In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

KIM RAYMOND KOPATZ,

Defendant and Appellant.

CAPITAL CASE

Case No. S097414

Riverside County Superior Court Case No. IF086350
The Honorable W. Charles Morgan, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
ANDREW MESTMAN
Deputy Attorney General
State Bar No. 203009
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2458
Fax: (619) 645-2271
Email: Andrew.Mestman@doj.ca.gov
Attorneys for Plaintiff and Respondent

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STATEMENT OF THE CASE

On September 30, 1999, the Riverside County District Attorney filed an information, charging appellant Kim Raymond Kopatz (hereinafter "Kopatz"), in count 1, with the murder of Mary Kopatz in violation of Penal Code section 187, subdivision (a).[1] In count 2, Kopatz was charged with the murder of Carley Kopatz. (§ 187, subd. (a).) (1 CT 98-99.) It was further alleged that Kopatz committed the murders of Mary and Carly Kopatz for financial gain within the meaning of section 190.2, subd.(a)(1). (1 CT 98-99.) Additionally, the special circumstance of multiple murders was alleged. (§ 190.2, subd. (a)(3).) (1 CT 98-99.)

On January 3, 2001, jury selection began. (3 CT 449.) The jury was sworn on January 16, 2001. (13 CT 3459.) On February 8, 2001, the jury found Kopatz guilty on counts 1 and 2 as charged. (14 CT 3800, 3802, 3810.) All special circumstances were found true. (14 CT 3801, 3803-3804, 3810.)

On February 14, 2001, the penalty phase began. (14 CT 3817.) The jury began their penalty phase deliberations on February 15, 2001. (14 CT 3866.) On February 15, 2001, the jury found death to be the appropriate punishment for the murders of Mary and Carley Kopatz. (14 CT 3859-3861, 3866.)

On March 21, 2001, the trial court denied Kopatz's motion for modification of the verdict. (14 CT 3903.) Kopatz was then sentenced to death as to counts 1 and 2. (14 CT 3903-3905.)

This appeal is automatic. (§ 1239, subd. (b).)

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[1] Unless otherwise noted, further statutory references are to the Penal Code.

STATEMENT OF FACTS

A. Introduction

Faced with over $100,000 in credit card debt and monthly expenses that well-exceed the family's monthly income, Kopatz, a stay-at-home father and fledgling day-trader, strangled to death his wife, Mary, and their three-year-old daughter, Carley. Kopatz then staged their bodies in the family minivan, abandoned about a mile from the Kopatz home, in an effort to make it appear that the two were victims of a carjacking or robbery committed by a third party. Kopatz stood to gain over $800,000 in life insurance proceeds from the deaths of his wife and child.

However, Kopatz's plan was not without err. His statements and behavior following the crimes, and physical evidence left in the van, on his person, and at his house, as well as a variety of other circumstantial evidence, all demonstrated Kopatz murdered his wife and daughter.

B. Prosecution's Case

In April 1999, Kopatz and Mary Kopatz had been married for 10 years. (5 RT 681-682.) They lived in a house on 9188 Garfield Street in the City of Riverside with their eight-year-old and three-year-old daughters, Ashley and Carley. (4 RT 504; 5 RT 698; 7 RT 998; 8 RT 1013-1014 9 RT1277.)

As of April 1999, Kopatz had 13 credit card accounts with a total debt of $117,883. (11 RT 1519-1525.) Several of the credit card accounts were over limit or overdue. (11 RT 1519-1525.) The family's monthly income as of April 1999 was $4,259.47. (11 RT 1515.) Their monthly expenses, which included mortgages, car payments, and a $5,580 minimum monthly payment on the credit cards, were $8,620. (11 RT 1515-1518.) Additionally, tax records detailed a loss of $71,955 during 1998. (11 RT 1508.) A Charles Schwab stock trading account Kopatz used for day-

trading contained a balance of $335. (11 RT 1512-1513.) During 1998, the account contained over $20,000. (11 RT 1513.) A second commodities account had a balance of $125 in April 1999. During 1998, over $46,000 had been deposited into the account.[2] (11 RT 1514.)

The Kopatz family had nine insurance policies covering various family members. Total benefits payable to Kopatz in the event of Mary and Carley's accidental death were more than $800,000. (11 RT 1479-1482, 1502-1507, 1526-1528, 1533-1534, 1551, 1567, 1603; 12 RT 1669, 1671.) In April 1999, Kopatz had an insurance policy with State Farm that provided $13,628 in coverage for Mary's wedding rings. (11 RT 1573-1574.)

Ashley was in the third grade at Riverside Christian School. (4 RT 501.) School began at 8:00 a.m. (4 RT 508.) Every morning from December 1998 to April 1999, Kopatz and his younger daughter, Carley, took Ashley to school, with one exception. (4 RT 503-505, 511.) On the morning of April 22, 1999, when Kopatz arrived at school, Carly did not accompany Kopatz and Ashley that day. (4 RT 506.)

In April 1999, David Laird frequently drove past Kopatz's house and often saw Kopatz working in his yard. (9 RT 1177-1180, 1184.) On April 22, 1999, Laird drove by Kopatz's house at 8:55 a.m. on his way to work. (9 RT 1182-1183, 1186.) At that time, Laird observed that the Kopatz's van was gone but their blue Chrysler was parked on the home's circular driveway. (9 RT 1186-1188.) He did not see Kopatz. (9 RT 1188.)

John and Connie Lopez lived at 9387 Duncan Street, approximately one mile from Kopatz's house. (6 RT 767-768, 779; 7 RT 947; 13 RT

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[2] The Kopatz family's monthly income and expenses (exhibit 83) and credit card debts are depicted in charts prepared by the investigator who analyzed the Kopatz family finances (exhibit 84).

1771.) On the morning of April 22, 1999, John noticed Kopatz's van parked two houses west of his house between 8:30 and 9:00 a.m. when he was taking his granddaughter to school. (6 RT 770.) John further testified that the van was still there when he took his wife to a doctor's appointment at 10:30.[3] (6 RT 770-771.)

Connie Lopez testified she did not notice the van when she and her husband left for her doctor's appointment at 9:00 a.m. (6 RT 780-781.) She saw the van there, however, at around 11:30 when they returned home. (6 RT 781.)

Alvaro Henriquez, who lived on Nellie Street, right next to Duncan Street, testified that on April 22, 1999, he saw Kopatz's van pull into his driveway sometime between 10:00 and 10:45 a.m.[4] (6 RT 790-793.) Thinking it was his neighbor, Alvaro waived to the driver, who waived back. (6 RT 797.) The van backed out of the driveway and drove off. (6 RT 797-798.) About five minutes later, as he was leaving his house, Alvaro saw the van had parked. (6 RT 798-799.)

Grace Henriquez testified she observed the van pass by her house on Nellie Street at approximately 10:15 a.m.[5] (6 RT 811-812.) A male was

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[3] On April 22, 1999, John Lopez told Officer Rick Cobb he saw the van between 10:00 and 11:00 a.m. (6 RT 774-775; 7 RT 947-948.) On April 23, 1999, he told Detective Shumway he first saw the van at around 8:40 a.m.. (6 RT 775; 7 RT 969-970.) A few days later, John Lopez said he was not sure if he had seen the van there that early but he was positive the van was there at 11:00 a.m. (7 RT 970-971.)

[4] He told Detective Cobb he first saw the van between 11:00 and noon. (7 RT 949.) A few days later, he told Detective Shumway be thought he saw the van driving between 10:30 and 10:45 a.m. (7 RT 972.)

[5] She told Detective Cobb she never noticed the van. (7 RT 950.) A few days later she told Detective Shumway she saw the van around 10:30 a.m. (7 RT 975.)

driving. (6 RT 814.) The van drove by two to three times.[6] (6 RT 818-820.)

Edward "Les" Ballou lived at 4466 Nellie, around the corner from Duncan Street. (6 RT 850-851, 857.) Ballou testified[7] that between 10:00 and 10:30 a.m. on April 22, 1999, he was in his front yard and he observed Kopatz walk by. (6 RT 858, 862.) Ballou said "hi" to Kopatz. (6 RT 858.) Kopatz was "dour," looked angry, and was not very nice, "[k]ind of like he was mad at something." (6 RT 858-859.) According to Ballou, the way Kopatz said "hello" back to him "wasn't really very nice." (6 RT 860.) Kopatz was alone and walking at a normal pace. (6 RT 859.) He wore a dark colored "sports shirt." (6 RT 859.)[8]

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[6] Both Alvaro and Grace Henriquez testified they saw a woman in a white Mercedes Benz diesel briefly pull up alongside the driver's side of the parked van. (6 RT 799-801, 825.) According to Grace, the woman in the Mercedes leaned towards the passenger side of her car. (6 RT 825.) Colleen Morgan, who lived about four blocks from where the van was found, testified on April 22, 1999, she drove her white Mercedes Benz diesel down Duncan Street sometime between 9:30 and 11:00 a.m. (10 RT 1414-1416.) She did not recall passing the van. (10 RT 1417.) Neither Alvaro nor Grace Henriquez mentioned the Mercedes to police. (7 RT 951.)

[7] Ballou died prior to trial. (6 RT 854.) His preliminary hearing testimony was read into the record pursuant to Evidence Code section 1291.

[8] Kopatz was arrested on May 28, 1999. (6 RT 849.) On June 3, 1999, after his first court appearance, Kopatz's photograph was published in the Riverside Press-Enterprise newspaper. (6 RT 850.) When Ballou saw the photograph, he told his wife, "That's the man I saw walking down the street." (6 RT 860.) Shortly thereafter, Ballou spoke to Detective Steven Shumway and stated he was 99.9 percent sure that the person in the photograph was the same person he saw walking on the day the bodies were found. (6 RT 850, 861.) He provided Detective Shumway with the photograph of Kopatz from the Press-Enterprise, which was sitting on a table when Detective Shumway arrived. (6 RT 853.) Ballou had no

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Kopatz's wife, Mary Kopatz, was the manager at Jenny Craig Weight Loss in Riverside. (5 RT 584-585, 608, 668.) Mary was always punctual. (5 RT 672.) On April 22, 1999, Mary was scheduled to work at 11:00 a.m. (5 RT 586, 670, 672.) When Mary did not arrive at work at 11:00 a.m., Mary's co-worker, Mary Burdick attempted to call the Kopatz residence. (5 RT 588-589, 670.) There was no answer. (5 RT 590.) Burdick and another co-worker, Jean Black, called the Kopatz house, when they had a free moment, approximately every 15 minutes, between 11:00 a.m. and 12:15 p.m. (5 RT 590, 592, 670-671.)

At approximately 11:00 to 11:30 a.m. on April 22, 1999, Ashley began experiencing high blood sugar levels while at school. (4 RT 507.) Ashley was a diabetic and she checked her blood sugar levels while in class. (4 RT 502, 507.) Approximately twice a week her levels would be high, and Ashley would go to the office of her principal, Patricia VanDyke. VanDyke, herself a diabetic, would then call Kopatz or Mary Kopatz to obtain permission to give Ashley an insulin injection. (4 RT 507-508, 529-530.)

At 11:30 a.m., Ashley went to VanDyke's office, but VanDyke was out of her office at lunch. (4 RT 507, 533, 569.) VanDyke's secretary, Linda Lee, attempted to contact Kopatz by telephone. (4 RT 570.) The phone rang six or seven times but there was no answer. (4 RT 570.) Lee waited a few more minutes, then tried to call Kopatz again, but once more, Kopatz did not answer the phone. Five minutes later, Lee called and, again, there was no answer. (4 RT 571.)

(...continued)
advanced notice that Detective Shumway was coming to his house. (6 RT 854.)

Sometime before noon, after Lee's first three attempts to reach Kopatz were unsuccessful, she called Mary Kopatz at work.[9] (4 RT 571-572; 587-588.) After learning that Mary was not at work, Lee called Kopatz again and received no answer. (4 RT 573.) Lee then decided it would be best for Ashley to run off some "excess energy" then check her sugar levels in 30 minutes. (4 RT 573.) At around 11:50-11:55 a.m., Lee went to lunch, returning around 12:35 p.m. (4 RT 573-574.)

When Principal VanDyke returned to the school around noon, she was told that Ashley had been in the office with a blood sugar of 424, which was "extremely high." (4 RT 532-533.) At about 12:05 p.m., VanDyke attempted to call Kopatz on his home phone. (4 RT 533.) The phone rang seven or eight times without an answer. (4 RT 534.) At that point, VanDyke attempted to call Mary at work, but was told that Mary had not arrived at work and her coworkers were concerned. (4 RT 534.) VanDyke then called Kopatz's cell phone for the first time. (4 RT 535.) There was no answer. (4 RT 535.) At 12:30 p.m., Van Dyke gave Ashley an insulin shot, then called Mary's work and was told they still had not heard from Mary and they were going to send someone to her house. (4 RT 536.) VanDyke then again tried to call Kopatz on both his home and cell phone. (4 RT 536.) She also called Kopatz's pager, leaving the school's telephone number as the call-back number. (4 RT 536-537.)

Sometime before noon on the day of the murders, Kopatz dropped off four "Member's Only" brand sports-type jackets and two ladies suits at the dry cleaners. (6 RT 883, 885-888.) According to the employee who helped Kopatz, Brenda Godoy, it was rare for Kopatz to bring men's clothing into

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[9] Mary's coworker, Mary Burdick, recalled that Ashley's school called regarding Ashley's diabetes sometime between 10:00 a.m. and 11:00 a.m. (5 RT 587-588.)

the store. (6 RT 884.) Kopatz was given receipt number 2067. (6 RT 885.) Subsequently, Godoy provided police with the five receipts that preceded Kopatz's receipt and the five receipts that followed Kopatz's receipt. (6 RT 889-890, 892.) Clyde Shupe, who was given receipt number 2064, testified he went to the dry cleaners on April 22, 1999 between 10:30 and noon. (7 RT 917.) The person with receipt number 2065, Mrs. Dabney, told Godoy she came in to the dry cleaners before lunch, around 11:30 a.m. (6 RT 892-893.) Each customer she contacted with the receipts before and after Kopatz's told Godoy they came into the dry cleaners before noon. (6 RT 893-895.)

Maria Montoya lived next door to Kopatz. (7 RT 920-922.) On April 22, 1999, as she was walking to school, Montoya observed Kopatz working on his yard, pulling weeds, between 12:00 and 1:00 p.m. (7 RT 925, 930, 933.) She did not see Kopatz's van. (7 RT 932.)

Mary's co-worker, Mary Burdick left Jenny Craig around 12:15 or 12:20 p.m. to "find Mary." (5 RT 593, 672.) At approximately 12:30 p.m., Burdick drove by the Kopatz house. (5 RT 595.) The car Mary Kopatz drove, a gray Chrysler, was parked in the driveway in front of the house, but the family's van was gone. (5 RT 594-596.) Mary Burdick did not see Kopatz as she drove past the Kopatz home. (5 RT 600.) After VanDyke had paged Kopatz, Mary's office called and informed her that someone had driven by Kopatz's house and observed Kopatz's car, but not the Kopatz's van. (3 RT 537.)

After driving past the Kopatz home, Mary Burdick then drove to her home and attempted to call the Kopatz home several times, letting the phone ring four to five times each call. (5 RT 597-598.) She continued to receive no answer. (5 RT 598.) At 1:15 p.m., Burdick called the police in effort to report Mary missing, however, the police would not take a missing

person report from her. (5 RT 597.) She continued to call the Kopatz house. (5 RT 598.)

At approximately 1:00 p.m., David Laird, drove by Kopatz's house and observed Kopatz working on a sprinkler in the front area of his circular driveway, towards the street.[10] (9 RT 1190-1191.)

At about 1:15 p.m., Kopatz called Jenny Craig and spoke to Jean Black. (5 RT 673-674.) Kopatz calmly asked if his wife had brought Carley into work with her. (5 RT 673.) Jean told Kopatz, "No. Mary hasn't made it to work yet." (5 RT 673.) Kopatz told Jean that Mary's cell phone and pager were on the counter.[11] (5 RT 673.) He explained that Mary had gone to run errands and pick up prescriptions at Sav-On and Walmart. (5 RT 673.) Kopatz said that he been "out back digging all day," he had lost track of time, and he had come inside to get a drink of water. (5 RT 673-674.) During the conversation, Kopatz knocked over a glass of water, stated, "Oh shit" and started acting "rattled" and "panicked." (5 RT 673-674.)

At approximately 1:30 or 1:40 p.m., Kopatz finally answered Mary Burdick's phone call. (5 RT 598.) Burdick explained to Kopatz that she was nervous and worried because Mary had not come to work and Ashley's school had called because Ashley was having a problem with her diabetes. (5 RT 598.) Kopatz, who sounded upset, explained that he had spoken Burdick's co-worker, Jean, and he was aware of the situation. (5 RT 598-599.) When asked where he had been all day, Kopatz stated he had been in

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[10] Laird became aware of the murders the next day, after reading about them in the newspaper. (9 RT 1182.) On May 5, 1999, Laird observed several police officers in Kopatz's yard. (9 RT 1181.) He stopped and spoke with them. (9 RT 1181.)

[11] Mary Kopatz routinely carried a cell phone in the event Ashley needed insulin. Jean had never seen Mary away from Ashley without the cell phone, noting that she "took it everywhere she went." (5 RT 674, 677.)

the backyard working. (5 RT 599-600.) Kopatz further stated that Mary and Carley had left the house between 8:30 and 9:00 a.m. to run errands. (5 RT 601.) He also thought that his wife had taken Carley to work because it was "take-your-daughter-to-work day." (5 RT 601.) However, Mary's place of work did not have a take-your-daughter-to-work day, and recently, Mary had told everyone at the office which she managed not to bring their children to work because of liability issues. (5 RT 584-585, 601-602.) Mary had also mentioned that Carley was too young for her to bring to work. (5 RT 602.)

At 2:00 p.m., VanDyke received a "frantic" call from Kopatz. (4 RT 538, 540.) Kopatz, who sounded "highly upset," told VanDyke, "I can't find Mary. I don't know where Mary is. I can't find Mary. She's missing. I can't find Mary." (4 RT 538.) VanDyke told Kopatz the school had been trying to contact him. (4 RT 538-539.) She asked Kopatz where Carley was and Kopatz told her Carley was with Mary and he didn't "know where they [were]." (4 RT 540.) Kopatz said that Mary's purse was on the kitchen sink and she had just taken her wallet, which she did often. (4 RT 540.) Kopatz then told her that "Doug," Mary's co-worker's husband had arrived at his house. (4 RT 541.)

After speaking with Kopatz, Mary Burdick told her husband Doug that Mary Kopatz had not shown up at work. (5 RT 602, 622.) Mary Burdick was "extremely concerned" that something had happened to Mary Kopatz and she wanted to go to Kopatz's house to help out. (5 RT 602, 622-623.) Because Kopatz was upset, Doug and Mary Burdick agreed that Doug would go to Kopatz's house instead. (6 RT 602, 623.) When Doug Burdick arrived at Kopatz's house between 2:10 and 2:15 p.m, Kopatz's car was parked in the driveway towards the garage. (5 RT 624-625.) Doug also observed a red wagon containing PVC pipe at the top of the driveway by the fence near the garage. There were tools on the ground next to the

wagon. (5 RT 637-638, 651-652.) The pipe was tied up in a "bundle" and did not appear to have been used. (5 RT 638.) Doug approached Kopatz's house and Kopatz opened the door for him, looking surprised. (5 RT 626, 628.) Doug asked Kopatz what he had been doing all day. (5 RT 640.) Kopatz told him he had been digging in the backyard, putting in sprinkler pipe. (5 RT 640-641.) It did not appear to Doug that Kopatz had been digging. (5 RT 641.) Kopatz was not sweaty. (5 RT 648.) Kopatz was wearing white shorts, a white t-shirt, white tennis shoes, and white socks. (5 RT 639.) There was no dirt on his pants or shirt. (5 RT 640.) Kopatz's hands were not dirty, but the tops of his hands and his forearms had blue paint on them. (5 RT 640.)

Doug asked Kopatz if anyone had heard anything from Mary. (5 RT 626-627.) At that point, Kopatz began shaking and crying, and stated, "There's something really wrong." (5 RT 627.) Doug asked Kopatz what was wrong and Kopatz stated that, "[W]e can't find Mary." (5 RT 628.) Kopatz became more visibly upset and started crying. (5 RT 628.) Kopatz answered the phone when it rang. (6 RT 628.) He told the person he was speaking with that Mary Kopatz had some errands she was going to run. (5 RT 629.) When Kopatz got off the phone, Doug asked him what Mary's errands were. Kopatz stated his wife was supposed to go to Sav-On and Walmart. (5 RT 629.) Doug observed Mary Kopatz's purse on the sink and asked Kopatz why it was there. (5 RT 630-631.) Kopatz told him that normally Mary just placed her wallet in her baby bag and left her purse at home. (5 RT 630.) Doug also observed a set of keys, a cell phone, and a pager near the front door on a shelf. (5 RT 630, 632.)

At 2:15 p.m., Linda Lee retrieved the voicemail message from her office phone that had been left by Kopatz. (4 RT 575, 577.) She had noticed a voice mail message had been left on her office phone about 45 minutes earlier. (4 RT 574.) In his message to Lee, Kopatz sounded

"winded" and out of breath. He seemed frantic and was speaking quickly. (4 RT 579-579.) Kopatz stated he had been working in the yard and had received a page that he thought was from Ms. VanDyke regarding Ashley. (4 RT 577-578.)

After school ended, Ashley was put into daycare until 3:00 p.m. At that time, Principal VanDyke called Kopatz who said he had not yet heard from Mary. (4 RT 541.) Ashley was taken to VanDyke's mother's dairy in Norco to keep her "occupied" so Kopatz could continue trying to find Mary. (4 RT 541.)

