IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **BILLY RAY JOHNSON JR.,** Defendant and Appellant.	Case No. F071640

Kern County Superior Court, Case No. BF151825A
The Honorable Gary Friedman, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The People filed second consolidated amended indictment and information Nos. BF151825A and BF151271A in the Kern County Superior court charging appellant, Billy Ray Johnson, with the following:

Count	Penal Code	Offense	Victim	Citation
I	§§ 220, subd. (a)(2), 261, subd. (a)(2)	Assault with the intent to commit forcible rape on a person under 18 years of age	A.M.	5CT 1152
II	§ 254, subd. (b)	Assault with a firearm	Karen[1]	5CT 1153
III	§ 212.5, subd. (a)	Robbery, first degree	A.M.	5CT 1155
IV	§ 460, subd. (a)	Burglary, first degree	A.M.	5CT 1156
V	§ 29800, subd. (a)(1)	Felon in possession of a firearm		5CT 1158
VI	§ 261, subd. (a)(2)	Forcible rape	L.D.	5CT 1159
VII	§ 261, subd. (a)(2)	Forcible rape	L.D.	5CT 1161
VIII	§ 212.5, subd. (a)	Robbery, first degree	L.D.	5CT 1163
IX	§ 460, subd. (a)	Burglary, first degree	L.D.	5CT 1164
X	§ 261, subd. (a)(2)	Forcible rape	A.R.	5CT 1166
XI	§ 261, subd. (a)(2)	Forcible rape	A.R.	5CT 1168
XII	§ 460, subd. (a)	Burglary, first degree	A.R.	5CT 1170
XIII	§ 288, subd. (b)(1)	Lewd and lascivious act on a child under the age of 14	E.R.	5CT 1172
XIV	§ 237	False imprisonment	K.R.	5CT 1174

[1] Karen's name is Ana Z., but she is referred to as Karen in the record. (9RT 1323; 10RT 1467-1468.)

XV	§ 237	False imprisonment	H.A.	5CT 1175
XVI	§ 261, subd. (a)(2)	Forcible rape	M.V.	5CT 1177
XVII	§ 261, subd. (a)(2)	Forcible rape	M.V.	5CT 1179
XVIII	§ 212.5, subd. (a)	Robbery, first degree	M.V.	5CT 1182
XIX	§ 460, subd. (a)	Burglary, first degree	M.V.	5CT 1183
XX	§ 237	False imprisonment	G.V.	5CT 1185
XXI	§ 29800, subd. (a)(1)	Felon in possession of a firearm		5CT 1186
XXII	§ 246.3, subd. (a)	Grossly negligent discharge of a firearm		5CT 1188
XXIII	§ 29800, subd. (a)(1)	Felon in possession of a firearm		5CT 1189
XXV[2]	§ 30305, subd. (a)	Felon in possession of ammunition		5CT 1191

It was alleged as to all counts that appellant had a strike prior (Penal Code, §§ 667, subds. (c)-(j) & 1170.12, subds. (a)-(e))[3] for burglary (§ 460, subd. (a)), that the same prior was a serious felony (§ 667, subd. (a)), and appellant served a prior prison term (§ 667.5, subd. (b)). (5CT 1152-1193.) It was also alleged in counts I-V, XVI-XXI, XXIII, and XXV that appellant personally used a firearm (§§ 667.61, subd. (e)(3), 12022.5, subd. (a), & 12022.53, subd. (b)). (5CT 1151-1193; 6CT 1546.) It was further alleged in counts IV, IX, XII, and XIX that another person, other than an accomplice, was present in the residence during the commission of the

[2] There was no count XXIV charged in the indictment. (See 5CT 1191.)

[3] Unless otherwise designated, all statutory references are to the Penal Code.

burglary (§ 667.5, subd. (c)(21).) (5CT 1156, 1164, 1170, 1183.) It was also further alleged in counts VI, VII, X, XI, XIII, XVI, and XVII that appellant committed rape during the commission of first degree burglary with the intent to commit rape (§ 667.61, subd. (d)(4)), committed rape during the commission of a burglary (§ 667.61, subd. (e)(2)), committed an offense against more than one victim (§ 667.61, subd. (e)(4)), and engaged in tying or binding the victim or another person (§ 667.61, subd. (e)(5)). (5CT 1159-1162, 1166-1169, 1172-1173, 1177-1178, 1180.) It was also alleged in count I that appellant assaulted A.M. with the intent to forcibly rape her during the commission of first degree burglary (§ 220, subd. (b)). (5CT 1152.) It was alleged in counts X and XI that appellant kidnapped A.R. during the commission of rape (§ 667.61, subd. (e)(1)). (5CT 1166, 1168.) And, it was alleged in counts XXII, XXIII, and XXV that appellant committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang. (5CT 1188, 1190, 1192.) Appellant was arraigned, pled not guilty, and denied the allegations. (6CT 1546.) The court bifurcated the gang and prior allegations. (4CT 1094; 8RT 1150.)

The jury found appellant guilty in all counts and found all of the allegations to be true except the allegation in count XX that appellant was personally armed (§ 12022.5, subd. (a)). (8CT 1961-1965.) The People dismissed the gang allegations in counts XXII, XXIII, and XXV. (8CT 1966.) Appellant waived a jury trial on his priors, and following a court trial, the court found those allegations to be true. (8CT 1966-1970.)

On May 19, 2015, the court sentenced appellant to a total indeterminate term of life with the possibility of parole after 14 years, life without the possibility of parole, and 300 years to life, plus a determinate term of 123 years in state prison as follows: for count I, life with the possibility of parole after 14 years plus a 10-year enhancement (§

12022.53, subd. (b)) and a 5-year enhancement (§ 667, subd. (a)); for count XIII, life without the possibility of parole plus a five-year enhancement (§ 667, subd. (a)); for counts VI, VII, X, and XI, 50 years to life plus a 5-year enhancement (§ 667, subd. (a)) for each count; for counts XVI and XVII, 50 years to life plus a 10-year enhancement (§ 12022.53, subd. (b)) and a 5-year enhancement (§ 667, subd. (a)), for each count; for count II, 18 years plus a 10-year enhancement (§ 12022.5, subd. (a)) and a 5-year enhancement (§ 667, subd. (a)); for count III, a term of two years and eight months plus an enhancement of three years and four months (§ 12022.53, subd. (b)); for count VIII, two years and eight months; for counts XIV and XV, one year and four months for each count; for count XVIII, two years and eight months plus an enhancement of three years and four months (§ 12022.53, subd. (b)); for counts XX and XXII, one year and four months for each count; and for counts IV, V, IX, XII, XIX, XXI, XXIII, and XXV, sentenced stayed (§ 654). (8CT 2022-2038, 2055-2064.) Appellant filed a timely notice of appeal. (8CT 2065-2066.)

STATEMENT OF FACTS

During the summer of 2013, four apartments were broken into and the women and children inside of them were assaulted, raped, molested, kidnapped, and/or falsely imprisoned. The victims' physical descriptions of their attackers and the modus operandi of the crimes strongly suggested one man was responsible. Appellant matched the physical description of the attacker and wore attire consistent with the attacker. Shoes recovered from appellant's residence showed similar tread design and wear patterns to shoe tracks found at three of the victims' apartments. Witnesses saw appellant at three of the victims' apartments during the summer of 2013. Data from appellant's cellphone placed him near three of the victims' apartments before those victims called 911. Appellant's cellphone had no service during the crimes committed against the fourth victim. And, DNA

analysis showed strong statistical likelihood that appellant contributed DNA to items in or just outside of three of the victims' apartments.

A. A.M. (Counts I-IV)

1. A.M.

In July of 2013, 19-year-old Karen was staying with her 17-year-old cousin, A.M. (9RT 1323, 1332; 10RT 1472.) A.M.'s mother was away at the time. (9RT 1332.) A.M. lived in the Kristine Apartments at 2901 Virginia Avenue in Bakersfield. (9RT 1321; 10RT 1519-1521.)

On Monday July 1, 2013, A.M. and Karen slept in separate bedrooms. (9RT 1337-1338, 1340.) A.M. woke up when her bedroom light turned on, and she saw a man in her room. (9RT 1341.) At trial, A.M. described the man as African-American, in his late twenties to early thirties, medium built, 200 to 220 pounds, and approximately six feet tall with "hazel-brown" [4] eyes and a deep voice. (9RT 1345, 1348, 1349-1350, 1377; 10RT 1423, 1424.) He wore a dark hoodie sweatshirt, a ski mask with a large cutout for his eyes, black cotton gloves with cutouts for his fingers, and he held a black handgun. (9RT 1342-1344, 1350-1351; 10RT 1416-1417.) A.M. did not notice if the man smelled. (9RT 1358.)

The man came towards A.M. and told her not to look at him. (9RT 1345.) He put a pillowcase over her eyes. (9RT 1345-1346.) A.M. cried, and he told her to shut up, or he would kill "the girl in the other room." (9RT 1350.) He took off her bra, touched her, and said, "I'm gonna rape you." (9RT 1350, 1353.) A.M. was terrified and peed on herself. (9RT 1353, 1376.) The man put the gun to her head and "racked" it. (9RT 1353, 1355.) A.M. screamed for Karen to call the police and pushed the gun away from her head. (9RT 1353, 1356.) The man told her to shut up and

[4] A.M. agreed with the prosecutor that "hazel" is a "greenish color." (9RT 1349.)

hit her in the head with his gun. (9RT 1356-1357.) A.M.'s pillowcase fell off, and she was face-to-face with the man's eyes. (9RT 1357-1358.)

Karen opened her bedroom door, and the man walked towards her. (9RT 1358-1359.) A.M. ran out of her apartment in her underwear and screamed for help. (9RT 1359, 1360.) He chased after her. (9RT 1363.) She ran to an apartment but no one answered the door. (9RT 1365.) A.M. then saw the man riding a bike in an alleyway in the back of the apartments. (9RT 1365-1366.) She ran to her cousin's apartment, and A.M.'s cousin called 911. (5CT 1313-1319; 9RT 1369-1371.) A.M. returned to her apartment to get dressed and noticed that her cellphone was missing. (9RT 1381-1382.)

A.M. did not think she would ever be able to identify the man who attacked her. (10RT 1425.) After appellant stood up in court at the prosecutor's request, A.M. testified that his height, body type, skin tone, and eyes were similar to her attacker. (10RT 1425-1426, 1427, 1450.) She agreed with defense counsel that appellant's eyes did not have green in them, based on her view in court. (10RT 1448.)

2. Karen

Karen heard screaming and opened her bedroom door. (10RT 1475.) A man pointed a gun at her head. (10RT 1477.) Karen described him as six feet one inch tall[5] and 29 or 30 years old with dark skin, a deep voice, and light brown hazel eyes. (10RT 1487-1488, 1492-1494, 1499-1500.) The man wore a black mask with separate holes for his eyes, a black sweater with a hood, black gloves, dark jeans, and "construction" shoes. (10RT 1478, 1479, 1487, 1499.)

[5] Karen testified the man was the same height as District Attorney Investigator Kauffman, who testified that he was six feet one inch tall. (10RT 1487, 1508.)

He shoved Karen against a wall and A.M. ran out of the apartment. (10RT 1477-1478, 1480.) The man hit Karen in the head and ran outside after A.M. (10RT 1481.)

Kern County Deputy Sheriff Travis Gaetzman interviewed Karen shortly after the assault, and she told him that the man was possibly a light-skinned Hispanic. (10RT 1543-1545.)

3. Investigation

Law enforcement believed a bedroom window was the point of entry into the apartment. (10RT 1526-1527.) After the assault, the window was open and the screen was on the ground. (10RT 1526-1527.) According to Karen, the window was closed when she went to bed, but she did not know if it was locked. (10RT 1474.) The screen was on the window the last time A.M. saw it. (9RT 1338-1339.)

a. Shoe Track Comparison

Law enforcement photographed a single shoe track found below the open bedroom window. (10RT 1526, 1528-1529.) Criminalist Dianna Matthias compared a photograph of that shoe track to shoes recovered from appellant's residence. (22RT 3960-3963; 25RT 4436, 4452-4453.) The shoe track's tread and wear pattern were similar to a black and white Nike shoe recovered from appellant's residence, and she could not eliminate the shoe as a source of the shoe track. (22RT 3962; 25RT 4452-4453.) Matthias could not say the shoe made the impression. (25RT 4458.) In order to have a conclusive result, there must be "individualizing features, which would be nicks, tears, cuts, embedded rocks, something in the shoe tread that then translates to the pattern in the dirt at the time that it was made." (25RT 4459.)

b. Facebook

Bakersfield Police Officer Robert Pair examined appellant's Facebook account. (26RT 4559.) On December 18, 2011, and November 14, 2012, pictures of appellant wearing a black hooded sweatshirt were uploaded onto his Facebook account. (3SCT[6] 578, 587; 27RT 4608, 4613.)

On June 17, 2013, a picture of appellant holding a large caliber handgun with the message, "[i]t is what it is. Play time is over" was uploaded onto his Facebook account. (3SCT 575; 26RT 4577, 4579.)

On June 27, 2013, appellant's Facebook account had the following status: "I have a new 45, but be walking around wit a 9mm and you didn't even know it." (26RT 4571.) Officer Pair testified that a "45" is a common term used to described a .45-caliber handgun. (26RT 4572.)

c. Appellant's Cellphone Data

A.M.'s cousin called 911 at 3:29 a.m., and law enforcement estimated the crime could have occurred 15 minutes before the call was made. (10RT 1463, 1512, 1514; 28RT 4846.)

(1) Activity

Destiny Walker was appellant's girlfriend. (18RT 3107.) On July 1, 2013, appellant and Walker exchanged calls and text messages between 12:18 a.m. and 3:00 a.m. (28RT 4791-4792.) There was a break in activity between 3:00 a.m. and 4:00 a.m. (28RT 4792.) Appellant sent Walker a series of text messages starting at 4:01 a.m. (28RT 4814.)

(2) Location

District Attorney investigator Jason Furnish, who analyzed appellant's cellular data, determined appellant's cellphone was in the area of the crime

[6] Respondent refers to the Supplemental Clerk's Transcript as "SCT."

scene at 2901 Virginia Avenue before the 911 call; however, cellular towers used by appellant's cellphone likely provided coverage to both the crime scene and his residence at 900 Quantico Avenue. (5SCT 1294; 27RT 4724; 28RT 4846.) The crime scene and appellant's residence were "in very close proximity as far as when you're talking about cell phone towers and coverage areas." (28RT 4895.) Furnish could not exclude appellant's cellphone's location from the crime scene or his residence at the time of the assault. (28RT 4846.)

B. L.D. (Counts VI-IX)

In July of 2013, 21-year-old L.D., her husband Dillon, and their one-and-a-half-year-old daughter lived in an apartment at 4300 Columbus Street. (10RT 1562, 1564.) Dillon had a "predictable" morning routine and left for work at about 4:45 a.m. (10RT 1564.) The night before the assault, L.D. and Dillon had sexual intercourse. (10RT 1582.)

On Thursday July 18, 2013, Dillon left for work and L.D. fell back asleep for 15 or 20 minutes. (10RT 1585-1588; 13RT 2100.) Her daughter was in bed next to her. (10RT 1587.) L.D. woke up and saw a man standing over her with his hand on her mouth. (10RT 1588-1590.) She described him as African-American, five feet 11 inches tall, and in his mid-twenties to early thirties, with a deep smooth voice, soft hands, medium build, and thin lower legs. (10RT 1593, 1596, 1606-1607; 11RT 1634, 1679.) She previously told the grand jury that the man had a "rough" voice. (11RT 1732-1733.) He also smelled strongly of cigarettes. (10RT 1594.) The man wore a sweater, a black ski mask with two cutouts for his eyes, black tennis shoes with some white on them, black jean shorts, and he had a black backpack. (10RT 1590-1591, 1601-1602, 1606, 1613, 1614, 1618; 11RT 1634-1635.) L.D. was not sure whether a mask later recovered from appellant's home was the same mask her rapist wore. (11RT 1725; 22RT 3907.)

The man told L.D., "[d]on't look at me" and "[d]on't scream. Think of your daughter." (10RT 1591, 1592.) He told her to get out of bed, and she complied because she was scared that he would hurt her daughter. (10RT 1592.) The man told her to go into the living room and get on her knees. (10RT 1594-1595.) He covered her face with her daughter's blanket and tied her wrists together behind her back with a strap from her daughter's unicorn purse. (10RT 1595, 1596, 1600-1602.)

The man asked L.D. if she had any money, and she told him there might be money in her wallet. (10RT 1599.) She directed him to her wallet, which contained $40 and her identification. (10RT 1606.) He then called L.D. by her name and said he knew her. (10RT 1608.)

The man told her to lie on the couch. (10RT 1610.) He removed her underwear, and she told him, "don't do this." (10RT 1611.) The man, however, touched her breasts and abdomen and pushed her shirt over her face. (10RT 1611-1612, 1618.) He told her he had been watching her and thought she was "damn sexy." (10RT 1613.)

L.D. heard what sounded like a backpack zipper and a condom wrapper tear. (10RT 1613-1615.) The man had vaginal intercourse with her. (10RT 1617-1618.) L.D. thought he wore a condom and did not ejaculate. (10RT 1617, 1619.) Eventually, he withdrew his penis and told L.D. to turn around so she would be on her stomach. (10RT 1621.)

L.D. rolled onto her stomach but somehow ended up on her back again, and she heard the sound of another condom wrapper tear. (11RT 1627-1629, 1630.) The man had vaginal intercourse with her again. (11RT 1631.) L.D. thought he wore a condom and was unsure if he ejaculated. (11RT 1631, 1632.)

The man walked her into the bathroom, and she heard him turn on the water for the bathtub. (11RT 1633, 1636.) He gave her a rag and told her to wash herself. (11RT 1640.) L.D. tried to avoid washing her vagina in an

attempt to preserve evidence, but he took the rag and washed her genital area. (11RT 1641-1642.) At some point, she heard what sounded like the bathroom window being put back in place. (11RT 1670.)

The man put a blanket over L.D.'s shoulders, led her back into the living room, and sat next to her on the couch. (11RT 1644-1645.) He talked to her about her relationship with Dillon and acted as if he and L.D. were having an affair. (11RT 1646, 1648.) The man told her not to call the police. (11RT 1646-1647.)

He walked L.D. to her bedroom and sat next to her on the bed. (11RT 1647.) The man said he needed to take her phone. (11RT 1647.) L.D. asked him not to, because it contained pictures of her daughter. (11RT 1647.) He told her he would hide it in the apartment instead somewhere she could find it. (11RT 1648.)

L.D. heard the front door open and close, but the man remained in the apartment and said, "don't move. I'm still here." (11RT 1650.) She then heard the kitchen window open. (11RT 1650.) L.D. dried off, dressed, grabbed her daughter, and left her apartment. (11RT 1651-1653.) She noted the time was 5:42 a.m. and estimated the man had been inside her apartment for 20 or 30 minutes. (11RT 1651-1652.)

1. Investigation

Dillon testified that the windows were locked and the screens were on all of the windows when he left for work the morning of the assault. (11RT 1795-1796.) After the assault, the bathroom and kitchen window screens were on the walkway behind L.D.'s and Dillon's apartment, and there were scratch marks on the bathroom window that had not been there before. (11RT 1675, 1676-1677, 1795.) Law enforcement tested the bathroom window and was able to open it from the outside when it was locked. (12RT 1895-1896.)

After the assault, L.D. went back to her apartment with officers to look for the wash cloth that she had used to clean herself, but it was gone. (11RT 1662.) Law enforcement found L.D.'s phone in the sofa cushions. (12RT 1818.) And, there was a gray telephone cord at the foot of L.D.'s bed that neither she nor Dillon had ever seen before. (11RT 1673-1674, 1794-1795.)

There were no leads for the first few weeks after L.D.'s rape. (12RT 1874.) Bakersfield Police Detective John Jamison classified L.D.'s case a "stranger rape." (12RT 1872-1874.) "Stranger rape is the rape of an individual by someone they have absolutely no knowledge of." (12RT 1872.) According to Jamison, a "stranger rape" is "[q]uite unusual and difficult to investigate." (12RT 1874.) And, the instant case was the first "stranger serial rape" that Detective Jamison had investigated in 25 years. (12RT 1855, 1874.)

a. Shoe Track Comparison

Law enforcement photographed shoe tracks in the dirt alleyway behind L.D.'s and Dillon's apartment beneath the kitchen and bedroom windows. (12RT 1836-1837, 2036.) Criminalist Matthias compared those shoe tracks to shoes recovered from appellant's residence, and she found similarities between the shoe tracks and black Reebok shoes with a white or silver stripe from appellant's residence. (25RT 4447, 4449, 4460-4461, 4466.) The shoe track and recovered shoes had a similar tread design, and the left shoe had a similar wear pattern to the shoe tracks. (25RT 4461-4466.)

b. Sexual Assault Examination

L.D. had ligature marks on her wrists consistent with being tied. (12RT 1976.) She also had two vaginal tears that were consistent with nonconsensual sex. (12RT 1977-1978.)

Bakersfield Police Officer James Dillon interviewed L.D. at the hospital. (12RT 1827.) She told him that her rapist had a deep voice, and she would know it if she heard it again. (12RT 1829, 1830.)

c. Appellant's Interview

On November 5, 2014, appellant gave a television interview. (5CT 1339.) L.D. watched that interview. (11RT 1711-1713.) She testified that appellant's demeanor was familiar, and she recognized his voice as the man who raped her. (11RT 1713, 1714.) Plus, the way appellant spoke, and his face shape and eye color were similar to her rapist. (11RT 1713-1714, 1718.)

d. Facebook

On September 23, 2012, a picture of appellant smoking a cigarette was uploaded onto his Facebook account. (3SCT 584-585; 27RT 4612.)

