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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PAUL GENTILE SMITH, Defendant and Appellant.	G044672 (Super. Ct. No. 09ZF0071) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Annie Featherman Fraser, Deputy Attorney General, for Plaintiff and Respondent.

* * *

The second superseding indictment charged defendant Paul Gentile Smith with the special circumstance murder (Pen. Code,[1] §§ 187, subd. (a) [murder], 190.2, subds. (a)(17)(A) [robbery special circumstance], (a)(18) [torture special circumstance]; count one) of Robert Haugen on October 24, 1988. The indictment alleged defendant personally used a knife during the murder (§ 12022, subd. (b)(1)). It also charged a number of offenses alleged to have been committed in 2009: two counts of soliciting an aggravated assault (§ 653f, subd. (a); counts two and three), attempted assault with force likely to cause great bodily injury (§§ 664, subd. (a), 245, subd. (a)(1); count four), and conspiracy to commit an assault with force likely to cause great bodily injury (§§ 182, subd. (a), 245, subd. (a)(1); count five). The trial on counts two through five was bifurcated from the trial on count one. The jury found defendant guilty of first degree murder and found the torture special circumstance and the knife use allegations true. Defendant subsequently pled guilty to the remaining charges. The court sentenced defendant to life without the possibility of parole on the murder, plus one year in prison on the weapon use enhancement. Sentences on the remaining counts were either ordered to run concurrently to the life sentence or were stayed pursuant to section 654.

Defendant appeals contending inter alia, his counsel was ineffective for failing to move to suppress his statements under *Miranda v. Arizona* (1966) 384 U.S. 436, the evidence does not support the torture-murder special circumstance, and the trial court erred in admitting evidence and instructing the jury. We affirm.

I

FACTS

The Murder

In 1988, the victim Robert Haugen lived in an apartment on Ninth Street in Sunset Beach with his roommate and good friend, Christina Marrah. Haugen sold

[1] All statutory references are to the Penal Code unless otherwise stated.

marijuana out of the apartment. Marrah went to work the day shift at a Ralph's grocery store on the morning of October 24, 1988. Shortly after 1:00 p.m., firefighters responded to the burning apartment. Upon entering Haugen's bedroom, firefighter's found his nude body supine on the bed, his legs spread apart with his feet touching the floor, a large floor-style stereo speaker on the floor was tilted and leaning against Haugen's genitals. A pillow covered Haugen's face.

The body was extensively burned, although the back and face showed little burn damage. A fire investigator testified the fire started on top of the bed, toward the rear of the bed. The speaker between Haugen's legs was burned when fire spread from the bed to the speaker. The fire had been started by an open flame, without the use of an accelerant. A match or a cigarette lighter may have been used. Haugen was lying on the bed prior to the fire. The lack of soot around his nose and mouth indicated he was dead before the fire.

A pair of Levi jeans and a jacket were found on the floor by the bed. The jacket had been cut up, as if by a pair of scissors. A pair of scissors with melted plastic handles was found on top of the jacket. The jacket bore some red stains and the floor beneath the clothing had not been burned, indicating the clothes were on the floor prior to the fire.

The police found marijuana residue and a triple beam scale in Haugen's closet. The scale could have been used for weighing marijuana. Blood drops were found on the kitchen floor and on a cabinet beneath the kitchen sink. Marrah testified the blood drops were not on the floor when she got up that morning and made herself a cup of coffee before going to work. A washcloth, with what appeared to be blood on it, was found in the bathroom attached to Haugen's bedroom. A criminalist collected the evidence, although DNA testing was not available at the time.

The autopsy revealed Haugen had been stabbed 18 times. There was a vertical superficial stab wound on the upper left side of his back. Below that wound was

a deep stab wound that penetrated an internal organ. A third wound was also deep and penetrated through the rib cage to an internal organ. Also in the back was a four and one-half inch long slash at the base of the neck. Another stab would on the right side of Haugen's stomach penetrated the liver. There were a number of slashing wounds to the neck. On the right side of the neck was a five inch long, front to back and nearly decapitating wound that severed the carotid artery and vein. Another severed the thyroid and the trachea. There were also three vertical cuts to the left side of Haugen's face. One cut through his eyebrow and eyelid, another cut into the nasal septum, cutting bone and cartilage. And another cut through his lip to his chin.

Because of the burned condition of the body, seven other stab wounds were not discovered until the chest cavity was cut open during the autopsy. The pathologist said Haugen bled to death due to the multiple stab wounds. None of the wounds were defensive wounds, i.e, were not incurred while the victim attempted to fend off an attack.

