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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY WAYNE BROWN,

Defendant and Appellant.

D057114

(Super. Ct. No. SCS206990)

APPEAL from a judgment of the Superior Court of San Diego County,  
Timothy R. Walsh, Judge. Affirmed.

A jury in San Diego County convicted Larry Brown of first degree murder of Vicki Jo Hunter, his girlfriend (Pen. Code,<sup>1</sup> § 187, subd. (a)). The jury also convicted Brown of arson of an inhabited structure, Hunter's motor home (§ 451, subd. (b)), and of evading an officer with reckless driving (Veh. Code, § 2800.2, subd. (a)). Brown

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<sup>1</sup> All further statutory references are to the Penal Code.

received a term of 25 years to life in state prison, with consecutive terms imposed for arson (eight years, the upper term) and reckless evasion (eight months, or one-third of the middle term).

Brown appeals, claiming insufficiency of the evidence to support either the first degree murder conviction or the arson count. Specifically, he argues his identity as the perpetrator was not proven, nor was the requisite premeditation and deliberation for first degree murder. He likewise argues that the dispute in the evidence about his identity as the perpetrator made it inappropriate for the trial court to give a jury instruction about flight, to assist the jury in consideration of the evidence presented about his high speed departure in Hunter's car from the scene of the arson, or the later vehicle pursuit leading to his arrest. (CALCRIM No. 372.)

Brown further contends the trial court erroneously admitted evidence of his prior domestic violence, in the form of testimony by four of his former wives and girlfriends, because such evidence was unduly prejudicial in light of the otherwise allegedly insufficient evidence to identify him as the perpetrator of the murder and arson. (Evid. Code, §§ 1109, 352.) He attacks the trial court's decision to instruct the jury on the manner for consideration of that evidence, under CALCRIM No. 852. (But see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013, approving a kindred instruction.)

Our examination of the record reveals that Brown's claims of insufficiency of the evidence have no merit, and his instructional error arguments are unsuccessful. We further conclude the trial court did not abuse its discretion in weighing the probative and

prejudicial effects of the prior domestic violence evidence, and it was properly admitted. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

An outline of the incidents and proceedings follows, with additional details to be set forth in connection with the discussions of Brown's appellate arguments, *post*.

### *A. Relationship, Fire, and Discovery of the Body*

In August 2006, Brown moved to San Diego from Arkansas, to join his cousin Kelly Cogburn and her live-in partner, Grace Kelly Hobbs, who were going to help him make a fresh start. Brown was in his 40's and had legal and domestic trouble in Arkansas that he wanted to leave behind (a warrant for evading arrest). Brown's friend, J.R. Perry, traveled with him and joined them there. Within two weeks, Brown met Cogburn's close friend Hunter, a neighbor of Cogburn at Campland by the Bay, where they each resided part of the year in their motor homes. Cogburn and Hunter had a practice of moving elsewhere at times, seeking better seasonal rent rates. Hunter worked as a bartender and Brown did odd jobs that Cogburn found for him.

Shortly after they met, Brown moved in with Hunter at her motor home. Brown used methamphetamine at times and the social scene included Brown and Hunter using methamphetamine a few times with Cogburn. Hunter's daughter, Danielle, was in her late teens, and she visited them on occasion.

Cogburn testified that once Brown and Hunter became a couple, he became demanding and "did not want her away from him, even if she had to go to work." Brown

thought Hunter might be cheating on him, possibly with Perry. Hunter asked Cogburn for help once or twice when she was trying to leave for work, over objections by Brown. On one particular date (sometime in the fall of 2006) Hunter asked for such help, so Cogburn and her partner, Hobbs, kept Brown busy while Hunter ran to her white Toyota Celica convertible to go to work. According to Cogburn, Brown started screaming angrily that "he'd get her [Hunter] . . . and everybody." He screamed "that he would blow up this f'ing park," since he knew how to do it and could get away. Hobbs heard him yell that he knew enough about propane gas so that he could blow the whole damn place up, and nobody would know how it happened.

Cogburn also heard Brown threaten to kill Hunter, saying "I'll f'ing kill her. I'll f'ing blow up this whole place." Hobbs heard him yell, "I'm going to kill that bitch if she keeps fucking around on me." Both Cogburn and Hobbs were scared by this incident, and they went straight to the park's ranger station and asked management to kick Brown out. Brown joined them at the station and told everyone there he was just arguing with his girlfriend, and he smoothed things out so he did not have to leave. However, Cogburn and Hobbs required his friend Perry to leave because of Perry's behavior. On four or five occasions, Cogburn heard Brown say and demonstrate with his hands how he would be able to snap someone's neck.

