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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD FERNANDES,

Defendant and Appellant.

C070233

(Super. Ct. No. 10F00556)

Defendant Donald Fernandes murdered his girlfriend, Karen Curtin. After repeatedly striking her in the head with a hammer, splitting open her skull, he placed a sock in her mouth and trash bag over her head in order to, as he explained to police, “put her out of her misery.” Defendant was convicted by jury of first degree murder with an enhancement for the personal use of a deadly weapon. The trial court sentenced him to

state prison to serve an indeterminate term of 25 years to life, plus a consecutive determinate term of one year for the deadly weapon enhancement.

On appeal, defendant contends: (1) the first degree murder conviction must be reversed because there is insufficient evidence of deliberation and premeditation; (2) the trial court violated his constitutional right to due process by denying his request to obtain Curtin's medical records from the Sacramento County Mental Health Treatment Center; (3) the trial court abused its discretion by excluding from evidence a booking photo of Curtin that was offered to counter the purported prejudicial impact of a more "flattering" pre-death photo offered by the prosecution; (4) the trial court prejudicially erred by instructing the jury with CALCRIM Nos. 361 and 362; and (5) the prosecutor engaged in misconduct during cross-examination of defendant and during rebuttal argument to the jury, rendering his conviction a denial of due process.

We disagree with each contention. As we explain, the record contains sufficient evidence to support the jury's finding that the murder was committed with premeditation and deliberation. Defendant had a motive to kill Curtin. And while he glosses over this fact in his appellate briefing, after brutally beating Curtin with the hammer, rather than call for medical assistance, he placed a sock in her mouth and a trash bag over her head. According to his own words, he did this to "put her out of her misery." Thus, even if an assault with a hammer is generally "not indicative of a preconceived design to kill" (*People v. Wharton* (1991) 53 Cal.3d 522, 548), defendant's spontaneous statement to police reveals he made the deliberate and premeditated decision to kill. With respect to defendant's remaining contentions, we conclude the trial court's decision to prevent him from obtaining Curtin's medical records did not violate his right to due process. Nor did the trial court abuse its discretion by excluding from evidence the proffered booking

photo. CALCRIM Nos. 361 and 362 were appropriately given to the jury. And even if providing these instructions was error, the error was harmless in light of the overwhelming evidence of defendant's guilt. Finally, we find no prejudicial prosecutorial misconduct. Accordingly, we affirm the judgment.

#### FACTS

On January 24, 2010, defendant struck Curtin in the head with a hammer 10 separate times. The attack occurred in her bedroom. Curtin was either on her bed when defendant struck her with the hammer or the assault caused her to fall onto the bed. Each blow lacerated her skin, causing blood to spatter on a bedroom wall and on clothes baskets near her bed. Several blows landed on the right side of Curtin's head, splitting open her skull and tearing the brain. She also received multiple facial fractures. One of the blows was partially blocked by Curtin's right hand and severed the tip of one of her fingers. The assault rendered Curtin unconscious, but did not result in her immediate death.

Rather than call for emergency medical services, defendant called an ex-girlfriend, Marti Hall. Defendant told Hall he had spent the previous night at Curtin's house. According to defendant, when he and Curtin got up that morning, they started fighting. At some point, Curtin "came at [him] with a hammer." Defendant then "blacked out." When he came to, Curtin was hurt. Hall tried to convince defendant to call 911. Defendant said he did not want to go to jail. Hall then hung up the phone and called 911.

Officers Tamer Sabra and Steven Davis with the Sacramento Police Department responded to Curtin's house and knocked on the front door. Receiving no response, they went around to the back of the house, found the back door partially open, announced their presence, and entered the house. As they entered, defendant came out of Curtin's

bedroom and closed the door behind him. The officers ordered defendant to put his hands up and walk towards them. Defendant complied with their commands and started to cry. Officer Davis handcuffed defendant and sat him down in the kitchen. As Officer Sabra walked over to Curtin's bedroom, defendant volunteered: "She tried to hit me with a hammer. I took it from her and hit her with it." Officer Sabra opened the bedroom door and found Curtin lying on the bed with a black trash bag over her head. She was still alive, but her breathing was labored. When Officer Sabra removed the bag, he "saw on the right side of her head there was a lot of blood, [and there] appeared to be brain matter on the wound." The officer also found a sock in Curtin's mouth. At this point, Officer Sabra removed the sock and yelled: "This is bad, this is bad . . . . There's a sock in her mouth." Still in the kitchen with Officer Davis, defendant responded: "I tried to put her out of her misery."

Paramedics arrived a short time later and transported Curtin to the University of California at Davis Medical Center. She was in a coma when she arrived. As mentioned, Curtin had numerous lacerations, an open skull fracture, multiple facial fractures, and severe hemorrhaging in the brain. There were also "multiple different hemorrhages within the muscles and the soft tissues on the inside of her neck," which was consistent with "[a]ny sort of blunt force injury or compression of the neck." Due to the severity of the brain injury, the neurosurgery team did not believe there to be any viable treatment options. The decision was made to provide Curtin with comfort care and allow her to die. She died on January 28, 2010.

