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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEE OTHA BELL,

Defendant and Appellant.

A154231

(San Francisco City & County
Super. Ct. No. SCN215738)

Defendant Lee Otha Bell appeals from a judgment of conviction by jury of one count of first degree murder (Pen. Code, § 187, subd. (a)). On appeal, he contends: (1) the trial court erred in admitting testimony regarding certain DNA evidence; (2) the trial court erroneously instructed the jury as to evidence of prior domestic violence and erred in refusing to instruct on manslaughter; (3) there was insufficient evidence of premeditation and deliberation necessary for first degree murder; (4) the trial court erred in imposing a restitution fine without a hearing on his ability to pay (*People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*)).

We affirm.

BACKGROUND

From 2008 to 2010, defendant and the victim engaged in a tumultuous relationship. During that time, the victim was treated at UCSF hospital for various domestic-violence related injuries.

In March 2009, the victim was “treated for some head pain, knee pain, and . . . some abrasions” after she was “assaulted” and “kicked in the head” by “[h]er partner.” She had a “cast on her right arm” and a cut which she also said “was from her partner.” She had “throbbing pain” and “bruising to her head.” Police interviewed her and noted she had a bump on her head, “her arm was bandaged up,” and she had a “cut or bleeding on her knee” and a “small cut on the hand.” The victim said her “then-boyfriend Lee Bell” approached her and “punched her in the head six times with a closed fist.” After she fell to the ground, “he then kicked her two times” and “took a pair of scissors, held it to her cheek, and said, ‘If you go to the police I’ll kill you.’” The injury on her hand had occurred “four days prior” and “was another injury that occurred from Mr. Bell.” The officers took photographs of the victim’s injuries, filed a report, and called for an emergency protective order.

Four months later, in July, the victim “presented to the emergency room” by ambulance with “shortness of breath, bloody stools, [and] abdominal pain.” She had what is known as “‘raccoon eyes,’” which is “bruising around” both of the eyes.” She told the nurse and physician assistant on duty her “injuries were due to domestic violence” and that they “were caused by her boyfriend.” She was diagnosed as having “two facial fractures” located at her “right zygomatic arch and her right internal orbital bone.”

In September, the victim once again presented at UCSF, this time with “shortness of breath.” After police arrived, she informed officers “she had been choked.”

The following month, the victim was “admitted to the hospital primarily with complaints of cough and fever and difficulty breathing.” She reported that she had “been assaulted” a week prior. She had been “choked

around the neck” by “her partner, and a subsequent examination showed “evidence of bruising along the lower part of her neck.”

Early the next year, in January 2010, the victim was taken to UCSF by ambulance. She “was wheezing, and she was throwing up,” and she had a “laceration on her . . . head” and complained of “pain to her entire rib cage” and “pain in her throat.” She stated she had “been assaulted,” “punched in the ribs” and “punched in the face,” “hit on the head and she was choked.” She reported her pain was a “10-out-of-10.” She informed police she “was attempting to break up with him or get away” from her boyfriend for the past “month and-a-half,” and “she believed he was going to kill her.” She told police her boyfriend of approximately 14 months was named “Lawrence Williams,” and described him as a “47-year-old Black male; dark complexion; approximately 6’2, 170 pounds; with a one-inch Afro and missing a front tooth” and that he used a bicycle to get around. Police could not find a “Lawrence Williams” registered at the address provided by the victim.¹

At the end of January, the victim was transferred from UCSF to a transitional residential facility. She had “an exacerbation of her chronic obstructive pulmonary disease,” pneumonia, and “multiple rib fractures.” A month later, she met with her “primary clinician” after she had left the facility “for a few days.” The victim stated she had “reconnected with her boyfriend Lee Bell . . . although she had a restraining order against him,” and that he “had beaten her and forced her to have oral, vaginal, and rectal sex with him; kept her trapped in the room; tore her fentanyl pain patch off”; and

¹ Defendant was described as “6’0 or 6’1, thin, probably 170 pounds, dark-skinned black male; very short afro,” and in 2010 he was in his “late forties.”

“destroyed her albuterol metered-dose inhaler.” The victim had “bruising around her left eye and cheek.”

By May, the victim was staying at a residential hospice facility. Early in the month, she returned to the facility with a “swollen lip” and a “laceration across her fingers of her right hand.” She told staff defendant had caused the injuries when he had “come at her with a knife.”

On May 16, she informed a nurse she was going to see defendant to get some money he owed her. The nurse told her, “‘I don’t think that’s a good idea. I think you should just let the money ride. You’ve been clean and sober for a while. This sounds like a disaster.’” The victim replied, “‘You know, I’ve been clean and sober, I have a hand on this. And this is the last thing I need to do to really be clean and sober and go forward.’” The nurse told her, “‘I think this a really poor judgment call. And be careful.’”

Two days later, on the morning of May 18, the victim’s body was found in a “fetal position” inside a suitcase retrieved from the San Francisco Bay.²

A little over a year later, in June 2011, defendant was indicted by grand jury. Trial finally commenced in January 2017. During the interim six-year period, there were motions to dismiss the indictment, several psychological assessments, motions to continue and discovery requests, and multiple requests for substitute counsel.

Prosecution’s Case

Defendant’s Conduct

Defendant’s social worker Isaiah Hurtado testified he first met defendant in 2008 and had “pretty frequent” contact with him until 2010. During that time, Hurtado met the victim, who defendant introduced “as his girlfriend.”

² The victim was “five and one-half inches” and weighed “125 pounds.”

In March 2010, defendant called Hurtado asking if he “could assist him in locating [the victim] at the medical center that she was staying at.” Defendant “called about seven times, each time increasingly more paranoid, saying [the victim] was after him and bothering him, and that sort of nature.” In the last phone call, defendant said “ ‘I’m going to put a stop to this bitch once and for all.’ ” Hurtado reminded defendant he was a “mandated reporter” and, as such, he “was going to have to call the police.” Defendant told Hurtado, “ ‘Do what you have to do, but I have to do what I have to do. And I’m going to—and there’s nothing you can do to stop me.’ ” Hurtado called police and filed a *Tarasoff* report,³ and then called “medical respite . . . [to] let them know that an attempt—or a threat on somebody’s life was being made.”

The office manager of the victim’s hospice facility testified that in March 2010 defendant’s name was placed on the “do-not-let-in list” at the facility. Defendant began calling the victim, at first “maybe two or three times a day,” and then “it just kept escalating and escalating as the days went on.” The calls and voicemails “became more aggressive.” The “last week before she disappeared” defendant called “repeatedly.” “Sometimes it would be one and the next hour and the next hour. It would be on the hour.” Sometimes the manager would answer and defendant would “hang up the phone; and then call back again,” and other times defendant would attempt to “change his voice.” The calls continued to escalate until the manager took the weekend of May 14 off. When he returned to work on Monday, May 17, he was told the victim left the facility the day before, but had not returned.

³ *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 (*Tarasoff*), superseded by statute as stated in *Regents of University v. Superior Court* (2018) 29 Cal.App.5th 890, 903.

The manager retrieved his voicemails from the weekend, and “most of them were from Mr. Bell looking for [the victim].” Defendant’s calls ceased, however, after the weekend, and the manager received no calls that Monday or any day thereafter.

In May 2010, defendant was residing at the Harcourt Hotel, a single room occupancy hotel in San Francisco. The hotel manager testified defendant’s behavior toward the victim “changed from day to day . . . one day he would introduce her to me and tell me he loved her; she was the greatest woman he ever met; she saved his life,” and then the next day “he’d tell me she was the devil; he didn’t want her in his room; to stay away from her; she was evil.” The manager last saw defendant on Tuesday, May 18. Defendant’s “demeanor most of the time was kind of anxious and nervous,” but that morning “[h]e seemed even more so.”

Defendant had been asked to leave the hotel by May 18. The desk clerk testified that at around 5:00 p.m. on Sunday May 16, the victim arrived at the hotel to see defendant. After the clerk informed defendant of her arrival, defendant came down to meet her in the lobby, and the two left together. They returned two hours later. Defendant was “shouting” in an “[a]ngry voice” at the victim who appeared “scared.” The clerk last saw defendant and the victim together at the elevators of the hotel.

Prior to residing at the Harcourt Hotel, defendant had lived at the Drake Hotel, another single room occupancy hotel in San Francisco. Although he had moved out of the Drake, he kept some of his belongings there. The property manager at the Drake testified that on Monday, May 17, defendant came to the hotel to sell the manager a bicycle and retrieve some of his belongings. The manager “didn’t notice anything out of the ordinary” with regard to defendant’s “behavior and demeanor.” He also did not notice

any “scratches” on his face, hands, neck or arms. Defendant retrieved his suitcase from the hotel storage area. The suitcase was a “large—not carry-on; soft-sided” dark nylon suitcase, with “an emblem on the front about a third of the way down.” Surveillance videos from the hotel’s security cameras were shown to the jury. They confirmed defendant went to the basement of the hotel and retrieved a suitcase. The manager of the Drake identified the suitcase in which the victim’s body was found as the “same one that left the hotel with Mr. Bell.”⁴

An emergency service coordinator testified he had coordinated defendant’s housing at the Drake, from “December 20th to January 21st of 2010.” When defendant moved out of the hotel, he left behind two suitcases, which the coordinator originally kept “right near my office.” The suitcases were later moved to the hotel’s basement when defendant failed to return within in two weeks to retrieve them. When defendant did return, the coordinator and defendant could only find one suitcase, which the coordinator described as a “waist-high suitcase, rectangular in shape” with “those two Lanza markings . . . I know there’s two distinctive markings on the corners.” The coordinator also identified the suitcase in which the victim’s body was found as the same one defendant had retrieved on that Monday morning.

The Autopsy

Assistant medical examiner Ellen Moffatt testified as an expert in forensic pathology. She performed the autopsy on the victim’s body and determined the time of death was “24 hours—maybe some hours less, but probably no more than 36 hours—before she was found in the suitcase.” The cause of death was “asphyxia due to neck compression” or strangulation.