In mid-November 2006, Brown was stopped by police and his vehicle was impounded. Cogburn and Hunter paid for his bail, which they arranged using a false name (Perry's). Once Brown did not have a car, he relied on Hunter more and went

everywhere with her. Although Brown originally had several telephones, they were lost or destroyed, and he used Hunter's telephone. Around Thanksgiving, Hobbs told Hunter she should get away from Brown, and Hunter said she was working on it. Hunter also told her friend Holly Maxwell she was planning to break up with Brown in about a week, "after he finished working on her motor home."

For a while in November 2006, Hunter and Brown stayed with Karen Bardack, a good friend of Hunter, but Bardack asked Brown to leave because he damaged her house and she could smell crystal meth being smoked there. On December 2, 2006, Hunter and Brown took her motor home to stay at the KOA Campground in Chula Vista (KOA). They did not tell Danielle where they were staying, and she found out later, which was unusual. On December 5, 2006, KOA employee Carlos Cabezuela saw Hunter and Brown around 4:30 or 5:00 p.m., driving her Toyota back to their campsite.

Later on the night of December 5, approximately between 7:00 p.m. and 10:00 p.m., Brown had a series of contacts with KOA employees at several points around the campground, asking them if they had seen his girlfriend, or asking if he could use and then using the office telephone, or walking around or driving around the campground. Around 10:30 p.m., Brown was smoking and nervously pacing around the restrooms, and he asked Cabezuela to "keep an eye out for" his girlfriend. Brown then walked to the motor home where Hunter's car was outside, and the lights went out and stayed out at least until around 12:30 a.m. on December 6.

Around noon on December 6, 2006, Brown went to the KOA office, paid for one more night, and told Akers, the employee who gave him the receipt, "this will be the last fucking night." Akers thought Brown smelled of liquor, seemed very fidgety or panicked, and his eyes were strange, glaring, terrified or confused. Next, around 2:00 p.m. that day, Brown asked KOA's customer service supervisor, Wayne Peterson, if he could take a quick shower before they closed for cleaning. About an hour later, KOA employee Hector Juarez was driving a KOA golf cart when he had to take evasive action to avoid being run into by Hunter's car, which was going 25 to 30 miles per hour, well over the campground's 10-mile speed limit. Although Juarez couldn't take a good look at the driver, he noticed the driver's hair was similar to that of the man Juarez had seen in front of Hunter's motor home. Juarez kept working, driving a large water truck used to keep the dust down on the streets in the campground. About 10 minutes after the near collision, Juarez parked the truck at the shop, but when his coworker Jose told him a motor home was on fire, he drove the truck over and sprayed water on the fire.

KOA's assistant manager, Ramon Becerra, learned of the fire at about 3:30 p.m. and immediately went there. Juarez told him that there was probably no one in the motor home at the time, because he had just seen the white car leave it, and that car had almost hit him. Chula Vista firefighters arrived at the campground at 3:44 p.m. and discovered that the door was locked, so they pried it open. Inside they found Hunter's dead, burned body on the bed in the back of the motor home, in the most severely damaged area.

The next day, Cogburn listened to a voicemail message left for her by Hunter on December 5, 2006, at about 8:50 p.m. Hunter sounded very upset, disturbed, and panicky as she begged Cogburn to come and get Brown, because he was "flipping out," and had taken her car keys. Hunter's message said that Brown had told his mother on the phone that Hunter was "a prostitute and a bitch." Hunter also told Cogburn she was scared to death of Brown, who was being both verbally and physically abusive.

Once Cogburn heard the message on December 6, at about 2:00 p.m., she immediately called Hunter's phone, which Brown answered. Cogburn asked about Hunter, and Brown said she was asleep. Brown said he could not come visit Cogburn to play darts, because he had some things to do. Cogburn called him again, and he again told her Hunter was asleep. Cogburn realized there was a problem when she saw a television news account about Hunter's motor home burning on the evening of December 6.