Defendant testified at trial. According to his account of events, he went to Curtin's house the night before the murder to see her and to pick up a pair of designer jeans he had previously left there. However, Curtin believed defendant owed her \$80 and

wanted the money before she would return the jeans. Defendant stayed the night. The following morning, Curtin “started having one of her panic attacks and anxiety attacks.” According to defendant, he had seen her have these attacks in the past and understood “she wasn’t taking medication that she told [him] she was supposed to be taking.” Defendant suggested they “go to the doctor or to the hospital to get her help.” At that point, as defendant explained: “She completely flipped out on me and told me that she would not go to the doctor, and told me that if I called or tried to attempt to take her, that she would fucking kill me.” Curtin then grabbed a hammer and “came towards [him] in a swinging motion.” That was when defendant blacked out. When he regained consciousness, he was lying on the bedroom floor. He stood up, saw Curtin’s body “sprawled out on the bed,” and “bolted from the room in a panic.” Defendant then called Hall. When he got off the phone with her, he believed Hall would be calling 911. Defendant then got dressed. The next thing he remembered was being taken into custody by police. He thought that he may have “passed out” between getting dressed and the arrival of the officers because he was “light-headed and in a drowsy state.” Defendant denied saying to Officer Davis that he tried to put Curtin out of her misery. He did not explain how the sock ended up in Curtin’s mouth or how the trash bag ended up over her head, except to say he did not “recall doing anything like that.”

At the time of the murder, defendant was 6 feet 2 inches tall and weighed 205 pounds. Curtin was 5 feet 5 inches tall and weighed 120 pounds.

## DISCUSSION

### I

#### *Sufficiency of the Evidence*

Defendant contends his first degree murder conviction must be reversed because there is insufficient evidence of deliberation and premeditation. He is mistaken.

“To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574].) The standard of review is the same in cases in which the prosecution relies on circumstantial evidence. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) Accordingly, we must affirm the judgment if the circumstances reasonably justify the jury’s finding of guilt regardless of whether we believe the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Thomas* (1992) 2 Cal.4th 489, 514; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

“A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080 (*Koontz*).) “Premeditation and deliberation can occur in a brief interval. “The test is not time, but reflection. ‘Thoughts may follow each other with great rapidity and cold, calculated

judgment may be arrived at quickly.”” [Citation.]” (*People v. Sanchez* (2001) 26 Cal.4th 834, 849; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.)

As stated in *People v. Solomon* (2010) 49 Cal.4th 792, in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), our Supreme Court identified “three types of evidence commonly shown in cases of premeditated murder: planning activity, preexisting motive, and manner of killing. [Citation.] Drawing on these three categories of evidence, *Anderson* provided one framework for reviewing the sufficiency of the evidence supporting findings of premeditation and deliberation. In doing so, *Anderson*’s goal ‘was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing rather than mere unconsidered or rash impulse.’ [Citation.]” (*People v. Solomon, supra*, 49 Cal.4th at p. 812.) Under the *Anderson* framework, “an appellate court will sustain a conviction where there exists evidence of all three [categories of evidence], where there is ‘extremely strong’ evidence of planning activity, or where there exists evidence of a motive to kill, coupled with evidence of either planning activity or a manner of killing which indicates a preconceived design to kill.” (*People v. Hovey* (1988) 44 Cal.3d 543, 556.)

After setting out these principles, defendant’s entire argument in support of reversal spans three sentences: “There was a lack of evidence of planning activity. The evidence showed a spontaneous act, the result of an unconsidered and rash impulse rather than preexisting reflection. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-332.) The conviction for first degree murder must be reversed for lack of evidence of premeditation and deliberation.” This argument is not persuasive. As mentioned, the *Anderson* framework does not require there to be evidence of planning activity in order to sustain a

conviction for first degree premeditated murder. Moreover, “‘*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.’ [Citations.]” (*People v. Solomon, supra*, 49 Cal.4th at p. 812.) Thus, while we agree with defendant there is no evidence he planned to kill Curtin prior to their argument that morning, this is not dispositive.

In *Koontz, supra*, 27 Cal.4th 1041, the defendant (Koontz) and the victim (Martinez) got into an argument in the apartment they shared at an independent living project. When Martinez sought refuge in the project’s office, which was located in another apartment, Koontz followed him there and continued the argument. After the project’s security monitor told the men he would have to write an incident report if they did not resolve their differences, Koontz said: “‘All right, I’ll settle it.’” (*Id.* at p. 1055.) He then locked the office door, pulled a handgun from his waistband, and demanded Martinez’s car keys. When Martinez refused, Koontz shot him in the abdomen. The security monitor tried to call for an ambulance, but Koontz pulled another handgun from his waistband, ripped the phone out of the wall, and threw the phone at Martinez, saying: “‘Let him call.’” (*Id.* at p. 1056.) At Koontz’s direction, the security monitor took Martinez’s car keys from his coat pocket, accompanied Koontz to the parking lot, and started Martinez’s car. Koontz then drove away in the car. Martinez died of the gunshot wound. (*Id.* at p. 1057.)

Applying the *Anderson* guidelines, our Supreme Court affirmed Koontz’s first degree murder conviction. The court explained: “[W]e easily find evidence of planning ([Koontz’s] arming himself and following [Martinez] to the Project’s office), motive (to effectuate a robbery), and a manner of killing indicative of a deliberate intent to kill

(firing a shot at a vital area of the body at close range, then preventing the witness from calling an ambulance). These facts suffice to support a verdict of premeditated and deliberate first degree murder.” (*Koontz, supra*, 27 Cal.4th at p. 1082.) However, while using the *Anderson* guidelines, the court was also careful to point out: “[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way.’ [Citation.] In other words, the *Anderson* guidelines are descriptive, not normative. ‘The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.’ [Citation.]” (*Id.* at p. 1081.)