⁴ Neither the videos nor the photographs of the suitcase, which were admitted into evidence, were included in the record on appeal.

Moffat's external examination revealed "bleeding in the soft tissue around [the victim's] left eye;" tears on her lower eye, left cheek, right upper lip, and left nostril; scrapes or abrasions on her neck, right lower lip, the underside of her chin, and lower gum; a "hemorrhage in the covering" of her left eye; and bruising on her extremities (outside of the arms, wrists, and legs). The injuries "on the head" were "consistent with somebody delivering a blow." The injuries to her wrists and arms "could happen by someone grabbing" her, while the injuries to her legs were "consistent with being kicked, being pushed, or bumping into something or falling down." The abrasions on her neck were consistent with "scratching to get rid of her attacker."

Moffat's internal examination revealed hemorrhages "in the soft tissue" of the eye, in the muscles that run along the left and right sides of the victim's neck, "underneath the bruises on her wrists," and "in the front part of her tongue," and fractures of "her left hyoid bone" and "her left fourth anterior rib." There were also signs of healing fractures to the right, eighth through tenth ribs on the side and to the left, seventh and eighth ribs on the side, and the victim's "left anterior descending coronary artery," was about 70 percent blocked." The broken hyoid bone occurred due to "[s]ome sort of pressure . . . applied to the neck," which can "happen with strangulation" either through "manual strangulation," a chokehold or ligature, although there were no ligature marks present. "[N]eck compression" or strangulation involves applying pressure to the neck which affects the "blood flow to the brain." "[A]s the blood flow is cut off, the sensation of needing oxygen in one's brain—maybe the person can still breathe; there's not enough pressure to choke off the trachea, but the blood can't carry enough oxygen to the brain." At that point, "[p]resumably, someone would struggle—or maybe not struggle

so much—and eventually they would black out.” “And if pressure is applied long enough; about five minutes, give or take, brain function will cease and the person dies.” The length of time may vary depending on the health of the person.

DNA Evidence

Tahnee Mehmet, a criminalist in the San Francisco Police Department Crime Lab from 2006 to 2011, testified as an expert in the field of DNA analysis and testing. Mehmet detailed the process she used to test the DNA retrieved from the handle of the suitcase. She used the “Polymerase Chain Reaction/Short Tandem Repeat” method, which involves the five basic steps: screening and collection, extraction, quantification, amplification or polymerase chain reaction testing, and interpretation or analysis. Additionally, once the polymerase chain reaction analysis is complete, if there is an inclusion—meaning the known reference sample is included as a potential contributor to the evidence sample—the analyst performs a statistical calculation, which determines the significance of that inclusion.⁵

Mehmet first took swabs from the suitcase handle, and after screening for DNA, engaged in the extraction process.⁶ During that process, the tube

⁵ “‘Once the PCR analysis is complete, there may or may not be a need to perform statistical analysis. If the subject of the investigation is not compatible with the [evidence sample], statistics or genetic frequency data is irrelevant. If the person has the same traits as the evidentiary specimen, then the question is how common or rare are those traits, i.e., what percentage of the population are potential donors of such a specimen.’ ” (*People v. Smith* (2003) 107 Cal.App.4th 646, 656–657 (*Smith*)).

⁶ The extraction process involves adding “chemicals and heat to the sample, and the DNA is released from the components of the cell [¶] [a]nd the rest of the cell components, the cell membranes and other proteins that are found within the cell, are removed during the extraction process.” At the end of the extraction process, “purified DNA” is left.

holding the sample “cracked” in the centrifuge, and “some of the sample was lost.” Mehmet recovered what she “could find within the tube that was enclosed and safe within the tube” and placed it into a new tube.

Following extraction, Mehmet proceeded to quantification, that is, determining “how much human DNA was present.” During quantification, Mehmet noticed some “inhibition,” which “is when something will co-extract with the DNA, and it will interfere” the amplification process.⁷ When this happens, an additional step is needed to purify “or cleanup” and “remove those inhibitors,” and she performed that step.

Mehmet then moved on to the amplification or polymerase chain reaction step, by which she is able to “make millions to billions of copies of those regions that I’m interested in so I can visualize it.”

The “amplified product” were then put into the “genetic analyzer” to sort the fragments. Those “fragments” were “transcribed into a DNA profile” or an electropherogram, a graphic visualization of the genetic data from which Mehmet conducted a profile analysis.

In her interpretation, Mehmet concluded the DNA retrieved from the suitcase handle was an indistinguishable mixture involving low levels of DNA but that the sample contained “a mixture of DNA from at least two individuals.” She determined the victim and defendant were “both included as possible contributors to the mixture of DNA found on the handle.”⁸ To

⁷ The inhibition could have been something environmental (e.g., dirt, grime, water, rocks, salt or dust) or something corporeal (e.g., such as “what is found in hemoglobin”).

⁸ “[T]here are different types of conclusions” that can be reached “when comparing known samples to evidence samples”: (1) “[I]nclusion,” meaning the person could be a “possible source of the DNA, meaning that they could have left that DNA sample”; (2) “[E]xcluded,” meaning that the “reference

come to this conclusion, Mehmet excluded data which fell below the crime lab’s “analytical” and “stochastic threshold”—that is, data that could be subject to random distortions, including “dropout.”⁹

Having concluded that both defendant and the victim were possible contributors, Mehmet performed the additional step—using the “combined probability of inclusion” method¹⁰—to measure “the rarity of that mixture profile.” She arrived at “two different calculations” or statistics for defendant and the victim. For defendant, she concluded the combined probability of inclusion, or the “probability that somebody else would be included at the same set of markers” as defendant, was approximately one in 590 African Americans, one in 8,190 Caucasians, one in 6,120 Hispanics, and one in

sample and the crime scene sample do not match and that [the] individual could not be the source of the DNA”; (3) “[I]nconclusive,” meaning “there is insufficient sample or . . . there are some similarities and there are some differences, but there’s not enough to draw an exclusion or inclusion statement”; and (4) “[N]o result,” meaning “no DNA was found in the crime scene sample.”

⁹ The “analytical threshold” is the laboratory-set number above which “we can be sure that those alleles are alleles or forms of DNA that we’re detecting.” The “stochastic threshold” is “a laboratory-set number used to assess whether a sample contains sufficient DNA to obtain reliable results.” (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 781, fn. 49, citing *United States v. McCluskey* (D.N.M. 2013) 954 F.Supp.2d 1224, 1276-1277.) Allele Dropout is the “failure to detect alleles above the analysis threshold.” (Chin et al., *Forensic DNA Evidence: Science and the Law* (The Rutter Group 2020) ¶ 6:2, p. 6-4.)

¹⁰ The combined probability of inclusion method is the probability that a random person would be included as a contributor to the DNA mixture at issue. (Scientific Working Group on DNA Analysis Methods: *Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Laboratories* (2017), p. 77 <<https://1ecb9588-ea6f-4feb-971a-73265dbf079c.filesusr.com/ugd/4344b0_50e2749756a242528e6285a5bb478f4c.pdf>> [as of Oct. 14, 2020].)

30,200 Asians. For the victim, she determined the “combined probability of inclusion, [was] approximately one in 9,130 U.S. Caucasians, one in 1,540 African-Americans,” one in 7,970 California Hispanics, and one in 33,100 General Asians “could be a possible contributor to the mixture of DNA detected in the suitcase handle swabs.” Mehmet did not use the known “reference sample from any individual in this case to interpret the mixture.” Instead—explaining one of the limitations of the combined probability of inclusion is that it does not take into consideration dropout, which she knew “could be happening in in this case”—she looked “at the markers¹¹ that had heterozygous alleles consistent with [the victim], then I used, . . . the statistical analysis on those markers only to answer the question, what is the likelihood or probability that somebody else would be included at the same set of markers that [the victim] shared with the evidence profile. [¶] And I did the same analysis for Lee Bell. That is why there are two different numbers generated from the same mixture.”

Mehmet testified that when she did the testing in this case in 2010, the “industry was using the [combined probability of inclusion]” method “regularly” for the additional step of determining inclusion statistics. At that time, this method was used in mixture profiles when “there was no discernable major and minor contributor to th[e] mixture sample.” She acknowledged that by the time of trial in 2017, “[t]he industry” had “moved

¹¹ A genetic marker is a “‘site on the DNA . . . also known as the locus (or location),” (*Smith, supra*, 107 Cal.App.4th at p. 653) identified by different DNA test for analysis. The test involved in the case at hand identified 10 markers, including a marker for gender, for analysis.

away from using” the combined probability of inclusion method and had “adopted an analysis that does take into consideration dropout.”¹²

Mark Powell, a criminalist supervisor at the San Francisco Police Department Crime Lab, testified as an expert in the field of DNA analysis and typing. He explained that the Scientific Working Group on DNA Analysis and Methods provides “guidance on how to interpret STR results or DNA results,” which, in turn, incorporates “guidelines . . . created by the FBI.” In 2014, the crime lab’s protocols changed to “really incorporate” those guidelines. However, the FBI guidelines are not mandatory, and there is “no requirement” for crime labs to follow them; “as long as [crime labs] . . . validate their methods, they can apply different methods to mixtures.”

As the technology used to evaluate DNA and the types of samples that could be evaluated (e.g., fingerprints, contact DNA, bodily fluids, etc.) have evolved, so too have the guidelines. The guidelines have likewise changed as to the “statistical interpretational threshold[s],” including for the combined probability of inclusion method. The “main thing” that changed during the relevant time period with respect to the “statistical interpretational threshold guidelines for the combined probability of inclusion” was that “the stochastic threshold, basically it gave kind of a warning not to use the [combined probability of inclusion] if the data was below the stochastic threshold.” When asked if the guidelines had been written “in a more conservative fashion to favor possible suspects from crime scene samples,” Powell replied,

¹² The combined probability of inclusion method disregards loci if there is a possibility of dropout. It is a more conservative statistical method that does not make use of all the available information. Other statistical methods, such as the random match or likelihood ratio, do take those loci into consideration, and so are “much more informative.”

