. Bolduc and autopsy photographs. Dr. Lawrence opined that the cause of death was manual strangulation. He based his opinion on the presence of hemorrhages in the muscles on Pina's neck, pinpoint hemorrhages (called "petechiae") in her eyes, the purple color of her face, bite marks on her tongue, and the "absence of any natural disease that can cause death . . . ." He further opined that she was strangled for at least two minutes before she died. He found it "unlikely that she was just briefly squeezed" because neither her larynx nor hyoid bone were fractured, nor was there "extreme bruising."

The autopsy photographs "showed evidence of early decomposition." Her eyelids and torso were bloated. During decomposition, bacteria "start multiplying in the body and produce gas and the gas produces bloating underneath the skin." Because Pina was at least partially face-down following her death, more blood had settled in her face than in the back of her head. There was some bloody fluid coming from her nostrils, which is not uncommon when someone is left face-down after death. As Pina's body decomposed and started to "bloat up," fluid accumulated in parts of her body that were "downward by gravity," including her torso, forming "fluid blebs." A bleb is "like a blister, containing a nasty smelling fluid."

Pina "had 30 percent coronary artery disease, which is a lot for a [person] of only 30 years of age, but not enough to be life-threatening . . . ." While "it might be easier to

have [a person who has a bad heart] die quicker by strangulation than someone with a completely normal heart," there was no way of telling at autopsy whether that happened here.[6]

Between October 1998 and March 2002, defendant's wife complained to police on three occasions that defendant physically abused her. On one of those occasions, she told police defendant pinned her neck against a headboard with his forearm. At trial, she acknowledged making the reports, but portrayed two of the incidents as involving mutual combat and said she lied to police when making the third report because she was afraid defendant would follow through on a threat to take her children. She also denied that defendant had pinned her neck against a headboard.

II
The Defense

Defendant testified at trial. He admitted strangling Pina, but said he did so only after she physically and verbally provoked him to the point where he lost control. He thus argued that he was guilty of at most voluntary manslaughter.

Defendant explained that he and Pina had been arguing in the weeks prior to her death, mostly about Zuniga's calls. He believed Pina was romantically involved with Zuniga, although she denied it. After they returned from the Torres' home early on April 15, 2006, they began to get intimate, but Pina apparently suspected something was wrong and asked defendant what was bothering him. He told her that he was still bothered by Zuniga's telephone calls. Pina denied talking to Zuniga and told defendant he was "full of shit." Thereafter, she repeatedly walked away from defendant as he

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[6] According to Dr. Lawrence, "The thing that can kill you quickly during an event like this is a sudden cardiac arrhythmia, a sudden fibrillation or stopping of the heart, and lack of oxygen can be one of the triggers that causes that. So if you start with a patient that has a bad heart, it might be easier to have them die quicker by strangulation than someone with a completely normal heart because . . . [¶] . . . [¶] . . . during the process, the heart can suddenly stop."

followed her from room to room. At one point, he grabbed her arm, and she lightly punched him on the chin. She then placed some of defendant's clothes and other belongings in a box and told him to "get the fuck out of here." She also told him, "I will see whoever I want. No man will control me. I will do whatever I want . . . . I'll fuck whoever I want. . . . If I want to fuck you, if I want to fuck [Zuniga], if I want to fuck [my husband], I will do whatever the hell I want." When she again began to walk away, defendant grabbed her arm. She hit him and told him that he probably did not have his daughter because, "[Y]ou're not even a good father. You're a lousy fucking father." Defendant "lost it." He grabbed Pina by the neck and said, "Fuck you Lucinda. I'm a good dad. I'm a good dad. I'm not a bad father. Fuck you."

Defendant said he did not know what he was doing when he was strangling Pina and insisted he did not intend to kill her. He did not know how long he choked her, but said, "It didn't seem long."

Pina's husband testified that Pina assaulted him at least three times during their marriage. He also acknowledged pleading guilty to "domestic violence" involving Pina in 1996.

DISCUSSION

I

The Trial Court Did Not Err in Denying Defendant's *Wheeler/Batson* Motion

Defendant contends the trial court erred in denying his *Wheeler/Batson* motion regarding the prosecutor's use of peremptory challenges against five African-American prospective jurors -- R.C., T.G., S.F., D.S., and T.C. We find no error.

A. Background

Jury selection in this case proceeded as follows. First, the trial court ruled on hardship requests of all prospective jurors in the venire. The court then summoned a panel of 18 prospective jurors to be questioned by the court and the attorneys. After the entire panel was questioned, the court heard challenges for cause, and then the attorneys

exercised peremptory challenges of any prospective jurors in the 12 seats in the jury box. As the seats in the jury box became empty, the court filled them with prospective jurors in the other six seats. When the panel was reduced to less than 12 persons, the court summoned additional prospective jurors to fill the empty seats, and another round of questioning began.

On the fourth day of jury selection, the prosecutor passed on the jury. At that time, there were four African-Americans on the panel -- S.F., D.S., T.C., and Prospective Juror No. 11. The defense, however, did not pass, and the selection process continued.

On the sixth day of jury selection, defendant made a *Wheeler/Batson* motion, claiming the prosecution appeared to be "systematic[ally] . . . removing all the African-Americans," noting that the prosecutor had exercised peremptory challenges to excuse five of the six African-American prospective jurors that had made it into the box -- R.C., T.G., S.F., D.S., and T.C. The only African-American that remained in the box was Prospective Juror No. 11. At the time of the motion, the prosecutor had exercised peremptory challenges against 13 prospective jurors.

The trial court found defendant had made a prima facie showing and asked the prosecutor to provide reasons for excusing the five African-American prospective jurors. The prosecutor did so, and the trial court denied defendant's *Wheeler/Batson* motion, finding the prosecutor had provided race-neutral reasons for excusing each of the African-American prospective jurors.

After the trial court denied the motion, five additional groups of prospective jurors were called before the jury was selected. Three of those prospective jurors ultimately sat on the jury, and four served as alternates. The record does not disclose the races of those jurors.[7]

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[7] In his opening brief, defendant asserts that five of the six African-American prospective jurors who survived the challenges for cause were removed by the prosecutor

The voir dire responses of each of the prospective African-American jurors excused by the prosecutor and the prosecutor's reasons for excusing them are summarized below.

1. R.C.

R.C. was in the first group of 18 prospective jurors to be questioned. She was married, had a young child, and worked as a housekeeper at the Alameda County Medical Center. When defendant, through his trial counsel, asked if anyone on the panel felt "that a man can defend himself against a woman," R.C. was the first person to respond, stating, "Yeah, because they have women out there that . . . [¶] . . . [¶] . . . beat guys too."

The prosecutor used her third peremptory challenge to excuse R.C. The prosecutor later explained that she was concerned with R.C.'s statement that a man could defend himself against a woman, explaining that she got the impression that R.C. "felt that could be a very likely situation, that a man would need to defend himself against a woman." She also noted that R.C. appeared to be "very tired. Her eyes were closed. She was bored. When I was questioning her, she appeared to be sleeping and not paying attention." Finally, she observed that R.C. "had a hostile look on her face" when she was being questioned by the court. Defendant responded that R.C. had "basically agreed with

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through the use of peremptory strikes. The People respond that it is impossible to discern how many African-American jurors were actually questioned because the record "contains no information on the race of any prospective jurors questioned after the *Batson-Wheeler* motion was heard. The record shows that three of the seated jurors, and all four of [the] alternates, were not called to the jury panel until after the motion." In his reply brief, defendant concedes "that the record in fact contains no information on the race of the prospective jurors called to the box *after* the *Batson-Wheeler* motion was heard." We subsequently granted defendant's motion to augment the record to include the "trial court's notes concerning [the] race of prospective and seated jurors." The trial court responded that it was "unclear as to what 'trial court notes' counsel [was] referring to." To the extent counsel was referring to the judge's notes, the court indicated they were "confidential and not part of the record on appeal" and, thus, would not be provided. We have not received any communication from defendant concerning the trial court's response.

what the law is, that people can defend themselves period," and the fact she looked bored was "no reason to make a challenge." The trial court found that the prosecutor exercised her peremptory challenge for "non-race reasons . . . ."

