

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY D. SWIERSKI,

Defendant and Appellant.

H038846

(Santa Clara County

Super. Ct. No. B1152547)

On June 20, 2012, a jury found Gary D. Swierski (appellant) guilty of the first degree murder of his wife, Reina. Thereafter, the court sentenced appellant to state prison for the indeterminate term of 25 years to life. Appellant filed a timely notice of appeal.

On appeal, appellant raises numerous issues, which we shall outline later. In addition, appellant has filed a petition for writ of habeas corpus in which he raises two of the same issues he has raised on appeal. This court ordered the petition considered with the appeal. We have disposed of the petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).) For reasons that follow, we affirm the judgment.

Facts and Proceedings Below

According to appellant, he met Reina after he placed a personal advertisement in *Cosmopolitan en Español* magazine. At first, they wrote and telephoned each other frequently. At the time, Reina was living in Honduras. However, in November 1997,

Reina traveled to the United States to visit appellant. She stayed with appellant in Sunnyvale; they married in August 1998. Reina was eight months pregnant at the time.

Claudia Molina worked with Reina at the Baja Fresh restaurant in Cupertino for three years. In 2005, Reina moved to the Baja Fresh restaurant in Sunnyvale. According to Molina, Reina said that she did not want to stay married to appellant; she wanted a divorce, but was afraid that appellant would take away their daughter. Reina told her that she feared for her life because appellant "had murdered his first wife."¹ Molina said that she could tell that Reina was always afraid by the expression on her face. Reina told her that appellant would spy on her and not let her go out with friends, and that appellant would record her telephone conversations. Molina said that appellant would come to the restaurant "all the time" and ask her questions about Reina, questions such as whether Reina was with someone else.

Noemi Garcia, the manager of the Cupertino Baja Fresh restaurant, testified that appellant had come to the restaurant and was "[h]ostile with Reina." He showed up at the restaurant while she was working and was "yelling" at Reina. Garcia said that she asked appellant to leave. At other times, appellant had come to the restaurant "seeing if [Reina] was inside working. Like spying on her." Appellant would drive around the restaurant and look in. Reina was nervous and "look[ed] scared."

Jennifer Glass lived with her parents in Pleasant Hill. Appellant and Reina were family friends. Sometime in 2000 or 2001, appellant and Reina came to her house on a surprise visit. Glass heard a vehicle outside the house and looked out of the window. She saw appellant and Reina in a van; they appeared to be arguing. She saw appellant punch Reina with his right fist. When Reina and appellant came to the door, Glass let

¹ Defense counsel objected on hearsay grounds, but the court overruled the objection and gave the jury a limiting instruction that they were "not to take that statement for any truth contained in it that the defendant murdered his first wife but for a reason to explain now [*sic*] she was fearful."

them in. Reina was covering part of her face with her hand; she asked to use the restroom. Glass saw that Reina's lip was starting to "puff up" and there was blood around the corner of her mouth. Glass's mother, Patricia Viacava, testified that Reina's lip was "busted open." Reina was crying and scared. Reina told Viacava that appellant had "smacked her in the mouth."

From approximately 2001 to 2005, Diane Arellano lived in the same apartment complex as Reina. Reina lived in one of the apartments upstairs from Arellano with appellant, his father, and a little girl—Reina and appellant's daughter. Arellano testified that Reina never spoke to her neighbors and she did not believe that Reina and appellant had any visitors. In nice weather, Reina would sit on the stairs while her daughter played on the patio. Appellant was always watching them from the top of the stairs. Later, Reina explained that she did not talk to anyone because appellant did not want her to; he would not let her go past the stairs. Reina could watch the baby play and then she had to go back to the apartment.

Arellano testified that one night at approximately 1:00 a.m. Reina knocked on her door. Reina said, "Please, please help me. My husband's trying to kill me. Please. I'm your neighbor, Reina."² Arellano let Reina into the apartment and locked the door. Reina begged Arellano not to let appellant into the apartment. Reina was scared and was crying. Reina did not want Arellano to turn on the lights because she thought that appellant would be watching. Reina apologized and reiterated that appellant was trying to kill her; he had tried to choke her. Reina gestured toward her neck area. Reina refused to call the police. She told Arellano that appellant had threatened her and said that she could not leave him; but if she did she "wouldn't live a life." Reina told her that appellant said he would kill her, "like his first wife."³ Arellano testified that Reina stayed at her

² The court overruled defense counsel's hearsay objection.

³ Again the court overruled defense counsel's hearsay objection and gave the jury a (continued)

apartment for several hours; then she asked Arellano to take her to a friend's house, and Arellano did.

Arellano said that she had seen bruises on Reina's arms, and that when Reina came over it was always to ask for protection. Arellano asked Reina why she did not leave appellant; Reina told her that she could not leave her daughter with appellant. After each instance where Arellano helped Reina and took her to a friend's house, something would happen to her car; twice someone put water in her gas tank, another time someone broke her windshield. After Arellano helped Reina, appellant would "just stare at" her; it was an "[e]vil stare."

Sandra Vargas and Reina worked together at Baja Fresh from 2000 to 2004. Vargas testified that she and Reina were best friends. Sometime in 2002, Reina appeared at her house unexpectedly. When Reina arrived she was quite frightened. According to Vargas, Reina was "desperate or upset" that appellant had hit her. Reina had marks on her neck. Vargas tried to persuade Reina to call the police, but Reina refused because she was afraid of appellant and feared that she would lose custody of her daughter. Reina stayed with Vargas for almost three months. Appellant came to her house to get Reina; while there he called Reina a "prostitute" and a "whore." By the end of 2004, Vargas was so afraid of appellant that she stopped speaking to Reina.

Ted Mattman met Reina when she worked at Baja Fresh in Sunnyvale. They became friends. In December 2004, they began dating. They met two to three times a week. Initially, Reina told him that she was separated from her husband, but later admitted that she was married. According to Mattman, Reina considered divorcing appellant; he testified that she "really wanted to get out of the situation, but she felt trapped because every time she would want to get out of the situation he would threaten her and . . . scare her to the point where, you know, she wouldn't follow through." Reina

limiting instruction.

was "visibly afraid" and "feared for her life." As their relationship developed, Reina confided in Mattman that appellant had punched her in the face and back and one time he strangled her and almost knocked her unconscious.

Mattman testified that one night, sometime in January or February 2005, after he dropped off Reina at about 11:20 p.m., he received a telephone call from her as he was driving home. Reina told him to "[g]o quickly" because appellant was coming after him. Later, Reina explained that when she got home appellant had been waiting for her in the bushes; he chased her with a screwdriver. Mattman asked Reina why she had not called the police. Reina said that appellant had cut himself so if the police showed up he would look injured and would say it was self-defense.

In February 2005, Reina and Mattman were having lunch together at a Quiznos restaurant when appellant approached them. Reina said that appellant had followed them. Appellant introduced himself as Reina's husband and asked Reina, "Where do you know this guy from?" After a tense silence, Reina said that she had to leave. Reina told Mattman on multiple occasions that she would be out with friends and appellant would appear. Sometimes he would have their daughter with him and would say things to her that would upset her.

After Reina's death, appellant appeared at Mattman's place of work. Appellant told the receptionist that his name was "Steve." When Mattman saw that "Steve" was appellant, he told the receptionist to call the police.

In 1985, appellant and Mansueta Casinillo had a daughter, Eva Swierski. Eva was born in New York. While the family was living there, Eva saw an incident in which appellant struck Casinillo. Casinillo went into a closet and cried.

When Eva was about eight years old, she moved to Santa Clara with her mother. Later, appellant moved to Sunnyvale. Appellant and Casinillo did not live together. Eventually, appellant gained legal custody of Eva. Casinillo contested the custody arrangement; a lengthy series of court proceedings concerning Eva's custody ensued.

