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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. ULYSSES ROBERSON, Defendant and Appellant.	C064027 (Super. Ct. No. S01CRF0236)

Defendant Ulysses Roberson was convicted of beating his four-year-old son to death. The People's theory was that defendant led a quasi-polygamist cult. Defendant and one of his wives, Rosemary Judith Olive, are of different races (defendant is Black and Olive is White) and their four-year-old son Alexander Sol "Salaam" Olive, the victim, was mixed race. The race issue caused defendant significant anger, which he focused on the victim long before the murder, referring to him as a "bad seed" and as "having a demon," among other things. In December 1985 or January 1986, defendant beat the victim to

death and disposed of the body; Alexander's body was never found.

Defendant was charged with murder in 2001. The case went to trial in 2009; the jury acquitted defendant of first degree murder, necessarily rejecting alleged torture-murder and race-murder special circumstances (Pen. Code, § 190, subds. (a)(16) & (a)(18)), but convicted him of second degree murder. (Pen. Code, §§ 187, subd. (a), 189.) The trial court sentenced defendant to prison for 15 years to life, and he timely appealed.

On appeal, defendant contends the trial court erred by allowing expert testimony on cult behavior to explain why the witnesses did not promptly report the killing. Defendant further contends the trial court erred by modifying a cautionary instruction on the frailties of eyewitness testimony to apply to defense evidence, which consisted of witnesses who testified they had seen the victim's age-progressed picture and subsequently reported seeing a child resembling that picture.

As we will explain, the expert testimony was not completely lacking in foundation and relevance, nor was it prejudicial. Further, any error was harmless in light of overwhelming evidence of defendant's guilt. Nor was the instruction problematic in the manner briefed by defendant. Accordingly, we shall affirm the judgment.

FACTUAL BACKGROUND

The pretrial proceedings were protracted, the trial was long, and the evidence was convoluted and bizarre. Although

defendant raises fairly narrow claims of error, it is necessary to provide enough factual detail to provide context to assess defendant's claims and to show the overwhelming nature of the evidence. Nonetheless, we omit many facts developed at trial.

We will divide the facts into eight sections. In sections 1-4 we summarize the testimony of four key witnesses, (1) Olive, the victim's mother, (2) Raj Roberson (Raj), defendant's lead wife, (3) Pamalar Lewis (Lewis), a secondary wife, and (4) Joseph Roberson (Uhrtiko), one of defendant's many sons. In section 5 we summarize other prosecution evidence. In section 6 we summarize the challenged expert cult testimony. In section 7 we summarize the defense "sightings" evidence, and in section 8 we discuss the People's rebuttal to that evidence.

1. Olive's testimony

Olive, a nurse, was born in 1957. She met defendant--who was using the name "Tony Amos Rich"--on June 14, 1980, when he arrived at her Houston hospital with Raj--who was using the name "Ulia Rich" and was in labor. Defendant claimed to be "a hermetic scientist, a mystic and a psychic" and invited Olive to his home to cast her astrology chart. She was asked to fill out forms detailing her personal history and goals and did so, because "the whole message was that it was to help me better myself and to be more in tune with the cycles of life and make appropriate decisions and empower myself[.]" Olive was given a blue drink and told to take a bath, fell asleep, and awoke to find herself in the midst of intercourse with defendant.

Defendant told Olive they were “connected” and when she told him he had impregnated her, he asked her to move in, which she did. The household included Raj, “the baby Yewaur, three-year-old Urenauld” and “a girl named Traci” (Traci Mills, really Kimberly Gudger). Although Olive had been in school, defendant told her Raj “was pregnant, and that she was working, and that if I needed to take care of my baby, I needed to work.” Olive finished her school term and began working full time.

Olive had been close with other family members, but once she moved in with defendant, he turned her against them, saying “my family was going to come against me, try to kill that baby within me because it was partially black . . . and that I couldn’t trust them[.]” When her family members came to Houston, defendant placed Olive in an apartment where Gudger also stayed, telling Olive her family was a threat to him. Defendant had taken Olive’s possessions and he had control of her car and paychecks.

Olive’s family thought she was in a cult and took her to a “deprogrammer” in Nebraska in 1981. She then stayed with her brother, where she gave birth to the victim on May 16, 1981. The deprogrammer warned Olive not to contact defendant, but she wrote to him, and eventually defendant and Raj contacted Olive and took her and the victim to Los Angeles.

Defendant announced that the victim would now be called “Salaam,” meaning “peace,” which would help the victim avoid trouble, “since he was mixed [race].” The group stayed at a hotel, then went to defendant’s mother’s house in San Bernardino

for a few weeks. Gudger had visited at the hotel, and Urenauld and Yewaur were at the San Bernardino house, along with a woman named Melvina Tolbert, “that Ulysses told me he brought back from Texas to California.” The group moved to Venice, where “a girl named Sue from Texas”--apparently Sue Caviness--joined them.

Olive worked two jobs and turned her paychecks over to defendant, because, “I decided that I was going to join this whatever you call it, group, which my son was part of.” Later, defendant had houses in Reseda and Fontana, and Olive lived with Lisa Robertson, defendant’s daughter (about age 12) and “the babies” (the victim and Uhrtiko). Then everyone lived in Fontana, except Caviness. Defendant again told Olive her family was a threat to him and was “against” her, and against “my son being black[.]” Raj--on defendant’s orders--prepared a restraining order for Olive to sign, and because Olive was in “an altered mind state,” she made up allegations about her family. To hide Olive and the victim from Olive’s family, defendant’s mother and her “male companion” “were like my bodyguards[,]” and defendant’s mother “made me look different than myself and had dark makeup on to make me look like a black person” and disguised her.[1]

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[1] Defendant’s estranged daughter, Lisa, testified she helped with the disguise, and it had been Olive’s idea. Lisa was impeached with several felony convictions. The parties stipulated Lisa had told investigators in 2009 that defendant had referred to the victim as a “‘little white snake[.]’”

The group then moved in a motor home to the Bay area, now augmented by Invaka, Raj's newest baby, who was born in the summer of 1982. When they left, Olive did not know where they were going, because defendant "groomed" them not to ask many questions. Defendant stopped in Richmond and told Olive she had a new name, Ruby Roberson, a new social security number, "and that was my drop-off point[,]" "a test to see how well" she could manage in a new city, and she "watched the motor home drive away" with her son in it: She made no protest, but was "blindly obedient to whatever he told me to do."[2] She worked at a hospital, but mailed her check to defendant at a post office box: he refused to tell her where he lived, because her family was a threat. Months later, defendant, Raj and "all the children" visited Olive in Oakland. Once while in Oakland, defendant began whipping Olive with a leather belt as she slept, and laughed about it.

