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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HUNG NGOC DO,

Defendant and Appellant.

H037180

(Santa Clara County

Super. Ct. No. CC790264)

A jury convicted defendant Hung Ngoc Do of two counts of first degree murder for the killings of Cathy Nguyen (“Cathy”) and Michael Bui, and found that defendant personally used a deadly or dangerous weapon in both offenses. (Pen. Code, §§ 187, 189, 12022, subd. (b)(1).) It also found true a multiple-murder special-circumstance allegation. (Pen. Code, § 190.2.) The trial court sentenced defendant to life without the possibility of parole, consecutive to two years’ imprisonment.

On appeal, defendant contends (1) the evidence is insufficient to support the verdict of first degree murder of Cathy; (2) the trial court erred in admitting evidence of two prior misdemeanor convictions; (3) the defendant is entitled to an additional 642 days of conduct credit; (4) the trial court erred in assessing a parole revocation restitution fine; and (5) the abstract of judgment must be corrected to strike the criminal justice administration fee.

We find the evidence sufficient to support a conviction of first degree murder for the killing of Cathy, and we find no error in the trial court's admission of the misdemeanor convictions. However, the trial court erred in failing to award defendant conduct credit and in assessing a revocation restitution fine. We modify the judgment to include the conduct credit, we strike the fine, and we strike the criminal justice administration fee. As modified, the judgment is affirmed.

FACTS

In May 1991, a witness discovered the bodies of Cathy and her son, Michael Bui, on the living room floor of her apartment. Police arrested no suspects for about 16 years, until 2007, after a computerized search of the CODIS¹ database showed that a blood sample from the crime scene contained defendant's DNA. Defendant was arrested and charged with murder in December 2007.

At the time of her death, Cathy was a 25-year-old mother of three young children. Her youngest son, Michael Bui, was born in 1988, two or three years before the killing. The record contains no precise evidence of who fathered Michael, but Jason Nguyen, Cathy's ex-husband, fathered her other two children.

I. *Defendant's Relationship to the Victims and Witnesses*

Defendant Hung Ngoc Do was born in 1958, and emigrated from Vietnam to the United States in 1981. At the time of the killings, he was 33 years old and was working as a machinist. He knew Cathy through his friendship with Cathy's ex-husband Jason Nguyen ("Jason").

Defendant met Jason and Cathy around 1981, when they lived in the same apartment complex. Jason, a witness for the prosecution, testified that defendant was his "best friend," and Jason considered him family. Defendant spent much time with Jason,

¹ CODIS (Combined DNA Index System) is a nationwide database connecting federal, state, and local DNA databanks.

Cathy, and Jason's brothers. They went to each others' homes, and to cafés and clubs where they danced and partied together. Defendant sometimes danced with Cathy.

Jason testified that he never observed any evidence of a romantic relationship between Cathy and defendant. Jason's sister also saw no evidence of a romantic relationship between Cathy and the defendant. The detective who originally investigated the crime testified that he had interviewed more than two-dozen witnesses, none of whom said defendant had any romantic interest in Cathy.

II. *Defendant's Marriage to and Separation from Ngoc Nu Nguyen*

In 1988, defendant married Ngoc Nu Nguyen ("Ngoc"). Around 1990 or 1991, they tried to start a family by engaging in frequent intercourse, but she required medical help. Ngoc testified that she wanted to have a child because she thought it would stabilize their marriage. After several months of effort, she became pregnant. Their daughter was born in May 1992. Ngoc testified that she did not notice any change in defendant's behavior around May 1991, and she did not suspect him of infidelity. She also bore a son by defendant in 1994.

Ngoc, testifying for the defense, stated that she filed for legal separation in 1992, but she continued to live with defendant until 1994. In 1993, she called the police after an argument with defendant in which he tried to take their daughter from her. Ngoc testified that defendant did not strike her.

In 1999, they physically separated. She again called police in 2000 when defendant came to her mobile home and tried to take their son to a family party. She testified that defendant did not strike her, but that he tried to grab the phone away from her, and it hit her on the face. She told the police that he hit her and injured her face, but she testified that it "just like hurt a little bit" and there was no evidence of injury when the police arrived.

On cross-examination, she testified that she had smelled alcohol on defendant and she told the police he had been drinking. The prosecutor pressed her on whether defendant hit her and threatened her:

“[Question:] Isn’t it, in fact, true that on the day this happened, that’s not all he did? He hit you in the face, he hit you in the head, he took the phone away, he pulled the phone out of its socket in the wall, he went and pulled another phone out of the socket in the wall, and then he told you that if you call the police, he would come back and kill you?”

“[Answer:] I don’t remember that.

“[Question:] That’s what you told the police.

