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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.

NANETTE ANN PACKARD,

Defendant and Appellant.

G046934

(Super. Ct. No. 09HF0844)

O P I N I O N

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

Eric S. Multhaupt, 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, Barry Carlton and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Nanette Ann Packard was sentenced to state prison for life without the possibility of parole after a jury convicted her of first degree murder for a 1994 homicide and found she committed the crime for financial gain. Defendant asserts claims of undue delay in charging her with the murder, ineffective assistance of counsel, and errors in the admission of evidence at trial. Finding no prejudicial error, we affirm the judgment.

FACTS

Shortly after 9 p.m. on Thursday, December 15, 1994, William McLaughlin, a man in his mid 50's, was shot to death inside his home located in a gated Newport Beach community. At the time of his death, McLaughlin had a net worth exceeding \$20 million.

Defendant met McLaughlin in 1991, when she was in her mid-20's. Shortly after they met, defendant moved into his home. Kevin McLaughlin, the victim's adult son from a prior marriage who had suffered serious injuries in an accident, also lived in the home. He attended Alcoholics Anonymous meetings on Thursday evenings.

At some point, McLaughlin made defendant the beneficiary of a \$1 million life insurance policy, appointed her as the trustee of a trust containing the bulk of his assets, and made a will leaving her \$150,000, a car, and the use of a beach house he owned for a year after his death. In addition, he gave defendant the authority to write checks in amounts of \$1,500 or less on an account used for household expenses.

The prosecution's theory of the case was that defendant and her boyfriend Eric Naposki, a one-time professional football player, conspired to kill McLaughlin for financial gain.

In 1994, defendant began surreptitiously withdrawing funds from the household checking account. One means she used to accomplish the thefts was forging

McLaughlin's name on checks. Initially, the amounts she stole were small. But the thefts began to increase and in the week before McLaughlin's murder, she forged his name on checks totaling \$365,000. One check dated December 14, 1994, was for \$250,000. Defendant deposited it into the account of her recently formed Nevada corporation. McLaughlin's tax accountant testified that "as the amounts got larger, the likelihood would have been [she] . . . would have been caught by [McLaughlin]"

During the summer of 1994, defendant and Naposki visited a new residential development with home prices ranging from \$800,000 to over \$2 million. Defendant told a sales agent that they would not be able to buy a home until the spring of 1995. Around this time, Naposki purchased a 9 millimeter Berretta 92F handgun.

At the time, Robert Cottrill worked as a trainer at a fitness center frequented by defendant and Naposki. Shortly after McLaughlin's murder Cottrill and his fiancée made an anonymous call to the police department. It was not until 2008 that an investigator learned Cottrill's identity and questioned him. At trial, Cottrill testified he saw defendant and Naposki working out together, holding hands, and kissing each other. Cottrill also said that he and defendant discussed the possibility of her investing in a software program he was trying to promote. He testified that, at a meeting in September or October 1994, defendant expressed interest in investing in his venture, but the money was "offshore" and it would take her sometime to obtain the funds.

During this same time period, a locksmith at a Tustin hardware store made copies of two keys for Naposki.

Suzanne Cogar lived in the same apartment complex as Naposki. Cogar contacted the police in early 1995, but when asked to call back and give a statement, she lost the nerve to do so. She called the police again in 1998 and, while providing the police information concerning McLaughlin's murder, gave only her first name. In 2009, an investigator discovered Cogar's identity and she agreed to cooperate with the police.

At trial, Cogar testified she often saw defendant with Naposki at the complex's pool. Over a hearsay objection, she testified that before Thanksgiving, Naposki said he was upset with a man named "Bill" and wanted to kill him because "Bill" was coming into defendant's bedroom and "making unwanted sexual advances" towards her. Before Cogar testified to Naposki's statements, the court instructed the jury that the statements were "not being admitted for the truth of what Mr. Naposki said" or "as proof that [defendant], in fact, made any claims to . . . Naposki," but could only be "consider[ed] . . . as evidence of Mr. Naposki's state of mind, that is, his motive to kill Mr. McLaughlin, or as circumstantial evidence of the existence of a conspiracy."

