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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRAD ROBERT MILLER,

Defendant and Appellant.

C071677

(Super. Ct. No. 62098243)

Defendant Brad Robert Miller shot his long-time friend, Eric McGhee, in the head three times. A jury convicted defendant of first degree murder and being a previously convicted felon in possession of a firearm. (Pen. Code, §§ 187, subd. (a), former 12021, subd. (c)(1).) The jury also found defendant personally discharged a firearm causing death. (Pen. Code, § 12022.53, subd. (d).) The trial court sentenced defendant to serve a prison term of 50 years to life for the murder and firearm enhancement. The court also imposed a consecutive three year term for being a previously convicted felon in possession of a firearm.

On appeal, defendant contends (1) the trial court erred in admitting evidence under Evidence Code section 1250¹ of the victim's state of mind regarding his plan to evict defendant from the victim's house, (2) admission of the victim's state of mind evidence violated section 352 and defendant's federal due process rights, and (3) the cumulative effect of these alleged errors denied him a fair trial.

We conclude the trial court erred in admitting the victim's state of mind evidence because no evidence showed defendant was aware of or motivated by the victim's state of mind. However, the error was harmless in light of the extremely strong evidence that was properly admitted against defendant. Moreover, the state of mind evidence was not so inflammatory it violated section 352 or denied defendant a fair trial. Based on only a single, nonprejudicial error, we reject defendant's cumulative prejudice argument. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Evidence

In 2009, defendant lived and worked in Montana with his cousin, Stuart Simonson. At trial, the parties stipulated that “[i]n December 2009 Simonson asked the defendant to leave his property and the defendant did, in fact, leave the premises and no longer worked with Simonson. During February of 2010 the defendant left Montana for California and moved in with Eric McGhee.”²

Defendant was supposed to stay with McGhee at his house in Roseville for only “[a] month or so.” At the time, Erina McGhee -- the victim's wife -- was in Russia for

¹ Undesignated statutory references are to the Evidence Code.

² Except as otherwise noted, date references are to events that occurred in 2010.

several months to take care of personal issues. Defendant and McGhee had been good friends for several years and had visited each other when they lived in different states.

McGhee had shared custody over Logan and Molly, his two teenage children from a previous marriage. Both Logan and Molly were close to their father and communicated with him at least every three days. Molly testified it would be unusual for her father to take more than a day to return a telephone call from her or Logan. McGhee said goodbye to his children before leaving on any business trip.

McGhee regularly communicated with his work supervisor by cell phone or text message. They routinely talked several times a day. McGhee was good at returning messages left for him by his work supervisor -- usually calling back within an hour.

During trial, the parties stipulated Simonson sent McGhee an e-mail on March 5, in which he stated: "Eric, please read the string of messages below. I know that [defendant] is down there in Sacramento area. He's threatening to kill people. For his sake he needs to get help. Please help." The attachment to Simonson's e-mail reflected the following communications:

At 8:00 p.m. on March 5, defendant sent the following e-mail to Simonson: "I don't know why you decided to fuck me so bad, but when I come back to town I suggest you ste[e]r clear of me. I am a man with nothing left to lose, and a pension for your ass. . . . I have a feeling I will find you just the same. . . . I will look you in the eyes as they haze over." Defendant followed this up with: "You wished nothing but harm on me. You fuck. You did so here. Expect it back. You have more than yourself to worry about you arrogant bastard." "See you soon you backstabbing fuck." Defendant followed this up with: "Be a smartass, you won't when you look into my eyes."

The next day, Simonson responded: "Not being a smartass. You should just consider the threats you are making. It is not mature or appropriate. I don't wish harm

on anyone.” Shortly after, Simonson added: “I think these death threat messages need to stop. You should move on with your life instead of making it worse.”

McGhee and defendant took Logan target shooting on March 14. Defendant brought his own gun, which he used with aim that impressed Logan. Logan recounted that defendant “seemed very skilled with [his gun] and was able to hit, I believe, a target that we had 25 yards out almost dead on every time I saw him as a very skilled and accurate shooter.”

Logan testified that on March 21, McGhee “walked in back to the house to find [defendant] drunk as a duck with the barrel of the gun in his mouth.” McGhee “took the gun away from [defendant] after calming him down” and then transported defendant to a hospital “to go in detox because of too much drinking.”

