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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.

TONY LOPEZ PEREZ,

Defendant and Appellant.

E054715

(Super.Ct.No. FSB904166)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek,
Judge. Affirmed.

David L. Polsky, 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, Barry Carlton, and Garrett
Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Tony Lopez Perez abducted the victim, Cori Desmond, as she was

leaving a bar late one night in Redondo Beach. After strangling Desmond, defendant dumped her body on a mountain highway near Big Bear. His live-in girlfriend, Tiffany Ware, alerted law enforcement about defendant's involvement.

A jury convicted defendant on one count of first degree murder. (Pen. Code, § 187, subd. (a).) The trial court sentenced defendant to state prison for an indeterminate term of 25 years to life.

On appeal, defendant argues there was insufficient evidence of first degree murder, including felony murder, and the trial court erred by admitting evidence of a prior uncharged sexual assault and defendant's sexual proclivities. We reject these contentions and affirm the judgment.

II

STATEMENT OF FACTS

A. Incident of February 15, 2009

The events described occurred on Saturday night and early Sunday morning, February 14 and 15, 2009. Desmond's movements were captured by surveillance video cameras from various businesses in the area.

On Saturday, February 14, 2009, Desmond worked as bartender at Beaches in Manhattan Beach from 3:00 p.m. to 9:00 p.m. Shortly after midnight on February 15, 2009, Desmond entered the Bac Street Lounge at the corner of Artesia Boulevard and Phelan Lane, in Redondo Beach. Desmond had worked there and still had friends among the employees. She drank two glasses of wine. Around 2:20 a.m., she left through the back door, leading to the bar's parking lot. She walked north on Phelan towards Artesia

Boulevard. Desmond was dressed in black pants, shirt, jacket, and tennis shoes and carrying a purse.

Desmond's Jeep Wrangler was parked on Mackay Lane, one block west of the bar and south of Artesia Boulevard. However, Desmond walked farther west, past Mackay. She passed by the South Bay Credit Union at 2:26 a.m.

Bogey's Sports Bar was three doors west of the credit union and two blocks west of the Bac Street Lounge, near the corner of Slauson Lane. Desmond had also worked there and she knew the owners and employees, and frequented the bar as a customer.

Brittany Karaffa, one of Desmond's best friends, was working that night at Bogey's. After Bogey's closed, Karaffa left work at 2:15 or 2:20 a.m. Around 2:30 a.m., Desmond banged on Bogey's door and asked to use the bathroom. Frank Canko, one of the owners, told her he could not let her in because state law prohibits bars from opening after 2:00 a.m. Desmond left Bogey's but she did not return east on Artesia Boulevard, back toward her car.

Around 2:40 a.m., Canko and the bar's co-owner, Chantel King, left walking west and around the corner to their vehicles on Slauson Lane, south of Artesia Boulevard. They did not see Desmond anywhere.

On the afternoon of Monday, February 16, 2009, a driver stopped near Running Springs on Highway 330 at mile marker 38 to remove his tire chains. Looking over the embankment, the driver noticed a person's lower leg protruding from a bag about 20 feet away. He reported his finding to a California Highway Patrol officer. The officer

confirmed the presence of a body and reported the finding to the San Bernardino County Sheriff's Department for a homicide investigation.

B. The Investigation

When Desmond's body was recovered, she was still dressed in black, including her jacket. Her purse, shoes, and socks were missing and her pants were pulled down to her knees. She was not wearing underwear. Her purse and shoes were never found. On February 17, 2009, Desmond's Jeep was located, still parked on Mackay Lane, locked, with the windows up.

On Friday, February 13, 2009, Desmond had spent the night at Karaffa's residence after a night of drinking. Desmond was wearing the same black clothes when she left Saturday morning. According to Karaffa, Desmond typically wore cotton underwear unless she had not been home for a couple of days.

On February 19, 2009, an autopsy was performed on the victim. She was 5 feet 6-1/2 inches tall and weighed 128 pounds. She died from suffocation. She had hemorrhages in her eyes, abrasions and internal and external bruising on her neck, and a fracture of the hyoid bone above her larynx, all of which are consistent with strangulation. In addition, she had blood in her nostrils and bruising inside and outside her mouth, injuries consistent with smothering by a hand applied over the nose and mouth. If the flow of blood to her brain had been obstructed without interruption, she would have lost consciousness within 15 to 20 seconds. Death from asphyxia can occur in about three or four minutes. Fingerprints could not be lifted off Desmond's neck.

