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

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES GRANT,

Defendant and Appellant.

H037673

(Santa Clara County

Super. Ct. No. CC802250)

A jury convicted defendant Charles Grant of first degree murder (Pen. Code, § 187)¹ and found true an allegation that he personally used a dangerous or deadly weapon in committing the crime (§ 12022, subd. (b)). Defendant admitted a prior serious felony conviction (§§ 667, subd. (a), 1192.7), and the trial court sentenced him to an aggregate term of 31 years to life.

On appeal, defendant contends that (1) the trial court improperly excluded lay opinion testimony; (2) the prosecutor committed misconduct; (3) there was insufficient evidence of burglary to support the felony murder charge; (4) the trial court improperly admitted evidence of defendant's poverty; (5) the trial court improperly admitted evidence of uncharged crimes to show motive; (6) the trial court improperly excluded

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

evidence of the victim's boyfriend's past cocaine addiction; and (7) the cumulative effect of these errors violated defendant's due process rights. We affirm.

I. Background

Kristi Harris was stabbed to death in her San Jose apartment on August 29, 1988. Police collected evidence and questioned numerous people, including Kristi's roommates and family members, her boyfriend Mark Naillon, her neighbors, and defendant, who lived in the apartment next door.² No charges were brought.

The case was reopened 20 years later, after DNA testing on fingernail scrapings taken from Kristi identified defendant and Mark as possible contributors. Testing also identified defendant as a possible contributor to DNA found on Kristi's workout pants and as the source of DNA extracted from a pubic hair found near her body.

The prosecution's theory was that defendant, who had been up all night using drugs, killed Kristi when she came home that Monday morning and interrupted his burglary of her apartment. The defense theory was that Mark, who told police he and Kristi argued two days before the murder, killed her Monday during his lunch break.

Prosecution witnesses testified that Kristi, Janet Jennings Miller, and Kristen Olsen Grant shared an apartment in the Cedar Glen complex in 1988. The downstairs bedroom was Kristi's, as was the assigned parking space across the street. Kristi usually parked there, but if she was "running in and out fairly quickly," she used a visitor spot closer to her front door.

Kristi worked as a hairdresser at her father's beauty salon. She had Mondays off and typically spent them working out, running errands, doing laundry, and visiting her

² Because several witnesses share surnames or have since married and changed their surnames, we refer to them by their first names. We do so for clarity and convenience, intending no disrespect. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

parents. She jogged on a nearby par course early on Monday mornings, and about 50 percent of the time, she met her sister Dana there. It took about 20 minutes to run the par course.

Ky Grant, whom Kristen later married, spent a lot of time at the Cedar Glen apartment. Mark, whom Kristi had been dating for “a couple years,” visited and sometimes spent the night, but he and Kristi spent more time at his house about 15 minutes away. Testimony about Mark and his relationship with Kristi was uniformly positive.

It was unusual for Kristi to stay at Mark’s on Sunday nights. If she did, she sometimes took running clothes with her, but more typically on Mondays, she would return home and change into them.

Kristen testified that on the Saturday before the murder, she and Ky and Kristi and Mark attended Kristen’s sister’s wedding. Kristen recalled Kristi and Mark “[d]ancing, happy, [and] having a good time.” Kristi spent Saturday night at Mark’s and telephoned Kristen on Sunday to let her know she planned to spend Sunday night at his house too.

When Kristen left for work around 7:45 a.m. that Monday, Ky and Janet were already gone, and Kristi was not yet home. Kristen expected her to return soon, since she “liked to get up and get going on her Mondays.” The screen on the living room window was in place when Kristen left.

Janet remembered opening the living room window before she left for work that Monday. The screen was on the window, undamaged. When Janet came home that evening, she noticed that Kristi’s car was “in the front like a visitor’s spot.” Janet assumed that Kristi and Kristen were both home. As she approached the apartment, Janet noticed that the living room screen was “off and thrown in the corner,” which was “odd.” “It made me stop and think, and I assumed that maybe somebody got locked out [and] . . . needed to . . . climb through the window.” Janet unlocked the door, saw Kristi lying on the floor “brutally attacked,” and ran, “panicked,” down the path to the common area.

Christopher Jones shared a Cedar Glen apartment with Spencer Knight and Keith Lentz. Their apartment was on the other side of defendant's, which was next door to Kristi's. Jones occasionally visited defendant and had seen him using methamphetamine and cocaine. Jones, Knight, and Lentz were on their porch when Janet "came out running, screaming" They "couldn't understand a word . . . something about her roommate" Jones "ran, opened up the door and almost tripped over the body," which was "right there." He called police.

Ruth Anderson was Cedar Glen's property manager in 1988. She was on defendant's porch, speaking to his then-wife Stacey about better supervising her four children, when Janet came home that Monday night. Anderson heard a door unlock, then a scream, and Janet ran past her. Defendant came outside right then, "and the first words out of his mouth were, 'Where's my bike? What happened to my bike?'" Janet "was in hysterics," Anderson told the jury, and defendant "could plainly see her," but he did not acknowledge her unusual behavior in any way. Anderson "thought immediately it was unusual." Someone asked her to call Mark, and she did so. The police arrived right after that.

San Jose Police Officer Robert Froese arrived on the scene at 8:57 p.m. Froese was briefed that the front window of Kristi's apartment was open, that the screen had been removed, and that "the neighbors living in [defendant's apartment] were concerned that it too may have been burglarized." Asked to investigate, Froese walked through defendant's apartment with him, remaining inside for two to three minutes. He did not shake defendant's hand, have any other physical contact with him, or touch anything in the apartment. Nothing in the apartment was amiss.

Froese entered Kristi's apartment about half an hour later, after inspecting her car and the area outside her apartment. Kristi's body was lying in a pool of blood on the living room floor. Her car keys, sunglasses, and a notepad were on the dining room table, and some laundry was on the floor. Her purse was in her bedroom.

A twisted clasp from a necklace was found on the floor at the bottom of the stairs, and the broken necklace was found by a chair in the living room. Froese noted blood stains on the living room carpet, on the stereo cabinet, on the television, and on the receiver. Dust patterns indicated that the receiver had been moved slightly. There were blood swipes on the wall of Kristi's bathroom and on the inside of the front door, and there was a blood smear to the right of the front doorknob. An impression on Kristi's bedroom door jamb appeared to have been made by the tip of a knife. Froese told the jury he believed the assault started outside Kristi's bedroom door by the stairs and then moved to the living room.

Froese's partner, officer Kenneth Womack, took fingernail scrapings from Kristi, and forensic vacuumings were also performed. "It's possible" that Froese held Kristi's fingers as Womack collected the evidence, but Womack did not recall him doing so. Both officers wore gloves.

Retired homicide detective George Padilla began interviewing witnesses that night. Neither Kristi's roommates nor Ky said anything about Mark that caused Padilla concern, and her family was "quite clear" that they did not consider Mark a potential suspect.

