

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM GREGORY MORDICK,

Defendant and Appellant.

G044742

(Super. Ct. No. 08NF0487)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
John Conley, Judge. Affirmed.

Richard de la Sota, under appointment by the Court of Appeal; and  
Quin Denvir for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and  
Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

\*

\*

\*

## INTRODUCTION

Defendant William Gregory Mordick appeals from the judgment entered in 2010 after a jury found him guilty of first degree murder of his wife, Katherine Mordick,<sup>1</sup> in 1983. We affirm. For the reasons we will explain, we hold (1) the trial court did not err by denying defendant's motion to dismiss the case for precharging delay; (2) substantial evidence supported the jury's verdict; and (3) the trial court's evidentiary rulings, challenged by defendant, did not constitute an abuse of discretion.

## SUMMARY OF TRIAL EVIDENCE

### I.

#### THE MORDICKS' TROUBLED MARRIAGE

In 1977, defendant and Katherine, who was often called "Kit" or "Kitty," were married. Katherine and defendant had two daughters: E. was born in 1978 and B. was born in 1980.

Katherine and defendant lived in a house located on South Ridgecrest Circle in Anaheim Hills (the Ridgecrest house). Katherine was a "food stylist" who staged food for print advertisements and commercials. Defendant struggled to earn a living as a photographer. Consequently, Katherine worked and defendant was often home with their two young girls. Toward the end of the marriage, defendant "was [not] working outside the house very much at all."

In August 1981, Katherine began to have an affair with Henry Bjoin, a photographer with whom she worked. At the end of 1981, Katherine called off the affair and stopped all contact with Bjoin to work on her marriage. During the summer of 1982,

---

<sup>1</sup> We refer to the victim, Katherine Mordick, and her sister, Donna O'Connell Bjoin, by their first names to avoid confusion; we intend no disrespect.

Katherine began working with Bjoin again and resumed her romantic relationship with him.

## II.

### KATHERINE'S SISTER, DONNA, WITNESSES TWO INSTANCES OF DOMESTIC VIOLENCE BY DEFENDANT AGAINST KATHERINE MONTHS BEFORE KATHERINE'S MURDER; DEFENDANT MOVES OUT OF THE RIDGECREST HOUSE AFTER FIRST INSTANCE.

In October 1982, Donna and her husband, Doug Holbrook, were moving; Katherine, defendant, and their daughters helped.<sup>2</sup> Donna and Holbrook were outside when E., screaming “mommy needs help,” ran to Donna. Donna ran inside the condominium and saw defendant holding Katherine by the shoulders and shaking her. After this incident, defendant and Katherine were separated; defendant moved out of the Ridgecrest house and never moved back in.

Defendant and Katherine agreed that defendant would visit the girls every other weekend. When it was his turn to have the girls for the weekend, defendant usually picked them up in the late afternoon or early evening on Friday and returned them on Sunday around the same time. Donna was often present during those exchanges. Donna testified that Katherine would have the girls ready to go on time so that there would be a quick exchange; defendant did not normally enter the Ridgecrest house.

On a Sunday in December 1982, Donna and Katherine were alone in their parents' house when defendant returned the girls after a visit. Donna heard screaming and found Katherine, in the corner of a room on the ground, covered in a ball covering her head. Defendant was on top of Katherine and was “striking her, hitting her, pounding her.” Katherine told Donna to get the girls out of the room; Donna complied. When Donna returned, she saw defendant getting off of Katherine. Katherine was “a mess”; she

---

<sup>2</sup> Holbrook testified at trial that Katherine did not help Donna and him move in October 1982. At the time of the murder, Donna was married to Holbrook. She testified that their marriage was troubled. In the summer of 1984, Bjoin and Donna married.

was crying and disheveled. Defendant never again reentered Katherine and Donna's parents' house.

### III.

KATHERINE PETITIONS FOR MARITAL DISSOLUTION; KATHERINE AND DEFENDANT MEET WITH KATHERINE'S ATTORNEY; DEFENDANT IS SERVED WITH AN ORDER TO SHOW CAUSE REGARDING CHILD AND SPOUSAL SUPPORT, CHILD CUSTODY, AND VISITATION ISSUES, SCHEDULED TO BE HEARD ON JANUARY 28, 2003.

In late December 1982 or early January 1983, Katherine met with family law Attorney Bernard Leckie, seeking his assistance in divorcing defendant. On January 4, 1983, Leckie filed a petition for dissolution of the Mordick marriage, on behalf of Katherine. On January 11, Leckie met with Katherine and defendant at Leckie's office. (The record does not reflect that defendant ever sought any advice of counsel with regard to the marital dissolution proceedings.) During the meeting, Leckie served defendant with, inter alia, an order to show cause on the issues of child custody, support, and visitation as well as spousal support. The order stated that defendant was to appear in court on January 28, 1983. Also during the meeting, Leckie proposed terms pertaining to child support, custody, and visitation, which he thought were reasonable, but also favorable to Katherine. Defendant "agreed to everything," which, Leckie testified, was "very uncommon" in marital dissolution actions. He stated defendant had a "very unusual" reaction at the meeting and described defendant's manner as quiet and "almost sullen." Leckie drafted a letter, dated January 12, to defendant informing him that the proposed property settlement agreement was enclosed with the letter and that he should sign and return it if it was satisfactory.

### IV.

KATHERINE IS MURDERED ON SATURDAY, JANUARY 22, 1983.

On Sunday, January 16, 1983, Donna was with Katherine at the Ridgcrest house when defendant returned the girls after his weekend visit with them. Donna

testified that defendant did not “really come in the house” and that the girls ran inside. At the front door, Katherine and defendant discussed plans for the following weekend, including whether defendant was going to take the girls to a birthday party. Katherine was planning to move out of the Ridgecrest house at the beginning of February and move closer to Los Angeles or to the valley. She and defendant agreed to switch weekends so that he would have the girls during the weekend of January 21 through 23. That way, defendant could take the girls to the birthday party and Katherine would have them with her the weekend they moved out of the Ridgecrest house. Defendant was to pick up the girls on Friday, January 21.

On Friday, January 21, Katherine and the girls went to Los Angeles to look for a place to live. They went to Bjoin’s studio and left Los Angeles at 2:00 p.m., because defendant was picking up the girls that evening.

Katherine’s brother, Joseph O’Connell, expected Katherine to arrive at his home on Saturday afternoon, January 22. She did not arrive as scheduled and had not made contact with O’Connell or his wife. Bjoin showed up at O’Connell’s house on Sunday evening, looking for Katherine after he had been unable to reach her.<sup>3</sup> O’Connell and Bjoin drove to the Ridgecrest house to look for Katherine. They arrived at the Ridgecrest house around 10:30 p.m. on Sunday, January 23, and saw that no lights were on and that it looked like no one was home. They knocked on the front door and rang the doorbell, but there was no response. They decided to leave, assuming Katherine might be on her way to O’Connell’s house.

As O’Connell and Bjoin walked away from the front door, they noticed a door to the garage. One of them opened the door and they saw Katherine’s car parked

---

<sup>3</sup> Bjoin had spent the weekend in San Diego with his brother’s family for his nephew’s birthday party. Bjoin had arrived at his brother’s home between 5:00 and 6:00 p.m. on Friday, January 21, and left around 9:00 or 9:30 a.m. on Sunday, January 23. While in San Diego, Bjoin tried to call Katherine several times. No one answered the telephone and the answering machine did not pick up.

inside the garage. O'Connell ran toward the front door and tried to get inside the house by breaking through a window after taking off the front window screen; Bjoin ran around to the back of the house. O'Connell was still working on the front window screen when he heard Bjoin scream. Bjoin opened the front door for O'Connell and turned on the porch light. Bjoin was sobbing. O'Connell saw Katherine's body lying on the floor of the dining room; her throat was slit. O'Connell, while making sure not to touch anything, sat Bjoin down at the kitchen table and then called the police.

Officer Gerald Taylor of the Anaheim Police Department received a call around 10:50 p.m. to go to the Ridgecrest house. He arrived there within 10 minutes. He saw Katherine's body lying on the floor. The black skirt that she was wearing had been pulled up above her waistline and she had no undergarments on. Bjoin told Taylor that he had last seen Katherine on Friday, January 21, at 2:00 p.m., at which time Katherine told Bjoin she had to leave because she had to be home to meet defendant at 6:00 p.m.