“[Answer:] This may be. At that time, I really don’t want him to get into my house anymore.”

Ngoc also admitted that in 1991 and 1992 defendant disappeared for days or weeks at a time, and she did not know where he was.

Defendant denied that he struck his wife in 1993. On cross-examination, he admitted pleading guilty to willfully inflicting a corporal injury resulting in a traumatic condition. He testified that he pleaded guilty because he was asked to plead guilty. The prosecutor, questioning defendant about his conviction in 2000, accused him of lying to the police to get out of trouble. Defendant testified that he told police he did not beat his wife, but he admitted pleading guilty to battery. Again, defendant testified that he pleaded guilty because he was asked to plead guilty. When asked whether he told police he had threatened to kill his wife, defendant testified that he could not recall because he “drank a little bit of beer.” He denied that he slapped his wife or struck her on top of the head.

III. *Defendant’s Visit to Cathy’s Apartment in 1991*

Defendant denied having any involvement with the killings. He testified that he once visited Cathy’s apartment for about an hour in 1991. Cathy had invited him because

they were friends. She gave him a glass of water and a sandwich. He testified that he suffered a bloody nose during the visit, and it “seems like” he washed his hands in the bathroom sink and wiped his hands with a towel. He could not recall whether he touched any doorknobs, and he did not know how his blood got on other locations in the apartment.

Jason testified that he, his brother, and defendant had visited Cathy’s apartment prior to her death to visit his children and Cathy’s youngest child. Jason did not see defendant suffer any injury or bloody nose, and he further testified that defendant stayed around the living room for the entire visit. Jason saw no evidence that either Cathy or the defendant were angry with the other.

IV. *Crime Scene Evidence*

Police testified that the bodies of both Cathy and Michael were lying face down and bloody. Both died from multiple stab wounds, but the record contains no evidence of who died first. A large pool of blood had collected under Cathy’s body, and the police found large bloodstains in various locations in the living room around the bodies. Crime scene investigators also collected blood samples from numerous locations throughout the apartment, including the kitchen, the bedrooms and a hallway bathroom.

Dr. Joseph O’Hara, a forensic pathologist, testified for the prosecution based on a written report by the coroner who examined the bodies. The coroner identified 22 stab wounds and 13 incised wounds on Cathy’s body.² The coroner located two stab wounds on the face, two on the front of the neck, five on the back of the neck, twelve on the back, and one on the chest. Of the wounds the coroner measured, he estimated a depth of three inches. The coroner examined some of the wounds to determine what kind of blade had been used. For a majority of these wounds, he determined they had been made with a

² An incised wound is a superficial, sharp-force injury to the skin that is longer than it is deep. A stab wound is deeper than it is wide, consistent with a knife plunged straight into the skin.

single-edged blade. However, O'Hara testified that he could not tell whether the wounds were inflicted by a kitchen knife or a hunting knife.

O'Hara testified that not all of the stab wounds were immediately lethal. Several were nonlethal, such that Cathy would have survived if she had received medical treatment and did not die from infection. However, both of her carotid arteries and jugular veins had been severed, and her lungs had been punctured. O'Hara testified that the carotids are high-pressure arteries, and that a lot of blood would have flowed out of Cathy's body. He estimated that Cathy would have died in no more than one or two minutes, but she would have been able to fight back through the infliction of most of the wounds. The record contains no evidence of the order in which the stab wounds were inflicted.

The coroner located numerous incised wounds consistent with the use of a knife, including wounds on her upper thigh and lower legs, her abdomen, her left hand, and her groin. O'Hara testified that he could not tell whether the wounds were created with a single-edged blade, a double-edged knife, or a serrated knife. The coroner also identified several "blunt force" injuries, a category that generally includes abrasions, contusions, and lacerations. She had numerous scratches or lacerations on her extremities, and a tear in the skin of her scalp. O'Hara testified that it was possible the wounds on her arms and hands were defensive, or "fighting back" wounds.

Crime scene investigators found large quantities of blood and large bloodstains in the living room and kitchen area near the bodies. A substantial amount of blood had collected under Cathy's body. Another pool of blood was found near Cathy's body on the floor between the kitchen and the living room. On the wall just south of Michael's body, investigators found a large bloodstain two to three feet high. An investigator testified that, given the quantity of blood and the height of the stain, it was consistent with Cathy's body being up against the wall while she was crawling or rolling, but not on her feet. A similar stain at the same approximate height was found on a closet door by

the entryway, several feet west of Michael's body. An investigator testified that this stain was also consistent with Cathy's body being pushed or rubbing up against the area. Another significant blood stain was found on a wooden plant stand adjacent to the large wall stain and Michael's body. A smaller bloodstain was found on the doorknob to the front door and the area around the doorknob adjacent to the entryway closet.