Padilla interviewed Mark early Tuesday morning and followed up a few days later. "[A]t all times cooperative," Mark described his activities "from the moment he woke up" that Monday and during the previous weekend, volunteering that he and Kristi had argued at the wedding Saturday. Mark gave police the names of people he had interacted with on Monday. His story checked out.

Padilla interviewed Kristi's sister Dana, who told him that Kristi telephoned her early Monday morning. Dana originally said Kristi called between 8:30 and 9:00 a.m., but then gave 9:00 to 9:30 a.m. as her best estimate. A few days later, she described her previous estimates as "rough" and said her best estimate was that Kristi called between

8:45 and 9:30 a.m. It was clear to Padilla that Dana was having difficulty remembering the specific time of the call.

Padilla interviewed defendant on September 7, 1988, and the recording of that interview was played for the jury. Defendant said he was unemployed and that his right forearm was in a cast because he had had surgery on his thumb. The Monday of the murder was Stacey's first day at word processing school, so she left early for an 8:00 a.m. class. Defendant and the children, aged nine, seven, three, and 13 months, walked to Food Villa for a loaf of bread, returning home, he "guess[ed]," around 9:30 or 10:00 a.m. They made sandwiches and then walked to Lawton School to visit Stacey, arriving "[r]oughly 10:30 or 11:00 -- something like that." Stacey was still in class, so "some lady" showed them the computer room. They "sat outside for a while" and then walked to Valley Medical Center (VMC), but the doctors were at lunch. They returned to the school, and when Stacey got out of class at 12:45 p.m., they went back to VMC, where doctors examined defendant's thumb. After "a couple hours" at VMC, they walked home. Finding a check in the mail, they walked to Fry's to get groceries, but when they arrived, they learned that the check was a PG&E rebate that could not be cashed for groceries. They walked home, arriving "[a]bout 8:00" in the evening. About 15 minutes later, Stacey told him his bicycle was missing, so he went downstairs. "[Jones] and them were outside. And I asked them if they seen my bike"

Asked if he had any ideas about what happened that morning, defendant suggested that his "second cousin" William Leroy Lewis, who was "on drugs now" and "just did a lot of time and just got out," might have come by to borrow the bike and "somethin' might've happened then, or I don't know." Defendant said Lewis had come by Sunday night when "us cousins were together." He identified the cousins as Theo Phillips and Thaddeus and Gregory Fort. Phillips spent Sunday night at defendant's apartment and left for work "about 6:00 in the morning." Padilla testified that police tried to follow up but could not locate the any of the cousins.

Padilla interviewed defendant's nine-year-old daughter Shaunte, and the recording of the interview was played for the jury. Shaunte was sleeping when her mother left for school that Monday morning, and defendant woke her up and told her to get dressed because they were going to the store for a loaf of bread. They came home, made sandwiches, and left to pick up her mother. They saw her father's doctor because he had cut the back of his hand. Shaunte did not see him cut himself, but he said he had done it slicing frozen hamburger. "[I]t happened before we went to the store," she said. Her father did some laundry before they went to pick up her mother.

Padilla interviewed defendant a second time on September 13, 1988, and the recording of that interview was played for the jury. Defendant added new details, admitting that he had cut his left hand "pretty deep" after they came back from the store and made sandwiches. He got his cast wet trying to clean the wound, so he went to VMC for stitches and to have the cast repaired. He did not tell police about the cut earlier because he was "scared," having heard after the first interview that "somebody at the apartment said some black guy must have did it because . . . their family . . . told [Knight and another neighbor] that the girl had had black skin or something in her fingernails." Padilla told the jury that no officer had been under the impression that "black skin" had been found under Kristi's fingernails.

Stacey told the jury she and defendant separated in 1996 and divorced in 2000. She controlled the family finances. Defendant had a drug problem before and during the time they lived at Cedar Glen, and he would use drugs as often as he could get them. He sometimes asked her for money to buy drugs, and she knew him to resort to theft or selling things from their home to pay for drugs. Neighbors and defendant's cousins visited regularly, and Stacey did not like that because she knew they would be doing drugs. Defendant used beer and brandy as precursors to crack cocaine and methamphetamine and typically stayed up all night when he used drugs. Then he would

“crash,” and he was “irritable” when he woke up. He threatened to harm her if she left him.

Stacey was upstairs when she heard visitors arriving around 10:00 or 11:00 p.m. on the Sunday before the murder. Defendant woke her in the middle of the night for money, and she reluctantly gave him \$50. When she got up the next morning, it appeared to her that he had been up all night.

The children were still asleep when Stacey left for school around 7:30 a.m. She called home when her first class ended a little before 9:00 a.m. to see if they were awake, but no one answered. She called again when her second class ended a little before 10:00 a.m., and this time, someone answered.

Stacey was surprised when her family showed up at the school “close to 1 o’clock.” She noticed a cut on defendant’s hand and what appeared to be blood “like on the cotton part of the cast,” and he told her he cut himself slicing frozen hamburger. The explanation struck her as odd because he had worked as a chef. She did not recall him ever, before or since that day, cutting himself in the kitchen. Besides, they had a microwave, so he could have defrosted the frozen meat first. It was unusual for defendant to prepare dinner in the morning. It was also unusual for him to have marched all four children to Food Villa for a loaf of bread, because there was a 7-Eleven right outside the Cedar Glen complex.

Stacey and Kristi had spoken only in passing. Kristi had never visited Stacey’s apartment, and no one in Stacey’s family had ever been inside Kristi’s apartment.

Shaunte testified that when the family lived at Cedar Glen, she sometimes walked or rode her bike to the 7-Eleven for bread or milk. She recalled very little about the day of the murder or about her 1988 interview with Padilla. She agreed that her memory of the incident would have been clearer two weeks after the murder and said she would not have lied to the police. She did not recall defendant ever having cut himself with a knife except on that Monday.

Lewis testified that he and defendant got together three or four times a week in 1988 to smoke marijuana and crack cocaine. On the Sunday before the murder, Lewis, defendant, and defendant's cousins smoked marijuana and drank beer in defendant's apartment. It would not have been unusual for defendant to have been using cocaine that night as well. Lewis could not recall more because drugs had damaged his memory.

Douglas Taylor lived at Cedar Glen in 1988. Defendant called him after midnight on the night before the murder, and Taylor went to defendant's apartment and sold him methamphetamine. Taylor saw six or seven men there.

Gary Lentz was asleep in his brother's Cedar Glen apartment on the night before the murder. Between midnight and 2:00 a.m., he awoke to find defendant and another man "rummaging around" by the coffee table. Defendant's speech was "rapid" and "a little kind of frantic," and he claimed to be looking for cigarettes. Lentz was 95 percent sure he had locked the front door because he was "compulsive" about that. He believed the intruders gained entry through a window, because the windows were "easy to pop." Lentz was angry, and he told the intruders to leave.