On December 15, 1994, defendant purchased a pair of alligator skin boots for \$429. She told the sales clerk the boots were for "her boyfriend" and described him as "a N.F.L. football player."

Later that day, defendant and Naposki drove to Walnut, California to watch defendant's son play in a championship youth soccer game. The game lasted longer than expected. At 8:20 p.m., after the game ended but before the awards ceremony, defendant told her ex-husband that she and Naposki had to leave because Naposki had an 8:00 p.m. appointment. She also canceled her visitation with the children that weekend. As they departed the field, defendant and Naposki began running. The evidence showed defendant made a call from her car phone at 8:24 p.m.

At 9:11 p.m., Kevin McLaughlin called 9-1-1 from the Newport Beach residence, reporting his father had been shot. McLaughlin was struck six times with 9 millimeter rounds in a pattern of two shots, followed by a pause, two more shots, followed by second pause before the final two shots. The prosecution presented evidence that Naposki, who worked in security, had received training in this shooting technique.

A forensics report on an examination of the bullets recovered from the residence prepared shortly after the murder listed 28 firearms that could have been used to kill McLaughlin. In December 2010, another forensics expert reexamined the bullets

and cross-referenced the results of his examination with a Federal Bureau of Investigation database on rifling characteristics. This expert concluded only two types of firearm could have been used in the McLaughlin murder, one of which was a Beretta F series handgun. At trial, the same ballistics expert testified the bullets were fired by “a Beretta 92F or a 92F-series-type firearm”

The police found a key in the front door of the McLaughlin residence and a second key on the ground outside of it. The key retrieved from the door was similar to the type Naposki had purchased from the locksmith. The other key was for a nearby pedestrian gate. The police later learned defendant had a key to the front door of the McLaughlin residence, but not to the pedestrian gate.

Defendant and Naposki were questioned by the police at least twice during the investigation of McLaughlin’s murder. Each gave conflicting statements.

When questioned upon her return to the McLaughlin residence the night of the murder, defendant told the police she left her son’s soccer game by herself and went shopping. She presented a receipt showing she made a purchase at 9:29 p.m. The next day defendant called her ex-husband, told him about the murder and said, ““You don’t need to tell [the police] anything about [Naposki] because he’s not involved.”” Nonetheless, the police learned the truth. When questioning defendant in late January, she admitted Naposki attended the game with her, but claimed she dropped him off at his Tustin residence before going shopping. Although the police questioned defendant’s ex-husband twice shortly after McLaughlin’s murder, it was not until an investigator re-interviewed him in 2010 that he mentioned defendant’s phone call.

Based on an outstanding warrant, the police arrested Naposki. The police found a notebook in his car. It contained the license plate number for McLaughlin’s car and a calendar with the following notations written in the space for January 1, 1995: ““New Year’s, January”” and ““P-R-O-P-O-S.”” The police also discovered a receipt for a \$600 watch Naposki acknowledged he purchased for defendant.

During his first interrogation on December 23, Naposki admitted going to the soccer game with defendant. But he claimed she took him to his apartment in Tustin after the game, arriving between 9:00 p.m. and 9:15 p.m. Naposki said he changed clothes and went to work as a security guard at a nightclub near the McLaughlin residence, arriving between 9:30 p.m. and 9:45 p.m. He initially denied owning any guns, but later acknowledged recently purchasing a Beretta. However, Naposki claimed he loaned the gun to a man named Jimenez and the gun was later stolen.

The police located Jimenez and learned Naposki gave him a .380 caliber gun and bullets that could be fired by a 9 millimeter gun. When confronted with this evidence during the second interview, Naposki admitted he previously lied to them about the weapon. He then claimed the Beretta was stolen from his vehicle one night when Jimenez used it for a security job.

During this interview, Naposki also told the police that on his way to work on the evening of December 15, he received a page from the nightclub's manager. Naposki said he stopped at a restaurant in Tustin and called the manager on a pay phone. Later, he claimed this call was made at 8:52 p.m.

The police searched Naposki's storage locker. Inside, they found three motorcycles and documentation indicating defendant had purchased at least two of them.