Investigators found numerous smaller bloodstains throughout the apartment. Some of these bloodstains contained DNA matching defendant's DNA. A police officer testified that it is common for an attacker with a knife to cut himself, particularly when the knife has no guard on the handle. Bloodstains containing defendant's DNA were found as follows:

Cathy was wearing nylon stockings at the time of her death. The stockings contained multiple bloodstains. Crime lab analysts found defendant's DNA in at least one of the stains.

Investigators found blood droplets containing defendant's DNA on the wheel of a child's bicycle in the living room.

Defendant was a major donor of the DNA found in a bloodswipe on the edge of a hallway closet door.

Defendant was the single source of blood swiped on a doorknob on the exterior side of the master bedroom door.

Investigators swabbed a bloodstain on the area around the hallway bathroom sink. Defendant was a major contributor to the DNA, and Cathy was a minor contributor.

Investigators found a bloodstain on a towel next to the hallway bathroom sink. Defendant was a major contributor to the DNA in the stain, and Cathy was a minor contributor.

Investigators found a transfer bloodstain on a teddy bear.³ Cathy was the major contributor to the DNA in the stain, and defendant was a potential minor contributor.

Defendant was the single source of a diluted bloodstain on a dust ruffle on the bed in the master bedroom.

Additionally, investigators found a broken fingernail on the floor a few feet from Michael's body. Cathy was the major contributor to the DNA on the fingernail, and defendant was a potential minor contributor.

Investigators used luminol, a chemical that glows on contact with blood, to detect trace amounts of blood not visible to the human eye. In addition to blood on the floor of the living room and kitchen area, the luminol revealed blood (1) on the carpet of the master bedroom; (2) in the middle bedroom, in a pattern leading from the door to a box in a corner where one of the teddy bears was found; (3) on the floor of the hallway bathroom; and (4) on the floor of the hallway leading from the living rooms to the bedrooms. The record contains no evidence of any tests to determine whose blood was found in any of these locations. One investigator testified that the blood in the hallway could have been tracked by the investigators, or by the initial police officers on the scene.⁴

Investigators found a multitude of knives in the kitchen. A knife block on the kitchen counter held ten knives with matching black handles. Two slots in the block were missing knives; one slot appeared to be designed for a smaller knife, and the other

³ Investigators found at least two teddy bears in the apartment. They found one on a shelf in the living room. They found another in a box in a child's bedroom. Photos show that both contained bloodstains. The record is ambiguous as to which was the source of the DNA test.

⁴ The initial police officer on the scene testified that he entered the apartment through the northwest bedroom and walked down the hall towards the living room. After exiting the apartment, he and another officer re-entered the apartment to check for persons in each bedroom. At the preliminary hearing, Khanh La, whom Cathy had been dating the year before her death, testified that he walked down the hallway and into the hallway bathroom after discovering the bodies in the living room.

slot for a larger knife. The smaller black-handled knife was found in a kitchen drawer with other knives. The larger black-handled knife had been placed in a dish-drying rack next to the kitchen sink. A larger white-handled knife lay on the edge of the sink next to the dish-drying rack. The record contains no evidence of forensic tests on any of the knives.

In the master bedroom, investigators found a number of Cathy's personal effects lying on the bed, including photographs, insurance papers, and letters. An investigator testified that it appeared someone had ransacked the room and pulled the items out of drawers. The investigator opined that the killer was looking for evidence that would connect him to the crime, particularly since the killer ignored a number of valuable items in plain view.

In the kitchen, investigators found food in various stages of preparation, including a bowl of snails, a bowl of cut-up vegetables, a bowl of noodles, and a pot with some cooked meat. On the dining room table next to the kitchen, investigators found a placemat with a partially-eaten piece of pizza, a cup with orange juice, and a piece of a candy bar on a paper towel. On the kitchen counter, next to the white-handled knife by the sink, investigators found an empty drinking glass. A fingerprint from the glass matched defendant's fingerprint.

DISCUSSION

I. *Sufficiency of the Evidence Supporting a Verdict of First Degree Murder*

At the end of the prosecution's case, defendant moved to dismiss any allegation of deliberation or premeditation in the killings of Cathy and Michael Bui. The trial court denied the motion. On appeal, defendant contends the evidence is insufficient to support a first degree murder conviction for the killing of Cathy. Defendant does not challenge the sufficiency of the evidence showing he willfully murdered Cathy—he argues only that the prosecution failed to present sufficient evidence to prove he killed Cathy in a deliberate, premeditated manner under Penal Code section 189.