By 1984 or the beginning of 1985, defendant lived in Seattle, and Olive visited two houses there. At the "University District" house, defendant lived with the women and children, who came and went between houses, and defendant sometimes lived alone at the "Mercer Island" house. During the summer of 1985,

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[2] For example, when defendant ordered her not to breastfeed the victim "because my breast milk was contaminated because of my heritage, my ancestry[,]" she complied, although she was "hysterical, crying about it." Defendant also posted a list of household rules and assigned chores. Olive testified there was a "commanding, oppressive atmosphere" in the rule-oriented household.

Olive heard Urenauld had left the family. Although Olive hated not having more contact with the victim, defendant wanted her to work in the Bay area, which she did.

Late in the summer of 1985, defendant told Olive to live in Sacramento, and Raj found a house there. At one point, Gudger opened the door to the police, and she "was ostracized, got her head shaven and her hair shaped in the shape of a devil horn and got thrown out of the house" for breaking defendant's rule that the door was never to be opened to the police.[3] A week later, Olive was arrested for obstructing an investigation when she refused to open the door to the police, in obedience to defendant's rule.

By October or November of 1985, defendant also had a house at South Lake Tahoe. Defendant generally wanted to have two houses: "He liked to have his own house, and he liked to pretty much dictate what was going to happen at each house" so he could meet "clients" without them knowing he had a group of children.

Once when defendant brought Olive to Sacramento, defendant brought the victim, who Olive found "was kind of weak and quiet and small. Felt very frail to me." The victim's lips were cracked and scabby, and "his entire face was bruised, and especially on the left side by his eye, by his mouth and face."

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[3] Testifying by telephone, Gudger denied defendant shaved her head. But she admitted she was with him for 10 years, had his child in 1985 (Jackie or Yves), had lied under oath for him in the past, and still feared him.

Olive gave the victim a bath, but he was “withdrawn and quiet[,]” though usually he had “a very bubbly personality.” During the bath Olive saw “severe scabs on both his ankles with edema above and below the scabs.” When she asked the victim what happened, he said, “‘my daddy tied shoestrings, and I was hanging with shoestrings.’” When defendant was asked about this, he told Olive the victim “was a bad seed . . . he was bad for this family. He needed to get out of this family. I needed to find a place for him. He was giving a bad influence. He can’t talk right.” The latter point referred to the victim’s speech pattern, which defendant tried to force the victim to change by denying him food.[4]

Defendant also said the victim “had a demon, and he had him on the verge of death, and he was getting the demon out of him and the demon was the same demon that the other child had, Urenauld.” To get the victim on the verge of death, defendant “hung [the victim] upside down by his ankles and left him there for three days.” Olive said she would find a place for the victim, but did not take the victim because she “was mentally incapable” and allowed defendant “to dominate and make a lot of decisions[.]”

The last time Olive saw the victim, he was standing in a corner, where defendant ordered him to stand, sucking his thumb. That would have been on December 19, 1985, the day she started a

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[4] There was much other testimony about defendant withholding food from children as a form of punishment.

job at San Francisco General Hospital. The first week of January 1986, defendant visited Olive in San Francisco. Although Olive expected to go to Sacramento to visit the victim, defendant and Felicia Burns (Bradley) took her to a restaurant in Sausalito, where defendant told her he had sent the victim away to a Muslim school "'to teach him how to be black.'" When Olive asked questions, defendant became "extremely forceful and said, 'I am not talking about this.'" They then went to the South Lake Tahoe house, and when Olive again asked about the victim, defendant yelled at her and told her not to bring his name up. This was about January 4, 1986. Defendant "kept saying that people were watching him, and everybody was watching him, and he could hear sounds." He posted people to keep watch, and carried a shotgun or rifle. Previously, he had carried a pistol, and he continued to do so. Olive saw that Invaka had a black eye, and Yewaur was made to stand in a corner in his underwear. On future visits, defendant refused to talk about the victim, and he screamed at Olive when she mentioned the victim to Pamalar Lewis.

On January 18, 1986, defendant called Olive and told her Raj was in labor, and Olive took a bus from San Francisco to assist. Defendant still refused to talk to Olive about the victim, and defendant and Raj confronted Olive about "disobeying repeatedly" by asking about the victim. Defendant told Olive, "'1986 is going to be a new year. I want to get you pregnant right away, and we're going to replace Salaam.'" When Olive persisted, defendant said he would kill her, and began punching

her, and kicked her when she was crouched on the floor. Raj, holding her newborn baby, managed to push defendant away from Olive. During the beating, defendant said “that Raj saved my life . . . and I needed to suffer pain, and I needed to be taught how to shut my mouth.” Olive tried to walk away but Raj picked her up in a van and brought her back to the house, where Olive was kept on a mattress, weak and in pain, for several days. During this period, defendant would wake her up and verbally abuse her, and laugh “about me being taught to keep my mouth shut.”

About a week later, defendant drove Olive to San Francisco so she could pick up her paychecks. Although she was visibly injured, defendant told her not to seek medical treatment to avoid police involvement, and defendant remained in the car with a shotgun. Eventually Olive said she would make up a story about being mugged, and he dropped her off at the hospital, where she stayed for two weeks, and needed to have jaw surgery. At the prompting of a doctor she knew, she made a report to the San Francisco Police Department about what had happened. Later, Garzetta Billingslea drove Olive to South Lake Tahoe, where Olive again reported the beating. At that time, “my jaw was completely wired, and I had a hard time talking. The other thing is that . . . I don’t know if you call it posttraumatic stress syndrome, posttorture syndrome, postconcentration camp syndrome, postpsychological manipulation, but I was . . . not as healthy as I am now.”

Olive later contacted the National Center for Missing and Exploited Children (NCMEC), and appeared on *Unsolved Mysteries*, in an effort to find the victim, including using an "age-progressed" photograph, containing modifications to a real photograph of the victim that purported to show what he would have looked like as he matured. In December 1985, the victim's hair color was dark or brownish red.

2. Raj's testimony

"Raj" (an acronym coined by defendant from her true name, Renee Alyce Jones), testified under immunity, and the jury was instructed it could find she was defendant's accomplice. She was 54 and was a youth program director in Cleveland. She met defendant at college in Atlanta in 1974 or 1975, where he cast her astrology chart. She quit school and moved in with him. Her parents forced her home, and had a deprogrammer take her to California. After about a month, Raj returned to defendant, and became pregnant by him when she was 20.