Cogar also testified to a second conversation she had with Naposki in January 1995. Naposki asked her, "Did you hear that man was killed?" When Cogar responded that she did not want to know if Naposki was the murderer he replied, "maybe I did, maybe I didn't." She testified Naposki went on to tell her the victim was killed with the same type of gun he owned, "but they'll never find the murder weapon on me because I don't have that gun anymore. I gave that gun to a buddy of mine." According to Cogar, Naposki also mentioned a key found at the murder scene was made at a store in Tustin that he frequented.

Police officers conducted timed test drives between the soccer field in Walnut and the McLaughlin residence in Newport Beach, including routes from Naposki's Tustin residence and the restaurant where Naposki claimed he made the telephone call. They determined that under any of these scenarios it was possible to make the trip in time to commit the murder.

In April 1995, defendant and Naposki met with a man about buying a house. Defendant told the man that she had money coming from either a trust or insurance, but did not have the funds to make an immediate purchase.

Shortly thereafter defendant was arrested and charged with grand theft and forgery arising from her check writing and her signing McLaughlin's name on a change of title for a vehicle after his death. She later pleaded guilty to the charges. Defendant filed a civil palimony action against McLaughlin's estate. The civil action was ultimately settled with defendant receiving \$220,000 from the life insurance policy and the balance paid to the estate as restitution.

The police twice submitted the case against defendant and Naposki to the district attorney in the mid- and late 1990's, but charges were not filed. After further review of the file by a cold case investigator, the prosecution charged defendant and Naposki with McLaughlin's murder in May 2009. The trial court later severed defendant's trial from Naposki's trial.

DISCUSSION

1. Precharging Delay

a. Background

Defendant and Naposki separately moved to dismiss this prosecution on the ground the delay in charging them with McLaughlin's murder violated due process of law. Defendant argued the delay prejudiced her ability to defend against the charge,

citing: (1) the loss or destruction of documentation supporting Naposki's claim that he called the nightclub from a Tustin restaurant at 8:52 p.m. on the night of the murder; (2) the loss of information showing defendant and Naposki attended the soccer game on December 15, 1994, including when the game ended, her location when making the car phone call at 8:24 p.m., the traffic conditions on the night of the murder, and the time of her arrival at the shopping mall; and (3) evidence relevant to other possible suspects.

The trial court issued a six-page order denying both motions. It concluded the 15-year lag in charging defendant and Naposki with McLaughlin's murder resulted from "only investigative delay." The court noted the case against them "was entirely circumstantial," and there was no indication the prosecution either purposefully delayed filing the case or did so for a tactical purpose. In support of its finding, the court cited the fact the police did not discover the identity of persons who made anonymous telephone calls relating to defendant's and Naposki's possible involvement until 2008 (Cottrill) and 2009 (Cogar), and first learned defendant asked her ex-husband to lie about Naposki attending the soccer game when an investigator re-interviewed him in 2010.

As for defendant's claim of prejudice it found that, except for the lack of documentation for Naposki's phone call to the nightclub, the assertions of lost or missing evidence "are at best speculative." On the missing pay phone records, the court found their value was limited to "corroborating Mr. Naposki's testimony that he made such a call." Further the court concluded "the loss of the phone records is as much, if not more attributable to [defendants] as it is the prosecution" because a defense investigator claimed he had a copy of a credit card receipt for the call "in early 1995" and "[i]f they did not have the hard copy, the[defendants] were in better position than the Newport Beach Police Department to secure" it. In addition, although the defense claimed the nightclub's manager "no longer has any memory of the page" triggering Naposki's pay phone call, the court noted the prosecution located nightclub manager in 2009 and he gave a "statement" that "casts doubt on a portion of Naposki's alibi."

