NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ERIK GALEN MENENDEZ et al., Defendants and Appellants.	B104022 (Super. Ct. No. BA068880)

APPEALS from judgments of the Superior Court of Los Angeles County, Stanley M. Weisberg, Judge. Affirmed.

Eric S. Multhaup, Kathy M. Chavez, Tamara P. Holland and Jeanne M. Fahey; Gardner & Derham, Cliff Gardner, Robert Derham and C. Delaine Renard, under appointments by the Court of Appeal, for Defendants and Appellants.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, John R. Gorey, Sanjay T. Kumar and Kenneth C. Byrne, Supervising Deputy Attorneys General, Elaine Tumonis, Steven D. Matthews, Mary Sanchez, Victoria Bedrossian and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

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I. INTRODUCTION

At approximately 10:30 p.m. on August 20, 1989, Joseph Lyle Menendez (hereafter referred to as "Lyle") and Erik Galen Menendez[1] entered the den of their parents' home in Beverly Hills and fired shotguns multiple times, killing their parents, Jose Menendez and Kitty Menendez. The shotguns had been purchased two days earlier in San Diego by the defendants using false identification. At the time of the shooting, Lyle was 21 and a student at Princeton University and Erik was 18 and was preparing to attend UCLA in the fall. At the time of the shooting, Jose and Kitty were unarmed, watching television and eating.

Erik and Lyle initially denied the killings, but ultimately confessed and alleged they were in fear of their parents after years of abuse. The defendants attempted, through their defense, to convince the jury that the verdicts should be voluntary manslaughter and not special circumstance murder.

On March 12, 1990, a felony complaint was filed in Beverly Hills Municipal Court charging defendants and appellants, Erik Menendez and Lyle Menendez, in counts 1 and 2 with the August 20, 1989 murder of their parents. The preliminary hearing was delayed because of litigation regarding admissibility of tape recordings involving defendants and their psychotherapist.

Defendants were subsequently indicted by the Grand Jury of Los Angeles County, charging them with the murder of their parents, Jose Menendez and Kitty Menendez in violation of Penal Code section 187.[2] As to both counts, it was alleged that defendants killed their parents while lying in wait, a special circumstance within the meaning of section 190.2, subdivision (a)(3). In count 3, the defendants were also charged with conspiracy to commit the murders pursuant to section 182, subdivision (1).

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1 For sake of simplicity and without any disrespect, the defendants and their parents will often be referred to by only one name.

2 All further statutory references are to the Penal Code unless otherwise indicated.

Defendants pleaded not guilty and denied the special circumstance allegations. Defendants were tried jointly commencing in June 1993, before separate juries, a procedure agreed to by all parties. Neither jury was able to reach a verdict, and the trial court ultimately declared a mistrial as to each defendant.

Defendants were retried starting in October 1995, before a single jury. The jury found defendants guilty as charged on March 20, 1996. The penalty phase resulted in verdicts of life without parole in April of 1996.

On July 2, 1996, the trial court imposed consecutive terms of life without parole on the murders and stayed the conspiracy sentence pursuant to section 654.

Defendants appeal from the judgments of conviction and sentences that were imposed.

II. FACTS

A. Prosecution's Case-in-Chief

On the morning of August 18, 1989, two days before the slayings, Mark Heffernan, Erik's tennis coach, gave Erik a two-hour lesson at the Menendez residence. Mr. Heffernan did not notice anything unusual in Erik's demeanor.

On August 18, 1989, Erik and Lyle purchased two Mossberg shotguns at a Big 5 Sporting Goods store in San Diego for $200 each.

Erik presented a California driver's license in the name of "Donovan Jay Goodreau."[3] Erik gave a nonexistent address in San Diego. Erik indicated that the address on the driver's

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3 Donovan Jay Goodreau lived with Lyle in Princeton, New Jersey for approximately six weeks in the Spring of 1989. On the day the two shotguns were purchased in San Diego, Goodreau was working at a restaurant in New York. After Goodreau moved out of Lyle's apartment, Lyle was in possession of Goodreau's wallet which contained credit cards and a California driver's license belonging to Goodreau.

license was incorrect since he had just moved. Erik signed the firearm transaction form and two entries on the federal firearm log using the name "Donovan Goodreau."

Perry Berman received a telephone call from Lyle during the afternoon of August 20, 1989. They discussed getting together in the evening. Berman said he planned to go to the "Taste of L.A.," a food festival at the Santa Monica Civic Auditorium. Lyle indicated that he and Erik were going to see the movie "Batman" in Century City, but after the movie was over, at about 9 or 9:30 p.m., he would go to the food festival. Berman waited until about 10:20 p.m. for Lyle and Erik to show up. However, the brothers did not arrive and Berman went home.

At about the time that Berman was leaving the food festival, Avrille Krom, a neighbor of the Menendez family, heard a series of 10 to 12 popping sounds. There was a series of popping sounds and then a lapse and then another series. Krom's son picked up the phone to call 911, but was dissuaded from doing so because Krom thought the sounds were simply firecrackers.

Berman received two calls from Lyle about 11 p.m. In the first, Lyle explained that he had gotten lost on the way to Santa Monica and the festival had closed by the time he arrived. Lyle suggested that Berman meet him and Erik at a restaurant in Beverly Hills. Berman was reluctant, but because Erik was very insistent, Berman agreed. During the conversation, Lyle sounded "anxious" and "excited." The second call was just a few minutes later and Lyle asked Berman to meet at the Menendez home instead of the restaurant. Berman demurred and agreed to wait to give Lyle and Erik time to go home and pick up Erik's fake identification. Neither Lyle nor Erik showed up at the restaurant. Berman, upset at the turn of events, left the restaurant and decided to drive to the residence so he could "yell at" Lyle and Erik. When he arrived, he saw numerous police cars outside and was told by the police that there was some "trouble." Berman went home.

A 911 dispatcher, received an emergency call at 11:47 p.m. concerning a possible shooting at the residence. The call made by Lyle said "someone killed my parents." Lyle

indicated that he had not heard anything unusual, he had just come home and discovered his parents had been shot to death.

Beverly Hills police officers responded to the 911 call. When the officers reached the front of the Menendez residence, Lyle and Erik ran out the front door of the house, toward the officers, screaming.

Leslie H. Zoeller was the investigating officer. He recovered "wadding," "spacers" for shotgun shells, and shotgun pellets. Zoeller opined that a total of 13 to 15 shotgun blasts were fired in the den. No ammunition was found inside the residence. No weapons were found in the den. The only weapons found in the house were two unloaded .22 caliber rifles in a closet off the upstairs master bedroom.

The brothers spoke to the police after the bodies of their parents had been removed from the den and again in September 1989. In both interviews they said they were elsewhere at the time of the killings. After the initial interview, they returned to the residence and requested entry so they could remove their tennis rackets from the den. During the initial interview, Lyle indicated the possibility that the killings were "business-related."

Jose and Kitty expired from multiple gunshot wounds. Jose suffered four gunshot blasts with buckshot ammunition. Kitty suffered seven gunshot blasts with buckshot ammunition and two gunshot blasts with birdshot ammunition. The wounds to Jose's legs occurred after death.

Randolph Wright, an attorney and friend of the family, talked to Erik and Lyle the day after the murders. Erik mentioned the possibility of a Mafia murder and discussed the possibility of probating his father's will. Lyle told Wright that he thought his father might have changed his will and that changes might be in the family computer. Lyle told Wright that there was a family safe and Lyle said that he could get the safe immediately. He did so and brought it back to Wright's residence. Erik spent two nights in the spare bedroom with the safe before it was opened. Lyle did not want anyone else present when the safe was opened except for his brother. After the safe was opened in privacy, Lyle informed the

family and friends that the safe was empty. Later that day, other relatives found Jose's 1981 will and under the terms, Lyle and Erik were the sole remaining beneficiaries.

At about the same time the 1981 will was found, family members realized there were entries on the family computer possibly relating to a new will. Three files on the computer directory were named "Will," "Erik" and "Lyle." No one was able to retrieve the contents of the files.

Howard Witkin, a computer expert, testified that he received an "emergency call" from Lyle regarding files on a home computer. Witkin found the files, but no information. Lyle asked Witkin to erase the disk because he was selling the computer and wanted to make sure that information relating to family financial matters was not discovered. Lyle also told Glenn Stevens that he found a computer expert to erase whatever was on the disk.

Richard Wenskoski was hired by Lyle within a few days of the killings to provide security services. Wenskoski provided 24-hour "around the clock" protection while Lyle was on the East Coast. Lyle told Wenskoski that either the Colombian Cartel or the Mafia was responsible for the killings. Lyle also told his girlfriend, Jamie Pisarcik, that the killings must have been mob related. Lyle terminated Wenskoski's services after about a week saying a deal had been reached and his life was no longer in danger.

Both brothers continued to perpetuate the Mafia hoax. Lyle hired bodyguards to protect him during the Fall 1989 semester at Princeton University. Erik told Berman, in late September or early October, that the killings were "business-related" and involved a man named Noel Bloom. His father had a problem with Bloom after the purchase of a distribution company.

At the time of his death, Jose was Chairman of the Board at L.I.V.E. Entertainment with an annual salary and benefit package of approximately $1,300,000. His assets included the family home in Beverly Hills valued at between $3,500,000 and $4,000,000 with a net value of approximately $1,500,000; property in Calabasas with a value of approximately $1,350,000; and stock in L.I.V.E. Entertainment valued at $5,000,000.

Erik and Lyle each received $326,747.62 in life insurance proceeds as a result of their father's demise at age 45. Following the murders, Erik and Lyle went on shopping and spending sprees. Just four days after the murders, Lyle purchased three Rolex watches and two money clips, charging more than $15,000 on his father's American Express account. Erik and Lyle purchased automobiles, houses, businesses, clothing, and expensive tennis services. The automobiles included a Jeep Wrangler for Erik and a Porsche 911 Carrera Cabriolet for Lyle.

Erik and Lyle made videotaped statements to their therapist, Dr. Jerome Oziel, on December 11, 1989.[4] On the tape, Erik and Lyle discussed their relationship with their parents and the reasons they killed them. Basically, Erik and Lyle told Dr. Oziel that they hated their father and the murder of their mother was a "mercy killing." The contents of the Oziel tape were corroborated by Erik's confession to his friend Craig Cignarelli. In fact, shortly after the murders, Erik walked Cignarelli through the den of the Menendez home explaining where his mother and father had been located when he and Lyle had shot them to death.

Two witnesses, Amir Eslaminia and Jamie Pisarcik, testified about efforts to fabricate evidence. Eslaminia, a high school friend of Erik's from Beverly Hills High School, started visiting the brothers in jail. Lyle asked Eslaminia to give testimony favorable to the defense, specifically to testify falsely that the day before the murders, Lyle and Erik came to him and said they needed a handgun for protection from their parents. Eslaminia's testimony was corroborated by a letter Eslaminia received from Lyle, dated July 7, 1991.

Pisarcik was the other witness who testified that Lyle had asked her to give false testimony. In December 1990, Lyle asked her to testify that his father had done to her what had been done to a character in a movie called "At Close Range." Pisarcik was familiar with this movie, having seen it with Lyle. In the movie, a man gives his son's girlfriend a

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[4] Dr. Oziel first began seeing Erik and Lyle in September 1988, after Erik was involved in two burglaries in Calabasas in July 1988.

sedative, then tells the girl to stop seeing his son. The girl refuses, and the father violently rapes the girl. Lyle said Pisarcik had to do it because a large sum of money was to be placed in her bank account. Pisarcik said if money appeared in her account she would tell the police.

The prosecution introduced into evidence nine pages police seized from Lyle's cell before the first trial. These pages contained references to "safe houses" in foreign cities. The materials also contained references to international travel and visas for different countries.

Dr. Roger McCarthy testified in an effort to reconstruct the crime scene. McCarthy concluded that 12 shots were fired and Kitty and Jose were seated when the first shot was fired and the second shot killed Jose and the first shots were aimed at the head and later shots were aimed at the knees.

B. Defense Case

The defendants presented evidence disputing the crime scene reconstruction, concluding that the crime scene was too complex to do an accurate reconstruction. The defendants also presented witnesses relating to various matters and incidents occurring before and after the murders, and expert testimony that Erik suffered from post-traumatic stress disorder.

Erik testified on his own behalf. He maintained that he had been physically and sexually abused by his father between the ages of six and 18. He loved his parents but killed them because they were going to kill him after he had disclosed to Lyle that his father had been sexually abusing him. Erik also feared his mother. She participated in her husband's abusive behavior by condoning it. Erik, in his testimony, placed great emphasis on the last few days of his parents' lives in an effort to show he thought his parents were going to kill him.

On Sunday, August 13, one week before the shootings, Jose discussed the courses Erik would be taking at UCLA in the fall. Jose told Erik that he would have to come home several nights a week and sleep over. Erik believed that he would be required to continue to have sex with his father and his hope of escaping the abuse was gone.

On Tuesday, August 15, Erik told Lyle about the sexual activity between him and their father over the last 12 years. Lyle told Erik he would talk to their father and the sexual activity would cease.

On Wednesday, August 16, four days before the shootings, Lyle told his mother that he wanted to speak to his father when he returned from a business trip the following day.

On Thursday, August 17, three days before the shootings, Jose returned home from his business trip. Erik stayed away from the family home until nearly midnight because he did not want to be present when Lyle talked to their father. When Erik returned home, his father confronted him and as Erik ran from the house, he saw his mother. He had a conversation with his mother and she informed him that she was aware of what had been going on. Lyle told Erik about his earlier conversation with his father. Lyle indicated that he had threatened to tell the police or relatives if the abuse did not stop. Erik told Lyle they would both die as a result of Lyle's threats to Jose. Erik, who feared for his life, concluded that he needed a gun because he believed his father would kill him if the information about the sexual activity were revealed. The idea of running away was dismissed as impossible even though Erik had traveled extensively in the United States and had false identification.

On Friday, August 18, two days before the shootings, the brothers drove to San Diego and purchased two shotguns. After arriving home, the shotguns were left in the car. Erik acknowledged that he intended to use a shotgun, if necessary, to shoot his parents.

On Saturday, August 19, the day before the shootings, the brothers stopped at a firing range so they could practice firing the shotguns, but were told they could not use shotguns at the firing range. They also purchased buckshot ammunition after talking with a sales clerk, who told them birdshot ammunition was essentially "useless" for "stopping" a person. The brothers stayed away from home in order to avoid going on a family shark fishing

expedition planned for three o'clock that afternoon. Erik was afraid his parents had planned to kill him and his brother during the trip. When they returned home late in the afternoon, the family went on the fishing trip. The trip lasted from four to 11:30 p.m. Erik and Lyle remained at the front of the boat because they were afraid of their parents.[5] After the fishing trip, the family returned home. Erik slept in the house and Lyle in the rear guest house. After Erik retired to his room, Jose pounded on the door, but Erik did not open it.

On Sunday, August 20, the day of the shootings, the brothers had agreed that Lyle was going to talk to their father to see if they could come to some resolution of the problem concerning the sexual abuse. Erik talked to Lyle about noon in the guest house and Lyle said he had not yet gone into the main house to talk to his father because he was scared. Lyle said he would talk to his father later that afternoon. Erik left the house about 1 p.m.

Erik returned to the mansion about 9:30 p.m. and talked to Lyle in the guest house. The brothers decided to go out, but their parents forbade it. Jose told Erik to go upstairs to his room. Lyle told his father not to touch Erik, and his father said he would do as he wanted. Lyle asked his mother if she was going to let this happen, to which she responded, "You ruined this family." Jose and Kitty went into the den and closed the doors behind them.

Lyle ran to the top of the stairs to where Erik was standing. Erik was in a panic and told Lyle he could not let his father into his bedroom. Even though Jose never expressly threatened him that day, Erik thought they were going to come and kill him. Erik ran to his bedroom and thought about locking the door behind him, but instead got his shotgun out of the closet and ran outside to his car. He ejected the two "worthless" birdshot shells he had placed in the shotgun while returning from San Diego on Friday and loaded the shotgun with

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5 Robert Anderson, the operator of the boat charter, corroborated Erik's testimony that there was very little interaction between the family. Erik and Lyle spent most of the trip at the front of the 31-foot boat.

the buckshot ammunition he had purchased the previous day. Lyle arrived at the car and loaded his shotgun. They entered the house together, each with a loaded shotgun.

Lyle and Erik, who believed their parents had guns inside the den, burst through the closed doors to the den off the foyer.[6] The lights in the den were off but the room was illuminated by the flickering television. According to Erik, his parents were both standing. He indicated on direct examination that he began firing only after his father began walking toward him and Lyle. However, on cross-examination, Erik indicated that he had no idea if Jose took a step in their direction. Erik said that as soon as he saw his parents, he immediately started firing. Erik heard the sound of Lyle's shotgun. Lyle shot his father in the back of the head. The brothers ran out of ammunition and went out to the car and reloaded. Lyle returned to the den. Erik heard one more shot and saw Lyle leave the den.

After the shootings, the brothers picked up the shells because they believed their fingerprints might be on them. When the police did not arrive, Erik and Lyle decided to leave the house. They drove to a movie theater in an effort to purchase tickets for a movie in an effort to fabricate an alibi. They purchased tickets for the 10:30 showing of "Batman," but had to throw the tickets away because they were time-stamped. On their way to meet Berman, they stopped at a car wash and dumped the incriminating evidence (i.e., shotgun shells, bloody pants, shoes with blood spatter) into the trash. Rather than meeting Berman, they returned home and "discovered" the dead bodies of their parents.

The defense offered several witnesses to buttress their argument of abuse. While staying with the Menendezes in the summer of 1977, Lyle's cousin, Brian Andersen, often heard Jose beat Erik and Lyle with belts and saw bruises on them. When the boys were young, Jose would grab them by the hair and hold them under water. Erik was often hit by his father for not doing well in sports.

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6 Neither Lyle nor Erik saw their parents with any weapons on the day of the murders. The belief that Jose and Kitty had guns in the den was based on Erik "knowing my mother and father."

A number of witnesses provided circumstantial evidence corroborating the molestation. When Jose was alone in the bedroom with either Erik or Lyle, no one was permitted to walk down the hallway toward the room. When Erik was 12 or 13, he confided a secret to his younger cousin, Andy Cano. Erik told Cano that his father had been touching him in a sexual manner. Erik made Cano promise to keep the matter a secret and never to reveal it to anyone.

Dr. Wilson, a clinical psychologist who specialized in the area of post-traumatic stress disorder, interviewed Erik for over 30 hours. Dr. Wilson concluded that he suffered from chronic post-traumatic stress disorder (PTSD) as well as from Battered Person's Syndrome and depression. Dr. Wilson opined that Erik's symptoms of post-traumatic stress disorder were as severe as they were because his father subjected him to repeated episodes of sexual molestation and repeated physical assaults or threats of assaults.

Dr. Wilson also opined Erik did not believe he could change his environment because of "learned helplessness." According to Dr. Wilson, Erik felt helpless because there was nothing he could do to change his environment. Dr. Wilson also opined that Erik was "hypervigilant." "Hypervigilance" refers to an excessive scanning of the environment for cues of threats or harm where, in fact, none exist. Dr. Wilson's conclusion was that by the night of August 20, Erik was in a panic state in which he had no time or ability for reflective thought. Dr. Wilson also diagnosed Erik as suffering from depression, with symptoms currently in remission because of medication.

Dr. Kerry English, a medical doctor with a specialization in pediatrics and a sub-specialty in the area of child abuse and sexual abuse, examined Erik in August of 1993. Dr. English found no physical evidence of sodomy. Dr. English also reviewed Erik's 1977 medical records which indicated Erik had been examined for a "hurt posterior pharynx, ulva and soft palate." Dr. English explained that although the injury could have been caused by an erect penis being shoved against the back of the throat, thereby bruising the posterior pharynx, there was no indication in the medical records as to the cause of the injury.

Dr. English acknowledged that the injury was consistent with being caused by a toy which could have been placed inside the mouth, or falling on a popsicle stick.

C. Rebuttal

Sometime after the killings, Cignarelli, Erik's best friend, received a tour of the den and was told by Erik what happened on the evening of August 20. Cignarelli gave a statement to the police on November 17, 1989, when he related the substance of Erik's confession although he was not entirely truthful in his comments to the police.

Some of the things Cignarelli mentioned in his interviews were not known to the public.

Dr. Park Dietz, a forensic psychiatrist, reviewed materials and interviewed Erik on three separate occasions. Dr. Dietz concluded Erik was suffering from a life-long mental disorder, at least from early childhood, known as general anxiety disorder. This disorder did not affect the critical reasoning aspects of the brain. Dr. Dietz indicated that post-traumatic stress disorder did not impair brain functioning. Dr. Dietz did not diagnose Erik with battered person's syndrome. Dr. Dietz disputed psychologist Wilson's claim that Erik was "hypervigilant" immediately prior to the crimes. Dr. Dietz also contradicted Wilson's conclusion of "learned helplessness." In sum, Dr. Dietz opined that at the time of the shootings, Erik did not suffer from any mental disorder that would preclude him from exercising reflective thought.

D. Surrebuttal

Dr. William Vicary, a forensic psychiatrist, treated Erik for approximately a year and one-half. Dr. Vicary opined that general anxiety disorder can affect a person's mental state at the time of an event. A person suffering from this disorder, if in a state of panic, could suffer an impairment in his ability to engage in reflective thought. In addition, the

symptoms of post-traumatic stress disorder (PTSD) overlap with those of generalized anxiety disorder, and the latter disorder makes a person more prone to developing PTSD. Child abuse, including sexual abuse, is more likely to cause PTSD than generalized anxiety disorder.

III. DISCUSSION

Defendants contend a number of evidentiary errors occurred during the course of the trial. The issues range from defendants' claim that the videotapes of psychotherapy sessions were illegally seized from Dr. Oziel and should not have been admissible during the trial, to judicial bias on the part of the trial court. We find no abuse of discretion in the rulings of the trial court and affirm the convictions based upon the overwhelming evidence presented against the defendants at trial.