On April 5, McGhee sent an e-mail to Simonson that stated in pertinent part: “Stuart, Hi. I know that it has been a while since you wrote this and I hope that the hate mail has stopped. Apparently [defendant] was sending those when he was drunk and with his current situation it causes blackouts. So I doubt that he’d remember sending them, not that . . . he could deny sending them. Anyway, as far as I can tell, he has stopped drinking, and he is getting help. I have been taking him to the doctor and the counselor.” McGhee added a postscript that implored: “And please, do not let him know I am writing on his behalf as there are still some anger issues and although I have been placed in the middle I am not trying to stir the pot.”³

³ Immediately after these e-mails were read to the jury, the trial court admonished: “You may consider the evidence that defendant made these statements or sent these e-mails . . . for the limited purpose of determining victim Eric McGhee’s state of mind and/or his relationship with the defendant at or about the time of the killing. You may not consider this evidence for any other purpose.”

Despite the hopeful tenor of McGhee's e-mail to Simonson, defendant continued to drink excessively. As the month of April progressed, McGhee's relationship with defendant frayed.

Defendant was frequently drunk when Molly and Logan visited McGhee. McGhee told defendant not to drink in front of the children. Defendant yelled back that alcohol was expensive and he did not want it poured down the drain. Once when defendant was drunk, he wrestled with Logan in a "hurtful" manner that would have injured Logan if he had not already been involved in wrestling and other school sports.

Logan was at McGhee's house on April 11 when defendant, in a drunken stupor, yelled, "I will kill you. I will kill you all." Defendant "was obviously having nightmares of some sort" and was scaring Logan. Logan testified, "I feel like that's when my dad decided to have him leave the house the next weekend." Logan remembered that McGhee "took us back to my mom's house and dropped us off like he normally would and said that he was planning to kick [defendant] out of the house later that week because he was going on a business trip to LA the weekend of the 17th, and I didn't know what date he was planning on leaving. Although, I know that it was supposed to be a weekend trip, and he told me that he was planning on disassembling [defendant's] gun and hiding it as well as kicking him out of the house. And at that point I was only under the impression that he was kicking him out for the weekend."

McGhee hired Angelina Dawson as a masseuse three times, with the last occasion occurring on April 13. After the massage on April 13, McGhee went to a bar with Dawson where he complained about defendant's drinking problems. McGhee explained he had a "definite plan" to stage "an ultimatum and intervention" for defendant. McGhee had been arguing with defendant about whether defendant could continue staying in the house. Defendant either had to "clean up his act" or leave before Erina returned from

Russia. Dawson never saw McGhee again after April 13. McGhee wrote a review of Dawson's last message that was posted on April 18. Reviews on the Website for which it was submitted take from zero to seven days to be posted.

Erina testified she told McGhee several times that defendant had to move out of the house. McGhee responded, “ ‘Just please get healthy, and I will take care of the business, and I will do anything to get him out of the house.’ ” On the evening of April 14, McGhee told Erina defendant was aware she was scheduled to return on the 20th of that month. During that long-distance conversation -- the last between McGhee and Erina -- McGhee said defendant had left the house and “he was gone.”

The prosecution's theory of the case was that defendant murdered McGhee on the morning of April 15. To this end, the prosecution introduced evidence McGhee sent his last text message at 8:49 a.m. on April 15. He last spoke with his supervisor at 9:26 a.m. McGhee and his supervisor were coordinating on the tasks McGhee was going to accomplish that day. At 10:00 a.m., McGhee made his last financial transaction at his local bank where he deposited a check. Phone records showed McGhee last used his cell phone at 10:35 a.m. from a location at or near his house.

Shortly after McGhee last used his cell phone, his neighbor, Mary Butler, heard two loud gunshots emanate from his house. Another neighbor, Tammy Kalinowski, was awakened from a nap when she heard at least two gunshots.

Although friends and family members called and sent McGhee numerous text messages after 10:00 a.m. on April 15, none was answered. McGhee did not show up for a scheduled business meeting in Los Angeles on April 17. McGhee's supervisor at the time later testified he became concerned because it was the first time McGhee had ever failed to show up. McGhee's children noted he did not call them as he invariably did before leaving on a business trip. Although McGhee's family and friends continued to

call him repeatedly after he disappeared on April 15, defendant did not call McGhee again after 7:58 a.m. on that day.