*B. Brown Leaves KOA, Communicates with Friends, and is Later Apprehended*

Before outlining additional evidence in the record, we observe that our standard of review requires analysis of the whole record in the light most favorable to the judgment, for determination of any substantial evidence support, which may include either direct or circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792 (*Stanley*)). Under California Rules of Court,<sup>2</sup> rule 8.204(a)(2)(C), read together with rule 8.360(a), an

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<sup>2</sup> All further rules references are to the California Rules of Court unless noted.

appellant's opening brief must provide a summary of "significant facts" in the record, but in this case, many of those facts appear only in the respondent's brief.<sup>3</sup>

After Brown was seen around 3:00 p.m. on December 6, leaving the campground in Hunter's car at a relatively high rate of speed, he was next heard from when he used Hunter's cell phone at 5:35 p.m. to call her friend Holly Maxwell, asking for a ride, because he said the police were after him, and he was afraid the police would impound Hunter's car. Maxwell replied she could not leave work and asked where Hunter was, and Brown said she was at the motor home watching television.

While watching the 6:00 p.m. news on television on December 6, about the fire at Hunter's motor home, Hunter's friend Karen Bardack called Hunter's cell phone to see if she was okay, and Brown answered. Brown said Hunter was at the motor home while he was running her errands, he was lost on the freeway, and he did not know what news she was talking about.

At 6:11 p.m. on December 6, Brown used Hunter's phone to call her daughter, Danielle, and she heard him "crying and hyperventilating" as he said he could not find

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<sup>3</sup> Brown's appellate counsel has not materially assisted us in the briefs submitted, because he has set forth only a selective and incomplete set of facts, omitting items that might be detrimental to his view of the evidence as it relates to his theories on appeal. In particular, defense counsel left out of his briefs abundant evidence about Brown's threatening, unusual, misleading or evasive conduct and communications with campground staff and friends of Hunter, both immediately before and after the time of the fire, up until his apprehension two days later. Appellate counsel, particularly where challenging the sufficiency of the evidence, is obligated to provide more comprehensive assistance to the court by providing an accurate basis for evaluation of the whole record, even if it might be more consistent with the prosecution's version of the evidence. (*Stanley, supra*, 10 Cal.4th 764, 793.)

Hunter and her motor home was burned down. Danielle's then-boyfriend, Brian Fitzgibbons, got on the phone with Brown a couple of times and thought he sounded scared out of his mind. When Brown said Hunter might be injured and that he was driving her car on the freeway but was lost, Fitzgibbons suggested he return to the campground to find out what was happening and gave him directions, but Brown did not want to go there. Brown said he did not have a driver's license and did not want Hunter's car to be towed. Later that night, when Danielle and Fitzgibbons heard the news on television, they tried to call Brown again, but he did not answer.

Hunter's boss at the bar where she worked, Richard Irby, called her telephone at 6:35 p.m. on December 6, and when Brown answered, asked to speak to Hunter. Brown said she was not feeling well and could not come to the phone. Irby asked Brown to have her call him for more work.

On the evening of December 6, Brown used Hunter's phone to leave a voicemail message for Hunter's friend Rosemary Olsen, asking her to call him because it was an emergency. Olsen's boyfriend had previously provided or sold methamphetamine to Hunter and Brown.

Two days later, at 4:26 p.m. on December 8, 2006, Brown was driving Hunter's car when he made a U-turn on the I-8 freeway near the Viejas area. A CHP motorcycle officer signaled that Brown should stop, but Brown began a 44-mile high speed chase involving several law enforcement departments and agents. He crashed Hunter's car,

pinning himself under it and sustaining injuries. His property inventory at the hospital included a KOA parking pass and receipt.

After a few days of Brown's hospitalization, Chula Vista detectives interviewed him and took fingernail scrapings and other DNA samples from him. The results did not exclude him from material found in Hunter's fingernail scrapings taken at her autopsy.

### *C. Trial, Instructions and Verdict*

Brown was charged with Hunter's murder, as well as arson and evading an officer. The trial court heard pretrial motions, and after conducting an extensive analysis under Evidence Code section 352, decided to admit evidence from five of Brown's previous wives or girlfriends about domestic violence acts he committed against them, as uncharged propensity evidence under Evidence Code section 1109. The court ruled this evidence could also be properly considered under Evidence Code section 1101, subdivision (b), as going to motive or intent, but not for the purpose of showing the identity of the perpetrator of murder or arson.