Anaheim Police Officer Robert McKay, his partner, Officer Steve Whitson, and criminalist Jim White investigated the scene of Katherine's murder. They found no sign of forced entry or ransacking, with the exception of one plant that was upended and had spilled, a speaker wire that had been roughly disconnected from a speaker, and a set of stereo speakers and a television set which had appeared to have been recently moved to the door. Moving boxes did not appear to have been opened. Katherine's purse sat undisturbed on the upstairs bathroom countertop. They did not find a murder weapon. Three bowls, one cup, two glasses, and a cooking pot were in the kitchen sink; the cooking pot appeared to have residue from a cream-of-wheat type of cereal.

Katherine's genital area did not show evidence of trauma; swabs taken from her genital area were negative for semen indicators, and vaginal slides were negative for sperm. Blood was found on Katherine's body, on the carpet underneath the table and

“along the chairs that are underneath the table”<sup>4</sup> in the dining room, on the wall by the front door, in the downstairs bathroom sink, on the television set, on the drapery near the rear sliding door, and on the rear sliding door itself. No blood was found on the carpet to the right side of Katherine’s body. No blood was detected on the underpants or tights found near Katherine’s body.

The forensic use of DNA was not available in 1983. The blood samples were tested for red blood cell antigens and human enzyme known as phosphoglucomutase (PGM) to determine the combination of alleles present in those samples. Defendant’s fingerprint was lifted from the bottom of the television set.

Deputy Coroner Joseph Luckey arrived at the Ridgecrest house at 2:55 a.m. on January 24. He estimated that the time of Katherine’s death was January 22 in the “p.m. hours.” At trial, Luckey testified that the time of death could have been 10:00 a.m. on January 22.

On Monday, January 24, 1983 about 10:00 a.m., Richard Fukumoto, M.D., performed an autopsy on Katherine’s body. He observed “two gaping cuts in the neck area, extending from the—below the left jaw, angle of the jaw, towards the midline, in [a] somewhat downward angle.” One cut was seven inches and the other was three inches in length. There were four “hesitation marks,” indicating the assailant had to stop because Katherine moved or for some other reason.

Katherine’s neck was cut “quite deep”; the cervical bone itself in the back of her neck was cut. The cuts, which severed Katherine’s carotid artery and jugular vein, caused massive bleeding and Katherine died within minutes. Fukumoto stated the blood that “spurt[ed]” from the severed artery would have flowed to Katherine’s left and potentially away from the assailant. He also stated that depending on the length of the assailant’s knife, the extent to which the assailant reached over Katherine, and whether he

---

<sup>4</sup> Blood was found below table height, tabletop level; the underside of the table had quite a bit of blood on it. Blood was not found on top of the table.

or she used the tip of the blade, the assailant's hand could have been "fairly far" from the wound itself. Fukumoto testified that in his opinion, the weapon was a smooth-edged knife. He stated a kitchen knife could have been the murder weapon.

Fukumoto also observed a bruise on Katherine's right temple, a bruise just above her right ear, and an abrasion on the upper surface of the right side of her chin, all of which were caused by blunt force using a round object such as a baseball bat or a fist. He stated that those injuries were "fresh wounds," which occurred before she died. He further stated such injuries could have stunned Katherine and caused her to fall to the ground. He found no signs of sexual trauma. He found two defensive wounds on Katherine's left hand.

Fukumoto testified he had opined that Katherine had died between 36 and 48 hours before he performed the autopsy, but stated it was possible she had died around 10:00 a.m. on Saturday, January 22. He further testified that after the injuries had been inflicted, Katherine would not have been able to "cry out for help."

James Edward Conley, a forensic specialist, who conducts crime scene investigations, testified that the crime scene in this case appeared to have been staged to suggest a sexual assault and a burglary with the intent to steal had occurred. Conley explained that a person who would stage a crime scene "could commonly be a person who felt that suspicion would naturally fall upon them and they are trying to misdirect law enforcement away from that."

Conley testified that his opinion was based on the following factors: (1) there was no sign of forced entry and little, if any, ransacking; (2) Katherine's purse containing cash was left undisturbed; (3) the only things apparently stolen were Katherine's keys and a sewing machine which is not a normal target for a theft; (4) there was no physical evidence of sexual touching; (5) it appeared Katherine's tights were removed after her throat was cut; (6) it is unusual for there to be a combination of the appearance of both theft and sexual assault motives in the same crime; (7) the crime

scene was located in a relatively small part of the Ridgecrest house; and (8) blood was found on the interior of the rear sliding door but not on the exterior of the door. He further opined that Katherine's assailant could have had "very minimal" blood on his or her clothing, "if any."

## V.

### DEFENDANT IS INTERVIEWED BY POLICE; INVESTIGATION OF KATHERINE'S MURDER CEASES.

Anaheim Police Detective John Cross called defendant at 3:14 a.m. on Monday, January 24, 1983, and informed him of Katherine's murder. Defendant told Cross that he had been at the Ridgecrest house at 10:00 a.m. on Saturday and volunteered that that weekend's visitation arrangement had been different because he usually picked up the girls on Friday. Defendant also told Cross that he went inside the Ridgecrest house because Katherine wanted to talk to him about her move the following weekend and because he had to wrap or pick up some gifts that the girls were going to take to a birthday party.

Later that same day, around 1:00 p.m., Cross and another detective drove to defendant's parents' house in Poway to meet with defendant in person. When asked whether there had been any violence in the relationship, defendant stated that during one argument, he might have shaken Katherine. Defendant told the officers that when he went inside the Ridgecrest house on January 22, the television and the stereo speakers were in their normal positions. He told them he had opened a closet door to check on a silkscreen that he had left there and then closed the door. Defendant said he drove the girls to a birthday party in Huntington Beach, hosted by his friend, Jana Johnson, and then drove to his parents' house in Poway.<sup>5</sup> He told Cross he arrived at the birthday party at 11:00 a.m. or earlier. (Johnson told the police that defendant had arrived at the party

---

<sup>5</sup> Johnson testified that without traffic, it was about a 25-minute drive from the Ridgecrest house to her house.

around 11:30 or 11:45 a.m. on Saturday, January 22.) When asked about the kitchen knives at the Ridgecrest house, defendant told the officers where the knife set was kept (in a cabinet); the officers later found the knife set and saw that one knife appeared to be missing from its slot.

On February 1, 1983, Cross interviewed defendant at the Anaheim Police Department. Cross mentioned that defendant had told him that the knives were kept near the stove up above in a cupboard; defendant said he did not know if they were all there “because last time [he] talked to Kitty she apologized for losing one of those knives.” Cross employed a ruse of telling defendant that a witness had seen him reenter the Ridgecrest house after he placed the girls inside the car on January 22, 1983. (Cross had not found anyone who saw defendant at the Ridgecrest house that morning.) Defendant stated he saw “[t]hat gentleman was there” but denied entering the Ridgecrest house after putting the girls in the car. He had stated to Cross that he “[w]ent back and closed the gate, got in the car and left.” He said he and Katherine had “a policy of not going back.” He volunteered to Cross that after he came back to the car, E. said, “what took you so long Daddy,” and defendant told her he had “to close the gate.” Defendant told Cross that E. asked whether he had “a fight with Mommy” and defendant said, “no we don’t do that anymore.”

During another interview with Cross on April 28, 1983, defendant referred to Bjoin as a “nice guy.” Defendant told Cross he was looking for the sewing machine that was missing from the Ridgecrest house. Defendant offered his journal to Cross and also gave Cross letters he had written to Katherine. Cross did not remember reading the journal.

In the spring or summer of 1983, the investigation of Katherine’s murder lost steam and it became a cold case.

## VI.

### THE INVESTIGATION INTO KATHERINE'S MURDER REOPENS IN 1999.

In 1999, the investigation of Katherine's murder was reopened and evidence that had been collected in 1983 was reviewed.

#### A.

##### *DNA Analysis on Blood Samples*

Elizabeth Thompson of the Orange County Sheriff's crime laboratory was assigned to analyze evidence that had been collected in the case of Katherine's murder. The blood found on the wall near the front door matched Katherine's DNA profile. Blood detected on a plastic bag found in a closet had a major male contributor that was consistent with defendant's DNA profile (one in 485 people shared the same profile). Blood found on a right-side closet door was also consistent with defendant's DNA profile.