Kristi's sister Dana testified that she looked for Kristi when she arrived at the par course at 8:10 a.m. that Monday, "[b]ecause typically she would have run about that time." Kristi was not there, so Dana ran by herself and then went to clean the salon. It was a chore the sisters shared. Dana's roommate Kim Seandel called the salon between 8:40 and 8:45 a.m. to report that Kristi had telephoned. "Maybe less than minutes" later, Kristi called Dana at the salon and told her she and Mark had cleaned it the night before. Dana told Kristi she had already run the par course, and Kristi said she planned to run, do her laundry at their parents' house, and then go to the gym. The sisters made plans to talk later that day about who would feed the family dog, since their parents were out of town.

Dana testified that Kristi never said where she was calling from. Kristi had no "particular habit," sometimes calling Dana from Mark's house and sometimes calling from her apartment. Kristi was not generally one who liked to sleep in when she was not

working. Dana tried to reach her at her apartment “around noon” but no one answered, so she called her parents’ house. No one answered there either.

The parties stipulated that Dana’s roommate Kim was interviewed by police on August 29, 1988, and that Kim told them that “at approximately 8:45 a.m. [that morning], she was home and received a telephone call from Kristi Kristi asked to speak with Dana, and [Kim] told her that Dana was at the shop. Kristi said she was planning to go running and wanted to know if Dana could join her. Kristi told [Kim] she would immediately call Dana at the shop. [Kim] said Kristi sounded fine, upbeat.”

Leslie Ann Dyerly lived at Cedar Glen in 1988. She had Mondays off. Dyerly left to do errands around 9:00 or 9:30 a.m. that Monday. As she came downstairs from her second-floor apartment, she noticed Kristi, “and we said ‘good morning.’” Kristi was by a black car, “locking up, like she had just come back.” She was wearing workout clothes, and her hair was in a ponytail. Dyerly was “100 percent” certain, “absolutely certain,” that she saw Kristi on the morning of the murder and not on some other Monday morning.

Kristi’s boyfriend Mark testified that he owned a painting company. Kristi was awake when he left his house around 7:00 a.m. that day for Palo Alto, where his crew was painting the Coverts’ house. They ran out of paint around 11:00 a.m., and Mark left to buy more. He drove home to pick up a check, cashed it at a nearby market, returned home to put most of the cash away, and then drove to the paint store he did business with. He bought the paint and a can of stain he had offered to get for the owners of the market, dropped off the stain, got gas, picked up lunch for his crew, and returned to Palo Alto, arriving around 12:45 p.m. He did not stop by Kristi’s apartment that day; that was not something he did on Mondays, because it was “her only day to do what she need[ed] to do,” and “when I’m at work, I have so many things I need to accomplish during the day, I don’t mix the two, ever.” He arrived home around 5:15 p.m., and he was outside with his brothers and neighbors when Anderson telephoned.

Mark told the jury he and Kristi argued at the wedding. Both had been drinking. “It was a tiff,” he said. “[T]here was a person . . . across the room and he was staring and staring . . . all night at us, and, you know, typical boyfriend/guy, I asked who this cat was and why is he doing that” Later that evening, the “guys were all doing shots,” and “an older woman came up to the bar . . . and . . . snuggled up next to [Mark].” “Kristi walked up and elbowed me in the rib and said, ‘Uh-huh, what are you doing?’ But we laughed about it.” After the wedding, the two had an “emotional” but “[e]xtremely positive” conversation about their future together. “We told each other . . . we’re not going to sweat the small stuff and we’re going to get married and have an awesome life.” Mark denied killing Kristi.

Retired police detective sergeant David Harrison interviewed the Coverts in 1988. Mr. Covert told him that he came home from work between 11:45 a.m. and 12:30 p.m. that Monday and saw Mark and his crew with food that Mark had bought for them. Harrison also interviewed one of the owners of the market where Mark cashed the check that Monday morning, and she corroborated Mark’s account.

Dr. Parvis Pakdaman qualified as an expert in forensic pathology and determining the cause and manner of death. He identified “stab wounds and slashes, chest and neck” as the cause of death and told the jury that determining the time of death is not a precise science. It was “almost impossible” to do so from the coroner’s observation in this case that rigor mortis was “present and hard” at a particular time.

Brooke Barloewen, a supervising criminalist at the Santa Clara County District Attorney’s Office Crime Laboratory (the SCC crime lab), qualified as an expert in hair comparison, screening for the presence of biological material, and performing DNA testing. Barloewen extracted DNA from one of the pubic hairs found near Kristi’s body and created a DNA profile. There was another pubic hair in the vacuumings taken from Kristi’s apartment that looked macroscopically “similar” to the other hair, but Barloewen was unable to extract DNA from that hair.

Lisa Skinner, a criminalist at the SCC crime lab, examined a sampling of Kristi's fingernail scrapings. Kristi was the source of DNA extracted from the left hand scrapings, and there was no foreign DNA detected. The right hand scrapings contained a mixture of DNA from at least two people. Kristi was a possible major contributor, and defendant was a possible minor contributor. There was one minor allele that could have come from Mark, but a single allele is not a sufficient basis for any conclusions. Skinner did not perform statistical calculations because the lab was not routinely doing that in 2005.

Skinner compared the DNA profile from the pubic hair found near Kristi's body to defendant's DNA profile and identified him as the source of that DNA.

Lynne Burley, a supervising criminalist and DNA technical advisor at the SCC crime lab, qualified as an expert in screening evidence for the presence of biological material and performing DNA testing. In 2006, Burley extracted DNA from a second sampling of Kristi's fingernail scrapings. Kristi was a possible contributor to the DNA extracted from the left hand scrapings, and there was no foreign DNA in the profile.

Burley analyzed DNA extracted from the right hand scrapings and concluded that it contained a mixture of DNA from at least three people. She identified Kristi as a possible major contributor and defendant and Mark as possible minor contributors, with defendant contributing more DNA than Mark. She explained that "it's not unusual" to find a person's own DNA under his or her fingernails. It was also "reasonable" that Mark's DNA would be found under Kristi's fingernails "from recent contact."

Burley performed "a combined probability of inclusion calculation." The probability that a randomly selected African-American would have DNA consistent with that attributed to defendant was one in 970,000. The likelihood for a randomly selected Caucasian was one in 180,000, and for a randomly selected Hispanic, it was one in 200,000. The likelihood that a randomly selected person would have DNA consistent

with that attributed to Mark was one in 23,000 African-Americans, one in 4,700 Caucasians, and one in 4,100 Hispanics.

Burley calculated a “likelihood ratio,” which showed that it was 6.42 trillion times more likely that the combined DNA extracted from the right hand fingernail scrapings came from Kristi, Mark, and defendant than from Kristi, Mark, and a random African-American. It was 52.4 trillion times more likely that it came from Kristi, Mark, and defendant than from Kristi, Mark, and a random Caucasian, and 96 trillion times more likely that it came from Kristi, Mark, and defendant than from Kristi, Mark, and a random Hispanic. Burley excluded Stacey and her four children, the Fort brothers, Phillips, Lewis, and Froese as possible contributors.