The matter went to jury trial, where additional testimony was taken about Brown's relationship with Hunter and the events giving rise to the fire, from friends of Hunter, KOA employees, and other witnesses. The investigating police detective, Matthew Hardesty, reviewed Brown's criminal history after he was apprehended and found that he had at least one prior felony evading arrest charge, and he also had an arrest warrant from Arkansas that was outstanding. Detective Hardesty stated that other witnesses told him that Brown told them about the arrest warrant on him out of Arkansas. The jury listened

to and read the voicemail message left for Cogburn by Hunter on December 5, about her panicky fear of Brown.

In testimony from fire investigators, they concluded the fire had been intentionally set, possibly with an open flame. The placement of Hunter's body on the bed in the motor home, straightened out and covered with quilts, appeared to the investigators to be very unusual, because it did not show any indications the victim had been trying to get out of the fire, as an adult victim would usually do. Hunter's purse and contents were found inside the motor home.

The medical examiner who conducted Hunter's autopsy, Dr. Bethann Schaber, testified that Hunter died from manual strangulation, and her body showed evidence of blunt force trauma and abrasions. Although a particular time of death could not be determined, Hunter was dead before the fire started. Toxicology reports performed at autopsy showed that Hunter had methamphetamine and marijuana in her blood.

In the defense case, Brown's mother described how Hunter had called her in early December 2006 and told her she and Brown were getting married, and they were very happy together. Brown's mother testified that when Brown and several of his previous wives or girlfriends lived with her in Arkansas, she had not seen him committing any domestic violence acts against them.

In closing argument, defense counsel argued that the circumstantial evidence against Brown was not enough to connect him to the crimes beyond a reasonable doubt (there was a "valley" or "canyon" of missing evidence). In particular, the prosecutor's

proposed timeline of events was deemed inaccurate, because it failed to account for the fact that the time of Hunter's death could not be precisely determined. Brown did not deny that he had fled from officers during the vehicle pursuit, but he argued that evidence and the account of how he left the campground should not reasonably be interpreted as amounting to his flight from any known crime.

At the close of the case, the jury received instructions about the elements of the various offenses, and after deliberating, convicted Brown on all charges. He appeals.

## DISCUSSION

### I

#### *FIRST DEGREE MURDER AND ARSON COUNTS*

##### A. Standards of Review for Sufficiency of Evidence

To assess Brown's contentions that the record does not disclose sufficient evidence establishing Hunter's death was a result of any careful thought or reflection on his part, nor that the manner of killing showed premeditation and deliberation, we apply well established rules. The appellate court reviews the entire record in the light most favorable to the judgment "to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*).)

An appellate court's assessment of whether there is evidentiary support for an inference that a particular killing occurred as the result of preexisting reflection, not an "unconsidered or rash impulse," is guided by *People v. Anderson* (1968) 70 Cal.2d 15,

26-27 (*Anderson*). Normally, the three categories of evidence that are relevant to resolving this issue of premeditation and deliberation are planning activity, motive, and manner of killing. (*Ibid.*) "However . . . '*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. . . .' Thus, while premeditation and deliberation must result from " 'careful thought and weighing of considerations' " [citation], we continue to apply the principle that '[t]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." [Citations.]' " (*Bolin, supra*, 18 Cal.4th at p. 331, relying on *People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

There is no requirement that evidence on each of the three *Anderson, supra*, 70 Cal.2d 15, factors must be produced to support a first degree murder conviction that is based on a theory of premeditation and deliberation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124-1125 (*Perez*); *People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1113.) The evidence must nevertheless show that the defendant made " 'a cold, calculated judgment, including one arrived at quickly . . . [that] is evidenced by planning activity, a motive to kill, or an exacting manner of death.' [Citation.]" (*Ibid.*; original italics.)

In evaluating a defendant's argument, an appellate court is not empowered to reweigh the facts. (*Bolin, supra*, 18 Cal.4th 297, 332-333.) The credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province

of the trier of fact. (Evid. Code, § 312.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the [jury's] verdict," we will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) "The test on appeal becomes whether substantial evidence supports [the decision], not whether the evidence proves guilt beyond a reasonable doubt." (*Ibid.*)

#### B. Contentions and Analysis: Murder

Applying the standards set forth above, we address Brown's challenges to the sufficiency of the evidence in support of his first degree murder conviction, on premeditation and deliberation. Although his arguments are framed using the three *Anderson* criteria, the thrust of his appeal is that insufficient evidence directly connects him to the offenses, since the killing and fire could have happened otherwise (such as at the hands of another person), and accordingly, the alleged instructional and evidentiary errors were particularly prejudicial. (*Anderson, supra*, 70 Cal.2d at pp. 26-27.) We next examine the factors focused upon by Brown, in claiming the verdicts represent merely guesswork and speculation, and were inaccurately based on circumstantial evidence and an inadequate timeline of events.

