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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DEAN COOPER,

Defendant and Appellant.

F069389

(Super. Ct. No. F13901544)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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Michael Dean Cooper (defendant) stands convicted, following a jury trial, of arson of an inhabited structure. (Pen. Code, § 451, subd. (b).) He admitted having suffered a prior conviction for a serious felony, (*id.*, § 667, subd. (a)(1)) that was also a strike (*id.*, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). His request to dismiss the prior strike conviction (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) was denied, and he was sentenced to a total term of 21 years in prison, and ordered to pay various fees, fines, and assessments.

We affirm. The trial court did not error in admitting evidence of uncharged misconduct; CALCRIM No. 375, as given, was not erroneous, and defense counsel's failure to object to its wording did not constitute ineffective assistance of counsel; and the trial court did not abuse its discretion by refusing to unseal juror information.

FACTS

I

PROSECUTION EVIDENCE

As of February 13, 2013, Carl Carr lived with his girlfriend, Bridgette Duke, in a single-wide trailer on Old Mill Road in Auberry.¹ The trailer, which was furnished, had a living space, two bedrooms, one bathroom, and a hot water heater. Although Old Mill Road had no streetlights, Carr had a couple of floodlights set up that provided exterior lighting.

Carr had known defendant for over a year. Defendant had helped Carr clean the property and set up the trailer. Although defendant helped out of friendship, Carr also paid him. As far as Carr was aware, defendant did not feel Carr still owed him money.

During the year or so that defendant worked on the property, Carr saw him frequently. A couple of times, defendant threatened that he would burn Carr's house down if Carr did not listen to him. Carr just ignored it and let defendant "blow it off."

¹ Unspecified references to dates in the statement of facts are to the year 2013.

Sometimes there were fires on Carr's property when defendant was working there. Carr thought the fires were part of the cleaning process, as there was trash to be burned. He thought that "until it got carried away when the fire department got called."

A couple of weeks before February 13, Carr told defendant not to come back on the property. The two men were not getting along, because defendant and Duke were not getting along. Duke would see defendant sneaking around on and cutting across Carr's property, and she and Carr would have to tell defendant to leave. When Carr told defendant not to be on the property any longer, defendant got mad and started screaming and carrying on. Carr just ignored him, as he always did when defendant acted that way.

On the evening of February 13, Carr, Duke, and Randy Anderson were watching television in the trailer.² Carr fell asleep, only to be awakened at 9:47 p.m. by people yelling about a fire. Carr heard a loud noise that sounded like a piece of metal falling. The door had blown off the hot water heater and flames started shooting up through the bedroom. Those inside the trailer managed to escape without injury, but the trailer and its contents were destroyed.

Anderson recalled feeling the trailer shake, then there was a boom.³ It sounded like it came from the back of the trailer, which was where the water heater compartment was located. Carr and Duke went outside to investigate, while Anderson remained on the landing outside the front door. Duke ran around the back side of the trailer and yelled "Fire." Anderson grabbed his belongings from the spare bedroom in which he was staying, then got out. While he was standing outside, he did not see anyone other than Carr and Duke.

² Anderson had been staying with Carr for a couple of weeks.

³ Here, we summarize Anderson's testimony at trial. Anderson's various pretrial statements are described later.

Anderson did not believe the trailer was properly balanced. A couple days before the fire, Carr and Duke were in their bedroom, having rough sex. Anderson thought the rough sex could have caused the trailer to shift, which in turn could have caused a propane line to rupture, leading to an explosion and fire.

Richard Schacher, Jr., chief of the Auberry volunteer fire department, met with Cal Fire Battalion Chief Eric Watkins (hereafter E. Watkins) at the location at 10:03 p.m. By that time, about half of the mobile home had active flame in it. The other half had heavy smoke coming out of it. Once the fire was extinguished, Schacher and E. Watkins looked at the scene and spoke to Carr. Carr related hearing a “boom” on the southeast end of the trailer and running outside, whereupon he smelled smoke and saw fire coming out of the top of the water heater closet area on the east end of the trailer. Nobody mentioned seeing defendant running from Carr’s home.

E. Watkins, who had been a fire investigator since 2006, determined the fire burned from the east of the trailer end toward the west. The water heater, which ran on propane, was at the east corner of the trailer. E. Watkins found no expanded metal or other signs it had exploded. He also examined the water heater’s bottom plate, as a leak in a water heater in a mobile home will often allow the water heater’s legs to fall through the floor and catch the wood on fire, thus causing a fire in the trailer itself. E. Watkins did not see any integrity issues, and there was still a gap between the heater and the floor, meaning the feet had not fallen through the floor. He ruled out the water heater itself as the cause of the fire. When the water heater was moved, he and Schacher both smelled gasoline, an ignitable liquid. According to E. Watkins, the smell of an ignitable liquid inside someone’s house is rare, and the odor was very strong in the area of the water heater.⁴

⁴ A hydrocarbon detector also alerted to hydrocarbon around the floor. Gasoline is a hydrocarbon.

As of February 13, Robert Landis resided in a double-wide mobile home on Auberry Road in Auberry, about a mile from where Carr lived. He had known defendant for five to six years, and considered him to be a friend. On February 13, defendant had a trailer behind Landis's house, but he was staying in the mobile home with Landis.

Defendant and Landis were inside the mobile home on the evening of February 13. Prior to that date, Landis had heard defendant make threats about burning down Carr's house, because, according to defendant, Carr owed him money for work defendant had done. On February 13, defendant said, "out of the blue," that he was going to go burn down Carr's house. Landis did not call 911 or alert Carr, because he had heard it before and thought it was nothing. Defendant had also threatened a few months earlier to burn Landis's home or to kill Landis. The threats were made in anger, and Landis did not consider them credible. He did not ask defendant to leave, however, because he was somewhat afraid and did not know what defendant was capable of doing.

After defendant made the threat against Carr's home on February 13, Landis got in the shower. When he got out, defendant was not there, but he returned a short time later. Defendant took off his tennis shoes and threw them in the fireplace insert, and said he "burnt Carl's house." Defendant related he had gotten gas from a wood splitter, gone across the field, and thrown the gas in the hot water heater room.⁵

Landis looked outside and saw a fire in the vicinity of Carr's property. He did not call 911, because defendant, who was there with him, had threatened him, and Landis was afraid. Eventually, Landis heard sirens. Defendant said that if Landis told anyone, defendant would burn Landis's house. Defendant spent the night in Landis's mobile home.

⁵ Landis had a wood splitter — a hydraulic tool with a gasoline motor used to split wood for a fire — on his property. It was possible to walk from Landis's property to Carr's property by cutting across a field behind Landis's house. Defendant and Landis had once walked to Carr's property from Landis's residence.

The next afternoon, Landis and defendant went to a bar, had a couple of beers, and played pool with defendant's cousin, Kenneth Johnson. Defendant told Johnson about the fire.⁶

Later that day, Johnson dropped defendant and Landis off at Landis's residence. That night, Landis and defendant got into a physical altercation. A man at Ponderosa Market said he had seen a fire and asked if Landis had seen it. When Landis told defendant that someone asked about it, defendant punched Landis in the face, splitting his lip. Landis got up and walked out. The last he saw, defendant was going toward Landis's room.⁷

Landis, who was angry, walked down to the house of his friend, Devon Egerer, to figure out how to fix the situation and do the right thing.⁸ He told Egerer about the Carr fire and the other things that had happened. The two went to Tiny Mart in Prather, a few miles away, and called the sheriff and the fire department. This was within an hour of when Landis left his home.