“I think so. I think that’s fair.” Additionally, the analytical threshold for reporting out (or noting) alleles is now different.

Powell also explained the combined probability of inclusion method is a “statistical tool” that “can be used for mixed DNA samples.” The guidelines “from 2010 as well as the . . . most recent ones that came out, those guidelines still allow and still have that what [Mehmet] did in 2010, in terms of using the CPI number, that that’s allowable.”

In January 2017, Powell was “asked to reconsider” the “rarity of the sample . . . given the new guidelines.” Powell created a new table of results based on Mehmet’s electropherograms. Powell’s table of results included “additional alleles” that Mehmet’s did not because “there was data that was less than” the stochastic threshold but still above the analytical threshold—meaning he could see there was DNA data but could not draw any conclusions based off that data because of the potential for dropout. Powell went through each of the genetic markers, and only two contains alleles all “above the [guideline] stochastic threshold,” as opposed to the six genetic markers Mehmet used. He thus determined under the new guidelines that it was “inconclusive” whether defendant and the victim were possible contributors to the DNA retrieved from the suitcase handle, because there was “not enough information” and it was a low-level sample. Because of this and the fact the sample from the suitcase handle was not an intimate sample (meaning collected “directly from somebody” or a personal “item of clothing”), Powell was not “able to assume a contributor,” and could not give any “statistical meaning” to what he saw. In other words, because Powell saw “possible peaks below the analytical threshold . . . [and] the data level was a low-level sample,” he was not “able to give statistics” as to whether defendant and the victim were contributors.

Powell also reviewed Mehmet's initial (five step) analysis and found no errors. There was some indication Mehmet had "referred to known profiles when evaluating the unknown evidence from the suitcase handle swab," and Powell stated a concern can rise with using "known profiles when making a statistical choice"—"there's a risk of reverse-engineering the result." But Powell did not "see any evidence of any type of bias" in Mehmet's interpretation of the evidence samples or any evidence she was "trying to 'fit' the evidence into some type of preconceived notion." When asked if the guidelines from "2010 as well as . . . the most recent ones that came out, those guidelines still allow and still have said . . . what [Mehmet] did in 2010, in terms of using the CPI number, that that's allowable," Powell, replied "Yes."

Bruce Budowle, who as part of his work with the FBI was the former chairman of the Scientific Working Group on DNA Analysis Methods, testified as an expert "in the area of forensic DNA typing, evaluation, interpretation, and statistical calculations." According to Budowle, the combined probability of inclusion method used by Mehmet to assess statistical significance is "the most commonly used method not only in the United States, but also in Asia, Africa and the Middle East."

Budowle reinterpreted the typing results—that is, the electropherogram—from 2010, but did not review Mehmet's results. He "looked at the evidence first" and did not refer to "any reference samples" from the victim or defendant. "[B]ased on the evidence," he determined the sample was a "two-person mixture." Next, he "assessed whether or not there could be potential for dropout at any of the markers, based on the general protocols that the crime lab uses" and determined, due to dropout, he also could only consider two genetic markers because those were the "only two

that fit the criterion of having no missing data.” However, unlike Powell, after comparing the evidence “to the known samples,” Budowle determined that both the victim and defendant “could be included as contributors of th[e] mixture.”

He then “performed two statistical analyses,” one using the combined probability of inclusion method, and the other using random match probability or modified random match probability method.

Under the combined probability of inclusion method, “[t]he results range[d] from one in 11 for African-Americans to one in 49 for Hispanics; Caucasians were one in 20,” with “respect to the inclusion of both [the victim and defendant.]” Budowle’s view was that it was “inappropriate” to have “two different statistics from the same sample” under the combined probability of inclusion method. Rather, it was “just one number for both” because “it’s not about, specifically about the person. It’s about the portion of the population that could be included that they must be part of.”

Under the random or modified random match probability method—a method of “calculation that’s done on single-source samples”—there are several ways “to get . . . a single-source component.” Sometimes, as Budowle did in this case, one can make “certain assumptions about the evidence” to exclude a known contributor. Essentially, Budowle explained, if you took a mixture of two DNA samples and you took out the known sample “then what’s left over has to belong to someone else.” You can then do “a calculation on the [remaining portion].” Budowle has written on this type of subtraction testing method, and stated “this is not an uncommon thing that’s done” and there is a “degree of acceptance on when you can subtract someone out.” He described a swab from a rape victim, and a sample on a glove found

“two miles away,” as different “scenarios,” one scenario that “allows us to do it [i.e., to subtract out]” and the other which does not.

Here, because the victim’s body was found inside the suitcase, Budowle assumed her DNA “could be on the suitcase” and thus subtracted out her DNA, and “‘What’s left over?’ It had to be from someone else.” After subtracting out the victim’s DNA from the mixture, Budowle could not exclude defendant as a contributor. Statistically, “the chance of . . . observing this profile in the population” ranges from “one in 1.3 million for African-Americans, one in 9.1 million Caucasians, and one in 10 million Hispanics.” On cross-examination, Budowle stated that if he had made an unreasonable assumption, “I would never have done it in the first place.” He thought it imminently “reasonable . . . that a person who has been murdered and put into a suitcase, DNA should be found on that suitcase.”

Other Domestic Violence Evidence

In addition to evidence of domestic violence by defendant against the victim, the prosecution presented evidence of domestic violence by defendant in two prior relationships.

Defendant dated C.H. from 1995 to 1997, and they had a daughter together. By the time of trial, C.H. had passed away, and her sister testified about defendant’s relationship with C.H. In August 1995, C.H. called her sister asking to be picked up because defendant “was beating on her.” When the sister arrived, she saw C.H. “was crying and she was arguing” with defendant. Defendant’s voice was “[a]ngry . . . evil.” Defendant picked up “a crowbar like you jack up a car with” and hit C.H. with it on the left side of her head “four, five times.” Although C.H. was bleeding from her head, she insisted on going to the police before going to the hospital.

C.H.'s former landlord testified that in February 1997, he was working at an apartment and "heard a scream and a thump" from next door. When he walked over, he saw defendant "pounding" on C.H., "actually . . . kicking her" and then proceeding to "punch her." The landlord was "incredulous . . . that somebody would pound on somebody that hard." He called the police and returned to the apartment where he saw C.H. "laying on the ground." Once an ambulance arrived, C.H. was "carried out in a stretcher" her face was "all bloody, all over." Defendant had left the scene, but prior to the arrival of the police he had "phoned [C.H.] at the apartment and told her that if she called the police he was going to kill her."

Another woman, D.H., testified that in 2008, she and defendant were dating and in a "sexual relationship that was based on him giving [her] drugs" and them having sex. One night, they were "hanging out and getting high," when they got into a fight. Defendant hit her in the face "a lot" of times and he "had a big knife" and said he would "kill" her if she left. She was "screaming" and "scared" but was able to leave and call the police after "two neighbors came into the room." Police recovered a "knife and a knife sharpener" from defendant's room.

An expert "in the area of domestic violence or, as the term used, in her field of the 'cycle of violence'" testified domestic "violence tends to escalate once it begins," and victims of domestic violence are most at "risk of either increased abuse or even being killed around the point that they're leaving" their abuser.

Defense Case

The defense called one witness. She testified that, in May 2010, after seeing a news broadcast about the victim's death, she had contacted the police and told them she believed she had seen the victim in a bar or club

either “the previous evening” or “several days” before the broadcast. The police record indicates she identified the bar as “Gregory’s Club.”

In May 2017, she was interviewed by the defense investigator. She told him she could not recall in which bar or club she had told the police she thought she had seen the victim. She told the investigator she had seen the victim at “the Bank Club” in Emeryville. She also told him she would not have told police it was “Gregory’s Club” because that club was actually called “ “Ayers Chapter 2.” ’ ” At trial, she testified, “ ‘Well, maybe what had happened is I had gone to Ayers first, and then I had gone to the Bank Club.’ ” She also could not recall what time she believed she saw the victim, any of the victim’s physical characteristics beyond skin color, or what she told the police when she first contacted them. Finally, she told the defense investigator she thought the victim had a suitcase with her, but she could not recall whether she had said that to the police.

Conviction

The jury convicted defendant of one count of first degree premeditated, willful, and deliberate murder. The court sentenced him to 25 years to life in state prison and imposed various fines and fees.

DISCUSSION

The DNA Testimony: Mehmet’s Testimony¹³

Section 402 Hearing

Before trial, defendant moved to “dismiss and alternatively to exclude” Mehmet’s testimony about the 2010 DNA test results. (Capitalization and

¹³ We review the trial court’s evidentiary rulings for an abuse of discretion. (*People v. McWhorter* (2009) 47 Cal.4th 318, 362; *Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 576 (*Cooper*) [appellate court reviews a trial “court’s execution of [its] gatekeeping duties for an abuse of discretion”].)

boldface omitted.) He maintained that under the “ ‘third prong’ ” of *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*),¹⁴ and under *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*), Mehmet’s conclusions “were the result of her lack of expertise in the subject matter of D.N.A. analysis and interpretation,” as well as her “utilization of improper D.N.A. testing procedures.”¹⁵ Defendant claimed these assertions were supported by “the recent disclosure” of Powell’s re-interpretation of the DNA data under the 2017 guidelines.

At the start of the Evidence Code section 402 hearing, the court informed the parties it had received and reviewed the defendant’s moving papers and the People’s opposition. It also confirmed they were “going to have a prong three hearing” regarding Mehmet’s testimony.

Mehmet then proceeded to testify, much as she would at trial. She opined the suitcase handle sample showed “a mixture of DNA from at least two individuals,” defendant and the victim both being included as possible DNA contributors. The statistical estimate, in turn, that the victim was

¹⁴ Abrogated by statute on another ground as stated in *People v. Wilkinson* (2004) 33 Cal.4th 821, 845–848.