In conducting this whole record review, we also consider the evidence that Brown's appellate briefs have downplayed or ignored, such as Brown's previous threats to Hunter's life, her statements to friends that they might break up, his unusual and misleading statements to her friends and family after the fire about her whereabouts, and

the circumstances of his flight from the campground. (*Stanley, supra*, 10 Cal.4th at pp. 792-793.)

*1. Planning Activity and Motive for Murder*

Brown contends that the circumstantial evidence does not support reasonable inferences that he planned to kill the woman he was planning to marry, or that he had any motive to do so. He argues that without a clear determination of the time of her death, the jury had insufficient information, physical or otherwise, to tie him to the offenses. Instead, the jury knew nothing direct about his activities or state of mind from the time he paid for another night, then left KOA the afternoon of December 6, until he was apprehended December 8. Moreover, the DNA evidence from the two sets of fingernail scrapings was inconclusive, which was natural, since he and Hunter lived together.

Although Brown denies on appeal his argument "simply asks this court to reweigh the facts" (*Bolin, supra*, 18 Cal.4th 297, 333), it is difficult to conclude otherwise. In addition to the facts and circumstances cited by Brown, there is ample additional evidence in the record from which the jury could have found the existence of planning activity or a motive. Specifically, Brown had been heard to threaten to kill Hunter before and suspect her of infidelity, and he was known to become angry if she left his company. He had obtained full access to her car and her telephone, since he had lost his own, and this could be seen as putting her at a disadvantage. The evidence that he was looking for her at the campground, and the evidence that she had become afraid of him by that time and was considering leaving him, combined with the fact that they had recently moved to

a new campground some distance away from their friends and family, allowed the jury to reach a reasonable conclusion that he was taking steps to place Hunter in a vulnerable position, in order to further dominate her in any way that he could, eventually including murder.

Further, Brown made numerous misleading statements about Hunter's whereabouts on the evening of December 6, using her telephone to call and talk to her family and friends, as early as 5:35 p.m., two hours after the fire. Those circumstances tied him to the time and place of Hunter's death, where they were living, in a manner reasonably indicative of his planning activity and the existence of a motive. In any case, the manner of this killing supplies other evidentiary indications of premeditation and deliberation, as we next discuss.

## 2. *Manner of Killing*

In conjunction with the above indications of Brown's planning activity and motive, the manner of killing, manual strangulation, supports the jury's finding of premeditation and deliberation. According to the medical evidence, to inflict that degree of force to Hunter's neck, the killer would have had to use direct pressure on the large arteries supplying blood to the brain for at least three to five minutes. If the victim was moving and struggling, it might have taken a longer time for her to die. The medical examiner found no marks of a rope or wire, so the bruises and scrapes that she detected on Hunter's neck indicated hands were used to apply the force, for a considerable period of time, thus showing "an exacting" manner of killing. (*Anderson, supra*, 70 Cal.2d at p. 27.)

The medical examiner also determined that Hunter was dead when the fire started. Her body was found by fire investigators to be arranged on the bed and covered with quilts, and the door was locked when the fire was discovered. These apparent efforts to prevent detection of what had already occurred could have been interpreted by the jury as showing the essential elements of this crime, including Brown's premeditation and deliberation in the manner of killing. As previously described, other substantial evidence supports the jury's decision that he was the perpetrator. (*Perez, supra*, 2 Cal.4th 1117, 1124.)

Although the jury received instructions on lesser included offenses, it convicted Brown of first degree murder of Hunter. Viewing the record in its entirety, we conclude that as a rational trier of fact, the jury had enough evidence, and reasonable inferences from it, to support its findings about Brown's apparent state of mind at the relevant times at the campground. (*Bolin, supra*, 18 Cal.4th 297, 331-332.)