Here, we do not find evidence of planning. Unlike *Koontz*, defendant did not bring the murder weapon to the argument that resulted in the victim’s death. The record reveals that Curtin kept hammers around the house because she restored old furniture. According to defendant’s testimony, Curtin came at him with the hammer and then he blacked out. However, the jury was not required to believe this version of events. Indeed, as mentioned, defendant stated to the responding officers: “She tried to hit me with a hammer. I took it from her and hit her with it.” This spontaneous statement belies his claim that he did not remember hitting Curtin with the hammer. And from it, the jury could reasonably infer he deliberately took the hammer from Curtin in order to hit her with it. Moreover, the jury could have disbelieved that Curtin initiated the violence with the hammer. At the time of his arrest, defendant had no injuries consistent with having been hit with a hammer. Defendant also admitted during his testimony at trial that he

went over to Curtin's house the night before the murder to retrieve a pair of designer jeans he had left there, but Curtin wanted the \$80 she claimed defendant owed her. Immediately after hitting Curtin with the hammer, defendant called Hall and admitted he and Curtin got into an argument that morning. The jury could reasonably have concluded this argument was over Curtin's demand for \$80 before she would return the jeans to defendant. But this does not mean defendant planned his murderous attack with the hammer ahead of time. The record does not reveal where the hammer was prior to the argument. Thus, defendant may have simply grabbed the closest object, which happened to be the hammer.

Nevertheless, we do find substantial evidence of premeditation and deliberation. As we have explained: "Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" [Citation.]" (*People v. Sanchez, supra*, 26 Cal.4th at p. 849.) Thus, defendant need not have planned the murder in advance in order to have reflected on his decision to kill Curtin. Defendant had a motive to kill Curtin: retrieval of his designer jeans and anger at Curtin's refusal to return them to him. And most importantly, the manner of killing is indicative of a deliberate intent to kill. Like *Koontz*, where the defendant "fired a shot at the victim's abdomen" and "then took active steps to prevent [the security monitor] from summoning medical care, without which the victim was certain to die" (*Koontz, supra*, 27 Cal.4th at p. 1082), here, defendant viciously and repeatedly hit Curtin in the head with the hammer, refused to call for emergency services, and then took active steps to make certain she died, i.e., by placing a sock in her mouth and trash bag over her head to "put her out of her misery." (See *People v. Davis* (1995) 10 Cal.4th 463, 510 [manner of

killing alone may support conviction for first degree premeditated murder]; *People v. Lee* (2011) 51 Cal.4th 620, 637 [manner of killing and defendant’s statement that he wanted to “straighten [the victim] out” supported conviction for premeditated first degree murder].)

We conclude the record contains sufficient evidence to support the jury’s finding that the murder was committed with premeditation and deliberation.

## II

### *Denial of Defendant’s Request to Obtain Curtin’s Medical Records*

Defendant also argues the trial court violated his constitutional right to due process by denying his request to obtain Curtin’s medical records from the Sacramento County Mental Health Treatment Center. We disagree.

### *Additional Background*

On July 14, 2011, defendant’s attorney served the Sacramento County Mental Health Treatment Center with a subpoena seeking to obtain Curtin’s medical records. The following week, the Sacramento County Counsel filed a written opposition to the subpoena asserting Curtin’s mental health records, if they existed, were protected by the psychotherapist-patient privilege of Evidence Code section 1014, which provides that a patient “has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist.” The opposition also claimed any such records were privileged under Welfare and Institutions Code sections 5328 and 10850.<sup>1</sup>

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<sup>1</sup> Welfare and Institutions Code section 5328 provides, with certain exceptions not relevant here, that “[a]ll information and records obtained in the course of providing services under [various divisions of the Welfare and Institutions Code], to either

On September 13, 2011, defense counsel filed a declaration under seal in support of the release of the subpoenaed records. The declaration stated: “It is my understanding, that at the time of the event [Curtin] had a history of mental instability and possible violence, and had received treatment at the Sacramento Mental Health [Treatment] Center. [¶] At the time of [Curtin’s] death, [defendant] stated to the police that she had attacked him with a hammer, and, that this was the last thing he could remember. [¶] It is my belief that the Sacramento Mental Health [Treatment] Center records may contain information, or will lead to information, that substantiates [defendant’s] claim of [Curtin’s] propensity for violence, or mental instability.”

On October 20, 2011, the prosecution filed a motion in limine requesting that the trial court “exclude any testimony or documentation concerning [Curtin’s] mental health” as “irrelevant to the issues in this case.” The same day, the trial court allowed defense counsel to make an offer of proof in support of his request to obtain the subpoenaed records. Counsel explained: “I can say that my client informed me on the day of the incident that he’d had a conversation with [Curtin]. [¶] Essentially he had some concerns about her behavior, and it was his belief, having a relationship in excess of four years I believe, a dating relationship on again and off again, that when she was off her

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voluntary or involuntary recipients of services shall be confidential.” This privilege operates independently of any privilege established by the Evidence Code. (*Boling v. Superior Court* (1980) 105 Cal.App.3d 430, 443.) Welfare and Institutions Code section 10850 provides, again with exceptions not relevant here, that “all applications and records concerning any individual made or kept by any public officer or agency in connection with the administration of any provision of this code relating to any form of public social services for which grants-in-aid are received by this state from the United States government shall be confidential, and shall not be open to examination for any purpose not directly connected with the administration of that program, or any investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any such program.” (Welf. & Inst. Code, § 10850, subd. (a).)

meds she became violent. [¶] And, in fact, he suggested that they need[ed] to go to the hospital because he believed that she was either high or on -- or mentally unstable because she was not on her meds, psychiatric meds, and that's when she grabbed a hammer and came after him. [¶] So I think it's important, first of all, to substantiate, if he were to take the stand, to substantiate the fact that she was on these meds. [¶] And perhaps those records may demonstrate there was times [sic] when she was taking her meds that she was supposed to -- there's probably times when she was and, and [sic] then what her conduct was, if noted in those records, whether they were violent or unstable in some fashion. [¶] Also, if there's any specific instances [sic] of violence when she -- or certainly violence when it comes to her behavior and my client's ability to protect himself, self-defense situation, but also even instability in that he, I believe would testify that he would treat her with kid gloves and became very nervous and concerned when she was off her medication because she would become completely unstable, unpredictable and violent.”