¹⁵ In *Kelly, supra*, 17 Cal.3d at page 30, the Supreme Court established a three-part test to be used by trial courts to assess the admissibility of expert testimony based on the application of new scientific techniques. Proponents of the evidence must demonstrate (1) the reliability of the technique at issue (first prong), (2) that the testimony with respect to the technique is offered by a properly qualified expert (second prong), and (3) that technique was correctly performed (third prong). The *Kelly* test was not changed by *Sargon*. (*Sargon, supra*, 55 Cal.4th at p. 772, fn. 6.)

In *Sargon*, the high court held “the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative.” (*Sargon, supra*, 55 Cal.4th at pp. 771–772.)

included in the sample was “approximately . . . one in 1,540 African-Americans” and for defendant, approximately “one in 590 African-Americans.”

Defense counsel commenced cross-examination by asking Mehmet about the later Scientific Working Group for DNA Analysis Methods Guidelines. The prosecutor objected on relevance grounds stating, “I think we need to focus on what happened in 2010, the guidelines, and if she followed the proper procedures and protocols in 2010.” Defense counsel responded, “if there’s an evolution in what’s considered proper and reliable procedures, then that’s something the Court needs to consider. [¶] The question I’m about to ask Ms. Mehmet . . . is, would her opinion change if she were to consider this same evidence under what are now improved procedures that have been issued by [the Scientific Working Group] and that will, and if not already, are being followed by all laboratories that are considered accredited and reliable government DNA laboratories.” (Italics omitted.)

The court stated it was “aware that science evolves, expert analysis evolves; but what we have in this case is a witness who is talking about what she did in 2010. And the standards did not change until . . . 2017,” and it would not be appropriate to ask “her to speculate about . . . whether she thinks [the DNA] results would be the same under [a 2017] analysis.” The court then pointed out Powell was going to testify to his reexamination utilizing the 2017 guidelines.

Later in the hearing, defense counsel asked Mehmet her “professional opinion” on whether the combined probability of inclusion method she used in 2010 to determine statistical probability was the “the most appropriate statistic for degraded mixtures.” When Mehmet responded that currently,

meaning in 2017, a “likelihood ratio” method would be “[t]he most appropriate,” the prosecution objected on the ground the hearing was about “whether or not the correct procedures were used back in 2010.” Defense counsel responded that was not the case “if the scientific thinking and understanding has changed, such that we know now that either the prior way of doing it was not reliable *or* that there’s a more reliable way to give weight to DNA evidence now, based on advances in the scientific thinking and understanding and that it’s the consensus of the forensic DNA testing community, I don’t see any way in which it’s not relevant—I guess, if it’s a relevance objection.”

The prosecutor responded, “When we’re talking about reliability, we’re talking about what happened in 2010 and whether or not the correctness of procedures were used, versus the quality of the analyst’s performance of those procedures. [¶] He’s talking about statistical interpretation, okay? The [combined probability of inclusion] number was approved of by the Court of Appeals back in 2010, and much earlier than that. [¶] . . . [¶] [A]nd that she concluded the correct procedures back in 2010, Your Honor, is really the sole issue of why we’re here.” The prosecutor went on to point out defense counsel would be able “to cast doubt on the [combined probability of inclusion] number, if he wants,” through his own experts, and what he is now arguing goes “to the weight, but not the admissibility, of the evidence.”

Defense counsel rejoined that the court should not “restrict itself to the knowledge that was available in 2010 in determining whether, in 2017, evidence is reliable and admissible.” At that point, citing to *Sargon*, counsel asserted the court was not only determining a *Kelly* prong three issue, “but is also deciding a reliability issue.”

The court reiterated it was conducting a “402 hearing and not the trial, itself.” That “a new standard has been put in place in 2017,” said the court, did not mean “this witness can’t testify as to the tasks she conducted in 2010 when—if those tasks comported with the protocols and understandings and the standards that existed back at that time period. [¶] The jury, in hearing all the evidence in this case, may choose to decide that they’re going to give more weight to the 2017 testing. They may choose to do that.”

Later in the hearing, defense counsel asked Mehmet if there were “any articles or journals you’ve read that have significantly changed and altered your view of interpreting mixtures of degraded DNA samples since 2010?” The prosecutor again objected. Defense counsel repeated, “for the record, . . . I think that, under prong three and under *Sargon Enterprises* the Court has to find that the evidence is reliable, and it’s reliable today. [¶] Not whether procedures that may have been later determined to be incorrect . . . in 2010; but then that’s okay, the evidence still comes into before the jury. [¶] That’s, I think, an admissibility question for this Court, and so that’s why I’m continuing to make this argument.” The court stated, “You’ve made the argument; the objection is sustained. Move on.”

In addition to seeking to ask Mehmet about the 2017 guideline changes, defense counsel had asked, before Mehmet commenced testifying at the hearing, for a section 402 hearing as to Powell’s testimony, stating “it would be a prong three” and counsel might “inquire somewhat into his expertise.” Counsel described Powell as having “essentially reevaluat[ed] an old test method that’s already met prong one muster along [*sic*] ago.” The court replied, “Right, we’re not talking about prong one.”

Prior to the section 402 hearing, Powell had been identified as a witness for the prosecution. However, prior to the conclusion of the hearing,

the prosecutor indicated it was “not my intention to call [Powell] at the trial,” although “depending on what the results are in terms of TrueAllele, that could change.”¹⁶ At that point, defense counsel stated the defense would call Powell to “cast doubt on the admissibility of the evidence the Court’s heard thus far.” Accordingly, defendant was still seeking a section 402 hearing as to his testimony. The prosecutor responded the People did not object to Powell’s qualifications under *Kelly* prong[s] 1, 2, or 3,” commenting the defense apparently intended to call Powell “to attempt to impeach” Mehmet’s testimony. The prosecutor reiterated the purpose of the section 402 hearing was to determine if Mehmet had “followed the correct procedures that were used back in 2010.”

The court ruled no section 402 hearing was required as to Powell because the “only reason we have a 402 hearing is if the opposing side, the side that is not calling him as a witness, requested it because they have concerns with prong one, two, or three under the *Kelly* authorities.” The prosecution had no *Kelly* issues with Powell, and the fact Powell reached a different conclusion than Mehmet would “go in front of the jury.”

Challenge to the Court’s Ruling on the Testimony

Defendant claims the trial court erred in excluding “crucial evidence showing Mehmet’s proposed testimony was outdated and unreliable, [and] based [on] protocols and guidelines that set a new standard for reliability in analyzing mixed DNA samples such as those recovered from the suitcase handle.” (Capitalization and boldface omitted.) Defendant’s briefing tends to speak in generalities. As we understand it, his principal challenge is to the propriety of any testimony by Mehmet about her 2010 test results given the

¹⁶ The prosecution was awaiting new DNA results based on testing using the TrueAllele system.

2017 modification of the guidelines. In this regard, he points to: (a) Mehmet’s own testimony that currently—meaning in 2017—the most appropriate statistical method is the likelihood ratio and not the combined probability of inclusion; (b) the “SWGDM 2010 and 2014 guidelines”;¹⁷ (c) Powell’s 2017 report under the new guidelines that the results during the first part of the analysis would have been “inconclusive”; and (d) Budowle’s 2017 recalculated combined probability of statistic (1 in 11 African-Americans) as evidence that Mehmet’s determinations were rendered “unreliable.” He also maintains, in this regard, that the trial court should have allowed him to cross-examine Mehmet at the 402 hearing as to whether her “opinion would be different in this case as to the statistic she assigned in 2010 if she were to apply the new procedures delineated in the 2017 SWGDAM Guidelines” and should have ordered a section 402 hearing for Powell. Defendant further suggests Mehmet’s analysis was flawed, even by 2010 standards. In this regard, he criticizes her testimony as to the two statistical probability numbers, one for the victim and another for defendant.

The Attorney General maintains defendant has forfeited his principal challenge to Mehmet’s testimony (that it should have been disallowed given the change in the guidelines). He asserts such a challenge had to be brought as a prong one *Kelly* challenge, but defendant invoked only prong three.

¹⁷ While we have obtained the 2017 SWGDAM guidelines, defendant cites to the 2010 or 2014 version of these guidelines, neither of which are included in the record on appeal. The 2017 guidelines state laboratories “shall establish” certain thresholds (analytical and stochastic) and provide guidelines, but leave it up to individual crime labs to set those numbers and guidelines. (Scientific Working Group on DNA Analysis Methods: *Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Laboratories, supra*, pp. 4–6.) The SFPD Crime Lab interpretational guidelines which were admitted at the section 402 hearing, are also not included in the record on appeal.

Defendant cannot now, says the Attorney General, invoke “Evidence Code sections 801 and 802, and *Sargon*” to “retroactively shoehorn a prong one *Kelly* argument into an alternative legal context.”

The distinction between a prong one *Kelly* challenge and a prong three challenge can sometimes be illusive. The case at hand is illustrative.

Defendant is not, in this case, challenging use of the polymerase chain reaction method for creating DNA profiles and making match determinations, per se. Nor is he challenging use of the combined probability of inclusion method in making a statistical probability analysis, per se. Understandably, since both methods have passed muster under a *Kelly* prong one examination. (See *People v. Jones* (2013) 57 Cal.4th 899, 935, 937 (*Jones*) [polymerase chain reaction method]; see also Chin et al., *Forensic DNA Evidence: Science and the Law* (The Rutter Group 2020) ¶ 6:3, pp. 6-15 to 6-17 [discussing the three recognized statistical methodologies, including combined probability of inclusion].)

Rather, he is making a more surgical challenge—specifically, he is challenging Mehmet’s final step in implementing the polymerase chain reaction method for creating a DNA profile and making a match determination. In that fifth and final step, Mehmet concluded the DNA sample from the suitcase handle contained “a mixture of DNA from at least two individuals” and further concluded the victim and defendant were “both included as possible contributors to the mixture.” Given these conclusions, she was able to move on to a statistical probability analysis using the combined probability of inclusion method. Powell, in contrast, was unable, following the 2017 guidelines, to move on to a statistical probability analysis. Rather, given the guideline changes to the “stochastic thresholds,” he reached an “inconclusive” determination as to whether the victim and defendant were

contributors to the DNA sample. In short, Powell's re-examination of the 2010 DNA data ended at the fifth and final step of the polymerase chain reaction method.