When Raj was about seven months pregnant, the couple went to San Francisco, where defendant did "a lot of drugs," and fired a gun into the ceiling, resulting in his arrest. Raj returned to her parents in Cleveland to have her baby, named Renauld, a name defendant changed to Urenauld. Three months later, Raj returned to defendant, because her parents told her she was stupid and that she "needed to be deprogrammed again." The couple moved to Houston, where they had two more sons, Yewaur and Joseph (Uhrtiko). Before that they had lived in Los

Angeles, where Raj was arrested due to a check-kiting scheme defendant concocted, that Gudger helped carry out.

When Raj resisted defendant, he slapped and beat her, and asked her to play Russian roulette. Once when she told him a car loan had been denied, he started “slapping me across my face like it’s my fault.” He often wore a gun on a holster around the house.

When they moved to Houston, Gudger lived with them. Raj did not like defendant’s sexual relationship with Gudger, but did not feel she could go home. Raj used the name “Ulia Rich” and defendant used “Tony Rich” to avoid Los Angeles warrants arising from the check scheme. Raj met Olive at the hospital, and eventually Olive moved in. Tolbert also moved in and had a relationship with defendant. Raj had introduced her to defendant when he wanted someone to help out with the family’s finances. Defendant would woo women into a relationship but once they were in, they “just became workers.”

When the family lived in Seattle, it included Janan Ali (who joined the family in Fontana), Tolbert, Raj and the various children; Gudger and Olive stayed in San Francisco. Defendant set house rules, Raj enforced them, and he would slap her if they were violated. He controlled the money. Raj was “too afraid to challenge him.” Once at the Oakland house, defendant beat Olive up after Olive asked him something. Renauld and the victim bore the brunt of defendant’s violence, “they got the worst spankings, the worst punishments.” Defendant once denied Renauld food for three days. When Raj questioned defendant’s

methods, he cursed her, and he hit her on more than 50 occasions, but she was too afraid to call for help. She saw the victim with welts on his legs and back, and once saw defendant hold the victim in the air by his arm and beat him with a belt.

Once at defendant's direction, Raj spanked Renauld lightly twice with a belt over some cookies, but defendant was not satisfied and beat Renauld "until he was black and blue, and his face was bruised up." Defendant used a belt, but had been calling for a stick to use. When Raj comforted her son, defendant "told me to let him go and was cursing me out." Defendant seemed crazy and Raj told him to leave before the police came. Before defendant left, he told Raj to tell the police "that Renauld had been playing with his little brother's penis, which was not true, and that I was the one that beat Renauld, because . . . I'm female, so it wouldn't be bad for me." When the police arrived, Raj told them that story, because she was afraid defendant would hurt or kill her and the children later.[5] Raj signed a statement admitting she beat Renauld with a stick, and pled guilty to felony assault. Defendant had threatened to kill her and Renauld if she left him, or have someone else do it for him. Renauld did not live with the family thereafter.

When the family moved to the Sacramento area, Lewis joined the family. While living in Sacramento, Raj once saw defendant

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[5] In 1991, when Renauld was 14, defendant forced Raj to have Renauld write a letter stating Raj beat him.

“had bound Salaam’s ankles” with wire or something else, causing scars, and another time he put the victim in a cold garage.

The family moved to South Lake Tahoe in November 1985, and Raj gave birth to a daughter, Unkw (Barbara), on January 18, 1986. Raj, defendant, Lewis, and “all the kids” (Raj’s sons except for Renauld, Gudger’s daughter Jackie (Yves), Tolbert’s son Herbert, and the victim) lived at the Lake Tahoe house; the other women visited.

Raj last saw the victim near the end of December 1985. She saw defendant yelling at the victim and coming from the garage with him, then saw them return to the garage. She went into the garage, which was “freezing cold[,]” but when defendant would not tell her why he put the victim in the garage, she covered the window because “I didn’t want somebody to look into the window and see Salaam out in the garage as cold as it was.” When Raj went in the garage later, defendant was punching the victim in the stomach, and when he realized she was in the room, he cursed her and told her to get out. As Raj was napping upstairs later, defendant “whispered in my ear, ‘Salaam is dead. I think I killed him. Salaam is dead.’” Raj began to cry, which made defendant angry. He told her to pull herself together, that he would kill her and everybody else and that there would be no witnesses, and then he held a gun to her stomach and said that he would shoot her and all the children. When Raj went downstairs, defendant was carrying the victim in a blanket and “it’s obvious that he’s dead[,]” but when Yewaur asked what was wrong with the victim, defendant said he was

asleep. Defendant then put the victim's body in a tub with running water.

Raj was too afraid to call 911, thinking defendant "would leave no witnesses, that he would kill everybody" as he had said. When it was dark, the children were dressed and put in the van, except for Yewaur, and Raj saw defendant putting bags and boxes in the van, including one box large enough to hold the body that had "weight" to it. As they left, defendant "was threatening me that if I told anyone, that he would blow me away and the kids away, and he kept stressing that repeatedly, and that he would take no witnesses." Later Raj testified defendant also said he would have her killed by somebody he knew if she talked. Raj thought they traveled toward San Francisco. Defendant stopped the van twice and got out, once for 20 to 40 minutes, when he took things out of the van. When he returned to the van, he continued to make threats. They returned to South Lake Tahoe. Defendant told Raj to tell people the victim was with Olive, and Raj complied. When Olive came to the house after Raj's baby had been born, Olive asked where the victim was and defendant "punched her dead in her face and was beating her and stomping her" until Raj intervened.

Raj testified that after 1992, defendant was "legally and physically" barred from contacting her. During that time she wrote letters to him professing her love, because he helped with her "living arrangements in order for me to get custody of my

kids."[6] Raj stopped loving defendant when he became violent, but continued to have his children "Because he was very controlling. It was a controlled environment. You did what he said, and that's it. You just did what he said." Raj continued to be afraid of him, because of his threats to have somebody else hurt her and the children.

3. Lewis's testimony

Pamalar Lewis, a clinical researcher, attended a summer session at UC Berkeley in 1985. She met defendant (known to her as "Dr. U.") at that time, when she was about 20 years old. He claimed to be a doctor in psychology, and they began dating. She went with him to Seattle to help him move people out of a house, including "Melvina [Tolbert], [Olive], Raj and children." Defendant persuaded Lewis to move to Sacramento by promising to give her "something better."

