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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP ELLISON,

Defendant and Appellant.

F061093

(Super. Ct. No. BF122622A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Phillip Ellison was charged with premeditated murder committed during the commission or attempted commission of rape (Pen. Code, §§ 187, 190.2, subd. (a)(17)(C); count 1) and attempted forcible rape (*id.*, §§ 261, subd. (a)(2), 664; count 2). He was further alleged to have suffered a prior serious felony conviction under the “Three Strikes” law. (*Id.*, §§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e).) His first trial ended in a mistrial prior to opening statements. Following a second trial, a jury convicted him as charged and found the prior conviction allegation to be true. The People having elected not to seek the death penalty, defendant was sentenced to prison for a total unstayed term of life without the possibility of parole. On appeal, he raises claims of insufficient evidence, and trial and sentencing error. For the reasons that follow, we affirm.

FACTS

I

PROSECUTION EVIDENCE

As of March 19, 2007, 14-year-old Jamesha Terry was a healthy eighth-grade student who resided in California City with family.¹ Jamesha’s mother, Melodie Davis, thought of defendant, a relative by marriage, as an uncle, and sometimes had him babysit her children. In March, defendant lived in the Desert Edge Apartments on California City Boulevard, across the street from the Aspen Mall. He did not have a vehicle. Jamesha’s mother prohibited Jamesha from going to defendant’s home alone due to an earlier incident.² To Davis’s knowledge, the only times Jamesha went to defendant’s

¹ Unspecified references to dates are to dates in 2007.

For the sake of clarity, we refer to Jamesha and several other persons by their first names. No disrespect is intended.

² In April 2006, while Davis and her husband went out of town, defendant stayed with Davis’s children at their house. Jamesha’s older brother, Denzel, was there. Denzel had his own bedroom with a full-sized bed large enough for two people. Jamesha had her

apartment were a month or two before March. On one occasion, Jamesha went with her mother and stepfather to sell some candy to children who were at defendant's apartment. Jamesha did not actually go inside the apartment. On the other occasion, Davis picked Jamesha up at defendant's apartment because Jamesha called and said she was being followed by somebody in a white truck and had run to safety at the apartment.

At approximately 3:38 p.m. on Monday, March 19, Jamesha got off the school bus at the Cal City Market bus stop, which was located behind the Aspen Mall, about half a mile east of Jamesha's home. She had a Betty Boop backpack. Nothing appeared out of the ordinary; the bus driver did not see Jamesha have contact with anyone when she got off the bus. The last the driver saw, Jamesha was walking alone toward the mall.

That day, Davis and her husband went to Lancaster. About 7:00 that evening, her son telephoned to report that Jamesha had not yet come home. Davis contacted Jamesha's teacher, who in turn contacted the bus driver. Davis contacted defendant to ask if he had seen Jamesha. He sounded concerned, and offered to help look for her. Davis picked him up, and they went to the bus stop at which Jamesha had been dropped off, but found no sign of the girl.³ Davis then contacted the police.

own bedroom with a queen-sized bed. On that occasion, Denzel saw defendant go into Jamesha's room, which had no door, and heard defendant say that Jamesha's mother had said he could sleep in Jamesha's bed for the night. Defendant told Jamesha she had to get out of the room so he could sleep there. Jamesha said he was lying and told him he could not. Defendant persisted; each time, Jamesha told him no. Defendant then said he was going to sleep at the foot of the bed, and Jamesha could sleep on the other side. Jamesha again told him no. Ultimately, Jamesha slept in her room, but defendant did not.

Jamesha's younger brother, James, recalled being in Jamesha's bedroom with Jamesha and Denzel during this incident. The brothers were using the computer, while Jamesha was on the bed, watching television. Defendant came in and sat down on the bed, and told Jamesha her mom said defendant had to sleep in Jamesha's bed that night. Jamesha told him no, that he was not sleeping with her. Defendant then laughed a little and got up and left the room.

³ According to Davis, as she and her husband arrived at defendant's apartment, Davis called to let defendant know they were pulling up. Her husband told her to go

Flyers bearing Jamesha's picture were posted and passed out around town, and Davis and her family continued to look for Jamesha. Davis was in daily contact with the police for the two weeks Jamesha was missing. Initially, Davis also had daily contact with defendant. After the first week, however, he started acting differently. Davis had to beg him to come to her house, which was unusual. He was also really quiet, which was unlike him.

Bernardo Parada's family ran a Mexican restaurant at the Aspen Mall. One afternoon in March, Bernardo discovered some schoolbooks in the restaurant's dumpster. The books, which were right on top, had not been there when he took out the trash the day before. Jamesha's name was on the front page of a workbook. Besides the books, Bernardo saw a pink backpack that had a few tears in it, and also a burned blanket.

The police were notified on March 28, and Lieutenant Bell and Officer Joseph contacted Bernardo at the restaurant. He directed them to the restaurant's dumpster behind the mall. Seized was a white plastic trash bag containing a candy bag, some papers and books, and pieces of Jamesha's pink Betty Boop backpack.⁴ On top of the restaurant's trash, Bell found, among other items, a folded blanket. Burn marks on the blanket visually resembled those made by the electric stovetop in defendant's apartment, although there was insufficient detail in the burn patterns on the blanket to specifically associate them with that particular stovetop.

upstairs and check the apartment. Davis ran up the stairs, but before she reached the apartment, she ran into defendant. Defendant was already at the top of the stairs. Davis testified, "[t]hat's the fastest I ever seen Phillip move with gout, with a cane." According to James, who was with Davis and her husband, defendant simply came downstairs and got in the car without Davis getting out.

⁴ Testimony concerning whether it was Bell or Bernardo who found the bag's contents in the dumpster was unclear and sometimes contradictory.

Defendant's semen was found in several places on the blanket.⁵ Jamesha's blood was found on areas of the blanket, mostly on the edges of the charred spots. Some of the blood stains had overlapping charring, indicating the blood was there before the burn marks. Trace evidence found on the blanket during laboratory examination included a cigarette butt bearing defendant's DNA; some hairs, grass and other natural debris; and a piece of the pink backpack.

Enfolded in the blanket were some towels and a washcloth with a bar of soap wrapped in it. Defendant's semen was found on one towel, and Jamesha's blood was found on another towel and the washcloth. The soap appeared to have been rubbed down quite a bit, and spots on it tested positive for blood. Carpet fibers found on the towels were microscopically and chemically similar to the carpeting in defendant's apartment.

Sara Parada was Bernardo's mother. At some point, a person who said he was the missing girl's uncle came to the restaurant and asked what the police had said and what the Paradases had found. The man, who had been a customer in the restaurant before, was African-American, used a cane, and walked toward the apartments across the street when

⁵ Dechelle Smothers, the criminalist who conducted the DNA analysis, explained that her laboratory types 15 different locations in variable regions of DNA that are different for everybody. A full DNA profile contains all 15 locations. In the case of the blood on the blanket, she was unable to get all 15 locations, and so obtained only a 10-loci partial profile.

Probability statistics speak to the frequency of a particular DNA profile in the population. The lowest probability in this case was one in 1.8 trillion, which was calculated for the partial profile obtained from the blood on the blanket. Probabilities calculated for 15-loci profiles reached into the quintillions. At the time of trial, earth's population was 6.8 billion. Thus, the probability of encountering an unknown, unrelated individual with any given DNA profile in this case was so astronomical with respect to the Caucasian, African-American, and Hispanic populations for which calculations were made, that we refer to DNA or bodily fluids as being those of defendant or Jamesha, although we recognize this is an oversimplification in terms of scientific accuracy.

he left. Mrs. Parada identified defendant as this man when shown photographs by an investigator for the district attorney's office on August 29, 2008.

As of March, Laura Cota managed the Desert Edge Apartments. She and her son, Carlos, who was about 11, lived in one of the apartments. Defendant lived in apartment 25, which was on the second floor. In March, none of the other second-floor apartments were occupied. Cota stored things in apartment 12 including pieces of old beige carpet. She did not always keep that apartment locked. Cota and Carlos did not know Jamesha, but saw the flyers with her photograph and were told by defendant that Jamesha was his niece and was missing. Cota never saw her at the apartment complex. Cota owned a dolly. She never loaned it to defendant or saw him with it. Sometimes she kept it in the storage area, but sometimes she would leave it by her door.

On Sunday, April 1, Carlos and three of his friends were walking in "a desert kind of area" in back of the apartments when they found a body covered with a piece of carpet. Carlos estimated it was "a pretty long time" between when he first learned Jamesha was missing and when he found the body.

Carlos called the police, and Officer Blanton responded to the scene. The distinctive odor of a decomposing body was overwhelming, and under the carpet Blanton saw what appeared to be a darker-complected, dark-haired female. Blanton secured the scene and contacted Officer Hightower, who was investigating Jamesha's missing-person case. When Hightower looked underneath the carpet, he found a decomposing body subsequently identified, by dental records, as Jamesha. Her blue jeans were below the hip area exposing her buttocks. There were no underpants.⁶ Her knees were apart with her legs crossed at the ankles exposing her genitals. Her bra was unclasped and it, and her white T-shirt, were pulled up almost around the neckline, exposing her breasts.

⁶ According to Davis, Jamesha wore underwear every day. She never knew Jamesha not to wear panties.

One Vans tennis shoe was located underneath, and the other next to, the body. A piece of nylon-type rope was found just north of the body. Also found were shoe prints several feet from the body, and a cigarette butt 20 to 30 feet south of the body.⁷ There was tree vegetation on the ground near the body that was visually similar to small plant material subsequently found inside the stovetop in defendant's apartment.⁸

Police also found wheel marks about 30 feet south of the body's location. The wheel marks ended on the pavement of the Desert Edge Apartments' parking lot. The marks were smooth in consistency, with a wheelbase of about 20 and a half inches. To Hightower's knowledge, no shoe tracks were seen leading from the end of the wheel marks to the body. There were boot tracks that lined up with the wheel marks, however, as if someone had walked with a cart. There were also wheel marks, consistent with the smooth wheel, suggesting someone went one direction with the wheeled object and then came back in the opposite direction. None of the sole patterns of the footwear seized in this case matched the boot marks by the wheel tracks.

Having been informed a body had been found, Davis arrived at the scene close to midnight. She told Hightower that defendant was not home, which was unusual. As a result, Hightower contacted Cota and determined defendant lived in apartment 25 of the Desert Edge Apartments. During their conversation, Cota stated she had sold defendant a blanket on Friday, which was also the last day she saw him at the apartment. Cota directed Hightower to apartment 12, where she kept the items that she sold. Inside that

⁷ Although Cota knew defendant to smoke multiple brands of cigarettes, no DNA was found on this cigarette butt.

⁸ The stovetop was not removed from the apartment until May 23, 2008, more than a year after defendant moved to a different apartment in the same complex because the police served a search warrant on his unit and damaged the door so it would not lock. Although defendant's original apartment showed signs of occupancy at the time the stovetop was seized, none of the utilities were on.

apartment was a large, beige-colored carpet remnant whose fibers were microscopically consistent with those of the carpet covering the body. In one of the stairwells for defendant's apartment was a piece of rope that was microscopically consistent with, and could have come from the same source as, the rope located near the body.