2. T.G.

T.G. was in the third group of prospective jurors to be questioned. He was married, had five children, and worked as a medical transporter for Kaiser Permanente. He also was a "senior deacon" at his church. In 1988, he was accused of being an accessory to murder and spent four months in jail before the charges were dismissed. His court-appointed attorney wanted him to plead guilty to manslaughter "as an accessory" or conspiracy to commit violence, but he refused to do so because he was innocent. He denied "harbor[ing] any resentment towards law enforcement or the court system" as a result of that experience or "feel[ing] sympathy for . . . defendant . . . ."

The prosecutor used her sixth peremptory challenge to excuse T.G. She explained that his experience of being "falsely accused" and spending four months in jail "gave him a lot of empathy and a lot of sympathy for . . . defendant . . . ." She also was concerned that his position in the ministry "would give him an abundant amount of passion, and . . . felt it would be difficult for him to convict somebody." Defendant did not challenge either of those reasons, and the trial court found that the prosecutor "had non-race reasons for challenging [T.G.]"

3. S.F.

S.F. was in the first group of prospective jurors. She was single, had two small children, and worked as a customer service representative for AT&T. When defendant asked the panel if a man could defend himself against a woman, S.F. spoke immediately after R.C., stating, "yeah, they have some women out there that . . . [¶] . . . [¶] . . . can play." When the prosecutor asked the panel whether "anyone had an unpleasant experience with police officers . . . or law enforcement," S.F. said she had been pulled over "I guess [because] I didn't slow down fast enough and they was all mad at me and

stuff . . . .” Once “they saw it was [her], and [she] had a baby . . . they were being cool and apologized.” She received a ticket, “but then they dropped it.”

After obtaining additional information about the incident, the prosecutor challenged S.F. for cause, arguing that she had failed to disclose relevant information. The prosecutor explained that a records check revealed that S.F. was charged in 2004 with a misdemeanor violation of Vehicle Code section 2800.1, evading a peace officer, and eventually pleaded guilty to an infraction for that offense. The police report indicated that S.F. was driving with a burnt-out taillight and an expired registration, and failed to stop when officers activated their lights and sirens. When she finally did pull over, she was hostile toward the officers. Because her car had tinted windows and police could not see inside, S.F. was ordered out of the car at gunpoint. She continued to disobey officers and was handcuffed and placed in the back of the patrol car. While in the patrol car, she threatened to file a complaint against the officers and told them her sister was a lawyer and her brother was “a cop.” When questioned further about the incident, S.F. acknowledged “going off and stuff” and admitted her sister was not a lawyer and her brother was not a cop. When asked why she previously failed to disclose that she had been arrested and charged with a crime, she explained that she did not believe that she had been arrested or charged with a crime since she was released within 30 minutes of being stopped and was given a ticket. The trial court denied the prosecutor’s challenge for cause, finding “this is not a case where she didn’t disclose” or “intentionally withheld the information.”

The prosecutor then exercised her ninth peremptory challenge to excuse S.F. She said that S.F. “wasn’t completely truthful” in her initial rendition of the incident and admitted lying to police. She also noted that S.F. was hostile toward the officers who stopped her and expressed hostility toward her when she was questioning S.F. about the incident. Finally, she noted that S.F. had “expressed the same view as [R.C.] about a man needing to defend himself.” Defendant responded that S.F. was “extremely gracious

[and] extremely straight-forward" and suggested that any hostility she did exhibit was the result the prosecutor being hostile toward S.F. The trial court ruled that "[e]ven with that, there was additional non-race reasons to remove her based on that incident she had with the police."

4. D.S.

D.S. was in the second group of prospective jurors to be questioned. He was not married, had no children, and worked as a counselor and a manager at St. Joseph's Behavior Out-Patient Services, which provided treatment to people with drug and alcohol addictions. He had a degree in social services and had received training in the mental health and chemical dependency fields. When asked if he had "any experience with alcohol," he said he used to drink but stopped because he felt awkward when clients asked him if he drank. When asked if he was "a recovering alcoholic or you just used to --," he responded, "I stopped." When asked if he quit drinking due to "a problem," he said he and his brother decided to stop "because we noticed it was getting harder to get up in the morning to go to work . . . ." The prosecutor then asked him, "Did you have a DUI [(driving under the influence)] or is there some changing point that you said, 'Okay, this is enough'?" He said he used to work for the airlines, and decided to stop drinking when he began his career in mental health because he felt awkward telling clients not to drink if he did so himself. He denied feeling sympathy for defendant, stating he felt "[m]ore empathy, not sympathy."

The prosecutor used her twelfth peremptory challenge to excuse D.S. Her primary concern was that as a social worker and a counselor, "he would have a great deal of sympathy or empathy for . . . defendant," and "could [not] be completely fair to the prosecution." She also believed he was "hiding something" with respect to his decision to quit drinking alcohol, but explained that was secondary to the issues related to his job. Defendant did not challenge either of those reasons; rather, he complained that a pattern of challenging African-American prospective jurors was beginning to form, noting that

D.S. was the fourth African-American to be challenged by the prosecutor, and that the prosecutor had failed to challenge other prospective jurors who talked about alcoholism, including one who admitted to being an alcoholic. The trial court ruled that "even looking at the pattern so far, [it saw] justifiable reasons for the prosecution to kick these people . . . [and] accept[ed] [the prosecutor's] reasoning for kicking [D.S.] on a non-race basis."

5. T.C.

T.C. was in the first group of prospective jurors. She was not married, had no children, and worked as a juvenile detention officer. Her job was "sort of like a corrections officer except they're kids." She saw attorneys come in and out of juvenile hall and knew people from the public defender's office by face, but not by name. She did not think her experiences at her job "might bias [her] one way or the other . . . against . . . defendant."

The prosecutor used her thirteenth peremptory challenge to excuse T.C. When asked to state her reasons for doing so, she began by stating that she thought T.C. was Hispanic, not African-American. The court responded that it believed she was African-American. As for her reasons for excusing T.C., the prosecutor explained that as a juvenile detention officer, T.C. might feel sympathy toward people accused of serious crimes. She noted that that she had exercised her first peremptory challenge to excuse a non-African-American prospective juror, F.R., who had worked for the California Department of Corrections for ten years. She was also concerned that T.C. "work[ed] with a number of public defenders and has had friendly dealings with them." She noted that T.C. had never been married and did not have any children, and thus, had limited life experience. Finally, she said T.C. "looked bored and dispassionate" when other jurors spoke about their life experiences. Defendant responded that it was disingenuous for the prosecutor to say that she thought T.C. was Hispanic, noting that both he and the court realized she was African-American. He also asserted that it was illogical to think that a

person working in "legal enforcement" would sympathize with defendant. As for T.C. being unmarried, he accused the prosecutor of "trying to come up with some reason that doesn't make any difference" and observed that many other prospective jurors looked bored during the lengthy voir dire. He added that "if the [c]ourt looks at the pattern of behavior and the actual lack of legitimate reasons on [T.C.], that's five of the six African-Americans that have been . . . thrown off, . . . it becomes inescapable after a while." The trial court ruled that although it did mention that it believed T.C. was African-American, it "accept[ed] the [prosecutor's] non-race reasons for challenging her. It just wasn't her looking bored. There was more that [the prosecutor] indicated."