On the evening of Friday, April 16, a neighbor heard broken glass being thrown into McGhee's garbage can.

McGhee's neighbor, Julianne Thomas, was surprised he never contacted her about taking care of his dog prior to his trip to Los Angeles. On Saturday morning, April 17, Thomas heard scraping noises that sounded like boxes or lawn furniture were being moved in McGhee's back patio. Thomas went over to feed McGhee's dog and rang the doorbell. After 20 seconds of waiting, she let herself in with a key. She was greeted by two dogs -- McGhee's and defendant's. After petting them, Thomas saw defendant on the staircase and said to him, "Oh, I wasn't expecting you to be here." Thomas testified defendant "wasn't responding right away, and he kept looking to the back of the house. [¶] And he finally said, 'Oh, I decided not to go.' " Thomas asked if he was taking care of the dogs and, after a pause, defendant responded affirmatively. Defendant asked "which neighbor" Thomas was and she explained where she lived. Thomas then left.

Also on April 17, Molly sent defendant a message via Facebook to inquire about her father. Defendant replied that McGhee "went to LA. Haven't heard from him either, [¶]let you know." Molly responded, "Thanks. We think he might have lost his phone. We're still unsure though." Defendant did not respond though he was in possession of McGhee's phone.

McGhee's family members became sufficiently alarmed that Martin Tanihana, the husband of McGhee's ex-wife, drove to McGhee's house to check on him. Tanihana saw McGhee's Toyota Camry parked in the driveway and defendant walking out of the front door of the house. Tanihana asked about McGhee, and defendant responded that he had not seen McGhee since April 15. Tanihana asked defendant to contact him if defendant

heard from McGhee, and defendant agreed. Defendant then went back inside the house and shut the door.

Around 2:00 p.m. on April 17, Roseville police officers arrested defendant for driving under the influence. Defendant was driving McGhee's Toyota and had McGhee's cell phone with him. Defendant was confrontational with the police and his blood alcohol level measured .28 percent. During the booking process, defendant listed McGhee as his emergency contact. However, defendant did not call McGhee. Instead, defendant called a friend, Dawn Lewis, to ask if she would bail him out of jail.⁴

On Sunday, April 18, Tanihana returned to McGhee's house with McGhee's ex-wife, their two children, and Molly. Tanihana noticed the Camry was no longer in the driveway but McGhee's Mercedes was still inside the garage. At that point, Tanihana realized McGhee had not driven to the airport to go on his business trip. As they walked into the backyard, they saw pieces of McGhee's glass dining room table in the garbage can. Molly climbed through the pet door at the back of the house and unlocked the nearby sliding door. They saw remnants of McGhee's dining room table in the kitchen area. McGhee's wallet and eyeglasses were sitting on the kitchen counter. The eyeglasses were broken. The wallet contained McGhee's identification, credit cards, and \$200 in cash. Due to poor eyesight, McGhee was incapable even of walking around the house without his glasses. The house was cold and "smelled like rust, like metallic." The house was completely dark and most of the window coverings were closed. The thermostat was in the off position. They exited and immediately called the police.

⁴ Defendant pled no contest to two counts of driving under the influence of alcohol as charged in a separate case, with one of the counts relating to his arrest on April 17. (Veh. Code, § 23152, subd. (a).) Defendant was sentenced to serve six months for each conviction, ordered to run concurrently with the sentence imposed in this case.

Roseville police officers arrived shortly thereafter, at around 6:00 p.m., and conducted a welfare check of McGhee's house. The police found McGhee's body, cold to the touch, in a bedroom closet. The blanket that had been wrapped around the body had dried blood on it.

Subsequent investigation revealed no signs of forced entry into the house. For lack of any indications of burglary, police suspected that "the person involved with the murder of Eric McGhee probably was a resident inside and was well-known to him."

Evidence collected inside McGhee's house showed a significant clean-up effort. A garbage bag found inside the house contained a heavily blood-stained mat, bloody cloths, paper towels, vodka bottles, and glass fragments. A vacuum cleaner had blood on it and contained glass shards, carpet fibers, dirt, and plaster. Next to the trash can in the yard stood cardboard with what appeared to be blood stains.