In addition to her fatal injuries, Desmond sustained bruising on her forehead, left cheek, and chin, all of which occurred when she was alive. While alive, she also suffered bruises to her left temple, to the left side of her head near the top, behind her right ear, and to the back of her head consistent with impact or pressure from an object. She also sustained some bruises to her left and right shins before death. Postmortem, she received abrasions on her legs, consistent with being dragged over a rough surface.

A vaginal exam revealed no bruising or other significant findings. No seminal fluid or sperm was found in her vagina and only Desmond's DNA was found in the vaginal and rectal cavities.

Desmond's blood alcohol concentration (BAC) was 0.35 percent, affecting the ability to perform simple functions. An inexperienced drinker would likely fall asleep above 0.30 BAC. An experienced drinker—someone who drinks daily—would be able to walk and talk without problems. Desmond was an experienced drinker with a high tolerance for alcohol. She was not known for slurring words, falling down, or passing out from alcohol.

C. Information from Tiffany Ware

Defendant's girlfriend, Tiffany Ware, lived with him on Carnegie Lane and they had a son. Their apartment was two blocks south of Artesia Boulevard between Slauson Lane and Mackay Lane. Defendant worked as the general manager of the Spitfire Grill in Santa Monica.

In May 2009, Detective Trevis Newport received an anonymous tip implicating defendant in Desmond's death. On August 12, 2009, Ware contacted the detective and

described defendant's activities on the night of February 14 and 15, 2009, and after Desmond's disappearance.

On February 14, 2009, defendant's family celebrated Valentine's Day at his restaurant. After the event, Ware spoke to defendant on the telephone from home around 11:00 p.m. before falling asleep. Around 2:00 a.m., she awoke and noticed defendant was not home. She called him at work and on his cellular telephone every half hour but he did not answer her calls.

Defendant did not arrive home until 4:30 a.m. on February 15, 2009. He explained he had been drinking with his brother at the restaurant's bar all night. He went back to work Sunday morning. He was supposed to be home between 5:00 and 7:00 p.m. but did not arrive home until 8:00 or 9:00 p.m. He was home for about an hour and then left to visit his mother. He arrived home about 2:00 a.m. on Monday, February 16, 2009. He had the day off from work. He bought some carpet cleaner and Lysol disinfectant, explaining to Ware that he had to clean his car—a 2000 Dodge Durango—because he had vomited in it two nights prior thereto. Ware thought it was odd that he waited so long to clean his vehicle and because he had never cleaned his vehicle's carpet before. Defendant also changed his story about why he came home late Sunday morning, saying he had arrived earlier but had fallen asleep in the car. Then, on Tuesday, February 17, 2009, defendant took his Durango to be detailed professionally.

At some later point, defendant suggested visiting Big Bear to see the snow, which Ware thought was strange because they had never been to the mountains before. While driving along Highway 330, defendant pointed out the location where Desmond's body

had been found. After that trip, on March 4, 2009, defendant traded in the Durango for a 2000 Ford Expedition. Ware was surprised because they only had \$900 in payments left and had been looking forward to paying off the vehicle. On another occasion, defendant volunteered to Ware, "I hope the cops did not think I killed that girl."

D. Prior Acts

Ware also testified regarding defendant's prior acts of sexual assault. In 2006, she had suffered lower back pain and begun taking medication that made her sleepy. On two occasions, she had fallen asleep on the sofa while medicated. She awoke to find defendant on top of her, attempting sexual intercourse. They broke up for a while but reconciled.

In January and February of 2009, defendant was sexually aggressive, seeking increasing amounts of sex, sometimes more than once in an evening. Defendant also frequently masturbated in the bedroom with Ware present and while the children were still awake. He downloaded pornography on the computer to use as a visual aid.

E. Investigation of Defendant

Detective John Gaffney obtained possession of defendant's former Dodge Durango from the new owner. Desmond's blood was detected in the vehicle on the carpet of the right rear threshold. It was mixed with trace DNA from another person but defendant was excluded as the trace contributor. Defendant's DNA was not found anywhere on Desmond's person.

