

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHEN ROSS BRAINARD,

Defendant and Appellant.

C076636

(Super. Ct. No. 13F02761)

Defendant Stephen Ross Brainard appeals from a judgment of conviction following a jury trial. Defendant killed his ex-girlfriend, Julia Bullinger.¹ He was charged with one count of murder (Pen. Code, § 187).² It was further alleged that defendant personally discharged a firearm causing great bodily injury or death

¹ In the record, Bullinger is sometimes referred to by her last name, Ray. We refer to her as Bullinger, which is the name used in the Information and verdicts.

² Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

(§ 12022.53, subds. (b)-(d)). A jury found defendant not guilty of first degree murder but guilty of second degree murder and found the firearm allegation to be true.

On appeal, defendant contends the trial court prejudicially erred in admitting into evidence: (1) a recording of a phone conversation between Bullinger and her friend recorded on defendant's digital recorder, offered to prove the defendant's state of mind; and (2) an autopsy photograph of Bullinger's leg with a trajectory probe inserted, showing a bullet's trajectory through the leg.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Trial Evidence

Bullinger's brother, John Bullinger, testified that his sister met and began dating defendant in 2011, and they began living together at a house on Lilac Lane in Rio Linda, which belonged to the Bullinger family. Bullinger and defendant broke off their romantic relationship in early 2013, but they continued to live together in the house as roommates, with defendant living in a separate bedroom.

Defendant's employer, Douglas Nelson, testified that defendant rarely missed work but would typically take his birthday off. Defendant took the day off for his birthday on Friday, April 26, 2013, but he briefly stopped by the shop that morning to turn in some paperwork. Defendant called in sick on his next scheduled work day, Monday, April 29. He did not show up for work the following day, April 30, without any explanation.

On the evening of April 30, 2013, John received a phone call from his mother asking him to check in on Bullinger because she was not responding to calls. He went to the Lilac Lane home that night and knocked on the door. Defendant answered but did not open the door. Speaking to John through the door, defendant said that Bullinger was not there. Noticing that her car was parked in the driveway, John asked again if his sister was there, and defendant replied that she was "with her friend Karen." Defendant was

“very abrupt.” John returned to the home the following morning and found that the street was barricaded off by police.

On May 1, 2013, around 5:37 a.m., defendant called 911.³ He identified himself and told the 911 dispatcher that he “shot [his] roommate yesterday.” He explained that he and Bullinger were “always fighting” and “used to be together” before “she decided she wanted to do other things.” He said that he continued to rent a room in the same house from Bullinger’s mother. Defendant told the dispatcher, “This happened at 9:15 in the morning and, um, I’ve been having this dilemma on-on what I should do, whether I should call or just shoot myself, or-or whatever.” He complained that Bullinger “had phone sex” with her ex-husband and that “she lies about this and lies about that.” He denied taking any drugs or medications at the time of the shooting. He admitted that he shot Bullinger “several times.” He claimed that he had “never even thought like, ‘Oh, I wish she was dead,’ ” “never even though[t] of doing something like [this] before, ever.”

Sheriff’s Deputy Ian Carver testified that he responded to the 911 call about a possible homicide at the Lilac Lane home that morning. Defendant complied with the deputies’ instructions to come outside of the house. Deputy Carver observed Bullinger’s body inside on the floor of the rear bedroom. She was lying on her back with her right leg up and bent somewhat against the side of the bed and her left leg extended out underneath her. He observed blood stains on her chest area and a wound to her “left knee thigh area.”

Detective Tony Turnbull testified that there were signs of a struggle in the bedroom, including large household items knocked over. He found .40-caliber shell casings in the bedroom near Bullinger’s body. There was a .40-caliber H&K

³ Both the recording of the 911 call and the transcript of the call were admitted into evidence.

semiautomatic handgun in the living room, loaded with nine rounds, one of which was in the chamber. In defendant's bedroom, the detective found an unlocked H&K gun box.