Defendant's Connection to the Murder

1. *Forensics*

Blood samples from the kitchen floor and cabinet, as well as blood from a washcloth found in the sink of the master bathroom were examined for DNA. The fact that the blood samples were from 1988 did not prevent the expert from obtaining DNA samples from the evidence collected from Haugen's apartment. The blood found in the kitchen and the blood on the washcloth came from the same person. A comparison of Haugen's DNA and the DNA from the blood samples showed the blood was not his. However, the DNA profile from the blood and the DNA profile obtained from defendant's buccal swab are the same. The expert testified defendant's DNA profile is rarer than one in one trillion unrelated individuals, and there are only six billion people on the planet.

2. *Defendant's Wife*

In 1988, defendant was married to Darcy Smith.[2] They met in high school in 1976 or 1977. Haugen went to the same high school. Darcy knew who Haugen was but was not a friend of his. Darcy and defendant married in 1981. They had two children together. They separated in 2004 and their divorce was final in 2007 or 2008.

During their marriage, defendant had a motorcycle. In 1988, Darcy did not like defendant smoking marijuana and did not want marijuana around their child. She once found marijuana hidden in a compartment of the motorcycle, confronted defendant, and told him to get rid of the marijuana.

She identified a copy of a letter she received from defendant when he was in jail. It was the only letter she received while he was in jail. She threw away the original.

3. *Tina Smith*

Tina Smith (see fn. 2, ante), no relation to defendant, met him in 2006. They started dating and she fell in love with him. Tina lived with defendant "off and on" during their relationship. She said defendant was physically and mentally abusive. During a period when they were "doing a lot of drugs," defendant accused her of stealing approximately $5,000 from him. He became angry, bound her up with rope, doused her with lighter fluid and attempted to set her on fire with something she called a "clicker," a device with "a long end on it," used to start a fire in a fireplace. Apparently the clicker did not work and defendant was unsuccessful in attempting to set her on fire.[3] She did not report the incident to the police because she was in love with defendant. Tina said

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[2] Because Darcy Smith and another witness, Tina Smith, have the same last name as defendant, we refer to these witnesses by their respective first names to avoid confusion. No disrespect is intended.

[3] In 2009, while defendant was in Orange County jail, he told her he was "glad the clicker did not work."

that was not the only time he tried to set her on fire.

In February 2007, Tina was in a car driven by defendant when he again questioned her about stealing his money. Defendant stabbed her in the left thigh. He also stabbed her in the right leg. Tina bled profusely, but defendant did not take her to a hospital as she asked. Instead, he drove her home and continued to talk about the money. When defendant's brother-in-law Scott Morris subsequently arrived at the house, he convinced defendant Tina had to go to the hospital. Tina spoke with the police at the hospital and, not wanting to get defendant into trouble, told the police she met a guy at a bar and was stabbed.

Tina moved away after the stabbing incident. Defendant eventually talked her into reconciling by telling her he was sorry and she could come back to collect her things. They agreed to meet in Las Vegas at Bally's around May 13, 2007. They spend a couple of nights at Bally's and then went to stay at the Four Queens. They stayed up a few days "doing a lot of drugs and whatnot." At the Four Queens, defendant told Tina he wanted her to tell him the truth about the money she stole from him. He became "really upset" and told Tina to take off her clothing. He tied her up with rope.[4] When she was on the bed, nude and bound, defendant forced his penis into her mouth. He also said, "let the torture begin." According to Tina, defendant "just went really, really nuts after that point." He ran the sharp point of a black, short knife with a skull on it, along her back, cutting her, hit her with the butt of a gun, and stabbed her in the right calf. He threatened to kill her if she did not tell him the truth. He also told her he wanted her to attempt suicide, and to take the gun and kill him. He paced around the room with the gun cocked and it accidentally discharged. That appeared to "scare him a little." He untied Tina, gave her the keys to his car, and said she could leave. She estimated the incident in the hotel occurred over approximately a two-hour period.

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[4] Tina said defendant had handcuffs with him, but she did not say whether he used them on her.

Tina left and drove around until she could not drive anymore because her leg was bleeding. She then called the police and informed them what had happened. The police arrested defendant for the crimes committed against Tina. Tina later changed her story to the Las Vegas police because she still loved defendant. Defendant subsequently served time in custody on the Las Vegas case.

Tina was working in Orange County in early 2009, while defendant was in jail in Las Vegas. She received a message sheriff's deputies wanted to talk to her about an incident that occurred more than 20 years earlier. She knew deputies had spoken with defendant's family members and friends. When defendant called her from jail in Nevada on March 1, 2009, she told him a detective wanted to talk to her about something he may have been involved in 25 years ago. She said the subject matter started with the letter "M." Defendant asked if it was murder and Tina said it was. She said the detective already spoke with defendant's friend Scott Pritchard. Defendant asked Tina to find out what questions were asked of Pritchard.