On September 30, 2012, a picture of appellant with a black backpack was uploaded onto his account. (3SCT 582; 27RT 4610-4611.)

On August 23, 2013, a picture of appellant was uploaded onto his account. (3SCT 571; 26RT 4574.) Officer Pair testified that appellant's legs were "[f]airly skinny" between his knee and ankle in the photograph. (26RT 4574.)

e. Appellant's Cellphone Data

L.D.'s cousin's wife called 911 at 6:04 a.m., and law enforcement estimated the crime could have occurred 45 to 60 minutes before the call. (5CT 1334-1338; 11RT 1656-1657, 1769; 12RT 1809-1810; 28 RT 4847.) L.D. had been afraid to call 911, because the man told her not to. (11RT 1657.)

(1) Activity

On July 18, 2013, there were incoming text messages and phone calls from Destiny Walker to appellant's cellphone between 12:07 a.m. and 1:03

a.m. (28RT 4817-4820.) Appellant made an outgoing call to Walker at 1:16 a.m. (28RT 4820.) There was a break in activity from 1:16 a.m. to 5:57 a.m. (28RT 4820.) At 5:57 a.m., appellant started making a series of outgoing calls to Walker. (28RT 4820-4821.)

(2) Location

Appellant's cellphone was at or near his residence between 12:07 a.m. and 1:16 a.m. (28RT 4847-4848.) At 5:57 a.m., appellant's cellphone used a tower that provided coverage to the area of 4300 Columbus Street, where L.D. lived. (5SCT 1296; 10RT 1564; 28RT 4848-4949.) In the four months of phone records that law enforcement reviewed, appellant's cellphone only accessed that tower that one time. (28RT 4849.) Between 5:57 a.m. and appellant's next outgoing call, he moved away from 4300 Columbus Street. (28RT 4849.) Appellant's cellphone returned to his "home tower" at 6:17 a.m. (28RT 4849-4850.)

f. Sabrina Thornbrough

In September of 2012, Sabrina Thornbrough moved to an apartment at 4416 Columbus Street. (12RT 1922.) She saw appellant in her apartment complex multiple times. (12RT 1926.) In June or July of 2013, sometime after 2:00 a.m., she saw appellant lying down in the backseat of his car, which was parked in an alleyway behind her apartment complex. (12RT 1924, 1927-1929.) It was hot outside, but appellant was wearing a black-hooded sweater with the hood on. (12RT 1929-1930, 1950.) Appellant got out of his vehicle and asked Thornbrough where her husband was. (12RT 1929.) Thornbrough was scared, so she made an excuse and drove off. (12RT 1929.)

2. DNA

a. Manual Interpretation

The manual interpretation of DNA involves examining an unknown genetic profile without looking at any known references. (22RT 3786.) An analyst separates the contributors from one another and determines how many potential contributors there are in a DNA profile. (22RT 3781, 3786.) As explained at trial, "at that point, before looking at the knowns, we say if somebody cannot be excluded, which statistic can we use to support that cannot-exclude statement. Once we do that, that's called our manual interpretation." (22RT 3786.) "Then we'll do the comparison to the known reference and then say if we can or cannot exclude individuals. And then when we cannot exclude them, we'll use that stat, or statistic, that we had said prior to looking at that known in our manual interpretation." (22RT 3786.)

Garett Sugimoto, a criminalist at the Kern County Regional Lab (hereafter, "Lab"), manually interpreted DNA evidence related to L.D.'s assault. (21RT 3758-3759; 22RT 3800-3801.) He explained that if a result was below a threshold established by the Lab, the sample was uninterpretable manually. (22RT 3798, 3808.)

Purse Strap: L.D. could not be excluded as a contributor. (2SCT 423; 22RT 3809.) There were other allelic peaks in the mixture that indicated a second contributor, but that portion was uninterpretable manually. (22RT 3810.) Consequently, Sugimoto could not make any conclusions regarding the second contributor. (22RT 3810.)

Telephone Cord: The sample from the phone cord was a "low-level sample" that was uninterpretable manually based on the Lab's protocols at that time. (2SCT 423; 22RT 3805, 3810.)

L.D.'s Cellphone: Sugimoto could not draw any conclusions about the sample, because it contained a mixture of at least four contributors. (22RT 3812.) Based on the Lab's protocols at that time, the sample was uninterpretable manually. (2SCT 423; 22RT 3812.)

Kitchen Window: The sample from the kitchen window was a "low-level sample" that was uninterpretable manually. (2SCT 423; 22RT 3809.)

b. TrueAllele

TrueAllele is computer software that analyzes DNA mixtures of two or more people. (23RT 4062-4063.) Dr. Mark Perlin, the chief scientific and executive officer of Cybergenetics, invented TrueAllele. (23RT 4016, 4062.) Sugimoto underwent a one-year training program to become proficient on TrueAllele and had experience operating the computer software. (24RT 4269-4270.)

TrueAllele objectively computes the probabilities of possible genotypes in a DNA sample by using all available data, unlike a laboratory that utilizes thresholds. (2SCT 411-412; 23RT 4059, 4062-4065, 4067-4068, 4086-4087, 4112-4113.) Once TrueAllele finishes its analysis, a trained operator looks at the genotype results and develops a match statistic to a known genotype. (23RT 4065-4066, 4084.) A match statistic is a type of likelihood ratio and "answers the question how much more does a suspect or a victim … match the evidence than a random person?" (23RT 4115-4116, 4118.) According to Dr. Perlin, once the match statistic "is around a thousand" there is "a lot of confidence" that the result was not a false positive. (23RT 4138.)

A match statistic is calculated relative to each ethnic population: black; Caucasian; and Hispanic. (24RT 4167-4168.) Dr. Perlin reports match statistics for the different ethnic populations but uses the lowest statistic in order "to be conservative" when he summarizes the information. (24RT 4168-4169.) Sugimoto calculates and reports the results for all three

ethnic populations, but he relies on the lowest match statistic from those results for his conclusions. (24RT 4278-4279.)

On October 17, 2013, the Lab sent an initial round of DNA data to Dr. Perlin, who analyzed the data using TrueAllele. (22RT 3844-3845; 23RT 4119-4122.) Sugimoto separately analyzed the data in this case using TrueAllele. (22RT 3845-3846.) Dr. Perlin and Sugimoto were unaware of the other's results. (22RT 3845, 3846; 24RT 4190-4191.) Dr. Perlin would expect that persons using TrueAllele with the same data and making the same assumptions would yield results within two factors of 10 of each other. (24RT 4192-4193.)

(1) Dr. Mark Perlin's Analysis

Dr. Perlin had to make certain assumptions when he input data into TrueAllele. (24RT 4244.) According to him, the most important assumption was the number of contributors there were to a DNA sample. (24RT 4244.) He based that assumption on the number and pattern of allelic peaks in the data. (24RT 4262.) If he assumed too few contributors, he may not find "a minor contributor as much" or miss "some of the contributors." (24RT 4261.) If he assumed too many contributors, "it ha[d] very little effect on the match statistic." (24RT 4261.) And, for samples with two or three contributors, once the match statistic reached the level of 100 or more, there were no false inclusions in the results. (24RT 4164.)

Purse Strap: A match between L.D. and a contributor was five quintillion times more probable than coincident. (2SCT 423; 23RT 4137-4138.) And, a match between appellant and a contributor was 43 times more probable than coincident. (23RT 4138.) Dr. Perlin did not have a lot of confidence in that match statistic. (23RT 4138-4139.)

Telephone Cord: A match between appellant and a contributor was 34,000 times more probable than coincident. (2SCT 423; 23RT 4140.) Appellant's DNA comprised about 50 percent of the sample. (23RT 4140.)

Dr. Perlin was not able to make a positive association with the other DNA found on the cord. (23RT 4140.)

L.D.'s Cellphone: A match between appellant and a contributor was 41,000 times more probable than coincident. (2SCT 423; 23RT 4142.)

Kitchen Window: A match between appellant and a contributor was 10 times more likely than coincident. (2SCT 423; 23RT 4143-4144.)

In total, three results supported appellant's inclusion as a DNA contributor in the samples analyzed. (24RT 4231.) Nine results supported the exclusion of appellant as a DNA contributor in the samples analyzed, including L.D.'s vaginal swabs. (24RT 4222, 4230.) And, one result was inconclusive. (24RT 4231.)

(2) Garett Sugimoto's Analysis

The Lab ran samples through TrueAllele at least twice. (24RT 4274, 4279-4280.) Once the results were concordant, i.e., within "two log(LR)" or two zeros of each other, Sugimoto compared the results to known references and determined match statistics. (24RT 4275, 4279.) Sugimoto reported the results as "cannot exclude, exclude, or inconclusive." (24RT 4275.) Under the Lab's protocols, a person could not be excluded if there was a match score greater than "a log(LR) of four, which is the equivalent to a likelihood ratio of 10,000." (24RT 4275.) A result was inconclusive if the match score was between negative 10,000 and 10,000. (24RT 4277.) And, a person was excluded if the match score was less than negative 10,000. (24RT 4277.)

Sugimoto testified that inferring subjects are present in a DNA mixture can impact match statistics by reducing uncertainty in mixtures and giving more definitive answers for other potential contributors. (25RT 4388-4389.) In L.D.'s case, he made inferences that assumed the presence of certain contributors in the samples he analyzed. (25RT 4388.)

Purse Strap: Sugimoto determined that it was inconclusive whether appellant was a contributor. (2SCT 423; 24RT 4283.)

Telephone Cord: Appellant could not be excluded as a contributor. (2SCT 423; 24RT 4285.) The match scores for appellant were the following: for the African-American population, it was 79,000 times more probable than coincident; for the Caucasian population, it was 39,000 times more probable than coincident; and for the Hispanic population, it was 56,000 times more probable than coincident. (24RT 4285.) Sugimoto could not draw a conclusion whether L.D. was a potential contributor. (24RT 4285.)

L.D.'s Cellphone: Appellant could not be excluded as a contributor. (2SCT 423; 24RT 4289.) The match scores for appellant were the following: for the African-American population, it was 22,000 more probable than coincident; for the Caucasian population, it was 12,000 times more probable than coincident; and for the Hispanic population, it was 21,000 times more probable than coincident. (24RT 4289.)

Kitchen Window: Sugimoto determined it was inconclusive whether appellant was a contributor. (2SCT 423; 24RT 4282-4283.)

C. A.R., K.R., E.R., and H.A. (Counts X-XV)

1. A.R.

In August of 2013, A.R. lived in the Kristine Apartments with her daughters, 13-year-old K.R., 11-year-old E.R., and 7-year-old H.A.[7] (13RT 2104-2106, 2109-2110; 14RT 2242-2243.) A.R. spoke "very little" English and understood "some" English. (13RT 2102, 2103.) She generally left for work at 5:00 a.m. when the girls were home with her. (13RT 2107, 2112-2113.)

[7] A.R. had custody arrangements with her daughters' fathers, so the girls only lived with her part of the time. (13RT 2106-2107.)

A week before the assault, K.R. saw a light shine through the window early in the morning after A.R. went to work. (14RT 2274-2275.) K.R. saw a shadow and heard someone push the window, so she crawled to the bathroom with her sisters and called their aunt, who came and got them. (14RT 2278-2279.) In response to this break-in attempt, A.R. put wooden dowels in all of the windows. (13RT 2141.)

Three days before the assault, A.R. had sexual intercourse with Miguel Munoz. (14RT 2229-2230.)

Two days before the assault, A.R. got home from work and observed that all of the dowels had been removed from the windows and $200 was missing. (13RT 2123-2124, 2144; 15RT 2415-2416.) A.R. called the police. (13RT 2142.) Law enforcement found a partial print on the outside of a window consistent with a glove. (15RT 2418.) In response to this break-in, the apartment manager put "screw things" in the windows that made them more difficult to open. (13RT 2147.)

The night before the assault, A.R. tested all of the windows. (13RT 2147.) A.R. and her three daughters slept in the same bed that night. (13RT 2148.)

On Thursday August 1, 2013, A.R. woke up at 4:00 a.m. and got ready for work. (13RT 2148.) When she opened her front door, a man pushed her back inside. (13RT 2155.) At trial, she described him as black, tall, and 30 years old or younger. (13RT 2156, 2161; 14RT 2214.) He smelled of cigarettes. (14RT 2209.) The man wore dark blue gloves that felt like plastic, a black mask with an opening for his eyes, a black sweater with a hood, red athletic shoes, and he had a black backpack. (13RT 2158, 2161, 2162, 2164, 2172-2174.)

The man pushed A.R., and she fell onto her back. (13RT 2155, 2157-2158.) A.R. was frightened and told him to let her go because her girls were sleeping. (13RT 2518.) He responded, "I know" and told her to shut

up. (13RT 2158, 2159.) A.R. told him she did not have any money. (13RT 2160.)

The man covered A.R.'s eyes with thick gray tape from his backpack and wound the tape around her head multiple times, but she was able to see out the bottom. (13RT 2163-2166, 2168.) She gave him her ATM card and code. (13RT 2167.) He stuffed a rag into her mouth that tasted like oil and covered her mouth with duct tape. (13RT 2168-2169.) The man grabbed her hands and tied them together behind her back with plastic. (13RT 2169-2170.) He also tied her feet together with the same type of plastic and connected her feet to her hands. (13RT 2171-2172.)

The man eventually dragged A.R. to the playroom, and she heard the sound of water coming from the bathroom. (13RT 2180.) He rubbed her buttocks and uncovered her mouth a little. (13RT 2180-2181.) A.R. lied and told him she was pregnant. (13RT 2181.) The man remarked, "oh, shit" and kicked her in the back. (13RT 2181.) He retrieved pillows and put them under her head and stomach. (13RT 2181-2182.) The man left and came back with E.R., and then he dragged A.R. to her bedroom. (13RT 2182-2183.)

He lifted A.R. onto her bed, lifted her shirt, ripped her bra, and rubbed her breasts. (13RT 2184-2185.) He turned her over facedown, cut her hands apart from her feet, and lowered her pants. (13RT 2187.) A.R. tried to resist, but he threatened to "do something" to her girls if she did not comply. (13RT 2187-2188.) She believed he would hurt her daughters if she resisted. (13RT 2188.)

The man penetrated A.R.'s vagina with his penis "a little." (14RT 2211-2212.) His penis was partially flaccid. (13RT 2191; 14RT 2212.) He put cream on her vagina and penetrated it again with his penis. (14RT 2211, 2212.) A.R. was unsure if he wore a condom. (13RT 2190-2191.) She

thought he ejaculated, because she felt something wet fall onto her legs. (13RT 2191.)

The man cleaned her vagina, legs, and behind her feet with a wet towel. (13RT 2192-2194.) He left and returned with her daughters. (13RT 2195, 2196-2197.) K.R. and E.R. were naked. (13RT 2196, 2197.) The man told them not to look at him, and he cut their bindings with a knife. (13RT 2197-2198.) He removed the tape from A.R.'s mouth and eyes, as well as the rag from her mouth, and put the tape in his backpack. (13RT 2199.) The man told them they "couldn't call the police" and that if they did, he would come back and the girls "would be the ones to pay for it." (13RT 2200.) He covered A.R. and her daughters with a blanket. (13RT 2200.) The man also took A.R.'s cellphone and told the girls to tell A.R. that he was sorry for what happened. (13RT 2200, 2201.) After he left, A.R. dressed herself and the girls, ran to a neighbor's apartment, and called 911. (14RT 2214-2218.)

2. K.R.

K.R. woke up and saw a man in the room. (14RT 2283.) At trial, she described him as African-American, skinny, and five feet eleven inches tall, with brown or hazel eyes. (14RT 2310, 2312.) He wore a black ski mask with one big hole around his eyes, a black hoodie, black rubber gloves, blue and white plaid shorts, red "sports" shoes, and he had a black backpack. (14RT 2283, 2285, 2286, 2290.)

The man tied K.R's. hands behind her back with zip ties and used tape to tie H.A.'s hands. (14RT 2289-2291, 2318, 2320, 2362-2363.) He took K.R. to her bedroom and told her to lie down on the bed. (14RT 2292.) The man stuffed underwear into her mouth, ripped off her clothes, and pulled her pants down. (14RT 2301-2302, 2303, 2313.) K.R. asked him why he was doing this, and he replied he wanted money. (14RT 2302.) Eventually, he cut off her plastic ties with a knife. (14RT 2316.)

Kern County Sheriff Deputy Amanda Plugge interviewed K.R. after the assault. (15RT 2454-2455.) K.R. told Plugge that the man put duct tape on her eyes and mouth, after he put articles of clothing in her mouth. (15RT 2456.) He told K.R. that he took off her clothes so she would not run away. (15RT 2456.) The man also said "not to look at his face, and specifically his eyes." (15RT 2457.) K.R. thought the man was 26 or 27 years old. (15RT 2459.) And, he used a purple towel to wipe tape residue off of the girls' faces. (15RT 2457-2458.)

3. E.R.

E.R. woke up and saw a man who "wasn't supposed to be there." (14RT 2358.) At trial, she described him as black, "pretty tall," brown-eyed, and in his twenties based on his voice. (15RT 2397, 2399, 2409.) He wore a black mask with two cutouts for his eyes, a black hoodie, blue and white plaid shorts, black gloves, red athletic shoes, and he had a backpack. (14RT 2358-2360; 15RT 2398-2399, 2404-2406.)

The man tied E.R.'s wrists behind her with zip ties, put duct tape over her eyes, put a clothing item in her mouth, and taped her mouth shut. (14RT 2362-2363, 2364-2365, 2370-2371; 15RT 2452-2453.) He also cut off her shirt with a knife, took off her shorts and underwear, and touched her breasts. (14RT 2368-2370, 2371-2372; 15RT 2395.) While touching her breasts, the man told E.R. that they were "nice" and asked her if she liked it. (14RT 2372-2373.) E.R. said no. (14RT 2373.) At some point, the man said he needed money "or something like that." (14RT 2366.)

Later, E.R., her mother, and her sisters were all in her mother's bed. (15RT 2389-2390.) The man "untied" all of them with a knife, put the duct tape and ties from E.R.'s hands into his backpack, and told them not to call the police. (15RT 2390, 2391, 2393.)

Deputy Plugge interviewed E.R. after the assault. (15RT 2447.) E.R. told Deputy Plugge that the man said he removed her clothes to keep her

from running away. (15RT 2452.) The man's gloves were "leathery" and his mask had a single cutout for his eyes. (15RT 2451, 2453.) And, E.R. believed that he was 29 or 30 years old based on his voice. (15RT 2453-2454.)

4. Investigation

The towel the man used to clean A.R. was not in the apartment, and Deputy Plugge did not see a wet purple towel in the apartment. (14RT 2225; 15RT 2458.) Law enforcement also never recovered A.R.'s cellphone. (16RT 2758.)

Kern County Sheriff Detective David Hubbard classified A.R.'s case as a "stranger rape." (16RT 2760.) He testified that stranger rapes are very unusual. (16RT 2761.)

a. Sexual Assault Examination

A.R. had red circular indentations around her wrists and ankles. (18RT 2927.) There were no tears in her vagina which is not inconsistent with forced sexual intercourse. (18RT 2930-2931.)

b. Facebook

On September 23, 2012, and December 6, 2012, photographs of appellant wearing blue and white plaid shorts were uploaded onto his Facebook account. (3SCT 577, 583; 27RT 4608, 4611.)

c. Appellant's Cellphone Data

A.R. called 911 at 6:03 a.m., and law enforcement estimated the crime could have occurred 40 minutes before the call. (16RT 2704; 28RT 4850.)

(1) Activity

There was a break in activity on appellant's cellphone between 8:30 p.m. on July 31st and 4:27 a.m. on August 1st. (28RT 4823.) At 4:27 a.m., Destiny Walker sent appellant a text message. (28RT 4823-4824.)

Appellant sent her a text message at 5:25 a.m. and called her multiple times until 7:06 a.m. (28RT 4824-4826.)

(2) Location

Appellant's cellphone was in the area of the crime scene at 2901 Virginia Avenue before the 911 call was made; however, cellular towers used by appellant's cellphone likely provided coverage to both the crime scene and his residence. (5SCT 1298; 28RT 4850.) Investigator Furnish could not exclude appellant's cellphone's location from either the crime scene or his residence at the time of the crimes. (28RT 4850-4851.)

(3) Internet History

District Attorney investigator Brian Canady reviewed the internet history on appellant's cellphone. (27RT 4665.) On August 2, 2013, at 6:57 a.m., appellant's phone accessed a news article entitled, "Sexual Assault Cases May Be Linked." (27RT 4667.) Later that same day, appellant's phone accessed a website about a secret witness program that offered $5,000 for information on the suspect wanted for sexual assaults. (27RT 4668.) Over the next three days, appellant's phone accessed numerous articles concerning the sexual assaults. (27RT 4668-4670.)

d. Zuli Cardenas and Jose Mendez

Eighteen-year-old Zuli Cardenas lived in the Kristine Apartments for most of her life. (18RT 3039-3040.) Late on August 24, 2013, or early August 25, 2013, someone attempted to break into her apartment while she was home alone. (18RT 3042-3043.) Cardenas was scared and called her boyfriend Jose Mendez. (18RT 3042, 3059.) Cardenas and Mendez drove around looking for the person who scared her. (18RT 3062.) Kern County Sheriff Deputy James Money stopped them. (18RT 3043, 3091-3092.)

Cardenas told Deputy Money that she had seen a man in the Kristine Apartment complex six or seven times late at night walking alone, walking

his dog, or riding a bike. (18RT 3044-3048, 3051, 3092.) She described the man as "a black male in his late twenties or early thirties, having short black hair and no obvious tattoos." (18RT 3092.) Cardenas had seen the man before in the front yard of 900 Quantico Avenue. (18RT 3093.) At trial, she identified that man as appellant, though she previously told Deputy Money that she did not think she would recognize the man again if she saw a photograph of him. (18RT 3045, 3093.)

Mendez testified that he saw appellant almost every night during the summer in the Kristine Apartment complex at 10:00 or 11:00 p.m. on a bike, walking his dog, or sitting on benches in the back of the apartments. (18RT 3064-3065, 3071.) On a prior occasion, appellant and Mendez got into a "stare-down" at a Super Q. (18RT 3079-3082.)

5. DNA

a. Manual Interpretation

Criminalist Sugimoto manually interpreted DNA evidence related to A.R.'s assault. (22RT 3814-3820, 3825-3831.)

A.R.'s Pants – Stain A (Sperm Fraction): The sample from stain A was separated into non-sperm and sperm fractions. (2SCT 423; 22RT 3818.) In the sperm fraction, Munoz was a potential contributor. (22RT 3819.) There were additional foreign alleles in the sperm fraction that were not attributable to A.R. or Munoz. (22RT 3819-3820.) Sugimoto tried to develop a profile of the additional contributor to upload into the Combined DNA Index System (hereafter, "CODIS"), but it was ineligible due to "the low level of the profile." (22RT 3819.)

A.R.'s Pants – Stain B (Sperm Fraction): The sample from stain B was separated into non-sperm and sperm fractions. (2SCT 423; 22RT 3826.) There were foreign alleles in the sperm fraction that were not attributable to A.R. or Munoz. (22RT 3828.)

A.R.'s Shirt (Sperm Fraction): The sample was separated into non-sperm and sperm fractions. (2SCT 423; 22RT 3826.) There were foreign alleles in the sperm fraction that were not attributable to A.R. or Munoz. (22RT 3828.)

b. TrueAllele

(1) Dr. Mark Perlin's Analysis

A.R.'s Pants – Stain A (Sperm Fraction): A match between appellant and a contributor was 1.78 million times more probable than coincident. (2SCT 423; 23RT 4147-4148; 24RT 4155-4156.) A match between Munoz and a contributor was 25 quadrillion times more probable than coincident. (23RT 4148.)

A.R.'s Pants – Stain B (Sperm Fraction): A match between appellant and a contributor was 5.44 million times more probable than coincident. (2SCT 423; 24RT 4156-4157.) And, a match between Munoz and a contributor was 263 quadrillion times more probable than coincident. (24RT 4157.) Munoz's DNA made up 93 percent of the sample, and appellant's DNA comprised the remaining seven percent. (24RT 4157-4158.)

A.R.'s Shirt (Sperm Fraction): A match between appellant and a contributor was 740 million times more probable than coincident. (2SCT 423; 24RT 4158-4159.) A match between A.R. and a contributor was five million times more probable than coincident.[8] (24RT 4158.) And, a match between Munoz and a contributor was 272 quadrillion times more probable than coincident. (24RT 4159.)

[8] Dr. Perlin explained that A.R. contributed to the DNA sample because there was not a complete separation of the non-sperm and sperm fractions in the sample. (24RT 4158.)

In total, Dr. Perlin analyzed 12 items related to A.R.'s case. (24RT 4235.) Three results supported appellant's inclusion as a DNA contributor in the samples analyzed. (24RT 4235.) And, nine results supported exclusion of appellant as a DNA contributor in the samples analyzed, including A.R.'s vaginal swabs. (24RT 4231-4232, 4235.)

(2) Garett Sugimoto's Analysis

A.R.'s Pants – Stain A (Sperm Fraction): Using Munoz as an inferred contributor, Sugimoto determined that appellant could not be excluded as a contributor. (2SCT 423; 24RT 4304.) The match scores for appellant were the following: for the African-American population, it was 2.3 million times more probable than coincident; for the Caucasian population, it was 11 million times more probable than coincident; and for the Hispanic population, it was 12 million times more probable than coincident. (24RT 4304.)

A.R.'s Pants – Stain B (Sperm Fraction): A.R. was excluded from the DNA profile. (2SCT 423; 24RT 4305.) Using Munoz as an inferred contributor, Sugimoto determined that appellant could not be excluded as a contributor. (24RT 4305.) The match scores for appellant were the following: for the African-American population it was 426,000 more probable than coincident; for the Caucasian population it was 1 million times more probable than coincident; and for the Hispanic population, it was 2.1 million times more probable than coincident. (24RT 4305-4306.)

A.R.'s Shirt (Sperm Fraction): Using A.R. and Munoz as inferred contributors, Sugimoto determined that appellant could not be excluded as a contributor. (2SCT 423; 24RT 4307.) The match scores for appellant were the following: for the African-American population, it was 69 million times more probable than coincident; for the Caucasian population, it was 43 million times more probable than coincident; and for the Hispanic

population, it was 100 million times more probable than coincident. (24RT 4307.)

D. M.V. And G.V. (Counts XVI-XX)

1. M.V.

In August of 2013, M.V. lived in an apartment complex at 231 Quantico with her nine-year-old daughter, G.V. (15RT 2486; 17RT 2838.) M.V. worked a job with regular hours from 8:00 a.m. to 5:00 p.m. (15RT 2487-2488.)

The night before the assault, M.V. checked all of the windows and doors to her apartment before she went to bed, except for the kitchen window. (15RT 2499-2500.) M.V. believed she left the kitchen window unlocked. (15RT 2500.) G.V. slept in M.V.'s room. (15RT 2501.)

On Monday August 19, 2013, M.V. woke up and heard a noise. (15RT 2495, 2505-2506.) She felt something hard on her mouth pushing her down. (15RT 2506.) M.V. opened her eyes and saw a man pointing something at her that looked like a gun. (15RT 2506-2507.) At trial, she described him as taller than her[9], in his twenties or thirties based on his voice, and African-American based on the way he spoke. (15RT 2530, 2567.) The man smelled "dirty" as if he had not showered in days. (15RT 2524-2525, 2535.) She did not have a chance to look at his eyes and never saw his skin color. (15RT 2508-2509, 2530.) He wore a black hooded sweatshirt and a black ski mask.[10] (15RT 2506-2507, 2508, 2567-2568.)

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[9] M.V. was five feet one inch tall. (15RT 2485.)

[10] M.V. told law enforcement that she did not know if the man could have been wearing a bandana. (16RT 2593.) She testified that "[i]t just looked like it was -- it covered his face, but it looked black to [her], so it could have been like a ski mask, kind of a nylon kind of thing, but he was definitely wearing a mask." (16RT 2593.) M.V. agreed with defense

(continued…)

The man told M.V. not to make any sounds or noise "if [she] don't want nothing to happen to [her]." (15RT 2509.) He took her into the living room, and she felt the gun on her back as she walked down the hallway. (15RT 2510.) The man tied her hands behind her back with zip ties and wrapped duct tape around her head covering her eyes. (15RT 2511-2512, 2514-2516.) M.V. could see out of a little opening in the tape and spotted a knife on a table. (15RT 2516-2517.) The man asked M.V. if she had money, and she said no. (15RT 2518.) He put duct tape on her mouth and closed the kitchen window. (15RT 2518-2520.)

The man used a knife to "rip[ ] off" M.V.'s shirt. (15RT 2525-2526.) She was scared he would do something to her, so she admitted there was money in the apartment. (15RT 2526.) The man grabbed her, and she showed him where she had put $5,000 cash in a dresser. (15RT 2523, 2526-2528.) M.V. heard him grab the bag of money. (15RT 2527.)

He brought her back to the living room, pulled down her shorts, and removed her underwear. (15RT 2531.) The man threw her on the couch, told her to open her legs, and touched her vagina. (15RT 2532, 2534-2535.) He told M.V. to get on the floor. (15RT 2533.) She felt a towel underneath her. (15RT 2533.)

The man kissed M.V.'s breasts. (15RT 2534.) She heard the sound of a condom wrapper ripping. (15RT 2536-2537.) He put his penis inside her vagina and it felt like he had a condom on. (15RT 2536-2537.) M.V. thought the man ejaculated based on the sounds he made. (15RT 2538.) He told M.V. to get on her knees, and then he put his penis inside her again. (15RT 2539.) She thought he ejaculated a second time. (15RT 2540.)

(…continued)
counsel that she could not tell if the man wore a mask or a bandana. (16RT 2593.)

After he was finished, M.V. heard the man do something with G.V. (15RT 2540-2541.) Then, M.V. heard water running from the bathroom shower. (15RT 2541.) The man returned and took M.V. to the bathroom. (15RT 2541-2542.)

The man put M.V. into her bathtub and cleaned her with a "scrubber." (15RT 2543-2544.) At some point, M.V. thought the man left the bathroom. (15RT 2544-2544.) M.V. heard G.V. scream, so she tried to stand up. (15RT 2545.) The man pushed her head down in the water. (15RT 2545.) M.V. was still gagged and could not breathe. (15RT 2545.) She thought she was going to die. (15RT 2545.)

He eventually released her, and she stood. (15RT 2546.) The water loosened the zip ties, and M.V. was able to free a hand. (15RT 2546.) She took the tape off her eyes and screamed G.V.'s name. (15RT 2546.) M.V. searched for G.V. but did not find her. (15RT 2547.) M.V. discovered that the man had left. (15RT 2547.)

M.V. called her ex-husband and 911. (15RT 2550-2551.) A short time later, she learned that G.V. was safe with a neighbor. (15RT 2554-2555.)

After the assault, M.V. observed that her kitchen window screen had been removed, she did not find the towel she had laid on, the man took her cellphone, and there was a blue ice chest in her living room that did not belong to her. (15RT 2563-2564, 2566.)

M.V.'s family moved her out of her apartment hours after the assault. (15RT 2570.) While moving the beds, they found a zip tie underneath one of the beds on the floor. (15RT 2570.)

Bakersfield Police Detective Rex Davenport interviewed M.V. a few days after the assault. (17RT 2887-2888.) M.V. stated that the man had warned her, "you don't want me to kill you and [your daughter]." (17RT 2891.) He also asked M.V., "how do I know you're not going to call the

police?" (17RT 2892.) And, he insinuated that he took off her shirt so she would not run away because she would be naked. (17RT 2892.) She described her rapist as insecure and stupid. (17RT 2891, 2893.)

2. G.V.

G.V. woke up and felt the bed shake. (16RT 2606.) A man took her mother to the front room. (16RT 2607, 2609.) G.V. described him as African-American and 30 to 35 years old. (16RT 2624, 2645.) He wore a heavy black jacket with a hood, a black mask with a white string that covered his face from the nose down, black leather gloves, short khaki pants, and red running shoes with a green stripe. (16RT 2607-2608, 2610-2611, 2625-2627, 2644.) He had "tiny" curly hair cut "[c]loser to his head." (16RT 2625.)

G.V. screamed and prayed out loud for God to protect her mom. (16RT 2617-2619.) The man returned to the room where G.V. was and duct taped her mouth, eyes, and ankles. (16RT 2619-2622.) He used zip ties on her hands. (16RT 2622.) G.V. was able to eventually slip her hand out of the zip tie, and she removed her bindings. (16RT 2630.)

She called 911, and the man came into her room. (16RT 2633-2634.) He got partially onto the bed where G.V. was. (26RT 2634-2635.) She screamed, threw her phone, and ran to a neighbor's apartment where she called 911 again. (16RT 2634-2638.)

Shortly thereafter, Bakersfield Police Officer Michael Crowe interviewed G.V. (17RT 2870-2872.) She told him that the man did not have a mustache or visible tattoos, was about six feet tall, and wore a black and white mask. (17RT 2872, 2873, 2877.) She later told Detective Davenport that the man was nice to her and apologized when he put tape on her mouth. (17RT 2894.)

Eight days after the assault, G.V. told crime lab technician Destinie Martinez that the man wore a white mask with black on it. (19RT 3278.)

Martinez tried to do a computerized composite drawing of the suspect with G.V., but G.V. was only able to select features for the man's chin, forehead, and skin color. (19RT 3278-3285.)

At trial, G.V. testified that appellant looked similar to the man. (16RT 2655-2656.) Appellant's skin coloring, age, hair length, and curly hair style were the same as the man. (16RT 2656-2657.) However, she could not say for sure that appellant was the man. (16RT 2657.)

3. Investigation

Bakersfield Police Officer Christopher Messick responded to M.V.'s apartment. (17RT 2838.) He observed a white zip tie attached to her wrist and a white zip tie in the parking lot outside her apartment. (17RT 2840-2841, 2845.) Law enforcement also recovered duct tape between the beds in the bedroom and M.V.'s cellphone in a field to the east of her apartment complex. (17RT 2850-2851, 2855-2857; 18RT 2969.)

Detective Davenport testified that there was a large migrant farm worker population around M.V.'s apartment, and a lot of the workers carried small plastic Igloo coolers. (17RT 2898.) Law enforcement recovered fingerprints from the ice chest left in M.V.'s apartment, along with a partial shoe track that is discussed below. (18RT 2994-2995.) Lab technician Lisa Wedeking-White entered the fingerprints into the Automated Fingerprinting Identification System (hereafter, "AFIS"), which contains fingerprints for persons arrested for misdemeanors and felonies. (19RT 3190.) The fingerprints did not match anyone in the database. (18RT 2996.)

Miriam's ex-husband, Ray V., a deputy probation officer, told law enforcement he was under the impression that Quincy, an Eastside Crip, bragged he committed this crime and had $5,000. (16RT 2697.)

a. Shoe Track Comparison

Law enforcement recovered a partial shoe track from M.V.'s kitchen counter and the ice chest. (18RT 2988-2989, 2995.) Criminalist Matthias found similarities between those shoe tracks and a pair of red Nike shoes recovered from appellant's residence. (22RT 3960; 25RT 4444, 4467-4468.) The tread design on those shoes was similar to the shoe track on the kitchen counter. (25RT 4468-4470.) The shoe track on the ice chest was difficult to analyze because "there was a lot of different lines and a lot of patterning to it." (25RT 4472.) However, there was "some patterning" on the ice chest that had "some agreement" with the red Nike shoes. (25RT 4472.)

b. Sexual Assault Examination

The examining nurse collected a pubic hair from M.V.'s cervix. (17RT 2817.) M.V. had red circular injuries around her wrists, an abrasion on her shoulder area, and tenderness in her lower back. (17RT 2817-2819.) She also had abrasions to her outer cervix area that can be consistent with non-consensual sex. (17RT 2814-2816.) M.V. had not been sexually active for several years prior to the assault. (15RT 2562.)

c. Appellant's Cellphone Data

G.V. called 911 the first time at 3:43 a.m. (16RT 2699.)

(1) Activity

Appellant's cellphone was a prepaid phone. (27RT 4681.) "[A] prepaid phone … starts off with a certain balance that you pay for, and then once that runs out you have to pay an additional amount of money to keep the service going." (27RT 4681.) On August 13, 2013, appellant's cellphone received a message from T-Mobile advising him that payment was due the following day. (27RT 4682.) On August 14, 2013, appellant's cellphone received another message from T-Mobile advising him that

payment was overdue and he would have to call in order to reactivate service. (27RT 4682.) And, on August 19, 2013, at 4:06 p.m., appellant's cellphone received a message from T-Mobile thanking him for applying a refill and advising him that his plan was renewed for 30 days. (27RT 4682.)

Investigator Furnish testified that there was a reduction in appellant's cellphone activity between August 13th and August 19th. (28RT 4827.) During that time, there were no outgoing text messages to a regular number until 5:28 p.m. on August 19, 2013. (28RT 4827-4828.) At that time, appellant resumed his "regular call activities." (28RT 4827.)

(2) Location

There was no location data for August 19, 2013, so investigator Furnish was unable to form an opinion as to appellant's cellphone's location prior to G.V.'s 911 call. (5SCT 1299; 28RT 4851.)

(3) Internet History

On August 20, 2013, appellant's cellphone accessed a news article entitled, "BPD[:] Serial Rapist May Have Struck Again" multiple times. (27RT 4670.) His phone also accessed stories related to the assaults on August 22, 2013, August 23, 2013, and August 24, 2013. (27RT 4671.)

On August 31, 2013, appellant's cellphone ran a Google search, which yielded information that law enforcement was awaiting the results on forensic evidence from multiple sexual assaults in east Bakersfield. (27RT 4672.) The search also provided a description of the person suspected of committing the assaults that matched the victims' descriptions. (27RT 4673.) The next day, appellant re-ran the same Google search, which yielded the same result. (27RT 4673-4674, 4676.)

d. Destiny Walker's New Automobile

Destiny Walker posted a message on Facebook stating, "that's a good thing, Eli. You ain't a true criminal like Billy." (26RT 4576.) Appellant

responded, "Destiny Walker, yeah, but when da money come in, what you be saying? Can you buy me a new car? Yeah." (26RT 4576.)

On August 19, 2013, at 11:10 a.m., Destiny Walker purchased a 1994 red Chevy Caprice. (18RT 3029-3032.) Walker paid $2,250 in cash for the vehicle and her driver's license listed her address as 900 Quantico Avenue. (18RT 3032, 3034-3035.)

4. DNA

a. Manual Interpretation

Criminalist Sugimoto manually interpreted DNA evidence related to M.V.'s assault. (22RT 3800-3801, 3831.)

Bathtub Handle: Sugimoto developed a DNA profile from the sample. (2SCT 423; 22RT 3832.) However, it was a low-level sample, and he could not draw any conclusions as to whether M.V. or G.V. could be excluded based on the Lab's protocols. (22RT 3835.)

Zip Tie from the Roadway: Sugimoto developed a DNA profile from the sample, and the profile was uploaded into CODIS. (2SCT 423; 22RT 3833, 3838.) He could not exclude G.V. and M.V. from that profile. (22RT 3836-3837.) On October 7, 2013, there was a CODIS "hit" on the profile. (22RT 3838.) After the "hit," the Lab requested a reference sample from appellant. (22RT 3839.)

On October 28, 2013, the Lab received a buccal swab from appellant. (22RT 3840-3841.) Sugimoto developed a profile for appellant's DNA and compared his profile to the DNA profile from the roadway zip tie. (22RT 3841.) The alleles from appellant's DNA profile were consistent with those from the zip tie. (22RT 3841-3842.)

Ice Chest: M.V. and G.V. were excluded as contributors from swabs taken from the cooler's handle and exterior. (2SCT 423; 22RT 3835, 3836.) There was a DNA profile from the exterior handle that was uploaded into

CODIS. (22RT 3835.) There was a different DNA profile from the cooler's exterior that was also uploaded into CODIS, but law enforcement did not get a "hit" on either profile. (21RT 3748-3749; 22RT 3836, 3870-3872.)

Duct Tape: M.V. was excluded as a contributor, but G.V. could not be excluded. (2SCT 423; 22RT 3836.) There were "minor alleles" on the sample that were uploaded into CODIS, but there was no CODIS "hit." (22RT 3838.)

b. TrueAllele

(1) Dr. Mark Perlin's Analysis

Bathtub Handle: A match between the bathtub handle and M.V. was 643,000 times more probable than coincidence, and a match between appellant and a contributor was 550 times more probable than coincidence. (2SCT 423; 24RT 4163.) Dr. Perlin's level of confidence with appellant's match statistic was "reasonably high" based on validation studies. (24RT 4163-4164.) He explained that for mixtures with two or three contributors, once the match statistic was a hundred or more, there were no false inclusions in the results. (24RT 4164.)

Zip Tie from the Roadway: A match between appellant and a contributor was 211 quintillion times more probable than coincidence. (2SCT 423; 24RT 4164-4165.) A match between M.V. and a contributor was 35,500 times more probable than coincidence. (24RT 4165.) Dr. Perlin could not tell with certainty whether there were two or three contributors to the DNA mixture on the zip tie. (24RT 4166.) He testified that "[i]t looks mainly like two people contributed, but there are a few very low-level alleles present at a few loci that could have arisen from someplace else." (24RT 4166.)

Ice Chest: Appellant was excluded as a contributor to the DNA samples from the ice chest. (2SCT 423; 24RT 4238-4240.)

Duct Tape: Appellant was excluded as a contributor to the DNA sample from the duct tape. (2SCT 423; 24RT 4241-4242.)

In total, Dr. Perlin analyzed 12 items related to M.V.'s case. (24RT 4244.) Two results supported appellant's inclusion as a DNA contributor in the samples analyzed. (24RT 4244.) And, 10 results supported appellant's exclusion as a DNA contributor in the samples analyzed. (24RT 4244.)

(2) Garett Sugimoto's Analysis

Bathtub Handle: Sugimoto could not draw a conclusion as to whether appellant was a contributor, because the match statistic was in the inconclusive range. (2SCT 423; 25RT 4317.)

Zip Tie from the Roadway: Appellant and M.V. could not be excluded as contributors. (2SCT 423; 25RT 4321-4322.) The match scores for appellant were the following: for the African-American population, it was 170 quintillion times more probable than coincident; for the Caucasian population, it was 15 sextillion times more probable than coincident; and for the Hispanic population, it was 14 sextillion times more probable than coincident. (25RT 4322.) And, the match scores for M.V. were the following: for the African-American population, it was 11 million times more probable than coincident; for the Caucasian population, it was 140 million times more probable than coincident; and for the Hispanic population, it was 6 million times more probable than coincident. (25RT 4322.)

Ice Chest: Appellant was excluded as a contributor. (2SCT 423; 25RT 4318-4319.)

Duct Tape: Appellant was excluded a contributor. (2SCT 423; 25RT 4321.)

E. Appellant's Arrest (Brass Knuckles and Suspended License)

On August 28, 2013, Bakersfield Police Officer Karl Martin contacted appellant in a 1994 maroon-colored Chevy Caprice. (18RT 3100-3102.) Appellant was in the driver's seat smoking a cigarette. (18RT 3101-3102.) Officer Martin found brass knuckles inside the vehicle and two condoms on appellant's person. (18RT 3102.) Appellant was wearing red Nike shoes. (18RT 3107-3108.)

Officer Martin arrested appellant for possession of brass knuckles and driving with a suspended license. (18RT 3104.) Appellant told Martin that he bought the vehicle a week earlier for $2000 in cash and the brass knuckles were inside of it. (18RT 3106-3107.) Appellant stated neither he nor his girlfriend Destiny Walker were employed, and he had not worked for the last year. (18RT 3107.) He claimed he was able to afford the vehicle because he had been saving. (18RT 3107.)

When Martin transported appellant to jail, appellant spontaneously blurted, "I told you that this had to do with more than just brass knuckles. [¶] … I have too many girls to be out here raping people." (18RT 3108.) Appellant also asked Martin to throw away the condoms, because he did not use them with Walker. (18RT 3110.) Martin noted that appellant smelled of stale cigarettes and as if he was homeless and had not showered in awhile. (18RT 3110.)

Martin also observed that appellant's eyes were a lighter shade of brown than most African-American males that Martin knew, including himself. (18RT 3112.) Martin testified that appellant was six feet one inch tall and weighed about 190 pounds. (18RT 3114.) Martin also described appellant as intelligent, meaning he was articulate when he spoke. (19RT 3157-3158.)

F. Surveillance

On October 10, 2013, law enforcement began surveilling appellant. (19RT 3208-3209.)

On October 13, 2013, at 2:40 a.m., appellant was standing at an intersection wearing a white sweater and dark pants. (19RT 3237-3238.) At approximately 3:40 a.m., he was walking northbound on Quantico in the middle of the roadway wearing a black hooded sweatshirt with the hood over his head and dark pants. (19RT 3239-3240.) Kern County Sheriff Sergeant Jeff Harbour illuminated appellant with the beams of his vehicle, because Harbour "was going to try to make [appellant] know somebody was watching him so he didn't feel too comfortable walking around." (19RT 3240.) Appellant became agitated, threw his hands into the air, and yelled. (19RT 3241.) Eventually, Harbour drove off, and law enforcement lost sight of appellant, until he returned home at 6:54 a.m. (19RT 3241-3245.)

G. Appellant's Cellphone Videos (Teresa G. and Ada R.)

On October 13, 2013, appellant's cellphone recorded eight videos between 1:56 a.m. and 6:14 a.m. (27RT 4685-4687.)

1. Teresa G.

At 3:52 a.m., appellant's cellphone recorded the outside of a building and "searching next to a doormat and a plant." (27RT 4690.) At trial, Teresa G. identified her house as the building in the video. (27RT 4688, 4690, 4702, 4707-4708.) In October of 2013, she lived with her two teenage children and worked at night from 10:00 p.m. until 6:00 a.m. (27RT 4703.)

2. Ada R.

At 6:04 a.m. and 6:06 a.m., appellant's cellphone recorded videos of a naked woman. (27RT 4691-4693.) Investigator Canady testified it

appeared to be the same woman in both videos. (27RT 4693.) Ada R. identified herself in one of the videos and testified that she never gave anyone permission to stand outside her bedroom window and film her while she was in her home. (27RT 4716-4718.) In October of 2013, she lived with her teenage son and woke up early to go to work. (27RT 4711.)

H. Apartment Complex Shooting

1. Shooting

On October 14, 2013, at approximately 9:00 p.m., Bakersfield Police Sergeant Brent Stratton was driving and saw a black male adult in front of an apartment complex holding what Stratton believed was a firearm. (19RT 3329-3330, 3334-3335.) The man was six feet tall with a slim build wearing a black t-shirt, white and black checkered shorts, and a white baseball hat. (19RT 3335.) Stratton heard gunshots as he drove past the man. (19RT 3334.) Stratton looked over his shoulder and saw muzzle flash coming from the area where the man was. (19RT 3334.)

After the gunfire, Stratton saw several vehicles fleeing, including a maroon-colored Chevy Caprice. (20RT 3391.) Stratton directed officers to stop that vehicle. (20RT 3392.) Law enforcement recovered eight shell casings from the scene of the shooting. (20RT 3397, 3484-3485.)

2. Discarding the Firearm

Bakersfield Police Sergeant Gary Carruesco was part of the undercover team surveilling appellant on the night of October 14, 2013. (20RT 3428-3429.) While attempting to watch appellant, Sergeant Carruesco heard gunfire. (20RT 3435.) Carruesco saw appellant enter the passenger side of a maroon-colored Caprice, while Destiny Walker entered the driver's side and drove off. (20RT 3437.) Carruesco followed appellant and Walker in an undercover vehicle. (20RT 3439.)

As Walker exited the highway, Carruesco observed a hand and a dark object "come out the passenger's-side window." (20RT 3439-3440.) Carruesco saw the object go towards a "city sump area" but did not see it land. (20RT 3440.) A marked patrol vehicle conducted a traffic stop on Walker and appellant. (20RT 3441.) Law enforcement did not find a firearm inside the vehicle. (20RT 3442.)

Sergeant Stratton responded to the "car stop" and identified appellant's clothing as the same the shooter wore. (20RT 3396-3397.) Law enforcement arrested appellant but released Walker. (20RT 3442.)

Martin transported appellant to jail and again noted that he smelled of stale cigarettes and as if he was homeless and had not showered in awhile. (18RT 3110.)

3. Recovery of the Firearm

Sergeant Carruesco and his partner searched along the fence of the sump for the item that had been thrown out of the vehicle. (20RT 3443.) There were no streetlights and neither officer had a flashlight. (20RT 3443.) After 10 minutes, the officers had not found anything and ended their search. (20RT 3443.) No other officers from Carruesco's department searched the sump that night. (20RT 3443-3444.)

On October 15, 2013, at 1:36 a.m., appellant called Walker from jail. (6CT 1444-1451; 20RT 3490, 3500-3502.) Bakersfield Police Detective Richard Dossey Jr. listened to that call and opined appellant gave Walker a coded message to go retrieve the firearm. (20RT 3501, 3503.)

Later that morning, Sergeant Carruesco went back to the sump and saw Walker and two other people walking on the sidewalk looking in the bushes. (20RT 3444-3445.) Law enforcement detained them, while officers searched the sump. (20RT 3445-3446.) An officer found a nine millimeter semiautomatic pistol lying in a tumbleweed. (20RT 3446.)

4. Ballistics

Criminalist Chris Snow analyzed the recovered firearm and eight shell casings from the apartment complex shooting. (20RT 3484-3485; 25RT 4421-4423.) He determined the recovered firearm fired the casings. (25RT 4426.)

I. Search Of Appellant's Residence

a. October 16, 2013

On October 16, 2013, law enforcement searched appellant's residence at 900 Quantico Avenue and found the following: a black ski mask in the backyard that had three openings; appellant's identification card; and red shoes. (19RT 3211; 22RT 3906, 3907, 3909-3910, 3918, 3920, 3946.)

b. December 17, 2013

On December 17, 2013, pursuant to a search warrant, law enforcement searched appellant's house again and found the following: white zip ties; blue and white plaid shorts; long black cargo shorts; numerous pairs of men's shoes; blue plaid cargo shorts; a black hooded pullover sweatshirt in a plastic trash bag in the backyard; a black plaid backpack; work gloves; and three pairs of binoculars. (22RT 3956-3957, 3959-3963; 25RT 4413.)

J. Appellant's Prior Offenses

1. Burglary And Receiving Stolen Property

In 2005, Bakersfield Officer Deron Miller responded to a residential burglary call. (26RT 4521-4522.) Two bedroom windows on the back of the residence were slid open. (26RT 4523.) Outside one of the windows, someone placed a chair against the window. (26RT 4523.) It appeared to Miller that someone had used the chair to access the window and enter the residence. (26RT 4523.) The victim reported stolen items, including money. (26RT 4524.)

Right after Officer Miller completed his investigation, he responded to a second call of a residential burglary in the same neighborhood as the first call. (26RT 4525-4527.) At the second location, someone slid open a bedroom window and placed an overturned five-gallon bucket beneath the window. (26RT 4528.)

Officers contacted appellant, who was in bed next door to the second residence. (26RT 4530-4531.) Law enforcement found a firearm plus items that had been stolen from the second residence. (26RT 4531.)

Officer Miller arrested appellant for the burglaries. (26RT 4533-4534.) The court took judicial notice that appellant was convicted of residential burglary and receiving stolen property. (26RT 4550.)

2. Prowling

In 2010, Bakersfield Police Officer Kenneth Perkins responded to a call of a prowler at 3:00 a.m. (26RT 4504-4505.) Perkins saw appellant jump over a fence out of someone's backyard. (26RT 4506-4507, 4510.) Appellant was wearing a black hooded sweatshirt, black shorts, black shoes, and black baseball batting gloves. (26RT 4507, 4511.) Perkins's partner identified himself as police and yelled at appellant to stop. (26RT 4508.) But appellant ran towards Perkins's partner and appeared as though he was going to try to knock him down or engage in a physical altercation. (26RT 4509.) Perkins's partner used his baton on appellant, and the officers arrested him for prowling and resisting arrest. (26RT 4509-4510, 4518.)

Appellant told Officer Perkins that an unidentified female drove him to the area and left him without a car. (26RT 4514-4515.) Appellant then started walking and a truck full of white males assaulted him. (26RT 4515-4516.) He was frightened, so he ran and hid. (26RT 4516.)

Law enforcement found a vehicle in the area that contained items linking appellant to the vehicle. (26RT 4517.) At first, appellant would not

admit it was his vehicle. (26RT 4517.) Perkins arrested appellant for prowling and resisting arrest. (26RT 4518.)

3. Possession of Stolen Property

In 2012, Bakersfield Police Officer Jason Felgenhauer responded to the 4300 block of Columbus Street at approximately 4:50 a.m. (26RT 4496-4497.) Law enforcement had already detained appellant and another male in a truck. (26RT 4497-4498.) Appellant was wearing a black hooded sweatshirt, dark pants, and a black baseball hat. (26RT 4498.) There was gym equipment in the back of the truck. (26RT 4498.)

After speaking with the victim, Officer Felgenhauer arrested appellant for possession of stolen property. (26RT 4499, 4502.) There was an allegation that appellant went onto someone's porch. (26RT 4502.) Appellant told Felgenhauer that he found the gym equipment in an alleyway. (26RT 4500.) Felgenhauer informed appellant that a witness had seen him and the other male load the equipment into a truck, but appellant denied any knowledge of what happened. (26RT 4501.) Appellant informed the officer that he lived at 4416 Columbus Street. (26RT 4501.)

K. Defense

1. DNA

Suzanna Ryan testified as a DNA consultant for the defense. (29RT 4944.) According to Ryan, in order to perform TrueAllele analysis, it is "basically a requisite that you have to assume a certain number of contributors." (29RT 4962.) And, she claimed that assumption can affect the likelihood ratios. (29RT 4979.) She testified that the Lab's validation study stated, "false inclusion numbers increased with contributor number. So when you have many potential contributors to a mixture, then it is a

greater possibility that you could falsely include someone with the TrueAllele system being used." (29RT 4979.)

(1) L.D.

Ryan reviewed the DNA case reports involving evidence related to L.D. (29RT 4953-4954.)

Telephone Cord: Ryan found the level of DNA low, which concerned her because a low level can affect the results and make them more difficult to interpret. (29RT 4955, 4958.) According to her, "[m]any individuals" believe that low-level samples should be split in half and both halves amplified to see if the results are the same. (29RT 4959.) That process was not done in L.D.'s case. (29RT 4960.)

In the manual interpretation of the phone cord, Ryan testified there were alleles missing from the DNA profile that were present in appellant's known DNA profile. (29RT 4970-4973.)

L.D.'s Cellphone: In the TrueAllele analysis of the cellphone, the analysts assumed there were four contributors to the DNA profile. (29RT 4978.) Ryan, however, believed it was possible there were more than four contributors and "when you have many potential contributors to a mixture, then it is a greater possibility that you could falsely include someone with the TrueAllele system being used." (29RT 4978, 4979.)

(2) A.R.

Ryan examined evidence related to A.R.'s case. (29RT 4979-4980.)

A.R.'s Underwear (Epithelial Fraction): Ryan reviewed the Lab's TrueAllele analysis of the epithelial fraction of A.R.'s underwear. (29RT 4982-4983.) According to her, there was an allele present that could not be attributed to A.R., Munoz, or appellant. (29RT 4983-4984.)

A.R.'s Pants - Stain A (Sperm Fraction): Ryan did a manual interpretation of the DNA profile and determined appellant could not be

excluded as a contributor. (29RT 5101.) She also testified that if she assumed appellant, Munoz, and A.R. contributed DNA to the profile, there were still additional alleles that were not consistent with any of their known DNA profiles. (29RT 4996.)

A.R.'s Pants - Stain B (Sperm Fraction): Ryan reviewed the manual interpretation of the DNA profile done by the Lab and used that interpretation to do her own comparisons. (29RT 5004-5005.) If she assumed there were only two contributors to the DNA profile, appellant would be excluded from the sample. (29RT 5006.) There were alleles present that did not match appellant's known DNA profile. (29RT 5007.) There was an indication in the data that there could have been three contributors. (29RT 5005-5007.)

In the TrueAllele analysis of the stain, the analyst ran the sample through the system selecting the option that the sample was degraded, which Ryan claimed could affect the likelihood ratio. (29RT 5008-5009.) She did not believe the stain was degraded. (29RT 5009.)

A.R.'s Shirt (Sperm Fraction): Ryan did a manual interpretation of the DNA profile and determined appellant could not be excluded. (29RT 5101.) She agreed that she found a "match" for appellant's DNA in the profile. (29RT 5101.)

(3) M.V.

Ryan examined evidence related to M.V.'s case. (29RT 5042.) She manually interpreted DNA evidence and determined that appellant was not a contributor to any DNA profiles from items recovered inside M.V.'s residence. (29RT 5042.)

Zip Tie from Roadway: Ryan did a manual interpretation of the DNA profile and determined appellant's DNA was present in the profile for the zip tie. (29RT 5101-5102.)

Duct Tape: In her manual interpretation of the DNA evidence from the duct tape, Ryan concluded there was unknown male DNA present that was not consistent with appellant. (29RT 5043-5044.)

2. Appellant

Appellant is African-American and six feet tall. (29RT 5143, 5175.) He was born on May 28, 1980. (29RT 5175.) Appellant testified that his eyes are brown and denied they are hazel or green. (29RT 5144.) He was convicted of felony aggravated battery in 2002 and residential burglary in 2005. (29RT 5171-5173.) He testified that he did not know he was also convicted of receiving stolen property in 2005 and denied involvement with the first burglary Officer Miller investigated. (29RT 5173.)

In 2013, appellant smoked. (29RT 5145.) During the summer of 2013, appellant claimed he showered, had rough hands and a thin mustache, got teardrops tattooed on the left side of his face, and committed 100 burglaries in east Bakersfield. (29RT 5118-5119, 5123, 5128-5129, 5148, 5149-5150.) He maintained he never raped anyone, molested a child, or wore gloves during those 100 burglaries. (29RT 5120-5121.) He also claimed that he had committed thousands of burglaries over the years and never wore a mask or took a gun with him. (29RT 5126, 5193.)

Appellant liked guns. (29RT 5131.) He testified that he sold the gun that he was pictured holding on Facebook and bought a ".45." (29RT 5194-5196.) He did not remember when or to whom he sold the gun. (29RT 5195-5196.) Appellant claimed he only had a ".45" during the summer of 2013. (29RT 5196.) He admitted, however, that on June 17, 2013, he told "Elizabeth" on Facebook that his "9mm" was not for sale. (29RT 5197.)

At trial, appellant admitted he was the man that Sergeant Stratton saw firing a gun. (29RT 5138-5139.) On cross-examination, however, he claimed that he held the gun but did not fire it. (30RT 5267.) Appellant

previously lied to law enforcement and said he was not near where the gun was fired. (30RT 5269.)

He paid attention to the coverage of the "East Side Rapist case" after "the one happened on Virginia," and then he constantly checked the coverage of it on his phone. (29RT 5140-5141.)

Appellant explained the statement he made to Officer Martin concerning the "East Side Rapist." (29RT 5165.) According to appellant, Martin made a comment, and appellant responded, "I got too many females." (29RT 5165.) Appellant could not remember what Martin initially said. (29RT 5165.)

Seven people lived in the house on Quantico in the summer of 2013. (29RT 5142.) Appellant denied that he owned all of the shoes shown in this case. (29RT 5142-5143.) And, his "girl" used zip ties to keep a crib together. (29RT 5166.)

On October 13, 2013, appellant met up with some friends. (30RT 5218-5219.) One of those friends used his phone to film Ada R. (30RT 5218-5219, 5222-5223.) Appellant did not know that friend's last name. (30RT 5219.)

Appellant denied talking to a 14-year-old girl on Facebook, giving her his phone number, wanting to meet her, or telling her that she was sexy. (30RT 5216.) He claimed he gave his Facebook password to people who shared it with others, and "[e]verybody" used his Facebook account. (30RT 5284.)

L. Rebuttal

1. DNA

Garett Sugimoto observed Ryan's testimony and disagreed with some of her opinions regarding this case. (30RT 5301-5302.)

The Lab conducted a validation study to develop protocols and become "TrueAllele competent, get online with the TrueAllele Casework system." (30RT 5304.) During that study, when the analysts assumed an incorrect number of contributors to a DNA mixture, "the match statistics actually decreased rather than would falsely increase or improve the match statistics." (30RT 5305-5306.)

a. L.D.

Ryan testified that there were more than two contributors to the DNA profile on the phone cord in L.D.'s case. (30RT 5302.) Sugimoto disagreed and was confident there were only two contributors to the DNA mixture. (30RT 5302.) He also disagreed with Ryan's testimony that there were potentially five or six contributors to the DNA mixture on the cellphone. (30RT 5303.) He was confident that there were only four contributors to that mixture. (30RT 5303.)

b. A.R.

Sugimoto disagreed with Ryan's assessment that she would exclude appellant from stain B of A.R.'s pants using a manual interpretation because there were foreign alleles. (30RT 5307-5308.) Sugimoto testified that the "foreign" alleles identified by Ryan were consistent with appellant's and Munoz's DNA profiles at one site and consistent with stutter, i.e., a known artifact, at another site. (30RT 5308-5309.)

c. M.V.

There were unknown alleles on the zip ties recovered from inside M.V.'s apartment. (30RT 5309-5310.) The unknown alleles did not contain a "Y" allele, which would have indicated the presence of male DNA. (30RT 5310.)

2. Facebook

a. Conversation With 14-Year-Old T.L.

On April 1, 2013, appellant had a conversation with T.L. on Facebook. (5SCT 1354-1361; 30RT 5323.) He initiated the conversation. (30RT 5323.) T.L. advised appellant she was 14 years old. (30RT 5324.) During their conversation, appellant gave her his phone number, asked her to text him, and told her she was cute. (30RT 5328.)

Lambert told appellant that she did not think she should text him because he was a grown man. (30RT 5328.) Appellant stated that she hurt his feelings, made him sad, and told her, "[e]veryone trips on age. Why?" (30RT 5328-5329.)

On September 17, 2013, appellant reengaged Lambert in another conversation on Facebook. (5SCT 1362; 30RT 5330.) During that conversation, appellant told Lambert that he wished he had her phone number and she was "hella sexy." (30RT 5330-5331.) He also asked if he could call her, because he wanted to get to know her. (30RT 5332.) Lambert eventually ended the conversation. (30RT 5332.)

b. Conversation With 15-Year-Old J.G.

On October 11, 2013, appellant asked J.G. to be his friend on Facebook. (30RT 5317.) J.G. informed appellant that she was 15 years old. (30RT 5323.) Appellant responded that he still wanted to be her friend. (30RT 5323.) J.G. did not reply. (30RT 5323.)

3. Firearm

Bakersfield Police Detective Joseph Galland examined the recovered firearm and found similarities between the recovered nine millimeter handgun and the gun appellant held in a Facebook picture. (30RT 5342-5349.) It was an unusual firearm that was only produced for six years.

(30RT 5347.) Galland believed it was "highly likely" that the guns were the same. (30RT 5349.)

4. Appellant's Appearance

Detective Hubbard interviewed appellant twice and had close contact with him on those occasions on August 29, 2013, and October 16, 2013. (30RT 5355-5356.) Hubbard testified that appellant did not have teardrop tattoos on his face "as they are today" during those interviews. (30RT 5356-5357.) Hubbard saw those tattoos for the first time when the trial began. (30RT 5356-5357.)

Detective Hubbard also testified that appellant's eyes are predominantly brown; however, Hubbard has seen a green or hazel tint in them under bright light in close proximity. (30RT 5357.)

5. Appellant's Statements

During the August interview, Detective Hubbard told appellant that his name came up during a burglary investigation. (30RT 5358, 5359.) Appellant denied involvement and told Hubbard that he was too old to commit burglaries and gave it up a long time ago. (30RT 5360.)

Appellant brought up the topic of rapes occurring in the neighborhood. (30RT 5361.) He claimed he had nothing to do with them and believed the rapist was a "dark-skinned Mexican." (30RT 5362.)

During the October interview, appellant told Detective Hubbard that he used to live at 4416 Columbus but had not been there in over a year, he had only been inside one apartment in the Kristine Apartment complex, which belonged to his ex-girlfriend, and he had never been inside any of the apartments in the 200 block of Quantico. (30RT 5363.) Appellant stated there was "no reason for law enforcement to find his DNA at any of those places." (30RT 5364.)

M. Surrebuttal

Appellant denied communicating with T.L. and J.G. on Facebook. (30RT 5378.) He let his family use his phone and gave his Facebook account information to his brother. (30RT 5379-5380.)

Appellant also claimed that he had burglarized and been inside many apartments in the Kristine Apartment complex. (30RT 5387.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN DENYING HIS REQUESTS FOR THE TRUEALLELE SOURCE CODE; REGARDLESS, ANY ERROR WAS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE OF APPELLANT'S GUILT

The trial court did not abuse its discretion in denying the defense requests for the TrueAllele source code. Dr. Perlin claimed the source code was a trade secret privilege under Evidence Code sections 1060 and 1061. (4CT 945.) And, appellant made no prima facie, particularized showing that the source code was relevant and necessary to his defense.

The trial court's denial also did not violate appellant's constitutional right to confront witnesses. (AOB 55-62.) Appellant's right to confront witnesses did not apply to pretrial discovery of the source code. (See *People v. Hammon* (1997) 15 Cal.4th 1117, 1126 (*Hammon*).) And, the trial court's denial of appellant's mid-trial discovery motion for the source code did not violate appellant's right to confront witnesses. "The routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1010, internal quotation marks and citation omitted (*Hovarter*).) Regardless, any error was harmless in light of the overwhelming evidence appellant was guilty of all crimes against the victims in this case.

A. Background

1. Pretrial

The defense filed a motion in limine requesting disclosure of the TrueAllele source code. (4CT 902.)

The People opposed arguing the source code was privileged under Evidence Code section 1060, and the defense failed to show that the source code was material or necessary. (4CT 930-953.) Dr. Perlin submitted a declaration, which contained the following relevant assertions:

- He provided consent for the People to assert the trade secret privilege pursuant to Evidence Code sections 1060 and 1061 on behalf of himself and Cybergenetics in relation to the source code. (4CT 945.)
- "TrueAllele is a probabilistic genotyping computer system that interprets DNA evidence using a statistical model." (4CT 946.)
- "TrueAllele is used to analyze DNA evidence, particularly in cases where human review might be less reliable or not possible." (4CT 946.)
- "The TrueAllele Casework system is Cybergenetics' computer implementation" of a two-step DNA approach: "objectively inferring genotypes from evidence data" and "subsequently matching genotypes, comparing evidence with a suspect relative to a population, to express the strength of association using probability." (4CT 946.)
- TrueAllele has been used in over 200 criminal cases in courts in California, Louisiana, Maryland, New York, Ohio, Pennsylvania, Virginia, United States Marine Corps, Northern Ireland, and Australia. (4CT 947.)

- TrueAllele has been subjected to over 20 validation studies, including seven that were published in peer-reviewed scientific journals. (4CT 948.)
- "There is no genuine controversy as to the validity and reliability of the TrueAllele method. To the contrary, computer analysis of uncertain data using probability modeling is the scientific norm." (4CT 948.)
- Source code is programming language used to write a computer program. (4CT 948.)
- TrueAllele's source code is written in a high-level dense mathematical language and details "step-by-step human-readable instructions that describe to the computer and programmers how the program operates." (4CT 949, 950.)
- TrueAllele has approximately 170,000 lines of computer source code written by multiple programmers over the course of 20 years, and it is Dr. Perlin's opinion that "it is wholly unrealistic to expect that reading through TrueAllele source code would yield meaningful information." (4CT 950.)
- "People can easily copy a computer program if they have its source code." (4CT 950.)
- The source code "contains the software design, engineering know-how, and algorithmic implications of the entire computer program." (4CT 950.)
- "Cybergenetics has invested millions of dollars over two decades to develop its TrueAllele system, the company's flagship product. Although the technology is patented, the source code itself is not disclosed by any patent and cannot be derived from any publicly disclosed source." (4CT 950.)

- "Cybergenetics considers the TrueAllele source code to be a trade secret. Cybergenetics does not disclose the source code to anyone outside the company. In fact, the source code has never been disclosed. The source code is not distributed to employees of Cybergenetics, and copies are not provided to individuals, business or government agencies that use or license the software." (4CT 950.)
- "There is keen interest from competitors to find out how to replicate TrueAllele. The TrueAllele software represents a technological breakthrough that has not been successfully replicated by any other company of this date." (4CT 951.)
- "Disclosure of the TrueAllele source code trade secret would cause irreparable harm to the company, enabling competitors to easily copy the company's proprietary products and services." (4CT 951.)
- Cybergenetics offers TrueAllele to crime labs for a fee of $60,000. (4CT 952.)
- "Cybergenetics provides opposing experts the opportunity to review the TrueAllele process, examine results, and ask questions." (4CT 952.)
- Cybergenetics has disclosed TrueAllele's methodology and published its underlying mathematical model. (4CT 952.)
- To Dr. Perlin's knowledge, "source code is not made available for other commercial software that is regularly used and relied upon in the area of forensic DNA identification" because "[s]ource code is not needed to access [sic] the reliability of these critical software programs, since they have all been tested and validated." (4CT 953.)

At a hearing on appellant's motion, the defense explained that it had not submitted a declaration from Ryan saying why the source code was necessary, because "you don't know what you don't know." (4RT 482.) The defense argued that it needed the source code so that Ryan could "then know what to do after she looks at it." (4RT 482.)

The court denied appellant's motion reasoning:

> [T]here has been no declaration or showing, with any precision or particularity, how a review of the TrueAllele source code would enable the defense to determine what assumptions were made or how reviewing the highly technical code would help defense counsel in cross-examining Dr. Perlin in trial or at a Kelly-Frye hearing. And also no showing by any expert how this information, the source code, with any degree of precision, how or why the formulations would affect the results in this case, and no declaration of particularized showing demonstrating any observed discrepancies in the testing. Suffice it to say, I don't see a specific logical connection between the source code to be examined and some consequential fact.
>
> It has been validated. Those tests have been noted in the works I indicated and what I looked at, and specifically as detailed in the declarations and also in the exhibit, Court's Exhibit 4. And apparently there have been seven studies published in peer-reviewed scientific journals, and I don't see any specific studies that have found problems with the results of the TrueAllele that can be linked to a problem -- or with any methodology as to any showing how they're inaccurate, and I don't see any scientific thing before us that questions the TrueAllele process, examine results, et. cetera.
>
> [¶] … [¶]
>
> The TrueAllele has been used, as I said, in over 200 criminal cases the paperwork indicates, expert testimony in over 20 trials, even here in Kern County. It's been accepted in California, Louisiana, Maryland, New York, Ohio, Pennsylvania, Virginia, United States Marine Corps, Northern Ireland, and Australia. I haven't seen all of these particular documents from any of those courts. I've seen the one

appellate court opinion that we talked about earlier today. But there are others mentioned in the Court's Exhibit 4.

As I said, seven studies have been published in the peer-reviewed scientific journals. The source code is a trade secret. I don't think adequate showing has been made to justify the breech of that privilege. And if there would be some showing as to the necessity of the source code, the Court might have to take another look at this issue.

As noted in Dr. Perlin's declaration, he says although the source code for TrueAllele is a secret … the methodology it employs and implements has been disclosed. Cybergenetics has published the core mathematics of TrueAllele's underlying mathematical model for over ten years, in 2001, 2009, and 2011.

And he goes on to state at page 25, this information discloses TrueAllele's genotype modeling mechanism and enables others to understand the basic method. Indeed, at least five other groups, he goes on to indicate, page 25, have independently developed software that use TrueAllele's linear mixture analysis approach.

And further, it's noted, the source code is not made available for other commercial software that is regularly used and relied on in the area of forensic DNA identification.

And I understand that to mean that in these other groupings where source code is patented or protected, trademark, it has not been made available for commercial software that's regularly used and relied on in the area of forensic DNA identification.

And in view of the testing and validation of the TrueAllele method, respectfully deny the request for production of the source code.

(4RT 494-497.)

The court also noted that the defense could take advantage of Dr. Perlin's offer to review the TrueAllele process, examine results, and ask

questions in an "Internet Skype-like meeting." (4CT 952; 4RT 495.) The defense, however, declined. (4RT 497-499.)

2. Trial

At trial during Dr. Perlin's testimony, the defense objected on the basis of *Melendez-Dias v. Massachusetts* (2009) 557 U.S. 305 to a question concerning whether the computer objectively inferred genotypes. (23RT 4090, 4091.) In the course of that objection, the defense reargued that it was entitled to TrueAllele's source code. (23RT 4091-4096, 4102-4105, 4107-4110.) The People opposed and argued that the court had already denied appellant's motion to obtain the source code and there was no change in circumstance. (23RT 4097-4098, 4110-4111.) The trial court denied appellant's motion and provided the following ruling: "For the reasons previously stated, my earlier order stands. There's been no particularized showing under Evidence Code Section 1060, et seq, as to how the TrueAllele source code is necessary to defense's ability to test the reliability of its results." (23RT 4111.)

B. Analysis

1. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Discovery Motions For The TrueAllele Source Code, Because The Source Code Was A Trade Secret And Appellant Made No Prima Facie Showing That The Information Was Necessary And Relevant To His Defense

"The court's ruling on a discovery motion is subject to review for abuse of discretion. [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 953 (*Jenkins*).) A "trade secret" includes "information, including a formula, pattern, compilation, program, device, method, technique, or process" that "[d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use" and "[i]s the subject of efforts that are

reasonable under the circumstances to maintain its secrecy." (§ 499c, subd. (a)(9); Evid. Code, § 1061, subd. (a)(1).)

Evidence Code section 1060 provides:

> If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

(Evid. Code, § 1060.)

"The party claiming the privilege has the burden of establishing its existence. [Citations.] Thereafter, the party seeking discovery must make a prima facie, particularized showing that the information sought is relevant and necessary to the proof of, or defense against, a material element of one or more causes of action presented in the case, and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit." (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1393 (*Bridgestone/Firestone*).) "It is then up to the holder of the privilege to demonstrate any claimed disadvantages of a protective order." (*Ibid.*)

Here, the trial court did not abuse its discretion in denying appellant's discovery motions. (See *Jenkins*, *supra*, 22 Cal.4th at p. 953.) Dr. Perlin explained that the TrueAllele source code was a trade secret privilege under Evidence Code section 1060, and he detailed the economic value of maintaining the secrecy of the source code plus the efforts Cybergenetics has made to maintain secrecy of the code. (4CT 945-953.) As such, he fulfilled his statutory burden in establishing the existence of a trade secret. (See *Bridgestone/Firestone*, *supra*, 7 Cal.App.4th at p. 1393; Evid. Code, § 1060.) Appellant, however, failed before and during trial to make a particularized showing why the source code was relevant and necessary to his defense. (See *ibid*; see also 4CT 902; 4RT 482; 23RT 4091-4096,

4102-4105, 4107-4110.) Consequently, the trial court's denials of appellant's motions for the source code were not an abuse of discretion.

2. The Trial Court Did Not Violate Appellant's Constitutional Right To Confront Witnesses In Denying His Pretrial Motion For The TrueAllele Source Code, Because He Had No Sixth Amendment Right To Pre-Trial Disclosure Of Privileged Information

"[T]he Sixth Amendment to the federal Constitution gives a criminal defendant the right to confront and cross-examine adverse witnesses." (*People v. Lopez* (2012) 55 Cal.4th 569, 576.) "[I]nvocation of the confrontation or compulsory process clauses in a claim involving pretrial discovery 'is on a weak footing' because it is unclear whether or to what extent those constitutional guarantees grant pretrial discovery rights to a defendant. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 982-983; see also *Hammon*, *supra*, 15 Cal.4th at p. 1126 ["it is not at all clear 'whether or to what extent the confrontation or compulsory process clauses of the Sixth Amendment grant pretrial discovery rights to the accused.'"].)

The California Supreme Court determined that United States Supreme Court precedent that addressed a defendant's right under the confrontation clause to information protected by state-created evidentiary privileges only applied to trial rights. (*Hammon*, *supra*, 15 Cal.4th at pp. 1123-1127.) It did not apply to pretrial rights. (*Ibid*.) "When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon … to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve." (*Id*. at p. 1127.) "Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily." (*Ibid*.) The *Hammon* court "decline[d] to extend

the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information." (*Id.* at p. 1128.)

"In [*Hammon*], the Supreme Court held the trial court properly quashed a subpoena duces tecum the defendant served on psychotherapists treating the alleged victim without first conducting an in camera review of the material. [R]eject[ing the] defendant's claim that pretrial access to such information was necessary to vindicate his federal constitutional rights to confront and cross-examine the complaining witness at trial or to receive a fair trial, *Hammon* held the trial court was not required, at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of third party psychotherapy providers." (*People v. Petronella* (2013) 218 Cal.App.4th 945, 958 (*Petronella*), internal quotation marks and citations omitted.)

Similarly, in *Petronella* the court held that the trial court's denial of a defense motion for pretrial discovery that sought attorney-client privileged information did not violate the defendant's constitutional rights. (*Petronella*, *supra*, 218 Cal.App.4th at pp. 958-960.)

Here, appellant had no right under the confrontation clause to pretrial discovery of the TrueAllele source code, which was protected by the trade secret privilege. (See *Hammon*, *supra*, 15 Cal.4th at p. 1128; *Petronella*, *supra*, 218 Cal.App.4th at pp. 958-960.) As such, the trial court's denial of appellant's pretrial request for the source code did not violate his constitutional right to confront witnesses.

3. The Trial Court Did Not Violate Appellant's Constitutional Right To Confront Witnesses In Denying His Mid-Trial Motion For The TrueAllele Source Code, Because The Routine Application Of State Evidentiary Law Does Not Implicate A Defendant's Constitutional Rights

"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1050-1051.) However, "[t]he routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." (*Hovarter, supra*, 44 Cal.4th at p. 1010.)

Here, as argued above, the source code was protected under the trade secret privilege. (See Evid. Code, §§ 1060, 1061.) The trial court's routine application of state evidentiary law, i.e., finding that appellant was not entitled to the privileged information, did not implicate his constitutional right to confront witnesses. (See *Hovarter*, *supra*, 44 Cal.4th at p. 1010.) Plus, there had been no change in circumstances since the court properly denied appellant's pretrial discovery motion for the same evidence.

Appellant's reliance on *Davis v. Alaska* (1974) 415 U.S. 308 (*Davis*) is misplaced. (AOB 56-58.) In *Davis*, a stolen safe was found on the property where a key prosecution witness lived. (*Davis*, *supra*, 415 U.S. at p. 309.) The witness, who was on juvenile probation for burglary, identified the defendant as one of two men he saw near where the safe was located. (*Id*. at p. 310.) Defense counsel sought to show that the witness identified the defendant "out of fear or concern of possible jeopardy to his probation" and to divert attention away from himself. (*Id*. at p. 311.) The

trial court ruled that the defense could not question the witness about his probation status. (*Id*. at p. 311.) On appeal, the Supreme Court reversed the judgment determining, "[t]he claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of [the witness's] vulnerable status as a probationer, … as well as of [the witness's] possible concern that he might be a suspect in the investigation." (*Id*. at pp. 317-318.) "Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry." (*Id*. at p. 319.)

Here, there is a practical difference between the error in *Davis* and the trial court's exercise of discretion in the instant case. Unlike the witness in *Davis*, Dr. Perlin was not facing any impending criminal consequences that would give him a motive to lie in order to receive prosecutorial favor. And, *Davis* did not address the admissibility of privileged information or a court's discretion to determine whether a defendant was entitled to privileged information. *Davis* is therefore distinguishable and does not support appellant's argument that the trial court violated his right to confront Dr. Perlin.

Appellant also argues that "[i]f machine results are going to determine guilt, then confrontation demands that the defense have access to and be able to cross-examine the programmer, here Dr. Perlin, to determine if there are any defects in the program." (AOB 59.) Appellant's argument lacks merit. He had access to TrueAllele's methodology and underlying mathematical model, so he could have cross-examined Dr. Perlin about the efficacy of the software. (4CT 952.) Similarly, appellant could have reviewed the seven published validation studies of TrueAllele and cross-examined Dr. Perlin about any perceived defects in TrueAllele based on those studies. (4CT 948.) Plus, the defense declined Dr. Perlin's offer to review the TrueAllele process, examine the results, and ask questions.

(4CT 952; 4RT 497-499.) Hence, appellant had sufficient "access" to TrueAllele in order to cross-examine Dr. Perlin about the software's competency.

Appellant contends that software codes are subject to human error. (AOB 60-62.) His argument is irrelevant. Appellant made no showing how obtaining the source code was needed in order to review the reliability of the TrueAllele analysis, how the source code would be used to review the results in this case, or what could be reviewed by the source codes that would be beneficial to his case. Plus, Cybergenetics does not reveal TrueAllele's source code, yet TrueAllele has been used in over 200 criminal cases and subjected to over 20 validation studies, including seven that were published in peer-reviewed scientific journals. (4CT 947, 948.) And, appellant presented no evidence questioning the reliability of TrueAllele in the aforementioned cases or validation studies.

Appellant also maintains the trial court relied on *People v. Lugashi* (1988) 205 Cal.App.3d 632 (*Lugashi*) and *People v. Nazary* (2010) 191 Cal.App.4th 727 (*Nazary*) in denying his request for the source code, even though those cases support his argument that he was denied the right to "vigorously challenge the operation" of TrueAllele. (AOB 63.) His argument is untenable for two reasons.

First, the court did not rely on *Lugashi* or *Nazary* in denying appellant's discovery motion for the TrueAllele source code. During appellant's "*Melendez-Diaz*" objection to Dr. Perlin's testimony, the court discussed the admissibility computer printouts and asked the clerk to get him "205 Cal.App.3d 632, *People vs. Lugashi*." (23RT 4090, 4094.) Later, when addressing whether machine-generated information was hearsay, the court referred to "*Nazary*" at "191 Cal.App.4th 727." (23RT 4100.) The court cited the following from *Nazary*: "The test of admissibility is whether the machine was operating properly at the time of the reading and

that the mechanical recordings of information are subject to impeachment through evidence of machine imperfections or by cross-examination of the expert who explained or interpreted information in the device." (23RT 4100.) The court's references to these cases did not show the court relied on them in denying appellant's motion for the TrueAllele source code.

Second, neither *Lugashi* nor *Nazary* support appellant's argument. In *Lugashi*, the court found that computer data was properly admitted as a business record. (*Lugashi*, *supra*, 205 Cal.App. at p. 638.) In *Nazary*, the court addressed the defendant's hearsay objection to computer-generated information on receipts. (*Nazary*, *supra*, 191 Cal.App.4th at pp. 750-755.) Neither case addressed an argument that the admission of evidence violated a defendant's right to confront witnesses. "It is axiomatic that an opinion does not stand for a proposition the court did not consider." (*People v. Taylor* (2010) 48 Cal.4th 574, 626.)

Respondent notes that the appellate court in *Commonwealth v. Foley* (2012) 38 A.3d 882 (*Foley*) addressed the admissibility of Dr. Perlin's DNA-related testimony. (*Foley*, *supra*, 38 A.3d at pp. 887-890.) In finding his testimony admissible, the court found "no legitimate dispute regarding the reliability of Dr. Perlin's testimony," and that the defendant "failed to establish the existence of a legitimate dispute over Dr. Perlin's methodology." (*Id*. at pp. 888, 890.) The court also noted that "scientists can validate the reliability of a computerized process even if the source code underlying that process is not available to the public" and discussed multiple peer-reviewed studies which found that "TrueAllele was much more sensitive than qualitative analysis such as that performed by the FBI," and "[w]hen a victim reference was available, the computer was four and a half orders of magnitude more efficacious than human review." (*Id*. at pp. 889-890, quotation marks omitted.)

4. Error, If Any, Was Harmless Because There Was Overwhelming Evidence Of Appellant's Guilt Independent Of The TrueAllele Results

Error, if any, was harmless because it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 (*Fudge*) [evidentiary errors under state evidence rules are evaluated under "standard of review … announced in [*Watson*], and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension"]; *People v. Alcala* (1992) 4 Cal.4th 742, 791 (*Alcala*) [evidentiary rulings reviewed for prejudice under *Watson* reasonable probability standard].)

Here, there was overwhelming evidence of appellant's guilt, so the jury would have reached the same verdict regardless of the alleged error. (See *People v. Houston* (2012) 54 Cal.4th 1186, 1222 [holding errors harmless "[g]iven the overwhelming evidence of defendant's guilt"]; *People v. Booker* (2011) 51 Cal.4th 141, 186 [when "[v]iewing the prosecutor's statements in the context of his entire argument, the jury was properly informed about the prosecutor's burden, and the evidence of defendant's guilt (notably, his own confession) was overwhelming"]; *People v. Doolin* (2009) 45 Cal.4th 390, 439 [holding evidentiary error harmless in light of "overwhelming evidence of defendant's guilt."]; Peo*ple v. Fields* (1983) 35 Cal.3d 329, 363 [holding that the prosecutor's misconduct and erroneous court ruling did not prejudice the defendant because "[t]he evidence of defendant's guilt of first degree murder was overwhelming"].)

Witnesses placed appellant at or near A.M.'s, A.R.'s, and L.D.'s apartment complexes during the summer of 2013. A.M. and A.R. lived in the Kristine Apartments. (9RT 1321; 13RT 2109.) Mendez saw appellant

in the Kristine Apartment complex almost every night during the summer of 2013. (18RT 3064-3065, 3071.) Cardenas testified that she had seen appellant in the Kristine Apartment complex six or seven times at night. (18RT 3044-3045-3047.) L.D. lived in an apartment complex at 4300 Columbus Street. (10RT 1564.) Thornbrough, who lived in an apartment complex at 4416 Columbus Street, saw appellant acting suspiciously lying down in the back of his car behind the apartment complex one morning in June or July of 2013, after 2:00 a.m. (12RT 1922, 1924-1929.)

The physical appearance of the assailant in each case was so similar that it evidenced it was the same man, and appellant matched that physical description. Appellant is African-American, and in the summer of 2013 he was approximately six feet one inch tall and 190 pounds, 33 years old, and has brown eyes with a green or hazel tint under bright light in close proximity and "[f]airly skinny legs." (18RT 3114; 26RT 4574; 29RT 5143, 5175; 30RT 5357.) Officer Martin testified that appellant's eyes were a lighter shade of brown than most African-American males that Martin knew, including himself. (18RT 3112.)

A.M. described her assailant as African-American, six feet tall, 200 to 220 pounds, and in his late twenties to early thirties with "hazel-brown" eyes and a deep voice. (9RT 1345, 1348, 1349-1350, 1377; 10RT 1423, 1424.) She testified that appellant's height, body type, skin tone, and eyes were similar to her attacker. (10RT 1425-1426, 1427, 1450.) Karen testified the man in the apartment had dark skin, was six feet one inch tall, and 29 or 30 years old with light brown hazel eyes and a deep voice. (10RT 1487-1488, 1492-1494, 1499-1500.)

L.D. described her rapist as African-American, five feet 11 inches tall, with a medium build, and in his mid-twenties to early thirties, with thin lower legs and a deep voice. (10RT 1593, 1596, 1606-1607; 11RT 1634, 1679.) Shortly after the attack, L.D. told law enforcement that she would

recognize her rapist's voice if she heard it again. (12RT 1829-1830.) L.D. watched appellant's interview and testified that his demeanor was familiar, and she recognized his voice as the man who raped her. (11RT 1713, 1714.) Plus, the way appellant spoke, his face shape, and eye color, were similar to her rapist. (11RT 1713-1714, 1718.)

A.R. testified her rapist was black, tall, and 30 years old or younger. (13RT 2156, 2161; 14RT 2214.) K.R. described him as African-American, five feet eleven inches tall, skinny, and 26 or 27 years old, with brown or hazel eyes. (14RT 2310, 2312; 15RT 2459.) E.R. stated the man was black, "pretty tall," and 29 or 30 years old, with brown eyes. (15RT 2397, 2399, 2409, 2453-2454.)

M.V. described her rapist as African-American, taller than her, and in his twenties or thirties. (15RT 2530, 2567.) And, G.V. stated the man was African-American and 30 to 35 years old. (16RT 2624, 2645.) G.V. described the man's hair as "tiny" curly hair cut "[c]loser to his head" and testified appellant's curly hair style was the same as the man. (16RT 2625 2656.) Pictures of appellant admitted at trial showed him with short curly hair. (See 3SCT 582, 587.)

There were also similarities in the modus operandi of the burglary and sexual assault crimes that evidenced the same man committed the offenses:

- The victims were attacked early in the morning on Mondays or Thursdays. (10RT 1512; 11RT 1651-1652; 13RT 2099-2100, 2148; 16RT 2699, 2704; 28RT 4846, 4850.)
- The man targeted female victims who lived in apartments where no males were present at the time of the assaults. (9RT 1321, 1323, 1332; 10RT 1585-1586, 1588; 13RT 2110; 15RT 2486.)
- The man removed screens at A.M.'s, L.D.'s and M.V.'s apartments and entered through a window. (10RT 1526-1527; 11RT 1676-1677, 1795-1796; 12RT 1895-1896; 15RT 2499-2500, 2566;

18RT 2988.) Due to an earlier break in, A.R. had "screw things" installed in her windows making them difficult to open, so the man waited until she opened her front door. (13RT 2147, 2155.)

- The man blindfolded all of the victim's eyes, except H.A. (9RT 1345-1346; 10RT 1595, 1596; 13RT 2165; 14RT 2364-2365; 15RT 2514-2516, 2456; 16RT 2620-2621.) He used duct tape to cover A.R.'s, K.R.'s, E.R.'s, M.V.'s, and G.V.'s eyes. (13RT 2165; 14RT 2364-2365; 15RT 2456, 2514-2516; 16RT 2621.)
- With the exception of A.M., the man bound all the victims' hands.[11] (10RT 1600-1602; 13RT 2169-2170; 14RT 2289-2291, 2318, 2320, 2362-2363; 15RT 2511-2512; 16RT 2622.) He used zip ties to bind K.R.'s, E.R.'s, M.V.'s, and G.V.'s hands. (14RT 2318, 2362-2363; 15RT 2452-2453, 2511; 16RT 2622.) A.R. described her bindings as "plastic." (13RT 2169-2170.)
- The man put tape across A.R.'s, K.R.'s, E.R.'s, M.V.'s, and G.V.'s mouths. (13RT 2168-2169; 14RT 2301-2302, 2370-2371; 15RT 2456, 2518; 16RT 2620.)
- The man told A.M., L.D., and K.R. not to look at him. (9RT 1345; 10RT 1591; 15RT 2457.)
- The man raped L.D., A.R., and M.V. twice, and told A.M. that he was going to rape her, before she fought him off. (9RT 1353, 1356; 10RT 1617-1618, 1631; 14RT 2211-2212; 15RT 2536, 2539.)
- The man used a condom when he raped L.D. and M.V. (10RT 1617, 1631; 15RT 2537.) A.R. testified that she was unsure whether he wore a condom when he raped her. (13RT 2190-2191.)

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[11] A.M., the first victim, was able to fight off the man because her hands were free. (9RT 1356.) The man bound all of the subsequent victims' hands.

- Before the man raped L.D., A.R., and M.V., he first moved them into a room where their children were not present. (10RT 1592, 1594-1595; 13RT 2182-2183; 15RT 2510.)
- After the man raped L.D., A.R., and M.V., he bathed them. (11RT 1640-1643; 13RT 2192-2194; 15RT 2543-2544.)
- The man put blankets on L.D. and A.R. after he bathed them. (11RT 1644; 13RT 2200.) In M.V.'s case, he left the apartment after G.V. called 911, while M.V. was still in the bathtub. (15RT 2546-2547; 16RT 2633-2635.)
- The man used weapons: he pointed a gun at A.M. and M.V.; and, he used a knife to cut A.R.'s, K.R.'s, and E.R.'s zip ties and E.R.'s and M.V.'s shirts. (9RT 1353; 13RT 2198; 14RT 2316-2318; 15RT 2390, 2395, 2506-2507, 2510, 2525-2526.)
- The man took A.M.'s, A.R.'s, and M.V.'s phones. (9RT 1381; 13RT 2200; 15RT 2564.) He initially told L.D. that he was going to take her phone, but he hid it in her sofa after she asked him not to because the phone contained pictures of her daughter. (11RT 1647-1648; 12RT 1818.)
- The man asked L.D. and M.V. for money and told K.R. that he was doing "this" for money. (10RT 1599; 15RT 2518.) A.R. volunteered that she did not have any money soon after the man forced his way into her home. (13RT 2160.)
- The man told L.D. and A.R. not to call the police. (11RT 1646-1647; 13RT 220; 15RT 2391.) He interrupted G.V.'s 911 call and partially came onto the bed where she was talking to 911. (16RT 2633-2635.)
- The man verbally threatened A.M., A.R., and M.V. (9RT 1350; 13RT 2187-2188; 15RT 2509.) In L.D.'s case, the man told her

"[d]on't scream. Think of your daughter." (10RT 1592.) And, L.D. was scared he would hurt her daughter. (10RT 1592.)

There were similarities in the physical attire the attacker wore that evidenced it was the same man in each case:

- The man wore a dark hoodie sweatshirt, a black sweater with a hood, or a heavy black jacket with a hood to A.M.'s, A.R.'s, and M.V.'s apartments. (9RT 1343; 13RT 2173; 14RT 2283, 2359; 15RT 2506-2507, 2568; 16RT 2607-2608.) L.D. testified that the man wore a sweater. (10RT 1618-1619.)
- Each victim testified that the man wore a mask, except for H.A. who did not testify. (9RT 1342; 10RT 1590; 13RT 2172-2173; 14RT 2283, 2359; 15RT 2508, 2567-2568; 16RT 2593, 2608.)
- A.M., L.D., A.R., K.R., E.R., and G.V. all testified that the man wore dark-colored gloves. (9RT 1350-1351; 10RT 1416-1417; 10RT 1588, 1601-1602; 13RT 2158, 2161, 2162; 14RT 2288, 2359-2360; 16RT 2611.)
- The man had a black backpack at L.D.'s and A.R.'s apartments. (10RT 1613-1614; 13RT 2164; 14RT 2290.)

Appellant wore attire consistent with the assailant. As noted above, most of the victims testified that the man wore a black hooded sweatshirt or sweater. (9RT 1343; 13RT 2173; 14RT 2283, 2359; 15RT 2506-2507, 2568; 16RT 2607-2608.) In December of 2013, law enforcement recovered a black hooded sweatshirt from appellant's residence. (26RT 3962.) On October 13, 2013, a little over an hour before appellant's cellphone recorded videos of Teresa G.'s residence and Ada R., law enforcement saw appellant in the middle of the roadway wearing a black hooded sweatshirt with the hood on. (19RT 3239-3240; 27RT 4690; 27RT 4961-4963.) In June or July of 2013, sometime after 2:00 a.m., Thornbrough saw appellant acting suspiciously while wearing a black hooded sweatshirt with the hood

on, even though it was hot outside. (12RT 1929-1930, 1950.) In November of 2010, appellant was wearing a black hooded sweatshirt when Officer Perkins arrested him for prowling. (26RT 4507, 4511.) And, appellant's Facebook account had multiple pictures of him wearing a black hooded sweatshirt. (3SCT 578; 587; 27RT 4608, 4613.)

K.R. and E.R. testified the man in their apartment wore blue and white plaid shorts. (14RT 2285; 15RT 2404-2406.) In December of 2013, law enforcement recovered blue and white plaid shorts from appellant's residence. (22RT 3959, 3961.) Appellant's Facebook account had multiple pictures of him wearing blue and white plaid shorts. (3SCT 577, 583; 27RT 4608, 4611.)

Appellant possessed items that were used by the assailant. L.D., A.R., E.R., and K.R. all testified that the man had a black backpack. (10RT 1613-1614; 13RT 2164; 14RT 2290.) Law enforcement recovered a black plaid backpack from appellant's residence. (22RT 3963.) And, appellant's Facebook account had a picture of him with a black backpack. (3SCT 582; 27RT 4610-4611.)

A.M. and M.V. testified that the man pointed a gun at them, and the man used a gun to hit A.M. (9RT 1353, 1356-1357; 13RT 2506-2507, 2510.) Appellant had at least one firearm during the summer of 2013. (26RT 4571; 29RT 5196, 5197.) And, two weeks before the assault on A.M., a picture of appellant holding a gun with the message "[i]t is what it is. Play time is over" was posted on his Facebook account. (3SCT 575; 13RT 4577, 4579.)

The man used zip ties to bind K.R.'s, E.R.'s, M.V.'s, and G.V.'s hands. (14RT 2318, 2362-2363; 15RT 2452-2453, 2511; 16RT 2622.) Law enforcement recovered zip ties from appellant's residence. (22RT 3959.)

Appellant's hygiene was similar to the assailant. L.D. testified her rapist smelled strongly of cigarettes, and M.V. testified that her rapist smelled "dirty" as if he had not showered for days. (10RT 1594.) Appellant's Facebook account had a picture of appellant smoking a cigarette, and appellant admitted he smoked in 2013. (3SCT 584-585; 27RT 4612; 29RT 5145.) Plus, Officer Martin noted appellant smelled of stale cigarettes and as if he was homeless and had not showered in awhile both times he transported appellant to jail in August and October of 2013. (18RT 3110.)

Appellant was involved in prior crimes where someone entered residences in a manner similar to the assailant in this case. The man entered A.M.'s, L.D.'s and M.V.'s apartments by sliding open windows. (10RT 1526-1527; 11RT 1676-1677, 1795-1796; 12RT 1895-1896; 15RT 2499-2500, 2566; 18RT 2988.) In 2005, Officer Miller investigated two burglaries where a burglar entered the residences by sliding open windows. (26RT 4523, 4528.) And, appellant was convicted of residential burglary and receiving stolen property in relation to those burglary investigations. (26RT 4500.)

There was also strong evidence appellant committed the crimes against A.M. A shoe track found below the open bedroom window the assailant used to enter the apartment had a similar tread and wear pattern to a shoe recovered from appellant's residence, and Criminalist Matthias could not eliminate the shoe as the source of the shoe track. (10RT 1526-1527, 1528; 22RT 3962, 25RT 4452-4453.)

Appellant's cellphone had a break in activity between 3:00 a.m. and 4:00 a.m., and the assailant broke into A.M.'s apartment at approximately 3:15 a.m. (28RT 4846, 4792.) Plus, appellant's cellphone was in the area of A.M.'s apartment before A.M.'s cousin called 911. (28RT 4846.)

Outside of the TrueAllele results, there was strong evidence appellant committed the crimes against L.D. L.D. testified her rapist wore black tennis shoes with some white on them. (11RT 1634-1635.) Criminalist Matthias found similarities between shoe tracks found beneath the kitchen and bedroom windows and black Reebok shoes with a white or silver stripe recovered from appellant's residence. (12RT 1837, 2036; 25RT 4447, 4449, 4460-4461, 4466.) The shoe track and recovered shoes had similar tread design, and the left shoe had a similar wear pattern design to the shoe tracks. (25RT 4461-4466.)

Appellant's cellphone had a break in activity from 1:16 a.m. to 5:57 a.m., and L.D.'s rapist broke into her apartment at approximately 5:00 a.m. to 5:15 a.m. (28RT 4820, 4847.) At 5:57 a.m., appellant's cellphone used a tower that provided coverage to the area of L.D.'s apartment. (5SCT 1296; 28RT 4848-4949.) His cellphone only accessed that particular cell tower that one time in the four months of phone records that law enforcement reviewed. (28RT 4849.)

Independent of the TrueAllele results, there was strong evidence appellant committed the crimes against A.R., K.R., E.R., and H.A. Ryan did a manual interpretation of the DNA profile from the sperm fraction on A.R.'s shirt and agreed she found a "match" for appellant's DNA in the profile. (29RT 5101.) In the manual interpretation of the sperm fraction sample from stains A and B on A.R.'s pants, there were foreign alleles that were not attributable to A.R. or Munoz. (22RT 3819-3820, 3828.) And, Ryan did a manual interpretation of the sperm fraction on stain A of A.R.'s pants and testified that appellant could not be excluded as a contributor. (29RT 5101.)

Appellant's cellphone was in the area of A.R.'s apartment before she called 911. (16RT 2704; 28RT 4850.) And, the day after A.R.'s rape

appellant began checking coverage of news stories linking the sexual assault cases. (27RT 4667, 4668-4670.)

E.R. was only 11 years old when she was molested. (14RT 2242, 2371.) Appellant showed an interest in underage girls, as evidenced by his attempts to engage in conversation with 15-year-old J.G. and his conversations with 14-year-old T.L., in which he gave T.L. his phone number, asked her to text him, told her she was cute and "hella sexy," asked if he could call her, and told her he wished he had her phone number. (30RT 5323-5324, 5328, 5330-5332.)

Apart from the TrueAllele results, there was strong evidence appellant committed the crimes against M.V. and G.V. In a manual interpretation of DNA evidence from the zip tie found in the roadway outside of M.V.'s apartment, Sugimoto testified the alleles from appellant's DNA profile were consistent with the alleles from the roadway zip tie, and Ryan determined appellant's DNA was present in the DNA profile for the zip tie. (22RT 3841-3842; 29RT 5101-5102.)

G.V. testified the man wore red running shoes. (16RT 2625-2626.) Criminalist Matthias found similarities between shoe tracks found on the kitchen counter and ice chest to red Nike shoes recovered from appellant's residence. (22RT 3960; 25RT 4444, 4467-4468.) The tread design on the shoes was similar to the shoe track on the kitchen counter. (25RT 4468-4470.) And, there was patterning on the ice chest that had "some agreement" with the red Nike shoes. (25RT 4472.)

M.V.'s rapist stole $5,000 cash from her. (15RT 2523, 2527.) Only seven hours later, appellant's girlfriend Destiny Walker paid for a new car with $2,250 in cash, even though appellant told Martin that neither he nor Walker were employed, and he had not worked in the last year. (16RT 2669; 18RT 3029-3032, 3034, 3107.) Appellant had previously posted the following message on Facebook: "Destiny Walker, yeah, but when da

money come in, what you be saying? Can you buy me a new car? Yeah." (26RT 4576.) Plus, appellant's prepaid cellphone ran out of service for an overdue payment on August 14, 2013, but he made a payment to renew service on the same day M.V. was robbed. (27RT 4682.)

Accordingly, there was overwhelming evidence of appellant's guilt in light of the aforementioned evidence, and error, if any, was harmless.

II. THE TRIAL COURT PROPERLY PRECLUDED THE DEFENSE DNA EXPERT FROM TESTIFYING ABOUT TRUEALLELE METHODOLOGY, AND THE COURT'S RULING DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE; REGARDLESS, ANY ERROR WAS HARMLESS

The trial court did not abuse its discretion in determining Suzanna Ryan, the defense DNA consultant, was not qualified to testify about TrueAllele methodology. (AOB 72-75.) She had never been trained on or operated TrueAllele, and had not used computer software that was similar to TrueAllele to do DNA interpretations or any other "probabilistic genotyping software." (29RT 5013, 5022-5023, 5024.) The court's ruling also did not infringe on appellant's constitutional right to present a defense under the Sixth Amendment. (AOB 75-79.) A state court's application of ordinary rules of evidence does not generally infringe on a defendant's right to offer a defense. (*People v. Linton* (2013) 56 Cal.4th 1146, 1183 (*Linton*.) And error, if any, in excluding Ryan's testimony about TrueAllele methodology was harmless in light of the rest of her testimony and the overwhelming evidence of appellant's guilt.

A. Background

Suzanna Ryan was a DNA consultant for the defense. (29RT 4946.) She had testified as a DNA expert 75 times, and at least 60 percent of those cases involved DNA mixtures. (29RT 4951-4953.)

Ryan had the following training on interpreting DNA mixture samples: employment training; a two-day workshop put on by the American Academy of Forensic Sciences; an online workshop; and a workshop on probabilistic software. (29RT 4946.) She had neither operated TrueAllele nor undergone its one-year training program. (29RT 5013.) Instead, she attended a 36-minute training Dr. Perlin conducted in Phoenix, watched some of his YouTube videos from his website, read a number of journal articles that he wrote or coauthored, reviewed the Lab's validation summary, and reviewed the Lab's protocols and procedures on TrueAllele analysis. (29RT 4961, 5011-5013.) She also attended a meeting Dr. Perlin spoke at 10 years ago, but it did not "incorporate as much of the mixture component" that was discussed at trial. (29RT 5012.)

She testified that "in order to perform the TrueAllele analysis it's basically a requisite that you have to assume a certain number of contributors." (29RT 4962.) According to her, that assumption can affect the results, and it is not "safe" to assume a set number of contributors in low-level DNA samples. (29RT 4962.) Some of the items tested in this case had a very low level of DNA present on them. (29RT 4955.)

Ryan testified that TrueAllele operators can select different options when they analyze DNA samples. (29RT 5008.) Some of those options include: assuming a contributor is present in a sample; assuming a contributor is not present in a sample; assuming how many contributors are present; and assuming a sample is degraded. (29RT 5008.) She claimed that "any of these options it affects the final outcome, whether -- it can affect it to the point of a person is included using a certain set of options and they are not included using these other options or it's inconclusive using other options. So there is an impact as to what options are selected or deselected." (29RT 5009.)

The TrueAllele analysis of stain B from A.R.'s pants showed that appellant and Munoz were possible contributors to the mixture. (29RT 5007.) Ryan testified that the operator ran the sample through TrueAllele with the degraded option selected. (29RT 5008.) According to her, turning that option "on" could have affected the likelihood ratio. (29RT 5008-5009.) Plus, she did not believe the stain was degraded. (29RT 5009.) Ryan also did not see any results in Dr. Perlin's case packet for that stain being run through TrueAllele without the degraded option selected. (29RT 5009-5010.)

The defense questioned Ryan multiple times if it was possible that appellant could have been excluded from stain B on A.R.'s pants if Dr. Perlin ran the sample without the degraded option selected. (29RT 5010.) The court sustained the prosecutor's objections to those questions for lack of foundation. (29RT 5009-5010.)

Defense counsel asked Ryan if she knew whether turning on and off the degraded option could cause a false inclusion in the results. (29RT 5010.) The prosecutor objected, and the court asked the defense to lay a foundation. (29RT 5010-5011.) In response, Ryan testified that she had reviewed journal articles regarding TrueAllele and looked at the results of what happened to particular samples in this case when different options were selected. (29RT 5011.) The prosecutor then conducted voir dire on Ryan's lack of training and experience with TrueAllele. (29RT 5011-5013.) The court sustained the objection unless "[defense] counsel can rephrase to show that the appropriate foundation has been met." (29RT 5013.)

Instead, defense counsel "move[d] on" and questioned Ryan about the results for A.R.'s shirt. (29RT 5013-5017.) The Lab assumed there were only three contributors, and one of those contributors was Munoz. (29RT 5016-5017.) The defense asked Ryan if that assumption affected the likelihood ratio that appellant contributed DNA to the sample. (29RT

5017.) Ryan replied, "[y]es, it can have an impact or an effect, because in order to come to that conclusion that Mr. Johnson is included, they had to select many of these options. So they had to select that the sample was degraded. That option was turned on. They had to assume three contributors. And they had to assume the identity of two of those contributors in order to get the likelihood ratio that is reported in the report." (29RT 5017.) The court sustained the prosecution's objection for lack of foundation and struck the answer. (29RT 5017.)

Defense counsel asked Ryan if she knew whether inferring contributors to a sample would affect the result in TrueAllele. (29RT 5017-5018.) The court noted Ryan said she had not used the TrueAllele software and sustained the prosecutor's objection for lack of foundation. (29RT 5018.)

The defense questioned Ryan about what she had reviewed from the Lab about how TrueAllele is used. (29RT 5018.) Ryan testified that she reviewed the Lab's validation summary and protocol on TrueAllele, but those did not discuss the effects of inferring possible contributors to a sample. (29RT 5018.) The protocol discussed the different options that could be selected in the software. (29RT 5018.)

Ryan explained that she also reviewed Dr. Perlin's case packet which "show[ed her] what the likelihood ratio is with different options turned on and turned off. So it's in the case file." (29RT 5018-5019.) Defense counsel questioned Ryan about what she learned from Dr. Perlin's work about how turning on and off options can affect likelihood ratios. (29RT 5019.) The court sustained the prosecution's objection for lack of foundation. (29RT 5019.)

The court held a brief unreported sidebar conference and then conducted an evidentiary hearing outside the presence of the jury so defense counsel "may attempt to show how Ms. Ryan can comment on the

TrueAllele method, methodology, not having runs tests per that method or employing that method." (29RT 5020.) Ryan testified that she reviewed Dr. Perlin's case packet, which showed what he did with each sample in this case. (29RT 5020-5021.) "Upon reviewing that it is illustrated what the effect of using various options has on the likelihood ratio. The likelihood ratio is provided with these various options." (29RT 5021.) Ryan explained that she understood what likelihood ratios were, had been trained on how to use them, and understood how to calculate them. (29RT 5021, 5023.) Likelihood ratios were not unique to TrueAllele. (29RT 5021-5022.)

Ryan admitted, however, that she had not used computer software that was similar to TrueAllele to do DNA interpretations or any other "probabilistic-type genotyping software." (29RT 5022-5023.) She had used software to calculate random match probabilities and likelihood ratios, "but not to the complexity as TrueAllele, which is a fully continuous probabilistic software." (29RT 5023.)

Ryan understood what it looked like when a likelihood ratio changed, and in her review of Dr. Perlin's notes, she was capable of seeing and understanding that different results were reached with different options selected. (29RT 5024.) She testified specifically about results Dr. Perlin reached in analyzing the semen fraction from A.R.'s shirt when there were no assumptions made about who was present in the sample. (29RT 5026-5027.) According to her, Dr. Perlin ran the sample through TrueAllele multiple times and reached likelihood ratios ranging from negative 22.27 and positive 3.48, which were inconclusive results based on the Lab's protocol. (29RT 5026-5027.) At this point, the court did not want to hear any further examples. (29RT 5027.)

The prosecutor asked Ryan if she basically looked at Dr. Perlin's results and "parrot[ed]" them. (29RT 5027.) Ryan disagreed and testified

the results she provided were not "reported" and "[w]hat's reported is the best result or the result that includes Mr. Johnson. So that was my issue with it, that not all the results are reported." (29RT 5027.) She opined that Dr. Perlin chose the best result because "that's what's reported in the report." (29RT 5027.) Ryan admitted that she did not know why Dr. Perlin did not report certain results or what factors he considered in making those determinations. (29RT 5029.) She never called and asked him about his conclusions. (29RT 5029.)

The People argued that Ryan did not have "sufficient training and experience in the operation and interpretation of Dr. Perlin's probabilistic genotyping software in order to come to conclusions." (29RT 5029-5030.) The prosecution admitted Ryan was very qualified in manual interpretation of DNA, but argued she was not qualified in the area of probabilistic genotyping. (29RT 5030.)

The court then stated the following: "The problem I find is that she can testify regarding the methodology she has employed in the past and any -- if it's other software computer probabilistic genotyping she can testify regarding the results of likelihood ratios, but within the confines of what tests she's actually run. [¶] But to use notes and figure -- and comment concerning the TrueAllele methodology, I have a problem with that. I'll sustain the objection in that regard." (29RT 5030.)

The prosecution and defense tried to clarify the court's ruling limiting Ryan's testimony. (29RT 5032-5037.) The court explained that Ryan could not say how Dr. Perlin arrived at likelihood ratios, but she could take the final result and testify about "how that compares to a methodology she would run." (29RT 5037.)

Defense counsel resumed questioning Ryan in front of the jury. (29RT 5038.) The defense asked Ryan if Dr. Perlin's results "with the different options, did they suggest that they fell below what he would

consider in his validation studies with the [Lab]?" (29RT 5040-5041.) The court sustained the People's objection for lack of foundation. (29RT 5040.)

The defense then questioned Ryan about whether she was familiar with the Lab's "likelihood ratio's bar" for determining whether "something" is conclusive or inconclusive utilizing TrueAllele. (29RT 5040-5041.) The court sustained the People's objection because Ryan had not used TrueAllele. (29RT 5041.) The defense then moved on to other topics. (29RT 5041.)

B. Analysis

1. The Trial Court Did Not Abuse Its Discretion In Finding The Defense DNA Expert Was Not Qualified To Testify About TrueAllele Methodology, Because She Had Never Operated Or Been Trained On TrueAllele

"The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion in shown. [Citations.]" (*People v. Bloyd* (1987) 43 Cal.3d 333, 357 (*Bloyd*).) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).) "The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement." (*People v. De Hoyos* (2013) 57 Cal.4th 79, 128, internal quotation marks and citations omitted.) Consequently, "the field of expertise must be carefully distinguished and limited." (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 37.) And, "[q]ualifications on related subject matter are insufficient. [Citations.]" (*People v. Hogan* (1982) 31 Cal.3d 815, 852 (*Hogan*), disapproved on other

grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 835-836.) "Whether a person qualifies as an expert in a particular case … depends upon the facts of the case and the witness's qualifications." (*Bloyd*, *supra*, 43 Cal.3d at p. 357.)

Here, the trial court did not abuse its discretion in finding that Ryan was not qualified to testify about TrueAllele methodology. (See *Bloyd*, *supra*, 43 Cal.3d at p. 357.) She had never operated TrueAllele or any probabilistic genotyping software, and she had not undergone its one-year training program. (29RT 5013, 5021, 5022, 5024.) As evidenced by the length of the training program and Ryan's own testimony, TrueAllele was a complex computer software. (29RT 5023.) Ryan also did not claim that she had testified about TrueAllele before or been qualified as an expert in the use of TrueAllele. Nor did she claim to have conducted a validation study of TrueAllele.

Instead, Ryan's familiarity with TrueAllele was based on attending a 36-minute lecture, YouTube videos from Dr. Perlin's website, the Lab's validation summary, the Lab's protocols and procedures on TrueAllele, and articles Dr. Perlin wrote or co-authored. (29RT 4961, 5011-5013.) Given her limited qualifications on TrueAllele, the trial court did not abuse its discretion in precluding her from testifying about its methodology. (See *Bloyd*, *supra*, 43 Cal.3d at p. 357.)

Appellant claims "Ms. Ryan would have testified that when Dr. Perlin input the data in his TrueAllele software program, he made assumptions that affected the results. She would testify that Dr. Perlin's own notes indicated that, had these assumptions not been made, appellant could not have been included as a likely contributor to the DNA found at the crime scenes." (AOB 66.) Appellant's concerns are unfounded. Ryan testified to the following, which addressed appellant's claims: "in order to perform TrueAllele analysis it's basically a requisite that you have to assume a

certain number of contributors," and that assumption can affect the results; a TrueAllele operator can select different options when analyzing DNA samples, including assuming a contributor was present in the sample, assuming a contributor was not present in the sample, and assuming the sample was degraded; and selecting any of those options "affects the final outcome, whether -- it can affect it to the point of a person is included using a certain set of options and they are not included using these other options or it's inconclusive using other options. So there is an impact as to what options are selected or deselected." (29RT 4962, 5008, 5009.)

Based on Ryan's testimony, the jury could have found that appellant's inclusion as a contributor in DNA samples in this case was the result of options that a TrueAllele operator selected when he ran the samples through the software. For example, both Dr. Perlin and Sugimoto testified that there were high match statistics for appellant's inclusion as a DNA contributor in the sperm fraction from stain B on A.R.'s pants. (2SCT 423; 24RT 4156-4157, 4305-4306.) Ryan testified that particular sample was run through TrueAllele with the degraded option selected, which could have affected the results. (29RT 5008-5009.) Thus, the jury could have concluded that Dr. Perlin's and Sugimoto's results were unreliable in light of Ryan's testimony.

Appellant also argues that Ryan's lack of operating or training on TrueAllele went "to the weight of her testimony, not its admissibility." (AOB 73.) His argument is untenable. "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility. [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 322, quotation marks omitted; *People v. Jones* (2012) 54 Cal.4th 1, 59 [same].) Here, as argued above, Ryan did not establish that

she had a sufficient knowledge of the TrueAllele methodology to testify about it in front of the jury. (See *ibid*.) As such, appellant's argument fails.

Appellant further claims that Ryan's knowledge of likelihood ratios made her qualified to testify that Dr. Perlin consistently selected the highest likelihood ratio to include in his report. (AOB 74.) His claim is flawed. "[T]he qualifications of an expert must be related to the particular subject upon which he is giving expert testimony. Qualifications on related subject matter are insufficient." (*Hogan*, *supra*, 31 Cal.3d at p. 852.) Here, Dr. Perlin expressed his TrueAllele results as match statistics, which is a type of likelihood ratio. (23RT 4118.) Ryan understood what likelihood ratios were, had been trained on how to use them, and knew how to calculate them. (29RT 5021, 5023.) However, she had never operated the TrueAllele software, did not know why Dr. Perlin only reported certain results, and did not know what factors he considered in making those determinations. (29RT 5013, 5029.) In sum, her ability to understand and calculate likelihood ratios did not render her competent to testify about the process of determining likelihood ratios using the TrueAllele software. (See *Hogan*, *supra*, 31 Cal.3d at p. 852.)

Appellant relies on a law review article to contend "[t]his is not the only case in which Dr. Perlin cherry-picked the likelihood ratio most incriminating to the defendant." (AOB 74.) Appellant's argument is irrelevant. The issue before this Court is whether the trial court abused its discretion in finding that Ryan was not qualified to testify about TrueAllele methodology. Plus, appellant's representation of the law review article is wrong. According to the article, in one case Dr. Perlin ran an evidence sample through TrueAllele four separate times and produced four different likelihood ratios ranging from 389 million to 17.8 billion that incriminated a defendant. (*The Admissibility of TrueAllele: A Computerized DNA Interpretation System* (2015) 72 Wash. & Lee L. Rev. 1033, 1072.)

Ultimately, Dr. Perlin used a likelihood ratio of 6.3 billion in court. (*Id*. at p. 1073.) Thus, contrary to appellant's assertion, Dr. Perlin did not choose the "most" incriminating ratio to the defendant. (AOB 74.)

2. The Trial Court Did Not Violate Appellant's Constitutional Rights In Ruling The Defense DNA Expert Was Not Qualified To Testify About TrueAllele Methodology, Because The Trial Court's Finding Was A Routine Evidentiary Ruling And The Defense Expert Still Cast Doubt On The TrueAllele Results

In a heading, appellant claims the trial court violated his Fifth, Sixth, and Fourteenth Amendment rights by precluding Ryan's testimony about TrueAllele methodology. (AOB 75.) However, appellant only analyzed his Sixth Amendment right to present a defense. (AOB 76.) "It is the responsibility of the appellant … to support claims of error with meaningful argument and citation to authority. When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [issues not supported by argument or citation to authority are forfeited].) Accordingly, appellant forfeited any claim regarding the Fifth and Fourteenth Amendments on this issue.

The trial court did not violate appellant's Sixth Amendment right to present a defense in excluding Ryan's testimony about TrueAllele methodology. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) "Although a defendant has the general right to offer a defense through the testimony of his or her witnesses, a state court's application of ordinary rules of evidence … generally does not infringe upon this right." (*Linton*, *supra*, 56 Cal.4th at p. 1183, internal quotation marks and citations omitted.)

Here, the trial court's finding that Ryan lacked the necessary qualifications to testify about TrueAllele methodology was a routine evidentiary ruling and did not infringe on appellant's constitutional right to offer a defense. (See *People v. Linton, supra,* 56 Cal.4th at p. 1183.) Plus, as stated above, Ryan testified about issues with TrueAllele that could cast doubt on its results: "it's basically a requisite that you have to assume a certain number of contributors" in TrueAllele and that assumption can affect the results; it is not "safe" to assume a set number of contributors in low-level samples and some of the samples in this case were low-level samples; a TrueAllele operator can select different options when analyzing DNA samples in the software; and those selections can affect the results and include a person in the results. (29RT 4955, 4962, 5009.) Thus, appellant still presented a defense that the jury could have believed cast doubt on the TrueAllele results.

3. Error, If Any, Was Harmless In Light Of The Rest Of The Defense DNA Expert's Testimony And The Overwhelming Evidence Of Appellant's Guilt

Error, if any, was harmless. It is not reasonably probable the jury would have reached a different result had the trial court allowed Ryan to testify about TrueAllele methodology. (See *Watson, supra,* 46 Cal.2d at p. 836; *Fudge*, *supra*, 7 Cal.4th at p. 1103 [evidentiary errors under state evidence rules under *Watson* harmless error standard]; *Alcala, supra,* 4 Cal.4th at p. 791 [evidentiary rulings reviewed for prejudice under *Watson* reasonable probability standard]; *People v. Walker* (1986) 185 Cal.App.3d 155, 166 [exclusion of defense expert was reviewed for error under *Watson* harmless error standard].) As argued above, even though the trial court precluded Ryan from testifying about TrueAllele methodology, she still testified about issues with TrueAllele that could cast doubt on its results. (29RT 4962, 5008, 5009.) Plus, there was overwhelming evidence of

appellant's guilt, including Ryan's testimony that her manual interpretation of DNA showed appellant's DNA "match[ed]" the DNA recovered from the stain on A.R.'s shirt and appellant's DNA was present in the profile for the zip tie found outside M.V.'s apartment. (29RT 5101-5102.) Accordingly, any error was harmless.

III. APPELLANT SHOULD BE ESTOPPED FROM CLAIMING THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A MISTRIAL, BECAUSE STRONG PUBLIC POLICY CONSIDERATIONS FAVORED THE COURT'S RULING AND THE DEFENSE ENGAGED IN GAMESMANSHIP, AND THE COURT DID NOT VIOLATE CODE OF CIVIL PROCEDURE SECTION 233 WHEN IT DENIED APPELLANT'S MOTION FOR A MISTRIAL; REGARDLESS, ANY ERROR WAS HARMLESS

Appellant should be estopped from claiming the trial court erred when it denied his motion for a mistrial after the court dismissed a sworn juror before alternate jurors were selected and sworn, because public policy considerations supported the court's ruling. (AOB 79-86.) "The question of whether to apply estoppel requires inquiry into the importance of the error on the parties and the courts examined in the light of relevant public policy considerations." (*People v. Cree* (1981) 123 Cal.App.3d 1013, 1016.) Strong public policy considerations of judicial efficiency and economy supported the court's proposed ruling (defer ruling on the motion to dismiss the sworn juror until after the alternates were selected and sworn) and the court's ruling (dismissing the sworn juror for cause, selecting alternate jurors, and randomly selecting one of the alternate jurors to replace the dismissed juror), because the court avoided unnecessarily restarting jury selection. Appellant should also be estopped from claiming error, because he engaged in gamesmanship by "demand[ing]" the court rule on a motion to dismiss the sworn juror, before the selection of alternate jurors, in order to force a mistrial. (11ART 2092-2093.) The law disfavors gamesmanship.

The trial court did not violate Code of Civil Procedure section 233 when it denied appellant's motion for a mistrial. A literal interpretation of the statute, i.e., requiring the court to discharge the jury and impanel a new one after dismissing the sworn juror, would have been an absurd result based on the unique circumstances in this case. And, the language of a statute should not be given a literal interpretation if doing so would result in absurd consequences the Legislature did not intend. (*People v. Thomas* (1992) 4 Cal.4th 206, 210 (*Thomas*).)

Finally, error, if any, was harmless because appellant's jury consisted of 12 members before opening statements began.

A. Background

After the defense and prosecution accepted the panel of 12 jurors, the trial court swore in the jury and excused them for the day. (10ART[12] 2039-2040.) As one of the jurors was leaving the courtroom, he learned that his wife had cancer and needed surgery. (11ART 2041-2042, 2077-2078.) The next day, the court examined the juror, who explained that his wife was the only person he was thinking of, he felt very distracted, and he needed to be with her. (11ART 2078-2079.) The court noted the juror was rubbing his eyes, and it had never seen "a more valid reason for cause." (11ART 2079.) The defense agreed to stipulate for cause and moved to excuse the juror for cause if there was no stipulation. (11ART 2079.)

The prosecutor agreed there was cause to excuse the juror but was concerned about excusing the juror before selecting alternate jurors. (11ART 2079-2080.) She advised the court to follow the guidance of *People v. Griffin* (2004) 33 Cal.4th 536 (*Griffin*), overturned on other grounds by *People v. Riccardi* (2012) 54 Cal.4th 758), and select alternate

[12] Respondent refers to the Augmented Reporter's Transcripts as "ART."

jurors before excusing the sworn juror. (11ART 2079, 2082-2083, 2089.) The defense objected and asked the court to excuse the juror at that time. (11ART 2080, 2083-2088, 2090-2092.) Defense counsel advised the court that the defense would ask for a mistrial after the juror was dismissed, because there would only be 11 jurors. (11ART 2088.) The court stated it intended to pick alternate jurors before excusing the sworn juror, but the defense "demand[ed]" a ruling on its motion to excuse the sworn juror for cause. (11ART 2092-2093.)

After a recess, the court indicated it would excuse the sworn juror for cause at that time. (11ART 2094.) The parties stipulated there was good cause, and the court excused the juror. (11ART 2094.) Defense counsel moved for a mistrial and argued that a jury of 11 persons was inadequate as a matter of law. (5CT 1286-1291; 11ART 2095, 2096.) He relied on *People v. Cottle* (2006) 39 Cal.4th 246 (*Cottle*) and contended he was entitled to a mistrial in order to "start anew with all peremptory challenges and a new chance to evaluate the entire dynamic of the proposed 'Judges of the Facts.'" (5CT 1288-1289.) The People opposed the motion and urged the court to follow *Griffin* and distinguish *Cottle*. (5CT 1292-1295.) The court denied the motion for mistrial based upon *Griffin*, section 1089, and Code of Civil Procedure sections 233 and 234. (11ART 2080, 2095, 2096.)

The defense did not ask to reopen voir dire on the seated jurors in order to fill the vacancy, because the defense had exercised 18 peremptory challenges while the People had only exercised 12. (11ART 2048-2049, 2097-2098.) Instead, the defense requested the court begin selecting alternate jurors and have the 12th juror chosen from the alternates. (11ART 2097-2098.) Eventually, six alternate jurors were selected and sworn, and one of the alternates was randomly chosen to fill the vacant juror seat. (11ART 2099; 2306; 9RT 1308.)

B. Analysis

1. Appellant Should Be Estopped From Claiming The Trial Court Erred In Denying His Motion For A Mistrial Because of Strong Public Policy Considerations Favoring Judicial Efficiency And Economy

Appellant should be estopped from claiming the trial court erred when it denied his motion for a mistrial. "The question of whether to apply estoppel requires inquiry into the importance of the error on the parties and the courts examined in the light of relevant public policy considerations." (*Cree*, *supra*, 123 Cal.App.3d at p. 1016.) There are strong public policy considerations favoring judicial efficiency and economy. (See, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 40 ["Joint trials are favored because they 'promote economy and efficiency'"]; *People v. Ochoa* (1998) 19 Cal.4th 353, 409 ["Because consolidation ordinarily promotes efficiency, the law prefers it"]; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 343 [one public policy underlying the doctrine of collateral estoppel is promotion of judicial economy]; *People v. Lyons* (1970) 9 Cal.App.3d 58, 62 ["The rule requiring objections on the trial level is based on sound policies: promoting efficiency, economy and the nonduplication of functions in the courts"]; Cal. Rules of Court, rule 10.603(a) ["The presiding judge is responsible for … allocating resources in a manner that promotes … expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations…."].)

Here, the trial court's proposed ruling (defer ruling on the motion to dismiss the sworn juror until after the alternates were selected and sworn) and its ruling (dismissing the sworn juror for cause, selecting alternate jurors, and randomly selecting one of the alternate jurors to replace the dismissed juror) favored those policy considerations, because the court avoided unnecessarily restarting jury selections. At the time of the alleged

error, the court had already spent considerable resources during nine days of jury selection and neither its proposed ruling nor its ruling disadvantaged appellant or the People. (5CT 1199, 1207, 1218, 1228, 1238, 1253, 1266, 1272, 1281.) The jury had 12 sworn jurors before the parties began opening statements. (5CT 1308-1309.)

2. Appellant Should Be Estopped From Claiming The Trial Court Erred In Denying His Motion For A Mistrial In Light Of His Gamesmanship

Appellant should be estopped from asserting the trial court erred when it denied his motion for a mistrial, because he engaged in gamesmanship trying to force the court into declaring a mistrial. And, the law disfavors gamesmanship. (See *Packer v. Superior Court* (2014) 60 Cal.4th 695, 714 [a trial court has discretion to deny a motion to recuse a district attorney if it was proffered by a defendant whose attorney "engaged in improper gamesmanship" by proposing to call witnesses of marginal importance who have a strong personal connection to the prosecutor in order to create a conflict]; *People v. Williams* (2013) 56 Cal.4th 165, 194, internal quotation marks and citation omitted [trial court is not required to afford a defendant a *Marsden*[13] hearing each time he makes the same accusations because "[t]o hold differently would be to risk allowing creative defendants to engage in gamesmanship by means of proclivity to substitute counsel—i.e., by making repeated and repetitious *Marsden* motions]; *In re Littlefield* (1993) 5 Cal.4th 122, 133 ["courts in general have discouraged the practice of deliberately failing to learn or acquire information that, under applicable statutes or case law, must be disclosed pretrial, concluding that such gamesmanship is inconsistent with the quest for truth, which is the objective of modern discovery"]; *Owens v. Superior Court* (1980) 28

[13] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Cal.3d 238, 247 [manipulating procedural rules regarding speedy trial rights "for adversarial advantage should be avoided in our legal system"].)

Here, the trial court's proposed ruling was reasonable and in accord with the trial court's actions in *Griffin, supra*, 33 Cal.4th 536.[14] (11ART 2092.) Plus, as noted above, it would not have disadvantaged appellant. The proposed ruling would have retained the entire jury that appellant had already accepted for the remainder of jury selection. Instead, the defense engaged in gamesmanship by "demand[ing]" the court rule on a motion to dismiss the juror before the selection of alternate jurors in an attempt to force a mistrial, because it would leave 11 sworn jurors on the jury. (11ART 2087-2088, 2092-2093.) Since the law disfavors gamesmanship and the trial court proposed a reasonable solution to the jury selection issue, appellant should be estopped from claiming the trial court erred in denying his motion for mistrial.

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[14] In *Griffin, supra*, 33 Cal.4th 536, moments after the 12 regular jurors were selected and sworn, but before alternate jurors were selected, one of the sworn jurors declared she was unable to fulfill her duties because her son had been arrested. (*Griffin, supra*, 33 Cal.4th at p. 562.) The defense rejected the court's suggestion to stipulate to excusing the juror and reopening and proceeding to select a new juror. (*Id*. at p. 563.) The court indicated it intended to select alternate jurors and replace the sworn juror with an alternate. (*Id*. at p. 564.) After selecting alternate jurors, the court re-examined the juror who said she was too distraught to serve as a juror. (*Id*. at p. 564.) The defense would not stipulate to the juror's discharge. (*Ibid*.) The court discharged the juror, and the defense moved for a mistrial. (*Ibid*.) The trial court denied the motion. (*Ibid*.) On appeal, the defense claimed the trial court erred by failing to reopen jury selection. (*Id*. at p. 564.) The high court found the trial court had no sua sponte duty to reopen jury selection. (*Id*. at p. 567.) As such, the court did not address the defense argument that the trial court erred in continuing the hearing on whether to discharge the sworn juror until after the alternate jurors were selected and sworn. (*Ibid*.)

3. The Trial Court Did Not Violate Code Of Civil Procedure Section 233 When It Denied Appellant's Motion For Mistrial, Because A Literal Interpretation Of That Statute Would Have Led To An Absurd Result

California Code of Civil Procedure section 233 provides:

> If, before the jury has returned its verdict to the court, a juror becomes sick or, upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If after all alternate jurors have been made regular jurors or if there is no alternate juror, a juror becomes sick or otherwise unable to perform the juror's duty and has been discharged by the court as provided in this section, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may again be tried. Alternatively, with the consent of all parties, the trial may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew.

(Code Civ. Proc., § 233.)

Code of Civil Procedure section 233 was enacted in 1988 in the Trial Jury Selection and Management Act. (Stats. 1988, ch. 1245, § 2; Code Civ. Proc., § 190.) The Act was "an extensive revision of the law with respect to juries," including laws addressing the selection of jury panels. (Stats. 1988, ch. 1245, § 2.) And, the Act provides that "it is the responsibility of jury commissioners to manage all jury systems in an efficient, equitable, and cost-effective manner, in accordance with this chapter." (Code Civ. Proc., § 191.)

The California Supreme Court explained the principles of statutory construction:

> The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. In order to determine this intent, we begin

> by examining the language of the statute. But [i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. Thus, [t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.

(*Thomas, supra*, 4 Cal.4th at p. 210.)

Here, this Court should find that the trial court did not violate Code of Civil Procedure section 233, because a literal interpretation of that statute would have resulted in an "absurd" consequence in this case. (See *Thomas, supra*, 4 Cal.4th at p. 210.) Under the plain language of Code of Civil Procedure section 233, the trial court should have discharged the jury after it dismissed the sworn juror, because there was no alternate juror and the defense did not consent to proceed with 11 jurors for the remainder of jury selection. (See Code. Civ. Proc., § 233.) However, in light of the unique circumstances in this case (the court and parties agreed there was cause to dismiss the sworn juror, and appellant insisted the court dismiss that juror before the selection and swearing in of alternates) discharging the jury and impaneling a new one would have been "absurd."

The Legislature was concerned about judicial efficiency and economy. (See Code of Civ. Proc, § 191.) As such, the Legislature could not have intended the "absurd" result of discharging the jury and impaneling a new one under the unique factual circumstances of this case, because that result would have unnecessarily wasted judicial resources and been contrary to those considerations.

Appellant's reliance on *Cottle*, *supra*, 39 Cal.4th 246 is misplaced. (AOB 83-84.) In *Cottle*, after the panel of 12 jurors were sworn and during the selection of alternate jurors, one of the sworn jurors advised the court he had reservations about serving as a juror. (*Id*. at p. 250.) Ultimately, the court denied a defense motion to dismiss that juror for cause. (*Id*. at p. 253.)

The court also denied the defense motion to reopen jury selection so the defense could use an unused peremptory challenge to dismiss that juror. (*Ibid*.) On appeal, the high court ruled that once the panel of 12 jurors was sworn, Code of Civil Procedure section 226[15] barred the trial court from reopening jury selection and permitting further peremptory challenges. (*Id*. at p. 255.) *Cottle* is distinguishable. The issue in *Cottle*, whether a court could reopen jury selection after the jury was sworn, was not raised in the instant case. Appellant specifically advised the court he was not seeking to reopen jury selection after the 12 jurors were sworn. (11ART 2097-2098.) As such, *Cottle* does not support appellant's argument.

Appellant contends the error deprived him of his "federal constitutional right to retain a chosen jury." (AOB 86.) His contention lacks merit. "[P]recedent holds that the right to a 'particular' jury applies when and only when a jury has been sworn, and jeopardy has actually attached." (*People v. Whitaker* (2013) 213 Cal.App.4th 999, 1011.) And, jeopardy does not attach until the 12 regular jurors and alternate jurors are selected and sworn. (*Griffin*, *supra*, 33 Cal.4th at pp. 565-566.) Since the alleged error occurred before the selection and swearing in of alternates, the court's ruling did not violate appellant's right to a particular jury.

4. Any Error Was Harmless Because Appellant Was Not Prejudiced By Having 11 Sworn Jurors During The Selection Of Alternate Jurors

Any error affected a state standard, not a constitutional right. (See *Cooper v. California* (1967) 386 U.S. 58, 62 [When "state standards alone have been violated, the State is free … to apply its own state harmless-error rule to such errors of state law"]; *Watson*, *supra*, 46 Cal.2d 818, 836.) Assuming, arguendo, the trial court violated Code of Civil Procedure

[15] "A challenge to an individual juror may only be made before the jury is sworn." (Code Civ. Proc., § 233, subd. (a).)

section 233, there is no reasonable probability of a different outcome absent the error in light of the overwhelming evidence of appellant's guilt as discussed above.

Appellant argues the alleged error was structural and requires reversal without a consideration of prejudice. (AOB 85-86.) His argument is untenable. (AOB 85-86.) "A structural defect is the type of error affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself, one that transcends the criminal process and def[ies] analysis by harmless-error standards. [Citation.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 851, internal quotation marks omitted.) "[R]eversal for structural error has been limited to instances such as adjudication by a biased judge, the complete deprivation of counsel, the unlawful exclusion of grand jurors based on race, the infringement on the right to self-representation, the denial of a public trial, and the giving of a constitutionally deficient instruction on the reasonable doubt standard. (*People v. Anzalone* (2013) 56 Cal.4th 545, 554-555, internal citations omitted.) "Trial errors, by contrast, are errors that occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether the error was harmless." (*People v. Marshall, supra*, 13 Cal.4th at p. 851.) "There is a strong presumption any error falls within the latter category, and it is the rare case in which a constitutional violation will not be subject to harmless error analysis. [Citation.]" (*Ibid.*)

Here, the failure to discharge the jury and impanel a new one was not a structural defect. As a result of the alleged error, appellant had 11 sworn jurors during the selection and swearing in of alternate jurors because he "demand[ed]" the court rule on his motion to dismiss a sworn juror before the selection of alternates. (11ART 2092-2093.) Those circumstances are markedly different from the aforementioned constitutional violations that

have been found to defy harmless error review. And, appellant had 12 jurors before the parties began opening statements. As such, the alleged error was not structural requiring reversal per se.

Appellant's reliance on *People v. Ames* (1975) 52 Cal.App.3d 389, and *People v. Ernst* (1994) 8 Cal.4th 441 are misplaced. (AOB 85.) In *Ames*, the court reversed judgment because the defendant was tried and convicted by a jury of 11 jurors, but the defendant did not personally waive her right to be tried by 12 jurors. (*People v. Ames*, *supra*, 52 Cal.App.3d 391-392.) In *Ernst*, the high court found that "a judgment in a criminal case resulting from a court trial must be reversed if the defendant did not expressly waive the right to a trial by jury." (*People v. Ernst*, *supra*, 8 Cal.4th at p. 443.) There is a practical difference between the errors in those cases and the alleged error in the instant case. Appellant was not tried and convicted by a jury of less than 12 jurors. Rather, appellant's jury was comprised of 11 jurors for a small portion of jury selection, because he forced the court to rule on a motion to dismiss a sworn juror for cause before the selection and swearing in of alternates. (11ART 2092-2093.) Accordingly, the holdings in *Ames* and *Ernst* do not support appellant's argument.

IV. THE TRIAL COURT WAS NOT REQUIRED TO MAKE THE PROSECUTOR JUSTIFY HER PEREMPTORY CHALLENGES TO PRIOR PROSPECTIVE FEMALE JURORS AFTER THE COURT DENIED APPELLANT'S *BATSON/WHEELER*[16] MOTION, AND THE COURT PROPERLY DENIED APPELLANT'S REQUEST TO MAKE THE PROSECUTOR JUSTIFY THOSE PRIOR PEREMPTORY CHALLENGES

After finding appellant made a prima facie case that prospective juror L.W. had been challenged because of her gender, the trial court was not required to ask the prosecutor to justify her challenges to other prospective female jurors for which no prima facie showing was found. (See *People v. Avila* (2006) 38 Cal.4th 491 (*Avila*); AOB 86-93.) And, the trial court properly denied appellant's request to make the prosecutor justify her prior peremptory challenges to female jurors, because there was nothing in the prosecutor's challenge to L.W. that cast the prosecutor's earlier challenges in a "new light." (See *Avila*, at p. 552.) The prosecutor provided multiple gender-neutral reasons for her challenge to L.W. (10ART 1861-1864.)

A. Background

During voir dire, K.G., a female potential juror, advised the court that she worked at night five days a week from 12:00 a.m. to either 4:00 a.m. or 8:00 a.m. (10ART 1838.) She had worked all night and only slept two hours before she came to court. (10ART 1838.) K.G. thought she could handle being a juror by sleeping after she left court each day until she had to report to work. (10ART 1838-1839.)

The prosecutor exercised a peremptory challenge to excuse K.G. (10ART 1840.) The defense made a *Batson/Wheeler* motion and argued the prosecutor was systematically excusing women. (10ART 1841, 1843-1844.) The court reviewed all of the peremptory challenges exercised by

[16] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

both parties up to that point. (10ART 1842-1844.) The prosecutor had excused women and men. (10ART 1842-1844.) The prosecution argued that the defense had not established a prima facie case of discrimination: "I don't think the prima facie case of systematic exclusion has been shown to justify even justifying any of the challenges. [¶] If the Court finds that you want a justification specifically for the last young lady that had purple hair, I can do that, but I don't --" (10ART 1844.) The court interrupted the prosecutor and found there was no prima facie case. (10ART 1844.) The court allowed the prosecutor to provide an explanation for her peremptory challenge. (10ART 1844.) The prosecutor explained her reasoning for challenging K.G.:

> Sure. And I probably should have challenged her for cause, actually with a lack of sleep like that.
>
> I don't think that is realistic that she can come in after working all night, and not asking for time off, and for any kind of period of time to be an attentive juror.
>
> That said, the juror was very young. She was about 19 years old. She had an unorthodox hairstyle in that it was a tinted purple color. Upon seeing her close up, she had multiple piercings of her mouth and tongue.
>
> [¶] … [¶]
>
> She seemed to be a polite young lady, but I think she was unrealistic regarding whether or not she could legitimately serve and be attentive as a juror in this case. So therefore, due to her age, her inability, I believe -- the potential, anyway -- to concentrate, her unrealistic expectation as to whether she could do that or not, and her youthful and unorthodox appearance, the People believe that she would not have been a good juror and did not exclude her on the basis of sex.

(10ART 1845.)

The defense argued that six of the prosecutor's eight peremptory challenges had excused female jurors, and the prosecutor had dismissed five females in a row. (10ART 1846-1847.) The court ruled: "Based on the evidence presented, there's been no evidence sufficient to permit me to draw an inference that discrimination has occurred in the exercise of the People's challenges." (10ART 1847.) And, the court found there was a gender-neutral reason for the prosecutor's challenge of K.G. (10ART 1847.)

The prosecutor exercised her next peremptory challenge to excuse L.W., a female. (10ART 1859-1860.) The defense "renewed" its motion under *Batson* and *Wheeler* alleging the prosecutor was systematically excusing female jurors. (10ART 1860-1861.) Defense counsel noted that seven of the prosecutor's nine peremptory challenges had excused female jurors. (10ART 1860-1861.) The prosecutor argued that the defense had not established a prima facie case of systematic exclusion based on gender. (10ART 1861.) The court provided: "[o]ut of an abundance of caution, I think that in my recollection of the earlier and current responses by [L.W.], find that a prima facie case has been shown." (10ART 1861.)

The prosecutor then explained her reasoning for excusing L.W. (10ART 1861-1864.) Weeks earlier, L.W. met privately with the court and both parties and told them that she had been arrested because a neighbor saw her dog go "to the bathroom" on her carpet while her child was home. (10ART 1861-1862.) The prosecutor characterized the story as "bizarre" and thought that L.W. may have mental deficiencies or dementia. (10ART 1861, 1862.) The court interjected that L.W.'s speech was slow but she seemed well-educated. (10ART 1862.) The prosecutor agreed L.W. seemed well-educated "and that's why I'm wondering if there may be some type of mental problem, or dementia, perhaps." (10ART 1862.)

The prosecutor also found it "bizarre" that L.W.'s arrest was more upsetting to her than her son's homicide. (10ART 1862-1863.) And, the prosecutor was concerned that L.W. may have "residual resentment" towards the district attorney's office since her son's assailant had not been prosecuted. (10ART 1863.)

Further, the prosecutor explained that she had "some concern" about L.W. because she attended one year of law school in order to answer questions as the president of a teacher's union. (10ART 1863.)

The defense admitted there was "something odd" about L.W. (10ART 1864.) Defense counsel argued, however, that "the Batson-Wheeler prima facie showing now requires the People to explain all their female challenges, because while it's interesting that [L.W.] was the subject of the People's peremptory challenge, it's seven out of nine now, Judge." (10ART 1864, 1866, 1869.) In response, the court noted that the defense had exercised seven peremptory challenges against female jurors. (10ART 1864-1865.) The prosecutor did not believe the law required her to explain all of her prior peremptory challenges. (10ART 1867, 1869.) She also noted that the venire had a lot more females than men, and defense counsel agreed there had been more females than males. (10ART 1867, 1868.)

The court ruled, "[b]ased on [L.W.'s] responses today and when she initially came in, and based upon the totality of the circumstances and the arguments of counsel, I find that group-neutral, genuine non-discriminatory purpose was used in excusing [L.W.] Respectfully deny the Batson-Wheeler challenge." (10ART 1870.) The court also noted it did not think the prosecutor was required to provide reasons for her prior peremptory challenges excusing females. (10ART 1869.) And, the prosecutor did not provide any reasons for her prior peremptory challenges.

B. Analysis

In *Batson*, *supra*, 476 U.S. 79, the United States Supreme Court held that peremptory challenges could not be used to remove potential jurors solely on account of their race where the defendant was a member of the same race. (*Id*. at p. 97.) In *Wheeler*, *supra*, 22 Cal.3d 258, the California Supreme Court held that peremptory challenges could not be used to remove prospective jurors solely on the basis of presumed group bias. (*Id*. at pp. 276-277.) The Court defined group bias as "when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*Id*. at p. 276.)

The California Supreme Court explained the process for a *Batson*/*Wheeler* inquiry:

> First, the opponent of the strike must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges. Second, if the prima facie case has been made, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications. Third, if the party has offered a nondiscriminatory reason, the trial court must decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination.

(*People v. Scott* (2015) 61 Cal.4th 363, 383, citation omitted.)

In *Avila*, *supra*, 38 Cal.4th 491, the high court ruled that once a trial court "finds a prima facie case of group bias as to the excusal of one prospective juror," the prosecutor is not required to "provide race-neutral explanations for all challenges made thus far to the members of the group in question, including those the court had ruled upon earlier[.]" (*Id*. at p. 548.) However, "upon request it may appropriately do so when the prosecutor's subsequent challenge to a juror of a protected class casts the

prosecutor's earlier challenges of the jurors of that same protected class in a new light, such that it gives rise to a prima facie showing of group bias as to those earlier jurors. But the burden is on the party making the later motion to so clarify, for that party ultimately has the burden of proof." (*Id.* at p. 552.)

Here, the trial court was not required to make the prosecutor provide gender-neutral explanations for its prior challenges to female jurors. (See *Avila*, *supra*, 38 Cal.4th at p. 548.) And, there was nothing in the prosecutor's challenge to L.W. that cast the prosecutor's earlier challenges to female jurors in "a new light." (See *id.* at p. 552; AOB 92.) As the prosecutor explained, there were multiple gender-neutral reasons to excuse L.W.: the prosecutor was concerned L.W. had mental deficiencies; the prosecutor was concerned L.W. had possible resentment towards the district attorney's office because her son's assailant had not been prosecuted; and L.W. exhibited bizarre reactions. (9ART 1861-1864.)

Accordingly, the trial court did not err in denying appellant's request for the prosecutor to explain all of her prior peremptory challenges against female jurors before L.W.

V. THIS COURT SHOULD REVIEW THE RECORD OF THE TRIAL COURT'S IN CAMERA *PITCHESS*[17] HEARING

In a supplemental opening brief, appellant requests this Court independently review the sealed transcript of the in camera hearing the trial court conducted pursuant to *Pitchess*, *supra*, 11 Cal.3d 531. (ASOB[18] 4-8.) Respondent agrees the request is appropriate and lawful. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.)

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[17] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

[18] Respondent refers to appellant's supplemental opening brief as "ASOB."

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: August 7, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13-point Times New Roman font and contains 30,361 words.

Dated: August 7, 2017

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Johnson, Jr.** No.: **F071640**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On August 7, 2017, I served the attached **RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on August 7, 2017, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on Augusat 7, 2017, at Sacramento, California.

/s/ ***S.R. Allen***
Declarant