Blood found on the rear sliding door and in the bathroom sink came from a major contributor and a minor contributor. At each location, the major contributor appeared to be Katherine and the minor contributor was consistent with defendant's DNA profile (one in 84 males shared the same profile as the minor contributor at those locations). Blood found in other parts of the Ridgecrest house was either not collected or not tested, or the results from testing were inconclusive. Testing of blood found on the drapery near the rear sliding door showed the major contributor was Katherine and the minor contributor had a DNA profile that was consistent with defendant's profile.<sup>6</sup> A

---

<sup>6</sup> Senior forensic scientist Mary Hong conducted tests on some of the blood evidence and testified that the blood found on the plastic bag was consistent with defendant's DNA profile and that the frequency of persons with that DNA profile is one in one trillion. She further testified the most reasonable interpretation of the evidence following testing of the blood found on the rear sliding door was that it consisted of Katherine's blood and defendant's blood.

vial of defendant's blood cracked and spilled on the envelope containing the blood sample collected from the drapery.

B.

*Summary of Excerpts from Defendant's Journals*

In January 2001, investigator Boyd Underwood along with investigator Paul Gallagher, traveled to Spokane, Washington, where defendant then lived. There, they found defendant's six journals. The following constitutes a summary of the excerpts from defendant's journals that were admitted into evidence during the prosecution's case-in-chief.

*August 31, 1981:* Defendant was surprised when Katherine told him a few days earlier that she was having an affair with Bjoin with whom she had been working for the last six months.

*September 27, 1981:* Defendant had been fired from his job because he did not get along with his boss. Defendant wrote: "This situation with Kit and Henry is wearing me down. He just refuses to accept the fact that Kit does not want to leave me for him. He is constantly laying the guilt trip on her and playing her emotions against her. She has told Henry it is over, that she wants to devote all of her energies to the family, but Henry is a little dense. [¶] He keeps hanging in there hoping I will throw in the towel and walk away. No way! [¶] I love what I have with Kit and I am not about to give her up, and especially not my girls."

*May 25, 1982:* "Kit and I are trying to be courteous to one another, not much else going on with us. In a way, it is hard to believe we have had this problem for a year now. No wonder I feel worn out. I have been fighting for us all by myself and getting slapped in the face for it. I am now starting to feel anger at Kit for her feelings toward me. [¶] Kit has made it sound like it is terrible living with me. . . . [¶] I do not fulfill any of her dreams, her dream man, me, has feet of clay and failings and that bothers her. She has had to work and resents that and resents my lack of work." He

added: "I do know one thing, I am not taking any more of her lip and I will speak up. Our emotional and sexual selves are already down to zero, my self esteem is not going to be brought down also."

*June 11, 1982:* "Kit just refuses to give constructive thought to our problem. She does not want this so-called magic with Henry to end. . . . She is playing a game with me and herself. The end result might not be as attractive as she thinks. [¶] If Kit does not get this job with Jack-in-the-Box we are in trouble. We are going down for the third count. We are running out of money, fast. Next week I look for any kind of job. Anything to bring in money. We are in bad shape!!"

*June 15, 1982:* "Henry is back. He called yesterday and indicated he wants to break the ice between himself and Kit. Kit is eager to accommodate this. I have severe reservations, but as I have found in the past, I have no real say in what Kit decides to do. She has indicated lately a desire to see Henry, all I can do is take my uneasy feelings and sit in a corner. . . . I don't have it in me to go through more rejection, turned off feelings, and lost love. My cup can only hold so much. So tonight I resigned myself to be prepared. I love my 2 girls too much to divorce Kit, I think we would move to separate rooms if things started with those 2 again. When the girls got a little older I think I would separate."

*July 16, 1982:* "In some respects Kit and I are no closer than a year ago. Her sexual feelings for me are farther away now. My lack of work is making her go farther away also. I just wish I had the money to get my own studio going."

*July 27, 1982:* "My lack of work is not helping either. I'm trying real hard but I am not making any headway. That is really frustrating. So it causes Kit to re-evaluate me as a provider and husband. Even though she sees me as a good father to the kids, I believe she has a real hard time relating to me as the provider she would like to have. I'm having a real hard time relating to myself right now. It is painful."

*August 12, 1982:* “Kit read my diary last night. She decided she wanted to know what was going on. She read the list of girls I had been to bed with, and the ones I fooled around with and the ones I was tempted with. I probably should have been honest with her before. But what can I do now, the damage is done. Her trust has been shattered, she will be open only to what she wants to. In a sense I am relieved, it has been a heavy burden on my heart, knowing I had done a few things that I was not honest about. I wonder if it will make Kit want to see Henry. I don’t blame her if she does. She feels betrayed by me and rightly so. I can in no way justify what I have done nor can I explain why I have behaved so.”

*September 8, 1982:* “A little flash back: Aug. 22, 1 a.m.—Kit and I had one of our usual arguments and I left for Kansas. I wanted to see my grandparents, they are old now and not well. . . . Then I came home, but should have stayed away longer. Kit and I are no better off. Her distance to me is farther. I don’t blame her. All of my deceptions have come to light. No service in Vietnam, did not graduate from college, and a few more to cover an escape route from this relationship. . . . If Kit keeps running from me my hurt will be multiplied to a level I might not be able to handle. [¶] I started sleeping in the other room. I will remain there until Kit forms good feelings for me or we separate.” He also wrote: “I wish I could find an answer to this suffocating weight I feel. My defenses down, scared of what is to come and how to hold onto what I want. I so desperately want Kit to be in love with me again, especially in a fun way. There has been so much sadness and sorrow, where will we find relief and rest.”

*September 13, 1982:* “Kit and I had one of our fights over the weekend. I’m so sorry these things happen but they do. I am so frustrated I get upset and say things I really don’t mean. I don’t want to separate or divorce but Kit does.” He wrote that Katherine’s feelings were “still going away from [him],” which caused him to “hurt so much.” He stated, “[t]he thought of not making things work and me separated from my

little ones just drives me crazy. I want and need them every day, not just once in a while, not just for a couple of hours.”

*September 18, 1982:* “Kit and I took a step farther apart. She asked that I stop all touch.” He also wrote: “So much beauty down the toilet—for what—me covering my insecurities and her not being able to talk when she had to. . . .”

*September 20, 1982:* “Oh God I hurt. I broke down and came apart last night. Kit is giving no ground on this separation issue and I am the one who has to leave. Me—why not Kit. Why doesn’t she go off by herself for a while and see what it’s like. Why do I have to be separated from my little ones? . . . Why has so much love and happiness turned to so much hate, anger, and despair? . . . Does Kitty see me as a threat to the kids and she wants to make sure they don’t hang around sick dad too much?”

*September 24, 1982:* “The hardest part is saying goodbye[e] to my girls, not tucking them in. . . . [F]or once my tangled web will cause me pain that I don’t know if I can bear. . . . This will be devastating, this is almost incapacitating.”

*September 28, 1982:* Defendant stated that he gave his wedding band to Katherine and told her that he planned to leave as “soon as [he] can psychologically handle it.” He wrote: “I am alone. Alone—with memories—I must go.”

*October 4, 1982:* Defendant stated that Katherine told him she did not trust him around the girls alone, which “just about cut [his] heart out.”

*October 11, 1982:* Defendant wrote that the Mordicks’ wedding anniversary on October 8 was “a bust”; Katherine refused “to do something” with him. “My heart hit a new low. We got into a big argument and I got hot and pulled Kitty’s wedding ring off her hand. I put that there in love and respect. I violated that love Friday, on our holy day.”

*October 20, 1982:* “Kitty and I are finally separated. I moved all my things out. It is really hard to take. It is very inconvenient living here with my parents

[in Poway]. I am too far from my little ones. I am too far from Kitty, whom I love very much.”

*October 27, 1982:* “Somehow I must adjust to being a weekend daddy and go on. I know Kitty will limit that contact down the line. She is just taking one step at a time and slowly asserting what she wants. . . . [¶] The cruelest thing Kitty has done is separate me from those beautiful girls. They have been my life. My reason for tomorrow.”

*November 3, 1982:* “Sometimes I wish I was strong enough to go away and find a new life for myself. The real me wants my kids and wife around forever. The real me wants the kids around forever so I can watch them grow and develop. I don’t want to be deprived of the future laughs, cries, triumphs, failures, quiet moments, and arguments.”