Defendant called Tina the next day and told her he spoke with the detectives and was probably going to be charged with murder. Defendant said the detectives insinuated he was gay because his DNA was found on the victim's bed. He told Tina he had gone to the victim's residence to buy dope, crawled across the victim's bed, that clothes went flying and that must be how his DNA got on the bed.

4. *Defendant's Statements to Investigators*

On March 1, 2009, investigators from the sheriff's department interviewed defendant in Las Vegas, where defendant was in custody on another matter. They told him they were contacting people about an old murder case in Orange County. They said the person was murdered and the building was set on fire, so they did not have much evidence. Defendant said he had heard Haugen's murder was a professional job, and that Haugen owed money to people. He said he only knew Haugen as his drug dealer, and

that he bought "pot" from Haugen once or twice a week. Defendant later admitted he and Haugen had been "pretty good friends."

Defendant denied ever getting into a fight or getting cut or stabbed in Haugen's apartment. He said they never did things together socially. Haugen was not invited to defendant's residence because Darcy did not want anyone involved with marijuana at the house. Darcy gave defendant a hard time about his marijuana use.

Defendant said he had been at Haugen's apartment a day before the murder to buy some marijuana, and stayed only about 20 minutes. Around 9:00 or 10:00 a.m. on the day Haugen was murdered, defendant called to buy more marijuana. He said he would be by the apartment after lunch. When defendant called again at approximately 1:00 p.m., Haugen's telephone was out of order.

The investigators told defendant they thought something happened between Haugen and him that day, and asked defendant how he got cut in the apartment. When defendant denied it, one of the investigators told defendant his blood was found in more than one place in the apartment. After defendant was told his DNA was found in the blood sample, defendant said he remembered he cut his right index finger in the apartment the day before the murder, when he was playing with his knife. He said Haugen got him a Band-Aid and his blood could not have been all over the apartment. Defendant told investigators he never stabbed anyone, but his girlfriend cut herself during sex.

5. *Defendant's Statements to Cellmate*

Arthur Palacios, who has been convicted of a number of felonies, was housed in the Orange County jail with defendant. He testified against defendant in hope of receiving consideration on an unrelated felony matter. Palacios said he became friendly with defendant, along with inmates Paul Martin and Paul Longacre. Defendant told Palacios things about his case, which Palacios then wrote down in a journal. He eventually turned the information over to law enforcement. Defendant told Palacios he

went to Haugen's residence on the date of the murder to buy marijuana, but Haugen refused to make the sale because defendant's wife had called Haugen and told him not to sell marijuana to defendant any more. Defendant said he got into an argument with his wife when she found marijuana in his motorcycle the day before the murder. When Haugen refused to sell to defendant, defendant told him he (Haugen) was going to make the sale and an "altercation broke out." In cutting Haugen's throat, defendant said he tried to pull Haugen's head off.

Defendant told Palacios there could not have been any droplets of blood on the floor because he had cleaned up everything very well. He also complained the police were wrong about the scale. He said he left it on the bed.

Defendant joked with Palacios, Martin and Longacre about defendant's bad luck at trying to burn people. He said he had unsuccessfully attempted to burn Tina. It was a running joke among the four inmates that defendant was not good at burning bodies.

Defendant also asked Palacios to pay Darcy a visit when Palacios makes bail. He wanted Darcy to provide him with an alibi and he wanted Palacios to make it clear defendant was "not playing games." Defendant further stated he was angry at Haugen's roommate for her testimony before the grand jury. Defendant said he told Tina to deal with the roommate so the roommate would not testify at trial.

II

DISCUSSION

Ineffective Assistance of Counsel

"The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. [Citation.] The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. [Citations.]" (*Kimmelman v. Morrison* (1986) 477 U.S.

365, 374-375.) To establish a claim of ineffective assistance of counsel, a defendant must establish both counsel's representation fell below an objective standard of reasonableness and it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; see U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) When counsel's shortcoming is alleged to have been the failure to move to suppress evidence obtained in violation of the Constitution, the defendant must demonstrate the suppression motion was meritorious and there is a reasonable probability the verdict would have been different had he prevailed on the motion. (*Kimmelman v. Morrison*, *supra*, 477 U.S. at p. 375 [failure to bring motion to suppress evidence under Fourth Amendment].) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Ledesma*, *supra*, at pp. 217-218, quoting *Strickland v. Washington*, *supra*, at pp. 693-694.) To prevail on a claim of ineffective assistance of counsel, a defendant must establish by a preponderance of the evidence that he is entitled to relief. (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 218.)