Fresno County Sheriff's Deputy Corey Holston was dispatched to Tiny Mart at 10:24 p.m. Upon arrival, he met with Landis, who reported that he was involved in a disturbance with someone he allowed to stay at his residence on Auberry Road. Landis said defendant had punched him, but Landis did not want to pursue charges. He told

⁶ Johnson assumed defendant was talking about a warming fire, because Johnson and defendant had been talking about having a warming fire since it was cold in the bar. When they stepped outside and saw a small fire pit in the back, defendant told Johnson, "I had me a fire last night."

⁷ Defendant slept on the living room couch and kept a few personal belongings in the guest bathroom off of the living room.

⁸ Landis had wanted defendant out of his mobile home off and on for a while. Landis wanted his place back, and also wanted defendant out because of the threats defendant had made. Those threats made Landis so uneasy and afraid that he was sleeping with a 12-gauge shotgun in his room.

Holston he wanted defendant out of his house, because defendant had punched him, threatened to burn down Landis's house, and threatened to kill Landis's mother.

Landis also told Holston about a house fire that occurred on Old Mill Road the previous evening. Landis said defendant lit the fire, although he did not say he actually witnessed it. Holston asked the basis for Landis's belief; Landis said defendant had told him he (defendant) removed some gasoline from a log splitter behind the residence. Landis believed defendant used it to ignite the fire. Landis related that defendant told him "we're just going to go light something on fire," then defendant left the residence a short time later. Landis said he (Landis) went to take a shower. A while later, defendant returned to the residence. He was laughing and told Landis not to say anything about what defendant had told him.

Holston asked what led up to the altercation in which Landis was punched. Landis explained that earlier in the evening, he had gone to the grocery store in Auberry, and a store employee started talking to him about the fire the night before. When Landis returned home and informed defendant of the conversation, defendant believed Landis had snitched on him. A disturbance broke out, whereupon defendant punched Landis.

E. Watkins responded to Holston's request for a fire investigator and took a statement from Landis. In part, Landis related that defendant had admitted setting fire to the Carr residence. Landis said defendant said Carr owed defendant money. Landis related that defendant left Landis's trailer that night, although Landis did not know at what time. Landis took a shower, and in 15 minutes or so, saw defendant come back in the house. Defendant then told Landis what he did to start the fire at Carr's residence. Landis related that defendant said he got gasoline out of the wood splitter, went to the Carr residence, and threw the gasoline into the water heater closet, where it ignited. Defendant then came back and burned the tennis shoes he was wearing. Landis told E. Watkins that he wanted defendant out of the house, and was tired of defendant taking advantage of him and not paying his rent or bills. Landis also said he had received

threats from defendant about wanting to kill Landis, as well as threatening to burn Landis's place.

Holston, E. Watkins, and three or four sheriff's deputies went to Landis's residence in an attempt to contact defendant. They arrived just before midnight. As they pulled up, Holston and E. Watkins saw smoke and flames coming out of the front of Landis's mobile home, the front door of which was open. Based on E. Watkins's knowledge, training, and experience, it appeared the fire had been burning approximately five to eight minutes.

Holston called for additional fire personnel, then his group approached the residence. Holston heard someone yelling and coughing from the vicinity of the mobile home. Defendant then crawled out the front door.⁹ No one else was inside, nor was anyone seen exiting or in the immediate vicinity. Defendant was taken into custody without incident.

E. Watkins advised defendant of his rights and took his statement. Defendant related that he and Landis had gone to a bar, where they had had some beers and played pool with Johnson and Johnson's girlfriend. With respect to the altercation, defendant said Landis talks too much, so defendant ended up "smacking him." Landis then went outside and defendant went to sleep. Defendant said he later got up to use the bathroom, at which time he became aware of the fire. He said Landis was in the house at that time.¹⁰ Defendant said he had no knowledge of the February 13 fire, and that Carr did not owe him any money. He related that on February 13, he had some beers, split a cord of wood, waited for his children to arrive, then went to sleep. At the conclusion of the interview, E. Watkins placed defendant under arrest for both fires.

⁹ Defendant was wearing a T-shirt, jeans, and boots, but no jacket. A Bic cigarette lighter was found in the pocket of his jeans.

¹⁰ E. Watkins knew Landis was not in the mobile home when the fire started, because they were together at Tiny Mart then.

E. Watkins returned to the Carr residence on the morning of February 15 for follow-up investigation. From burn indicators in the water heater closet, he ascertained the fire originated from the back side of the water heater, albeit not on the floor itself, and burned up the back side of the water heater and into the ceiling portion of the closet.¹¹ There was a propane gas line going to the water heater, but there were no integrity issues with it. As the piping — which likely would have been “well deteriorated” by fire had the fire started there — was intact, E. Watkins ruled it out as a source of ignition. There was evidence the fire started high and stayed high, which helped rule out a possible malfunction of the water heater. The majority of water heater fires start with the flame toward the front and down low. In addition, there were signs of sooting with a bit of a feathering effect indicative of a flammable or ignitable liquid being used. The intense burning on one side and the pattern would not have happened without human intervention. E. Watkins believed it showed a “pour pattern,” with a liquid being put in at a higher level and flowing toward the back. It was ignited by the water heater’s pilot light, which was behind a panel on the bottom portion of the water heater. When the accelerant was poured over the water heater, the fumes seeped into the cracks at the bottom and touched the pilot light. The fire could have been lit by another source such as a lighter or matches, however.¹²

¹¹ The water heater closet was on the outside of the trailer. The back wall of the water heater closet was connected with the inside of the trailer. At least half the house beyond the back wall of the water heater closet was destroyed. The water heater itself did not explode. E. Watkins explained that the piping catching fire would have caused holes, venting any pressure. If the water heater was not pressurized, it would not explode. In his experience, water heaters usually did not explode, because there were too many points at which pressure could be relieved.

¹² E. Watkins did not see any burns on defendant’s face or body. If the Carr fire had ignited immediately, the arsonist likely would have been badly burned. Because an ignitable fluid was poured near the top of the water heater and flowed down the back, ignition was not immediate because the fumes had to reach the ignition source. Someone could have thrown in the liquid and left quickly enough so as not to get injured.

Debris from the scene and a can of gasoline from Landis's wood splitter were submitted to the Department of Justice (DOJ). DOJ analysis detected gasoline residues in the wood flooring and fire debris sample. The liquid from the wood splitter also contained gasoline, and ignited under an open flame. The DOJ laboratory did not compare the gasoline from the wood splitter to that in the debris sample.

Within a few days, E. Watkins spoke with Johnson. Johnson related that on the night of February 14, he, defendant, Landis, and Johnson's girlfriend went to a bar in Auberry, had some beers, and played pool. At one point, they commented on how cold it was in the bar. Defendant said, "Yeah, I had me a fire last night." Johnson said he assumed defendant was talking about a warming fire.