### C. Contentions and Analysis: Arson

According to Brown, the sequence of events proven at trial not only failed to show his connection beyond a reasonable doubt to the murder, it also failed to demonstrate he was the one who set the motor home on fire. Brown points to evidence that Hunter was known to smoke methamphetamine at times, that any open flame could have caused the fire, and there was flammable material found in the motor home. He therefore argues the jury had insufficient information, physical or otherwise, to definitively tie him to the arson.

In viewing the direct and circumstantial evidence at trial in a light most favorable to the judgment, the lack of direct physical evidence of Brown's firesetting is not dispositive. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Rather, the circumstances of the fire as a whole could reasonably be evaluated as amounting to a substantial showing that Brown started it to hide the evidence that he had killed Hunter. He was known to be physically present at the campground immediately before the fire, and he was seen leaving in a hurry, in Hunter's car, immediately before the fire was detected. He took her telephone with him and later made phone calls to acquaintances from it, claiming that Hunter was still at the motor home, or that she couldn't come to the phone or that he didn't know what was going on. The position of Hunter's burned body on the bed, under the covers where the fire started, behind a locked door, is further evidence supporting reasonable inferences by the jury that it was Brown, her cohabitant, who committed arson of the inhabited dwelling, most likely to destroy evidence he killed her.

#### D. Related Instructional Issue on Flight Evidence

Finally, Brown argues the trial court erred by instructing the jury on consciousness of guilt based on flight. Pursuant to CALCRIM No. 372, the trial court instructed the jury that if it concluded Brown fled or tried to flee immediately after a crime was committed, it could consider this evidence to infer he had an awareness of his guilt of the crime. According to Brown, there was insufficient evidentiary support for the instruction, for two reasons. First, his main defense was that he had been misidentified as

the perpetrator of any crimes at the campground, so his travels from there should not be interpreted as flight. Second, he admitted in argument that he had fled during the high speed vehicle pursuit, possibly because he knew he had an outstanding arrest warrant from Arkansas, so no consciousness of guilt about any crimes at the campground should be inferred from the circumstances of that flight.

On Brown's first claim, we note that above, we have rejected his contentions that no substantial evidence connected him to these offenses against Hunter. His first premise on this instructional error claim fails (that no evidence showed he was the perpetrator who fled). In any event, "the facts of each case determine whether it is reasonable to infer that a defendant's flight shows consciousness of guilt." (*People v. Mason* (1991) 52 Cal.3d 909, 941 (*Mason*)). If a defendant has committed other crimes, and his knowledge of those crimes might explain why he fled from authorities, that factor affects the weight, not the admissibility, of the evidence of flight. (*Id.* at p. 942.)

If there is such admissible evidence connecting the flight with the defendant as the person who fled, "and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight. [Citation.] 'The jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt. [Citation.] The jury's need to know these things does not change just because identity is also an issue. Instead, such a case [only] requires the jury to proceed logically by deciding first whether the [person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on

guilt. The jury needs the instruction for the second step.' " (*Mason, supra*, 52 Cal.3d 909, 943.)

With regard to the crimes at the campground, there was enough evidence presented to allow the jurors to be instructed that they could reasonably infer that when Brown sped out of the campground in Hunter's car, his actions were motivated by an awareness of guilt. (See *People v. Lucas* (1995) 12 Cal.4th 415, 470-471 (*Lucas*)). In particular, the jury could have inferred that he left the campground with the purpose of avoiding being observed or arrested, because he was known to have lived at the motor home with Hunter, and he had been seen in the area around the time the fire started. (*People v. Crandell* (1988) 46 Cal.3d 833, 869, abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) The jury could have inferred that the close timing between the fire and his departure was not coincidental but evinced his awareness of guilt of these offenses. The possibility of other reasons for Brown's departure in Hunter's car was a matter for the jury to consider when weighing the evidence, and this did not preclude the instruction on flight.

Moreover, the evidence of his later, admitted flight during the vehicle pursuit could have supported such an instruction, because the courts do not specify any defined period related to the offense during which a defendant's flight must occur. (*People v. Carter* (2005) 36 Cal.4th 1114, 1182.) It is not required that the defendant be in possession of knowledge that certain criminal charges have been filed, to give rise to an

inference of consciousness of guilt from flight. (*Mason, supra*, 52 Cal.3d 909, 941-942, fn. 11.)