Kopatz called his mother, Betty Kopatz, at around 3:00 p.m. (7 RT 961.) He told her that Mary and Carley were missing. (7 RT 962.) Kopatz also stated he had spoken to Mary's father, Bob Foley, who was en route to the house. (7 RT 962.) When Kopatz's father, Arthur Kopatz, came home, Betty told him about the phone call from Kopatz.[12] (7 RT 955,963.) Betty and Arthur drove from their house in Torrance to Kopatz's house in Riverside, arriving around 5:50 p.m. (7 RT 955, 963.)

Doug Burdick asked Kopatz whether he had called the police. Kopatz said he had not. (5 RT 633.) Doug told Kopatz that his wife, Mary Burdick, had attempted to file a police report but the police "would not take

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[12] Arthur Kopatz denied speaking to Kopatz on the telephone. (7 RT 955.) However, Sergeant Patrick Watters of the Riverside Police Department testified he spoke to Arthur Kopatz, who told him he had spoken to Kopatz on the phone at 3:00 p.m. (8 RT 1001.) Kopatz told him Mary's coworker had come by the house and said Mary did not show up for work. Arthur further stated Kopatz told him that he took their older daughter to school at 8:00 a.m., and Mary was going to take Carley to work with her. (8 RT 1001, 1011.) As previously noted, Jenny Craig, where Mary Kopatz worked, did not have a take-your-daughter-to-work day, and recently, Mary Kopatz had told everyone at the office not to bring their children to work because of liability issues. (5 RT 601-602.)

it" so he said it would be best that Kopatz immediately call the police. (5 RT 633.) Kopatz did not want to call the police, stating it was a "fucking pain in the ass." (5 RT 633.) Kopatz became upset and appeared to be angry. (5 RT 634.) He started doing a few "strange things," like repeatedly spitting in the sink, using profanity, and folding clothing. (5 RT 634, 636.) Doug again suggested that Kopatz call the police. (5 RT 634.) After ten minutes of "going back and forth," Doug convinced Kopatz to call the police department. (5 RT 634.) The phone call to the police occurred approximately an hour after Doug arrived at Kopatz's house, around 3:15 p.m.[13] (5 RT 635.) Kopatz spoke to police for 15 to 20 minutes. (5 RT 641.) When he was placed on hold, Kopatz became "very upset," hit the kitchen cabinet with his fist, and stated, "Ah, fuck. Here we go again." (5 RT 642.)

In his phone call to police, Kopatz stated his wife and daughter were missing and his wife had failed to show up for work at 11:00 a.m. after running errands. (13 CT 3467-3468, 3470, 3472, 3481.) He stated he did not think Mary was going to take Carley to work with her. (13 CT 3468.) He denied arguing with his wife. (13 CT 3470.) He stated he had called hospitals and he had been out doing yard work. (13 CT 3470, 3476, 3482-A.) Kopatz told the dispatcher he was disabled in an accident and he was home all the time. (13 CT 3475-3476.) Kopatz stated that the last time he saw his wife was about 7:30 a.m. because he took his other daughter to school. (13 CT 3481.) Mary was going to run errands and come back because she had to be at work at Jenny Craig at 11:00 a.m. (13 CT 3481.)

At approximately 3:20 p.m, Kopatz's younger brother Alan arrived at the Kopatz house. (5 RT 643, 684.) Earlier, Alan had spoken to his

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[13] An audiotape of Kopatz's phone call with the police was played for the jury. (6 RT 900.) A transcript is found at 13 CT 3467-3485.

stepdaughter and learned that Mary Kopatz was missing. (5 RT 682-83.) Alan parked his car in the driveway leading up to the Kopatz garage. (5 RT 687.) He observed blue "PVC glue" on Kopatz's hands, wrists and elbows. (5 RT 688.) Alan asked, "What's going on?" (5 RT 685.) Doug Burdick responded that Mary had not shown up at work and was missing. (5 RT 685.) Alan asked Kopatz what Mary had been doing that morning and where she could have gone. (5 RT 643, 686.) Kopatz stated that Mary was going to run errands and was going to Sav-On. (5 RT 686.) He told his brother that he had called Sav-On to see if Mary had arrived there, but was told that Mary had not picked up her prescription.[14] (5 RT 686.) Kopatz stated he had called the police and had called emergency rooms. (5 RT 687.) Kopatz denied arguing with Mary, stating there was not a problem and that everything between him and his wife had "been just fine."[15] (5 RT 688, 701.) Kopatz explained that Mary had left in the morning to pick up a prescription for Ashley at Sav-On, then had a few more errands to run. (5 RT 689.)

Alan Kopatz decided to drive to Sav-On to search for Mary's van. (5 RT 644, 689.) As Alan was leaving, he grabbed a set of Kopatz's keys in the event he found the van. (5 RT 644, 689.) Kopatz became "very agitated," and told Alan not to take "the whole fucking set of keys." (5 RT 645) Instead, Kopatz took the van key from the keychain and handed it to

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[14] The prosecution presented the testimony of several Sav-On employees who testified that they were working on the morning of April 22, 1999 and they did not recall receiving a phone call from Kopatz asking if his wife picked up a prescription. (6 RT 750 [Frank Lombardo], 763 [Mercedes Brand]; 11 RT 1147 [Kevin Rawls], 1156 [Juana Longoria], 1162-1163 [Tina Shaw], 1172 [Sally Swor].) According to Lombardo, such a phone call would have been unusual because it was Kopatz who usually picked up the prescriptions from the store. (6 RT 748, 750.)

[15] Alan testified he was unaware of Kopatz's financial problems. (5 RT 702.)

Alan.[16] (5 RT 645) Alan then drove approximately two miles to the Sav-On. (5 RT 698-690.) At about 3:30 p.m., he drove throughout the parking lot and behind the store, but did not see the van. (5 RT 690-691.)

Alan drove back to Kopatz's house taking a different route, arriving at approximately 3:40 p.m. (5 RT 692.) He told Kopatz and Doug Burdick that he had found "nothing." (5 RT 645, 694.) Alan testified that because several other people were coming to the Kopatz house, he cleaned up the PVC piping, wagon and tools that were in the driveway close to the front of the house. (5 RT 694-695.) He gathered the PVC that was "spread out all over the driveway" and placed it near a brick wall to make more room for cars to be parked in the driveway. (5 RT 695.) He put the tools and other PVC items in the wagon. (5 RT 696.) According to Alan, there was evidence that work had been done in the front yard including a foot and a half deep hole in the grass and another hole dug near a brick planter. (6 RT 696.) Alan further testified that in both of those holes there was PVC piping that was "freshly" cut and glued. (5 RT 697.)

Doug Burdick left Kopatz's house when Kopatz's father arrived, telling Kopatz that he hoped "everything works out okay." (5 RT 646-647.) Burdick testified that while he was at the house, he observed Kopatz's body shaking, but Kopatz was not having trouble moving around. (5 RT 646-647.) Further, according to Burdick, Kopatz did not complain of back pain while he was at the house. (5 RT 646-647.) Burdick testified that at some point he went down the hall to use the restroom. (5 RT 649.) He observed a set of woman's rings in a dish next to the bathroom sink. (5 RT 649, 662.) One of the rings he saw in the bathroom "had a similar cut" to Exhibit 23A, which was a photograph of Mary's Ring. The other that he

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[16] Alan testified he took the key off the keychain. (5 RT 689.)

saw was "very, very similar" to Exhibit 23B, Mary's anniversary band. (5 RT 662-664; 11 RT 1573-1574.)

Kopatz and Alan Kopatz discussed other possible places Mary could have gone. Kopatz stated that Mary shops at the mall, Walmart and Kmart. (5 RT 704.) Alan called the "Galleria" and explained to a Riverside police officer that Mary was missing. According to Alan, the officer offered to search the parking lots of the mall and Target. (5 RT 705.) At approximately 4:20 to 4:30 p.m., after he had not heard back from the officer, Alan decided to drive to the nearby Walmart. (5 RT 705-706.) As he drove down Van Buren, while looking up and down the side streets and at passing traffic, Alan observed a van on Duncan Street, approximately a mile from Kopatz's house, that appeared similar to Kopatz's. (5 RT 706; 6 RT 730; 13 RT 1771-1772.) He drove around the block and parked near the van, which he identified by the license plates as belonging to Kopatz. (5 RT 708.) Alan exited his car, took a few steps towards the van, returned to his car and retrieved a hand towel, approached the van and looked into the driver's side window.[17] (5 RT 708.) He attempted to open the door with the towel, but the door just "jiggled" and did not open. (5 RT 716.) After seeing "absolutely nothing" inside the van (5 RT 709), Alan approached a nearby house and knocked on the door, but there was no answer. (5 RT 710; 6 RT 768.) He saw John Lopez at the house next door, ran to Lopez's house, stated that he had a "possible emergency" and asked to use Lopez's telephone. (5 RT 710; 6 RT 769.) Lopez gave Alan his cordless phone. (5 RT 711; 6 RT 769.) Alan called Kopatz's house but the line was busy. Utilizing the operator, he made an "emergency break through to [Kopatz's] phone." (5 RT 711.) Alan spoke to Kopatz, who

[17] The back windows of the van had a dark tint, while the front windows were lightly tinted. (5 RT 708-709.)

answered the telephone. (5 RT 711-712.) He told Kopatz that he "found the van." (5 RT 712.) Kopatz let out a deep sigh and stated, "Oh, my God." (5 RT 712-713.) Alan asked Kopatz to hand the phone to Bob Foley, Mary's father, who had arrived at the house earlier. (5 RT 714.) Alan gave Mr. Foley directions to the parked van. (5 RT 714.)

After the phone call, Alan recalled that he had not looked into the backseat of the van. (5 RT 714.) He walked back to the van and peered into the driver's side, back seat window, placing his hands on the window to help see through the tinting. (5 RT 715.) He saw Mary's body lying lengthwise on the floor. (5 RT 715, 718; 6 RT 744.) Alan yelled, "Oh, my God," and ran back to the Lopez house. (5 RT 715-716.) He exclaimed that there was "a body in the back," and called 911. (5 RT 715-716.) While speaking with the 911 operator, Alan returned to the van, and looked in the window on the driver's side behind the second seat. (5 RT 717.) Inside, he saw Carley laying facedown. (5 RT 717.)

Riverside firefighters arrived at the scene and approached the driver's side of the van. (8 RT 984.) A firefighter opened the driver's door, unlocked the rear sliding door from the inside, then opened the sliding door. (8 RT 984, 992.) Mary Kopatz's body was on the floorboard. (8 RT 985, 992-993.) Carley's body was near the rear seats. (8 RT 985-986, 989.) Riverside Police Detective Rick Cobb arrived at the scene at 4:55 p.m. and firefighters told him that the van contained two females who appeared to be victims of a homicide. (7 RT 941-942.)

Inside the van, Mary Kopatz was laying face up in the middle compartment floorboard of the van. (9 RT 1220, 1226; Exhs. 3-A, 3-B, 3-H, 4-A.) Mary was wearing white socks. Her shoes were not on her feet but were found elsewhere in the van. (9 RT 1222-1223, 1231, 1236, 12685.) Her left shoe was untied. (9 RT 1232.) Bruising to her knees and right hand were visible. (9 RT 1224.) Mary had ligature marks around her

neck and blood on her face. (9 RT 1225-1226.) There was a stripe of blood beginning at her right ear and ending at the right side of her nose. This stripe was interrupted on her cheek. (9 RT 1226; Exhs. 3-F, 3-H.) Evidence Technician Fuller opined that Mary was in a different position when the blood flow was interrupted. (9 RT 1225-1227.) Mary's belt was unlatched and her zipper was down. (9 RT 1224, 1229.) Her pants were unbuttoned and spread open, exposing her underwear. (9 RT 1224, 1229.) Mary's bra was "protruding" from under her shirt. (9 RT 1224-1225.) There were no rings on her right hand. (9 RT 1232.)

One of Mary's nails had been broken off, but it did not appear to be a "fresh break." Two other fingernails had been broken but it could not be determined whether they were "worn or freshly broken." (10 RT 1426.) The pinky fingernail on Mary's right hand was broken. (10 RT 1434.) A small amount of tissue, which appeared to be skin, was adhered to one of the fingernails from the left hand. (10 RT 1426.)

Carley's body was toward the rear of the van on the floorboard. (9 RT 1221; Exhs. 3-G, 3-C.) Carley was lying face down behind a row of seats. There was a large pool of blood beneath her face. (7 RT 942.) She had blood on her arms. (9 RT 1223.) The shirt near her head was blood-soaked. (9 RT 1243.) There was no blood on Carley's sandals, legs, or shorts. (9 RT 1242-1243.)

Inside the van, there was "debris" on the floorboard, including two blank checks from the Kopatz checking account which been torn up. (9 RT 1230-1231, 1258-1259.) On the floorboard of the front passenger seat was Mary's blue diaper bag. (9 RT 1247.) Mary's wallet, containing a $20 bill, credit cards, her driver's license and social security card, was found on the floorboard between the two front seats. (9 RT 1251-1252.) Numerous cards and receipts were also found in the wallet and on the floorboard. (9 RT 1248, 1251-1262.) None of the receipts were dated April 22, 1999, the

day of the murders. (9 RT 1261.) The glove box was closed. (9 RT 1248.) The front driver's seat of the van was at its furthest position back.[18] (9 RT 1245, 1248.) The rear windows of the van were darker tinted than the front windows and it was very difficult to see into the rear windows. (9 RT 1213.)

There was a blood transfer on the back of the driver's seat in the van. (9 RT 1272.) According to Fuller, the transfer was a smear from an object with blood on it coming into contact with the seat in a swiping motion. (9 RT 1272.) Blood smears were also found on the inside handle of the driver's side sliding door and on the interior window frame. (9 RT 1273-1274.) Additionally, there was a smear on the passenger side armrest in the middle row. (9 RT 1275.)

Detective Cobb spoke to Alan Kopatz, who appeared calm. (7 RT 943.) Alan indicated that earlier in the day, Kopatz had told him his wife and daughter were supposed to go to Sav-On Drugs to pick up a prescription but they never did. (7 RT 943.) Alan further stated that Mary's employer, Jenny Craig, had also called and said Mary had not showed up for work. (7 RT 943.) Alan told Detective Cobb that after going to Kopatz's house he began searching for Mary and Carley. (7 RT 943-944.) While driving to Walmart, he observed the Kopatz van on Duncan Street. (7 RT 944.) He used a phone to call Kopatz and told him he found the van. (7 RT 944.) Alan further stated he unsuccessfully attempted to open the driver's side door. (7 RT 944.) When he looked inside, he observed the victims. (7 RT 945.) Alan then told Detective

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[18] Kopatz is 5'10" inches tall and weighed 165 pounds. (14 CT 3891[Probation Rpt.]) His wife Mary was 5'6"inches tall and weighed 134 pounds at the time of her death. (8 RT 1111[Pathologist testimony].)

Cobb that he called Kopatz and told him that his wife and daughter were dead. (7 RT 945.)

Alan Kopatz called and told his mother that Mary and Carley were dead. (7 RT 967.) When Kopatz's mother told Kopatz this news, Kopatz stated, "Oh my God. Not my baby too," then grabbed his face and began hitting his head against the cupboard. (7 RT 965, 968.)

Sergeant Patrick Watters of the Riverside Police Department arrived at Kopatz's house at approximately 6:30 p.m. (8 RT 998.) Sergeant Watters spoke with Kopatz's father, Arthur, who said he arrived at Kopatz's house at 5:00 p.m. after speaking to Kopatz on the phone. Kopatz told his father that Mary's coworker had come by the house and said Mary did not show up for work. Arthur further stated Kopatz told him that he took their older daughter to school at 8:00 a.m., and Mary was going to take Carley to work with her. (8 RT 1001, 1011.)

Riverside Police Department Evidence Technician Carlton Fuller arrived at Kopatz's house at 6:43 p.m. (9 RT 1207.) Fuller, who had no knowledge of the victim's injuries, was instructed to conduct a gun-shot residue test on Kopatz's hands. (9 RT 1207-1208.) When Fuller arrived at the residence, Kopatz was on his back on a couch in his living room. (9 RT 1208, 1279.) Fuller observed red marks on Kopatz's eyelid below his eye and a scratch to his forehead area. (9 RT 1280.) Additionally, Kopatz had scratches and cuts on his hands, red marks on his wrist, and bruising around his elbows. (9 RT 1280-1281.) He had blue glue on his hands. (9 RT 1209, 1281.) While Fuller was taking photographs and swabs from Kopatz's hands, Kopatz was uncooperative, leaning away, and facing into the couch. (9 RT 1210.) Kopatz's hands shook when Fuller attempted to photograph them. (9 RT 1210.) When Fuller asked Kopatz questions such as when he last washed his hands or whether he was right or left-handed, Kopatz did not answer. (9 RT 1210.)

At some point, the paramedics arrived at Kopatz's house in response to Kopatz's complaints of back pain. Officer Patrick McCarthy testified when he arrived at the house at 6:00 p.m., he observed Kopatz sitting in a chair being examined by the paramedics and Riverside Fire Department. (8 RT 1014-1015.) The paramedics left at around 6:30 p.m., stating Kopatz was "fine." (8 RT 1002.) According to Officer McCarthy, Kopatz repeatedly complained of severe back and head pain. (8 RT 1017-1018.) He also was, "showing somewhat spasms and flexing his arms inconsistently." (8 RT 1018.) At approximately 8:00 p.m., Kopatz demanded to be seen again by paramedics.[19] (8 RT 1002, 1016.) The paramedics returned. (8 RT 1002, 1016.) Between at 8:00 and 9:00 p.m., Kopatz was taken by the paramedics to Riverside Community Hospital. (8 RT 1003, 1018.)

At 9:00 p.m., Tim Ellis, a senior evidence technician for the Riverside Police Department, arrived at emergency room of Riverside Community Hospital to photograph Kopatz. (4 RT 550-551, 553.) Kopatz had redness around the left side of his face and eye. (4 RT 554.) There were scratches on his left arm. (4 RT 555.) Parts of his left wrist area and the top of the back of his hand were covered with blue glue. (4 RT 555.) Further, he had linear-type abrasions or scratches on his right hand and above his wrist. (4 RT 557.) He had a scratch, abrasion or laceration on his right middle and index fingers. (4 RT 558-559.) There was blue glue on this hand as well. (4 RT 558-559.) While photographing Kopatz's hands, Kopatz was "shaking rather badly." (4 RT 556.) Kopatz also "moaned and groaned a lot." (4 RT 557.)

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[19] Appellant's father did not want the paramedics to come, fearful of the scene it would cause. (8 RT 1002.)

Kopatz was evaluated by the emergency-room staff, which cleared him and gave him pain medication. (8 RT 1020.) At that point, Kopatz walked out of the hospital and was taken by Officers McCarthy and Godner to the detective bureau of the Riverside Police Department. (8 RT 1021.) While in the patrol car, Kopatz complained about head and back pain. (8 RT 1021.) Kopatz did not make any inquiries or ask any questions about the investigation or about his wife and daughter. (8 RT 1021, 1028.) They arrived at the police station at around midnight. (8 RT 1021.) Once they arrived at the station, Kopatz's complaints regarding his pain increased. (8 RT 1027-1028.) He complained of severe pain and back spasms and he was unable to sit in a chair so, at one point, he laid down on the floor. (8 RT 1028.)

Kopatz's Interview with Police

At approximately 1:00 a.m. on April 23, 1999, Kopatz was interviewed at the Riverside police station.[20] Kopatz told police he returned to his house between 8:30 and 9:00 after dropping Ashley off at school. (13 CT 3640.) His wife and other daughter were getting ready to leave when he got home. [21] (13 CT 3640.) Mary told him she was going to run some errands, including picking up prescriptions at Sav-On and going to Target, Walmart, Mervyns or the mall. (13 CT 3640-3641.) Kopatz stated that Mary and Carley were going to come home before Mary went to work at 11:00. (13 CT 3641.) After his wife left between 8:30 and 9:00 a.m., Kopatz cleaned around the pool and worked on the sprinklers in his front yard. (13 CT 3641.) Kopatz stated that he realized Mary was missing

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[20] A video of the interview with Kopatz was played to the jury. (Exh. 81-B; 13 RT 1775.) A transcript of the interview (Exh. 81-A) is found at 14 CT 3636-3676.

[21] He told the 911 dispatcher, however, he last saw Mary and Carley at 7:30, *before* he took Ashley to school. (13 CT 3481.)

between 1:00 and 1:30 p.m. He went inside the house to get some water and saw his wife's purse. (13 CT 3641-3642.) He stated that Mary's work tried to call him but he did not have his phone outside with him. (13 CT 3642.) Kopatz told police he began looking for Mary – he called Sav-On to see if she had picked up the prescription.[22] (13 CT 3642.) He called the police and was told to call hospitals. (13 CT 3642.) Kopatz stated he called four or five hospitals but there was "no one there." (13 CT 3642.) Then, Mary's co-worker's husband, Doug, came over. (13 CT 3642-3643.) Doug helped Kopatz make phone calls and Kopatz made a missing person report. (13 CT 3643.) Kopatz told police he called his parents and brother and told them Mary never showed up at work. He left his brother a message. (13 CT 3643-3644.) His parents and brother came to his house. (13 CT 3643-3644.) Kopatz told police that Doug and his brother went to look for Mary. Doug went to the mall and his brother went to the Sav-On. (13 CT 3644.) When asked by police why his hand was shaking, Kopatz explained that due to a head injury, occasionally he would start shaking for no reason, and he was taking medication for headaches. (13 CT 3644-3645.)