A. Pretrial Rulings

1. Failure to Suppress the Tapes Seized From Dr. Oziel's Office on March 8, 1990

Lyle contends that the December 11, 1989 tapes seized from Dr. Oziel's safe deposit box was improperly seized because the search warrant did not identify the safe deposit box as a location to be searched, Dr. Oziel's consent to search the safe deposit box was involuntary because law enforcement incorrectly informed him the search warrant included the box, and discovery of the tape was not inevitable. Erik joins in these contentions.

a. Consent to Search

On March 8, 1990, a search warrant was served at the residence of Dr. Oziel. The warrant listed three categories of items to be seized: (1) six cassette tapes with information relating to the murders of Jose and Kitty; (2) appointment schedule books, including

appointment dates and times for the defendants and Dr. Oziel; and (3) any safe deposit box keys and paperwork which showed the existence and location of any safe deposit boxes rented by the Oziels. The warrant listed two locations to be searched: Dr. Oziel's residence and his office. At the time the warrant was served, detectives from the Beverly Hills Police Department, a Special Master[7], Deputy District Attorney Elliott Alhadeff, and two individuals from the police department's identification bureau were present to videotape the execution of the warrant. The Special Master represented from the outset that the warrant authorized the police to search three different locations: Dr. Oziel's home, his office, and his safe deposit boxes.

The Special Master waited for Dr. Oziel's attorney to arrive before conducting the search. Dr. Oziel was shaking and afraid. Dr. Oziel read the warrant with his wife and the Special Master showed Dr. Oziel's attorney a copy of the warrant. When the attorney arrived, Dr. Oziel consulted with him regarding the warrant. Dr. Oziel told the police that none of the articles listed in the search warrant were in his house except for the appointment dates and times. Dr. Oziel said the tapes were in a safe deposit box.

The law is clear that the prosecution bears the burden of showing a consent to search was voluntary and unaffected by duress or coercion. It is equally clear that the trial court's findings on the issue of consent, whether express or implied, will be upheld on appeal if supported by substantial evidence. (*People* v. *Aguilar* (1996) 48 Cal.App.4th 632, 639.) The trial court found that Dr. Oziel consented to turn over the tapes. The court found that Dr. Oziel's submission to the authority of the search warrant and consenting to the disclosure of the tapes was based not on the threat to search the safe deposit box, but was based on his desire to offer the tapes after being made aware that the police knew of their

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7 Section 1524, subdivision (c)(1), provides in part that no search warrant shall issue for documentary evidence in possession or under control of a psychotherapist who is not reasonably suspected of engaging in criminal activity unless a special master is appointed to accompany the persons serving the warrant.

existence. The trial court also found that Dr. Oziel was concerned for his safety and after the tapes were discovered, he wanted the authorities to listen to them so that his personal safety would be assured. After the tapes were seized, Dr. Oziel, at his home, played portions of the tapes to alert the police that he needed protection, presumably from the defendants. Dr. Oziel took measures later to protect his safety.

The defendants rely on the case of *Bumper* v. *North Carolina* (1968) 391 U.S. 543 in arguing that the consent was invalid. Defendants' reliance on *Bumper* is misplaced. In *Bumper*, four white police officers went to defendant's home and were greeted by defendant's 66-year-old African-American grandmother. The officers did not have a search warrant, but one of the officers told the grandmother that they possessed a warrant to search the residence. The court found the consent given by the grandmother was invalid.

The circumstances in this case are not similar to the coercive circumstances in *Bumper*. Dr. Oziel and his attorney read the search warrant and had an opportunity to confer before consenting to the search. The trial court found Dr. Oziel's consent was based on his fear and concern for his own protection. This is clearly evidenced by Dr. Oziel's cooperation and willingness to play the tape at his residence after it was taken from the safe deposit box.

b. Inevitable Discovery

Even, for the sake of argument, if the tapes were improperly seized, we find that the doctrine of inevitable discovery would have applied and the tapes would have ultimately been seized from the safe deposit box.

In *Nix* v. *Williams* (1984) 467 U.S. 431, the court held that evidence discovered as a result of illegal police conduct may nonetheless be admitted at trial, if the prosecution establishes, by a preponderance of the evidence, that the evidence inevitably would have been discovered even if no violation of the Constitution had occurred.

The search warrant specifically provided that items to be seized from Dr. Oziel's home included any safe deposit keys and paperwork which showed the existence and location of any safe deposit boxes rented by the Oziels.

On the day of the search, a file folder containing the Oziels' bank records was located in the home. The file folder contained bank records from three banks, one of which was Union Federal Bank, the bank where the safe deposit box was located containing the tapes. A safe deposit box key labeled "186" was recovered from Mrs. Oziel's wallet in the kitchen. It is clear that the tapes in the safe deposit box would have been ultimately discovered pursuant to another warrant if not voluntarily turned over by Dr. Oziel.

2. Denial of Erik's Requests for Severance and a Separate Jury

Erik contends that he was deprived of his rights to due process and a fair trial because the trial court denied his request for severance or a separate jury. Lyle has summarily joined in this argument, but has shown no authority in support of his claim that the trial court's denial of severance or separate juries was prejudicial to him. The mere assertion of a claim without citation waives the issue on appeal. (*People* v. *Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11.) However, we find no error as to the trial court's ruling on severance or request for separate juries.

Erik argues that the prosecution's case against Lyle was much stronger than its case against him. The trial court ruled admissible against Lyle, but not Erik, evidence of Lyle's consciousness of guilt and spending sprees. Although the court gave a limiting instruction for the jury to consider evidence only against Lyle, Erik contends that the limiting instruction was useless. Erik alleges that the limiting instruction was of no effect for two reasons. First, it was an extremely lengthy and complicated trial and difficult for the jury to follow the limiting instruction during deliberations. Second, the two defendants were brothers, thus increasing the likelihood that the jury associated Lyle's actions with those of Erik, despite the evidence to the contrary.

The law is quite clear that defendants jointly charged be jointly tried, unless the court, in its discretion, orders separate trials. (§ 1098.)[8]

The Legislature's stated preference for joint trials was enhanced by the passage of Proposition 115, adopted in 1990. Section 1050.1 makes joint trials the rule and separate trials the exception. (*People* v. *Alvarez* (1996) 14 Cal.4th 155, 190.) The case against Erik and Lyle involved common crimes, with common events and common victims, thus a textbook case for a joint trial. (*People* v. *Pinholster* (1992) 1 Cal.4th 865, 932.) Joint trials are the rule and separate trials are the exception. Generally, joint trials serve the interests of justice by avoiding inconsistent verdicts and enabling accurate assessment of relative culpability. (*In re Samano* (1995) 31 Cal.App.4th 984.)

The law is clear that it is not an abuse of the trial court's discretion to refuse a motion for separate trials made on the ground that damaging testimony admissible against one defendant and not admissible against another may be received; in absence of strong showing to the contrary it is presumed that an instruction admonishing a jury to consider evidence which was admissible against only one defendant in connection with that defendant only is sufficient protection. (*People* v. *Santo* (1954) 43 Cal.2d 319.) We find no evidence that the jury was incapable of obeying the curative instruction.

The fact that Erik and Lyle were brothers is certainly not a basis for severance of their trials. In a prosecution of two brothers and a third person for robbery and murder, a court held it was not error to admit into evidence a confession of one of the brothers, rendered out of the presence of the other brother, where, on four different occasions, the trial court

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8 Section 1098 provides: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial."

instructed the jury that it could not consider the confession in determining the other brother's guilt or innocence. (*People* v. *Ketchel* (1963) 59 Cal.2d 503, disapproved on other grounds by *People* v. *Morse* (1964) 60 Cal.2d 631.)

It is also clear that a trial judge has full discretion to determine a motion for severance in a criminal case and that the trial court's discretion will not ordinarily be disturbed by a reviewing court. (*People* v. *Floyd* (1970) 1 Cal.3d 694, overruled on other grounds by *People* v. *Wheeler* (1978) 22 Cal.3d 258.)

A leading California Supreme Court case held that separate trials might be appropriate where there is: an extrajudicial statement by one defendant which incriminates the other and cannot be adequately edited to excise such incriminating portions; prejudicial association with codefendants; the likelihood of confusion resulting from evidence on multiple counts; conflicting defenses; or the possibility that at a separate trial, a codefendant would give exonerating testimony. (*People* v. *Massie* (1967) 66 Cal.2d 899, 916-917.)

The presence of one or more of the *Massie* factors does not mandate severance. The California Supreme Court has explained, that "[i]f the fact of conflicting or antagonistic defenses *alone* required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.' " (*People* v. *Hardy* (1992) 2 Cal.4th 86, 168, quoting *People* v. *Turner* (1984) 37 Cal.3d 302, 312-313, overruled on other grounds in *People* v. *Anderson* (1987) 43 Cal.3d 1104, 1115, italics in original; see *People* v. *Boyde* (1988) 46 Cal.3d 212, 232 [noting that no state court had found an abuse of discretion or reversed a conviction on the ground that conflicting defenses warranted separate trials].)

There is no evidence that severance or a dual jury was warranted because of confusion of the evidence. *People* v. *Massie*, *supra*, 66 Cal.2d at pages 916-917 and 919, refers to confusion of evidence on multiple counts as a factor suggesting the need for severance, not to confusion of the evidence.

Erik relies on *U. S.* v. *Sherlock* (9th Cir. 1989) 962 F.2d 1349, for the proposition that severance is required and limiting instructions are ineffective when the evidence is

complicated. However, that is not the holding of *Sherlock*. In *Sherlock*, a nontestifying codefendant's redacted statement was admissible because it did not refer to the defendant by name and did not incriminate him unless linked with other evidence introduced at trial. The trial court instructed the jury to consider the statement only against the codefendant, and not against the defendant. In spite of the court's instruction, the prosecutor improperly used the instruction and the trial court allowed the argument that rendered the limiting instruction ineffective. The conviction was reversed on these grounds and not because of the complexity of the evidence. The prosecutor was allowed to disregard the instructions and three times argued the statement buttressed the case against the defendant and the trial court ruled these statements were proper argument and did not give the jury any further instructions.

There was no such improper use of the trial court's instructions during the prosecutor's closing argument in the case at bar. The prosecutor identified the defendants individually and discussed the evidence applicable to each of them separately. For instance, as to Erik, the prosecutor mentioned that Erik attempted to portray himself as a helpless child, his false statements to police, family and friends, the significance of his statements to Dr. Oziel, his acquisition of false identification, and his claim that he loved his mother but could not say what he loved about her.

As to Lyle, the prosecutor discussed specific items of evidence against him as well, such as, the fact that he returned to the house after the initial shooting to shoot his mother in the face at close range, the fact that he lived away from home and was not under his father's control, his statements to Dr. Oziel that he missed his parents in the same way he missed his dog, and his plan to escape from jail.

a. Anticipated Evidence Against Lyle Not Unduly Prejudicial to Erik

(1) Severance Was Not Warranted Based Upon the Proposed Admission of Escape Plan Evidence

Erik contends that the admission of evidence of Lyle's plan to escape from jail warranted severance or dual juries. We disagree.

The prosecution introduced into evidence nine pages police seized from Lyle's jail cell before the first trial. These pages contained reference to "safe houses" in foreign cities. The materials also contained references to international travel and visas for different countries.

The escape plan evidence was properly admitted against Lyle as relevant evidence of Lyle's consciousness of guilt. The trial court deleted any reference to Erik and all plural pronouns, such as "we" and "us," that by inference could be construed as referring to Erik. Thus, admission of the evidence was not a violation of the *Aranda-Bruton* rules relating to admission of a nontestifying codefendant's confession implicating a defendant, even with a limiting instruction. (*Bruton* v. *United States* (1968) 391 U.S. 123; *People* v. *Aranda* (1965) 63 Cal.2d 518.)

Moreover, consciousness of guilt evidence tending to establish that Lyle planned the escape from jail was of little prejudicial impact on the issue of Erik's guilt. Certainly, the escape plan evidence was not so powerful or incriminating as to Erik to believe that a jury would disregard a limiting instruction. It also did not bolster an otherwise weak case.

(2) Severance Was Not Warranted Based Upon the Proposed Testimony of Jamie Pisarcik

Erik contends that severance or dual juries was required because of the proposed testimony of Lyle's former girlfriend that Lyle had contacted her in an effort to commit perjury. We disagree.

Pisarcik testified that Lyle had asked her to give false testimony. The trial court weighed the probative value of the evidence against the potential prejudicial effect on Erik pursuant to Evidence Code section 352 and concluded that the probative value outweighed any prejudicial impact. The court explained that the proposed testimony tended to show Lyle's consciousness of guilt. Prior to Pisarcik's testimony, the trial court instructed the jury that her testimony was admissible only as to Lyle.

Pisarcik's testimony was not inadmissible pursuant to *Bruton* as an extrajudicial statement of a nontestifying codefendant. The jury was instructed twice that Pisarcik's testimony was admissible only against Lyle, and the jury is presumed to have understood and followed those instructions. (*People* v. *McLain* (1988) 46 Cal.3d 97, 119.)

(3) Severance Was Not Required Because of the Proposed Testimony of Donovan Goodreau

Erik alleges that severance or dual juries was required because of Goodreau's proposed testimony that Lyle was strapped for cash before the killings, thus supplying him a financial motive. We disagree.

Goodreau's testimony was limited to a description of how he came to reside with Lyle, moved out after they had a disagreement, left his wallet and driver's license behind and wasn't in San Diego when the defendants purchased the shotguns in San Diego.

(4) Severance Was Not Warranted Based Upon the Proposed Admission of Evidence of Lyle's Post-Crime Spending

Erik contends that severance or dual juries was warranted because of the proposed testimony concerning Lyle's excessive post-crime spending. We disagree.

Prior to the testimony concerning Lyle's post-crime spending, the trial court instructed the jury that the testimony was only admissible as to Lyle.

In addition, at Erik's request, the trial court instructed the jury that testimony regarding purchases made by each defendant after their parents' deaths was to be considered only as to the defendant making the purchase. The trial court further explained that the jury had heard testimony regarding Lyle's purchases of a Porsche, a restaurant, and certain property, and such evidence could only be considered as to Lyle. The jury was also instructed that evidence Erik had purchased a Jeep and other items could only be considered as to him.

Erik's claim that there was no evidence that he had a financial motive is not supported by the evidence. Within hours of his parents' death, he was inquiring about a will and ended up "sleeping" with a safe believed to contain a will. He purchased a Jeep, jewelry, borrowed significant sums for gambling, hired a tennis coach at $5,000 a month and signed an offer to purchase a home for $1,100,000. Even if it is true that Erik spent less than his brother, he still spent significant sums of money after the death of his parents.

(5) Severance Was Not Warranted Based Upon the Proposed Testimony of Marlene Eisenberg

Erik contends that severance or dual juries was warranted by the proposed testimony of Eisenberg that Lyle had said he was in the shower at the time of the killings, that at the funeral service Lyle claimed to be actually wearing, and metaphorically "filling," his father's shoes. We disagree.

At the beginning of Eisenberg's testimony, the jury was instructed that her testimony was to be considered only as to Lyle. The statements did not constitute a confession and did not implicate Erik's constitutional rights under *Bruton*.

(6) Severance Was Not Warranted Based Upon the Proposed Testimony of Glenn Stevens

Erik contends that severance or dual juries is required because of the proposed testimony by Stevens regarding Lyle's discussion about erasing a will from the family computer, his purchase of a Porsche, a restaurant and other property after the killings, and his statement about the problems he faced if the police got their hands on the Oziel tape. We disagree.

At the start of Stevens's testimony, the trial court instructed the jurors that they were to consider his testimony only as to Lyle. Lyle's statements to Stevens about hiring someone to erase the computer was not inadmissible pursuant to *Bruton*, because the statements did not refer to Erik in any way. Admitting evidence about Lyle's purchase of property after the murders did not refer to Erik in any matter.

The statement referring to the Oziel tapes tended to show Lyle's consciousness of guilt and did not refer to Erik in any way.

(7) Severance Was Not Warranted Based Upon the Proposed Testimony of Richard Wenskoski

Erik contends that the trial court erred in not granting a severance or dual juries because of the testimony of Wenskoski that Lyle claimed his parents were killed by a drug cartel or the mob and that Lyle spent extravagantly after his parents' deaths. We disagree.

Prior to Wenskoski testifying, the trial court ruled that his testimony was only to be considered as to Lyle. None of the proposed testimony was so prejudicial as to require a severance.

(8) Severance Was Not Warranted Based Upon the Proposed Testimony of Howard Witkin

Erik contends that severance or dual juries was required by the testimony of computer consultant Witkin that Lyle asked him to search for certain files on the computer at the Menendez residence on August 31, 1989, and when Witkin could not find the files, Lyle's request to cover up the attempts at erasure. We disagree.

When Witkin testified, the trial court instructed the jury that all of his testimony as to statements made by Lyle were admissible only against Lyle. Testimony as to what Witkin did and saw on the computer was received as to both defendants. Lyle's statements to Witkin did not refer to Erik and were properly admissible in a joint trial. (*Richardson* v. *Marsh* (1987) 481 U.S. 200, 208.) The statements also were not inadmissible under *Bruton*.

(9) Severance Was Not Warranted Based Upon the Proposed Testimony of Detective Zoeller's Interview With Lyle on September 17, 1989

Erik contends that severance or dual juries was required based upon the testimony of Detective Zoeller. We disagree.

The trial court properly allowed the September 17, 1989 tape-recorded statements to Detective Zoeller with limiting instructions. The trial court did order one redaction, concerning Lyle's lifelong desire to own a Rolex watch, from Erik's statement.

At trial, the tape-recorded statements made by Lyle and Erik were played for the jury. The only part of the statement that implicated Erik was a repetition of the alibi Lyle had already given on August 21, 1989. The alibi statement was presented to both juries in the first trial and it was admitted in the retrial as to both defendants without any request for a limiting instruction.

(10) Brian Eslaminia's Testimony Was Not Before the Court at the Time of the Severance Motion

Erik contends that severance or dual juries is required because of the testimony of Eslaminia regarding Lyle's efforts to solicit him to commit perjury. We disagree.

When denial of a severance motion is asserted as error on appeal, the claim must be determined on the basis of the showing made at the time of the motion. (*People* v. *Balderas* (1985) 41 Cal.3d 144, 171 [motions for severance and objections to consolidation evaluated "in light of the showings then made and the facts then known"].)

The admissibility of Eslaminia's testimony was not raised in connection with the severance motion. The first time Eslaminia's testimony was addressed in a hearing to determine its admissibility at the second trial was on October 23, 1995, over six months after the court denied the request for severance or dual juries. Because Eslaminia's testimony was not before the court at the time of the severance ruling, it is irrelevant to the determination whether denial of severance constituted an abuse of discretion. (*People* v. *Mitcham* (1992) 1 Cal.4th 1027, 1049.)

Notwithstanding the fact the Eslaminia proposed testimony was not before the court at the time of the severance ruling, the trial court ruled that Eslaminia's testimony was admissible as to both defendants. Therefore, even if Erik's request for severance would have been granted, the testimony from Eslaminia would have been admitted in a separate trial or a separate jury deciding the guilt of Erik.

b. The Admission of Evidence Against Lyle Did Not Have the Effect of Bolstering an Otherwise Weak Case

The trial court in denying the motion for severance relied in part on the case of *People* v. *Keenan* (1988) 46 Cal.3d 478. In *Keenan*, one factor to consider would be whether the evidence that would have been otherwise inadmissible in Erik's separate case had the effect of bolstering an otherwise weak case. In *Belton* v. *Superior Court* (1993) 19

Cal.App.4th 1279, 1284, the court held that there must be extreme disparity between strong and weak cases in order to demonstrate the potential for prejudicial "spillover" from one case to another. We find no disparity present.

The evidence does not suggest that the case against Erik was relatively weak. There was significant evidence which undermined Erik's credibility, including false alibi statements, his efforts to portray the murders as business-related and confessions to Dr. Oziel and his best friend, Cignarelli. There was also evidence of financial motive for the crime.

c. Benefits of Joint Trial Outweighed Any Potential Prejudice to Erik

Pursuant to *People* v. *Keenan*, *supra*, 46 Cal.3d 478, when ruling on a motion to sever counts and by analogy in considering the issue of severance of trials, the trial court must assess whether the benefits of a joint trial outweigh the likelihood of substantial prejudice to the defendant. (*Id.* at p. 500.) We conclude that the benefits of a joint trial were substantial.

In *Richardson* v. *Marsh*, *supra*, 481 U.S. at pages 209-210, the United States Supreme Court explained as follows: "Joint trials play a vital role in the criminal justice system . . . . It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling [a] more accurate assessment of relative culpability -- advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."

In the instant case, given the length of the trial and the number of witnesses who testified on both sides, the benefits of a joint trial were enormous. The benefits were not obtained at the expense of the search for justice or at the expense of any substantial prejudice to Erik.

d. Denial of Erik's Request for Dual Juries Was Proper

Because there was no legal basis for severing the defendants' trials, there was no legal reason for the court to grant the alternative request for dual juries.

The use of dual juries is an acceptable way to avoid the necessity for a complete severance when evidence at a joint trial is not admissible as to all defendants. (*People* v. *Cummings* (1993) 4 Cal.4th 1233, 1287.) This procedure would resolve any *Bruton* or *Aranda* issue because a jury could be excused at appropriate times to avoid hearing inadmissible evidence.

The trial court explained that there was a logistical problem in conducting such a high publicity trial with two juries including the likelihood of "seepage" of information between juries in a high publicity case. In fact, these concerns were expressed by the trial court in the first trial. The trial court had experienced problems in the first trial and was concerned about a potential lack of cooperation from trial counsel in the second trial. There certainly was no abuse of discretion in the trial court's denial of a request for dual juries.

3. Denial of Motion For Intracounty Transfer

Erik claims a change of venue motion should have been granted because the pretrial publicity in the case prejudiced the jury pool in Van Nuys to a greater extent than in downtown Los Angeles. Lyle joined in this contention. We disagree.

Prior to the retrial, the trial court heard argument from counsel concerning the location of the trial. The defendants conducted a pretrial telephonic survey of approximately

800 individuals, apparently jury-eligible from the Northwest District (Van Nuys), the Central District (downtown Los Angeles), and the West District (Santa Monica; the district where the murders took place). Erik's counsel indicated that the survey results indicated that there was a "slightly better chance, but statistically significant that [defendants] could get a fairer jury downtown than here [in Van Nuys]." The trial court denied the motion to transfer the case and ruled that the trial would be in Van Nuys. The trial court found that the results of the survey and the manner in which it was conducted were not compelling or decisive on the issue of where the case would be tried. The trial court ultimately granted defendants' request for the prospective jurors to be selected using a "non-competitive draw" from a 20-mile radius around the Van Nuys courthouse.