In this case, there is sufficient evidence from which a jury could infer that Brown took the actions that he did, both at the time of the fire and two days later, because he had knowledge of guilt about his activities toward Hunter at the campground. (*Lucas, supra*, 12 Cal.4th at p. 471.) The court properly gave the instruction to enable the jury to decide whether flight occurred, what weight to give the evidence, and whether there were alternative explanations for his departures. (*Ibid.*; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) There was no error in this respect.

## II

### *EVIDENTIARY ERROR CONTENTIONS: UNCHARGED MISCONDUCT*

#### A. Due Process

Brown contends that the trial court, in allowing the admission of evidence of his prior acts of domestic violence against several of his former domestic partners, infringed on his right to due process, or the court otherwise abused its discretion. (Evid. Code, §§ 1101, subd. (b), 1109, 352.) He contends the trial court did not adequately take into account the lack of physical evidence directly connecting him to Hunter's death or the burning of her motor home, and the prosecution relied instead only on a circumstantial showing. According to Brown, such evidence of uncharged domestic violence would then become unduly prejudicial, and harmful error occurred under either accepted state or federal standards.

We have addressed these same sufficiency of the evidence arguments above, and have rejected Brown's contentions that no substantial evidence connects him to those offenses against Hunter. His main premise, that without such substantial evidence of connection, propensity evidence was per se prejudicial, fails, because the prosecution did succeed in introducing overwhelming evidence that he was the perpetrator, despite his denials and criticisms. We nevertheless consider his claims that an abuse of discretion occurred in the trial court's weighing process under Evidence Code section 352.

Where a defendant is accused of an offense involving domestic violence, Evidence Code section 1109, subdivision (a)(1) provides, in part, "evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." It is well established that Evidence Code section 1109 does not violate due process through the manner in which it will allow a jury to consider evidence of a defendant's propensity to commit such a crime. In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the court rejected a similar attack on analogous provisions of Evidence Code section 1108, subdivision (a), which permit evidence of prior sex offenses to be admitted when a defendant is charged with a like sexual offense. As the court explained in *Falsetta, supra*, 21 Cal.4th at page 917, the trial court's weighing process prescribed by Evidence Code section 352, incorporated into Evidence Code section 1108, will provide adequate safeguards against due process violations in this respect. (See also *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

The same reasoning permits admission of evidence of prior acts of domestic violence under Evidence Code section 1109, subject to the safeguards at trial provided by the trial court's compliance with the requirements of Evidence Code section 352. (Evid. Code, § 1109, subd. (a); *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028; *People v. Johnson* (2000) 77 Cal.App.4th 410, 417-420; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-706.) Such testimony has high probative value, as follows:

" 'The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked.' " (*Hoover, supra*, 77 Cal.App.4th 1020, 1027-1028.)

#### B. Analysis and Application

To examine Brown's argument that the admission of this domestic violence propensity evidence was erroneous, we first acknowledge that the record shows the trial court ruled upon the respective motions in limine by separately considering the admissibility of the evidence under both Evidence Code sections 1101, subdivision (b), and 1109, and it expressly referred to the weighing process of Evidence Code section 352, when reaching its conclusions. The trial court put on the record that in a diligent effort to analyze the evidence, it had spent an "elaborate" amount of time reviewing the information (many, many hours). The trial judge personally created separate charts and documents to understand this information, by summarizing each of the five victims'

experiences, and listing a number of commonalities among their experiences as a battered wife or girlfriend of Brown. These included Brown's infliction on them of choking, kicking, blows to the head, broken bones of the head and face, controlled environments, accusations of infidelity, and isolation by taking these people out of the environment where they normally were.

The court stated it therefore had an adequate basis to characterize the experience of those five women with Brown as domestic violence, and those events were not unduly remote or dissimilar. The court noted that these events took place over a long period of time and were continuous, both as to the individual women and as to Brown, and therefore they were probative evidence because of their cumulative nature. The court ruled that this evidence would not take up an undue amount of trial time, because only about 10 percent of the planned prosecution witness list would be these five women. Since the previous incidents related by these witnesses had not resulted in their deaths, those incidents were not more aggravated or inflammatory than the charged offenses. Accordingly, even though the evidence was no doubt damaging to the defense, it qualified for admission under Evidence Code section 1109, pursuant to that Evidence Code section 352 analysis.