B. Applicable Law

"Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race." (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) "The *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race.[**8**] Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims." (*Id.* at pp. 612-613.)

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8 All advocates are prohibited from excluding prospective jurors based on race. (*Lenix, supra,* 44 Cal.4th at 612.) Because *Lenix* concerned a challenge to the prosecutor's conduct, the court couched its discussion in terms of the prosecutor's conduct. (*Id.* at p. 612, fn. 7.) We shall do the same.

"A prosecutor asked to explain [her] conduct must provide a ' "clear and reasonably specific" explanation of [her] "legitimate reasons" for exercising the challenges.' [Citation.] 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*Lenix, supra,* 44 Cal.4th at p. 613.)

"At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.' " (*Lenix, supra,* 44 Cal.4th at p. 613.) We review the trial court's findings for substantial evidence. (*Id.* at p. 627.) "So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*Id.* at p. 614.)

Finally, "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons." (*Lenix, supra,* 44 Cal.4th at p. 622.) However, it "is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Ibid*.) Moreover, "comparative juror analysis on a cold appellate record has inherent limitations." (*Ibid.*) Although a written transcript may reflect that two or more prospective jurors gave similar answers to the same question, "it cannot convey the different ways in which those answers were given." (*Id.* at p. 623.) Likewise, while two panelists might give a similar answer on a given point, "the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Id*. at p. 624)

"For these reasons, comparative juror [analysis] is most effectively considered in the trial court where the defendant can make an inclusive record, where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard. . . . Defendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Lenix, supra*, 44 Cal.4th at p. 624.) In conducting a comparative juror analysis, we "need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*Ibid.*)

C. Analysis

Defendant contends "[t]he record does not support the race-neutral reasons offered for striking prospective jurors [R.C. and T.C.]" While he concedes that "the record does supply some *plausible* race-neutral explanations for the challenges to [S.F., T.G., and D.S.]," he asserts that the prosecutor's "statements in support of those challenges . . . compels [*sic*] an inference that she was in fact challenging jurors on racial grounds." He further argues that because some of the reasons proffered by the prosecutor were implausible or unsupported by the record, the trial court erred in failing to question the prosecutor about her proffered reasons and make detailed findings.

1. R.C. and S.F.

Defendant contends that the prosecutor's "statement that she excused [S.F.] and [R.C.] in part because of their responses concerning a man's right to exercise self-defense against a woman was demonstrably pretextual, as [the prosecutor] accepted non-[B]lack jurors with substantially identical answers . . . ."[9] In particular, defendant cites the

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[9] Defendant does not contend that the prosecutor's other reasons for excusing S.F. -- her prior encounter with police and responses to questions during voir dire regarding the same -- were implausible or unsupported in the record. Rather, he contends "the

answers given by Prospective Juror Nos. 5, 7, and 10. As a preliminary matter, defendant did not raise any of these specific juror comparisons at trial; thus, the prosecutor did not have an opportunity to respond to the alleged similarities. Accordingly, a comparative juror analysis on this point is of limited value. (See *Lenix, supra,* 44 Cal.4th at p. 624.)

When asked whether "a man can defend himself against a woman," both R.C. and S.F. responded in the affirmative, explaining that there were women "out there" that act aggressively or violently toward men. The prosecutor said those responses concerned her because they reflected a belief that it was not uncommon for men to have to defend themselves against women. This was a legitimate concern. As the People point out, R.C. and S.F.'s responses suggest "that they were familiar with aggressive and violent women," and thus, might be sympathetic to defendant, who told detectives that he strangled Pina after she punched him and threw objects at him.

When asked whether a man should be able to defend himself against a woman if he thinks he is going to be attacked, Prospective Juror No. 5 stated, "I think every person should have the right to defend [themselves], if they feel their body is going to be harmed." When asked whether "there's any situation where a man can defend himself from a woman," Prospective Juror No. 7 said, "Oh, yeah." Unlike the responses of R.C. and S.F., the responses of Prospective Juror Nos. 5 and 7 did not convey a belief that men commonly are required to defend themselves against women. Their responses conveyed only that there are situations where men should be permitted to defend themselves against women. Thus, their responses were not substantially similar to those of R.C. and S.F., and the prosecutor's failure to excuse them did not demonstrate a discriminatory intent.

As for Prospective Juror No. 10, when asked if he had been the victim of a violent crime, he recounted an incident when his adult daughter, who had attention deficit

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prosecutor's proffer of an additional and demonstrably pretextual reason for excusing [S.F.] does shed some light on the prosecutor's motivation for challenging all but one of the six [B]lack jurors who had been called to the box" at the time he made his motion.

hyperactivity disorder, failed to take her medication for several days, became agitated, and began hitting him. He closed the garage door to protect himself, and neither he nor his daughter was injured during the incident. There was nothing about that isolated incident or Prospective Juror No. 10's description of it that conveyed a belief that men commonly are required to defend themselves against women. To the contrary, he attributed the incident to his daughter's mental disorder and her failure to take her medication.

In any case, there were additional characteristics in all the identified non-African-American jurors that would likely have cancelled out any concern about their belief that a man should be able to defend himself against a woman. (See *Lenix*, *supra*, 44 Cal.4th at p. 631 ["While an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer. Likewise, reviewing courts should not do so."].) Prospective Juror No. 5 had an associate degree in criminal justice and had studied to be a probation officer at one time. Prospective Juror No. 7's brother retired from the San Joaquin County Sheriff's Department. Prospective Juror No. 10 did not respond physically when he was being hit by his daughter; rather, he closed the garage door to protect himself.

In his reply brief, defendant notes that Prospective Juror No. 10 "expressed the opinion . . . that the girls in his family were 'more vicious than boys,' " and argues "[t]his certainly suggests that he would be sympathetic to the defense argument that [defendant] was provoked by [Pina's] violent conduct." Even assuming that Prospective Juror No. 10's response reasonably could be interpreted as conveying a belief that it was not uncommon for men to have to defend themselves against women, the prosecutor could have viewed his non-violent response to his daughter's aggressive and violent conduct as outweighing that general belief.

Finally, defendant challenges the prosecutor's reliance on R.C.'s demeanor as a basis for excusing her. "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*Lenix, supra*, 44 Cal.4th at p. 613; see also *People v. Turner* (1994) 8 Cal.4th 137, 170 [peremptory challenge upheld where juror's body language seemed angry and hostile].) Nevertheless, defendant asserts that the prosecutor's failure to question R.C. concerning her boredom "suggests a false and pretextual reason for the challenge." Having observed R.C. in the courtroom, the prosecutor could have concluded that asking her whether she was bored was unnecessary. That other jurors also appeared bored, as defendant contends, does not demonstrate that the prosecutor's exercise of a peremptory challenge against R.C. was discriminatory. R.C.'s boredom was not the only reason cited by the prosecutor for excusing her. As previously discussed, the prosecutor was also legitimately concerned that R.C. believed that it was not uncommon for men to have to defend themselves against women, and thus, might be sympathetic to defendant, who told detectives that he strangled Pina after she punched him and threw objects at him. (*Ante*, p. 18.) Consequently, the prosecutor could have concluded that R.C. posed more of a risk than jurors who merely appeared bored. (See *Lenix, supra*, 44 Cal.4th at p. 624.)