Kopatz told police that his brother returned, then left again, saying he was going to search the Walmart parking lot. (113 CT 3645-3646.) Then, according to Kopatz, his brother called, spoke to his father-in-law, and said that they had found the van. (13 CT 3646.) His father-in law left to go to the van but he stayed home because "They didn't want me to go anywhere. They wanted me to stay cause the, they, couldn't seen anyone in the van. And so he want, want, wanted me to wait at home for them." (13 CT

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[22] As previously noted in footnote 14, several Sav-On employees testified that they were working on the morning of April 22, 1999 and they did not receive a phone call from Kopatz.

3646.) Then his brother called, spoke to his mother, and said that "they were gone." (13 CT 3647-3648.)

Kopatz was asked how he had received his "injuries" to his wrist. (13 CT 3648.) Kopatz stated the "cuts" were from trees in his yard and he received them "six months" earlier. (13 CT 3648.) After the police stated that the injuries were "fresh," Kopatz explained he received the cuts pulling out roots from a tree. (13 CT 3648.) He also explained that that morning or afternoon, he had "smacked" his head on a brick planter, scraping it, while working in the front of his yard by the long driveway. (13 CT 3649.) Kopatz stated that he had been working in dirt all day. (13 CT 3650.) He explained that his hands were clean because he had washed them. (13 CT 3651.) Kopatz also explained that the "blue stuff" on his hands was glue for PVC pipe. (13 CT 3651.)

When asked by police whether he and Mary had been having any "problems recently," Kopatz stated they had been doing "great together" and had recently gone on a vacation. (13 CT 3651-3652.) He said he and Mary had been married over ten years. (13 CT 3652.)

Kopatz explained to police that he gets "the shakes" a couple of times a year. It happened more frequently after his accident. (13 CT 3652.) He sees a neurologist twice a year and is prescribed medications for his migraines. (13 CT 3653-3654.) Kopatz stated his doctor was aware that he gets "the shakes" a few times a year and thought it might have been seizures. Kopatz explained that he has also stuttered since his accident. (13 CT 3655.) Kopatz stated that his condition does not prevent him from driving a car. (13 CT 3656.) Kopatz told police that his back was "very sore" and the shakes cause it to tense up and hurt "very badly." (13 CT 3656.) He stated that the pain goes down his legs to his hamstring area. (13 CT 3656.)

When police asked about a scratch on the right side of Kopatz's cheek, Kopatz stated that his mom told him he grabbed his face and scratched himself when "they told [him]." (13 CT 3657.) Detective Shumway observed that Kopatz did not have finger nails and questioned how Kopatz could have done that. (13 CT 3657.)

Kopatz denied arguing with Mary that morning. (13 CT 3658.) Kopatz stated that if neighbors heard something at his house that sounded like arguing, it was possibly his stereo which was usually kept on "all the time." (13 CT 3658.) He turned the stereo on when he woke up at 5:00 a.m. (13 CT 3658.) At about 5:30 a.m., Kopatz read the newspaper, listened to the radio, and watched the news. (13 CT 3658-3659.) Mary woke up after 6:30 a.m. and got Ashley's breakfast ready. (13 CT 3659.) Kopatz then got Ashley ready for school and took her to school in the car, although he normally drove the van. (13 CT 3660.) According to Kopatz, after taking Ashley to school, he checked the oil in the van near his garage.[23] (13 CT 3661.) His wife left around 9:00 a.m. to run errands. (13 CT 3662-3663.) Mary had their daughter with her and was going to return home after shopping. (13 CT 3664.) Mary never said she was going to take Carley to work with her, although Ashley had gone to work with Mary a few weeks earlier. (13 CT 3664.)

Kopatz called Mary's work around 1:00-1:30 p.m. (13 CT 3664.) Mary's work tried to call but he was outside and didn't have a phone and they did not leave him a message. (13 CT 3665.) Kopatz told police that his headache was getting worse and he had memory and concentration problems, but he never experienced blackouts. (13 CT 3665-3666.)

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[23] Evidence was presented showing that the van had received an oil change less than one month and only 1310 miles earlier. (9 RT 1248; 11 RT 1500-1501; Exh. 68.)

Kopatz told police that he had "no idea" who killed Mary and Carley. (13 CT 3667.) He stated his wife usually wore a wedding ring and earrings. (13 CT 3667.) Also, according to Kopatz, Mary carried her wallet in her diaper bag. (13 CT 3670.) Kopatz told police that when his brother called and told him he found the van, he handed the phone to his sister-in-law because he was crying "badly." (13 CT 3672.)

Following his interview, officers transported Kopatz to his family's house in Riverside. (8 RT 1031.) Kopatz complained about pain during the drive. (8 RT 1031.) Officers assisted him while walking to the front door of the house. (8 RT 1031.)

The Autopsies of Mary and Carley Kopatz and Results of Forensic Testing

On April 28, 1999, pathologist Aruna Singhania conducted the autopsies of Mary and Carley Kopatz at the Riverside Coroner's Office. (8 RT 1077, 108, 1113-1114.) Dr. Singhania observed trauma to Mary's face. She had a black eye on her right side, a contusion and abrasion at the base of her chin and bruising on the left angle of the jaw, consistent with blunt-force trauma. (8 RT 1082-1083, 1085, 1087.) She had bruising on the left side of her forehead. (8 RT 1084.) Further, there was discoloration of the left side of her face. (8 RT 1085.) On Mary's left side, there was a streak of dripping blood that went from her ear to her cheek, stopping near her nose. (8 RT 1086.) This suggested that Mary's body was face down at some point, contrary to the position she was found inside the van. (8 RT 1103-1104.) She had a contusion or abrasion inside the right angle of the mouth. (8 RT 1087.) She had a contusion behind her left ear also consistent with blunt force trauma. (8 RT 1091.) She also had blunt-force trauma to the back of the head, causing bleeding inside the scalp. (8 RT 1095.)

There was a one centimeter wide ligature mark going across Mary's neck. (8 RT 1088.) A second ligature mark suggested that the body or ligature was moving. (8 RT 1088, 1090.) The ligature mark came to an end behind her ear, suggesting that Mary was strangled from behind. (8 RT 1089.) Dr. Singhania testified the ligature that left the marks was "smooth," consistent with nylon rope or an electrical cord. (8 RT 1089.) Mary had discoloration or bruising on the neck consistent with a cord being wrapped tightly around her neck. (8 RT 1091.) Further, Mary had hemorrhages in the capillaries of her eyes, consistent with being strangled. (8 RT 1092-1093.) Her neck injuries were consistent with being strangled from behind with a smooth cord. (8 RT 1096, 1108.)

Mary had suffered two broken ribs on her right side. (8 RT 1105-1106.) Internally, she was bleeding between the ribs. (8 RT 1107.) Her broken ribs could have been caused by a knee being forcefully placed against her rib cage as she was on the ground. (8 RT 1141-1142.) Mary had a superficial linear scrape on her chest that appeared to have been inflicted postmortem. (8 RT 1097.) Three other superficial lacerations on her chest were postmortem wounds. (8 RT 1104-1105.) She had a contusion and abrasion on her left elbow and on both of her knees. (8 RT 1098-1099.) Further, she had contusions on her left shoulder, left wrist, and on the back of both hands. (8 RT 1100.) There were no injuries consistent with sexual assault. (8 RT 1104.) The contents of her stomach were consistent with eggs. (11 RT 1109.) The solid food in her stomach indicated she had eaten two hours or less prior to her death. (11 RT 1109.)

The cause of Mary's death was asphyxia due to ligature compression of the neck. A contributing condition was the fracture of the ribs to the right side, which was not a fatal injury, but likely to cause significant pain. (8 RT 1110-1111.)

Carley, who weighed only 39 pounds, had been found with the right side of her face and body laying in a pool of blood. (8 RT 1115, 1127.) She had also suffered a ligature wound across the anterior of her neck identical to the wound suffered by Mary. (8 RT 1114, 116.) Unlike Mary, the ligature had not slipped nor moved, likely because Carley had not struggled. (8 RT 1116.) The wound went from front to back suggesting the assailant strangled her from behind. (8 RT 1116.) She had petechial hemorrhages on her face caused by strangulation. (8 RT 1118.)

Carley also had suffered a slashing wound to the skin of her neck, exposing, but not damaging, her larynx and thyroid. (8 RT 1119-1121, 1124.) These wounds were made by a sharp instrument with a cutting edge. (8 RT 1122-1123.) Most likely, these injuries were inflicted post-mortem. (8 RT 1123.) Additionally, Carley had a superficial slashing wound to her right upper arm. (8 RT 1114.) Carley had no other bruises or injuries. (8 RT 1114-1115, 1126.) The cause of Carley's death was asphyxia due to ligature compression of the neck. (8 RT 1127.)

A portion of carpet and the hallway door frame from the Kopatz house were collected by police for suspected blood. The carpet screened positive for blood and had "drop-like stains." (10 RT 1446.) Criminalist Michele Merritt could not determine whether a stain on the backside of the carpet was from cleaning solution. However, she opined that if any liquid had been applied to the bloodstain, it occurred after the blood had dried completely. (10 RT 1447.) Additionally, it appeared that fibers from the carpet had been cut. (10 RT 1447.) The stain removed from the wall also tested positive for blood. (10 RT 1448-1449.)

Fibers found on Mary's front torso, left sock, and lower left leg were consistent with fibers from the Kopatz house carpet. (10 RT 1443-1444.) A fiber found on Mary's shorts was similar to a fiber from the van carpet. (10 RT 1444.) Six carpet fibers found on Mary were inconsistent with the

house and van carpets. (10 RT 1452.) Five fibers found on Carley's back could have come from the car seat cover from the middle seat in the van. (10 RT 1444.)

An interior kitchen door from Kopatz's house was damaged 54 inches from the bottom of the door. (10 RT 1450.) The door had been "pressed in" and there was "concentric linear damage to it" with paint missing from the center. (10 RT 1451.) No trace evidence, however, was found on the door. (10 RT 1452.)

DNA testing established that Mary and Carley Kopatz could not have been contributors to fingernail scrapings found under Mary's fingernail. (10 RT 1382.) Kopatz, however, could not be eliminated as a possible contributor. (10 RT 1382.) The genetic profile would occur once in every 14,000 Caucasians, once in every 32,000 Hispanics, and once in every 1,900,000 African-Americans.

Further, the DNA profile from the blood from the Kopatz doorjamb was an exact match to Mary's profile, which was "strong evidence" that Mary was the source of the blood.[24] (11 RT 1588.) The sample of carpet with possible bloodstains from Kopatz's house was also examined. (11 RT 1589-1590.) The sample testified positive for blood, however, no DNA profile was obtained from the sample.[25] (11 RT 1590-1591.) Additionally, several blood samples taken from the van matched Mary Kopatz's DNA profile. (11 RT 1592-1596.)

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[24] Gregonis testified the blood from the hallway doorjamb could be expected to be found in about 1 in 4.2 million Caucasians, 1 in 7.6 million Hispanics, and 1 in 95 million African Americans. (10 RT 1589.)

[25] One possible reason for the inability to obtain a profile was the presence of an inhibitor, such as a cleaning solution, being applied to the stain. (10 RT 1591.)

Evidence Regarding the Staging of the Crime Scene and Kopatz's Suspicious Behavior Following the Murders

Detective Shumway testified there was evidence that the suspect had altered crime scene in effort to make it appear that a different type of crime was committed. This criminal behavior is known as "staging" in violent crime scene analysis. (13 RT 1777-1778.) Here, the suspect staged the crime to appear that a theft or sexual assault had occurred. (13 RT 1778-1779.) Regarding a staged sexual assault, Shumway testified that Mary's clothing had not been forcibly removed. (13 RT 1780.) Rather, her shirt was lifted up, partially exposing her breasts. Her bra was cut, and her pants were neatly unbuttoned, which was inconsistent with an actual rape occurring. (13 RT 1779.) There was no evidence Carley had been sexually assaulted. (13 RT 1781.)

Further, there was evidence that the suspect staged a robbery. (13 RT 1780.) Mary's wallet and belongings had been dumped on the floorboards, but her cash, credit cards, and identification, had been left behind, which was uncommon. (13 RT 1780-1781.) Also, there was no evidence that there had been a carjacking. (13 RT 1782.) Shumway testified that based on the evidence in the van, it was obvious that the victims had been killed elsewhere. (13 RT 1782.)

On Saturday April 24, 1999, two days after the murders, Kopatz and his daughter Ashley drove to Mary's parents' house in Long Beach after attending the Orange County Swap Meet. (8 RT 1059.) When Kopatz arrived, he asked Mary's brother, Robert Foley, if he could park his car in the back of the driveway. (8 RT 1060.) Kopatz stated that he thought he had been followed by police and his car may have been bugged. (8 RT 1060.) Kopatz also told Robert and his father-in-law that there had been "a lot of police around the house" and they should not to talk to the police. (8 RT 1060.) He gave Mary's father an attorney's business card and told him

that if they were contacted by the police they should refer the police to the attorney.[26] (8 RT 1061.)

Robert Foley and his sister Janet observed that Kopatz had scratches on his hands, forearms, forehead and face. (8 RT 1061, 1063, 1065-1066.) Kopatz also had a bump on his forehead. (8 RT 1066.) There were scratches on his hands where there had previously been blue PVC pipe glue. (8 RT 1062-1063.) Kopatz explained to Janet that he got the scratches on his hand while digging, "putting in piping." (8 RT 1067.) He said he injured his head when he bumped his it on a brick while digging deep in a hole in his backyard. (8 RT 1067.)

On the morning of April 26, 1999, Mary Burdick received a phone call from Kopatz. (5 RT 603-604.) Kopatz asked Mary if she had come by Kopatz's house at 11:00 or 11:30 a.m. on the day of the murders. (5 RT 604.) Mary explained that she had expected Mary Kopatz at work around 11:00 a.m. and when she failed to show up, she went by Kopatz's house at 12:30 p.m. (5 RT 605.) Kopatz then stated, "Well, I must have been out to lunch or eating lunch when you came by." (5 RT 605.)

On April 26, 1999, on the day the $13,628 insurance policy covering Mary's wedding rings was set to expire, Kopatz made a claim for Mary's rings under the policy. (11 RT 1574, 1579.) The following day, State Farm claims specialist William Mendiola spoke to Kopatz on the phone. (11 RT 1575.) Kopatz reported the rings missing. (11 RT 1575.) He stated his wife had been wearing the rings at the time of the murder, but when her body was found in a van a mile from his home, the rings were missing. (11 RT 1578.)

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[26] The card was for Jay Jaffee, one of the attorneys who represented Kopatz at trial. (8 RT 1061.)

Additionally, police located evidence that on the day before and the day after the murders, Kopatz played a "fantasy stock game" online. (11 RT 1501-1502.)

C. Defense Evidence

Kimberly De la Hoya testified that on April 29, 1999, after police handed her a flyer at a checkpoint, she told police she had observed a van that appeared similar to Kopatz's on April 22, 1999, sometime after 9:00 a.m. (12 RT 1686-1687, 1689.) She saw a K-Frog bumper sticker on the vehicle. (12 RT 1687.) The van was empty. (12 RT 1687.) However, a few months later, she told police that it was actually a blue van that she had observed. (12 RT 1688.)

Doug Burdick testified that he could not recall whether he told Detective Shumway he had observed rings in Kopatz's bathroom when he was interviewed the day after the murders, although he thought he had. (13 RT 1794, 1797.) Before his trial testimony, Burdick asked Detective Shumway if the rings were ever located. (13 RT 1794-1795.)

Arthur Kopatz testified that receiving notice that one of Kopatz's insurance policy premiums was past due, he signed Kopatz's name to the notice and wrote "Mary was 'murdered 4-22-99. Death cert not released as of 7-06-99" in an effort to cancel the deductions being made from Kopatz's checking account. (13 RT 1801-1802.) He was not making a claim on the policy on Kopatz's behalf. (13 RT 1803.)

Mary Rolle, who lived across the street from the Kopatz family, testified on April 22, 1999, at approximately 9:00 a.m., Kopatz crossed the street and spoke to her regarding his sprinklers. (13 RT 1805-1806.) There was nothing unusual about Kopatz's demeanor. (13 RT 1807.)

D. Penalty Phase

1. Prosecution Evidence

Mary's older sister, Sandra Zalonis, testified that growing up in Long Beach, Mary was quiet and "sweet." (15 RT 2077.) Everyone always wanted to be around her. (15 RT 2078.) Mary was approximately 15 years old when Zalonis moved to Florida. (15 RT 2079.) The two sisters kept in touch and spoke every two weeks on the telephone. (15 RT 2080.) Zalonis testified she received a phone call from her sister Janet informing her that Mary and Carley had been murdered. (15 RT 2080.) She had last seen Mary and Carley in June of 1998. (15 RT 2080.) It was difficult being so far from her family after the crimes and she had not done well; she attended grief counseling and got divorced. (15 RT 2081.) Zalonis testified she missed "everything" about Carley and Mary, including Carley's voice and grin. (15 RT 2081.) Thursdays are difficult for her because it is the day they were killed. Holidays are also hard. (15 RT 2082.)

Mary's mother, Hazel Foley, testified that growing up, Mary was always happy and laughing. (15 RT 2084.) She loved to ride her bike and play with her sisters. (15 RT 2086.) After Mary got married, the two remained close and Hazel would baby-sit for Ashley while Mary worked. (15 RT 2088.) Mary was very dependable and thoughtful and was a good mother to her children, who were the "love of her life." (15 RT 2089.) It hurt Mary to go to work every day because she would rather have been home with the kids. (15 RT 2089.) Carley was a very sweet granddaughter. (15 RT 2093.) Hazel testified she learned her daughter and granddaughter were dead from her other daughter Janet. (15 RT 2092.) It "tore [her] up" to think that somebody could do such a horrible thing. (15 RT 2092.) The murders have had a "terrible" effect on her and it hurts her every day. (15 RT 2093.)

Another of Mary's sisters, Janet Foley, testified the she and Mary were only 18 months apart and were very close. (15 RT 2095.) Mary's marriage to Kopatz was her first and she said it was going to be "forever." (15 RT 2097.) Mary met Kopatz at work and, when they were first married, Mary was happy. (15 RT 2098.) According to Janet, Mary was a loving mother, a true friend, and a special sister. (15 RT 2099.) Carley always had a smile, with a personality to match. (15 RT 2100.) She helped her sister Ashley check her blood sugar levels. (15 RT 2100.) Carley had a special security blanket that she called her "Blankie Bear." (15 RT 2101.) Carley, her Blankie Bear, and Mary were buried together in the same coffin. (15 RT 2101-2102.) A photo of Carley, Blankie Bear, and Mary adorns their headstone. (15 RT 2102.) Janet further testified that the funeral was difficult. Particularly, the music Kopatz selected for the funeral, which was "all about him," was upsetting, as the family had suspicions about what had happened to Mary and Carley. (15 RT 2108-2109.) Janet further testified that the murders have been devastating to her parents, who are now raising Ashley and have had to adjust their lifestyle to adapt to Ashley's diabetes. (15 RT 2103-2104.) Ashley misses her sister. (15 RT 2106.) Mary's brother Russell is upset that he was not there to help Mary and Carley. (15 RT 2105.) Every family gathering is painful, according to Janet. (15 RT 2105.)

Additionally, three of Mary's nieces and nephews testified: Ryan Foley (age 9), Kyle Foley (age 12), and Vanessa Soto (age 14). The three testified the murders have been difficult and they miss their aunt and cousin. (15 RT 2111-2112, 2115-2119.)

Mary's younger brother Robert Foley testified the murders have been difficult to deal with and he feels guilty for failing to prevent them. (15 RT 2121.) His father's life has changed since the crimes as he is now raising Ashley and does not get to enjoy his retirement. (15 RT 2121-2122.)

According to Robert, his mother has "nothing but sadness in her eyes." (15 RT 2122.) For all Ashley has gone through, she was doing "extremely well." (15 RT 2123.) However, Robert stated that his son sometimes cries himself to sleep. (15 RT 2123-2124.) His family misses Mary and Carley, "tremendously." (15 RT 2124.)

2. Defense Penalty Phase Evidence

Kopatz's neighbor, Hilda Haraka, testified she lived on the same street as Kopatz and his family and became acquainted with the Kopatzs while they took walks through the neighborhood. (15 RT 2130-2131.) While her husband was recuperating from a stroke, Kopatz would go out of his way to visit with him. (15 RT 2131.) Hilda further testified that she would occasionally baby-sit the Kopatz' children. (15 RT 2131-2132.) Hilda testified Mary was "very sweet" and news of the murders was shocking. (15 RT 2132.) She never saw Kopatz behave in an angry or temperamental way. (15 RT 2132.) Hilda was aware that Kopatz would occasionally get headaches. (15 RT 2133.)

Larry Haraka, Hilda's son, testified he lived with his parents following his father's stroke and knew Kopatz for three to four years. (15 RT 2135.) They socialized on a few occasions. (15 RT 2135-2136.) Larry described Kopatz as quiet and mellow. (15 RT 2136.) He was aware that Kopatz had suffered an industrial accident and would occasionally get headaches and stutter slightly. (15 RT 2136-2137.) He was surprised to learn that Kopatz had been convicted of the murders. (15 RT 2137.) He never observed any problems between Kopatz and Mary. (15 RT 2138.)

Kopatz's mother, Betty Kopatz, testified Kopatz was born in September 1952, and, growing up, he was a quiet boy, who got along well with his siblings. (15 RT 2141-2142.) After high school, Kopatz joined the army for three or four years, then worked various jobs. (15 RT 2142.) He bowled quite often and was on track to becoming a professional bowler.