*November 4, 1982:* “Why do I always have to come out on the short end of the stick? Why do I give and give and get nothing in return? I miss those beautiful kids so. They are my tomorrows and dreams, why do I have to be separated from them?”

*November 22, 1982:* “I wonder what is going on with Kitty. We have been separated one month now and she has made no attempt to contact me. . . . [.] If Kitty gives up, I’ll go crazy for a while. I love her so, I just can’t let go. I refuse to believe this relationship can come to an end. We are so good together. Work prospects are getting slim, exasperating, and taxing on my soul. . . . I’m not making any headway as a photographer.”

*November 29, 1982:* “Kitty gave me a great Thanksgiving gift. She told me to let go, she is no longer going to work on her feelings for me. She wants us to end our relationship. Finished . . . I guess we are at opposite ends of the spectrum. I want us to work, she wants us to go our separate ways.” He also wrote, “I wish I could get custody, but the courts seem to favor mothers, fathers lose all around for some reason.

The love I have from my girls should carry me through life. I just pray Kitty does not move too far away. That would really break my heart.”

*December 1, 1982:* “Now I am separated and even feel more desperate, so lonely, so left alone.”

*December 12, 1982:* “Goodbye Kitty. Kitty and I had a fight this evening, she struck me, I lost my temper and struck back. The girls were watching. Oh the hurt, to have such tender eyes see the anger in their parents. To see the anger in Kitty for me, growing even as we are apart. Time has not healed anything for her, only festered bad feelings for me. [¶] I hurt for the girls, no permanent home, run around here and there. . . . I agreed to let the girls stay with Kitty during our separation, because I thought we would get back together. Now we are not. Now what do I do? They need a stable place to call home.” He wrote: “Today I told Kitty I would let go of my feelings. She was free to pursue her feelings for Henry, that’s what she has wanted for a long time. Now she can have him, but I will not let Henry have my girls. They can start their own family.”

*December 19, 1982:* Defendant wrote that he returned the girls home 25 minutes late; Katherine “raised hell,” said, “she was being too generous” and that defendant “was seeing them too much.” Katherine told him, “[t]hat after the first of the year, she will no longer be so generous and some real changes were going to be made.” Defendant stated: “I’m afraid she will start using the kids to strike back at me. They are going to be greatly hurt by her anger and dislike for me. . . [.] Sometimes I think I should just go away, that would be the easy solution. I would greatly like custody of E[.] and B[.], but the courts don’t smile on daddies too often, even good daddies but not so good husbands.”

*December 20, 1982:* “What am I going to do. Kitty is getting more and more upset with me. More anger is being directed at me and the kids are becoming

pawns of her anger. They are too precious to be used in that way. Their beautiful hearts could be wounded for ever. What do I do.”

*January 2, 1983* (three weeks before Katherine’s murder): “Kit still will not let me in the house. She says it is all over and it is her house now.” He also wrote, “[t]oday Kitty told me she finally got a lawyer and was going to call it quits. She is filing for divorce. Ending our 5 years of beauty and turmoil. . . .”

*January 12, 1983* (the day after defendant met with Katherine and her attorney): “I need a lot of money to pay for Kit’s and my separation. I have another 16 years of paying child support. A lot of money starting at \$650 dollars a month, \$7800 a year or \$124,800 over 16 years, barring any raises in payments. Keep the nose to the grindstone.”

*January 18, 1983* (within a week of Katherine’s murder): “It is such a letdown after the girls are gone. The sunshine and laughter is gone. An empty hurt in my stomach replaces the smiles and feeling ultimate joy. Such peaks and valleys. I pray my heart will remain strong. At times, I get so weak and just want to go away somewhere, to relieve confusion for the girls. I know I will always have their love, I have given it to them so freely. Then I won’t hear B[.] say how hard it is having 2 different parents. I know I could ease their pain by going away. I know Kitty would not mind.”

### C.

*In 2003, a Grand Jury Convened; in 2008, Further DNA Testing Is Conducted, and Defendant Is Interviewed and Arrested.*

A grand jury convened in 2003, regarding Katherine’s murder. Aside from references to certain witnesses’ testimony before the grand jury, our record does not describe the grand jury proceeding or its outcome.

In 2008, further DNA testing was done, using a different kit. Thompson testified that based on the results of her testing, the blood that was collected in the bathroom sink had a major contributor and a minor contributor and probably constituted a

mixture of blood of each contributor or a mixture of blood from one contributor and saliva from the other and not “touch DNA” which is left through sweat and/or skin which has sloughed off. As to the blood found in the bathroom sink, Thompson testified that a “good cleaning” of the sink basin would wipe away DNA.

On February 6, 2008, defendant was interviewed by detective Robert Blazek and prosecution investigator Larry Montgomery. Defendant discussed how Katherine was not a very good housekeeper and that he was the housekeeper at the Ridgecrest house. During the interview, the following colloquy occurred:

“[Blazek]: I know give us something here let us, give us an opportunity to help figure this out. What really happened that day? What happened when you went back in that second time? Why did you go back in?”

“[Defendant]: I told everybody, uh, I’d forgotten the birthday card and the present we were going to take to Jan and Phil’s.

“[Blazek]: Okay.

“[Defendant]: I took the kids out to the car and forgot the birthday present.

“[Montgomery]: And what happened, what happened when you got back in the house?”

“[Defendant]: I’m sorry?”

“[Montgomery]: What happened when you got back in the house? Because that’s, that’s where the crux of this whole thing . . . .

“[Defendant]: Nothing, I picked up the present and left.”

## PROCEDURAL BACKGROUND

In February 2008, the prosecution filed a felony complaint charging defendant with Katherine’s murder. In September 2008, defendant was charged in an information with one count of first degree murder in violation of Penal Code section 187, subdivision (a). The information alleged defendant intentionally murdered Katherine for

financial gain within the meaning of Penal Code section 190.2, subdivision (a)(1). At the first trial, the court declared a mistrial after the jury was unable to reach a verdict, having been equally divided as to defendant's guilt.

The trial court scheduled a retrial for September 2010. Defendant filed a motion to dismiss the case due to prefiling delay. The court denied defendant's motion to dismiss.<sup>7</sup>

The jury found defendant guilty of first degree murder as charged in the information. The jury, however, found it not to be true that defendant committed first degree murder for financial gain, within the meaning of Penal Code section 190.2, subdivision (a)(1).

The trial court sentenced defendant to state prison for a term of 25 years to life. Defendant appealed.

## DISCUSSION

### I.

#### THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION TO DISMISS THE CASE BASED ON THE PROSECUTION'S DELAY IN BRINGING CHARGES AGAINST HIM.

Defendant contends the trial court erred by denying his motion to dismiss the case brought on the ground "he was prejudiced by the unjustified delay in bringing charges against him." (Capitalization and boldface omitted.) "We review for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if substantial evidence supports them [citation]." (*People v. Cowan* (2010) 50 Cal.4th 401, 431.) For the reasons we

---

<sup>7</sup> During the first trial in this matter, defendant had previously moved to dismiss the case based on precharging delay. The trial court denied his motion. At defendant's retrial, the court did not defer to the earlier denial of defendant's motion to dismiss, "in an abundance of caution," in deciding to deny the motion to dismiss.

explain, the trial court did not abuse its discretion by denying defendant's motion to dismiss the action.

In *People v. Abel* (2012) 53 Cal.4th 891, 908, the California Supreme Court recently summarized the applicable legal principles to motions to dismiss based on precharge or prearrest delay, stating: "A defendant's state and federal constitutional speedy trial rights [citations] do not attach before the defendant is arrested or a charging document has been filed. [Citation.] Nonetheless, a defendant is not without recourse if a delay in filing charges is prejudicial and unjustified. The statute of limitations is usually considered the primary guarantee against overly stale criminal charges [citation], but the right of due process provides additional protection, safeguarding a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence [citation]."

The Supreme Court further stated: "A defendant seeking relief for undue delay in filing charges must first demonstrate resulting prejudice, such as by showing the loss of a material witness or other missing evidence, or fading memory caused by the lapse of time. [Citation.] Prejudice to a defendant from precharging delay is not presumed. [Citations.] In addition, although 'under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process. . . . If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.' [Citation.] If the defendant establishes prejudice, the prosecution may offer justification for the delay; the court considering a motion to dismiss then balances the harm to the defendant against the justification for the delay. [Citation.] But if the defendant fails to meet his or her burden of showing prejudice, there is no need to determine whether the delay was justified. [Citations]." (*People v. Abel, supra*, 53 Cal.4th at pp. 908-909, fn. omitted.)