Defendant's apartment was secured by police the night of April 1. Hightower and members of the crime lab entered it the next day. Between the time it was secured, with an officer guarding it, and the time Hightower entered, defendant was not seen at the apartment. Among the items found inside were a teen magazine, a computer, and school identification for Anita J. It was subsequently determined the computer had been used to run Internet searches on Jamesha's case. Multiple searches were conducted, and at least one news media website featuring a story about Jamesha was accessed, early on March 29.

The apartment complex's dumpster was also searched. In it was a Southern California Edison bill with defendant's name and apartment number information. There were also four stained pillows, one of which, along with a pillow sham, bore defendant's DNA. Some white Adidas tennis shoes, that were the size worn by defendant and that Davis thought belonged to him, were located next to the power bill; the right shoe could have made some, but not all, of the prints found near Jamesha's body, although it could not be positively identified as the source of those prints. The dumpster also contained clothing, some of which Davis and James identified as belonging to Jamesha, and some of which James identified as belonging to him and to defendant.

Davis was notified of the positive identification of Jamesha the Friday after the body was found. Between the time the body was discovered and the time it was identified, defendant did not contact Davis, a circumstance she found "odd."

Dr. Duong performed the autopsy on Jamesha. The body was in a state of decomposition, and showed evidence of insect activity, skin slippage, discoloration, and bloating. Duong estimated death occurred several days to a week earlier.

A sexual assault kit was taken from Jamesha's body at autopsy. No semen was found on the oral, anal, or vaginal swabs, although the vaginal swabs were positive for blood. Blood was found on the clothing Jamesha was wearing, although this was "not surprising" given the state of the body. The clothing was negative for semen. Fingernail swabs and scrapings were also taken from each hand.⁹ Defendant's DNA was found on the swab taken from Jamesha's left hand.¹⁰

An external examination of the body showed no type of injury. Internal examination showed no injury or type of disease that could have contributed to Jamesha's death. Because of the condition of the body, Duong could not rule in or rule out the presence of petechiae in the eyes or skin, such as would occur in asphyxia due to strangulation or smothering, or injuries to the neck consistent with manual or ligature strangulation. Although the face appeared darker than the torso, this was not significant to him in determining the cause or manner of death. The hyoid bone was intact, but that bone is hard to fracture in individuals under age 25. Similarly, although Duong examined the genital area and saw no evidence of trauma, the condition of the body again came into play. No cause of death appeared in the toxicology report. Although Duong saw some lividity, because of the condition of the body, he could not determine how Jamesha was positioned at the time she died. There were no visible external marks on her wrists or ankles suggesting she was bound.

Because he did not see any natural cause or any wounds or injury, Duong gave the cause of death as undetermined, meaning he did not know. As for manner of death, the

⁹ Because Jamesha's fingers were dehydrated, the fingernails were embedded, as opposed to being nicely formed, so they could only be scraped along the edge and not underneath.

¹⁰ Smothers could not say what biological substance was on Jamesha's hand, when it was put there, or whether it was deposited by direct contact or transferred indirectly through the touching of something that had the DNA on it.

choices were natural, accident, suicide, or homicide. Duong was able to rule out natural, accident, and suicide.

Dr. Cohen, retired chief forensic pathologist for Riverside County, had performed hundreds of autopsies on decomposing or decomposed remains and had supervised several thousand more. In addition, he received special training in decomposition as part of his formal forensic pathology training.

Cohen reviewed Jamesha's case, including scene and autopsy photographs, Jamesha's medical history, Duong's autopsy report, and the coroner's investigative report. Jamesha's body was moderately to severely decomposed. The absence of something that could explain the death naturally allowed Cohen to exclude natural causes as a possible cause or manner of death. The absence of obvious physical injury also excluded accidental types of fatality. The toxicology report, combined with the fact there was no gunshot or stab wound, also enabled him to exclude suicide.

Based on the level of decomposition shown in the photographs and the insect activity on the body, Cohen opined that death occurred more than a few days and less than a month before the body was found. Jamesha was reportedly missing for 13 days; what Cohen saw in the photographs of the body was consistent with Jamesha dying on March 19 and being found on April 1.

According to Cohen, biological evidence, such as semen or seminal fluid, can become obscured by decomposition. Beyond three to five days, detecting such fluids "becomes hit or miss." After a body has been in a decomposed state for a week or two, "the absence of detection does not exclude sexual assault." Moreover, with a body as decomposed as Jamesha's, superficial or minor injuries, such as small cuts or tears in the mouth, vagina, or rectum, could go undetected, even if Jamesha bled from them.

Cohen explained that suffocation (the placing of something over the face to prevent the passage of air into the airways) can take anywhere from 20 or 30 seconds to many minutes or longer to kill a person. A person can suffocate someone by using only

their hands or by holding a pillow over the other person's face. It is possible to suffocate a person and leave nothing that would be seen at autopsy, particularly if there is decomposition. Based on Cohen's review of this case and his training and experience, suffocation was one of the top possible causes of Jamesha's death.

Cohen further explained that there are two primary types of strangulation: manual, which is accomplished by use of hands; and ligature, which is accomplished by use of a ligature such as a belt, sheet, article of clothing, or other implement that is wrapped around the neck. In both types, the compression of the neck causes decreased blood flow from the heart to the brain and/or the reverse. If the veins are compressed so that the flow of blood from the brain back to the heart is impeded, the head tends to become engorged with blood, which is called suffusion.

With manual strangulation, there tends to be a better chance of developing both surface and internal injuries to the neck. In some cases, these injuries may be obscured by decomposition. With ligature strangulation, there may be a furrow or indentation across the neck if the ligature was very narrow and firm. With broader, softer ligatures such as clothing or a bed sheet, there may be no marks at all on the neck. Even with decomposition, Cohen would expect to see a ligature mark if a slender, firm ligature were used. If the ligature were taken away after death, however, the mark might not tend to resist decomposition as well as if the ligature were left in place. According to most literature and studies, the hyoid bone, which is pliable in young people, is broken in about 30 to 50 percent of cases of manual strangulation, and less commonly in ligature strangulation.

Petechiae are pinpoint hemorrhages that are typically found in the eyes or on the face where there has been compression of the neck. In cases of strangulation, there tend to be abundant petechiae. In Cohen's opinion, however, the state of decomposition did not permit an accurate assessment of Jamesha's petechiae, as her eyes were very dark and discolored.

To render a person unconscious by strangulation may take 15 seconds to a minute. It then takes two to eight minutes for the heart to stop and the person officially to die. With a healthy victim, if the force is released, the person will regain consciousness. Thus, the person doing the strangulation or suffocation has to continually apply pressure.

Based on Cohen's review of Jamesha's case, strangulation — ligature more than manual, because of the absence of reported injury to the hyoid bone or strap muscles — was “high on [his] list” of possible causes of death. In his “best assessment,” much of which was based on excluding other things, he believed Jamesha died from either ligature strangulation or suffocation. In Cohen's opinion, the photographs taken of Jamesha at autopsy supported this; Jamesha's face and head were very dark compared to her shoulders and upper chest. Although with decomposition the body becomes discolored more in the face and head and then in the rest of the body, in Jamesha's case the shoulders and upper chest were quite a bit lighter than the face and head, possibly indicating neck compression with suffusion. The face and head would turn beet red during the process of neck compression, and would then appear darker during the process of decomposition. Cohen could not be completely certain neck compression occurred, since the head tends to become more discolored with time than the rest of the body. Almost always, however, the shoulders, neck, and upper chest are almost as dark as the face and head. Jamesha's photographs, in contrast, showed “quite a disparity” between the color of the face and head and the color of the lower neck and rest of the body. A line of demarcation could almost be drawn just below the chin, dividing the darker areas from the lighter areas. Cohen opined that Jamesha died at the hands of another person. He further opined that the cause of death was homicidal violence of undetermined origin, and that the manner of death was homicide.

At some point after the body was identified, Anita J. contacted Davis and gave information concerning her own interaction with defendant. She also told Davis and the police about Angela S.

Anita, who was a high school student in 2007, was 15 when she first met defendant through a friend of hers. At the time, defendant lived in a second-floor unit at the Desert Edge Apartments.

At some point after she met defendant, Anita started going over to his apartment after school. She did this several times a week. Sometimes there were teenage girls and males in their early 20's present, while other times Anita went by herself. There were never any adults present who were around defendant's age, which Anita estimated to be approximately 39 or 40. Defendant allowed Anita to drink alcohol at his apartment, and he allowed her and the other teenagers to smoke marijuana there. Sometimes, Anita and the others spent the night at defendant's apartment.

On New Year's Eve of 2006, Anita went to a get-together at defendant's apartment. There were no adults present who were close to defendant's age. At the party, people — including Anita — drank alcohol and smoked marijuana. At some point, Anita decided to go to sleep on the couch. The last she saw her friend Angela, Angela was sitting on the bed next to defendant. Anita was the first to go to sleep. When she awoke the next morning, all her friends were already awake. She believed Angela and defendant were both on defendant's bed, although she was not certain. She did not remember how they were positioned. Anita and Angela left together later that morning. After they left, Angela told Anita something defendant had done to her.

Anita learned Jamesha was missing on March 19. She visited defendant's apartment the next day. The apartment appeared the same as it usually did. Defendant seemed sad and he talked about Jamesha being missing.

Angela S. went to school with Anita and met defendant through her. Angela had contact with defendant on MySpace, where he was known as "Dimples." Her picture was on MySpace, but there was no nudity. In response to a picture in which Angela had cornrows in her hair and was wearing jeans and a T-shirt, defendant commented on MySpace that she was looking good.

Angela, who was 16 years old at the time, met defendant in person on New Year's Eve day, 2006, when she went to a party at his apartment. Some other teenage girls and some adult males were there. People were drinking alcohol, and Angela had some. Nobody was smoking marijuana. Defendant had a bottle in his hand, but Angela had no idea what was in it and did not really see defendant drinking, because she was not paying attention to him. Having seen people in various states of intoxication, Angela described defendant as "[f]eeling good" that night. Around 2:00 a.m., Angela decided to go to sleep. In the bathroom, she changed into a long white T-shirt defendant gave her, but left on her bra and underwear.¹¹ She then lay down on the only bed in defendant's apartment. Anita was on the couch, and another couple were on the floor. The apartment was so small that Angela had nowhere to sleep, so defendant told her that she could sleep in the bed. Defendant was next to Angela on the bed, and they both fell asleep. In the middle of the night, Angela was awakened by defendant's tongue in her ear. She was lying on her side. He was behind her; he had moved closer and his body was touching hers. He was moving his tongue around and rubbing one of her thighs. He moved his hand near her vaginal area, touching her over her underwear, then touched her stomach. He then moved his hand up to her breasts and rubbed and squeezed them for several minutes. She was uncomfortable and did not know what to do, so she tried to move to show she was awake. Finally, she moved all the way over on the bed and defendant stopped touching her. She then fell back asleep. The next day, she got up and left shortly after Anita. Defendant was still asleep. Angela told Anita what had happened a couple of days later.

¹¹ Defendant did not give any of his other guests anything into which to change.