E. Watkins concluded, based on his knowledge, training and experience, that the Carr fire was caused by someone putting ignitable liquid onto the water heater within the closet. E. Watkins ruled out all causes other than arson. In his opinion, defendant committed the arson. E. Watkins based this conclusion on his investigation as a whole; the statements by witnesses, particularly Landis and Johnson; and what E. Watkins observed on February 14.

The Landis fire was investigated by Cal Fire Battalion Chief Mark Watkins (hereafter M. Watkins), E. Watkins's brother. M. Watkins arrived at the Landis property just after midnight on February 15. The fire had been extinguished, but firefighters were still on the scene. He was informed the structure "was fully involved."

Charring, staining, and sooting on wood members (upright posts that appeared to have been part of the framing to support a porch structure) indicated the fire started inside the mobile home and burned outward. Based on the flooring that was left, M. Watkins determined the area on the west end of the mobile home was least involved. This meant the area of origin was the eastern part of the home. Charring and fire direction indicators

caused M. Watkins to conclude the fire probably traveled from the northeastern corner of the mobile home toward the west and south.

Due to the extent of the damage, M. Watkins was unable to determine the fire's exact point of origin and cause, although he established the northeast corner bedroom, Landis's bedroom, was where the fire started. The two possible causes of the fire were electrical and arson.¹³

There was an electrical meter panel on a power pole near the northwest corner of the structure. Two of the breaker switches were in the tripped position, while the rest were in the off position. Breakers sometimes trip because of an electrical short. The electrical short could be the cause of the fire, or the breakers could trip because the fire caused an electrical short. Because the mobile home was burned so badly, M. Watkins was unable to examine the wiring in and around the northeast corner, and so was unable to rule out electrical short as a possible cause.

M. Watkins was also unable to rule out arson, due to the other causes he had ruled out; what Landis had told him about the situation with defendant; what E. Watkins had told him about defendant coming out of the burning mobile home when firefighters arrived; and fire coming out of the window of Landis's bedroom, where M. Watkins believed the fire originated. Although M. Watkins was unable to rule out an electrical cause of the fire, he formed the opinion arson was the likely cause.

On October 3, Anderson was interviewed by Daniel Jenkins, an investigator for the district attorney's office. The interview began around 11:00 a.m. and lasted more than 30 minutes. Anderson appeared coherent, and was very detailed and articulate in his statements. He did not "appear to be sleeping" or "speaking in his sleep."

Anderson told Jenkins that on February 13, he was living at the Carr residence and working for Carr. That night, Anderson, Carr, and Duke were inside the trailer, when

¹³ M. Watkins was able to exclude all other possible causes.

Anderson heard a loud boom. When Duke yelled "Fire," Anderson ran to his bedroom to retrieve some of his property, then ran outside for safety. The trailer was on fire.

Anderson looked approximately 20 to 30 feet to the southwest of the trailer, in an area illuminated by a 600-watt halogen light suspended from a tree and saw defendant running away from the scene toward the tree line of the property. Anderson then gave a specific detailed description of the person he saw running. Anderson did not see the person's face, but he had played football in high school and been trained to identify people from the back even when they did not have names and numbers on their jerseys. Because of this, together with the specific stance, posture, and way of running defendant had, Anderson was able to identify defendant.

Anderson told Jenkins that he and defendant were friends and drinking buddies, but he had become fearful of defendant. Anderson related there was an unknown dispute between Carr and defendant, and that was why defendant was asked to move out of Carr's trailer and leave.

On October 8, Anderson telephoned Jenkins and said he wanted to recant his statement of October 3. Anderson said he thought the entire interview was a dream, did not remember speaking with Jenkins and must have been sleepwalking, and wanted specifically to recant the part about seeing defendant.

Jenkins interviewed Anderson on October 11. When Jenkins asked why Anderson wanted to recant his statement, Anderson explained he had a longstanding sleepwalking condition, although he was not receiving any type of medical treatment for it. Anderson then said he believed the fire started because he and Carr had been working on the water heater for the trailer earlier in the week, and neither was a professional water heater installer. Then, the night of the fire, Carr and Duke were in the bedroom of the trailer, having rough sex. Anderson stated he had previously told Carr the pads for leveling the trailer were not steady, and Anderson believed the bedroom action caused the trailer to shift, which made the water heater fall over, breaking it from the propane line and

causing the fire inside the water heater closet. Anderson stated that what he previously told Jenkins was fine, and the only part he wished to recant was the part where he said he saw defendant running away.¹⁴

Concerned Anderson had possibly been dissuaded, Jenkins began listening to the jail calls associated with defendant.¹⁵ In the first call, the person to whom defendant spoke related that Ken Jabral was trying to get hold of Anderson. Defendant said he was using a different JID number, so he could talk about whatever they were doing. The other person said he himself could not get too involved, because he did not want it looking like bribery. Defendant responded that if Anderson testified, “that’s it” Defendant said they needed Anderson to say in court that it was not defendant whom Anderson saw run away, whatever it cost to “[b]uy his ass.” The caller assured defendant Jabral knew where Anderson lived and was going to deal with him. The caller added, “You know and I mean *deal* with him.”

In the next call, the person to whom defendant was speaking told defendant that Anderson had been going to “clean [defendant’s] clock,” but had recanted his story to the district attorney and felt good about it. Defendant responded it was because Anderson

¹⁴ At trial, Anderson explained that because Jenkins woke him up on October 3, Anderson said some things that were incorrect. Anderson testified he was “not quite conscious” of what, exactly, he was saying, as he had had a sleep disorder for a long time and had a history of talking in his sleep. Anderson denied saying Carr and Duke had rough sex the night of the fire; rather, it was two to three days earlier. He also denied ever working on the water heater in the trailer that burned; he and Carr installed the water heater in Carr’s new trailer. Anderson testified nobody bribed, threatened, or told him to change his statement. He believed he may have had notions, in his dreams, of defendant running from the scene, because of Carr’s and Duke’s insinuations implying defendant did it and the pressure Anderson felt from them to say he saw defendant running from the fire.

¹⁵ Audio recordings of the calls were played for the jury. The parties stipulated defendant used a jail identification number (JID) that belonged to another inmate when he made the calls, but that his voice appeared on each individual call. All the calls were made in October.

was lying. Defendant also said it was not enough for Anderson to say it was not defendant. Instead, Anderson needed to give a description of the person he saw running away. Defendant said he knew Anderson did not see anything and was a liar, but he needed Anderson to be an eyewitness and on defendant's side. Defendant said they needed Anderson to say Carr tried to bribe him into naming defendant.

In a third call, defendant told "Ray" — the person to whom he was speaking — that they could talk, because defendant was not using his JID number. Defendant said the fire investigator was lying and trying to make defendant look guilty, when there "wasn't a trace of any way to find out anything in all that mess" Defendant told Ray to keep Anderson happy, "[i]f we have to bribe him . . . or whatever" Defendant said he would buy Ray a brand new car, but to keep Anderson "under your wing" Defendant said that with Anderson's statement and Ray, defendant was going to win, and he would make it worth Ray's while by buying him a vehicle and property.