(15 RT 2142.) In the 1990's, however, Kopatz had an accident at worked and went on disability. Mary started working full-time at that point. (15 RT 2143.) Betty Kopatz testified she never saw Kopatz become explosive or extremely angry. (15 RT 2144.) Rather, if Kopatz was having problems, he would come to her for advice. (15 RT 2144.) She will stay in touch with Kopatz even though he will be in prison. (15 RT 2144.)

Kopatz's older sister, Patricia Lilore, testified that growing up, she and her family were close. (15 RT 2146.) Kopatz was quiet and dependable. (15 RT 2146.) In 1979 she moved to Arizona and was not very close to Mary. (15 RT 2146-2147.) After his accident at work, Kopatz's behavior changed. He had headaches, would slur or stutter, and couldn't finish sentences. (15 RT 2148.) She never saw Kopatz become violent. (15 RT 2148.)

Kopatz's younger brother, Alan Kopatz, testified he envied Kopatz growing up and Kopatz "took [him] under [his] wing." (15 RT 2154.) He had a great childhood. (15 RT 2156.) Kopatz was never in trouble with the law. (15 RT 2154.) According to Alan, Mary was an exceptional woman, a very hard worker, and it appeared Kopatz and Mary had a good marriage. (15 RT 2156.) After Kopatz's injury at work, Mary held the family together. (15 RT 2157.) After the accident, Kopatz lost the ability to play sports, and he suffered headaches and began to stutter. (15 RT 2158.) When Ashley was diagnosed with diabetes, Kopatz and Mary became very involved with the Junior Diabetes Program. They attended fundraisers, walkathons, and raised thousands of dollars for the charity. (15 RT 2158.) Alan stated that he would continue to stay in touch with his brother. (15 RT 2159.)

Kopatz's friend, Charles Marshall, testified that after Kopatz's injury at work, his personality changed. He was withdrawn and less assertive and outgoing. (15 RT 2169-2170.)

Another friend and neighbor, Jimmie Tyson, testified Kopatz was very close to his kids, which made the crimes "hard to comprehend." (15 RT 2174.) According to Tyson, Mary and Kopatz did not appear to have problems with their marriage. (15 RT 2175.) After his injury, Kopatz stuttered more and had to concentrate more than others. (15 RT 2175-2176.)

Further, it was stipulated that Kopatz executed a disclaimer and waiver as to any and all of the insurance policies subject to this case, permitting any and all benefits of those policies to go to his surviving child, Ashley. (15 RT 2182.)

3. Prosecution Penalty Phase Rebuttal Evidence

Mary's former coworker, Jean Black, testified she attended a swim party at Kopatz's house on July 4, 1998. (15 RT 2189.) Prior to the party, Mary told her she was nervous when people stopped by their house unannounced because Kopatz's behavior was unpredictable. (15 RT 2189-2190.) She attributed this behavior to Kopatz's injury and stated she was unhappy in her relationship, which was "not a close loving relationship." (15 RT 2190.) Mary told her Kopatz exhibited anger, outbursts, and used obscenities. (15 RT 2190.) When this occurred, she would leave with the children. (15 RT 2190.)

On the weekend before Easter, prior to the murders, Black saw Mary at the mall. After Ashley asked Mary if they were going home, Mary said, "You saw how mad your father was, we can't go home yet." (15 RT 2191.) On another occasion, during a pool party, Kopatz became upset and was using obscenities, embarrassing Mary. (15 RT 2191-2192.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED KOPATZ'S MOTION TO SUPPRESS HIS STATEMENTS MADE TO POLICE

Kopatz contends the trial court erred in denying his motion to suppress evidence of his interview with police. (AOB 66-103.) First, he argues that the interview was the fruit of an unlawful seizure because police detained Kopatz by transporting him to the Riverside detective bureau and keeping him there for more than an hour. (AOB 74-89.) Next, he contends the interview with police violated his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S. Ct. 1602, 16 L. Ed. 2d 694]["*Miranda*"] because he was subject to a custodial interrogation and no *Miranda* warnings were provided. (AOB 89-94.)

Kopatz's claims should be rejected. First, Kopatz was not seized within the meaning of the Fourth Amendment when he agreed to go with police to the detective bureau for a voluntary interview. Further, *Miranda* advisements were unwarranted because Kopatz was not in *Miranda* custody during his interview. In any event, Kopatz suffered no prejudice from the admission of his interview with police.

A. Procedural and Factual Background

Between at 8:00 and 9:00 p.m. on the night of the murders, Kopatz was taken by paramedics to Riverside Community Hospital after complaining of head and back pain. (8 RT 1003, 1018.) Officer Patrick McCarthy of the Riverside Police Department stayed with Kopatz at the hospital. (8 RT 1020-1021.) After Kopatz was discharged, he walked with Officer McCarthy and his partner, Officer Godner, to a patrol vehicle and was transported to the detective bureau. (8 RT 1020-1021.)

On cross-examination, Officer McCarthy testified he had been directed by Detectives DeVinna and Shumway to transport Kopatz to the

bureau for a voluntary interview. (8 RT 1024-1025.) After receiving this request, McCarthy told Kopatz they were going to the bureau. McCarthy could not recall whether he had asked Kopatz for his permission, but he believed, "I told him we were going to go down to the detective bureau." (8 RT 1025.) Kopatz was not placed under arrest and he did not object to going to the detective bureau. (8 RT 1025-1026.) Kopatz, who was not handcuffed, was escorted into the station. (8 RT 1026.) Detective McCarthy waited at the station while Kopatz was interviewed. (8 RT 1026.) At the conclusion of the interview, McCarthy drove Kopatz to his family's house in Riverside. (8 RT 1026.)

Towards the end the prosecution's case-in-chief, the prosecution recalled Detective Shumway for purposes of presenting Kopatz's interview with police at the Riverside detective bureau at approximately 1:00 a.m. on the morning following the murders. Outside the jury's presence, Kopatz's counsel objected to the introduction of the taped interview, stating the interview was a "result of [an] illegal transport/detention." (12 RT 1707.) Counsel explained that they initially believed Kopatz's transfer from the hospital to the detective bureau had been voluntary, but following Officer McCarthy's testimony indicating that McCarthy had not asked Kopatz's permission to go to the bureau, counsels' position had changed. (12 RT 1707-1708.) Kopatz's counsel further argued that the record indicated that while Kopatz had not been arrested, he was the "focus" of suspicion, and he was brought to the bureau without permission, which amounted to an arrest without probable cause. (12 RT 1708.) Counsel explained that he would have filed a motion to suppress, under section 1538.5, however, until McCarthy's testimony, they were under the belief that Kopatz's transportation to the bureau had been consensual. Citing *Dunway v. New York* (1979) 442 U.S. 200 [99 S. Ct. 2248; 60 L. Ed. 2d 824], *People v. Boyer* (1989) 48 Cal. 3d 247, *People v. Harris* (1975) 15 Cal. 3d 391, and

People v. Aguilera (1996) 51 Cal. App. 4th 1151, counsel asserted that Kopatz's statements to police were the product of an "illegal transport/detention" and an unlawful arrest. (12 RT 1708-1709.) The court asked the parties to provide written case citations, stated it would read Officer McCarthy's testimony, and indicated it would hold a hearing on the admissibility of the interview the following day. (12 RT 1712, 1714-1715.)

The next day, the trial court noted it had received written authorities from both parties.[27] (13 RT 1716.) The prosecution then informed the court that Officer McCarthy was at the hospital with his wife and was unavailable for the hearing. However, Officer Goodner, who also accompanied Kopatz from the hospital to the detective bureau, was available to testify. (13 RT 1716-1717.)

The court then held a hearing regarding the admissibility of Kopatz's interview with police. First, Officer Goodner testified that on April 22, 1999, he was at Kopatz's house for approximately 45 minutes. (13 RT 1718-1719.) During that time, Kopatz was complaining about his back and head. (13 RT 1719.) Kopatz was moving freely around his house at that time and officers were not restricting his movements. (13 RT 1719, 1725-1726.) Later, after Kopatz requested that he be transported to the hospital, one of the sergeants at the scene directed Goodner to go to the hospital and then provide transportation for Kopatz to the detective bureau. (13 RT 1720.) At the hospital, he observed Kopatz in the emergency room area, being readied for release. (13 RT 1721, 1728.) Officer Goodard told Kopatz he was being taken to the detective bureau because, "they would like to talk to him there." (13 RT 1721.) Kopatz stated that this was "Fine." (13 RT 1721.) Kopatz walked out of the hospital on his own

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[27] The handwritten authorities provided by the parties are included in the Clerk's Transcript. (13 CT 3680.)

accord. He was not placed in handcuffs, nor placed under arrest, and his freedom of moment was never restricted or prohibited in any way. (13 RT 1721.)

Officers Goodard and McCarthy drove Kopatz, who was seated in the back seat of the patrol vehicle per standard protocol, to the detective bureau on Spruce Street. (13 RT 1721-1722.) Kopatz was not frisked or searched prior to entering the patrol car. (13 RT 1722.) The drive to the bureau took approximately 10 minutes. (13 RT 1722.) Once there, Officer Goodner opened the car door for Kopatz and Kopatz walked into the station, where he spoke with detectives. (13 RT 1722.) Goodner was asked to wait around to give Kopatz a ride home when the interview was completed. (13 RT 1722.) After the interview, Goodner drove Kopatz to his brother's house. (13 RT 1723.) During the night, Kopatz never stated he wanted to leave, nor did he ask if he was not free to leave. (13 RT 1723.) His movement was not restricted in any manner. (13 RT 1723.) Kopatz did not complain at all during his time with Officer Goodner. (13 RT 1724.)

Detective Shumway testified he and Detective DeVienna interviewed Kopatz at the Spruce Street detective bureau at approximately 1:00 a.m. on April 23, 1999. (13 RT 1737-1738, 1744-1745.) The interview occurred in an unlocked interview room measuring approximately 10 feet by 11 feet. (13 RT 1738.) At the time, Kopatz was being interviewed as a witness. (13 RT 1739.) He was not a suspect. (13 RT 1744.) He was free to leave any time he wished. (13 RT 1748.) Either he or Detective DeVinna had directed assisting officers to bring Kopatz to the bureau. (13 RT 1739.) He never directed the officers to restrain Kopatz's freedom of movement. Kopatz was free to go at any time. (13 RT 1739.) Once Kopatz arrived at the bureau, he was not handcuffed nor was his movement restricted. Kopatz was told he was going to be asked a couple of questions and then he would be free to leave. (13 RT 1741.) Kopatz did not voice any objection

to the interview other than, towards the end, asking how much longer the interview would take. (13 RT 1740.) During the interview, Kopatz drank water. (13 RT 1745.) Also, at some point, Kopatz needed to use the restroom and, per policy, he was escorted to the restroom while Detective Shumway waited outside. (13 RT 1747-1748.) Kopatz did not appear sedated but was somewhat non-responsive and he looked down as he spoke, making it difficult for the officers to hear. (13 RT 1745-1745.) After the interview, Kopatz was free to leave and he was transported to his brother's house. (13 RT 1740.) According to Shumway, the interview never became accusatory. Kopatz was never accused of murdering his wife and daughter. (13 RT 1741.)

The trial court watched the video and reviewed the transcript of Kopatz's interview. (13 RT 1753-1754.) After argument by counsel (13 RT 1754 [prosecutor], 1759-1760 [Kopatz's counsel]), the trial court denied Kopatz's motion. The court expressed that, under the totality of the circumstances, a reasonable person would not have felt that he was in a custodial setting. (13 RT 1761.) As such, because there was no "custodial or arrest situation," there was no requirement that Kopatz be given his *Miranda* rights. (13 RT 1761.) The court allowed the prosecution to play the video of the interview during the prosecution's case-in-chief, "for whatever purpose they think is important in the presentation of evidence." (13 RT 1761.) The video was played during Detective Shumway's testimony. (13 RT 1774.)

B. Kopatz Was Not Seized Within the Meaning of the Fourth Amendment Because His Transportation to the Riverside Detective Bureau and Interview with Police Was Consensual

Kopatz first argues his statements to police should be suppressed because he was unlawfully seized within the meaning of the Fourth Amendment when officers transported him from the hospital to the

detective bureau and conducted his interview. (AOB 74-89.) He asserts that a reasonable person in his situation would not have felt they were free to leave. (AOB 76-83.) He additionally contends he did not consent to being transported and interviewed by police. (AOB 87-89.) Kopatz's claim should be rejected. Kopatz's interaction with the police was a consensual encounter. As a result, he was not seized within the meaning of the Fourth Amendment.

In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. This Court reviews the court's resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. (*People v. Brendlin* (2006) 38 Cal.4th 1107, 1113–1114.)

The Fourth Amendment protects against unreasonable searches and seizures. (U.S. Const., 4th Amend.; *People v. Hernandez* (2008) 45 Cal. 4th 295, 299.)

> " 'For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police "contacts" or "interactions" with individuals, ranging from the least to the most intrusive. First, there are . . . "consensual encounters" . . ., which are those police-individual interactions which result in no restraint of an individual's liberty whatsoever--i.e., no "seizure," however minimal--and which may properly be initiated by police officers even if they lack any "objective justification." . . . Second, there are what are commonly termed "detentions," seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police "if there is an articulable suspicion that a person has committed or is about to commit a crime." . . . Third, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual's liberty which are comparable to an

arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime.' "

(*People v. Hughes* (2002) 27 Cal. 4th 287, 327-338 citing *In re James D.* (1987) 43 Cal. 3d 903, 911-912.)

A seizure occurs when the police, "'by means of physical force or show of authority,'" restrains the individual's freedom of movement. (*People v. Celis* (2004) 33 Cal.4th 667, 673.) Whether a seizure has occurred is determined by an objective test that asks not whether the individual perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. (*Ibid.*) When the officer engages in conduct that would communicate to a reasonable person that he was not free to ignore the officer's presence and go about his business, there has been a seizure. (*Ibid.*) Circumstances establishing a seizure can include the presence of several deputies, a deputy's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the deputy's request might be compelled. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

"As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual. . . ." (*People v. Terrell* (1999) 69 Cal.App.4th 1246, 1253; *In re Manuel G., supra*, 16 Cal.4th at p. 821.) An officer's uncommunicated state of mind and the subjective belief of the individual citizen are irrelevant in determining whether a Fourth Amendment seizure has occurred. (*In re Manuel G., supra*, 16 Cal 4th, at p. 821; *People v. Castaneda, supra*, 35 Cal.App.4th 1222, 1227.) Moreover, an officer's "beliefs concerning the potential culpability of the individual being questioned" are relevant to determining whether a seizure occurred "only if" those beliefs "were somehow manifested to the individual" being interviewed—"by word or

deed"—and "would have affected how a reasonable person in that position would perceive his or her freedom to leave." (*Stansbury v. California* (1994) 511 U.S. 318, 325[114 S. Ct. 1526; 128 L. Ed. 2d 293]; *People v. Zamudio* (2008) 43 Cal.4th 327, 346.) Indeed, "[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the. . .issue, for some suspects are free to come and go until the police decide to make an arrest. The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case." (*Stansbury v. California, supra*, 511 U.S. at p. 325; *People v. Zamudio*, 43 Cal. 4th at p. 345.) Because an officer on duty is likely to be in uniform, display a badge, and carry a weapon, those factors are generally irrelevant to determining the nature of the contact. (See *People v. Zamudio, supra*, 43 Cal. 4th at p. 346.)

In view of all of the circumstances here, Kopatz was not seized within meaning of the Fourth Amendment. His interactions with the officers were consensual and resulted in no restraint on his liberty. As in *People v. Zamudio, supra*, 43 Cal. 4th at p. 344, "[t]he evidence in the record supports the conclusion that there was no threat or application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, and no command associated with the officers' request that defendant come to the police station." Rather, here, Kopatz initiated the police involvement by reporting his wife missing. (6 RT 900; 13 CT 3467-3485.) Subsequently, following the discovery of Mary and Carley's body, Kopatz went to the hospital in an ambulance after complaining of neck and back pain. (8 RT 1003, 1018.) When he was discharged, Kopatz was told he was going to be taken to the detective bureau to speak with the police. (8 RT 1025; 13 RT 1721.) Kopatz understood that it was his choice whether or not he went to the detective's bureau to assist police with the

investigation upon leaving the hospital as evidenced by him giving his consent, stating was "Fine." (13 RT 1721.) He walked, without handcuffs, to the patrol vehicle. (13 RT 1721.) He was not frisked nor searched prior to entering the backseat of the car. (13 RT 1722.) During the ten minute drive to the bureau, Kopatz voiced no complaints nor opposition. (13 RT 1724.) At this point, prior to arrival at the bureau, the police had not restrained Kopatz's freedom of movement whatsoever "'by means of physical force or show of authority.'" (*People v. Celis*, *supra*, 33 Cal.4th at p. 673.)

Once at the station, Kopatz, unrestrained in any manner, went with police into an unlocked interview room to speak with police about his wife and daughter. (13 RT 1738, 1740.) The interview began immediately upon his arrival at the station. (13 RT 1744.) Kopatz was told he was going to be asked "some" questions and then he could "get out of here," meaning he would be free to leave. (13 RT 1740-1741; 13 CT 3636.) Thus, officers clearly conveyed to Kopatz the fact he was allowed to leave the bureau, and thus, he was not under arrest. The interview itself was investigatory and was not "hostile, menacing, or accusatory." (*People v. Zamudio*, 43 Cal. 4th at p. 345.) When Kopatz stated he was tired at one point, the police told him they would, "try to get this done as quickly as we can." (13 CT 3639.) Kopatz was allowed to use the restroom following the interview. (13 RT 1747-1748.) Moreover, making good on their earlier promise to Kopatz, at the conclusion of the interview, Kopatz was driven to his brother's house in Riverside, consistent with the absence of any seizure. (13 RT 1723, 1740.)

Based on the foregoing, Kopatz's transportation to the detective bureau and subsequent interview with police was a consensual encounter which resulted in no restraint of his liberty. Accordingly, Kopatz's motion to suppress was properly denied.

C. The Trial Court Properly Denied Kopatz's Motion To Suppress His Statements Because *Miranda* Advisements Were Unwarranted; Kopatz Was Not In *Miranda* Custody When He Was Questioned at the Detective Bureau

Kopatz further contends his statements should be suppressed because his interview with police was a "custodial interrogation" but no *Miranda* warnings were given. (AOB 89-93.) He asserts that a reasonable person in his position would not have felt free to leave the interview. (AOB 91.) Admission of Kopatz's interview was proper. *Miranda* warnings were not required because substantial evidence demonstrates Kopatz was not in custody for the purposes of *Miranda* during the interview. However, if the court erred in admitting any Kopatz's interview, the error was, without a doubt, harmless.

In reviewing a claim that a statement is inadmissible because it was obtained in violation of a defendant's rights under *Miranda*, the reviewing court "'evaluate[s] the trial court's factual findings regarding the circumstances surrounding the defendant's statements" (*People v. Dykes* (2009) 46 Cal.4th 731, 751, quoting *People v. Rundle* (2008) 43 Cal.4th 76, 115) but "accept[s] the trial court's determination of disputed facts if supported by substantial evidence." (*People v. Davis* (2009) 46 Cal.4th 539, 586) The reviewing court "independently decide[s] whether the challenged statements were obtained in violation of *Miranda*." (*Ibid.*; *People v. Dykes, supra*, 46 Cal. 4th at p. 751.) This Court:

> Accept[s] the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. Although [this Court] independently determine[s] whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained, [this Court] give[s] great weight to the considered conclusions of a lower court that has previously reviewed the same evidence.

(*People v. Wash* (1993) 6 Cal.4th 215, 235-236, citations omitted; accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

"Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. When reviewing a trial court's determination that a defendant did not undergo custodial interrogation, an appellate court must 'apply a deferential substantial evidence standard' [Citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave'" [Citation.] (*People v. Leonard* (2007) 40 Cal. 4th 1370, 1400.)

A defendant must be advised of his or her *Miranda* rights whenever he or she is in custody and

> is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

(*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 [100 S.Ct. 1682, 64 L.Ed.2d 297] fns. omitted.)

Generally, a person is in "custody" when he has "been taken into custody or otherwise deprived of his freedom of action in any significant way." (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) However, "custody" requires something more than simply being questioned at a police station as a suspect. (See *Oregon v. Mathiason* (1977) 429 U.S. 492, 495[97 S. Ct. 711; 50 L. Ed. 2d 714][no custody when Kopatz came voluntarily to the police station, and was immediately informed that he was not under

arrest].) Furthermore, "[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." (*Stansbury v. Cal., supra,* 511 U.S. at p. 325.)

Where the questioning takes place somewhere other than at a police station, the person is considered to be in *Miranda* custody when there has been "a formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citations.]" (*People v. Morris* (1991) 53 Cal.3d 152, 197.) When, as in this case, the questioning takes place at a police station, *Miranda* "custody" will exist if someone in the suspect's place, based on the objective circumstances, would reasonably believe that he is not free to leave. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 662[124 S. Ct. 2140; 158 L. Ed. 2d 938]; *California v. Beheler* (1983) 463 U.S. 1121, 1125[103 S. Ct. 3517; 77 L. Ed. 2d 1275]; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.) Thus, "[w]here no formal arrest takes place, the relevant inquiry . . . is how a reasonable man in the suspect's position would have understood his situation." (*People v. Boyer* (1989) 48 Cal.3d 247, 272, overruled in part by *People v. Stansbury, supra,* 9 Cal.4th at p. 830, fn. 1; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442[104 S. Ct. 3138; 82 L. Ed. 2d 317].)