The evidence also showed defendant tried to clean himself of blood. Inside the washing machine located in McGhee's house, police found defendant's set of keys, an unexpended .380-caliber bullet, and bloody clothing consistent with defendant's size. Defendant's right foot appeared to have "caked on" blood stains. A swab of the blood found on defendant's right foot tested positive for McGhee's DNA.

One of defendant's keys opened a padlocked gun case found in McGhee's master bedroom. Next to the gun case was a box of .380-caliber bullets with 10 rounds missing from the 50-round box. Inside the gun case, defendant's .380-caliber Bersa semiautomatic handgun was found without its magazine. Stains and smudges on the ammunition box and padlock tested presumptively positive for blood. Police found the magazine underneath a dog bed nearby where defendant slept. The magazine contained five unexpended .380-caliber bullets of the same type as the bullet found in the washing

machine and the ammunition box. DNA testing of the gun's surface indicated a match with defendant's DNA profile.

Defendant's "unkempt bedding" was found in the loft area of the house. Around that area of the house, Sergeant Douglas Blake found that "[a]ll of [defendant's] items had kind of been conglomerrated, packed up, and were at the top of the stairs right next to the bathroom where he had located a number of visible signs of blood on the hot water handle, on the towel drying rack." A nearby "laundry hamper had all of [defendant's] clothing and paperwork, [with] signs of visible blood there."

An autopsy was performed on McGhee's body at 10:45 a.m. on Monday, April 19. The forensic pathologist found the body exhibited fully developed rigor mortis, but was unable to determine whether the rigor mortis was increasing or decreasing. The ambient temperature to which the body is exposed is the most important variable in determining the rate at which rigor mortis manifests. However, no one measured McGhee's body temperature when discovered or the ambient temperature of the room from which his body was removed. McGhee's body was refrigerated at the morgue prior to the autopsy.

The forensic pathologist had a difficult time determining McGhee's time of death, explaining: "His case was very complicated because there w[ere] some contradictions in terms of the lividity and the rigor mortis and also one result that came back as a result of toxicology." The minimal blanching corresponded to a stage of lividity that suggested the time of death might have ranged from eight hours to more than a day before the autopsy. A blood test revealed the presence of beta-phenethylamine (PEA), which signals decomposition of a body. However, the level of PEA was not tested because it does not accurately establish time of death. Nonetheless, the presence of PEA signaled McGhee had been dead for several days, possibly since April 15. Due to the contradictory indications concerning time of death, the pathologist believed that

“extrinsic factors” such as the time when the victim was last heard from most likely provided the best indication of when McGhee died.

McGhee’s body had abrasions around the left eye and contusions to his face that were consistent with being hit in the face while wearing eyeglasses. The body also had contusions and abrasions around the back and legs that were caused around the time of death.

McGhee suffered three gunshots to the head. One bullet entered the side of McGhee’s neck and appeared to be caused while the gun was in contact with McGhee. Another bullet entered his forehead and existed next to his left ear. The third shot was fatal. It entered the back of McGhee’s head, completely perforated the brain and fractured the skull before lodging behind his left eye.

Robert Wilson, a criminalist at the California Department of Justice Crime Lab, concluded two of the bullets removed from McGhee’s body had been fired by defendant’s .380-caliber Bersa handgun. The third bullet was too damaged to ascertain which gun had shot it. However, the third bullet could have been fired by defendant’s gun. All five unfired bullets found in the magazine to defendant’s gun matched those of the three found in McGhee’s body. The three bullets found in McGhee’s body would have rendered the eight-bullet-capacity magazine fully loaded.

As part of his job, McGhee hired and fired employees at his company. When employees left the company, McGhee collected their work badges. Inside McGhee’s house, police found the identification badges of four former employees. Police officers interviewed these four individuals before concluding none was involved in McGhee’s murder. The police ruled out the possibility any of these four individuals had been inside McGhee’s house.

When interviewed by Sergeant Blake, defendant stated he had been drinking heavily and “kind of remembered [McGhee] had four friends over, um, or employees, I’m not sure what they were. . . . But I kind of remember (pause) them helping me clean [the broken kitchen table] up. And, I didn’t see [McGhee] around. I kind of looked around the house. But I knew things weren’t right because his cell phone was there, and the car was there and I just started drinking again.” Defendant had small cuts and abrasions on his hands consistent with handling broken glass.