The trial court then reviewed the subpoenaed records in camera and denied defendant's request, explaining: “[T]he Court has determined that there are no records in this sealed envelope that would be relevant, material and/or tend to support any admissible evidence based on the offer of proof that was made in chambers. [¶] Without breaching the confidences of the victim's mental records, I'll only say that they describe, these records, events that occurred in 2005 and 2000 -- and 2007.” These records were provided to this court under seal.

### *Analysis*

Denial of a defendant's request to examine the confidential psychiatric records of a critical prosecution witness for purposes of impeachment “implicate[s] the fundamental

fairness of trials and [is] therefore subject to analysis under the due process clause of the Fourteenth Amendment to the United States Constitution.” (*People v. Abel* (2012) 53 Cal.4th 891, 931; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56 [94 L.Ed.2d 40].) In this context, the trial court has a “duty to review the documents and to determine which, if any, are material and should be disclosed.” (*People v. Martinez* (2009) 47 Cal.4th 399, 453.) “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*Pennsylvania v. Ritchie, supra*, 480 U.S. at p. 57; *People v. Abel, supra*, 53 Cal.4th at p. 931.)

Defendant acknowledges that “[t]his case does not involve the confrontation of [Curtin] as a witness, since she was deceased at the time of trial.” Nonetheless, he argues that “Curtin’s mental health records would have substantially corroborated his testimony [i.e., Curtin had an anxiety attack the day she was killed and attacked defendant with the hammer after he urged her to go to the doctor], even if they did not disclose serious prior assaultive incidents. In this context, it was an abuse of discretion and a denial of due process to exclude evidence of [Curtin’s] history of mental treatment, mental disorders, and mental issues.” Having reviewed the confidential records ourselves, we find no reasonable probability that, had the trial court disclosed the records to the defense, the result of the trial would have been different. Nor do we find a reasonable probability that nondisclosure caused an adverse effect on defense counsel’s investigations or trial strategy. (See *People v. Abel, supra*, 53 Cal.4th at p. 931 [reviewing court must consider “adverse effect nondisclosure might have had on counsel’s investigations and trial strategy”].) We find no due process violation.

### III

#### *Exclusion of the Booking Photo*

We also reject defendant's claim that the trial court abused its discretion by excluding from evidence a booking photo of Curtin that was offered to counter the purported prejudicial impact of the more "flattering" pre-death photo offered by the prosecution and admitted into evidence.

"We review the trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code section 352, including photographic evidence, for abuse of discretion." (*People v. Cole* (2004) 33 Cal.4th 1158, 1198; *People v. Martinez* (2003) 31 Cal.4th 673, 692.) We will not disturb such rulings "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez, supra*, 20 Cal.4th at pp. 9-10.)

Defendant acknowledges that a pre-death photograph of Curtin was "relevant to show the extent of the harm caused by defendant's actions." (*People v. Cole, supra*, 33 Cal.4th at p. 1198.) Thus, he does not quarrel with the trial court's decision to allow into evidence a photograph of Curtin taken during a family birthday party in 2005. Nevertheless, he asserts the trial court should have also allowed the admission of a sanitized booking photograph taken in 2003 following a domestic violence incident between Curtin and a previous boyfriend, Charles Hughes. Hughes testified about this incident during defendant's case. Defendant argues that "the sanitized booking photograph should have been introduced in addition to the flattering 'head shot' of the victim. The goal should be to erase any prejudicial effect of [the] more flattering image, if that is possible. To fail to introduce both photographs is to elevate this victim's status

and create a special sympathy factor which would otherwise be considered irrelevant.”

We disagree for two reasons.

First, while we agree with defendant’s observation that there is no “single or preferred means of presenting [photographic evidence of a murder victim during life]; an unflattering photograph is just as probative as a flattering photograph,” the reverse is also true. And here, aside from whether the photographs are “flattering” or not, the trial court could reasonably have concluded the most recent photograph was the most probative for purposes of showing the extent of the harm caused by defendant’s violent assault. (See *People v. Cole, supra*, 33 Cal.4th at p. 1198.) We cannot find this to be “an arbitrary, capricious, or patently absurd” decision. (*People v. Rodriguez, supra*, 20 Cal.4th at pp. 9-10.)

Second, we perceive no prejudice arising from the admission of the 2005 photograph of Curtin. It is a family photograph. As with many such photographs, Curtin is smiling. But this does not “present a one-sided image” of Curtin. We must assume jurors are intelligent persons capable of understanding that a family photograph does not capture the whole of a person. (See *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1437 [jury system rests on the assumption jurors are intelligent and capable persons].) Nor can we conclude the jury’s passions and prejudices would have been inflamed by admission of the family photograph. (See *People v. Gurule* (2002) 28 Cal.4th 557, 655.) Because there was no prejudicial effect to be erased by the less flattering booking photo, the trial court’s decision to exclude the latter photograph could not have resulted in a “manifest miscarriage of justice.” (*People v. Rodriguez, supra*, 20 Cal.4th at pp. 9-10.)

We conclude the trial court did not abuse its discretion by excluding from evidence the booking photo of Curtin.

## IV

### *Instructional Error*

Defendant further asserts the trial court prejudicially erred by instructing the jury with CALCRIM Nos. 361 and 362. He did not object to these instructions at trial. “Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant’s substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]” (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) We find no error, much less a miscarriage of justice.