Hernandez v. *Municipal Court* (1989) 49 Cal.3d 713, 729, holds that a felony prosecution may properly be brought in any judicial district within a county that was otherwise an appropriate venue. Section 1033, subdivision (a) provides for a change of venue from one county to another where there is shown a "reasonable likelihood that a fair and impartial trial cannot be had in the county."

People v. *Cummings*, *supra*, 4 Cal.4th 1233, discusses the standard for review of the denial of an intracounty transfer under local court rules. The court stated as follows: "Assuming, therefore, that a judge of the Los Angeles County Superior Court has discretion to transfer a felony prosecution to another judicial district within the County of Los Angeles to avoid potential prejudice from pretrial publicity, identical criteria for transfer and standards of appellate review should govern. We recognize that the expense and inconvenience of a change of venue might be avoided by an intracounty transfer. In the absence of a statutory right to such transfer, there is no reason to create a different rule to govern a motion for intracounty transfer." (*Id.* at p. 1276, fn. 17.)

The trial court's denial of defendants' motion to transfer the case from Van Nuys to downtown Los Angeles is to be evaluated under the legal standards generally applicable to a change of venue motion.

a. Factors to be Considered in Intracounty Transfer

The factors to be considered by trial courts in determining a motion to change the location of the trial include (1) the nature and gravity of the offense, (2) the nature and extent of the publicity, (3) the size of the community, (4) the status of the defendant in the community, and (5) the popularity and prominence of the victim. (*People* v. *Anderson*, *supra*, 43 Cal.3d 1104; *People* v. *Harris* (1981) 28 Cal.3d 935, 948.)

(1) The Nature and Gravity of the Offense

The nature of an offense refers to particular facts of a crime that make it sensational or otherwise embedded in the consciousness of the community. (*People* v. *Hamilton* (1989) 48 Cal.3d 1142, 1159.) The fact that the offenses were sensational and most serious would weigh in favor of a transfer of the case, but it would not necessarily be dispositive. (*People* v. *Proctor* (1992) 4 Cal.4th 499, 524.) The case had obtained notoriety in the entire county.

(2) The Nature and Extent of the Publicity

The exposure to pretrial publicity did not necessitate an intracounty transfer. There was substantial publicity about the case throughout the entire county of Los Angeles and substantial publicity alone is not enough to warrant a change of trial location. (*People* v. *Daniels* (1991) 52 Cal.3d 815, 853.)

The pretrial survey did not warrant a transfer of the trial to downtown Los Angeles. The pretrial telephone survey of supposedly eligible jurors included 223 persons residing in downtown Los Angeles, 200 residing in the Santa Monica judicial district, and 361 drawn from Van Nuys. Even if the survey were reliable and accurate, Erik has not shown that there was a reasonable likelihood that he could not receive a fair trial without the transfer. There was no difference between the judicial districts in the exposure to pretrial publicity.

The trial court indicated that the results had "nothing to do with who will ultimately be on the jury." The trial court concluded that the individuals, who happen to be at home, pick up the telephone and agree to be questioned, are not necessarily a reliable indication of the jury pool's actual beliefs, opinions or biases. "[G]eneralizations that an opinion survey expresses do not necessarily translate into operational beliefs." (*People* v. *Venegas* (1994) 25 Cal.App.4th 1731, 1738.)

(3) Size of Community

The size of the community was a factor weighing against an intracounty transfer. The Van Nuys judicial district is a very large metropolitan area with a population in excess of 1.3 million persons.[9] The fact that the jury pool for the Van Nuys district is very large certainly negates against any bias. In *People* v. *Sanders* (1995) 11 Cal.4th 475, 506, the court stated: "As has been frequently emphasized, ' "adversities of publicity are considerably offset if trial is conducted in a populous metropolitan area." ' " While the size of the Van Nuys district is not by itself determinative, it certainly is strong evidence against the need to transfer the case to another district for trial.

(4) The Status and Prominence of the Defendants and the Victims

Certainly, the status and prominence of the defendants and the victims does not weigh in favor of an intracounty transfer. The victims and the defendants had no particular celebrity status in the community. There is nothing to indicate that either the victims or the defendants were more prominent in Van Nuys than in downtown Los Angeles.

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[9] The pool of jurors surveyed by the defendants from the Van Nuys judicial district encompassed 46 different zip codes and showed a total population of 1,334,407 according to the 1990 Federal Census figures.

The prominence of the defendants and the victims was certainly something that only occurred after the gruesome killings. Nothing indicates that before the murders, the Menendez family was anything more than a wealthy Beverly Hills family unrecognizable to most people.

Even assuming that the trial court erred in denying the intracounty transfer, the defendants have failed to show "the pretrial publicity actually had a prejudicial effect, i.e., that it denied [defendants] a fair trial by denying [them] the right to a fair and impartial jury." (*People* v. *Cummings*, *supra*, 4 Cal.4th at p. 1275.) The defendants have failed to carry their burden that "in view of what actually occurred at trial, it is reasonably likely that a fair trial was not in fact had." (*People* v. *Howard* (1992) 1 Cal.4th 1132, 1168.)

The voir dire in the case went into great detail about pretrial publicity and media coverage. The prospective jurors were required to complete a 19 page questionnaire, including numerous questions on any preconceived notions that they may have and whether they would be able to set aside and disregard any preconceived beliefs or opinions. The voir dire consumed several days. In addition to the trial court inquiring of the potential jurors, all counsel were also allowed to question the prospective jurors in great detail.

It is also significant that the trial court granted several requests to excuse jurors for cause. In addition, the defendants had 11 peremptory challenges remaining when the jury was accepted and nine peremptory challenges remaining when the alternates were accepted. The defendants' "failure to exhaust [their] peremptory challenges strongly indicates that 'the jurors were fair and that the defense itself so concluded.' " (*People* v. *Sanders*, *supra*, 11 Cal.4th at p. 507.)

B. Trial Rulings

1. Defendants' Objection to the Order of Proof

Defendants contend that the trial court violated their Fifth and Sixth Amendment rights by requiring that they testify first before presenting any other affirmative defense

evidence. While both defendants testified during the first trial, only Erik testified at the second trial. The defendants rely on *Brooks* v. *Tennessee* (1972) 406 U.S. 605 in support of their argument. In *Brooks*, the United States Supreme Court invalidated a Tennessee statute which mandated that a defendant who wanted to testify in his defense had to do so before presenting any other testimony. Lyle claims that the trial court made rulings requiring that he testify first and when he did not do so, the court's rulings prevented the jury from hearing relevant testimony from Diane Vandermolen and Dr. Jon Conte, as well as evidence concerning an essay he had written in 1982. Erik also claims that the trial court made a ruling requiring that he had to testify first before he could present other relevant evidence. Erik argues that he was prejudiced by the trial court's ruling because he testified first, was "hammered" during cross-examination and only after his testimony was he able to produce additional evidence to "mitigate the damage." We disagree with the contentions of the defendants.

The issue of the admissibility of lay and expert testimony regarding abuse was discussed and litigated throughout the trial. The trial court did indicate that a crucial issue was whether the defendants killed out of an "actual belief of imminent danger of death or great bodily injury and a need to act." The court stated, "if that actual belief is not presented to the jury, then the experts have nothing to corroborate." The court noted that absent testimony from the defendants, the mental state experts' opinions would be irrelevant. The defendants' position was that they should be allowed to present the testimony of lay witnesses to corroborate defendants' testimony and the testimony of the experts, regardless of proof.

During Erik's testimony, his counsel attempted to introduce a three-page essay dated December 10, 1982, which Lyle had written as a child.[10] According to defense counsel, the essay would explain why Erik did not tell Lyle earlier that he had been sexually abused by

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10 The document was an essay which had been written by Lyle about a man who was sentenced to death for murdering a child molester.

their father. The prosecution objected because the admission of the essay lacked foundation and also pursuant to Evidence Code section 352.[11] The trial court sustained the objection on hearsay grounds and Evidence Code section 352 grounds. The court did indicate that it would be willing to revisit the issue "if and when [Lyle] testifies."

Counsel for defendants later sought to introduce the testimony of their cousin, Brian Anderson. Anderson was being offered by Lyle to corroborate the testimony of Erik that Lyle was afraid immediately prior to the commission of the murders. Anderson knew nothing about Lyle's state of mind on August 20, 1989. Defense counsel indicated that the basis for the opinions of Dr. Conte would be information received before the first trial, including conversations with Lyle and other lay witnesses.[12] The prosecution objected and indicated that there was no foundation for the testimony. The trial court commented that it would be interesting if a defendant chose not to testify, but offered statements to an expert with an attempt to get those statements before the trier of fact as a basis for the opinion and to rely on brief testimony from a codefendant as to certain declarations and demeanor of the defendant. The court was very clear in saying that "[t]hese are all issues that would have to be evaluated." Counsel for Lyle hypothesized that it was possible that the court might preclude Dr. Conte from testifying because Lyle refused to testify.

The issue of whether Lyle had to testify before other witnesses testified was again raised when the defense presented its offer of proof with respect to the testimony of Diane

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11 Evidence Code section 352 provides as follows: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

12 Dr. Conte's testimony would have been regarding Battered Person's Syndrome and its effects on Lyle's mental state.

Vandermolen.[13] The court found the evidence remote and speculative as to whether that incident was in Lyle's mind at the time he killed his parents. The court noted that without the foundation of Lyle's testimony, "it's kind of hard to see how it comes in." The court ruled that the statement to defendant's cousin, Diane Vandermolen, was hearsay and that there were no exceptions to the hearsay rule. The court further found that the testimony of Erik to the effect that Lyle told Erik "it also happened to him" did not provide a basis for the receipt of Vandermolen's testimony regarding the statement Lyle allegedly made to her in 1976.

Lyle's claim that the trial court violated his federal constitutional rights by requiring him to testify first before the trial court would admit testimony from corroborating witnesses was waived by Lyle's failure to raise a Fifth or Sixth Amendment argument in the trial court. (*People* v. *Hines* (1997) 15 Cal.4th 997, 1035.)

Erik's counsel's remarks that she was concerned about the court's ruling, and her reference to *Brooks* v. *Tennessee*, *supra*, 406 U.S. 605, did not constitute formal objections. His failure to make that argument in the trial court means that he may not do so on appeal. (*People* v. *Clark* (1993) 5 Cal.4th 950, 988, fn. 13.)

The record is clear that while there were lengthy discussions concerning the admissibility of lay and expert witnesses, the court *never* ruled on the questions of whether defendants were required to testify before those witnesses. Neither counsel specifically asked for the court to make a ruling requiring the defendants to testify first in violation of the holding in *Brooks* v. *Tennessee*, *supra*, 406 U.S. 605. Therefore, the defendants have waived their right to appellate review on this issue by failing to obtain a ruling from the trial court. (*People* v. *Danielson* (1992) 3 Cal.4th 691, 728-729.)

In any event, we find no violation of the federal Constitution and find no evidence that the trial court abused its discretion in determining the "order of proof." It is well settled

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[13] Diane Vandermolen would have testified that when Lyle was eight years old, Lyle told her his father was touching his genitals.

that regulating the order of proof at a trial rests within the sound discretion of the trial court. (Evid. Code, § 300.)[14] The order of proof almost always lies within the discretion of the trial court. (*People* v. *Contreras* (1989) 210 Cal.App.3d 450, 456.) In addition, evidence must be excluded if it lacks foundation: "In many situations, the qualification of a witness to testify . . . or the admissibility of a particular item of evidence, is *conditional* upon the showing of preliminary facts as a *foundation*. Although fact questions are ordinarily for the jury [citation], this preliminary issue of admissibility is decided by the trial judge. [Citations.]" (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1712, p. 1671, emphasis in original.)

The issue before the trial court was not whether the defendants were required to testify before their lay and expert witnesses testified, but whether the testimony of those witnesses was admissible in light of the prosecution's objections based on lack of foundation and Evidence Code sections 350[15] and 352. In fact, the court allowed defendants to present six medical and crime scene reconstruction experts and two lay witnesses who were on the fishing boat the night before the murders, even though neither defendant had testified. In addition, Lyle called several witnesses during the defense case, even though he never testified at the second trial. His decision not to testify at the second trial was clearly a tactical trial decision and was not a result of an erroneous ruling by the trial court.

While some cases have held that a defendant need not testify in order to have the defense of "imperfect" self-defense submitted to the jury (*People* v. *De Leon* (1992) 10 Cal.App.4th 815), a defendant must show that he subjectively perceived an imminent danger before corroborating testimony of lay witnesses concerning prior acts of violence or threats or mental state testimony by expert witnesses about the perception of threats become

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14 Evidence Code section 320 provides as follows: "Except as otherwise provided by law, the court in its discretion shall regulate the order of proof."

15 Evidence Code section 350 provides as follows: "No evidence is admissible except relevant evidence."

relevant. In *De Leon*, there was substantial evidence concerning defendant's honest but unreasonable belief in the need to defend against imminent peril. The defendant did not testify, but numerous eyewitnesses to the incident did.

In *U. S.* v. *Singh* (2d Cir. 1987) 811 F.2d 758, the defendant sought to introduce hearsay testimony, but the trial court would not allow the testimony until after the defendant testified, when the court said it would be " 'in a better position to see what first-hand information there is.' " (*Id.* at p. 762.) The defendant in *Singh* relied upon *Brooks* v. *Tennessee*, *supra*, 406 U.S. 605 to argue that he had improperly been required to be the first defense witness. The *Singh* court found *Brooks* inapposite, because unlike Brooks, Singh was not required to testify before any other defense testimony was given. The *Singh* court held that the trial court did not abuse its discretion by requiring the defendant to lay a proper foundation before it would admit hearsay evidence.

Defendants rely on the case of *Williams* v. *State* (Okla.Crim.App. 1996) 915 P.2d 371 to support their claim. *Williams* involved a defendant who shot and killed two individuals and then claimed self-defense. The trial court ruled that Williams could not present any evidence of self-defense unless he first took the witness stand. The trial court's decision in *Williams* was wrong. Not only did the trial judge require the defendant to take the stand before any evidence of self-defense could be presented by the defense, the trial judge even prohibited the defense from cross-examining any of the prosecution witnesses concerning the issue of self-defense. However, *Williams* is distinguishable from the facts before us. First, in the case at bar, the trial judge indicated that a proper foundation would have to be laid before the experts could testify. The trial court expressed its willingness to reconsider the admissibility of testimony concerning their fear of their parents if a proper foundation was made. In addition, there was independent evidence in the *Williams* case that would have warranted the self-defense instruction vithout the defendant testifying. The defendant stated right after the shooting to witnesses, it was "them or me." There was evidence of threats made in the witness' presence and the victim attempted to find a gun to kill the defendant. The defendant was warned that the victim wanted to kill him and there was

evidence that the victim continued to make threats against the defendant on the morning of the killing.

The trial court did not abuse its discretion in regulating the order of proof.

2. Evidence of Mental Condition of Jose and Kitty

The defendants contend that the trial court erred in precluding Kitty's psychologist, Dr. Edwin Cox, from testifying about her mental condition. The defendants also claim that the court erred in exclusion of mental disorder testimony on the part of Jose and Kitty. Lyle alleges that Dr. Cox would have testified to the following concerning Kitty's mental condition: (1) she was an "obsessive, . . . depressed, [and] suicidal" individual who sometimes had "outbursts of anger" and rage which were "often out of proportion to the event triggering it"; (2) image was "extremely important" to her; (3) the most important person in her life was her husband; and (4) she was "very controlled" by her husband.

Erik made similar claims about Dr. Cox's testimony. In addition, he argued the testimony of the following individuals was improperly excluded from the retrial: (1) Roger Smith (a former high-ranking executive with L.I.V.E. Entertainment, would say that Jose was totally controlling and belittling in his business relationships and instilled fear in his employees); (2) Dr. Ann Burgess (would have testified that Jose's conduct as an adult in his business, family, and social settings was consistent with an autocratic and authoritarian personality disorder);[16] and (3) Dr. Lester Summerfield (would have testified that Kitty was borderline, obsessive and depressive). We find no error in the trial court's rulings. The evidence was not offered to demonstrate Jose and Kitty acted in conformity with any past

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16 The record does not reflect either defendant making a motion to call either Roger Smith or Dr. Burgess at trial. The alleged error is therefore waived. (*People* v. *Rowland* (1992) 4 Cal.4th 238, 262.) In any event, we find no violation of state or federal constitutional rights.

conduct. (Evid. Code, § 1103.)[17] The trial court also properly found that the probative value, if any, was substantially outweighed by its prejudicial effect and the strong probability it would confuse the issues for the jury pursuant to Evidence Code section 352.

The testimonies of Dr. Cox and Dr. Summerfield was unrelated to the events which occurred on the evening of the murders. Dr. Cox had only had three therapy sessions with Kitty. There was no evidence that when Kitty was confronted and shot by her sons that she was on the verge of a rage, being controlled by her husband, or considering the relative importance of her children in comparison to her husband. In fact, the jury was only instructed on heat of passion voluntary manslaughter as to Jose. While the provocation necessary for heat of passion may occur over a period of time, heat of passion is not established when a defendant acts out of belated revenge or anger. (*People* v. *Dixon* (1995) 32 Cal.App.4th 1547.)

There was no testimony that Jose was acting in a similar manner towards his sons as he acted towards his coworkers at the time he was shot by his sons.

The victim's conduct on the occasion in question in conformity with the particular character trait must tend to exculpate defendant from guilt of the crime charged. The evidence clearly indicates that at the time of the shooting, there was not a connection between the alleged past mental or emotional state of Jose and Kitty and the immediate circumstances surrounding the murders. In fact, the evidence clearly shows that at the time of the shootings, Jose and Kitty were unarmed in the den, watching television, eating blueberries and cream, with a UCLA application for Erik in front of them.

Even assuming there was a scintilla of evidence offered to show that Jose and Kitty were acting in a manner consistent with their alleged emotional and/or mental states, the

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[17] Evidence Code section 1103 provides, in pertinent part: "(a) In a criminal action, evidence of the character or a trait of character . . . of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

probative value was outweighed by potential for confusion of issues or prejudice. While a court should not take lightly its obligation to get all relevant and legally admissible evidence before the jury, the ultimate triers of fact, the trial court properly refused to allow the requested evidence concerning the mental and/or emotional condition of Jose and Kitty at dates or times other than at the time of the murder. There was no abuse of discretion in the trial court's exclusion of the evidence.

3. Restriction of "Source Witnesses"[18]

The defendants contend that the trial court abused its discretion when it limited defense source witnesses. The defendants allege that the evidence was relevant to the provocation theory advanced by the defense, to corroborate Erik's testimony, and important to the theory of imperfect self-defense. We find no error. The trial court did not abuse its discretion pursuant to Evidence Code sections 350 and 352 in excluding or limiting the testimony from the source witnesses for whom defendants made offers of proof. The defense case took over two full months. The length of the defense belies the argument that the trial court arbitrarily limited the source witness testimony offered by the defense.

A defendant has a constitutional right to present a defense and call witnesses in his favor. (*Rock* v. *Arkansas* (1987) 483 U.S. 44, 52; *Chambers* v. *Mississippi* (1973) 410 U.S. 284, 294, 297-298.) However, both sides must comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Chambers* v. *Mississippi*, *supra*, 410 U.S. at p. 302.)

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18 The trial court characterized the defense "source witnesses" as individuals who had: "observed certain things, either observed the interaction of the defendants with their parents or gave character evidence of relating to the parents, either by describing certain acts or behavior of the parents, even reference to the parents' childhood or upbringing, things of that nature . . . ."

Evidence Code section 352 provides that even relevant evidence may be excluded if the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. This allows the trial court discretion to exclude or limit either side's evidence during trial. A trial court's exercise of discretion will not be reversed unless it exceeds the bounds of reason, "all of the circumstances being considered." (*People* v. *Tran* (1996) 47 Cal.App.4th 759, 771.) The limitations on testimony did not hinder defendants' presentation of their defense to the jury. In most cases, the proposed testimony would have just served to corroborate other testimony presented to the jury.

The trial court has discretion to limit the testimony presented during a trial and to control the proceedings. A criminal defendant is entitled to present relevant evidence, including evidence that corroborates his testimony. (*People* v. *Minifie* (1996) 13 Cal.4th 1055, 1066.) The trial court allowed numerous source witnesses to testify on behalf of the defendants. The source witnesses were allowed to testify, in detail, about the relationship the defendants had with their parents. This testimony included incidents of physical and mental abuse by Jose and Kitty. The source witnesses were also allowed to testify about Jose disciplining the defendants by sending them to their room and no one being allowed to go down the hallway near the bedroom when Jose was punishing the defendants. The source witnesses also were able to testify about Erik's learning disabilities. The witnesses were allowed to testify about threats Jose had made and Jose's statements about Mafia connections.

The trial court stated the principal issue was the state of mind of the defendants at the time of the killings and the relevance the prior incidents may have had on the defendants' mental state at the time of the killings. The source witnesses were allowed to testify extensively concerning many areas in an effort to determine the state of mind of the defendants at the time of the killing. We find no abuse of discretion in the trial court's limitation or exclusion of some source witness testimony.

4. Restriction of Expert Witness Testimony

Lyle contends that the trial court erred by excluding the testimony of Dr. Conte because Lyle had not testified first, and the testimony of Dr. Stuart Hart because it was not probative. Erik contends that the trial court erred by excluding the testimony of Dr. Hart, and limiting the scope of the testimony of Dr. Wilson, Dr. Vicary, and Dr. English. Both defendants allege that expert testimony should have been permitted concerning the alleged unreliability of the Oziel tape.

