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

THE PEOPLE,

Plaintiff and Respondent,

v.

LEROY EUGENE KENDALL,

Defendant and Appellant.

F060907

(Super. Ct. No. MF8375A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

On June 26, 2008, appellant Leroy Eugene Kendall threw several household objects at his wife, Rujeanie Fuller (the victim).<sup>1</sup> On July 7, appellant stabbed the victim several times, inflicting serious wounds.

On July 23, an information was filed in Kern County Superior Court charging appellant with attempted premeditated murder (count 1), assault with a deadly weapon (count 2) and two counts of inflicting corporal injury on a spouse (counts 3 and 4). (Pen. Code, §§ 664, 187, subd. (a), 189, 245, subd. (a)(1), 273.5, subd. (a).)<sup>2</sup> Enhancement allegations that appellant personally inflicted great bodily injury in violation of section 12022.7, subdivision (a) during the commission of counts 1 and 2, that he personally used a dangerous or deadly weapon in violation of section 12022, subdivision (b)(1) during the commission of counts 1 and 3, and that he personally inflicted great bodily injury in violation of section 12022.7, subdivision (e) during the commission of count 3 were specially alleged.

Appellant entered not guilty pleas on all counts and denied all of the enhancement allegations. During pretrial proceedings, he brought 13 motions to substitute court-appointed counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*); two *Marsden* motions were granted. On March 2, 2010, appellant elected to represent himself.

On June 28, 2010, jury trial commenced. Appellant was found guilty of attempted murder, assault with a deadly weapon, inflicting corporal injury on a spouse (counts 1-3) and battery on a spouse in violation of section 243, subdivision (e)(1) (lesser included offense to count 4). The jury found all of the enhancement allegations true, with the exception of the allegation that the attempted murder was premeditated, which the jury

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<sup>1</sup> Unless otherwise specified, all dates refer to 2008.

<sup>2</sup> Unless otherwise specified, all statutory references are to the Penal Code.

found not true. On August 9, 2010, appellant was sentenced to an aggregate, unstayed term of 13 years imprisonment.

Appellant advances seven appellate issues. He argues that the lower court committed prejudicial error by (1) failing to conduct a competency hearing; (2) declining to appoint advisory counsel; (3) excluding appellant's proposed expert witnesses; (4) ordering appellant to be restrained during trial; (5) admitting evidence of appellant's acts of domestic violence against a former wife; (6) allowing a police officer to testify that horizontal cuts on the victim's right palm were defensive in nature; and (7) prohibiting appellant from cross-examining the victim about a child abuse investigation. None of these arguments is persuasive. The judgment will be affirmed.

## **FACTS**

### **I. Prosecution Evidence**

#### **A. Victim's Testimony**

The victim testified that she married appellant in 2007 and they moved to California the following year because her father was sick.

On June 26, the victim was sick with pneumonia and resting in bed. Appellant became angry and threw several objects at her, including a spray bottle, a vacuum and an earring rack. The victim feared that appellant would kill her so she fled out the back door. The victim injured herself jumping over a fence into a neighbor's yard.

The victim's father passed away a few days later. His wake was held on July 7 and the victim spent the day at church. When the victim left home, at approximately 9:00 a.m., appellant was drinking vodka and orange juice with a woman named "Annette" and the victim's brother, Alphonso Fuller (Fuller).

The victim returned home around 5:30 p.m. The house was empty. Appellant and Fuller arrived with a case of beer and a bottle of liquor in a bag. The victim, who was still ill, retired to her bedroom. Appellant and Fuller went into the garage, where they

drank alcohol and smoked cigarettes. The victim did not drink any alcohol or take any illegal drugs. She is diabetic and stopped drinking alcohol 25 years ago.

Appellant entered the victim's bedroom and said, "I got your brother to the point where he's not able to defend himself nor you, too." Appellant left the bedroom and went into the kitchen. The victim heard him rummaging in the kitchen drawers. He returned to the bedroom holding a large butcher knife. Appellant called the victim a "black B," and said that he would kill her. The victim was sitting on the side of the bed and she put her right arm up with her palm out to protect herself. Appellant swung the knife at her seven times, stabbing her in the chest, back and arms. Appellant left the butcher knife in her chest and left the bedroom. The victim pulled the knife out of her chest and walked into the living room, where Fuller was asleep. She handed Fuller the knife and collapsed.

The victim was hospitalized for treatment. She suffered serious injuries, including a punctured lung. She was in a great deal of pain and still has scars on her back, arms, chest and stomach.

On the day before the victim testified, appellant gave a photograph of the victim to the victim's mother. Appellant drew handwritten notations on it. They included the phrase "Rejeanie Fuller 666" and several symbols. He drew lines across the image of the victim in the areas where he had stabbed her.<sup>3</sup> The photograph frightened the victim.

#### **B. Other Prosecution Evidence**

Fuller testified that he drank beer and hard liquor with appellant before and after his father's wake on July 7. The victim did not drink any alcohol. The mood between appellant and the victim "wasn't good" because they had argued at some earlier point in time. Appellant began to complain about the victim while they were drinking in the

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<sup>3</sup> Jay Winn, an investigator employed by the Kern County District Attorney, also identified appellant's handwriting on this photograph.

garage after the wake. Fuller did not “want to have that conversation” and went inside the house. Fuller checked on his sister and then fell asleep in the living room. Sometime later, the victim woke him up. She was “real bloody” and hyperventilating. He heard a door close and then heard appellant’s car start. Fuller took a knife out of the victim’s left hand and placed it on a coffee table. He called emergency services; the 911 call was played for the jury.

Jean King testified that appellant arrived at a house in California City where she and several other women had gathered after the wake. He was the only male in the house. A police officer called and directed all the women to go outside. Appellant came up behind her and handed her a set of keys on a key ring. The keys had something red and sticky on them. She dropped the keys. Someone picked them up and handed them to a police officer.

California City Police Department Sergeant Jeffrey Takeda was designated as the investigating officer. Sergeant Takeda testified that he arrived at the victim’s home at approximately 7:00 p.m. The victim was semi-conscious. She told him that “Leroy” stabbed her and confirmed that “Leroy” was her husband. A large, bloody knife was resting on a table in the living room. A knife block in the kitchen had an empty slot for a knife that was of similar size and shape to the one found in the living room. There was a large amount of blood around the victim and a blood trail in the hallway. There were bloodstains on the master bedroom carpet, a large amount of blood on the bed and a “couple of items on the bed that [were] consistent with human tissue.”

Sergeant Takeda testified that a family member arrived and told police officers that appellant could be found at another house in California City. Police officers responded to that location and arrested appellant. California City Police Department Officer Jack Craig handed Sergeant Takeda a set of keys that appeared to have blood on them. During the booking process Sergeant Takeda saw “some scratches” on appellant’s right forearm.

Officer Craig testified that he placed appellant in a cell. While Officer Craig was walking down the hall, he heard the sound of water running in appellant's cell for an excessive period of time. As Officer Craig returned to the cell and saw appellant attempting to wash something off the right sleeve of the long-sleeved T-shirt that he was wearing.<sup>4</sup> Officer Craig removed appellant from the cell and took the shirt from him. He saw a substance that appeared to be blood on one of the sleeves. Officer Craig also "noticed what [appellant] explained as cuts on his right forearm," and "a spot ... on the left side of [appellant's] abdomen."

Sergeant Takeda testified that he went to Kern Medical Center on July 11 to interview the victim, but she was still unconscious. He measured and photographed the victim's injuries. There was a horizontal stab wound on her right chest, two stab wounds to her upper right arm, a stab wound to her lower right arm, horizontal cut marks on the palm area at the edge of her right hand and bruising around her left wrist. Sergeant Takeda interviewed the victim on July 17. She was still hospitalized. The victim became visibly upset and "stated that it did not make sense why Leroy would do this to her."

Appellant's former wife, Judy Kendall, testified about two incidents of domestic violence that occurred in 1995.<sup>5</sup>

Photographs of the crime scene, the victim's wounds, the knife, the marks on appellant's arm and the photograph of the victim on which appellant drew handwritten notations were admitted into evidence.

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<sup>4</sup> Officer Craig testified on direct examination that appellant was wearing a windbreaker jacket. On cross-examination, Officer Craig clarified that he initially thought that appellant was wearing a jacket, but when appellant removed the garment, Officer Craig realized that it was a long-sleeved T-shirt. Appellant recalled Officer Craig as a defense witness and elicited this testimony a second time.

<sup>5</sup> Solely to avoid confusion, Judy Kendall will be referred to as Judy. No disrespect is intended or implied by this informality.

## **II. Defense Evidence**

California City Police Officer John Bishop testified that he interviewed the victim on June 26. The victim said “that she got into an argument with [appellant] and that at some point, [appellant] threw several items at her, including a wooden food tray and a plastic tray which held all of her earrings.” The victim said that one of the trays hit her in the back and another tray scratched one of her arms and one of her legs. In his report, Officer Bishop wrote that the victim sustained “minor injuries.”

California City Police Officer Anthony Flores testified that all of the crime scene photographs were taken on July 7. The date on the photographs is “the time stamp given by the report-writing program that we use when it was uploaded into that report-writing system, not when it was actually taken.”

The victim was recalled as a defense witness. She denied informing appellant at any point during their marriage that she “had a mental disorder such as by the name of PSD or Post Traumatic Stress Syndrome—disorder.” The victim denied drinking any alcohol on July 7 and denied arguing with appellant on that date because he thought she was “abusing [her] prescription drugs.” She denied driving to Los Angeles on July 7 where a friend named “Boogey” styled her hair and drank cocktails with her. She denied grabbing the knife by the blade and stabbing appellant in the arm. On cross-examination, she testified that the pill bottles by her bed were medications to treat pneumonia and other medical conditions.

