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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LAWRENCE JOHN RIVERA,

Defendant and Appellant.

E053069

(Super.Ct.No. FBA006835)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey, Judge. Affirmed.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty of first degree murder. (Pen. Code, § 187, subd. (a).) The trial court sentenced defendant to prison for an indeterminate term of 25 years to life. Defendant raises five contentions on appeal. First, defendant asserts the trial court erred by allowing the prosecutor to present hearsay evidence, specifically out-of-court statements made by the victim to April Marcum. Second, defendant contends that if he forfeited the foregoing hearsay contention, then his trial counsel was ineffective for not objecting to the hearsay statements. Third, defendant asserts if this court finds the hearsay statements testified to by April Marcum and other witnesses were properly introduced, then the trial court erred by incorrectly instructing the jury on the limited purpose of the hearsay statements. Fourth, defendant contends the trial court had a sua sponte duty to give a limiting instruction related to out-of-court statements. Fifth, defendant asserts if this court rules in favor of the People on the foregoing instruction contention, then defendant's trial counsel was ineffective. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION'S CASE-IN-CHIEF

The victim was 26 years old when she died. The victim had one child, Aurianna. In 2002, the victim was in the process of divorcing her husband, Brandon Garcia. Garcia moved to Alabama during the divorce proceedings, and the victim moved into an apartment with Aurianna, who was approximately two years old. The victim's apartment was off Jasper Road in Barstow. The victim worked at Raytheon.

The victim met defendant through her babysitter. Defendant was the victim's babysitter's brother-in-law. The babysitter asked the victim if she would help defendant

obtain a job at Raytheon, and the victim “put in a good word” for defendant; defendant obtained a job at Raytheon a few months before May 2002. Also several months prior to May 2002, the victim told her mother (Mother) defendant was planning to help her pay for her divorce. Since the victim helped defendant to obtain a job at Raytheon, the victim thought defendant was repaying that favor. Mother told the victim not to accept the money, because Mother has never heard of defendant and she wanted the victim to be cautious.

During a telephone conversation on May 12, 2002, the victim told Mother that she had recently gone to the movies with defendant. Mother encouraged the victim to not date anyone because Garcia “would have made things even more difficult” for the victim if she dated. The victim told Mother that defendant was just a friend. However, the victim also told Mother that “she was beginning to get worried about [defendant] because he was bothering her all the time. She felt like he was stalking her.” The victim told Mother she planned to tell defendant that she did not want a serious relationship, and she only wanted to be friends.

The victim also spoke to her father (Father) on May 12, 2002, via telephone. The victim told Father that defendant “wanted to see her,” and defendant was “kind of spooking her, because he was watching her in different places.” Father advised the victim to “get rid of the guy.” Father asked the victim if she was scared of defendant, and the victim, who had previously been in the military, responded that she “could kick his ass.” Father suggested the victim not date anyone, so as to not complicate her divorce proceedings. The victim told Father defendant was just a friend.

Hal Raster worked with defendant at Raytheon. Defendant told Raster the victim helped him obtain the job at Raytheon. Approximately one week before May 14, 2002, defendant asked Raster if Raster “could imagine [defendant] with a girl like [the victim].” Raster reminded defendant that the victim was married, but defendant “kept pushing it.”

On another occasion, Raster and defendant were delivering mail to the different Raytheon buildings and they arrived at the victim’s cubicle. Raster and the victim talked about their children and laughed, while defendant sat in the corner “with this kind of weird look on his face.” The victim asked Raster, “[W]hat’s wrong with him?” Raster asked defendant what was wrong, but defendant “just shook his head.” Defendant and Raster went outside, but defendant said he needed to retrieve something from the victim or talk to the victim. Defendant went back inside the building, and Raster waited in the truck outside. Approximately five minutes later, defendant returned to the truck. Defendant’s face was “bright red,” he appeared irritated, and seemed to be “to the point of tears.” Raster asked what was wrong, and defendant responded that he “didn’t like being made a fool of.”

Patricia Boggs was the victim’s friend and coworker at Raytheon. On May 14, 2002, the victim told Boggs that defendant “wanted to take her out again,” but the victim said she did not want to go with defendant. The victim told Boggs she had gone to a movie with defendant, and it appeared defendant “wanted more than a friendship.” The victim told Boggs defendant “was real possessive with her, and he would be calling her on the phone all the time.” The victim also told Boggs that defendant went with the

victim when she filed her divorce paperwork, and defendant loaned her the money for the filing fees.

Heather Ince shared a cubicle with the victim at Raytheon. During the day of May 14, 2002, Ince and the victim made plans to go grocery shopping in the evening to prepare for a barbeque. The victim told Ince that defendant wanted to go to the movies with the victim that night, but she did not want to go because she believed defendant “wanted to have more of a relationship with her” and the victim was uncomfortable with that idea. Ince saw the victim leave Raytheon around 4:00 p.m. on May 14, 2002. The victim was supposed to call Ince around 6:15 p.m. about getting together for shopping, but the victim never called. At approximately 6:45 p.m., Ince called the victim, but the victim did not answer.

Around 5:00 or 6:00 p.m. on May 14, 2002, Phillip Zavala was knocking on doors, inviting people to attend Bible study and passing out flyers with information about the Bible study. Specifically, Zavala was knocking on doors at an apartment complex on Jasper Road in Barstow. Zavala knocked on an apartment door, and defendant opened the door. Zavala saw a woman sitting on a couch and a two- or three-year-old female child in the apartment. Zavala gave defendant a flyer for Bible study. In a sarcastic tone, defendant told Zavala, “[W]e’ll be there.” Zavala left after defendant’s response.