2. T.G.

Defendant does not contend that the prosecutor's primary reason for excusing T.G. -- his spending four months in jail for a crime he says he did not commit -- was implausible or unsupported by the record. Rather, he asserts that the prosecutor's failure to provide a "reason for failing to credit [T.G.'s] repeated and obviously sincere assertions that his past experience and his religious faith would not cause him to hold the prosecution to a higher standard" demonstrates a discriminatory intent.

The prosecutor was not required to accept T.G.'s assertions at face value. (See *People v. Panah* (2005) 35 Cal.4th 395, 441.) She reasonably could believe that, despite his denials, T.G. harbored some lingering resentment toward law enforcement for having

spent four months in jail for a crime he did not commit. (See *Wheeler, supra,* 22 Cal.3d at p. 275; see also *People v. Farnam* (2002) 28 Cal.4th 107, 138.) The prosecutor also reasonably could believe that T.G.'s position in the church might make him more sympathetic to defendant and receptive to his claim that he was guilty only of manslaughter. (See *People v. Semien* (2008) 162 Cal.App.4th 701, 708 [prosecutor's peremptory strike of church pastor legitimate and race neutral because a "pastor is in the business of forgiveness, and the prosecutor was not required to accept the pastor's assurance that he could find someone guilty"].)

3. D.S.

Defendant does not contend that the prosecutor's primary reason for excusing D.S. -- his background as a social worker -- was implausible or unsupported by the record. Rather, he asserts that the prosecutor's secondary reason -- his past problems with "drugs [*sic*] and alcohol" -- lacked credibility because she did not ask Prospective Juror K.H., a recovering alcoholic, whether she had a DUI, or excuse Prospective Juror T.H., a recovering alcoholic who had run-ins with the law and DUI's. He also asserts that there was no support in the record for the prosecutor's suspicion that D.S. was "hiding something" or her concern that D.S. would be an apologist for those who used alcohol and drugs.

Neither K.H. nor T.H. was a social worker or a counselor -- the prosecutor's primary reason for excusing D.S. Thus, while all three reported past problems with alcohol use, the prosecutor reasonably could have concluded that D.S. posed a greater risk than K.H. or T.H. given his background as a social worker and employment as a counselor. (See *Lenix, supra,* 44 Cal.4th at pp. 623-624.) Moreover, the prosecutor's suspicion that D.S. might have been hiding something about his prior alcohol use and his reason for quitting was supported by the record, as was her concern that he would be sympathetic to someone who used alcohol. D.S. initially indicated he quit drinking because he felt awkward telling clients not to drink when he did so himself. Later,

however, he said he and his brother quit drinking because it was getting harder for them to go to work in the morning. A prospective juror may be excused based on a hunch, unless other evidence shows that the hunch is a pretext for group bias. (*People v. Turner*, *supra*, 8 Cal.4th at p. 165.) No such evidence exists here. Lastly, the prosecutor's concern that D.S.'s work as a counselor to those who abuse drugs and alcohol might make him more sympathetic to defendant, who reportedly had consumed alcohol prior to strangling Pina, was reasonable. (See *People v. Watson* (2008) 43 Cal.4th 652, 677.)

4. T.C.

Defendant contends that each of the prosecutor's reasons for excusing T.C. were pretextual. He argues that the prosecutor's explanation that she excused T.C. because she was a juvenile detention officer was "inherently implausible" because her "job in a law enforcement role would ordinarily indicate that she would be a favorable juror for the prosecution." He also asserts that the prosecutor's statement that T.C. "work[ed] with public defenders" is unsupported in the record. Finally, he asserts that the prosecutor's failure to challenge two non-African-American jurors who, like T.C., were unmarried and had no children demonstrated a discriminatory intent.

The prosecutor's concern that T.C. might be sympathetic toward defendant based on her employment as a juvenile detention officer was not inherently implausible. Indeed, the prosecutor used her first peremptory challenge to excuse F.R., a retired correctional officer.

The prosecutor's statement that T.C. worked with public defenders is supported in the record. T.C. said she saw public defenders "come in and out" of juvenile hall and that she knew them by face, but not by name. Because T.C. had regular contact with public defenders during the course of her job, the prosecutor reasonably could conclude she might have a defense bias.

Finally, the prosecutor's failure to excuse two non-African-American prospective jurors -- Prospective Juror No. 12 and T.H. -- who were unmarried and had no children

did not demonstrate a discriminatory intent. Again, defendant did not raise these specific juror comparisons at trial; thus, the prosecutor did not have an opportunity to respond to the alleged similarities. Accordingly, a comparative juror analysis on this point is of limited value. (See *Lenix, supra,* 44 Cal.4th at p. 624.) In any case, limited life experience was just one of the reasons cited by the prosecutor for excusing T.C. The prosecutor reasonably could have viewed T.C.'s employment as a juvenile detention officer as posing more of a risk for the prosecution than someone who was simply unmarried and had no children. In addition, Prospective Juror No. 12 had additional characteristics that would likely have negated any concern about her marital status and lack of children. (See *Lenix, supra*, 44 Cal.4th at p. 631.) She worked as a chemist at Lawrence Livermore Lab. As the People point out, the prosecutor reasonably could have viewed her occupation as a scientist as favorable given the prosecutor's reliance on expert testimony in establishing the amount of time it would have taken Pina to die. Prospective Juror No. 12 also stated that she was previously married to a business attorney and had a high regard for the American judicial system. As the People note, the prosecutor reasonably could have viewed that as a plus.

In sum, substantial evidence supports the trial court's finding that the prosecutor's peremptory challenges of R.C., T.G., S.F., D.S., and T.C. were not motivated by discriminatory intent. Our conclusion is bolstered by the fact that the prosecutor initially passed on the jury when four African-Americans -- S.F., D.S., T.C., and Prospective Juror No. 11 -- were still on the panel. (*People v. Reynoso* (2003) 31 Cal.4th 903, 926; see also *People v. Snow* (1987) 44 Cal.3d 216, 225.) Because defendant failed to show that the prosecutor's stated reasons for excusing the African-American prospective jurors were either inherently implausible or unsupported by the record, the trial court was not required to question the prosecutor or make detailed findings, as urged by defendant. (*People v. Silva* (2001) 25 Cal.4th 345, 386.) Accordingly, the trial court did not err in denying defendant's *Wheeler/Batson* motion.

II
Any Error in Failing to Evaluate the Reliability of the Information Upon Which Dr. Lawrence's Testimony Was Based Was Harmless

Defendant next contends "[t]he trial court abused its discretion in permitting Dr. Lawrence to testify without evaluating the reliability of the information on which [his] opinion relied." As we shall explain, any error was harmless.

A. Background

After the trial court ruled that Dr. Lawrence could testify concerning the contents of the autopsy report without running afoul of the confrontation clause, defendant asserted that the trial court must "make a threshold determination" as to the reliability of Dr. Bolduc's findings before allowing Dr. Lawrence to offer opinions based on those findings. The court declined to do so, but stated that defendant was not precluded "from testing the trustworthiness of what [Dr. Lawrence] bases his opinion on . . . ." and set an Evidence Code section 402 hearing to determine the extent to which defense counsel would be permitted to cross-examine Dr. Lawrence concerning Dr. Bolduc's work history and allegations related thereto.