Defendant argues he was denied effective assistance of counsel because his attorney failed to move to suppress statements he made to police during questioning while he was in custody in Las Vegas. He maintains the officers who questioned him were obligated to advise him of his *Miranda* rights. In *Miranda v. Arizona*, *supra*, 384 U.S. 436, the Supreme Court "adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the 'inherently compelling pressures' of custodial interrogation. [Citation.] The Court observed that 'incommunicado interrogation' in an 'unfamiliar,' 'police-dominated atmosphere,' [citation], involves psychological pressures 'which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely,' [citation]. Consequently, it reasoned, '[u]nless adequate protective devices are employed to dispel the compulsion inherent in

custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.' [Citation.]" (*Maryland v. Shatzer* (2010) __ U.S. __, __ [130 S.Ct 1213, 1219].)

Defendant was clearly in custody in Clark County jail in Nevada at the time he was questioned by sheriff's deputies about this murder in Orange County. The question however, is whether defendant was in custody *for purposes of requiring Miranda's prophylactic warnings*. After briefing was completed in this matter, oral argument was continued at defendant's request because the United States Supreme Court had recently heard argument in a similar case. The high court subsequently issued its decision in *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181].[5]

In *Fields*, while the defendant was serving a sentence in a Michigan jail, he was escorted to a conference room where he was questioned by two sheriff deputies about an incident that occurred prior to his imprisonment. (*Howes v. Fields*, *supra*, __ U.S. at p. __ [132 S.Ct. at p. 1185].) At the beginning of the questioning, Fields was told he was free to leave and return to his cell. Later, he was again told he was free to leave. He was not restrained by handcuffs or manacles, and the door to the room was open at times during the questioning. (*Id*. at p. ___[132 S.Ct. at p. 1186].) At no time was Fields advised of his *Miranda* rights or informed he did not have to speak to the officers. (*Ibid*.) Fields contended the statements he made during the questioning were obtained in violation of *Miranda*. (*Ibid*.)

The court concluded "'custody'" is a term of art in *Miranda* jurisprudence and is meant to designate circumstances "that are thought generally to present a serious danger of coercion." (*Howes v. Fields*, *supra*, __ U.S. at p. __ [132 S.Ct. at p. 1189].) A determination of custody is but the first step in deciding whether, given the objective circumstances of the questioning, "a 'reasonable person [would] have felt he or she was

[5] We issued an order inviting the parties to brief the effect of the decision on the present case and have considered those briefs.

not at liberty to terminate the interrogation and leave.' [Citation.]" (*Ibid*.) The court went on to state, "Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." (*Id.* at p. __ [132 S.Ct. at p. 1189].)

In the context of a sentenced prisoner questioned about an offense that occurred outside prison, the court found at least three reasons why the "standard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests that the [*Miranda*] Court sought to protect when it afforded safeguards to persons subjected to custodial interrogation." (*Howes v. Fields*, *supra*, __ U.S. at p. __ [132 S.Ct. at p. 1191.) First, the person already serving a sentence is not presented with the same shock that often accompanies an initial arrest just prior to questioning. (*Id*. at p. __ [132 S.Ct. at p. 1190].) Second, a prisoner is unlikely to believe the questioning officer has the authority to promptly release him or her. Thus, the defendant will be less likely to talk to the officer with the hope of being immediately released. (*Id*. at p. __ [132 S.Ct. at p. 1191].) Third, a sentenced prisoner will know the questioning officer lacks the authority to shorten his or her already imposed sentence. (*Ibid*.)

As a result, the court concluded that "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interview is conducted. [Citation.] An inmate who is removed from the general prison population for questioning and is 'thereafter . . . subjected to treatment' in connection with the interrogation 'that renders him in "in custody" for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*.' [Citation.]" (*Howes v. Fields*, *supra*, __ U.S. at p. __ [132 S.Ct. at p. 1192].)

The court considered the facts suggesting Fields was in custody for purposes of requiring a *Miranda* advisement: he was summoned to the conference room for questioning, he was not advised he did not have to speak with the deputies, the

deputies were armed, the questioning lasted between five and seven hours, and once a deputy used a sharp tone of voice with Fields (*Howes v. Fields*, *supra*, __ U.S. at p. [132 S.Ct. at pp. 1192-1193].) The court also chronicled those facts militating toward Fields not being considered in custody for purposes of requiring an advisement — Fields had been advised at the beginning he could leave and go back to his cell whenever he wanted, he was not physically restrained, during the questioning he was again told he could leave, he was not threatened, the questioning took place in a well-lit conference room, he was not "uncomfortable," he was offered food and water, and the door to the room was left open at times during the questioning. (*Id*. at p. __ [132 S.Ct. at p. 1193.) The court concluded, on balance, the evidence demonstrated Fields was not in custody for purposes of requiring advisement per *Miranda*. "Taking into account all of the circumstances of the questioning—including especially the undisputed fact that respondent was told that he was free to end the questioning and to return to his cell—we hold that respondent was not in custody within the meaning of *Miranda*. (*Id.* at p. __ [132 S.Ct at p. 1194].)