Lewis testified defendant disciplined Salaam by placing him in a closet, and once she saw the victim hanging "from the . . . rail of the crib upside down" with his head on the mattress for at least an hour. She "saw rope burns around his ankles" with torn flesh and drawn blood, and he was suspended upside down from the pole of his playpen for two days. She did not ask why this was done, because she was afraid and did not intercede

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[6] The jury did *not* hear that defendant had been serving a lengthy prison sentence in Washington for child sexual abuse, and had arranged a house for his children and "Janan, Jasmine" and "Meta" which Raj joined.

because “you just didn’t interfere.” She was afraid of defendant, but also may have loved him.

Lewis heard defendant speak about getting the devil out of the victim, and he withheld food from the children. Raj imposed minor discipline, but reported children to defendant for “physical” punishments, such as with a belt, and reported the victim more often. Defendant did not work, but Gudger and Olive gave him their paychecks, and Lewis gave Raj money “to help out.”

Lewis last saw the victim between December 22, 1985 and January 7, 1986. Lewis learned the victim was being punished in the garage, and saw him “without clothes on and laying on the concrete floor.” It was cold, so she got the victim a blue blanket, and covered him. When defendant saw the victim had a blanket, he went to the garage, hit the victim, then returned, stating the victim “had a lot of spunk that, you know, he was near dead, and yet he got a blanket[.]” Lewis saw defendant take the blanket off the victim before he held the victim by the ankles and beat the victim with a piece of firewood. Lewis heard the victim call out, “‘I won’t do it again.’ Something like that.” Before the beating, Raj “put a curtain up to cover the window so neighbors wouldn’t see.” The firewood was a piece “like a board” that came prepackaged from the store, also described at trial as a “stick.” Lewis did not intercede because she was afraid of defendant.

Later she saw defendant drag the victim upstairs by his arm, and he seemed to be alive.[7] That evening, Lewis saw Raj, who was very pregnant, in the van with children, and saw defendant bring "a bundle" in the blue blanket that could have been the victim. Defendant told Lewis not to go upstairs, but after he left, she went upstairs with Yewaur, the only child left behind, to look for the victim, whom she never saw again, and from an upstairs window Lewis saw the van leave.

On a later date, Lewis saw Olive with facial injuries, and defendant said, "if Raj had not been there, he would have killed" Olive. Lewis testified that during the time she was at the South Lake Tahoe house, she did not leave because there was "a cooperative effort" to keep her there.[8]

4. Joseph's testimony

Joseph Roberson ("Uhrtiko"), the son of Raj and defendant, testified he was born in May 1981. Joseph remembered that the last time he saw the victim, the victim was in a blanket defendant was carrying, and the victim's "arm was hanging out, and he didn't look awake or anything." Once, defendant disciplined the victim by holding him upside down by one leg and

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[7] An investigator testified Lewis said she saw the victim in a tub and thought he was conscious. A peace officer testified Lewis told him she had not seen the victim in a tub, but said defendant struck the victim with a stick at least 20 times.

[8] The parties stipulated Gene Hawkins would testify that on March 11, 1986, Lewis told him she was given "'an ultimatum'" of either living with the family or being "'disassociated with'" defendant, and she chose to "'work and live with the women and the children,'" and believed in defendant.

“whooping” him. Joseph remembered an occasion where defendant announced it was “payday,” and all the women turned over their paychecks and money. Joseph had two felony convictions, for theft and assaultive conduct.

5. Other prosecution evidence

Felicia Burns (Bradley) testified she met defendant in January 1986, when she was 18, through her coworker Tolbert, who asked Burns to fill out a form with personal information on it, so defendant could cast her astrology chart. Burns flew to San Francisco from Seattle, and had intercourse with defendant. The next day Burns met Olive, had lunch in Berkeley, then went to the South Lake Tahoe house. There were a number of children there, but when Burns asked about “Salaam,” defendant “said he didn’t like him because he was half white” and “told me that he sent him away because he was bad and incorrigible.” Sometimes defendant “would threaten the other children and tell them that he would send them away like he sent Salaam.” He would also tell children “that the state would take them, that they would end up in foster homes, or that satanic groups would somehow get them and would sacrifice them to the devil.” He would terrify the young children by describing “that they would drain the children’s blood and use it as a sacrifice, blood sacrifice.”

Defendant also told Burns the victim was with Gudger. Burns stayed at the South Lake Tahoe house for several weeks because, “I was a kid. I was 18 years old with nothing to do.” She left after she saw defendant break Olive’s jaw, after Olive asked him about Salaam. Burns was too afraid to take Olive to

the hospital or report the assault. During the period she was at South Lake Tahoe, Burns worked as a nanny for the children, but also took trips with defendant to San Francisco, where he bought cocaine, which he pressured her to use. The last time she left the house with him, “he said that we had to get away because they wanted to take the children and sacrifice them.” Defendant said, “he wanted all of us to work and pretty much go underground and buy some motor homes and recruit other people so we can have our own underground family network.” After going to Los Angeles with the family, Burns ultimately returned to Seattle. When she received a call from defendant claiming that he was God, it “kind of woke me up[,]” and she began to “detach” herself from defendant. However, when she first was contacted by the police she was not cooperative because, “I was brainwashed[.]” She was afraid of defendant because he had vowed to seek revenge on anybody who betrayed him. Later, when she felt safe, she cooperated with the police. Burns had two misdemeanor theft-related convictions.

Michael Houchen, a former Los Angeles detective, testified that on March 5, 1986, he spoke with Raj, who was belligerent and evasive and told him she did not know where the victim was, but speculated he was with his mother. Defendant told Detective Houchen that Salaam had been dropped off with “Joy” and “Pam” some time before and defendant assumed the victim was with his mother.

Karen Preston, a Seattle optometrist born in 1958, met defendant in June 1985, after she was introduced to him by her

patient, Tolbert, who called him “Dr. U.” and said “he had methods for helping people with their difficulties in life.” When Preston’s father was in an accident, Tolbert told Preston this was “‘especially’” when she should see him. Preston, “extremely off balance” and “vulnerable[,]” went to meet defendant, who claimed an expertise with “various metaphysical disciplines.” Defendant asked her to bear his children “from the beginning.” Of the many children in the household, “Salaam definitely stood out to me because he was a little bit more active than the other children. A little bit more impish, I guess, is the best word to use. He had red hair that was curly and very adorable. He was adorable.”