Bullinger sustained three gunshot wounds to the torso. One of the wounds to the torso originated in the upper calf of her left leg, exited the calf, entered the upper thigh, exited the upper thigh, and then entered the torso. That gunshot was consistent with the victim being in a defensive posture -- laying on her back with her foot in the air, with the left knee bent to the point that her thigh was close to her upper abdomen. Each bullet was fired from close range. One of the chest wounds displayed a partial muzzle imprint; according to the pathologist, the imprint indicated that the muzzle was either lightly contacting the skin or no more than an inch away when the gun was fired. There were fresh bruises on her left lower leg and ankle. The cause of death was multiple gunshot wounds caused by three bullets. There were small amounts of Valium and Restoril, which are sedative and sleeping aid medications, in Bullinger's blood.

Following his arrest, defendant gave a video recorded interview with Detective Paul Belli.⁴ Defendant admitted early in the interview, "I'm guilty. I shot her." He stated that he and Bullinger had broken up a few months prior to the shooting because he was "upset about her talkin' with her exes." He moved into the guest bedroom and continued to live with Bullinger as a roommate. He stated that she began having "phone sex" with a man from Southern California. He started recording Bullinger's phone conversations through the outlet in his room. He was upset that Bullinger was "badmouthing" him to other people on the phone for "hours and hours." He was also angry that Bullinger "ruined [his] birthday." They were supposed to go to a movie for his birthday on Friday, April 26, 2013, but Bullinger cancelled their plans because she had flat tires on the front of her car. Defendant said she accused him of putting screws in her

⁴ The jury viewed the recording of the interview, and the transcript of the interview was also admitted into evidence.

car's tires, which he denied. He said they were the same type of screws she kept in a pill container with "screws and miscellaneous crap in it."

Defendant also mentioned that Bullinger was "seeing a guy in Folsom" during the last three months. The man had a large, expensive home. But defendant said he was not concerned about them having sex, because the man was not able to do so.

On the morning of the murder, defendant decided to confront Bullinger because he thought she was being "secretive" and lying to him. He was "finding [] stuff out" by recording her conversations and confronted her about it. She asked, "How do you find all this stuff out?" Defendant replied, "I got you on tape." She went to her bedroom. He followed her, stopping in his bedroom to get his gun. He saw that she started to dial 911 and pushed her over, took her phone, and threw it against the wall. Defendant said he "[j]ust blew up" and threw other phones "so that they wouldn't work." Defendant said he thought she had grabbed the phone "[t]o call the cavalry." Defendant then pulled his gun from his pocket. Bullinger said, "If you're gonna shoot me, can I say goodbye to my mother?" Defendant responded, "You ain't sayin' goodbye to nobody." He shot her in the leg and then twice in the chest. By the time he fired the last two shots, she was on the floor. He claimed that when he picked up the gun, he was "just furious" and did not know what he was thinking.

Defendant told the detective he did not play the recordings of Bullinger's phone conversations for her because she did not want to hear them. Defendant explained that he recorded the conversations on a small digital recorder and told the detective that he kept it behind his computer screen on his desk.

Defendant did not present evidence in his defense.

Verdict and Sentencing

The jury found defendant not guilty of first degree murder but guilty of second degree murder. The jury also found the firearm allegation to be true. The trial court subsequently sentenced defendant to an aggregate term of 40 years to life, calculated as

follows: an indeterminate term of 15 years to life for murder in the second degree plus a consecutive indeterminate term of 25 years to life for the firearm enhancement.

DISCUSSION

Defendant contends that the trial court erred in admitting a recording of a phone conversation between Bullinger and her friend, Karen, recorded on defendant's digital recorder and offered to prove defendant's state of mind. He also contends the court erred in admitting an autopsy photograph of Bullinger's leg with a trajectory probe inserted, offered to prove a bullet's trajectory through the leg and into the torso. We disagree.

I. Admission of the Phone Conversation

A. Background and Defendant's Contentions

The prosecutor filed a motion in limine requesting admission of a phone conversation between Bullinger and her friend, Karen, which was recorded on defendant's digital recorder.⁵ During the conversation, Bullinger told Karen, "[Y]ou wouldn't believe what has been going on around here. He hands me a nail and I go get into my little tool box, and what kind of nail do you think I have back there? That exact same[,] he gave me one of the nails."⁶ She also told Karen, "I'm gonna keep one phone with me so I have one finger on nine." She then said that she could not talk about it because "he listens to everything" and "lies."