William Schmitt worked at Raytheon in May 2002. Schmitt had seen the victim at work, but did not know defendant. When going to work, Schmitt typically left his house at 5:00 a.m., and travelled down Yermo Cutoff Road. On the morning of May

15, shortly after 5:00 a.m., in a desolate area of Yermo Cutoff Road, Schmitt saw a red car on the side of the road and a male on the driver's side of the car. In May 2002, defendant drove a red Mitsubishi Mirage.

The victim was scheduled to arrive at work at 7:30 a.m. on May 15. The victim did not arrive at 7:30. Ince called defendant's boss to ask if defendant was at work, because Ince "had this horrible, horrible feeling that something was terribly wrong." Ince called the victim numerous times May 15, but never received an answer. Defendant did not go to work at Raytheon as scheduled on May 15. Raster called defendant's cell phone and spoke to defendant. Defendant seemed confused, he initially told Raster that his alarm did not work, but then said he was sick.

Dale Domek worked at Raytheon. On May 15, several coworkers asked Domek if he had seen or heard from the victim that day. At 2:30 p.m., when Domek left work, he went to the victim's apartment. At the apartment complex, Domek saw the victim's car. Domek knocked on the victim's door, but no one answered. A neighbor, Ann Graf, asked Domek if she could help him. Domek explained the situation to Graf, and Graf opened the unlocked front door of the victim's apartment. Domek and Graf entered the apartment. Domek saw Aurianna standing up in her crib. Domek went through the apartment, but could not find the victim. Domek and Graf looked for the victim in the apartment complex—in the laundry room and in a neighbor's apartment. After walking around, Domek called 911.

Ince also went over to the victim's apartment. Domek and Graf were in the apartment when Ince arrived. Ince found the victim's cell phone in the apartment. Garcia said the victim would not leave Aurianna alone in the apartment.

San Bernardino County Sheriff's Acting Detective Carter was dispatched to the victim's apartment at approximately 5:00 p.m. on May 15. An investigator told Detective Carter (1) the victim was missing; (2) the victim's child, purse, and cell phone were found inside the apartment; and (3) the victim had been dating defendant. Detective Carter went to Fort Irwin, where defendant lived, to speak to defendant. Detective Carter found defendant at defendant's second job, working at a convenience store.

After Detective Carter identified himself to defendant, he noticed defendant "was extremely nervous. His hands were literally shaking. And as he answered, he stuttered." Defendant did not express surprise, shock, or concern upon learning the victim was missing. Defendant told Detective Carter he had dated the victim. Defendant said the last time he saw the victim was the evening of May 13, at his residence. Defendant denied being at the victim's apartment on May 14. Detective Carter noticed scratches on the right side of defendant's face, as well as swelling and bruising under defendant's left eye. Defendant told Detective Carter he obtained the scratches from a tree branch. Detective Carter believed the scratches were consistent with fingernail scratches.

The following day, on May 16, defendant again did not arrive at work at Raytheon. Detective Carter went to defendant's residence to speak to him. Detective

Carter again saw the scratches and bruising on defendant's face, but Detective Carter also saw scratches on defendant's chest, hands, arms, and waist, as well as bruises on defendant's arm and chest. The bruises on defendant's right bicep looked like fingertips, as though someone grabbed defendant's arm. Law enforcement took samples of defendant's blood, and scraped under his fingernails. Defendant had two people's DNA under his fingernails—a male and a female. The victim and defendant were determined to be the likely contributors to the DNA under defendant's fingernails. At the victim's apartment, Detective Carter found the Bible study flier that Zavala had been passing out door-to-door; the flier was on the sofa. Defendant's fingerprint was found on the flier inside the victim's home.

Also on May 16, Deputy Briggs was following defendant in order to conduct a traffic stop, due to defendant's car having tinted windows. Eventually, defendant stopped along Deputy Brigg's car, and asked him why he was following defendant. Deputy Briggs asked if could search defendant's car, and defendant agreed. Deputy Briggs saw hair strands on the passenger side of the car near the headrest, and reddish-brown stains on the passenger door panel. Deputy Briggs saw scratches on defendant's face and arms.

Defendant's red car was towed to the sheriff's crime lab. Deborah Harris, a San Bernardino County Sheriff's Crime Scene Investigation Training Specialist, found four stains on the passenger door panel, which she identified as bloodstains. The bloodstains on the front passenger door panel appeared to be contact stains—where something bloody touched the door panel. Harris found two hairs on the passenger seat. On the

rear passenger door panel, Harris found an impact bloodstain. An impact bloodstain occurs when blood splatters after an impact. DNA testing revealed that blood on the front passenger door panel, rear passenger door panel, and driver's headrest belonged to the victim.

On May 17, Raster saw defendant at work at Raytheon. Defendant "was kind of walking hunched over, and he was very, very pale. Raster noticed a small mark under defendant's eye, and scratches on defendant's chin and neck. Raster also saw defendant's jacket was ripped. The last time Raster had seen defendant, on May 10, defendant's jacket was not ripped. Defendant's manager, Denise La Page also saw defendant at work on May 17. Defendant appeared "[v]ery nervous" to La Page—he picked up his paycheck from La Page but would not look at her. Defendant did not return to work after May 17 and did not submit a vacation request. Thus, defendant was terminated from Raytheon for failing to attend work.

On May 18, 2002, Willie Shepperd went to work as store manager of a convenience store where defendant worked as a shift manager. Defendant came to work at 2:00¹ on May 18. At the end of Shepperd's shift, around 4:00, she counted the money and balanced it with the money in the safe. Shepperd organized the money in bundles of \$2,000. Shepperd placed two bundles of \$2,000 in the safe. At 11:00 p.m., a second shift manager, Sunae Evans, called Shepperd to tell her \$2,000 was missing from the safe. Evans had seen defendant in the office where the safe was located.