In reviewing a claim of insufficient evidence, this court reviews the whole record in the light most favorable to the prosecution to determine whether the record discloses substantial evidence to support the conviction. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419; *People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Combs* (2004) 34 Cal.4th 821, 849.) “Substantial evidence” is evidence that is “reasonable, credible, and of solid value” such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.” (*People v. Combs, supra*, at p. 849.)

“A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.] ‘The process of premeditation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” [Citations.]’ ” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) “An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.” (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

Defendant contends the evidence is insufficient to support a finding of deliberation and premeditation under *People v. Anderson* (1968) 70 Cal.2d 15. Anderson had been living with a woman for about eight months when he brutally stabbed her 10-year-old daughter to death. (*Id.* at p. 19.) He inflicted more than 60 stab wounds over the girl’s entire body, including a post-mortem wound from her rectum to her vagina. (*Id.* at pp. 21-22.) Her dress had been torn off, and the crotch of her panties had been ripped out. (*Id.* at p. 21.) The prosecution contended the murder was sexually motivated. (*Id.* at p. 22.) Our high court, however, found insufficient evidence to support first degree murder.

It reduced Anderson's sentence to second degree murder, notwithstanding the heinous nature of the crime. (*Id.* at p. 23.) It held that "the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation." (*Id.* at pp. 23-24.)

The *Anderson* court identified three categories of evidence courts have used to assess deliberation and premeditation: (1) "planning activity," or facts about how and what the defendant did before the killing that show the defendant was engaged in activity directed toward, and intended to result in, the killing; (2) facts about the defendant's prior relationship to or conduct with the victim from which the jury could reasonably infer a "motive" to kill; and (3) "manner of killing," or facts showing that the manner of killing was so particular and exacting that the defendant acted according to a "preconceived design." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) (Hereafter, "the *Anderson* factors.") The court further observed that courts typically sustain first degree murder verdicts when there is evidence of all three factors, or at least extremely strong evidence of type (1), or evidence of type (2) in conjunction with type (1) or type (3). (*Id.* p. at 27.)

The court held that the evidence of Anderson's conduct was insufficient to show any of these three factors. (*People v. Anderson, supra*, 70 Cal.2d at p. 27.) In assessing the evidence of type (1), "planning" evidence, the court contrasted the facts with those in *People v. Hillery* (1965) 62 Cal.2d 692, in which the court found the evidence was sufficient to support first degree murder. In *Hillery*, the killer surreptitiously entered the victim's home, took measures to silence the victim, and carried her to a location where they were unlikely to be discovered. (*Id.* at p. 704.) By contrast, Anderson had taken none of these steps, and the court found no evidence of a relationship between Anderson and the victim from which the jury could infer a motive. (*People v. Anderson, supra*, 70 Cal.2d at p. 33.) Regarding the manner of killing, the defendant in *Hillery* had stabbed his victim directly in her chest. (*People v. Hillery, supra*, 62 Cal.2d at 704.) The *Anderson* court noted that this evidenced a deliberate intention to kill, as compared with

the “ ‘indiscriminate’ multiple attack of both superficial and severe wounds” that Anderson inflicted. (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) The court found the manner of killing in *Anderson* more like that in *People v. Craig* (1957) 49 Cal.2d 313, in which the manner of death, although violent and brutal, could not support an inference that the wounds were inflicted “deliberately and in a particular manner.” (*People v. Anderson, supra*, 70 Cal.2d at p. 33.)

More recently, the California Supreme Court has clarified the application of the *Anderson* factors. It noted that “[t]he *Anderson* guidelines are descriptive, not normative. [¶] The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.” (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) “Unreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way.” (*People v. Thomas* (1992) 2 Cal.4th 489, 517.)

In *People v. Perez, supra*, 2 Cal.4th 1117, the court found the evidence sufficient to support a verdict of first degree murder on facts similar to those here. (*Id.* at p. 1125.) Perez had known the victim since high school. (*Id.* at p. 1122.) He stabbed her to death in her home shortly after her husband left for work. (*Id.* at p. 1120.) The front door of the home was found ajar, and a broken dish with dog food was found near the victim’s body. (*Id.* at p. 1121.) Evidence of a violent struggle was found throughout the house. (*Id.* at pp. 1121-1122.) The victim’s body suffered 26 stab wounds and 12 puncture wounds to her head, face, neck, and carotid artery. (*Id.* at p. 1122.) She also suffered defensive wounds to her forearms, wrists, and hands, in addition to blunt force injuries to her eyes, nose, and lips. (*Ibid.*) Perez used two knives; one was found lying broken near

the victim's body. (*Ibid.*) He cut his hands during the attack. (*Id.* at p. 1123.) In the master bedroom, dresser drawers and jewelry boxes were found open. (*Id.* at p. 1121.)