In an effort to draw further interpretations, Burley performed Y-STR testing, which examines male DNA only and “isn’t as discriminating” as the autosomal testing described above. Y-STR testing identified defendant as a possible major contributor and Mark and Froese as possible minor contributors to the DNA extracted from Kristi’s right hand fingernail scrapings. Burley noted that Mark’s and Froese’s Y-STR profiles were “fairly identical,” which is “kind of the downside to doing Y-STR testing.” Considering the tests she performed as a whole, however, Burley excluded Froese as a possible contributor to the DNA extracted from Kristi’s right hand fingernail scrapings. Skinner testified that she agreed with this conclusion.

Burley examined Kristi’s workout pants and found DNA “consistent with [defendant’s profile]” on the left front thigh area. The probability that a randomly selected African-American male would have this partial profile was one in 125. Burley excluded the Fort brothers, Phillips, Lewis, and defendant’s stepsons as possible contributors.

Surgeon Dr. Barry Press qualified as an expert in hand surgery. He reviewed defendant’s medical records and testified that the cast on defendant’s arm would not have prevented him from gripping a knife or using it forcefully.

Psychiatrist Dr. Douglas Tucker qualified as an expert in psychiatry, drug addiction, and the effects of drugs on the human body. Presented with a hypothetical that tracked the prosecution's version of events that Sunday and Monday, Dr. Tucker opined that the scenario was "consistent with the desperation of somebody who wants to continue using the drug." He explained that crack cocaine has a short half-life in the body. "[W]hen people are drinking and smoking crack, and maybe . . . using methamphetamine, and . . . at some point, there's not immediate access," users start to go through withdrawal. "You get the early withdrawal and then you get what's called tweaking, which is an extremely unpleasant, agitated, half withdrawal, half intoxicated state with methamphetamine and cocaine where a person can initiate a kind of frenzied seeking for more drugs" The hypothetical pattern of drug use would not negate the intent to kill or to commit theft.

Anthony Le and his sister Mai Le testified for the defense. Le and his sister lived at Cedar Glen in August 1988, and police interviewed him the day after the murder. The parties stipulated that he told police he left for school at 11:00 a.m. on the morning of the murder. He did not notice Kristi's car when he left, but he saw it parked in the stall closest to her apartment when he returned at 4:00 p.m. Le conceded on cross-examination that he did not know Kristi, had never spoken to her, and had no reason to pay attention to where she parked her car.

The parties stipulated that Debra Gonzalez, a receptionist at Lawton School, was interviewed by police on September 12, 1988, and told them that the school's sales representative had given defendant a brief tour of the school shortly after noon on the day of the murder.

Criminalist Mark Moriyama qualified as an expert in trace evidence evaluation. He examined nine "off-white particles" vacuumed from Kristi's carpet and compared them to a sheetrock sample, a ceiling sample, and a sample of casting material from a hospital. Three were similar to the ceiling sample. Five were "layered" and had

“infrared characteristics similar to latex.” Moriyama could not identify a source of the latex-like material.

Henry Templeman, who qualified as an expert in fingerprint analysis, testified that no identifiable fingerprints from Kristi’s apartment matched defendant’s but two matched Mark’s.

Former San Jose Police Officer Jerome Smith, who interviewed Dyerly on August 29, 1988, testified that his report made no mention of Dyerly having seen Kristi that morning, but he conceded on cross-examination that the report only documented her afternoon activities.

After deliberating for six and a half hours, the jury returned a guilty verdict and found the personal use allegation true. Defendant admitted a prior serious felony conviction, and the trial court sentenced him to an aggregate term of 31 years to life. Defendant filed a timely notice of appeal.

II. Discussion

A. Claimed Improper Exclusion of Testimony

1. Background

The prosecution moved in limine to exclude Dana’s lay opinion about where Kristi telephoned her from that Monday. The prosecutor described Dana’s conflicting statements on the subject. At the preliminary examination, Dana testified that Kristi “really didn’t have a habit” on Monday mornings—sometimes she would start her day from Mark’s, and other times she would go home and start her day from there. It was Dana’s *impression* that Kristi had called her from Mark’s that Monday. Dana later testified that Kristi told her that she was at Mark’s. Dana would testify at trial, the prosecutor told the court, that “Kristi never told her where she was calling from.” The trial court excluded Kristi’s purported statement as inadmissible hearsay and ruled that

any lay opinion testimony by Dana on the subject had to be based on something other than that hearsay statement.

Dana's roommate Kim reportedly told an investigator in 1988 that when Kristi called her looking for Dana, she said that she was at Mark's. By the time of trial, Kim had no memory of that Monday's events. The trial court excluded Kristi's statement to Kim as inadmissible hearsay.

2. Dana's Testimony

Defendant claims the trial court improperly excluded Dana's lay opinion testimony. We disagree.

"If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony." (Evid. Code, § 800; *People v. Farnam* (2002) 28 Cal.4th 107, 153.) Whether to admit lay opinion testimony is within the trial court's sound discretion. (*People v. Medina* (1990) 51 Cal.3d 870, 887.)

Defendant argues that Dana should have been permitted to opine that since she and Kristi "had previously made plans to run early in the morning," Kristi's failure to show up caused Dana to believe that Kristi must have overslept and was still at Mark's when she called. The problem with this argument is that the proffered opinion is not rationally based on Dana's perceptions. (Evid. Code, § 800, subd. (a).)

Dana's observations do not support the premise that she and Kristi "had previously made plans" to meet that morning. It was not Kristi's "habit" to jog with Dana on Mondays; the two met at the par course only "50 percent of the time." Sometimes they met "spontaneously," and other times, they planned it in advance. Dana did not recall speaking with Kristi over the weekend, nor did she call her early that Monday morning. She simply went to the par course "*in maybe hopes to meet up* with [Kristi] to run with

her.” (Italics added.) She was disappointed *but not surprised* when Kristi was not there. These facts do not rationally support Dana’s proffered opinion.

The record discloses no other observations by Dana to support the proffered opinion. She heard no voices in the background and no “music or the radio or anything like that” during her five-minute conversation with Kristi. Her opinion was speculation. It was not an abuse of discretion to exclude it.

Price v. Northern Electric Railway Company (1914) 168 Cal. 173 (*Price*), on which defendant relies, does not compel a different conclusion. Injured in a workplace accident, Price was allowed opine at trial that the work that day was being “‘rushed’” by the foreman. (*Id.* at p. 181.) The testimony was properly allowed, the court held, because it was rationally based on Price’s personal observations that the foreman’s orders that day “‘were all in a hurry up style’” and communicated in language that “‘most of the time’” was “‘forcible language.’” (*Ibid.*) Dana’s proffered opinion, by contrast, was not rationally based on any personal observations she described at trial.

Defendant next contends that “everything which Kristi said to Dana which caused Dana to believe that Kristi was telephoning from Mark’s house” should have been admitted under Evidence Code 356’s rule of completion. His failure to raise this argument below forfeited it on appeal. (*People v. Pearson* (2013) 56 Cal.4th 393, 460 (*Pearson*)). It lacks merit in any event.