In another call, the female with whom defendant was speaking responded to defendant's statement that they were trying to win this, by saying they were going to try to do it as close to the truth as possible. Defendant agreed, but said if Anderson was going to be used, the story needed to be tampered with a little bit. He also told the female not to give Anderson "another cent of weed" Defendant told the woman, "Get everybody in a circle, get one thing that matches perfectly, and pay everybody off. Play dirty as they were playing me." He noted Anderson said he did not see anything, but did not say he saw somebody other than defendant run away like he was supposed to. Defendant told the woman: "Do what you got to do to do it. Use your manipulating sneakiness too. Lie. Cheat. Manipulate. Bribe. Whatever you gotta do."

II

DEFENSE EVIDENCE

On the evening of February 13, Johnson went to Landis's house to visit with defendant and watch television. It was still daylight when he arrived, but dark when he

left a few hours later. While he was there, he did not hear defendant threaten Landis, say he wanted to burn down Carr's house, or make any comments about Carr. Johnson was in the vicinity of Landis and defendant the whole time he was at the house; Landis was walking around and fell asleep before Johnson left.

Karen Jewell was Carr's neighbor. As of February 13, she lived 200 to 300 feet from his home with her daughters, Rebecca Cummings and Amanda Cummings. All were acquainted with defendant.

On the night of February 13, the three women heard an explosion. Jewell grabbed the telephone and ran outside to see Carr's house on fire. She called 911. Amanda ran to her bedroom window, from which she saw a wall of fire. She then dressed and went outside and saw Carr's trailer on fire. The trailer was almost engulfed. Rebecca dressed and got outside within two to three minutes. At no time did any of the three see defendant running away from the scene. Jewell was certain defendant was not at the scene even immediately before the explosion, because he would have had to run past her place, and she would have heard him.¹⁶ Rebecca would not have seen anyone leaving the area while she was dressing, but Amanda was watching from the window and would have said something.

Jewell was standing in the dirt road that ran between her place and Carr's residence, watching to make sure the fire did not spread through the trees to her home, when she saw Carr walking down the dirt road away from the fire with his hands in his

¹⁶ According to Amanda, the windows were not open that night due to the cold. Because the television was on, she could not have heard footsteps 200 to 300 feet away. Prior to the boom, she would not have been able to hear someone running from Carr's house. The person would have had to run right in front of her property in order for her to hear him or her.

As part of his investigation, E. Watkins walked between the Carr and Landis residences. The distance was about half a mile to a mile, and he was able to avoid Old Mill Road. At no point did he have to pass the residence across the street from Carr's home. It was in the opposite direction.

pockets. He was wearing dark pants, a white shirt, and a jacket. Rebecca saw Carr walking away, up the road, as fast as he could. Amanda saw Carr walk past at a steady gait.

Defendant testified he had known Carr for two and a half to three years. Defendant did some work for Carr, such as property cleanup, demolition on a trailer, and building a house pad, and they became friends. During the cleanup of Carr's property on Old Mill Road, some of the brush and other debris was burned daily in a burn barrel, as was typical for the Auberry area.¹⁷ Defendant also built Carr's trailer, including the hot water heater. Defendant was paid for his work according to the deal he made with Carr. Carr did not owe him any money at the end of defendant's work, and defendant felt Carr treated him fairly.

Defendant denied ever threatening Carr or his family, or saying he was going to burn down Carr's house. Prior to February 13, defendant and Carr were friends. They did not even get into verbal fights. Defendant disliked Duke, but this did not affect his relationship with Carr. Defendant and Duke only had words one time, about six months before the fire. Defendant and Carr never had an argument about a tractor, and Carr never asked defendant to leave the property.

Defendant had known Landis for years and lived with him. When defendant first moved in, defendant had a small trailer in the back. It was pretty run down, so he moved into Landis's house toward the end of summer 2012 so defendant's children could have a nice place when it was defendant's turn to have custody. Defendant paid Landis rent. Defendant denied ever threatening to burn Landis's house down, or threatening Landis or his family. Defendant never told Landis he wanted to burn down Carr's house. He never made any threats about Carr to Landis.

¹⁷ Defendant used diesel from his tractor to start the fires in the burn barrel. Unlike gasoline, with which he was familiar from lighting fires in burn barrels in the past, diesel does not explode.

On February 13, defendant woke up expecting his children to come over that day for a visit. He started working on splitting a cord of wood with the splitter, stacking it, and piling up the excess bark. His children never showed up, but Johnson, his cousin, came over about dusk. They watched some television, then Johnson left around 10:00 p.m. Defendant did not go to Carr's house or take gasoline from Landis's wood splitter and set Carr's house on fire. Defendant did not have any conversation with Landis about setting Carr's house on fire; Landis was passed out. Defendant did burn off the bark he had put in the burn barrel after splitting the cord of wood, then he went to bed. When he mentioned having a fire to Johnson the next day, he was talking about the fire in the burn barrel. He did not start the Carr fire.

On February 14, defendant split some more wood, and mostly passed the time around the house with Landis. Landis had to renew his food stamp card, so Landis drove to the casino with Egerer that morning for a couple of hours. That evening, defendant went to a bar with Johnson and Johnson's girlfriend. It was almost dark when they arrived. Landis had to deliver a cord of oak, and he was dropped off at the bar about an hour after defendant and Johnson got there. Defendant and Johnson were drinking at the bar. So was Landis, who had been drinking all day.

Everyone was having a good time at the bar. By the time they left, it was dark out. Once back at Landis's house, defendant had another beer. Landis continued drinking. They got into a verbal argument, because Landis had been talking to defendant's ex-wife about defendant, and that was why she had not dropped off defendant's children the day before.

At some point that night, Landis was sitting on the chair, and he started "talking shit." When defendant started "talking shit" back, Landis jumped up like he was going to do something to defendant, and defendant punched him in the mouth. Defendant then went into the room in which he was staying, which was in the back of the trailer. He did

not see Landis leave, but when defendant returned from the back room, the front door was wide open and Landis was not inside the house.

Defendant paced around the living room for a minute, then, as he was cold, he lit a small fire in the fireplace. This was at the other end of the house from Landis's bedroom. Because it was too cold to sleep in his room, defendant put cushions from the couch on the floor in front of the fireplace and dozed off watching the fire while it got going. The fireplace was an old one with a wood stove insert, and the door to the insert was open to get air to the fire. Defendant was wearing a shirt, pants, and boots, but no jacket. In his pockets were his wallet, pipe, and lighter.

Defendant woke at some point to find it smoky inside the house. He thought it was because he left the door open on the wood stove. He went to use the bathroom, then returned to the living room and started to go back to sleep. Because the house kept getting smokier, he pulled a blanket over his head. After a couple minutes, however, the smoke got really thick, and defendant's eyes started burning and he began coughing. He tried to make it to the front door, which was still open from when Landis left earlier, but he had to get down on the floor and crawl out, because the smoke was so thick.¹⁸ Thinking Landis was still in the house, he started yelling at him to get out, that there was a fire. Defendant was lying on his stomach on the edge of the porch, coughing and hacking, when someone yelled at him not to move and he was arrested.

The first defendant heard about the Carr fire was after his arrest, when E. Watkins was questioning him. Defendant denied starting either fire. Everything he owned, other than his truck, was in Landis's house.