At trial, the parties stipulated defendant had been convicted of a misdemeanor within 10 years of the murder charged in this case.

Defense Evidence

Dr. Ruth Ballard, an expert on genetics and DNA testing, testified on behalf of the defense. She explained it is not unusual to find DNA from one housemate on another housemate because DNA can be transferred by blood, saliva, semen, and skin cells. Dr. Ballard agreed it was defendant’s DNA that was found on the Bersa handgun and McGhee’s DNA was found on defendant’s foot. However, she stated McGhee’s DNA might have shown up on defendant’s foot in some manner other than on the stains that were swabbed by the police. And, Dr. Ballard noted it was not possible to determine whether defendant left his DNA on the gun on the day of the murder.

Retired Los Angeles County Sheriff’s Department Sergeant Frank Salerno testified as an expert on homicide investigations. Salerno stated the investigation into McGhee’s death had been poorly conducted. For example, he opined the crime scene had not been properly checked for fingerprints. Moreover, the temperature of the victim and the ambient environment are important investigative data that were not collected. Salerno also faulted the lead detective for waiting two days before examining the crime scene and not attending the autopsy.

Dr. Terri Haddix testified as an expert in forensic pathology. Based on the autopsy findings related to lividity, rigidity, coolness, decomposition, and lack of insect activity, Dr. Haddix estimated McGhee had died approximately 24 hours before his body was discovered. On cross-examination, Dr. Haddix acknowledged there was “very much a disconnect between” physical signs exhibited by McGhee’s body and his lack of any activity more than 24 hours before his body was found.

One of McGhee’s neighbors testified he lived two doors away from McGhee but did not hear anything like gunshots on the morning of April 15.

DISCUSSION

I

Admission of the Victim’s Statements and E-mails as State of Mind Evidence

Defendant contends the trial court committed reversible error in admitting evidence of the victim’s state of mind even though no other evidence showed defendant was aware of McGhee’s plan to evict defendant for his excessive drinking. We conclude the trial court erred in admitting the evidence of McGhee’s state of mind, but the error was harmless.

A.

Section 1250

Section 1250 provides for the admission into evidence “of a statement of the declarant’s then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health)” when “offered to prove the declarant’s state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action.” (*Id.*, subd. (a)(1).) However, section 1250 “does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.” (*Id.*, subd. (b).)

The California Supreme Court examined the requirements for admissibility of state of mind evidence under section 1250 in *People v. Riccardi* (2012) 54 Cal.4th 758 (*Riccardi*). *Riccardi* involved convictions for double homicide after the People introduced evidence that one of the victims, Connie, told her friend she wanted to end her dating relationship with the defendant and he was no longer welcome in her home. (*Id.* at pp. 765, 813.) Connie told another friend she was frightened of defendant and “very afraid for her life.” (*Ibid.*) On appeal, the defendant challenged Connie’s state of mind statements as irrelevant hearsay that did not meet the standard for admissibility under section 1250. (*Id.* at pp. 810-811.)

The *Riccardi* court held the evidence was relevant because the victim’s intent to end her dating relationship with defendant indicated she would not have willingly let him into her apartment. (54 Cal.4th at pp. 765, 815.) The victim’s state of mind evidence also provided evidence of defendant’s motive when combined with defendant’s admissions he was despondent over being rejected and had disabled Connie’s newly installed home alarm. (*Id.* at p. 819.) The state of mind evidence was admissible under section 1250 because there was additional evidence that “the defendant was aware of and reacted to the decedent victim’s fearful state of mind and the victim’s actions in conformity with that fear.” (*Id.* at p. 818.) The *Riccardi* court held that “evidence of the decedent’s state of mind, offered under . . . section 1250, can be relevant to a defendant’s motive -- but only if there is independent, admissible evidence that the defendant was aware of the decedent’s state of mind before the crime and may have been motivated by it.” (*Id.* at p. 820.)

B.

Evidence of McGhee's State of Mind

Relying on section 1250, the trial court admitted — over objection by the defense — McGhee's statements to his family and friends about his plans to evict defendant from the house. The trial court explained:

“[R]elevant then to the issue of the victim's state of mind is what he knew about the defendant while the defendant was living with him in his home. Thus, the e-mail sent from Simonson to the victim about the middle of March appears essentially to be a warning from Simonson to the victim whereby Simonson informs the victim that the defendant is, quote, ‘imploding. . . and threatening to kill people and needs help.’ Simonson also forwarded to the victim a string of threatening e-mails he had received from the defendant.