Prior to the trial, the prosecution filed a motion to exclude expert testimony relating to Battered Person Syndrome (BPS). The trial court held an extensive hearing, lasting several days, based upon Evidence Code section 801 and the *Kelly-Frye* requirement that the proposed evidence be accepted in the general scientific community. After the hearing, the trial court found that, although it was a "close call," defendants had met their burden of showing a foundation for the admissibility of evidence relating to their mental states at the time of the crimes under Evidence Code section 801, "to the extent that some expert testimony in this field is admissible as to the effects of fear on their perception of imminent danger." The court also noted that the issue remained as to what sort of evidence could be admitted, an issue which section 1107 of the Evidence Code, by way of analogy does not really address. The court also said that some of the evidence introduced in the first trial should really have been excluded pursuant to section 29.[19]

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19 Section 29 states: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

In order for a court to admit expert testimony, generally two elements must be met: (1) the subject must be so related that it is beyond the general knowledge of laypersons; and (2) the expert's opinion will aid the trier of fact in the search for the truth. Expert testimony in the Battered Person Syndrome (BPS) case generally serves two purposes: (1) enable the jury to understand how a battered child might perceive imminent danger when using deadly force; and (2) the testimony will strengthen the battered child's credibility as a witness, if the alleged battered child testifies.

Even though Evidence Code section 801 allows expert testimony as it relates to a subject that is sufficiently beyond common experience, the right to present expert testimony is not without limits. Expert testimony or evidence may still be excluded under Evidence Code section 352. (*People* v. *Alcala* (1992) 4 Cal.4th 742, 788-789.) In addition, cumulative expert testimony may also be excluded on the same basis (*People* v. *Mincey* (1992) 2 Cal.4th 408, 439) or pursuant to Evidence Code section 723.[20]

The trial court has wide discretion in determining the relevancy of an expert's opinion. (*People* v. *McAlpin* (1991) 53 Cal.3d 1289, 1303.) It is important to note that the jury is the trier of fact and not the experts. Therefore, the experts may not testify as to the ultimate question of whether the defendant is telling the truth when the credibility of a defendant is in dispute. (*People* v. *Ainsworth* (1988) 45 Cal.3d 984, 1012.) An expert may not give general testimony about the characteristics of child sexual abuse victims "in such a way as to allow the jury to apply the syndrome to the facts of the case and conclude" that the alleged victim was actually sexually abused as a child. (*People* v. *Bowker* (1988) 203 Cal.App.3d 385, 393.)

We find no manifest abuse of discretion in the trial court's limiting the scope of the testimony of some expert witnesses and in excluding the testimony of other experts.

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20 Evidence Code section 723 provides as follows: "The court may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party."

a. Dr. Wilson

Erik argues that the trial court imposed unwarranted restrictions on the testimony of Dr. Wilson as follows: (1) Dr. Wilson was not allowed to testify regarding any specific examples of fear-inducing behavior by Jose and Kitty; (2) Dr. Wilson was prevented from testifying that in his opinion Erik had, in fact, been molested; and (3) Dr. Wilson was prohibited from testifying about the impact Erik's "negative self-reference" had on the events leading to the killings.

(1) Alleged Abusive Behavior of Jose and Kitty

Erik contends that Dr. Wilson should have been allowed to testify about numerous incidents including: (1) Kitty abandoning Erik in shopping malls; (2) Jose intimidating Erik and others; (3) Kitty sharing in Jose's authoritarian and abusive behavior; (4) Jose encouraging competition among family members; (5) Jose bragging about his ability to get people killed; (6) Erik's fear of his mother; and (7) not allowing Dr. Wilson to testify as to Erik's reaction to a photo of a green mask, which would have corroborated Erik's testimony about the significance of the green mask as well as supporting Dr. Wilson's conclusion that Erik had PTSD based on child abuse.

The trial court did allow Dr. Wilson to testify that Erik had told him about his mother losing him in shopping malls and not coming to get him for hours. While the court sustained the prosecution's hearsay objection to the question of whether Dr. Wilson had received information that Jose was an "intimidating person," Dr. Wilson was able to testify that he was aware that Erik had observed both of his parents "intimidating his teachers." Dr. Wilson was also able to testify that he had received information that Jose had "tried to portray himself to [Erik] as someone capable of killing people."

The trial court sustained the prosecution's objection concerning Dr. Wilson's opinion concerning whether Kitty was a "day-to-day enabler of [Jose's] authoritarian style of child-rearing," and if encouraging competition among family members caused isolation, which in turn led to a failure to report child abuse. The questions were properly objected to by the prosecution because they concerned behavior of the victims which was remote in time and not relevant as to Erik's state of mind on August 20, 1989. The trial court certainly has discretion to limit evidence offered to make the victim of a crime look bad. (*People* v. *Kelly* (1992) 1 Cal.4th 495, 523.)

The testimony about Erik's fear of his mother was in part based upon her poor driving habits. Testimony that Kitty's poor driving habits "terrorized" Erik was allowed. Defense counsel was also able to elicit from Erik that fear of his mother was influenced by the fact that Erik suffered from PTSD.

Erik argues that the trial court committed error by not allowing Dr. Wilson to testify about Erik's reaction when he was shown a photograph which had been taken in 1976. The photo showed a green Halloween mask which was being worn by someone standing next to Erik. The trial court ruled that if Erik had wanted to testify about the photograph, assuming it had some relevance, it should have been done during Erik's testimony. In addition, testimony regarding Erik's reaction to being shown a photograph taken several years before the murders was not relevant to his mental state on August 20, 1989.

(2) Prohibition of Dr. Wilson Testifying Concerning the Claim of Sexual Abuse

Erik alleges that the trial court improperly prohibited Dr. Wilson from describing his evaluation of notes taken by Dr. Hart, whose testimony was excluded, and Dr. Vicary, who was allowed to testify in surrebuttal. Erik also alleges that the trial court would not allow Dr. Wilson to testify as to how Erik revealed the molestation and that he used language consistent with having actually been molested.

Erik alleges that Dr. Wilson was not permitted to describe his evaluation of notes made by the excluded experts. The trial court did sustain the prosecution's objection to a question about "what kind of things" he listened for in order to help him validate the information he received. The trial court found that defense counsel was simply "trying to buttress the credibility of" Erik through the testimony of Dr. Wilson. Dr. Wilson had earlier testified that he had examined Dr. Vicary's notes and the notes showed that Erik had revealed his alleged sexual abuse to him in a manner which indicated that Erik was telling the truth. The court did not abuse its discretion in prohibiting cumulative testimony on this subject.

While the trial court did not allow Dr. Wilson to go into the specifics of the statements Erik had given to Dr. Hart, Dr. Wilson was allowed to testify that he reviewed the statements Erik had given to Dr. Hart and what Erik told him was consistent with what Erik had told Dr. Hart. The jury certainly could have inferred that Erik's testimony was credible, based on the testimony showing that he gave consistent reports to both doctors. Since the trial court ruled that Dr. Hart would not be allowed to testify because his proposed testimony was not probative on the issue of the mental states of the defendants at the time of the killings, the substance of his notes that were reviewed by Dr. Wilson certainly would not be admissible.

Dr. Wilson also was not allowed to give his opinion regarding the claim that Lyle had told Diane Vandermolen when he was eight years old that Jose was molesting him. The ruling was proper because it would be inappropriate for Dr. Wilson to have given his opinion as to whether or not Erik or Lyle was sexually molested. The issue of molestation would be for the jury to decide in its evaluation of the testimony and evidence received during the trial.

The defendants rely on *People* v. *Humphrey* (1996) 13 Cal.4th 1073, to support their argument. In *Humphrey*, a jury convicted the defendant of voluntary manslaughter after she killed the man with whom she had been living. The court found that the evidence of "battered women's syndrome" was relevant to the defendant's state of mind as to whether

she believed it was necessary to kill her batterer in self-defense and the reasonableness of that belief.

The expert in *Humphrey* was allowed to testify concerning the general characteristics of battered women's syndrome, describe the history of defendant's relationship with the victim, including description of psychological control and abuse to which defendant was subjected. In addition, the expert was allowed to testify that he believed the defendant's description of her experiences.

The Supreme Court held that the trial court erred when it instructed the jury not to consider BWS evidence in deciding whether the defendant's belief in the need to defend herself was reasonable. Evidence of BWS is normally relevant to the reasonableness, as well as the subjective existence of a battered woman's belief in the need to defend.

Humphrey is inapposite. *Humphrey* was actually not decided based upon whether or not an expert could testify about BWS, but was decided based upon an erroneous jury instruction regarding the reasonableness of defendant's actions in the context of self-defense. Also, in *Humphrey* there was no dispute that the defendant had been battered. The expert's testimony related to her genuine perception of imminent danger and her need to kill her abuser. In contrast, the defendants mental state defense required them to get the jury to believe that they had in fact been abused.

The defendants also rely on *People* v. *Aris* (1989) 215 Cal.App.3d 1178 in support of the argument that in testifying about BPS, an expert may offer his opinion that the defendant was actually battered or assaulted. However, *Aris* is distinguishable. *Aris* involved BWS and evidence of that syndrome is clearly admissible, if relevant, pursuant to Evidence Code section 1107.

In *Aris*, as with *Humphrey*, the issue was not whether the defendant had been battered, but the testimony from the expert was presented on the issue of the defendant's genuine perception of imminent danger and a need to kill the victim.

In the present case, the issue of molestation was not a given, but was contested. Since the issue of molestations and abuse and BPS were in dispute, we find no abuse of

discretion in the trial court's decision to limit Wilson's testimony concerning whether Erik had actually been abused. In *People* v. *Harlan* (1990) 222 Cal.App.3d 439, 449-450, the trial court properly ruled that a child abuse expert could testify regarding general concepts and observations of victims as a class, but could not offer his opinion concerning the victim in the case. In *People* v. *Erickson* (1997) 57 Cal.App.4th 1391, the court ruled that an expert on domestic violence could not testify as to whether a defendant believed that her life was in danger the night her abusive boyfriend was killed. The trial judge in the instant case did no more or less than the trial judges in *Harlan* and *Erickson*.

(3) Negative Self-Reference

Erik also contends that Dr. Wilson was prevented from testifying fully as to BPS because of the trial court's limitation on his testifying about the impact that Erik's "negative self-reference" had on the events leading up to the killings.

When defense counsel sought to ask Dr. Wilson if Erik had a very "negative self-reference," the prosecution objected under Evidence Code sections 350 and 352. The trial court observed that expert testimony regarding Erik's "negative self-reference" was simply asking Dr. Wilson to summarize and recharacterize Erik's testimony in a way that did not require an expert. We find no abuse of discretion in the court's ruling.

b. Limitation on the Scope of Dr. English's Testimony

Erik argues that the trial court committed error by preventing Dr. English from testifying that in his opinion Erik had been sexually molested as a child.

The law is quite clear that a trial court may properly exclude an expert from testifying about the ultimate question of whether a witness is telling the truth about his particular claims. (*People* v. *Ainsworth*, *supra*, 45 Cal.3d at p. 1012.) *Ainsworth* holds that where the credibility of the complaining witness is at issue, and the sole purpose of the expert's

opinion is to buttress the credibility of that witness, the expert may not testify concerning the ultimate question of whether the witness is telling the truth. The purpose of Dr. English's testimony was to support the credibility of Erik's claim that he had been abused. We find no abuse of discretion in the trial court's decision not to allow Dr. English's testimony on this point.

c. Limitation on the Scope of Dr. Vicary's Testimony

Erik claims that the trial court improperly limited Dr. Vicary's testimony to surrebuttal and limiting his testimony to "general anxiety disorder" and its effect on people, but not allowing him to testify as to how this disorder might have influenced Erik.

Erik's defense counsel attempted to call Dr. Vicary as his last witness in his case-in-chief. The prosecution objected because the defense had already presented expert testimony regarding Erik's state of mind at the time of the killings. The defense indicated that Dr. Vicary would not offer an opinion as to Erik's state of mind at the time of the offense but would basically testify as he had at the first trial. The specific areas that Dr. Vicary would testify about included: (1) manner in which the history of molestation was presented to him by Erik and that Erik was reluctant to talk about it and didn't use the molestation as an excuse for the killing; (2) during his first interviews in 1990, Erik was depressed and anxious, with symptoms of panic attacks; (3) Dr. Vicary prescribed medication for Erik and his condition had improved; and (4) Erik had symptoms consistent with symptoms displayed by victims of molestation and PTSD.

The trial court found that Dr. Vicary's description of Erik's mental state in June of 1990 and thereafter was not relevant to the issue of what Erik's state of mind was at the time of the slayings. Dr. Wilson had already testified as to Erik's state of mind at the time of the slayings and the court said it would not allow this to be brought out again through Dr. Vicary, who was a "source witness" upon whom Dr. Wilson had relied in forming his opinions. The court found that the reliability of Dr. Vicary's notes and reports that were

used by Dr. Wilson were not attacked during the cross-examination of Dr. Wilson and would not be relevant.

During surrebuttal, Erik's counsel indicated her desire to call Dr. Vicary. The defense argued that the prosecution had introduced evidence in rebuttal regarding their theory as to Erik's mental state at the time of the homicides and Dr. Vicary believed it was wrong. The defense wanted Dr. Vicary to testify as he had in the first trial and to testify concerning the behavior of Erik about which Dr. Dietz had ignored.

The trial court ruled as follows: (1) Dr. Vicary's observations, opinions, and diagnosis of Erik's mental state at the time of the killings, relied upon by Dr. Wilson, were not disputed by Dr. Dietz and Dr. Vicary's testimony in this area would not be proper surrebuttal; (2) Dr. Vicary's diagnosis and opinions regarding Erik's mental state at the time of the homicides was cumulative to the testimony of Dr. Wilson and was excluded; (3) Dr. Vicary's testimony concerning general anxiety disorder was proper surrebuttal, but not testimony concerning PTSD, which had already been covered by Dr. Wilson; and (4) Dr. Vicary could not testify as to whether and how general anxiety disorder may have effected Erik although he was allowed to testify as to whether general anxiety disorder was an appropriate diagnosis when a person indicated the thing he feared the most was his parents.

The trial court did not allow Dr. Vicary to testify that there was a flaw in Dr. Dietz's method of diagnosing Erik as suffering from general anxiety disorder. That was a subject the trial court properly felt should have been handled during the cross-examination of Dr. Dietz. In addition, Dr. Vicary was not allowed to testify that research contradicted Dr. Dietz's description of hypervigilance and learned helplessness as those topics should have been covered during the cross-examination of Dr. Dietz.

The trial court did indicate to defense counsel that it would have permitted Dr. Vicary to testify during the defense case-in-chief if the defense had located any portion of the transcript showing the prosecution had attacked Dr. Vicary or his notes during Dr. Wilson's testimony. Defense counsel didn't supply the court with the requested citations to the record

and the issue was waived. (Cf. *People* v. *Hunt* (1982) 133 Cal.App.3d 543, 556 [objection abandoned when defendant refrained from producing requested points and authorities].)

In any event, we find no abuse in discretion in the trial court's ruling the mental state of Erik a year after the killing was not relevant to Erik's mental state at the time of the murders. It is not significant that Erik was depressed while in custody awarding trial for multiple murders.

d. Trial Court Preclusion of Dr. Hart's Testimony

The defendants contend that the trial court erred when it ruled that Dr. Hart's testimony was not probative on the issue of their mental states at the time of the homicides. Lyle contended that Dr. Hart would have indicated to the jury that Lyle was psychologically maltreated by his parents, the maltreatment caused him to develop BPS, and BPS directly affected his state of mind at the time of the killings. Erik contended that Dr. Hart's testimony was necessary so the jury could make an informed decision about whether or not he had been molested. Erik further argued that Dr. Wilson had relied on the expertise and information Dr. Hart had in order to support his own conclusions. The prosecution objected to the defendants calling more than one expert. The trial court precluded Dr. Hart from testifying because his testimony was not probative. After considering the defendants' offer of proof, the trial court ruled as follows with respect to Dr. Hart: "[T]he focus is on the defendants' state of mind, each defendant's state of mind at the time of the killings. And evidence of Dr. Hart as proposed is merely supportive of testimony of the other experts as to their findings that the defendants each suffered from either post-traumatic stress disorder or battered-person syndrome. They are entitled to rely upon Dr. Hart's report. They're entitled to rely upon his investigation. That doesn't make Dr. Hart a witness who is necessarily one who should testify just because other experts relied upon his information in his report."

We find that the trial court did not abuse its discretion when it excluded Dr. Hart's testimony as not being probative to the issue of the defendants' mental states at the time of

the killings. It is clear that the trial court has the authority to limit the number of experts and the trial court exercised its discretion in determining that the testimony would be cumulative. For example, Dr. Hart would have testified that the abuse inflicted upon the defendants caused them to suffer from PTSD and BPS. However, Dr. Wilson previously testified that Erik suffered from BPS and PTSD as a result of the abuse his parents inflicted upon him. Other witnesses, including Erik, had testified as to the alleged psychological abuse.

e. Trial Court Preclusion of Dr. Conte from Testifying

Lyle contended that the trial court erred by precluding Dr. Conte from testifying that Lyle suffered from BPS and this condition had an effect on his state of mind at the time he killed his parents.

Lyle bases his argument in part on the case of *People* v. *Humphrey*, *supra*, 13 Cal.4th at page 1087. However, as previously mentioned, *Humphrey* is distinguishable. There was no dispute as to the fact that Humphrey had been battered.

Lyle also relies on *People* v. *Aris*, *supra*, 215 Cal.App.3d 1178 and *People* v. *Day* (1992) 2 Cal.App.4th 405, for the proposition that expert testimony regarding BPS is relevant to a self-defense claim and therefore, Dr. Conte's testimony should have been allowed. However, in *Aris* and *Day* there was no dispute that the defendants had been abused.

We agree that expert testimony is helpful in establishing a claim of self-defense. It will help a jury to understand how a battered child might perceive imminent danger and will affect the battered child's credibility as a witness.

In the case at bar, Lyle and his counsel made a tactical decision not to testify. Lyle did not establish a proper foundation for Dr. Conte's testimony, specifically that Lyle was afraid of his parents on the night of the shootings. As a foundational matter for asserting the doctrine of imperfect self-defense, the evidence must show that the defendant actually

perceived an imminent danger before expert testimony may be admitted with respect to how a history of abuse might have affected the defendant's perception of danger.

The only preliminary fact supporting the admissibility of expert testimony as to Lyle was Erik's testimony that Lyle looked "scared" and was "shaking" moments before the murders were committed. Dr. Conte's testimony was inadmissible on the grounds that it lacked foundation. The issue of whether the foundational evidence is sufficiently substantial is a matter within the court's discretion. (*People* v. *Lucas* (1995) 12 Cal.4th 415, 466.)

The trial court determined that there was insufficient preliminary facts indicating that Lyle was afraid of his parents on the night of the shootings. The trial court ruled that expert testimony on this point would only be admissible as it related to Lyle's state of mind on August 20, 1989.

We do not find an abuse of discretion in the trial court's exclusion of Dr. Conte's testimony based upon the trial court's finding that a proper foundation was not laid for his testimony.

f. Trial Court's Exclusion From Evidence Why Dr. Wilson Believed the Oziel Tape was Unreliable

The defendants contend that the trial court violated their state and federal constitutional rights to due process and to present a complete defense by excluding the alleged unreliability of the December 11th tape-recording of their confessions.

The defendants' claim is without merit. The defendants rely on *Crane* v. *Kentucky* (1986) 476 U.S. 683. In *Crane*, the defendant sought to introduce evidence concerning the physical and psychological circumstances surrounding the confession. The *Crane* court held that although the trial court had made a pretrial ruling concerning the voluntariness of the confession, that did not prevent the defendant from attacking the reliability of the confession during the trial. The *Crane* court noted that if a defendant was stripped of the power to describe to the jury the circumstances that prompted his confession, he "is effectively

disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" (*Id.* at p. 689.) Nonetheless, even though the "blanket exclusion" of testimony concerning the circumstances surrounding a confession violates a defendant's right to a fair trial, the trial court still retains " 'wide latitude' " to exclude evidence that is repetitive, of marginal relevance, or poses an undue risk of prejudice or confusion of the issues. (*Id.* at pp. 689-690, quoting *Delaware* v. *Van Arsdall* (1986) 475 U.S. 673, 679.)

In the case at bar, the trial court allowed testimony concerning the circumstances surrounding the making of the Oziel tape. Erik testified in great detail as to the circumstances of the taping including that prior to making the tape, Dr. Oziel had begun to "blackmail" the defendants. Unlike in *Crane*, Erik was able to fully describe for the jury his account of the circumstances surrounding the making of the confession. In addition, Dr. Wilson was in effect being asked to testify that he believed Erik's story even after listening to the tape. This certainly is not a proper subject of expert testimony. (*People* v. *Ainsworth*, *supra*, 45 Cal.3d at p. 1012.)

We find that the trial court did not abuse its discretion in precluding Dr. Wilson from stating his opinion as to why he thought the Oziel tape was unreliable.

5. Attorney-Client Privilege with Attorney Chaleff and Psychotherapist-Patient Privilege with Dr. Oziel

Lyle contends that the tape-recorded session of December 11, 1989 with Dr. Oziel was protected by the attorney-client privilege and the psychotherapist-patient privilege. Erik joins in the argument.

a. Background

Prior to the first trial, the California Supreme Court ruled that the tape recording of the December 11, 1989 session between the defendants and Dr. Oziel was protected by the

psychotherapist-patient privilege. (*Menendez* v. *Superior Court* (1992) 3 Cal.4th 435.) However, the trial court ruled that under Evidence Code section 1016[21] the defendants had placed their mental and emotional condition in issue and the tape recording was admissible. The trial court also held that the December 11 tape recording was not inadmissible on the grounds of attorney-client privilege. The trial court ruled that the December 11 session was not a confidential communication between a client and a lawyer as defined in Evidence Code section 952.[22] The court found that it was a therapeutic session for the defendants.

Prior to the second trial, the parties relitigated the issue of whether the December 11 tape recording was protected by the psychotherapist-patient or attorney-client privileges. The trial court incorporated its prior ruling from the first trial and ruled that Evidence Code section 1016 precluded the defendants from asserting the psychotherapist-patient privilege in the second trial. The trial court also ruled that the defense had waived both the attorney-client and psychotherapist-patient privileges by playing the December 11 tape recording in

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21 Evidence Code section 1016 provides as follows: "There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: [¶] (a) The patient; [¶] (b) Any party claiming through or under the patient; [¶] (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or [¶] (d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient."