Repeatedly during her teenage years, Eva ran away from home. She testified that when she was in high school, appellant choked her in an attempt to stop her sucking her thumb. Appellant yelled at her and called her "fat," a "loser," and a "whore." When appellant married Reina, Eva lived with them. Eventually, appellant and Reina began having arguments over money because Reina was unwilling to contribute her income to paying the bills. Eva described a fight in which appellant "slammed" Reina "into a wall"

Appellant told Eva that he believed Reina was "cheating on him." Appellant said that he "caught her with somebody." Appellant called Reina a "fucking whore," and said that if she left him he would "kill her." A short time before Reina died, appellant drove Eva to a wooded location. He told Eva that he "was planning on killing [Reina] and so maybe he's going to put her there, or something." Appellant told Eva to buy a bag and a shovel; she purchased the items from a Big 5 store.

On March 8, 2005, Eva was out drinking and smoking marijuana with her friends. Appellant telephoned her twice and insisted that she return home immediately. According to Eva, during the second telephone call appellant appeared to be upset. After the second telephone call, Eva returned home. When Eva arrived home appellant told her that he had choked Reina to death. Eva said she suggested that they call an ambulance, but appellant told her that it was "probably too late." Eva went with appellant to the master bathroom. Appellant showed Eva a big plastic bag in the bathtub. He said that Reina's body was in the bag. Initially, Eva described it as a garbage bag, but later testified that it was "a different type of bag" with handles.

Eva went downstairs; she lay on the floor and cried. Appellant told Eva to help him carry Reina's body to his vehicle, but Eva said she did not want to. Appellant became frustrated and upset; he shook Eva. He shouted at Eva and told her that she could not tell anyone or he was "going to hurt" her or them. Eventually, Eva helped appellant carry Reina's body down the stairs.

Appellant and Eva took Reina's body to appellant's vehicle and loaded it into the trunk. Appellant asked Eva to drive, but she refused. Eva rode in the passenger seat for somewhere between 30 minutes and an hour. They went "someplace in the hills." It appeared that they were "[i]n the woods somewhere." Eva was not certain that they were in the same place that appellant had taken her previously. Appellant parked his vehicle, took Reina's body out of the trunk, and carried it up a small hill. He was gone for approximately an hour. Eva stayed in the vehicle and cried. When appellant returned to the vehicle they drove home. Appellant asked Eva to dispose of a pair of pants and Reina's cellular telephone. Appellant told Eva not to tell anyone because he did not "want to have to hurt anybody else."⁴

Months after Reina was killed, appellant told Eva that "he went back to get the teeth." At the time the police were asking questions about Reina's teeth.

In February 2011, Eva was concerned for her safety because someone was breaking into her home. She decided to move to Michigan with her daughter and her mother. Eva intended to confess to the police in Michigan about her role in Reina's death once her mother and daughter were safe with an aunt. However, while driving, Eva's mother decided she did not want to go. Eva went to the nearest police station, which was in Auburn, and told them her story.

On April 4, 2008, Alex Vido and her boyfriend discovered a skull while hiking just off Highway 9. Vido and her boyfriend were originally heading for Castle Rock State Park, but the road was closed due to an accident and so they pulled over to the side of the road. The place where they hiked appeared to be a fire trail. Vido took a photograph of the skull and found a CHP officer; two officers followed them back to

⁴ Eva admitted on cross-examination that she had a learning disability that affects her memory, but she was not quite sure how; and her drug use made it difficult for her to remember details.

where they had found the skull. The prosecution and the defense stipulated that based on dental X-rays a dentist had determined that it was Reina's skull.

Forensic anthropologist Lauren Zephro testified that she examined a skull, which had the first vertebra attached and a portion of the hyoid bone. The hyoid bone sits high on the neck behind the mandible. The skull did not appear to have decomposed at the location where it was found; and the skull did contain a full set of teeth. Zephro removed two of the teeth and sent them to the Santa Clara County Crime Laboratory for DNA analysis. Zephro estimated that the skull had been there for five years. The bag was very decomposed, but "did retain context" so she could see that the skull was contained within the bag. On cross-examination, defense counsel established that the hyoid bone is U-shaped and the part that was found was the bottom of the U; the condition of the bone indicated that it had been attached to the rest of the U by cartilage. The part of the bone Zephro examined was not fractured.

Criminalist Michelle Halsing, a specialist in DNA analysis, obtained DNA samples from appellant and from Laura (appellant's and Reina's daughter). Based on her analysis of these samples and the DNA collected from the teeth from the skull, Halsing determined that there was a high likelihood that the skull belonged to Reina.

Lieutenant Craig Anderson of the Sunnyvale Department of Public Safety described a drive that he and Detective Greg Giguere conducted with Eva directing them. The drive started at appellant's Sunnyvale home and went to where Eva's best recollection was of where appellant stopped on the night of Reina's death. Later the detectives went back and videotaped the route they had traveled. The video recording was played for the jury with Lieutenant Anderson narrating. Lieutenant Anderson testified that Eva had described certain things, such as a light pole and a four-way stop that they found were on the route. They drove straight at the four-way stop sign into a very remote area. However, on the drive back, at the four-way stop sign a right turn took them to the area where Reina's skull was located in 2008. Lieutenant Anderson testified

that approximately three and one-half miles after the turn there was a fire trail gate and a small hill; this was where Reina's skull was located.

Detective Giguiere testified that he received a telephone call from the Auburn Police Department on February 22, 2011. He was informed that Eva had come in to the police department and described the details surrounding Reina's death. Detective Giguiere went to Auburn and interviewed Eva. His description of what she told him confirmed the main points of Eva's testimony. Eva told him that appellant had physically abused her. Detective Giguiere obtained records from Child Protective Services, which indicated that Eva had been made a ward of the court between 2000 and 2002 based on her reporting that she had been abused by appellant.

Uncharged Acts of Domestic Violence

Appellant's first wife, Mansueta Casinillo, testified that she met appellant when a friend posted her description in Cherry Blossom magazine. Casinillo was born in the Philippines. She corresponded with appellant for three years and then moved to New York to live with him; they married in 1983 or 1984. Their daughter, Eva, was born in July 1985.

Appellant called Casinillo lots of derogatory names including "stupid" and "whore." He would belittle her for her accent and her inability to find employment as a social worker. Appellant punched and slapped her and forced her to have sex against her will. Once, he spat in her food while she was cooking. On another occasion, Casinillo suffered an asthma attack and appellant told Casinillo to "shut the F up" and to "be quiet."

Appellant threatened to kill Casinillo if she ever left him. Nevertheless, Casinillo moved to California, where appellant's sister offered to provide Casinillo a place to live. Eventually, Casinillo filed for divorce from appellant; that was followed by several years of litigation over custody and child support.

Elizabeth Armijo testified that she was born in Bolivia and had a romantic relationship with appellant. While she was working as a cashier at a Burger King, she

met appellant, who was a frequent customer. Eventually, Armijo moved into an apartment with appellant. From that point on, their relationship changed.

Armijo testified that on May 31, 1996, she was driving with appellant and they were arguing. They were on their way to pick up Armijo's son from school; Armijo felt that appellant was causing her to be late. Armijo told appellant that she could not drive safely when they were arguing and she asked him to get out of the vehicle. Appellant began screaming obscenities into Armijo's ear. Armijo attempted to push him away. Appellant responded by punching Armijo "very hard" in the face. He grabbed her by the neck and tried to choke her. Armijo drove back to their apartment, locked the door, and called the police. She had bruises and swelling of her neck as a result of this incident. Officer Shellie Rice of the Sunnyvale Department of Public Safety, who responded to Armijo's call to the police, described Armijo's injuries in detail for the jury.

Immediately after this incident, Armijo terminated her relationship with appellant. He threatened to have Armijo deported if she did not come back to him. Lieutenant Gary Anderson testified that in a search of appellant's home he found letters relating to Armijo that were addressed to various government agencies such as the INS; "the letters were reports on" Armijo "in efforts to get her deported." Shortly after the incident where appellant punched and tried to choke Armijo, immigration authorities detained Armijo. Unexpectedly, appellant showed up at her deportation hearing; he offered to marry her in order to enable her to avoid deportation. Armijo refused and was deported.