### *CALCRIM No. 361*

CALCRIM No. 361, as delivered to the jury in this case, provided: “If the Defendant failed in his testimony to explain or deny certain evidence against him, and if he could reasonably be expected to have done so based upon what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the Defendant guilty beyond a reasonable doubt. [¶] If the Defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

In determining whether this instruction was properly given, we must “ascertain if defendant . . . failed to explain or deny any fact of evidence that was within the scope of relevant cross-examination.” (*People v. Saddler* (1979) 24 Cal.3d 671, 682.) Stated differently, “[t]here [must be] facts or evidence in the prosecution’s case within [the defendant’s] knowledge which he [or she] did not explain or deny.” (*Ibid.*) “A contradiction between the defendant’s testimony and other witnesses’ testimony does not constitute a failure to deny which justifies giving the instruction. [Citation.] ‘[T]he test

for giving the instruction is not whether the defendant's testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear.' [Citation.]" (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.)

Here, as mentioned, defendant did not explain how the sock ended up in Curtin's mouth or how the trash bag ended up over her head, except to say he did not "recall doing anything like that." But he remembered other things, such as Curtin's purported anxiety attack, his attempt to convince her to go to the doctor, and her attempt to hit him with the hammer. At that point, he claimed to have blacked out. However, immediately after regaining consciousness, defendant remembered calling Hall, getting dressed, and being taken into custody by police. He denied making certain statements to the responding officers. Most importantly, he denied telling Officer Davis he tried to put Curtin out of her misery immediately after Officer Sabra yelled: "This is bad, this is bad . . . . There's a sock in her mouth." Defendant denied coming out of Curtin's bedroom prior to being taken into custody, claiming he was in the living room when the officers came through the back door. Thus, as was the case in *People v. Kozel* (1982) 133 Cal.App.3d 507, defendant's "lack of memory was selective." (*Id.* at p. 531.) The jury "could have found that [this memory loss] was feigned, and that it was within [defendant's] knowledge to fill in the gaps in his testimony. Since the evidence could have been so construed, it was not error to give [CALCRIM No. 361]." (*Ibid.*)

Nevertheless, citing *People v. De Larco* (1983) 142 Cal.App.3d 294, defendant asserts that "[f]ailure to recall is not an appropriate basis for this instruction." We find *De Larco* to be distinguishable. There, the defendant was convicted of burglarizing an automotive shop. His fingerprint was found on a flashlight in the shop. At trial, the

defendant testified he had previously visited a friend who worked at the shop and touched a number of tools during that visit, although he did not specifically remember touching the flashlight. (*Id.* at p. 299.) The CALJIC version of CALCRIM No. 361 was given to the jury based on the fact the defendant “failed to recall having touched the flashlight.” (*Id.* at p. 309.) The Court of Appeal held this was error, explaining: “Obviously, if defendant admitted having touched tools in the shop days prior but could not specifically remember the flashlight, and in addition denied having been in the shop that evening, he could not disclose any further facts that would shed light on his innocence. We conclude, therefore, that there was no support in the record for the giving of the instruction.” (*Ibid.*) Unlike *De Larco*, where the defendant claimed not to remember something as trivial as which particular objects he touched while visiting his friend at the automotive shop, here, the evidence supports the conclusion that defendant’s selective memory loss was feigned.

The trial court did not err in providing the jury with CALCRIM No. 361. In any event, “[e]ven had the jury accepted [defendant’s] explanation that he did not remember what happened and thus he was not able to explain or deny, the evidence of [first degree murder] was overwhelming. The error would be harmless.” (*People v. Kozel, supra*, 133 Cal.App.3d at p. 531.)

#### ***CALCRIM No. 362***

CALCRIM No. 362, as delivered to the jury in this case, provided: “If the Defendant made a false or misleading statement before the trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude the Defendant made the statement, it is up to you to decide the

meaning and importance, it's [*sic*] meaning and importance. [¶] However, evidence that the Defendant made such a statement cannot prove guilt by itself.”

“It is well established that pretrial false statements by a defendant may be admitted to support an inference of consciousness of guilt by the defendant.” (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1102, citing *People v. Showers* (1968) 68 Cal.2d 639, 643.) Whether the falsity of the pretrial statement is demonstrated by the fact it is inconsistent with the defendant’s trial testimony, or whether such falsity is proved by the testimony of other witnesses, is immaterial. (*Edwards, supra*, at pp. 1102-1103.) Where there is evidence that the defendant made a pretrial false statement, the trial court is required to instruct the jury on the proper method of analyzing this evidence. (*Id.* at p. 1104.) CALCRIM No. 362 correctly instructs the jury on how to do so.

Here, as mentioned, defendant told Hall he “blacked out” immediately after Curtin “came at [him] with a hammer.” He then told the responding officers: “She tried to hit me with a hammer. I took it from her and hit her with it.” This statement to police contradicts his statement to Hall that he did not remember hitting Curtin with the hammer. From it, the jury could have reasonably concluded defendant’s statement to Hall was false. While there was testimony defendant also told police he “blacked out,” the jury could have reasonably concluded defendant fabricated the blackout story while on the phone with Hall, slipped up under the stress of being arrested and revealed the truth, and then regained his composure and went back to his claim of having blacked out. This conclusion would also explain why defendant’s trial testimony was consistent with his statement to Hall.

The trial court did not err in providing the jury with CALCRIM No. 362. In any event, in light of the overwhelming evidence of defendant's guilt, any error in giving this instruction would be harmless.