“On April 5th the victim replied to Simonson acknowledging that he received Simonson's e-mail and explained that the defendant was sending the e-mails when he was drunk but had now stopped drinking and was getting help. The victim told Simonson that he had been helping the defendant by taking him to a doctor and counselor and attributed the defendant's threatening behavior to drinking and theorized that due to the blackouts he doubted whether the defendant even remembered making the threats.

“The victim wrote at the bottom of the e-mail, quote, ‘And please, do not let him know I'm writing this on his behalf because there may still be some anger issues and although I've been placed in the middle I am not trying to stir the pot,’ unquote.

“The e-mail from Simonson to the victim and the victim's response in this Court's view are relevant evidence to shed light on the nature of the relationship between the defendant and the victim and the victim's state of mind. The defendant's action of sending threatening e-mails while drunk and the warnings Simonson gave is all

information that the victim received about the defendant's ongoing behavior and arguably would have considered those facts when deciding whether or not to kick the defendant out of his home. In the e-mail sent by the victim he, himself, appears worried about how the defendant may react if he, the victim . . . [¶] . . . was e-mailing Simonson. The victim's statement he has been placed in the middle and not trying to stir up the pot tends to show the precarious relationship between the defendant and the victim and is circumstantial evidence that could shed light on motive for the defendant to kill the victim. In the Court's view these e-mails are circumstantial evidence tending to show motive.

“In summary, the Court will permit statements made by the victim to others that explain his state of mind and/or his intentions concerning the defendant, and the Court will permit evidence of the e-mail the victim received from Simonson and the victim's reply to it. However, . . . the People will not be permitted to introduce evidence concerning . . . Simonson's fear.”

Consistent with the trial court's ruling, the prosecution introduced statements by McGhee to family and friends about intending to evict defendant from the house before Erina returned from Russia. However, the prosecution did not introduce evidence defendant knew of McGhee's intent to make defendant leave the house. Instead, the evidence at trial suggested McGhee intended to stage a surprise “intervention” to impose on defendant the stark choice of moving out or living an entirely sober life. Had there been evidence McGhee had carried out the intervention or defendant knew of McGhee's plan, McGhee's state of mind evidence would have been admissible under section 1250. (*Riccardi, supra*, 54 Cal.4th at p. 819.) However, the evidence at trial did not show defendant knew of McGhee's plan to stage an intervention or evict him from the house.

The Attorney General asserts evidence showing defendant knew of McGhee's plan to evict him may be found in the fact police investigators found defendant's personal items packed together at the top of the stairs. The Attorney General suggests this evidence "indicates that the issue over [defendant's] drinking had come to a head and McGhee had asked [defendant] to leave." We are not persuaded. The only sentence in the record supporting the Attorney General's assertion came in the form of Sergeant Blake's statement: "All of [defendant's] items had kind of been conglomerated, packed up, and were at the top of the stairs right next to the bathroom where [Sergeant Blake] had located a number of visible signs of blood on the hot water handle, on the towel drying rack."

Defendant lived in McGhee's residence with a plan to stay only for about a month. Logan's testimony indicated defendant never settled in beyond sleeping on the couch. There was no evidence defendant had ever unpacked or had his personal belongings more widely distributed even when he was a welcome guest at McGhee's house. Although defendant's suitcases were found in his living area, there was no testimony they were packed and ready to go. Defendant had his medicine bottle sitting on the landing, his paperwork stacked in the open, and clothes in a laundry hamper and the washing machine. And, Sergeant Blake testified it was obvious that in the loft area where defendant stayed, it appeared someone was "residing there." Compared to the evidence in *Riccardi* of a defendant who clearly knew and understood the victim's state of mind to exclude him from her house, there is no separate evidence defendant knew McGhee intended to stage an intervention or evict him from the house. (*Riccardi, supra*, 54 Cal.4th at pp. 819-820.) Consequently, the trial court erred in admitting evidence of McGhee's state of mind under section 1250.

C.