In October 2009, two sheriff's detectives, Newport and Robert Warrick, interviewed defendant. Defendant initially said he left work around 1:00 a.m. on

February 15, 2009. When he got home, he went to bed. He told the detectives that he did not see anyone outside his apartment complex and he denied cleaning his vehicle with any cleaning products he had purchased.

Next defendant changed his story, stating that, while returning home from work, he turned left onto Slauson Lane from Artesia Boulevard and noticed some people outside Bogey's. He may have whistled at some women. He continued south on Slauson, turned left onto Carnegie, parked near his apartment around 1:30 a.m. and fell asleep in his vehicle. When he awoke between 3:00 and 3:30 a.m., he found Desmond's body lying in a driveway about 10 feet west of his vehicle. She was not breathing and he concluded she was dead. He was afraid he would be blamed for killing her and he put her body on the floor of his Durango, behind the driver and front passenger's seats. He covered her body with a duffel bag and jacket, locked the vehicle, entered his apartment, and fell asleep on the sofa. At 5:30 a.m., he woke up and—thinking it was a bad dream—he checked the Durango to find Desmond's body was still there. He slept again, waking after a couple of hours to go to work and stopping at a grocery store to pick up black trash bags.

Defendant further told the detectives that, after his shift ended around 7:00 p.m. on February 15, 2009, he went to the parking lot and used two bags to enclose Desmond's body, wearing latex gloves to avoid fingerprints. He drove to his mother's house in Redondo Beach, explained he was having problems with another girlfriend, and asked his mother to cover for him if Ware called. He returned to his apartment briefly and then headed for Rancho Palos Verdes, where he planned to dispose of the body. It was too

crowded there so he proceeded toward Running Springs. Defendant stopped at a turnout on Highway 330, where it was extremely dark, dragged Desmond's body to the edge of the ravine, and dumped it over the side of the ravine.

Because Ware testified that defendant arrived home at 2:00 a.m. on Monday, February 16, 2009, defendant had about seven hours after leaving work at 7:00 p.m. to drive back to Redondo Beach, next to Rancho Palos Verdes, and then to Highway 330 to dump the body before returning home. The trip would take about six hours.¹

Later, on the same day as his interview, defendant participated in two reenactments, one on Carnegie Lane and the other one at his workplace. While en route to Redondo Beach, he mentioned for the first time that, when he parked on Carnegie Lane that night, he had masturbated before falling asleep. He also said that, when putting Desmond's body in the Durango, he might have applied pressure to her neck for 15 or 20 seconds and heard a "whimper of air" coming from her. After the second reenactment, defendant was arrested. At his booking, he was six feet tall and weighed 260 pounds.

The next morning, defendant agreed to show Detective Warrick where he had dumped Desmond's body at the mile marker 38 on Highway 330. During a recorded conversation, defendant said he was "really drunk" that night. He repeated that he found Desmond on the sidewalk. He shook her because she appeared passed out and she started

¹ The distances from defendant's home to his workplace is 19.4 miles and takes about 26 minutes to drive. The distance from his workplace to Rancho Palos Verdes is 24.9 miles (or about a 48-minute drive) and from Rancho Palos Verdes to mile marker 38 is 98.2 miles (or about a two-hour drive). The distance from Highway 330 to defendant's home is 92.4 miles (and takes about 1 hour, 43 minutes to drive).

screaming. He panicked, fearing that she thought he was trying to rape her. He “possibly” put his left hand over her mouth and pressed down to quiet her. He also grabbed her throat with his right hand and thought he “pressed down too hard.” She became quiet in less than 20 seconds. Defendant was scared and put her in his car, “possibly” hitting her head while doing so.

After the demonstration on Highway 330, defendant was interviewed again. He said he was extremely drunk when he got home and thought he masturbated in his Durango before passing out. He woke up about two hours later to his cellular telephone’s signal. He then noticed Desmond on the ground to his left in the fetal position. She did not have her shoes on. She smelled of alcohol. He turned her onto her back and shook her. Desmond appeared startled. She told him to get away and slurred her words a little; seemingly drunk. She tried to get away from him and began screaming, so he put his hand over her mouth, pressing down on her mouth and her neck to quiet her. He thought she might accuse him of attempting to rape her. He did not think he would kill her but he thought she might pass out. After she stopped moving, he was scared and put her in his vehicle. Her pants were undone, and as he was putting her in the Durango, her pants came down. She was not wearing underwear. He pushed up her pants. While getting her into the vehicle, he grabbed her by her neck. After getting her in the vehicle, he heard a “little whimper of air” coming from her. He thought she was dead, so he did not attempt to seek help. He did not punch her but she may have banged her head on the ground or vehicle. Defendant did not notice her bleeding. When he dumped her body, her pants may have fallen down again but he did not stop to pull them up.

Laurie Moreno lived across the street from defendant's home. On February 15, 2009, she woke up at 3:00 a.m. and went outside to smoke a cigarette. She did not see a woman lying on the sidewalk at that location. After about 10 minutes, she went back inside. She heard no screaming that night.

F. Defense Witnesses

Defendant's sister and his sister-in-law testified they had not known him to be violent.

III

SUFFICIENCY OF EVIDENCE

The prosecutor relied on two theories of first degree murder—(1) that the murder was willful, deliberate and premeditated, and (2) that it was committed during the course of an attempted rape and thus constituted felony murder. Defendant contends the prosecutor failed to present sufficient evidence to support either theory and that the conviction should be modified to second degree murder. Defendant maintains no rational juror could have concluded the killing was planned rather than spontaneous.

In opposition, respondent contends there was substantial evidence from which a jury could reasonably infer defendant acted with premeditation and deliberation and killed Desmond during attempted rape.

A. Standard of Review

The prosecution must prove all elements of the charged offense and all facts necessary to establish each of those elements beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 524, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-

278.) A reviewing court must decide whether, viewing the record in the light most favorable to the judgment, a rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. (*People v. Marshall* (1997) 15 Cal.4th 1, 34, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence includes circumstantial evidence and the related reasonable inferences. (*People v. Holt* (1997) 15 Cal.4th 619, 669, citing *People v. Raley* (1992) 2 Cal.4th 870, 891; *In re Michael D.* (2002) 100 Cal.App.4th 115, 126.) In other words, evidence must support inferences and “the prosecution may not fill an evidentiary gap with speculation.” (*People v. Felix* (2001) 92 Cal.App.4th 905, 912, citing *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573.)

B. Deliberation and Premeditation

Murder is first degree when deliberate and premeditated. If the elements of either deliberation or premeditation are absent, the murder is in the second degree. (Pen. Code, § 189.) When the evidence shows only that the defendant killed the victim but nothing more, malice may be inferred but the killing is second degree murder and not first degree murder. (*People v. Lines* (1975) 13 Cal.3d 500, 506.) Defendant asserts no evidence of what occurred immediately before the killing allowed the jury to find deliberation and premeditation.

“Premeditated” means considered or “thought over” in advance. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 767.) A “deliberate” killing is one committed after carefully weighing the considerations

for and against the act. (*Koontz*, at p.1080; *Mayfield*, at p. 767.) A premeditated killing is not spontaneous. (*People v. Perez* (1992) 2 Cal.4th 1117, 1134.)

In *People v. Anderson* (1968) 70 Cal.2d 15, the Supreme Court analyzed whether a murder was deliberate and premeditated based upon evidence of planning, motive, and manner. The *Anderson* court explained: “The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as ‘planning’ activity; (2) facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of ‘a pre-existing reflection’ and ‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed’ [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a ‘preconceived design’ to take his victim’s life in a particular way for a ‘reason’ which the jury can reasonably infer from facts of type (1) or (2).” (*Id.* at pp. 26-27.)

Premeditation and deliberation are not the same as a deliberate intent to kill. Premeditation and deliberation require “‘substantially more reflection; i.e., more understanding and comprehension of the character of the act than the mere amount of

thought necessary to form the intention to kill.’ [Citation.] It is therefore ‘obvious that the mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill.’ [Citation.] Consequently, an intentional killing is not first degree murder unless the intent to kill was formed upon a preexisting reflection and was the subject of actual deliberation and forethought.” (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 823; *People v. Thomas* (1992) 2 Cal.4th 489, 517.)

On the other hand, “‘The 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.]’” (*People v. Koontz, supra*, 27 Cal.4th at p. 1080, citing *People v. Mayfield, supra*, 14 Cal.4th at p. 767; *People v. Cook* (2006) 39 Cal.4th 566, 603.)

C. Felony Murder

In the alternative, the verdict of first degree murder could have been based on the theory of felony murder that the killing was committed during the commission of an attempted rape. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; *People v. Nelson* (2011) 51 Cal.4th 198, 213.) First degree murder includes not only deliberate and premeditated murder but also “[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate,” certain enumerated felonies, including rape. (Pen. Code, § 189.) For felony murder, the requisite mental state is “‘simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed.’” (*People v. Hart* (1999) 20 Cal.4th 546, 608.) “‘There is no requirement of a

strict “causal” [citation] or “temporal” [citation] relationship between the “felony” and the “murder.” All that is demanded is that the two “are parts of one continuous transaction.” [Citations.] There is, however, a requirement of proof beyond a reasonable doubt of the underlying felony. [Citation.]” (*Id.* at pp. 608-609; *People v. Booker* (2011) 51 Cal.4th 141, 175.)

D. Analysis

Defendant contends there was no evidence of planning, motive, or design establishing premeditation and deliberation because he told police that he found Desmond lying intoxicated on the ground and accidentally killed her while attempting to quiet her when she began screaming. Defendant reasons that, even if the jury did not believe the killing was accidental, it does not compel an inference that the killing was premeditated and deliberate. The incident appears to have been the product of a chance encounter.

The prosecutor argued that defendant’s motive was to prevent Desmond from reporting his attempt to rape her. According to defendant, the motive on which the prosecutor relied would not support an inference of “‘pre-existing reflection’ and ‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed.’” (*People v. Anderson, supra*, 70 Cal.2d at p. 27.) There was no evidence from which the jury could infer that defendant’s effort to silence Desmond was other than a rash or impulsive act resulting from fear or panic. Additionally, there was no evidence of a preconceived design in the manner of the killing. Strangling a person does not by itself indicate a preconceived design to kill. (*People v. Rowland* (1982) 134

Cal.App.3d 1, 8.) As such, the prosecution proved defendant unlawfully killed Desmond and nothing more, permitting an inference of murder in the second degree and not in the first degree. (*People v. Lines, supra*, 13 Cal.3d at p. 506; *People v. Bender* (1945) 27 Cal.2d 164, 179; *People v. Howard* (1930) 211 Cal. 322, 329.)

Defendant relies on two cases to argue the evidence of attempted rape was insufficient, *People v. Craig* (1957) 49 Cal.2d 313, 316-317 and *People v. Johnson* (1993) 6 Cal.4th 1, overruled on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826. In *Craig*, defendant brutally beat to death a woman whom he had encountered late at night on a San Francisco street. Her clothes were ripped and her underwear was torn, exposing the front part of her body. There was no evidence of a sexual attack or of the presence of semen. The California Supreme Court held “there is a total lack of satisfactory evidence that the killing was committed either in the attempt to commit rape or in the commission of rape; that the evidence shows no more than the infliction of multiple acts of violence on the victim and that even though the killing was an extremely brutal one the People have proved only that the defendant was guilty of second degree murder [citation].” (*Craig*, at p. 319.)

In *Johnson*, defendant killed his girlfriend and her daughter in their home, stole the victims’ jewelry, and committed arson to conceal his crimes. Although one victim had been beaten severely and her body was nude from the waist down, there was no evidence of sexual conduct. Citing *Craig* and other similar cases, the court held the evidence was not sufficient to support first degree murder based on attempted rape. (*People v. Johnson, supra*, 6 Cal.4th at pp. 41-42.)

Respondent does not address, or even cite, these cases. However, we deem them to be distinguishable from the present case because of the additional elements here of defendant masturbating in his car, while lying in wait for a victim.

Furthermore, *People v. Rundle* (2008) 43 Cal.4th 76 supports the application of the felony murder theory of this case. In *Rundle*, the victim was found nude and bound. Although “the circumstance of the victim’s being found partially or wholly unclothed is not by itself sufficient to prove a rape or an attempted rape has occurred, such a fact is not irrelevant and is one of the relevant circumstances”—including the absence of evidence that an attempted sexual assault did *not* occur. (*Id.* at p. 139.) *Rundle* also recognized that a defendant’s own admissions may support the conclusion there was sufficient evidence for a rational trier of fact to find he attempted to rape a victim. Here defendant told the detectives that ultimately he strangled Desmond because he panicked and he thought she might accuse him of rape. The jury might reasonably infer defendant was frightened because he had tried to rape Desmond. (*Id.* at pp. 139-140.) We also reject defendant’s contention that insufficient evidence existed for the jury to determine he specifically intended to have vaginal intercourse. (*Id.* at p. 140.)

We do not agree that no evidence showed premeditation and deliberation. Defendant has, of course, admitted to sitting in his car masturbating and to disposing of Desmond’s body, claiming to have strangled her accidentally. Based on the evidence, the jury could reasonably infer that defendant, while compulsively masturbating, waited in his car for a victim to appear until he seized Desmond off the street. Thus, there was evidence of planning and motive. Furthermore, defendant admitted he heard a “whimper

of air” from Desmond and chose not to seek help because he did not want her to accuse him of rape. During the course of events as he described them, there was certainly enough time for him to contemplate a deliberate killing.

But, even if we accepted defendant’s argument, we still conclude there is substantial evidence to support felony murder, committed during an attempted rape. The evidence strongly supports defendant inflicted injuries on Desmond during a struggle and then he strangled her—perhaps accidentally—because she resisted his effort to rape her.

Ultimately, defendant either planned to kill Desmond or he panicked and smothered Desmond while trying to rape her. Because sufficient evidence supported a finding that defendant attempted to rape Desmond, we reject defendant’s claim that the first degree murder conviction must be reversed. We conclude there was sufficient evidence defendant committed first degree murder either on a theory of willful, deliberate and premeditated murder theory or felony murder.

IV

SEXUAL CONDUCT

We also reject defendant’s arguments that the trial court abused its discretion by allowing Ware to testify about defendant trying to have sex with her while she was unconscious in 2006 and about his sexual demands and frequent masturbation in 2009. (*People v. Waidla* (2000) 22 Cal.4th 690, 717, 723-725; *People v. Memro* (1995) 11 Cal.4th 786, 864.)

The trial court admitted evidence of the 2006 nonconsensual acts under Evidence Code section 1108, to show defendant’s propensity for committing nonconsensual sex

offenses. (Evid. Code, § 1108, subd. (d)(1)(D).) The trial court admitted evidence showing defendant's increased sexual appetite in 2009 under Evidence Code section 1101, subdivision (b), on the disputed issue of motive.

A reviewing court will not disturb a trial court's exercise of discretion under Evidence Code sections 352, 1101, and 1108, unless the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner. (*People v. Escudero* (2010) 183 Cal.App.4th 302, 310.) By enacting Evidence Code section 1108, the Legislature found that evidence of uncharged sexual offenses is so uniquely probative in sex crime prosecutions that it is presumed admissible without regard to the limitations of Evidence Code section 1101. (*Escudero*, at p. 310; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 405.) Prior sexual offenses showing a defendant's propensity to prey upon and to assault vulnerable women is highly probative on disputed material issues such as motive, intent and the absence of accident or mistake. The trial court does not abuse its discretion admitting such evidence under Evidence Code section 1108, and Evidence Code section 352. Here the prior sexual offenses were not particularly inflammatory when compared to the charged crime; the evidence did not uniquely tend to evoke an emotional bias against the defendant as an individual while having very little effect on the issues; and admission of the evidence did not consume an undue amount of time. (*Escudero*, at p. 310.)

The trial court also did not abuse its discretion by admitting evidence of defendant's increased sexual appetite and frequent masturbation in 2009 under Evidence Code section 1101, subdivision (b), and Evidence Code section 352. Even if defendant's

conduct was not illegal, the evidence of his disposition before the murder was reasonably considered more probative than prejudicial by the trial court. Evidence is considered relevant if it tends logically, naturally, and by reasonable inference to establish any element or fact material to the prosecution's burden of persuasion. (See Evid. Code, § 210; *People v. Heard* (2003) 31 Cal.4th 946, 953.)

Furthermore, even if the challenged evidence had not been admitted, other circumstantial evidence clearly showed defendant murdered Desmond with premeditation and deliberation and in the attempted perpetration of a rape. Defendant's improbable claim that he happened upon Desmond's body lying in a driveway was uncorroborated and was amply contradicted by other evidence as we have already summarized in this opinion.

V

DISPOSITION

The trial court's evidentiary rulings were not an abuse of discretion. Sufficient evidence supported a conviction for first degree murder. We affirm the judgment.

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CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

MILLER

J.