At the evidentiary hearing, Dr. Lawrence described Dr. Bolduc's report as "complete, excellent, and allowed [him] to arrive at [his] own conclusion." "It indicate[d] all the things that are normally put in a report of th[at] type to allow somebody like [Dr. Lawrence], independently, to make a conclusion as to the cause and circumstances of death." Dr. Lawrence was aware of "baggage associated with [Dr. Bolduc's] career . . . ." He knew that Dr. Bolduc had been fired from Kern County, Dr. Bolduc had been allowed to resign "under a cloud" in Orange County, both Stanislaus and San Joaquin Counties refused to use him on homicide cases, and Sonoma County was reluctant to use him. He noted, however, that "there's never been an allegation . . . that [Dr. Bolduc's] not fully trained, fully qualified, and fully capable of doing these cases. The only reason they won't use him is because the law requires the [d]istrict

[a]ttorney provide this background information to each defense attorney for each case, and they feel it becomes too awkward to make them easily try their cases. And for that reason, they want to use me instead of him." To Dr. Lawrence's knowledge, the only thing Dr. Bolduc had ever done wrong was failing to mention he had worked for Kern County in his résumé and instead stating he had been an "independent consultant." According to Dr. Lawrence, the other allegations leveled against Dr. Bolduc were "not supportable and had not been fully investigated." He described the criticisms leveled against Dr. Bolduc as "95 percent fluff" and said that Dr. Bolduc was as qualified as anyone, including himself, to perform the duties of a forensic pathologist.

The trial court ruled defendant would be permitted to cross-examine Dr. Lawrence at trial regarding Dr. Bolduc; however, defendant failed to do so.

B. Applicable Law

"[A]ny material that forms the basis of an expert's opinion testimony must be reliable." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "A trial court . . . may not admit an expert opinion based on information furnished by others that is speculative, conjectural, or otherwise fails to meet a threshold requirement of reliability." (*People v. Dodd* (2005) 133 Cal.App.4th 1564, 1569.)

C. Analysis

Assuming for argument's sake that the trial court was required to make a threshold finding concerning the reliability of the autopsy report, as defendant contends, any error was harmless because on this record there is no reasonable probability the trial court would have found the report unreliable.

While defendant raised numerous allegations concerning Dr. Bolduc's competence, he failed to substantiate even one. The only witness to testify at the evidentiary hearing concerning the allegations raised by defendant was Dr. Lawrence, who said they were unsupported and had not been adequately investigated. Dr. Lawrence also indicated that he had complete confidence in Dr. Bolduc's abilities and described his

report as excellent. Thus, there simply was no basis for the trial court to conclude that the autopsy report was not reliable. Accordingly, any error in failing to make such a determination was harmless.

III

Any Error in Admitting Photographs of Pina's Body Was Harmless

Defendant next contends the trial court abused its discretion in admitting three photographs of Pina's body taken after it was discovered. We need not consider whether the trial court abused its discretion because, as we shall explain, any error in admitting the challenged photographs was harmless.

A. Background

Prior to trial, the People moved in limine to introduce various photographs taken "at the scene and at the autopsy as demonstrative evidence to give the jury a better understanding of what happened . . . ." Defendant objected to the admission of five of the photographs -- People's Exhibit Nos. 26, 27, 29, 30, and 66.[10]

Exhibit Nos. 26 and 27 were photographs of Pina's face taken as her body lay on the floor of her car. Her face was bloated and a purple hue, her lips were black, and there was a bloody discharge coming from her nose. The prosecutor argued, among other things, that the photographs were "relevant to show the condition of the body, how long it was in the car, how [it] was found, how [it] was laying, [and] how that comports with . . . defendant's statement as to how [it] was lying [*sic*] and how [it] was positioned in the car."

Defendant responded that the photographs of Pina's face had little relevance given the deteriorated state of the body and his confession. He further asserted that "the position of the body . . . ha[d] nothing to do with . . . how [Pina] died or even anything that happened closely relating to that death" and that the photographs were misleading in

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10 Further references to exhibits are to those offered by the prosecution.

that Pina's face appeared bruised and beaten and that any probative value was substantially outweighed by the prejudicial impact of showing photographs "that d[id] not accurately reflect what . . . she looked like at the time of her death . . . ."

The trial court ruled "the relevance value of the photographs outweigh[ed] the prejudicial manner because they reflect[ed] how the crime was committed [and] how [Pina's] body was at the scene . . . ." Although those issues were not contested, the court found the photographs were admissible to "clarify testimony." The court did, however, conclude that admitting both photographs would be unduly prejudicial, and thus, required the prosecutor to choose one. She selected Exhibit No. 27.

Exhibit Nos. 29 and 30 were photographs of Pina's upper body taken shortly after it was removed from her car and as it was being placed inside a body bag. Exhibit No. 29 depicted the right side of Pina's body, while Exhibit No. 30 depicted the left. Her abdomen was bloated, and the skin on her right side was peeling and discolored. There were not as many markings on her left side. She was wearing a pajama top and bottoms, and the top was pulled up, exposing her midsection and the lower portion of her right breast. The prosecutor asserted that the markings on the right side of her body were relevant to establishing "[t]hat she was lying [*sic*] on the floor of the car for several days," and the pajamas and lack of undergarments were relevant to disproving defendant's initial statement that Pina "was going to go out that night and drive to Tracy."

Defendant responded that the photographs were not necessary to the prosecution's case because it was undisputed that Pina's body was left on its side in the back of the car, defendant admitted Pina had not left in the middle of the night as he had previously indicated, Pina's pajamas were visible in other photographs, and witnesses could testify as to whether she was wearing any undergarments. Defendant also asserted that any potential relevance was substantially outweighed by the photographs' prejudicial impact.

The trial court found the photographs of Pina's upper body were relevant, reasoning: "They show [Pina] in her pajamas, which is consistent with . . . defendant's statement. [Pina's] intent that evening, the fact that she has no bra, no intentions of going out. They're still relevant even if these issues are not contested." The court did, however, find that admitting both photographs would be unduly prejudicial, and thus, required the prosecutor to choose one. She selected Exhibit No. 29.

Exhibit No. 66 was a photograph of Pina's backside, which was covered by pajama bottoms. The buttocks area of her pajamas was stained. The prosecutor asserted that the photograph showed Pina urinated on herself, which she argued was relevant to Pina's intent. More particularly, the prosecutor argued that Pina would not have left to drive to Tracy with a full bladder. Defendant responded that "[n]o one knows what those fluids are. . . . Even if it is urine, that has no probative significance . . . and it is prejudicial by the nature of what it is." The trial court found the photograph was "relevant with regard to [Pina's] intent" and admitted it. In doing so, the court observed that "[i]t [did not] show [Pina's] face, just the lower covered half of the body" and was not "particularly gruesome."

Defendant renewed his objections to the photographs (Exhibit Nos. 27, 29, and 66) at trial, arguing "there [wa]s no medical basis for" them; and that they had little probative value, were cumulative, and prejudicial. The trial court overruled his objections, and the photographs were admitted.

B. Applicable Law

" '[T]he admissibility of this evidence has two components: (1) whether the challenged evidence satisfied the "relevancy" requirement set forth in Evidence Code section 210, and (2) if the evidence was relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the [evidence] was not substantially outweighed by the probability that its admission would

create a substantial danger of undue prejudice.' " (*People v. Heard* (2003) 31 Cal.4th 946, 972 (*Heard*), quoting *People v. Scheid* (1997) 16 Cal.4th 1, 13 (*Scheid*).)