Defendant's showing falls short of the showing found wanting in *Fields.* Defendant was advised at the beginning of the meeting that he did not have to talk to the deputies and that if he told them he did not want to talk, "we'll be done." There is no evidence whether the investigators were armed, whether defendant was in handcuffs or any other restraints, whether a sharp tone of voice was ever used on defendant — in fact, defendant concedes the questioning "was congenial at first" and remained nonconfrontational as defendant was asked about his relationship with the victim — and the questioning was much shorter than in *Fields*. What is more, defendant did not seek to terminate the questioning and have the investigators frustrate his attempt. Defendant has shown only that the investigators questioned him while he was imprisoned in Nevada on other charges, and such a showing is insufficient to trigger a requirement to advise him of his rights per *Miranda*.

As stated above, in order to prevail on an ineffective assistance of counsel claim, defendant must not only show counsel acted below an objective standard of reasonableness, he must also demonstrate prejudice. In other words, defendant must show a motion to suppress his statements would have had merit. He has failed to make that showing and, having failed to do so, his ineffective assistance of counsel claim must fail. Because he has not demonstrated prejudice, there is no need to address whether counsel's performance was deficient (*People v. Kipp* (1999) 18 Cal.4th 349, 366-367), although the record on appeal, unavailing as it is on the issue of the merits of a motion to suppress, does not support a colorable claim counsel's performance was lacking in connection with the *Miranda* issue.

Sufficiency of the Torture Special Circumstance

The indictment alleged a torture special circumstance in connection with the murder charge. The special circumstance applies when "[t]he murder was intentional and involved the infliction of torture." (§ 190.2, subd. (a)(18).)

"'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We accept all assessments of credibility made by the trier of fact and then determine if substantial evidence supports each element of the special circumstance. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 387.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "The standard of review is the same when the prosecution relies

mainly on circumstantial evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

"To prove torture murder, the prosecution must establish '"a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose."' [Citation.] To prove a torture-murder special circumstance, the prosecution must show that defendant intended to kill and had a torturous intent, i.e., an intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. [Citation.] The jury may infer the intent to inflict extreme pain from the circumstances of the crime, the nature of the killing, and the condition of the victim's body. [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 237.)

"The intent to torture 'is a state of mind which, unless established by the defendant's own statements (or by another witness's description of a defendant's behavior in committing the offenses), must be proved by the circumstances surrounding the commission of the offense [citations], which include the nature and severity of the victim's wounds." [Citation.] 'We have, however, cautioned against giving undue weight to the severity of the wounds' [citation]; severe injuries may also be consistent with the desire to kill, the heat of passion, or an explosion of violence." (*People v. Mungia* (2008) 44 Cal.4th 1101, 1137, italics omitted.) The victim in *Mungia* had been struck 23 times in the head and face, but also had defensive wounds on various areas of her body. The pathologist who performed the autopsy noted the victim "had thick lacerations on the left side of her head in different directions, which indicated they were 'inflicted in a frenzy almost' (that is she received 'a lot of blows in a short period of time'), and characterized her injuries as extremely painful . . . ." (*Id.* at p 1110.) The court in *Mungia* found the nature of the wounds did not provide the evidence necessary to support a reasonable inference of torture, notwithstanding the fact the injuries were painful. (*Id*. at p. 1137.) The defensive wounds indicate a struggle and while "[t]he

killing was brutal and savage, . . . there is nothing in the nature of the injuries to suggest that defendant inflicted any of them in an attempt to torture [the victim] rather than to kill her." (*Ibid*.)

Mungia is inapposite. While the injuries to the left side of the victim's head in that case indicated perhaps a frenzied savage action by Mungia, the injuries here do not make a similar suggestion. Although Haugen was stabbed 18 times, he suffered absolutely no defensive wounds. It was as if he had somehow been restrained from attempting to protect himself. Of course, had defendant bound Haugen as he later did Tina, this would account for the lack of defensive wounds. If he was not bound, it is possible defendant, an excellent wrestler in his day, may have had Haugen in a hold from which he could not escape to defend himself.