Appellant testified in his own defense that at approximately 10:30 p.m. on the night Reina died he was awakened by her cellular telephone beeping. He went into the bathroom to turn it off. Reina woke up and came into the bathroom; she began cursing loudly in Spanish. Reina asked him what he was doing with her telephone; she said, "I told you don't ever look at my phone" Appellant said that "all of a sudden, she picked up this knife that we had in the bathroom that we use[d] for . . . a back scratcher." Then, "she says to me, you know—with her back to me, she's 'I'm going to kill you

tonight, motherfucker.' " Appellant demonstrated how Reina turned around with the knife held high and came at him and stabbed him. Reina stabbed him in the forearm.

Reina pulled the knife out of appellant's arm and raised her arm again. She attempted to stab appellant, but missed. According to appellant, Reina raised the knife a third time. Appellant punched her in the face. Reina fell into the bathtub onto a large garbage bag containing old clothing, which they stored in the bathtub. Her head fell into the bag; appellant fell on top of Reina.

Appellant said he took the knife from Reina's hand and stood up. Reina was motionless in the bathtub, but appeared to be breathing. Appellant said he was concerned that she would regain consciousness and call the police or that a neighbor might call them. He explained that he telephoned Eva to come home so that someone would be in the house to look after the younger children when the police arrived.

Appellant said that he tried to shake Reina to wake her up, but she did not respond. He called Eva again and insisted that she come home. Appellant testified that he took Reina out of the bathtub and administered CPR for 10 minutes. When he realized that Reina was dead, he panicked. He stuffed her body into a black duffel bag.

When Eva returned home approximately 30 to 45 minutes later, she urged him to telephone 911, but he thought it was pointless because he was sure Reina was dead. When Eva insisted on telephoning the police, appellant threatened to tell them that she was involved in Reina's death. Eva did not telephone the police, but she refused to help him carry Reina's body downstairs. Appellant said he carried the body by himself and placed it in the backseat of his vehicle. He insisted that Eva accompany him because he was concerned that if he left her behind she would telephone the police. Appellant denied that he had asked Eva to drive his vehicle.

Appellant drove toward Monte Sereno where he had worked before on a construction job. He stopped his vehicle near Saratoga. He carried Reina's body across the road and up a hill; Eva stayed in the vehicle. Appellant put the bag down and left it

without burying it; he returned to his vehicle. He drove home with Eva. The next day, he returned on his motorbike with a shovel and buried the bag. He never returned to that location.

Appellant said that he did not realize that Reina was having an affair with Mattman until the police mentioned it after her death.

In rebuttal, Officer Brian Wilkes of the Sunnyvale Department of Public Safety testified that he was the first officer to contact appellant following Mattman's report that Reina was missing. He testified that appellant stated that Reina "had packed some belongings and had left[]" and that he "believed that she may be having an affair and this was not unusual for her to just leave." Officer Wilkes said that appellant was the first person to mention an affair.

The jury deliberated for less than seven hours before finding appellant guilty of first degree murder.⁵

Discussion

I. Denial of Trombetta Motion

According to defense counsel, on June 9, 2005, Sunnyvale police officers executed a search warrant at appellant's home. Among other things, they seized a number of audio cassette tapes. In a telephone conversation between appellant and then Detective Craig Anderson, Detective Anderson described several of these tapes as "recordings [appellant] made of he [*sic*] and Reina arguing."⁶ The transcript of the recording of the conversation between appellant and Anderson shows the following: "Yeah, I took—we took numerous

⁵ During this time, the jury listened to read-backs of a portion of appellant's testimony and several different portions of Eva's testimony totaling 47 minutes.

⁶ According to then Detective Anderson's report, "[Appellant] . . . wanted to know if I had taken some audio recorders and audio tapes from his house. I told him I had and knew that some of the tapes were illegal recordings he made of our telephone conversations, illegal recordings he made of my telephone conversation with Eva, and recordings he made of he [*sic*] and Reina arguing."

tape recorders, numerous audio cassettes, audio cassettes of you tape recording phone calls with me which is illegal. Audio cassettes of conversations I had with Eva on the telephone which is illegal. All kinds of stuff like that. *Audio cassettes apparently that you had of arguments with Reina* that were apparently it's a concealed, concealed audio recorder, things like that." (Italics added.)

According to defense counsel, no tapes conforming to the above italicized description were ever turned over to the defense. Appellant filed a motion pursuant to *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*) seeking dismissal of the case.

At the hearing on appellant's *Trombetta/Youngblood* motion, Lieutenant Anderson⁷ explained that he had not actually listened to the cassette tapes at the time of his conversation with appellant. Specifically, he testified that "[t]hen I use[d] the word 'apparently' a couple of times. I wasn't referring to something that I had listened to. I was referring to something that—and I can't recall how I became aware of this. Either was told to me by another detective or another officer or if I was just referencing what we had learned during the investigation of Reina's accusations of him recording her."

Anderson testified that he had no recollection of listening to any recording in which appellant and Reina yelled at each other; or any recording where Reina was speaking Spanish "going off on something." Further, he testified that he sometimes provides false information to suspects as an investigative tool; and in this case his use of the word "apparently" meant that the tapes did not exist or he did not personally review or have personal knowledge of their existence.

At the conclusion of the hearing, the court found that there was no "evidence that the tapes—tape actually existed or in terms of their exculpatory value or that the police should have known of their exculpatory value." The court denied the motion.

⁷ At the time of trial Detective Anderson had been promoted to lieutenant.

Appellant contends that the court erred in denying his *Trombetta/Youngblood* motion.

The constitutional due process rights of a defendant may be implicated when he or she is denied access to favorable evidence in the prosecution's possession. (*Brady v. Maryland* (1963) 373 U.S. 83.) *Trombetta* outlines how the state's failure to preserve evidence may violate those rights. In *Trombetta*, the high court limited the state's affirmative duty to preserve evidence to that which "might be expected to play a significant role in the suspect's defense." (*Trombetta, supra*, 467 U.S. at p. 488.) This standard of "constitutional materiality" imposes two requirements that a defendant must meet in order to show a due process violation. As an initial matter, the evidence must "possess an exculpatory value that was apparent before [it] was destroyed." (*Id.* at p. 489.) Additionally, it must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Ibid.*)

Destroyed evidence with only potential, rather than apparent, exculpatory value is without remedy under *Trombetta*, but *Youngblood, supra*, 488 U.S. 51 provides a limited remedy when the state has acted in bad faith in failing to preserve the evidence. In *Youngblood*, police obtained semen samples from a rape kit and several items of clothing, but they could not definitively establish the identity of the assailant through their initial tests. (*Id.* at pp. 52-54.) Subsequently, the police failed to take measures necessary to preserve those samples, such as refrigerating the clothing. (*Id.* at p. 54.) Although properly preserved samples could have exculpated the defendant in that case, that evidence was only "potentially useful" (*id.* at p. 58) to the defense and not " 'potentially exculpatory' " at the time it was allowed to deteriorate. (*Id.* at p. 57.) The court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58.)

We review the trial court's decision on a *Trombetta/Youngblood* motion under the substantial evidence standard. (*People v. Montes* (2014) 58 Cal.4th 809, 837; *People v. Memro* (1995) 11 Cal.4th 786, 831.) "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole 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 . . ." in support of the court's decision. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." [Citations.]' [Citation.]" (*Ibid.*)

We note three things for the record. First, defense counsel received copies of all the tapes that were taken from appellant's home; she so declared in her declaration in support of the *Trombetta/Youngblood* motion. Second, Lieutenant Anderson testified that there were no recordings of appellant and Reina arguing or of Reina "going off" in Spanish. The trial court was entitled to credit Lieutenant Anderson's testimony. The testimony of a single witness is sufficient to prove a disputed fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Third, assuming that there was another tape out there somewhere that contained either Reina arguing with appellant or Reina "going off" in Spanish, and assuming that the tape contained precisely the evidence that appellant now posits that it did, its absence "did not deny [appellant] all opportunity 'to obtain comparable evidence by other reasonably available means.' [Citation.]" (*People v. Thomas* (2012) 54 Cal.4th 908, 929.) To the contrary, the trial court authorized admission of evidence of Reina's character for violence. Specifically, the court permitted defense counsel to elicit testimony from appellant's daughters about arguments between

appellant and Reina and acts of violence by Reina against appellant pursuant to Evidence Code section 1103.⁸

Respondent argues that appellant may not be heard to complain of a *Trombetta* violation when he not only possessed evidence comparable to that allegedly destroyed, but refused even to introduce it. Appellant counters that it is reasonable to assume that the primary reason counsel decided not to call appellant's daughters was her concern that they would say something that might open the door to the prosecution's questioning appellant about the death of another intimate partner. Nevertheless, as the California Supreme Court has explained in another context, " "[t]he criminal process . . . is replete with situations requiring the 'making of difficult judgments' as to which course to follow. [Citation.] Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." ' [Citations.]" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 153 [the defendant did not offer any authority supporting his claim that despite proper joinder of the trial, the strategic decision he was required to make between testifying and remaining silent resulted in a gross unfairness amounting to a denial of due process and in other respects denied him his constitutional rights].)

In sum, we find no due process violation and the trial court did not err in denying appellant's *Trombetta/Youngblood* motion.

⁸ The court indicated that it was going to allow the daughters to testify about Reina's acts of violence toward appellant and "those would come in under a [Evidence Code section] 352 analysis." With respect to acts of violence against the girls, the court was not sure of their relevance. When defense counsel argued that under Evidence Code section 1103 she was not limited to showing just acts of violence by Reina against appellant, the court noted that unless the court knew what appellant's defense was going to be, the court could not conduct a "352 analysis."

II. Right to Present a Complete Defense

Appellant contends that the court deprived him "of his Sixth and Fourteenth Amendment right to present a complete defense by threatening to admit inflammatory and prejudicial evidence if he did so."

Background

Pursuant to Evidence Code section 1109,⁹ the prosecution moved in limine to introduce evidence that appellant had killed his former girlfriend Hilda Muhammad.¹⁰ According to the prosecutor, on June 25, 1993, "[her] body was pulled from the water in the Basha Kill Wildlife Management Area in Wurstsboro, New York. She was fully clothed in a purple jump suit with her shoes still on her feet. Her body was face down or on its side, fifteen feet from shore. Her body was eight feet from a location where she could stand with her feet touching the ground and her head above the waterline. She was in an 'angelic' pose with her arms out to [the] side contrary to the more common traumatic position a drowning victim is found. [¶] The Basha Kill Wildlife Management Area is a wetland with no current. It is not a place for swimming. No reported

⁹ Under Evidence Code section 1101, subdivision (a), "evidence of a person's character or a trait of his or her character," including in the form of "evidence of specific instances of his or her conduct" is "inadmissible when offered to prove his or her conduct on a specified occasion." However, under Evidence Code section 1109, subdivision (a)(1), "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." Thus, "[s]ection 1109, in effect, 'permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes. [Citation.]' [Citation.]" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232.) Murder is a crime of domestic violence for the purposes of Evidence Code section 1109; it is " 'the ultimate form of domestic violence.' " (*People v. Brown, supra*, at p. 1237.) However, evidence of acts occurring more than 10 years before the charged offense is inadmissible under Evidence Code section 1109, subdivision (e), unless the court determines that the admission of the evidence is in the interest of justice.

¹⁰ There are various spellings of Hilda Muhammad's name in the record. For consistency we use the spelling that is on the death certificate.

swimming accidents or drowning had been reported in the 15 years prior to Hilda's death. Hilda was a champion swimmer who swam regularly at a college in Middletown."

According to the prosecutor, although Muhammad's death was ruled accidental—asphyxia due to drowning—by the Orange County Pathologist, Dr. Michelle Jorden from the Santa Clara County Medical Examiner's office reviewed the autopsy photographs and the investigation report, which cast doubt on that ruling. According to the prosecutor, Dr. Jorden made the following findings. "(1) Florid petechiae on the face which is consistent with an asphyxia death but very unusual for a drowning. Superficial abrasions to Hilda's face suggestive of smothering type abrasions. She also found tongue bite marks which lends support for strangulation; (2) Blunt Trauma to the Head Otherwise Unexplained. The photographs showed temporalis muscle hemorrhage on the right side of the head indicative of blunt trauma to the head; (3) Hemorrhage around the Cervix/Uterus. This finding, in conjunction with the torn clothing around the pelvis area suggests forcible or rough sexual intercourse." The prosecutor explained that Dr. Jorden would testify that if the Muhammad case had been assigned to her originally and she had performed the autopsy and made these findings, coupled with information she learned through the investigation,¹¹ she would have concluded that Muhammad's death was a "homicide by asphyxia/strangulation."

¹¹ According to the prosecutor, appellant contacted the police and claimed that Muhammad had drowned accidentally. He explained to the police that he and Muhammad arrived at the Basher Kill Area to go swimming after they had had dinner together at the Red Lobster in Middletown. He claimed that while he put on his shorts, Muhammad went into the water alone and fully clothed; she swam to the middle of the pond while he stayed near the shore because of an ear infection. Fifteen minutes later, Muhammad called for help and could not stay afloat. Appellant told the police he started to swim to her, but became fatigued and began to experience chest pains so he swam back to shore to get an inflatable tube from his vehicle. Before he could return to the water Muhammad went under. After calling for her several times, he drove to the police station. Five days later when he was interviewed again, his story changed. This time he told the police that they had eaten dinner at home before going to Red Lobster to eat (continued)

The defense moved in limine to exclude all of the evidence surrounding Muhammad's death on Evidence Code section 352 grounds. Counsel argued that it had no relevance to the pending case and any mention of Muhammad's death by the prosecution would prejudice and inflame the jury. The prosecution objected to such exclusion of the evidence by filing a supplemental memorandum of points and authorities.

Ultimately, the court granted defense counsel's motion and excluded the evidence. The court made the following findings: "With respect to [Muhammad], this evidence is outside the window, although not by much, of [Evidence Code section] 1109. Certainly, it's no more inflammatory than the current charges. [¶] I do think it is somewhat remote. And I think that the probability of confusion is great. It will take three to four days to present. [¶] I also think that the degree of certainty of its commission . . . is an issue in this case. The fact that the incident involving Ms. Muhammad did not result in a prosecution, let alone a conviction of the defendant, increases the danger that the jury may wish to punish the defendant for the uncharged offenses and therefore increases the likelihood that the jury will confuse the issues because the jury has to determine whether the uncharged offenses in fact occurred. [¶] So I'm going to find that [Evidence Code section] 352 weighs in favor of exclusion, and I will be excluding that evidence."

During trial, outside the presence of the jury, pursuant to Evidence Code section 1103, subdivision (a), defense counsel proposed to adduce evidence of prior instances of violent behavior by Reina. Specifically, defense counsel proposed to elicit testimony from Crystal—appellant's daughter and Laura's half-sister—that Reina grabbed her by the ears and shook her back and forth after Crystal prepared some food for Laura. Then Reina pulled a telephone out of the wall. Also counsel proposed to elicit testimony from Crystal about an occasion when Reina and appellant were arguing in which Reina

again. Appellant claimed they had tried to swim in this location on two prior occasions.

threw an orange at appellant and hit him in the back; an incident when during an argument, Reina picked Crystal up by the face and scratched her; and an incident when Reina, appellant and Crystal were in a minivan and Reina slapped appellant with her outstretched arm. Counsel proposed to elicit testimony from Laura that Reina slapped her in the face in 2002; and testimony that Reina hit appellant in the head and shoulders with a day-planner book.