A photograph has an unduly prejudicial effect where it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*Heard, supra,* 31 Cal.4th at p. 976; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1168 (*Carter*).)

"[T]he erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded." (*Carter, supra,* 36 Cal.4th at p. 1170-1171, applying the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Analysis

Although we question the photographs' probative value given defendant's confession and the other evidence concerning the condition and position of Pina's body at the time it was found, we need not consider whether the trial court abused its discretion in admitting them because any error was harmless. (See *Scheid, supra,* 16 Cal.4th at p. 21; *Heard, supra,* 31 Cal.4th at p. 978; *Carter, supra,* 36 Cal.4th at pp. 1170-1171.)

Although the photographs were unpleasant, they were no more inflammatory than the graphic testimony provided by the prosecution's witnesses. The detective who discovered Pina's body testified that he could smell "decaying flesh" as he approached her car. Dr. Lawrence testified the body "showed evidence of early decomposition."[11] He further testified that her eyelids and torso were bloated as a result of bacteria multiplying inside her body. Her face was purple. Due to the position of her body after death, more blood had settled in her face than in the back of her head. In addition, fluid accumulated in parts of her body that were "downward by gravity," including her torso,

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[11] The autopsy was performed the day the body was discovered as well as the following day.

forming blister like "blebs" containing "nasty smelling fluid." There was also some bloody fluid coming from her nostrils.

Given that testimony and defendant's confession, it is not reasonably probable that the jury would have reached a different conclusion, i.e., acquitted defendant or found him guilty of manslaughter as opposed to second degree murder, had the photographs been excluded.

IV
Defendant's Conviction for Second Degree Murder
Must Be Reduced to Voluntary Manslaughter

Defendant contends the prosecutor prejudicially misstated the law during her rebuttal argument by telling the jury that to find defendant guilty of the lesser offense of voluntary manslaughter it had to conclude an average person would act the same way under the same circumstances by strangling or otherwise killing Pina. We agree.

A. The Issue Was Not Forfeited

As a preliminary matter, the People assert defendant forfeited this issue by failing to "specifically object to the prosecutor's argument that a reasonable person would not have reacted to Pina's insults and pronouncements of independence by killing her."

" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

During her rebuttal argument in this case, the prosecutor told the jury: "I mean, people fight with their spouses, their boyfriends and girlfriends every day about much worse things and they don't kill each other. The defendant says, 'Well, I snapped.' So that gives him a reason to not be guilty of murder? Because this provocation, 'Well, she called me a bad dad, that really pissed me off, and I thought she was playing around with her friend, [Zuniga], that really pissed me off so I killed her.' No. That doesn't change a

murder to manslaughter because that's not sufficient provocation. You don't get a discount for murdering someone because they called you a bad parent."

Defendant's trial counsel objected, stating, "[T]his isn't a discount. . . . It's an improper characterization of what the evidence and the law is." The objection was overruled, and the prosecutor continued with her argument. While the objection could have been more specific, we find it was sufficient to call the trial court's attention to the impropriety of the prosecutor's suggestion that to be sufficient the provocation must be such as would cause a person of average disposition to kill, and thus, to preserve the claim on appeal.

We further conclude defendant's failure to request a curative admonition did not forfeit the issue because the court immediately overruled the objection, and defendant had no opportunity to make such a request. (*People v. Hill, supra,* 17 Cal.4th at pp. 820-821.) Moreover, on the record before us, we are convinced that any further attempt by defendant to bring the issue to the trial court's attention would have resulted, at most, in the trial court admonishing the jury to follow its instructions, which, as we later explain, would not have clarified the issue of adequate provocation for the jury.

Defendant's trial counsel objected to the prosecutor's statement that "as a result of the provocation, it has to be because of the provocation, the defendant acted under influence of intense emotion that obscured his judgment" on the ground the prosecutor had misstated the law. In doing so, defendant's trial counsel observed that the provocation must be such that it "obscured his reasoning or judgment, and number three [of CALCRIM No. 570] refers to the average person, the fact that a person of average disposition to [*sic*] act rashly and without due deliberation, that is from passion rather than judgment." He also asserted the prosecutor's misstatement of the law constituted misconduct and requested the trial court "[a]sk the jury to disregard what [the prosecutor] said about that." The trial court stated that it did not find misconduct and admonished the jury that it was going to instruct them on the law and to disregard counsels' statements to

the extent the statements conflicted with the court's instructions. Immediately thereafter, the prosecutor told the jury, "What the Defense is referring to is this law instruction [CALCRIM No.] 570, voluntary manslaughter. [¶] What I have done is I took the significant words and simplified it." Defendant's trial counsel again objected on the ground the prosecutor was "[a]gain . . . misstating the law" and committing misconduct. He also asked the trial court to admonish the jury. The trial court overruled the objection, and stated that it had already admonished the jury.

On this record we are convinced that any additional attempts by defendant to call the court's attention to the prosecutor's misstatement of the law on provocation would have resulted, at best, in an admonition to follow the court's instructions, not the arguments of counsel. As we discuss in detail below, under the extraordinary circumstances of this case, such an admonition would have been futile because the prosecutor's argument introduced ambiguity into the instruction that was never clarified. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 821.)

For all the foregoing reasons, we find the asserted grounds for misconduct were preserved for appellate review.

B. Background

During her closing argument, the prosecutor argued defendant was guilty of first or second degree murder; she did not mention voluntary manslaughter. In his closing argument, defendant's trial counsel noted the prosecutor's omission and argued that to secure a conviction for first or second degree murder, the prosecutor first had to prove defendant was not acting in the heat of passion when he killed Pina. He went on to discuss the elements of heat of passion, including provocation, and asserted that to be sufficient the provocation must be such as to cause a person of average disposition to act "rashly and without due deliberation, that is from passion rather than from judgment."

During her rebuttal argument, the prosecutor advised the jury that voluntary manslaughter is a lesser offense to murder and went on to discuss its elements, including

provocation. Among other things, she argued: "Slight or remote provocation is not sufficient," telling the jury, "You're a bad dad. Slight or remote provocation. [¶] . . . It must be sufficient provocation. Okay. It can't just be some little thing, oh, that just caused me to go -- to snap and I'm going to kill you. Not enough. [¶] Would the average person act the same way under the same circumstances? That's what you need to ask yourself. [¶] The Defense wants you to buy this argument that when a couple fights, and one person gets really angry and snaps over something the other said, that's voluntary manslaughter. I mean, couples fight every day. People fight every day. They fight over a lot worse things that [*sic*], gee, I think you might be interested in somebody else because I saw a message on your phone or I notice that you have been calling this person and you're not being honest with me or you're a bad parent. [¶] I mean, people fight with their spouses, their boyfriends and girlfriends every day about much worse things and they don't kill each other. The defendant says, 'Well, I snapped.' So that gives him a reason to not be guilty of murder? Because this provocation, 'Well, she called me a bad dad, that really pissed me off, and I thought she was playing around with her friend, [Zuniga], that really pissed me off so I killed her.' No. That doesn't change a murder to manslaughter because that's not sufficient provocation. You don't get a discount for murdering someone because they called you a bad parent." Defendant's trial counsel objected, stating, "[T]his isn't a discount. . . . It's an improper characterization of what the evidence and the law is." The court overruled the objection, and the prosecutor continued: "Would a reasonable person have done the same thing as the defendant in this situation? [¶] The bottom line is reasonable people do not act this way. When people do act that way, we call them murderers. [¶] What would a person of average disposition do? I submit to you that all of the couples having fights in Stockton, throughout this trial, they're not killing each other over such trivial matters." The prosecutor later posed the following question: "Do we all strangle our girlfriends or

boyfriends when they tell us we're bad parents and they suspect we might like somebody else?"