Additionally, the fact that Haugen suffered 18 stab wounds does not compel the conclusion the wounds were inflicted in a frenzy or sudden burst of anger. A number of the wounds were not deadly. Indeed, one wound to his back was superficial. While it is not unheard of for a victim of a sudden frenzy of violence to suffer one or more superficial wounds, the jury was not unreasonable in concluding defendant intended to torture Haugen. One of the stab wounds to his back was a vertical ("up and down type") wound less than one inch in size. Considering Haugen could not defend himself and the depth of other wounds, the jury was entitled to conclude defendant intentionally did not thrust the knife into Haugen as far as it would go. A number of the wounds inflicted on the apparently defenseless victim were to his back. Haugen also suffered three wounds to a discreet area of his body, the left side his face. One cut through his eyebrow and eyelid. (*People v. Elliot* (2005) 37 Cal.4th 453, 467 [cutting through eyelids without cutting eyes "strongly implies the use of controlled force designed to torture"].) Another went into his nose, cutting bone and cartilage. The third cut was through his lip to his chin. The coup de grâce appears to have been the wounds to Haugen's neck and throat. The carotid artery and vein were severed and defendant nearly decapitated Haugen.

Based on the evidence admitted at trial, the jury could reasonably have concluded defendant deliberately inflicted nonfatal wounds on Haugen with the intent he suffer extreme pain, and defendant did so for a sadistic purpose. Accordingly, we find the true finding on the torture special circumstance allegation is supported by substantial evidence.

Evidence Code section 1101

Defendant contends the trial court erred in admitting evidence of the acts he perpetrated against Tina in 2007, more than 18 years after the charged murder. As a general rule, character evidence is inadmissible. (Evid. Code, § 1101, subd. (a).) However, subdivision (b) of Evidence Code section 1101authorizes "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, 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."

"The rules governing the admissibility of evidence of other crimes are well settled. Although evidence of prior criminal acts generally is inadmissible to show bad character, criminal disposition, or probability of guilt, such evidence may be admissible when relevant to prove some material fact other than the defendant's general disposition to commit such an act. (Evid. Code, § 1101, subd. (b).) 'As Evidence Code section 1101, subdivision (b) recognizes, that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present crime. Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion.'

[Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 49.) Although *Jones* referred to evidence of a prior crime to prove a material fact, the mere fact that the uncharged act occurred after the charged offense does not make evidence of the uncharged crime inadmissible. (*People v. Williams* (1970) 10 Cal.App.3d 638, 643.)

The reasoning behind the use of other crimes evidence to prove intent is based on the recognition "'"'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution."' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 706, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Admission of Evidence Code section 1101, subdivision (b) evidence is addressed to the sound discretion of the trial court." (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609.) We review the trial court's ruling for an abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) "A trial court abuses its discretion only if its ruling falls outside the bounds of reason. [Citation.]" (*People v. Burney* (2009) 47 Cal.4th 203, 241.)

In deciding whether to admit other crimes evidence under Evidence Code section 1101, subdivision (b), the court must first determine whether the proffered evidence is relevant. "On the issue of probative value, materiality and necessity are important. The court should not permit the admission of other crimes until it has ascertained that the evidence tends logically and by reasonable inference to prove the issue upon which it is offered, that it is offered on an issue material to the prosecution's case, and is not merely cumulative." (*People v. Stanley* (1967) 67 Cal.2d 812, 818-819, fns. omitted.) If the evidence is relevant, "the trial court must then consider 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 misleading the jury." (Evid. Code, § 352.)' ([*People v.*] *Ewoldt* [(1994)] 7 Cal.4th [380,] 404.)" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) Because other crimes evidence is inherently prejudicial, its admission "'requires extremely careful analysis.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Ultimately, such evidence is admissible only if its relevance substantially outweighs its prejudicial effect. (*Ibid*.)

Prior to trial, the prosecutor filed a motion seeking to introduce evidence of defendant's uncharged acts of violence against Tina to prove defendant intended to torture Haugen. The prosecutor set forth in the motion the evidence he claimed was admissible under Evidence Code section 1101, subdivision (b). The first incident occurred in January 2007. There, defendant became upset with Tina because he suspected she had stolen money from him. He tied her up with "rope type material" and doused her with lighter fluid. He then proceeded to attempt to set her on fire with a "clicker" style lighter. Had defendant been able to light Tina aflame after dousing her with lighter fluid, the evidence would have supported the conclusion he did so with the intent to torture. (See *People v. D'Arcy* (2010) 48 Cal.4th 257, 294 [killing by setting victim on fire after dousing her with gasoline supported conviction for torture murder]; *People v. Cole* 33 Cal.4th 1158, 1196-1199 [evidence of extreme pain suffered by victim who was set ablaze after being doused with a flammable liquid].) We reject defendant's contention that evidence of his effort to set Tina on fire should not have been admitted because it was not clear whether he intended to cause her pain. There is no evidence he knew the "clicker" would not work or that he intentionally disabled it and intended only to scare Tina. Indeed, his comment to her over the jail telephone to the effect he was glad the "clicker" did not work and his statement to Palacios that he had unsuccessfully attempted to set Tina on fire, tend to show the failure to ignite the lighter fluid was due to nothing more than Tina's good fortune.