Harmless Error

As the California Supreme Court noted in *Riccardi*, erroneous admission of hearsay evidence under the state of mind exception provided by section 1250 does not warrant reversal if, “based on the entire record, it is not reasonably probable that defendant’s guilty verdict was affected by any evidentiary error.” (54 Cal.4th at p. 825; *People v. Watson* (1956) 46 Cal.2d 818, 836–837 [holding errors of state law are subject to the reasonable probability standard].) In this case, the erroneous admission of statements regarding McGhee’s state of mind was harmless in light of the extremely strong evidence of defendant’s guilt.

The police investigation found no evidence of forced entry into McGhee’s house, which indicated the murderer had access to the residence. Blood stains found in the house indicated McGhee had been shot inside the residence. Defendant was sleeping on McGhee’s couch, and McGhee’s neighbor found defendant living in the house after the murder and before the body was discovered. Blood stains were also found on clothing that matched defendant’s size in the laundry. Additional blood was found in the bathroom shower used by defendant.

Defendant admitted to the police he had cleaned up the broken glass table. However, defendant said he did so with the help of four unnamed people. Yet, defendant offered no explanation as to how anyone else could have murdered McGhee with a weapon that was later found locked in a gun safe to which defendant had the key. The attempts to clean up the crime scene — by washing clothes, mopping up the floor, and throwing out blood-stained items — indicated murder by a resident of the house rather than by a stranger. At the time of McGhee’s murder and for the days afterward, defendant was the only resident of the house.

The padlocked gun case containing the murder weapon was opened with a key from defendant's keychain. The gun's magazine was found in the area where defendant slept. A DNA profile of blood stains found on the gun matched defendant's DNA.

Defendant's behavior also demonstrated his guilt. The day after the murder, defendant told Molly -- via Facebook message -- he believed McGhee had gone to Los Angeles. However, both of McGhee's cars were at his house. When Molly told defendant she wondered whether McGhee might have been out of touch because he lost his cell phone, defendant did not reply even though he had McGhee's cell phone at the time.

McGhee's glasses and wallet were in plain sight on the kitchen counter. Later defendant would tell the police he knew something was "wrong" when he saw McGhee's glasses and wallet in the kitchen. Rather than search for McGhee or notify anyone, defendant's response was to get drunk.

Also the day after the murder, defendant did not bother calling McGhee to bail him out of jail when arrested for driving under the influence. Instead, defendant called another friend to make bail even though McGhee had demonstrated a willingness to help defendant when he got into trouble while drinking.

The evidence established defendant killed McGhee by shooting him in the head three times. The evidence was conclusive that at least two of the bullets found in McGhee's body were fired from defendant's gun. McGhee's DNA was found on defendant's foot in what appeared to be caked-on blood.

While the forensic evidence gleaned from McGhee's body suggested conflicting times of death, other evidence established no one heard from McGhee after 10:00 a.m. on April 15. Defendant's expert testimony that the forensic evidence could suggest a time of death after April 15 did not exonerate defendant. Defendant was the one who was living

at the house when McGhee's body was rolled into a blanket and stowed in a closet. Defendant was the one found driving McGhee's car and possessing McGhee's cell phone. The victim's blood was found on defendant's clothing in the washing machine. And, defendant's gun, with his DNA on it, was the murder weapon.

Defendant's expert testimony on ballistics did not sever the connection between defendant's gun and the bullets found in McGhee's body. The three bullets found in McGhee's body matched the caliber of defendant's Bersa handgun. The expended bullets also matched the bullets found among defendant's clothes in the washing machine. The five unfired bullets in the magazine to defendant's gun would have brought the magazine to capacity when including the three that had been fired into McGhee.

Defendant's attempt to fault the police investigators for not collecting fingerprint samples, not having the lead investigator attend the autopsy, and not having conducted more in-depth interviews of the four people whose identification badges were found in McGhee's house does not undermine the weight of the evidence against him. Instead, the evidence presented by the People forged a strong link between defendant and the murder.

The addition of evidence regarding McGhee's state of mind regarding defendant's drinking problems did not make any difference in the outcome. Defendant's jury had already properly heard from McGhee's children that defendant drank excessively, and became angry and irrational when intoxicated. Moreover, McGhee's children noted McGhee and defendant had already gotten into arguments about defendant's drinking in the house. The evidence also showed defendant was confrontational when arrested for driving under the influence of alcohol on the day after the murder. Against this properly admitted evidence, the erroneously admitted evidence of McGhee's state of mind was harmless.