¹⁸ The front door opened into the front room where defendant had gone to sleep by the fireplace. When defendant lit the fireplace, he did not close the door. Instead, he "kicked back" and fell asleep, even though it was frosty outside and just about as cold inside, and he knew the front door was open.

Defendant admitted making the jail telephone calls that were played for the jury. He explained that he had heard someone had seen the person who ran away from Carr's house. He was trying to get hold of Anderson so Anderson would go to court and tell the truth.

DISCUSSION

I

ADMISSION OF UNCHARGED MISCONDUCT

A. Background

Defendant was charged only with setting fire to Carr's residence. The People moved, in limine, to present evidence of defendant's assault on Landis and the Landis fire, pursuant to Evidence Code section 1101, subdivision (b).¹⁹ The People offered the evidence to show motive, knowledge, absence of mistake, and intent, and to assist the jury in determining whether defendant had the knowledge to start a fire of a similar structure. The People asserted the proffered evidence was admissible under section 352. Defendant moved, in limine, for exclusion of the evidence, arguing there were insufficient similarities between the Landis and Carr fires for purposes of section 1101, subdivision (b), and the fact the fires occurred a day apart would be extremely prejudicial in that the jury would infer defendant started both fires.

After argument, the trial court found similarities in that defendant had a dispute with the owner of each of the homes that was burned, a fire occurred shortly after the dispute, and there was evidence of defendant's presence at both fires. The court ruled the proffered evidence would not be admitted to prove intent, but found it relevant to motive, knowledge, absence of mistake, and common plan.

The evidence that was presented concerning the Landis assault and fire is summarized in the statement of facts, *ante*. During the jury instruction conference, the

¹⁹ Further statutory references are to the Evidence Code unless otherwise stated.

trial court observed that, based on how the evidence unfolded at trial, *People v. Harrison* (2005) 35 Cal.4th 208 (*Harrison*) supported admission of the uncharged acts on the theory they were probative of consciousness of guilt, which in turn was relevant to identity. During a further instructional conference, the trial court confirmed the evidence was being admitted with respect to identity, in addition to the purposes for which the trial court initially ruled it would be allowed. After further argument concerning *Harrison*'s facts and holding, and the similarities (or lack thereof) between the charged and uncharged acts in the present case, the trial court declined to change its ruling. Jurors subsequently were instructed they could consider the evidence "for the limited purpose of deciding whether or not the defendant was the person who committed the offense charged . . . or that the defendant had a motive to commit the offense charged . . . or the defendant knew how to cause the fire when he allegedly acted in committing the offense charged . . . or the defendant had a plan to commit the offense [charged]"

Defendant contends the trial court erred by admitting evidence of the uncharged Landis assault and fire. We conclude any error was harmless.

B. Analysis

"Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 369; see § 1101, subs. (a), (b).) It is also admissible to prove the intermediate fact of motive. (*People v. Thompson* (1980) 27 Cal.3d 303, 319-320, fn. 23, disapproved on another ground as stated in *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

"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 [such as section 352] requiring exclusion of the evidence.’ [Citation.] Evidence may be excluded under . . . 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.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 22-23.)²⁰

A trial court’s resolution of the issues involved in determining admissibility under sections 352 and 1101, subdivision (b) is reviewed for abuse of discretion. (*People v. Jones* (2013) 57 Cal.4th 899, 930 [§ 1101]; *People v. Carter* (2005) 36 Cal.4th 1114, 1149 [§ 352].) “ ‘A court abuses its discretion when its ruling “falls outside the bounds of reason.” [Citation.]’ [Citation.]” (*People v. Carter, supra*, at p. 1149.) In reviewing the trial court’s determinations, we view the evidence in the light most favorable to that court’s ruling. (*People v. Edwards* (2013) 57 Cal.4th 658, 711.)

In order for evidence of uncharged acts to be admissible to prove identity, common design or plan, or intent, the charged offenses and uncharged acts must be sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Kipp, supra*, 18 Cal.4th at p. 369; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*).) The trial court’s determination on this issue essentially is a determination of relevance. (*People v. Kipp, supra*, at p. 369.)

²⁰ Despite frequent references in case authority to other or prior crimes, “section 1101[, subdivision](b) authorizes the admission of ‘a crime, civil wrong, *or other act*’ to prove something other than the defendant’s character. . . . The conduct admitted under [the statute] need not have been prosecuted as a crime, nor is a conviction required. [Citations.] The conduct may also have occurred after the charged events, so long as the other requirements for admissibility are met. [Citation.] Specifically, the uncharged act must be relevant to prove a fact at issue [citation], and its admission must not be unduly prejudicial, confusing, or time consuming [citation].” (*People v. Leon* (2015) 61 Cal.4th 569, 597-598.)

“To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. [Citation.] Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a ‘ ‘pattern and characteristics . . . so unusual and distinctive as to be like a signature.’ ’ [Citation.]” (*People v. Kipp, supra*, 18 Cal.4th at pp. 369-370; see *Ewoldt, supra*, 7 Cal.4th at p. 403.)

“A lesser degree of similarity is required to establish relevance on the issue of common design or plan. [Citation.] For this purpose, ‘the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.’ [Citation.]” (*People v. Kipp, supra*, 18 Cal.4th at p. 371; see *Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

“The least degree of similarity is required to establish relevance on the issue of intent. [Citation.] For this purpose, the uncharged crimes need only be ‘sufficiently similar [to the charged offenses] to support the inference that the defendant “ ‘probably harbor[ed] the same intent in each instance.’ [Citations.]” ’ [Citation.]” (*People v. Kipp, supra*, 18 Cal.4th at p. 371; see *Ewoldt, supra*, 7 Cal.4th at p. 402.)

In the present case, the evidence, if believed by the jury, demonstrated a number of similarities between the Carr and Landis fires. In each instance, a mobile home burned. Those homes were located in the same general area. They caught fire just over 24 hours apart. In each case, defendant was very familiar with the property in general and the mobile home in particular, having lived and/or worked there. Each fire was preceded, within a relatively short period of time, by a dispute between defendant and the owner. In each instance, there was evidence placing defendant at the scene at the time of the fire.

We conclude these are adequate points of similarity — even in light of the main dissimilarity, to wit, the point of origin of the fire — to render evidence of the Landis fire relevant at least to absence of mistake (i.e., the Carr fire was deliberately set) and motive

(i.e., the Carr fire was set in retaliation or revenge for defendant's dispute with Carr).²¹ (See *People v. Soper* (2009) 45 Cal.4th 759, 778-779; *People v. Demetrulias* (2006) 39 Cal.4th 1, 15-17.) Accordingly, the trial court did not abuse its discretion in concluding the evidence was admissible, pursuant to section 1101, subdivision (b), with respect to those purposes.