In his written motion, the prosecutor argued that while the phone conversation was hearsay, it was admissible for the non-hearsay purposes of showing Bullinger's state of mind (Evid. Code, § 1250) and, because defendant admitted to listening to Bullinger's

⁵ This conversation apparently took place on April 26, 2013, because during the conversation, Bullinger indicated that it was defendant's birthday, which was on that date.

⁶ According to defendant's interview statement, the date of his birthday was the same day Bullinger accused him of putting "screws" in her car's tires.

phone conversations, showing premeditation. Defendant opposed the motion in limine, contending that Bullinger's state of mind and defendant's knowledge of the conversation were not relevant to any disputed issue. The trial court agreed with defendant that Bullinger's state of mind was irrelevant. However, the court agreed with the prosecutor that the conversation was relevant to show defendant's state of mind and, in particular, to show premeditation and motive. The court noted that defendant admitted to recording Bullinger's phone conversations and told police that he was upset about the way Bullinger talked about him to other people during those conversations. Bullinger mentioned nails defendant handed her from which the court inferred they were the implements used to deflate her tires and that she was blaming defendant for the flats. The court also noted that Bullinger said she was going to keep her finger on the nine on her phone, and that defendant told the police he grabbed his gun after Bullinger went to the phone. The court ruled that the evidence was admissible to show defendant's state of mind to establish "motive and premeditation." The recording showed that defendant knew that Bullinger was "going to call for help when she grabbed the phone because he heard that conversation."

During argument on the motion, defense counsel also challenged the admissibility of the phone conversation on foundation and relevance grounds because there was no evidence defendant actually listened to the conversation. The trial court ruled that the recording of the conversation was admissible if the prosecutor laid the proper foundation that defendant heard the conversation, but the court noted it could likely be inferred that defendant listened the conversations he recorded, based on his statements to the police. The court further stated that the phone conversation was relevant to defendant's motive, which was "intertwined with the issue of premeditation because [Bullinger] describes how she is aware that [defendant] is listening to everything and blames him for the screws, although she calls them nails, into her tire." Accordingly, the court ruled that the evidence was admissible to show the phone conversation's effect on the listener,

defendant. The court did, however, allow defense counsel to propose redactions of irrelevant portions of the conversation and a limiting instruction to the jury.

During the prosecution's case in chief, defense counsel again objected to the phone conversation "for the record." The trial court listened to the phone conversation during a break to review it again. The court agreed to redact a portion of the conversation. Immediately after the recording of the phone conversation was played for the jury, the court instructed: "This recording . . . is being admitted for the sole purpose of showing . . . defendant's state of mind, meaning its possible affect [*sic*], if any, on the defendant. The recording may be considered by you for this purpose only. [¶] You may not consider this recording for the truth of what is being stated"

Defendant contends that the trial court abused its discretion in failing to exclude the recorded conversation as irrelevant and highly prejudicial. He contends the conversation was irrelevant because there was insufficient evidence establishing that defendant listened to his recording of the phone conversation.

B. Analysis

Because defendant admitted killing Bullinger, the issue in this case was whether the homicide was first or second degree murder, or voluntary manslaughter. Here, the specific statements at issue in the conversation were not offered to prove the truth of the matters asserted but, rather, their effect on defendant. (*People v. Jablonski* (2006) 37 Cal.4th 774, 820-821 (*Jablonski*)). The evidence tended to prove deliberation, premeditation, and motive and was admissible for that non-hearsay purpose. The trial court carefully exercised its discretion in reviewing the conversation; the court considered the pleadings and arguments, and agreed to redact a more inflammatory portion of the phone conversation in which Bullinger compared defendant to Jodi Arias. Additionally, the court gave an appropriate limiting instruction immediately after the recording was played for the jury.