¹ The record does not reflect whether it was 2:00 a.m. or 2:00 p.m., but we infer it was 2:00 p.m. given the timeline.

Defendant told Evans he needed money. Upon arriving at the store, Shepperd noticed one of the \$2,000 bundle wrappers was in the trash. Defendant had access to the safe. Defendant never returned to work at the convenience store, and never said he planned to take a vacation.

On May 22, San Bernardino County Sheriff's Detective Swan and Sergeant Tesselaar drove from Interstate 15 to Highway 395, looking for the victim's body along dirt roads. The officers then drove along defendant's and the victim's paths to and from Raytheon. Along that path, they turned onto Yermo Cutoff Road. Detective Swan was in the passenger's seat, and he noticed a "a stack of rocks on the south side of Yermo Cutoff anywhere from 5- to 6- to 700 feet off the road edge," which caught his attention. The rocks reminded Detective Swan of a grave in the old west. When Detective Swan stepped out of the car onto the sandy shoulder, he saw drag marks on the shoulder along with a set of footprints. The drag marks went from side to side, and appeared erratic, as though "[t]here had been something on the ground struggling." The drag marks were consistent with someone's limbs being on the ground, and that person being pulled.

Detective Swan and Sergeant Tesselaar did not find anything by the rocks, so they decided to follow the drag marks. The drag marks led to an area where an altercation appeared to have happened—Detective Swan found a blue button with thread running through the holes in the dirt, the soil was disturbed, and the bushes were "munched down." Two sets of footprints—one with shoes and one without—led away from the altercation area. The shoe prints went in one direction, and the prints without shoes went in another direction. At one point, the two different sets of footprints

appeared to be about 50 yards apart from one another. However, there came a point where the shoe tracks were farther apart, as though the person was running, and went in the direction of the tracks without shoes—as though the person with shoes was running towards the person without shoes.

In the area where the two tracks came back together, Detective Swan and Sergeant Tesselaar found a second area that appeared to be the site of a fight or struggle. The sand in the second area was disturbed compared to the surrounding smooth desert terrain. Sergeant Tesselaar requested an aerial search, and the victim's body was found 250 to 300 yards from where the officers parked along Yermo Cutoff Road. The victim's body was in "a depressed wash area," which was below the street grade, so the body could not be seen "until you got right up on to her."

The victim's clothing was torn, and sand had been pushed up along the side of her body and over her abdomen. Bloodstains appeared on the victim's blouse and bra. In the area around the victim's body, Harris found socks, a cigarette pack, a necklace, and a bra strap. There were two sets of footprints leading towards the victim's body—one with shoes and one without shoes. One of the sets of prints appeared to be from a smaller foot.

The victim's body was already in a "fairly advanced" decomposed state when it was discovered by law enforcement. It appeared that large animals—birds or coyotes—had disturbed the victim's body. For example, the victim's left ear and tips of her toes were missing, and her hands were beginning to mummify. Due to the decomposition, an exact cause of death could not be determined. The victim's body was X-rayed, but

no bullets or knife blades were found in the body. No gunshot wounds or stab wounds were found, although it was possible there was a single stab wound that had already decomposed. No blunt trauma was found on the victim's body, such as fractures; however, bruises would not have been discoverable given the advanced state of decomposition. There was no evidence of strangulation, although it could not be completely ruled out.

The cause of death on the victim's death certificate was "undetermined"; however, it was considered a "probable homicide," and a natural cause of death, such as disease, was ruled out. Possible causes of death were asphyxia, such as smothering or strangulation. It appeared the victim died approximately one week before May 22. Scrapings of the victim's fingernails revealed defendant's DNA under her nails.

At some point during the investigation, law enforcement became aware that defendant left the country. Sheriff's Sergeant Jacobs contacted the airline reporting company (a passenger manifest clearinghouse) to ask if a person by defendant's name, or defendant's alias, Lawrence Hale, had taken an airline flight. Law enforcement discovered defendant had flown from Los Angeles to London; from London, defendant flew to Germany; from Germany he flew to Holland; and from Holland he flew to Australia. In 2007, Australia issued an extradition order for defendant. Upon boarding a commercial airline flight with law enforcement, defendant launched into a "profanity-laced tirade," and was ordered off the plane by the flight captain. Defendant was transported to San Bernardino County approximately two weeks later via a government flight.

B. APRIL MARCUM: PROSECUTION WITNESS

During the prosecution's case-in-chief, outside the presence of the jury, the trial court explained that a substitute clerk, April Marcum, was working in the courtroom during one of the days of defendant's trial. Marcum told the trial court, which in turn told the trial attorneys, that "In 2002, [Marcum] recalls the victim in this case applying [for] or requesting . . . a restraining order at the clerk's office. [Marcum] assisted the victim in paperwork, apparently, for a restraining order. The victim was applying for a restraining order against the defendant, Mr. Rivera. She may be able to give you more information. [¶] I asked her if she had ever been interviewed by law enforcement. She said no. She was on maternity leave. That's why she recalled it, it was near the time her child was born."

The prosecutor and defendant's trial attorney stated they had not heard about Marcum's story before the trial court's comments. Later, the prosecutor sought to add Marcum to the prosecution's witness list. The prosecutor initially sought to call Marcum during the prosecution's case-in-chief. Defendant's trial attorney expressed concern that Marcum had a "false memory" about the victim, perhaps due to reading court files and working in the courtroom. Defendant's trial attorney expressed skepticism that Marcum would recall defendant's name from an interaction in 2002, when the trial was taking place in 2011. Ultimately, the prosecutor decided not to call Marcum during the prosecution's case-in-chief.