II

Whether the Evidence of the Victim's State of Mind was Unduly Prejudicial or Prevented Defendant from Receiving Due Process

On appeal, defendant also challenges the admission of evidence of McGhee's state of mind as violating section 352 and his federal constitutional right to due process. We reject the contentions.

A.

Defense Counsel's Objections

Before trial, defense counsel moved to exclude McGhee's statements on hearsay grounds. Defense counsel did not object on grounds of section 352 or assert any federal constitutional impediment to the admission of McGhee's statements. Instead, defense counsel argued only that the evidence was inadmissible under section 1250. Defense counsel did cite section 352 in moving to exclude the e-mail exchange between Simonson and McGhee. However, no federal constitutional grounds for the motion to exclude the e-mails were given. The trial court admitted the evidence of McGhee's statements and the e-mail exchange with Simonson as relevant, nonprejudicial, and admissible under section 1250.

B.

Section 352

As the California Supreme Court has explained, “ ‘A party desiring to preserve for appeal a challenge to the admission of evidence must comply with the provisions of . . . section 353, which precludes reversal for erroneous admission of evidence unless: “There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated to make clear the specific ground of the objection or motion.” ’ ” (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171, quoting *People v. Morris*

(1991) 53 Cal.3d 152, 187.) Consequently, defendant's failure to object to McGhee's statements on grounds of section 352 forfeits the issue for purposes of appeal. However, defendant did object to the e-mail exchange between Simonson and McGhee as violative of section 352, and thereby preserved the issue as to the e-mails for review.

In reviewing the admission of evidence over an objection based on section 352, we apply the abuse of discretion standard to determine whether the probative value of the evidence “ ‘was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice.’ ” (*Riccardi, supra*, 54 Cal.4th at p. 826, quoting *People v. Scheid* (1997) 16 Cal.4th 1, 13.) Under this deferential standard, we conclude the e-mail exchange between Simonson and McGhee was not unduly inflammatory, and took up little time in an otherwise lengthy trial. Ample evidence was properly admitted at trial to show that when defendant got drunk he became physically rough with Logan, suicidal when alone, and yelled about “kill[ing] you all” while in a drunken stupor. And, as we have recounted in detail, the evidence strongly connected defendant with the murder. (See part I C., *ante*.)

For these reasons, we conclude admission of the e-mail exchange did not violate section 352 because the evidence was not unduly inflammatory.

C.

Claimed Federal Constitutional Error

Even though defendant forfeited part of his evidentiary challenge premised on section 352, he may nonetheless “make a very narrow due process argument on appeal.” (*People v. Partida* (2005) 37 Cal.4th 428, 435.) While defendant's due process challenge has not been forfeited due to the evidence concerning McGhee's state of mind, it is also not meritorious.

The erroneous admission of evidence violates federal due process guarantees only if it renders the trial fundamentally unfair. “The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant’s trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 562-564.)” (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Here, the evidence defendant finds objectionable did not render his jury trial unfair.

In admitting the state of mind evidence, the trial court instructed the jury it could “consider the evidence that defendant made these statements or sent these e-mails . . . for the limited purpose of determining victim Eric McGhee’s state of mind and/or his relationship with the defendant at or about the time of the killing. You may not consider this evidence for any other purpose.” We presume the jury heeded the instruction and thus made only the narrowly constrained use of the state of mind evidence. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.) Against this backdrop, defendant received vigorous representation by his trial attorney who extensively cross-examined witnesses and introduced several expert witnesses in an effort to cast doubt on the prosecution’s case. In the end, however, the evidence of guilt was clear. Defendant’s guilty verdict rested on the basis of the admissible evidence, not on an unfair trial.

III

Cumulative Prejudice

Having determined there exists only a single, nonprejudicial error in this case, we reject defendant’s claim that multiple errors cumulated in reversible prejudice. “Because that is the only potential error identified, defendant cannot show cumulative error.” (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1357; *People v. Brents* (2012) 53 Cal.4th 599, 619 [“Because the trial court did not make multiple errors, defendant’s claim of cumulative prejudice necessarily fails”].)

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

MAURO, Acting P. J.

MURRAY, J.