In *People v. Nelson* (2008) 43 Cal.4th 1242, 1249-1250, the Supreme Court rejected the argument that when the delay is as long as it was in that case (the charge was in 2002 for a 1976 murder), prejudice should simply be presumed, with no need to show specific prejudice. The Supreme Court explained: “That has never been the law, and we decline to adopt such a rule here. As we have explained, ‘[t]he statute of limitations is usually considered the primary guarantee against bringing overly stale criminal charges,’ and there ‘is no statute of limitations on murder.’ [Citation.] Presuming prejudice would be inconsistent with the Legislature’s declining to impose a statute of limitations for murder, among the most serious of crimes. To avoid murder charges due to delay, the defendant must affirmatively show prejudice.” (*Id.* at p. 1250.) The court concluded, “the justification for the delay in charging defendant with this 1976 crime—he was not charged until further investigation, specifically the DNA testing in 2002, provided strong new evidence of his guilt—outweighed the prejudice defendant suffered from the delay. Accordingly, the delay did not violate defendant’s constitutional rights to a fair trial and due process.” (*Id.* at p. 1247.)

Here, in denying defendant’s motion to dismiss the case, the trial court explained its ruling as follows: “Obviously 25 plus years is a long time. Though the [*People v. Nelson*], *supra*, 43 Cal.4th 1242] case was 26. There is some prejudice here. You can just read the materials I was given from Mrs. Pioch as to what day was it that she last saw the victim? Or was it even that weekend? To see that there’s some problems caused by the delay. But the court doesn’t find any purposeful or deliberate or reckless delay. It’s just delay. [¶] Is it negligent delay? Should there have been earlier D.N.A. tests and so on? Well, a lot of us remember when D.N.A. started, . . . it was extremely expensive and extremely time consuming. And old cases were placed on the back burner, there’s no question about that. Just like in the [*People v. Cowan*], *supra*, 50 Cal.4th 401] case, nobody bothered to look at it for a long time. [¶] As the case law points out, of course delay weakened the government’s case, too. That’s *Nelson* at page 1251. And the

district attorney is under no obligation to file before concluding an investigation. And the court talks about Monday morning quarterbacking.” (Italics added.)

The trial court continued, “[s]o, is there some prejudice? Yes. [¶] In terms of balancing, is it deliberate delay? No. [¶] Is it reckless delay? No. [¶] Is it simply investigative delay? That’s the way the court would term it. [¶] *Cowan* I felt was important because you could, the Supreme Court could have looked at that as negligence, that Mr. Roper completely missed it, I guess that the defendant’s prints matched. And no one bothered to second guess it for years. But the court felt that that was simply human error. And I think anything in our case is investigative delay or looked at at its worst, is mere human error. [¶] So, the motion to dismiss is denied. I think as I mentioned I have to review it again, if there is a conviction after that time to see, well, okay, that’s the way it looked at the beginning, but how did it all pan out. [¶] So, the motion is denied without prejudice.” (Italics added.)

Although defendant points out that one of the forensic scientists testified she had performed DNA analysis as early as 1993, the record does not show the prosecution wrongfully delayed the commencement of the DNA testing of the crime scene blood samples in 1999 and 2000.<sup>8</sup> Defendant contends he suffered prejudicial, unjustified precharging delay during the 2000 to 2008 time period, in light of his

---

<sup>8</sup> In *People v. Nelson, supra*, 43 Cal.4th at page 1256, the Supreme Court rejected the defendant’s argument that “the DNA technology used here existed years before law enforcement agencies made the comparison in this case and that, therefore, the comparison could have, and should have, been made sooner than it actually was” and that “the state’s failure to make the comparison until 2002 was negligent.” The Supreme Court explained: “A court may not find negligence by second-guessing how the state allocates its resources or how law enforcement agencies could have investigated a given case. . . . ‘Thus, the difficulty in allocating scarce prosecutorial resources (as opposed to clearly intentional or negligent conduct) [is] a valid justification for delay . . . .’ [Citation.] It is not enough for a defendant to argue that if the prosecutorial agencies had made his or her case a higher priority or had done things a bit differently they would have solved the case sooner.” (*Id.* at pp. 1256-1257.)

argument in his supplemental opening brief that “the crime was solved, if at all, by 2000 when the DNA testing was completed, yet [defendant] was not charged for an additional eight years, on February 6, 2008.”

Defendant argues his defense was greatly prejudiced by the prosecution’s delay in charging him because (1) his father died in 2002, and thus was unable to testify that when defendant returned home from the birthday party, defendant was wearing the same clothes he had been wearing before he left to pick up the girls; (2) his brother died in 2001, and, due to his father’s and brother’s deaths, neither was able to testify that they discussed the proposed settlement terms of defendant and Katherine’s divorce and why defendant was not overly concerned about those terms; (3) “the DNA evidence in the case had deteriorated and weakened, resulting in partial . . . and inconclusive results”; and (4) “the passage of time had eroded the memory of virtually every witness and potential witness,” and, specifically, the memories of the Mordicks’ neighbor, Bonnie Pioch (hereafter, Pioch), her son (then four-year-old J.), then four-year-old E., and defendant himself.

The appellate record supports the trial court’s finding that defendant only suffered “some prejudice.” As to his father’s death and unavailability as a witness, defendant did not produce any evidence showing his father had seen defendant before he left to pick up the girls at the Ridgecrest house on January 22, 1983. Furthermore, defendant testified that his parents were not home when he and the girls arrived there after attending the birthday party. Defendant’s father and brother would not have been able to testify regarding defendant’s statements he was not concerned about the proposed divorce settlement terms, because any such statements would have constituted inadmissible hearsay.

There is no evidence the DNA collected at the crime scene weakened or deteriorated between 2000 and 2008. It is also speculation that E.’s, J.’s, and Pioch’s memories surrounding Katherine’s murder materially deteriorated during that time

period. E. and J. were both four years old on January 22, 1983, and would likely have very limited memories of that time in their lives after even a short period of time had passed. Since January 1983 (as discussed *post*), Pioch offered multiple conflicting accounts of when she last had spoken with Katherine and the surrounding circumstances of that conversation. There is no evidence Pioch's questionable memory was affected by the eight-year time period following the completion of most of the DNA analyses in 2000. Pioch testified that her memory had always been that she last saw Katherine on Friday, January 21, after work. (Pioch also, and rather inconsistently, told the grand jury she thought her memory was "sketchy.") Defendant asserts that on cross-examination, the prosecution made him look bad because he could not remember writing certain journal passages.

We therefore examine whether the trial court abused its discretion in balancing the amount of prejudice defendant suffered due to the precharging delay against the justification for the delay. Defendant contends the prosecution offered no real justification for the delay in charging him with murder, particularly after the DNA testing was completed by 2000.

The record shows, however, that the investigation of Katherine's murder had not concluded at the time the initial DNA and PGM analyses were conducted. Although those analyses yielded results supportive of the conclusion defendant was Katherine's murderer, in light of defendant's prior residence at the Ridgcrest house and the absence of his DNA on Katherine's body and clothing, those results alone were not dispositive. Further DNA analyses were conducted on evidence in 2004 and 2007, and again in 2008, using a different kit for analysis. In addition, defendant's journals were retrieved and reviewed, and defendant was interviewed again in 2008.

Substantial evidence shows the precharging delay here was investigative delay. As stated in *People v. Nelson, supra*, 43 Cal.4th at page 1256: "A court should not second-guess the prosecution's decision regarding whether sufficient evidence exists

to warrant bringing charges. ‘The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor’s judgment as to when to seek an indictment. . . . Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect’s guilt beyond a reasonable doubt. . . . Investigative delay is fundamentally unlike delay undertaken by the government solely to gain tactical advantage over an accused because investigative delay is not so one-sided. A prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt.’”