C. DEFENSE CASE

Defendant testified at trial. Defendant denied murdering the victim. The following is the defense's version of the events: Defendant moved to California in November 2001. That same month, defendant met the victim at his brother's house, and they became closer in April 2002. Defendant and the victim were "friends who sometimes had casual sex." The victim never told defendant she wanted to stop being friends with him.

The scratches on defendant's face following the victim's death/disappearance were inflicted by Raster and the police. According to defendant, on May 14, 2002, Raster and defendant had a physical altercation at Raytheon. Raster denied being in a physical altercation with defendant. Raster believed defendant was obsessed with the victim. Defendant believed he and Raster had an acrimonious relationship because Raster was jealous of defendant's involvement with the victim. Raster denied being jealous of defendant's interest in the victim. Defendant explained he lied to law enforcement about being scratched by a tree branch because he was afraid of being fired by Raytheon for fighting with a coworker at the workplace.

The last time defendant saw the victim was at work on May 13. Defendant missed work at Raytheon on May 14 because he was waiting for a furniture delivery, but he went to his second job at the convenience store. Defendant worked at Raytheon and the convenience store on May 15. Defendant missed work on May 16 because he was being held by police.

Defendant learned the victim was missing during the evening of May 15, 2002, when Detective Carter came to speak to defendant at the convenience store. Defendant was afraid Detective Carter was at the convenience store to arrest him for fighting with Raster. When Detective Carter asked defendant about the victim, defendant thought Detective Carter was investigating a child abuse case—the victim intentionally abandoning her child. Defendant stated that after he was questioned by law enforcement, on May 15, a deputy “beat [him] like Rodney King.” Defendant said he sustained “massive injuries” as a result of the police brutality, hence the scratches and bruises.

Defendant did not recall if he tried to telephone the victim after learning she was missing. Defendant explained that his fingerprint was on the Bible study flier, because Deputy Durbin handed it to defendant while defendant was at the police station, and defendant held the flier when the deputy handed it to him. The victim’s blood was in defendant’s car because she accidentally cut herself when she was helping defendant move and reached for a box of cutlery in his car. Defendant believed his DNA was under the victim’s fingernails because they engaged in sexual intercourse on May 12, 2002.

Defendant explained he did not return to work at the convenience store because he had given his two-week notice, due to obtaining the job at Raytheon. Defendant denied taking \$2,000 from the convenience store. When defendant went to work at Raytheon on May 17, coworkers were hostile towards him. Defendant immediately quit

Raytheon because of the hostility, and because he feared for his safety. Defendant quit Raytheon by sending an e-mail to human resources.

Defendant had been planning the trip to Holland and Australia for several months before he left. Defendant left America on May 20, 2002. Defendant explained that he traveled under the name Lawrence Hale because that was the name on his passport; he changed his name in May 2001. While in Australia, defendant obtained a job selling artwork and used the name Nathan Burnett. Defendant used the name because his employer encouraged him to say he was the painter of the artwork, and that was the name on the paintings. Defendant only used the name Nathan Burnett at work, other people in Australia knew him by Lawrence John Hale or Lawrence John Rivera. Defendant was arrested in Australia on September 19, 2002.

Defendant told law enforcement the victim feared her estranged husband, Garcia. Garcia brought a ceremonial wedding knife to Sergeant Jacobs, which was in a red box with a velvet interior. Garcia told Jacobs he found the knife in Aurianna's crib, lying in its case.

The defense provided the testimony of a DNA analyst, Blaine Kern. Kern tested three items from the location where the victim's body was found: two socks and a package of cigarettes. One sock had the victim's DNA on it. The package of cigarettes and the second sock did not have DNA on them.

During the prosecutor's cross-examination of defendant, the prosecutor extensively questioned defendant about defendant's extradition paperwork and civil lawsuits he filed against various law enforcement officers. The questions were designed

to show defendant did not submit to the laws of the United States, such as the perjury laws, and that he had not previously alleged being beaten by the police in the manner testified to during direct examination. When presented with documents during the cross-examination, defendant often responded, “I do not acknowledge, nor do I recognize this document as originating from me.”

D. APRIL MARCUM: REBUTTAL WITNESS

During the defense’s case, outside the presence of the jury, the trial court and the trial attorneys discussed the prosecutor’s plan to call Marcum as a rebuttal witness. The trial court asked defendant’s trial counsel, James Terrell, if he had any objection to Marcum testifying. Terrell objected on the basis of Marcum’s testimony being unreliable and prejudicial. Terrell argued Marcum’s story was problematic because it was unbelievable that she recalled the victim saying defendant’s name years prior, when (1) there was no evidence that the victim filed paperwork against defendant, (2) years had elapsed, (3) Marcum had worked on defendant’s court case, and (4) the case was discussed in the media and local community.

The prosecutor argued Marcum’s testimony was relevant to rebut defendant’s testimony that he had sexual intercourse with the victim three nights before the victim’s disappearance/death, and their relationship was problem-free. Terrell asserted the victim and defendant could have had a fight and reunified—Marcum’s testimony did not truly rebut defendant’s testimony. Terrell concluded, “This is not trustworthy evidence. It’s so, so prejudicial.”

The trial court found defendant testified about having a friendly sexual relationship with the victim within the days prior to her disappearance, and Marcum's testimony would "be that close in time to her disappearance, [the victim] was at the window seeking forms for a restraining order against [defendant]." The trial court concluded, "So with the dispute in the facts, obviously [the victim] is unable to tell us what was really going on. Ms. Marcum is a percipient witness to [the victim's] behavior close in time to her disappearance." The court overruled defendant's objection to Marcum's testimony. Terrell requested a standing objection for the duration of Marcum's testimony; the trial court concluded Terrell had made a sufficient record of objecting "to all of the testimony of Ms. Marcum."