## V

### *Prosecutorial Misconduct*

Finally, defendant contends the prosecutor engaged in misconduct during cross-examination of him and during rebuttal argument to the jury. He cites seven examples of purported misconduct. Five of these examples involve objections that were sustained by the trial court. One example involves an objection that was overruled. And one example involves conduct to which no objection was made. As we shall explain, defendant has forfeited a number of his arguments by failing to either object or ask the trial court to admonish the jury to disregard the prosecutor's allegedly improper remarks. His remaining arguments fail on the merits.

“Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such “unfairness as to make the resulting conviction a denial of due process.” [Citation.] By contrast, our state law requires reversal when a prosecutor uses ‘deceptive or reprehensible methods to persuade either the court or the jury’ [citation] and “it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct” [citation]. To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm.” (*People v. Davis* (2009) 46 Cal.4th 539, 612; *People v. Gamache* (2010) 48 Cal.4th 347, 370-371.) “A claim will not be deemed forfeited due to the failure to object and to request an admonition only

when ‘an objection would have been futile or an admonition ineffective.’ [Citation.]” (*People v. Thomas* (2012) 54 Cal.4th 908, 937.)

### ***The Prosecutor’s Cross-Examination of Defendant***

1. During cross-examination of defendant, the prosecutor asked: “Now you said on direct examination that you have never raised a hand to a woman. [¶] Isn’t it true that you struck [Curtin] about two weeks prior to this incident in front of her neighbor, Jamie Merritt (phonetic)?” Defendant answered: “No.” Defendant’s counsel did not object to this question, request that the answer be stricken, or request a curative admonition. On appeal, defendant argues this question referred to “facts not in evidence” and was “an improper means of proof and a violation of the right of confrontation.” He further asserts the failure to object should be excused because “an admonition would not have cured the harm” caused by this question, especially in light of the “consistent pattern of polemic-through-cross-examination” engaged in by the prosecutor. The argument is forfeited. As we explain more fully below, we disagree with defendant’s characterization of the prosecutor’s cross-examination as a whole. Even assuming this particular question should not have been asked (see *People v. Wagner* (1975) 13 Cal.3d 612, 618-619), we cannot conclude that an objection would have been futile or an admonition ineffective. Nor would we find a reasonable probability of a more favorable result without the asserted misconduct. (See *People v. Davis, supra*, 46 Cal.4th at p. 612.)

2. Defendant also complains the prosecutor asked whether his statement to Officer Davis (“I tried to put her out of her misery”) was “the most potent evidence” against him. Defense counsel’s “argumentative” objection was sustained. The prosecutor then asked: “You’re denying that because that is a pretty significant piece of evidence for the prosecution, correct?” The trial court sustained defense counsel’s

objection that the question called for speculation. The prosecutor moved on. Even if the questions were improper, this does not rise to the level of reversible prosecutorial misconduct. The objections were sustained, defendant did not answer the questions, and the prosecutor moved on to another subject. “A party is generally not prejudiced by a question to which an objection has been sustained.” (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236; *People v. Dykes* (2009) 46 Cal.4th 731, 764 [“because the trial court sustained objections to the argumentative element of the prosecutor’s questioning, we assume any prejudice was abated”].) Nor can defendant be heard to complain that the trial court did not admonish the jury to disregard the questions. Defense counsel did not request such an admonition.

3. Defendant further asserts the following questions amounted to reversible misconduct because they improperly asked about his willingness to take a plea in violation of Evidence Code section 1153. The prosecutor asked defendant about a pretrial phone conversation with his friend, Brandy Smith, during which defendant said: “I have talked to people in here who have done worse and they have gotten five to six years. I am not even tripping. If they drop it down to involuntary manslaughter, I am cool. I will take whatever they throw at me.” When asked whether he recalled that conversation, defendant answered: “I may have said that.” Defense counsel did not object. A short time later, the prosecutor asked defendant about certain pretrial phone conversations he had with his mother. The prosecutor asked: “Do you recall telling your mother that you’re gonna fight for less than life?” Defendant answered: “Why wouldn’t I?” The prosecutor clarified: “When you say you’re going to fight for less than life, you mean you’re going to do whatever you can to get out from under a conviction of murder, correct?” Defense counsel objected that the question was “argumentative and vague.”

The trial court sustained the objection and excused the jury for the noon recess. During the noon recess, the trial court expressed concern that “there was at least one question, and then a second question that was objected to that referenced jail conversations with the defendant’s mother and/or a former girlfriend, wherein the defendant’s responses made reference to potential life imprisonment. [¶] The Court is concerned that the jury not be exposed to the question or subject of penalty or punishment, and proposes to give a limiting, a brief limiting instruction to the jury when they enter the courtroom reminding them that that subject is not for their consideration, and that their determination in this case will be without concern for penalty or punishment.” Following the noon recess, the trial court gave the proposed admonition.

Acknowledging there was no objection to the question about his conversation with Smith, defendant argues the trial court’s interruption of the proceedings preserves the issue for review. (See *People v. Collins* (2010) 49 Cal.4th 175, 226-227.) We agree the trial court in effect interposed its own objection to the prosecutor’s reference to potential punishment. But this is not the same as defendant’s argument on appeal that the questions improperly asked about defendant’s willingness to take a plea. This argument is forfeited. It also lacks merit. Evidence Code section 1153 provides: “Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.” This provision applies “only to statements made in the context of bona fide plea negotiations,” i.e., “statements made to the trial court and to the prosecuting attorney because those are the participants in a plea bargain.” (*People v. Magana* (1993) 17 Cal.App.4th 1371, 1377.) The provision does not apply to “voluntary

disclosures about the bargaining process made to third persons uninvolved and unnecessary to the plea negotiations.” (*Ibid.*) Thus, defendant’s statements to Smith and his mother are not covered by Evidence Code section 1153. The prosecutor’s questions did not amount to misconduct.