Evidence Code section 356 provides that “[w]here 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.” (Evid. Code, § 356.) “The purpose of this section is to prevent the use of selected aspects of a conversation . . . , so as to create a misleading impression on the subjects addressed.’ [Citations.]” (*Pearson, supra*, 56 Cal.4th at

p. 460.) Portions of a conversation that do not clarify or explain the portions that were admitted may be excluded in the trial court's discretion. (*People v. Williams* (2006) 40 Cal.4th 287, 319 (*Williams*).

Defendant does not argue that the admitted portions of Kristi's telephone conversation with Dana created a misleading impression. (*Pearson, supra*, 56 Cal.4th at p. 460.) Nor does he explain why the excluded portions of the conversation were necessary to make the admitted portions understood. (Evid. Code, § 356.) The conversation "wasn't very long, maybe [a] couple minutes." Kristi's apparent purpose in calling was to tell Dana she did not need to clean the salon because Kristi and Mark had already cleaned it on Sunday night. Kristi briefly described her plans for the day, and the sisters agreed to talk later about who would feed the family dog. The jury was not left with a misleading impression that Kristi had called from one location as opposed to the other. Nothing the jury heard required explanation or clarification by any excluded portions of the conversation, including any statement by Kristi that she was calling from Mark's. (*Pearson*, at pp. 460-461.)

Defendant next contends that Dana's preliminary hearing testimony should have been admitted under the prior inconsistent statement exception to the hearsay rule. He concedes that his trial counsel did not seek admission of the statement on that ground, but maintains that the argument was preserved for appeal, either because further argument on the issue would have been futile or because his counsel's failure to object constituted ineffective assistance of counsel. We reject both arguments.

"The proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation" for its admission. (*People v. Livaditis* (1992) 2 Cal.4th 759, 778-779 (*Livaditis*)). Defendant did not do that, so he cannot argue that it would have been futile to raise the issue "again" because the trial court had already "ruled against [him] once." At the hearing, defendant's trial counsel argued that Dana's *opinion* that Kristi called from Mark's (and/or Kristi's statement to Kim that she was

calling from Mark's) were "very material" because they appeared to have been made between 9:00 and 9:30 a.m. that morning, which "tighten[ed] up the timeframe in which [defendant] could have possibly done this homicide to probably a half hour." Counsel opined that he could get Kristi's statement into evidence only through Dana or Kim, neither of whom had any desire to mislead the court. He did not identify any recognized exception to the hearsay rule and argue that Kristi's statement fell within it. He simply asked the court, in general terms, "to find that under those specific circumstances, that there would be an exception to the hearsay rule that would allow me to, in fact, get into cross-examination on that precise issue." "I think it's hearsay," the court responded, "but I'm not hearing an exception. That evidence or that statement is excluded." Where, as here, the trial court all but invited defense counsel to articulate a specific exception to the hearsay rule, defendant cannot claim it would have been futile for his counsel to have done so. We reject defendant's futility argument. (*Livaditis, supra*, 2 Cal.4th at pp. 778-779.)

Defendant argues in the alternative that his trial counsel was prejudicially deficient in failing to seek admission of Dana's preliminary examination testimony as a prior inconsistent statement to impeach her trial testimony. We disagree.

A defendant seeking reversal for ineffective assistance of counsel must prove both deficient performance and prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218 (*Ledesma*); *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Ledesma*, at pp. 217-218.) A court deciding an ineffective assistance claim does not need to address the elements in order, or even to address both elements if the defendant makes an insufficient showing on one. (*Strickland*, at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." (*Ibid.*)

Here, defendant cannot show prejudice. There was no evidence from which the jury could have concluded that Kristi called Dana that morning from anywhere other than Mark's house or her own apartment. It was undisputed that her apartment was only a 15-minute drive from Mark's house. Dana testified that Kim telephoned her at the salon between 8:40 and 8:45 a.m., and that "[m]aybe less than minutes later," Kristi called her. Their conversation lasted "maybe [a] couple minutes." Had Kristi called Dana from Mark's, then, she would have had time to get home by 9:00 or 9:30 a.m., when Dyerly said she saw her locking up her car. Defendant does not dispute this point. His alibi did not begin until 11:00 a.m., when he and the children would have been walking to Lawton School. Thus, whether Kristi called from Mark's house or from her own apartment, defendant would have had time to commit the murder. That, the powerful DNA evidence linking defendant to the murder, and the lack of evidence implicating Mark, make it not reasonably probable that, but for defendant's trial counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland, supra*, 466 U.S. at p. 687.)

3. Kim's Testimony

Defendant asserts that Kristi's statement to Dana's roommate Kim should have been admitted under Evidence Code section 356. He forfeited that argument, and it fails in any event for the same reasons his similar argument about Kristi's statement to Dana failed. Kristi called Kim looking for Dana. Kim told Kristi that Dana was at the salon, and Kristi said she would call Dana there. Defendant does not contend, and we do not believe, that there is anything misleading about this testimony that the excluded portion of Kristi's conversation with Kim would have explained or clarified. (*Pearson, supra*, 56 Cal.4th at p. 460; *Williams, supra*, 40 Cal.4th at p. 319.)

Defendant next argues that Kristi's hearsay statement to Kim was admissible under Evidence Code section 1250 as a statement of intent. He forfeited this argument by failing to raise it below. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177-1178 (*Ramos*).

In any event, it lacks merit, because the record does not support defendant's assertion that Kristi told Kim "that, because her sister Dana was not at home, Kristi *intended to call from [Mark's] house to their father's beauty salon*, to reach Dana." (Italics added.) If a report of Kim's 1988 conversation with investigators was made, it is not included in the record on appeal. The prosecutor's motion in limine asserted that Kim "reported to investigators that Kristi said she was calling from Mark's home." At the hearing on the motion, defendant's trial counsel told the court that Kristi "had a telephone conversation with Kim in which she indicated to Kim that she was, in fact, at the apartment of [Mark]." When the trial court described the proffered evidence as "a statement that Kristi told Kim on the phone 'I'm calling from [Mark's] house,'" neither side challenged that characterization. Kristi's straightforward assertion that she was at Mark's house was not admissible under Evidence Code section 1250 for the simple reason that it was not a statement of intent. (See *People v. Majors* (1998) 18 Cal.4th 385, 403 [statements of the defendant's intent to conduct a drug deal admitted]; *People v. Earnest* (1975) 53 Cal.App.3d 734, 743-744 [statement of intent to burn residence to collect insurance proceeds admitted].)

Defendant next argues that the exclusion of Kristi's statement to Kim violated his equal protection rights because the court admitted different evidence favorable to the prosecution under the state of mind exception. We reject the argument. The first prerequisite to a successful claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more "similarly situated" groups in an unequal manner. (*In re Eric J.* (1979) 25 Cal.3d 522, 530, italics added.) Parties whose meritorious evidentiary motions are granted are not similarly situated with parties whose evidentiary motions are denied.