E. PROSECUTION'S REBUTTAL CASE

Marcum testified during the prosecution's rebuttal case. Marcum worked at the clerk's counter in the Barstow courthouse. At "the very end of 2001 [or] the beginning of 2002," Marcum recalled the victim coming to the counter with a little girl. The victim was "very polite, but very scared." The victim wanted a restraining order. Marcum and the victim spoke about the victim's situation for "a good 20 minutes." Marcum recalled sitting down with the victim and going through the paperwork. While the two were talking, the victim told Marcum "[t]he whole story."

The prosecutor asked Marcum what the victim told her. At that point, Terrell raised a hearsay objection. The trial court sustained the objection. The prosecutor responded, "May we approach? I believe it was in the previous ruling." A conference

was then held off the record. When questioning resumed, the following exchange occurred:

“[Prosecutor]: Did she tell you about—and I’ll withdraw my question.

“The Court: Okay.

“[Prosecutor]: Did she tell you about why she was there seeking a restraining order?

“[Marcum]: Yes.”

After additional questioning, Marcum testified the victim told her she wanted a restraining order against defendant. The victim told Marcum she wanted the restraining order because defendant was her coworker; he asked her out a few times, but she refused, and he was stalking her. Marcum explained, “[S]he could not get away from him. She was very scared. She was very scared. She said that everywhere she went, he was there, and she could not get away from him. She was very fearful that something was going to happen and she wanted to do something.”

Marcum testified the victim never filed the restraining order paperwork. Marcum recalled the victim because the victim “was not like any other person that ever c[a]me in. She was very well dressed. Very, very nice. Very well groomed.” Marcum recalled the victim telling Marcum her “whole life story in a matter of 20 minutes,” such as the fact that she was separated from her husband. Marcum recalled seeing a television news story about the victim’s death, around the time of the killing, which showed a photograph of the victim. Marcum cried upon seeing the news because she had spoken to the victim four to six months prior to the victim’s death. Marcum

explained, “And that’s why I’ll never forget her.” The prosecutor asked Marcum why she never told law enforcement about her conversation with the victim. Marcum responded, “I didn’t know I needed to.” Marcum believed “the justice system would work itself out.”

A deputy who defendant accused of beating him denied striking defendant, and denied seeing another person assault defendant. A second deputy also denied beating defendant and denied seeing defendant being assaulted by others.

F. JURY INSTRUCTION

During a discussion of jury instructions, the trial court said, “We’ll discuss Instruction 319, which is statements of unavailable witnesses. I’m not sure if that will work, or we need to draft one regarding the statements that came in through the testimony of Ms. Marcum as to [the victim’s] statements that she was being—she was the victim of stalking and seeking a restraining order. So I’m going to look at that.”

The prosecutor told the court he had “some issues with 319.”² The prosecutor explained some of the victim’s statements were introduced to show the victim’s state of

² CALCRIM No. 319 provides: “_____ <Insert name of unavailable witness> did not testify in this trial, but (his/her) testimony, taken at another time, was (read/played) for you. In addition to this testimony, you have heard evidence that _____ <insert name of unavailable witness> made (another/other) statement[s]. [I am referring to the statement[s] about which _____ <insert name[s]> testified.]

“If you conclude that _____ <insert name of unavailable witness> made (that/those) other statement[s], you may only consider (it/them) in a limited way. You may use (it/them) in deciding whether to believe the testimony of _____ <insert name of unavailable witness> that was (read/played) here at trial. You may not

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mind, but CALCRIM No. 319 requires prior statements of unavailable witnesses not be used for the truth of the matter, “you may only use them to decide to believe the testimony of the witnesses who relayed the statements.” The prosecutor argued that some of the victim’s out-of-court statements were offered for the truth of the matter, under a hearsay exception; for example, statements the victim made about going to the movies with defendant.

The trial court responded, “[T]hose were different kinds of statements. There were statements made of conduct that was going to occur or her plans to do something. I’m more concerned about the statements made though—conveyed through Mr. Raster and Ms. Marcum regarding how [the victim] felt about [defendant]. [¶] Those are my—that’s really my concern, is that they were—that testimony came into trial, not under the clearly defined statements of the intent hearsay exception, but more of a kind of this is what she told me she was doing. And there was really no instruction for me on how the jury should take those statements.”

The prosecutor responded, “[T]here’s ample case law to support the proposition that the victim saying ‘I’m afraid of him’ is admissible for the truth of the statement.” The prosecutor said he cited the state of mind exception to the hearsay rule in his trial brief, and explained, “I was under the impression that’s the way they were taken in court under the hearsay exception as briefed at the beginning of trial.” The prosecutor

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use (that/those) other statement[s] as proof that the information contained in (it/them) is true, nor may you use (it/them) for any other reason.”

asserted CALCRIM No. 319 could be applied to defendant's writings related to the extradition, in that the jury could not use the fight against extradition as evidence of defendant's guilt, but it could use the statements to evaluate defendant's credibility.

The trial court gave the trial attorneys a modified version of CALCRIM No. 319 to review, and explained, "I'm just concerned that some of the—there was a multitude of statements that were made by a number of witnesses from [the victim]." The trial court said, "So I'd ask that both of you review 319, and if you have suggestions or a more pinpoint instruction, then please supply that on Monday. If you like the broadness of the way I have offered it—it is rather broad the way I've modified it—that's fine too. So hopefully counsel can review it. You'll have the weekend to decide. But the statements that she made that she was afraid, those were admitted for the truth of the matter. [¶] So I see your point, [prosecutor], but some of the others were not." As an example, the court said the statement about defendant stalking the victim was not admitted for the truth of the matter.