The prosecutor argued that this evidence would open the door to his introducing prior acts of violence by appellant pursuant to Evidence Code section 1103, subdivision (b). The court ruled that as a general matter, there was no question that appellant's prior violent acts were admissible, but the court pointed out that it had already excluded evidence regarding Muhammad's death based on its Evidence Code section 352 analysis. Defense counsel argued that Muhammad's death was not actually evidence of violent conduct, because her death had been ruled an accidental drowning and therefore did not prove that appellant had done anything violent. Counsel argued that evidence of the events surrounding Muhammad's death was covered by Evidence Code section 1103, subdivision (b), only if the preliminary fact that appellant was responsible for Muhammad's death could be established. Further, counsel argued that allowing the prosecutor to inquire into Muhammad's death would put appellant in the position of having to defend against a case in which he was never charged. The prosecutor responded that the jury could decide whether Muhammad's death constituted violent conduct by appellant.

In the end, the court ruled that the evidence surrounding Muhammad's death could come in pursuant to Evidence Code section 1103, subdivision (b), if the defense presented evidence of Reina's prior acts of violence pursuant to Evidence Code section 1103, subdivision (a). Based on the court's ruling, defense counsel indicated that she would not be offering any "1103 evidence at this time."

Appellant contends that the court's ruling constituted a "prejudicial abuse of discretion." Appellant argues that the court's ruling prevented him from presenting an "Intimate Partner Battering defense."

At the outset, we note that Evidence Code section 1103, subdivision (a), provides in pertinent part: "In a criminal action, evidence of the character or trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if such evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." Evidence that Reina had violently attacked both appellant and the children would have been admissible under this section to prove that she did have a character trait for violence. " 'It has long been recognized that where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible.' [Citations.] Under Evidence Code section 1103, such character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence. [Citation.]" (*People v. Wright* (1985) 39 Cal.3d 576, 587.) However, in self-defense cases, when a defendant presents evidence of the victim's character for violence, the prosecution may produce rebuttal evidence of the defendant's own character for violence, which may be used to draw propensity inferences. (Evid. Code, § 1103, subd. (b); *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173-1175; *People v. Myers* (2007) 148 Cal.App.4th 546, 552-553.)

We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code section 1103. (See *People v. Davis* (2009) 46 Cal.4th 539, 602.) Certainly, the trial court did not abuse its discretion in ruling that the evidence surrounding Muhammad's death was admissible. Although the trial court originally excluded the evidence, it did so in part because she had died in 1993. Acts occurring more than 10 years prior to the charged offense are presumptively

inadmissible pursuant to Evidence Code section 1109, subdivision (e). Evidence Code section 1103, subdivision (b), which authorizes rebuttal evidence of a defendant's character for violence, contains no comparable restriction.

Appellant argues that the trial court's reasons for excluding the evidence concerning Muhammad's death pursuant to Evidence Code "section 352 were no less valid on account of the evidence being offered in response to evidence of Reina's character for violence."

Appellant had "a choice as to presenting evidence of the victim's character, which is similar to many tactical choices at trial—such as deciding whether to testify, or whether to present direct evidence of his own good character. The defense choice of strategy often makes admissible in rebuttal certain evidence which would not be admissible in the prosecution's case-in-chief." (*People v. Blanco, supra*, 10 Cal.App.4th at p. 1176.)

Appellant argues that the "apparent reason for the court's change of heart is that the defense was seeking to introduce evidence which would have supported a defense theory based on appellant being a victim of Intimate Partner Battering ('IPB'), and the court wanted to prevent the defense from doing so." We find appellate counsel's position concerning the trial court's "apparent reason" for its ruling to be both inappropriate and offensive. We point out that there "is a presumption in the honesty and integrity of our judicial officers." (*People v. Hernandez* (1984) 160 Cal.App.3d. 725, 746.)

Furthermore, as appellant concedes, the prosecutor addressed the trial court's concern that evidence of Muhammad's death would take several days. The prosecutor assured the court that the only additional witness necessary to establish that Muhammad was murdered by appellant was the coroner. The trial court considered the prosecutor's representations and found that the probative value of the disputed evidence outweighed any prejudice and undue consumption of time.

Appellant complains that defense counsel was faced with an unpalatable choice between exposing him to the increased danger posed by the prosecutor's rebuttal evidence and abandoning evidence that would have supported his defense. He asserts that defense counsel should not have been forced to make this choice and thus, the trial court's ruling violated his constitutional right to present a complete defense.

As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's constitutional right to present a defense. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) "Some rights are mutually exclusive. For example a criminal defendant has a right to remain silent and a right to testify on his own behalf. He cannot do both, and hard choices are not unconstitutional." (*People v. Frye* (1998) 18 Cal.4th 894, 940, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Moreover, "[t]he right to present a defense . . . does not include the right to present evidence free from rebuttal" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1062.)

In sum, the trial court did not prevent appellant from presenting a defense; it was appellant's choice not to introduce the evidence of Reina's violence. Appellant's argument ignores the express terms of Evidence Code section 1103, subdivision (b).

III. Admission of Evidence of Uncharged Acts of Domestic Violence

Appellant contends that the court abused its discretion and violated his rights to due process under the federal Constitution by admitting prejudicial and inflammatory evidence, which served no purpose other than to arouse the jury's passions and prejudices.

Specifically, appellant challenges the admission of evidence of his prior acts of domestic violence against Casinillo because they were remote in time and not similar to the charged offense; admission of testimony by three different witnesses mentioning

Muhammad's death;¹² and admission of testimony by Arellano that she suffered "consequences" every time she helped Reina.

Even if the trial court abused its discretion in admitting this evidence, we would find any such assumed error harmless. The application of the ordinary rules of evidence such as Evidence Code section 352 does not implicate the federal Constitution. Thus, we review allegations of error under the reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Marks* (2003) 31 Cal.4th 197, 226-227.) The "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." (*People v. Brown* (2003) 31 Cal.4th 518, 545.) Under the *Watson* standard, the erroneous admission of evidence does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence had been excluded. (*People v. Fuiava* (2012) 53 Cal.4th 622, 671 [applying the *Watson* standard to the erroneous admission of evidence].)

Here, the evidence of appellant's guilt was overwhelming. It is undisputed that appellant killed Reina; he so admitted during his testimony. However, the testimony from Eva that appellant instructed her to buy a shovel and a bag before the killing and even took her to a wooded area where he planned to dump Reina's body was powerful evidence that he planned Reina's murder. He admitted to Eva that he choked Reina to death. This evidence, coupled with evidence that he repeatedly battered and abused Reina and threatened to kill her, convinces this court that there is no reasonable probability that the result of the trial would have been more favorable to appellant without the allegedly erroneously admitted evidence.

¹² Arellano, Molina, and Mattman all testified that Reina feared for her life because appellant had told her that he had killed a former wife.

IV. Ineffective Assistance of Counsel

Appellant claims that his counsel provided ineffective assistance by failing to object to the admission of damaging evidence and to two instances of misconduct by the prosecutor during the prosecutor's summation to the jury.

We set forth the law applicable to appellant's claims.

A criminal defendant has a right to the assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*)). This right "entitles the defendant not to some bare assistance but rather to effective assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*), italics omitted.) "To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, at p. 694.)

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

"In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny . . ." and must "view and assess the reasonableness of counsel's acts or omissions . . . *under the circumstances as they stood at the time that counsel acted or failed to act.*" (*Ledesma, supra*, 43 Cal.3d at p. 216, italics added.) Although deference is not abdication (*id.* at p. 217), courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. (*People v. Kelly* (1992) 1 Cal.4th 495, 522-523.)

We note that counsel has no duty to make frivolous or futile objections. (*People v. Weaver* (2001) 26 Cal.4th 876, 931.)