The *Perez* court found that the jury could have inferred the following events from the evidence: Perez entered the victim's home surreptitiously while she was warming up her car. (*People v. Perez, supra*, 2 Cal.4th at p. 1126.) He surprised her, causing her to drop the dish containing the dog food. (*Ibid.*) He began beating her about the head and neck with his fists. (*Ibid.*) He retrieved a knife from the kitchen, which broke during the attack and cut his hands. (*Ibid.*) He then retrieved a second knife to complete the killing. (*Ibid.*)

The court found evidence of planning in Perez's surreptitious entry into the home. (*Ibid.*) Having surprised the victim, Perez then had a motive to kill her to prevent her from identifying him. (*Id.* at pp. 1126-1127.) The manner of killing, in which defendant paused to retrieve a second knife, also demonstrated premeditation and deliberation. (*Id.* p. at 1127.) The court also noted that Perez's conduct after the killing—searching through dresser drawers and jewelry boxes—appeared to be “inconsistent with a state of mind that would have produced a rash, impulsive killing.” (*People v. Perez, supra*, 2 Cal.4th at p. 1128.)

We find that the facts of this case bear a greater resemblance to those of *Perez* than those of *Anderson*. Though the evidence of planning and motive is scant—perhaps due to the 16-year delay in identifying and arresting the defendant—the jury could have inferred premeditation and deliberation from the manner of killing.

First, the evidence is consistent with a violent struggle between defendant and Cathy. Respondent argues that the wounds were not inflicted in rapid succession because defendant pursued Cathy through the apartment as she physically struggled and fought for her life. Although the record does not support the inference that defendant pursued Cathy throughout the apartment, the bloodstains on the south wall suggest that she may have been trapped or pushed up against that wall. Together with the bloodstain on the

entryway closet door, the wounds on Cathy's extremities, and the broken fingernail found near her body, the jury could have inferred that Cathy had engaged in a prolonged attempt to defend herself and Michael. The bloodstains around the entryway area, together with the blood on the front door doorknob, are consistent with an attempt by Cathy to escape from defendant. Under either scenario, some period of time must have elapsed between the start of the attack and Cathy's loss of volition. The jury could reasonably infer that the passage of time, combined with resistance from the victim, required defendant to exhibit a sufficient degree of deliberation and intent to kill to convict defendant of first degree murder.

The sheer number of wounds on Cathy's body—some of which were likely fatal by themselves—is further evidence of defendant's intent to kill. (*People v. Elliot* (2005) 37 Cal.4th 453, 471 [three potentially lethal knife wounds, together with numerous other stab and slash wounds, implied a preconceived design to kill]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 658-659 [sheer number of wounds supported a finding of deliberation].)

Respondent argues that defendant "chose not to relent until he delivered the lethal blows to Cathy's chest and neck." The record does not support this claim; there is no evidence of the order in which defendant inflicted the wounds. Nonetheless, defendant inflicted a majority of the stab wounds to Cathy's upper torso. In particular, defendant stabbed Cathy in the neck seven times, and he stabbed her once in the left breast directly in front of the heart. It is common knowledge that the neck contains life-critical blood vessels, such as the carotid arteries and jugular veins, both of which defendant severed. The jury may have inferred that defendant was aiming the knife at her neck and heart with the deliberate intent to kill her by severing critical blood vessels or stabbing her heart. This evidence supports a finding of deliberation.

Finally, evidence of motive is not altogether absent. As in *Perez*, defendant had known the victim prior to the crime. The jury could have inferred that defendant killed

Cathy to prevent her from identifying him after initially assaulting her or Michael. The jury could also have inferred that defendant killed Cathy to gain access to her personal effects, found in the ransacked master bedroom. Alternatively, as an investigator opined in his testimony, the jury could have found that defendant was searching for any documents that may have connected him to the victims. In either scenario, the papers and photographs on Cathy's bed, together with the absence of any blood on these items, suggest defendant conducted himself carefully and with purpose such that his post-killing conduct was inconsistent with a state of mind that would have produced a rash, impulsive killing. (*People v. Perez, supra*, 2 Cal.4th at p. 1128.)

Given the totality of the record, a rational jury could have found beyond a reasonable doubt that the defendant murdered Cathy with deliberation and premeditation.

II. *Admission of Defendant's Prior Misdemeanor Convictions*

Defendant contends the trial court erred in admitting evidence of his two prior misdemeanor convictions. He argues that the evidence was highly prejudicial and minimally probative, requiring exclusion under Evidence Code section 352. He also argues that the admission of this evidence violated his due process rights under the Fourteenth Amendment.