The prosecutor expressed confusion regarding the court's conclusion. The prosecutor explained the victim's statements to Marcum "were admitted purportedly for their truth, and I don't know what limited—what kind of limits the Court would like to the tell the jury about that." The trial court responded that the statements Marcum relayed about the victim being stalked would have typically been admitted because they were made in a situation involving fear; however, such a foundation was not laid in this case. The trial court explained, "I don't know when [the statements to Marcum] occurred. I thought initially from the representations of counsel that those statements

would have been made within a week of [the victim's] disappearance. But then Ms. Marcum is somewhat indicating in her testimony that they could have been made in December. [¶] So they're not really statements of impending fear or statements of intent. They're more exclamations of what's happening in her life, which are clearly hearsay and, you know—I mean, the foundation at least was not adequate.”

On Monday morning, the trial court asked the attorneys if they had any instruction requests. Both attorneys said, “No.” The trial court gave the jury the following modified version of CALCRIM No. 319: “[The victim] did not testify in this trial, but some of her statements were relayed to you through other witnesses testifying during this trial. [¶] If you conclude that [the victim] made those statements, you may only consider (it/them) in a limited way. You may only use them in deciding whether to believe the testimony of the witnesses who relayed the statements. [¶] You may not use those statement[s] as proof that the information contained in them is true, nor may you use them for any other reason.”

DISCUSSION

A. HEARSAY

1. *FORFEITURE*

Defendant asserts the trial court erred by permitting the prosecutor to present Marcum's testimony regarding the victim's out-of-court statements, because the testimony was hearsay. The People assert defendant forfeited this issue by not raising it in the trial court. We agree with the People.

In order to preserve an evidentiary issue for appeal, an objection must be raised in the trial court. (Evid. Code, § 353; *People v. Wheeler* (1992) 4 Cal.4th 284, 300.) Defendant raised a hearsay objection to a specific question during Marcum’s testimony, and the trial court sustained the objection. Defendant did not raise a second hearsay objection. Given that defendant’s hearsay objection to Marcum’s testimony was sustained, and that a second hearsay objection was not made, we conclude the hearsay issue as to Marcum’s testimony has been forfeited. If defendant had a second hearsay issue with Marcum’s testimony, then that objection needed to be raised for the first time in the trial court. (Evid. Code, § 353; *Wheeler*, at p. 300.)

Defendant asserts he did not forfeit this contention because his trial counsel could have reasonably believed a hearsay objection would have been futile. Defendant’s argument is not persuasive because the hearsay objection raised during Marcum’s testimony was sustained by the trial court, thus, it would not have been reasonable for defendant’s trial counsel to believe raising a second hearsay objection would have been futile, since the first hearsay objection was successful.

In a second argument, defendant contends he did not forfeit this contention because he had a standing objection to Marcum’s testimony. Defendant’s argument is not persuasive because (1) it is not clear if the court granted the request for the standing objection,³ and (2) defendant’s pretestimony objections were made on the bases of

³ As set forth *ante*, when Terrell requested a standing objection, the trial court responded, “I think you’ve made your record, Mr. Terrell, that you object on behalf of [defendant] to all of the testimony of Ms. Marcum. All right.”

Marcum's testimony being (a) cumulative, (b) prejudicial, and (c) unreliable.

Defendant's pretestimony objections did not concern hearsay, as evidenced by defendant making a separate hearsay objection during Marcum's testimony. Given that the pretestimony objections were not based upon hearsay, we are not persuaded that defendant preserved the issue for appeal.

2. *EVIDENCE CODE SECTION 352*

In an alternative argument, defendant asserts the trial court erred by not excluding Marcum's testimony regarding the victim's statements because the testimony was more prejudicial than probative. (Evid. Code, § 352.) We disagree.

A trial 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." (Evid. Code, § 352.) "A trial court's exercise of discretion in admitting or rejecting evidence pursuant to Evidence Code section 352 "will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice." [Citation.] [Citation]." (*People v. Thomas* (2011) 51 Cal.4th 449, 485.)

Defendant argued Marcum's testimony was so untrustworthy that it was prejudicial. The trial court responded, "[T]he Court will overrule your objection, Mr. Terrell. The jury will be able to decide whether or not the testimony of Ms. Marcum is

unreliable or untrustworthy in comparison to the testimony of [defendant] and how [defendant] characterized [his and the victim's] relationship.”⁴

The trial court's decision was within reason, because defendant was able to cross-examine Marcum on how she was able to remember a conversation with a patron over a period of nine years. Defendant questioned Marcum about the number of patrons she helped on a daily basis, and how it was possible to remember the victim saying defendant's name. Given that defendant was able to cast doubt on the reliability of Marcum's memory, the trial court's decision was reasonable. Defendant was not greatly prejudiced by the alleged untrustworthiness of Marcum's testimony because that alleged untrustworthiness was shown to the jury, and the jury was able to evaluate whether Marcum's testimony was credible. Thus, defendant did not suffer prejudice as a result of the testimony, because the faults in the testimony were readily apparent to the trier of fact. In sum, we conclude the trial court did not err.