Here, we, “[l]ike the trial court, . . . find no evidence that law enforcement or the prosecution deliberately delayed the investigation in order to gain a tactical advantage over defendant. Nor do we find evidence of negligence.” (*People v. Cowan, supra*, 50 Cal.4th at p. 436.) “[B]alancing defendant’s weak showing of prejudice against the strong justification for the delay [citation], we find no due process violation. Accordingly, the trial court did not abuse its discretion” when it denied defendant’s motion to dismiss due to prearrest delay. (*Ibid.*)

## II.

### SUBSTANTIAL EVIDENCE SUPPORTED THE JURY’S VERDICT.

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also

reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility. [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to support a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Defendant contends insufficient evidence shows he murdered Katherine, arguing: “In sum, the prosecution’s theory was that at 10:00 a.m. on a Saturday morning in a closely populated subdivision [defendant] placed his daughters in his car, went back in the house, inflicted the horrific wounds the victim suffered, then went back out and took his children to a birthday party as if nothing had happened, all either without getting a drop of blood on him or getting blood only on his hands (the disposition of which is unknown) but not on his clothing. On top of that, he was able to deposit his own blood in various locations about the crime scene without suffering any apparent wound himself.”

We conclude substantial evidence supported the jury’s verdict. Defendant’s anger at Katherine and ability to cause her physical harm was established by evidence of instances of domestic violence that increased in seriousness the month before her murder. Katherine minimized her contact with defendant. He was generally not permitted in the Ridgecrest house or at Katherine’s parents’ house.

Defendant’s journal entries revealed his increasing despondency and desperation as his marriage fell apart in the months leading up to the murder. He was upset that Bjoin appeared to be taking his place with Katherine and, potentially, with his daughters. He was upset that Katherine had discovered his deceptions about serving in Vietnam and graduating from college, and also his infidelity; he felt she was using those discoveries to escape from the marriage. He did not think it was fair he had to move out of the Ridgecrest house when they separated. He described the pain he felt at seeing the girls less often and the fear he felt that Katherine would increase restrictions on his access to them. He stated he feared Katherine moving very far away with the girls. (Katherine

planned on moving to the Los Angeles area the weekend after the murder and was in the process of packing.) Defendant's behavior at Katherine's attorney's office was oddly calm and almost sullen, and he agreed to her initial demands for support and custody even though he was struggling to earn an income. Defendant was scheduled to appear in court on the order to show cause regarding support and custody issues a few days after Katherine was murdered.

Defendant told Cross that he was present at the Ridgecrest house at 10:00 a.m. on January 22, 1983; substantial evidence shows he was the last person known to have seen Katherine alive. Johnson stated defendant did not arrive at the birthday party (located about 25 minutes from the Ridgecrest house) until 11:30 or 11:45 a.m. He admitted he went inside the Ridgecrest house because the girls, he claimed, were late in being ready to be picked up that morning. Although he adamantly and repeatedly denied going back into the Ridgecrest house after he had put the girls in the car (he stated he had already loaded their clothing and the presents for the birthday party), during the interview in 2008, defendant admitted going back into the Ridgecrest house after the girls got in the car, because he forgot the birthday present. He thus had the opportunity to quickly strike Katherine on the head to stun her and then slit her throat. Fukumoto testified that once Katherine's neck had been cut, she would not have been able to scream or yell. Ample evidence showed how the assailant of such an attack could get little or none of the victim's blood on him or her.

No murder weapon was found. Fukumoto testified that the murder weapon could have been a kitchen knife. Defendant told the police officers where the set of kitchen knives was kept (inside a cabinet). The police discovered one knife missing from that set. Defendant testified at trial that he "grew up with hunting and fishing" and was familiar with how to use a hunting knife. He stated he used a hunting knife to clean quail.

Evidence was also presented that the downstairs area appeared to have been staged to look like the murder was connected to a sexual assault and a burglary with the intent to steal. There was no evidence of any sexual trauma, sperm, or semen on Katherine's body, notwithstanding the evidence that her skirt had been raised and her undergarments were removed. In addition, the positions of the television and the two speakers were not consistent with a burglary with the intent to steal. Nothing was taken from the Ridgecrest house (except for Katherine's keys and a sewing machine that defendant claimed was missing); Katherine's purse sat undisturbed on a countertop. Conley testified that staged crime scenes are often created by perpetrators who would be suspected of a crime and wish to mislead investigators.

Although the results of testing the blood evidence collected at the crime scene were not conclusive in establishing defendant's guilt, they supported the jury's verdict. True, defendant lived in the Ridgecrest house until October 1982; he was present in the Ridgecrest house in the morning of January 22, 1983; and his DNA could thus be found in many places in the Ridgecrest house. The jury could reasonably accept Hong's testimony that the most reasonable interpretation of the results of testing a sample taken from the blood smear on the rear sliding door was that it contained Katherine's blood and defendant's blood. (Test results showed the rear sliding door had Katherine's blood and a male minor contributor with a DNA profile consistent with defendant's profile—a profile which defendant shares with one in 84 males.) The jury could similarly reasonably conclude the bathroom sink contained defendant's blood in light of the test results showing that sample contained Katherine's DNA and DNA consistent with defendant's profile. The jury would have been reasonable in questioning the coincidence that defendant had gone into a closet to check on a silkscreen the morning of January 22, 1983 (as he told the police), and the appearance of his blood on the door of the closet and on a plastic bag inside the closet.

Defendant argues it is implausible that he deposited his own blood in the Ridgecrest house in the morning of January 22, 1983, because no cuts were found on him. But there is no evidence he was examined for cuts that day. He did not meet in person with the police officers until over 48 hours after the murder, and, thus, any cut he might have suffered during the morning of the murder might not have been obvious.

More than substantial evidence, therefore, supported the jury's finding defendant murdered Katherine. We acknowledge that defendant has cited, in his appellate briefs and at oral argument, trial evidence that might support an inference that he did not murder Katherine. We emphasize that reversal is unwarranted simply because evidence also supports a contrary finding from the jury verdict. As a reviewing court, we do not reweigh the credibility of witnesses. It is the jury, not the appellate court, that must be convinced of guilt beyond a reasonable doubt. (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Our task is to determine whether substantial evidence supports the judgment. It does.

### III.

#### EVIDENTIARY RULINGS

Defendant challenges several evidentiary rulings of the trial court. He contends the trial court erroneously (1) limited the trial testimony of Pioch, (2) admitted E.'s statements to defendant, and (3) admitted excerpts of defendant's journal entries. Defendant further contends the trial court erroneously excluded the journal entry he wrote on January 24, 1983, after Cross informed him of Katherine's murder. "We review a trial court's rulings on the admission and exclusion of evidence under the abuse of discretion standard." (*People v. Thompson* (2010) 49 Cal.4th 79, 128.)

#### A.

##### LIMITATION OF PIOCH'S TESTIMONY

Defendant argues the trial court erred by improperly limiting Pioch's trial testimony.

At trial, Pioch testified that in 1983, J., her then four-year-old son, played with E. Pioch testified that on Sunday, January 23, J. went to the Ridgecrest house twice. Pioch testified that “sometime that weekend,” she and J. went to the Ridgecrest house; Pioch did not see the girls, which was unusual, because whenever she would ring the doorbell, they would typically “come running.” Pioch saw packing boxes in the Ridgecrest house. Katherine told Pioch she was using that weekend to pack and to possibly go on a retreat. Pioch further testified that the conversation took place on Friday, January 21. Pioch later testified that the conversation occurred when she and J. were in the car after Pioch’s workday and Pioch had stopped to talk to Katherine. Pioch further stated that was the last time she saw Katherine alive.

Pioch acknowledged at trial that a transcript of her testimony before the grand jury showed she testified that the conversation took place sometime on Saturday, January 22, in either the late morning or midafternoon. Pioch stated her grand jury testimony was inaccurately recorded and it was her memory in 2003, as it was her memory at trial, that the subject conversation with Katherine took place on Friday, January 21. Pioch further testified at trial the “Saturday conversation was actually the Saturday before that afternoon conversation, which [she] tried to tell them and they kept flipping weekends.” She said she “got upset at the grand jury.” Pioch testified at trial it had always been her “very vivid[]” memory that she last saw Katherine on Friday; she further testified that she “live[s] with that [her] whole life.”

Defendant’s argument in this appeal focuses on the trial court’s exclusion of additional testimony by Pioch about what Katherine allegedly told her in a conversation. However, as we explain, that proffered testimony was inadmissible hearsay. Specifically, defendant contends that at the retrial, “Ms. Pioch was not allowed to testify, as she had at the grand jury and during the first trial, that [Katherine] had also said that her daughters were not available to play with J[.], because they had already gone with their father, and that J[.] should come back on Sunday when they would be back.”