Fuller and King were recalled as defense witnesses. Fuller testified that appellant did not force him to get drunk. Fuller did not recall seeing “a bunch of pill bottles” beside the victim’s bed. King testified that appellant, who she knew as “Rujeanie’s husband,” handed her a set of keys on the evening of July 7.

Sergeant Takeda was recalled as a defense witness. He asked the victim “about her medical problems or any mental problems and she told me the only medical problems she had was her diabetes. She had a heart attack about ten years prior.” The victim said

that she does not drink because she is a diabetic. She did not mention anything about a workers' compensation claim. When Sergeant Takeda interviewed the victim on July 17, she was not incoherent and did not indicate that she and appellant had argued on July 7.

Officer Craig was recalled as a defense witness. He did not believe that the cuts on appellant's forearms "were severe enough to transfer much blood at all."

Appellant did not testify.<sup>6</sup>

## DISCUSSION

### I. Failure To Conduct A Competency Hearing Was Not An Abuse Of Discretion; Appellant's Due Process Rights Were Not Infringed

#### A. Facts

On January 8, 2010, appellant filed a *Marsden* motion to relieve defense counsel Fred Gagliardini.<sup>7</sup> Appellant supported the motion with points and authorities and a

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<sup>6</sup> In closing, appellant argued, "The fact is, I had cuts to my right arm, not scratches, and I'm right handed. Therefore, you don't have to be a crime scene expert to know it's unlikely I would cut myself on the right arm. The fact is, my mentally-ill wife was the one running around that day with the knife, not me."

<sup>7</sup> Appellant was represented by six attorneys before he elected to represent himself. He was first represented by Craig Elkin and then Howard Levich. There is no indication in the record why they substituted out. Appellant was next represented by William Lee. Appellant began filing *Marsden* motions. On October 7, the public defender's office was relieved because of a conflict. Appellant was referred to the indigent defense program and Ronald Carter was appointed to represent appellant. Appellant continued filing *Marsden* motions. On October 26, 2009, a *Marsden* motion was granted and Carter was relieved. Thereafter, Fred Gagliardini was appointed to represent appellant. The *Marsden* motions continued. A *Marsden* motion was granted on February 11, 2010, and Gagliardini was relieved. Michael Gardina was appointed to represent appellant. On March 2, 2010, appellant elected to represent himself after his most recent *Marsden* motion was denied.

During a *Marsden* hearing on October 7, appellant said that he filed a "formal complaint" with the public defender and the prosecutor accusing Lee of committing a sexual battery on him. During a *Marsden* hearing on December 29, Carter said that appellant had written letters to the State Bar complaining about him. Appellant sent threatening mail to Kern County District Attorney Ed Jagles (the district attorney) and Assistant District Attorney Gina Nagles (the prosecutor). During a pretrial hearing on

declaration in which he averred that defense counsel refused to confer with him concerning the preparation of the defense, failed or refused to subpoena witnesses favorable to the defense and failed or refused to subpoena a psychiatrist who could testify to the fact that a key witness has a lengthy history of mental illness.

Appellant filed another *Marsden* motion on January 28, 2010. The mailing envelope for this *Marsden* motion is included in the clerk's transcript. The front side of the envelope was correctly addressed; appellant decorated the back side of the envelope with hand-drawn symbols and phrases. Appellant drew a cross with the word "Christi" next to it, a solar system with the phrase "the beginning" near it and a star enclosed within a circle near the word "devil." Appellant also wrote "God most high," "God almighty" and "Psalm 109:8."<sup>8</sup> Appellant drew several letters that appear to be Hebrew, the alpha and omega symbols and a star.

The *Marsden* motions were heard on February 11, 2010. Appellant responded appropriately to the court's opening remarks and agreed with the court "that the main thing that you are alleging ... is that there has been a substantial breakdown in the attorney-client communication between you and Mr. Gagliardini."

The court asked defense counsel if communications with appellant had broken down to the extent that he could not further represent appellant. He replied, "No. I don't think there's ever been effective communication between the two of us." Then he said:

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April 14, 2010, appellant said that he filed a complaint with Kern County Sheriff Donny Youngblood "against some of the members of the Sheriff's Department." During a hearing on June 20, 2010, appellant said that he complained to the "judiciary committee" about three judges sitting in the Kern County Superior Court. Appellant also said that he filed a complaint for "federal civil rights' violations" with the "civil rights commission of Washington DC" against the California City Police Department, the district attorney and the prosecutor.

<sup>8</sup> Psalm 109 is an imprecatory psalm that calls upon God to punish the wicked. Verse 8 provides: "Let his days be few; and let another take his office." (Bible, Standard King James Version (Pure Cambridge), Book of Psalms, Psalm 109:8.)

“I was going to declare a doubt today as to [appellant’s] mental competence. And as a result of that, that the Marsden motions were sent in pro per by [appellant]. I don’t believe he is competent to stand trial. He’s been evaluated previously, but it is my understanding that the nature of the letters that were written and continue to come in to me and to others, as well as the envelopes and the drawings and the symbolism, and the prayer requests that I be—that my days be few, that may another take my place, that my children be fatherless and [my wife] a widow, that my children be wandering beggars, that creditors should seize all I have, that no one extends kindness to me, that is the prayer from the Psalm 109 that continues to be written on the back of [appellant’s] letters to me. I seriously—I have serious concerns as to whether [appellant] can effectively assist me in the preparation of a defense. I don’t dispute that he knows where he is, that he knows who you are, that he knows your role as well as mine and the role of the prosecutor. But it is the second prong that I have serious doubts with. And I continue to have those doubts and was prepared to declare that this morning but for the Marsden motion. And I will immediately, after whatever the court’s ruling is, if it keeps me on as [appellant’s] attorney, that will be my very next step.”

The court replied that this matter presented a “unique situation because, as a practical matter, there has been a breakdown.” The court continued, “And you are telling me that breakdown is probably due to the second prong of him not being mentally competent to assist you as his lawyer. And—but the problem I have is given the filing and the timing of the filing of the Marsden motion, I think what I’m going to have to do is grant the motion, send it to [Department] One and let them make a decision as to have another lawyer appointed. And [Department] One can make a determination as to whether or not there should be a [section] 1368 motion or not.”

Defense counsel asked the court to determine if the breakdown in communication occurred due to his incompetence. The court made a finding that “there is not an issue as to competence. What he’s raised in his pleading is issue of complete breakdown of the relationship which has nothing to do with the effectiveness of counsel.”

The court asked appellant if he understood that the *Marsden* motion was going to be granted based on a breakdown in his relationship with defense counsel. Appellant responded affirmatively but then said, “For the record, your Honor, I have—just want to

also—it is not true that my motion was primarily or solely based on breakdown of communication, there was an element that was—” The court stopped appellant and said, “There is no reason to go further. You might jeopardize your motion by telling me other things. Right now I believe there’s a breakdown.” Appellant acknowledged the court’s direction but then said, “Well, and that he did not subpoena crucial witnesses crucial to my [d]efense.” The court replied, “That’s what you accused the other lawyer of doing. Do you recall that?” Appellant replied, “Yes, sir.” The court continued, “I’m not going to have him address that right now because legally it’s moot since I have addressed the issue and made a determination that there is a breakdown in the relationship between you and Mr. Gagliardini. I don’t intend to go in[to] the factual breakdown of the rest of the motion, it is not necessary.” Appellant responded, “Yes, your Honor.”

The court granted the *Marsden* motion and set the matter for appointment of new counsel, a status conference and hearing to reset the trial date. Michael Gardina was appointed to represent appellant. He did not declare a doubt as to appellant’s competency.

**B. The Trial Court Did Not Infringe Appellant’s Due Process Rights Or Abuse Its Discretion When It Granted The *Marsden* Motion And Declined To Order Competency Proceedings**

Appellant argues that that judgment must be reversed because the trial court violated his due process rights by failing to expressly determine whether or not there was substantial evidence of mental incompetency. Appellant also argues that the trial court abused its discretion because the record contains substantial evidence of incompetency. We are not convinced. As will be explained, the trial court’s failure to act on defense counsel’s statement concerning appellant’s mental competence “was in effect a denial.” (*People v. Sundberg* (1981) 124 Cal.App.3d 944, 957 (*Sundberg*)). The record does not contain substantial evidence of mental incompetency. The trial court did not violate

appellant's due process rights or abuse its discretion when it failed to order a competency hearing.

### **1. General Legal Principles**

“Both the due process clause of the Fourteenth Amendment to the United States Constitution and state law prohibit the state from trying or convicting a criminal defendant while he or she is mentally competent. [Citations.]” (*People v. Lewis* (2008) 43 Cal.4th 415, 524.) “Both federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial.” (*People v. Rogers* (2006) 39 Cal.4th 826, 847.) When evidence casting doubt on the defendant's competency is less than substantial, it is within the discretion of the trial judge whether to order a competency hearing. (*People v. Welch* (1999) 20 Cal.4th 701, 742 (*Welch*).

Section 1368 codifies the procedure to be followed in California when a doubt concerning the defendant's competency arises during the pendency of criminal proceedings. Section 1368, subdivision (a) provides:

“If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.... At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.”

Section 1368, subdivision (b) provides:

“If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which

is held pursuant to Section 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.”

“A trial court’s decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial. [Citations.] The failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence, however, requires reversal of the judgment of conviction. [Citations.]” (*People v. Rogers, supra*, 39 Cal.4th at p. 847.)