II

DEFENSE EVIDENCE

Ashley Griggs went to school with Jamesha. About a week before she learned Jamesha had been reported missing, she overheard Jamesha say she did not want to be at home and wanted to leave home. Jamesha seemed kind of mad.

Jamesha and Jon'ell Finney were best friends in 2007. Finney knew defendant because he was Jamesha's uncle and the girls sometimes spent the night at his residence. When interviewed by FBI Agent Abe on April 30, Finney said that Jamesha told her things were difficult, life was messed up, and she wanted to run away. Jamesha said she had no definite plans to do so as of that point in time, however.

In March, Maryann Storey owned a pizza restaurant in the Aspen Mall. At about 9:45 p.m., three adults and a child came in. The woman, who identified herself as the mother and the two men as the stepfather and uncle, said she was looking for her daughter. She described the girl's clothes and said she had a pink backpack with a Betty Boop logo. Earlier that day, between 3:00 p.m. and 4:00 p.m., Storey had seen someone with such a backpack. This person was with another female juvenile. They were talking and giggling. The girl with the backpack took a couple of steps inside the door, faced the direction of two girls who were sitting inside, then turned around and walked right back out. It appeared to Storey that the presence of the two girls inside caused the girl in the pink backpack to leave quickly. The girl and her companion ran straight to the Desert Edge Apartments across the street. That was the last Storey saw of them. The girls in the restaurant remained there.

Officer Deges interviewed Davis on March 19. Among other things, she told him that Jamesha recently had been in several fights; that she had been the victim of several assaults.

Michael Cash knew Jamesha's brother, Denzel, and found out through him that Jamesha was missing. Denzel was passing out flyers and asked if Cash had seen

Jamesha. Cash related that he had seen her the day before at the library. When Cash saw Jamesha, she was holding hands with a Black male with cornrows who looked to be somewhere around 30 years old or in his mid 30's. The person was wearing baggy pants and did not limp or use a cane.¹²

Edward Kittell attended the New Year's Eve party at defendant's apartment on December 31, 2006, and spent the night. In defendant's apartment, the living room area and bed were basically in the same room. On the night of the party, Kittell slept on the floor in front of the television. When he fell asleep, defendant was already in bed; Angela was on the couch or the floor. Kittell never saw her on the bed that night while defendant was sleeping there.

DISCUSSION

I

SUFFICIENCY OF THE EVIDENCE

Defendant contends the evidence is insufficient to sustain his convictions for first degree murder (whether on a theory of premeditation or felony murder) and attempted rape, and the special circumstance finding. He further contends the trial court deprived him of due process and a fair trial by denying his motion for acquittal (Pen. Code,

¹² Cash told Abe that Denzel came to school and passed out flyers the day after Jamesha was reported missing. The next day, Cash saw a girl at the library. At first, he did not know who she was, but then he recognized her as Jamesha. Cash described the man she was with as being in his early 20's, with cornrows and a black mustache. This man and Jamesha were holding hands and walking toward Rite Aid, whereupon Cash lost sight of them.

Abe had contact with Davis on several occasions. At one point, Davis related that Jamesha sold candy to students at school to earn spending money, and that Davis bought candy for Jamesha from Rite Aid. Davis said Jamesha had quite a bit of candy and \$60 to \$70 stored in a purse she kept in her room, but when Davis checked the purse, she found only \$7.

§ 1118.1) on the sex allegations.¹³ Accordingly, he contends, we must reverse the judgment in its entirety or, at the very least, reverse the conviction on count 2, strike the special circumstance finding, and modify the conviction on count 1 to second degree murder. We disagree.

The test of sufficiency of the evidence is the same under the due process clauses of both the federal and state Constitutions. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) We must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is “reasonable, credible, and of solid value.” (*People v. Johnson, supra*, at p. 578.) An appellate court must “presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). “Where the circumstances support the trier of fact’s finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant’s innocence. [Citations.]” (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747; accord, *People v. Cain* (1995) 10 Cal.4th 1, 39.) “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

¹³ At the close of the People’s case, defendant moved for acquittal on all counts and the special allegation. After argument, the trial court denied the motion. At the conclusion of the defense’s case, defendant requested reconsideration. After argument, the court stated its previous ruling would stand.

reasonable doubt. [Citation.]” (*Jackson v. Virginia, supra*, 443 U.S. at p. 319.)
“Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) “[S]ubstantial evidence” does not mean mere speculation, however, and a reasonable inference may not be based on suspicion alone. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1235; *People v. Reyes* (1974) 12 Cal.3d 486, 500.)

The foregoing standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125), and applies to special circumstance allegations as well as substantive charges (*People v. Horning* (2004) 34 Cal.4th 871, 901). It is also the standard applied by the trial court when reviewing a Penal Code section 1118.1 motion, a ruling on which we independently review. (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.) Where, as here, the trial court has denied the motion, “we must ... assume in favor of its order the existence of every fact from which the jury could have reasonably deduced from the evidence whether the offense charged was committed and if it was perpetrated by the person or persons accused of the offense. [Citations.] Accordingly, we may not set aside the trial court’s denial of the motion on the ground of the insufficiency of the evidence unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached by the court below. [Citations.]” (*People v. Wong* (1973) 35 Cal.App.3d 812, 828.)¹⁴

¹⁴ To the extent defendant claims denial of his motion for acquittal prejudiced him by precluding a motion to strike, or for mistrial based on, testimony concerning uncharged acts and led to erroneous jury instructions thereon, issues concerning the uncharged acts are addressed in parts II and III of the Discussion, *post*. We note that, at least for purposes of determining whether double jeopardy bars retrial, the United States Supreme Court has held that a reviewing court must consider *all* of the evidence admitted by the trial court, even where some of the evidence was admitted in error, and even if,

Defendant implicitly concedes the evidence was sufficient to identify him as Jamesha's killer. We conclude it was also sufficient to sustain the jury's findings of, and the trial court's denial of defendant's Penal Code section 1118.1 motion with respect to, first degree murder, attempted rape, and the rape-murder special circumstance.

“A killing ‘committed in the perpetration of, or attempt to perpetrate’ one of several enumerated felonies, including rape, is first degree murder. [Citation.] The rape-murder special circumstance equally applies to a murder ‘committed while the defendant was engaged in ... the commission of, [or] attempted commission of’ rape. [Citations.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129-1130, fn. omitted, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) “Forcible rape is a general intent crime involving an act of sexual intercourse accomplished against the victim's will by means of force or fear. [Citation.] An attempt to commit rape has two elements [citation]: the specific intent to commit rape, and a direct but ineffectual act done towards its commission. [Citation.] Such act cannot be merely preparatory, and must constitute direct movement towards completion of the crime. [Citation.] However, attempted rape does not necessarily require a physical sexual assault or other sexually “unambiguous[]” contact. [Citations.]” (*People v. DePriest* (2007) 42 Cal.4th 1, 48.)

In the present case, Jamesha's body was found with her jeans down below her hips, and her shirt and unclasped bra pushed up above her breasts, exposing her breasts, genitals, and buttocks. Her underpants — something she always wore — were missing altogether. Her blood and defendant's semen were found on a discarded, partially burned blanket. Defendant's DNA was found in the area of the nails of one of her hands. From this evidence, the jury reasonably could have inferred defendant attempted to or did have sexual intercourse with Jamesha, that she struggled or fought him because it was against

without the inadmissible evidence, there was insufficient evidence to support a conviction. (*Lockhart v. Nelson* (1988) 488 U.S. 33, 40-42.)

her will, that he killed her during the commission of his attempt, and that he disposed of her body and other evidence. There was simply no reason for Jamesha's blood to be on a blanket, defendant's DNA to be on her nails, her to have been mostly disrobed and to be missing underpants and have her bra unclasped, and for defendant to have killed her, unless he tried to have sex with her and she resisted. Thus, the evidence is sufficient to sustain the convictions and special circumstance finding even without considering the other-acts evidence, although that evidence — which tended to show defendant had a sexual interest in teenage girls in general and Jamesha in particular — strengthens the inferences that reasonably could be drawn.

As support for his proposition that “even with other injuries, moved or torn clothing, without more, is insufficient to make out a discrete completed or attempted sex crime beyond a reasonable doubt,” defendant relies on *People v. Johnson* (1993) 6 Cal.4th 1, 38-42, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879; *People v. Raley* (1992) 2 Cal.4th 870, 889-891; *People v. Anderson* (1968) 70 Cal.2d 15, 34-36; *People v. Granados* (1957) 49 Cal.2d 490, 497; and *People v. Craig* (1957) 49 Cal.2d 313, 318-319. As the California Supreme Court has stated, however, “the facts of other cases, such as [those cited by defendant], are not particularly helpful in evaluating the sufficiency of the evidence in this case.” (*People v. Rundle, supra*, 43 Cal.4th at p. 140.) “While in each of those cases the condition of the body might have suggested some sexual motive in the killing, no evidence supporting more than a strong suspicion thereof was adduced. Hence in *Anderson* there was no evidence the defendant had ever formed any lewd or sexual feelings toward the victim, and a laceration in the vaginal area appeared to be only one of several randomly inflicted wounds. [Citation.] In *Granados*, while defendant had asked the victim whether she was a virgin and, when her body was found, her skirt was above her private parts, there was no evidence of contusion or laceration of her private parts or evidence of spermatozoa. [Citation.] Finally in *Craig*, while the victim's nightgown and panties were torn open exposing the

front of her body, her legs were apart, and defendant had said he would like ‘a little loving,’ there remained no certain evidence of rape. There was instead evidence he had intentionally ‘beat up a woman,’ strangled her, and dragged the body some 20 to 25 feet. [Citation.]” (*People v. Hernandez* (1988) 47 Cal.3d 315, 347.)

It is true that Jamesha’s decomposed body provided no evidence of a sexual assault. However, “what the pathologist can say from a laboratory examination is more limited than what a reasonable trier of fact may find beyond any reasonable doubt, after considering the evidence as a whole.” (*People v. Chambers* (1982) 136 Cal.App.3d 444, 455.) “[U]nlike several of the cases cited by defendant, here there was no evidence tending to show a sexual assault did *not* occur. When a victim is discovered a relatively short time after the crime, it is more likely the crime scene and the victim’s body will show evidence of sexual assault — such as trauma to the body or sexual organs, or the presence of the perpetrator’s bodily fluids — if such an assault occurred. An absence of such evidence in that type of case may be strong evidence the perpetrator did not have or intend to have sexual contact with the victim, which may tend to outweigh other facts and inferences, rendering the evidence of sexual assault legally insufficient. [Citations.] Here, by contrast, the evidence did not tend to eliminate a sexual assault; it simply was inconclusive due to the nature of the crime scene and the advanced state of decomposition of [Jamesha’s] body.” (*People v. Rundle, supra*, 43 Cal.4th at p. 139.) “Moreover, for the special circumstance or felony-murder rule, there need not be an actual rape; an attempted rape is sufficient. [Citation.] Accordingly, the verdict would be supported if defendant had intended to rape [Jamesha], but she resisted and he killed her without actually raping her.” (*People v. Kelly* (2007) 42 Cal.4th 763, 789.) Here, the fact the body was only partially clad, with underpants missing and the sex organs exposed when found, considered in conjunction with the other circumstances we have mentioned, support the jury’s verdict. (See, e.g., *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 164; *People v. Kelly, supra*, 42 Cal.4th at p. 789.)