22 Evidence Code section 952 provides as follows: "As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer."

its case-in-chief in the first trial. The court's ruling was based in part on Evidence Code section 912.[23]

b. Attorney-Client Privilege

The trial court ruled that the defendants had waived the attorney-client privilege pursuant to section 912. The defendants put the tape into evidence only after the trial court had overruled the attorney-client privilege objection. We need not decide whether this constituted a voluntary waiver of the privilege because the trial court correctly ruled that the December 11 session was not a confidential communication between a client and a lawyer as defined in Evidence Code section 952.[24]

The burden is on the party claiming the existence of the privilege to show that it should be protected. (*San Diego Professional Assn.* v. *Superior Court* (1962) 58 Cal.2d 194.) Once the existence of the relationship is shown, communications made in the course of the relationship are "presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential." (Evid. Code, § 917.)[25] The law is also quite clear that the attorney-client

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23 Evidence Code section 912, subdivision (a) provides, in pertinent part: "[T]he right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), . . . [or] 1014 (psychotherapist-patient privilege) . . . is waived . . . if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone."

24 We note that the prosecution did not present this evidence, but rather defendants presented it voluntarily during their case. (Evid. Code, §§ 912, 919.)

25 Evidence Code section 917 provides: "Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential."

privilege attaches to a defendant's communications to a psychiatrist assisting the defendant's attorney. (*People* v. *Caro* (1988) 46 Cal.3d 1035, 1060, fn. 11.) The trial court after extensive in camera proceedings found that (1) an attorney-client relationship existed between defendants and Mr. Chaleff on December 11, (2) Mr. Chaleff attended the December 11 meeting, and (3) he gave defendants legal advice at that time. However, the court ruled that the December 11 session between the defendants and Dr. Oziel was not covered by the attorney-client privilege because "the tape-recorded session of December 11 was for the purpose of therapy." Since the purpose of the December 11 meeting was therapy, the court said the communications were not "confidential communications" within the attorney-client privilege.[26]

The defendants allege that the court was incorrect in looking at the purpose of the session with Dr. Oziel on December 11. We disagree. The critical factor for purposes of the attorney-client privilege with regard to the communication with experts is to determine if the communication is made in confidence to obtain legal advice from an attorney. (*Linde Thomson Langworthy Kohn & Van Dyke* v. *RTC* (D.C. Cir. 1993) 5 F.3d 1508.) There was substantial evidence to support the court's finding that the communication that the defendants had with Dr. Oziel on December 11 was not to obtain legal advice or a report from Dr. Oziel for purposes of litigation. The defendants had established a relationship with Dr. Oziel after the Calabasas crimes and had seen him on several occasions prior to the

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26 In the court's findings of act, the trial court stated: "The court finds that the tape-recorded session of December 11 was for the purpose of therapy. This finding is based upon the evidence presented to this Court. . . . [¶] The Court further finds that this session would have occurred whether or not the defendants had sought the advice of [attorney] Chaleff and regardless of what his advice had been in this matter. That the session occurred and what was said during the session were the product of the therapeutic relationship between the defendants and [Dr.] Oziel and not the product of the relationship the defendants had with [attorney] Chaleff. [¶] The Court further finds that the defendants and [attorney] Chaleff contemplated that a record of this therapy session could possibly be of use to them in defense of a criminal charge if one was later filed against the defendants, but that this was not the motivation for the session."

December 11 consultation. The scope of review of the trial court's decision is limited. The California Supreme Court states: " 'When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations].' " (*People* v. *Gionis*, *supra*, 9 Cal.4th at p. 1208.)

c. Psychotherapist-Patient Privilege

Evidence Code section 1014 provides for the psychotherapist-patient privilege.[27] However, under Evidence Code section 1016 there is no privilege if the patient tenders his mental or emotional condition as an issue in trial.[28] At the first trial, the defendants admitted killing their parents but sought a manslaughter conviction based upon their mental and emotional conditions. Since the defendants tendered their mental and emotional conditions as part of their defense at the first trial, the trial court held that the psychotherapist-patient privilege was lost at their second trial. The trial court properly allowed the prosecution to introduce the December 11, 1989 tape recording at their second trial.

In *People* v. *Clark*, *supra*, 5 Cal.4th 950, the court held that the defendant waived his attorney-client privilege of confidentiality of a defense psychotherapist by having the psychotherapist testify at a pretrial suppression hearing. This court has also held that there is no miscarriage of justice from the introduction in evidence in the guilt phase of a murder

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27 Evidence Code section 1014 provides in part that a patient, "whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ."

28 Evidence Code section 1016 provides in part that there is no privilege "as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: [¶] (a) The patient . . . ."

trial, of defendant's confession made to a psychotherapist, where the defendant had called the psychotherapist as his own witness in a prior criminal prosecution unrelated to the murder case and had elicited admissions from him. (*People* v. *Garaux* (1973) 34 Cal.App.3d 611.) In *Garaux*, the defendant had confessed to a psychotherapist, Dr. Solomon, appointed by the court at Garaux's request in an unrelated case in which he was charged with assault with a deadly weapon, burglary and attempted burglary. However, in view of the evidence presented by Garaux in an unrelated first trial where he called Dr. Solomon as his own witness and elicited the admissions from him, the court held that Garaux had waived any privilege in his subsequent murder case. We believe that the logic of *Garaux* and *Clark* to be sound and the trial court properly found a waiver of the psychotherapist-patient privilege by the defendants in the second trial as a result of their placing into issue their emotional and mental condition in the first trial.

6. Attorney-Client Privilege with Attorney Wright

Lyle contends that the trial court erred when it admitted into evidence confidential communications to attorney Randolph Wright which were protected by the attorney-client privilege. Erik joins in this contention.

On August 21, 1989, at approximately 11 a.m., Mrs. Clara Wright drove to the Menendez residence to pick up a tennis racket that her son had left with Erik at a tennis tournament. Mrs. Wright, who was unaware of what had happened, saw police activity at the residence. Mrs. Wright discovered that the parents had been killed and Erik said that they were trying to locate her husband, attorney Randy Wright. Mrs. Wright told Erik to come over at about 3 p.m. to talk to her husband. The substance of the Wrights' trial testimony was that the defendants appeared to be extremely concerned about the possibility of a new will existing in the family computer. Mr. Wright also testified about Lyle's statements about where he and Erik had been at the time of the shootings, and Lyle's speculation that the murders might have been Mafia-related.

The trial court found that there was an attorney-client relationship between Mr. Wright and Lyle and Erik. The court recognized the communications between Mr. Wright and Lyle and Erik were presumed to be confidential and the prosecution bore the burden of rebutting that presumption. The court held that the prosecution had carried its burden. The court ruled that the communications to Mr. Wright were not confidential because they were made in the presence of a third party, Mrs. Wright. Alternatively, the court ruled that the "crime-fraud exception" of Evidence Code section 956 applied.[29]

In order for the communication to be protected under the law, the communication must have been intended to be confidential. (*Price* v. *Superior Court* (1958) 161 Cal.App.2d 650.) When Erik and Lyle arrived at the Wright home around 3 p.m., Mr. Wright was not home. They talked freely to Mrs. Wright. Erik indicated that he wanted to get into the different files or compartments of the family computer located in the family home to see if there might be a new will in it. He told her that he and Lyle had checked the computer but neither of them were very good at computers. Mrs. Wright testified that Erik "was . . . very concerned about having a will in the computer." Mrs. Wright was also present at the time Erik and Lyle talked to Mr. Wright about probating the will. The trial court held that the presence of Mrs. Wright made the communications between Lyle, Erik, and Mr. Wright nonconfidential. The presence of necessary third parties such as secretaries, agents and messengers during a discussion with an attorney do not obviate the attorney-client privilege. However, Mrs. Wright was not exercising any of the roles while being present during the discussion with Lyle, Erik, and her husband. Since the communication was not confidential, we need not discuss the other basis that the trial court allowed the testimony, specifically pursuant to Evidence Code section 956.

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[29] Evidence Code section 956 provides as follows: "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

7. Exclusion From Evidence of 17-Page Letter Seized from Erik's Cell[30]

Lyle argues that because the prosecution's handwriting expert used the 17-page letter in testifying about the firearms transaction record, the letter is admissible. The defendants further allege that the letter is admissible as a "State of Mind" exception to the hearsay rule. Erik joins in this contention.

a. Prosecution's Handwriting Expert

The defendants' argue that they should have been entitled to introduce the letter into evidence because the prosecution's handwriting expert "relied" on the letter in reaching his opinion regarding the identity of the person who signed the firearm transaction record. (See Evid. Code, § 1417.)[31] However, the trial court properly ruled that the letter was not admissible to bolster the handwriting expert's opinion.

A defendant's statements are not hearsay and are admissible when relied on in forming opinions by a expert opinion. (*People* v. *Coleman* (1989) 48 Cal.3d 112.) In *Coleman*, relied upon by the defendants, the Supreme Court held that the prosecutor properly read certain reports to a defense psychiatrist during cross-examination and was allowed to refer to the reports in his closing argument to the jury. The court noted that the

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30 In the letter, Lyle made both incriminatory statements and statements which were exculpatory. In one passage he wrote that "[w]hat we did in Aug[ust] was a mistake for [*sic*] what I can tell and I dont [*sic*] know what to do about it." In another portion of the letter he stated that "[w]e did not do anything for the money." In a third passage he wrote, "[w]e alone know the truth--we alone know the secrets of our families [*sic*] past. I do not look forward to broadcasting them around the country. I pray that it never has to happen."

31 Evidence Code section 1417 provides as follows: "The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court."

reports were properly disclosed to the jury as matter relied upon by the psychiatrist in forming his opinion pursuant to Evidence Code section 721.[32] While this statute discusses the scope of an expert witness's cross-examination, it does not mention the introduction of written documents into evidence. Even assuming in certain situations, Evidence Code section 721 would allow the introduction of the letter since it was relied upon by the prosecution's expert in forming an opinion as to the signature on the firearm transaction form, it clearly became not relevant when Erik admitted he had signed the form. While it is certainly appropriate for the jury to hear about and even physically view in evidence documents relied upon by experts in forming an opinion as to a disputed issue or fact, there was no disputed issue or fact for the jury to consider concerning the signature on the firearm transaction form when Erik took the witness stand and admitted the signature was his. If the prosecution knew that Erik was going to admit the signature, then there would have been no reason to have called the handwriting expert as a witness in the prosecution's case-in-chief. Since trials are not scripted plays and the prosecution did not have the script of Erik's testimony, the handwriting expert's testimony and the basis for his opinion was relevant until Erik admitted signing the document in question.

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[32] Evidence Code section 721 states as follows: "(a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his qualifications, (2) the subject to which his expert testimony relates, and (3) the matter upon which his opinion is based and the reasons for his opinion. [¶] (b) If a witness testifying as an expert testifies in the form of an opinion, he may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless: [¶] (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his opinion; or [¶] (2) Such publication has been admitted in evidence."

b. State of Mind Exception to the Hearsay Rule

The defendants allege that the letter was admissible within the provisions of Evidence Code sections 1250 and 1252.[33] To be admissible per section 1252, the statement must be made in a natural manner and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are made at a time when the motive to deceive is lacking. (*People* v. *Edwards* (1991) 54 Cal.3d 787.) Lyle's letter was clearly written while in jail awaiting trial for a capital offense. While one passage of the letter was incriminatory, the bulk of the letter was exculpatory. While Lyle was awaiting trial in jail it is extremely likely that Lyle had a motive to deceive.

The Supreme Court has stated that hearsay statements of a declarant's then existing state of mind should be admitted only where they are shown to have been made under circumstances indicating that they are reasonably trustworthy and when they show primarily the then state of mind of the declarant and not the state of mind of the accused. (*People* v. *Howard* (1988) 4 Cal.3d 375.) In *People* v. *Livaditis* (1992) 2 Cal.4th 759, the court excluded several letters offered on behalf of the defendant because they were unreliable. The court found that the need for cross-examination was compelling and the defendant's sincerity in telling potential defense witnesses he was sorry was suspect.

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33 Evidence Code section 1250 provides as follows: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

Evidence Code section 1252 provides as follows: "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

The letter sought to be introduced into evidence related not to a declarant other than Lyle, but to the accused himself. The letter was properly excluded. To the extent that the letter was an attempt to determine Erik's state of mind at a particular time, the state of mind exception does not allow evidence about the beliefs of hearsay declarants to be used to infer the conduct of third persons. It also excludes other statements about the declarant's state of mind, i.e., intent, motive, etc. as evidence of a third person's conduct. The statements of Lyle in his letter to Erik would be inadmissible to show Erik's state of mind.

8. *Wheeler-Batson* Motions[34]

Erik alleges that the trial court improperly denied their *Wheeler-Batson* motions. The motions were made on the basis of gender bias against prospective female jurors. Lyle joins in this argument. We find no error.

Following a lengthy voir dire process,[35] the first 18 prospective jurors were seated, with only six of the randomly selected venire being women. The prosecutor exercised five of his first six peremptory challenges against the female jurors: prospective jurors numbers 1527, 1524, 1236, 1317, and 1202. The defense objected to the use of the peremptory challenges under *Wheeler* and *Batson* on the basis of gender. The trial court denied the motion finding that the defense had failed to make a prima facie showing of discrimination and that the answers given by the excused jurors in writing and orally provided a "good basis" for the prosecutor's peremptory challenges.

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34 *People* v. *Wheeler*, *supra*, 22 Cal.3d 258 and *Batson* v. *Kentucky* (1986) 476 U.S. 79.

35 Each prospective juror filled out a 19-page publicity questionnaire, comprised of 31 questions with numerous subparts; was individually questioned on publicity issues outside the presence of other prospective jurors; and filled out a 28-page general questionnaire, consisting of 143 questions with numerous subparts.

During the next day of voir dire, the trial court instructed the prosecutor to be prepared to place on the record the reason for excusing the female jurors for the purpose of appellate review. After the next round of peremptory challenges, the defense renewed the *Wheeler-Batson* motion. At this time, the prosecution had exercised 19 peremptory challenges, five against men and 14 against women. The defense challenged the prosecution's excusal of prospective female juror 1920 on the basis of gender bias. The court pointed out answers given by this juror in the questionnaire concerning abuse in her family would be a sufficient basis for excusing her.

The trial court found, based upon all of its observations, it was understandable why the prospective female jurors were challenged and that the challenges were not based on gender. The trial court found that the defendants had failed to make a prima facie case of discriminatory use of peremptory challenges. However, for purpose of making a record, the trial court did require the prosecutor to state his reasons for excusing prospective female juror 1920. The prosecutor indicated that she was excused because she had stated on the questionnaire, "I do know that [the defendants] were abused as children," and "I believe the brothers thought their lives were in danger, so they had no choice in committing the crime." In addition, the woman had seen her parents' abusive relationship, and had been seeing a therapist for depression.

Following another round of peremptory challenges, a jury of 12 was accepted and sworn to try the case. Of the 12 jurors, seven were male and five were female.

The prosecutor began his peremptory challenge in the selection of the six alternate jurors by excusing potential alternates 1135, 1425 and 1938, all women. The defendants again objected and argued that the prosecutor had excused the three prospective jurors because they were women. The defense observed that out of the prosecution's 24 challenges, only six had been exercised as to men. The trial court determined that the burden had shifted to the prosecution to explain the three challenges. After the prosecutor stated his reasons and the defense responded, the trial courted found that each of the

challenges were exercised based upon the responses of the jurors in the questionnaires and during the voir dire.

After another round of challenges, six alternate jurors were accepted and sworn to try the case. Of the six alternates, two were female.

The following day, the prosecutor stated for the record his reasons for exercising the peremptory challenges as to each female juror. The trial court found the prosecutor stated sincere and genuine reasons for exercising his peremptory challenges.

Erik argues that the trial court incorrectly found they failed to establish a prima facie case of gender-based use of peremptory challenges in their first two motions. In addition, as to all three motions, a comparative juror analysis of the prosecutor's stated reasons for exercising his peremptory challenges reveals a discriminatory use of peremptory challenges.

The right to a trial by a jury drawn from a representative cross-section of the community is guaranteed by article I, section 16 of the California Constitution. The procedural protocol for determining a *Wheeler* violation is as follows: "If a party believes an opponent is improperly using peremptory challenges for a discriminatory purpose, that party must make a timely objection and a prima facie showing that the jurors are being excluded on the basis of group bias. [Citation.] To establish a prima facie case, the moving party should first make as complete a record as possible: second, the moving party must establish that the persons excluded are members of a cognizable group: and third, the moving party must show a strong likelihood that the persons are being excluded because of group association. [Citations.] Once the moving party has established a prima facie case, the burden shifts to the other party to come forward with a race-neutral explanation related to the particular case to be tried. [Citations.]" (*People* v. *Fuentes* (1991) 54 Cal.3d 707, 714.) It is then the trial court's obligation to consider all the evidence to determine whether there exists a reasonable inference peremptory challenges have been used on the ground of group bias alone. (*People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 281.)

There is a presumption that the party exercising a peremptory challenge is doing so on constitutionally firm ground. (*People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 278.) The

presumption is capable of being rebutted only by a strong showing, not a mere inference, or not by simply the fact that more female jurors are excluded.

Second, the Supreme Court has consistently recognized it is the burden of the defendant pursing a *Wheeler* motion to show, as part of a prima facie case of group bias, a "strong likelihood" of exclusion because of a group association. (*People* v. *Garceau* (1993) 6 Cal.4th 140, 170-171.) A defendant may not simply rely upon exclusion of the group-associated prospective jurors in establishing "a strong likelihood" of removal because of group bias. (*People* v. *Howard*, *supra*, 1 Cal.4th at p. 1154.) Rather, a defendant should underscore "other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions." (*Ibid.*)

a. Lack of Prima Facie Case

We now turn to discuss whether the trial court properly found that the defendants did not establish a strong likelihood prospective female jurors 1527, 1524, 1236, 1317, and 1920 were challenged because of group association.[36] As to prospective female jurors 1527, 1524, 1236, and 1317, the basis for establishing a prima facie case cited by defendants' was: (1) there was nothing indicative in the questionnaires or in oral voir dire by the court or by the prosecution to justify the excusals; and (2) the prosecution used five of its first six peremptory challenges against women when the first 18-seated jurors were composed of 12 men and six women and the jury pool was 60 to 65 percent male. The defendants showing was clearly insufficient. The law is quite clear that because a trial judge's findings will turn on the evaluation of credibility, great deference is given to their findings. (*People* v. *Fuentes*, *supra*, 54 Cal.3d at p. 714.) The trial judge, having observed the voir dire, is in the

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36 On appeal, the defendants concede prospective female juror 1202 was properly excluded.

best position to determine under "all relevant circumstances" of the case whether there was a "strong likelihood" prospective jurors are being challenged "because of their group association." (*People* v. *Turner* (1994) 8 Cal.4th 137, 168.) The defendants also failed to establish a strong likelihood that juror 1920 was challenged because of her group association.

Even though the defendant may not be able to show a prima facie case, the trial court should not " 'blind itself to everything except defense counsel's presentation.' " (*People* v. *Davenport* (1995) 11 Cal.4th 1171, 1201.) The record clearly establishes that the trial court did not blind itself to the defense counsel's presentation in denying the *Wheeler* motions. The close connection to abusive relationships of prospective female jurors 1527, 1317, and 1920, the weak positions on the death penalty by prospective female jurors 1524 and 1236, and the confrontation with the police by prospective female juror 1317, adequately showed the reasons why the prosecutor would have challenged the jurors in question.

b. Comparative Juror Analysis

The defense contends that the court adopt a comparative juror analysis in its assessment of disqualification of the female jurors. We disagree.

In determining whether prosecutor's asserted race-and-gender neutral reasons for excusing jurors are pretextual, the court is not required to "reassess good faith" by analyzing whether the asserted reasons are also applicable to jurors who were not excused-comparative juror analysis is not required by state or federal constitution. (*People* v. *Dunn* (1995) 40 Cal.App.4th 1039.)

The California Supreme Court has concluded the use of comparative juror analysis to evaluate the prosecutor's stated reasons for peremptory challenges unrealistically ignores the variety of factors and considerations which go into an attorney's decision to select certain jurors while challenging others who appear to be similar. (*People* v. *Fuentes*, *supra*, 54 Cal.3d at p. 715; *People* v. *Johnson* (1989) 47 Cal.3d 1194, 1220.) "It should be apparent,

therefore, that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar." (*People* v. *Johnson*, *supra*, 47 Cal.3d at p. 1221.) The court is obligated to adhere to California Supreme Court authority. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

We also find that it is significant that the jury chosen to try the case included five women and the prosecutor still retained nine of its peremptory challenges at the conclusion of jury selection. We also believe it is significant that the defense did not exercise all of their peremptory challenges. The fact that the jury included members of the group allegedly discriminated against, while not conclusive, is an indication of good faith in exercising peremptories by the prosecutor. (*People* v. *Turner*, *supra*, 8 Cal.4th at p. 168.)

9. Evidence of Defendants' Post-Crime Spending and Related Activities

Erik contends that he was prejudiced by evidence of "post-crime spending" in violation of Evidence Code sections 1101 and 352.[37] Erik also contends that he was prejudiced by admission of Lyle's post-crime spending. Lyle joins in Erik's argument. However, Lyle has not submitted any authority to demonstrate how he was harmed or prejudiced by evidence admitted concerning his post-crime spending. Nonetheless, we find no error in the trial court's rulings concerning evidence of the defendants' post-crime spending.

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37 Evidence Code section 1101, subdivision (b), provides as follows: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Erik argued that the post-crime spending evidence was simply bad conduct evidence that the prosecution introduced in order to persuade the jury that Erik was a greedy brat who heartlessly killed his parents in order to gain access to the money he recklessly spent almost from the moment of their deaths. Erik contends that Evidence Code section 1101, subdivision (a) prohibits admission of "evidence of a person's character" and the post-crime spending evidence was inadmissible. However, the prosecution alleged that the evidence was admissible to show motive, intent and state of mind and thus admissible under Evidence Code section 1101, subdivision (b). We agree with the prosecution.