Although Preston had loved defendant, she became afraid of him. Defendant complained about Urenauld, who had “gone to the neighbors and had resulted in a call to the police[,]” and complained about the victim, stating he “was a terrible behavior problem, and that they were searching for methods to resolve that.” After defendant broke off the relationship because Preston was “challenging him[,]” Preston posted bail for Raj and leased a van for the family, “because I had been rejected by him, and I might have believed in some way that it would make him feel favorably toward me again.” Preston did not feel free to cut defendant off, because he owed her money and she was physically afraid. Defendant “talked about kind of a cosmic war that he was engaged in, psychic war that he was engaged in, good against evil sort of a thing.”

During a call in January 1986, defendant said, “the problem with Salaam had been resolved, and that he had sent Salaam away, and that he was not coming back.” When Preston asked for details, defendant repeated that Salaam had been sent away and would not be coming back, and when asked if he had been sent to a foster home, defendant said no and, “That was all I needed to know.” This horrified Preston. During one call defendant said, “that Urenauld had created problems for the family that were, in essence, tearing it apart, and that he was not going to let . . . another child do that to the family.” During another call, in November or December 1985, defendant said that during a business meeting at his house, “one of the individuals had died at his home, and that this had created a plethora of problems for him in terms of how to deal with the consequences of the death that had occurred at his house.”

Nicole Mankis, who babysat for the family, testified defendant treated the victim differently, saying the victim was “evil” like Urenauld, and that defendant “had to discipline the evil out of him.” The children lined up and knelt before defendant to receive food. Raj was the “preferential partner” and had better privileges than the other women who “worked and behaved like servants and were obedient, and Raj was obedient.” Mankis became frightened of defendant when he showed her the book *Magick*, by Aleister Crowley, and claimed to have special powers, but because she was 16 and had no money, she stayed.

Renauld Jones (“Urenauld”) testified the victim was punished more severely than other children, and defendant “on a

very regular basis talked about the way he spoke, his race, the fact that he was White, and because he was White, he was the devil or he had demons." Defendant withheld food, and Jones still had scars from beatings. Sometimes he would be locked under the stairs or in a storage area, once for days. He was taught not to trust anybody and not talk about what happened at home. He was told his father was a doctor, a martial arts expert and God. When defendant beat Jones (then age eight) with wood in Seattle, Jones ran away, was taken to a hospital, and never returned. In 1991, at Raj's request, Jones wrote a letter stating that Raj had beaten him, not defendant. In 2006, defendant asked Jones to convince family members "to retract any statements that they made with regards to the pending trial."

Garzetta Billingslea testified she was born in 1957 and met defendant in October 1985, at Olive's suggestion, "because I was going through changes through life[.]" Defendant ("Dr. U.") asked her to fill out some paperwork, and they had an intimate relationship for a couple of months before Christmas 1985. Defendant made negative comments about the victim's mixed race. Billingslea saw the victim tied upside down from a crib or playpen. She did not intervene because "People were more into Ulysses and following his orders, everyone in the house, and for you to do otherwise would be a mistake." All the women were subservient to defendant. Before Christmas, Billingslea retrieved her things from the South Lake Tahoe house, and the children were there, except for the victim.

While under arrest in March 1986, defendant told peace officers Olive had taken the victim with her when she left the South Lake Tahoe house in December 1985. In 2000, when an FBI agent asked defendant where the victim was, defendant said to talk to Olive. Former South Lake Tahoe Police detective Douglas Pelissero testified Jean Solomon told him that on the weekend of March 8-9, 1986, defendant and Raj told her the victim was with Olive.

In May 1986, Pelissero searched a storage locker in Los Angeles that Raj had rented, and among other things found a doctor's bag with "'Dr. U.R.'" on it. DNA testing of blood on a blue blanket found in March 1986 in a U-Haul at the South Lake Tahoe house showed the blood was "consistent with originating from a biological offspring" of defendant and Olive.

6. Expert testimony about cults

Professor Janja Lalich testified as an expert about "closed groups," and we discuss her testimony again in Part I, *post*.

Before the jury, Lalich testified she is a sociology professor at Chico State, and studies groups and group dynamics. She studies "self-sealing systems" created by "a charismatic leader who professes to have some kind of special power or special authority" and she testified these groups typically evolve into "closed groups, ultra authoritarian groups" that do not necessarily live "off on some compound somewhere, but everybody is in agreement with the role of the leader . . . and they don't entertain any kind of counter ideas or alternative

ideas about the world." Lalich herself was in such a group for over 10 years.

Such groups begin with a charismatic leader purporting to have special powers to whom people submit their authority and attempt to please, and who promulgates rules and regulations that can include diet, clothing, childbearing and name changes. She cited as an example the Heaven's Gate group, whose members wore bags on their heads for months before committing suicide. Although authority stems from the leader, peer pressure helps enforce the rules. New members are typically people at a transition point in their lives, who are enticed in and encouraged to break prior social and family ties. "If you have family in the group, or you've become very close to the people in the group, that's going to make it more and more difficult to think about leaving and will keep you further and further bound to the group." Members may do things against their self-interest, such as committing crimes, and giving up money or even children for the group. Lalich had studied cases of members failing to intercede to help a child who is punished to set an example, or failing to report abuse or even death later, "to keep everything inside the group." When people eventually leave the group, "they're often very confused and shameful and guilty and embarrassed . . . and so in the beginning especially, it's very difficult for them to gain clarity on the experience." However, she knew of no case where a child *homicide* had not been reported for 16 years. She did not know defendant or about his

case, except “the basics[,]” and she offered no opinions about this particular case.

7. Unsolved Mysteries “sightings” evidence

Gilbert Zamora, a forensic artist and sworn officer with the San Jose Police Department, testified as a defense witness about age-progression training and techniques, to assist in locating missing children. He identified an age-progressed photograph of the victim, prepared by another artist, and opined it fairly depicted the victim for use as an investigative tool.

Eight witnesses from around the country testified to having seen the age-progressed depiction of the victim either on one of its multiple airings on *Unsolved Mysteries* or elsewhere, and having seen a male that resembled the photograph, typically mentioning the hair color. None of these witnesses had ever seen the victim in life, and most saw the male in question only once. Ken Hunt, a former South Lake Tahoe police officer, received printouts from *Unsolved Mysteries* reporting claims to have seen the victim arising from two airings of the show, from 47 states and two or three countries.

We briefly describe the “sightings” testimony.