Defendant further contends testimony regarding Katherine's statements to Pioch was admissible under Evidence Code section 1250, which provides as follows: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) *This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.*" (Italics added.)

Evidence Katherine told Pioch that the girls were not available to play with J. because they had already gone with defendant and that J. should return on Sunday does not constitute a statement of Katherine's existing state of mind, emotion, or physical sensation. Nor was that evidence offered by the defense to prove Katherine's state of mind, emotion, or physical sensation or to prove or explain her acts or conduct. The value the proffered statements made by Katherine had to the defense was to prove that she was still alive after defendant had left with the girls, and, thus, for the truth of the statements—defendant had indeed come and gone at the time Katherine spoke with Pioch.

Katherine's alleged statements constituted statements of her memory that the girls had left with defendant, explaining why they could not play with J. then and that they were scheduled to return on Sunday. Evidence Code section 1250, subdivision (b) expressly states that evidence of a statement of memory or belief to prove the fact remembered or believed is not admissible under section 1250, subdivision (a). (See Assem. Com. on Judiciary com., 29B pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1250, p. 281 [the limitation of section 1250, subdivision (b) "is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the

declarant’s then existing state of mind—his memory or belief—concerning the past event. If the evidence of that state of mind—the statement of memory—were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred”].)<sup>9</sup>

In any event, to the extent the defense sought the admission of the proffered statements to “prove or explain” Katherine’s conduct of packing (because the girls were away), the exclusion of such evidence offered for that purpose was not prejudicial. It was well established by evidence, and undisputed at trial, that Katherine was in the process of preparing for her imminent move from the Ridgecrest house.

The trial court did not err by so limiting Pioch’s testimony.

## B.

### ADMISSION OF E.’S STATEMENTS TO DEFENDANT

Defendant argues the trial court erred by admitting the portion of his February 1, 1983 interview with Cross, in which defendant stated that on January 22, 1983, after he closed the front gate, E. asked him, “what took you so long Daddy” and “did you have a fight with Mommy?” Defendant contends E.’s statements to him constituted inadmissible hearsay that should have been excluded at trial. Defendant also contends the admission of E.’s statements violated defendant’s right of confrontation under the Sixth and Fourteenth Amendments to the United States Constitution and the California Constitution. We address and reject each of defendant’s arguments, in turn.

---

<sup>9</sup> “We give the Law Revision Commission comments ‘substantial weight.’” (*Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 524, quoting *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 62.)

1.

*The Trial Court Did Not Err by Admitting Defendant's February 1, 1983  
Interview with Cross, Containing E.'s Statements.*

Defendant does not dispute that his statements to Cross during the February 1, 1983 interview were admissible against him, as admissions of a party, under Evidence Code section 1220. (*People v. Jennings* (2010) 50 Cal.4th 616, 660; *People v. Horning* (2004) 34 Cal.4th 871, 898, fn. 5 [“section 1220 covers all statements of a party, whether or not they might otherwise be characterized as admissions” (italics omitted)].) Defendant argues his recital to Cross of E.'s statements constituted “double hearsay” and that “her statement[s are] inadmissible unless it separately qualifies under an exception to the hearsay rule.”

Neither defendant nor the Attorney General, in their respective appellate briefs, analyzes whether E.'s two statements constitute hearsay in that they were “offered to prove the truth of the matter stated,” within the meaning of Evidence Code section 1200, subdivision (a). Defendant and the Attorney General assume the statements constitute hearsay. While E.'s statement, “what took you so long Daddy,” could arguably be offered for the truth of the matter—that defendant took a long time in returning to the car—E.'s statement to defendant, “did you have a fight with Mommy?” was not offered for the truth of the matter because it did not assert or imply a truth and thus was not inadmissible hearsay. In any event, the trial court concluded E.'s statements were adopted by defendant, and thus, as adoptive admissions within the meaning of Evidence Code section 1221, constituted admissible evidence.

“The law pertaining to adoptive admissions is well settled. ‘Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.’ (Evid. Code, § 1221.)” (*People v. Jennings, supra*, Cal.4th at p. 661.) On the other hand, “[t]he mere recital or

description of another's statement does not necessarily constitute an adoption of it: "[A] statement describing another's declaration is normally not regarded as an admission of the fact asserted by the other. One does not admit everything he recounts or describes merely by reason of the relating of it." [Citation.]'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1258.)

During the February 1, 1983 interview, defendant stated that he had not gone back into the Ridgecrest house after E. and B. were in the car, explaining: "No, cause I . . . brought their clothes out and went back in the house and got them and their gifts. And I came back and put them down. I was upset with E[,] when I came back from the gate cause she had her seatbelt off. I said you can't do that because of a new law. She said oh that's right Daddy. Cause she was standing there by the door. She goes what took you so long Daddy. I said, to close the gate. She said, did you have a fight with Mommy? I said, no we don't do that anymore. That's when she said, oh good."

To the extent E.'s statement "what took you so long Daddy" was offered to prove a "truth" (Evid. Code, § 1200, subd. (a)) that defendant took "so long" in returning to the car, defendant adopted E.'s characterization of the time he had been away by explaining that he had gone to close the gate. Thus, E.'s statement was properly admitted as an adoptive admission.

## 2.

### *The Admission of E.'s Statements Did Not Violate Defendant's Constitutional Rights to Confront Witnesses.*

Defendant contends the admission of E.'s statements violated his constitutional right to confront witnesses. As we explained *ante*, E.'s statement to defendant, "did you have a fight with Mommy," did not constitute a statement offered for the truth of the matter asserted. Admission of that statement, therefore, did not violate defendant's constitutional rights to confront witnesses. (See *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 [the confrontation clause "does not bar the use of

testimonial statements for purposes other than establishing the truth of the matter asserted”].)

As for E.’s statement asking defendant why he took “so long” returning to the car, “it is well settled that an adoptive admission can be admitted into evidence without violating the Sixth Amendment right to confrontation ‘on the ground that “once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions*, and are admissible on that basis as a well-recognized exception to the hearsay rule.”’” (*People v. Cruz* (2008) 44 Cal.4th 636, 672.) “‘Being deemed the defendant’s own admissions, we are no longer concerned with the veracity or credibility of the original declarant. Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant.’ [Citation.] Stated another way, when a defendant has adopted a statement as his own, ‘the defendant himself is, in effect, the declarant. The “witness” against the defendant is the defendant himself, not the actual declarant; there is no violation of the defendant’s right to confront the declarant because the defendant only has the right to confront “the witnesses against him.” [Citations.]’” (*People v. Jennings, supra*, 50 Cal.4th at pp. 661-662.)

As we concluded *ante*, because defendant adopted E.’s statement, “what took you so long Daddy,” during the February 1, 1983 interview with Cross, the admission of E.’s statements did not violate defendant’s constitutional right to confront witnesses.

### C.

#### THE TRIAL COURT DID NOT ERR BY ADMITTING EXCERPTS FROM DEFENDANT’S JOURNALS.

Defendant contends the trial court erred by admitting excerpts from his journals into evidence. In his supplemental opening brief, defendant argues:

“Supposedly to show motive, the prosecution sought to introduce several items of

evidence that simply made [defendant] look bad: [¶] 1) [defendant] had falsely claimed to have served in Vietnam [¶] 2) [defendant] had falsely claimed to be a college graduate [¶] 3) on the back cover of [defendant]’s journal was a list of women he ‘had been to bed with,’ ‘fooled around with,’ or ‘was tempted with.’” Defendant argues the trial court erred by ruling that the probative value of that evidence outweighed its prejudicial effect under Evidence Code section 352.

Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” In *People v. Eubanks* (2011) 53 Cal.4th 110, 144, the California Supreme Court reiterated: “‘Evidence is substantially more prejudicial than probative [citation] [only] if, broadly stated, it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome” [citation].’ [Citation.] “The prejudice which . . . Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.” [Citations.] “Rather, the statute uses the word in its etymological sense of ‘prejudging’ a person or cause on the basis of extraneous factors.’” [Citations.]”