Moreover, “the probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus. [Citations.]” (*People v. Demetrulias, supra*, 39 Cal.4th at p. 15; see *People v. Thompson, supra*, 27 Cal.3d at p. 319, fn. 23.) “Where other crimes or bad conduct evidence is admitted to show motive, ‘an intermediate fact which may be probative of such ultimate issues as intent [citation], identity [citation], or commission of the criminal act itself’ [citation], the other crimes or conduct evidence may be dissimilar to the charged offenses provided there is a direct relationship or nexus between it and the current alleged crimes [citations].” (*People v. Cage* (2015) 62 Cal.4th 256, 274.) “‘Motive is not a matter whose existence the People must prove or whose nonexistence the defense must establish. [Citation.] Nonetheless, “[p]roof of the presence of motive is material as evidence tending to refute or support the presumption of innocence.’” [Citation.]” (*People v. Roldan* (2005) 35 Cal.4th 646, 707, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) “It is elementary, evidence of motive to commit an offense is evidence of the identity of the offender. [Citations.]” (*People v. Daniels* (1971) 16 Cal.App.3d 36, 46.) Since, in the

²¹ Penal Code section 451 requires that, in order to be guilty of arson, a person act “willfully and maliciously” “[A]rson’s ‘willful and malice requirement ensures that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional ignition or act of setting a fire; ‘in short, a fire of incendiary origin.’” [Citations.]’” (*In re V.V.* (2011) 51 Cal.4th 1020, 1029.) In terms of the requisite similarity, absence of mistake is analyzed like intent. (*People v. Burnett* (2003) 110 Cal.App.4th 868, 881.)

present case, evidence of the Landis fire was probative of motive, it was also relevant to the issue of defendant's identity as the perpetrator of the Carr fire.

Evidence of uncharged misconduct may also be probative of consciousness of guilt, which in turn is also probative of identity. In *Harrison, supra*, 35 Cal.4th 208, the defendant was charged with murdering Thompson and Robinson. At trial, the prosecutor sought the admission of evidence relating to the defendant's attempt to murder Davis. (*Id.* at p. 228.) The prosecutor proffered evidence that, two days after the double murder, a witness overheard the defendant tell someone that the defendant was planning to kill Davis because Davis knew the defendant had killed Thompson and Robinson and because Davis had been known to provide information to the police. (*Id.* at pp. 228-229.) In rejecting the defendant's claim the evidence should not have been admitted, the California Supreme Court stated:

“Defendant here contends that evidence of the attempted murder of Olin Davis was irrelevant, and that the prosecutor used it in violation of . . . section 1101, subdivision (a) to show defendant was of bad character and thus must have committed the double murders. He asserts this was precisely what the prosecutor argued to the jury. But, . . . whether evidence was erroneously admitted does not depend on counsel's later argument to the jury. Here, evidence of defendant's attempt to murder Davis was admissible under . . . section 1101, subdivision (b) to prove his identity as the killer of Thompson and Robinson. Davis testified that a day or two after Thompson and Robinson were killed, defendant admitted to Davis that he killed them. And Robert Williams testified that a few days after the murders, he overheard defendant tell Richard Johnson that he (defendant) should kill Davis. Under these circumstances, defendant's attempt, a week after the double murders, to kill Davis — to whom he had admitted the murders — was probative of defendant's consciousness of guilt, which in turn was probative of his identity as the perpetrator of the charged offenses. [Citations.] The evidence of defendant's attack on Davis also bolstered the credibility of Davis's testimony that defendant told him he had killed Thompson and Robinson, because it explained why, after the attack, Davis told the police about defendant's admission, when he had not previously done so. [Citation.]” (*Harrison, supra*, 35 Cal.4th at p. 230, fn. omitted.)

We concur with the trial court that the uncharged misconduct in the present case was admissible on the issue of identity, despite the lack of “signature” characteristics. This includes evidence of the Landis fire and, under *Harrison*, defendant’s assault on Landis.

This does not end our inquiry, however. Even when uncharged misconduct meets the requirements of section 1101, subdivision (b), “in order to be admissible such evidence ‘must not contravene other policies limiting admission, such as those contained in . . . section 352. [Citations.]’ [Citation.] We thus proceed to examine whether the probative value of the evidence . . . 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.]” (*People v. Balcom* (1994) 7 Cal.4th 414, 426-427.) “ ‘Evidence is prejudicial within the meaning of . . . section 352 if it “ ‘uniquely tends to evoke an emotional bias against a party as an individual’ ” [citation] or if it would cause the jury to “ ‘prejudg[e]” a person or cause on the basis of extraneous factors’ ” [citation].’ [Citation.]” (*People v. Foster* (2010) 50 Cal.4th 1301, 1331.)

Admission of evidence of uncharged misconduct “ ‘produces an “over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.” [Citation.] It breeds a “tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offences” [Citation.] Moreover, “the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor.” [Citation.] [Citation.] Due to these inherent risks, ‘uncharged offenses are admissible only if they have *substantial* probative value.’ [Citations.]” (*People v. Foster, supra*, 50 Cal.4th at p. 1331.) “ ‘ “[H]ow much ‘probative value’ proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and

the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).” [Citation.]’ [Citation.] ‘[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence [citations].’ [Citation.]” (*People v. Pertsoni* (1985) 172 Cal.App.3d 369, 375.)

In the present case, the challenged evidence was highly probative, at a minimum, on the issues of absence of mistake, motive, and identity, all of which were material issues in the case. Conversely, the evidence was not unduly prejudicial within the meaning of section 352. (See, e.g., *Harrison, supra*, 35 Cal.4th at p. 231; *People v. Kipp, supra*, 18 Cal.4th at pp. 371-372; *Ewoldt, supra*, 7 Cal.4th at p. 405.) Accordingly, the trial court did not abuse its discretion under section 352.²²

We need not decide whether defendant’s uncharged misconduct was erroneously admitted for some purposes, such as common scheme or plan, because any error in this regard was harmless. (See *People v. Foster, supra*, 50 Cal.4th at p. 1333.) Since the evidence was highly probative on several issues at trial, its admission did not violate defendant’s federal due process rights. (*People v. Kelly* (2007) 42 Cal.4th 763, 787.) Accordingly, any error is one of state law only, and so is assessed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Thomas* (2011) 52 Cal.4th 336, 356 & fn. 20; *People v. Foster, supra*, 50 Cal.4th at p. 1333; *People v. Malone* (1988) 47 Cal.3d 1, 22.) Contrary to defendant’s claim, this was not a close case. The evidence

²² Although the trial court did not expressly weigh the prejudicial impact of the evidence against its probative value, we believe the requisite showing can be inferred from the record. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1237; *People v. Padilla* (1995) 11 Cal.4th 891, 924, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Mickey* (1991) 54 Cal.3d 612, 656.) Were we to conclude the trial court failed to evaluate the evidence under section 352, however, we would be satisfied that had the court done so, it would have admitted the evidence in any event; hence, any error in that regard was not prejudicial. (*People v. Padilla, supra*, 11 Cal.4th at p. 925.)

against defendant was exceedingly strong, if not overwhelming. Under the circumstances, “[i]t is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the alleged error. [Citation.]” (*People v. Thomas, supra*, at p. 356, fn. omitted; accord, *People v. Foster, supra*, at p. 1333.)

II

CALCRIM No. 375

Defendant contends CALCRIM No. 375, as modified by the trial court and given to the jury, was confusing, erroneous, and reasonably likely to have been applied in a manner that diluted the prosecution’s burden of proof. Alternatively, he contends that if we conclude the issue was forfeited by defense counsel’s failure to object to the modified instruction, defendant received ineffective assistance of counsel. Defendant’s claims lack merit.