Defendant reasserted the claim of prejudicial precharging delay in her motion for a new trial. In denying the renewed motion to dismiss, the court ruled “the evidence produced in both trials only reinforces my belief in the accuracy of th[e prior] ruling I am less convinced than ever that such [a] receipt [of the pay phone call] even existed.”

b. Analysis

Defendant contends the trial court erred in denying her motions to dismiss for the delay in charging her with McLaughlin’s murder. She claims the loss of pay phone records precluded her from presenting “a defense based on . . . Mr. Naposki’s innocence,” which “would have been far stronger” than her claim he committed the murder alone. She also cites “the absence of contemporaneous interviews with employees of the . . . [n]ightclub where Naposki worked” as prejudicing her defense. Finally, she complains no justification exists for the delay because the police “could have but did not pursue the available evidence with sufficient diligence to initiate a charge near the time of the offense.”

The principles governing a claim of precharging delay are well settled. “The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant’s arrest and charging.” (*People v. Cowan* (2010) 50 Cal.4th 401, 430; see also *United States v. Lovasco* (1977) 431 U.S. 783, 789 [97 S.Ct. 2044, 52 L.Ed.2d 752].) But “[p]rejudice . . . from precharging delay is not presumed” and when “seeking relief for undue delay” the defendant “must first demonstrate resulting prejudice” (*People v. Jones* (2013) 57 Cal.4th 899, 921.) “Prejudice may be shown by “loss of material witnesses due to lapse of time [citation] or loss of evidence because

of fading memory attributable to the delay.” (*People v. Cowan, supra*, 50 Cal.4th at p. 430.)

“[A]lthough “under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process,”” where ““the delay was merely negligent, a greater showing of prejudice [is] 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.” (*People v. Jones, supra*, 57 Cal.4th at p. 921.)

“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, supra*, 50 Cal.4th at p. 431.) “In evaluating the correctness of a trial court’s denial of a defendant’s speedy trial motion, we consider all evidence that was before the court at the time the trial court ruled on the motion.” (*People v. Jones, supra*, 57 Cal.4th at p. 922.)

We find no abuse of discretion here. The court found only investigative delay hampered the prosecution’s filing of the murder charge. “The justification for the delay is strong when there is ‘investigative delay, nothing else.’” (*People v. Cowan, supra*, 50 Cal.4th at p. 431.) The record supports its conclusion. Several Newport Beach Police Department officers testified at trial, reflecting the fact that the department assigned a significant portion of its resources to the McLaughlin murder investigation. The police department twice unsuccessfully submitted the case to the district attorney in the mid- and late-90’s. In denying the pretrial dismissal motion, the trial court noted the identities of the anonymous callers, Cottrill and Cogar, were discovered only after “long hours and hard work” by a cold case investigator who reexamined the case. Further, “[i]t

should be equally obvious that 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. To impose such a duty 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself,'" (*United States v. Lovasco, supra*, 431 U.S. at p. 791].)

Defendant does not challenge the court's investigative delay finding. Thus, her argument that had the police conducted a more diligent investigation, the case would have been filed sooner amounts to merely challenging the police department's allocation of its investigative resources. (*People v. Abel* (2012) 53 Cal.4th 891, 911.) "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" (*People v. Nelson* (2008) 43 Cal.4th 1242, 1256-1257.) "For the same reason, the difficulty in allocating scarce investigative resources provides a valid justification for delay." (*People v. Abel, supra*, 53 Cal.4th at p. 911.)

The court also reviewed the assertions of lost evidence defendant cited and found the bulk of them to be only speculative. As for the loss of the pay phone call records, both defendant and Naposki knew shortly after McLaughlin's murder that they were suspects and thus had an incentive to collect and retain exculpatory evidence. (*People v. Cowan, supra*, 50 Cal.4th at p. 432.) In fact, defendant presented evidence documentation of the pay phone call was initially obtained. But copies of it were never provided to the prosecution and, given the fact the police continued to investigate defendant's and Naposki's possible participation in McLaughlin's murder for sometime thereafter, no justification exists for the failure to maintain what is now claimed to be key evidence.

Defendant argues that if she had access to this documentation, it would have changed her entire defense from claiming Naposki committed the murder alone, to asserting he did not kill McLaughlin. Considering the very strong evidence produced at trial pointing to Naposki as the murderer, this contention is unpersuasive. Even assuming Naposki stopped to make the phone call, the prosecution presented testimony that he could have reached McLaughlin's home in time to commit the murder.