The jurors were instructed that evidence of each defendant's post-crime spending was to be used in the case only against that defendant. The trial court also gave the standard motive jury instruction.[38]

a. Post-Crime Spending Evidence Relevant to Motive, Intent and State of Mind

Motive is a material fact. (*People* v. *Sykes* (1955) 44 Cal.2d 166, 170.) It is well settled that motive is always relevant in a criminal proceeding. (*People* v. *Perez* (1974) 42 Cal.App.3d 760, 767.) As stated in *People* v. *Vidaurri* (1980) 103 Cal.App.3d 450, 461: "A defendant's motive—a state-of-mind fact—is relevant to prove that he committed the offense charged, including having the requisite intent, on the circumstantial-evidence-reasoning process than a person normally acts in conformity with his state of mind. The evidence thus avoids the proscription of Evidence Code section 1101, subdivision (a), against evidence of a defendant's commission of other crimes or bad acts whose *sole* relevancy is that of establishing a defendant's propensity or disposition to commit criminal

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38 The trial court instructed the jury as follows: "Motive is not an element of the crime charged and need not be shown; however, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will, therefore, give its presence or absence, as the case may be, the weight to which you find it to be entitled."

acts as proof that he committed the crime for which he is on trial, and becomes admissible under the exceptions set forth in Evidence Code section 1101, subdivision (b)." (Italics in original.)

Certainly, motive is extremely relevant in a murder prosecution. It may be relevant to show the degree of murder, or possibly reduce a murder to manslaughter or in some instances, be relevant to the argument of self-defense. In *People* v. *Gallego* (1990) 52 Cal.3d 115, a first degree murder and kidnapping prosecution, prior killings were admissible to prove motive and disprove the defendant's defense of diminished capacity.

In the present case, the motive evidence presented by the prosecution, greed, was certainly relevant to rebut the defense argument that the killings were done in the heat of passion. "[W]here a defendant is on trial for a crime in which pecuniary gain is the usual motive, evidence of the sudden acquisition of money by the defendant is admissible, even though the source of the money is not traced." (*United States* v. *Jackskion* (2d Cir. 1939) 102 F.2d 683, 684.) In *United States* v. *Kwitek* (7th Cir. 1972) 467 F.2d 1222, the federal court noted, "[e]xpensive trips, gambling and other instances of free spending and high living may be pertinent in crimes involving a motive of enrichment. Proof of prior impecunity is not necessary. Admission of this type of evidence is addressed primarily to the sound discretion of the Trial Judge." (*Id.* at p. 1225.) The evidence introduced was exactly the type mentioned in *Kwitek*, to wit, gambling trip to Lake Tahoe, trip to tennis tournament in Israel with private tennis coach, purchase of two Rolex watches and money clips, efforts to purchase million dollar residences, and purchase of expensive clothes and expensive automobiles.

During his trial testimony, Erik indicated that his father was concerned about Lyle's spending habits and was considering responding by changing his will. This testimony is certainly consistent with the prosecution's efforts to portray the defendants as greedy and after their parents' money.

Since the evidence admitted of the post-crime spending was relevant to the defendants' motive, intent, and state of mind, it was not inadmissible as character evidence

under Evidence Code section 1101. Evidence of a defendant's motive may be "critically important in showing a reason for [the] criminal behavior and in rebutting [a] claim of self-defense." (*People* v. *Pertsoni* (1985) 172 Cal.App.3d 369, 375.)

b. Trial Court Did Not Abuse Its Discretion Under Evidence Code Section 352

The trial court ruled that the post-crime spending was relevant evidence subject to an exclusion under section 352 of the Evidence Code. Evidence Code section 352 "reposes considerable discretion in the judgment of trial judges; their determinations will not be disturbed unless a clear abuse of discretion is shown." (*People* v. *Jacobs* (1987) 195 Cal.App.3d 1636, 1656.) The trial court weighed the probative value of the post-crime spending evidence against the dangers of prejudice, confusion and undue time consumption.

The probative value of the evidence was extremely great considering the prosecution's theory of greed presented to the jury. The evidence was relevant to the issues and although damaging to the defendants, it was not unduly prejudicial. The term prejudicial is not synonymous with damaging. Arguably, all evidence that is adverse to a defendant is damaging. However, damaging evidence is not excludable pursuant to Evidence Code section 352.

The spending evidence was not cumulative or remote. The trial court actually excluded some of the prosecution's offer of additional instances of post-crime spending that were not admitted at the first trial. The spending evidence was certainly not remote. The evidence offered occurred in a period of approximately six months, from August 1989 until February 1990. The remoteness of evidence may affect the weight but not the admissibility. (*People* v. *Ing* (1967) 65 Cal.2d 603, 612 [remoteness of 15 years affected the weight but not the admissibility of evidence of another offense offered to show a common scheme or plan].) In *People* v. *Daniels*, *supra*, 52 Cal.3d 815, the court allowed a prior bank robbery conviction in 1980, in which the defendant exchanged gunfire with police and was rendered a paraplegic, admissible to prove motive in the first degree murder of two police officers by

use of a firearm occurring two years later. Certainly, the trial court's allowance of post-crime spending evidence for a period of six months, starting within days of the murders, was not inadmissible as being too remote.

The defendants were not prejudiced by the admission into evidence of the other defendant's post-crime spending and related activities. The trial court was careful to admonish the jury that the post-crime spending evidence was admitted only as to the spending defendant and was further instructed that the presence or absence of motive was to be given the weight to which the jurors found it to be entitled.

10. Limitations on Erik's Testimony

Erik alleges that the trial court violated his state and federal constitutional rights to present a defense, to compulsory process, to due process, and to the protection from self-incrimination by finding that certain portions of his proffered testimony were irrelevant or the probative value was substantially outweighed by the prejudicial effect. Lyle joins in this argument. However, he has not submitted any argument as to how he was harmed by the evidentiary rulings. However, we find no error as to the court's rulings.

a. Direct Examination

Erik argues that the trial court improperly sustained prosecution objections to the questions about the rigors of defendant's tennis training offered to rebut the greed theory and that defendant led a life of leisure after the killings. In addition, Erik argues that the trial court improperly sustained objections to questions about Erik's knowledge of and involvement in the erasure of the contents of the family computer. However, the record indicates that Erik testified about being involved in tennis all his life, having various tennis coaches throughout his life, the type of training he received after the death of his parents in comparison to the training before his parents died and the reasons he hired Mark Heffernan,

the full-time coach hired after his parents death. Erik was also able to testify as to his lack of knowledge and involvement in the erasure of the contents of the family computer. Among other things, Erik testified that he did not know anything about the computer expert hired by his brother.

Erik argues that he was improperly precluded from testifying about his mother's bizarre and dangerous treatment of her children. However, Erik did testify about his mother's reaction to his performance on tests. He testified about his mother picking him up late and her reckless driving. Erik was also allowed to testify about his mother's violence and tantrums.

b. Cross-Examination

On cross-examination, Erik alleges that the trial court continued to preclude him from offering complete evidence to support his imperfect self-defense theory, specifically statements on the Oziel tape. Erik contends that he wasn't able to answer questions that he failed to bond with his mother. However, the testimony reflects that Erik testified that it was not true that he couldn't bond with his mother. Erik also argues that he wasn't able to explain the statement on the Oziel tape that he killed his mother out of mercy. However, Erik explained to the jury that it was Dr. Oziel who told him what to say on the tape about his mother's killing. Erik was also permitted to testify as to the reason the tape was made and what he was trying to say on the tape.

Erik was also able to testify as to how his life and the life of his brother were ruined by their father. Erik was also able to respond to the prosecutor's allegations that he made up the allegations of sexual molestation after he was in custody.

c. Redirect Examination

Erik alleges that the trial court improperly sustained prosecution objections to questions regarding Jose and Kitty's treatment of Erik. However, the record indicates that he was able to testify as to how his father treated him when the list of instructions prepared by his father was not followed. Erik was also able to testify about his father sexually molesting him. He was also able to testify as to how his mother treated him including his mother's lack of emotion and that she did not express any remorse for the way her husband treated Erik.

Erik also contends that he was precluded from clarifying subjects brought up by the prosecution on cross-examination. However, the record does not support Erik's allegation. He was able to clarify his testimony about the truthfulness of the Wrights's testimony on cross-examination.

Erik was also able to testify about his life and he did not know about imperfect self-defense but learned about it when he heard the court instruct the jury at the end of the first trial.

Any restrictions placed on the testimony of Erik certainly were not an abuse of discretion and were excludable under Evidence Code section 352. The restrictions did not violate the federal Constitution. The " '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' " (*People* v. *Fudge* (1994) 7 Cal.4th 1075, 1102-1103 quoting *People* v. *Mincey*, *supra*, 2 Cal.4th at p. 440.) The courts are vested with wide discretion under Evidence Code section 352 and the trial court's rulings will not be overturned on appeal unless there is an abuse of discretion.

Erik relies on *Rock* v. *Arkansas*, *supra*, 483 U.S. 44 to support his contention that the trial court placed unreasonable restrictions on his testimony. We disagree. In *Rock*, the Supreme Court held that Arkansas's per se rule excluding all hypnotically refreshed testimony infringed impermissibly on a criminal defendant's right to testify on his or her

own behalf. The per se rule excluding the testimony in *Rock* was clearly error. However, the justices in *Rock*, while holding that a State's evidentiary rules may not be arbitrary or disproportionate to the purpose they were designed to serve, did indicate that the right to present relevant testimony is not without limitation. The limitations placed upon Erik's testimony by the trial judge were neither unreasonable or arbitrary. While the right to testify on one's own behalf is one of the rights that "are essential to due process of law in a fair adversary process" (*Faretta* v. *California* (1975) 422 U.S. 806, 819, fn. 15), the right is not without limitation. "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Chambers* v. *Mississippi*, *supra*, 410 U.S. at p. 302.)

Erik argues that the trial court erred in not admitting a photograph of the woods where he had allegedly been molested. There was no dispute that the defendants had lived in a wooded area. The trial court, in its discretion, did not allow the photograph into evidence indicating that it was not relevant to the issue of the mental state of the defendants on the day they killed their parents.

Erik argues that the trial court improperly excluded from evidence a three-page essay dated December 10, 1982, which had been written by Lyle when he was a child. The trial court properly excluded the essay because it was hearsay (statements of Lyle) and in the exercise of discretion under Evidence Code section 352. The trial court felt that the probative value was weak because Erik had already testified about how his state of mind was affected by the essay.

Erik argues that the trial court improperly excluded a photograph of the defendants as children sitting on a boat in a lake. Erik argued that the photograph was necessary to show the size of the lake when his father dropped him off in the middle of the lake and forced him to swim to shore. However, the trial court did allow Erik to testify in detail as to his recollection of the incident, including a description of the lake.

Erik argues that the trial court improperly excluded a photograph of the cul-de-sac where the defendants lived when they were young. Erik argues that the photograph was relevant as evidence of the bicycle incident, when his father forced the seven or eight-year-old Erik to ride a new bicycle in the cul-de-sac and down a steep grade if he wanted to keep the bicycle. Erik rode the bicycle, but injured himself and his parents did not obtain medical treatment for him. The trial court, in the exercise of its discretion, ruled that the probative value of the evidence was substantially outweighed by the potential prejudice and undue consumption of time. The incident occurred approximately 10 or 11 years prior to the murders.

Finally, Erik argues that the trial court erred when it refused to allow Erik to testify on redirect examination about his understanding of the punishment he faced if he were convicted. The trial court indicated that the subject had been brought up on cross-examination when Erik volunteered information on the subject when he was asked about his motive in testifying before the jury. Further, the court found that it would be inappropriate for the jury to speculate on the issue of punishment in deciding the guilt of Erik.

11. Admission of Erik's Grand Theft and Residential Burglary in 1988

Erik maintains that the evidence was inadmissible under Evidence Code sections 1101 and 352. Erik also maintains that the trial court erred in admitting the evidence without "sanitizing" it by allowing the prosecution to introduce details of the crimes. Lyle joined in this argument. The prosecution maintained that the evidence was properly admissible as evidence of the defendants' relationship with their parents.

During the prosecution case-in-chief, the prosecution sought to introduce evidence that Erik had committed a grand theft and residential burglary in Calabasas in 1988. The trial court ruled that the evidence was not relevant during the prosecution's case-in-chief. During the testimony of Erik, the defense sought to preclude the prosecution from cross-examining him on the issue of prior crimes. The trial court held that the Calabasas evidence

was probative of the relationship between Jose and Erik, which the defense had put in issue during Erik's direct examination through extensive testimony about Jose's character and Erik's relationship with him. The trial court found that although "there is some prejudice" from the prior crimes evidence, that was outweighed by the probative value of the evidence.

The evidence clearly was not inadmissible character evidence precluded by Evidence Code section 1101, subdivision (a). The theory of the respective parties on the issue of the defendants' mental health at the time of the murders varied greatly. The prosecution's theory was that the defendants, motivated by greed, were guilty of first degree murder in the deliberate planning and murder of their parents with malice. The defense theory was that the parents had abused them and, therefore, they did not harbor the mental state necessary for first degree murder.

The Calabasas crimes were significant in determining the relationship between the defendants and their parents.[39] During the Oziel tape, Lyle referred to the Calabasas issue and the affect it had on their relationship with their father and how his father had cried after the incident. In addition, Erik even testified that one of the reasons his father spoke about eliminating him from his will was because of the Calabasas crimes.

While the evidence of the Calabasas crimes was relevant to determine the impact on the relationship with Erik and Lyle and their parents, the evidence is still subject to Evidence Code section 352 review. We find that the court in determining relevance and weighing the prejudicial effect of proffered evidence against its probative value, did not abuse its discretion in allowing the evidence of the Calabasas crimes.

Erik also argues prejudice resulted from the prosecution going into the details of the crimes, Erik's motive for the crimes and Jose's response. The prosecutor was allowed to explore the effect of the crimes on the relationship between the defendants and their parents. In fact, that was the relevance of the evidence. The prosecutor was allowed to question Erik

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39 The evidence showed that Erik participated in both Calabasas crimes, while Lyle only participated in one of the crimes.

on the amount of cash he took from one of the residences because it was relevant to show the crime was not a "juvenile prank." Cignarelli, who was also involved in the theft, testified that he wrote in his notes that he observed Erik remove $60,000 worth of property from the safe at the residence.

The trial court instructed the jury, on two occasions, that the evidence was to be considered solely for the purpose of determining the relationship the defendants had with their parents. The evidence was not submitted as bad character evidence which would have been inadmissible pursuant to Evidence Code section 1101, subdivision (a).

C. Instructional Rulings

1. Denial of Imperfect Self-Defense Instruction (CALJIC No. 5.17)

The defendants contend that the trial court erred in not instructing the jury on imperfect self-defense. The defense also contends that even if it was proper to refuse the imperfect self-defense instruction, their reliance on the belief that the instruction would be given warranted a mistrial. In effect, the defense believed that they were taken by surprise when the trial court refused to instruct on imperfect self-defense. The defense contends that the surprise deprived them of due process, the effective assistance of counsel, and the right to present a defense. We disagree.

The prosecution's theory as to Erik was that, even according to the facts testified to by Erik, there had been no showing of substantial evidence of a perceived "imminent danger" necessitating the use of lethal force in self-defense on his part. The prosecution argued with respect to Lyle, that in the absence of any testimony on his part, the record failed to contain substantial evidence that he perceived a necessity for the use of lethal force in self-defense.

The position of Lyle was essentially that circumstantial evidence could support a jury instruction regarding imperfect self-defense. Erik alleged that the doctrine did not contain an objective element with respect to the requirement of imminence of harm.

a. Propriety of Not Instructing on Imperfect Self-Defense Pursuant to CALJIC No. 5.17[40]

Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant actually but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter. (*In re Christian S.* (1994) 7 Cal.4th 768.)

In *People* v. *Aris*, *supra*, 215 Cal.App.3d at pages 1187-1188, the court defines imminence as follows: "The definition of imminence in California has long been well settled. 'A person whose life has been threatened by another, whom he knows or has reason to believe has armed himself with a deadly weapon for the avowed purpose of taking his life or inflicting a great personal injury upon him, may reasonably infer, when a hostile meeting occurs, that his adversary intends to carry his threats into execution. The previous threats alone, however, unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party. There must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his life or suffer serious bodily injury unless he

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40 The 1995 revision to CALJIC No. 5.17, a modified version of which was requested at the retrial provided as follows: "A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter. [¶] As used in this instruction, an "imminent" [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].]"

immediately defends himself against the attack of his adversary. The philosophy of the law on this point is sufficiently plain. A previous threat alone, and unaccompanied by any immediate demonstration of force at the time of the rencounter [*sic*], will not justify or excuse an assault, because it may be that the party making the threat has relented or abandoned his purpose, or his courage may have failed, or the threat may have been only idle gasconde, [*sic*] made without any purpose to execute it. On the other hand, if there be at the time such a demonstration of force . . . [indicating] that his adversary was on the eve of executing the threat, and that his only means of escape from death or great bodily injury was immediately to defend himself against the impending danger . . . .' (*People* v. *Scoggins* (1869) 37 Cal. 676, 683-684.) Understanding that the belief need *not* be reasonable for imperfect self-defense, the above quotation clearly sets forth the immediacy of the imminence requirement in California." (Italics in original.)

The doctrine of imperfect self-defense is "narrow." (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783.) It requires without exception that the defendant must have had an actual belief in the need for self-defense. Moreover, " '[f]ear of future harm — no matter how great the fear and no matter how great the likelihood of the harm — will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.' " (*People* v. *Humphrey*, *supra*, 13 Cal.4th at p. 1082, quoting *In re Christian S.*, *supra*, 7 Cal.4th at p. 783, italics in original; *People* v. *Sekona* (1994) 27 Cal.App.4th 443, 449.) " ' "[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*" . . . [¶] This definition of imminence reflects the great value our society places on human life.' " (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783, quoting *People* v. *Aris*, *supra*, 215 Cal.App.3d at pp. 1187, 1189, italics in original.)

In order to instruct a jury on imperfect self-defense, there must be substantial evidence presented by the defense to support such an instruction. We find no error in the trial court refusing to instruct on imperfect self-defense. Immediately prior to the shooting, the defendants left the area near the den when their parents went into the den and closed the

doors behind them. They retrieved their shotguns from their hiding places, ran out of the house and met at Erik's car (which was parked near the front of the residence). Instead of driving away from the residence, they then loaded their shotguns with buckshot ammunition, went back into the house, returned to the den and shot and killed their unarmed parents while they were in the den watching television.

Erik, also candidly testified, that the danger he thought existed "was in the future[,] when they came out of [the] room," and he knew that his parents could not shoot him and his brother through the walls of their home. In other words, there was not a danger of imminent harm because Erik and Lyle's parents could not kill them until they exited the den. Erik also testified that, on the day of the murders, his father never said that he was going to kill him.

The defendants cite a number of cases in support of the proposition that a reasonable jury could have found that an imminent danger was present. However, these cases are distinguishable.

In *In re Christian S.*, *supra*, 7 Cal.4th 768, the defendant began carrying a handgun after being physically and verbally harassed and threatened by the victim's friends for about a year. The victim, a so-called "skinhead" and possible gang member, chased the defendant down the beach on the day of the fatal shooting. The victim repeatedly threatened "to get him," and challenged defendant to fire his weapon. The victim halted his advance each time defendant pointed his gun at the victim. Finally, after additional taunting by the victim, the defendant shot and killed the victim from a range of at least 20 feet. The Supreme Court remanded the matter to the trial court, finding that if the defendant had an actual but unreasonable belief in the need to defend, he was entitled to the benefit of the doctrine. (*Id.* at p. 784.)

In re Christian S. is distinguishable from this case. In *In re Christian S.*, the victim chased the defendant, repeatedly taunting the victim and threatening to "get" him while the victim was only about 20 feet away. The events that led to the killing were not interrupted by brief physical separation, an entirely different set of circumstances from those in the

present case where Erik and Lyle left the residence, went to load their shotguns and then returned to the den to kill their parents.

Lyle cites the case of *People* v. *Lewis* (1960) 186 Cal.App.2d 585. However, *Lewis* is distinguishable. In *Lewis*, the victim pulled a gun on the defendant. The defendant kicked the victim, who fell backwards and hit his head. The blow to the head stunned the victim for several moments. The victim followed the defendant and yelled, " 'you can go nowhere; you cannot get away.' " (*Id.* at p. 595.) Defendant fled to a nearby barn, picked up a hatchet, ran back toward the victim and threw the hatchet at him. The victim later died from the hatchet wounds. The defendant did not testify at trial or call any witnesses, but relied on a theory of self-defense. He requested jury instructions on manslaughter and lesser included offenses. The trial court refused the latter requests, giving instructions only on self-defense and murder. The Court of Appeal reversed holding that "[t]aking the defendant's statements as true the jury could have found that the defendant acted under the influence of fear which was not reasonably justified by the circumstances." (*Id.* at p. 598.) In *Lewis*, the victim was in close physical proximity to the victim throughout the period of time immediately preceding the homicide. The defendant was basically trapped by an armed assailant who had previously fired a gun at him. The facts are a far cry from the instant case where the defendants' parents were in the den, unarmed, eating and watching television. Certainly, there are numerous distinctions from these cases and the present case. First, prior to being shot, Jose and Kitty did not make any movements which could in any way be interpreted as constituting commencement of an assault. Second, the victims were not armed and had not been armed at all during the day. Third, Erik and Lyle were able to separate themselves from any perceived danger by simply leaving the residence. Fourth, they had a reasonable means of escape in Erik's vehicle. Finally, Erik testified that the only danger he perceived on the day of the murders "was in the future" and not while his parents were in the den.

In *People* v. *Barton* (1995) 12 Cal.4th 186, the Supreme Court considered a voluntary manslaughter conviction in a case where a fatal shooting followed a traffic dispute. The defendant testified that just prior to the shooting, the victim swung at defendant with what

appeared to be a knife. The victim ignored the defendant's demand to drop the knife and then made a sudden movement toward the defendant forcing him to step backward. The prosecution evidence showed that the victim was unarmed and just before the shooting he moved away from, rather than toward the defendant, the Supreme Court found that the jury could reasonably conclude that the victim was unarmed, but that the defendant, his judgment clouded by his anger, unreasonably believed the victim was armed and trying to attack him. (*Id.* at p. 202.) "In *Barton*, the California Supreme Court stated as follows: "Because unreasonable self-defense closely resembles true self-defense, it is tempting to treat unreasonable self-defense as a "defense" as that term is used in [*People* v.] *Sedeno* [1974] 10 Cal.3d [703,] 716-717. Indeed in *People* v. *Wickersham* (1982) 32 Cal.3d 307 [] (hereafter *Wickersham*), this court erroneously yielded to that temptation. [¶] . . . [¶] Contrary to the statement in *Wickersham*, *supra*, 32 Cal.3d at page 329, 'unreasonable self-defense' is, as we explained earlier, not a true defense; rather it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder. Accordingly, when a defendant is charged with murder the trial court's duty to instruct sua sponte, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense. [¶] . . . This does not mean, however, that trial courts must instruct sua sponte on unreasonable self-defense in every murder case. Rather, the need to do so arises only when there is substantial evidence that the defendant killed in unreasonable self-defense, not when the evidence is 'minimal and insubstantial.' (*People* v. *Flannel* [1979] 25 Cal.3d [668,] 684.) [FN. 8] Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. (*People* v. *Flannel*, *supra*, 25 Cal.3d at p. 684.)" (*People* v. *Barton*, *supra*, 12 Cal.4th at p. 200 & fn. 8.) While Erik testified that at the time he entered the den,

he believed that his parents were about to kill him and Lyle's face was pale, drawn and he was frightened, this evidence was not substantial or sufficient to deserve consideration by the jury. There was no evidence that Jose or Kitty had guns on the day of the killings or at the time Erik and Lyle came into the den with loaded shotguns, and there was no evidence they were about to be killed which would warrant the giving of the requested instruction on imperfect self-defense.