In 1993, Rhinda Clem worked in a Yakima hospital where, “pretty regularly” over about a year, she saw “a young thin boy about ten. Ten or eleven, a mulatto” that resembled the victim’s photograph. In 1988, Kathy McKinney saw “an orange-haired black child” near a Sacramento elementary school who resembled the photograph. Leigh Trimaldi lived in West Palm Beach in 1995 and within a week of seeing *Unsolved Mysteries* saw

a boy about 12 who had “very orangey, reddish-orangey” hair and facial features and “mulatto skin tone” that resembled the photograph. Andrea Gaither saw the *Unsolved Mysteries* broadcast between 2002 and 2004, and saw the video from a link on the webpage for the NCMEC, and testified that in 2002, in Garland, Texas, she saw a young “biracial” man with “xanthous” or “yellowish” skin and “natural red hair with very tight curly texture” resembling the photograph. James Elves lived in Seattle in 1992, watched the *Unsolved Mysteries* broadcast, and called the program because a boy he knew “really well” in the neighborhood resembled the photograph. The boy was known as “Diamond” and stayed with his grandmother, “Ruby,” who was “part black[.]” Karen Christensen lived in Everett, Washington in 1993, saw the photograph on *Unsolved Mysteries*, and a couple of days later saw a “biracial” boy near an elementary school who had “copperish” red hair waiting for a bus, and who looked like the photograph. Christine Tassio visited Seattle in 1993, and while sitting on a bench saw a family with several children, including one who “didn’t match the rest of the children. He was a light-skinned black boy with very orange hair.” Madeline Lucas lived in Rancho Cordova in 1993 and called a television program within a few hours of watching it because she saw a “mixed race” boy with “bright red hair” who resembled the photograph walking along her sidewalk.

8. Rebuttal to “sightings” evidence

Psychologist Scott Fraser testified artistic renderings are not reliable, and described problems with cross-racial

identifications. A “distinctive cue” such “a red-haired child of mixed race” may dominate one’s memory.

DISCUSSION

I

Expert Cult Testimony

Defendant contends Lalich’s testimony about closed groups was erroneously admitted. He contends the evidence lacked foundation, was irrelevant, and was unduly prejudicial. As we explain, although the testimony was of questionable *value*, we find no prejudicial error in its admission.

A. Background

The People moved in limine to introduce testimony about the effects of mental and emotional abuse upon victims and how individuals can control others. The People in part analogized to cases of posttraumatic stress syndromes (rape victims and battered partners) and the Patti Hearst case. The People also likened defendant’s household to the Manson Family, and proffered testimony of female “‘family members’” to show defendant manipulated them “through isolation, intimidation, threats.” “As the ‘unquestioned leader’ of his ‘family,’ Defendant was able to secure compliance and silence[.]” (See *People v. Manson* (1976) 61 Cal.App.3d 102, 130-131 [evidence of unusual sexual practices “reasonably tended to show Manson’s leadership of the Family”].)

The trial court tentatively ruled this evidence admissible. Defendant later filed a counter-motion to exclude testimony about “mind control on the grounds that the proffered [evidence]

is not generally accepted by the relevant scientific community, the prosecution has failed to identify any myth which the testimony is intended to refute and the testimony is irrelevant." The defense provided a declaration from a psychologist who opined that Lalich's theory of "'Bounded Choice,'" as espoused in her book of the same title, was a discredited brainwashing theory. Lalich's responsive declaration detailed her expertise and proposed testimony, and claimed the defense psychologist's own views had been discredited.[9]

The trial court then held a hearing (Evid. Code, § 402) to determine the admissibility of Lalich's testimony, at which Lalich testified largely in line with her later trial testimony, which we have already summarized. Additionally, she outlined some facts about closed groups which were not generally understood. In particular, contrary to most expectations, the followers of a charismatic figure need not be "crazy, stupid people" but can be intelligent, come from intact homes, and be well-educated, but often are at a transition point in their lives. Also contrary to generally-held expectations, the process is not limited to a sudden awe of the leader, but is a "step-by-step process that changes people." Further, members

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[9] No purpose would be served by airing further details of this squabbling. The California Supreme Court has explained there is a difference of opinion about the existence and contours of "brainwashing." (*Molko v. Holy Spirit Assn*. (1988) 46 Cal.3d 1092, 1109-1110 (*Molko*).) Further, the defense did not call its psychologist to testify at trial to rebut Lalich.

cannot easily leave, because eventually, a member “cannot imagine life outside the group” and the leader may have made threats to keep members from leaving. Another misconception is that such groups live in isolated compounds, but they can exist “in all kinds of living situations and configurations[.]”

The trial court ruled Lalich’s testimony was admissible, because it would tend to “disabuse jurors of commonly held misconceptions” and could explain why someone would not report child abuse or cooperate with the police. Further, the jury was free to disregard the evidence, which was not tied to this case.

During closing arguments, the prosecutor argued defendant had “ultimate power and ultimate control” within the family, which he expanded by seducing younger women, fathering children with them, alienating them from society, and enforcing his will through threats and abuse. Lalich’s testimony supported the argument that “it does happen in our world where people get so seduced by these charismatic authorities, these people who have this charisma and are able to seduce others to come to them and basically do their bidding” and once a person joins the group “all you think about is this is what the program is, and this is what I do, almost becoming like these little robots.”

The defense argued defendant’s lifestyle was not on trial, Raj’s testimony was not credible because she was jealous of defendant’s other women, and the victim was still alive. The defense denigrated “the self-proclaimed expert regarding charismatic leaders” and argued even that testimony did not explain the “colossal difference between giving over your

paycheck to someone who you wanted to be involved with and failing to report the murderous assault upon a child[,]" emphasizing that Lalich had no examples of unreported child beating deaths within self-sealing groups. The defense also argued Raj's behavior was not robotic, and pointed to evidence showing Billingslea and Caviness had successfully left defendant when they chose.

The jury was instructed on the use of expert opinions generally, and in particular was instructed "you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide."

B. Foundation and Relevance

On appeal, defendant first contends Lalich's testimony lacked foundation and was irrelevant.

We apply the following rules: "First, the decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' [Citation.] Second, 'the admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education

could reach a conclusion as intelligently as the witness[.]”’” (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 (*McAlpin*), in part quoting Evid. Code, § 801, subd. (a).)

Defendant does not challenge Lalich’s qualifications. Although he declines to concede that “Lalich’s theories of coercive influence were valid,” because he does not explicitly argue they were *invalid*, he has forfeited the point. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 929 (*Anderson*).)

Defendant contends Lalich described brainwashing, which defendant views as occurring only with “extreme” conduct, and that there were only “superficial similarities between what Lalich described and the facts of the case.” Referring to Lalich’s testimony as “no more than speculation,” defendant contends, “There was no popular misconception about cults that Lalich’s testimony was necessary to rebut.”