A. *Background*

After the killings in this case, defendant twice pleaded guilty to domestic violence charges. In 1993, he pleaded guilty to violating Penal Code section 273.5, willfully inflicting corporal injury upon a spouse, resulting in a traumatic condition. A violation of section 273.5 is a "wobbler" offense, punishable as either a felony or a misdemeanor. Seven years later, in 2000, he pleaded guilty to violating Penal Code section 243, subdivision (e), misdemeanor battery against a former spouse.

Trial counsel for defendant moved in limine to exclude evidence of both of these convictions and their related conduct. The trial court ruled that if defendant testified, the prosecution would be allowed to question him about the conduct underlying the

convictions using the language in the relevant statutes. Furthermore, if defendant denied the conduct, the prosecution would be allowed to introduce the rap sheets to prove the convictions. Alternatively, if defense counsel chose to elicit an admission to the conduct from defendant during direct examination, the court would allow the prosecution “to do some limited exploration” on cross-examination.

The trial court, ruling that the evidence would only be admitted for impeachment purposes, issued limiting instructions to the jury. The court instructed the jury twice—first when the witness testified, and again before closing arguments—that it could only consider the evidence to assess the credibility of defendant and his wife. In its final jury instructions, the court added the admonition that the evidence could not be considered as evidence of the defendant’s bad character or propensity for violence. The trial court denied defendant’s request to sanitize evidence of the convictions by limiting references to them as “misdemeanor conduct.”

Defense counsel chose to disclose the convictions to the jury in opening argument. He characterized the incidents as disputes or arguments between defendant and his wife. Counsel did not state whether defendant struck his wife or otherwise engaged in conduct prohibited by the applicable statutes, but stated that defendant was arrested and pleaded guilty or no contest to “misdemeanor domestic violence” and “battery on a former spouse.” Counsel then introduced evidence of the underlying conduct in his direct examination of defendant’s wife, discussed *supra*. Counsel again introduced evidence of the conduct in his direct examination of defendant. The prosecution cross-examined both witnesses about the incidents and elicited defendant’s admission that he pleaded guilty to both offenses.

B. *Application of 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 . . . create substantial danger of undue prejudice” The trial court

enjoys broad discretion in assessing whether the probative value of the evidence is outweighed by concerns of undue prejudice or confusion. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.)

We review the trial court’s ruling for abuse of discretion. (*People v. Riggs* (2008) 44 Cal.4th 248, 290.) We will not reverse the court’s ruling unless the appellant can show the court exercised its discretion in an arbitrary, capricious or patently absurd manner, resulting in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

For the reasons below, evidence of defendant’s convictions was relevant to impeach both defendant and his wife.

1. *Relevance and Probative Value of the 1993 Conviction*

Evidence of conduct underlying a misdemeanor conviction may be admissible for impeachment purposes. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.)⁵ However, the court must still consider the relevance and probative value of the evidence. “Not all past misconduct has a ‘tendency in reason to prove or disprove’ a witness’s honesty and veracity.” (*Ibid.*) In particular, crimes of moral turpitude are relevant to a witness’s credibility because “[m]isconduct involving moral turpitude may suggest a willingness to lie” (*Ibid.*, citations omitted.)

In *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402, we held that a felony conviction under Penal Code section 273.5 constitutes a crime of moral turpitude that can be admitted for impeachment purposes. Applying *People v. Castro* (1985) 38 Cal.3d

⁵ The *Wheeler* court, distinguishing between the fact of a conviction and the underlying conduct, held that while the conduct was admissible, the fact of the conviction was excludable as hearsay. However, *Wheeler* concerned the conviction of a non-party witness. Here, the fact of the conviction, a result of defendant’s pleading guilty, meets the hearsay exception for admission of a party. (See *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1052 [felony guilty plea admissible as a party admission in a subsequent civil action].) Accordingly, we analyze the fact of the conviction in conjunction with the underlying conduct.

301, we looked to the least adjudicated elements of the offense. (*People v. Rodriguez, supra*, 5 Cal.App.4th at p. 1402.) We held that an offender under the statute must injure a person in a “special relationship for which society rationally demands, and the victim may reasonably expect, stability and safety” (*Ibid.*) A violation of that special relationship connotes the “readiness to do evil” that defines moral turpitude. (*Ibid.*) Although *Rodriguez* concerned a felony conviction, a misdemeanor conviction requires the same elements, necessarily involving a violation of the same “special relationship” between offender and victim. Therefore, a misdemeanor offense under Penal Code section 273.5 also qualifies as a crime of moral turpitude. The defendant’s conviction under that statute was thereby relevant and probative to his credibility as a witness.