Defendant also challenges the sufficiency of the evidence to support a finding of first degree murder based on a theory of premeditation and deliberation. “But because we have concluded defendant’s first degree murder conviction is adequately supported under the theory of [rape] felony murder and the jury found true the [rape]-murder special circumstance, we need not address this point. [Citations.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1177-1178; accord, *People v. Rundle, supra*, 43 Cal.4th at pp. 140-141.)

In any event, the evidence was sufficient. “A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.] ‘The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly....” [Citations.]’ [Citation.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) In *People v. Anderson, supra*, 70 Cal.2d 15, the California Supreme Court “said that ‘generally first degree murder convictions are affirmed when (1) there is evidence of planning, motive, and a method of killing that tends to establish a preconceived design; (2) extremely strong evidence of planning; or (3) evidence of motive in conjunction with either planning or a method of killing that indicates a preconceived design to kill.’ [Citation.] These factors are not the exclusive means, however, to establish premeditation and deliberation; for instance, ‘an execution-style killing may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite little or no evidence of planning and motive.’ [Citation.]” (*People v. Tafoya* (2007) 42 Cal.4th 147, 172.)

In the present case, a reasonable jury readily could have inferred defendant had a motive for killing Jamesha: to keep her quiet about his sexual attack on her. Because of the state of her body, the precise cause of death could not be determined. However, Dr.

Duong could not rule out asphyxiation as the cause, while Dr. Cohen opined that suffocation or strangulation was very possible. Either could take several minutes to cause death. From this evidence, jurors reasonably could have inferred defendant had time to consider the nature of his actions, and that he acted pursuant to a deliberate plan to kill. (See, e.g., *People v. Solomon* (2010) 49 Cal.4th 792, 815; *People v. Stitely* (2005) 35 Cal.4th 514, 544; *People v. Davis* (1995) 10 Cal.4th 463, 510.)

In light of the foregoing, the evidence was sufficient to sustain the jury's verdicts and special circumstance finding. Further, the trial court did not err by denying defendant's Penal Code section 1118.1 motion.

II

ADMISSION OF EVIDENCE OF UNCHARGED ACTS

Defendant mounts a multifaceted attack on the trial court's admission of evidence concerning his prior conduct with Jamesha and Angela S. He says the admission of the evidence, whether to show propensity, intent, or motive, was prejudicial error that deprived him of due process, equal protection, and a fair trial. We reject his claims.

A. Background

Prior to the first trial, defendant moved, in limine, for exclusion of evidence of other sex crimes. In his written motion, he contended the evidence to be adduced at trial would be insufficient to establish rape or attempted rape, and the court should not admit the uncharged acts unless and until sufficient evidence existed to prove an attempted rape occurred. The People, in contrast, moved in limine for admission, pursuant to Evidence Code¹⁵ sections 1101, subdivision (b) and 1108, of the Angela S. incident and concerning defendant's conduct toward Anita J.¹⁶ The People asserted the evidence was admissible,

¹⁵ Further statutory references are to the Evidence Code unless otherwise stated.

¹⁶ With respect to Anita, the People sought to present testimony that defendant allowed her and other teenagers to go to his residence to drink alcohol and smoke marijuana; defendant sometimes gave her hugs that lasted too long and made her feel

under section 1101, subdivision (b), to show defendant's intent and motive; the evidence was admissible, under section 1108, to show defendant's disposition to commit the charged offense; and the probative value of the prior acts was not substantially outweighed by potential prejudice so as to make the evidence inadmissible under section 352. After extensive argument, the trial court ruled that the evidence regarding Angela was admissible under section 1101, subdivision (b) as to intent, and was also admissible under section 1108. The court ruled the proffered evidence with respect to Anita was inadmissible, except that Anita could testify concerning the incident with Angela. The court found the evidence concerning the incident when defendant was babysitting Jamesha and her brothers to be probative to show intent under section 1101, subdivision (b), and that the probative value was not outweighed by prejudicial effect.

After the mistrial, both parties renewed their motions. The trial court adopted its previous rulings.

The testimony concerning the two incidents is summarized in the statement of facts, *ante*.

B. Analysis

Generally speaking, section 1101 "prohibits the admission of other-crimes evidence for the purpose of showing the defendant's bad character or criminal propensity." (*People v. Catlin* (2001) 26 Cal.4th 81, 145.) Section 1108 is an express exception to that rule. (§ 1101, subd. (a).)¹⁷ Subdivision (a) of section 1108 provides:

uncomfortable; and, on one occasion when she was wearing a skirt with shorts underneath, he made an apparent reference to her genital area.

¹⁷ Section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge,

“In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” For purposes of the statute, a sexual offense includes rape, as proscribed by Penal Code section 261; commission of a lewd or lascivious act, as proscribed by Penal Code section 288; and annoying or molesting a child under 18, as proscribed by Penal Code section 647.6; or an attempt to engage in any such conduct. (§ 1108, subd. (d)(1)(A), (F).) Section 1108 also applies where the defendant is accused of first degree felony murder with a crime specified in subdivision (d)(1) of the statute as the underlying felony. (*People v. Story* (2009) 45 Cal.4th 1282, 1294.)

Section 1108 represents a determination by the Legislature “that, in a sex offense prosecution, the need for evidence of prior uncharged sexual misconduct is particularly critical given the ‘serious and secretive nature of sex crimes and the often resulting credibility contest at trial’ [citation] By removing the restriction on character evidence in section 1101, section 1108 now ‘permit[s] the jury in sex offense ... cases to consider evidence of prior offenses *for any relevant purpose*’ [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352.” (*People v. Britt* (2002) 104 Cal.App.4th 500, 505.) Section 1108 thus “permits evidence of the defendant’s commission of ‘another sexual offense or offenses’ to establish the defendant’s *propensity* to commit sexual offenses” (*People v. Medina* (2003) 114 Cal.App.4th 897, 904), and it allows a jury to consider ““other sexual offenses as evidence of the defendant’s disposition to commit such crimes, and for its bearing on the

identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.”

probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.” [Citation.]” (*People v. Falsetta* (1999) 21 Cal.4th 903, 912.)

Defendant contends section 1108 violates due process on its face.¹⁸ The California Supreme Court has rejected this claim (*People v. Falsetta, supra*, 21 Cal.4th at pp. 915-918), and has consistently adhered to that holding (*People v. Loy* (2011) 52 Cal.4th 46, 60-61; *People v. Wilson* (2008) 44 Cal.4th 758, 797). We are bound by those opinions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)¹⁹

Defendant also contends section 1108 violates equal protection because it treats those accused of a sexual offense differently from all other criminal defendants. “The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. [Citation.]” (*In re Eric J.* (1979) 25 Cal.3d 522, 530, fn. & italics omitted.) Defendant makes no attempt to show those accused of sexual offenses are similarly situated with respect to all other criminal defendants. (Cf. *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1311; see generally *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199-1200.)

¹⁸ Defendant did not raise constitutionally based objections to the other-acts evidence in the trial court. Nevertheless, he may properly challenge section 1108’s constitutionality for the first time on appeal. (*People v. Letner and Tobin, supra*, 50 Cal.4th at p. 200.) He is also permitted to claim admission of the evidence, insofar as assertedly erroneous for the reasons presented to the trial court, had the additional legal consequence of violating the Constitution. (*People v. DePriest, supra*, 42 Cal.4th at p. 19, fn. 6.)

¹⁹ The Ninth Circuit Court of Appeals has upheld, against a due process challenge, a similar federal rule (*U.S. v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1024-1027 [upholding Fed. Rules Evid., rule 414, 28 U.S.C.]), while a lower federal court has concluded the California Supreme Court properly upheld section 1108 (*Rogers v. Giurbino* (S.D.Cal. 2007) 619 F.Supp.2d 1006, 1014-1015).

Assuming equal protection analysis is appropriate, however, section 1108 does not infringe on a defendant's constitutionally protected rights, and so, contrary to defendant's contention, only the rational relationship test, and not strict scrutiny, applies. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 184 (*Fitch*); accord, *Rogers v. Giurbino*, *supra*, 619 F.Supp.2d at p. 1016; cf. *People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1312.) Section 1108 "withstands this relaxed scrutiny. The Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant's commission of other sex offenses. This reasoning provides a rational basis for the law.... In order to adopt a constitutionally sound statute, the Legislature need not extend it to all cases to which it might apply. The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]" (*Fitch, supra*, 55 Cal.App.4th at pp. 184-185.)²⁰

Defendant further contends section 1108 is unconstitutional as applied to him. This is essentially a claim the trial court did not "sufficiently and properly evaluate[] the proffered evidence under section 352. [Citation.]" (*People v. Holford* (2012) 203 Cal.App.4th 155, 185; cf. *U.S. v. LeMay*, *supra*, 260 F.3d at p. 1026.) "[O]nly if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process." [Citation.]" (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.) Cases in which the admission of evidence will be said to have violated due process and rendered the trial fundamentally unfair are "rare and unusual occasions" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 232.)

²⁰ Although not expressly holding that section 1108 survives an equal protection challenge, the California Supreme Court quoted *Fitch* with approval on this point in *People v. Falsetta*, *supra*, 21 Cal.4th at page 918.

We find neither due process violation nor abuse of discretion, which is the standard by which we review a trial court’s rulings on relevance and admission of evidence under section 352. (*People v. Loy, supra*, 52 Cal.4th at p. 61; *People v. Harrison* (2005) 35 Cal.4th 208, 230.)²¹ “‘Relevant evidence’ means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (§ 210.) By pleading not guilty, defendant placed all elements of the murder, attempted rape, and special circumstance in issue at trial. (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.)

Section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” Under this statute, “the trial court enjoys broad discretion in assessing whether the probative value of particular

²¹ It is also the standard by which we review a trial court’s rulings on admission of evidence under sections 1101 and 1108. (*People v. Loy, supra*, 52 Cal.4th at p. 61; *People v. Harrison, supra*, 35 Cal.4th at p. 230.) Once the trial court found the Angela S. incident admissible under section 1108, it did not need to further analyze it under section 1101, or to rely on section 1101 to admit the evidence to show intent in addition to propensity. “‘In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible *without regard to the limitations of Evidence Code section 1101.*’ [Citation.] When section 1108 swept away the general prohibition on character evidence set forth in section 1101, it rendered moot the exceptions to that prohibition created by section 1101, subdivision (b).” (*People v. Britt, supra*, 104 Cal.App.4th at pp. 505-506.) Thus, leaving aside the section 352 analysis, whether the charged and uncharged acts are similar, and to what degree, “is no longer the yardstick for admission of uncharged sexual misconduct” under section 1108. (*Britt, supra*, at p. 506.) Because the factors pertinent to admission under section 1101, subdivision (b) inform, to a certain extent, a section 352 analysis, and defendant has subsumed his challenge to the admissibility of the other-acts evidence under sections 1101 and 1108 in his argument that section 352 and due process required that evidence’s exclusion, we examine the trial court’s rulings as made.

evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Stated another way, “discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]” (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

The California Supreme Court has summarized the principles of law applicable to admissibility of evidence under section 1101 as follows:

“Evidence Code section 1101, subdivision (a) generally prohibits the admission of evidence of a prior criminal act against a criminal defendant ‘when offered to prove his or her conduct on a specified occasion.’ Subdivision (b) of that section, however, provides that such evidence is admissible when relevant to prove some fact in issue, such as motive, intent, knowledge, identity, or the existence of a common design or plan.