It is well established in California that out-of-court statements, when offered to show the effect on the hearer, are admissible nonhearsay. (See *Jablonski, supra*, 37 Cal.4th at p. 820 [A victim’s statement later communicated to the defendant that she was afraid of the defendant was admissible to show, not that she was actually afraid, but rather to show the statement’s effect on the defendant and his premeditation of the murder.]; *People v. Boyette* (2002) 29 Cal.4th 381, 428-429 [trial court erroneously excluded as hearsay, testimony by defendant’s mother that she had been threatened because it was not offered to prove the mother was actually threatened, but for the purpose of showing the effect on the defendant who had learned of the threats].) Consistent with these cases, Bullinger’s statements in her phone conversation with Karen were offered to show their effect on defendant.

Citing *People v. Riccardi* (2012) 54 Cal.4th 758, 820, defendant contends that even if this was a valid nonhearsay purpose, the prosecutor did not lay a sufficient foundation by establishing that defendant *actually heard* the conversation. We disagree. There is substantial evidence to support an inference that defendant actually heard the phone conversation: (1) the recording of the phone conversation was on defendant’s recording device; (2) the conversation occurred on defendant’s birthday, allowing him the opportunity of several days while he was at home over the weekend to listen to the phone conversation before he killed Bullinger; (3) defendant admitted that he regularly recorded and listened to Bullinger’s phone conversations and told the officers where to find the device on which he made the recordings; (4) during his interview, defendant said he was upset that Bullinger was “badmouthing” him to other people on the phone for “hours and hours” and said she accused him of putting screws in her car’s tires, which Bullinger referred to in the phone conversation as nails; and (5) defendant claimed that Bullinger attempted “[t]o call the cavalry” before he killed her because she “hit the 9,” just as Bullinger told Karen she would do during the recorded phone conversation. This evidence was sufficient to support a reasonable inference that defendant listened to the

phone conversation and that it had an effect on his state of mind leading up to the killing. We conclude the trial court did not abuse its discretion in admitting the phone conversation.

Furthermore, even if admission of this evidence could be construed as error, it was harmless. State evidentiary error is reviewed under the *Watson*⁷ harmless error standard. (*People v. Buffington* (2007) 152 Cal.App.4th 446, 456.) “ ‘[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.’ [Citation.]” (*People v. Beltran* (2013) 56 Cal.4th 935, 955 (*Beltran*)). “[T]he *Watson* test for harmless error ‘focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.’ [Citations.]” (*Id.* at p. 956.)

Defendant contends that but for the admission of the recorded phone conversation, he would have obtained a voluntary manslaughter verdict under a “heat of passion” theory instead of a second degree murder verdict. We are not persuaded.

“[T]he factor which distinguishes the ‘heat of passion’ form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of

⁷ *People v. Watson* (1956) 46 Cal.2d 818, 836.

average disposition to act rashly or without due deliberation and reflection.” (*People v. Lee* (1999) 20 Cal.4th 47, 59 (*Lee*).

Here, there is no evidence in the record of such a provocation that would incite an ordinary person to act rashly, “out of unconsidered reaction to the provocation.” (*Beltran, supra*, 56 Cal.4th at p. 942.) According to defendant’s own narrative, he and Bullinger had broken up three months before he killed her. Defendant knew Bullinger was talking to other men and seeing one of them for several months before killing her, but her involvement with other men was not adequate provocation. “[T]he killing must be ‘upon a sudden quarrel or heat of passion’ (§ 192); that is, ‘suddenly as a response to the provocation, and not belatedly as revenge or punishment. Hence, the rule is that, if sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter.’ [Citation.]” (*People v. Daniels* (1991) 52 Cal.3d 815, 868.) “[I]t is insufficient that one is provoked and later kills.” (*Beltran*, at p. 951.) Here, three months elapsed between the purported break up over Bullinger talking to other men, and a reasonable person’s passions would have cooled in the interim.