The record refutes these assertions. Defendant concedes, as he must, that the trial evidence showed defendant’s family dynamics mirrored Lalich’s testimony about closed groups, in that there was evidence he claimed special powers, required members to turn over their money, cut off contact outside the family, imposed strict rules, assigned new names to members, and had members recruit other women at a vulnerable point in their lives. We interpret defendant’s argument to be that he was not brutal or “extreme” enough to run a closed group as described by Lalich--in support of this point, he contrasts his behaviors with prior reported tactics of the Unification Church. But whether defendant’s family fell within a “closed group” as

described by Lalich was for the jury to consider, in assessing the relevance of her testimony. The cases cited by defendant do not state or imply there must be a particular level of coercion to admit such testimony. Also, neither of the cases cited by defendant show the Unification Church used extreme physical violence to control its members, as the evidence establishes that defendant did. (See *Molko*, *supra*, 46 Cal.3d at pp. 1102-1106; *Katz v. Superior Court* (1977) 73 Cal.App.3d 952, 972-983.)

Further, Lalich testified in limine about misconceptions or myths about closed groups, as recounted *ante*. Although Lalich's trial testimony did not mirror her in limine testimony, the latter amply supports the trial court's in limine ruling, because Lalich's testimony tended to rebut myths about closed groups. Contrary to defendant's argument, this testimony had some relevance, as we describe *post*. Although not directly on point, there are cases that adequately paved the way for the trial court's ruling.

Most directly relevant is *People v. Riggs* (2008) 44 Cal.4th 248 (*Riggs*). In that case, the California Supreme Court upheld the admission of expert testimony about Battered Women's Syndrome, to show "that it is common for people who have been physically and mentally abused to act in ways that may be difficult for a layperson to understand" and show why a person would remain in an abusive relationship. (*Riggs, supra*, at pp. 293-294.) In this case, Lalich's testimony helped explain why women in the household would not intervene to stop defendant from beating children generally, and beating the victim in

particular, and why they would not report the abuse or immediately leave him.

Also instructive is *McAlpin*, *supra*, 53 Cal.3d 1289, where our Supreme Court reached a similar conclusion about expert testimony showing why a parent would not report sexual molestation of a child, namely "the fear of breaking up the marriage or harming relations with other family members, a sense of shame or failure as a parent, a psychological refusal to accept the fact of molestation, or a reluctance to damage the reputation of the alleged offender[.]" (*McAlpin, supra*, at p. 1299.) In ruling the evidence admissible, the court likened the case to rape trauma syndrome, where similar testimony "'would play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths.'" (*Id*. at p. 1300.)

In this case, there was testimony defendant feared outsiders taking control of the family and punished a member who allowed the police into the house, and there is a reasonable inference that he enforced his will upon the women in part by his treatment of their children and in part by his prolonged demands of adherence to his rules. Lalich's testimony could help the jury understand why the women did not protest defendant's abuse at the time, or report it later. This was relevant because it went to the credibility of their claims.

B. Inflammatory Nature of the Evidence

Defendant also contends Lalich's testimony was more prejudicial than probative (Evid. Code, § 352) and served only to inflame the jury. We disagree.

First, Lalich did not purport to testify about defendant or his family, she testified about cults generally, albeit under the "closed group" rubric.[10] Although this arguably diminished the *relevance* of her testimony, it also diminished any potential for prejudice.

Second, the *percipient* testimony about defendant's family and its dynamics was far more shocking than the abstract testimony given by Lalich. Multiple witnesses testified that as young women they joined defendant's polygamist household, bowing to his authority, enforced with threats that in some cases caused fear to the present day. Lalich's testimony pales in comparison to the descriptions of defendant's abuse of his "wives" and children, such as repeatedly hitting Raj, savagely beating Olive--breaking her jaw--and then denying her medical care, hanging the victim by his ankles for days at a time, and viciously beating the victim to death. (Cf. *People v. Harris* (1998) 60 Cal.App.4th 727, 737-738 [evidence of prior viciously

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[10] The trial court ruled the term "cult" was pejorative and excluded its use, although the word "cult" was used at least once at trial. But given the references at trial to brainwashing, Aleister Crowley, the Heaven's Gate group, and deprogramming--references to which no objections were interposed--we agree with defendant that it became clear to the jury that the testimony referenced "cults."

brutal attack inflammatory in comparison to charged offenses].) As the trial court accurately stated before the in limine hearing regarding Lalich's testimony, there already had been "an awful lot of testimony from a variety of different witnesses about what the alleged dynamics were[.]" Thus, we reject the claim that Lalich's testimony was inflammatory.

C. Prejudice

Finally, to show the prejudicial effect of Lalich's testimony, defendant states that the only person who claimed at trial to know the victim was dead was Raj. Although perhaps technically accurate, this observation misleads. Raj's clear and compelling account of the murder and its aftermath was well-corroborated. There was abundant evidence from multiple witnesses that defendant demonized the victim because of his mixed race--referring to the four-year-old victim as "evil," "possessed" and a "little white snake," and had consistently abused him in the past, including hanging him by his ankles until he was "near death," beating him, denying him food, and locking him in a freezing garage.

Specific to the night of the murder, after Lewis saw defendant hit the victim in the garage, defendant again commented the victim was "near dead." Lewis then saw defendant carrying a bundle in a blue blanket--she never saw the victim again. Joseph testified the last time he saw the victim, the victim was in a blanket defendant was carrying and "didn't look awake or anything." Burns testified defendant would threaten the other children by telling them "he would send them away like

he sent Salaam." Defendant gave inconsistent statements about where the victim was, and told Preston the victim had been sent away and would not come back. Defendant beat Olive severely when she asked where the victim was. Renauld Jones testified defendant asked him to convince relatives to retract any statements they had made regarding the upcoming trial. The blue blanket contained blood, which DNA testing indicated was from the offspring of defendant and Olive. There was overwhelming evidence to corroborate Raj's account of the murder and the body's disposal.[11]

Accordingly, even if Lalich's testimony were more properly excluded than admitted, it is not reasonably probable the trial result would have been different had the testimony not been admitted. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *People v. Watson* (1956) 46 Cal.2d 818, 836.)[12]

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[11] We note also that the jury declined to convict defendant of the more serious charge--first degree murder--which bolsters the conclusion that the jury was able and willing to weigh the evidence dispassionately.