“‘The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.’ [Citation.] Evidence may be excluded under Evidence Code section 352 if its probative value is ‘substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ [Citation.] ‘Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value.’ [Citation.]

“We have considered specific circumstances under which evidence of uncharged crimes may be admitted under subdivision (b) of Evidence Code section 1101. When the prosecution seeks to prove the defendant’s identity as the perpetrator of the charged offense with evidence he had committed uncharged offenses, the admissibility of evidence of the uncharged offenses turns on proof that the charged and uncharged offenses share sufficient distinctive common features to raise an inference of identity. A lesser degree of similarity is required to establish the existence

of a common plan or scheme and still less similarity is required to establish intent. [Citations.]” (*People v. Lindberg, supra*, 45 Cal.4th at pp. 22-23; see also, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

Here, the trial court admitted defendant’s uncharged prior conduct toward Angela and Jamesha to show intent. To be admissible for this purpose, “the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance. [Citation.]” (*People v. Yeoman* (2003) 31 Cal.4th 93, 121-122.) The trial court did not exceed the bounds of reason by concluding both incidents met this standard. Angela and Jamesha were around the same age (indeed, the prior incident involving Jamesha involved the same victim as the charged offenses); at some point during the course of the uncharged events involving Angela and the charged events involving Jamesha, some or all of the girl’s clothing was removed, whether by the girl herself in order to change or for some other reason; and, both of the uncharged events involved a bed, while the existence of defendant’s semen and Jamesha’s blood on the blanket gives rise to a reasonable inference a bed was involved in the charged events. Considering the similarities not in isolation, but rather as a whole, we conclude the trial court did not abuse its discretion by admitting defendant’s prior conduct on the issue of intent. (See, e.g., *People v. Jones* (2011) 51 Cal.4th 346, 370-371 [evidence of defendant’s participation in robbery of three men leaving store properly admitted in trial of charged home invasion and murder; though crimes were not particularly similar, “they contained one crucial point of similarity — the intent to steal from victims whom defendant selected”].)

The trial court also admitted evidence of the incident involving Angela pursuant to section 1108. In sex crimes prosecutions, evidence a defendant committed another sex offense is relevant to the issue of his disposition or propensity to commit such offenses. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012 (*Reliford*).) Hence, the incident involving Angela had probative value.

Concluding the evidence was relevant does not end our analysis. “Evidence of uncharged offenses ‘is so prejudicial that its admission requires extremely careful analysis. [Citations.]’ [Citations.]” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) The “prejudice” referred to in section 352 is not the effect relevant albeit damaging evidence may have on a party’s case, but rather “characteriz[es] evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]” (*People v. Scheid* (1997) 16 Cal.4th 1, 19.) As a result, evidence should be excluded as unduly prejudicial “when it is of such nature as to inflame the emotions of the jury, motivating [jurors] to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.’ [Citation.]” (*People v. Escudero* (2010) 183 Cal.App.4th 302, 310.)

“The factors to be considered by a trial court in conducting the Evidence Code section 352 weighing process depend upon ‘the unique facts and issues of each case...’ [Citation.]” (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116.) Where subdivision (b) of section 1101 is concerned, the pertinent factors include whether the evidence “(a) ‘tends logically, naturally and by reasonable inference’ to prove the issue upon which it is offered; (b) is offered upon an issue which will ultimately prove to be material to the People’s case; and (c) is not merely cumulative with respect to other evidence which the People may use to prove the same issue.’ [Citation.]” (*People v. Guerrero* (1976) 16 Cal.3d 719, 724; see also *People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-406.) “In exercising [section 352] discretion as to a sexual offense, ‘trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial

impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' [Citation.]" (*People v. Loy, supra*, 52 Cal.4th at p. 61; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 282; *People v. Harris* (1998) 60 Cal.App.4th 727, 737.)

Here, the record as a whole demonstrates the trial court was well aware of, and performed, its duty to undertake the requisite balancing process. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1187-1188; *People v. Malone* (1988) 47 Cal.3d 1, 21-22.) Its rulings did not constitute an abuse of discretion. Acts showing defendant had a sexual interest in female teenage acquaintances — and Jamesha in particular — were relevant to issues in dispute at his trial, particularly his guilt of the attempted rape charge and the truth of the special circumstance allegation. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 824.) The uncharged acts were not particularly inflammatory compared to the charged offenses; moreover, the evidence was presented quickly and without irrelevant detail, and the prior acts were not remote. (See *People v. Loy, supra*, 52 Cal.4th at p. 62; *People v. Wilson, supra*, 44 Cal.4th at pp. 797-798.) Although defendant was never punished for the uncharged acts, a fact that can heighten prejudicial effect (see *People v. Ewoldt, supra*, 7 Cal.4th at p. 405), this did not render the evidence substantially more prejudicial than probative. Significantly, the evidence “did not encourage the jury to prejudge defendant's case based upon extraneous or irrelevant considerations. [Citation.]" (*People v. Rogers, supra*, 39 Cal.4th at p. 853.)

The trial court acted well within its discretion in admitting the challenged evidence. Since the evidence was admitted for a permissible purpose and its exclusion was not compelled by section 352, defendant's due process rights have not been violated.

III

JURY INSTRUCTIONS

Defendant raises several claims of error with respect to the instructions given his jury. To the extent we find error occurred, we conclude it was harmless.

A. Uncharged Acts

1. CALCRIM No. 375

Pursuant to CALCRIM No. 375, the trial court instructed defendant's jury:

“The People presented evidence of other behavior by the defendant that was not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses.

“Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt.

“A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

“If the People have not met this burden, you must disregard this evidence entirely.

“If you decide the defendant committed the uncharged offenses or act, you may, but are not required to, consider that evidence *for the limited purpose of deciding whether or not the defendant was the person that committed the offenses alleged in this case* or the defendant acted with the intent to rape in this case, or the defendant had a motive to commit the offenses alleged in this case, *or the defendant had a plan or scheme to commit the offenses alleged in this case.*

“In evaluating the evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses.

“Do not consider this evidence for any other purpose.

“Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

“If you conclude the defendant committed the uncharged offenses or acts, that conclusion is only one factor you consider along with all the other

evidence. It is not sufficient by itself to prove the defendant is guilty of rape or attempted rape or that the murder was committed during a rape or attempted rape that has been proved.

“The People must still prove each charge and allegation beyond a reasonable doubt.” (Italics added.)

Defendant now says inclusion in the instruction of identity and common scheme or plan constituted “acute” (full capitalization and boldface omitted) error that denied him due process and a fair trial.

It is true the prior bad acts evidence was not admitted to prove identity or the existence of a common scheme or plan. The similarities between the charged and uncharged acts were insufficiently similar to permit admission of the uncharged acts, under section 1101, subdivision (b), on the issue of identity (see *People v. Barnwell* (2007) 41 Cal.4th 1038, 1056), and arguably were insufficiently similar to show common scheme or plan (see *People v. Kipp* (1998) 18 Cal.4th 349, 371).

We question, however, whether defendant forfeited his claim of error by failing to object to, or request a modification of, the challenged portion of the instruction in the trial court. Generally speaking, a trial court has no sua sponte duty to give a limiting instruction (see *People v. Jones* (2003) 30 Cal.4th 1084, 1116) or to revise or clarify an instruction that accurately states the law (*People v. Lee* (2011) 51 Cal.4th 620, 638). On the other hand, it has been held that, if the trial court does give a limiting instruction on uncharged acts, it must do so accurately, and should limit the issues upon which such evidence may be considered by striking from the instruction the issues upon which the evidence is not admissible. (*People v. Key* (1984) 153 Cal.App.3d 888, 899; *People v. Swearington* (1977) 71 Cal.App.3d 935, 949.)

In any event, any error clearly was harmless. Although circumstantial, the evidence that defendant was the perpetrator was very strong. The prosecutor did not suggest to the jury that the evidence of uncharged acts could be used to show identity. Moreover, the subject of identity was not wholly divorced from the purposes for which

the evidence was relevant. The evidence was relevant to show motive, an intermediate fact which may be probative of ultimate issues such as intent, premeditation, or the commission of the criminal act itself, and which may be established by evidence of prior *dissimilar* acts. (*People v. Clark* (1992) 3 Cal.4th 41, 127; *People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23, disapproved on another ground in *People v. Rowland* (1992) 4 Cal.4th 238, 260; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017-1018.) Although the prosecutor did argue to the jury — without objection — that defendant’s prior acts could be used to determine whether defendant had a plan or scheme, her argument on that point was brief and addressed by defendant in his own argument. Moreover, as both parties argued the evidence, scheme or plan was closely related to propensity, intent, and motive, all of which the other-acts evidence was relevant to show. In addition, the jury was instructed that it could *not* use the uncharged acts to conclude defendant had a bad character or was disposed to commit crime, and that the evidence was insufficient, by itself, to establish defendant’s guilt.

In light of the foregoing, any error in including identity and common scheme or plan in CALCRIM No. 375 did not prejudice defendant, because it is not reasonably probable he would have obtained a more favorable result in the absence thereof. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see *People v. Foster* (2010) 50 Cal.4th 1301, 1332-1333 [applying *Watson* standard to erroneous instruction that jury could consider evidence of defendant’s prior crimes with respect to issue of identity of perpetrator, and observing that, because evidence was admissible regardless of whether it was relevant to issue of identity, jury would have heard it even if trial court had not admitted it to establish defendant’s identity as perpetrator].)

Nor did the instruction result in denial of due process. Any error in the instruction’s reference to the evidence as relevant to prove defendant’s identity as the perpetrator, or to demonstrate a common scheme or plan, “did not ‘infect[] the entire trial.’ [Citation.]” (*People v. Foster, supra*, 50 Cal.4th at p. 1335, quoting *Estelle v.*

McGuire (1991) 502 U.S. 62, 72.) Moreover, because identity and scheme or plan were rationally related to the purposes for which the other-acts evidence was relevant, CALCRIM No. 375 as given did not state permissible inferences of identity and common scheme or plan that were irrational, arbitrary, and unfair under the facts of the case, nor did the instruction unconstitutionally lower the prosecution's burden of proving every element of the charged offenses and special circumstance allegation beyond a reasonable doubt. (See *Yates v. Evatt* (1991) 500 U.S. 391, 402, fn. 7, disapproved on another ground in *Estelle v. McGuire, supra*, 502 U.S. at p. 72, fn. 4; *Francis v. Franklin* (1985) 471 U.S. 307, 314-315; *People v. Moore* (2011) 51 Cal.4th 1104, 1131-1133; *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1037-1039.)

2. CALCRIM No. 1191

With respect to the evidence admitted pursuant to section 1108, the trial court instructed the jury in the language of CALCRIM No. 1191, to wit:

“The People presented evidence that the defendant committed the crime of lewd or lascivious act with a child 14 or 15 years old. That was not charged in this case.