The court proceeded to address the prosecution's alternate requests to admit the evidence under Evidence Code sections 1101, subdivision (b), and agreed it was appropriate to show purposes of motive and intent, but not for showing identity of Brown as the perpetrator (not a clearly singular or signature method).

In light of the trial court's express explanation of this reasoning process, and to evaluate its validity, we turn to the specifics of the testimony and exhibits provided by the prosecution, from four of Brown's former wives or girlfriends (one of whom mentioned another (5th) abused girlfriend). First, Brenda Dastillon was married to and lived with Brown from 1982 to 1994, and they later divorced. She testified to dozens of incidents of domestic violence committed against her by Brown, including choking and strangling at least 15 or 20 times. He accused her of infidelity and hit her for admitting it or not admitting it. He used methamphetamine and forced her to do so, and hit her whether he was under the influence or not. He threatened to kill her many times. To get away, she had to hide and seek help from authorities.

Long after their divorce, Brenda Dastillon personally witnessed Brown attacking his then girlfriend, Leilani Baker, in the face hard enough to make her blood splatter. Leilani Baker was unable to travel to the trial.

Rachel Tidwell was living with and married to Brown from 1993 to 1996, when they divorced. She testified about numerous incidents of domestic violence, including being choked until she was unconscious. Brown held her against her will and she was rescued by a police officer.

Cynthia Brown was married to Brown from 1997 to 1999, when they divorced. She testified Brown assaulted her on many occasions, breaking her nose and jaw, and choking her to the point of unconsciousness. He stomped on her face when she tried to escape, but she eventually succeeded.

Brenda C. Ammons had a romantic relationship with Brown from 2005 through 2006, during which he held her against her will, broke her jaw and her foot, and threatened to kill her and destroy her life. She escaped when he passed out one night, and she was taken to the hospital and treated for her injuries.

The probative value of such testimony is found not only in its cumulative nature, showing Brown engaged in a continuous and fairly unbroken pattern of domestic abuse, but also in the close similarity of his methods against his domestic partners. He threatened to kill them, and choked and beat them until they could escape. In particular, the manner of killing Hunter, manual strangulation, was the extreme version of a technique he had used before on at least three or four of his previous partners. Taken together, this testimony shows the current offenses against Hunter further demonstrated Brown generally followed a pattern of extreme domestic abuse.

This domestic violence testimony was highly relevant and probative, not unduly remote, and overall, it was used properly to create a strong inference that Brown had a propensity to commit the specific acts with which he was charged. (See *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) We can find no error, harmful or otherwise, in the trial court's admission of the prior incidents of domestic violence, because their probative value far outweighed any potential prejudice. (*People v. Cabrera, supra*, 152 Cal.App.4th 695, 703-706.) The court adequately exercised its discretion and there was no evidentiary error. (Evid. Code, § 352.)

### C. Pattern Instruction on Uncharged Misconduct

Finally in this domestic violence context, Brown challenges the giving of CALCRIM No. 852, which told the jury that it could rely on the evidence about other uncharged domestic violence incidents, if proven by a preponderance of the evidence, as part of determining whether Brown was likely to commit and did commit the charged offenses, due to his disposition or inclination to commit domestic violence. This instruction limited the consideration of this evidence for the stated purpose, and for the purposes provided in CALCRIM No. 375, dealing with proof of motive and intent through evidence of uncharged offenses.

Brown acknowledges that the California Supreme Court has resolved the issue of the validity of CALCRIM No. 852 against him, and he thus raises this issue solely to preserve it for any further review. In *Reliford, supra*, 29 Cal.4th 1007, 1009-1013, the court held that an analogous instruction explaining the application of Evidence Code section 1108 (a 1999 version of CALJIC No. 2.50.01) correctly stated the law. This holding properly extends to evidence of prior uncharged incidents of domestic violence, under Evidence Code section 1109. (See *People v. Loy* (2011) 52 Cal.4th 46, 74-75 [confirming that a jury may not convict the defendant based solely on evidence of a prior such offense (there, sexual crime), but acknowledging that under *Reliford* this type of instruction is not likely to mislead the jury concerning the limited purpose for which it may consider other crimes evidence, or the prosecution's burden of proof]; see *Falsetta, supra*, 21 Cal.4th at pp. 920.) We are bound by this Supreme Court authority and resolve

Brown's argument against him. (*Auto Equity v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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NARES, J.

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McDONALD, J.