The unreasonable belief of the defendant is subjective but it must be supported by sufficient facts or evidence introduced at trial to merit the jury instruction by the trial court. Thus the unreasonable subjective belief of the defendant must be supported by some objective basis that it existed, which is the evidence introduced at trial.

The case of *People* v. *Dixon*, *supra*, 32 Cal.App.4th 1547 illustrates the requirement of an objective element in order for the jury to be instructed on imperfect self-defense. The *Dixon* case established that there was no imminent peril as a matter of law even if an individual has an actual belief in the existence of such a peril. To satisfy the objective or "reasonable person" element of the imperfect self-defense test, the accused's heat of passion must be due to sufficient provocation. The *Dixon* case also establishes that the defendant is not permitted to fashion his own definition of the term "imminent" in the context of unreasonable self-defense. In this case, as were the facts in *Dixon*, an imminent peril was plainly "not present."

Erik's claim that the imperfect self-defense instruction should have been given because he began shooting both of his parents only after he saw his father "advancing toward him" is not persuasive. While Erik testified on direct examination that he began firing only after his father began walking toward him and Lyle, during cross-examination he said that he had "no idea if [Jose] took a step in my direction." Erik is not properly allowed to use this argument by creating the alleged "imminent peril."

In *People* v. *De Leon*, *supra*, 10 Cal.App.4th 815, the court in discussing the legal significance of the defendant not testifying stated: "Substantial evidence of a defendant's state of mind, including an 'honest but unreasonable belief in the necessity to defend against

imminent peril to life' (CALJIC No. 5.17), may be present *without* defendant['s] testimony. (*People* v. *Castillo* (1987) 193 Cal.App.3d 119, 126 []; *People* v. *Anderson* (1983) 144 Cal.App.3d 55, 62 [].)" (*Id.* at p. 824, original italics.) The fact that Lyle did not testify certainly did not preclude an instruction on imperfect self-defense if the direct or circumstantial evidence presented at trial warranted the instruction.

There is also another reason why the trial court would be justified in not giving the imperfect self-defense instruction as to Kitty The testimony of several prosecution witnesses and Erik tend to show that Lyle fired the fatal shotgun blast into his mother's face and head killing her after he and Erik had already shot her and Lyle left the house, went out to Erik's car, reloaded and reentered the residence, firing the fatal shots.

Even if the trial court erred in failing to give CALJIC No. 5.17 to the jury, the error was harmless. The jury was instructed on first degree murder, second degree murder, malice aforethought, voluntary manslaughter as to Jose on a heat of passion theory, the distinction between murder and manslaughter, and the requirement that the jurors were to find manslaughter as to Jose rather than murder if the jurors had a reasonable doubt whether the crime was murder or manslaughter. The jury was also given instructions on the special circumstance allegations of multiple murder convictions and murder while lying in wait. Since the defendants were found guilty of murder in the first degree and both special circumstances were found to be true, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendants.

Where it is possible to determine that despite an erroneous omission of an instruction on a lesser included offense, if the factual question posed by the omitted instruction is resolved adversely to the defendant under properly given instructions, he is not prejudiced by the omission. (*People* v. *Sedeno* (1974) 10 Cal.3d 703, disapproved on another point in *People* v. *Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) In *Sedeno*, the court held that it was error to fail to give a *sua sponte* instruction on involuntary manslaughter. However, the error was not prejudicial in the circumstances of the case since the jury, under the instructions given on first degree murder, necessarily found both that the killing was

intentional and that it was committed with malice. In *People* v. *Prettyman* (1996) 14 Cal.4th 248, the court also held that there was no error in not giving an involuntary manslaughter instruction when the jury was instructed on first and second degree murder and the jury convicted the defendant of first degree murder.

In *People* v. *Visciotti* (1992) 2 Cal.4th 1, 57, footnote 25, the court held that any error trial court committed in failing to instruct the jury on voluntary manslaughter was harmless where the jury found, under proper instructions, that the murder was intentional and was committed in the perpetration of a robbery, thus establishing that the killing was first degree murder under the felony-murder rule. The court has found harmless error where the jury finds a special circumstance allegation true such that the omitted instruction was deemed to have been resolved adversely to the defendant under other, properly given instructions. (*People* v. *Berryman* (1993) 6 Cal.4th 1048, 1081.) In *Berryman*, the special circumstance finding meant killing was necessarily felony-murder and the failure to instruct on involuntary manslaughter was harmless error.

As our Supreme Court has made clear: "It has been long held that voluntary manslaughter presupposes an intent to kill, but that, in spite of that intent, certain statutorily defined mitigating circumstances negate the element of malice aforethought. [Citations.] As we stated in [*People* v. *Brubaker* (1959) 53 Cal.2d 37]: 'Voluntary manslaughter is a willful act, characterized by the presence of an intent to kill, engendered by sufficient provocation and by the absence of premeditation, deliberation and (by presumption of law) malice aforethought.' [Citation.]" (*People* v. *Hawkins* (1995) 10 Cal.4th 920, 958-959.) The error, if any, was harmless because the jury found true the special circumstances that Erik and Lyle committed multiple murders while lying in wait and conspiracy to commit murder. This finding necessitated that the killings were deliberate and committed with malice. Premeditation, deliberation and lying in wait findings are factually inconsistent with

unreasonable self-defense voluntary manslaughter.[41] Thus, the factual question posed by the omitted instruction was necessarily resolved adversely to Erik and Lyle, under other, properly given instructions. (*People* v. *Sedeno*, *supra*, 10 Cal.3d at p. 721.)

b. Trial Court's Pre-Trial Comments Concerning Imperfect Self-Defense

At the first trial, at the request of the prosecution and defense, the trial court read a modified version of CALJIC No. 5.17 to the juries.[42]

During the pretrial stages of the retrial, the prosecution filed a motion to exclude evidence defendants sought to introduce with respect to the doctrine of imperfect self-defense. The prosecution argued that even from the defendants' own testimony at the first trial, there was no substantial evidence that the defendants killed their parents because they perceived an immediate danger.

During the pretrial hearing, counsel for Erik reminded the court of the "extraordinary nature of making a decision about instructions before there's been any testimony in the case." In response, the court noted the following: "That's clear, that nothing we are discussing relates to what will happen at the end of the trial by way of instructions. It is premature at this stage to do so. [¶] What we have been discussing is the People's objection to certain evidence and utilizing the evidence that was presented in the first trial as a very

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41 CALJIC No. 8.81.3, read to the jury, stated that the special circumstance could only be found true if at least one of the homicides was murder of the first degree.

42 As given to the juries in the first trial, CALJIC No. 5.17 provided as follows: "A person who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, or the commission of a forcible and atrocious crime, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person, in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of voluntary or involuntary manslaughter. Forcible sodomy is a forcible and atrocious crime."

detailed offer of proof by the defense as to what they would offer in the retrial, making certain assumptions that this is the evidence that would be offered in the retrial. [¶] Obviously, different witnesses may be called in the retrial and different testimony from the same witnesses might be elicited. There's no way of anticipating that. The only purpose of embarking on this analysis was to deal with the issues of relevance as to whether this sort of evidence that was subject to the People's objection is relevant to any potential issue in this case. And that's the only reason we've been discussing it. [¶] This is clearly an area of pretrial rulings on matters that are subject to change based upon things that actually develop during the course of trial."

The trial court also pointed out that the question of whether there was substantial evidence of imminent danger presented at the first trial was "a very close issue." The court went on to say that it was inclined to rule that there was substantial evidence to justify the imperfect self-defense instruction being given to the jury "understanding full well that these matters, as we've discussed, are made solely for the purpose of analyzing the issue of relevance of the proffered evidence."

Prior to closing argument, the trial court and counsel discussed jury instructions. The trial court ruled that Erik had failed to present substantial evidence of imminent peril as a matter of law, and CALJIC No. 5.17 would not be read to the jury. The court noted that its ruling applied to both defendants, but that Lyle was "in a much weaker position than Erik on the entire issue, based on the evidence that's been presented here."

We find that there was no "court-induced" ineffective assistance of counsel. The trial court, prior to the attorneys' closing arguments, stated that it would not read the instruction on imperfect self-defense. Each defense counsel knew before closing arguments which jury instructions would be given and were able to argue the case intelligently to the jury.

2. Jury Instruction on Overt Act Committed in Furtherance of Conspiracy

Lyle contends that the trial court's refusal to instruct the jury that it must unanimously agree on the overt act committed in the furtherance of the conspiracy was error. Erik joins in the contention. The defendants allege that the court's error violated their Sixth Amendment right to a jury determination beyond a reasonable doubt on every material fact essential to a conviction. The defendants did not assert that the failure to give the unanimity instruction was a violation of their federal constitutional rights in the trial court. Therefore, the federal argument is waived pursuant to *People* v. *Hines*, *supra*, 15 Cal.4th at page 1035. Nevertheless, we find no error on the part of the trial court.

When a defendant is prosecuted for a crime under several different legal theories, the trial court need not instruct the jury that it must unanimously agree on the legal theory upon which it convicts the defendant. (*People* v. *Failla* (1966) 64 Cal.2d 560, 567.) However, when a defendant is prosecuted for a crime under any one of several acts which alone is sufficient to constitute the offense, the trial court must instruct the jury that it must unanimously agree on the act constituting the offense. (*People* v. *Diedrich* (1982) 31 Cal.3d 263, 281.) In *Diedrich*, a bribery prosecution, the prosecution presented evidence of two separate violations of the bribery statute which occurred between January and April of 1973. The Supreme Court held that the trial court erred in failing to instruct the jury that it must unanimously agree as to at least one of the distinct acts of bribery before returning a verdict of guilt.

The jury is not required to agree on the theory of a crime or why a particular act is unlawful. In a prosecution for burglary, there is only one act that constitutes the offense, but the act may be presented to the jury on several different theories. To commit a burglary, the entry must be with the intent to commit a theft or any felony. The jury is not required to be instructed that they must unanimously agree on a specific felony before they can find the defendant guilty. The crime is the entry with the intent to commit a theft or any felony. The jury is, of course, required to unanimously agree that a felonious entry took place, but need

not agree on the specific felony intended by a defendant. (*People* v. *Failla*, *supra*, 64 Cal.2d at p. 569.)

In refusing to instruct the jury that it must unanimously agree on the overt acts on which the conspiracy is based, the trial court relied on *People* v. *Jones* (1986) 180 Cal.App.3d 509. The court held that the jury is not required to be instructed that it must unanimously agree on a particular overt act charged in the conspiracy. The *Jones* court held that although "[an] overt act [is] required to establish the existence of a conspiracy, [it] is not an actual element of the crime. . . ." (*Id.* at p. 516.) In a conspiracy case, the overt act goes to the theory of the crime. If more than one overt act is alleged, the jury need only agree that an overt act was performed (similar to the burglary analogy). The jury is not required to agree that a particular over act occurred, their only requirement is to agree that an overt act occurred.

The defendants rely on *People* v. *Ramirez* (1987) 189 Cal.App.3d 603. In *Ramirez*, the court reached an opposite result from the court in *Jones*. In *Ramirez*, the court held that trial courts must specifically instruct the jury that it must unanimously agree on the overt act upon which the conspiracy is based. However, the decision in *Ramirez* is wrong because it fails to recognize that "an overt act is an essential element in that it is the theory which proves a criminal conspiracy, rather than an element in the actual crime of conspiracy." (*People* v. *Von Villas* (1992) 11 Cal.App.4th 175, 235.)

The three alleged overt acts were: (1) defendants' purchase of the shotguns on August 18, 1989; (2) defendants' acquisition of the ammunition for the shotgun on August 20, 1989; and (3) Lyle's contacting Perry Berman by telephone on August 20, 1989, to arrange a meeting later that night to serve as an alibi.

With regard to overt acts (1) and (2), the facts demonstrating that those acts were performed were established through the testimony of Erik. These overt acts were not controverted or disputed by any other witness. In fact, Erik's account of purchasing the shotguns was consistent with the testimony of an employee of the sporting goods store where the shotguns were purchased. Concerning overt act (3), the facts showing the

occurrence of that act were established through the testimony of Perry Berman. Just as with overt acts (1) and (2), there was no testimony or evidence that was presented which controverted Berman's testimony.

In *Ramirez*, the court held that if there is a failure to give a unanimity instruction on the underlying offense, reversal is required when there is a reasonable possibility of jurors disagreeing as to the commission or nature of the overt act. (*People* v. *Ramirez*, *supra*, 189 Cal.App.3d at pp. 613-614.) Even using the *Ramirez* rationale on conspiracy, there was no evidence presented at trial which would controvert the overt acts alleged in the information and the conviction would be upheld under *Ramirez* or the standard of harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 21.)

3. Jury Instruction on Conspiracy to Commit Manslaughter

Lyle contends that the trial court's refusal to give a requested instruction on conspiracy to commit manslaughter was error.[43] Erik joins in this argument. We find that the crime of conspiracy to commit manslaughter does not exist.

Under section 182, a conspiracy "to commit any crime" is also a criminal offense. Section 182 also states "[i]f the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit the felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree." (§ 182, subd. (a).)

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43 Although not specified, the defendants mean voluntary manslaughter. Since the evidence is clear that the defendants intended to kill their parents, involuntary manslaughter is not an issue.

A criminal conspiracy is comprised of two or more persons conspiring to commit any crime, together with proof of the commission of an overt act by one or more of the parties to the agreement, in furtherance of the conspiracy. (§§ 182, subd. (a)(1), 184.) Conspiracy is a specific intent crime that divides into two elements: (1) the specific intent to agree (conspire); and (2) the specific intent to commit the offense which is the object of the conspiracy. (*People* v. *Swain* (1996) 12 Cal.4th 593, 600.)

In arguing that the trial court erred in failing to instruct the jury on the crime of conspiracy to commit voluntary manslaughter, the defendants rely primarily on the case of *People* v. *Horn* (1974) 12 Cal.3d 290, 296. In *Horn*, the defendants were convicted of unlawful manufacture of a fire bomb, arson and conspiracy to commit first degree murder. The defendants decided " 'to get rid of Elmer [Damron].' " (*Id.* at p. 293.) Horn met with four juveniles and offered to pay them $20 each to bomb or burn a house. The defendants and the juveniles went to a house and made several fire bombs. The defendants and the juveniles returned to the vicinity of Damron's house and the juveniles lit the bombs, threw them at the house and then ran away from the location to where a car was waiting to pick them up. The juveniles and the defendants were arrested a short time later.

During trial, the defendants in *Horn* presented evidence that at the time of the commission of the offenses, they were intoxicated to the extent that they lacked the capacity necessary to form malice aforethought. The defendants contended that the target offense of their conspiracy was voluntary manslaughter, not murder.

In *Horn*, the trial court did not instruct the jury that diminished capacity arising from intoxication could reduce a homicide to manslaughter.[44]

The Supreme Court in *Horn* held that conspiracy to commit murder was not always conspiracy to commit first degree murder. The court rejected the theory that "any

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[44] Prior to being abolished by statute in 1981, diminished capacity was a defense to all specific intent crimes. (See *People* v. *Cruz* (1980) 26 Cal.3d 233, 242.)

conspiracy to commit a homicide is, of logical necessity, a conspiracy to commit first degree murder." (*People* v. *Horn*, *supra*, 12 Cal.3d at p. 298.)

The court in *Horn* recognized that in *People* v. *Kynette* (1940) 15 Cal.2d 731, they had stated that ". . . 'a conspiracy to commit murder can only be a conspiracy to commit murder of the first degree for the obvious reason that the agreement to murder necessarily involves the "willful, deliberate, and premeditated" intention to kill a human being.' " (*People* v. *Horn*, *supra*, 12 Cal.3d at p. 298, quoting *People* v. *Kynette*, *supra*, 15 Cal.2d at p. 745.)

The question of the continued validity of *Horn* was raised in *People* v. *Swain*, *supra*, 12 Cal.4th 593. In *Swain*, the court expressly noted that the definition of premeditation existing when *Horn* was decided, as well as the defense of diminished capacity, have "passed into history." As a result, the *Swain* majority stated that: ". . . the rationale of *Horn*, *supra* [], would no longer afford any principled basis on which to distinguish between the mental state required for *conspiracy* to commit murder; the specific intent to agree and conspire with intent to kill -- and the mental state of *premeditated* first degree murder." (*People* v. *Swain*, *supra*, 12 Cal.4th at p. 608, italics in original.)

Justice Mosk, in his concurring opinion in *Swain*, opined that, "*Horn* has been wa[i]ting from the day it was decided," and even if *Horn* was good law when it was decided, "It is no longer." (*People* v. *Swain*, *supra*, 12 Cal.4th at pp. 615-616 (conc. opn. of Mosk, J.).) Justice Mosk's conclusion was based on the legislative abolition of diminished capacity as a defense and a change in the definition of premeditation. "*Horn* has been overruled for all practical purposes through the legislative abrogation of its premises. It is now a citation without substance. It falls of its own weight." (*Id.* at p. 617 (conc. opn. of Mosk, J.).)

Justice Mosk, in writing the dissent in *Horn*, some 22 years before *Swain*, was quite clear in stating that under California law there are no degrees of conspiracy. If defendants are charged with the crime of conspiracy, they are either guilty as charged or not guilty.

Conspiracy is a separate crime and needs to be determined by itself and without reference to the alleged mental capacity determined by consideration of the planned

subordinate felony. Conspiracy stands or falls on its own merits, without reference to the planned felony. The target offense of a conspiracy, such as murder, robbery, or burglary, may be divisible into degrees, a conspiracy is not.

Manslaughter is defined as the unlawful killing of a human being without malice aforethought. (§ 192.) A homicide is voluntary manslaughter if the unlawful killing occurred "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)), or while the killer was acting under the actual but unreasonable belief in the need to use deadly force to defend against an imminent threat of great bodily injury or death, also known as imperfect self-defense. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 771.)

Based upon the legal definition of conspiracy and manslaughter, in order for a defendant to conspire to commit voluntary manslaughter, he or she would apparently have to agree to kill in the future while under some form of heat of passion. This would be highly unlikely. "While a vivid imagination may be able to conjure up an agreement to have a sudden quarrel, it taxes credulity to suggest a conspiracy to kill in the heat of passion." (*People* v. *Horn*, *supra*, 12 Cal.3d at p. 304 (dis. opn. of Mosk, J.).)

A criminal conspiracy is simply two or more persons conspiring to commit a crime, with proof of the commission of an overt act by one or more of the parties to the agreement, in furtherance of the conspiracy. If a conspirator can agree to commit a target offense, and that target offense involves an unlawful killing, the offense necessarily contemplates a first degree murder. It is incongruous to believe that a person could conspire to kill at a future time, while under a heat of passion.

The trial court's refusal to give the requested instruction was proper.

4. Constitutional Sufficiency of the Lying-In-Wait Special Circumstance

Defendants were charged and the jury found to be true the special circumstance of lying-in-wait. (§ 190.2, subd. (a)(15).)[45]

Lyle contends that the lying-in-wait special circumstance is too vague to distinguish lying in wait from any other intentional killing. Lyle also claims that the lying in wait special circumstance violates the Eighth Amendment because it fails to narrow the class of murderers eligible for the death penalty. Erik joins in these arguments.

a. Due Process

People v. *Morales* (1989) 48 Cal.3d 527 discusses the requirements for a lying in wait special circumstance. The court held that physical concealment or ambush is not an element of the special circumstance. The concealment that is required may be either ambush or by creating a situation in which the victim is taken unawares, even though aware of the presence of the murderer.

Mere concealment of purpose is not enough, by itself to establish the special circumstance. Many "routine" murders are accomplished that way. The court in *Morales* stated the elements as follows: "But we believe that an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a

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45 Section 190.2, subdivision (a)(15) states: "The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been found under Section 190.4, to be true: [¶] . . . [¶] (15) The defendant intentionally killed the victim while lying in wait."

special circumstance." (*People* v. *Morales*, *supra*, 48 Cal.3d at p. 557.) While the court stated that whether a lying-in-wait murder has occurred is often difficult to determine and needs to be analyzed on a case by case basis, looking at all of the facts and circumstances. The court held that a lying-in-wait murder is the type of aggravated killing which would justify society's most severe penalty.

The *Morales* case was followed in *People* v. *Edwards*, *supra*, 54 Cal.3d 787. The court reiterated that concealment of physical presence was not required and that concealment of purpose alone would be sufficient. *Edwards* also rejected the defendants' argument that the lying-in-wait special circumstance was unconstitutionally vague because it did not " '. . . provide notice, guidance or any principled method to identify a class of murderers that are more deserving of death.' " (*Id.* at p. 824.) The defendants argument in this case that the special circumstance is "too vague to distinguish lying-in-wait from any other intentional killing" is almost identical to the argument rejected by the California Supreme Court in *Edwards*.

The defendants also cite cases where the lying-in wait special circumstance should have been filed, but according to defendants, was not filed. (*People* v. *Rosenkrantz* (1988) 198 Cal.App.3d 1187, 1193-1195 [victim waited for hours outside victim's residence armed with an Uzi; victim emerged, was confronted, and shot in the chest]; *People* v. *McKinzie* (1986) 179 Cal.App.3d 789, 791-792 [at night, defendant called victim over to kitchen window, spoke to her, then shot her three times through the window].)