Background

At trial, Dr. Jorden, an assistant medical examiner and neuropathologist, testified generally about the mechanics of strangulation and its effects on the human body. Dr. Jorden explained that unconsciousness results after 10 to 20 seconds of pressure sufficient to cut off the flow of blood to the carotid artery. Alternatively, if the trachea is compressed the victim is prevented from breathing. Dr. Jorden conceded that she had never examined Reina's body because Reina's body had not been found.

Before trial, defense counsel moved the court to rule that Dr. Jorden could not testify on the ground that Dr. Jorden's testimony was not relevant because there was no cause of death in this case. The court found that the testimony was relevant to "corroborate what Eva's saying" Defense counsel persisted, explaining that the cause of death in this case was disputed and there was no medical evidence of cause of death. Defense counsel protested that she was not certain of the "parameters" of Dr. Jorden's testimony, though the prosecutor had advised her that Dr. Jorden would testify about "[s]trangulation in general." The court told defense counsel that she had her answer; and that Dr. Jorden was going to testify "how people die from strangulation and . . . how . . . their breathing gets shut down and how long it takes and what kind of pressure there has to be and would you do that to someone and not know that they had died. [¶] I mean, I'm sitting here, and I'm telling you what . . . [the prosecutor]'s shaking his head. So that's what I'm assuming we're going to hear. So I don't find that there's anything improper in his explanation to you or that you require any additional information from him."

Defense counsel reiterated that she was objecting to Dr. Jorden testifying because "there's no indication of what exactly she's going to testify to that's relevant in general to this case if there's no cause of death determination. [¶] I guess what I also want to put on

the record is that she cannot, without some kind of evidence, refer to this case as a strangulation case because she hasn't determined the cause of death. And I don't think that—" The court interrupted defense counsel to say that if counsel heard Dr. Jordan do that she should object, but that the court did not feel that the court needed to rule until the witness testified. The court continued, "Once we get the witness on the stand, if you feel that the witness is testifying to things that are inappropriate, please approach, and we'll deal with it. But for right now, I don't believe, based on what I can foresee, that there are going to be any . . . real issues here." Defense counsel asked the court if her objection was noted for the record.

Appellant complains that counsel "never objected to Jordan's testimony on the basis that its limited probative value was outweighed by a very real possibility of confusing or misleading the jury."

The court made it quite apparent that the court found the proposed testimony by Dr. Jordan to be entirely proper because Dr. Jordan's testimony would be restricted to describing the mechanics of strangulation. Defense counsel could reasonably have determined that the court's relevancy determination encompassed an Evidence Code section 352 analysis and any further objection by defense counsel would have been futile. "Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.) Furthermore, counsel could have recognized that Dr. Jordan's testimony would not be *unduly* prejudicial in that it did not tend *uniquely* to evoke an emotional bias against appellant as an individual while having very little effect on the issues because there was no cause of death determination by Dr. Jordan. In addition, counsel could reasonably have believed that her relevancy objection was the strongest ground for exclusion and made a tactical decision to focus on that ground.

More importantly, "competent counsel may often choose to forgo even a valid objection." (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.) It appears that counsel made

a tactical decision to use Dr. Jordan's testimony to appellant's advantage. In this case, defense counsel established on cross-examination that in cases of manual strangulation, generally, the hyoid bone is fractured. This, coupled with Zephro's testimony that Reina's hyoid bone was not fractured, supported the defense theory that appellant did not strangle Reina. "Matters involving trial tactics are matters "as to which we will not ordinarily exercise judicial hindsight" [Citation.] "In the heat of a trial, defendant's counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. Except in rare cases an appellate court should not attempt to second-guess trial counsel" [Citations.] . . . "The choice of when to object or not is inherently a matter of trial tactics not ordinarily reviewable on appeal; failure to object does not necessarily indicate incompetence" [Citations.]" (*People v. Frierson* (1979) 25 Cal.3d 142, 158.)

Appellant complains that defense counsel did not request and the court did not give an admonition to the jury that they were not to consider Dr. Jordan's testimony as evidence that Reina was in fact strangled. He asserts that in the absence of such an admonition "it is impossible to imagine that the jury did not do precisely that." Appellant's theory that in the absence of an admonition the jury would have used Dr. Jordan's testimony as evidence that Reina was in fact strangled depends upon a highly speculative and improbable chain of events. First, the jury would have to have ignored Dr. Jordan's testimony that she never examined Reina's body, that she never determined a cause of death, and that she "didn't write a report regarding Reina Swierski at all." Defense counsel was not required to request an admonition in light of this testimony.

In sum, on the issue of defense counsel's failure to object to the testimony of Dr. Jordan on Evidence Code section 352 grounds, appellant has not overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (*Strickland, supra*, 466 U.S. at p. 689) and shown deficient performance under the first prong of *Strickland* (*id.* at p. 687).

Next appellant contends that trial counsel was ineffective in failing to object to two instances of prosecutorial misconduct. Appellant asserts that at the end of the prosecutor's rebuttal argument, the prosecutor "misstated the law in a manner [that] impermissibly reduced or shifted the burden of proving elements of the charged offenses." Further, he vouched for Eva and argued facts that were not in evidence.

Background

Alleged Misstatement of the Law

In response to defense counsel's argument that if the jury thought that it was possible there was an attack by Reina with the backscratcher knife the jury should vote not guilty, the prosecutor responded, "[T]hat could not be further from the truth. That is 100 percent false. The law is I have to prove to you the truth of the charge beyond a reasonable doubt. And a 'reasonable doubt' is defined as follows: 'It is not a mere possible or imaginary doubt because everything relating to human affairs is open to some possible or imaginary doubt.' That is the legal language." Appellant concedes that this was a correct description of the prosecutor's burden of proof, but asserts that immediately thereafter the prosecutor contradicted that point by stating the following: "What that means is, if you're back in the jury room and someone says 'Well, it is possible, you know, that . . . maybe he caught her on the phone that day, and they had an argument, and then this happened. Maybe that's possible,' other jurors should, please, say, 'Time out,' right there. [¶] *First of all, there's no evidence of that. The defendant—even the defendant's story wasn't that. He didn't say that 'We had'—that 'I caught her on the phone' and that 'We argued over it.' His . . . story was 'I—beeping phone. I picked it up. And before I could even see anything, she came in the room and did this.'* [¶] *So the other jurors should say, 'Wait. There's no evidence. There's no testimony to point [to] that. We're going off the reservation when we talk about that testimony.'*" (Italics added.)

Appellant contends that the italicized language was a misstatement of the law because "it conveyed to the jury that [he] had the burden of producing evidence to prove

his contention that he acted in self-defense." We are not convinced; however, even if the prosecutor committed misconduct and even if trial counsel should have objected, appellant has not demonstrated prejudice. He has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, 466 U.S. at p. 694.) "Prosecutorial misconduct is cause for reversal only when it is 'reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant.'" (See *People v. Milner* (1988) 45 Cal.3d 227, 245.)

Here, it is not reasonably probable that the result of the proceeding would have been different had defense counsel objected to the prosecutor's statement. First, as we have explained more fully *ante*, there was strong evidence of appellant's guilt of first degree murder. Second, it is not reasonably likely that the jury applied any of the prosecutor's statements in an objectionable manner. The jury was instructed that the attorneys' statements were not evidence and that it should decide the case based only on the evidence presented at trial. At the beginning of trial, the court instructed the jury pursuant to CALCRIM No. 200, "You must decide . . . as jurors what the facts are. You must use only the evidence that is presented in the courtroom. Evidence is the sworn testimony of witnesses, exhibits admitted into evidence, and anything else I tell you to consider as evidence. [¶] Nothing that the attorneys say is evidence." Later, the court reaffirmed this by telling the jury that they "must decide what the facts are. It is up to all of you and you alone to decide what happened, based only on the evidence that has been presented to you in this trial." Further, the trial court instructed the jury with CALCRIM No. 200, that if anything counsel said conflicted with the court's instruction, the jury must follow the court's instructions. In addition, the court told the jury that appellant was "presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt." The court properly advised the jury of the reasonable doubt standard. Finally, the court instructed the jury that the "People have

the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter."