We conclude the trial court properly exercised its discretion in denying both of defendant's pretrial and posttrial motions to dismiss because of the delay in charging her with McLaughlin's murder.

2. *Ineffective Assistance of Counsel*

The attorney initially retained by defendant demurred to the felony complaint charging her with McLaughlin's murder, relying on *Kellett v. Superior Court* (1966) 63 Cal.2d 822 to dismiss the case. However, the demurrer was overruled and the public defender who thereafter took over her defense did not renew this claim when she was bound over for trial. Defendant now claims the failure to renew the *Kellett* argument constituted ineffective assistance of counsel, entitling her to a reversal of the conviction.

This argument lacks merit. To establish a claim of ineffective assistance of counsel, a defendant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice." (*People v. Bolin* (1998) 18 Cal.4th 297, 333; see also *In re Crew* (2011) 52 Cal.4th 126, 150.) We begin with "a presumption that counsel's performance fell within the wide range of professional competence and . . . [d]efendant thus bears the burden of establishing constitutionally inadequate assistance of counsel." (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) For prejudice, "the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome.”” (*People v. Bolin, supra*, 18 Cal.4th at p. 333.) Further, since “[t]he object of an ineffectiveness claim is not to grade counsel’s performance”” (*In re Cox* (2003) 30 Cal.4th 974, 1019), where “it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed”” (*id.* at pp. 1019-1020; quoting *Strickland v. Washington* (1984) 466 U.S. 668, 697 [104 S.Ct. 2052, 80 L.Ed.2d 674]).

We agree with the Attorney General’s argument that any effort to renew the *Kellett* claim would not have succeeded and therefore defendant did not suffer any prejudice from the public defender’s failure to seek dismissal of either the murder charge or the financial gain special circumstance on this ground. Penal Code section 654, subdivision (a) declares in part, “An acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission under any other.” In *Kellett v. Superior Court, supra*, 63 Cal.2d 822, the petitioner was arrested and charged with brandishing a firearm, a misdemeanor. Subsequently, it was learned he had a prior felony conviction and he was charged in another proceeding with possession of weapon by a felon, a felony. The petitioner pleaded guilty to the misdemeanor charge and then sought to dismiss the felony charge under Penal Code section 654.

The Supreme Court granted relief. Citing the policies of avoiding “needless harassment and the waste of public funds” (*Kellett v. Superior Court, supra*, 63 Cal.2d at p. 827), it declared, “[w]hen, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.” (*Ibid.*, fn. omitted.)

People v. Valli (2010) 187 Cal.App.4th 786 noted, “[a]ppellate courts have adopted two different tests to determine a course of conduct for purposes of

multiple prosecution. [¶] One line of cases finds *Kellett* not applicable where the offenses are committed at separate times and locations.” (*Id.* at p. 797.) “A second test . . . consider[s] the totality of the facts and whether separate proofs were required for the different offenses. . . . ‘What matters . . . is the totality of the facts, examined in light of the legislative goals of [Penal Code] sections 654 and 954, as explained in *Kellett*.’” (*Id.* at pp. 798-799.)

Defendant’s reliance on the *Kellett* doctrine fails under either approach. Her check forgeries and thefts from the household account occurred before McLaughlin’s murder while she forged the vehicle title certificate after he was killed. Defendant may have signed McLaughlin’s name on the checks at the residence, but the thefts occurred when she cashed the checks. There is no evidence the post-murder forgery occurred at the McLaughlin residence. As for the financial gain special circumstance allegation, ““the relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.”” (*People v. Carasi* (2008) 44 Cal.4th 1263, 1309.) The jury could have concluded defendant expected to acquire the life insurance policy benefits, money, a car, and use of the beach house by killing McLaughlin.