The fact that the lying-in-wait special circumstance has not been used more widely in the past is certainly not a basis for finding that the trial court erred in the present case by instructing the jury on the special circumstance or the jury was incorrect in finding the special circumstance as to both defendants to be true. While trial courts and defense attorneys may desire, in certain cases, to determine the charges or allegations to be filed by the prosecuting agency, until the law changes, it is the province of the prosecutor to make the filing decisions. If the charges and the allegations survive procedural attacks such as a

section 1118.1 motion, then the trier of fact is to determine the guilt of the defendant and the validity of the special allegations on a case by case basis.[46]

b. Eighth Amendment

In *People* v. *Sims* (1993) 5 Cal.4th 405, 434, the California Supreme Court rejected the claim that the lying-in-wait special circumstance violates the Eighth Amendment to the United States Constitution: "In order to avoid the United States Constitution's Eighth Amendment proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' [Citation.] Defendant contends that the lying-in-wait special circumstance, if interpreted to apply to the facts of this case, does not provide a meaningful basis for narrowing the class of murders for which the penalty of death may be imposed. We previously have rejected the same contention, however, with respect to analogous facts and circumstances [citations] and again conclude that the lying-in-wait special circumstance, as interpreted in this and previous decisions, has clear and specific requirements that sufficiently distinguish from other murders a murder committed while the perpetrator is lying in wait, so as to justify the classification of that type of case as one warranting imposition of the death penalty." (*Ibid.*, citing *Furman* v. *Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.); *People* v. *Edwards*, *supra*, 54 Cal.3d at p. 824; *People* v. *Morales*, *supra*, 48 Cal.3d at pp. 557-558.)

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46 Section 1118.1 states in relevant part: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

We find no error or constitutional infirmity in the lying-in-wait special circumstance found to be true as to both Erik and Lyle.

5. Factual Sufficiency of the Lying-In-Wait Special Circumstance

Lyle contends that even if the lying-in-wait special circumstance is constitutional, substantial evidence was not present to show that the defendants (1) physically concealed themselves (2) for a substantial period of watching and waiting before they murdered their parents. Erik joins in these arguments.

The jury was properly instructed with CALJIC No. 8.81.15, Special Circumstances -- Murder While Lying in Wait.[47] The record does not indicate that the defendants requested the instruction be modified to require them to be *physically* concealed. Since the defendants did not request this modification, their claim on appeal is waived. (*People* v. *Daya* (1994) 29 Cal.App.4th 697, 714.) Regardless, the law does not require physical concealment, but only "concealment of purpose." (*People* v. *Morales*, *supra*, 48 Cal.3d at pp. 554-557.)

The defendants claim that the jury was not instructed that the watching and waiting had to occur for a "substantial" period of time. However, the jury was so instructed as evidenced by CALJIC No. 8.81.15. The defendants did not seek any modification of the instruction from the trial court. The instruction is appropriate and taken from *People* v. *Morales*, *supra*, 48 Cal.3d at page 557.

The defendants claim that even if the lying-in-fact instruction can pass constitutional muster, the evidence does not support the allegation. We disagree. The trial court, at the time of the section 1118.1 motion ruled that there was sufficient evidence for an appellate

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47 CALJIC No. 8.81.15 states in relevant part: "[W]hen a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established."

court to sustain the jury's finding of the truth of the lying-in-wait special circumstance. The evidence at trial clearly showed that the defendants purchased the shotguns in San Diego two days before the murders, premeditated during that period of time, waiting for an opportune time to strike, specifically at 10 p.m. on a Sunday evening while Jose and Kitty were unarmed, watching television, eating and possibly going over Erik's application to UCLA which was found on the table in the den.

D. Prejudice Arguments

1. Judicial Bias Affecting Due Process and a Fair Trial

Defendants allege that the bias arises from the unique circumstances of the case and the difference between the conduct in the first trial and the conduct in the second trial. The defendants' allegations appear to be based on the premise that because the trial judge excluded certain evidence or ruled differently on certain issues during the retrial, the trial judge is biased against defendants. Defendants do not cite any portion of the record wherein they objected to a ruling based upon judicial bias and, therefore, any issue relating to judicial bias is waived. (*People* v. *Davenport*, *supra*, 11 Cal.4th at p. 1196 ["Defendant never challenged the trial judge on the ground that he was biased; hence he has waived any such claim."].) In any event, we find no judicial bias.

The law is quite clear that while unfavorable rulings by a trial judge may constitute grounds for reversal if they amount to error, unfavorable rulings do not demonstrate bias or prejudice on the part of the trial judge. In fact, repeated rulings against a litigant, no matter how erroneous and how vigorously and consistently expressed, are not a basis for disqualification of a judge on the ground of bias and prejudice. (*United States* v. *Shibley* (S.D. Cal. 1953) 112 F.Supp. 734.) Undoubtedly, in the course of a trial, many rulings are unfavorable to a litigant, but much more is required than unfavorable rulings to support a claim of judicial bias.

The defendants complain about the trial court's discretionary evidentiary rulings pursuant to Evidence Code section 352. There was no abuse of discretion as to these rulings and the rulings do not show that the trial judge was biased against defendants In fact, even if the bulk of the trial judge's discretionary rulings were unfavorable to the defense that does not mean that the judge used a double standard. (*People* v. *Alcala*, *supra*, 4 Cal.4th at p. 798.)

Defendants allege that because the rulings were different in the second trial, the trial judge must be biased. This simply is not true and not supported by the record. As stated in *U. S.* v. *Zuno-Arce* (9th Cir. 1995) 44 F.3d 1420, 1423, "[r]arely will a retrial produce exactly the same evidence as the first trial . . . ." There certainly were differences between the first and second trial. At the second trial, Lyle did not testify, Dr. Oziel did not testify, some defense witnesses were precluded from testifying and the scope of the testimony of other defense witnesses was limited. The difference in the trials was due in large part to another prosecution team that had the benefit of using the first trial as a learning tool in determining how to approach the retrial. The trial judge also, upon reflection, could have determined, that prior rulings were incorrect.

The trial judge exercised appropriate control during the course of the difficult proceedings. It certainly is the duty of the trial judge to control the proceedings and to limit the introduction of evidence and argument of counsel to relevant and material matters, with a view to the expeditious determination of the truth. (*People* v. *Blackburn* (1982) 139 Cal.App.3d 761, 764.) The trial judge also gave the jury the standard instruction (CALJIC No. 17.30) which informed the jurors that he had not intended to suggest what facts should be found, or it believed or disbelieved any witness, and further, if anything he had done seemed to so indicate, the jurors were to disregard it and form their own conclusions.

Erik also argues that the trial judge was biased against him because the trial judge was "periodically critical and chastising" his lead counsel. We do not find that the judge acted in an unduly harsh manner toward Erik's counsel, in fact, it appears that the judge was extremely "thick of skin and long of fuse" and exercised the patience of Job. At one point,

the court merely asked counsel if her apology was sincere after she, while in the presence of the jury, moved to strike what she characterized as the prosecutor's "smart-ass remark."

Even assuming a trial judge's excessively harsh criticism of counsel, the United States Supreme Court has stated that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." (*Liteky* v. *United States* (1994) 510 U.S. 540, 555.) The Supreme Court in *Liteky* even went on to state that bias or partially is not established by "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." (*Id.* at pp. 555-556.)

In *Liteky*, the Supreme Court noted that a trial judge after completion of evidence may be exceedingly ill disposed towards a defendant. However, the judge is not thereby recusable for bias or prejudice since his knowledge was acquired during the course of the proceedings. The *Liteky* court also went on to make the following observation: "Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." (*Id.* at p. 551.)

The cases cited by the defendants are distinguishable. In *People* v. *Fatone* (1985) 165 Cal.App.3d 1164, the Court of Appeal held that the trial court's consistent pattern of unjustified abuse of defense counsel before the jury, combined with a number of mistaken legal rulings, deprived the defendant of a fair, impartial trial. The comments of the trial judge in *Fatone* were belittling and inappropriate. In the case at bar, the trial judge did not belittle or humiliate any counsel.

In *People* v. *Zammora* (1944) 66 Cal.App.2d 166, the trial judge committed prejudicial misconduct by making undignified and intemperate remarks casting the defense counsel in an unfavorable light. The trial judge also implied that counsel would resort to

unethical practices in presenting a defense. Clearly, the practices in *Zammora* were inappropriate and not at all like what happened in these very lengthy proceedings.

Finally, this case is nothing like *U. S.* v. *Van Dyke* (8th Cir. 1994) 14 F.3d 415. In *Van Dyke*, the trial judge "repeatedly interrupted defendant's testimony, often taking on an impeaching air and/or bolstering the prosecution's case." (*Id.* at p. 418.) The judge also took over questioning on behalf of the prosecutor possibly giving the jury the impression that the judge and the prosecutor were working toward the same goal. The trial judge in the present case showed no bias toward either side.

2. Defendants' Allegation of Judicial Error or Prosecutorial Misconduct

Lyle argues that the prosecutor and the trial court committed a series of errors during the prosecutor's summation which denied his due process right to a fair trial. Lyle alleges repeated misconduct by allowing the prosecutor to argue to the jury that defendants should be convicted because of the absence of evidence which the trial court had excluded at the prosecutor's request. Erik joins in this argument. We disagree.

The principles governing a prosecutor during trial are clear. "The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.) The law is also quite clear that a prosecutor "has broad discretion to state [his or her] views as to what reasonable inferences may or may not be drawn from the evidence" (*People* v. *Mitcham*, *supra*, 1 Cal.4th at p. 1047) and "to urge whatever conclusions he [or she] deems proper." (*People* v. *Thomas* (1992) 2 Cal.4th 489, 526.)

The prosecutor's opening argument took approximately three and one half days and the rebuttal argument approximately one half day. Lyle challenges certain remarks made by the prosecutor in the opening and rebuttal arguments.

During the second day of argument, the prosecutor told the jury that Jose was neither a harsh nor a ruthless man towards his sons. He was a patient man and was a loving father who was not the "kind of man [that] would be abusing his sons." The prosecutor stated that Jose loved both Lyle and Erik and wanted to "nurture their development." The prosecutor also stated Jose was not a punitive man.

The prosecutor's argument was based upon evidence before the jury. The evidence presented at trial was that Jose cried about Erik's involvement in the Calabasas crimes and Lyle's failure at Princeton and Jose forgave his sons for their transgressions. These acts by Jose was evidence that allowed the prosecutor to argue that Jose loved his sons and was not the type of person who would abuse his sons.

During the third day of argument, the prosecutor stated that the defense was seeking to scrape the bottom of the barrel to find abuse. The defense argued the prosecutor's argument was improper because there was substantial evidence of abuse which the defense was not allowed to present. The trial court did admonish the jury to disregard this remark by the prosecutor and the jury is presumed to have followed the court's admonition to disregard the comment. (*People* v. *Delgado* (1993) 5 Cal.4th 312, 331.)

During the last day of argument, defendants complain about four comments the prosecutor made: (1) the defendants were on "automatic pilot"; and didn't call a mental health expert; (2) no convincing proof sexual abuse took place; (3) nude photographs; and (4) the rock throwing incident.

a. Automatic Pilot Comment

The prosecutor stated that defendants were on "automatic pilot" the night they killed their parents and Lyle didn't even call a mental health expert. We find that this was not improper argument and the prosecutor drew a reasonable inference from the evidence. Counsel is certainly given broad discretion to state his or her views. (*People* v. *Mitcham*,

supra, 1 Cal.4th at p. 1047.) It is up to the jury to accept or reject the views presented by counsel in argument as they are the ultimate triers of fact in any jury trial.

There certainly was sufficient evidence for the prosecutor to argue that defendants' theory was simply not believable, i.e., that at the same moment Erik and Lyle decided that their parents were able to kill them while in the den and they were unable to escape.

The proffered testimony of Dr. Hart that was excluded by the trial court at the request of the prosecution would have simply been presented to explain why Lyle thought the way he thought. Dr. Hart's proposed testimony on battered person syndrome would not have been able to prove what Lyle was thinking on the night his parents were killed. The prosecutor was commenting on the state of the evidence as presented by Lyle, i.e., lack of evidence of Lyle's state of mind at the time of the murders. (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 446.) As to Dr. Conte, the trial court did not feel that a proper foundation had been laid for the introduction of Dr. Conte's testimony and absent that foundation, his testimony was inadmissible.

b. No Convincing Proof Sexual Abuse Took Place

The prosecutor argued: "A great deal of evidence was presented concerning the allegations of sexual abuse, and as I indicated, there is no evidence whatsoever that the sexual abuse ever took place." The prosecutor was simply commenting on the state of the evidence before the jury. This is permissible argument. The proffered testimony of defendants would not have established sexual abuse. In addition, a witness called by the defense, Dr. English, specifically testified that there was no physical evidence of sodomy upon an examination of Erik.

The case of *People* v. *Varona* (1983) 143 Cal.App.3d 566 cited by Lyle is inapposite. In *Varona*, a rape case, the defendants attempted to introduce evidence that the complaining witness had earlier pled guilty to prostitution and was on probation at the time of the trial. The evidence was excluded. In his argument to the jury, the prosecutor argued that there

was no evidence that the woman was a prostitute. This clearly was misconduct in arguing a falsehood when he knew the woman was a prostitute and the defense was ready and willing to produce the proof. In *Varona*, the prosecutor knew that the defense had the proof and was willing to present it except for the fact that the evidence had been excluded. Here, the excluded evidence would not have established what defendants wanted to show, that they had sexually abused by their parents. Dr. Hart would have testified as to the parenting methods of Jose and Kitty and Dr. Conte would have testified as to his diagnosis of Lyle as a battered person.

c. Nude Photographs

Lyle challenges the prosecutor's argument concerning the allegation that Jose took nude photographs of the defendants when they were children. Concerning these photographs, the prosecutor stated "[t]here is no corroboration of sexual abuse" because there was no proof of the identity of the photographer.

The prosecutor's argument that there was no proof of the photographer's identity, despite the defense's unsubstantiated allegation Jose took the photographs, did not corroborate the defendants' claim of sexual abuse. This was permissible argument.

d. Rock Throwing Incident

Lyle challenges the prosecutor's discussion of a rock-throwing incident and Jose's reaction to Lyle's injury. The fact that Jose's reaction, merely sending Alan Anderson to his room, revealed that Jose was restrained and forgiving was certainly a proper argument and reasonable inference to be drawn from the evidence presented at trial.

Lyle also challenges portions of the prosecutor's rebuttal argument. During rebuttal, the prosecutor argued that there was "no evidence" presented that Jose was abusive. The prosecutor asked the jury "where . . . do we have evidence of physical and sexual abuse?"

Over the objection of the defense, the prosecutor told the jury that ". . . in this whole trial you did not hear any evidence, other than from Erik [], of . . . physical and sexual abuse." The prosecutor further argued that the physical and sexual abuse "wasn't proven here in court."

The rebuttal is proper if made in response to arguments of defense counsel. (*People* v. *McDaniel* (1976) 16 Cal.3d 156, 177.) Defense counsel argued that there was evidence of sexual molestation as to both Erik and Lyle. Defense counsel also argued that Jose was physically abusing his sons. The prosecutor's argument questioning the evidence of sexual abuse, constituted an invited response in rebuttal. (*Ibid.*)

Lyle also argues that the trial court improperly denied his motion to reopen the defense following objections to the prosecutor's statements on the second day of opening argument.

The trial court has broad discretion to reopen a case and allow the introduction of additional evidence. (*People* v. *Goss* (1992) 7 Cal.App.4th 702, 706.) A motion to reopen a criminal case is reviewed on the abuse of discretion standard. (*People* v. *Marshall* (1996) 13 Cal.4th 799, 836.) We find no abuse of discretion.

The defense request to reopen came at a very late stage in the proceedings, after all the evidence had been presented and the prosecutor was in the second day of his opening argument. The evidence that the defense wanted to introduce, i.e., testimony from Peter Cano, Diane Vandermolen, and Dr. Hart, was not new evidence. The cases cited by the defense related primarily to new evidence. The question of the admissibility of the proffered testimony has been discussed in detail previously.

3. Defendants' Allegation of Cumulative Prejudice

Erik argues that they were deprived due process and a right to a fair trial by the following: (1) trial court exclusion of Lyle's videotaped first trial testimony; (2) trial court's refusal to instruct the jury on heat of passion as to Kitty; (3) trial court admission of

the "escape" plan into evidence; (4) prosecution's cross examination of Dr. Wilson; and (5) prosecutor's improper argument. Lyle joins in these arguments.

a. Exclusion of Lyle's Videotaped Testimony from the First Trial

Lyle elected not to testify in the second trial so Erik attempted to introduce the videotape of Lyle's prior testimony. Erik alleges that the trial court erred in ruling that Erik could only present the transcript of Lyle's prior testimony and not the videotape. We disagree.

While the videotape would normally be the best evidence of Lyle's prior testimony, the trial court, exercising appropriate control of the proceedings, decided not to allow the tape to be admitted into evidence. The reason the videotape was not allowed by the trial court related to several problems with the videotape. The camera was focused on things other than Lyle when he testified such as exhibits and other individuals in the courtroom. When the videotape was edited by Erik, there were 38 "blockouts" (portions of the videotape Erik "blocked out" when the camera was not focused on Lyle) in the first two-thirds of the first of five videotapes of Lyle's testimony. There was also a problem with the equipment when the videotapes were shown to the trial court. Based on the large number of "blockouts" and the editing process, the jury would not have been able to adequately determine the credibility of Lyle.

Erik alleges that the court erred in making the same ruling with respect to the audio transcript. We disagree. The trial court found that the audio presentation would be "too cumbersome and too difficult for this court to assume that it will work effectively and not create distractions, and unfairly emphasize testimony." The procedure to present the audio portion would have involved extensive editing to delete objections. The trial court properly exercised its discretion when it also refused to allow the audio portion of Lyle's previous trial testimony to the jury. After the trial court rule that the videotape testimony would not

be allowed, the defense made a tactical decision not to request that the transcript of Lyle's previous trial testimony be read to the jury.

The case cited by Erik is inapposite. *U. S.* v. *Mejia* (9th Cir. 1995) 69 F.3d 309, involved a situation where a suppression hearing was started before a judge who became ill and the hearing was reassigned to another judge. The second judge decided that he would start the hearing from scratch. When it was determined that two witnesses who had testified in the initial hearing would not be available until the next court day, the judge denied a request for continuance and considered the prior testimony of the witnesses from the previous hearing. It clearly was error for the judge to not grant a one day continuance in order to have the presence of live witnesses to personally judge their credibility. However, in the instant case, the trial court properly found that there were significant flaws in the prior videotaped testimony of Lyle and excluded it. The prior videotaped testimony, with the numerous problems would not have presented a satisfactory way for the jury to judge the credibility of Lyle's prior testimony.

Pursuant to section 1044, the trial court has the discretion to control the proceedings.[48] We find no abuse of discretion as to the trial court's ruling concerning Lyle's videotaped testimony.

b. Trial Court's Refusal to Instruct on Heat of Passion/Provocation as to Kitty

Erik argues that the trial court's refusal to instruct on heat of passion was error. We disagree. The trial court determined that the evidence presented in the case did not justify the giving of the instruction. The evidence indicates that defendants, after initially shooting

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48 Section 1044 states as follows: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

their parents, and realizing that their mother was still alive, went out to Erik's car and reloaded Lyle's shotgun and went back into the residence to complete the act of murder.

Any error in not giving the heat of passion instruction is harmless in view of the jury's rejection of voluntary manslaughter as to Jose and the jury's finding of first degree murder as to Kitty when given the choice between first and second degree murder. (*People* v. *Sedeno*, *supra*, 10 Cal.3d at pp. 720-721.)

c. Admission of Evidence of Lyle's "Escape" Plan

Erik alleges that the trial court erroneously admitted written materials made by Lyle allegedly showing a plan to escape from custody. We disagree.

The jury was instructed that the evidence was only admissible against Lyle. The trial court prevented the prosecution from eliciting testimony that the exhibit was "an escape plan."

As to Lyle, the probative value of the escape plan was great and the evidence was relevant to show Lyle's state of mind and consciousness of guilt. The trial court did not abuse its discretion in admitting the evidence as to Lyle.

d. Cross-Examination of Dr. Wilson

Erik argues that during the cross-examination of Dr. Wilson, the prosecution improperly insinuated that defense counsel Barry Levin, who had written a book on Post-Traumatic Stress Disorder, had fabricated this component of the defense and had presented falsified testimony. We disagree.

The question the prosecutor asked Dr. Wilson on cross-examination was as follows: "Now, did Mr. Levin write a book about post-traumatic stress disorder?" Erik argues that the question was misconduct under *People* v. *Schindler* (1980) 114 Cal.App.3d 178. However, *Schindler* is different from the instant case. In *Schindler*, the trial court

improperly allowed testimony regarding the defendant's desire to hire a particular attorney, specifically the attorney who previously prosecuted her husband for murder. The prosecutor was allowed to argue the time and circumstances surrounding the defendant's selection of counsel, who had prosecuted her husband and use her constitutional right to retain a counsel of her choosing to show that she was guilty of murder. In the instant case, the trial court sustained the defense objection to the question about Mr. Levin's book, struck the answer, and admonished the jury to disregard the question. The trial court also allowed defense counsel the opportunity to ask follow-up questions of Dr. Wilson about Erik's first trial testimony to dispel the inference Erik had recently fabricated the symptoms of post-traumatic stress disorder. In addition, the court discussed with counsel a possible further instruction to the jury regarding the prosecutor's question.

e. Allegation of Prosecutorial Misconduct

Erik alleges that the trial court erred in permitting the prosecutor to argue that defense counsel had in effect colluded with Erik in fabricating a defense. We disagree.

A prosecutor has great discretion in stating his views as to what reasonable inference may or may not be drawn from the evidence. (*People* v. *Mitcham*, *supra*, 1 Cal.4th at p. 1047.) Of course, argument by either the prosecution or defense is not evidence and the jury was so instructed.

Certainly the prosecutor's argument about Erik's attempt to explain away the Oziel tape was within permissible bounds of argument as was the prosecutor's comment about inconsistencies in Erik's testimony from the first trial to the retrial. We find that the prosecutor did not cross the lines of impermissible argument and did not commit misconduct during argument.

IV. DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JACKSON, J.*

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.