According to defendant’s statement to the police, the only possible remaining provocations were Bullinger’s private phone conversations defendant recorded without her knowledge in which she “badmouthed” him, and her attempt to call 911. On the morning he killed her, defendant said he decided to confront Bullinger because she had been secretive and he was “finding [] stuff out” from the recorded phone conversations. He told her he knew what she was saying because he had been recording her conversations. She retreated to her bedroom; he then grabbed his gun from his bedroom and followed after her. Defendant said he “blew up” when he saw that she started to dial 911 for help. In sum, defendant engaged in escalating stalking behavior by monitoring Bullinger’s private calls and then claimed heat of passion provocation when he did not like what he heard on those calls. While his *former* girlfriend’s actions of having private phone conversations about defendant, talking to other men and then attempting to call

911 when confronted by defendant about these conversations may have been adequate provocation in defendant's own mind, that is not the standard. This was not conduct that would "cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Lee, supra*, 20 Cal.4th at p. 59.) Accordingly, we cannot agree with defendant that he would have fared better at trial had the jury not heard Bullinger's phone conversation with Karen. Even if the trial court erred in admitting the conversation, there was no prejudice. The evidence here does not establish adequate provocation for voluntary manslaughter; thus any error in admitting the phone conversation was harmless.

II. Admission of Photograph

A. Background and Defendant's Contentions

During the trial, the prosecutor sought to admit a photograph showing the trajectory of how one of the bullets entered and exited Bullinger's lower leg, entered and exited her upper leg, and then entered her torso. The photograph depicted a rod inserted into "[Bullinger]'s leg wound, which shows the bullet trajectory's travel through her leg out of the exit wound." The prosecutor contended that the photograph was "as sterile as possible" because it was taken after the leg had been cleaned and there were no blood stains. The court questioned whether the photograph was probative when there was no dispute that defendant was the shooter. The prosecutor responded that he thought it was probative of "whether [Bullinger] was ever standing up when he shot her or on the ground the whole time essentially defenseless." The court expressed concern that the depiction of the rod in the leg might be difficult for jurors who had said that they were "squeamish." However, defense counsel was not concerned about whether the photograph was too graphic. He responded, "[T]hat photograph by itself is very cold[,] I would agree, and it is sterile. And there is nothing in and of itself that I would say is overly gruesome. *Just not necessary. It shows nothing that could not be testified to.* And it adds nothing with respect to any disputed issue." (Italics added.)

When the court returned to discussion of the photograph the next day, the prosecutor represented that he had spoken with the pathologist, who “felt it was a fairly important piece of demonstrative evidence” because it showed that “the victim was likely in a defensive position” with her “leg in the air at the time the shot was fired.” The court asked if defense counsel had any further objection, and counsel replied, “Same thing. Same objection. I don’t know how the doctor could not simply explain that. I don’t know what the picture with the rod in it does to make that any clearer.”

The trial court admitted the photograph, ruling: “Based on that offer of proof I would permit the doctor to be able to use that photograph. I don’t have the photograph in front of me, but I know what it looks like. It is basically the victim’s leg. It is not a bloody photograph particularly. It is more of a -- the wounds are more -- I don’t know what the medical testimony would be but it is more open in the sense that the rod is -- you see it from the top of her leg down to her[,] just above her calf area. [¶] Based upon that representation by the People, that I’ll allow the People to be able to use that with their expert. And it is just the one photograph with the rod. We are not talking about multiple photographs indicating direction of travel using the rod.”

On appeal, defendant contends that the trial court prejudicially erred in admitting the photograph because it was “gruesome, inflammatory, and totally unnecessary” under Evidence Code section 352. The People respond that defendant forfeited this argument by failing to make a clear objection based on section 352 in the trial court. We agree that defendant forfeited the objection and in any event, the photograph should not have been excluded as unduly prejudicial under Evidence Code section 352.

B. Analysis

Evidence Code section 352 provides, “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” “The governing

test [under Evidence Code section 352] evaluates the risk of ‘*undue*’ prejudice, that is, ‘ “evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,” ’ not the prejudice ‘that naturally flows from relevant, highly probative evidence.’ [Citations.]” (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) “Evidence is not inadmissible under [Evidence Code] section 352 unless the probative value is ‘substantially’ outweighed by the probability of a ‘substantial danger’ of undue prejudice or other statutory counterweights.” (*People v. Holford* (2012) 203 Cal.App.4th 155, 167 (*Holford*).)