Nor did “the evidence needed to prove one offense necessarily suppl[y] proof of the other[.]” (*People v. Valli, supra*, 187 Cal.App.4th at p. 799.) The thefts and forgeries helped establish the motive for killing McLaughlin, but they were not essential to proving defendant’s guilt of the murder or the financial gain special circumstance. “The evidentiary test . . . requires more than a trivial overlap of the evidence. Simply using facts from the first prosecution in the subsequent prosecution does not trigger application of *Kellett*.” (*Ibid.*)

While the police strongly suspected defendant was involved in McLaughlin’s murder that was not enough to require joint prosecution of this crime with the forgeries and theft charges. (*People v. Davis* (2005) 36 Cal.4th 510, 558 [“We have

recognized an exception to the multiple-prosecution bar where the prosecutor ‘is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence’”).) Nor would “the policies underlying [Penal Code] section 654—preventing harassment of the defendant and the waste of public resources through relitigation of issues . . . be served here by holding” the murder prosecution barred because defendant was previously charged and convicted of forgery and theft. (*Id.* at pp. 558-559 [kidnapping and robbery charges not barred by the defendant’s prior plea to taking the victim’s car].)

Since defendant has failed to establish a timely renewal of the multiple prosecution argument would have succeeded, we conclude her ineffective assistance of counsel claim lacks merit.

3. *Evidentiary Rulings*

a. *Background*

Defendant challenges two evidentiary rulings by the court during trial. The first involved Cogar’s testimony that Naposki told her he wanted to kill a man named “Bill” for making unwanted sexual advances toward defendant shortly before McLaughlin’s murder. The second concerns testimony by the district attorney’s investigator that Cottrill told him defendant said she planned to marry Naposki. “We review the trial court’s rulings on the admission of evidence for abuse of discretion.” (*People v. Cowan, supra*, 50 Cal.4th at p. 462.)

b. *Naposki’s Statement to Cogar*

Defendant argues “Naposki’s remark[] to Cogar do[es] not qualify [as circumstantial evidence of a conspiracy] because Cogar was not a co-conspirator, and his remarks to an uninvolved third party in no way furthered the conspiracy.” She also

argues this evidence was inadmissible to show Naposki's state of mind because "it was too prejudicial . . . to be admitted even with a limiting instruction."

As to defendant's first point, the only authority cited in support of it are cases applying the co-conspirator exception to the hearsay rule. (*People v. Leach* (1975) 15 Cal.3d 419, 428; *People v. Saling* (1972) 7 Cal.3d 844, 852; *People v. Gann* (2011) 193 Cal.App.4th 994, 1005-1007.) That is not the case here.

Rather, the appropriate rule is that "a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389; cited with approval in *People v. Harris* (2013) 57 Cal.4th 804, 843.)

Defendant has failed to show the court committed an abuse of discretion on this issue. The trial court admitted Cogar's testimony for a relevant nonhearsay purpose. As the Attorney General notes, "[e]vidence of Naposki's state of mind, i.e., his motive to kill premised on information he received, was relevant, as [defendant] denied entering into a conspiracy with him and contended that he acted alone due to jealousy . . ." (*People v. Ortiz, supra*, 38 Cal.App.4th at p. 389 ["such evidence must be relevant to be admissible—the declarant's state of mind must be in issue"].) Further, before doing so, the court found the prosecutor had "crossed the threshold of [a] preponderance of the evidence" to establish the existence of a conspiracy.

Defendant argues Cogar's testimony violated the *Bruton/Aranda* rule. (*Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *People v. Aranda* (1965) 63 Cal.2d 518.) Not so. These cases "are inapplicable, because the[y] involve the use of out-of-court statements by un-cross-examined codefendants to incriminate a defendant at a joint trial." (*People v. Williams* (2013) 56 Cal.4th 630, 668.)

Defendant was not tried jointly with Naposki. Further, as already noted, Naposki's statements were offered for and admitted for a nonhearsay purpose.

She also claims Cogar's testimony about what Naposki said before the murder was too prejudicial and the trial court erred in failing to rule on her Evidence Code section 352 objection. First, merely because the trial court did not expressly mention this statute in denying defendant's objection to this evidence does not mean it failed to consider that ground. "[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352." (*People v. Doolin* (2009) 45 Cal.4th 390, 438.) Second, defendant provides no explanation of why Cogar's testimony was too prejudicial. "The prejudice which exclusion of evidence under 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. . . . 'The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'" (*People v. Lopez* (2013) 56 Cal.4th 1028, 1059.) Because of its probative value, Cogar's testimony was certainly damaging to the defense, but was not the type of evidence that would constitute prejudice under the statute.