Accordingly, defendant is not making a typical prong-one *Kelly* challenge to a new general methodology. Rather, he claims there has been a scientific evolution in how to best perform one of the steps of a scientifically accepted methodology. We need not, and do not, resolve whether this kind of challenge is better labeled a prong-one or prong-three *Kelly* challenge, as we conclude defendant cannot, in any event, demonstrate any error in allowing Mehmet's testimony was prejudicial. (See *Jones, supra*, 57 Cal.4th at pp. 939–940 [not addressing merits of the defendant's claim that a certain methodology associated with polymerase chain reaction method constituted a new scientific technique because the "defendant suffered no prejudice" by admission of expert's testimony].)

As we have recited, the jury not only heard Mehmet's testimony, it also heard Powell's testimony. Accordingly, the jury was told about the change in the Scientific Working Group DNA Analysis and Method guidelines, and also told, by Powell, that under these new guidelines, the results were "inconclusive" and accordingly no statistical probabilities could be determined as to the likelihood defendant or the victim contributed to the DNA sample from the suitcase handle. Thus, defendant was able to both fully cross-examine Mehmet and to urge the jury to reject her analysis in favor of Powell's. Furthermore, Budowle's testimony was, in important respects, the same as Mehmet's—both concluded defendant could not be excluded as a DNA contributor and therefore both went on to statistical probability

analyses.¹⁸ Moreover, Mehmet’s statistical probability number as to defendant was so low it was of little probative value.

Defendant complains Mehmet’s testimony “broke the tie” between Powell’s opinion that no conclusion could be drawn as to whether defendant could be excluded as a contributor of the DNA, and Budowle’s opinion that neither the victim nor defendant could be excluded. Not only is this speculation on defendant’s part, it flies in the face of the instructions given to the jury, which we must presume they followed. (See *People v. Erskine* (2019) 7 Cal.5th 279, 301 [jurors are presumed to have followed court’s instructions].) The trial court instructed the jury as follows: “If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witnesses without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.” Thus, the jurors were specifically instructed they could not do as defendant postulates, that is, they could not “add up” the number of witnesses who concluded the defendant and the victim could not be excluded as contributors and the number of witnesses who concluded otherwise, and credit whichever view amassed the most votes.

Turning to the second aspect of defendant’s challenge to Mehmet’s testimony—the manner in which she performed her testing even under 2010 standards—he appears to be taking issue with (a) her use of known reference

¹⁸ While defendant also challenges Budowle’s testimony, as we discuss in the next section, the trial court did not abuse its discretion in allowing it.

samples and (2) her determination of statistical probability numbers for both the defendant and victim. In this regard, defendant points to (a) Powell and Budowle's testimony that use of "known profiles when making a statistical choice"—"there's a risk of reverse-engineering the result" and (b) Budowle's testimony that reaching two statistical probability numbers under the combined probability of conclusion method would be "inappropriate."

Again, we need not decide whether these asserted shortcomings were merely matters going to the weight of Mehmet's testimony or its admissibility, as defendant cannot show that her testimony was prejudicial. Not only was the jury able to evaluate Mehmet's testimony in light of that by Powell and Budowle, as we have discussed above, but wholly apart from Mehmet's testimony, there was overwhelming evidence defendant committed the murder, and did so with planning and premeditation. He inflicted brutal injuries on the victim for years. When the victim was recovering in medical facilities from the grievous injuries defendant inflicted, he relentlessly attempted to track her down. When she left these facilities and saw defendant, he would beat her and she would return to the facilities with serious injuries. Defendant told his social worker he was " 'going to put a stop to this bitch once and for all,' " which the social worker understood was a threat he was going to kill her. Only days before the killing, defendant left increasingly "aggressive" voicemails on the hospice facility's phone. The victim was last seen with defendant on the Sunday before her body was found on Tuesday, May 18, 2010. The day before, on Monday, defendant retrieved a suitcase he had left at the Drake hotel, and the following day, the victim was found in that suitcase. And in stark contrast to defendant's making repeated phone calls to the hospice center just prior to the killing, he made not a single call after the killing.

In sum, there is no reasonable probability the outcome would have been more favorable to defendant had Mehmet's testimony been excluded. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The DNA Evidence: Budowle's Testimony

Section 402 Hearing

Defendant also asked for a section 402 hearing as to Budowle's testimony, and at the hearing, Budowle testified much as he would at trial. He looked first at the electropherogram and the thresholds the laboratory used "to determine whether or not there may be missing data in the evidence profile." After determining he could only use two loci for comparison, Budowle then looked at the known reference samples to see if the victim, the defendant, or both, could be included as possible contributors. Concluding neither defendant nor the victim could be excluded, he then undertook two statistical analyses—one using the combined probability of inclusion method and the other using the modified random match probability method.

In connection with the random match probability method, Budowle assumed the victim would be a "contributor of the mixture" because she was "pushed into a suitcase and being shoved into a suitcase and being compacted in there—it's likely you might find the victim's DNA on and in the suitcase." Once he subtracted out the victim's DNA as a contributor, he focused on the remaining portion to "calculate a modified random match probability to give a better indication of the strength of the evidence."

The prosecutor then asked Budowle if making the kind of "assumption" he had made was "generally accepted in the relevant scientific community" or, stated another way, if he was "able to do that."

At that point, defense counsel objected on hearsay grounds under *Sanchez*,¹⁹ asserting “case-specific hearsay necessary for [an] expert’s opinion is not admissible.”

The court stated, “I don’t think there is any question” about the victim’s body being found inside the suitcase. However, “[t]he language that Counsel used was that she was pushed into the suitcase. We haven’t had evidence on that specific issue yet. So I don’t think that—if that makes a difference in the evaluation, I think you need to ask the witness that. But he is allowed to rely on the assumption that her body was found within this very suitcase.”

Budowle then responded, “Yes,” when asked if he subtracted the victim’s DNA profile from the mixture sample, based on the assumption the victim’s “body was found in the suitcase.” Once her profile was subtracted, he used the random modified match probability method on the remaining profile and determined he could not exclude defendant as a contributor, with a statistical weight of “1 in 1.3 million African-Americans, 1 in the 9.1 million [Caucasians and], 1 in 10” million Hispanics.

On cross-examination, Budowle explained a decision to subtract out a known DNA profile does not involve “specific criteria,” rather it is “going to be case-specific in the information.” For example, “[if] one owns a car and has been driving it for ten years, with the sensitivity of tests we have today, it is expected that one’s DNA will be in that car,” and an intimate sample taken from a victim—a vaginal swab from a rape victim, fingernail clippings, or a piece of intimate apparel—there is “increased confidence that if something of course is taken from the physical body of a person that that’s going to have their DNA on it most likely.” But “generally speaking,” because “you have greater confidence when something is taken directly from the body” of a

¹⁹ *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).

victim, “it doesn’t mean an all or none” scenario because, “for instance” a pair of gloves found five blocks away would not be appropriate to “subtract that out under that circumstance even if I had a picture of the victim wearing the gloves.”

In this case, Budowle stated all he knew was that the victim “was found in the suitcase” and he assumed “if someone was killed and placed into a suitcase, they didn’t physically go in on their own. . . . One would have to physically take the body and put it into the suitcase” because “she didn’t walk in there and just die on her own.”

At the conclusion of the hearing, defense counsel renewed his objection that Budowle’s “assumptions get into the level of speculation . . . basically what he said was an assumption is necessary to go from a mixture that has a 1 in 11 chance of a random person being included in the population to a 1 in 1.6 million of an African American person,” and so his testimony should be excluded under *Sargon*, prong-three of *Kelly*, and Evidence Code sections 352 and 402.

The court ruled Budowle “performed his analysis using acceptable—standards that are acceptable and proper standards, protocols, and procedures that are accepted within the relevant scientific community” and that he could testify. The “assumption that he’s operating on is that [the victim’s] body was found in the suitcase. With that limited assumption, his evidence can come in. . . . As long as [the People] prove that, his testimony can come in. [¶] How her body went into the suitcase—whether it was stuffed, pushed—any verb that relates to it other than the verb ‘found’ is not an assumption that he can make in this case. But that her body was found in the suitcase is, I think, a supportable assumption, and assuming that that comes in in the People’s evidence, he can testify.”

Challenge to the Court's Ruling on the Testimony

On appeal, defendant renews his assertion that Budowle's decision to subtract-out the victim's DNA, on the assumption it would be on the suitcase handle, was improperly speculative under *Sargon, Kelly*, and Evidence Code section 801 because there assertedly was no evidence to support it—that is, there was no evidence that merely because the victim was found in the suitcase, her DNA would be on the handle.

“California has long recognized that an expert's opinion cannot rest on his or her qualifications alone: ‘even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence.’ [Citation.] California courts have been particularly chary of expert testimony based on assumptions that are not supported by the evidentiary record: ‘an expert's opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide any assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities.’” (*People v. Wright* (2016) 4 Cal.App.5th 537, 545 (*Wright*).)

“Our Supreme Court recently affirmed that ‘ “an expert opinion has no value if its basis is unsound. [Citations.] Matter that provides a reasonable basis for one opinion does not necessarily provide a reasonable basis for another opinion. Evidence Code section 801, subdivision (b), states that a court must determine whether the matter that the expert relies on is of a type that an expert reasonably can rely on ‘in forming an opinion upon the

subject to which his testimony relates.’ . . . We construe this to mean that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.” ’ (Sargon, *supra*, 55 Cal.4th at p. 770, italics omitted.) In other words, assumptions which are not grounded in fact cannot serve as the basis for an expert’s opinion: ‘ “[T]he expert’s opinion may not be based ‘on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors. . . .” ’ ” (Wright, *supra*, 4 Cal.App.4th at pp. 545–546.)