The jury was instructed in the language of former CALCRIM No. 570 in pertinent part as follows:

"The defendant killed someone because of a sudden quarrel or in the heat of passion if:

"1. The defendant was provoked;

"2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured [his] reasoning or judgment;

"AND

"3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] . . . [¶]

"It is not enough that the defendant simply was provoked. . . . You must decide whether the defendant was provoked and whether the provocation was sufficient. *In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.*" (Italics added.)

C. Applicable Law

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. 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 trial court or the jury. Furthermore, and particularly pertinent here, when the claim 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. Morales* (2001) 25 Cal.4th 34, 44.)

"Manslaughter is a lesser included offense of murder. (§ 192; *People v. Thomas* (2012) 53 Cal.4th 771, 813.) The mens rea element required for murder is a state of mind constituting either express or implied malice. A person who kills without malice does not commit murder. Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter. Heat of passion arises if, ' "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." ' [Citation.] Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice." (*People v. Beltran* (2013) 56 Cal.4th 935, 942, fn. omitted.) "Provocation is adequate only when it would render an ordinary person of average disposition 'liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " (*Id.* at p. 957.) The standard is *not* whether the provocation would cause an ordinary person of average disposition to kill. (*Id.* at p. 938-939.)

D. The Prosecutor Misstated the Law of Voluntary Manslaughter

Defendant contends the prosecutor misstated the law of voluntary manslaughter during her rebuttal argument "when she argued that the provocation had to be sufficient to cause a reasonable person to kill," and the trial court's "instruction was insufficient to cure the harm of the argument because the instruction itself is susceptible to the interpretation urged by the prosecutor." We agree.

As previously mentioned, after remand by the Supreme Court and oral argument in this case, the California Supreme Court issued its decision in *Beltran,* clarifying "what kind of provocation will suffice to constitute heat of passion and reduce a murder to manslaughter." (*Beltran, supra,* 56 Cal.4th at p. 938.) The court rejected the Attorney General's assertion that "the provocation must be of a kind that would cause an ordinary person of average disposition *to kill*," and reaffirmed the standard it adopted nearly a century ago: "Provocation is adequate only when it would render an ordinary person of average disposition 'liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " (*Id.* at pp. 938-939, 957.) At issue in that case was the same pattern jury instruction given in this case, former CALCRIM No. 570,[12] which stated in pertinent part: " 'In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.' " (*Beltran, supra,* 56 Cal.4th at p. 944.) The Court of Appeal found "the given instruction was potentially ambiguous because it 'did not expressly limit the jurors' focus to whether the provocation would have caused an average person to act out of passion rather than judgment' and 'allowed, and perhaps even encouraged, jurors to consider whether the provocation would cause an average person to do what the defendant did; i.e., commit a homicide.' " (*Id.* at p. 954.) Accordingly, the Court of Appeal reversed the defendant's second degree murder conviction. (*Id*. at p. 945)

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[12] Former CALCRIM No. 570 was subsequently revised to omit any reference to how a person of average disposition would have reacted. As amended, it reads in pertinent part: "In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." (CALCRIM No. 570 (2008 rev.).)

Our Supreme Court "disagree[d] that the instruction is ambiguous as written," noting that "under ordinary circumstances, the instruction's statement that the jury should consider how a person of average disposition 'would react' under the same circumstances would have been unproblematic. . . . Telling the jury to consider how a person of average disposition 'would react' properly draws the jury's attention to the objective nature of the standard and the effect the provocation would have on such a person's state of mind." (*Beltran, supra,* 56 Cal.4th at 954, fn. omitted.) Nevertheless, the court found "the parties' closing arguments muddied the waters on this point." (*Ibid.*) In particular, the court observed "the prosecutor's examples that a reasonable person would not kill if '[y]ou stub your toe' or get 'cut off in traffic' . . . seemed to suggest that the jury should consider the ordinary person's conduct and whether such a person would kill," which is not the standard. (*Ibid.*) The court further explained "provocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is whether the average person would *react* in a certain way: with his reason and judgment obscured." (*Id.* at p. 949.)

The court found "[t]he prosecutor's jury argument arguably approached the improper argument condemned in *People v. Najera* (2006) 138 Cal.App.4th 212," namely, " ' "Would a reasonable person do what the defendant did? Would a reasonable person be so aroused as to kill somebody? That's the standard." ' " (*Beltran, supra,* 56 Cal.4th at p. 954, fn. 15.) The court concluded the prosecutor's jury argument "may have confused the jury's understanding of the court's instructions" by "creat[ing] an ambiguity about the nature of sufficient provocation . . . ." (*Id.* at pp. 955, 956.)

Having so concluded, the *Beltran* court considered whether the potential ambiguity created by the prosecutor's argument prejudiced the defendant. (*Beltran, supra,* 56 Cal.4th at pp. 955-957.) Applying the harmless error standard articulated in *People v. Watson, supra,* 46 Cal.2d 818, 836, the court concluded "[i]t was not reasonably probable that the jury . . . was misled to defendant's detriment." (*Beltran,*

supra, 56 Cal.4th at p. 956.) The court reasoned that "although counsel's argument may have created ambiguity about the nature of sufficient provocation," the jury asked for clarification of the standard and the trial court gave it. (*Ibid.*) Specifically, the jury sent the trial court the following note, pinpointing the issue: " 'In instruction [CALCRIM No.] 570: "In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts." Does this mean to commit the same crime (homicide) or can it be other, less severe, rash acts[?]' " (*Id.* at p. 945.) "The trial court responded with a correct statement of law, that '[t]he provocation involved must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion *that his judgment or reasoning process was obscured.*' " (*Id.* at p. 956)

The court found that because the trial court's "response properly refocused the jury on the relevant mental state, properly set out in CALCRIM No. 570, and away from whether an ordinary person of average disposition would kill in light of the provocation[,] . . . it was not reasonably probable that any possible ambiguity engendered by counsel's argument misled the jury." (*Beltran, supra*, 56 Cal.4th at p. 956.) The court added that the potential for prejudice was lessened by "the strong evidence supporting defendant's murder conviction and the comparatively weak evidence of any legally adequate provocation . . . ." (*Id.* at p. 957.)

Following the court's decision in *Beltran*, we solicited supplemental briefing on its impact, if any, on defendant's claim that the prosecutor committed misconduct by misstating the law concerning voluntary manslaughter in her rebuttal argument. Not surprisingly, each party claims *Beltran* supports its position. Like the court in *Beltran*, we find the prosecutor's argument may have created an ambiguity about the nature of the sufficient provocation; unlike the court in *Beltran*, however, we conclude it is reasonably

probable the jury was misled thereby and that defendant would have received a more favorable result absent the error.