“This crime is defined for you in these instructions.

“You may consider this evidence only if the People have proved ... by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses.

“Proof by a preponderance of the evidence is a different burden of proof than a proof beyond a reasonable doubt.

“A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

“If the People have not met this burden of proof, you must disregard this evidence entirely.

“If you decide the defendant committed the uncharged offense, you may, but are not required to, conclude from the evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that

decision also conclude that the defendant was likely to commit rape or attempted rape as charged here.

“If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor you consider along with all the other evidence. It is not sufficient by itself to prove the defendant guilty of rape or attempted rape in this case.

“The People still must prove each charge and allegation beyond a reasonable doubt.

“Do not consider this evidence for any other purpose.” (Italics added.)

At trial, defendant objected to the instruction’s language requiring that the uncharged acts be proved by a preponderance of the evidence, and he unsuccessfully requested that language requiring proof beyond a reasonable doubt be inserted instead. He now contends CALCRIM No. 1191 — particularly its preponderance-of-the-evidence standard — conflicted with CALCRIM No. 224, which told jurors in pertinent part:

“Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced the People have proved each fact essential to that conclusion beyond a reasonable doubt.

“Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence ... is that the defendant is guilty.” (Italics added.)

This conflict, defendant argues, resulted in an unconstitutional lowering of the prosecution’s burden of proof, and denied defendant his rights to due process, a fair trial, and a jury determination beyond a reasonable doubt. He says this is so “because the preponderance standard for inferring ultimate guilt in [CALCRIM No. 1191] conflicts with the burden of proof specified in CALCRIM No. 224, and, ... permits an ultimate finding of guilt based upon prior conduct proven only by a preponderance of the evidence. The instruction ... fails to distinguish the lesser standard of proof to *establish* the prior conduct from the greater standard of proof applicable to the ultimate propensity

and guilt inference. Further, the instruction ... suggests the prior conduct is sufficient to support conviction if jurors find the conduct to be true beyond a reasonable doubt.”

Defendant says “lawyers may grasp the distinctions implicitly drawn in these instructions (between essential and non-essential circumstantial inferences supporting guilt and establishing prior conduct and inferring guilt based on it); but jurors would not necessarily have understood this.”

“The Due Process Clause requires the government to prove a criminal defendant’s guilt beyond a reasonable doubt, and trial courts must avoid [instructing in such a way] as to lead the jury to convict on a lesser showing than due process requires.” (*Victor v. Nebraska* (1994) 511 U.S. 1, 22.) “The constitutional question ... is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [beyond-a-reasonable-doubt] standard.” (*Id.* at p. 6.) Thus, “[a] defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]’ [Citation.]” “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” [Citations.]’ [Citation.]” (*People v. Solomon, supra*, 49 Cal.4th at p. 822; accord, *Estelle v. McGuire, supra*, 502 U.S. at p. 72.) Moreover, in assessing whether jury instructions were erroneous, a reviewing court must ““assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.’ [Citation.]” [Citations.]” (*People v. Guerra, supra*, 37 Cal.4th at pp. 1148-1149.)

In *Reliford, supra*, 29 Cal.4th 1007, the California Supreme Court rejected claims that the 1999 version of CALJIC No. 2.50.01 (1) permitted jurors, having found an uncharged sex offense true by a preponderance of the evidence, to rely on that alone to convict the defendant of the charged offenses (*Reliford, supra*, at p. 1013); (2) implied that prior sex offenses proved beyond a reasonable doubt were sufficient to prove the

present offense beyond a reasonable doubt (*id.* at p. 1015); and (3) could be interpreted by jurors as permitting conviction of the charged offenses under the preponderance-of-the-evidence standard (*id.* at pp. 1015-1016).²² With respect to the latter argument, the high court stated:

“We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty ‘beyond a reasonable doubt.’ [Citations.] Any other reading would have rendered the reference to reasonable doubt a nullity. In addition, the jury was told that circumstantial evidence could support a finding of guilt of the charged offenses only if the proved circumstances could not be reconciled with any other rational conclusion [citation] — which is merely another way of restating the reasonable-doubt standard. [Citation.] *The jury thus would have understood that a conviction that relied on inferences to be drawn from defendant’s prior offense would have to be proved beyond a reasonable doubt.*”

“We likewise reject the ... assertion that the instruction, even if correct, is too ‘complicated’ for jurors to apply. This is not the first time jurors have been asked to apply a different standard of proof to a predicate fact or finding in a criminal trial. [Citations.] As we do in each of those circumstances, *we will presume here that jurors can grasp their duty — as*

²² The instruction given in *Reliford* told jurors, in pertinent part: “‘Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in the case. [¶] ... [¶] If you find that the defendant committed a prior sexual offense ..., you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense ..., that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide. [¶] You must not consider this evidence for any other purpose.’” (*Reliford, supra*, 29 Cal.4th at pp. 1011-1012.)

stated in the instructions — to apply the preponderance-of-the-evidence standard to the preliminary fact identified in the instruction and to apply the reasonable-doubt standard for all other determinations.” (Reliford, supra, 29 Cal.4th at p. 1016, italics added.)

Defendant acknowledges *Reliford*, but says it did not address the claims he now raises. When *Reliford* is considered in conjunction with *People v. Virgil* (2011) 51 Cal.4th 1210 (*Virgil*), it is apparent the California Supreme Court has rejected defendant’s contentions.

In *Virgil*, the trial court instructed, pursuant to CALJIC No. 2.50 (the counterpart of CALCRIM No. 375), that evidence of the defendant’s uncharged misconduct could be considered only for the purpose of determining if it tended to show the identity of the person who committed the charged offense. The court also instructed that the uncharged crimes had to be proved by a preponderance of the evidence, and that the jury could not consider such evidence for any purpose unless satisfied the defendant committed the other crimes. The court also defined preponderance of the evidence. (*Virgil, supra*, at p. 1259.)

On appeal, the defendant claimed the instructions were flawed because they failed to convey that the jury had to find the defendant’s guilt of the uncharged crimes beyond a reasonable doubt before those crimes could be used to support an inference of his identity as the perpetrator of the charged crimes. The high court rejected the premise of the defendant’s claim based on a long line of cases holding that, during the guilt phase of a trial, evidence of other crimes may be proved by a preponderance of the evidence. (*Virgil, supra*, 51 Cal.4th at p. 1259.) The court then stated:

“Despite our long adherence to this rule, defendant urges us to reconsider the standard of proof set forth in the uncharged conduct instructions because, he asserts, this court ‘has not adequately addressed the conflict between the circumstantial evidence instruction [CALJIC No. 2.01],’ which requires proof beyond a reasonable doubt of each essential fact in the chain of circumstances necessary to establish guilt, and CALJIC No. 2.50, which permits consideration of uncharged crimes if they

are proven by only a preponderance of the evidence.^[23] We have explained before, however, that these different standards of proof are reconciled by the different purposes for which the evidence is used. When evidence of uncharged misconduct is admitted for the purpose of establishing identity or intent, we have explained that the crimes are mere ‘evidentiary facts.’ [Citation.] The jury cannot consider them at all unless they find them proven by a preponderance of the evidence. ‘If the jury finds by a preponderance of the evidence that defendant committed the other crimes, the evidence is clearly relevant and may therefore be considered. [Citations.]’ [Citation.] If the jury finds the facts sufficiently proven for consideration, it must still decide whether the facts are sufficient, taken with all the other evidence, to prove the defendant’s guilt beyond a reasonable doubt. [Citations.]” (*Virgil, supra*, at pp. 1259-1260, 1st brackets in original.)

Defendant says CALCRIM No. 1191 “needs to explain that circumstantial evidence like prior offenses which one or more jurors decide is *essential* for overall guilt ... must be proved beyond a reasonable doubt.” In our view, the first paragraph of CALCRIM No. 224 (“Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt”) says just that. The fact this requirement is contained in CALCRIM No. 224, but not in CALCRIM No. 1191, is of no significance. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

²³ CALJIC No. 2.01 is the counterpart of CALCRIM No. 224. The relevant portion of CALJIC No. 2.01 has long read: “However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant’s guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.”

“We are not [as] skeptical [as defendant] of the jurors’ abilities [to understand the distinctions drawn by CALCRIM Nos. 224 and 1191]. It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court’s instructions. [Citation.] The record reflects no confusion on the part of the jury, or requests for further guidance on these points.” (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) Defendant’s claim of error fails.

B. Reasonable Doubt

Pursuant to CALCRIM No. 220, the trial court instructed the jury, in pertinent part:

“Proof beyond a reasonable doubt is *proof that leaves you with an abiding conviction that the charge is true.* [¶] ... [¶]

“In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially *compare and consider all the evidence that was received throughout the entire trial.*

“Unless the evidence proved the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.” (Italics added.)

Pursuant to CALCRIM No. 222, the jury further was told:

“*You must decide what the facts are in this case.*

“*You must use only the evidence that was presented in this courtroom or during a jury view.*

“Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence and anything else that I told you to consider as evidence.” (Italics added.)

Defendant now complains these instructions denied him due process, a fair trial, and his right to a jury determination on all issues beyond a reasonable doubt, because (1) jurors were told, in CALCRIM No. 222 and other instructions, that they had to decide the facts based solely on the evidence presented in court, whereas reasonable doubt may be based on the *absence* of evidence, and (2) the “abiding conviction” language is

“archaic and incomplete” and conveys “an insufficient standard of proof akin to clear and convincing evidence and going only to jurors’ duration of belief in guilt, not their degree of certainty.” His arguments lack merit.²⁴

Both the United States Supreme Court and the California Supreme Court have rejected challenges to the constitutionality of CALJIC No. 2.90, which is worded similarly to CALCRIM No. 220.²⁵ (See, e.g., *Victor v. Nebraska*, *supra*, 511 U.S. at pp. 16-17; *People v. Farley* (2009) 46 Cal.4th 1053, 1122.) In *Victor v. Nebraska*, *supra*, 511 U.S. at pages 14-15, the United States Supreme Court stated: “An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, *correctly states the government’s burden of proof*. [Citations.]” (Italics added.) Courts universally have rejected challenges to CALCRIM No. 220’s use of the phrase “abiding conviction,” including that it conflates the separate concepts of duration and weight. (E.g., *People v. Zepeda* (2008) 167 Cal.App.4th 25, 28-32; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1119; *People v. Stone*, *supra*, 160 Cal.App.4th at pp. 332-334; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1238-1239; cf. *People v. Freeman* (1994) 8 Cal.4th 450, 504 & fn. 9 [suggesting modification of CALJIC No. 2.90 to refer to “abiding conviction” without references to “moral evidence” and “moral certainty”].) Defendant provides no reason why we should not follow these cases.

²⁴ Because the issues raised implicate defendant’s substantial rights, he did not forfeit his claims of error by failing to object to the instructions in the trial court. (Pen. Code, § 1259; see *People v. Taylor* (2010) 48 Cal.4th 574, 630, fn. 13; *People v. Holmes* (2007) 153 Cal.App.4th 539, 544; but see *People v. Stone* (2008) 160 Cal.App.4th 323, 331.)