What defendant overlooks in challenging Budowle’s assumption that the victim’s DNA would be on the handle, is that an expert can rely on reasonable inferences based on the evidence. (See *People v. Cook* (2007) 40 Cal.4th 1334, 1345 [DNA expert’s “assumption, that the blood spatters on the right shoe came from a single source, seems little more than application of common sense”]; see also *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 740 [“expert’s testimony about a plaintiff’s earning capacity must be grounded in reasonable assumptions”]; *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 128 [based on the evidence, expert “reasonably could infer that” defendant failed to request medical procedure].)

Thus, the issue here is not whether there was other direct evidence the victim’s DNA was on the suitcase handle, but whether Budowle’s assumption that there was, based the fact the victim’s body was found in the suitcase, was reasonable or whether it was “based solely upon suspicion, imagination, speculation, supposition, surmise, conjecture, or guesswork.” (Wright, *supra*, 4 Cal.App.4th at p. 546, citing *People v. Raley* (1992) 2 Cal.4th 870, 891, superseded by statute on other grounds as stated in *People v. Brooks* (2013) 3 Cal.5th 1, 63, fn. 8.) The trial court, in performing its gate-keeping function, “conducts a “circumscribed inquiry” to “determine whether, as a

matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert’s general theory or technique is valid.” [Citation.] *The goal of trial court gatekeeping is simply to exclude “clearly invalid and unreliable” expert opinion.’*” (*Cooper, supra*, 239 Cal.App.4th at p. 590, quoting *Sargon, supra*, 55 Cal.4th at p. 772.)

We certainly cannot say Budowle’s assumption was unreasonable or that his opinion was “ “clearly invalid and unreliable.” ’” (*Cooper, supra*, 239 Cal.App.4th at p. 590, italics omitted.) To quote *Sargon*, his assumption that the victim would be a contributor to the DNA found on the suitcase handle did not constitute “a leap of logic or conjecture.” (*Sargon, supra*, 55 Cal.4th at p. 772.) Accordingly, the trial court did not abuse its discretion in leaving it to the jury to decide what weight, if any, should be given to his evaluation of the DNA taken from the suitcase handle.

Instruction on Prior Domestic Violence

“Evidence of prior criminal acts is ordinarily inadmissible to show a defendant’s disposition to commit such acts. (Evid. Code, § 1101.) However, the Legislature has created exceptions to this rule in cases involving sexual offenses (Evid. Code, § 1108) and domestic violence (Evid. Code, § 1109).” (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251 (*Reyes*).

As we have recited, the prosecution introduced considerable evidence of prior domestic violence by defendant against the victim and several other women. The trial court instructed the jury with regard thereto by giving CALCRIM No. 852A as follows:

“The People [have] presented evidence that the defendant committed domestic violence that was not charged in this case . . . [¶] . . . [¶] Domestic violence means abuse committed against an adult who is a person who dated or is dating the defendant. [¶] Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily

injury to himself or herself or to someone else. [¶] You may consider the evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] *If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit the murder of Pearla Louis, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the murder of Pearla Louis. The People must still prove the charge beyond a reasonable doubt.* [¶] Do not consider this evidence for any other purpose.” (Italics added.)

Defendant asked the trial court to replace the italicized language with the following language: “If you decide that the defendant committed the uncharged domestic violence, you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed murder. Remember, however, that evidence of uncharged domestic violence is not sufficient alone to find the defendant guilty of murder. The People must still prove the charge of murder beyond a reasonable doubt.” The trial court declined to do so.²⁰

Relying on *People v. James* (2000) 81 Cal.App.4th 1343 (*James*), defendant claims the instruction “violate[s] due process by increasing the likelihood the jury would misuse evidence of prior offenses, opening the door to conviction based merely on propensity.” (*Id.* at p. 1346.) *James*, however,

²⁰ Whether an instruction correctly states the law is a question of law we review de novo. (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1152.)

involved a different instruction, specifically the 1997 version of CALJIC No. 2.50.02. (*Id.* at p. 1349.)

Since then, the jury instructions on Evidence Code section 1108 and section 1109 have been revised, and these instructions, including those pertaining to prior domestic violence, have been upheld against due process challenges. (E.g., *People v. Johnson* (2008) 164 Cal.App.4th 731, 739–740 [upholding CALCRIM No. 852²¹]; *People v. Reyes, supra*, 160 Cal.App.4th at pp. 250–253 (*Reyes*) [same].)

We agree with the reasoning of *Johnson* and *Reyes*, and need not, and do not, discuss this point further.

Next, defendant, relying on *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157 (*Ulster*), contends CALCRIM No. 852A’s permissive inference is unconstitutional “because . . . the evidence lacked any rational connection between prior domestic violence” and the necessary elements of first degree murder.²²

“A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to

²¹ CALCRIM No. 852 has since been replaced by CALCRIM No. 852A, which retains the substance of the original CALCRIM instruction and pertains to evidence of prior domestic abuse. CALCRIM No. 852B, in turn, pertains to prior charged acts of domestic violence.

²² Defendant did not raise this specific contention below. We nonetheless address the merits of this contention. (Pen. Code, § 1259 [“Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any . . . instruction . . . , and which affected the substantial rights of the defendant.”]; *People v. Jimenez* (2016) 246 Cal.App.4th 726, 730 [“ “[W]hether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim.” ’ ’].)

draw that conclusion.” (*Francis v. Franklin* (1985) 471 U.S. 307, 314.) The party challenging the instruction must demonstrate its invalidity applied to him. (*Ulster, supra*, 442 U.S. at p. 157.) Since the permissive inference “leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the ‘beyond a reasonable doubt’ standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.” (*Ibid.*; *People v. Mendoza* (2000) 24 Cal.4th 130, 180 (*Mendoza*), superseded by statute on other grounds as stated in *People v. Brooks, supra*, 3 Cal.5th at p. 63, fn. 8 [“ ‘A permissive inference violates Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.’ ”], citing *Ulster, supra*, 442 U.S. at pp. 157–163.)

Initially, we note the court in *People v. Pescador* (2004) 119 Cal.App.4th 252, 258, rejected a similar challenge to the constitutionality of the permissive inference in connection with CALJIC No. 2.50.02. (See *Reyes, supra*, 160 Cal.App.4th at pp. 251–252 [“The reasoning of the cases analyzing CALJIC No. 2.50.02 is equally applicable to the validity and propriety of CALCRIM No. 852.”].) In *Pescador*, the defendant contended “the instruction improperly permitted the jury to rely on prior acts of domestic violence to infer that he had a propensity to commit premeditated murder and did, in fact, commit premeditated murder.” (*Pescador*, at p. 258.) Based on the facts of that case, the court concluded instructing on CALJIC No. 2.50.02 “was neither illogical nor a violation of defendant’s due process rights” and that there was “ “substantial assurance that the presumed fact is more likely

than not to flow from the proved fact on which it is made to depend.” ’ ’ ”
(*Pescador*, at p. 260, quoting *Ulster*, *supra*, 442 U.S. at p. 166, fn. 28.)

Here, defendant threatened the victim on several prior occasions and “reason and common sense” suggests he had thought about killing the victim—as he had previously expressed—and might one day make good on those threats. (See *Mendoza*, *supra*, 24 Cal.4th at p. 180; *People v. Brown* (2011) 192 Cal.App.4th 1222, 1237 [“[M]urder is ‘the ultimate form of domestic violence.’”].) Additionally, neither the instruction nor the prosecution’s argument suggested that the jury could find premeditation and deliberation solely on the basis of prior acts of domestic violence. Indeed, the instructions stated domestic violence evidence “is not sufficient by itself to prove that the defendant is guilty of the murder” and that the People still had to prove the charge beyond a reasonable doubt.

Accordingly, based on the facts of the case, we conclude instructing on CALCRIM No. 852A “was neither illogical nor a violation of defendant’s due process rights.” (See *Pescador*, *supra*, 119 Cal.App.4th at p. 260.)

Refusal to Instruct on Manslaughter

“If supported by substantial evidence, a trial court has the duty to instruct on a lesser included offense. [Citation.] ‘The duty applies whenever there is evidence in the record from which a reasonable jury could conclude the defendant is guilty of the lesser, but not the greater, offense. . . .’
Ultimately, ‘[i]t is for the court alone to decide whether the evidence supports instruction on a lesser included offense.’ ” (*People v. Trujeque* (2015) 61 Cal.4th 227, 271, italics omitted.)

Defendant maintains the trial court erred in failing to instruct on manslaughter.²³

“Manslaughter is the unlawful killing of a human being without malice.” (Pen. Code, § 192.) Voluntary manslaughter is such a killing “upon a sudden quarrel or heat of passion.” (*Id.*, § 192, subd. (a).)

Defendant identifies the following evidence as raising “a reasonable doubt about sudden quarrel/heat of passion.” He first points to his March 2010, “increasingly more paranoid,” calls to his social worker, wherein he threatened the victim, stating “‘I’m going to put a stop to this bitch once and for all.’” Second, he points to his calls over the May 14th weekend to the victim’s hospice facility.²⁴ Finally, he points to the evidence that the last time

²³ We independently review the trial court’s decision. (*People v. Trujeque, supra*, 61 Cal.4th at p. 271.)

²⁴ Transcripts of some of the calls are included in the record on appeal. In one call defendant states, “Hi. This is Lee Bell. And I’m callin’ ‘cause [the victim]—you know—is—you know—callin’ my number—her and another friend on the computer and other stuff they doin’. You know—when I call back to see what answer, she don’t say anything. You know what I’m sayin’? She won’t answer the phone. So she keep doin’ it, her and her friend. I’m tryin’ to find out what’s goin’ on, you know? And that’s why I’m callin’. Tell her—you know—not to call me if she got to do all that type of stupid stuff. You know—playin’ games, tryin’ to run up lookin’ crazy, all this old stuff, okay? I told her to leave me alone—you know—if she can’t act right or treat a person right. But she’s continue to play these games, okay? I don’t know what she tryin’ to do but she doin’ too much, okay? Messin’ up my life with all this old stuff she doin’. So tell her to stop. You know—tell her don’t even call me period.” In another call, defendant states, “You know—and I been callin and all this old stuff. You know—[the victim] . . . you better get that straight, okay? She callin’ me—you know—use somebody’s phone—whatever—you know—she don’t answer the phone back and got me callin’. I don’t know if she live there or not. But hey, I’m gonna say somethin’. You need to get that straight, okay? This is Lee Bell, okay? ‘Cause I told you don’t call me—you know—and play them games if you can’t talk to a person

defendant and the victim were seen together, on Sunday May 16th, defendant “was angrily shouting at her” and she “looked scared.” Citing *People v. Berry* (1976) 18 Cal.3d 509 (*Berry*) and *People v. Borchers* (1958) 50 Cal.2d 321 (*Borchers*), defendant contends this evidence “required instructing on voluntary manslaughter.”