Taken together, these instructions properly informed the jury of the prosecution's burden of proof, and any assumed error in the prosecutor's rebuttal argument was not prejudicial. (*People v. Carey* (2007) 41 Cal.4th 109, 130 [we presume jurors intelligent and capable of following trial court's instructions].) "In the absence of evidence to the contrary, we presume the jury understood and followed the court's instructions" and did not base its verdicts on any misstatement by the prosecutor. (*People v. Williams* (2009) 170 Cal.App.4th 587, 635.)

In sum, appellant has not satisfied the second prong of the *Strickland* test in that appellant cannot show a reasonable probability that, absent the alleged deficient representation, the result of the proceeding would have been different.

Alleged Vouching for Eva

During closing argument, defense counsel asserted that the prosecutor had actively prevented Eva from communicating with a defense investigator. Defense counsel asked, "Why? Why? Are they worried that I'm going to trick her, or are they worried that I'll actually get the real story of what happened? Not the story that they put together with her after speaking to her over and over again."

In his rebuttal, the prosecutor disputed defense counsel's allegations that he prevented the defense from communicating with Eva and that he coached her testimony. Specifically, the prosecutor told the jury "And, by the way, they . . . complained . . . 'Well, we didn't get a chance to talk to her before. And we tried to subpoena her, and she wouldn't talk to us.' Remember all that stuff? Again, not true. Not true. [¶] She came to the preliminary hearing, folks. January, 2011, she walked into court, Eva did. In front of a judge, got up on the witness stand, just like she did here, swore to tell the truth, and answered every question the defense threw at her. And was there a single question, then

or here, about this story he told? They didn't ask her one question about it. Don't you find that interesting? [¶] They didn't ask her, 'Well, didn't he say to you that . . . this was an accident and that there was a fight?' They didn't even ask her. [¶] 'Didn't you, when you were in the bathroom, see . . . blood on the ground?' No questions. [¶] 'Didn't you see . . . this serrated back-scratcher knife?' Didn't even bother to ask her a question about it. Nothing."

Appellant contends that since the transcript of the preliminary examination was not before the jury, "this was a statement of facts not in evidence. . . . Since the purpose of the prosecutor's statement was to assure the jury that he had personal knowledge of how [Eva] testified at the preliminary examination, which was not available to them and which supported Eva's veracity, it was also vouching."

Certainly, it is well-settled that "[i]t is misconduct for prosecutors to bolster their case 'by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it.' [Citation.] Similarly, it is misconduct 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.' [Citation.] The vice of such remarks is that they 'may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence.' [Citation.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 336 (*Bonilla*).

However, a prosecutor's comments cannot be characterized as improper vouching if the prosecutor's assurances regarding the honesty or reliability of a prosecution witness, or the strength of the case, are based on the facts of the record and inferences reasonably drawn therefrom, rather than from any purported personal knowledge or belief. (*Bonilla, supra*, 41 Cal.4th at pp. 336-337.)

Our review of the record discloses no such improper comment by the prosecutor. The first part of the statement with which appellant finds fault ("She came to the preliminary hearing, folks. January, 2011, she walked into court, Eva did. In front of a

judge, got up on the witness stand, just like she did here, swore to tell the truth, and answered every question the defense threw at her") was followed by a discussion of Eva's testimony in the trial, with the prosecutor pointing out that Eva was never asked by defense counsel about seeing blood in the bathroom or whether she saw the backscratcher knife. In the context of the prosecutor's rebuttal argument, there was no inference that he was vouching for evidence that had not been introduced at the trial. Appellant's claim fails on the merits because the prosecutor's statements were fair comment regarding appellant's failure to present logical evidence that would have supported appellant's defense. (*People v. Valdez* (2004) 32 Cal.4th 73, 134 [prosecutor's comments did not mischaracterize evidence or assume facts not in evidence, but merely commented on the evidence and drew permissible inferences therefrom].)

Furthermore, Eva testified that she had appeared at the preliminary hearing and had given the same account of appellant's actions on the night of Reina's death. She said that defense counsel was at the preliminary hearing and asked her "[a] lot of questions." Eva said that she answered all the questions.

The prosecutor did not attempt to bolster Eva's credibility by reference to facts outside the record. Rather, as can be seen, the prosecutor utilized facts established at the trial to establish how Eva testified at the preliminary examination. In light of Eva's trial testimony, the prosecutor's comments here were based on Eva's testimony. In essence, he urged the jury to credit Eva's description of the events because that description had remained consistent from the time of the preliminary hearing. The prosecutor made a fair comment on the witness's credibility and did not refer to facts outside the record. As a consequence, his argument did not constitute vouching and was not misconduct.

Trial counsel cannot be deemed to have provided ineffective assistance for failing to object to proper argument. In any event, the failure to object to evidence or argument "rarely constitutes constitutionally ineffective legal representation . . ." [Citation.] (*People v. Huggins* (2006) 38 Cal.4th 175, 252; accord, *People v. Ghent* (1987) 43 Cal.3d

739, 772-773 [rejecting contention that counsel's failure to object during prosecutor's closing argument amounted to ineffective assistance because counsel might well have tactically assumed that an objection or request for admonition would simply draw closer attention to the prosecutor's isolated comments]; *People v. Harris* (2008) 43 Cal.4th 1269, 1290 [same].) Here, counsel could have decided that objecting would focus the jury's attention on the fact that she had not asked Eva any questions about the backscratcher knife or whether she had seen blood in the bathroom in ways that would not be helpful to the defense.

Appellant has not established any basis for finding ineffective assistance of his trial counsel.

V. Admission of Letters Written by Appellant

Appellant contends that his rights to due process and a fair trial and/or his Sixth Amendment right to effective assistance of counsel were violated by the erroneous admission of a variety of prejudicial and inflammatory letters.

Background

As noted, *ante*, on June 9, 2005, police officers executed a search warrant on appellant's residence in Sunnyvale. Officers seized a large quantity of documents.

Several of these documents were introduced into evidence. Specifically, exhibit No. 6 was a letter addressed to the Mayor of Sunnyvale, in which appellant accused Sandra Vargas of driving "while intoxicated" and/or "under the influence of illegal drugs." In the letter, appellant accused Vargas of driving with small children who were not restrained in car seats.

Exhibit No. 34 was a series of letters regarding the deportation of Armijo and her son. In one letter, appellant asked the Internal Revenue Service to prosecute Armijo for tax evasion and fraud because she worked as an illegal alien. In another letter, appellant asked the Immigration and Naturalization Service to prohibit Armijo from working

pending her deportation. Appellant suggested that "sale of her vehicle to raise funds is more appropriate at this time."

Exhibit No. 35 was a handwritten note to an unknown recipient in which, according to the prosecutor, appellant wrote, "What you are now is what you will always be: dumb blond, bimbo, white trash, nig, 'n-i-g,' lover, black cock sucker, bleach blond, zebra baby maker, Oreo cookie, Oreo cookie maker, half breeds, mutts."