This Court is to consider the totality of the circumstances, including whether the suspect agreed to the interview; whether the suspect was told he or she could terminate the questioning; whether the suspect's movement was restricted during the interview; whether the objective indicia of arrest are present; and the length and form of questioning. (*People v. Stansbury, supra,* 4 Cal.4th at p. 1050; *People v. Pilster, supra,* 138 Cal.App.4th at pp. 1403-1404.) However, no one factor is dispositive. (*People v. Morris, supra,* 53 Cal.3d at p. 197.)

Lengthy and detailed questioning, even over several hours, would not lead a reasonable person to believe his or her freedom of movement had been impaired where the tone is generally nonaccusatory. But even pointed questioning about a suspect's involvement does not convert the questioning into a custodial interrogation. (*People v. Morris, supra*, 53 Cal.3d at pp. 197-198; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1164; *People v. Spears* (1991) 228 Cal.App.3d 1, 21-26.)

Here, the trial court properly found Kopatz was not in custody for the purposes of *Miranda* based on the totality of the circumstances. (13 RT 1761.) A reasonable person in Kopatz's position would not believe that he was not free to terminate the interview and leave the detective bureau. As discussed above, Kopatz consented to being interviewed at the station following his discharge from the hospital. He was told he was going to be taken to the detective bureau to speak with the police. (8 RT 1025; 13 RT 1721.) Kopatz stated this was "Fine." (13 RT 1721.) He walked, without handcuffs, to the patrol vehicle. (13 RT 1721.) He was not frisked nor searched prior to entering the backseat of the car. (13 RT 1722.) During the ten minute drive to the bureau, Kopatz voiced no complaints nor opposition. (13 RT 1724.) Certainly, a reasonable person, knowing that police were investigating a murder, would understand they were not a suspect and thus were free to leave under these circumstances, i.e., no arrest, handcuffs, or restraint of his freedom.

Once at the station, Kopatz, still without handcuffs, went with police into an unlocked interview where he was promptly interviewed. (13 RT 1744.) At the beginning of the interview, Kopatz was told he was going to be asked "some" questions and then he could "get out of here," meaning he would be free to leave. (13 RT 1740-1741; 13 CT 3636.) Indeed, at the end of the interview the detectives did not arrest him; instead they took him

home. (See *People v. Leonard, supra,* 40 Cal. 4th at p. 1401.) Moreover, the questioning during the interview was nonaccusatory. Rather, the detectives' questions were investigatory in nature, asked in an effort to determine what Mary and Carley had done that morning, and inquiring into the circumstances surrounding Kopatz's activities that day. Nothing indicates the detectives' demeanor was overbearing, and Kopatz answered the questions posed by them. While, at one point the officers asked Kopatz to look at them, Detective Shumway testified this was only because they were having difficulty understanding Kopatz, because he kept looking down. (13 RT 1746.)

In *Oregon v. Mathiason, supra,* 429 U.S. 492, the defendant agreed to be interviewed at the police station about a burglary, and a convenient time was agreed upon. The defendant drove himself and upon arrival was informed that he was not under arrest. The interview took place in a closed office, and the defendant was not restrained. The officer told him that the police believed he was involved in the offense and falsely told him that his fingerprints had been found at the scene. After a few minutes, the defendant admitted he had taken the property. (*Id.* at p. 493.) The Court concluded that the defendant was not in *Miranda* custody because there was no indication that his freedom to depart was restricted. The Court also noted that a noncustodial situation is not converted into one in which *Miranda* applies simply because the questioning took place in a "coercive environment." (*Id.* at p. 495.)

> . . . Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the

> questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

(*Id.* at p. 495.)

In *People v. Holloway, supra*, 33 Cal.4th 96, the defendant had initially been handcuffed at his parole agent's office. When detectives arrived, they removed the handcuffs and told the defendant he was not under arrest. They asked to interview him at the station, indicating he could come with them or get a ride from a friend. The defendant rode with the detectives. At the beginning of the interview, the detectives confirmed that he was not under arrest, that he had volunteered to come to the station, and was not in handcuffs. The defendant eventually made incriminating statements which were admitted at trial. (*Id.* at p. 119.) This Court concluded that the defendant was not in *Miranda* custody. The setting was "objectively inconsistent with a degree of restraint equivalent to arrest; no reasonable person would believe under these circumstances that he was compelled to accompany the officers or to remain with them during the interview." (*Id.* at p. 120.)

Similarly, in *People v. Leonard, supra*, 40 Cal.4th 1370 (*Leonard*), the defendant was a suspect in a series of murders in Sacramento and wanted for questioning. The police went to the defendant's apartment and asked him if he would accompany them to the sheriff's station to be fingerprinted and answer questions. (*Id.* at p. 1398.) The defendant stated that he was too busy at the moment but that he would be available the next day. (*Ibid.*) The following day, because the defendant had epilepsy and could not drive, the police officers picked him up and took him to the sheriff's station. (*Ibid.*) At no time during the drive was the defendant handcuffed. (*Ibid.*) At the station, the defendant was fingerprinted and

taken to an interview room, which was not locked. (*Leonard, supra*, 40 Cal.4th at pp. 1398, 1401.) "At the beginning of the interview, [the officer] told defendant he was not under arrest, he did not have to answer any questions, and he was free to leave anytime." (*Id.* at p. 1398.) During the interview, the defendant made damaging statements which were used against him at trial. (*Id.* at pp. 1398-1399.) When the interview ended, the officers drove the defendant back to his apartment. (*Id.* at p. 1399.) On appeal, the defendant in *Leonard* argued that the statements were improperly used against him at trial because he was subject to custodial interrogation and not advised of his *Miranda* rights. (*Leonard, supra*, 40 Cal.4th at pp. 1399-1400.) Applying the standards set forth above, this Court found the defendant "was not subjected to custodial interrogation" because "a reasonable person in his position would have felt free to leave." (*Id.* at pp. 1400-1401.)

In this case, Kopatz's questioning closely mirrors the questioning in *Leonard* and *Holloway*. Here, as in those two cases, officers gave defendants a ride to station; the defendants were not handcuffed, and were placed in an unlocked interview room. Further, as in *Leonard*, Kopatz was driven home at the conclusion of the interview. Although Kopatz was not expressly told he was not under arrest and he was free to leave, Kopatz was told he was going to be asked "some" questions and then he could "get out of here." (13 RT 1740-1741; 13 CT 3636.) Coupled with the fact he was unhandcuffed, had not been frisked, and was not otherwise restrained, this reasonably conveyed that Kopatz was free to leave. (13 RT 1740-1741; 13 CT 3636.)

Based on the foregoing, "a reasonable person . . . would have felt free to leave" and therefore Kopatz "was not subject[] to custodial interrogation." (*Leonard, supra*, 40 Cal.4th at pp. 1400-1401.) Consequently, because Kopatz was not subject to custodial interrogation,

Miranda does not apply. Therefore, the trial court did not err in denying the motion to suppress his interview with police.

D. There Was No Prejudice From The Admission of Kopatz's Interview

Even if error occurred from the admission of Kopatz's interview it was harmless. The admission of a statement made in violation of *Miranda* is reviewed under the test of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 87 S. Ct. 824], which requires reversal unless the error was harmless beyond a reasonable doubt. (*People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) Error in denying a suppression motion on Fourth Amendment grounds is also subject to *Chapman*. (*People v. Moore* (2011) 51 Cal. 4th 1104, 1129; *People v. Prince* (2007) 40 Cal. 4th 1179, 1250.) An error is harmless when it does not contribute to the verdict because it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403[111 S. Ct. 1884; 114 L. Ed. 2d 432], disapproved on another ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 73, fn. 4 [116 L. Ed. 2d 385, 112 S. Ct. 475].)

Here, there was overwhelming evidence of Kopatz's guilt, notwithstanding admission of the interview. Kopatz's statements to police were not essential to the proof of Kopatz's involvement in the crime because, in large part, any inculpatory statements contained in the interview were also made to and admitted at trial through other witnesses. His statements to friends and family and his behavior following the crimes, and physical evidence left in the van, on his person, and at his house, as well as a variety of other circumstantial evidence all pointed to Kopatz as the perpetrator of Mary and Carley's murders.

After Ashley experienced high blood sugar levels, beginning at around 11:30 a.m., school officials repeatedly and unsuccessfully attempted

to contact Kopatz on his home phone, cell phone, and pager. (4 RT 534-537, 570-571.) Similarly, after Mary failed to show up at work at 11:00, her Jenny Craig co-workers also continually called Kopatz to no avail. (5 RT 588-590, 597-598, 670-671.) Finally, at 1:15 p.m., Kopatz surfaced, when he contacted Jenny Craig and spoke to Jean Black. (5 RT 673-674.) Kopatz explained to those concerned that Mary and Carley had run errands. (5 RT 673, 601.) Thus, although he was aware Mary was supposed to be at work at 11:00 and would have to drop Carley off at home prior to going to the office, Kopatz waited until 1:15 p.m. to question his wife and daughter's whereabouts, feebly explaining he had been in the back yard digging and had lost track of time. (5 RT 673-674.) It wasn't until 3:15 p.m. that Kopatz, lamenting that it was a "fucking pain in the ass," was finally convinced to call the police to report his wife and daughter missing. (5 RT 633.) Additionally, evidence was presented showing that Mary always carried her cell phone. (5 RT 674, 677.) However, Mary's cell phone and pager had been left at home that day. (5 RT 630, 632, 673.) Also, at the house, Doug Burdick observed a set of woman's rings that appeared to be Mary's in a dish next to the bathroom sink. (5 RT 649, 662.) Burdick testified that one of the rings he saw in the bathroom "had a similar cut" to Exhibit 23A, which was a photograph of Mary's Ring. The other that he saw was "very, very similar" to Exhibit 23B, Mary's anniversary band. (5 RT 662-664; 11 RT 1573-1574.) Mary's rings were missing when her body was found. (9 RT 1232.) The rings were insured for $13,628. (11 RT 1573-1574.) Kopatz made an insurance claim for Mary's rings only four days after the murders. (11 RT 1574, 1579.)

Additionally, Kopatz made several false or misleading statements following the disappearance of his wife and daughter. A defendant's false or misleading statements are admissible at trial to support an inference of

consciousness of guilt. (*People v. Edwards*, *supra*, 8 Cal.App.4th at p. 1102; 14 CT 3700 [CALJIC No. 2.03].) Kopatz claimed he thought that his wife had taken Carley to work because it was "take-your-daughter-to-work day." (5 RT 601; 8 RT 1001, 1011.) However, Jenny Craig, did not have a take-your-daughter-to-work day, and recently, Mary Kopatz had told everyone at the office not to bring their children to work because of liability issues. (5 RT 601-602.)

Further, Kopatz's statements concerning when he last saw the victims were not consistent. Kopatz told Mary Burdick that Mary and Carley had left the house between 8:30 and 9:00, after returning from dropping Ashley off at school at 8:00 a.m. (5 RT 601.) However, when Kopatz first called police to report Mary and Carley missing, Kopatz indicated he had last seen them at 7:30, when he left to take Ashley to school. (13 CT 3481.) Recognizing the significance of this inconsistency, the prosecution aptly noted that, "You don't forget and make a mistake as to when you last saw your wife and your daughter, unless you're lying." (14 RT 1907.)

Moreover, Kopatz claimed he had called Sav-On to see if Mary had picked up her prescriptions. (5 RT 686.) However, the prosecution presented the testimony of six Sav-On employees who testified that they were working on the morning of April 22, 1999 and they did not recall receiving a phone call from Kopatz asking if his wife picked up a prescription. (6 RT 750 [Frank Lombardo], 763 [Mercedes Brand]; 11 RT 1147 [Kevin Rawls], 1156 [Juana Longoria], 1162-1163 [Tina Shaw], 1172 [Sally Swor].) According to Lombardo, such a phone call would have been unusual because it was Kopatz who usually picked up the prescriptions from the store. (6 RT 748, 750.)

Additionally, following the crimes, Kopatz had redness and several fresh scratches, abrasions, and "gouges" on his hands, arms, face, and eye.

(4 RT 554-557; 8 RT 1061, 1063, 1065-1066; 9 RT 1280-1281.) He attempted to conceal the lacerations on his hands with blue PVC glue. (5 RT 640, 688; 8 RT 1062-1063.) He was uncooperative when police attempted to photograph his hands. (9 RT 1210.) As the jury was instructed, efforts to conceal evidence could be considered as a circumstance tending to show a consciousness of guilt. (14 CT 3701; CALJIC No. 2.06.) Further, despite his claim that he'd been digging in the backyard all day, his hands and clothing were clean. (5 RT 640.) Doug Burdick observed that Kopatz was not sweaty nor did he appear to have been digging. (5 RT 641, 648.)

The bodies of Mary and Carley were found in Kopatz's van, roughly one mile from Kopatz's house. (13 RT 1771.) Fingerprints lifted from the driver's side of the vehicle matched Kopatz's prints and the front driver's seat of the van was at its furthest position back, suggesting Kopatz had been driving the vehicle. (9 RT 1245, 1248; 12 RT 1634-1637.) Les Ballou observed Kopatz walking near the van on the morning of the murders. (6 RT 858, 862.)

Inside the van, police found two blank checks from the Kopatz checking account which had been torn up, and Mary's wallet, containing $20 and her credit cards. (9 RT 1230-1231, 1251-1252, 1258-1259.) This suggested Kopatz had staged the crime scene effort to make it appear that a robbery was committed. (13 RT 1777-1778, 1780.) Also, Mary's clothing had not been forcibly removed. (13 RT 1780.) Rather, her shirt was lifted up, partially exposing her breasts. Her bra was cut, and her pants were neatly unbuttoned, which was inconsistent with an actual sexual assault occurring. (13 RT 1779-1780.) There was no evidence that Carley had been sexually assaulted. (13 RT 1781.) This was evidence Kopatz staged the crime to appear that sexual assault had occurred. (13 RT 1778-1779.) While numerous receipts were found in the van, none of them were dated

April 22, 1999, the day of the murders, showing Mary had not run errands that morning. (9 RT 1261.) It was obvious to police that the victims had been killed elsewhere. (13 RT 1782.)

Furthermore, the forensic evidence pointed to Kopatz as his wife and daughter's killer. Human tissue found under Mary's broken fingernail matched Kopatz's DNA profile. (10 RT 1369, 1382, 1426-1428.) Moreover, Mary's blood was found on hallway doorjamb of Kopatz's house (10 RT 1448-1449; 11 RT 1587-1588), supporting the prosecution's theory that Mary and Carley were killed in the house, then placed in the van. More blood was found in the house on carpet near the hallway doorjamb, although police were unable to determine the source, quite possibly because Kopatz had used a cleaning solution on the carpet in an effort to remove the stain. (10 RT 1446, 1591.) The carpet fibers also appeared to have been cut (10 RT 1447), which could have been another attempt by Kopatz to hide the bloodstain.

Additionally, significant evidence established the murders were committed for financial gain. As the jury was instructed, presence of a motive could establish that the defendant is guilty. (14 CT 3709; CALJIC No. 2.51.) Kopatz, who did not work after becoming disabled, had lost substantial amounts of money in his commodities accounts the year preceding the killing. (11 RT 1513-1514.) He had $117,000 in credit card debt and his expenses exceeded his income by over $4,000 a month. (11 RT 1515-1525.) Kopatz stood to receive over $800,000 in life insurance benefits from nine policies upon the death of Mary and Carley. (11 RT 1479-1482, 1502-1507, 1526-1528, 1533-1534, 1551, 1567, 1603; 12 RT 1669, 1671.) Moreover, as noted, Kopatz made an insurance claim for Mary's rings, which were insured for more than $13,000, only four days after the murders. (11 RT 1574, 1579.) Callously, the days before and after the murders, Kopatz played a "fantasy stock game" online with his

hypothetical riches, suggesting he was already counting the money he stood to receive from his wife and daughter's deaths. (11 RT 1501-1502.)

Kopatz contends admission of the interview was prejudicial because his statement to police regarding when he last saw Mary and Carley differed from his statement in the missing person report. (AOB 99.) However, as noted above, Kopatz also told Mary Burdick that Mary and Carley had left the house between 8:30 and 9:00 a.m., after he returned from dropping Ashley off at school at 8:00 a.m. (5 RT 601.) This statement was contrary to his statement in the missing person report indicating he last saw his wife and daughter before dropping Ashley at school. (13 CT 3481.) Thus, evidence of the discrepancy in when Kopatz claimed to have last seen his wife and child was already admitted through another witness. Similarly, Kopatz complains he suffered prejudice because in the interview he stated he worked in the dirt all day, but Detective Shumway commented that his hands were clean. (AOB 100.) Again, as noted above, evidence that Kopatz hands were clean and Kopatz did not appear to have been working in the dirt was admitted through the testimony of Doug Burdick. (5 RT 640-641, 648.)

In sum, admission of Kopatz's interview with police was harmless beyond a reasonable doubt. The trial court's ruling should be upheld.

II. EVIDENCE OF LES BALLOU'S PRIOR CONSISTENT STATEMENT WAS PROPERLY ADMITTED

Kopatz contends the trial court erred by admitting statements of Les Ballou through the testimony of his widow, Mae Ballou, under the hearsay exception for prior consistent statements of a witness. (AOB 103-129.) Kopatz further contends he was prejudiced by admission of this testimony. (AOB 127-129.) Kopatz's claim should be rejected. Mae Ballou's testimony was properly admitted to support Les Ballou's credibility as a hearsay declarant under Evidence Code sections 791 and 1202. Further,

even assuming the evidence was improperly admitted, any error was harmless. As Kopatz recognizes, Mae Ballou's testimony simply repeated that of her husband, Les, which was properly admitted, and thus, it was merely cumulative. Hence, it is not reasonably probable that any erroneous admission affected the verdict.

A. Procedural Background

Les Ballou died on July 20, 2000, prior to Kopatz's trial. (6 RT 854.) During trial, his preliminary hearing testimony was read to the jury, without objection, pursuant to the testimony exception to the hearsay rule in Evidence Code section 1291, subdivision (a)(2).[28] (6 RT 856 et seq.)

As previously noted, Ballou testified he lived at 4466 Nellie, around the corner from Duncan Street, where the bodies of Mary and Carley were found. (6 RT 857.) Between 10:00 and 10:30 a.m. on the day of the murders, he was in his front yard and he observed a man, he identified as Kopatz, walk by his home. (6 RT 858, 862.) Ballou said "hi" to Kopatz. (6 RT 858.) Kopatz was "dour," looked angry, and was not very nice, "[k]ind of like he was mad at something." (6 RT 858-859.) According to Ballou, the way Kopatz said "hello" back to him "wasn't really very nice." (6 RT 860.) Kopatz was alone and walking at a normal pace. (6 RT 859.) He wore a dark colored "sports shirt." (6 RT 859.)

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[28] At the time of Kopatz's trial, Evidence Code section 1291 provided in relevant part:

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

Kopatz was arrested on May 28, 1999. (6 RT 849.) On June 3, 1999, after his first court appearance, Kopatz's photograph was published in the Riverside Press-Enterprise newspaper. (6 RT 850.) When Ballou saw the photograph, he told his wife, "That's the man I saw walking down the street." (6 RT 860.) Shortly thereafter, Ballou spoke to Detective Shumway and stated he was "99.9 percent" sure that the person in the photograph was the same person he saw walking on the day the bodies were found. (6 RT 850, 861.) He provided Detective Shumway with the photograph of Kopatz from the Press-Enterprise, which was sitting on a table when Detective Shumway arrived. (6 RT 853.) Ballou had no advanced notice that Detective Shumway was coming to his house. (6 RT 854.)

On cross-examination, Ballou testified he spoke to police a day after the bodies were found. (6 RT 864.) He did not tell them about seeing a man walk by his house. (6 RT 864.) He did not tell police about Kopatz until June 26, when he was interviewed at his house by Detective Shumway. (6 RT 865, 868.) At that time, he told Shumway he saw Kopatz on the same day as the homicides. (6 RT 869.) Ballou's answer was non-responsive when asked by Kopatz's counsel how he remembered that it was the day of the murders, and not some other day, when he saw Kopatz walk by his house. (6 RT 866-867.) He told his wife about the man he saw walking a few minutes after he saw him. (6 RT 867.) Referring to the photo of Kopatz from the newspaper, Ballou told Detective Shumway, "That sure looks like the fellow that I saw that day." (6 RT 869-870.) Ballou testified he had never seen Kopatz in a lineup and his observations of Kopatz in the courtroom when he testified during the preliminary hearing was the first time he had seen him in person, other than on the day of the murders. (6 RT 871-872.) He was aware he would be asked to identify the person he saw in the newspaper at court. (6 RT 872.) When

Ballou saw the newspaper, he told his wife, "That person resembles the person who walked down the street" or ""That's the man that I saw walk by." (6 RT 872-873, 878.) According to Ballou, Kopatz was wearing a sports shirt and had dark hair. (6 RT 873-874.) Kopatz's hair was thinning; however, Ballou never mentioned this fact to police. (6 RT 874.) He did not notice any scratches, abrasions, or bumps on Kopatz. (6 RT 875.) Kopatz did not have a mustache on the day Ballou observed him, although, in the photo from the newspaper, he did. (6 RT 876.)

Towards the end of the prosecution's case-in-chief, the defense objected to the prosecution's witness, Mae Ballou, Les Ballou's widow, who was anticipated to testify to a prior consistent statement regarding the identification of Kopatz made by her husband. (12 RT 1607.) Kopatz's counsel noted that there had been no evidence of a prior inconsistent statement, and "you have to have a prior inconsistent statement before a prior consistent statement is introduced." (12 RT 1607.) Counsel also expressed that testimony that Les told police he had not seen anything unusual the day of the murders did not qualify as a prior inconsistent statement. (12 RT 1607-1608.)