Relying on *Chambers v. Mississippi* (1973) 410 U.S. 284 (*Chambers*), defendant contends that the exclusion of testimony about where Kristi called from violated his right to present a defense. Not so. *Chambers* stands for the proposition that a state may not

impede a defendant's right to put on a defense by applying evidentiary rules "mechanistically to defeat the ends of justice." (*Id.* at p. 302.) It does not hold that a defendant must be allowed to present any evidence he chooses. In noting that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," the *Chambers* court also declared that "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Ibid.*) The challenged statement here was properly excluded as hearsay to which no exception applied, and its exclusion did not violate defendant's due process rights. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Defendant argues that exclusion of the testimony violated his right to cross-examine witnesses. The argument is meritless. "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in *otherwise appropriate cross-examination* designed to show a prototypical form of bias on the part of the witness" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, italics added (*Van Arsdall*)). Here, unlike in *Van Arsdall*, defendant was not prohibited from engaging in otherwise appropriate cross-examination of Dana. He was precluded from cross-examining her with hearsay statements to which no exception applied. His confrontation rights were not violated.

B. Asserted Prosecutorial Misconduct

Defendant claims the prosecutor committed misconduct when he said at closing argument that "we simply don't know where [Kristi] was calling from." Defendant forfeited this claim by failing to raise it below, and in any event, it lacks merit. (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

““The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor's . . . intemperate behavior violates the federal

Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’”” [Citation.]” (*People v. Gray* (2005) 37 Cal.4th 168, 215-216.) “A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence. [Citation.]” (*Ledesma, supra*, 39 Cal.4th at p. 726.) “When the issue ‘focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ [Citations.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203 (*Cole*).

The challenged statement here was fair comment on the evidence. Dana testified unequivocally at trial that Kristi never said where she was calling from that morning. She explained that Kristi had no particular habit; she sometimes called from Mark’s and other times called from her own apartment. There was evidence to support a finding either way, and either way, defendant had time to commit the murder. We see no reasonable likelihood that the jury could have construed the prosecutor’s neutral remark in an objectionable fashion. (*Cole, supra*, 33 Cal.4th at pp. 1202-1203.)

The record does not support defendant’s assertion that the prosecutor “knew perfectly well” where Kristi called from and “dishonest[ly]” misrepresented that he did not. Defendant’s argument assumes that a particular statement out of Dana’s many conflicting statements on the subject (i.e., her statement at defendant’s 1991 preliminary examination that Kristi in fact said she was at Mark’s house) was “the truth” and that her other statements and her trial testimony were false. Dana’s varying statements on the subject were excluded because her apparent confusion rendered them unreliable and

speculative. Kim’s statement to police was excluded as unreliable hearsay. At trial, Dana told the jury that Kristi “never” said where she was calling from. The prosecutor did not commit misconduct by arguing that “we simply don’t know where [Kristi] was calling from.”³

C. Claimed Insufficiency of the Evidence

Defendant contends that there was insufficient evidence of burglary to support the felony murder charge. There was no evidence that he entered Kristi’s apartment with larcenous or felonious intent, he argues, because nothing was missing, and the apartment had not been ransacked. We disagree.

Section 189 defines felony murder: “All murder . . . which is committed in the perpetration of, or attempt to perpetrate . . . burglary . . . is murder of the first degree.” (§ 189.) Section 459 defines burglary: “Every person who enters any house, room, apartment, . . . or other building, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.” (§ 459.) “‘Although the People must show that a defendant charged with burglary entered the premises with felonious intent, such intent must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable. [Citations.] When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal.’ [Citations.]” (*People v. Price* (1991) 1 Cal.4th 324, 462.) A reasonable inference is one that is “‘drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.’” (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

³ The cases defendant relies on are distinguishable on this basis. In each of those cases, the prosecutor misrepresented a verifiable fact. (*People v. Frohner* (1976) 65 Cal.App.3d 94, 107-109; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1317-1319, 1324; *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968.) Nothing like that occurred here.

“‘In reviewing a challenge to the sufficiency of the evidence . . . , we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.’ [Citation.] ‘The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Ramirez* (2006) 39 Cal.4th 398, 463 (*Ramirez*)). “In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact.” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Here, there was ample evidence to support a jury finding that *someone* broke into Kristi’s apartment that morning with theft in mind. The window screen that was on when Janet and Kristen left for work had been slit and removed, dust patterns indicated that the receiver had been moved slightly, and a broken necklace and its twisted clasp were found on the living room floor. The jury could reasonably have inferred from these facts that Kristi interrupted a burglary when she came home that morning. (See *Ramirez, supra*, 39 Cal.4th at p. 463.) So too could the jury reasonably have inferred that defendant was the one who broke in, because DNA evidence implicating him was found in Kristi’s apartment when it was undisputed that neither he nor anyone in his family had ever been inside her apartment and that Kristi had never visited his.

There was, moreover, additional evidence to support a finding that defendant broke in with the specific intent to commit theft. Witnesses testified that he had been up all night drinking and using drugs with his cousins and that he typically used crack cocaine and methamphetamine when they came over. He woke Stacey in the middle of the night for money, then bought methamphetamine from Taylor. He broke into the Lentz apartment between midnight and 2:00 a.m., and when he was caught “rummaging

around,” his speech was “a little kind of frantic.” The jury could reasonably have inferred from these facts that defendant had exhausted his drug supply, was experiencing the very unpleasant withdrawal symptoms that Dr. Taylor described, and was engaged in the sort of “frenzied seeking” for more drugs that those symptoms triggered. The jury could reasonably have concluded that, having left the Lentz apartment empty handed, defendant broke into Kristi’s in search of something to sell to sustain his habit—in short, with larcenous intent—and killed her when she interrupted him. That nothing was actually taken from Kristi’s apartment does not mean larcenous intent was lacking, because “[t]he jury reasonably could have concluded that defendant abandoned his plan to steal in order to flee and avoid apprehension.” (*Ramirez, supra*, 39 Cal.4th at p. 464.) We conclude that there was sufficient evidence of burglary to support defendant’s felony murder charge.

D. Evidence of Defendant’s Poverty

1. Background

The trial court granted defendant’s motion in limine to exclude reference to defendant’s financial status and “whether he’s impoverished or not.” The court clarified that the prosecution would be permitted to introduce evidence and to argue that defendant “was motivated to break into the apartment to steal something that he could use to acquire more drugs.” At trial, the prosecutor elicited evidence from Stacey that she was not employed in August 1988, that money was “a little bit” tight with four children, that she controlled the family finances, and that if defendant needed money, she would be the one to give it to him. When she could not recall if defendant was working at the time, the prosecutor asked if she recalled any income coming in as a result of his efforts, and she blurted out “AFDC [Aid to Families with Dependent Children].” “The question is his efforts, his work,” the prosecution prompted her; “[t]hat’s what I’m trying to get at.” Stacey responded that defendant was not working at the time and that she controlled the

finances. She testified that she preferred to shop for groceries at Fry's, which was less expensive than Food Villa. Describing what the family did on the day of the murder, Stacey testified that they mistook a PG&E rebate check for a tax refund and tried to buy groceries with it.