Here, the prosecutor repeatedly suggested to the jury that it should consider the average person's conduct and whether such a person would have acted the same way under the same circumstances by killing Pina. In particular, she observed that people fight over much worse things every day and do not kill each other. Indeed, at one point, she asked the jury: "Do we all strangle our girlfriends or boyfriends when they tell us we're bad parents and they suspect we might like somebody else?" As previously discussed, the standard is *not* whether the provocation would cause an ordinary person of average disposition to kill. (*Beltran, supra,* 56 Cal.4th 938-939.) Because the prosecutor repeatedly suggested otherwise in her argument, we conclude her argument was improper and may have created an ambiguity about the nature of sufficient provocation. (*Id.* at pp. 948, 954, fn. 15; *Najera, supra,* 138 Cal.App.4th at pp. 223-224.)

E. The Prosecutor's Misstatement of the Law Was Prejudicial

The People acknowledge that "[t]o the extent that the prosecutor argued that an ordinary person would not strangle their spouse or lover when faced with such provocation as alleged here, her comments were arguably improper under *Najera*." However, relying on *Beltran's* approval of the given version of former CALCRIM No. 570, the People contend that any misstatement of law was rendered harmless by the repeated admonitions to the jury--from both the trial court and the prosecutor--to rely on that instruction, rather than the arguments of counsel, for the correct legal standard. We are not persuaded.

In *Beltran*, the court held that former CALCRIM No. 570, at issue here, is not "ambiguous *as written*" but found that the prosecutor's argument had introduced an ambiguity into the instruction. (*Beltran, supra,* 56 Cal.4th at pp. 954, 955, 957.) The same is true here.

Like the prosecutor in *Beltran*, the prosecutor here introduced ambiguity into the instruction by suggesting that the jury should consider the ordinary person's conduct and whether such a person would kill. (*Beltran, supra,* 56 Cal.4th at p. 954.) In doing so, the prosecutor improperly drew the jury's attention away from "the *rashness* of the act" and improperly focused the jury's attention "on the act alone." (*Id.* at p. 957.) The given instruction directed the jury to "consider whether a person of average disposition would have been provoked and *how such a person would react in the same situation knowing the same facts*." (Former CALCRIM No. 570, italics added.) Based on the prosecutor's improper argument, the jury could construe the italicized portion of the instruction as directing it to improperly consider whether a person of average disposition in the same situation and knowing the same facts would react by killing the victim. Having introduced ambiguity into the instruction, it defies logic to suggest, as the People do here, that any potential error was harmless because the jury was admonished to follow the instruction.

In *Beltran*, the court did not rely on the fact that the jury was instructed with former CALCRIM No. 570 in concluding it was not reasonably probable the jury was misled by the potential ambiguity. Rather, it found any ambiguity created by the prosecutor's argument was clarified by the trial court's response to a question by the jury: "The jury's note pinpointed the issue, inquiring if it should consider whether an ordinary person would 'commit the same crime (homicide) or can it be other, less severe, rash acts,' " and the trial court responded that " '[t]he provocation involved must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion *that his judgment or reasoning process was obscured*.' " (*Beltran, supra,* 56 Cal.4th at p. 956.) Under these circumstances, the court concluded it was not reasonably probable the jury was misled to the defendant's detriment. (*Ibid.*)

Conversely, in the present case, the jury never asked and was never told that they should not consider whether an ordinary person of average disposition would kill in light of the provocation. In other words, they were never "properly refocused" away from the prosecutor's improper argument. (*Beltran, supra,* 56 Cal.4th at p. 956.) In sum, the prosecutor's misstatement of the law was not rendered harmless by the court's instructions.

Nor is this a case where the evidence supporting the defendant's murder conviction is so strong and the evidence of any legally adequate provocation so comparatively weak that a different result was not reasonably probable. (*Beltran, supra,* 56 Cal.4th at p. 957.) "[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citations.]" (*Id.* at p. 956.) In *Beltran*, the court found evidence of provocation was both weak and contradicted. (*Ibid.*) In particular, the court observed that the defendant's testimony that he had gone to the victim's apartment at her invitation and that he had not been angry at her earlier in the day was not only uncorroborated, but also was "at odds with a great deal of other evidence." (*Ibid.*)

In contrast, here, the evidence of provocation was neither weak nor contradicted. Defendant testified he suspected Pina was romantically involved with Zuniga, and in the weeks before her death, he and Pina argued about calls from Zuniga. When he raised the issue on the night in question, Pina responded by telling him to "get the fuck out of" her house and that she would have sex with whomever she pleased, including her husband and Zuniga. She also told defendant he had lost custody of his daughter because he was "a lousy fucking father." These statements are beyond the "mundane annoyances"

referred to in *Beltran*. (*Beltran, supra,* 56 Cal.4th at p. 950.) Indeed, these types of sexual taunts have been found adequate to "arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition such as to cause him to act rashly from this passion." (*People v. Berry* (1976) 18 Cal.3d 509, 515; see also *People v. Le* (2007) 158 Cal. App.4th 516, 528 ["provocation can include the verbal taunts of an unfaithful wife and infidelity"].) Indeed, former CALCRIM No. 570 includes as examples of sufficient provocation "verbal taunts by an unfaithful wife [citation]; and the infidelity of a lover [citation]." (Related Issues to former CALCRIM No. 570.) Moreover, unlike *Beltran*, defendant's testimony was not contradicted by other witnesses.

Nor was the evidence of murder so relatively strong. While Dr. Lawrence opined Pina was strangled for at least two minutes before she died because neither her larynx nor hyoid bone were fractured and there was no "extreme bruising," he also acknowledged that Pina "had 30 percent coronary artery disease," which could have made it "easier [for her to] die quicker . . . than someone with a completely normal heart . . . ."[13] He further testified that there was no way of knowing if that is what happened here. This evidence is not so strong when compared to the evidence of legally sufficient provocation such that there is no reasonable probability the jury would have found defendant guilty of voluntary manslaughter as opposed to second degree murder absent the error. Finally, as defendant points out, "while it may well be that [his] actions in disposing of the body and temporarily fleeing did reflect consciousness of guilt [(see *Beltran, supra,* 56 Cal.4th at p. 957)], there is no rational basis on this record to conclude that his conduct specifically

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13 The length of time Pina was strangled was relevant to the jury's determination of whether sufficient time had elapsed for defendant's passion to " 'cool off' and for [his] judgment to be restored." (*Beltran, supra,* 56 Cal.4th at p. 951.) " '[I]f sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter--"the assailant must act under the smart of that sudden quarrel or heat of passion." ' " (*Ibid.*)

reflected guilt about *murdering* Ms. Pina, as opposed to reflecting guilt resulting from committing the *lesser crime* of killing her in the heat of passion."[14]

In sum, the evidence is such that there is a reasonable probability the error of which defendant complains affected the result. Accordingly, defendant's second degree murder conviction must be reduced to voluntary manslaughter.

DISPOSITION

The judgment for second degree murder is reversed, and the trial court is directed to enter judgment of conviction for voluntary manslaughter and resentence defendant accordingly unless the district attorney, within 30 days of the filing of the remittitur, elects to retry him for second degree murder.[15]

BLEASE, Acting P. J.

I concur:

HOCH, J.

I concur in the result only:

NICHOLSON, J.

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[14] Since we reverse the judgment on this ground, we need not reach defendant's additional contention that the prosecutor committed misconduct by "encourag[ing] the jury to convict [him] of murder without first considering whether the prosecution had proved beyond a reasonable doubt that the killing was done in the heat of passion."

[15] Since defendant will either be resentenced or retried, his claim that the clerk's minutes and abstract of judgment do not accurately reflect the amount of restitution imposed is moot.