The prosecutor argued that Mae Ballou's testimony was admissible as a prior consistent statement under Evidence Code section 791, noting that Les was cross-examined at length at the preliminary hearing, and his recollection as to whether he had seen Kopatz the day of the murders been challenged. (12 RT 1608.) The prosecutor explained that on cross-examination, Les Ballou had indicated he had told his wife about Kopatz, but also, on cross-examination, testified that when he spoke to Officer May, he stated he had not seen anything or anyone unusual that day. (12 RT 1608.) Thus, according to the prosecutor, Les Ballou's statement to his wife regarding his observation of Kopatz, made prior to his observation of Kopatz's photo, was a consistent statement which corroborated the fact he

did see a person pass by his house on April 22, as he indicated in his testimony. (12 RT 1608.)

Kopatz's counsel additionally argued he did not believe the proper foundation had been established to allow a prior consistent statement of Les Ballou, suggesting the prosecution failed to allege, "that the defense has alleged either improper motive on behalf of Mr. Ballou...or recent fabrication." (12 RT 1609.)

The trial court expressed that Les Ballou's statement to his wife about seeing "an individual" was admissible, "not for the truth" because Ballou's credibility was placed at issue when he was cross-examined about whether he was mistaken regarding the identification of Kopatz. (12 RT 1609.)

Secondly, as to whether Ballou's statement to his wife was admissible for its truth, the prosecutor expressed that Ballou's cross-examination "was an attack on his credibility" with regard to whether Ballou had actually seen Kopatz walk by on the day of the murders. (12 RT 1610.) The prosecution further stated the "tenor" of cross-examination was that that Ballou was fabricating the fact he saw Kopatz after viewing the newspaper photo. (12 RT 1610.) According to the prosecutor, Les Ballou's statement to his wife was admissible to rebut the "insinuation of fabrication" from the subsequent identification of Kopatz from the newspaper photo. (12 RT 1610-1611.)

The Court ruled Mae Ballou's testimony was admissible, "as to both purposes," but recognized the only purpose the prosecution wanted to use her testimony was for "the truth versus the nontruth." (12 RT 1611.)

Mae Ballou then testified that on the day of the murders, April 22, 1999, her husband was out front of their house "taking care of" gophers. (12 RT 1614.) At some point, prior to noon, while she was gardening, her husband told her he said "hello" to a man that walked by and the man ignored him and walked away. (12 RT 1615.) Mae though the lack of

response from the man hurt her husband's feelings. (12 RT 1615.) Mae further testified she was present when her husband saw Kopatz's photo in the newspaper. (12 RT 1616; Exhibit 22.) At that time, Les told her that Kopatz was the same man who passed by him without saying "hello." (12 RT 1617.) She asked Les if he was sure. (12 RT 1617.) He said he was. (12 RT 1617.) Later, the police questioned them about their recollections of that day and about the photograph. (12 RT 1616-1617.) Les Ballou did not have any memory problems. (12 RT 1617-1618.)

On cross-examination, Mae testified that when her husband was interviewed by police in June after he observed Kopatz's photo in the newspaper, Les told police Kopatz was the person he had seen on the day of the murders. (12 RT 1620-1622.) However, on April 23, the day after the homicides, when they spoke to Detective May, she and Les told Detective May that the only thing unusual that they saw on April 22 was an AT&T repairman working on a roof. (12 RT 1626-1628.)

Later, Detective Shumway testified that he interviewed Les and Mae at their house on June 26, 1999. (13 RT 1777.) Mae told Detective Shumway that Les had told her about seeing a man before he saw the picture in the newspaper. (13 RT 1777.) During the interview, Mae said her husband told her he "saw a picture that resembled the person..." and that the picture "Really looked like him." (13 RT 1791.)

When the defense took Shumway as their own witness, Shumway testified that on April 23, 1999, Detective May interviewed Les and Mae Ballou. (13 RT 1789-1790.) During that interview, Les did not mention seeing someone walking in front of his house on April 22. (13 RT 1790.) Nor did Mae Ballou mention that Les had told her he had seen someone unfamiliar walk by their house. (13 RT 1790-1791.)

B. While Les Ballou's Prior Consistent Statements Were Not Admissible Pursuant to Evidence Code Sections 1236 and 791, they Were Admissible Pursuant to Evidence Code Section 1202

Kopatz argues that the trial court prejudicially erred when it admitted, as prior consistent statements, Mae Ballou's testimony regarding her husband's identification of Kopatz. (AOB 107-129.) Kopatz correctly notes that the prior statements of Les Ballou were not admissible as substantive evidence under Evidence Code section 1236, nor to support his credibility as a witness under Evidence Code section 791, because Les Ballou did not testify at the trial, but rather, he was a hearsay declarant. (AOB 107-114.) However, he erroneously contends the prior consistent statements were not admissible to support Les Ballou's credibility as a hearsay declarant under Evidence Code sections 791 and 1202 because the foundation requirements of Evidence Code section 791 were not met. (AOB 114-126.) Although admitted under the wrong legal theory, as explained below, the prior statements of Les Ballou were admissible, and even assuming error, Kopatz cannot demonstrate prejudice.

This Court reviews a trial court's ruling on an evidentiary question for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Welch* (1972) 8 Cal.3d 106, 117.) A trial court's exercise of discretion will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) "[D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65; see also *People v. Waidla* (2000) 22 Cal.4th 690, 725.) Additionally, admission of evidence pursuant to a hearsay exception is reviewed under an abuse of discretion standard. (*People v. Martinez* (2000) 22 Cal.4th 106, 120.) However, in terms of varying underlying factual

matters pertinent to the hearsay determination, a trial court's ruling will be upheld if it is supported by substantial evidence. (Cf. *People v. Phillips* (2000) 22 Cal.4th 226, 235-236; *People v. Cudjo* (1993) 6 Cal.4th 585, 608-609.)

"In general, hearsay evidence is inadmissible. Evidence Code section 1200 provides, in pertinent part: '(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. [] (b) Except as provided by law, hearsay evidence is inadmissible.'" (*Correa v. Superior Court* (2002) 27 Cal.4th 444, 451.)

Evidence Code section 1236 provides:

> "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 791."

Under Evidence Code section 791, evidence of a statement made by a witness that is consistent with his testimony at the hearing can be admitted to support his credibility when: (1) a prior inconsistent statement is admitted and the consistent statement predated the inconsistent statement, or (2) an express or implied charge is made to show the witness's testimony is recently fabricated, influenced by bias, or improperly motivated "and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791, subds. (a), (b).)

Here, the trial court ruled Mae Ballou's testimony regarding Les Ballou's statements was admissible, "as to both purposes." (12 RT 1611.) Thus, it appears that the trial court admitted the prior consistent statements under both Evidence Code sections, i.e., as substantive evidence under Evidence Code section 1236, and as rehabilitative evidence under Evidence Code section 791. Kopatz first contends that the trial court erred in

admitting the evidence under these sections because Les Ballou did not testify at trial. Rather, his preliminary hearing transcript testimony was read into the record under the former testimony exception to the hearsay rule. (AOB 107-114.)

As Kopatz correctly notes, both Evidence Code sections 1236 and 791 allow for the admissibility of a statement that is consistent with the witnesses' testimony at "the hearing." Evidence Code section 145 defines "The hearing" as "the hearing at which a question under this code arises, and not some earlier or later hearing." (Evid. Code § 145.) (See *People v. Hitchings* (1997) 59 Cal.App.4th 915 (*Hitchings*); *People v. Williams* (1976) 16 Cal.3d 663 (*Williams*) ["Testimony at the hearing" means testimony at hearing in which question regarding admissibility arises, not some earlier hearing."].)

As Kopatz recognizes, where a witness is unavailable at trial, as Les was in this case, the prosecution cannot introduce his or her preliminary hearing testimony and then offer statements consistent with that testimony under section 1236. (See *Williams*, *supra*, 16 Cal.3d at pp. 668-669 [concerning prior inconsistent statements under Evidence Code section 1235].)

In *Williams, supra*, 16 Cal. 3d 663, Morris told a police officer that the defendant had committed a robbery. At the preliminary hearing, Morris denied making such a statement. The police officer then testified as to the Morris's prior statement. At trial, Morris was declared unavailable, so his preliminary hearing testimony was read into the record. The district attorney again called the police officer to testify as to the Morris's prior inconsistent statement under Evidence Code section 1235.

This Court held that the trial court erred by admitting the police officer's testimony because Morris had not testified at trial. This Court stated:

> Another indication that section 1235 is inapplicable here is found in section 145 of the Evidence Code. Again, section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony *at the hearing* . . . ." (Italics added.) Section 145 provides: "'The hearing' means the hearing at which a question under this code arises, and not some earlier or later hearing." Morris not having testified at trial -- the hearing at which the admissibility of his prior inconsistent statements arose -- those statements were not inconsistent with his testimony "at the hearing." [Citations.]

(*Williams, supra,* 16 Cal. 3d at p. 669; see also *People v. Rojas* (1975) 15 Cal. 3d 540; *People v. Blacksher* (2011) 52 Cal. 4th 769, 806 ["Eva's statements to Ruth about the restraining order were not admissible for their truth as prior inconsistent statements under Evidence Code sections 1235 and 770. Those sections permit admission of inconsistent statements made by a witness who actually testifies at the proceeding. [Citations] Because Eva did not testify at trial, those sections do not apply here."].)

Similarly, in *People v. Hitchings, supra,* 59 Cal. App. 4th 915 (*Hitchings*), the Court of Appeal applied *Williams* to section 1236. In *Hitchings*, the appellant who had been arrested for murder, told his girlfriend, Pellegrini, in a recorded conversation, that he could not remember what had happened. At his first trial, appellant had testified that he did not remember entering the victim's house, and that he did not believe he killed the victims. This testimony was read into the record by the district attorney at the second trial. According to appellant, the district attorney was using appellant's prior testimony to suggest he was lying about his lack of memory.

At the close of the prosecution's case, defense counsel requested permission to play the entire tape of appellant's conversation with Pellegrini to demonstrate that he had professed a lack of memory to Pellegrini. Over the district attorney's objection, the trial court permitted defense counsel to

read only limited portions of a transcript of the recording into the record. On appeal, Hitchings contended the trial court erred by not allowing him to play the entire audiotape of his conversation with Pellegrini at the county jail which he asserted was admissible as a prior consistent statement under Evidence Code sections 791 and 1236. The court, however, held that the tape was not admissible as a prior consistent statement under Evidence Code sections 791 and 1236 because appellant never testified at the second trial:

> Although *Williams* involved Evidence Code section 1235 and not section 1236, we find the Supreme Court's reasoning in that case persuasive. The language of Evidence Code section 1236 is virtually identical to section 1235. In fact, the provisions were enacted as part of the same legislative bill in 1965, and both became effective on January 1, 1967. Thus, under ordinary rules of statutory construction, Evidence Code section 1236 should be interpreted consistently with section 1235. (*People v. Caudillo* (1978) 21 Cal. 3d 562, 585 [146 Cal. Rptr. 859, 580 P.2d 274], disapproved on other grounds in *People v. Escobar* (1992) 3 Cal. 4th 740, 751, fn. 5 [12 Cal. Rptr. 2d 586, 837 P.2d 1100]; 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Introduction to Crimes, § 36, pp. 44-47.)
>
> Here, appellant did not testify at his second trial. Thus, he did not testify at "the hearing" at which the question of whether his prior consistent statements were admissible arose. (*See Williams, supra*, 16 Cal. 3d at p. 669.) Accordingly, the statements made by appellant during his conversation with Pellegrini could not be consistent with his testimony at "the hearing." Those statements are therefore not admissible under Evidence Code sections 791 and 1236. (See *Williams, supra,* 16 Cal. 3d at p. 669.)

(*Hitchings, supra*, 59 Cal. App. 4th at p. 922.)

In light of the aforementioned cases, because Les Ballou did not testify at trial, i.e. "the hearing" in which question regarding admissibility arises, not some earlier hearing, the trial court erred in admitting his statements to his wife as prior consistent statements pursuant to Evidence

Code sections 1236 and 791. (*Williams, supra*, 16 Cal. 3d at p. 669; *Hitchings, supra*, 59 Cal. App. 4th at p. 922.)

Even if the trial court improperly admitted the testimony pursuant to Evidence Code sections 1236 and 791, the evidence of Les Ballou's prior consistent statements was nevertheless admissible pursuant to Evidence Code section 1202, which concerns the impeachment of a declarant whose hearsay statement is in evidence, as distinguished from the impeachment of a witness who has testified. (See Evid. Code § 1202, Law Revision Commission Comments.) When the admission of evidence is correct under any legal theory, then the trial court's ruling admitting such evidence will be upheld on appeal. (*People v. Brown, supra,* 33 Cal.4th at p. 901.)

As this Court stated in *People v. Zapien*

> 'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]

(*People v. Zapien, supra*, 4 Cal.4th at p. 976.)

In other words, a judgment will be affirmed if the trial court reached the correct result, albeit for the wrong reasons. (*People v. Vera* (1997) 15 Cal.4th 269, 272; *People v. Zapien* (1993) 4 Cal.4th 929, 976 ; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

Evidence Code section 1202 provides: "[a]ny . . . evidence offered to . . . support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing." Accordingly, here, if Les Bellou had testified at trial, his prior consistent statements would have been admissible to support his credibility as a witness under Evidence Code section 791. As such, they were also admissible to support his credibility as a declarant under Evidence Code section 1202.

As previously noted, Evidence Code section 791 provides: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." Thus, under Evidence Code section 791, 'a prior consistent statement is admissible as long as the statement is made before the existence of any one of the motives that the opposing party expressly or impliedly suggests may have influenced the witness's testimony.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 492.)

Here, contrary to Kopatz's argument (AOB 117-120), Ballou was impeached with a prior inconsistent statement during his preliminary hearing testimony and therefore, had he testified at trial, his prior consistent statement to his wife Mae was admissible to support his credibility under Evidence Code section 791, subdivision (a). Ballou testified, in essence, that he saw an unfriendly man walk by on the morning of the murders. On cross-examination, Ballou admitted he did not tell police he had seen a man walk by his house. (6 RT 864.) Further, when Detective Shumway testified as a defense witness (13 RT 1786), Shumway testified that the day after the murders, Officer May asked Les Ballou whether he saw someone "unfamiliar" or whether he noticed "anything out of the ordinary" on the day of the murders. (13 RT 1790.) Les did not mention that he had seen an unfriendly man walk in front of his house that morning. (13 RT 1790.)

Thus, the record demonstrates that Les was, in fact, impeached with a prior inconsistent statement – that he had not seen anyone unfamiliar or anything out of the ordinary on the morning of the murders, contrary to his testimony about seeing an unfriendly man. As Les's statements to Officer May, admitted through Detective Shumway, were hearsay, they were only admissible as inconsistent statements for impeachment purposes. Because the inconsistent statements were admitted to attack Les Ballou's testimony, the prior consistent statements were admissible for rehabilitation purposes, pursuant to Evidence Code section 791, subdivision (a).

Mae Ballou's testimony regarding her husband's prior consistent statements was also admissible under Evidence Code section 791, subdivision (b) which makes evidence of a witness's prior consistent statement admissible if it is offered after an "implied charge has been made that [the witness's] testimony at the hearing is recently fabricated ... and the statement was made before the ... motive for fabrication ... is alleged to have arisen." (Evid. Code, § 791, subd. (b).) Here, Les Ballou testified he observed an unfriendly man on the day of the murders. In court, he identified that person as Kopatz. (6 RT 858.) On cross-examination, Ballou admitted he did not mention seeing Kopatz walk by his house until June 26th, when he showed police the newspaper photo. (6 RT 864-865.) He explained he recognized Kopatz's photo when he saw it in the paper as someone he saw on April 22. Les Ballou's ability to recall how he knew he had seen Kopatz on the day of the crimes, as opposed to another day, was challenged by the defense. (6 RT 866-867.) Les Ballou was questioned about his identification of Kopatz during testimony at the preliminary hearing:

> [Kopatz's Counsel]: And this is the first time that you had actually seen [Kopatz] in person other than - - other than your testimony that you saw him on the 22nd?

[Les Ballou:] Yes.

[Kopatz's Counsel]: You never saw [Kopatz] in a lineup, did you?

[Les Ballou:] No. No.

[Kopatz's Counsel]: And you were coming to court today, you know that you were coming to court to testify in this matter - -

[Les Ballou:] Yes.

[Kopatz's Counsel]: -- correct? And you were coming to court in an effort to make an identification; correct

[Les Ballou:] Yes.

[Kopatz's Counsel]: And, of course, you spoke to Mr. Mitchell, the District attorney; correct?

[Les Ballou:] Yes.

[Kopatz's Counsel]: And you spoke to Detective DeVinna as well in connection with this case; correct?

[]

[]

[Les Ballou:] Yes.

[Kopatz's Counsel]: And so you knew that the person that you saw in the newspaper, [Kopatz], would, in fact, be the person that is seated here at counsel table; correct?

[Les Ballou:] Yes.

[Kopatz's Counsel]: So you knew you were going to be asked to identify the person that you saw in the newspaper; right?

[Les Ballou:] Yes.

(6 RT 871-872.)

This broad, implicit, charge of fabrication of Les Ballou's identification of Kopatz warranted admission of a prior consistent statement

for purposes of rehabilitating the witness. (*People v. Brents* (2012) 53 Cal. 4th 599,616.) Evidence Code section 791 permits the admission of a prior consistent statement when there is a charge that the testimony given is fabricated or biased, not just when a particular statement at trial is challenged. (*People v. Kennedy* (2005) 36 Cal.4th 595, 614.)

Thus, because evidence of a statement made by Les Ballou that was inconsistent with his testimony was admitted to attack his credibility, evidence of his prior consistent statement was properly admitted to support his credibility as a hearsay declarant under Evidence Code sections 791, subdivisions (a) and 1202. Additionally, evidence of the prior consistent statement was properly admitted under Evidence Code section 791, subdivision (b) and 1202 because there was an implied charge that Les Ballou's testimony at the hearing was recently fabricated. The evidence was properly admitted.

C. Any Error in the Admission of Mae Ballou's Testimony Was Harmless

Even assuming that Les Ballou's statements to his wife were inadmissible to support his credibility pursuant to Evidence Code sections 791 and 1202, Kopatz has not demonstrated that there is a reasonable probability of a different verdict had the prior consistent statements not been admitted. (See, e.g., *People v. Castro, supra*, 38 Cal.3d at p. 319; *People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.) As Kopatz recognizes, Mae Ballou's testimony that Les told her he saw an unfriendly man on the day of the murders and that Kopatz's photo in the newspaper looked like the person he saw that day was entirely duplicative of Les Ballou's testimony, which was subject to cross-examination. For the same reason, even if the court erred by instructing the jury that prior consistent statements could be used "as evidence of the truth of the facts as stated by the witness on that former

occasion," by providing CALJIC No. 2.13 (14 CT 3704), the error was also harmless under *People v. Watson, supra.*

Kopatz, however, contends (AOB 127) that prejudice from Ballou's testimony must be assessed by the standard for federal constitutional error, namely whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23–24 [17 L. Ed. 2d 705, 87 S. Ct. 824].) This Court should reject Kopatz's attempt "to inflate garden-variety evidentiary questions into constitutional ones." (*People v. Boyette* (2002) 29 Cal.4th 381, 427 [127 Cal. Rptr. 2d 544, 58 P.3d 391].) The proper standard for review of the assumed evidentiary error here is that for state law error under *People v. Watson, supra* (whether "it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error").

As discussed in detail above in Argument I, *supra,* the evidence overwhelmingly established Kopatz killed his wife and daughter for financial gain. His statements and behavior following the crimes, and physical evidence left in the van, on his person, and at his house, as well as a variety of other circumstantial evidence all pointed to Kopatz as the perpetrator of his Mary and Carley's murder. Thus, even assuming admission of Mae Ballou's testimony regarding Les Ballou's prior consistent statement was erroneous, it was harmless even under the more onerous *Chapman* standardin light of the strong additional evidence of guilt presented in this case. (*People v. Harrison* (2005) 35 Cal.4th 208, 239-240.)

III. THERE WAS NO *CRAWFORD* ERROR BECAUSE NO STATEMENT OF JENNIFER FLEMING WAS ADMITTED AT TRIAL

After Mary went missing, Kopatz told several people that Mary was going to run errands that morning. (5 RT 601[Mary Burdick], 629 [Doug Burdick],673 [Jean Black], 686 [Alan Kopatz]; 13 CT 3467-3468,

3481[911 operator], 3640-3641[police detectives].) One of the errands, identified by Kopatz, included picking up a prescription at Sav-On. (5 RT 629, 673; 7 RT 943; 13 CT 3640-3641.) Kopatz told his brother and the police that he had called Sav-On in an effort to determine whether Mary had picked up the prescriptions. (5 RT 686; 13 CT 3642.) Kopatz stated he was told she had not. (5 RT 686.)

To rebut Kopatz's claim that he called Sav-On, the prosecution presented the testimony of six Sav-On employees who were working on the morning of April 22, 1999 - Frank Lombardo, Mercedes Brand, Kevin Rawls, Juana Longoria, Tina Shaw, and Sally Swor. These witnesses testified that either they did not receive a phone call from Kopatz that day or they could not recall receiving a phone call from Kopatz asking if his wife picked up a prescription. (6 RT 750 [Frank Lombardo], 763 [Mercedes Brand]; 11 RT 1147 [Kevin Rawls], 1156 [Juana Longoria], 1162-1163 [Tina Shaw], 1172 [Sally Swor].) According to Lombardo, such a phone call would have been unusual because it was Kopatz who usually picked up the prescriptions from the store. (6 RT 748, 750.)