Asserting a violation of the trial court's in limine ruling, defendant moved to strike Stacey's testimony about defendant's "poverty," specifically, her reference to AFDC, and asked the court to give a limiting instruction "with respect to AFDC." The prosecutor did not oppose the request for a limiting instruction, and the court instructed the parties to prepare one that they agreed upon. The court then denied the motion to strike, noting that it would deal with the request to give a cautionary instruction "as I've indicated." The court later gave a limiting instruction on a different issue, but neither the parties nor the court again mentioned a limiting instruction about Stacey's reference to AFDC.

2. Analysis

Defendant claims the trial court's failure to strike evidence of his "poverty" and/or to deliver a curative instruction after Stacey blurted out "AFDC" and described trying to buy groceries with the PG&E rebate check violated his right to due process. We disagree.

"Generally, evidence of a defendant's poverty or indebtedness is inadmissible to establish a motive to commit robbery or theft, 'because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice.' [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 999 (*McDermott*)). However, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*); *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair

trial.’ [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.” (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 (*Jammal*)). “Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson*⁴ test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.” (*Partida*, at p. 439.)

Here, even if we assume that defendant preserved the issue and further assume that the trial court erred, defendant cannot establish a due process violation, because the jury could have drawn permissible inferences about defendant’s motivation and intent from the challenged evidence. It could reasonably have inferred that defendant broke into Kristi’s apartment not because he was impoverished as a general matter but because he was in that “extremely unpleasant, agitated, half withdrawal, half intoxicated state” that Dr. Taylor described, had an immediate desire for more drugs to sustain his high, and did not want to wait for Stacey (who controlled the family finances, was “uncomfortable” giving him money for drugs, and felt that “there were better uses for that money”) to come home from school and give him more than the \$50 she had already given him. Thus, admission of the evidence did not render defendant’s trial fundamentally unfair.

Applying the *Watson* standard, we conclude that any error was harmless. Stacey’s reference to “AFDC” was fleeting and her testimony about the PG&E rebate check relatively brief. We have already noted the strength of the prosecution’s case. It is not reasonably probable that defendant would have obtained a more favorable result had the challenged evidence been excluded. (*Watson, supra*, 46 Cal.2d at pp. 835-836.)

⁴ *People v. Watson* (1956) 46 Cal.2d 818, 835-836 (*Watson*).

E. Uncharged Crimes Evidence

Defendant claims the trial court improperly admitted evidence of uncharged crimes to establish motive. We disagree.

“Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person’s character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person’s character or disposition.’ [Citation.] ‘Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive [or] intent [Citation.] The trial judge has discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, “[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.” [Citation.]’ [Citation.] “We review for abuse of discretion a trial court’s rulings on relevance and the admission or exclusion of evidence under Evidence Code sections 1101 and 352.” [Citation.]’ [Citation.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668 (*Fuiava*)).

1. Evidence of Defendant’s Drug Use

Defendant argues that evidence of his drug use was inadmissible to prove motive for two reasons: because “[t]here is no direct causal connection between drug use and

theft” and because the evidence was “an improper proxy for evidence of poverty.” (Boldface omitted.) We cannot agree.

We note at the outset that the relevant inquiry is not whether there is a “direct causal connection” generally “between drug use and theft.” The inquiry is whether defendant’s drug use in this particular case was “logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive” (*Fuiava, supra*, 53 Cal.4th at p. 667.) Because it was, evidence of defendant’s drug use that weekend was not a mere proxy for his poverty but instead, compelling evidence of his motive for burglarizing Kristi’s apartment on that particular Monday morning.

Under the analysis described in *Fuiava*, admission of the evidence was proper. It was material because it suggested a plausible motive for the burglary. (*People v. Davis* (2009) 46 Cal.4th 539, 604 [“Although motive is not an element of any of defendant’s crimes ‘the absence of apparent motive may make proof of the essential elements less persuasive’”].) The drug use evidence suggested “that [defendant] felt a strong need for . . . money [or] property on the [day] in question and acted out of that motive”—not, as he argues, “because he was too poor to buy drugs on his own” and not, as he also suggests, out of “mere curiosity; or a desire to look at the young women’s possessions; or a desire to see how to see how that apartment was arranged.” (*People v. Demetrulias* (2006) 39 Cal.4th 1, 14 (*Demetrulias*).)

The evidence was also probative because motive can be probative of intent. (See *Demetrulias, supra*, 39 Cal.4th at p. 14 [“Motive, though not itself an ultimate fact put at issue by the charges or the defense in this case, was probative of [an] ultimate fact[, intent”].) The jury could reasonably have concluded that, having exhausted both the \$50 Stacey gave him and the methamphetamine that he bought from Taylor, wanting more drugs to sustain his high, and unwilling to wait for Stacey to return home and give him more money, defendant broke into Kristi’s apartment with the intent to steal

something to sell or trade for more drugs. The evidence was, therefore, highly probative on an element of the crime on which the felony murder charge was based.

Finally, no rule or policy required exclusion of the drug use evidence. “Evidence of uncharged offenses ‘is so prejudicial that its admission requires extremely careful analysis. [Citations.]’” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*)). “[T]o be admissible[,] such evidence ‘must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.’ [Citation.]” (*Ibid.*) “The probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus.” (*Demetrulias, supra*, 39 Cal.4th at p. 15.) “Evidence of a defendant’s drug use is inadmissible, however, “‘where it “tends only *remotely* or *to an insignificant degree* to prove a material fact in the case” [Citation.]’” (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1392 (*Felix*)).

In *Felix*, the court held that evidence of the defendant’s heroin use was properly admitted to establish his motive for burglarizing his sister’s house, but improperly admitted to establish his motive for burglarizing a different house a month later. (*Felix, supra*, 23 Cal.App.4th at pp. 1393-1395.) The burglary of the defendant’s sister’s house was “the classic example of direct probative evidence establishing motive” because he admitted that he broke in to find items to sell so he could buy more drugs. (*Id.* at pp. 1393-1394.) The second burglary a month later, however, was at the other end of the continuum between admissible and inadmissible motive evidence, since there was “no evidence” establishing a “nexus” between that burglary and the defendant’s drug use. (*Id.* at p. 1395.)

Here, while defendant did not admit burglarizing Kristi’s apartment to sustain his drug high, it cannot be said that there was “no evidence” establishing a nexus between his drug use that weekend and the burglary and murder Monday morning. (*Felix, supra*, 23 Cal.App.4th at p. 1395.) On the contrary, evidence of defendant’s drug use, together with

expert testimony describing the “extremely unpleasant, agitated, half withdrawal, half intoxicated state . . . where a person can initiate a kind of frenzied seeking for more drugs,” provided a convincing nexus between defendant’s drug use and the burglary. Stacey’s testimony that she had known defendant to resort to theft or selling things from their home to pay for drugs, and Lentz’s testimony about finding defendant “rummaging around” in the Lentz apartment after midnight made the nexus between defendant’s drug use and the burglary and murder even stronger. Given this convincing nexus, we reject defendant’s suggestion that the evidence was more prejudicial than probative.