4. Defendant also complains about the manner in which the prosecutor asked whether he had ever joked about being accused of committing murder. Outside the presence of the jury, defense counsel informed the trial court he anticipated the prosecutor would ask defendant about a pretrial phone conversation with Smith, during which he said: “‘The reason I am calling you so early is that’s when they let the killers out.’” Counsel objected on relevance grounds. The prosecutor responded: “He’s laughing when he says it. [¶] That’s the point. He is laughing and joking with this particular caller about the fact that, you know, ‘That’s when they let the killers out,’ (ha-ha-ha), not showing any remorse at all, which is a total juxtaposition to how he acted on direct examination.” The trial court expressed concern that “the jury might conclude [from the phrase ‘[t]hat’s when they let the killers out’] that the jailer, the Sheriff, houses the most dangerous, violent inmates that are held during pretrial custody in a particular section. And that therefore the jury might conclude that [defendant] is such a person because the Sheriff thinks so.” The prosecutor suggested she could “phrase [her] question in terms of: ‘Haven’t you joked about being accused of murder?’” The trial court agreed this would resolve the concern and “embrace[d] the People’s reasons for wanting to ask the question.”

The prosecutor then asked defendant: “Haven’t there been times where you have joked about being accused of murder?” Defendant answered: “I don’t recall ever joking about being accused for murder.” The prosecutor followed up: “Do you recall a

telephone call with Brandy Smith from the jail on February 5th, 2010? [¶] It was fairly early in the morning, and you call [Smith] and she says: ‘Why did you get -- how come you got to call me so early?’ [¶] And you joked with her about: ‘Oh, this is when they let us killers out’ or something to that effect?” Defense counsel’s objection was sustained and the jury was admonished to disregard the prosecutor’s question. The prosecutor then asked: “Did you joke with [Smith] about being let out to use the phone because you were a killer?” After another objection was sustained, the prosecutor moved on to another subject. While we agree the prosecutor’s question included the statement the trial court found to be objectionable, we find no prejudice since defense counsel’s objection was sustained and the jury was directed to disregard the question. (See *People v. Dykes*, *supra*, 46 Cal.4th at p. 764; *People v. Johnson*, *supra*, 109 Cal.App.4th at p. 1236.)

5. Defendant’s final assertion of prosecutorial misconduct arising from the prosecutor’s cross-examination of him concerns “were they lying” questions. As mentioned, Officer Davis testified defendant told him: “I tried to put [Curtin] out of her misery.” Defendant denied making this statement. During cross-examination, the prosecutor asked defendant whether Officer Davis was committing perjury. Defense counsel’s objection, that the issue of credibility was “for the jury,” was sustained. The prosecutor then asked: “Are you saying he was lying about that?” The same objection was sustained. The prosecutor finally asked: “When Officer Davis, a sworn Officer took the stand, and testified that you said: ‘I tried to put her out of her misery,’ was that not true?” Defense counsel again objected on the ground that whether Officer Davis was telling the truth was “for the jury” to decide. The prosecutor asked to approach, an unreported sidebar was held, after which the prosecutor moved to another subject.

Defendant argues these “were they lying” questions were argumentative. However, because defense counsel did not object on this ground below, the claim is forfeited. (See *People v. Gonzales and Solis* (2011) 52 Cal.4th 254, 318.) Arguing that a question is for the jury to decide is different than arguing that the question is argumentative. The potential problem with “were they lying” questions is not that they invade the province of the jury. As our Supreme Court has explained: “It is a truism that it is for the jury to determine credibility. Questions that legitimately assist the jurors in discharging that obligation are proper. The ‘legal cliché used by many courts, [that evidence would “invade the province” or “usurp the function” of the jury] is, as Dean Wigmore has said, “so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric,” and “remains simply one of those impracticable and misconceived utterances which lack any justification in principle.”’ [Citations.]” (*People v. Chatman* (2006) 38 Cal.4th 344, 380.) The potential problem with “were they lying” questions is that they may be “argumentative,” or call for “irrelevant or speculative testimony.” (*Id.* at p. 381.) “If a defendant has no relevant personal knowledge of the events, or of a reason that a witness may be lying or mistaken, he [or she] might have no relevant testimony to provide. No witness may give testimony based on conjecture or speculation. [Citation.] Such evidence is irrelevant because it has no tendency in reason to resolve questions in dispute. [Citation.]” (*Id.* at p. 382.) Thus, defense counsel’s objection that the questions invaded the province of the jury cannot be held to preserve the argument defendant now asserts on appeal.

Defendant’s claim also fails on the merits. “A defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he [or she]

might also be able to provide insight on whether witnesses whose testimony differs from his [or her] own are intentionally lying or are merely mistaken.” (*People v. Chatman, supra*, 38 Cal.4th at p. 382.) Here, defendant was obviously a percipient witness to his statement to Officer Davis. Indeed, during his direct examination, defendant testified that he actually told the officer: “I didn’t want to see her in pain, and I wanted to take her to the hospital, and she freaked out and picked up a hammer and started to attack me.” Accordingly, defendant was able to provide insight into whether Officer Davis was intentionally lying or merely misunderstood his statement. In any event, even assuming the questions were improper, we would find no prejudice since defense counsel’s objections to these questions were sustained and defendant did not answer the questions. (See *People v. Dykes, supra*, 46 Cal.4th at p. 764; *People v. Johnson, supra*, 109 Cal.App.4th at p. 1236.) And again, defendant cannot be heard to complain the trial court did not admonish the jury to disregard the questions because he did not request such an admonition.