The second incident offered under Evidence Code section 1101, subdivision (b) was the February 2007 incident in defendant's car, where he stabbed Tina in her left thigh and right leg, again because he suspected she stole from him and he wanted her to admit the theft. The third incident occurred in the hotel room at the Four Queens in Las Vegas, where defendant forced Tina to remove her clothing, tied her up, and forced her to orally copulate him. During that incident defendant stated, "let the torture begin." He then scratched her arms, chest, and leg with a knife, hit her with his gun, and stabbed her in the right calf. The court overruled defendant's objection.[6] Defendant argued the charged murder and the uncharged acts were dissimilar because the uncharged acts involved only assaults. However, uncharged acts need not involve the same offense as the charged crime to be admissible. (*People v. Evers* (1992) 10 Cal.App.4th 588, 598 [evidence of prior assault admitted in murder trial].)

Defendant's conduct in the incidents wherein he stabbed and cut Tina demonstrated that when he uses a knife to inflict injuries on another person, he does so with the intent to inflict pain for a sadistic purpose. The evidence of the stabbing incident in defendant's car showed he inflicted pain on Tina in an effort to persuade her to tell him what he wanted to hear about her connection with his missing money. He continued questioning her about the money after he stabbed her. In the incident in the Las Vegas hotel room, defendant again used a knife for the purpose of causing great pain to Tina. He cut her legs and back with it after he tied her up. He also stabbed her in the leg. When he did not get what he wanted from her — again, information about his missing money — he pulled out a gun, hit her with the butt, and threatened to kill her unless she told him about the money.

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[6] The court cited *People v. D'Arcy*, *supra*, 48 Cal.4th 257, as authority for admitting the proffered evidence, but the court in *D'Arcy* did not consider the application of Evidence Code section 1101. The other crimes evidence admitted in *D'Arcy* was admitted in the penalty phase as aggravating evidence under section 190.3. (*People v. D'Arcy*, *supra*, 48 Cal.4th at p. 271.)

The other crimes evidence was offered to prove defendant intended to torture Haugen during the murder. Haugen was stabbed 18 times, but the injuries do not appear to have been the result of a frenzied attack. Haugen suffered no defensive injuries. It appears he had been incapacitated in some manner and unable to defend himself. Haugen suffered a number of knife stab wounds to his back, a number to his chest and three to his face. Many were not designed to kill, especially those to his face and back. The evidence of defendant's crimes against Tina, including stabbing her as a means of persuasion, incapacitating her by tying her up so she was unable to defend herself and then, either inflicting great pain by stabbing and cutting her with a knife or attempting to inflict great pain by trying to set her on fire, were relevant to prove defendant's intent when he repeatedly stabbed and cut Haugen.

In *People v. Ewoldt*, the court concluded the probative value of other crimes evidence is enhanced if it comes from source other than a witness to the charged offense and the potential for prejudice is decreased when the "testimony describing the defendant's uncharged acts is no stronger or more inflammatory than the testimony concerning the charged offense." (*People v. Tran* (2011) 51 Cal.4th 1040, citing *People v. Ewoldt*, *supra*, 7 Cal.4th at pp 404-405.) Here, the probative value of the evidence was enhanced because it came from a source independent of any witness to the charged offense. The potential psychological effect of the uncharged evidence on a witness to the charged offense was not present because the evidence tying defendant to the murder was either scientific or came from statements made by defendant himself. There was no eyewitness to the murder or to defendant's presence at the scene at the time of the murder. To the extent Tina, the source of the uncharged crimes evidence, also testified to conversations she had with defendant about the murder, there was no potential her testimony about those conversations would be affected by introduction of other crimes evidence; her conversations with defendant were recorded by law enforcement.

Defendant contends the incidents involving Tina occurred approximately 18 years after the murder were remote and should not have been admitted into evidence. Remoteness is a factor to consider in weighing the relevance of the evidence. (*People v. Fuiava* (2012) 53 Cal.4th 622, 665.) Nonetheless, the remoteness of other crimes evidence ordinarily goes to the weight of the evidence, not its admissibility. (*People v. Archerd* (1970) 3 Cal.3d 615, 639.) Here, the probative value of the other crimes evidence with respect to defendant's intent was not rendered insubstantial due to its remoteness. Defendant's conduct in stabbing and otherwise torturing (or attempting to torture) Tina was probative of his intent in incapacitating Haugen and stabbing and cutting him repeatedly before killing him.