Defendant contends that the probative value of the evidence was minimal because the offense was remote in time. However, the conviction was probative not solely as evidence of moral turpitude, but also as a prior statement inconsistent with the witnesses’ testimony. Both defendant and his wife testified at trial that defendant did not hit her. Defendant’s guilty plea, in which he impliedly admitted inflicting injury on his wife, was directly relevant to contradict his contemporaneous testimony. Similarly, defendant’s plea cast doubt on his wife’s testimony. Not only did his wife deny that defendant hit her, she effectively testified to the stable nature of their marriage at the time of the offense. Evidence of discord in their relationship in 1993 was relevant to cast doubt on her contemporaneous testimony concerning the state of their marriage in 1991. We find the probative value of the conviction to be significant.

2. Relevance and Probative Value of the 2000 Conviction

We need not resolve whether the offense in 2000 under Penal Code section 243, subdivision (e), constitutes a crime of moral turpitude. That evidence was admissible because defense witnesses had made prior statements in direct contradiction to their testimony on the stand. This entitled the prosecution to impeach them with their own prior statements about that conviction.

First, defendant's wife testified on direct examination concerning the facts underlying defendant's 2000 conviction. Defense counsel asked her if defendant had slapped her, and she testified that he did not. She admitted telling the police that he hit her, but in characterizing the incident, she minimized the severity of his conduct. On cross-examination, the prosecution questioned her about her statements to police according to the police reports. She admitted that she told the police defendant had been drinking.⁶ The prosecution asked if defendant slapped her *and* hit her on the top of the head; if he took away a second phone to prevent her from calling the police; and if he threatened to kill her.⁷ She testified that she could not remember, but when asked if she told the police that defendant did these things, she stated, "This may be."

The prosecution's questioning of defendant's wife was directly relevant to the credibility of her initial testimony on direct examination. She made contradictory statements to the police, and testified to a potentially misleading version of the event. Therefore, the prosecution was entitled to impeach her with her statements to police.

Later in the proceedings, defendant testified on direct examination that he did not hit his wife in 2000. However, his guilty plea impliedly corroborated his wife's statements to the police that she had been hit, casting doubt on her credibility as a witness. His plea also cast doubt on his own contemporaneous testimony. The conviction was therefore relevant to the credibility of both witnesses regardless of whether the offense constituted moral turpitude.

3. Potential Prejudicial Effect of Evidence of the Convictions

Defendant argues that the evidence of his convictions was highly prejudicial. He points to the similarity between the nature of the prior offenses and the instant offense. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925 [one factor the court must consider in its exercise of discretion is whether the prior conviction is for the same or substantially

⁶ Defense counsel made no objection to this question.

⁷ Defense counsel made no contemporaneous objections to any of these questions.

similar conduct to the charged offense].) While both the prior convictions and the instant offense involved some degree of violence against women, the offense of murder differs enormously from battery, particularly in light of the facts on this record. But, “[t]he identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion.” (*People v. Castro* (1986) 186 Cal.App.3d 1211, 1216.) This factor did not require exclusion of the prior convictions.

Defendant also contends that the jury, having no evidence of motive, may have improperly inferred a motive from defendant’s propensity to commit violence against women. We identified the separate evidence of motive *ante*. But in any case, defendant has made no showing that the jury was unable or unwilling to obey the court’s limiting instructions that it could only consider the evidence to assess the credibility of defendant and his wife.

Defendant also argues that admission of the convictions opened the door to additional prejudicial evidence. For example, defendant’s wife admitted on cross-examination that her husband disappeared periodically during 1991 and 1992. The defense opened the door to this evidence when defendant’s wife testified, on direct examination for the defense, that she noticed nothing unusual about defendant’s behavior in 1991, and that she had no suspicions of infidelity. When asked if defendant spent time at home, she testified that he came home after work most of the time, and spent weekends with her. She characterized his behavior as “normal.”

Given her testimony on direct examination, the prosecution was entitled to impeach her with her inconsistent statements to the police, in which she complained about defendant being gone for weeks at a time. Defendant contends that his wife was referring to his absence in 1993, making it irrelevant to the murders in 1991. However,

the prosecutor specifically questioned the wife about the 1991 to 1992 timeframe; she admitted that defendant sometimes disappeared at that time.⁸

Defendant concedes that the damaging evidence resulted from defense counsel's tactical decision to elicit his wife's testimony about the convictions. Nonetheless, he argues that the evidence would not have come to light "but for" the trial court's admission of the evidence, citing *Alvarado v. Hickman* (9th Cir. 2002) 316 F.3d 841, 855-857, reversed on other grounds *Yarborough v. Alvarado* (2004) 541 U.S. 652. In *Alvarado*, the Ninth Circuit Court of Appeals held that a trial court erroneously admitted Alvarado's statements to police in violation of his *Miranda* rights. (*Alvarado v. Hickman, supra*, at p. 855.) After his statements were admitted, Alvarado testified in his own defense. (*Alvarado v. Hickman, supra*, at p. 844.) The state argued that the error had no effect on the outcome of the trial because Alvarado's statements would have been admissible regardless of the *Miranda* violation once he testified. (*Alvarado v. Hickman, supra*, at p. 856.) The court, noting that the tactical decision to put Alvarado on the stand may have been influenced by the introduction of his statements, rejected the state's argument.