3. *DUE PROCESS*

In a second alternative argument, defendant asserts the admission of Marcum's testimony concerning the victim's out-of-court statements violated defendant's state and federal due process rights because the statements rendered the trial fundamentally unfair, in that they were “admitted for the truth of the matters stated.” Contrary to

⁴ Defendant's opening brief specifically cites Evidence Code section 352. Thus, we are reviewing this issue for an abuse of discretion. It does not appear defendant is arguing this court should independently review whether the hearsay statements have the required indicia of reliability. (See *People v. Tatum* (2003) 108 Cal.App.4th 288, 296 [“A trial court's determination regarding whether a hearsay statement has the required indicia of reliability is subject to independent review on appeal.”].)

defendant's position, the trial court instructed the jury with the modified version of CALCRIM No. 319, which specifically instructed the jury that testimony regarding the victim's out-of-court statements could not be used "as proof that the information contained in them is true." Given that the trial court instructed the jury *not* to use the out-of-court statements for the truth of the matters asserted, we find defendant's argument to be unpersuasive.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends his trial counsel, Terrell, was ineffective for not expressly objecting to Marcum's testimony on the basis of hearsay. As set forth *ante*, Terrell did raise an express hearsay objection during Marcum's testimony, and that objection was sustained. Thus, we will construe defendant's contention as asserting Terrell was ineffective for not repeatedly raising hearsay objections during Marcum's testimony. We disagree with the contention.

To secure a reversal of a conviction based on ineffective assistance of counsel, "a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

In regard to the reasonableness of counsel's performance, "[r]eviewing courts defer to counsel's reasonable tactical decisions." (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) "If the record on appeal sheds no light on why counsel acted or failed to

act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus.’ [Citation.] ‘Failure to object rarely constitutes constitutionally ineffective legal representation.’ [Citation.]” (*People v. Gray* (2005) 37 Cal.4th 168, 207.)

Terrell raised a successful hearsay objection during Marcum’s testimony, thus it is clear Terrell understood the hearsay issues. Accordingly, Terrell’s lack of repeated objections was not due to a failure to understand the process. It is unclear from the record why Terrell did not continue to object during Marcum’s testimony. It appears Terrell made a tactical decision to not continue objecting, but the exact reason for that decision is not evident in the record. Since Terrell had previously objected to Marcum’s testimony on the basis of the evidence being cumulative, it is possible he felt it would be in defendant’s best interests to allow Marcum’s testimony to go forward uninterrupted, since similar information was already presented to the jury.

An example of Marcum’s testimony being cumulative is Mother’s testimony that the victim told Mother “she was beginning to get worried about [defendant] because he was bothering her all the time. She felt like he was stalking her.” Additionally, Father testified that the victim told him defendant was “kind of spooking her, because he was watching her in different places.” Since Marcum’s testimony about defendant stalking the victim and scaring the victim was mostly cumulative of the victim’s parents’

testimony, it is possible Terrell made a tactical decision to not continually interrupt Marcum's examination with hearsay objections.

In sum, it is unclear why Terrell did not raise further hearsay objections to Marcum's testimony, but there is at least one possible explanation. Since the record on appeal sheds little light on why Terrell acted or failed to act in the manner challenged, defendant's claim of ineffective assistance must be rejected.

Defendant's ineffective assistance of counsel argument is mostly dependent upon the prior contention's hearsay argument—defendant incorporates by reference the hearsay argument into the ineffective assistance of counsel argument. Since we did not find defendant's hearsay assertions to be persuasive *ante*, we do not discuss them further.

C. MODIFIED JURY INSTRUCTION

Defendant contends the trial court erred by incorrectly instructing the jury on the limited way to use the victim's out-of-court statements, because the instruction was inapplicable and confusing given the circumstances of this case, i.e., prior testimony from the victim was not presented in this case. The People assert the trial court incorrectly instructed the jury, because it should have instructed the jury to use the victim's out-of-court statements to determine her state of mind; however, the People contend defendant benefitted from the trial court's overly narrow instruction. We agree defendant did not suffer prejudice as a result of the instruction.

As set forth *ante*, the trial court gave the jury the following modified version of CALCRIM No. 319: “[The victim] did not testify in this trial, but some of her

statements were relayed to you through other witnesses testifying during this trial. [¶] If you conclude that [the victim] made those statements, you may only consider (it/them) in a limited way. You may only use them in deciding whether to believe the testimony of the witnesses who relayed the statements. [¶] You may not use those statement[s] as proof that the information contained in them is true, nor may you use them for any other reason.”

For the sake of judicial efficiency, and since both parties agreed an error occurred, we will assume, without deciding, that the trial court erred in giving the jury the foregoing modified version of CALCRIM No. 319. Instructional errors are reviewed under the standard from either *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson* (1956) 46 Cal.2d 818, 836. Defendant asserts the *Watson* standard applies, so we apply the *Watson* standard. Under the *Watson* standard, reversal is not required unless it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (*Ibid.*)

The trial court instructed the jury that it could not use the victim’s out-of-court statements “as proof that the information contained in them is true.” The trial court instructed the jury that the out-of-court statements could only be used for evaluating the credibility of the witnesses who relayed the out-of-court statements. The trial court’s instruction was helpful to defendant because it restricted the jury from using the out-of-court statements as proof of defendant stalking the victim and the victim being scared of defendant. The instruction so severely limited the use of the out-of-court statements that it is difficult to see how defendant could have been harmed by the instruction.

Nearly all of the out-of-court statements were (1) harmful to defendant, e.g. they involved allegations of stalking and fear, or (2) neutral, e.g., they involved statements about future plans, such as attending the movies. Thus, it was beneficial for defendant to have the jury instructed not to consider those statements for their truth.

Moreover, to the extent the instruction could be considered harmful to defendant, as opposed to beneficial, there was overwhelming evidence of defendant's guilt, such that a result more favorable to defendant would not have been reasonably probable if the error had not occurred. For example, defendant was seen in an apartment with a woman and small child the night of the victim's disappearance/death; defendant's fingerprint was found on a flier delivered to the victim's apartment the night of her disappearance; a car similar in color to defendant's was seen during the early morning hours parked along the road where the victim's body was found; the victim's blood was found in defendant's car; defendant's DNA was under the victim's fingernails; defendant had scratches and bruising on his face and body following the victim's disappearance; the scratches were consistent with fingernail scratches; defendant missed work following the victim's disappearance; when defendant arrived at work his jacket was torn; and defendant left the country approximately one week after the victim's death, taking a circuitous path to Australia, where he worked under an alias.