“[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.” (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85.) Here, the challenged evidence was highly probative, and the jury was properly instructed that it was admitted for a limited purpose only. There was no abuse of discretion.

2. Evidence of the Lentz Burglary

Asserting that “motive” means “incentive” or “inducement,” defendant argues that his entry into the Lentz apartment, “arguably without permission,” did not provide a “motive” to burglarize Kristi’s apartment, because “‘motive’ means a reason for acting.” (Italics added.) We reject the argument.

“Other crimes evidence is admissible to establish two different types or categories of motive evidence. In the first category, ‘the uncharged act supplies the motive for the charged crime; the uncharged act is cause, the charged crime is effect.’ [Citation.] ‘In the second category, the uncharged act evidences the existence of a motive, but the act does not supply the motive. . . . [T]he motive is the cause, and both the charged and uncharged acts are effects. *Both crimes are explainable as a result of the same motive.*’ [Citation.]” (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1381 (*Spector*).

Defendant’s argument assumes that evidence of the Lentz burglary was offered as category one motive evidence, where “‘the uncharged act supplies the motive for the

charged crime.’” (*Spector, supra*, 194 Cal.App.4th at p. 1381.) He is incorrect. The evidence was offered as category two motive evidence—i.e., on the theory that defendant’s “frenzied seeking for more drugs” that Monday morning was the cause of *both* burglaries.

Defendant next argues that evidence of the Lentz burglary should have been excluded as a product of improperly delayed discovery, since “Lentz never told this alleged story of a burglary to any of the police officers who interviewed him in 1988.” We disagree.

“Both the prosecution and the defense must disclose the identities and addresses of all persons they intend to call as witnesses at trial Any relevant written or recorded statements of such witnesses, or reports of the statements of such witnesses, must also be disclosed.” (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 374; § 1054 et seq.) The prosecution must also disclose “all ‘relevant real evidence seized or obtained as part of the investigation.’” (*Izazaga*, at p. 374.) Disclosures must generally be provided at least 30 days before trial; material that becomes known to or comes into the possession of a party later than that must be disclosed immediately. (§ 1054.7.)

The prosecution complied with these rules. The record reveals that Lentz told police in 1988 that he was at his brother’s Cedar Glen apartment on the Sunday before the murder, that he had a conversation with defendant in the middle of the night when defendant came over, and that he commented at the time that defendant appeared to be wide awake. Lentz did not testify at the preliminary examination. The prosecutor contacted him “several weeks” before trial to tell him he might be needed to testify about his middle-of-the-night conversation with defendant “when he came over to your apartment,” and Lentz responded, “You mean when he *broke into* my apartment?” (Italics added.) The prosecutor stopped Lentz “right there,” immediately sent an investigator to interview him, and gave the defense a copy of the investigator’s statement. There was no discovery violation.

F. Evidence of Mark's Past Cocaine Addiction

Defendant contends that the trial court improperly excluded evidence of Mark's past cocaine addiction. We disagree.

1. Background

The prosecution moved in limine to exclude evidence of Mark's past drug use as irrelevant, impermissible character evidence, and unduly prejudicial. The prosecutor told the court that Mark had sought treatment for cocaine addiction "five to six years" before the murder and had volunteered that information when police interviewed him in 1988. Mark told police that he had a poor credit score because of his past drug use and could not get a checking account, "[w]hich is why on the day of the murder, he went to his apartment to retrieve a check that he had been given for a previous job to go cash it." There would be "no evidence of [Mark's] cocaine usage at or near the time of this case," the prosecutor told the court, and the lack of a checking account would explain why Mark went to the convenience store, so questions about why he cashed the check there "should not be deemed as 'opening the door' to evidence of his prior drug usage."

Defendant's trial counsel argued that Mark's "emotional" conversation with Kristi after they argued at the wedding "fit the profile" of someone who had "fall[en] off the wagon." If the prosecution's drug expert was allowed to testify about the effects of defendant's drug use during the weekend before the murder, counsel asserted, the defense "should be able to go on the fact that [Mark's] behavior also may be indicative that he started to use drugs again." Counsel conceded that he had "no other evidence" or information about Mark's past drug use.

The trial court denied the motion as irrelevant absent "more evidence of [Mark] actually using drugs." "I don't think it's relevant," the court ruled. The court cited Evidence Code 352 as an additional basis for its ruling: "I think its probative value is nil . . . , so I think it's excluded under 352."

2. Analysis

Defendant argues that evidence of Mark's "long-term cocaine use" should have been admitted to impeach Mark's credibility. We disagree.

"A trial court should allow latitude in the scope of cross-examination, but a witness cannot be cross-examined as to irrelevant or immaterial matters." (*People v. Gloria* (1975) 47 Cal.App.3d 1, 4.) "Evidence is irrelevant . . . if it leads only to speculative inferences." (*People v. Morrison* (2004) 34 Cal.4th 698, 711 (*Morrison*)). "Although a trial court enjoys broad discretion in determining the relevance of evidence [citation], it lacks discretion to admit evidence that is irrelevant." (*Id.* at p. 724.)

The proffered evidence here led only to the speculative inference that Mark *may* have started using cocaine again. Defense counsel conceded that he had "no other evidence" and "no other information" about Mark's alleged fall "off the wagon." He also conceded, when challenged by the trial court, that it was "obviously not true" that people argue and get emotional only if they are using drugs. The trial court properly excluded the evidence as irrelevant. (*Morrison, supra*, 34 Cal.4th at pp. 712-713.)

Defendant argues in the alternative that evidence of Mark's past cocaine addiction should have been admitted to "rebut his claimed good character." He forfeited this argument by failing to raise it below. (*Ramos, supra*, 15 Cal.4th at pp. 1177-1178.) It lacks merit in any event, because claims that Mark engaged in "long-term drug use" and "financial misfeasance" are wholly speculative inferences defendant draws from Mark's voluntary statement that he once sought treatment for cocaine addiction. Evidence that leads only to speculative inferences is irrelevant, and the trial court lacks discretion to admit irrelevant evidence. (*Morrison, supra*, 34 Cal.4th at pp. 711, 724.)

Defendant claims the exclusion of this evidence violated his right to confrontation. We have determined that the trial court's rulings were proper. There is thus no predicate on which to base defendant's constitutional claim. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1249.)

Defendant argues that his trial counsel's failure to properly articulate meritorious grounds for admission of the evidence was ineffective assistance of counsel. We disagree, because defendant cannot show prejudice. (*Strickland, supra*, 466 U.S. 668, 697.) The prosecution's case was very strong. Both motive and opportunity were shown, and compelling DNA evidence linked defendant to the crime. It is not reasonably probable that the result of the proceeding would have been different had the jury learned that Mark had sought treatment for cocaine addiction five or six years before Kristi's murder. (*Ibid.*)

G. Cumulative Error

Defendant claims the cumulative effect of the trial court's errors violated his due process rights. As we have found no error, there was no violation of due process. (*People v. Myles* (2012) 53 Cal.4th 1181, 1225.)

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Grover, J.