In *Berry, supra*, 18 Cal.3d 509, the Supreme Court concluded the defendant was entitled to an instruction on voluntary manslaughter (*id.* at pp. 515–516) in light of the following evidence: The defendant’s wife told the defendant she had “fallen in love with another man” and had cheated on him with that man, and that she may have been pregnant with the man’s child. She kept photographs of the other man. She told the defendant she wanted a divorce. And she engaged in a two-week period of “tormenting” the defendant whereby she “alternately taunted” him with her infidelity “and at the same time sexually excited defendant, indicating her desire to remain with him.” (*Id.* at p. 513.)

In *Borchers, supra*, 50 Cal.2d 321, the Supreme Court again concluded the defendant was entitled to an instruction on voluntary manslaughter. “From the evidence viewed as a whole the trial judge could well have concluded that defendant was roused to a heat of ‘passion’ by a series of events over a considerable period of time: [the defendant’s girlfriend’s] admitted infidelity, her statements that she wished she were dead, her attempt to jump from the car on the trip to San Diego, her repeated urging that defendant shoot her, [her son], and himself on the night of the homicide, and her taunt, ‘are you chicken.’” (*Id.* at pp. 328–329.)

with sense. . . . My name is Lee Bell. Get it straight now ‘cause see I’m getting harassed by [the victim] and—you know—when she playin’ them games. I ain’t gonna play these kinda games no more.”

The evidence in the instant case is not similar to that in *Berry* or *Borchers*. Even if the conduct described in *Berry* and *Borchers* would still be considered sufficient to justify a heat of passion instruction, the victim here did nothing akin to what the victims in those cases did, nor did she engage in any other behavior that could have been considered sufficiently provocative.

To warrant an instruction on provocation and heat of passion, there must be substantial evidence to support a finding that, at the time of the killing, the defendant’s “reason was actually obscured as the result of a strong passion aroused by a ‘provocation’ sufficient to cause an ‘ordinary [person] of average disposition . . . to act rashly without due deliberation and reflection, and from this passion rather than from judgment.’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) Here, beyond defendant’s own vague references to the victim’s “games” in his phone calls to the hospice facility, there is no evidence of any provocation on the victim’s part sufficient to support a manslaughter instruction.

Accordingly, the trial court did not err in failing to give such an instruction.

Sufficiency of the Evidence²⁵

“A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. . . . “Deliberation” refers to careful weighing of considerations in forming a course of action; “premeditation”

²⁵ “When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court, ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ ” (*People v. Powell* (2018) 5 Cal.5th 921, 944 (*Powell*).

means thought over in advance. . . . “The process of premeditation and deliberation does not require any extended period of time. “The true test is not duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.’ ” ” (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.) The evidence must be “ ‘supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.’ ” (*Ibid.*)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), our Supreme Court “developed guidelines to aid reviewing courts in assessing the sufficiency of evidence to sustain findings of premeditation and deliberation.” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419–420.) The court observed evidence typically found sufficient to support such findings “ ‘falls into three basic categories: (1) facts about how and what [the] defendant did *prior* to the actual killing . . . what may be characterized as “planning” activity; (2) facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a “motive” to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of “a pre-existing reflection” and “careful thought and weighing of considerations” rather than “mere unconsidered or rash impulse hastily executed” [citation]; [and] (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a “preconceived design” to take his victim’s life in a particular way for a “reason” which the jury can reasonably infer from facts of type (1) or (2).’ ” (*People v. Thomas* (1992) 2 Cal.4th 489, 516–517, quoting *Anderson*, at pp. 26–27.)

There is abundant evidence in all three categories here.

“*Planning activities:*” Defendant repeatedly threatened the victim. He told her he would kill her and he told his social worker he would “ ‘put a stop to this bitch once and for all,’ ” which the social worker understood to be a death threat and as to which he made a *Tarasoff* report. Defendant repeatedly called the hospice facility in an effort to locate the victim, and his calls became increasingly “aggressive.” On the day before the victim’s body was found, he was seen retrieving the suitcase in which the body was found.

Defendant nevertheless claims “facts about [his] activity before the [victim’s] death are totally absent.” He cites *Anderson, supra*, 70 Cal.2d 15 and *People v. Boatman* (2013) 221 Cal.App.4th 1253 (*Boatman*) as analogous.

In *Anderson*, the defendant killed the 10-year-old daughter of a woman with whom he lived. (*Anderson, supra*, 70 Cal.2d at p. 19.) The Supreme Court concluded there was insufficient evidence to support a first degree murder conviction. (*Ibid.*) There, the victim’s mother left for work leaving the victim with defendant. On the afternoon of the murder, defendant purchased alcohol at a nearby liquor store. An hour or two after that purchase, the victim’s teenage brother returned home. (*Id.* at pp. 19–20.) After finding the door locked, which was not unusual, he spent about 30 minutes in the basement. From there, he heard noises coming from upstairs “like boxes and other things being moved around, like someone was cleaning up,” and he heard the shower running. (*Ibid.*) After eventually getting into the house, he found the kitchen door locked and knocked. The defendant opened the kitchen door, and the brother saw blood on the floor, which defendant explained was from a cut. (*Id.* at p. 20.) The brother left to attend a school dance. When the mother returned home, she noticed blood in the living room, which the defendant explained was from the brother who had cut

himself. When the brother returned home for his wallet and the mother found no cuts, the defendant offered a “subsequent explanation that [the victim] had been cut.” (*Id.* at p. 21.) The victim’s body was found on the floor of her bedroom; “her clothes, including her panties out of which the crotch had been ripped, were found in various rooms of the house”; bloody footprints matching the victim’s size were found leading from the master bedroom to her bedroom, and there was blood “in almost every room” of the house. (*Id.* at p. 21.) The court held there was no evidence of “any conduct . . . prior to the killing which would indicate that he was planning anything, felonious or otherwise.” (*Id.* at p. 32.)

In *Boatman*, the defendant shot his girlfriend in the face, killing her. (*Boatman, supra*, 221 Cal.App.4th at p. 1257.) The Court of Appeal concluded there was insufficient evidence to support a first degree murder conviction. (*Ibid.*) There, the defendant had just been released from jail. After walking home, he spoke with his younger brother for a while and then went to pick up his girlfriend and returned to his house. (*Id.* at p. 1258.) His older brother’s girlfriend was sleeping in the room next to the one in which the victim was shot, and she was “awakened by a ‘[l]oud screaming’ ” or “‘loud talking,’ ” which she could not tell from where it was coming. (*Ibid.*) A couple of minutes later, she heard a gunshot and then “heard a commotion and screaming; ‘it seemed like someone was panicking, like yelling or screaming like out of fear.’ ” (*Id.* at pp. 1258–1259.) Defendant stated he and the victim were in his bedroom, when the victim retrieved a gun from underneath defendant’s pillow. Defendant “was not worried because he trusted [his girlfriend],” and he “slapped the gun away.” (*Id.* at p. 1260.) He then began teasing the victim with a bug that had landed on her, “causing her to ‘scream[] a little bit.’ ” (*Ibid.*) When he next turned back to the victim,

she had the gun again. He took the gun, which he knew was loaded, away from her, and “cocked the hammer, but did not intend to threaten or shoot her” but rather was “[j]ust kind of being stupid.” (*Ibid.*) The victim then “‘slapped the gun, and as soon as she slapped the gun, the gun went off.’” (*Ibid.*) Given the fact that defendant had taken the victim not to an “isolated location” but rather to his home, which was occupied by people, all of whom could identify him, there was no evidence defendant left the room to retrieve the gun and “the only evidence regarding his possession of the gun was that he took it away” from the victim, and finally, he testified the shooting was an accident led the court to conclude the case lacked “any planning evidence whatsoever.” (*Id.* at p. 1267.)

Neither of these cases is similar to the facts of this case. As we have recited, defendant made multiple threats to and about the victim, and additionally, the victim’s body was found in a suitcase defendant retrieved the day before she was found.

“*Prior Relationship and Motive:*” Defendant repeatedly and brutally beat the victim, and repeatedly threatened her life. He told his social worker shortly before the killing he would “‘put a stop to this bitch once and for all.’” When she left the hospice facility just prior to her murder, she told staff she was going to see defendant to get money he owed her. The last time she was seen with defendant, Sunday May 16th, two days before her body was found, he was angry and she appeared scared.

Defendant maintains that while there were “threats to kill . . . such evidence did not form the basis from which the jury could reasonably infer a ‘motive’ to kill the victim, because no consistent action followed from which could be reasonably inferred that the threats meant [defendant] really intended to kill her.” Stated differently, defendant contends, citing *People v.*

Felix (2009) 172 Cal.App.4th 1618, 1627, that a “jury [is] entitled to give significant weight” to a defendant’s threats “made close in time” to the murder, but here, “none of the threats . . . were closely followed by unequivocal action giving weight and meaning to the threats,” and “between the times such threats were made and the time when [the victim] died, [defendant] and [the victim] continued their romantic interest in each other.”