The prosecution also called Detective Robert Shelton who testified that on April 26, 1999 he contacted "all but two" of the Sav-On employees who were working on April 22, 1999, in effort to determine whether Kopatz had called or come in to pick up a prescription. (12 RT 1678-1680.) Shelton stated he spoke to Sally Swor, Frank Lombardo, and Juana Longoria. (12 RT 1679.) Longoria told him she had not spoken to Kopatz on that day. (12 RT 1679.) Swor also told him she had not spoken to Kopatz.[29] (12 RT 1680.) The following colloquy then occurred:

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[29] Both Longoria and Swor testified they could not recall whether they had spoken toKopatz on April 22. (11 RT 1156, 1172.)

[The Prosecutor:] Now, you also spoke to, did you not, Tina Shaw?

[Detective Shelton:] Yes, sir.

[The Prosecutor:] Kevin Rawls?

[Detective Shelton:] Yes, sir.

[The Prosecutor:] Mercedes Brand?

[Detective Shelton:] Yes.

[The Prosecutor:] Jennifer Fleming?

[Detective Shelton:] Yes, sir.

[The Prosecutor:] And Frank Lombardo; correct?

[Detective Shelton:] Yes, sir.

[The Prosecutor:] Who was it you didn't speak to who was working that you didn't cover?

[Detective Shelton:] Just two. On that particular day I didn't speak to Swor or Lombardo. I contacted Lombardo and Swor on 5/3

[The Prosecutor:] And you spoke to all the other ones on April 26, 1999?

[Detective Shelton:] Yes.

(12 RT 1680, emphasis added.)

On cross-examination, Detective Shelton indicated he spoke to Shaw, Fleming, Rawls, Brand, and Longoria individually at the pharmacy. (12 RT 1681.)

Kopatz now contends the admission of the out of court statement of Jennifer Fleming was error under *Crawford v. Washington*(2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] that denied him his right of confrontation under the Sixth Amendment. Kopatz's claim is without merit. First, Kopatz did not object to the evidence so any claim of error has

been forfeited. Moreover, while Kopatz correctly notes that Fleming did not testify and thus was unavailable for cross-examination, his argument fails because no statement from Jennifer Fleming was, in fact, admitted at trial. The only testimony regarding Fleming was Detective Shelton's affirmation that he had spoken to her. However, none of her statements were admitted through Shelton's testimony. In any event, any assumed error was harmless.

A defendant may not complain for the first time on appeal that the admission of evidence violated the right to confrontation, or any other right under the federal Constitution. (*People v. Boyette* (2002) 29 Cal.4th 381, 424 [due process, reliable penalty determination, and cruel and unusual punishment]; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [confrontation]; *People v. Zapien* (1993) 4 Cal.4th 929, 979-980 [confrontation]; *People v. Raley* (1992) 2 Cal.4th 870, 892 [confrontation and due process].) In this case, Kopatz did not object to Detective Shelton's testimony that he spoke to Jennifer Fleming on hearsay nor confrontation grounds. Consequently, this claim has been forfeited.

The Supreme Court's decision *in Crawford v. Washington, supra,* does not change the fact that Kopatz has forfeited his constitutional claim. *Crawford* merely applied the Confrontation Clause. The decision did not create a new constitutional right which was not in existence at the time of Kopatz's trial. Thus, if Kopatz wished to object on the specific ground that there was a violation of the right to confrontation, he could have done so even before *Crawford.* It remains the rule that in order to preserve an issue for appeal, there must be an objection on a specific basis. (*People v. Champion* (1995) 9 Cal.4th 879, 918.)

Kopatz's claim also fails on the merits. The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against

him." (U.S. Const., 6th Amend.) In *Crawford v. Washington, supra*, 541 U.S. 36, the United States Supreme Court abandoned what had been the prevailing interpretation of the Confrontation Clause and held that "*[t]estimonial statements* of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Id.* at p. 59, emphasis added.) "[A]dmission of testimonial statements of a witness who did not appear at trial" is impermissible unless the witness "was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at 53-54.) "Where testimonial evidence is at issue, . .the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Id.* at p. 68 [footnote omitted].) While expressly declining to "spell out a comprehensive definition of 'testimonial,'" the *Crawford* Court held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Ibid.*)

Kopatz specifically argues that Fleming's statement to Detective Shelton "that she did not receive any call from Kopatz inquiring about his wife's picking up a prescription" was "testimonial" and therefore should have been excluded under *Crawford.* (AOB 141.) The difficulty with this argument, however, is that no such statement from Fleming was admitted in evidence. Rather, Detective Shelton merely confirmed he had spoken to Fleming. (12 RT 1680.) Shelton did not convey anything said by Fleming during their conversation. Thus, no statement, let alone "testimonial statement" from Fleming was introduced at Kopatz's trial.

As both the United States and California Supreme Courts have recognized, *Crawford* applies only to the admission of testimonial

statements by a witness who is not produced in court for cross-examination. (E.g., *Davis v. Washington* (2006) 547 U.S. 813, 821 [126 S.Ct. 2266, 165 L.Ed.2d 224] [observing that "[a] critical portion" of the holding in *Crawford* "is the phrase 'testimonial statements'" and that "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause"]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 812 ["Only the admission of testimonial hearsay statements violates the confrontation clause-unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant"]; *People v. Geier* (2007) 41 Cal.4th 555, 603 ["the confrontation clause applies only to testimonial hearsay statements"]; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 173 ["Because *Crawford* applies only to 'testimonial statements,' we must first determine whether Morales's statement falls into that category"].) Because no testimonial statement of Jennifer Fleming was admitted at Kopatz's trial, his argument necessarily fails.

Kopatz suggests that the "fair import" from Sheldon's testimony that he spoke to Jennifer Fleming, "was that she told him she did not receive a call from Kopatz on April 22, 1999." (AOB 134.) However, this is merely an inference from Sheldon's testimony and not a testimonial statement from Fleming. An inference is not evidence. (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1149.) Because no statement from Jennifer Fleming was introduced against Kopatz at his trial, Kopatz's *Crawford* argument should be rejected.

Even assuming a testimonial statement from Fleming was improperly admitted at Kopatz's trial, any error was harmless beyond a reasonable doubt. Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. This Court must determine whether it is clear beyond a reasonable doubt that a rational

jury would have reached the same verdict absent the error. (*People v. Loy* (2011) 52 Cal.4th 46, 69-70.)

Here, even if evidence of Jennifer Fleming's statement was improperly admitted, six other Sav-On employees testified that Kopatz did not call the store on the day of the murders. This evidence strongly supported the prosecution's theory that Kopatz was not telling the truth when he said he called the store. A defendant's false or misleading statements are admissible at trial to support an inference of consciousness of guilt. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1102; see 14 CT 3700 [CALJIC No. 2.03].)

Moreover, as detailed above in Argument I, the circumstantial evidence overwhelmingly established Kopatz murdered his wife and daughter. His statements and behavior following the crimes, and physical evidence left in the van, on his person, and at his house, as well as a variety of other circumstantial evidence all unerringly pointed to Kopatz.. Thus, even assuming admission of Fleming's statement constituted *Crawford* error, it was harmless beyond a reasonable doubt in light of the strength of the other evidence of his guilt presented in this case. (*People v. Harrison*, *supra*, 35 Cal.4th at pp. 239-240.)

After Ashley experienced high blood sugar levels, beginning at around 11:30 a.m., school officials repeatedly and unsuccessfully attempted to contact Kopatz on his home phone, cell phone, and pager. (4 RT 534-537, 570-571.) Similarly, after Mary failed to show up at work at 11:00, her Jenny Craig co-workers also continually called Kopatz to no avail. (5 RT 588-590, 597-598, 670-671.) Finally, at 1:15, Kopatz surfaced, when he contacted Jenny Craig and spoke to Jean Black. (5 RT 673-674.) Kopatz explained to those concerned that Mary and Carley had run errands. (5 RT 673, 601.) Thus, although he was aware Mary was supposed to be at work at 11:00 and would have to drop Carley off at home prior to going to

the office, Kopatz waited until 1:15 p.m. to question his wife and daughter's whereabouts, feebly explaining he had been in the back yard digging and had lost track of time. (5 RT 673-674.) It wasn't until 3:15 that Kopatz, while lamenting that it was a "fucking pain in the ass," was finally convinced to call the police to report his wife and daughter missing. (5 RT 633.) Additionally, evidence was presented showing that Mary always carried her cell phone. (5 RT 674, 677.) However, Mary's cell phone and pager had been left at home that day. (5 RT 630, 632, 673.) Also, at the house, Doug Burdick observed a set of woman's rings that appeared to be Mary's in a dish next to the bathroom sink. (5 RT 649, 662.) Burdick testified that one of the rings he saw in the bathroom "had a similar cut" to Exhibit 23A, which was a photograph of Mary's Ring. The other that he saw was "very, very similar" to Exhibit 23B, Mary's anniversary band. (5 RT 662-664; 11 RT 1573-1574.) Mary's rings were missing when her body was found. (9 RT 1232.) The rings were insured for $13,628. (11 RT 1573-1574.) Kopatz made an insurance claim for Mary's rings only four days after the murders. (11 RT 1574, 1579.)

Additionally, Kopatz made several false or misleading statements following the disappearance of his wife and daughter. As noted, a defendant's false or misleading statements are admissible at trial to support an inference of consciousness of guilt. (*People v. Edwards*, *supra*, 8 Cal.App.4th at p. 1102; 14 CT 3700 [CALJIC No. 2.03].) Kopatz claimed he thought that his wife had taken Carley to work because it was "take-your-daughter-to-work day." (5 RT 601; 8 RT 1001, 1011.) However, Jenny Craig, did not have a take-your-daughter-to-work day, and recently, Mary Kopatz had told everyone at the office not to bring their children to work because of liability issues. (5 RT 601-602.) Additionally, Kopatz told police that morning he had checked the oil in his van. (13 CT 3661.) This statement is certainly suspect, considering the van had just received an

oil change less than one month and 1310 miles earlier. (9 RT 1248; 11 RT 1500-1501; Exh. 68.)

Further, Kopatz's statements concerning when he last saw the victims were not consistent. Kopatz told Mary Burdick that Mary and Carley had left the house between 8:30 and 9:00, after he returned from dropping Ashley off at school at 8:00 a.m. (5 RT 601.) Similarly, during his police interview, he stated that his wife and daughter were getting ready to leave when he returned home from dropping Ashley off at school, between 8:30 and 9:00. (13 CT 3641.) However, when Kopatz first called police and reported Mary and Carley missing, Kopatz indicated he had last seen them at 7:30, when he left to take Ashley to school. (13 CT 3481.) Recognizing the significance of this inconsistency, the prosecution aptly noted that, "You don't forget and make a mistake as to when you last saw your wife and your daughter, unless you're lying." (14 RT 1907.)

Additionally, following the crimes, Kopatz had redness and several fresh scratches, abrasions, and "gouges" on his hands, arms, face, and eye. (4 RT 554-557; 8 RT 1061, 1063, 1065-1066; 9 RT 1280-1281.) He attempted to conceal the lacerations on his hands with blue PVC glue. (5 RT 640, 688; 8 RT 1062-1063.) He was uncooperative when police attempted to photograph his hands. (9 RT 1210.) The jury was instructed that efforts to conceal evidence could be considered as a circumstance tending to show a consciousness of guilt. (14 CT 3701; CALJIC No. 2.06.) Further, despite his claim that he'd been digging in the backyard all day, his hands and clothing were clean. (5 RT 640; 13 CT 3651.) Doug Burdick observed that Kopatz was not sweaty nor did he appear to have been digging. (5 RT 641, 648.)

The bodies of Mary and Carley were found in Kopatz's van, roughly one mile from Kopatz's house. (13 RT 1771.) Fingerprints lifted from the driver's side of the vehicle matched Kopatz's prints and the front driver's

seat of the van was at its furthest position back, suggesting Kopatz had been driving the vehicle. (9 RT 1245, 1248; 12 RT 1634-1637.) Les Ballou observed Kopatz walking near the van on the morning of the murders. (6 RT 858, 862.)

Inside the van, police found two blank checks from the Kopatz checking account which had been torn up, and Mary's wallet, containing $20 and her credit cards. (9 RT 1230-1231, 1251-1252, 1258-1259.) This suggested Kopatz had staged the crime scene effort to make it appear that a robbery was committed. (13 RT 1777-1778, 1780.) Also, Mary's clothing had not been forcibly removed. (13 RT 1780.) Rather, her shirt was lifted up, partially exposing her breasts. Her bra was cut, and her pants were neatly unbuttoned, which was inconsistent with an actual sexual assault occurring. (13 RT 1779-1780.) There was no evidence Carley had been sexually assaulted. (13 RT 1781.) This was evidence Kopatz staged the crime to appear that sexual assault had occurred. (13 RT 1778-1779.) While numerous receipts were found in the van, none of them were dated April 22, 1999, the day of the murders, showing Mary had not run errands that morning. (9 RT 1261.) It was obvious that the victims had been killed elsewhere. (13 RT 1782.)

Furthermore, the forensic evidence pointed to Kopatz as his wife and daughter's killer. Human tissue found under Mary's broken fingernail matched Kopatz's DNA profile. (10 RT 1369, 1382, 1426-1428.) Moreover, Mary's blood was found on hallway doorjamb of Kopatz's house (10 RT 1448-1449; 11 RT 1587-1588), supporting the prosecution's theory that Mary and Carley were killed in the house, then placed in the van. More blood was found in the house on carpet near the hallway doorjamb, although police were unable to determine the source, quite possibly because Kopatz had used a cleaning solution on the carpet in an effort to remove the stain. (10 RT 1446, 1591.) The carpet fibers also

appeared to have been cut (10 RT 1447), which could have been another attempt by Kopatz to hide the bloodstain.

Additionally, significant evidence established the murders were committed for financial gain. The jury was instructed that presence of a motive could establish that the defendant is guilty. (14 CT 3709; CALJIC No. 2.51.) Kopatz, who did not work after becoming disabled, had lost substantial amounts of money in his commodities accounts the year preceding the killing. (11 RT 1513-1514.) He had $117,000 in credit card debt and their expenses exceeded their income by over $4,000 a month. (11 RT 1515-1525.) Kopatz stood to receive over $800,000 in life insurance benefits from several insurance policies upon the death of Mary and Carley. (11 RT 1479-1482, 1502-1507, 1526-1528, 1533-1534, 1551, 1567, 1603; 12 RT 1669, 1671.) Moreover, as noted, Kopatz made an insurance claim for Mary's rings, which were insured for more than $13,000, only four days after the murders. (11 RT 1574, 1579.) Callously, the days before and after the murders, Kopatz played a "fantasy stock game" online with his hypothetical riches, suggesting he was already counting his money. (11 RT 1501-1502.)

In light of the overwhelming evidence of guilt with regard to the murders of Mary and Carley for financial gain special circumstance, it is clear beyond a reasonable doubt any error in the admission of Fleming's "statement" had no effect on the jury's verdict.

IV. VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED DURING THE PENALTY PHASE OF KOPATZ'S TRIAL

Kopatz contends his death judgment must be reversed because the victim impact evidence presented during the penalty phase of his trial was "so extensive and prejudicial it created a fundamentally unfair atmosphere for the penalty trial and resulted in an unreliable sentence of death." (AOB 148, 155.) To the contrary, the trial court acted well within its broad

discretion, committed no error, and denied Kopatz no constitutional right in admitting the victim impact evidence pursuant to Section 190.3(a).

Victim impact evidence is admissible under federal law "unless such evidence is so unduly prejudicial that it results in a trial that is fundamentally unfair," and under state law "so long as it is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Taylor* (2010) 48 Cal.4th 574, 645-646, quotation marks omitted.)

Kopatz argues the victim impact here was "excessive." (AOB 152.) He is wrong. The trial court carefully exercised it's discretion regarding victim impact evidence in this case.

Prior to trial, Kopatz filed a motion to exclude victim impact evidence. (2 CT 357-377.) The prosecution filed points and authorities regarding victim impact evidence. (14 CT 3794-3799.) Therein, the prosecution indicated it intended to offer testimony from family members and friends who would describe the impact Kopatz's crimes have had on their lives. The testimony would also include how they learned of the crime, what the victim's loss has meant, and their descriptions of the victims. (14 RT 3798.) The prosecution also indicated it would present photographs of the victim. (14 RT 3799.)

At a hearing on the motion, Kopatz's counsel argued that the victim impact evidence should be excluded because this case was particularly emotional given the relationship between the victims and Kopatz. (15 RT 2040.) Because of this, counsel was concerned the jury would give the evidence "much more weight or substantial weight..." (15 RT 2041.) The prosecutor, however, argued any suggestion that the jury would base its decision on purely emotional reasons was "completely speculative." (15 RT 2042.) Rather, according to the prosecution, the law allows for the presentation of evidence on the impact of Kopatz's crimes on the victims'

family. (15 RT 2042.) The prosecution indicated this evidence would be "limited" and "brief," and, if properly instructed, the jury would decide the issue appropriately. (15 RT 2042-2043.)

The trial court denied Kopatz's motion to exclude the victim impact evidence, aptly noting that the defense concern that this was an emotional case because of the relationship of the victims was a function of Kopatz's own doing. Thus, it would be unfair to exclude the evidence "based upon this man's choosing these specific victims." (15 RT 2045.).[30]

In California, Penal Code section 190.3, subdivision (a), permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." Factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v. Edwards* (1991) 54 Cal.3d 787, 833-836; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063; *People v. Pinholster* (1992) 1 Cal.4th 865, 959.) The fact that

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[30] In exercising it's discretion, the court excluded a photograph of the victims' headstone. (15 RT 2066-2067.) The trial court would have been well within it's discretion in admitting the photograph of the victims' headstone. (*People v. Zamudio* (2008) 43 Cal.4th 327, 367 [Still photographs or photographs in a video of the victim's grave marker or grave site are properly admitted as circumstances of the crime], citing *People v. Kelly* (2007) 42 Cal.4th 763, 797 [videotape ending with view of victim's grave marker]; *People v. Harris* (2005) 37 Cal.4th 310, 352 [photograph of victim's gravesite].) While the trial court could not anticipate this Court's subsequent decisions approving omission of this evidence, such evidence is a factor in any prejudice analysis. (*People v. Tully* (2012) 212 Cal.Lexis 7247 at fn 30.)

Kopatz himself was a member of that family is hardly a reason to exclude evidence regarding the impact of his actions on the family of Mary and Carley. (See e.g. *People v. Streeter* (2012) 54 Cal. 4th 205 [victim impact evidence properly admitted where defendant killed mother of his child, whom defendant lived with]; *People v. Stanley* (1995) 10 Cal. 4th 764, 831-832 [victim impact argument by prosecutor proper in case where defendant murdered wife.])

At the penalty phase of Kopatz's trial, as summarized in detail above in the statement of facts, the prosecution called seven witnesses who provided victim impact testimony – Mary's mother, three siblings, two nieces, and her nephew.[31] That evidence was consistent with the prosecution's representations at the time the trial court ruled on the admissibility of the victim impact evidence, and entirely within the limitations on victim impact evidence enunciated by this Court, as well as the United States Supreme Court.

The victim impact witnesses testified regarding the circumstances surrounding how they learned about the crimes. (15 RT 2080 [Sandra Zalonis], 2092 [Hazel Foley].) These family members also discussed the impact the murders have had on their lives, as well as the lives of other family members. [15 RT 2081-2082 [Sandra Zalonis], 2093 [Hazel Foley], 2103-2104 [Janet Foley], 2111-2112 [Ryan Foley], 2115-2116 [Kyle Foley], 2117-2119 [Vanessa Soto] 2121-2124 [Robert Foley].) The evidence admitted here is the type of "personal perspectives" and testimony concerning "the kinds of loss that loved ones commonly express in capital cases." (*People v. Taylor, supra*, 48 Cal.4th at p. 646.) The testimony

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[31] As appellant notes, the testimony from these seven witnesses consisted of 52 pages in the reporter's transcript and lasted approximately one-hour and forty-five minutes. (AOB 152.)

about how the murders of Mary and Carley affected them was well within the bounds of admissible victim-impact testimony. (See *People v. Martinez* (2010) 47 Cal.4th 911, 961.)

The witnesses' testimony, although emotional, was not surprising, shocking, or inflammatory. Instead, it was a tragically obvious and predictable consequence of Kopatz's murder of his wife and young daughter. (*People v. Sanders* (1995) 11 Cal.4th 475, 550.) The evidence in this case did not exceed the bounds of admissible victim impact evidence. Kopatz's argument to the contrary should be rejected.

V. KOPATZ WAS NOT PREJUDICED BY THE TECHINICAL ERROR IN THE INSTRUCTION REGARDING THE MULTIPLE MURDERS SPECIAL CIRCUMSTANCE

Kopatz argues that the trial court prejudicially erred in instructing the jury regarding the multiple murder special circumstance at the penalty phase of his trial. (AOB 156-168.) He claims the instruction provided by the court deprived him of an individual penalty determination for the murders of Mary and Carley and provided an illegal theory of imposing the death penalty, requiring reversal of the penalty verdicts and judgment of death. (AOB 157.) Kopatz has waived this claim by failing to object to the instruction or the corresponding verdict form. In any event, Kopatz is not entitled to relief as he was not prejudiced by the technical error in the instruction and verdict form.

The information charged Kopatz, in count 1, with the murder of Mary Kopatz and, in count 2, with the murder of Carley Kopatz. (§ 187, subd. (a).) (1 CT 98-99.) As to counts 1 and 2, the special circumstance of murder for financial gain was alleged as to each count of murder. Kopatz (§ 190.2, subd.(a)(1).) (1 CT 98-99.) The information also correctly alleged one multiple murder special circumstance. (§ 190.2, subd. (a)(3).) (1 CT 98-99.)