Exhibit No. 43 was a 2002 letter addressed to Secretary of Defense Donald Rumsfeld and copied to United States Homeland Security Advisor Tom Ridge and Senate Majority Leader Tom Daschle. Appellant wrote, "With our national security at risk from the ever increasing threat of domestic terrorism from al-Qaeda and/or others, I feel that I should do my civic duty and inform you of my un-American wife and her feelings towards the USA and her feelings about helping a potential terrorist obtain a real license by fraud." Appellant wrote, "If something catastrophic were to happen and it could be connected to Reina it would be a real tragedy to think that no action was taken. I would then say, I told you so."¹³

In limine, defense counsel requested exclusion of all the evidence seized in the search of appellant's residence pursuant to Evidence Code section 352, including all books, magazines, notes, newspaper, clippings, and DVDs. During the hearing on defense counsel's in limine motions, the prosecutor asked if the court could come back to defense counsel's request to exclude this evidence because he "ha[d] a list" that he did not have with him. The court agreed to revisit the issue later. Later in the afternoon session, the prosecutor told the court in relation to defense counsel's request to exclude the evidence seized from appellant's residence, "[Defense counsel] wants to know what evidence of all the evidence that's been collected that I intend to introduce. And I want to

¹³ Appellant complains about a letter to a homeowner's association in which he complained about Arellano. However, this letter was not admitted into evidence.

be complete in my response. So I'd like to hold off on that as well." After Vargas testified, defense counsel objected to exhibit No. 6 (the letter to the Mayor of Sunnyvale) on the ground that there was no foundation laid that appellant actually sent the letter. The court agreed with defense counsel and told the prosecutor that the letter was not going to come into evidence. However, at the end of the testimonial portion of the trial, the prosecutor moved to have the letter admitted into evidence; the court admitted exhibit No. 6 without any contemporaneous objection from defense counsel. Similarly, exhibit No. 43 and exhibit Nos. 34 and 35 were admitted into evidence by the court without any contemporaneous objection by defense counsel. We can find nothing in the record to support the conclusion that the court ruled on the admissibility of exhibit Nos. 43, 34 and 35.

Appellant argues that "[i]n light of the unclarity [*sic*] as to whether defense counsel objected to the admission of the letters, and if so how the court ruled on the objection, [he] submits in the alternative that either the court erred by admitting them over appellant's objection, or defense counsel's failure to object 'fell below an objective standard of reasonableness' and thus constituted ineffective assistance."

Respondent argues that all the letters were admissible under Evidence Code section 1101, subdivisions (a) and (b) on the issue of appellant's intent and motive to inflict emotional distress on appellant's romantic partners as well as anyone who helped his romantic partners get away from him. We are not persuaded. The problem with the respondent's argument is that the jury was never instructed pursuant to CALCRIM No. 375 on using exhibit Nos. 6, 34, 35, and 43 for a limited purpose of proving appellant's intent and motive. Absent such an instruction the only purpose for admitting the letters was to show that appellant had a character trait for vindictiveness. The prosecutor made this point when cross examining appellant. Immediately before cross examining appellant about the Vargas, Arellano, and Rumsfeld letters, he asked appellant "When you don't like someone or they're against you, you go all out to destroy them,

don't you?" After questioning appellant about the letter he wrote to the homeowner's association about Arellano, the prosecutor made the point again, "Like I say . . . when . . . someone's against you, you'll go to any means to destroy them."¹⁴

That being said, whether we analyze this issue as the trial court abusing its discretion in admitting this evidence, or defense counsel's failure to contemporaneously object to the admission of exhibit Nos. 6, 34, 35, or 43 into evidence, we find the error harmless.

If we address the issue as one of ineffective assistance of counsel, appellant has the burden of showing "there is a reasonable probability that [he] would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland, supra*, 466 U.S. at pp. 687-694.) If we address the issue as one of evidentiary error, reversal is required "only if a reasonable probability exists that the jury would have reached a different result had [the] evidence been excluded. [Citations.]" (*People v. Whitson* (1998) 17 Cal.4th 229, 251; *Watson, supra*, 46 Cal.2d at p. 836; see *People v. Samuels* (2005) 36 Cal.4th 96, 113 [applying *Watson* standard to erroneous admission of character evidence].)

As we have explained *ante*, the evidence of appellant's guilt was overwhelming. Appellant fails to show a reasonable probability of a more favorable outcome but for the alleged evidentiary error and/or failure of defense counsel to object to the admission of the evidence.

¹⁴ Evidence Code section 1101, subdivision (c), does not prohibit admission of evidence of uncharged prior conduct to attack a defendant's credibility. It expressly provides: "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." Since the prosecutor did not suggest at any point that the content of the letters was false, they could not have been introduced for the purpose of attacking appellant's credibility.

Appellant argues for application of the more stringent test of *Chapman v. California* (1967) 386 U.S. 18, 24, claiming the error violated his rights to due process and a fair trial. Generally, however, " 'violations of state evidentiary rules do not rise to the level of federal constitutional error.' [Citation.]" (*People v. Samuels, supra*, 36 Cal.4th at p. 114.) We see no reason to depart from this principle here.

VI. *Failure to Instruct on Imperfect Self-defense Voluntary Manslaughter*

Appellant was charged with murder. In addition to the instructions on murder, the court instructed the jury on voluntary manslaughter—heat of passion. However, the court did not instruct on imperfect self-defense voluntary manslaughter.¹⁵

Appellant contends that his Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial were violated by failing to instruct on imperfect self-defense voluntary manslaughter.

Assuming for the sake of argument that the trial court was required to give an instruction on imperfect self-defense voluntary manslaughter, an error in failing to instruct on a lesser included offense does not warrant reversal unless an examination of the entire cause, including the evidence, discloses that "it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred. [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 149; see *Watson, supra*, 46 Cal.2d at p. 836.)

"Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085-1086.) Thus, the failure to give a lesser included offense

¹⁵ In addition, the court instructed the jury on justifiable homicide—a killing in self-defense; excusable homicide—accident; and excusable homicide—accident in the heat of passion.

instruction is often harmless where the jury is given other reasonable lesser offense options but rejects those options in favor of the charged offense. In such cases, the jury is not "forced [into] 'an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other.' " (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 262 (*Lacefield*), disapproved on other grounds in *People v. Smith* (2013) 57 Cal.4th 232, 242; see *People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1353 [defendant charged with robbery; failure to instruct on lesser included offense of grand theft was harmless because jury was instructed on lesser included offense of petty theft and was thus not put to an unwarranted all-or-nothing choice]; cf. *People v. Lipscomb* (1993) 17 Cal.App.4th 564, 571 [defendant charged with assault with a firearm and failure to instruct on lesser related offense of brandishing was harmless where the jury was not faced with an all-or-nothing choice because it was instructed on other lesser related offenses].)

In the context of a murder case, as our Supreme Court explained in *People v. Rogers* (2006) 39 Cal.4th 826, any error in failing to give an instruction on a lesser included offense was harmless because, as here, the jury had rejected the lesser options of second degree murder and heat of passion voluntary manslaughter. (*Id.* at p. 884; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1156 [failure to give involuntary manslaughter instruction harmless where jury found defendant guilty of first degree murder in the face of exhaustive instructions pertaining to the lesser included offenses of second degree murder and voluntary manslaughter; the jury reached the factual conclusion that defendant acted with malice aforethought, deliberation, and premeditation].)

VII. Cumulative Error

Appellant contends that the cumulative prejudice flowing from all the aforementioned errors deprived him of a fair trial.

However, reversal based on cumulative error is required only if a high number of instances of error occurring at trial creating a strong possibility that "the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*People v. Hill* (1998) 17 Cal.4th 800, 845.) For instance, in *Hill* at pages 844 through 847, the court concluded that the cumulative impact of constant and outrageous misconduct by the prosecutor and several legal errors occurring at trial, "created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors." (*Id.* at p. 847.)

Certainly, " '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009.) The combined effects of multiple errors may indeed render a trial fundamentally unfair. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) However, as discussed *ante*, since we have found none of appellant's claims of error meritorious and/or prejudicial, a cumulative error argument cannot be sustained. No serious errors occurred, which, whether viewed individually or in combination, could possibly have affected the jury's verdict. (*People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Valdez, supra*, 32 Cal.4th at p. 128.) Simply put, since we have found no substantial error in any respect, appellant's claim of cumulative prejudicial error must be rejected. (*People v. Butler* (2009) 46 Cal.4th 847, 885.) Appellant was entitled to a fair trial, not a perfect one. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

PREMO, Acting P. J.

MIHARA, J.