²⁵ CALJIC No. 2.90 defines reasonable doubt, in pertinent part, as “that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.” Prior to 1994, the concluding phrase read, “an abiding conviction to a moral certainty of the truth of the charge.” (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 221, fn. 13.)

Similarly, we have rejected the argument that CALCRIM Nos. 220 and 222 eliminate the doctrine of reasonable doubt due to lack of evidence (*People v. Zavala* (2008) 168 Cal.App.4th 772, 781; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093; *People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154, 1156-1157), as have various other Courts of Appeal (e.g., *People v. Garelick, supra*, 161 Cal.App.4th at pp. 1117-1119; *People v. Campos, supra*, 156 Cal.App.4th at pp. 1237-1238; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1269; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510; cf. *People v. Taylor, supra*, 48 Cal.4th at p. 631 & fn. 15 [rejecting claim CALJIC No. 2.90 failed to inform jury reasonable doubt could be based on lack of evidence].) Defendant says he disagrees with these opinions, but does not cite a single case agreeing with his disagreement. We see no reason to revisit the issue.

C. Nonincidental Felony Requirement

Pursuant to CALCRIM No. 730, defendant's jury was instructed:

“The defendant is charged with the special circumstance of murder committed while engaged in the commission of rape, in violation of Penal Code Section 190.2, sub (a), sub 17.

“To prove that this special circumstance is true, the People must prove that, one, the defendant committed or attempted to commit rape; two, the defendant intended to commit rape; three, the defendant did an act that caused the death of another person; and four, the act causing the death and the rape or attempted rape were part of one continuous transaction; and five, there was a logical connection between the act causing the death and the rape or attempted rape.

“The connection between the fatal act and the rape or attempted rape must involve more than just their occurrence at the same time and place. [¶] ... [¶]

“The defendant must have intended to commit the felonies of rape or attempted rape before or at any time of the act causing the death.

“In addition, in order for this special circumstance to be true, *the People must prove that defendant intended to commit rape or attempted rape independent of the killing.* [¶] ... [¶]

“If you find the defendant only intended to commit murder, and the commission of rape or attempted rape was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.” (Italics added.)

Defendant complains that the italicized portion of the instruction is inadequate to convey the requirement that, in order for a felony-murder special circumstance to be true, the underlying felony may not be incidental to the killing, but rather the killing must be committed to advance an independent felonious purpose. Defendant prefers optional paragraph number 2 of CALJIC No. 8.81.17, which requires proof that “[2. The murder was committed in order to carry out or advance the commission of the crime of ___ or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [attempted] ___ was merely incidental to the commission of the murder.]” He says the final two sentences of CALCRIM No. 730 “convey a bare independent intent element, which applies to any felony-murder, instead of the objective non-incidental element that is the crux of the special circumstance.” Under his interpretation, the conjunctive “and” in the final sentence “transforms the non-incidental element into an intent element (similar to felony murder) which it was never intended to be and which transforms any felony-murder into special circumstance murder. Concurrent intent to kill and to commit an *independent* felony may support the special circumstance. The problem is that the instruction eliminates the independent (non-incidental) felony requirement as a separate element by stating it solely in terms of intent and then employing the final conjunctive usage.”

At trial, defendant did not object to, or seek clarification or modification of, the instructional language he now challenges. Accordingly, we question whether his claim has been preserved for appeal. (See *People v. Valdez* (2004) 32 Cal.4th 73, 113.) In any event, his claim fails on the merits.

A murder committed during an attempted rape can form the basis for both a felony murder conviction and a rape-murder special circumstance finding. (*People v. Guerra*,

supra, 37 Cal.4th at p. 1133.) “For a felony-murder special circumstance to apply, the felony cannot be merely ‘incidental or ancillary to the murder’; it must demonstrate ‘an independent felonious purpose,’ not an intent ‘simply to kill.’ [Citations.]” (*People v. Davis* (2009) 46 Cal.4th 539, 609.)

This requirement arose from the California Supreme Court’s opinion in *People v. Green* (1980) 27 Cal.3d 1 (*Green*).²⁶ (*People v. Stanley* (2006) 39 Cal.4th 913, 956.) In *Green*, the defendant made his wife remove her clothes, then, after fatally shooting her, directed his companion to remove her wedding rings. (*Green, supra*, 27 Cal.3d at pp. 15-16.) The California Supreme Court affirmed the defendant’s conviction of premeditated murder, but reversed the jury’s finding of a robbery-murder special circumstance, which was based on the defendant’s taking of the victim’s clothes, purse, and rings in order to thwart identification of the body. (*Id.* at p. 55.) While finding the evidence sufficient to support the defendant’s conviction for robbery (*id.* at pp. 56-59), the high court found it insufficient to establish, as required by statute for a felony-murder special circumstance, that the murder was committed “‘during the commission’” of the underlying felony (*id.* at p. 59). Instead, the court found, the case involved “the exact opposite, a robbery in the commission of a murder.” (*Id.* at p. 60.) The court reasoned that the Legislature, in enacting the death penalty statute, “must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not” (*id.* at p. 61, fn. omitted), and that the purpose of the special circumstance was to single out those “defendants who killed in cold blood in order to advance an independent felonious purpose” (*ibid.*). It found that “[t]he Legislature’s goal is not achieved ... when the defendant’s intent is not to steal but to kill and the robbery is merely incidental to the murder ... because its sole object is to

²⁶ *Green* was overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239 and *People v. Hall* (1986) 41 Cal.3d 826, 834, footnote 3.

facilitate or conceal the primary crime.” (*Ibid.*) The court concluded that when, “in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other [statutorily enumerated] felonies ... such a crime is not a murder committed ‘during the commission’ of” a felony within the meaning of the special circumstance statute. (*Id.* at pp. 61-62.)

As the California Supreme Court has summarized the rule, “to prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder.” [Citation.]” (*People v. Horning, supra*, 34 Cal.4th at p. 907.) “[W]hen the defendant has an independent purpose for the commission of the felony, and it is not simply incidental to the intended murder, *Green* is inapplicable.” (*People v. Clark* (1990) 50 Cal.3d 583, 608.) “The ‘independent felonious purpose’ rule ... is a mechanism for ensuring that a felony-murder special-circumstance finding is based upon proof that the defendant intended to commit the underlying felony separately from forming an intent to kill the victim; that is, the felony was not merely an afterthought to the murder” (*People v. Rundle, supra*, 43 Cal.4th at p. 156.) “[T]he focus is on the relationship between the underlying felony and the killing” (*People v. Hernandez, supra*, 47 Cal.3d at p. 348.) “For those who kill, however, we need not discern their various mental states in too fine a fashion; a ‘concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance.’ [Citation.]” (*People v. Abilez* (2007) 41 Cal.4th 472, 511.) These principles apply even where the killing may have been premeditated (*People v. Prince* (2007) 40 Cal.4th 1179, 1262), and although commission of the felony was not necessarily the killer’s primary motivation (see *People v. Guerra, supra*, 37 Cal.4th at pp. 1133-1134).

“*Green* established one requirement, not two.” (*People v. Horning, supra*, 34 Cal.4th at p. 907.) Thus, “there is no requirement that the prosecution prove an

additional or different element that the killing be committed to ‘advance’ the felony. [Citation.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 760-761, fn. omitted.)

Significantly, the California Supreme Court has “rejected the assertion that [the portion of the instruction in issue] states an element of the special circumstance that must be presented to the jury for determination, regardless of whether the evidence warrants such an instruction. [Citations.]” (*People v. Taylor, supra*, 48 Cal.4th at p. 629; accord, *People v. Valdez, supra*, 32 Cal.4th at pp. 113-114.) “Thus, a trial court has no duty to instruct on the second paragraph of CALJIC No. 8.81.17 [or, by parity of reasoning, the final portion of CALCRIM No. 730] *unless the evidence supports an inference that the defendant might have intended to murder the victim without having had an independent intent to commit the specified felony.* [Citation.]” (*People v. D’Arcy* (2010) 48 Cal.4th 257, 297, italics added; see also *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 908 [looking to evidence and parties’ theories of the case in determining defendant entitled to *Green* instruction].)

Without pointing to any specific evidence, defendant says, “On these clouded facts the court here rightly instructed on the point.” To the contrary, we find absolutely *no* evidence that would support an inference defendant might have intended to murder Jamesha without having had an independent intent to rape her. (See *People v. D’Arcy, supra*, 48 Cal.4th at p. 297.)²⁷ “We may *speculate* about any number of scenarios that may have occurred A reasonable inference, however, ‘may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work....’ [Citations.]” (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5, 545, fn. 6.)

²⁷ That the Attorney General argues CALCRIM No. 730’s validity rather than disputing whether the trial court had a duty to instruct on the nonincidental felony requirement, does not preclude us from finding no such duty.

Based on the lack of evidence at trial supporting the giving of the challenged portion of CALCRIM No. 730, that portion of the instruction was not required. (See *People v. Navarette* (2003) 30 Cal.4th 458, 505.) Since it properly could have been omitted, defendant suffered no prejudice from any purported error in that portion of the instruction. (*People v. Monterroso* (2004) 34 Cal.4th 743, 767; see also *People v. Harden* (2003) 110 Cal.App.4th 848, 866-867.)²⁸

IV

SENTENCING ISSUES

A. Constitutionality of Application of Felony-Murder Special Circumstance

Defendant contends the felony-murder special circumstance was applied in an arbitrary and vague manner, in violation of due process, equal protection, and the Eighth Amendment to the United States Constitution. He predicates his claim on the felony-murder special circumstance's purported failure to explain or narrow eligibility for death or life in prison without the possibility of parole (LWOP), versus felony murder, in any rational way. He further says capital defendants receive some narrowing by way of aggravating factors and the penalty phase of trial, while LWOP defendants do not. In essence, he complains that since he was convicted as the actual killer, his LWOP term was based on a dual use of the same facts that supported mere felony murder with its term of 25 years to life in prison.²⁹

²⁸ Were we to pass upon the correctness of the instruction, we would conclude CALCRIM No. 730 adequately conveys the nonincidental felony requirement.

²⁹ Citing *People v. Partida* (2005) 37 Cal.4th 428, 437-438, the Attorney General says defendant forfeited his claim by failing to raise it below. *Partida* addressed the issue of when a due process argument may be raised on appeal following a trial court's ruling to admit or exclude evidence, and is thus distinguishable. The argument defendant makes here presents a pure question of law and may therefore be raised for the first time on appeal. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

“[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State’s responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates ‘standardless [sentencing] discretion.’ [Citations.] It must channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428, fns. omitted.) “To avoid [the constitutional flaw of failing adequately to channel sentencing decisions so that the result is a pattern of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” (*Zant v. Stephens* (1983) 462 U.S. 862, 877, fn. omitted.)