Evidence Code section 353 provides, in pertinent part: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion . . .*” (Italics added.) “ ‘In accordance with this statute, [the California Supreme Court has] consistently held that the “defendant’s failure to make a timely and specific objection” on the ground asserted on appeal makes that ground not cognizable. [Citation.]’ ” (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.) “ ‘[T]he objection must be made in such a way as to alert the trial court to the . . . basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.’ [Citation.] What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but *it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred*

in failing to conduct an analysis it was not asked to conduct.” (*Id.* at p. 435, italics added.) “The requirement of a specific objection under section 353 applies to claims seeking exclusion under section 352.” (*Holford, supra*, 203 Cal.App.4th at p. 169.) Without a specific objection, the trial court is not “fully apprised of the basis on which exclusion is sought; nor can the trial court conduct a balancing analysis” (*Id.* at p. 170.)

Here, trial counsel for defendant did not make a specific objection based on Evidence Code section 352. He did not object on the grounds that the photograph was gruesome and inflammatory. Nor did he assert that the photograph created a substantial danger of prejudice. Defendant essentially argues that we should understand his objection, “not necessary,” to mean the probative value is outweighed by the substantial danger of undue prejudice. But it is clear from the record that defense counsel’s objection and the court’s discussion of the photograph was based on whether the photograph was relevant or perhaps cumulative. Whereas section 352 concerns otherwise relevant admissible evidence that is *substantially* outweighed by its prejudicial effect (*Holford, supra*, 203 Cal.App.4th at p. 167), defense counsel argued that the photograph “add[ed] nothing” and was “[j]ust not necessary.” These arguments did not state or imply that the photograph was unduly prejudicial. In fact, defense counsel conceded in the trial court that the photograph was “sterile” and not “overly gruesome.” To argue on appeal that “the squeamish nature of the photograph would have created a stronger prejudice towards” defendant seems disingenuous.

Even if the argument could be considered preserved for appeal, it fails. As we have noted, the probative value of evidence must be “substantially outweighed” by the “probability of a ‘substantial danger’ of undue prejudice or other statutory counterweights” before it can be excluded under Evidence Code section 352. (*Holford, supra*, 203 Cal.App.4th at p. 167.) We have reviewed the photograph. We agree with trial counsel’s assessment. It is “sterile” and not “overly gruesome.” While some may

consider it unpleasant, it is no more unpleasant than autopsy photographs typically admitted in murder trials. Our high court has repeatedly observed, “ ‘ ‘ ‘murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant.’ ” ’ ’ ” (*People v. Cunningham* (2015) 61 Cal.4th 609, 668, citing *People v. Roldan* (2005) 35 Cal.4th 646, 713; see also *People v. Gurule* (2002) 28 Cal.4th 557, 624; *People v. Fierro* (1991) 1 Cal.4th 173, 223; *People v. Pierce* (1979) 24 Cal.3d 199, 211.) Moreover, as the prosecutor discussed, other more graphic photographs of the crime scene were admitted without objection, which depicted the body before it had been cleaned and showed blood stains and flies near the body. Additionally, the rod does not substantially change the appearance of the gunshot wounds and defense counsel did not contest other photographs of the leg from different angles that he conceded were “basically the same image” without the rod. His concern was not that the photograph was graphic but that it was “duplicative.” But the photograph with the rod was relevant and probative of the way in which the victim was shot and her defensive position at the time the bullet that went through her leg was fired by defendant; it assisted the jury in understanding the testimony of the pathologist in this regard. (*Cunningham*, at p. 668; *People v. Montes* (2014) 58 Cal.4th 809, 862.) And this testimony combined with the photograph was circumstantial evidence of defendant’s state of mind when he shot the victim. (See *Cunningham*, at p. 668.)

Defendant has failed to establish reversible error from the admission of the photograph.

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

BLEASE, Acting P. J.

RENNER, J.