““[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.]” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168.) “Although motive is normally not an element of any crime that the prosecutor must prove, ‘evidence of motive makes the crime understandable and renders the inferences regarding defendant’s intent more reasonable.’ [Citation.] “‘Evidence tending to establish prior quarrels between a defendant and decedent and the making of threats by the former is properly admitted . . . to show the motive and state of mind of the defendant.’” (*People v. Riccardi* (2012) 54 Cal.4th 758, 815.) In *People v.*

*Nicolaus* (1991) 54 Cal.3d 551, 577, the California Supreme Court held that “[a]ny evidence tending to establish a  *motive* on defendant’s part to kill his ex-wife was thus plainly relevant and probative to proving a premeditated, intentional first degree murder.” In that case, the Supreme Court further held: “While evidence of the type here in question obviously carried some potential for prejudice, it was patently relevant and probative to the prosecution’s case-in-chief. The trial court did not abuse its discretion in admitting the documents.” (*Id.* at p. 578.)

Here, the journal excerpts were highly probative of the issue of defendant’s motive to kill Katherine. They recorded defendant’s perception of how his already fragile marriage took a huge hit during the months before Katherine’s murder. They showed that in August 1982, Katherine discovered defendant had lied to her about serving in Vietnam and having graduated from college. She also learned he had been unfaithful to her. The journal excerpts reflected Katherine’s negative reaction to those discoveries and the ongoing deterioration of the Mordicks’ marriage. They showed defendant’s increasing frustration and, ultimately, despair that Katherine had filed a petition for dissolution of the marriage, and planned to increasingly limit defendant’s contact with the girls.

We, therefore, conclude the probative value of the journal excerpts at issue “far outweighed its prejudicial effect, justifying the trial court’s decision to admit it.” (*People v. Tran* (2011) 51 Cal.4th 1040, 1050.)

D.

THE TRIAL COURT DID NOT ERR BY EXCLUDING DEFENDANT’S JOURNAL  
ENTRY WRITTEN ON JANUARY 24, 1983, AFTER CROSS INFORMED  
DEFENDANT OF KATHERINE’S MURDER.

Defendant contends the trial court erred by excluding excerpts from the five-page journal entry he wrote on January 24, 1983, after he was informed by Cross around 3:00 a.m. of Katherine’s murder. Defendant argues the trial court erred by

refusing the admission of excerpts from that entry in which he stated: (1) “I received a phone call that has put me in shock and disbelief”; (2) “My world has stopped, my world has caved in”; (3) “Divorce was one thing I could handle, this, I don’t know”; (4) “I feel so all alone. Divorced, we were separated, but I always knew I could rely on Kitty for help”; (5) “Though we had our problems, I know I could call on Kitty to help with the girls and I would help her”; and (6) “Now there is such an empty feeling. There is a void.”

Defendant argues, “[f]irst, the entry was admissible as a statement of [defendant]’s then-existing state of mind under Evidence Code section 1250[, subdivision ](a)” and “[s]econd, the evidence was admissible under [Evidence Code] section 356.” Defendant also argues the January 24, 1983 journal entry should have been admitted “for the non-hearsay purpose of dispelling any notion that after his wife’s death [defendant] had stopped writing in his journal.” For the reasons we will explain, defendant’s arguments are without merit.

1.

*The January 24, 1983 Journal Entry Was Inadmissible  
Under Evidence Code Sections 1250 and 1252.*

Although Evidence Code section 1250, subdivision (a)(1) allows the admission of a statement offered to prove the declarant’s state of mind “at that time or at any other time when it is itself an issue in the action,” the California Supreme Court has explained that “this exception to the hearsay rule is inapplicable ‘if the statement was made under circumstances such as to indicate its lack of trustworthiness.’ (Evid. Code, § 1252.)” (*People v. Ervine* (2009) 47 Cal.4th 745, 778.) “““The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.”” [Citation.] ‘To be admissible under

Evidence Code section 1252, statements must be made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are “made at a time when there was no motive to deceive.””” (Id. at pp. 778-779.)

In *People v. Ervine*, *supra*, 47 Cal.4th at page 779, the Supreme Court found the trial court did not abuse its discretion in excluding evidence of the defendant’s postoffense handwritten notes, explaining: “At the time defendant wrote these documents, he was trapped inside his house; personnel from the Lassen County Sheriff’s Department and other law enforcement agencies were just outside. He was aware that his only options were surrender or suicide, and his statements focus largely on securing forgiveness. In addition, he had been grazed by a bullet himself, which is what caused him to stop shooting, not a sudden concern over the welfare of the officers outside, and he elected to write these notes while attempting to pursue negotiations with law enforcement. There was thus ample ground to suspect his motives and sincerity when he wrote these self-serving documents.”

Here, defendant’s January 24, 1983 journal entry was written after he had been contacted by law enforcement and informed that Katherine had been found murdered. Defendant was aware that her murder was being investigated and was, no doubt, also aware that he would be *a* prime suspect if not *the* prime suspect in Katherine’s murder, at the time he wrote the journal entry expressing his shock and feelings of emptiness. Defendant had a motive to deceive when he wrote the journal entry—at a minimum, to deflect suspicion (whether justified or unjustified) away from himself. Hence, the January 24, 1983 journal entry was properly excluded under Evidence Code sections 1250, subdivision (a) and 1252.

2.

*The January 24, 1983 Journal Entry Was Not Admissible  
Under Evidence Code Section 356.*

Defendant contends the January 24, 1983 journal entry should have been admitted into evidence under Evidence Code section 356 which provides: “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole *on the same subject* may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.” (Italics added.) “The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party’s oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which ‘have some bearing upon, or connection with, the admission . . . in evidence.’” (*People v. Arias* (1996) 13 Cal.4th 92, 156.)

In *People v. Johnson* (2010) 183 Cal.App.4th 253, 287, the appellate court stated: “A court does not abuse its discretion when under Evidence Code section 356 it refuses to admit statements from a conversation or interrogation to explain statements made in a previous distinct and separate conversation. (See *People v. Williams* (2006) 40 Cal.4th 287, 319 . . . [within court’s discretion not to admit statements made by defendant in first interview with detectives to explain statements made in another interview 24 hours later]; *People v. Barrick* (1982) 33 Cal.3d 115, 131-132 . . . [within court’s discretion not to admit postarrest statements to explain prearrest statements; defendant’s arrest and admonishment of constitutional rights separated the interrogation into two separate interrogations].)”

Here, excerpts from defendant's journals, written in the months leading up to Katherine's murder, were admitted to show defendant's motive to kill Katherine. Defendant's journal entry written after being informed of Katherine's murder was separate from the premurder journal entries and was not necessary to make the premurder journal entries understood within the meaning of Evidence Code section 356. The trial court, therefore, did not abuse its discretion by refusing to admit the January 24, 1983 journal entry under section 356.

3.

*Admission of the January 24, 1983 Journal Entry Was Not Necessary to Establish That Defendant Continued to Write in His Journal After Being Informed of Katherine's Murder.*

Defendant also argues the trial court should have admitted the January 24, 1983 journal entry "for the non-hearsay purpose of dispelling any notion that after his wife's death, [defendant] had stopped writing in his journal." Defendant explains: "Since the jury heard no evidence that [defendant] had continued with his journal after learning of her death, they would likely have viewed his stopping his entries at that point as suspicious, as evidence of consciousness of guilt. Thus, the trial court erred in not admitting the entry (with an admonition that the jury not consider it for the matter of the truth stated) or, in the alternative, in not instructing the jury that [defendant] had written an entry on January 24, 1983, but its contents were not relevant to the jury's deliberations."

Admitting the January 24, 1983 journal entry was not necessary to communicate to the jury that defendant continued to write in his journal after he learned of Katherine's murder. Defendant does not cite where in the record he requested a jury instruction informing the jury he had written an entry on January 24, 1983 and that its contents were irrelevant. Defendant does not assert he was precluded from testifying that he continued to write in his journal. Thus, even assuming the jury might have considered

defendant's failure to continue to write in his journal after Katherine's murder as reflective of his consciousness of guilt, defendant was not precluded from communicating that fact to the jury through his direct testimony.

Any error in failing to admit the January 24, 1983 journal entry, however, was harmless in light of defendant's testimony about the shock and sorrow he felt after learning of Katherine's murder and Cross's testimony that defendant appeared to be shaken up at the news Katherine had been murdered. We find no prejudicial error.

#### IV.

#### CUMULATIVE ERROR

Defendant argues the cumulative effect of the trial court's errors deprived him of a fair trial. As we have concluded the trial court did not commit any errors, defendant's argument of cumulative error necessarily fails.

#### DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.