In sum, the instruction was so narrow that it ultimately aided defendant's case. However, to the extent it could be considered harmful, the strong evidence reflecting defendant's guilt causes us to conclude a result more favorable to defendant would not have been reasonably probable had the error not occurred.

Defendant contends the instructional error was not harmless because the instruction was so confusing that it is likely the jurors used the out-of-court statements for an improper purpose, which prejudiced defendant. “‘When we consider a claim of this sort, the question we ask is whether there is a reasonable likelihood that the jury construed or applied the challenged instruction[] in an objectionable fashion.’

[Citation.]” (*People v. Osband* (1996) 13 Cal.4th 622, 679.)

The instruction, in plain language, told the jurors to only use the out-of-court statements to evaluate the credibility of the witnesses relaying the hearsay. Given the instruction, reasonable jurors likely used the out-of-court statements to determine if they were consistent across the witnesses, thus helping the jurors to determine if the witnesses were reliable. For example, Marcum testified that the victim said she was very afraid of defendant, in late 2001 or early 2002. However, the victim’s mother testified that the victim helped defendant obtain employment at Raytheon in May 2002, and the victim went to the movies with defendant around May 2002. Given the somewhat contradictory out-of-court statements about when the victim began fearing defendant, the jurors could have reasonably construed the instruction as requiring them to use the testimony about the out-of-court statements to decide whether the hearsay witnesses were credible, i.e., which inconsistent version was most believable. In sum, we are not persuaded that the instruction was so confusing that the jurors likely used the evidence in an unconstitutional manner that prejudiced defendant.

D. SUA SPONTE JURY INSTRUCTION

Defendant contends the trial court erred by not sua sponte instructing the jury that the victim's out-of-court statements should have been used for the limited purpose of evaluating the victim's state of mind. Defendant's argument is as follows: A trial court typically does not have a sua sponte duty to instruct on the limited purpose for which evidence was admitted except in narrow circumstances, and this case is within the narrow circumstances. Specifically, the victim's out-of-court statements were so critical to proving premeditation or kidnapping, for the first degree murder charge, that the court had a sua sponte duty to instruct the jury on how to use the "state of mind" evidence, i.e. the out-of-court statements.

Defendant's argument is not persuasive because, as set forth *ante*, the limiting instruction given by the trial court was more helpful to defendant than the "state of mind" instruction being suggested here. The instruction given to the jury required the jury to not consider the victim's out-of-court statements for any purpose other than evaluating the hearsay witnesses' credibility. Defendant is now suggesting the jury should have been instructed to use the out-of-court statements as evidence of the victim's state of mind. While defendant may be correct, it appears such an instruction would be more harmful to defendant's cause than helpful.

Defendant appears to be concerned that without the "state of mind" instruction, the jurors felt free to use the out-of-court statements in an unconstitutional manner. However, this interpretation of the trial court's instruction is not reasonable, as explained *ante*. The modified instruction required the jury to use the out-of-court

statements to evaluate the witnesses' credibility, which was not confusing given the somewhat conflicting accounts by the witnesses—the jury would have needed to assess which witnesses' versions of the events and victim's statements appeared more reliable. Thus, we do not find this argument to be persuasive, because defendant was benefitted by the limiting instruction given by the trial court.

Further, we disagree with defendant's premise that the victim's out-of-court statements were critical evidence of kidnapping. There was substantial evidence supporting a finding of kidnapping, without the victim's out-of-court statements. For example, defendant was seen in an apartment with a woman and small child the night of the victim's disappearance/death; defendant's fingerprint was found on a flier delivered to the victim's apartment the night of her disappearance; the victim's daughter was found alone in the apartment; the victim was a good mother who would have never left her daughter alone; the victim's purse and cell phone were found in the apartment; the victim's blood was in defendant's car; a car similar in color to defendant's car was seen in the early morning hours along the road where the victim's body was found, with a male in the driver's seat; drag marks were found near the road leading into the desert; the drag marks looked like one person was pulling another person; the drag marks were erratic, as though the person on the ground was struggling; and foot impressions made it appear that one person had shoes while a second person with smaller feet did not have shoes.

The foregoing evidence reflects the victim did not willingly leave her apartment with defendant and did not willingly go into the desert with defendant—she was taken

against her will. It appears the victim left the apartment without her purse, telephone, shoes, or child, and thereafter was bleeding in defendant's car. Eventually, the victim was dragged from the car into the desert, struggling against defendant. Thus, the victim's out-of-court statements were not critical evidence for the kidnapping finding; there was a plethora of evidence supporting such a finding without the victim's statements. Accordingly, the out-of-court statements were not critical to the finding of first-degree murder based upon kidnapping.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant asserts, "If this court determines that Marcum's testimony was admissible for a limited purpose and further finds that [defendant] forfeited his claim on appeal that the trial court committed reversible error when it failed to properly instruct the jury about the limited purpose for this evidence, based upon trial counsel's failure to request a proper limiting instruction, [defendant] is entitled to relief under the ineffective assistance of counsel doctrine. [Defendant] is also entitled to relief under this doctrine if this court further finds that he forfeited his claim of instructional error relative to all other hearsay statements made by [the victim]."

We have found only one instance of forfeiture, *ante*, related to the prosecutor presenting Marcum's testimony regarding the victim's out-of-court statements. We have already rejected defendant's ineffective assistance of counsel contention related to the forfeiture. We did not make a forfeiture finding related to the alleged instructional error. Accordingly, we need not address this second ineffective assistance of counsel contention.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RICHLI
Acting P. J.

CODRINGTON
J.