We find this argument incredulous. *Felix* involved a defendant who, “[o]ver the course of about an hour prior to the shooting, . . . threatened to kill [the victims] at least twice,” and the Court of Appeal concluded the “jury was entitled to give significant weight to [the defendant’s] verbal expressions of malice made so close in time to the shooting.” (*Felix, supra*, 172 Cal.App.4th at p. 1627.) *Felix* does *not* say jurors can infer motive from threats *only* if they are immediately followed by “unequivocal action.” Moreover, the instant case is one of escalating domestic violence wherein the final days before the killing were marked by extreme brutality and threats. And by no stretch of the imagination can the victim’s final meeting with defendant be characterized as a resumption of a “romantic interest in each other.” Given the facts of this case, the jury could reasonably infer “defendant entertained a ‘motive’ for killing” the victim. (*Anderson, supra*, 70 Cal.2d at p. 33.)

“*Manner of Killing*”: The medical examiner testified the victim was strangled, which could have taken up to five minutes to accomplish. The victim’s body had extensive bruising, “thirty separate hemorrhages,” multiple abrasions and fractures to her hyoid bone and her left anterior rib—consistent with someone grabbing her wrists, delivering a blow to her head, kicking or pushing her to the ground. “[A]brasions on the left back of the neck” were consistent with trying to get the attacker’s “hand or hands . . . possibly trying to get that off her neck.” And after the victim was killed, she

was put into the suitcase defendant retrieved the day before the victim's body was found in the suitcase in the bay.

Defendant maintains the “manner of death in the instant case was not so particular and exacting that the jury would reasonably infer [he] must have intentionally killed” because it was “just as likely that this time the choking [*sic*] and bruising would relent before unconsciousness or death would occur, just as it had in the past.” In short, according to defendant, since he had previously choked the victim numerous times before and she had managed to survive, the fact he finally strangled her to death does not show a “‘preconceived design’ to take [the victim’s] life.”

To begin with, defendant’s theory—that he simply got unlucky the last time he choked her—overlooks that he not only strangled her, but he also put her body in his suitcase he had retrieved the day prior to when the body was found and the suitcase was found floating in the bay. Thus, the contextual details of the killing clearly permit the conclusion, the killing was planned and not an accidental mishap.

Furthermore, in *People v. Disa* (2016) 1 Cal.App.5th 654, the Court of Appeal held that “[w]hile not overwhelming,” strangulation evidence was “sufficient to support a verdict of premeditated and deliberate first degree murder. (*Id.* at p. 666.) There, the defendant used a carotid restraint hold to kill the victim. A police officer testified he “the average person in the hold loses consciousness within about 12 seconds, and the hold should never be applied longer than 30 seconds.” (*Id.* at p. 663.) The court ruled, the defendant employed a “manner of killing . . . which can render a victim unconscious within a few seconds and dead in a minute. This manner of killing may be viewed as demonstrating ‘a calculated design to ensure death rather than an unconsidered explosion of violence.’” (*Id.* at p. 666.)

Defendant claims *Disa* is distinguishable because here the manner of killing was “a more gradual process ending with brain function cessation, taking five minutes or less depending the victim’s condition” and there was “no evidence showing acknowledgement of the risk of death showing conduct taken to assure that the chokehold with neck pressure indeed would lead to death.” We do not share defendant’s interpretation of the facts. On the contrary, the evidence in the instant case is more compelling than that in *Disa*. In addition to the substantially longer time required to kill the victim, here, the victim also sustained extensive bruising, abrasions and 30 hemorrhages, plus her body was placed into a suitcase the defendant had retrieved the day before her body was found. It was certainly permissible for the jury to “infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a ‘preconceived design’ to take his victim’s life.” (*Anderson, supra*, 70 Cal.2d at p. 27.)

In sum, the first degree murder conviction is amply supported by the evidence.²⁶

Dueñas Challenge

At sentencing the trial court imposed a \$40 court operations fee (Pen. Code, § 1465.8), a \$30 conviction assessment (Gov. Code, § 70373), and a \$7,500 restitution fine (Pen. Code, § 1202.4, sub. (b)(2)).

²⁶ Having rejected all of defendant’s claims of error as to his conviction, with the exception of the admission of Mehmet’s DNA testimony, we also reject his claim that “cumulative” error requires reversal. And even as to Mehmet’s testimony, we have not concluded the trial court abused its discretion, since defendant cannot, in any event, show any supposed error in its admission was prejudicial.

Citing *Dueñas, supra*, 30 Cal.App.5th 1157, defendant contends the trial court violated his constitutional rights by imposing the assessments and restitution fine without holding a hearing on his ability to pay.

In *Dueñas*, the defendant was a chronically-ill, unemployed homeless woman with cerebral palsy and limited education who supported her two children through public aid. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1160–1161.) She had lost her driver’s license because of her inability to pay her juvenile citations and then acquired three misdemeanor convictions for driving without a license because the accumulating fines and fees prevented her from clearing the citations and recovering her license. (*Id.* at p. 1161.) She experienced a series of “cascading consequences” because of “a series of criminal proceedings driven by, and contributing to, [her] poverty,” and she had already been ordered to pay the charges by the end of her probation period. (*Id.* at pp. 1163–1164.)

The Court of Appeal reversed, holding “the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair [and] imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process . . .” (*Dueñas, supra*, 30 Cal.App.5th at p. 1168.) The court ordered the trial court to stay execution of the restitution fine “unless and until the People prove that [the defendant] has the present ability to pay it.” (*Id.* at pp. 1172–1173.)

Forfeiture

The Attorney General does not oppose striking the two assessments, but maintains defendant forfeited his *Dueñas* challenge to the restitution fine since he failed to raise the issue in the trial court. Defendant claims his

failure to object should be excused (a) because *Dueñas* represented an “unforeseeable change in the law” making any objection futile and (b) because implied in the finding of an ability to pay is “a fundamental question of sufficiency of the evidence,” an issue which is not subject to the forfeiture rule.

Courts have split on the general issue of forfeiture.²⁷ (Compare *People v. Johnson* (2019) 35 Cal.App.5th 134, 137-138 (*Johnson*) [challenge to imposition of statutory minimum restitution not forfeited because change in law caused by *Dueñas* was not reasonably foreseeable] with *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 [challenge to assessments and restitution fine in excess of statutory minimum forfeited and “*Dueñas* was foreseeable. *Dueñas* herself foresaw it”] and compare *People v. McCullough* (2013) 56 Cal.4th 589, 596–597 [forfeiture rule applicable to challenge sufficiency of evidence supporting jail booking fee if that fee is not first challenged in trial court] and *People v. Parra* (1999) 70 Cal.App.4th 222, 224, fn. 2 [“sufficiency of the evidence issues are never waived”].)

Here, however, we need not weigh in on the disagreement over whether *Dueñas* was an unforeseeable change in the law. Because the trial court imposed a restitution fine *above* the statutory minimum, defendant had “every incentive” to object based on an inability to pay, and his failure to object therefore resulted in a forfeiture of the issue on appeal. (See *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1032–1033 [it was “unnecessary to address any perceived disagreement on the forfeiture issue” because the court imposed the statutory maximum fine, and “even before *Dueñas*,” defendants

²⁷ This issue is currently on review by the California Supreme Court (*People v. Kopp*, Nov. 13, 2019, S257844, rev. granted.)

“had every incentive to object” because Penal Code section 1202.4 “expressly permitted such a challenge”].)

Ineffective Assistance of Counsel

Defendant alternatively argues we should address the merits of his *Dueñas* claim “to forestall a claim of ineffective assistance” based on his counsel’s failure to object to the imposition of fees on the ground of his inability to pay.

To prove such a claim, defendant must overcome the presumption he received effective assistance of counsel by demonstrating his counsel’s representation fell below an objective standard of reasonableness resulting in demonstrable prejudice. (*People v. Lucas* (1995) 12 Cal.4th 415, 436–437.) Under *Strickland v. Washington* (1984) 466 U.S. 668, claims of ineffective assistance of counsel require proof of both deficient representation and resulting prejudice from an attorney’s substandard performance. (*Lucas*, at p. 436, citing *Strickland*, at pp. 687–689.) On direct appeal, a defendant must demonstrate counsel’s failure to object lacked any “rational tactical purpose” and but for counsel’s lack of objection, there is a reasonable probability the result would have been different. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007–1009.) Here, we can posit a “rational” reason for counsel’s not objecting. Defendant was sentenced to 25 years to life in state prison, and any prison wages would be available to pay the \$7,500 restitution fine.

Nor would we, in any case, conclude defendant’s *Dueñas* claim had merit. On the contrary, *Dueñas* is readily distinguishable. Unlike the record in *Dueñas*, the record here does not show that defendant had become mired in an “inescapable, government-imposed debt trap . . . [such as] *Dueñas* faced” as a misdemeanor probationer. (*Johnson, supra*, 35 Cal.App.5th at p. 139

[distinguishing *Dueñas*].) Nor does the record show defendant—who stands convicted of first degree murder—experienced a series of “cascading consequences” because of “a series of criminal proceedings driven by, and contributing to, [his] poverty.” (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) Finally, as we have observed, defendant is serving a lengthy prison sentence and any prison wages will be available to pay the restitution fine.²⁸

DISPOSITION

The judgment is affirmed.

²⁸ That the Attorney General states he has no objection to striking the two assessments is not a basis on which we can reverse a judgment in the absence of any error, let alone error that is prejudicial. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1201, citing Cal. Const., art. VI, § 13 [constitution generally prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error was prejudicial]; see also *Hardisty v. Hinton & Alfert* (2004) 124 Cal.App.4th 999, 1007–1008 [parties seeking stipulated reversals of judgments must submit memoranda of points and authorities and declarations and other documentary evidence persuasively demonstrating that reversal of the judgment in question will not adversely affect nonparties or the public, erode public trust, or reduce the incentive for pretrial settlement pursuant to Code Civ. Proc., § 128, subd. (a)(8)].) Nor are we, in any case, required to accept concessions by the Attorney General. (See *People v. Petri* (2020) 45 Cal.App.5th 82, 87 [rejecting concession by Attorney General that case should be remanded for a hearing on defendant’s ability to pay assessments].)

Banke, J.

We concur:

Humes, P.J.

Sanchez, J.

A154231, People v Bell