There is no doubt the felony-murder special circumstance is similar to felony murder. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1088, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) However, “the fact that the aggravating circumstance duplicated one of the elements of the crime does not make [the resulting] sentence constitutionally infirm.” (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 246.) In California, the felony-murder special circumstance, unlike felony murder, requires proof the defendant committed the act resulting in death in order to advance an independent felonious purpose. (*Berryman, supra*, at p. 1088.) As the Ninth Circuit Court of Appeals has recognized, California’s “felony-murder rule broadens criminal liability, imposing a kind of vicarious liability for murders that occur during the commission of a felony.... The felony-murder special circumstance statute, by contrast, narrows criminal liability, allowing capital punishment only for a certain restricted class of murders. Under the felony-murder special circumstance statute, as defined in *Green*, a

defendant is not death-eligible for ordinary felony murder.” (*Clark v. Brown, supra*, 450 F.3d at p. 914.)

The California Supreme Court has repeatedly rejected claims that California’s death penalty scheme in general — of which LWOP is a part — is unconstitutional, and that the felony-murder special circumstances in particular do not adequately narrow the pool of persons eligible for the death penalty. (See, e.g., *People v. Enraca* (2012) 53 Cal.4th 735, 769; *People v. Eubanks* (2011) 53 Cal.4th 110, 153; *People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Pollock* (2004) 32 Cal.4th 1153, 1195-1196 & cases cited; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Majors* (1998) 18 Cal.4th 385, 432; *People v. Marshall* (1990) 50 Cal.3d 907, 945-946.) The state high court has also rejected challenges based on equal protection, vagueness, and overbreadth. (See, e.g., *People v. Booker* (2011) 51 Cal.4th 141, 195; *People v. Eubanks, supra*, 53 Cal.4th at p. 153; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Koontz, supra*, 27 Cal.4th at pp. 1094-1095; *People v. Kraft, supra*, 23 Cal.4th at p. 1078; *People v. Marshall, supra*, 50 Cal.3d at pp. 945-946.) None of the court’s analyses distinguish between, or depend on, the fact there is a penalty phase of trial, with the introduction of aggravating and mitigating factors, if the death penalty is sought. Indeed, the court has said, “There is no constitutional infirmity in permitting the use of the same facts to sustain a first degree felony-murder conviction and a felony-murder special-circumstance finding at the guilt phase, and to establish a factor in aggravation under [Penal Code] section 190.3, factor (a), at the penalty phase. [Citations.]” (*People v. Lewis* (2001) 25 Cal.4th 610, 676.) In short, the California Supreme Court has rejected defendant’s claims, and we are bound to follow its holdings. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

B. The Prior Conviction

Defendant contends he was wrongly found to have previously committed a serious felony under the Three Strikes law. He says the trial court erred by concluding his prior conviction constituted a strike, and in terms of what issues it submitted to the jury. His claims lack merit.³⁰

A. Background

The amended information alleged defendant was convicted, on or about November 1, 1990, in Los Angeles County Superior Court, of violating Penal Code section 245, subdivision (a)(1). The offense was further alleged to constitute a strike within the meaning of Penal Code sections 667, subdivisions (c)-(j) and 1170.12, subdivisions (a)-(e).

During the bifurcated trial on the issue, defense counsel objected to the admission of certain evidence as irrelevant to the issue whether defendant suffered a prior serious felony conviction, i.e., whether the prior conviction constituted a strike. Defendant took the position he was entitled to have a jury trial on each fact that could increase penalty, with the key fact being whether he pled to a strike prior or a nonstrike prior. The prosecutor countered that the only issue for the jury was whether defendant was the person who suffered the 1990 conviction, and whether the prior conviction was a strike constituted a question of law for the court, not the jury. The trial court agreed with the prosecutor, and ruled that the question before the jury would only be whether defendant suffered the prior conviction. Accordingly, it instructed jurors to decide whether the evidence proved defendant was convicted of the alleged crime, and refused a requested instruction that would have told jurors the People must prove beyond a reasonable doubt

³⁰ Resolution of these issues has no practical effect on defendant's sentence: Although the trial court doubled the sentence imposed on count 2 due to defendant's prior strike conviction, it stayed that sentence pursuant to Penal Code section 654.

that the prior conviction was a serious and/or violent felony within the meaning of Penal Code sections 667, subdivisions (c)-(j) and/or 1170.12, subdivisions (a)-(e).

After the jury returned a true finding on the allegation, the parties filed written briefs concerning whether the evidence was sufficient to establish the prior conviction constituted a strike. After argument, the court found defendant pled to assault with a deadly weapon; accordingly, the prior conviction constituted a strike.

B. Analysis

“The Three Strikes law provides for enhanced punishment for any person convicted of a serious felony who previously has been convicted of a serious felony. [Citations.]” (*People v. Houck* (1998) 66 Cal.App.4th 350, 354.) “[S]erious felony” includes “any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice” (Pen. Code, § 1192.7, subd. (c)(8)) and “assault with a deadly weapon, ... in violation of [Penal Code] Section 245” (*id.*, subd. (c)(31)).

At all times pertinent to this appeal, Penal Code section 245, subdivision (a)(1) has proscribed “assault ... with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury”³¹ Assault with a deadly weapon is a serious felony. Assault by means of force likely to produce great bodily injury (the “GBI prong”) is not, absent the additional element of personal infliction of great bodily injury. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.)

As the California Supreme Court has summarized the law,

“The People must prove each element of an alleged sentence enhancement beyond a reasonable doubt. [Citation.] Where, as here, the mere fact that a prior conviction occurred under a specified statute does not

³¹ Effective January 1, 2012, subdivision (a)(1) of Penal Code section 245 proscribes assault with a deadly weapon or instrument other than a firearm, while subdivision (a)(4) of the statute proscribes assault by any means of force likely to produce great bodily injury. All references to Penal Code section 245, subdivision (a)(1) are to the statute as it existed before this amendment.

prove the serious felony allegation, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. [Citations.]

“A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison, including the abstract of judgment describing the prior offense. [Citations.]

“‘[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction....’ [Citations.] ‘[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold requirements of admissibility. [Citation.] Some evidence must rebut this presumption before the authenticity, accuracy, or sufficiency of the prior conviction records can be called into question.’ [Citation.]

“Thus, if the prosecutor presents, by such records, prima facie evidence of a prior conviction that satisfies the elements of the recidivist enhancement at issue, and if there is no contrary evidence, the fact finder, utilizing the official duty presumption, may determine that a qualifying conviction occurred. [Citations.]

“However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People have failed in their burden. [Citations.]

“On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]” (*People v. Delgado, supra*, 43 Cal.4th at pp. 1065-1067; see also *People v. Guerrero* (1988) 44 Cal.3d 343, 355.)

In the present case, the People presented, and the trial court admitted into evidence, a number of certified documents. The complaint, filed October 4, 1990, in Los

Angeles County Municipal Court, charged defendant in count 1 as follows: “On or about September 2, 1990, in the County of Los Angeles, the crime of ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON, in violation of PENAL CODE SECTION 245(a)(1), a Felony, was committed by PHILLIP ELLISON, who did willfully and unlawfully commit an assault upon Gerald Watters with a deadly weapon, to wit, Sledge Hammer, and by means of force likely to produce great bodily injury.” It was further alleged that defendant intentionally and personally inflicted great bodily injury on the victim within the meaning of Penal Code section 12022.7, causing the offense to become a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(8).

The reporter’s transcript dated October 4, 1990, showed that on the date set for the preliminary hearing, a plea agreement was reached. As stated by the prosecutor, defendant was to “plead guilty to the offense alleged in count 1 with the understanding he [would] receive a 6-month lid at the time of sentencing.” Defendant confirmed he understood and wanted to proceed on that basis. In taking defendant’s waivers, the prosecutor informed defendant that he was charged “with violation of Penal Code section 245(a)(1), on or about September 2 of this year, you assaulted Gerald Watters ... with a deadly weapon, to wit, a sledge hammer, with means of force likely to produce great bodily injury.” In the course of waiving his rights, defendant stated he understood the prosecutor’s advisement that if defendant was convicted of another felony offense in the future, the fact defendant would have this one on his record meant his future sentence could be enhanced. The prosecutor subsequently asked, “Mr. Phillip Ellison, to felony complaint BA025249 charging you in count 1, violation of Penal Code section 245(a)(1), that is basically assault with force likely to produce great bodily injury with a deadly weapon, committed on or about September 2 of this year against Gerald Watters, how do you plead to this charge?” Defendant responded, “Guilty,” and confirmed that was what occurred on or about the specified date.

Both the complaint and the reporter's transcript of the change of plea proceeding may properly be considered in determining the nature of defendant's prior conviction. (*People v. Sohal* (1997) 53 Cal.App.4th 911, 915 [reporter's transcript of plea]; *People v. Colbert* (1988) 198 Cal.App.3d 924, 930 [prior accusatory pleading]; see *People v. Houck, supra*, 66 Cal.App.4th at p. 356 [considerations of fairness dictate inclusion, in "record of conviction," only documents reliably reflecting conduct of which defendant convicted].) Considered together, and particularly taking into account that the complaint specified the deadly weapon used — a sledge hammer — and defendant was advised his conviction could result in enhanced punishment were he to be convicted in the future (something that would not result merely from the GBI prong of the statute), it is readily apparent defendant pled to assault with a deadly weapon. That he may also have admitted using the weapon with force likely to produce great bodily injury does not, under the circumstances, render the evidence ambiguous and, therefore, insufficient. (Compare, e.g., *People v. Delgado, supra*, 43 Cal.4th at pp. 1069-1070 [abstract of judgment, identifying statute under which prior conviction occurred as "'PC' '245(A)(1),' then separately describ[ing] the offense as 'Asslt w DWpn'" constituted prima facie evidence that conviction was for serious felony of assault with deadly weapon; as defendant produced no rebuttal evidence, trial court could properly find beyond a reasonable doubt that prior serious felony conviction had occurred] with *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 [only evidence presented by People, abstract of judgment showing guilty plea to Pen. Code, § 245, former subd. (a) (now subd. (a)(1)) with notation "'ASLT GBI/DLY WPN'" proved nothing more than least adjudicated elements of offense, and so was insufficient to establish violation of statute in way that constituted serious felony].)

In light of the foregoing, we conclude the trial court, as a rational trier of fact, could have found the prosecution sustained its burden of proving, beyond a reasonable doubt, that defendant suffered a prior strike conviction. (See *People v. Delgado, supra*,

43 Cal.4th at p. 1067.) Defendant says, however, that the trial court erred by refusing to submit all prior conviction issues beyond the bare fact of conviction — including identification and the issue whether the prior conviction constituted a strike — to the jury. He recognizes the California Supreme Court has held to the contrary (*People v. McGee* (2006) 38 Cal.4th 682, 685-687, 707-709; *People v. Epps* (2001) 25 Cal.4th 19, 25), and we are bound by those opinions (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455; see also *People v. Jefferson* (2007) 154 Cal.App.4th 1381, 1386-1388).

V

CUMULATIVE PREJUDICE

Last, defendant claims the cumulative effect of the errors he identified deprived him of a fair trial by an impartial jury. “However, “[d]efendant has demonstrated few errors, and we have found each error or possible error to be harmless when considered separately. Considering them together, we likewise conclude that their cumulative effect does not warrant reversal of the judgment.” [Citation.]” (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 825.)

DISPOSITION

The judgment is affirmed.

DETJEN, J.

WE CONCUR:

KANE, Acting P.J.

FRANSON, J.