As Kopatz recognizes (AOB 157), it is erroneous to charge and allow the jury to find two multiple-murder special circumstances. (*People v. Booker* (2011) 51 Cal. 4th 141, 178; *People v. Zamudio* (2008) 43 Cal.4th 327, 363["Defendant correctly asserts that two multiple-murder special-circumstance allegations were erroneously charged and found true. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 422 [64 Cal. Rptr. 3d 721, 165 P.3d 512]"]) Regardless of the number of murders charged in an information, it is error to charge more than one special circumstance alleging multiple murders. However, such double counting has been consistently found harmless because it does not result in the jury considering any inadmissible evidence. (*People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

Apparently, in an effort to further protect against the erroneous double counting of multiple murder special circumstances by a jury, the instructions and verdict forms were modified in a manner that was technically incorrect. While the jury was correctly called upon to determine the appropriate penalty for the murder of Mary Kopatz committed for financial gain, and the appropriate penalty for the murder of Carley Kopatz committed for financial gain, it was also asked to separately consider the appropriate penalty for the multiple murders of Mary and Carley Kopatz.

Specifically, at the penalty phase, the jury was instructed regarding the financial gain special circumstance as follows:

> Having found the defendant, Kim Raymond Kopatz, guilty of first degree murder under counts I and II of the information, and having found the special circumstances that each murder was intentional and carried out for financial gain within the meaning of Penal Code section 190.3(a)(1) to be true, you must now return verdicts as to each count in one of the following forms:

As to Count One:

We the jury in the above-entitled action, as to defendant Kim Raymond Kopatz, fix the penalty under count I of the information, as death, for the murder of Mary Kopatz,

or

We the jury in the above-entitled action, as to defendant Kim Raymond Kopatz, fix the penalty under count I of the information, as life without the possibility of parole, for the murder of Mary Kopatz.

As to Count Two:

We the jury in the above-entitled action, as to defendant Kim Raymond Kopatz, fix the penalty under count I of the information, as death, for the murder of Carley Kopatz,

or

We the jury in the above-entitled action, as to defendant Kim Raymond Kopatz, fix the penalty under count I of the information, as life without the possibility of parole, for the murder of Carley Kopatz.

(14 CT 3830.)

With regard to the multiple murder special circumstance, the jury was instructed:

Having found the defendant, Kim Raymond Kopatz, guilty of two counts of first degree murder, *under counts I and II* of the information, and finding the multiple murder special circumstance within the meaning of Penal Code section 190.3(a)(3) to be true, you must now return a verdict in one of the following forms:

We, the jury in the above-entitled action, as to defendant, Kim Raymond Kopatz, fix the penalty *under counts I and II* of the information, as death, *for the multiple murders* of Mary Kopatz and Carley Kopatz,

or

> We, the jury in the above-entitled action, as to defendant, Kim Raymond Kopatz, fix the penalty *under counts I and II* of the information, as life imprisonment without the possibility of parole, *for the multiple murders* of Mary Kopatz and Carley Kopatz

(14 CT 3831, emphasis added.)

> The jury returned the following three verdict forms:
>
> We, the jury in the above-entitled action, as to defendant KIM RAYMOND KOPATZ, fix the penalty *under counts I and II* of the information as death, for the multiple murders of Mary Kopatz and Carley Kopatz.

(14 CT 3859, emphasis added.)

> We, the jury in the above-entitled action, as to defendant KIM RAYMOND KOPATZ, fix the penalty under count II of the information as death, for the murder of Carley Kopatz.

(14 CT 3860.)

> We, the jury in the above-entitled action, as to defendant KIM RAYMOND KOPATZ, fix the penalty under count I of the information as death, for the murder of Mary Kopatz.

(14 CT 3861.)

Kopatz now complains that the court's instruction on the multiple murder special circumstance (14 CT 3831), providing the jury the option to fix a penalty for "multiple murders" was erroneous. (AOB 156.) He contends that by informing the jury that it could impose a single penalty on both counts, the instruction deprived him of an individual penalty determination for each count and provided an illegal theory of imposing the death penalty. (AOB 156-157.)

First and foremost, Kopatz has waived this claim. Kopatz did not object to the Court's instruction on the multiple murder special circumstance during the parties' discussions of the penalty phase jury instructions. (See 15 RT 2046-2060, 2183-2186.) Moreover, immediately prior to the penalty phase of the trial, the court and counsel discussed the

jury instructions and the verdict forms. When asked whether Kopatz had looked at the verdict forms, Kopatz's counsel expressed, "Those are fine, Your Honor." (15 RT 2184.) As such, Kopatz has waived this issue by failing to object to the form of the verdict when the court proposed to submit it or when the jury returned its finding. (*People v. Jones* (2003) 29 Cal. 4th 1229, 1259; *People v. Bolin, supra*, 18 Cal.4th at p. 330.)

In any event, while the instruction was incorrect, it is clear that Kopatz was not prejudiced in any way by the technical error in the instruction and verdict form. Here, the trial court properly instructed the jury at the penalty phase to return one penalty verdict for the financial gain special-circumstance murder of Mary Kopatz in count 1 and one penalty verdict for the financial gain special-circumstance murder of Carley Kopatz in count 2. Requiring the jury to reach separate penalty verdicts as to each murder count is entirely proper.

> A defendant who kills more than one person may be convicted and punished for each murder. (*People v. Andrews* (1989) 49 Cal.3d 200, 225 [260 Cal.Rptr. 583, 776 P.2d 285]; *People v. Ramos* (1982) 30 Cal.3d 553, 587 [180 Cal.Rptr. 266, 639 P.2d 908].) Separate penalty verdicts have been returned in other capital cases. The defendant in *People v. Bittaker* (1989) 48 Cal.3d 1046 [259 Cal.Rptr. 630, 774 P.2d 659] was convicted of first degree murder of five victims and was given separate death verdicts as to each murder victim. (*Id.* at pp. 1106, 1110, fn. 34.) Likewise, the defendant in *People v. Mattson* (1990) 50 Cal.3d 826 [268 Cal.Rptr. 802, 789 P.2d 983], who was convicted of the first degree murder of two girls, was given a separate verdict of death as to each murder victim. (*Id.* at p. 838.) We are not persuaded that there is any impropriety in requiring the jury to return a separate penalty verdict for each capital murder count.

(*People v. Sandoval* (1992) 4 Cal. 4th 155, 197.)

Requiring the jury to make a separate penalty determination for the multiple murder special circumstance is not required by law, and is not consistent with the penalty scheme that envisions a penalty verdict as to

each murder. However, Kopatz was not prejudiced by what is in effect a superfluous death verdict. (See, *People v. Booker, supra*, 51 Cal. 4th at p 178; *People v. Zamudio, supra*, 43 Cal.4th at p. 363.)

The prosecutor explained to the jury during his penalty phase argument, the jury had "three decisions to make," including whether, "for the two first-degree murders, one and two, of Mary and Carley, under the multiple murder special circumstance, does he deserve death or life without possibility of parole." (15 RT 2219.) Accordingly, the agreed upon instructions and verdict forms gave Kopatz the benefit of his jury considering separately whether death was appropriate for the murder of Mary for financial gain, and for the murder of Carley for financial gain, from whether death was appropriate for having committed multiple murder.

Kopatz complains the instruction was erroneous in permitting the jury to determine an appropriate penalty based on both counts of murder. (AOB 160.) He is wrong. While this Court has recognized that there is nothing improper about requiring a separate death verdict for each count of special circumstance murder (*People v. Sandoval, supra,*4 Cal.4th at p. 197), it is not an entitlement. Moreover, even if it were required as a matter of law, Kopatz cannot show any prejudice.

Kopatz speculates the instructions and verdict forms would permit the jury to first decide death was appropriate for multiple murder and then the jury "could then have filled out the verdict forms for Counts 1 and Count 2 merely as confirmatory of the verdict for multiple murders, without giving each single count the particularized attention to which appellant is constitutionally entitled." (AOB 161.) Kopatz's claim of prejudice rests with untenable speculation that the jury would ignore the instructions and

fail to deliberate regarding the appropriate verdict for the murder of Mary for financial gain and the murder of Carley for financial gain. Moreover, Kopatz does not explain how he is prejudiced if the jury decided based on a single multiple murder special circumstance that he deserved the death penalty for the murders of Mary and Carley.

Further, Kopatz's characterization of the instruction and verdict form for multiple murders as an unauthorized, unconstitutional, and illegal theory for imposing the death penalty (AOB 160) misses the mark. Kopatz was rendered death eligible based on the financial gain special circumstances and multiple murder special circumstance being found true. Nothing in the instructions or verdict form permitted "double counting" of the multiple murder special circumstance. Indeed, the instructions and verdict forms ensured the jury only considered the single multiple murder special circumstance finding as to the two murders. Kopatz's complaint is actually that the jury may have decided he deserved death based on the multiple murder special circumstance without giving consideration to the financial gain special circumstance, resulting in "merely confirmatory" death verdicts as to that special circumstance finding. Even if that were so, he is not conceivably prejudiced by the absence of multiple death verdicts.

VI. THE JURY WAS PROPERLY INSTRUCTED WITH CALJIC NO. 8.85 DURING THE PENALTY PHASE OF HIS TRIAL

Acknowledging that this Court has previously rejected the basic contentions raised in this argument, Kopatz asserts the trial court erred by instructing the jury with standard CALJIC No. 8.85 at the penalty phase of his trial. (AOB 163-168; 14 CT 3825-3826.) He asserts that the instruction was constitutionally flawed because it failed to advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending on the jury's appraisal of the evidence. (AOB 163.) Kopatz's claim should be rejected; this

Court has previously rejected similar claims, and the instructions provided to the jury were constitutionally sound.

Contrary to Kopatz's argument, the trial court was not required to instruct the jury as to which of the listed sentencing factors are aggravating, which are mitigating, and which could be either mitigating or aggravating, depending upon the jury's appraisal of the evidence. (E.g. *People v. McKinnon* (2011) 52 Cal. 4th 610, 692; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 ["The aggravating or mitigating nature of the factors is self-evident within the context of each case."].) Additionally, "the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not unconstitutionally suggest that the absence of such factors amounted to aggravation." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 228.) This Court has repeatedly have held that "CALJIC No. 8.85 is both correct and adequate." (*People v. Valencia* (2008) 43 Cal.4th 268, 309.)

In sum, the instruction given was constitutionally sound. Moreover, this court has previously rejected claims similar to the ones Kopatz raises here, and Kopatz has not provided a persuasive reason for this Court to revisit those decisions.

VII. THE JURY WAS PROPERLY INSTRUCTED WITH CALJIC NO. 8.88 AT THE PENALTY PHASE OF HIS TRIAL

Kopatz additionally asserts that the trial court erred in instructing the jury with CALJIC No. 8.88 at the penalty phase of his trial. (AOB 169.) Specifically, he asserts the instruction: 1) reduced the prosecution's burden of proof because it failed to inform the jury that it was required to impose a sentence of life without possibility of parole if it determined that mitigation outweighed aggravation; 2) reduced the burden of proof because the instruction failed to inform jurors they had the discretion to impose life without possibility of parole even in the absence of mitigating evidence; 3)

the "so substantial standard" for comparing mitigating and aggravating circumstances reduced the burden of proof; 4) reduced the burden of proof by failing to convey that the central decision at the penalty phase is the determination of the appropriate punishment; 5) failed to set out the appropriate burden of proof; 6) failed to require juror unanimity on aggravating factors; 7) failed to require written findings regarding aggravating factors; and 8) failed to instruct the jury on the presumption of life. (AOB 169-205.)

Kopatz acknowledges his challenges have been previously rejected by this Court, but submits this Court incorrectly decided those cases and should now reconsider its decisions. (AOB 170.) There is no reason for this Court to reconsider its numerous cases rejecting arguments identical to those made by Kopatz.

Kopatz first contends that CALJIC No. 8.88 improperly reduced the prosecution's burden of proof below the level required by section 190.3 because the instruction failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to impose a sentence of life without parole. (AOB 171-175.)

Preliminarily since no clarifying instruction was requested, respondent submits this issue was waived. (*People v. Arias, supra*, 13 Cal.4th at p. 171.) In any event, Kopatz's argument fails. Where, as here, the jury is instructed in the language of CALJIC No. 8.88, the court need not further instruct that life without parole is mandatory if mitigation outweighs aggravation.[32] (*People v. Mendoza* (2011) 52 Cal. 4th 1056, 1097; *People v. Tate* (2010) 49 Cal.4th 635, 712.)

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[32] CALJIC No. 8.88, as instructed here, provided:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall

(continued...)

Similarly, contrary to Kopatz's claim (AOB 175-176), CALJIC No. 8.88 is not unconstitutional for failing to inform the jury that it may return a sentence of life without the possibility of parole even in the absence of mitigating evidence. (*People v. Lindberg* (2008) 45 Cal. 4th 1, 52; *People v. Moon* (2005) 37 Cal.4th 1, 43.)

Kopatz also contends CALJIC No. 8.88 is unconstitutionally vague and reduced the burden of proof by utilizing the term "so substantial" in telling the jurors how to weigh the aggravating and mitigating circumstances. (AOB 176-178.)

(...continued)
be imposed on the defendant. After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(14 CT 3832-3833.)

This Court has repeatedly rejected the claim that the term "so substantial" is vague or otherwise violates the Eighth Amendment. (*People v. McKinnon* (2011) 52 Cal. 4th 610, 693; *People v. Prieto, supra*, 30 Cal.4th at p. 273; *People v. Boyette, supra*, 29 Cal.4th at p. 465; *People v. Gurule* (2002) 28 Cal.4th 557, 662; *People v. Ochoa, supra*, 26 Cal.4th at p. 452.) As this Court has explained,

> Defendant also faults CALJIC No. 8.88 for calling on the jury to impose death if they find "substantial" aggravating factors, implicitly compelling a death verdict if aggravating circumstances outweighed mitigating ones. Defendant observes that under our case law, the jury may reject a death sentence even if mitigating circumstances do not outweigh aggravating ones. Our reading of the instruction discloses no compulsion on the jury to impose death under such circumstances. Instead, the instruction simply explains that no death verdict is appropriate unless substantial aggravating circumstances exist which outweigh the mitigating ones. This instruction was proper under our case law.

(*People v. Taylor* (2001) 26 Cal.4th 1155, 1181.)

Kopatz's claim (AOB 178-179) that the use of the term "warrants" fails to clearly advise jurors that they may only impose the death penalty if they conclude it is the appropriate penalty, has also been rejected by this Court. (*People v. McKinnon*, supra; *People v. Boyette, supra*, 29 Cal.4th at p. 465, citing *People v. Breaux* (1991) 1 Cal.4th 281, 316.) Kopatz fails to provide any reason for this Court to depart from these precedents.

Kopatz also contends CALJIC No. 8.88 is unconstitutional because it fails to set out the appropriate burden of proof. (AOB 180-194.) He first contends the instructions are constitutionally flawed for failing to assign the state the burden of proving beyond a reasonable doubt the existence of an aggravating factor or proving beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. However, this Court has held that CALJIC No. 8.88 is not flawed for failing to assign the burden

of proof to one of the parties. (*People v. Hovarter* (2008) 44 Cal. 4th 983, 1029; *People v. Moon, supra*, 37 Cal.4th at p. 44.)

Moreover, contrary to Kopatz's claim (AOB 186-189), the instruction is not unconstitutional in failing to inform the jury that neither party bears the burden of persuasion. (*People v. Collins* (2010) 49 Cal. 4th 175, 260; *People v. Friend* (2007) 47 Cal.4th 1, 90; *People v. Harris, supra*, 43 Cal.4th at p. 1322).

Nor was CALCRIM No. 8.88 deficient in failing to inform the jury that the mitigating circumstances need not be found unanimously or demonstrated by any particular standard of proof. (*People v. Ervine* (2009) 47 Cal. 4th 745, 810; *People v. Rogers* (2006) 39 Cal.4th 826, 897.) Further, as this Court has noted, contrary to Kopatz's claims here (AOB 189-193):

> There being no legal requirement that the jury be informed of a burden of proof for the penalty phase, we also reject defendant's further claim that CALJIC No. 8.88's failure to inform the jury who bears the burden of proof constitutes a structural error requiring reversal of the penalty verdict without inquiry into prejudice. (See *Arizona v. Fulminante* (1991) 499 U.S. 279 [113 L. Ed. 2d 302, 111 S. Ct. 1246].)

(*People v. Moon, supra*, 37 Cal. 4th at p. 44.)

Kopatz additionally contends that CALJIC No. 8.88 violated the Sixth, Eighth, and Fourteenth Amendments by failing to require juror unanimity on aggravating factors. (AOB 194-197.) This Court has consistently and repeatedly held that the jury is not required to agree unanimously on what aggravating factors exist. (*People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Combs, supra*, 34 Cal.4th at p. 867; *People v. Monterroso, supra*, 34 Cal.4th at p. 795; *People v. Morrison, supra*, 34 Cal.4th at p. 730; *People v. Pollock, supra*, 32 Cal.4th at p. 1196; *People v. Yeoman, supra*, 31 Cal.4th 93, 157; *People v. Jenkins, supra*, 22 Cal.4th at p. 1053; *People v. Howard* (1992) 1 Cal.4th 1132, 1196.) This Court has

likewise already rejected Kopatz's claim that *Ring* requires otherwise. (See e.g., *People v. Monterroso, supra*, at p. 796 [*Apprendi* and *Ring* have not altered conclusions regarding juror unanimity]; *People v. Morrison, supra*, 34 Cal.4th at p. 730 [same plus observation that *Blakely* does not undermine prior analysis]; *People v. Pollock, supra*, 32 Cal.4th at p. 1197; *People v. Prieto, supra*, 30 Cal.4th at p. 275 [*Ring* does not undermine previous ruling on point].) Because Kopatz provides no persuasive reason for departing from this precedent, his claim should be rejected.

Kopatz also claims the failure of the jury to make any written findings during the penalty phase violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 198-203.) This Court has consistently rejected any claim that the jury must make written findings as to aggravating factors. (*People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Cornwell, supra*, 37 Cal.4th at p. 105.)

Lastly, Kopatz argues the trial court's failure to instruct the jury the presumption favors life rather than death violated his rights under the Fifth, Eighth and Fourteenth Amendments. (AOB 204-205.) As Kopatz acknowledges, this Court has rejected the argument that an instruction on the presumption of life is required in capital cases. (*People v. Arias, supra*, 13 Cal. 4th at p. 190; see *People v. Abilez* (2007) 41 Cal.4th 472, 532.) Because Kopatz provides no compelling reason for reconsideration, his claim should likewise be rejected.

In sum, Kopatz's arguments about the instruction have been thoroughly discussed and individually rejected by this Court. Kopatz's claims may be rejected.

VIII. THERE WAS NO CUMULATIVE ERROR

Kopatz argues that the cumulative effect of the claimed errors in this case warrants reversal of the judgment and sentence. (AOB 206-208.) As

discussed above, there are no errors to cumulate. (See *People v. Thornton* (2007) 41 Cal.4th 391, 453.)

A criminal defendant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and...the Constitution does not guarantee such a trial."].)

Any claim based on cumulative error must be assessed to see if it is reasonably probable the jury would have reached a result more favorable to the defendant in their absence. (*People v. Holt* (1984) 37 Cal.3d 436, 458.) Applying that analysis to the instant case, this contention should be rejected. Notwithstanding Kopatz's arguments to the contrary, Kopatz received a fair and untainted trial. The Constitution requires no more.

Even when considered together, it is not reasonably probable that, absent the alleged errors, Kopatz would have received a more favorable result, and any errors were harmless. Thus, even cumulatively, any errors are insufficient to justify a reversal of the verdicts.

IX. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION

Kopatz contends that the use of the death penalty as a regular punishment for a substantial number of crimes is contrary to international norms of human decency and that, consequently, the death penalty violates international law and the Eighth and Fourteenth Amendments of the federal

Constitution. (AOB 209-212.) International law does not require California to eliminate capital punishment. (*People v. Blacksher, supra*, 52 Cal.4th at p. 849; *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Doolin, supra*, 45 Cal.4th at p. 456.) Furthermore, California does not impose the death penalty as regular punishment in California for numerous offenses. (*Ibid.*) Instead, "[t]he death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)" (*People v. Doolin, supra*, 45 Cal.4th at p. 456, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1, 44.) Thus, California's death penalty law does not violate international law or the federal Constitution.

Kopatz also contends the failure to provide intercase proportionality review violates the Eighth and Fourteenth Amendments to the Constitution because the proceedings are conducted in a constitutionally arbitrary, unreviewable manner. (AOB 212-216.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Cornwell, supra*, 37 Cal.4th at p. 105; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.) Because Kopatz provides no persuasive reason for departing from this precedent, his claim should be rejected.

X. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE INTERNATIONAL LAW

Kopatz contends the California death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights. (AOB 217-219.) This Court has repeatedly rejected similar arguments and should do so again here. International law

does not prohibit a sentence of death where, as here, it was rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849 [rejecting claim "again"]; *People v. Gonzales and Soliz, supra*, 52 Cal.4th at p. 334; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Ward, supra*, 36 Cal.4th at p. 222; *People v. Elliot, supra*, 37 Cal.4th at p. 488.) Kopatz does not present any reason to revisit these holdings.

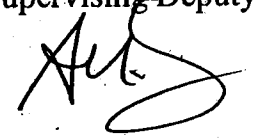
CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: August 13, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General



ANDREW MESTMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **33,263** words.

Dated: August 13, 2012

KAMALA D. HARRIS
Attorney General of California

ANDREW MESTMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent