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COURT OF APEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RICHARD RAYMOND TUITE, Defendant and Appellant.	D044943 (Super. Ct. No. SCD166932)

APPEAL from a judgment of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed.

A jury convicted Richard Raymond Tuite of voluntary manslaughter (Pen. Code,[1] § 192, subd. (a)) as a lesser included offense of murder in the stabbing death of 12-year-old Stephanie Crowe (Stephanie). The jury also found Tuite used a deadly weapon (a knife). (§ 12022, subd. (b).) In a separate proceeding, the trial court found

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

Tuite had a prior prison term conviction within the meaning of section 667.5, subdivision (b). The court sentenced Tuite to 13 years in prison.

On appeal, Tuite contends the trial court erred by: (1) denying him a continuance when investigators found Stephanie's DNA on a second piece of his clothing less than two months before the start of the trial and later denying his motion for a new trial on the same issue; (2) precluding defense counsel from cross-examining a prosecution expert witness about his efforts to prevent a defense expert from testifying; (3) improperly instructing the jury concerning evidence of uncharged acts; (4) limiting the jury's request for a readback of testimony during deliberations; (5) denying his new trial motion based on juror misconduct; and (6) failing to give a sua sponte instruction on involuntary manslaughter as a lesser included offense of murder. Tuite also contends he received an unfair trial as a result of the cumulative effect of the errors.

FACTUAL BACKGROUND

Overview

On January 21, 1998, at around 6:00 a.m., Stephanie was discovered lying in the doorway of her bedroom; she had been stabbed in her bed and had managed to crawl to the door before dying. Stephanie had nine stab wounds, two of which were fatal: one severed a major artery and caused external bleeding; and the other perforated a lung and caused blood to accumulate in the chest cavity. None of the nine wounds was below her chest. The condition of the body indicated Stephanie had died at least six hours before she was discovered.

Although Escondido police detained Tuite, who was a transient, because of his strange behavior in the Crowes' neighborhood the previous evening, police soon focused their investigation on Stephanie's older brother, Michael Crowe, then 15, and two of his friends, Joshua Treadway and Aaron Houser.[2] Police arrested them after Michael made damaging admissions and one of his friends confessed during lengthy interrogations. The San Diego County District Attorney's Office prosecuted the trio, who were then high school freshmen, but the murder case against them was dismissed in February 1999 after tests showed Stephanie's blood was found on the red shirt Tuite had worn on January 20 and January 21, 1998.

In May 2002 the Attorney General charged Tuite with murdering Stephanie.

In essence, Tuite's trial, which began in February 2004, became a trial within a trial, as Tuite primarily presented a third-party culpability defense — namely, that Stephanie's brother and his friends killed Stephanie. Thus, while the prosecution in its case-in-chief linked Tuite to the homicide by presenting circumstantial evidence, including evidence that Stephanie's blood was on his clothes, Tuite's case-in-chief consisted largely of evidence, developed by the Escondido police, that Michael and his two friends killed Stephanie. Tuite also defended against the blood evidence by presenting evidence that Stephanie's blood was found on his clothes as a result of contamination caused by careless police work. In its rebuttal case, the prosecution

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[2] For the remainder of this opinion, these three teenagers will be referred to as Michael, Joshua, and Aaron, respectively.

essentially presented a defense of Michael and his friends. We now proceed to set forth in greater detail the evidence presented in each party's case.

Prosecution Case-in-chief

One afternoon in early January 1998, Tuite knocked on the door of Cecilia Jachna's residence. Before Jachna responded, Tuite turned the door handle and tried to enter the house. Jachna shut the door, locked it with a deadbolt and asked Tuite why he was there. Tuite asked if "Tracy" was home. Jachna told Tuite no one named Tracy lived with her. Tuite left after Jachna repeated herself a couple of times and ordered him off her property.

"Tracy" was Tracy Nelson, who became friends with Tuite in 1987 or 1988; they had both used crystal methamphetamine at the time. The friendship lasted until 1994, when Nelson moved to a residence on East Valley Parkway in an area commonly known as the "Ranch." The Ranch was located near the Crowe residence. The last time Nelson saw Tuite was when he showed up at the Ranch. Nelson's then-husband told Tuite to leave.

On the evening of January 20, 1998 — the night Stephanie was killed — Tuite went to a home in the Ranch, which was then occupied by Danette Mogelinski, Frank Romanelli and Frank's daughter, Jessica. Tuite knocked on the door. Assuming it was a neighbor, Mogelinski said, "It's open, come in." Tuite opened the door and asked for "Tracy." When Mogelinski said she did not know anyone named Tracy, Tuite shut the door. A few seconds later, Tuite reopened the door without knocking and asked: "Are

you sure you don't know where 'Tracy' is? Richard is looking for her." Tuite stared into the house as Mogelinski closed and locked the door.

Tuite headed up a hill to a duplex near Valley Center Road and Lake Wohlford Road, which was occupied by Sheldon Homa, his son Shannon and his daughter-in-law Dawn. Tuite pressed his face against the window of Sheldon's unit and looked inside. Grabbing an axe for protection, Sheldon ran outside and asked Tuite what he wanted. Tuite said he was searching for a girl named "Tracy" and that Mogelinski had suggested he check for her at the Homa residence. Sheldon told Tuite he was lying and ordered him to leave.

Sheldon went to his son's unit and asked him to telephone the police. Shannon and Dawn decided to follow Tuite in their car. Tuite walked down Valley Center Road, went to the parking lot of the Lutheran church, walked over to Lake Wohlford Road and stood in the road with his hands in the air, walking in circles.[3] Tuite then headed back up Valley Center Road and turned right. Shannon and Dawn returned home and telephoned the police.

Escondido Police Officer Barry Ososkie responded to the Homas' call and arrived at the Lutheran church at 8:15 p.m. Ososkie did not see Tuite and "closed out" the call.

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3 Other witnesses also testified that Tuite was behaving in a bizarre manner. For example, Rebecca McCaslin testified she saw an agitated Tuite at a bus stop at around 6:00 p.m. on January 20; he was walking around, talking to himself and pointing in the air.

Between 9:00 and 10:00 p.m., Tuite approached the Green/West property, which was between one-quarter and one-half mile away from the Crowe residence, banged on the door of a trailer and yelled: "This is Richard, I want to see your daughter Tracy." Patrick Green, who lived in the trailer with his wife and daughters, told Tuite no one named Tracy lived there and ordered him to leave. However, Tuite, who appeared intoxicated, insisted Tracy was there and kept banging on the door. Green grabbed his pellet gun, and he and wife went outside to warn his father-in-law, Gary West, who lived in the main residence with his wife. Tuite banged on the Wests' door and said, "I want to see the girl." West ordered Tuite to leave and said he was calling the police. Tuite walked backwards down the driveway, staring at West and the Greens. Then, he turned around and headed up the road leading to the Crowe residence. West went inside and telephoned the police.

Responding to West's call, Escondido Police Officer Scott Walters drove around the area looking for Tuite but did not see anyone. Walters circled the Wests' driveway in his patrol car and then drove to the Crowe residence. Walters noticed the door leading from the laundry room to the interior of the house was open.[4] As Walters circled the Crowes' driveway, his patrol car activated the sensor light above the exterior laundry room door, and the door closed from the inside. Because he did not see Tuite, Walters considered it a no contact call, and left. He listed the suspect as "gone on arrival."

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4 The laundry room door, which the family commonly used to go in and out of the house, was considered the front door to the house.

Inside the Crowe residence, the evening of January 20 had been fairly routine. Stephanie's uncle, Michael Kennedy, had visited the Crowes and left about 9:00 p.m. through the laundry room door. Michael Kennedy left the door unlocked. Stephanie watched television and later spoke on the telephone with her best friend until a few minutes past 10:00 p.m. Stephanie's younger sister, Shannon Crowe (Shannon), also watched television. Shannon shared a bedroom with her maternal grandmother, Judith Kennedy; both of them went to bed about 9:00 p.m. As he often did, Stephanie's brother, Michael, spent most of the evening in his bedroom. Stephanie's father, Stephen Crowe (Stephen), had a headache when he got home after work and went to bed early. Stephanie's mother, Cheryl Crowe (Cheryl), went to bed about 10:00 p.m. The Crowes always shut their bedroom doors at night as a fire precaution.

During the night, Cheryl heard knocking or pounding on the wall, and the door to the master bedroom "was opened and shut and opened." She did not investigate. Michael also heard pounding on the laundry room door; he thought someone had answered the door, and he went back to sleep.

After Stephanie's body was discovered at around 6:30 the following morning by Judith, Stephen called 911. He then ran outside to direct the first emergency responders. Stephen was surprised to find the laundry room door locked — by both the knob lock and the deadbolt — because the door was normally unlocked.

The Crowe family gathered in the living room after the police arrived to begin their investigation. At one point, Michael told his family that he had awakened with a headache at 4:30 a.m. and went to the kitchen to get Tylenol and a glass of milk.

Although Michael would have passed Stephanie's room on the way to the kitchen, he did not see her in the hallway; instead, he said he thought her door was closed.

Police took members of the Crowe family to the police station for interviews. Police began an extensive investigation of the homicide scene, looking for evidence in the Crowe residence; the Crowe family was not allowed to return for 10 days. Investigators used a fluorescein process to locate bloodstains throughout the house, and they searched the house thoroughly for fingerprints. Police seized and impounded numerous items, including knives, tools, carpets, and portions of walls. Police found no sign of forced entry.

Also that morning, the detectives were informed that many nearby residents had telephoned 911 the previous evening, complaining that a transient had knocked on their doors, looking for someone. After Tuite was identified in a photo lineup as that transient, police found him in a nearby strip mall. Tuite agreed to go to the police station, where police questioned him, took hair samples and fingernail scrapings, took photographs and impounded his clothes, including a long-sleeved red turtleneck (the red shirt) and a white T-shirt, in exchange for new clothes. This took place while Tuite was in a small holding cell with a concrete floor and no furniture. Tuite handed his clothes to Officer Scott Christensen, who placed each item of clothing in a separate bag. The bags sat open on the concrete floor before they were sealed. Earlier in the day, Christensen had been at the crime scene, where he videotaped the interior and exterior of the Crowe residence. Christensen had not placed protective booties over his shoes when he videotaped the Crowe residence, and did not change his shoes before walking into Tuite's holding cell.

Other police officers, who also had been at the crime scene and did not wear protective booties over their shoes, walked into the holding cell when Tuite was present. After processing Tuite, police released him.

Police sent trace evidence collected at the Crowe residence, such as strands of hair, for DNA analysis. In the first report, Tuite was excluded as the donor of DNA found on any of 37 items that were analyzed. Tuite's fingernail scrapings also were analyzed; only Tuite's DNA was found in those samples. Tuite's fingerprints were not found in the Crowe house.

Because there were no signs of forced entry, police focused their investigation on Michael, Joshua and Aaron. Police linked a knife believed to have been used to kill Stephanie to Joshua and Aaron.

Tuite had continued his bizarre search for Tracy after Stephanie's body was discovered on January 21. At 8:15 that morning, Tuite approached Noralee Dremin as she was returning to her apartment. Dremin entered her apartment, shut the door and turned the deadbolt. Tuite immediately knocked on the door, and Dremin told him to leave. Tuite responded, "If you'll let me come in, we can talk more." Dremin called 911. Police responded and briefly detained Tuite. The officers, who were not aware of any connection to the Stephanie Crowe homicide, did not see any blood on Tuite's clothing and did not find any weapons on him.

Subsequently, Tuite knocked on the door to apartment No. 26 in the same apartment complex. Sandra Freitas, who lived in the complex, told Tuite that apartment

No. 26 was vacant. Tuite said he was looking for Tracy. Tuite followed Freitas and tried to enter her apartment with her. Freitas' husband told Tuite to leave, and he complied.

On January 22, Tuite went to another apartment complex in Escondido, where he banged on the door of a vacant apartment, which had an eviction sign in a window. The maintenance man asked Tuite to leave; Tuite said he was looking for Tracy. A police officer contacted Tuite behind the complex. Tuite did not have any weapon and seemed disoriented.

On January 26, Tuite attempted to break into the residence of Frank Santibanez at night. Santibanez telephoned the police. Tuite told a police officer that he was looking for an old friend. Tuite did not have any weapon.

On January 27, Tuite opened the front screen door and turned the doorknob to Joyce Fisher's home. Fisher asked who was there; Tuite replied he was looking for someone named Richard or that he was Richard. Fisher told Tuite to leave, but he kept trying to open the door. Fisher telephoned 911.

On February 12, Tuite followed 13-year-old Somer Hall and her girlfriends as they took a bus trip from San Diego to Escondido, changing buses several times. When the girls arrived in Escondido, Tuite followed them to Hall's apartment complex and repeatedly called out "Tracy" to Hall. An adult who lived in the complex told Tuite that Hall was not Tracy and to leave the girls alone.

On February 17, before 7:00 a.m., Tuite went to the residence of Patsy Walker, pounded on the door and kept repeating, "Tracy, Tracy." Tuite tried unsuccessfully to open the door.

On February 21, Tuite peered into the window of Meredith Vezina's residence. Tuite told Vezina he was looking for someone.

On February 26, Tuite peered into the windows of various apartments in a complex. Tuite was escorted off the property, but he returned and tried to force his way into one of the apartments. Tuite said he was looking for a friend.

On February 25, at around 5:00 a.m., Tuite knocked on the door and tried to enter the residence of Roxanne Neal. Tuite next pressed his face against a window and looked inside.

On March 13, while Tuite was in the mental health ward of the Vista jail on an unrelated matter, he paced back and forth, raised his arms up in the air, and yelled, "Tracy, you whore. I am going to kill you."

On April 28, police investigators examined Tuite's impounded clothing for bloodstains. On the red shirt, they used a fluorescein process, which required the shirt to be completely wet. No bloodstains were found. During this process, Detective George Durgin photographed the red shirt before the fluorescein was applied. Durgin used the police department's only tripod, which he also had used at the Crowe residence crime scene. At that time, Durgin had not used protective covering for the legs of the tripod. Durgin testified that he could not recall if he placed a tripod leg in a blood stain at the crime scene. The wet red shirt was then placed in a paper bag.

Because the white T-shirt had visible blood stains, the police circled certain stains on the shirt with an ink pen and sent the shirt to serologist Thomas Fedor for DNA testing. Fedor kept the white T-shirt in a freezer until he analyzed it on May 18. Fedor

tested the circled stains on the white T-shirt and found the bloodstains matched Tuite's genetic type. Stephanie was excluded as a donor of DNA on that shirt. Fedor, however, did not test the stains on the bottom hem of the T-shirt because he did not believe they were of interest to police. He returned the white T-shirt to the Escondido Police Department.

In December, criminalist Jennifer Mihalovich tested Tuite's red shirt for DNA. Mihalovich found Stephanie's blood on the red shirt. Mihalovich opined the blood was a blood drop and not a transfer.

In 1999, the district attorney arranged for further testing of the bloodstains on the red shirt by Orchid Cellmark DNA testing firm. Mark Stolorow, a forensic biologist and executive director of Orchid Cellmark, found five areas to be tested and sent the red shirt to Tia Fenton, a DNA analyst, for testing. Fenton found Stephanie's DNA and the DNA of a male on the red shirt. The teenagers were excluded as donors of the DNA,[5] but Tuite was not excluded as a donor. At trial, Stolorow testified the stains were not consistent with dried flakes of blood that were saturated with liquid and then penetrated the red shirt. Stolorow opined it was more likely the blood was wet when applied.

In May 2002, Tuite was arrested and charged with murdering Stephanie. The prosecuting agency was the Attorney General's Office.[6]

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5 Murder charges against the three boys were dismissed in February 1999.

6 The Attorney General's Office was the agency that prosecuted Tuite at trial because the San Diego County District Attorney's Office recused itself. (See Gov. Code, § 12550.)

In December 2002, a police officer reviewed photographs taken at the Crowe residence and photographs of items found in Tuite's pockets on January 21, 1998. The contents of Tuite's pockets included a Smith Brothers cough drop wrapper and a torn Snickers candy bar wrapper. During the initial investigation, police had found wrappers from Smith Brothers cough drops in Stephanie's and Michael's bedrooms, and a Smith Brothers cough drop package on the kitchen counter. Distribution of Smith Brothers cough drops is limited in Southern California. Police also had found a Snickers candy bar wrapper in Stephanie's closet.

In April 2003, the Attorney General's Office asked Faye Springer, a criminalist with the Sacramento County Forensic Services Laboratory who had an expertise in the microscopic examination of fibers, to examine Tuite's red shirt for blood spatter. Springer agreed, but wanted to examine all of Tuite's outer clothing and shirts. Springer observed three blood smears near the bottom front hem of Tuite's white T-shirt and recommended they be tested for DNA. A DNA analysis showed that two of the smears shared the DNA of Tuite and Stephanie. Springer opined the blood was placed on the white T-shirt while the blood was wet. She testified the smears were inconsistent with the defense theory that police at the crime scene had picked up blood flakes on their shoes, transferred the blood flakes to Tuite's holding cell, where they were deposited on Tuite's clothing and later rehydrated onto his clothes.

On the first day of his trial, February 2, 2004, Tuite escaped from the courtroom holding tank during the lunch hour by freeing himself from handcuffs. Tuite left the

courthouse and boarded a bus. At 4:30 p.m., officers apprehended Tuite in the Clairemont area.

In addition to the evidence concerning Tuite's search for Tracy by knocking and opening doors to various residences, the prosecution presented evidence that police had found Tuite in possession of a knife on four separate occasions — three before Stephanie's fatal stabbing and one afterward. The court admitted the evidence concerning Tuite's search for Tracy and prior incidents of knife possession for the limited purpose of showing a characteristic method, plan or scheme. (Evid. Code, § 1101, subd. (b).)

Defense Case

The bulk of the defense case was evidence directed toward establishing that Michael, Joshua and Aaron killed Stephanie. This evidence largely was presented by showing the videotapes and audiotapes of police interrogations of Michael and Joshua.

Police became suspicious of Michael after they interviewed him on January 21, 1998. Michael said he awoke at around 4:30 a.m., turned on his television, went to the kitchen to get milk and Tylenol and thereafter returned to his room. He further said Stephanie's door was shut and he did not see her body. This contradicted evidence that Stephanie died around midnight and her body was positioned in the doorway.

On January 22, when a police sergeant went to the Treadway residence to interview Joshua, the sergeant saw a survival-style knife on the couch. Joshua said it belonged to his brother, who said the knife belonged to Joshua.

On January 23, detectives interrogated Michael, starting at 6:00 p.m. and concluding around midnight. The detectives falsely told Michael that they found

Stephanie's blood in his bedroom and accused him of killing her. Michael denied killing his sister and said he loved her and was a good brother. Eventually, Michael said he knew he killed Stephanie because the detectives said he did, but he had no memory of it. He attributed the killing and his loss of memory to rage. Michael said since the seventh grade he had resented Stephanie and blamed her for making him unpopular. Police arrested Michael after the interrogation and took him to juvenile hall.

On January 27, Aaron's mother reported that one of the knives from her son's collection was missing. Police obtained warrants and searched the Treadway and Houser residences. They found two knives under Joshua's bed. One of them — the "Best Defense knife" — looked like the knife observed on the couch five days earlier by the sergeant. Aaron identified it as the missing knife. Police arrested Joshua for stealing it. Joshua's mother said he had obtained the knife about January 16. The lead detective believed the knife could have been the murder weapon.

Police started interrogating Joshua that evening and continued for 10 to 12 hours into the next morning. Joshua said Michael often talked about killing Stephanie because everything she did made him angry, but he thought Michael was kidding. Joshua denied being involved in Stephanie's killing and said the Best Defense knife was not the murder weapon because it had been under his bed since early January when he stole it from Aaron. Police told Joshua he was lying when he said he stole the knife. Joshua changed his story and said Aaron gave him the knife, telling him to dispose of it because Michael used it to kill Stephanie. He took the knife home and put it under his bed. Joshua was allowed to go home.

On February 10, detectives again interrogated Joshua, who said Aaron admitted he helped Michael kill Stephanie: Michael held Stephanie and kept her quiet while Aaron "took care of the rest." Joshua said other than disposing of the knife, he did not participate in the killing. Joshua repeatedly denied being at the Crowe residence; he insisted that Aaron gave him the knife on Super Bowl Sunday and threatened to kill him if he told anyone. After the detective suggested Joshua acted as a lookout, he admitted he was at the Crowe residence the night of the killing and gave the following account. Joshua initially stayed outside as a lookout but then went to the kitchen. Michael rinsed the knife in the sink and gave it to Aaron. Joshua and Aaron left together. Aaron told Joshua that Michael went into Stephanie's room first and covered her mouth. Aaron then entered the room and stabbed her. Aaron took the knife home to clean it thoroughly and gave it to Joshua a few days later, on Super Bowl Sunday.

The defense also presented expert testimony from individuals who had been retained by the district attorney's office when it was prosecuting Michael, Joshua and Aaron for Stephanie's murder.

Brian Kennedy, one of those experts, assembled Stephanie's bed and used a forensic mannequin to analyze the stabbing attack. He concluded that Stephanie's comforter was used to restrain her. He said more than one person probably participated in the killing, but it could have been only one. He also opined that it was likely one person held the comforter while the other stabbed Stephanie.

Brian Kennedy also testified about the prosecution's blood evidence. Kennedy looked at a photograph of the bloodstain on the red shirt identified by Mihalovich as

having Stephanie's DNA. Kennedy testified the bloodstain appeared to be physically altered, perhaps diluted, and looked like a dry clot. Kennedy described a dry clot as a "dried piece of blood sitting on top of the material," which then is diluted and fused into the material. Kennedy said the blood was either semi-dry when it was applied, or a water-based liquid came into contact with the shirt, causing the blood to be reconstituted and diffused into the material. Kennedy opined another bloodstain was transferred onto the red shirt; this blood stain appeared to be diluted and diffused into the material, unlike fresh blood. Kennedy said he would expect this type of pattern if dried blood came into contact with a wet piece of clothing or if dried blood was deposited on clothing that later became wet. Kennedy also opined that dried blood on the foot of a tripod could have transferred onto a nearby piece of clothing without directly contacting it.

As to Tuite's white T-shirt, Kennedy reviewed photographs of the shirt that had been taken in 1998 and in 2003. In the 1998 photograph, ink marks appeared only on the left shoulder of the shirt; however, in the photograph taken in 2003, ink marks appeared on both left and right shoulder areas of the shirt. Kennedy opined that the ink appearing on the left shoulder had transferred to the right shoulder sometime between the time the two photographs were taken. He further testified that a water-based product could have changed the appearance of the bloodstains on the white T-shirt, rendering Springer's analysis and the subsequent DNA testing suspect. Kennedy also said freezing and thawing a garment causes condensation that can reconstitute bloodstains and affect forensic blood analysis.

Another defense expert originally contacted by the district attorney's office was Special Agent Mary Ellen O'Toole of the FBI's Behavioral Analysis Unit, who had been asked to investigate the homicide scene and determine whether it was organized or disorganized. O'Toole testified at Tuite's trial that Stephanie was a targeted victim because (1) of six people in the house, only she was attacked; (2) the attacker had to pass other rooms to reach her bedroom; (3) there was no evidence of sexual assault or theft; and (4) the nature of her injuries.

O'Toole opined it was an organized crime scene because (1) the crime involved planning, (2) all wounds were inflicted before death, (3) the perpetrator exhibited familiarity with the layout of the house and left no clue as to points of entry or exit, and (4) the attacker maintained control as evidenced by the fact no one else in the house was aroused and there were no self-inflicted injuries. O'Toole also opined there were probably multiple perpetrators, although one person could have committed the crime.

Gene Lawrence, a criminalist in the sheriff's laboratory who spent 600 hours over two years examining trace evidence, testified he found nothing that connected Tuite with the inside of the Crowe residence.

Psychiatrist Mark Kalish examined Tuite's psychiatric records from various state mental institutions where Tuite had received treatment since 1994. Kalish opined that Tuite suffers from schizophrenia, organic brain syndrome and methamphetamine abuse. Schizophrenia typically causes hallucinations, primarily auditory. Schizophrenia can also cause delusions or false beliefs such as paranoia or grandiosity. Other typical symptoms are disorganized speech and grossly disorganized behavior. Symptoms of organic brain

syndrome include impaired memory, deterioration of language function, impairment of motor activities, impaired ability to recognize or identify objects, impaired ability to think abstractly, and impaired ability to concentrate or focus on the task at hand.

Prosecution Rebuttal

The prosecution's rebuttal case attempted to refute the defense claim that Michael, Joshua and Aaron killed Stephanie. An expert on police interrogations testified the techniques used by police during Michael's and Joshua's interrogations were coercive. Michael, Joshua and Aaron testified they did not have any involvement in the killing of Stephanie. In addition, Michael and Joshua explained why they had made inculpatory statements to the police.

Retired FBI agent Gregg McCrary attacked O'Toole's crime scene evaluation. He opined the crime scene was more disorganized than organized. Among other things McCrary saw no evidence of control by the perpetrator. He opined Stephanie's killing was a "blitz" attack, involving immediate application of force.

Psychologist Paul Mattiuzzi met twice with Tuite and reviewed his mental health records dating back to 1990. Mattiuzzi opined that Tuite had suffered from chronic schizophrenia for at least 15 years. The diagnosis did not mean Tuite had all the symptoms associated with schizophrenia. Mattiuzzi disagreed with Kalish that Tuite had been diagnosed with organic brain damage.

DISCUSSION

I

A. *Denial of Continuance Was Not an Abuse of Discretion*

Tuite contends the court erred by denying him a continuance of the trial date after investigators discovered Stephanie's blood on his white T-shirt less than two months before the trial was scheduled to begin. Specifically, Tuite claims the court (1) did not give the defense adequate time to prepare for the new evidence, (2) failed to exercise its discretion by not considering facts revealed in counsel's sealed declaration, (3) abused its discretion by acting arbitrarily, and (4) deprived him of his constitutional rights. We consider these contentions seriatim, after setting forth pertinent facts disclosed by the record.

In April 2003, Springer told the Attorney General she had located presumptive blood stains on the hem of Tuite's white T-shirt, which had not previously been tested for DNA. On June 27, 2003, Springer recommended DNA testing for these stains, as well as for the stains on the red shirt. In August, the prosecution notified defense counsel of plans to conduct destructive testing on Tuite's clothes and invited the defense to have an expert present.[7] Also in August, the prosecution notified defense counsel that Tuite's

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[7] There is a conflict between the prosecution and defense on this point. According to the defense, the Attorney General informed defense counsel that the red shirt would be tested. According to the Attorney General, the defense was told Tuite's clothes would be tested.

clothes, including the red shirt and white T-shirt, had been returned to the San Diego County Sheriff.

Defense counsel directed Marc Taylor, a defense expert, to observe the testing of the red shirt. On September 19, Taylor watched Connie Milton of the sheriff's crime lab take two items of clothing from sealed evidence bags. The first item was the red shirt; Milton cut portions of the red shirt for further testing, and Taylor observed the cutting process and photographed the shirt. Milton then removed the white T-shirt from another evidence bag and cut portions of it for later testing. Taylor had not expected the white T-shirt to be tested; defense counsel had not told him the white T-shirt was to be tested, and Taylor was not aware that it had any evidentiary significance.[8] Nonetheless, Taylor photographed the white T-shirt and monitored the cutting process. Taylor agreed to delay the DNA analysis to December 8.

Taylor did not prepare a report of his observations of September 19. In November, Taylor received a fax request from defense counsel for the photographs of the

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8 Had he known that Stephanie's blood would be found on the white T-shirt, Taylor declared he would have done several things before the shirt was cut. Taylor would have recommended (1) a microscopic examination of the stains to reveal the nature of the staining on the fabric, (2) the taking of detailed photographs of the stains and the surrounding areas, (3) a wash from the suspected stains be analyzed for the presence of a blood preservative, and (4) a test for the enzyme Amylase to see if there were indications that saliva was present. Taylor said he would have more closely examined the stains to determine the possibility that they could have resulted from contamination. Taylor noted that by the time it was determined that Stephanie's blood was on the white T-shirt, it was too late to perform these procedures because the samples had been consumed in the testing.

red shirt. Taylor sent the requested photographs of the red shirt to defense counsel, but did not send the photographs of the white T-shirt at that time.

Milton started the extraction process on December 8, with Taylor present. On December 10, the prosecution notified defense counsel that Milton found Stephanie's DNA on the white T-shirt. Attorney William Fletcher, who handled the forensic evidence for the defense at trial, was surprised by those results because he had not known the white T-shirt had undergone DNA analysis. He did not discuss the white T-shirt with Taylor until December 10.

On December 18, defense counsel asked that the trial, scheduled to begin February 2, 2004, be continued. The prosecution did not oppose the continuance. The court denied the motion without comment. Defense counsel then moved to exclude the white T-shirt blood evidence. In support of the this motion, the defense filed declarations by Taylor and Fletcher.

On January 14, following an evidentiary hearing, the court denied the motion to exclude the evidence. The defense then renewed the continuance motion and filed a sealed declaration by Fletcher in support of the motion.[9] The court told counsel that unless there was something new in the sealed declaration, it did not intend to continue the trial date.

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9 Pursuant to the request of appellate counsel, we unsealed the declaration on November 17, 2005.

In his sealed declaration, Fletcher said the first time he learned the white T-shirt had undergone DNA analysis was on December 10, 2003, when he was informed that Milton's recent testing revealed Stephanie's blood was in two stains on the white T-shirt. Until then, Fletcher believed, on the basis of the 1999 tests, that the white T-shirt "had no evidentiary value relat[ed] to the crime." Taylor had not mentioned to Fletcher that the white T-shirt was being tested.

Further, the defense did not receive a packet of information detailing Milton's DNA analysis until December 30, 2003. The defense did not receive Springer's report detailing her analysis of Tuite's clothing, which was dated July 29, 2003, until January 6, 2004. Among other things, Springer's report disclosed she had microscopically viewed the stains on the white T-shirt. Fletcher said the defense did not similarly view the stains microscopically because the defense did not have Springer's report until after the samples had been consumed.

Fletcher declared that he was in the process of duplicating the discovery materials and sending them to defense experts for review. The defense needed to interview both Fedor, the serologist who had tested the white T-shirt for DNA in 1999, and Springer. Those interviews could not be conducted until the defense experts had reviewed the discovery materials. Fletcher also said further DNA testing of areas close to the stains needed to be conducted to determine the validity of the procedures used in Milton's DNA analysis and decide whether the defense should request an Evidence Code section 402

hearing. Fletcher said the defense needed at least 60 days for its experts to complete the review of Springer's and Milton's results and conduct additional testing.[10]

When the court asked the prosecution to address the defense motion to continue the trial date, the prosecution indicated it was a reasonable request under the circumstances and suggested failure to grant the motion might present a viable appellate issue. The court and the prosecutor then engaged in a colloquy, set forth in the margin, in which the court took issue with the prosecutor's comment.[11]

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10 In his sealed declaration, Fletcher also said the presence of Stephanie's "blood on the 'white shirt' could materially affect the defense theory of contamination. Until the investigation, analysis, and review of this new information regarding the 'white shirt' are completed, it will be impossible to present an opening statement and proceed with a defense with such potentially devastating information left unresolved. The Attorney General's Office will present the evidence of blood on the 'white shirt' in their opening statement. They will urge that this evidence refutes any suggestion by the defense that the blood present on the red shirt was a result of contamination. . . . [¶] I cannot competently represent Mr. Tuite with respect to the evidence of the stains on the 'white shirt' without sufficient time to complete the analysis and investigation . . . ."

11 On appeal, Tuite complains that the following colloquy between the court and the prosecutor demonstrated the arbitrary nature of the court's refusal to grant a continuance:

> "THE COURT: Do you want Justice Huffman's phone number? I'll give it to you.
>
> "[THE PROSECUTOR]: I have no idea.
>
> "THE COURT: I'll give it to you right now.
>
> "[THE PROSECUTOR]: I have never spoken to Justice Huffman, Your Honor.
>
> "THE COURT: Or Justice O'Rourke. Maybe he would like to talk to you."
>
> "THE COURT: Look, you need somebody to talk to —
>
> "[THE PROSECUTOR]: I am completely satisfied communicating with the court."

Addressing all the attorneys, the court said:

> "You want a continuance. [¶] You guys, both sides, you want to put this thing off until I am off the bench and you guys are retired and new teams come in, and that's not going to happen. This thing has been [continued] over and over and over again."

The court reminded counsel that it (1) had made it clear when it denied the continuance motion in December that the parties had two more months to prepare for trial; and (2) had sent the parties an e-mail later that month, confirming the trial would start on February 2, to "make sure there are no misunderstandings about future dates involving the Tuite case." The court said it was not going to let the attorneys " 'weasel out' " of the February 2 trial date. The court added:

"You guys had as of the 18th of December, you knew that these problems existed . . . , you talked to your expert, you knew what was going on, you knew what was out there, you had at least two months.

> "I can make some rulings as to what you can do and what you can't do. You have got two attorneys on both sides; one is working on forensic, the other one is working on something else.
>
> "I was here. Even though I was off during the holiday, I stayed in San Diego. I called my clerk every day [and asked] 'What's going on?' You could have gotten a hold of me if you had any problem. Nobody got a hold of anybody. You are all sitting around sipping your eggnog and singing Christmas carols or whatever. The usual excuse that government employees use during the holidays, it's the holidays. Well, that's the way it goes.
>
> "This case is starting February the 2d. We are going to start selecting a jury on that date."

Although the court denied the continuance motion, it precluded the prosecution from mentioning the white T-shirt evidence during its opening statement. Since the presentation of evidence would commence around February 18, the court said the defense

would have two months from the time the court had made it clear there would be no further continuances.

Our legal analysis begins with a recognition that a trial court may grant a continuance only if there is a showing of good cause. (§ 1050, subd. (e).) "A continuance shall be granted only for that period of time shown to be necessary. . . ." (§ 1050, subd. (i).) The "trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037 (*Jenkins*).) A showing of good cause necessitates "a demonstration that both the party and counsel have used due diligence in their preparations." (*People v. Mickey* (1991) 54 Cal.3d 612, 660 (*Mickey*).) "[W]hether a continuance should be granted rests within the sound discretion of the trial court, although that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare." (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.)

On appeal, a ruling on a motion to continue is reviewed under the abuse of discretion standard. (*Mickey*, *supra*, 54 Cal.3d at p. 660.) The trial court's exercise of discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) An order denying a continuance "is seldom successfully attacked." (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 332, p. 490.) Tuite bears the burden of establishing that denial of the

continuance request was an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

Applying the law as stated above, we determine the trial court did not abuse its discretion in denying the motion to continue. The court reasonably could have determined that a continuance was not warranted because the defense had adequate time prior to the trial date to address the new developments with respect to the white T-shirt.

In this regard, it is significant that the court, by precluding mention of the white T-shirt before the start of testimony, addressed defense counsel Fletcher's concerns that (1) the defense could not possibly be ready to counter the white T-shirt evidence before the start of the trial on February 2, 2004, and (2) the Attorney General would have an unfair advantage if allowed to mention during its opening statement that Stephanie's blood was found on the white T-shirt. (See fn. 10, *ante*.) Thus, the court effectively gave the defense two months before presentation of the evidence began — from December 18, 2003, until February 18, 2004 — to counter the new evidence of the existence of Stephanie's DNA on Tuite's white T-shirt. (See *People v. Serrata* (1976) 62 Cal.App.3d 9, 16 [no abuse of discretion in denial of continuance where despite denial, "defense counsel had ample opportunity to analyze all of the [newly produced evidence] before the trial had reached a point where such evidence could be developed by the defense"].)

In our view, two months was a reasonable amount of time for the defense to adequately respond to the blood evidence on the white T-shirt and perform the specific tasks the defense claimed were required in light of this evidence: (1) a review by the defense experts of materials documenting Springer's and Milton's analyses, as well as

serologist Fedor's 1998 testing of the white T-shirt; (2) subsequent interviews of Springer and Fedor; and (3) further DNA testing of areas close to the stains to determine if the procedures followed by the prosecution experts were valid, and to decide whether to request an Evidence Code section 402 hearing to challenge those procedures. Although the interval of time permitted by the trial court was shorter than the defense desired, it was sufficient, in light of all the circumstances, to allow the necessary preparation. That is all the law requires. (§ 1050, subd. (i).) As the United States Supreme Court has stated, "'a defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials." (*Brown v. United States (*1973) 411 U.S. 223, 231-232; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1255 ["Defendant, of course, was not constitutionally entitled to a perfect trial, or to ideal representation"].)

Even if we were to accept Tuite's argument that the defense was not given a full two months to prepare for the new development because counsel did not receive the packet detailing Milton's DNA analysis until December 30, 2003, and did not receive Springer's report until January 6, 2004 — thereby reducing the preparation time to six weeks — we still determine the court allowed the defense adequate time to accomplish what it said needed to be done. Since the blood stains on the white T-shirt tested by the prosecution had been consumed in the process, it was not possible for the defense to conduct any independent forensic analysis of those stains.[12] Consequently, as to those

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[12] To the extent the areas of the white T-shirt surrounding those tested by the prosecution might contain additional blood evidence, the trial court reasonably could

stains what was left for the defense to do essentially was to evaluate the procedures used by the prosecution experts. In doing so, the defense was not required to start from scratch. It had already retained blood experts specifically to counter the evidence of Stephanie's blood on Tuite's *red* shirt, and had developed a trial strategy of countering the prosecution's blood evidence with its dry blood/contamination theory. The trial court reasonably could have determined that given this groundwork, which already had been laid, six weeks was a sufficient amount of time to prepare a defense to similar blood evidence found on Tuite's *white T-shirt*. (See *People v. Snow* (2003) 30 Cal.4th 43, 77 [no good cause for continuance where request concerns theory or evidence of "long standing"].)

Tuite also claims that because the court did not consider relevant facts as stated in the sealed declaration, it failed to exercise its discretion, which itself constituted an abuse of discretion. (See *People v. Orabuena* (2004) 116 Cal.App.4th 84, 99 [failure to exercise discretion is an abuse of discretion].) Tuite's claim fails because he has not carried his appellate burden of establishing that the court did not consider all of the relevant factors. (*People v. Blackwood* (1983) 138 Cal.App.3d 939, 949.) The presumption that the trial court has considered all factors will not be overcome, absent an affirmative showing to the contrary. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310; see also Evid. Code, § 664.) Here, the record shows the court read the declaration and

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conclude that only a few days' time would have been needed for forensic testing, as the prosecution's actual testing of the white T-shirt only took a two-day period.

said it would evaluate it for new information. There is no evidence that the court did not consider the sealed declaration. Thus, Tuite's assertion is purely speculative and does not support an abuse of discretion finding.

Nor can Tuite successfully rely on the prosecutor's acquiescence to a continuance to show an abuse of discretion. "Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause [for a continuance]." (§ 1050, subd. (e).)

Based on some of the language used by the court, Tuite also claims the court acted arbitrarily — and therefore abused its discretion — in denying his motion for a continuance. We disagree. The court used brusque language and talked to counsel in a colloquial — and sometimes abrupt — manner, but there was, obviously, no jury present, and when read in context, the court's informal and blunt manner of communicating to the attorneys falls short of being intemperate. To us, it appears that the court was venting its frustration about the delays in getting the case to trial.[13] With respect to the unnecessary colloquy with the prosecutor (see fn. 11, *ante*), we assume the court was annoyed by the prosecutor's suggestion that it was creating an appellate issue. Although it would have made for a more dignified record had the court kept its annoyance to itself, the colloquy

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[13] The trial court's frustration is understandable. The scheduled trial date of February 2, 2004, was a little more than six years after Stephanie was killed. It had been one and a half years since Tuite was charged with murder. The court proceedings in Tuite's case had been continued five times. (See § 1050, subd. (a) [codification of legislative finding that "criminal courts are becoming increasingly congested" and that "[e]xcessive continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses"].)

was essentially innocuous. Also, the colloquy did not involve — and was not directed at — defense counsel.

We also reject Tuite's claim that the denial of his motion to continue violated fundamental principles of the United States and California Constitutions. "'[I]t is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel.' [Citation.] Instead, '[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge . . . .' [Citation.]" (*Jenkins*, *supra*, 22 Cal.4th at p. 1039.) As stated in *Ungar v. Sarafite* (1964) 376 U.S.575, 591, "[t]hese matters are, of course, arguable, and other judges in other courts might well grant a continuance in these circumstances. But the fact that something is arguable does not make it unconstitutional." We have considered the relevant factors in this case and conclude, for the same reasons that we determine there was no abuse of discretion, that Tuite was not denied due process of law.

Nor was Tuite's constitutional right to counsel compromised by the denial of the eleventh-hour continuance request, given the similarity of the new forensic evidence, both in substance and materiality, to the already existing blood evidence against Tuite. As we have discussed, the discovery of Stephanie's blood on the white T-shirt, while a significant development, required only that the defense refine the contamination theory it had already developed with respect to the red shirt to cover the white T-shirt as well — and the defense had at least six weeks to do so. The trial record itself demonstrates that this time was sufficient, as the defense team, in fact, placed before the jury a viable

theory, supported by expert testimony, as to how each of the shirts could have become contaminated. While the defense team, like all trial lawyers, could certainly have benefited from having more time to hone and prepare their case, there is nothing in the record to suggest that the denial of the continuance request so limited counsel's preparations as to violate Tuite's constitutional right to assistance of counsel.

Assuming arguendo that the court abused its discretion by not granting a continuance, the error would be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Basically, the court's denial of the continuance request precluded the defense from presenting the expert of its choice — Herbert MacDonell — at trial to counter the white T-shirt evidence. Whether MacDonell would have been available to testify at the trial is not known; however, for purposes of reviewing this issue, we will assume that he was. The litmus test for prejudice then becomes whether MacDonell's testimony would have made any difference in the outcome. We conclude beyond a reasonable doubt that it would not. As further discussed in part I.B, *post*, MacDonell largely adopted the defense contamination theory presented at trial — namely, that dry blood was transferred to the white T-shirt, which later became wet. Moreover, MacDonell conceded he was not able to authoritatively refute Springer's theory. (See fn. 14, *post*.)

B. *Denial of New Trial Motion Was Not an Abuse of Discretion*

In a related assignment of error, Tuite contends the court erred when it subsequently denied his motion for a new trial based on "newly discovered evidence" concerning the white T-shirt. We first set forth the relevant background.

In August 2004, Tuite filed a supplemental motion for a new trial based on newly discovered evidence — the declaration of Herbert MacDonell, a nationally-know criminalist, in which he opined the blood on the white T-shirt was "consistent with a dampened shirt coming in contact with dried blood flakes." However, MacDonell also stated that he could not eliminate Springer's theory that the blood was wet or semi-wet when it came into contact with the shirt.

Tuite's trial counsel conceded MacDonell's theory could have been presented in the defense case-in-chief, but said he did not have a witness to support it and did not have the time to find one as he was preparing for trial. Counsel argued the jury convicted Tuite on the "unrebutted testimony" of Springer. Once the trial was over, counsel sought funds to further investigate and find an expert with national credentials. Because MacDonell was busy with other matters, he did not conduct his evaluation for another two and a half months. Counsel argued that the denial of the continuance motion rendered MacDonell's testimony "newly discovered evidence" warranting a new trial.

Our legal analysis begins with section 1181, which provides in relevant part:

> "When a verdict has been rendered . . . against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial."

In deciding a motion for new trial based on newly discovered evidence, the trial court considers, among other things, whether the evidence, and not merely its materiality, is newly discovered; whether the evidence is merely cumulative; whether the evidence would likely lead to a different result on retrial; and whether the party could not with

reasonable diligence have discovered and produced it at the trial. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) A new trial motion based on newly discovered evidence is looked on with disfavor, and a court's refusal to grant a new trial on that ground is rarely reversed on appeal. (*People v. Fairchild* (1962) 209 Cal.App.2d 82, 84.) "'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."'" (*Delgado*, at p. 328.)

In light of those legal principles, we determine the court did not abuse its discretion in denying the motion for new trial based on MacDonell's declaration. The court found the declaration did not constitute newly discovered evidence and was cumulative, noting that the defense presented evidence countering Springer's testimony through its experts, which essentially was the same as set forth in MacDonell's declaration. Additionally, the court found a different result was not probable had the jury heard his testimony.

We agree with the trial court's conclusions. MacDonell's theory was largely the same presented by Tuite's experts at trial, namely, that after blood was transferred to the white T-shirt, the shirt became wet, as established by comparing the earlier photograph of the white T-shirt with the 2003 photograph of the white T-shirt. (In the earlier photograph there were ink stains only on the left shoulder area, but in the 2003 photograph there were ink stains on both the left and right shoulder areas.) Tuite's trial experts opined the application of water or a water-based liquid during this time period likely altered the blood stains on the hem of the white T-shirt, rendering the reconstituted

stains that were analyzed in 2003 of questionable evidentiary value.[14] Given the cumulative nature of MacDonell's declaration and his candid observation that he could not rule out Springer's theory, we agree with the trial court that a different result was not probable. There was no abuse of discretion in denying the motion for a new trial.

II

Limit on Cross-examining Prosecution Witness Was Not Prejudicial Error

Tuite contends the trial court violated his federal and state confrontation rights by precluding his counsel from cross-examining prosecution expert McCrary about his attempt to prevent defense expert O'Toole from testifying. Tuite is correct. However, as we shall explain, the error does not warrant reversal.

At issue was a February 24, 2004 letter McCrary wrote to the International Criminal Investigative Analysts Fellowship (ICIAF) about a potential ethical violation by O'Toole. In the letter, McCrary complained that O'Toole was undermining the successful prosecution of Tuite, whom he called the "true killer." McCrary also wrote that the San Diego County Sheriff's Office and the Attorney General were shocked and dismayed by O'Toole's proposed testimony, which they viewed as an attempt to obstruct justice.

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14 MacDonell's declaration read in pertinent part: "It is my opinion, based on a review[of] these photographs of the white [T]-shirt, that the blood transfer on the white T-shirt is consistent with a dampened shirt coming in contact with dried blood flakes." Other than acknowledging he had "reviewed Ms. Springer's findings and cannot eliminate her theory of wet or semi-wet blood applied to the white T-shirt," MacDonell did not provide any further detail in his bare-bones declaration. In its motion for new trial, the defense did not present any other evidence as to what MacDonell would have testified to had he been called as an expert at trial.

Additionally, McCrary's letter said O'Toole's analysis was "fundamentally flawed."

McCrary also expressed the hope that "cooler, more rational thinking will prevail and Ms. O'Toole will not testify."[15]

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[15] The letter read in pertinent part: "I view the ethical issue inherent in this case to be the fact that an ICIAF member and an FBI Supervisory Special Agent, Ms. Mary Ellen O'Toole, is attempting to undermine the successful prosecution of Richard Tuite who has been charged and is being tried for the murder of 12-year-old Stephanie Crowe. After Ms. O'Toole was prohibited from testifying in federal court in the civil case, she has now volunteered to testify in the criminal trial in state court for the defense. This appears to directly violate the missions of the ICIAF, the FBI and the NCAVC [National Center for the Analysis of Violent Crime]. These organizations are dedicated to supporting law enforcement in their efforts to protect the innocent while bringing the guilty before the bar of justice where they can be held accountable for their actions. [¶] The Office of the Attorney General for the State of California and the San Diego County Sheriff's Office are working jointly to see that justice is done in the case. After a thorough and meticulous investigation they have identified the true killer, Richard Tuite. They have linked Tuite to the murder of Stephanie Crowe through incontrovertible physical, forensic and circumstantial evidence, not the least of which is having identified the blood spatter on both Tuite's shirt and undershirt as belonging to the victim (who had been stabbed to death). [¶] Neither the San Diego County Sheriff's Office nor the Office of the Attorney General for the State of California has requested the assistance of the NCAVC or [the] ICIAF in this matter. Both agencies are shocked and dismayed that Mary Ellen O'Toole, a representative of both the FBI and [the] ICIAF, has injected herself into this case in what they view as an attempt to obstruct justice and undermine the successful prosecution of Richard Tuite. [¶] The long range implications for this are both obvious and distressing. Ms. O'Toole's proposed testimony damages the relationship between the FBI, the ICIAF and law enforcement agencies when we should be working [to] build a sense of trust and rapport with those agencies. [¶] I have reviewed the multitude of underlying documents and evidence in this case and believe Ms. O'Toole's analysis to be fundamentally flawed, self-contradictory and not supported by the majority of the evidence in this case. [¶] . . . [¶] I have been subpoenaed by the State of California to testify for the prosecution, specifically to rebut the proposed testimony of Ms. O'Toole. I will do so if necessary, but remain hopeful that cooler, more rational thinking will prevail and Ms. O'Toole will not testify. This would remove an unnecessary obstacle to what is already a complicated and difficult prosecution."

At an Evidence Code section 402 hearing held during trial, Tuite sought permission to cross-examine McCrary for bias using the letter. McCrary testified at the hearing that he had been asked to write the letter by the president of the organization. McCrary said he knew O'Toole had initially been contacted by the district attorney's office while it was prosecuting the three teenagers for Stephanie's murder. In response to a query from the court, McCrary agreed that O'Toole, as an FBI agent, could testify for the defense only with the agency's permission. When asked by defense counsel where he got the information about the Attorney General's Office and the sheriff's office being "'shocked and dismayed'" and thinking O'Toole was trying to "'obstruct justice,'" McCrary said his sources were two prosecutors handling the case for the Attorney General's Office. McCrary admitted he had not talked to the sheriff's detective who investigated the case until the morning of the hearing. McCrary also conceded that the prosecutors had not used the same words — for example, "'obstruct justice and undermine the successful prosecution of Richard Tuite'" — that McCrary had used in his letter.

Tuite's counsel argued the letter showed McCrary had "crossed over the line from being a witness to being an advocate." Counsel claimed that the letter addressed McCrary's credibility because McCrary not only said he disagreed with O'Toole, but also tried to prevent her from testifying. At the conclusion of the hearing, the court said it would decide later whether the defense could use the letter during its cross-examination of McCrary.

After McCrary testified on direct examination, the matter was brought up again outside the presence of the jury. Tuite's counsel argued that McCrary's letter showed bias, and the jury was entitled to know he tried to prevent O'Toole from testifying. The court ruled that the defense could not cross-examine McCrary about the letter because it was irrelevant.

We begin our legal analysis with the Sixth Amendment to the United States Constitution, which guarantees the right of the accused in a criminal prosecution "to be confronted with the witnesses against him." The California Constitution, in almost identical language, also protects the right of confrontation. (Cal. Const., art. I, § 15.) The Confrontation Clause embraces the accused's right of cross-examination. (*Pointer v. Texas* (1965) 380 U.S. 400, 404.) As the high court has observed:

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 316 (*Davis*).)

Impeachment includes an exploration of the witness's bias. (*Davis*, *supra*, 415 U.S. at pp. 316-317.) "[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.)

The Confrontation Clause, however, does not preclude a trial court from imposing any limits on the defendant's exploration of potential bias of a prosecution witness. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 679.)

> "On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, . . . interrogation that is repetitive or only marginally relevant. And as we observed . . . 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 679, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 20; accord, *People v. Jennings* (1991) 53 Cal.3d 334, 372 [court may limit impeachment evidence that has only slight relevancy to the issues presented].)

Further, a trial court's limitation on cross-examination relating to a witness's credibility does not violate the Confrontation Clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 679; *People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

Under the above-stated legal principles, we agree Tuite's counsel should have been allowed to cross-examine McCrary about his February 24, 2004 letter, and the trial court violated Tuite's constitutional right to confront adverse witnesses when it precluded such cross-examination.

The letter was relevant because it demonstrated bias and impacted McCrary's credibility in a manner that could lead a reasonable jury to question the reliability and validity of his testimony. (See Evid. Code, §§ 210, 780, subd. (f).) The letter bore directly on McCrary's credibility and reliability by indicating McCrary had a personal

interest in convicting Tuite, whom he referred to as "the true killer." The letter also demonstrated McCrary had prejudged Tuite's case and was acting more as an advocate for the prosecution than as a forensic expert. Moreover, McCrary's unusual attempt to dissuade O'Toole from testifying revealed a bias in favor of the prosecution and a bias against O'Toole. The letter also revealed McCrary's tendency to exaggerate; his statement that the sheriff's office and the prosecuting agency viewed O'Toole as obstructing justice was not only a gross overstatement but was also unreliable because no one from the sheriff's office had talked to him about O'Toole's upcoming testimony. For all these reasons, it is likely that a reasonable jury would have received "a significantly different impression of [the witness's] credibility had [the excluded cross-examination] been permitted." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.)[16]

The question remains whether the error warrants reversal. A constitutionally improper denial of a defendant's opportunity to impeach a witness for bias is subject to the *Chapman* harmless error analysis. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.)

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16 The Attorney General relies on *People v. Sapp* (2003) 31 Cal.4th 240 to support the trial court's barring the use of the letter to impeach McCrary. The reliance is misplaced. In that case, the defense sought to impeach a prosecution psychologist with the fact that Medi-Cal fraud charges were filed against him but, for reasons unrelated to his guilt, were later dismissed. (*Id*. at pp. 288-289.) Here, the impeachment evidence — the letter — was relevant because it directly related to McCrary's trial testimony rather than being collateral to the expert's testimony, as was the case in *Sapp*, *supra*, 31 Cal.4th 240, 290.

"The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt," taking into consideration "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.)

Applying the *Van Arsdall* criteria, we conclude the error was harmless beyond a reasonable doubt — that the result would have been the same even if the defense were allowed to impeach McCrary with his letter.

The primary basis for our conclusion is the minimal "importance of the witness' testimony in the prosecution's case." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.) McCrary was called in the prosecution's rebuttal case to respond to O'Toole's expert testimony labeling the crime scene "organized."[17] McCrary opined the crime was more disorganized than organized. Although a ruling allowing McCrary to be impeached with the letter potentially would have led the jury to discount his rebuttal opinion and have lent greater weight to O'Toole's testimony about the crime scene, we are confident the verdict would not have changed.

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17 McCrary agreed with O'Toole regarding her opinion that Stephanie was a "targeted . . . victim."

While the fact that the crime scene was relatively orderly and the killer was able to perpetrate the crime without raising any alarm was a significant part of the defense, the competing *experts' opinions* as to whether to label the crime scene "organized" or "disorganized" had almost no significance. The jury was presented with extensive and undisputed factual evidence depicting what the Crowe family heard and saw on the night of the crime and what the crime scene looked like in the morning when Stephanie was found, including a crime scene videotape and a large number of photographs. Thus, regardless of O'Toole and McCrary's conflicting opinions of the appropriate label to describe the crime scene, the defense was able to present substantial evidence and argue to the jury that, based on the *facts* of the crime, only Michael (or some other insider) could have killed Stephanie. The jury's agreement or disagreement with this argument did not depend on O'Toole and McCrary's labeling, but rather on the application of the jurors' common sense to the undisputed facts upon which the experts' labels were based.

Further, the error in excluding McCrary's letter had no impact on the central evidence against Tuite — the DNA evidence that Tuite had Stephanie's blood on his clothing. Apart from the defense's dry blood contamination theory, the only rational explanation for how Tuite came to have Stephanie's blood on his clothing was that he killed her.

In sum, although allowing the defense to impeach McCrary with his letter would have detracted from his expert testimony and perhaps strengthened O'Toole's, we conclude the exclusion of the letter had a de minimis effect on the outcome. In other words, had the court allowed the defense to use the letter to impeach McCrary, the result

would not have been different. We conclude beyond a reasonable doubt that the error was harmless. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684; *Chapman*, *supra*, 386 U.S. at p. 24.)

III

Instruction Concerning Uncharged Acts Was Proper

Tuite contends the trial court committed instructional error regarding the evidence of uncharged acts, namely, his ongoing search for Tracy and his possession of a knife on other occasions. Tuite asserts the instruction given created an unreasonable inference that violated due process principles. We disagree.

At issue is the following instruction given by the court pursuant to CALJIC No. 2.50:

> "Evidence has been introduced for the purpose of showing that the defendant committed other acts other than that for which he is on trial.
>
> "Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show a characteristic method, plan or scheme in the commission of acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show:
>
> "The defendant possessed the means that might have been useful or necessary for the commission of the crime charged;
>
> "A clear connection between the other acts and the crime of which the defendant is accused so that it may be inferred that if defendant committed the other acts defendant also committed the crime charged in this case.
>
> "For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

"You are not permitted to consider such evidence for any other purpose."[18]

We begin our analysis by recognizing that on review of a constitutional challenge to an instruction, "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) In doing so, we keep in mind that "'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. [Citation.]'" (*Boyde v. California* (1990) 494 U.S. 370, 378.) Also, we determine "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts." (*People v. Kelly* (1992) 1 Cal.4th 495, 525.)

"Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the

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18 Tuite's proposed instruction for the uncharged acts evidence, which the court rejected, read as follows: "Evidence has been introduced for the purpose of showing that the defendant committed acts other than that for which he is on trial. The evidence is relevant only if it establishes a common plan, design or scheme by the accused. You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the acts. [¶] Before you may consider such evidence, you must first determine whether the evidence shows a common plan, design or scheme by the defendant to enter into houses looking for Tracy; and/or shows a common plan, design or scheme to carry knives. [¶] If you determine that any of the acts have been established by a preponderance of the evidence, then you may consider such evidence for the limited purpose of determining whether, in furtherance of either common plan, design or scheme the defendant entered into the Crowe house looking for Tracy and/or possessed a knife on the evening of January 20, 1998. [¶] The evidence of past or subsequent acts may not be used to establish the identity of the killer nor as evidence of the intent of the killer. The evidence may not be considered on the issue whether the accused did or did not have a disposition or propensity to commit criminal acts."

crime — that is, an 'ultimate' or 'elemental' fact — from the existence of one or more 'evidentiary' or 'basic' facts." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 156 (*Ulster County Court*).) Notwithstanding their important role in the factfinding process, inferences and presumptions violate the Due Process Clause of the Fourteenth Amendment if they undermine the jury's responsibility to find the elements of the crime beyond a reasonable doubt. (*Ibid*.) This is so because the Due Process Clause embodies the "'bedrock, "axiomatic and elementary" [constitutional] principle'" that "'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Francis v. Franklin* (1985) 471 U.S. 307, 313 (*Francis*), quoting *In re Winship* (1970) 397 U.S. 358, 364.)

In determining whether an inference or presumption violates the Due Process Clause, the first step is to determine whether it is a mandatory presumption or a permissive presumption or inference. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 514 (*Sandstrom*).)

A permissive inference — as opposed to a mandatory presumption — permits the jury to infer an ultimate fact based upon the prosecution's proof of a basic or evidentiary fact. (*Ulster County Court*, *supra*, 442 U.S. at p. 157.) Because a permissive presumption leaves the jury "free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the [jury] could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the

presumptively rational fact finder to make an erroneous factual determination." (*Ibid*.) The parties agree the instruction challenged here created a permissive inference rather than a mandatory presumption.

In assessing Tuite's argument, we focus on the particular language challenged, "but the inquiry does not end there. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole." (*Francis*, *supra*, 471 U.S. at p. 315.) Thus, we consider the instruction in the context of all the jury instructions because "[o]ther instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption." (*Ibid*.) This analysis "requires careful attention to the words actually spoken to the jury, . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." (*Sandstrom*, *supra*, 442 U.S. at p. 514.) We also evaluate the inference as applied to the record in the case. (*Ulster County Court*, *supra*, 442 U.S. at pp. 160-161.)

Tuite claims that the instruction infringed upon his right to due process of law because it set forth an inference of guilt that lacked reason and common sense in light of the evidence. (*Francis*, *supra*, 471 U.S. at pp. 313-315.) Tuite argues "[n]othing about the uncharged acts suggested he would commit homicide." According to Tuite, the instruction permitted the jury to *illogically* infer that he fatally stabbed Stephanie from

the evidence that he (1) went door-to-door and sometimes tried to enter residences while looking for Tracy, and (2) sometimes carried knives.

We disagree. The instruction can be broken down into three steps. The first step for the jury was to decide whether it found the evidence of the uncharged acts believable. If so, the jury could move to the second step, namely, to determine in light of that evidence whether Tuite had a characteristic method, plan or scheme in committing these acts similar to the method, plan or scheme used in killing Stephanie. The third step for the jury was to decide whether this common method or plan tended to show that (1) Tuite possessed a knife that night; and (2) there was a clear connection between the evidence and Stephanie's killing, leading to an inference that if Tuite committed these acts he also killed Stephanie.

We find the inference — as applied to the facts of the case and in the context of the entire charge to the jury — rational. There were no signs of forced entry, yet the jury found an intruder entered the Crowe house on the evening of January 20, 1998, and stabbed Stephanie to death. This conclusion was supported by the following circumstances: the Crowes often left open the laundry room door, which was on the side of the house fronting the driveway; Tuite was searching for Tracy that evening, knocking on and opening doors to residences in the neighborhood; and Tuite was last seen on the road leading to the Crowe residence. Thus, the evidence placed Tuite in the area of the crime on the night of the crime and explained how he could have entered the Crowe residence without leaving signs of a forced entry. Also, there was evidence that the murder weapon, a knife, was never found, and Tuite often carried a knife. A jury

reasonably could infer from the evidence that Tuite brought the knife into the Crowe residence and left with it. Thus, a rational jury could find that a clear connection between the evidence of the uncharged acts and the stabbing death of Stephanie had been established. The instruction does not mandate that the jury infer that Tuite killed Stephanie; rather, it allows the jury to draw that inference — much like the jury would do with other circumstantial evidence. Further, the instruction tells the jury *not* to consider the evidence of uncharged acts for any purpose other than to show Tuite had a characteristic method, plan or scheme in committing the uncharged acts similar to that used in the charged crime.

In our view, the instruction, when considered with other instructions, did not lessen the prosecution's burden to establish each element of the crime beyond a reasonable doubt. The jury was instructed (1) its job was to decide all questions of fact (CALJIC No. 1.00); (2) it was to consider the instructions as a whole and each instruction in light of the others (CALJIC No. 1.01); (3) circumstantial evidence is evidence from which an inference *may* be drawn (CALJIC No. 2.00); (4) an inference is a logical and reasonable deduction that may be drawn from proven facts (CALJIC No. 2.00); (5) when circumstantial evidence is equally susceptible to two reasonable interpretations, the jury must adopt the interpretation pointing toward innocence (CALJIC No. 2.01); (6) evidence admitted for a limited purpose cannot be used for any other purpose (CALJIC No. 2.09); and (7) the prosecution has the burden of proving the defendant guilty beyond a reasonable doubt (CALJIC No. 2.90). The jury also was instructed pursuant to CALJIC No. 2.50.1, a companion instruction to CALJIC No. 2.50, that if it found the defendant

committed the uncharged acts, "you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged, or any lesser included crime, in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime." (CALJIC No. 2.50.1.)

We conclude that a reasonable juror would not have understood the permissive presumption of CALJIC No. 2.50, when considered with the remaining instructions, to be either an invitation or a compulsion to use the uncharged acts evidence by itself to find Tuite guilty of murder, or a lesser included crime, regardless of whether it was satisfied beyond a reasonable doubt that he killed Stephanie. (See *People v. Anderson* (1989) 210 Cal.App.3d 414, 427 ["a permissive inference empowers the jury to credit or reject the inference based on its evaluation of the evidence, and therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt"].) This court concluded in *Anderson* that the permissive inference of CALJIC No. 2.15, when read in conjuction with the remaining instructions, "sufficiently informed the jury of the permissive nature of the inference, and did not impose any constitutionally suspect presumption." (*Id*. at p. 430.) Likewise, we find the permissive inference of CALJIC No. 2.50, as applied in this case, was constitutionally sound.

IV

Limited Readback of Testimony Was Not Error

Tuite contends that the trial court erred when the jury asked for a second readback of defense expert Brian Kennedy's testimony on cross-examination because the court

denied Tuite's request to also include four pages of Kennedy's direct examination that was related to the jury's request. The contention is without merit.

During deliberations, the jury submitted two notes involving a readback of Brian Kennedy's testimony. The first request, tendered on May 18, read as follows:

> "May we please have the following testimony read:
>
> "1) Faye Springer
>
> – Findings regarding what form blood was in when it got on white tee shirt
>
> "2) Brian Kennedy
>
> – Testimony regarding Faye Springer's findings (immed[iately] before re-direct)
>
> – Testimony of how blood got on red shirt
>
> "3) Mark Stolorow
>
> – Entire testimony[.]"

The second request, tendered on May 24, read:

> "May we please hear the following testimony <u>again</u>:
>
> "1) Faye Springer
>
> – portion regarding in what state blood got on white tee shirt (wet, transfer)
>
> – portion re: theory of contamination
>
> "2) Brian Kennedy
>
> – Portion regarding Faye Springer's findings
>
> "3) Mark Stolorow
>
> – Opinion as to how blood stains got on red shirt[.]"

At issue is the second jury note. With regard to Brian Kennedy's testimony, the prosecution maintained that the jury wanted to hear pages 141 to 143 of his testimony, which was the final portion of the cross-examination. The defense requested that pages 60 through 63, which was part of the direct examination of Kennedy, also be read because in that portion of the testimony, Kennedy was impliedly referring to Springer's findings related to the same subject — possible "corruption" of the white T-shirt.

The court agreed with the prosecution, noting Brian Kennedy had not discussed Springer's findings until page 141 of his testimony and the jury's request had been specific. The court found the additional testimony that defense counsel proposed to be read back contained Kennedy's own opinion about the evidence; it did not include Kennedy commenting on Springer's findings.

A jury has the right to rehear testimony and instructions on request during its deliberations under section 1138.[19] (*People v. Frye* (1998) 18 Cal.4th 894, 1007.) Section 1138 requires the trial court to "satisfy requests by the jury for the rereading of testimony." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1020; see also *People v. Cooks* (1983) 141 Cal.App.3d 224, 261; *People v. Butler* (1975) 47 Cal.App.3d 273, 283-284.) It is the court's duty to assist the jury when it requests readback testimony. (*People v.*

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[19] Section 1138 reads: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

Carmical (1968) 258 Cal.App.2d 103, 108 (*Carmical*).) "It is not the party to whom the law gives the right to *select* testimony to be read. And the law does not make the party or his attorney the arbiter to determine the jury's wishes." (*Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 714.)

We find no error. In the second note, the jury requested testimony from Springer, Brian Kennedy and Stolorow be read "again," which can be reasonably interpreted as referring to the request contained in the first note. The first note requested Kennedy's "[t]estimony regarding Faye Springer's findings (immed[iately] before re-direct)." Thus, the jury in both notes requested the portion of Kennedy's testimony during cross-examination that dealt with Springer's findings. The court "met the jury's precise request." (*Jenkins*, *supra*, 22 Cal.4th at p. 1028.) "The trial judge does not have to order read any part of the testimony not requested by the jury foreman." (*People v. Gordon* (1963) 222 Cal.App.2d 687, 689 (*Gordon*).) As an early case put it: "If the jury did not wish to hear it read the court was not required to compel them to listen to it. It may be assumed that the portion of his testimony which they heard included all upon which they desired to have their memory refreshed." (*People v. Smith* (1906) 3 Cal.App. 62, 68; see also *People v. Cathey* (1960) 186 Cal.App.2d 217, 222.)

Tuite argues unpersuasively that the trial court placed too much emphasis on the word "again" in the second note. Even if we were to construe the second note as ambiguous, it is the duty of the court, after consulting the parties, to interpret what the jury is requesting and decide what the jury should hear. (§ 1138.) In *Carmical*, *supra*, 258 Cal.App.2d at page 108, the reviewing court found the trial court did not err because

"the portions selected by the trial judge clearly and fairly epitomized the testimony concerning the points which the jury was interested in." We find the portions selected by the trial court here did so as well.

Further, we can assume the jurors were satisfied with the testimony that was reread to them. "Had they wanted further testimony read to them, or other further clarification, they certainly would have so requested. If the testimony actually read to them did not contain the matters they wished to hear, they surely would have said so." (*Gordon*, *supra*, 222 Cal.App.2d at p. 689.) In this case, the jury, which sent 18 notes to the court during its deliberations, was "quite capable" of asking for more if not satisfied, but it did not. (*People v. Cox* (2003) 30 Cal.4th 916, 969; see also *Jenkins*, *supra*, 22 Cal.4th at pp. 1027-1028.)

V

No Error in Denying New Trial Motion Based on Juror Misconduct

Tuite contends that the trial court erred by denying his new trial motion based on juror misconduct. The contention is without merit as we shall explain after first highlighting the pertinent facts.

After the jury returned its verdict, the court and counsel learned that the jury had discussed a defense chart that was not admitted as an exhibit, but had inadvertently been brought into the jury room. The chart was an enlargement of a spreadsheet prepared by

criminalist Lawrence, who testified for the defense that no trace evidence connected Tuite with the homicide scene.[20]

An entry on the chart concerning 16 hairs recovered from a tapestry comforter read: "1 fragment similar to Tuite — mit[ochondrial] DNA poss[ible]; others not consistent with Tuite." Another entry on the chart concerning 11 hairs recovered from a fitted sheet read: "1 hair w/root consistent w/Tuite & Michael; 1 fragment similar to Tuite, mit[ochondrial] DNA poss[ible]. Rest not consistent w/Tuite." According to a declaration submitted by the defense, one juror said he changed his mind about Tuite's culpability after he saw the information contained in these two entries.[21]

Another juror, M.J., stated during an interview conducted by the prosecution that the jury discussed the chart, including the entry of "mitochondrial DNA possible." M.J. further explained: "I know . . . a little bit about it, that . . . it's based on the mother's genetics, but that it appeared that it had not been done." M.J. later told a defense investigator that she worked in a biology related field and knew a little bit about mitochondrial DNA. She told the jury information about mitochondrial DNA, including

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20 Tuite's counsel used the chart when Lawrence testified and also during his closing argument.

21 As the trial court correctly noted, Evidence Code section 1150 bars the use of evidence showing a juror's mental processes during deliberations to impeach a verdict. Evidence Code section 1150 limits jurors' statements regarding their deliberations to "objective facts." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 351; *In re Stankewitz* (1985) 40 Cal.3d 391, 397-398.)

that it is determined from the mother's genes. M.J. also said the jury was not sure if mitochondrial DNA testing had been done because no results were listed.[22]

In his motion for a new trial, Tuite made a broad misconduct argument focusing on the jury's use of the chart during deliberations and claiming this constituted jury misconduct. The court denied the motion, partly relying on waiver principles. The court also found that there was no misconduct, reasoning that the chart was de facto evidence because it had been published to the jury during the trial. Additionally, the court cited *People v. Clair* (1992) 2 Cal.4th 629, 668, which held that when "'a jury innocently considers evidence it was inadvertently given, there is no misconduct.'" Finally, the court found even if there were misconduct, there was no prejudice.

On appeal, Tuite has narrowed his argument; he asserts the jury misconduct consisted only of juror M.J.'s "improper assertion of her DNA expertise to interpret for the jury the meaning of the cryptic phrase 'mit DNA poss' on the chart."[23]

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[22] This juror's statements were admissible under Evidence Code section 1150, subdivision (a) to the extent they set forth "conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." Our Supreme Court noted: "In rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419, citing *In re Stankewitz, supra*, 40 Cal.3d at p. 398.)

[23] By doing so, Tuite implicitly acknowledges that the presence of the chart in the jury room did not constitute juror misconduct. Further, we may assume Tuite is not disputing the trial court's finding that the chart, because it was published to the jury, was de facto evidence.

We begin our legal analysis with the Sixth Amendment to the United States Constitution, which guarantees the accused a right to a trial by an impartial jury. (See also Cal. Const., art. I, § 16.) "An impartial jury is one in which no member has been improperly influenced . . . and every member is '"capable and willing to decide the case solely on the evidence before it."'" (*In re Hamilton* (1999) 20 Cal.4th 273, 294, citations omitted.) A fundamental principle underlying the right to a jury trial is the requirement that jurors must decide the case based solely upon the evidence presented at trial. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473.)

Under section 1181, subdivisions 2 and 3, a motion for a new trial may be brought on the grounds of juror misconduct or unauthorized receipt of evidence by the jury. The court's ruling "'"rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." [Citations.]'" (*People v. Williams* (1997) 16 Cal.4th 635, 686.)

To prevail on a claim of jury misconduct, a defendant must show misconduct on the part of a juror; if he does, prejudice is presumed and the state must then rebut the presumption or lose the verdict. (*People v. Marshall* (1990) 50 Cal.3d 907, 949 (*Marshall*).) On review, we independently apply an objective standard to determine whether the misconduct was prejudicial. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 296.)

A juror may commit misconduct if he or she obtains or shares with other jurors information about the case that was not received in evidence at the trial. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) "A juror . . . should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of

external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963.) However, "[i]t is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work." (*Ibid*.)

Thus, as our Supreme Court noted in *People v. Steele* (2002) 27 Cal.4th 1230, 1266 (*Steele*): "A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting 'an opinion explicitly based on specialized information obtained from outside sources,' which we have described as misconduct."

The key is how to draw that line in the context of the "jury system [as] an institution that is legally fundamental but also fundamentally human." (*Marshall*, *supra*, 50 Cal.3d at p. 950.) After all, "during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. 'Jurors are not automatons. They are imbued with human frailties as well as virtues.'" (*Steele*, *supra*, 27 Cal.4th at p. 1266; see also *In re Carpenter* (1995) 9 Cal.4th 634, 650, quoting *Marshall*, at p. 950.)

It follows that although "[a] juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, . . . if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence." (*Steele*, *supra*, 27 Cal.4th at p. 1266.)

From these cases, we distill that juror misconduct occurs where a juror uses specialized knowledge to contradict evidence presented at trial and to unduly sway the other jurors' opinions on the basis that his or her specialized knowledge is authoritative. (Compare *In re Malone*, *supra*, 12 Cal.4th at p. 963 [holding a juror's insertion of personal technical knowledge of polygraph testing is misconduct] with *Steele*, *supra*, 27 Cal.4th at p. 1266 [holding jurors' insertion of knowledge gained through military experience and principles of medical testing is not misconduct].) Thus, for example, a juror with a background in law enforcement who vouches for his extraneous and erroneous legal statements on the strength of his claimed expertise, commits misconduct. (*Marshall*, *supra*, 50 Cal.3d at p. 950.)

If misconduct is established, the prosecution must rebut the resulting presumption of prejudice by showing there was no actual prejudice. (*People v. Cooper* (1991) 53 Cal.3d 771, 835.) "Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant." (*In re Hamilton*, *supra*, 20 Cal.4th at p. 296,

italics omitted.) Bias can be shown in two ways: (1) "if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror"; and (2) if "it is substantially likely the juror was actually biased against the defendant." (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653.)

Applying these legal principles, we conclude the record before us does not establish juror misconduct by M.J.[24] There is nothing about what M.J. told her fellow jurors that suggests that she was doing anything other than using her life experience in evaluating and interpreting the chart. She simply explained the reference to "mit DNA poss" on the two entries of the chart. Under the pertinent legal principles, we cannot say that M.J. improperly attempted to sway the other jurors' opinions on the basis that her specialized knowledge was authoritative.

VI

Failure to Instruct on Involuntary Manslaughter Was Not Error

Tuite contends the trial court erred by failing to sua sponte instruct on involuntary manslaughter as a lesser included offense to murder because the jury may have found he lacked the specific intent to kill because of mental disease or defect. We disagree.

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24 Even if we were to assume M.J. committed misconduct, the record does not show that it is reasonably probable that any juror was improperly influenced to Tuite's detriment. We are precluded from considering the statement by the one juror who said he changed his mind after seeing the two entries on the chart. (See fn. 21, *ante*.) When we exclude that juror's statement, there is nothing in the record to show M.J.'s conduct, "judged objectively, [was] inherently and substantially likely to have influenced [members of the jury]." (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653.) Further, we find no substantial likelihood that M.J. or any other juror was "actually biased" against Tuite as a result of hearing M.J.'s comments about mitochondrial DNA testing. (*Ibid*.)

During a hearing on psychiatrist Kalish's proposed testimony, Tuite's counsel said the defense was not claiming Tuite's mental disease mitigated the offense, but rather was offering expert testimony to show that Tuite could not have killed Stephanie because of his mental state. During his closing argument, counsel urged the jury to conclude that Tuite's hallucinations, grossly disorganized behavior, impaired concentration and other symptoms of his schizophrenia and organic brain syndrome would have precluded him from entering the Crowe house, killing Stephanie and leaving the crime scene without depositing any trace evidence.

In addition to Kalish's expert testimony and the rebuttal expert testimony by psychologist Mattiuzzi, the jury heard lay testimony concerning Tuite's mental health status from witnesses who saw him behave in a bizarre manner. (See fn. 3, *ante*.)

The court instructed the jury on, and submitted verdict forms for, the crimes of murder in the first degree, murder in the second degree and voluntary manslaughter. Tuite's counsel did not object. With respect to the evidence of Tuite's mental disease or defect, the court instructed the jury pursuant to CALJIC No. 3.32:

> "The evidence you received from Dr. Kalish and Dr. Mattiuzzi regarding the defendant's psychiatric history was offered and admitted into evidence solely on the issue of whether or not the defendant had the mental and/or physical ability to carry out the acts involved leading up to and including the killing of Stephanie Crowe and leaving the murder scene. Such evidence was not offered on the question of whether the defendant actually formed the required specific intent and mental state which are elements of the crime charged in Count 1, namely Murder, or the lesser crimes of Murder in the Second Degree or Voluntary Manslaughter.
>
> "You have received evidence from sources other than mental health professionals Dr. Kalish and Dr. Mattiuzzi, regarding a mental disease, defect or disorder of the defendant at the time of the commission of the

crime charged, namely, Murder, in Count 1. You may consider this evidence for the purpose of determining whether the defendant actually formed the required specific intent and mental state which are the elements of the crime charged in Count 1 or the lesser crimes of Murder in the Second Degree or Voluntary Manslaughter."

The court also instructed the jury pursuant to CALJIC No. 8.72:

> "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder."

We begin our legal analysis with the recognition that criminal homicide is defined by statute and is divided into two classes — murder and manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 460 (*Rios*).) Murder is defined as "the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Malice is either express or implied. "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.)[25]

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25 Courts have attempted to offer a more helpful definition of implied malice, directing that juries should be instructed malice is implied "when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1215; see also *Rios*, *supra*, 23 Cal.4th at p. 460 [malice is shown by an intent to kill or by acting with "awareness of the danger and a conscious disregard for life"].)

Manslaughter is defined as "the unlawful killing of a human being without malice." (§ 192.) Thus, "[t]he distinguishing feature is that murder includes, but manslaughter lacks, the element of malice." (*Rios*, *supra*, 23 Cal.4th at p. 460.)

Manslaughter is divided into three types — voluntary manslaughter, involuntary manslaughter, and vehicular manslaughter. (§ 192, subds. (a), (b), (c).)[26]

Voluntary manslaughter is the unlawful killing of a human being without malice aforethought but with an intent to kill. (*Rios*, *supra*, 23 Cal.4th at p. 463.) The statute describes voluntary manslaughter as an unlawful killing without malice committed "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) However, heat of passion and sudden quarrel are not elements of the crime of voluntary manslaughter. (*Rios*, at pp. 462-463.) They are simply factors for the jury to consider in determining the ultimate question of whether the prosecution has proved the malice element of murder beyond a reasonable doubt. (*Id*. at pp. 461-462.)[27] Voluntary manslaughter also includes the judicially created doctrine of imperfect or unreasonable self defense — when a person kills while having an unreasonable but actual or good faith belief that it was necessary to do so in self-defense, malice aforethought (the mental element necessary for murder) is negated and the chargeable offense is reduced to manslaughter. (See, e.g., *In re*

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26 Vehicular manslaughter (§ 192, subd. (c)) is not an issue here.

27 To the extent Tuite claims it was error to instruct on voluntary manslaughter because there was no evidence of heat of passion or sudden quarrel, he is mistaken. Heat of passion or sudden quarrel are not elements of voluntary manslaughter. (*Rios*, *supra*, 23 Cal.4th at pp. 462-463.)

Christian S. (1994) 7 Cal.4th 768, 773.) A conviction for voluntary manslaughter is sustained by proof and findings that the defendant committed an unlawful and intentional homicide regardless of whether there was proof of heat of passion, sudden quarrel, or imperfect self-defense. (*Rios*, at pp. 469-470.)

Involuntary manslaughter is defined as an unlawful killing without malice "in the commission of a [non-felony] unlawful act . . . ; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) The phrase "without due caution and circumspection" requires proof of criminal negligence, which is shown by aggravated, gross, reckless conduct. (*People v. Penny* (1955) 44 Cal.2d 861, 879; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135.) Implied malice may be distinguished from gross negligence by both the higher degree of the risk involved and by the requirement that the risk be subjectively appreciated rather than merely objectively apparent. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46, fn. 4.)

Both voluntary manslaughter and involuntary manslaughter are lesser included offenses of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 989-990; *People v. Ochoa* (1998) 19 Cal.4th 353, 422 (*Ochoa*).) However, involuntary manslaughter is not a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784.)

Regarding the trial court's sua sponte obligation to instruct on lesser included offenses, the basic rule is presented in *People v. Mendoza* (2000) 24 Cal.4th 130, 174 (*Mendoza*):

> "An instruction on a lesser included offense must be given only when the evidence warrants such an instruction. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense. [Citations.] In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged."

This rule applies to involuntary manslaughter. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081 (*Berryman*), reversed on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) As our Supreme Court observed:

> "A court is not obligated to instruct sua sponte on involuntary manslaughter as a lesser included offense unless there is substantial evidence, i.e., evidence from which a rational trier of fact could find beyond a reasonable doubt [citation] that the defendant killed his victim 'in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection' [citation]." (*Berryman*, *supra*, 6 Cal.4th at p. 1081.)

With this rule in mind, we determine the trial court did not err in failing to instruct on involuntary manslaughter because there was no evidence that Tuite was guilty of that offense, namely, that he killed Stephanie in the commission of an unlawful act not amounting to a felony or in the commission of a possibly deadly but lawful act without "due caution and circumspection." (§ 192, subd. (b).) As we have noted, there is no obligation to instruct on a lesser included offense that is not supported by the evidence. (*Mendoza*, *supra*, 24 Cal.4th at p. 174.)

Tuite's claim that the trial court was obligated to instruct on involuntary manslaughter because of the evidence of his mental status is also unavailing. There was

no substantial evidence from which a jury composed of reasonable individuals could have found that Tuite committed involuntary manslaughter on the basis of his mental status. The testimony of psychiatrist Kalish was not offered to show that Tuite lacked the intent to kill Stephanie because of mental disease or defect. Under the limiting instruction (CALJIC No. 3.32), the jury could only consider Kalish's testimony to bolster the defense theory that Tuite did not kill Stephanie because his schizophrenia and organic brain syndrome symptoms — such as grossly disorganized behavior and impaired concentration — would have precluded him from entering the Crowe residence undetected, killing Stephanie, and leaving the crime scene without depositing any trace evidence.

The lay evidence concerning Tuite's mental status — testimony by some prosecution witnesses about Tuite's peculiar behavior around the time Stephanie was killed — did not constitute substantial evidence that Tuite lacked the intent to kill because of mental disease or defect. "'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.'" (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) Although a reasonable jury could find evidence of talking to oneself in public, walking around in circles and pointing in the air was abnormal or highly unusual behavior, a rational trier of fact could not find on the basis of such evidence that Tuite did not have the intent to kill Stephanie. Tuite had the presence of mind to go door-to-door in his search for Tracy, and he entered residences when the door was unlocked. Tuite demonstrated that, regardless of his bizarre conduct, he could form intentions and act on them.

Tuite's reliance on *People v. Ray* (1975) 14 Cal.3d 20, 27-28 (*Ray*), disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110, is of no avail. In that case, which was decided before the defense of diminished capacity was abolished,[28] there was substantial evidence regarding the defendant's intoxication due to drug use. The jury was instructed on first and second degree murder, voluntary manslaughter, and diminished capacity as it related to those crimes. The Supreme Court reversed because the jury was not instructed on involuntary manslaughter, observing:

> "If because of diminished capacity the perpetrator is unable to entertain malice but nevertheless is found to be able to form the intent to kill the crime is voluntary manslaughter. If because of his diminished capacity he additionally did not intend to kill, his crime, if any, is involuntary manslaughter. . . . 'Once facts are adduced which would constitute a basis for finding that defendant had both diminished capacity . . . , and also unconsciousness or lack of the intent to kill, the trial court fails in its duty to instruct the jury as to all issues of law raised by the evidence . . . if it does not supplement the statutory definition of involuntary manslaughter. It must also instruct that if, due to diminished capacity the defendant had neither malice nor intent to kill, the offense could be no greater than involuntary manslaughter.'" (*Ray*, *supra*, 14 Cal.3d at p. 28, italics and citations omitted.)

Ray, *supra*, 14 Cal.3d 20, is distinguishable as it involved an unconsciousness defense based on voluntary intoxication evidence. As pointed out by our Supreme Court in

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28 Effective January 1, 1982, the Legislature abolished diminished capacity as a defense by amending section 22 and adding section 28, which restricted a defendant's use of evidence of voluntary intoxication to negate mental capacity. (Stats. 1981, ch. 404, §§ 2, 4, pp. 1591-1592; see also *In re Christian S.*, *supra*, 7 Cal.4th at p. 775.) The Legislature also enacted section 29, which limited psychiatric testimony regarding a defendant's mental state. (Stats. 1984, ch. 1433, § 3, p. 5030.) In 1982, section 25, which also abolished the defense of diminished capacity, was added to the Penal Code as a result of the voters adopting the Proposition 8 initiative at the June 8, 1982 Primary Election.

Ochoa, *supra*, 19 Cal.4th at page 423, an involuntary manslaughter conviction is in order "[w]hen a person renders himself or herself unconscious through voluntary intoxication and kills in that state[and] the killing is attributed to his or her negligence in self-intoxicating to that point . . . ." Here, there was no substantial evidence that Tuite rendered himself unconscious through voluntary intoxication and then killed Stephanie in that state. No rational jury could have found on the basis of his peculiar behavior of talking to himself, walking around in circles and pointing up in the air that Tuite was unconscious through voluntary intoxication when he killed Stephanie.

VII

There Was No Cumulative Error

Tuite contends the cumulative effect of the errors committed rendered his trial fundamentally unfair and violated his right to due process. We disagree.

Having reviewed Tuite's claims, we have found only one clear error — namely, the court's limitation on the cross-examination of McCrary. This error was harmless, and even assuming there was other error, "any so-called cumulative error was harmless even under the most exacting standard of review." (*People v. Cornwell* (2005) 37 Cal.4th 50, 98.)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

MCDONALD, J.