**2. The Trial Court’s Failure To Expressly Determine Whether Or Not There Was Substantial Evidence Of Incompetency Did Not Violate Appellant’s Due Process Rights**

In *People v. Stewart* (1979) 89 Cal.App.3d 992 (*Stewart*), this court explained that subdivision (b) of section 1368 “must be read in connection with the entire statutory scheme” and is not properly interpreted to require a trial court to hold a hearing whenever “counsel informs the court of his belief in the possible incompetence of his client.” (*Stewart, supra*, at p. 996.) A doubt in the mind of counsel, or anyone else other than the trial court, is not sufficient to require a hearing on the issue of sanity. “[A] defendant is not entitled to a trial on the issue of his mental competence merely upon the statement of defense counsel, but that there must be objective substantial evidence of doubt as to the defendant’s mental competence before he is entitled to a full hearing pursuant to section 1368 [citations].” (*Ibid.*) We concluded that “[w]hen the judge’s attention is called to the issue of incompetency, or he suspects the possibility (Pen. Code, § 1368, subd. (a)), the trial judge has a duty to determine whether or not there is substantial evidence to require a full hearing. If the judge determines that a full hearing is required, he is then obligated to conduct such a proceeding. Otherwise, in the absence of an abuse of discretion, a full hearing is not required.” (*Ibid.*)

Relying on *Stewart, supra*, 89 Cal.App.3d 992, appellant argues that the trial court violated his due process rights by failing to expressly determine whether or not there was substantial evidence of incompetency. This contention is without merit.

It is unclear from defense counsel's comments on the topic of incompetency whether he was affirmatively declaring a doubt within the meaning of section 1368. Defense counsel stated that if appellant had not filed a *Marsden* motion, he had planned to declare a doubt about appellant's competence. Yet, defense counsel did not request a continuance so that he could gather and present evidence of appellant's incompetency. He did not argue that the trial court should not hear the *Marsden* motion because he had a doubt about appellant's competency. If we interpret defense counsel's remarks as a declaration of doubt within the meaning of section 1368, then the trial court's decision to grant the *Marsden* motion effectively operated as a denial and an implied finding that appellant was competent.

In *Sundberg, supra*, 124 Cal.App.3d 944, the reviewing court found that the trial court's failure to act on defense counsel's declaration of doubt and request for a continuance for further examination operated as a denial. The *Sundberg* court explained, "Trial counsel represented an examining physician would conclude Sundberg was not mentally competent to stand trial and requested a continuance to allow further examination, yet the court in substance refused the request. While nowhere in the record does there appear a denial, yet the court's failure to act was in effect a denial." (*Id.* at p. 957) Without further discussion, the appellate court determined that the totality of the evidence before the trial court was sufficient to require it to grant a continuance to ascertain if a doctor could offer substantial evidence of incompetency. (*Ibid.*)

We will follow the guidance of *Sundberg* on this point. The trial court's decision to proceed on the *Marsden* motion was effectively a determination that there was not substantial evidence of incompetency and discretionary decision not to conduct a competency hearing.

Further, appellant has given *Stewart, supra*, 89 Cal.App.3d 992, an overly broad reading. In *Stewart*, this court did not hold that a *mentally competent* defendant's due process rights are violated if the trial court fails to expressly rule on defense counsel's declaration of doubt. As explained in *People v. Koontz* (2002) 27 Cal.4th 1041, 1063, "When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing." (See also *Welch, supra*, 20 Cal.4th at p. 738.) When the accused is mentally competent, a trial court's failure to act after defense counsel expresses a doubt does not violate his due process rights. It is the act of trying or convicting the accused while he or she is legally incompetent that violates due process. (*Pate v. Robinson* (1966) 383 U.S. 375, 378; *People v. Lewis, supra*, 43 Cal.4th at p. 524.) Thus, appellant's reliance on cases such as *People v. Ary* (2004) 118 Cal.App.4th 1016, 1020, is misplaced because they involved situations where there was substantial evidence of incompetency.

As we will explain further *post*, there was not substantial evidence of incompetency before the trial court and defense counsel did not represent that he could obtain evidence of incompetency. Appellant affirmatively demonstrated his competency in his written motions and during the *Marsden* hearings. Therefore, the trial court's decision to grant the *Marsden* motion and not conduct further proceedings pursuant to section 1368 did not violate appellant's due process rights.

### **3. The Record Does Not Contain Substantial Evidence Of Incompetency**

"A defendant is mentally incompetent if, as a result of a mental disorder or developmental disability, he or she is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." [Citation.] (*People v. Koontz, supra*, 27 Cal.4th at p. 1063.) Evidence is substantial if it raises a reasonable or bona fide doubt concerning the accused's competence to stand trial. (*Id.* at pp. 1063-1064.) "Substantial evidence of incompetence may arise from separate

sources, including the defendant's own behavior." (*People v. Ramos* (2004) 34 Cal.4th 494, 507.) Yet, "a defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." (*Id.* at p. 508.) The opinion of a psychiatrist or qualified psychologist that the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings or incapable of assisting in his defense satisfies the substantial evidence test. (*Welch, supra*, 20 Cal.4th at p. 738.) In contrast, the opinion of defense counsel that his client is incompetent does not constitute substantial evidence of incompetency. (*Stewart, supra*, 89 Cal.App.3d at p. 996.)

Applying this standard to the evidence before us, we find that the record does not contain substantial evidence of incompetency. Respondent's argument that "the record demonstrates appellant's recalcitrance and obstreperousness," and not mental incompetence is persuasive. There was no evidence that appellant suffered from a mental disease or defect. Defense counsel did not make an offer of proof that he could obtain testimony from a psychiatrist or psychologist opining that appellant was not incompetent. Appellant's many *Marsden* motions reflected ongoing disputes over investigation and trial strategies. He was not *incapable* of cooperating with his defense attorneys; he was *unwilling* to do so because he disagreed with their strategies and distrusted them. Appellant's handwritten notations on the back of envelopes and his complaints about defense attorneys, the prosecutor, judges and police are indicative of anger and malice, not incompetency.

Appellant affirmatively demonstrated that he understood the legal process and was able to actively participate in his defense. His written *Marsden* motions were coherent and comprehensible. They were correctly formatted, and appellant cited the proper legal standard. Appellant participated appropriately during the *Marsden* hearings and did not exhibit any bizarre behavior. It was evident from appellant's remarks during the

February 11, 2010, *Marsden* hearing that he understood the legal proceedings and was able to participate properly. He cogently explained his complaints concerning defense counsel's performance.

Once appellant elected to represent himself, he further proved that he was mentally competent. At the self-representation hearing, appellant stated that he was a college graduate and worked as a paralegal. He filed several pretrial motions, worked with his court-appointed investigator and developed a trial strategy. He actively participated during the trial. He gave opening and closing arguments, thoroughly cross-examined witnesses, challenged the prosecution's documentary evidence, called defense witnesses and participated in the instructional conference.

For all of these reasons, we conclude that there was not substantial evidence of incompetency before the trial court on February 11, 2010, or at any other point in time. Therefore, we hold that the trial court did not violate appellant's due process rights when it failed to conduct a competency hearing.

#### **4. Failure To Order A Competency Hearing Was Not An Abuse Of Discretion**

When the evidence casting doubt on the defendant's competency is less than substantial, the decision whether to order a competency hearing is committed to the discretion of the trial court. (*Welch, supra*, 20 Cal.4th at p. 742.) When the trial court's declaration of a doubt is discretionary, more is required than the statements of defense counsel that defendant is incapable of cooperating in his defense. (*Ibid.*) As we have explained, appellant affirmatively demonstrated that he was mentally competent. Here, just as in *Welch, supra*, 20 Cal.4th at page 742, "[T]he circumstances noted by the court—that defendant and his counsel did not agree on which defense to employ, and that defendant had a paranoid distrust of the judicial system and had stated his counsel was in league with the prosecution—while suggesting the trial court *could have* ordered a hearing on competence to stand trial, do not establish that the trial court *abused its*

*discretion* in failing to do so, justifying reversal on that basis.” Accordingly, we conclude that the trial court’s failure to declare a doubt as to appellant’s competency was not an abuse of discretion. (*Ibid.*)

## **II. Appellant’s Request For Advisory Counsel Was Properly Denied**

### **A. Facts**

Defense counsel subpoenaed the victim’s health records.

Pursuant to a stipulation, on September 17, 2008, the prosecutor provided the victim’s health records from Hall Ambulance and Kern Medical Center that related to the stabbing.

Appellant sought medical records that predated the stabbing.

In February 2009, the trial court reviewed some medical records and determined that they did not contain relevant material.

In September 2009, the trial court reviewed additional medical records. It concluded that some of the records relating to a workers’ compensation claim that the victim filed in the 1990’s could be relevant to appellant’s defense and ordered those records to be provided to defense counsel.<sup>9</sup> Since the victim did not waive her right to confidentiality, the court entered a protective order prohibiting appellant from seeing these records.

On March 2, 2010, appellant moved to represent himself. Appellant stated that he was a college graduate and his prior work history included nine years as a police officer, a management position with the United States Department of Agriculture, and “paralegal work for the federal and state level.”

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<sup>9</sup> Appellant refers to these documents as “psychiatric records.” Respondent correctly points out that there is no evidence in the record indicating that these records pertained to the victim’s mental health.

The court informed appellant that the protective order preventing him from access to the victim's psychiatric and medical records would remain in effect if he was permitted to represent himself. Defense counsel would be allowed to discuss the contents of the medical records with appellant, but appellant would not be given copies of the records. The court asked appellant, "You understand you are not going to be able to look at those records?" Appellant replied, "Yes, sir."

The court also informed appellant he would not "have a stand-by attorney or co-counsel. If you represent yourself, that's it. You are representing yourself. You are not getting help from Mr. Gardina or somebody else." The court asked appellant if he "realize[d] that" and appellant replied affirmatively.

The court granted the self-representation motion and authorized funds for a defense investigator. The court stated that defense counsel "might have to bring [the medical records] over to the court or give [them] to the investigator."

On March 18, 2010, appellant filed a motion for appointment of advisory counsel. Appellant argued in his supporting points and authorities that he needed advisory counsel because he did not have access to the victim's medical records. Also, he needed advisory counsel because the law library had limited resources, he would be subpoenaing witnesses who lived out of town and out of state, he did not have access to witnesses and needed trial clothing.

This motion was heard on April 14, 2010. During his remarks, appellant focused exclusively on obtaining the victim's mental health records. He asked the court to "appoint me advisory counsel who can take custody of these ... records or dismiss this protective order so that I can take custody of [them]." The court continued the hearing and ordered Mr. Gardina to appear.

Court reconvened on April 16, 2010. The prosecutor stated that she did not have any objection to providing appellant with medical records that were related to the stabbing.

Mr. Gardina said the medical records that are the subject of the protective order related to a workers' compensation claim that the victim made during the "mid '90s to the late '90s, early 2000's." He had discussed the contents of these records with appellant. He explained that appellant "had a theory, and I said the records did not support that theory." He gave the records to appellant's investigator. He did not believe that appellant needs advisory counsel due to these records.

Appellant said that he had previously seen these medical records in his capacity as the victim's husband and he "know[s] the records pertain to the fact that she has a history of suicide attempts, she has a history of anger and mental lapses." Appellant argued that since he was now acting as his own defense counsel, the records should be released to him.

The court denied the motion for advisory counsel and refused to modify the protective order. It reasoned:

"There is a difference between the records being discoverable and actually being admissible. From [what] I've heard, I don't need to appoint advisory counsel at this point in time. You are representing yourself. We went through the perils and pitfalls before. Your investigator can still discuss the records with you but cannot give you the actual records. So apparently you have indicated to me that you have seen them before and you know all this information.... But if the trial court allows you to make a case for or cross-examine the witness about memory lapses and/or suicide attempts, again if that's the trial court's call, then you have the information to do that."

**B. Denial Of The Motion For Advisory Counsel Was Not An Abuse Of Discretion**

Appellant argues that the trial court abused its discretion by failing to appoint advisory counsel. We disagree.

A court possesses discretion to appoint advisory counsel to a self-represented defendant to "promote orderly, prompt and just disposition of the cause." (*People v. Mattson* (1959) 51 Cal.2d 777, 797.) "The weight of both federal and California

precedent, including United States Supreme Court precedent, establishes that a criminal defendant does not have a constitutional right to the assistance of advisory counsel, but that it is within the discretion of trial courts to appoint advisory counsel to assist a criminal defendant who is proceeding in propria persona.” (*People v. Goodwillie* (2007) 147 Cal.App.4th 695, 709.) “The factors which a court may consider in exercising its discretion on a motion for advisory counsel include the defendant’s demonstrated legal abilities and the reasons for seeking appointment of advisory counsel.” (*People v. Crandell* (1988) 46 Cal.3d 833, 863.)

Some appellate courts have concluded that a self-represented appellant in a non-capital case cannot be allowed to challenge a verdict on the ground that the trial court abused its discretion or otherwise committed reversible error by not appointing advisory counsel because it would “entirely eviscerate[]” the rule that a defendant who exercises his right to represent himself cannot later complain that he was denied the effective assistance of counsel. (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430.) Other courts continue to recognize the propriety of such a challenge. They adhere to the position that a trial court’s denial of advisory counsel is reviewed for an abuse of discretion and will not be disturbed on appeal if there is a reasonable or even fairly debatable justification for the court’s ruling. (See, e.g., *People v. Sullivan* (2007) 151 Cal.App.4th 534, 554.)

Assuming arguendo that a verdict in a noncapital case may be challenged on the ground that a self-represented defendant was not provided with advisory counsel, there was no abuse of discretion in this case. Appellant was fully warned of the risk of self-representation, and he was specifically told that he would not be able to review the victim’s medical records or be provided with the assistance of legal counsel.<sup>10</sup> During

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<sup>10</sup> Appellant makes much of the fact that the trial court, when accepting appellant’s assertion of the right to self-representation, referenced “stand-by attorney,” not advisory counsel. This reference is not significant because the trial court also informed appellant

the hearings on the motion for advisory counsel, appellant exclusively focused on his need to review medical records relating to the victim's workers' compensation claim. Yet, appellant also acknowledged that he had previously seen these records. Also, the defense investigator possessed these records and could discuss them with appellant. In addition, Mr. Gardina stated that these medical records did not support the defense theory that appellant wanted to pursue. Since appellant previously saw these medical records and could discuss them with the investigator, his ability to investigate and prepare a defense and to cross-examine the victim was fully protected.

Additional factors do not establish an abuse of discretion. The mere fact that there were resource limitations due to appellant's limited access to the law library did not translate to a right to advisory counsel. The defense investigator could ensure that subpoenas were served on defense witnesses and obtain clothing for appellant. Appellant's claim that advisory counsel was necessary because this case involved complex legal and factual issues was not presented to the trial court. Consequently, it was not preserved for appellate review. (*People v. Mattson* (1990) 50 Cal.3d 826, 853-854.)

The record reflects that appellant was an educated person with legal training as a paralegal. Appellant was mounting a vigorous defense at the time that the motion for advisory counsel was denied. Appellant had filed motions for judicial notice, to set aside the information, and to require a material witness bond. Here, as in *People v. Crandell*, *supra*, 46 Cal.3d at page 864, appellant "had demonstrated in his motion papers an ability to research the law, to cite applicable precedent, and to engage in reasoned argument." Similar to the defendant in *People v. Sullivan*, *supra*, 151 Cal.App.4th at page 554,

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he would not receive legal help from Mr. Gardina "or somebody else." The trial court's remarks, when considered in their entirety, adequately warned appellant that he would not receive assistance from advisory counsel.

appellant vigorously pursued his defense of actual innocence. He filed a “plethora of motions” and during the trial he interposed objections, cross-examined prosecution witnesses and presented evidence in his own defense. (*Ibid.*) This is not a case where the lack of advisory counsel created a trial that “could rightly be described as a “farce or a sham.”” [Citation.]” (*People v. Bigelow* (1984) 37 Cal.3d 731, 745.)<sup>11</sup>

For all of these reasons, we hold that the trial court did not abuse its discretion when it declined to appoint advisory counsel.<sup>12</sup> (*People v. Sullivan, supra*, 151 Cal.App.4th at pp. 554-555.)

### **III. The Trial Court Did Not Abuse Its Discretion Or Violate Appellant’s Due Process And Equal Protection Rights When It Denied His Applications To Appoint Three Expert Witnesses And Excluded These Witnesses**

#### **A. Facts**

On or about May 24, 2010, appellant filed ex parte applications for orders appointing three defense experts and requesting travel expenses and lodging. He sought appointment of Dr. Matthew Carroll, who is a forensic psychiatrist, as well as Michael Sweedo, who is an expert in blood stain patterns, and “Forensic Analytical Sciences, Inc.”

In appellant’s supporting declaration, he averred that the court issued an order on February 27, 2009, appointing Forensic Analytical Sciences to examine DNA evidence. He also averred that the court issued orders on July 27, 2009 and September 15, 2009,

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<sup>11</sup> Appellant’s assertion that we are precluded from considering his performance at trial is not well-taken. (See, e.g., *People v. Sullivan, supra*, 151 Cal.App.4th at pp. 554-555; *People v. Bigelow, supra*, 37 Cal.3d at p. 745.)

<sup>12</sup> Since discretion was not abused and no error appears, it is not necessary to determine the applicable standard of prejudice. (*People v. Bigelow, supra*, 37 Cal.3d at pp. 744-746 [per se reversal applied in a capital case]; compare, e.g., *People v. Goodwillie, supra*, 147 Cal.App.4th at p. 716 [*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) standard of a reasonable probability of a more favorable verdict applies in noncapital cases].)

appointing Dr. Carroll and Mr. Sweedo to examine evidence in this case. However, the clerk's transcript does not show that any orders appointing experts or allocating funds to the defense were made on those dates. During the *Marsden* hearing conducted on March 2, 2010, defense counsel made remarks indicating that funds were allocated for the defense to conduct DNA testing and that Forensic Analytical Sciences, Inc. tested some of evidence. There is no indication in the record that funds were allocated for Dr. Carroll or Mr. Sweedo, or proof that either of these individuals examined any evidence in this case.

The three applications bear stamps indicating that they were denied by Kern County Superior Court Judge Lee P. Felice on May 25, 2010. Next to the denial stamp on two of the applications is the handwritten phrase "w/out prejudice."

On June 29, 2010, the hearing on in limine motions was held. The court asked appellant if he wanted to renew his applications to appoint experts. Appellant responded affirmatively.

The prosecutor stated that appellant did not have anyone under subpoena. Also, she had not received a witness list and had not been provided with the required 30 days' notice for expert witnesses. The prosecutor commented that appellant was "unprepared to proceed to trial but yet, we're not hearing the motion to continue."

Appellant insisted that he was ready to proceed with trial.

After a recess, the prosecutor orally motioned for all the discovery to which the People were legally entitled. The prosecutor stated that she had not been provided with notice of experts that were retained by the defense or with any reports or material generated by them.

During discussion of this request, the court asked appellant if he had "any discovery with regard to DNA analysis in this case." Appellant replied that he had a three-page report dated July 16, 2009, that was prepared by Eleanor Salmon, who is a DNA technician employed by Forensic Analytical Sciences, Inc. The prosecutor stated

that she had not been provided with a copy of the report, although appellant might have included portions of the report in his letters to her. The trial court directed appellant to hand the report to the prosecutor. The prosecutor examined the report and stated that page two was missing. The court asked appellant, “[W]here is page 2 of 4?” Appellant replied that he did not “have it available at this time, but like I said, I made it a part of the file by mailing all of my exhibits along so it should be in this master filed dated—it was filed March 18th, 2010.”<sup>13</sup>

The court asked appellant if he had consulted with any other experts. Appellant said that he had correspondence from Mr. Sweedo in which he opined that the wounds on the victim’s palm were not defensive in nature. The court directed appellant to gather all related materials and give them to the bailiff so he could show them to the prosecutor. The prosecutor examined these materials and said that appellant had handed him “a string of e-mails that appear candidly to be communications between the investigator and the expert arranging appearances [and] money .... There’s no report.”

Next, the court attempted to ascertain which expert witnesses appellant planned to call at trial. Appellant eventually named Dr. Carroll, Mr. Sweedo and Ms. Salmon. Appellant stated he did not have any additional materials from these experts. He asked for an order approving additional funds “in the neighborhood of 7,000, no more than \$7,500 for each” expert so they would testify.

The court asked the prosecutor if she wanted to make a “motion[] to exclude evidence for failure to provide discovery.” The prosecutor argued that appellant should be required to either agree to a 30-day continuance to comply with the notice requirements or waive his right to present expert evidence. She could not immediately respond to expert DNA testimony and would need time to prepare a response. The court

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<sup>13</sup> During proceedings on the next day, appellant told the court that he was not provided with page two of the report and had “never seen a Page 2.”

stated that a continuance would not be granted without good cause. The prosecutor motioned for a continuance. The court tentatively denied this motion, reasoning that it would not “treat [appellant] any differently than I would any defendant who’s represented by an attorney in terms of requiring him to meet the standards that he must meet.” Thereafter, the prosecutor moved to exclude the expert witnesses identified by appellant because discovery requirements were not satisfied.

Appellant argued, “It would be my position, Your Honor, that the prosecution is not ready. She’s been haggling all morning trying to find some excuse to continue it.” Appellant also argued, “I don’t think at this point in time, especially with the ex-parte witnesses, that I should be required to show my hand, so to speak, so much as to go into this much detail. Plus, I don’t have this material.” Appellant asserted that if the trial court declined to appoint the three expert witnesses it would violate his “6th and 14th Amendment rights through the United States Constitution of effective cross-examination and effective confrontation during trial.” Appellant stated, “I’m not agreeing to any more continuances. If the honorable court denies me these most crucial witnesses, then I will just take it up on appeal.”

The court asked appellant if he was aware that his applications to appoint the three experts had been denied by Judge Felice. Appellant acknowledged that he knew the applications were denied. The court asked appellant if he was asking it “to reconsider your request to appoint these three experts.” Appellant replied, “If necessary, yes, Your Honor.”

The trial court ruled, “I’m going to deny your request for appointment of the experts that have been previously denied by Judge Felice. I find that your requests are untimely. I don’t find good cause under the circumstances.”

The trial court granted the People’s motion to exclude the three expert witnesses. It found “that the defendant has failed to comply with discovery, specifically with the requirement that disclosures be made at least 30 days prior to trial under Penal Code

section 1054.7, including the requirement that the names and ... statements of those experts, including results of examinations, tests, experiments or comparisons be provided in discovery and all of that is excluded.”

## **B. The Expert Witnesses Were Properly Excluded**

Appellant argues that the trial court abused its discretion and violated his constitutional due process and equal protection rights when it denied his motion to reconsider the requests for appointment of three experts and precluded these individuals from testifying. We are not convinced.

### **1. Applicable Legal Principles**

“On June 5, 1990, the electorate adopted Proposition 115, the ‘Crime Victims Justice Reform Act,’ which, inter alia, mandated reciprocal discovery in criminal matters.” (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1259.) “Section 1054 et seq. ‘governs the scope and process of criminal discovery’ in this state.” (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 46 (*Meraz*).

Section 1054.3 requires a criminal defendant and his or her attorney to disclose to the prosecutor “[t]he names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.” (§ 1054.3, subd. (a)(1).)

Section 1054.7 provides that “[t]he disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred.” “‘Good cause’” under section 1054.7 is expressly limited “to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.” (§ 1054.7.)

Section 1054.5, subdivision (b) provides that “a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order.” Yet, subdivision (c) of section 1054.5 provides, in relevant part: “The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted.”

*People v. Edwards, supra*, 17 Cal.App.4th 1248, determined “that preclusion sanctions may be imposed against a criminal defendant only for the most egregious discovery abuse. Specifically, such sanctions should be reserved to those cases in which the record demonstrates a willful and deliberate violation which was motivated by a desire to obtain a tactical advantage at trial such as the plan to present fabricated testimony in *Taylor*[ v. *Illinois* (1988) 484 U.S. 400].” (*Id.* at p. 1263.) In *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758, the appellate court concluded, “[A]bsent a showing of significant prejudice and willful conduct, exclusion of testimony is not appropriate as punishment. To conclude otherwise might well place upon the truth-finding process an imprimatur of unreliability inconsistent with confidence in a finding of guilt.”

A trial court’s ruling on discovery matters is reviewed under the abuse of discretion standard. (*Meraz, supra*, 163 Cal.App.4th at p. 48.) “[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]’ [Citation.]” (*Ibid.*)

## **2. The Trial Court Did Not Abuse Its Discretion Or Infringe Appellant’s Constitutional Rights When It Excluded The Defense Witnesses**

Having carefully examined the record, we discern no abuse of discretion. Respondent’s argument that “[t]he record supports an implied finding that appellant

intentionally failed to follow the discovery rules to gain a tactical advantage, and that less restrictive sanctions would not have achieved the purpose of reciprocal discovery,” is convincing.

The circumstances surrounding appellant’s failure to comply with the discovery statutes and timing of his oral motion to reconsider the denial of the applications to appoint experts demonstrate that appellant was engaging in gamesmanship. Appellant’s application for appointment of defense experts was denied on May 25, 2010. Yet, appellant waited until in limine motions were heard on June 29, 2010, to orally renew these applications. During the hearing on in limine motions, appellant acknowledged that he knew the applications had been denied. When appellant was asked to explain his failure to comply with the discovery statutes, he replied, “I don’t think at this point in time, especially with the ex-parte witnesses, that I should be required to show my hand, so to speak, so much as to go into this much detail.” Appellant opposed a continuance and accused the prosecutor of “haggling all morning trying to find some excuse to continue it.” Appellant’s inaction following denial of his pretrial applications for appointment of defense experts, his disregard of discovery statutes and his opposition to a trial continuance were all conscious tactical decisions that appellant believed would work to his advantage.

The prosecutor was prejudiced by appellant’s failure to comply with the discovery statutes. The People’s case did not include expert testimony. By failing to provide the prosecutor with a witness list and statements, appellant deprived the prosecutor of a reasonable opportunity prior to trial to prepare a response to the issues that would be raised by expert testimony for the defense on the subjects of DNA, blood splatter and the victim’s mental health.

In light of all the circumstances, we conclude that less restrictive sanctions would have undermined the purpose of the reciprocal discovery statute, rewarded appellant’s misconduct and required the trial to be continued over his objection. Exclusion of the

experts' testimony was an appropriate remedy and the trial court did not abuse its discretion when it denied appellant's motion to reconsider the order denying his applications for appointment of defense experts and granted the prosecutor's motion to exclude these experts.

Since the trial court acted within its discretion in excluding these witnesses and its decisions were not arbitrary or disproportionate to the purposes that the discovery statutes were designed to serve, these rulings did not violate appellant's constitutional rights to due process and equal protection. (*United States v. Scheffer* (1998) 523 U.S. 303, 308; cf. *Taylor v. Illinois, supra*, 484 U.S. at p. 409 [preclusion of defense witnesses as sanction for violating discovery rule did not violate compulsory process clause]; see also, e.g., *People v. Cudjo* (1993) 6 Cal.4th 585, 611; *People v. Hart* (1999) 20 Cal.4th 546, 607.)

In addition, appellant has not established prejudice. No evidence in the record supports appellant's claim that these witnesses would have provided testimony favorable to the defense. Appellant did not make an offer of proof concerning the expected testimony of these experts. There is nothing in the record indicating what the three experts would have testified if they had been called as defense witnesses. During the *Marsden* hearing on March 2, 2010, defense counsel stated that the results of the DNA analysis did not benefit the defense. Thus, on this appellate record, the alleged error is harmless.

#### **IV. Restraining Appellant During Trial Was Proper**

##### **A. Facts**

During spring 2010, appellant mailed several large manila envelopes containing legal motions to the prosecutor and the district attorney. Appellant placed a powdery substance inside the envelopes and drew handwritten notations on them. Some of the notations referenced Psalm 109. In one of the envelopes addressed to the prosecutor, appellant included a newspaper article discussing a family law case in which a judge

refused a mother's plea to issue a restraining order and the father subsequently killed their baby and himself.

The prosecutor reported the suspicious mail to the Kings County Sheriff's Department, who investigated this incident.<sup>14</sup> The Hazardous Material Emergency Response Unit of Kern County Environmental Health identified the powdery substance as onion salt. The prosecutor told the investigating officer that she thought appellant sent the newspaper article to scare her and she did not feel comfortable appearing in court when he was present. Appellant admitted to the investigating officer that he mailed these items, but denied that he was attempting to threaten the prosecutor. He said that he sealed the envelopes with toothpaste. He denied lacing the envelopes with onion salt. The incident was determined to be "suspicious but non-criminal."

On April 4, 2010, the court ordered appellant not to put any foreign substances on future correspondence or his self-representation privilege would be terminated. Appellant was ordered to send all future legal correspondence to the prosecutor's investigator, Jay Winn. Appellant complied with this directive.

Prior to jury selection, the court raised the issue of whether there was manifest need for physical restraints.

The bailiff reported that appellant did not have any rule violations or documented incidents, but was classified as a security risk based on the charges.

The prosecutor asked for one of appellant's legs to "be shackled out of the sight of the jury to prevent movement towards witnesses, towards jurors, towards myself." In support of this request, she discussed the threatening messages appellant sent to her, his

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<sup>14</sup> Appellant attached a copy of the investigative report generated by the Kern County Sheriff's Department concerning the threatening mail (case No. SR10-08128) as an exhibit to an unrelated motion.

prior employment as a law enforcement officer and his conviction for placing an explosive device under Judy's bed.<sup>15</sup>

The court asked for more specifics about the threatening letters. The prosecutor made an offer of proof concerning a packet of information that she had compiled. She explained that appellant mailed six envelopes containing garlic salt. Four envelopes were addressed to the prosecutor and two envelopes were addressed to the district attorney. The prosecutor said that on all of the envelopes appellant "continuously does Hebrew and Arabic and citing Psalm[] 109, Verses 1 through 33, written on there. This is another envelope that was addressed to me specifically. It talks about 666, the marks of the beast, again in Arabic." Also, appellant mailed a package to the prosecutor containing something that appeared to be a "trigger switch" that would lead someone to think "maybe it was going to explode." Appellant wrote the name "Christopher Mammy" as the sender on this package. In addition, appellant manipulated the photographs that were contained in the newspaper article he sent to the prosecutor by drawing a moustache on the judge and making "[i]t look[] like he hit her." The prosecutor interpreted these actions as a threat towards her. She had "concerns for [her]self and for the witnesses testifying in this case." The court accepted the offer of proof.<sup>16</sup>

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<sup>15</sup> As is explained further, *post*, in section A. of part VI., in July 1995, Judy found a suitcase containing three bombs under a bed in her house. Appellant was convicted in the United States District Court for the Eastern District of Arkansas of possessing an unregistered destructive device in violation of title 26 United States Code section 5861(d) and sentenced to 37 months' imprisonment and three years' supervised release. The conviction was affirmed in *United States v. Kendall* (1998) 138 F.3d 1235.

<sup>16</sup> The packet of information described by the prosecutor is not contained in the appellate record. The clerk's transcript does not include a photocopy of the letters, envelopes, newspaper article or the item that appeared to be a trigger switch.

In response, appellant said that “Psalm[] 109:8 pertains to false witnesses. Now, if she wants to put her little twist in it, so be it.” He said that he put toothpaste on the envelopes. Appellant argued that he was not dangerous.

The trial court determined that there was evidence of nonconforming conduct based upon the offer of proof by the prosecutor. It found that there was a manifest need for some restraint. It ordered one leg shackle be placed on appellant from under his chair. The chain would have a soft cloth on it and be concealed by a modesty panel around the table. Defendant would be able to stand or sit in a comfortable manner and his hands would be free. Outside the presence of the jury, the court directed the bailiff to assist appellant in examining and organizing trial exhibits.

On the day before the victim testified, appellant sent a photograph of the victim to her mother. He drew handwritten notations such as “Rujeanie Fuller 666” on it. Appellant drew lines across the image of the victim in the areas where he had stabbed her.

#### **B. There Was A Manifest Need For Restraint**

Appellant argues that “his behavior was exemplary” and there was no need for restraints. We emphatically disagree.

“‘[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury’s presence, unless there is a showing of a manifest need for such restraints. [Citation.]’” (*People v. Mar* (2002) 28 Cal.4th 1201, 1216.) “Any restraints should be as ‘unobtrusive as possible, although as effective as necessary under the circumstances.’ [Citation.]” (*People v. Livaditis* (1992) 2 Cal.4th 759, 774.) A showing of violence, a threat of violence or other nonconforming conduct must appear on the record. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944.) “A reviewing court will uphold the decision of the trial court to shackle a defendant, however, absent an abuse of discretion.” (*Ibid.*)

The court did not abuse its discretion. “It is not necessary that the restraint be based on the conduct of the defendant at the time of trial.” (*People v. Livaditis, supra*, 2 Cal.4th at p. 774.) Appellant is a former police officer and he has a history of criminal violence. He placed bombs underneath his former wife’s bed. He threatened the prosecutor by sending her an escalating series of messages that culminated with a simulated “trigger switch” for an explosive device. The fact that appellant refrained from sending any additional threatening messages after the trial judge warned him that he would lose his in propria persona privileges did not mitigate his threats or reduce his dangerousness. Appellant also sent a threatening photograph to the victim’s mother on the day before the victim testified. This frightened the victim and made it more difficult for her to testify. We agree with respondent that “[t]he trial court was well within its discretion by imposing the minimal restraint on appellant in light of his threats against the female prosecutor, the charges of violence appellant faced, his history of violence towards women, and the layout of the courtroom.”

Appellant’s contention that the jury would have noticed appellant’s limited mobility is purely speculative. As a general rule, unseen shackles do not affect a defendant’s presumption of innocence. (*People v. Jackson* (1993) 14 Cal.App.4th 1818, 1829.) The record does not contain any evidence indicating that the jury could have deduced that appellant was shackled. The trial court specified that appellant would be able to sit or stand comfortably. There is no indication in the record that the leg shackle impaired appellant’s self-representation in any way. Appellant did not indicate that he wanted to testify but did not do so because of the leg restraint. *People v. Burnett* (1980) 111 Cal.App.3d 661 (*Burnett*), on which appellant relies, is inapposite. In *Burnett*, the record did not demonstrate a manifest need for restraint. (*Id.* at pp. 667-669.) In contrast, the decision to restrain appellant was fully justified by his pretrial conduct towards the prosecutor and the victim, as well as his criminal history.

In any event, the alleged error was harmless. “Unless the record affirmatively shows that the jury saw the restraints, we believe the error is not constitutional error, and it should therefore be tested under the *Watson*[, *supra*, 46 Cal.2d at page 836] test.” (*People v. Jackson, supra*, 14 Cal.App.4th at p. 1829.)<sup>17</sup> “We have consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury.” (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.) “[M]easures such as an unobtrusive leg brace concealed under trousers with a draped counsel table may prevent the jury from seeing that the defendant is restrained at all.” (*People v. Jackson, supra*, at p. 1829, fn. omitted.) This is such a case. There is no indication in the record that the jury saw the leg shackle. Also, the evidence proving appellant’s guilt was overwhelming.<sup>18</sup> The victim testified that appellant stabbed her. Her testimony was consistent with pretrial statements she made to her brother and Sergeant Takeda. Appellant fled the scene immediately after the stabbing and handed a set of bloody keys to Jean King. He was observed in his cell washing blood off his shirt. The defense theory that the victim stabbed herself does not have any evidentiary support. Appellant’s decision not to testify cannot be reasonably attributed to the leg restraint. Accordingly, we conclude that appellant was not prejudiced by the leg restraint.

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<sup>17</sup> When there is evidence that unjustified shackles were seen by the jury for a substantial length of time, the error is reviewed under the harmless beyond a reasonable doubt test announced in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Jackson, supra*, 14 Cal.App.4th at p. 1830.)

<sup>18</sup> Appellant’s assertion that the jury only accepted a portion of the prosecution’s case is unconvincing. Appellant was convicted of all charges and enhancements related to the stabbing with the exception that the attempted murder was premeditated. The not true finding on the premeditation allegation is wholly attributable to the lack of evidence proving advance planning. The jury’s decision to convict appellant of a lesser included offense to the charged crime in count 4 merely indicates that they believed Officer Craig’s testimony that the victim only suffered minor injuries when appellant threw objects at her on June 26.

**V. Testimony That Wounds On The Victim’s Palms Were Defensive In Nature Was Properly Admitted**

**A. Facts**

Sergeant Takeda testified that he had been employed by the California City Police Department for nine years and was the senior officer in charge of the crime scene. He testified that the injuries to the victim’s right hand were significant because “they were cuts and they were in a horizontal fashion, which may have indicated that the victim may have had her hand up in a fashion as if—like in a defensive fashion and the horizontal orientation of the cut would be significant with—”

Appellant objected. When asked to state the basis of his objection, he said, “That—is this an expert witness or is [he] considered—what expert does he have? [*sic*]” The court asked appellant, “So your objection is calling for expert opinion testimony?” Appellant responded, “Yes. Is he considered an expert witness?” The court overruled the objection.

Thereafter, Sergeant Takeda testified, “The horizontal orientation of the cuts would be consistent with being attacked with an edged weapon, such as a knife. If the knife was being stabbed and you had your hand up in that fashion, it would make a horizontal cut consistent with the other injuries she had on her body.”

On cross-examination, appellant questioned Sergeant Takeda on this point. He asked, “[I]n your opinion, these were defensive wounds on my wife’s hands; is that correct?” Sergeant Takeda responded. “Yes. That was my opinion.” Appellant continued, “Would you agree that it’s also possible that since you’ve given that opinion, this could also be from a person who was holding this knife by the blade and stabbing caused her hand to get cut like that? Could it possibly have happened that way?” Sergeant Takeda replied, “Yes.”

During the instructional conference, the parties discussed CALJIC No. 2.80, which instructs on expert testimony. The court asked, “I’m trying to consider whether any of

the opinions expressed by the police officers would constitute expert opinions. With regard to the opinion that the cuts were defensive wounds, that could arguably be an expert opinion.” The court asked the prosecutor if she agreed. The prosecutor responded, “I would just ask to leave [CALJIC No. 2.80] in just to err on the side of caution so the defendant can argue this instruction to the jury.” In response to the court’s query of appellant whether he agreed, appellant said, “Yes, Your Honor, but I would also for the record like to have it placed on the record that I attempted to question these officers as expert witnesses but I was not allowed to do so.” The court gave a modified version of CALJIC No. 2.80.

**B. Admission Of This Testimony Was Not An Abuse Of Discretion**

Appellant argues that Sergeant Takeda was not properly qualified as an expert to testify that the victim’s palm wounds were defensive in nature. We are not persuaded.

“‘A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.’ [Citation.] An expert witness’s testimony in the form of an opinion is limited to a subject ‘that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact ....’ [Citation.] A claim that expert opinion evidence improperly has been admitted is reviewed on appeal for abuse of discretion. [Citation.]” (*People v. Catlin* (1995) 26 Cal.4th 81, 131.)

Assuming arguendo that Sergeant Takeda’s testimony that the wounds on the victim’s palms appeared to be defensive in nature was beyond common experience (see, e.g., *Caldwell v. State* (2000) 245 Ga.App. 630), the trial court did not err in admitting this testimony as expert opinion evidence. The trial court’s implied finding that Sergeant Takeda had the requisite training and experience to qualify as an expert on this topic was reasonable and supported by the evidence. The prosecutor elicited testimony that Sergeant Takeda had been employed as a police officer for nine years. He was the senior officer at the crime scene. We believe the trial court could reasonably conclude from this

testimony that Sergeant Takeda possessed sufficient training and experience to reach a conclusion about the nature of the wounds in this case. No laboratory analysis or experiments were necessary to make this determination. Sergeant Takeda's experience as a police officer provided him with sufficient training to examine the victim's wounds and opine whether or not they were defensive.

*People v. Williams* (1992) 3 Cal.App.4th 1326, which is relied upon by appellant, is distinguishable. In that case, the officer based his testimony that the defendant was under the influence of alcohol upon the results of a scientific test, and not on his own observations and reasonable inferences that could be derived from them. (*Id.* at pp. 1333-1335.)

In any event, the alleged error is harmless. Ordinarily, "violations of state evidentiary rules do not rise to the level of federal constitutional error." (*People v. Benavides* (2005) 35 Cal.4th 69, 91.) "[T]he applicable standard of prejudice is that for state law error, as set forth in ... *Watson* [, *supra*,] 46 Cal.2d [at page] 836 (error harmless if it does not appear reasonably probable verdict was affected)." (*People v. Cudjo, supra*, 6 Cal.4th at p. 611.) Sergeant Takeda testified on cross-examination that the wounds on the victim's palms could have been caused if she were holding the knife by the blade. This was the only testimony supporting the defense theory that the victim stabbed herself. Also, contrary to appellant's assertion, this was not a close case. The evidence proving appellant stabbed the victim was overwhelming. In addition to the victim's testimony that appellant stabbed her, the victim fled the scene shortly after the stabbing, handed a set of bloody keys to Jean King and was observed washing blood off the sleeve of his shirt. Thus, it is not reasonably probable that the jury would have returned a more favorable verdict in the absence of testimony that the wounds on the victim's palms were defensive in nature.

### C. Constitutional Objections Were Not Preserved For Appellate Review

Appellant also contends that admission of Sergeant Takeda's testimony that the wounds on the victim's palms were defensive in nature infringed his "constitutional rights to confrontation, fair trial, due process, and to a meaningful opportunity to present a defense." Respondent persuasively argues that these points were not preserved for appellate review.

"No procedural principle is more familiar to [the United States Supreme Court] than that a constitutional right, or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*United States v. Olano* (1993) 507 U.S. 725, 731.) This principle is codified at Evidence Code section 353, subdivision (a). "Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence." (*People v. Mattson, supra*, 50 Cal.3d at p. 854.)

The contemporaneous objection rule applies to claims of state and federal constitutional error. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 320, fn. 10.) A claim that the introduction of evidence violated the defendant's rights under the confrontation clause must be presented to the trial court for decision or it is forfeited on direct appeal. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19; *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin, supra*, 26 Cal.4th at p. 138, fn. 14.) In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*), the United States Supreme Court wrote, "The defendant *always* has the burden of raising his Confrontation Clause objection ...." (*Id.* at p. 327.) Furthermore, "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." (*Id.* at p. 314, fn. 3.) Similarly, to the extent a defendant may be understood to argue that due process required exclusion of evidence for a reason different than his

trial objection, the claim is forfeited unless a due process objection was lodged below. (*People v. Partida* (2005) 37 Cal.4th 428, 436.)

Appellant did not interpose any constitutional objections to admission of Sergeant Takeda's testimony that the wounds on the victim's palms were defensive in nature. Therefore, he forfeited appellate review of such claims. (*Melendez-Diaz, supra*, 557 U.S. at pp. 314, fn. 3 & 327.)

## **VI. Evidence Of Prior Domestic Violence Was Properly Admitted**

### **A. Facts**

The prosecutor filed an in limine motion to admit evidence of two incidents of prior domestic violence pursuant to Evidence Code section 1109. Judy would testify about an occasion in February 1995 during which appellant knocked her down and put a gun to her head. She would also testify about another occasion in July 1995 in which appellant placed a briefcase containing three explosive devices under a bed in her house. If necessary, as rebuttal evidence, the prosecutor would offer the testimony of Judy's son, Leon Hussey, who was an eyewitness to appellant's physical violence towards his mother.

During the hearing on this motion, appellant argued that this evidence was irrelevant because "[t]his case is not about what happened between me and my ex-wife back in 1994." He also argued that Judy and Hussey "got up in court, initially told police and lied and said that I had did all these things. Then they came back into the court less than two months later and admitted that they had lied about these [things]." In addition, appellant asserted that the charges arising from the explosive device incident had been "dismissed and expu[n]ged."

The prosecutor stated that she possessed an appellate opinion affirming appellant's conviction for possessing an unregistered device in case No. 97-2503EA. (*U.S. v. Kendall, supra*, 138 F.3d 1235.) However, she did not want to admit evidence of this conviction.

The trial court admitted testimony about the prior acts of domestic violence. It reasoned:

“I am considering the authorities cited referencing Evidence Code section 1109 and the case law. And this is an issue that the Court needs to exercise its discretion under Evidence Code section 352 with regard to whether the probative value of such evidence is substantially outweighed by its prejudicial effect. I am also going to consider the four-factor balancing test as outlined in the case of [*People v. Branch* (2001) 91 Cal.App.4th 274, 283-286].

“I do find that based on the offer of proof, the prior offense is similar to the charged offense. I do find that it’s not likely to confuse a jury about the issue of the current case after hearing testimony about the prior alleged offense. I do find that the prior conduct alleged is substantially similar to the charged offense. I also find that the evidence would not be unduly time consuming.... I do find the probative value of such evidence is not substantially outweighed by its prejudicial effect and People’s motion Number 1 is granted, which means they may present the evidence consistent with the offer of proof from both Judy Kendall and Herman Leron Hussey.”

Judy testified that in February 1995, appellant picked her up by her neck, slammed her to the floor and hit her head of the floor. He put a pistol to her head, cocked it and said, “[N]igger, I will kill you.” She was afraid and “scared for [her] life.” He ceased the attack when his children started crying. She obtained a restraining order against him after this incident. They subsequently reconciled. In July 1995, Judy found a briefcase containing bombs under “the bed in the front bedroom.” She was frightened and thought that the bombs were “a threat towards [her]self.”

After Judy testified, the court found that admission of this testimony “is in the interest of justice.”

#### **B. The Applicable Statutory Framework And Standard Of Review**

“Evidence of prior criminal acts is ordinarily inadmissible to show a defendant’s disposition to commit such acts. (Evid. Code, § 1101.) However, the Legislature has created exceptions to this rule in cases involving sexual offenses (Evid. Code, § 1108)

and domestic violence (Evid. Code, § 1109).” (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251.) Evidence Code section 1109 “reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are ‘uniquely probative’ of guilt in a later accusation.” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 532.)

Evidence Code section 1109, subdivision (a)(1) provides that “in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by [Evidence Code] Section 1101 if the evidence is not inadmissible pursuant to [Evidence Code] Section 352.”<sup>19</sup>

Evidence Code section 1109, subdivision (e) provides, “Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.” “[T]he ‘interest of justice’ exception is met where the trial court engages in a balancing of factors for and against admission under [Evidence Code] section 352 and concludes ... that the evidence was ‘more probative than prejudicial.’” (*People v. Johnson, supra*, 185 Cal.App.4th at pp. 539-540.)

Due to its incorporation of Evidence Code section 352, Evidence Code section 1109, subdivision (a)(1) makes evidence of past domestic violence inadmissible if the court determines that “its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create

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<sup>19</sup> As applicable here, “[d]omestic violence is defined in Penal Code section 13700. “Domestic violence” means abuse committed against [a qualified individual.]’ (Pen. Code, § 13700, subd. (b).) “Abuse” means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.’ (Pen. Code, § 13700, subd. (a).)” (*People v. James* (2010) 191 Cal.App.4th 478, 482-483; Evid. Code, § 1109, subd. (d)(3); see also *People v. Brown* (2011) 192 Cal.App.4th 1222, 1234.)

substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”  
(Evid. Code, § 352.)

“““The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” [Citation.] Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s).” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

A trial court’s decision to admit evidence pursuant to Evidence Code sections 1109 and 352 is reviewed under the deferential abuse of discretion standard. (*People v. Johnson, supra*, 185 Cal.App.4th at p. 531.) “We will reverse only if the court’s ruling was ‘arbitrary, whimsical, or capricious as a matter of law. [Citation.]’ [Citation.]” (*People v. Branch, supra*, 91 Cal.App.4th at p. 282.)

### **C. Admission Of Propensity Evidence Was Not An Abuse Of Discretion**

The record affirmatively demonstrates that the trial court carefully weighed the proffered evidence of prior domestic violence against the applicable legal standard. It determined that the two incidents were substantially similar to the charged offense, were not likely to confuse the jury, would not be unduly time consuming and admission of this evidence would be in the interest of justice. All of these conclusions are reasonable and supported by the record. The prior acts of domestic violence were extremely probative to prove appellant’s propensity for violence against his wives. Further, “[a] defendant’s pattern of prior acts of domestic violence logically leads to the inference of malice aforethought and culpability for murder.” (*People v. Brown, supra*, 192 Cal.App.4th at p. 1237.) The prior domestic violence, although extremely serious, was less inflammatory than the circumstances of the stabbing and Judy’s testimony required only

16 pages of trial transcript. This evidence was not excessively remote and was substantially similar to the charged offenses.

Appellant's contention that the trial court's balancing test was legally deficient because it failed to individually consider each incident of prior domestic violence and did not set forth the factual basis supporting its finding that admission of this evidence was in the interest of justice misses the mark. The trial court applied the correct standard to the evidence in a reasoned and reasonable matter. The court was not required to "expressly weigh prejudice against probative value, or even expressly state that it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under ... [Evidence Code] section 352. [Citation.]" (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315.) The trial court is not required "to articulate its consideration of each of a list of particular factors of probability and prejudice in making a decision under [Evidence Code] section 352." (*Ibid.*)

Appellant also argues that the prior acts of domestic violence were excessively remote because they occurred 13 years before the charged offenses. We are not convinced. "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch, supra*, 91 Cal.App.4th at p. 284.) "[S]ubstantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses. [Citation.]" (*Id.* at p. 285.) For example, *People v. Morton* (2008) 159 Cal.App.4th 239, 248, upheld admission of evidence of domestic violence that occurred "more than nine years prior" to the current charge and *People v. Johnson* (2000) 77 Cal.App.4th 410, determined that evidence of prior domestic violence dating back approximately 10 years before the charged crimes was properly admitted. (*Id.* at pp. 416-420.) Cases upholding admission of evidence pursuant to Evidence Code section 1108 are instructive. *People v. Branch, supra*, at page 284, upheld admission of a sex crime that was committed 30 years before the current crime. *People v. Pierce* (2002) 104 Cal.App.4th 893, 900, upheld admission of a

prior sex crime that occurred 23 years before the charged offense. *People v. Soto* (1998) 64 Cal.App.4th 966, upheld admission of an appellant's molestation of two young girls 30 years before and 21 to 22 years before the current offenses. (*Id.* at pp. 977-978, 991-992.) *People v. Waples* (2000) 79 Cal.App.4th 1389, upheld admission of a prior molestation that occurred during a period of time that was 18 to 25 years before the charged crimes. (*Id.* at pp. 1393, 1395.) Following and applying these authorities, we conclude that appellant's prior domestic violence was not excessively remote.

Appellant's arguments that the prior incidents of domestic violence were dissimilar to the stabbing and that the Legislature's concern with an "escalating pattern of domestic violence" was not satisfied are unpersuasive. All three incidents involved serious acts of violence against appellant's wives and express or implied threats of murder. In 1995, appellant put a gun to Judy's head and put a bomb under her bed. In 2008, he stabbed the victim with a kitchen knife while she was resting in bed. All of these incidents of domestic violence were life-threatening and left little room for escalation. *People v. Johnson, supra*, 185 Cal.App.4th 520, is analogous. In that case, the defendant was charged with attempted murder. Admission of evidence showing that he shot his former girlfriend was upheld. The appellate court explained, "The common factors in all three crimes strongly suggest defendant has a problem with anger management, specifically with regard to female intimate partners, and specifically when he feels rejected or challenged by such a partner. He has demonstrated a pattern of using guns to exact revenge." (*Id.* at p. 533.)

We are also not persuaded by appellant's contention that admission of this evidence was likely to mislead the jurors because they were not informed whether the events led to criminal convictions. "The admission of prior acts as propensity evidence encompasses both charged and uncharged acts." (*People v. Brown, supra*, 192 Cal.App.4th at p. 1233.) Here, as in *People v. Johnson, supra*, 185 Cal.App.4th 520, there was no confusion because "[t]he past acts of violence were separated by time and

involved different victims and witnesses. And there was no deception or confusion engendered by the arguments of counsel.” (*Id.* at p. 533.)

Appellant’s final contention, that the explosive device incident did not qualify as domestic violence, was not preserved for appellate review. Appellant did not present this objection to the trial court for its decision. He only objected to admission of the prior acts of domestic violence on the grounds of relevance and remoteness. Since this point was not raised below, appellant forfeited appellate consideration of it. (Evid. Code, § 353, subd. (a); *People v. Mattson*, *supra*, 50 Cal.3d at pp. 853-854.)

For all of these reasons, we reject appellant’s challenges to the admissibility of propensity evidence and uphold admission of Judy’s testimony concerning appellant’s prior acts of domestic violence. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1135-1139; *People v. Jennings*, *supra*, 81 Cal.App.4th at pp. 1313-1316.)

## **VII. Appellant’s Cross-examination Of Judy Was Not Improperly Restricted**

### **A. Facts**

During appellant’s cross-examination of Judy, he asked if she was the subject of a “federal investigation.” The prosecutor’s objection on the ground of “improper impeachment” was sustained.

Appellant asked Judy if she was the subject of a “US Marshal investigation.” The prosecutor’s objection was sustained.

Thereafter, appellant asked Judy if she was the subject of an Arkansas “Department of Human Service investigation.” The court sustained the prosecutor’s objection and directed appellant to “[f]ollow a different line of questioning.” When appellant complained, the court conducted further proceedings outside the presence of the jury.

The court asked appellant why he was asking these questions.

Appellant explained that he was “trying to impeach this witness, attack her credibility. She has been a subject of a federal investigation in which they investigated her for planting these fake bombs at the house, and she was investigated for that.”

The court stated, “What you’re going to end up doing is getting all the evidence about this case, including the prosecution against you, into evidence if you go down [that] road.” It directed appellant not to “ask her anything about the federal investigation or any investigation relating to the bombs” because that would “make it relevant to talk about what the investigators then discovered about the bomb, that you were prosecuted for that and convicted.”

Appellant replied, “Yes, Your Honor I understand that. But the question that I want to ask her about the department of human service violation is when she was investigated for domestic violence against her foster child, which would be similar to the same type of charges you say we have to stay with, domestic violence.”

The court asked, “What does that have to do with the allegation that you committed physical violence against her?”

Appellant replied, “If I’m not allowed to have proper impeachment of this witness, then I think this would be a gross violation of my constitutional rights to effective cross-examination and confrontation guaranteed me under the 6th and 14th Amendment, Your Honor.”

The court asked appellant if he had “[a]ny other offer of proof” as to “what you expect to elicit from the witness with regard to this child-abuse allegation.”

After complaining about the prosecution “playing this dog and pony show and bringing up issues that have nothing to do with the case,” appellant eventually replied, “This would show what her credibility is really like, that she’s not the sweet little woman from church, that she has skeletons in her closet. I got skeletons in my closet. This has nothing to do with the case at hand. She don’t know nothing that happened on July the 7th, 2008.”

The court directed appellant to “Make an offer of proof as to what you think the evidence will establish relating to Judy Kendall and child abuse.”

Appellant eventually stated that he would try to establish that Judy “was the subject of an investigation into domestic abuse related to a female foster child.”

The court asked appellant if he had “[a]ny other specifics,” to which appellant replied, “That’s it, Your Honor.”

The trial court sustained the prosecutor’s objection, reasoning that appellant had not made an offer of proof “sufficient to make it relevant.”

### **B. Appellant Did Not Establish The Relevancy Of This Line Of Questioning**

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it tends “to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) “Trial judges retain ‘wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’ [Citations.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.) It is axiomatic that “[a] trial court’s ruling to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion and will be upheld unless the trial court ‘exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” (*Ibid.*)

Appellant argues that the trial court erroneously refused to permit him to impeach Judy with a specific act of violence on a minor child. This contention lacks merit. Appellant did not make an offer of proof that Judy abused a child. He did not provide any specific information concerning a prior act of violence on a child. He only offered to prove that Judy was investigated for an unspecified act of child abuse on an unidentified female foster child at an unspecified point in time. We are persuaded by respondent’s

argument that it was irrelevant whether Judy was the subject of an investigation: “Being investigated is not a crime or a prior bad act, nor could [Judy’s] answer be inconsistent with any prior testimony. In short, her answer could not impeach her credibility.” Accordingly, we uphold the trial court’s determination that appellant failed establish the relevancy of testimony concerning the child abuse investigation. Judicial discretion was not abused and no evidentiary error appears.<sup>20</sup>

**DISPOSITION**

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Hill, P.J.

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Wiseman, J.

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<sup>20</sup> Appellant also invokes the doctrine of cumulative error. Since we have rejected all of his claims of error, there are no cumulative effects to consider and no denial of due process.