Defendant also asserts the limiting instruction given before Cogar testified to what Naposki said was insufficient. But "[t]he presumption is that limiting instructions are followed by the jury." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) Defendant cites a federal case for the proposition that there are circumstances where a limiting instruction cannot suffice to protect against the jury's misuse of evidence introduced for a limited purpose. However, nothing in the record supports a conclusion the jury in this case failed to adhere to the court's admonition. Further, "we are not

bound by the decisions of the lower federal courts even on federal questions.” (*People v. Bradley* (1969) 1 Cal.3d 80, 86.)

Next, defendant argues the prosecutor misused this testimony during closing argument. However, since she failed to assert a prosecutorial misconduct claim, we conclude any such contention is waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793[“[E]very brief should contain a legal argument with citation of authorities on the points made” and “[i]f none is furnished on a particular point, the court may treat it as waived, and pass it without consideration”].) In any event, “[t]he court’s instructions, not the prosecution’s argument, are determinative, for ‘We presume that jurors treat the court’s instructions as a statement of the law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.’” (*People v. Mayfield* (1993) 5 Cal.4th 142, 179; see also *People v. Boyette* (2002) 29 Cal.4th 381, 435-436.) Again, defendant again fails to cite anything in the record dispelling the presumption.

Thus, we reject defendant’s claim the trial court erred in allowing Cogar testify to what Naposki told her before the murder.

c. Cottrill’s Statement to the Investigator

Finally, defendant argues the trial court erred in allowing an investigator testify Cottrill told him that defendant said she planned to marry Naposki. We agree the trial court erred in admitting this evidence, but find it was harmless.

Laurence Montgomery, an investigator with the district attorney’s office, testified that he interviewed Cottrill after learning his identity. Over a defense objection, Montgomery stated Cottrill said defendant told him that she was planning to marry Naposki. The court admitted this testimony as a prior inconsistent statement under Evidence Code section 1235 [“Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 770”].

Defendant argues this was error because there was no compliance with Evidence Code section 770 [witness's prior inconsistent statement not admissible unless the witness was either "so examined while testifying as to give him an opportunity to explain or to deny the statement" or "has not been excused from giving further testimony in the action"]. After Cottrill completed his testimony he was excused as a witness. While on the stand Cottrill was never asked whether defendant made the statement Montgomery attributed to him. The Attorney General does not dispute this point, but argues any error was harmless because there was other evidence supporting the fact that defendant and Naposki were planning to marry.

We agree with the Attorney General's argument. Where evidence admitted under Evidence Code section 1235 is "merely cumulative," "it is not reasonably probable that such erroneous admission affected the verdict." (*People v. Arias* (1996) 13 Cal.4th 92, 153.) That is the case here. There was other testimony and documentary proof that strongly suggested defendant and Naposki planned to marry and live together once McLaughlin was killed.

The real estate agent who showed defendant and Naposki homes in the new development during the summer of 1994 testified she "assumed they were married" because "they acted like they were" and "said they had four children and were looking for a home." Cottrill himself testified that at the fitness center defendant and Naposki "came in together, . . . worked out together," "h[e]ld hands," "kissed," and would "leave together." The entries in Naposki's notebook also suggested that he and defendant planned on getting married. Thus, defendant has failed to show prejudice from this isolated evidentiary error.

For the same reason, defendant's claim the admission of this testimony violated her constitutional right to due process of law also fails. "Only when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' [citation], have we imposed a constraint tied to the Due Process Clause." (*Perry v. New*

Hampshire (2012) ___ U.S. ___, ___ [132 S.Ct. 716, 723, 181 L.Ed.2d 694, 706]; see also *People v. Partida* (2005) 37 Cal.4th 428, 439 [“the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*”].) Given the other evidence establishing defendant’s romantic involvement with Naposki, the erroneous admission of Cottrill’s prior inconsistent statement did not render defendant’s trial fundamentally unfair.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.