### ***The Prosecutor’s Rebuttal Argument***

6. During rebuttal argument to the jury, the prosecutor argued: “The defense also brought up the fact they presented character witnesses to discuss the defendant’s lack of propensity for violence against women. [¶] Well, ladies and gentlemen, just because in the past he may not have struck a woman, had any physical violence towards Marti Hall that she’s aware, or other women that she’s aware of, doesn’t mean he’s not capable of doing this horrific crime. [¶] Oftentimes murders [*sic*], and I am sure you experienced this with reading the paper and what not, they will hit it out of the ballpark.” Defense counsel objected. The trial court sustained the objection and admonished the prosecutor to “limit [her] comments to the evidence before the Court.” The prosecutor continued:

“Just because there is no evidence that he has committed violence in the past doesn’t mean he’s not capable of hitting it out of the ballpark, if you will, in this case.”

Defendant argues that “[n]either party introduced evidence bearing on the propensity of people in general to commit unforeseen violent assaults.” While true, “[i]t is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.’ [Citation.]” (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568; *People v. Williams* (1997) 16 Cal.4th 153, 221.) The evidence the prosecutor was commenting on was testimony that defendant was not violent towards women. We conclude it was fair for the prosecutor to comment this evidence does not establish defendant was incapable of Curtin’s murder. The fact that individuals with no history of violent conduct have successfully committed murder is a matter of common knowledge.

7. Following the “hit it out of the ballpark” comment, the prosecutor argued: “Lastly, the defense points out, and it is true, that the People must prove there was no blackout in this case. [¶] First of all, the Defendant said he didn’t know why he blacked out. But that being, that aside, people black out for a reason. [¶] And the defense brought up: Well, look, [the forensic pathologist] said that loss of consciousness is consistent with a concussion. [¶] We have no evidence, there is no evidence because I asked [the responding officers] if the Defendant appeared injured or sick. [¶] No. And we all, when people get concussions, there is physical evidence that they are ill. I mean, I remember watching a football game years ago, the 49’ers, and Steve Young suffered a

concussion. Out cold. I remember when he came to --” Defense counsel interposed an objection: “No set of facts.” After a brief discussion at sidebar, the trial court overruled the objection. The prosecutor continued: “So there was a game years ago, and Steve Young was tackled, and he had a concussion, and he was completely out of it. He wasn’t moving. He was laying [*sic*] there. He wasn’t able to stand up, do anything. [¶] When somebody blacks out, they’re incapable of physical, as a concussion like [defense counsel] mentioned, they’re incapable of any physical act or any intentional acts. [¶] That’s not the case here. We didn’t have a blackout. [¶] We have a man who grabbed a hammer and hit the victim numerous times causing her death. [¶] We know that he did not blackout, and here’s the proof beyond a reasonable doubt, because he told [Officer Sabra]: She came at me with a hammer, tried to hit me with a hammer. I took it and hit her back.”

Defendant asserts the prosecutor’s argument — it was “impossible” for him to have blacked out “based on sports injuries she had observed on television” — is “speculation in the guise of argument.” We first note defendant misconstrues the prosecutor’s argument. She did not argue it was impossible for defendant to have blacked out. The prosecutor was responding to the closing argument of defense counsel, during which he argued defendant’s claimed blackout was consistent with having suffered a concussion: “[Defendant] has been consistent from word go that it was a blackout. And the symptoms are of a concussion . . . . [¶] It’s somewhat, the symptoms -- do you remember I asked [the forensic pathologist]: What are some symptoms of a concussion? [¶] Dizziness. All right. Unable to think clearly. [¶] Now this is somewhat telling, all right.” As mentioned, defendant testified he was “light-headed and in a drowsy state.” The pathologist testified, in connection with whether it was possible

defendant sustained a concussion during the attack, that symptoms of a concussion are being “dazed, confused, a lower than normal level of consciousness.” In response to defense counsel’s argument, the prosecutor pointed out there was no evidence defendant appeared injured or sick. The prosecutor then described how Steve Young appeared when he suffered a concussion during a football game and argued that a person who blacks out from a concussion is “incapable of any physical act or any intentional acts.” Thus, the prosecutor was not arguing it was impossible for defendant to have blacked out. It is common knowledge that people can black out for a number of reasons. The prosecutor was arguing if defendant blacked out *from having suffered a concussion*, as defense counsel suggested, he would have been “[o]ut cold.”

However, even with this clarification, we must conclude the argument was not a fair comment on the evidence. The pathologist did not testify that people who black out from concussions are always completely incapacitated. And while, as mentioned, an attorney’s closing argument may contain matters not in evidence, but that are examples drawn from common experience, history or literature (*People v. Wharton, supra*, 53 Cal.3d at pp. 567-568), the prosecutor did not stop at describing the Steve Young situation as one example of a blackout caused by concussive brain injury. She went one step further and argued that because Steve Young was “[o]ut cold,” whenever “somebody blacks out [from having sustained a concussion], they’re incapable of any physical act or any intentional acts.” Nevertheless, we find no prejudice. As was the case in *People v. Ratliff* (1987) 189 Cal.App.3d 696, “the evidence of defendant’s guilt was overwhelming. [¶] . . . [¶] Moreover, the jury was instructed that statements of counsel are not evidence. They were also instructed on burden, degree of proof and the presumption of innocence. We must presume the jury follows its instructions. [Citation.]” (*Id.* at pp. 702-703.)

We conclude the prosecutor’s behavior did not comprise “a pattern of conduct “so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.” [Citations.]” (*People v. Gamache, supra*, 48 Cal.4th at pp. 370-371.) Nor did any particular instance of purported misconduct involve “the use of deceptive or reprehensible methods to persuade the trial court or the jury.’ [Citations.]” (*Ibid.*)

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ BLEASE \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ NICHOLSON \_\_\_\_\_, J.