[12] Defendant refers in passing to "the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution" but makes no explicit federal argument. As the People point out, defendant's burden under federal law would be to show that there were *no* permissible inferences to be drawn from the evidence and that its admission made the trial *fundamentally unfair*. (See *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *People v. Kelly* (2007) 42 Cal.4th 763, 787; *People v. Partida* (2005) 37 Cal.4th 428, 439.) Even if the federal claims were not forfeited for the failure to argue (see *Anderson*, *supra*, 152 Cal.App.4th at p. 929), we do not see how the admission of Lalich's expert testimony resulted in fundamental unfairness, for reasons we have already explained.

II

Instruction on Eyewitness Testimony

The defense attempted to raise a reasonable doubt about whether the victim was still alive by presenting witnesses who, generally speaking, testified they had seen someone resembling the victim's aged photograph as shown on *Unsolved Mysteries*. Because none of these witnesses had known the victim in life, they were not really *identifying* the victim--rather, they were making a *comparison* between what they saw on television and a person they saw elsewhere.

Defendant unsuccessfully objected to an instruction on eyewitness identification, asserting it was designed to ensure a defendant was not wrongly identified as the perpetrator, but in this case it would be applied to identification *of the victim* after his supposed murder, and therefore make it harder to raise a reasonable doubt whether the victim was alive.

The challenged instruction, a modification of CALCRIM No. 315, was given to the jury as follows:

> "In evaluating a witness's testimony relative to identification, you may consider the following questions:
>
> "Did the witness know or have contact with Alexander Sol Olive before the event?
>
> "How well could the witness see the subject?
>
> "What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation?
>
> "How closely was the witness paying attention?

"How much time passed between the event and the time when the witness reported seeing the subject?

"Did the witness ever change his or her mind about the identification?

"How certain was the witness when he or she made an identification?

"Are the witness and subject of different races?

"Were there any other circumstances affecting the witness's ability to make an accurate identification?"[13]

In argument, the prosecutor emphasized that the "sightings" witnesses, while perhaps sincere, were wrong, and "what's really clear is that these people were identifying a black or a biracial child with red hair, because that was an unusual feature." The defense argued many witnesses saw a boy that looked like the victim, and argued in detail why those sightings were credible.

On appeal, defendant contends the instruction was argumentative, and shifted the burden of proof to the defense because it "implied that the jury had to reach a certain level of certainty with regard to the defense evidence, before they could consider it."

We agree with defendant that the original "eyewitness" instruction (CALCRIM No. 315) is designed to be used when there is eyewitness testimony identifying a *defendant* as the perpetrator. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1143-

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[13] CALCRIM No. 226 instructed the jury in part to consider how well *any* witness could "see, hear or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened?"

1144 (*Wright*); *People v. Golde* (2008) 163 Cal.App.4th 101, 119.) Arguably, this instruction should not have been given to clarify how the jury was to consider a particular area of *defendant's* evidence. We do not encourage this practice. However, we disagree that the modified version given in this case was argumentative or altered the burden of proof, as defendant contends.

A. Argumentative

Defendant relies in part on *People v. Fudge* (1994) 7 Cal.4th 1075, to support his claim that discussion of eyewitness identification is best left to argument and expert opinion--therefore the instruction as given was argumentative. In *Fudge*, the defense produced expert testimony about eyewitness identification to challenge the identification of Fudge as the perpetrator, and proposed an instruction on eyewitness identification factors. (*Fudge*, *supra*, 7 Cal.4th at pp. 1109-1110, fn. 8.) It was in that context that the *Fudge* court stated: "A criminal defendant 'is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence.' [Citations.] An explanation of the effects of such factors, however, 'is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate.'" (*Fudge, supra*, at p. 1110.) *Fudge* held the trial court erred harmlessly by refusing the proposed instruction. (*Id*. at pp. 1110-1112.)

Thus, *Fudge* does not hold that any instruction outlining factors relevant to identification is necessarily argumentative.

An argumentative instruction is "an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.'" (*People v. Mincey* (1992) 2 Cal.4th 408, 437; see *Wright*, *supra*, 45 Cal.3d at pp. 1135-1138 [trial court properly refused to instruct jury to consider specific items of evidence about the identification].) The challenged instruction did not invite the jury to draw inferences from the sightings evidence, it merely drew to the jury's attention a number of standard factors that would be relevant to any identification, and it did not compel the jury to answer any of those questions, or suggest the jury should answer them in any particular way. It is well known that eyewitness identifications of strangers and of members of another race may be unreliable. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 908; *State v. Henderson* (2011) 208 N.J. 208 [27 A.3d 872, 930].) Although the instruction referred to defense "sightings" evidence rather than evidence identifying defendant as the perpetrator, it did so in a neutral and commonsense way. It was not argumentative.

B. Burden of Proof

Nor did the instruction alter the burden of proof.

"In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood

that instruction in a manner that violated his constitutional rights. [Citations.] We interpret the instructions so as to support the judgment if they are reasonably susceptible to such interpretation, and we presume jurors can understand and correlate all instructions given." (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.)

The jury was instructed on the presumption of innocence and the People's burden of proof beyond a reasonable doubt, and that "the People must prove . . . the Defendant committed an act that caused the death of another person[.]" Viewing all of the instructions together, the challenged instruction did not impair defendant's ability to raise a reasonable doubt of guilt by demonstrating that the victim might have been alive beyond January 1986.

Defendant asserts that if the instruction had not been given, it is reasonably probable the jury would have found a reasonable doubt. We disagree. If the "sightings" evidence had raised a reasonable doubt, the challenged instruction would not have steered the jury away from a not guilty verdict. As we have explained, the instruction was fairly benign and was not argumentative, nor did it shift the burden of proof to defendant. The instructions together made it clear that the People were required to prove the victim was dead.

Further, the probative value of the sightings evidence was very limited: None of the witnesses had known the victim in life, and the sheer number of sightings from all over the country undermined each individual sighting, most of which were

fleeting and vague.[14] In contrast, the evidence the victim was dead--and dead at defendant's hand--was overwhelming, as we have recounted in detail *ante*. Accordingly, we reject defendant's claim that it is reasonably probable that the challenged instruction caused defendant any prejudice.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.

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[14] We implied the same in our *Palma* letter, issued in response to defendant's pretrial petition for writ of mandate, and referenced in defendant's briefing. (See *Palma v. U.S. Industrial Fasteners, Inc*. (1984) 36 Cal.3d 171.) There, we suggested the trial court's reasons for excluding the sightings evidence as irrelevant went to weight rather than admissibility. (See *Roberson v. Superior Court* (C062557) [writ denied Sept. 11, 2009].) The trial court later admitted the evidence after holding an evidentiary hearing.