A. Background

In light of its admission of the evidence of defendant’s uncharged misconduct, the trial court decided, without objection, to give CALCRIM No. 375 (Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.). During the instructional conference, the court and counsel discussed *Harrison* and the purposes for which jurors would be permitted to consider the evidence, and the trial court’s proposed modifications of the instruction. At no time did defense counsel object on the ground defendant now raises. Ultimately, the trial court gave CALCRIM No. 375 as follows:

“Now, the People presented evidence of other behavior by the defendant that was not charged in this case, specifically that the defendant assaulted Robert Landis and caused a fire at Robert Landis’[s] trailer on February 14, 2013. 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 acts.

“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 that the defendant committed the uncharged acts, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not the defendant was the person who committed the offense charged in Count One or that the defendant had a motive to commit the offense charged in Count One or the defendant knew how to cause the fire when he allegedly acted in committing the offense charged in Count One or the defendant had a plan to commit the offense alleged in Count One.

“In evaluating the evidence, consider the similarity or lack of similarity between the uncharged offenses and acts and the charged offense. Do not consider this evidence for any other purpose. If you conclude that the defendant committed the uncharged acts, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the arson of the inhabited structure charged in Count One. The People still must prove that charge beyond a reasonable doubt.”

B. Analysis

On appeal, defendant complains the instruction failed to tell the jury it had to find true by a preponderance of the evidence *both* that defendant assaulted Landis and that he caused the fire at Landis’s trailer, before using either or both to show defendant was the person who committed the Carr arson. Defendant says jurors could have concluded defendant did not start the Landis fire, but did punch Landis, and could have used that fact alone to determine defendant was the person who started the Carr fire, had a motive to start the Carr fire, knew how to start the Carr fire, and had a plan to commit the Carr arson — all inferences, defendant claims, that are illogical. Because the instruction invited jurors to draw an inference of guilt without a proper basis, defendant contends, reversal is required because the error was not harmless beyond a reasonable doubt.

“A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]” (*People v. Lang* (1989) 49 Cal.3d 991, 1024, abrogated on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176,

1190.) As defense counsel did neither, the issue has not been preserved for appeal. (See, e.g., *People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1236; cf. *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

Moreover, we find no error. “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.]” (*People v. Cross* (2008) 45 Cal.4th 58, 67-68; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) It is axiomatic that “[j]urors are presumed to understand and follow the court’s instructions. [Citation.]” (*People v. Holt* (1997) 15 Cal.4th 619, 662.) “Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.” (*Boyd v. California* (1990) 494 U.S. 370, 380-381.)

Although CALCRIM No. 375, as given in the present case, did not expressly state jurors had to find, by a preponderance of the evidence, *both* that defendant assaulted Landis *and* that defendant caused the fire at Landis’s trailer before using either or both to show defendant committed the Carr arson, the instruction referred to evidence of the Landis assault and Landis fire in the conjunctive (viz., “specifically that the defendant assaulted Robert Landis *and* caused a fire at Robert Landis’[s] trailer” (italics added)), and thereafter referred to this evidence as the uncharged *acts* — plural: “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 *acts*” (italics added); “If you decide that the defendant committed the uncharged *acts*, you may, but are not required to, consider that evidence” (italics added); “consider the similarity or lack of similarity

between the uncharged *offenses and acts* and the charged offense” (italics added); “If you conclude that the defendant committed the uncharged *acts*” (italics added).

In light of the foregoing, we have no trouble concluding jurors would have understood CALCRIM No. 375 in a commonsense manner, to require a finding of defendant’s commission of *both* the Landis assault and the Landis fire, rather than in the hypertechnical manner advocated by defendant. (See *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1225, overruled on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Lewis* (2008) 43 Cal.4th 415, 462, overruled on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920.) Accordingly, we reject the notion CALCRIM No. 375, as given by the trial court, was constitutionally defective because it permitted jurors to draw irrational inferences from the other-crimes evidence. (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. Jones, supra*, 57 Cal.4th at pp. 934-935; *People v. Castro* (1985) 38 Cal.3d 301, 313.)²³

III

REFUSAL TO UNSEAL JUROR INFORMATION

Defendant contends the trial court abused its discretion by refusing to unseal juror information, thereby depriving defendant of a fair opportunity to investigate juror misconduct and denying defendant due process and a fair trial. We conclude the issue was forfeited by defendant’s failure to bring the alleged misconduct to the trial court’s

²³ It necessarily follows defense counsel was not ineffective for failing to object. Accordingly, we do not further address defendant’s claim of ineffective assistance of counsel.

attention at the earliest opportunity.²⁴ That the trial court reached the merits of the issue is, under the circumstances, of no import.

A. Background

After the jury returned its verdict, the court ordered all identifying juror information sealed pursuant to Code of Civil Procedure section 237, subdivision (a)(2), and it set the matter for sentencing. Defendant subsequently moved for a continuance of sentencing, because defense counsel had received information two acts of jury misconduct occurred during trial and deliberations, and she needed time to investigate preparatory to moving for a new trial. The motion was granted. Defendant subsequently moved for a further continuance, on the ground defense counsel needed an opportunity to submit a written petition for release of juror information. The motion again was granted.

Defendant subsequently filed a written petition for an order disclosing juror identifying information pursuant to Code of Civil Procedure sections 206 and 237. In her supporting declaration, defense counsel represented that during trial, defendant was approached by a named inmate who said his father was on defendant's jury and asked what defendant would give them to hang the jury. The inmate stated, " 'My dad likes money, so let's work this out.' " The report of an interview the defense investigator conducted of defendant was appended as an exhibit. According to that report, defendant related he was approached by the other inmate on Sunday night, November 24, 2013, and defendant turned down the offer.²⁵ Defendant believed the inmate's father was indeed on the jury, because, when the inmate approached defendant again a couple of days after the verdict was rendered, the inmate knew certain details about defendant's trial.

²⁴ It is apparent from the record the fault in this regard was that of defendant himself, and not defense counsel.

²⁵ The jury returned its verdict on Wednesday, November 27, 2013.

The People opposed any disclosure of personal juror information. They asserted good cause for release of the information did not exist, an evidentiary hearing on juror misconduct was required only upon a demonstration of a strong possibility of prejudicial misconduct, and the scope of any inquiry as to the verdict was limited by section 1150, subdivision (a). The People argued defense counsel's declaration failed to contain any admissible evidence of juror misconduct, let alone prima facie evidence that would support a reasonable belief misconduct occurred, and defendant failed to demonstrate diligent efforts to contact jurors by other means.

A hearing was held on the petition. Following argument, during which the prosecutor pointed out the defense exhibits were not sworn affidavits, and everything of relevance in them and in defense counsel's declaration constituted inadmissible hearsay, the court agreed that none of the statements from third parties were admissible, but nevertheless found it appropriate to assess the defense's factual claims.

The court turned first to the statements from defendant's parents. The court noted those issues had already been addressed.²⁶ It stated:

“If there was anything more to contacts with jurors or any conduct of jurors that may have been observed, overheard or otherwise witnessed by either of these parents on November 27th it should have been brought to the court's attention and dealt with at that time. So these unsworn declarations, statements after the fact, quite frankly, carry no weight with the court at this time.