Evidence of defendant's crimes against Tina was not more prejudicial than probative. (Evid. Code, § 352.) The evidence of the uncharged offenses was not stronger or more inflammatory than evidence of Haugen's murder. Defendant's blood at the scene of the murder, taken together with his inconsistent, incriminating statements to the police and his statements to Tina and Palacios provided strong evidence he murdered Haugen. The manner in which he cut and stabbed Haugen before killing him, especially the injuries defendant inflicted to Haugen's face, strongly suggested an intent to torture Haugen. The gruesome nature of the murder and the attempted cover up (the arson) made the inflammatory nature of the other crimes evidence pale by comparison.

Defendant also contends the trial court should not have permitted Tina to testify she saw defendant orally copulate a male at one of the sex parties they attended. We would agree this evidence does not fall within the purview of Evidence Code section 1101, subdivision (b). It was not evidence of a "crime, civil wrong, or other act . . . relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .)" and defendant was not charged with having committed an unlawful sexual act. (Evid. Code, § 1101, subd. (b).) However, as this evidence was not included in the prosecutor's motion to admit other

crimes evidence, the court did not rule evidence of Tina and defendant's sex life was admissible under Evidence Code section 1101, subdivision (b). Further, defendant did not object when the evidence was admitted at trial. The issue has not, therefore, been preserved for appeal. (*People v. Rogers* (1978) 21 Cal.3d 542, 548 ["questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal"].)[7]

CALCRIM No. 375

The court instructed the jury pursuant to CALCRIM No. 375, informing the jury evidence of uncharged crimes was offered for the limited purpose of determining whether defendant acted with intent to commit torture as charged in the murder count and the special circumstance allegation. The instruction stated the evidence of the uncharged crimes may only be considered if the jury finds by a preponderance of the evidence the defendant committed the uncharged crimes. Defendant contends that as a result of the inclusion of this instruction in the charge to the jury, there is a reasonable probability the jury believed it could properly convict defendant on less than proof beyond a reasonable doubt. He argues "jurors cannot perform the mental gymnastics required" when instructed on the requirement of proof beyond a reasonable doubt, the presumption of innocence, and also instructed uncharged crimes need only be proven by a preponderance of evidence before such evidence may be considered.

This same argument was rejected by the California Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007, in connection with a similar instruction.

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[7] In opposing the prosecutor's motion, defense counsel argued testimony about one of the incidents would probably include testimony about defendant and Tina's sexual orientation. Presumably, counsel was referring to the incident where defendant bound Tina and forced her to orally copulate him before he said, "let the torture begin," cut her with a knife, hit her with a gun, and stabbed her in the calf. In any event, counsel's reference to Tina and defendant's sexual orientation cannot be deemed an objection to evidence not being offered.

Defendant's case does not present any distinction with a difference and as a result, the holding in *Reliford* applies and we are bound thereby. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In *Reliford*, the defendant was charged with rape. Pursuant to Evidence Code section 1108, the prosecution introduced evidence that defendant was previously convicted of assaulting a woman with the intent to commit rape. (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1011.) The jury was instructed, "'Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case.'" "'If you find that the defendant committed a prior sexual offense in 1991 involving S[.]B[.], you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offense. 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 in 1991 involving S[.]B[.], 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.'" (*Id*. at pp. 1011-1012.)

The defendant in *Reliford* argued his jury relied on the contested instruction alone to convict him. (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1013.) In other words, the jury would convict him solely on evidence that need only have been proven by a preponderance of the evidence. The court rejected the argument because the jury was not instructed it could convict solely on the basis of the other crimes evidence, and the jury was instructed to consider the instructions as a whole. "Viewed in this way, the instructions could not have been interpreted to authorize a guilty verdict based solely on proof of uncharged conduct. [Citations.]" (*Ibid*.)

So too, here. The jury was instructed on the presumption of innocence, the requirement of proof beyond a reasonable doubt to convict, and that proof defendant

committed the uncharged offenses "is not sufficient by itself to prove that defendant is guilty of Murder or that the special circumstance is true. *The People must still prove the charge and allegations beyond a reasonable doubt*." (Italics added.) Moreover, in argument the prosecutor told the jury that he had to prove the crimes against Tina only by a preponderance of the evidence before they may consider that evidence, but that "[y]ou still have — I still have to prove it to you beyond as reasonable doubt . . . his guilt for the murder . . . ." A reasonable jury could not have interpreted the instructions to permit conviction absent prove of defendant's guilt beyond a reasonable doubt. Consequently, we conclude defendant was not denied due process.

Cumulative Error

Defendant contends the cumulative effect of the complained of errors requires reversal. As we have not found any errors, defendant's argument necessarily fails.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.