Alvarado is inapposite. In *Alvarado*, counsel put his client on the stand to rebut the harmful evidence after the statements had already been admitted. Here, defense counsel informed the jury of defendant's convictions in opening argument, and he elicited evidence of the conduct from defendant's wife on direct examination before defendant took the stand. Furthermore, both the defendant's testimony and his wife's testimony contradicted their previous statements, yielding fertile ground for impeachment. If the defense witnesses had not offered such contradictory testimony,

⁸ Defendant also contends that the prosecutor used this evidence improperly in closing argument by implying defendant was cheating on his wife with the victim. Defense counsel made no objection to this argument; thus, this contention is forfeited on appeal.

defendant's argument would hold greater force. But given the record in this case, the trial court was within its discretion to admit the evidence.

Finally, relying on *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, defendant argues that the admission of his prior convictions as propensity evidence violated his due process rights under the Fourteenth Amendment. But the trial court did not admit the prior convictions for propensity or character purposes—it admitted the evidence based on its relevance to the credibility of defendant's testimony and that of his wife. When a trial court has the discretion to admit evidence of a prior offense based on its relevance, there is no violation of due process. (*People v. Castro, supra*, 38 Cal.3d 301 at p. 317.) “Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process.” (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

III. *Additional Conduct Credit for Time Served*

Defendant contends the trial court erred in assessing zero days of conduct credit under Penal Code section 2933.5. He argues that he is entitled to an additional 642 days of conduct credit under Penal Code section 4019. Respondent concedes this point. We accept respondent's concession and will modify the abstract of judgment to reflect an additional 642 days of conduct credit.

At the sentencing hearing, the trial court found defendant had served 1,284 days in custody, but the court awarded zero days of conduct credit under Penal Code section 2933.5. Section 2933.5 prohibits the award of conduct credit to every person convicted of murder, inter alia, who has been convicted two or more times, on charges separately brought and tried, of certain listed felony offenses, and who has served two or more separate prior prison terms. (Pen. Code, § 2933.5, subd. (a)(1).) Defendant had no prior felony convictions, and he had served no prior prison terms. Therefore, Penal Code section 2933.5 does not prohibit defendant from receiving conduct credit.

Defendant contends he should have been awarded conduct credit under the version of Penal Code section 4019 in effect at the time of the offenses. Under that version of the statute, defendant is entitled to conduct credit calculated by dividing the days of actual custody by four and multiplying the result, excluding any remainder, by two. (*People v. Caceres* (1997) 52 Cal.App.4th 106, 110.) Defendant was in custody for 1,284 actual days, so he is entitled to 642 additional days of conduct credit.

IV. *Assessment of a Parole Revocation Restitution Fine*

Defendant contends the trial court erred in assessing a parole revocation restitution fine of \$10,000 under Penal Code section 1202.45. Respondent concedes this point. We accept respondent's concession and will order this fine stricken.

At the sentencing hearing, the trial court assessed a parole revocation restitution fine of \$10,000 under Penal Code section 1202.45. However, the defendant committed the offenses in 1991, before the statute was first made effective on August 3, 1995. (Stats. 1995, ch. 313, § 6, eff. Aug. 3, 1995.) Application of the fine to defendant would violate the constitutional prohibition against ex post facto laws. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 678.)

V. *Administration Fee*

Defendant contends that although the trial court waived the criminal justice administration fee, the abstract of judgment erroneously states that defendant owes a criminal justice administration fee of \$295.50. Respondent concedes this point. We accept respondent's concession and will order this fee stricken.

Defendant is correct that the trial court orally waived the criminal justice administration fee at the sentencing hearing. Under a section titled "Other orders," the abstract of judgment lists "CJAF \$289.50." The abstract of judgment conflicts with the court's oral pronouncement. When there is a conflict between the oral pronouncement of judgment and the abstract of judgment, the oral pronouncement controls. (*People v. Morelos* (2008) 168 Cal.App.4th 758, 768.)

DISPOSITION

The abstract of judgment shall be corrected to exclude the criminal justice administration fee of \$289.50. The judgment shall be modified to include an additional 642 days of conduct credit, and the parole revocation restitution fine of \$10,000 shall be stricken. As modified, the judgment is affirmed.

Márquez, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.