“Now, a similar assessment of [defendant]'s declaration will be made, too. He's talking about supposed contact by a relative of a juror during the course of the trial. It should have been brought to the court's attention. And the fact that whatever identifying information [concerning the inmate] isn't obtainable now, it certainly would have been at the time. That person was in custody at the time with [defendant], if we're to believe [defendant]'s statements. Again, the time to have addressed that issue

²⁶ Because of possible deficiencies in the trial record, defendant is not pursuing, on direct appeal, claims related to what his parents allegedly overheard a juror say during a break in deliberations.

would have been then, and even if we assume that this solicitation or bribe occurred it never — it never happened. And any type of contact or any type of influence on a sitting juror has not been established. There is no prima facie basis for believing there's any juror misconduct at all. There's no linkage within [defendant]'s statements between that son in jail and his father who allegedly was one of the jurors. So, essentially, even if I were to accept these as proper declarations the court finds them inherently unbelievable, find them to be, quite frankly, factually disputed in the court record and entirely insufficient to establish a prima facie case for disclosure of juror identifying information under [section] 237 of the Code of Civil Procedure. So that will be denied without further hearing.”

B. Analysis

“After a verdict is entered, a criminal defendant may ‘petition the court for access to personal juror identifying information within the court’s records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose.’ (Code Civ. Proc., § 206, subd. (g).) Code of Civil Procedure section 237, subdivision (b) provides that ‘[t]he petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror’s personal identifying information.’ ” (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1430.) “If the trial court finds that the moving party has made a prima facie showing of good cause, and if it finds no compelling interest against disclosure, it must set the matter for hearing. (Code Civ. Proc., § 237, subd. (b).) The trial jurors are entitled to notice, an opportunity to object to disclosure, and an opportunity to appear. (Code Civ. Proc., § 237, subd. (c).) [¶] If none of the jurors object, the trial court must grant disclosure. However, if a juror is unwilling to be contacted, the trial court must deny disclosure. (Code Civ. Proc., § 237, subd. (d).)” (*People v. Johnson* (2013) 222 Cal.App.4th 486, 492, fn. omitted (*Johnson I*).

“Good cause, in the context of a petition for disclosure to support a motion for a new trial based on juror misconduct, requires ‘a sufficient showing to support a reasonable belief that jury misconduct occurred. . . .’ [Citations.] Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or

unsupported. [Citation.]” (*People v. Cook* (2015) 236 Cal.App.4th 341, 345-346.)

“Absent a showing of good cause for the release of the information, the public interest in the integrity of the jury system and the jurors’ right to privacy outweighs the defendant’s interest in disclosure. [Citations.]” (*People v. McNally, supra*, 236 Cal.App.4th at p. 1430.)

We review the denial of a petition for disclosure for abuse of discretion. (*People v. Cook, supra*, 236 Cal.App.4th at p. 346; accord, e.g., *People v. Carrasco* (2008) 163 Cal.App.4th 978, 991; *People v. Santos* (2007) 147 Cal.App.4th 965, 978.) In so doing, we note that a defendant seeking disclosure is not required to introduce admissible evidence jury misconduct actually occurred in order to make the required prima facie showing. Rather, he or she need only prove that talking to the jurors is reasonably likely to produce admissible evidence of such misconduct. (*Johnson I, supra*, 222 Cal.App.4th at p. 493.) A defendant likewise need not show he or she has made diligent efforts to contact the jurors by other means. (*Id.* at pp. 495-497.) Finally, because the prima facie showing merely triggers an evidentiary hearing, at which any necessary credibility determinations may be made, “a ‘prima facie showing’ connotes an evidentiary showing that is made without regard to credibility.” (*People v. Johnson* (2015) 242 Cal.App.4th 1155, 1163 (*Johnson II*)). Rather, the trial court considers the facts demonstrated by admissible evidence to determine whether they would sustain a favorable decision if the evidence submitted by the movant were credited. (*Id.* at p. 1164.)

As previously described, defendant sought disclosure of personal juror identifying information with a view toward developing a motion for new trial based on juror misconduct. Doubtless, a juror’s attempt to solicit a bribe from a defendant would constitute misconduct, if established. In the present case, however, defendant was alerted to the possible misconduct on Sunday, November 24, 2013. Trial was in session the following day. Yet, apparently because he thought the trial was going well, defendant saw fit to withhold from his counsel and the court any information concerning the alleged

misconduct until well after the verdict was returned, and the jury discharged, on Wednesday, November 27, 2013.²⁷

Under the circumstances, defendant has forfeited any claim of juror misconduct based on the alleged bribery solicitation.²⁸ “ ‘A defendant or his attorney, who possesses knowledge, during the progress of a trial, of the conduct of jurors which he deems to be prejudicial, may not fail to call the court’s attention thereto, speculate upon receiving a favorable verdict, and then assign the conduct as prejudicial misconduct for the first time after an adverse verdict has been returned against him.’ [Citation.]” (*People v. Martinez* (1968) 264 Cal.App.2d 906, 912-913; accord, *People v. Orchard* (1971) 17 Cal.App.3d 568, 576; *People v. Quiel* (1945) 68 Cal.App.2d 674, 680; see *People v. Holloway* (2004) 33 Cal.4th 96, 124.) As the California Supreme Court has observed on many occasions, “ ‘[o]ur courts are not gambling halls but forums for the discovery of truth.’” [Citation.]’ [Citation.]” (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 392.) To permit a defendant to withhold, until after he or she sees whether the verdict will be favorable, information of possible juror misconduct that could have been investigated and

²⁷ During the hearing on defendant’s second motion for continuance of sentencing, the court inquired why the alleged solicitation of a bribe was not reported when it occurred. Defense counsel responded that defendant did not think it was a “big deal to report it at that point because his trial, in his mind, was going well.”

Defendant’s first motion for a continuance of sentencing was filed on January 17, 2014. The record does not indicate when defense counsel first learned of the alleged misconduct. When asked if there was legal cause the court could not discharge the jury after the verdict was returned and the jurors polled, however, defense counsel answered, “No,” thus strongly indicating she had no knowledge of it at that point.

²⁸ Defendant asserts we cannot find forfeiture because “[t]he trial court reached this issue on its merits and never ruled that counsel had failed to bring the information to the court’s attention in a timely fashion.” To the contrary, the court stated the information should have been brought to the court’s attention and addressed at the time it happened. That the court did not deny defendant’s petition for disclosure solely on the ground of forfeiture does not preclude us from upholding the court’s ruling on that basis.

cured during trial, “not only licenses the parlor but encourages defendants to roll the dice.” (*Ibid.*)

Since defendant forfeited his claim of jury misconduct, there was no need for any postverdict questioning of jurors concerning such alleged misconduct. Hence, there was no need for juror information to conduct such questioning. (*People v. Carrasco, supra*, 163 Cal.App.4th at p. 991.) The trial court properly refused to unseal juror information.

DISPOSITION

The judgment is affirmed.

DETJEN, J.

WE CONCUR:

LEVY, Acting P.J.

PEÑA, J.