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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TRAVIS JAMES HOFFMEISTER, Defendant and Appellant.	H040141 (San Benito County Super. Ct. No. CR0800493)

Defendant Travis James Hoffmeister was convicted by a jury of the first degree murder of Christella Macias. (Pen. Code, §§ 187, subd. (a), 189.)[1] After denying his motion for a new trial, the court sentenced Hoffmeister to an indeterminate term of 25 years to life in prison.

On appeal, Hoffmeister argues: (1) there was insufficient evidence to support the jury's finding that the murder was committed willfully, deliberately and with premeditation; and (2) the trial court abused its discretion in admitting certain evidence, specifically books obtained from a storage locker, evidence of prior property damage carried out by Hoffmeister with a specific type of hammer, and evidence of a prior incident in which Hoffmeister choked his girlfriend. Hoffmeister also argues that, if the evidentiary errors are deemed waived by defense counsel's failure to timely object at trial, his counsel provided constitutionally ineffective assistance.

[1] Unspecified statutory references are to the Penal Code.

We agree the evidence was not sufficient to support the finding that Hoffmeister acted willfully, deliberately and with premeditation in killing Macias and will remand the matter to the trial court to resentence Hoffmeister for second degree murder. We also agree that the trial court erred in admitting evidence of the prior choking incident, but find no prejudice thereby. We find no merit to Hoffmeister's remaining arguments.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The prosecution's case-in-chief

1. Discovery of Macias' body and initial investigation

The morning of June 22, 2007, Josh Wardell left his home in Hollister and got into his truck to drive to work. As he reached the intersection, he noticed a body lying in the street near where it dead-ended at a field. He turned onto the street, parked and walked over, thinking it was a homeless person or someone passed out. As he approached, he could see the body was that of a young adult female, naked, with a bag tied around her head.

Wardell got out his cell phone and called 911. The 911 operator asked if he was comfortable cutting open the bag to see if the woman was still alive, so Wardell pulled a knife out of his pocket and sliced the bag open. He saw that the young woman was dead.

Sergeant George Ramirez responded to the scene after other officers, as well as firefighters and medics, had already arrived. An officer was putting up crime scene tape around the area, and Ramirez entered the taped-off area to take preliminary photographs, including some photos of the body. He observed that there was a black sweatshirt and white plastic bag around the victim's neck. Ramirez also saw that the victim had a couple of tattoos on her body,[2] so he called the records division to see if those matched with anyone in their database. He subsequently determined the victim was Christella Macias.

[2] The victim had "Macias" tattooed on her abdomen and "Margarita" on her forearm.

After Ramirez discovered the victim's identity, he learned two other pieces of information about her: (1) that Macias had a protective restraining order against another person, but that individual had been incarcerated for several months; and (2) that a Hollister police officer had stopped a vehicle about a week ago with Macias and a man named Christopher Sosa in it. Ramirez passed both pieces of information along to those responsible for investigating the murder.

Hollister Police Sergeant Don Magnuson put up crime scene tape around the area. He then walked around the neighborhood, knocking on doors to ask if any of the residents had seen or heard anything. He spoke with around six to eight people, including Elvira Rios, but no one reported seeing anything.

Hollister Police Officer Rosie Betanio also canvassed the neighborhood. She knocked on doors and spoke to a number of people, none of whom had heard or seen anything suspicious.

Hollister Police Detective Jeffrey Caires arrived at the scene around 9:00 a.m. When he approached Macias' body, he was surprised by the lack of blood in the area given the head trauma that Ramirez had informed him the victim suffered. Caires concluded that Macias had been killed elsewhere and transported to this location. Caires also believed that Macias' body had been arranged in a particular way, with her arms out to the side and her legs straight. Given that there was a large field a few feet away, where the body could have easily been hidden for at least some time, Caires believed the murderer was "trying to make a statement" by leaving Macias' body in plain view and positioned in a particular way.

Caires noticed that Macias' clothing appeared to be wrapped around her head and neck along with some white bags. He knew that Wardell had cut open the bags in order to determine if Macias was still alive. Caires saw a skull fragment was located on Macias' sweatshirt, "almost like it was placed there," so he was careful not to move it.

In inspecting the body, Caires observed that there was blood on the victim's hands, but the rest of the body was "somewhat clean . . . almost as if she was washed."

Based on the lack of evidence in the area, Caires requested assistance from the California Department of Justice (DOJ) in processing the scene. Once the DOJ investigative team arrived, Caires remained on site taking notes and coordinating with them as they worked. The DOJ team was in charge of removing Macias' body and transporting it to the morgue for an autopsy.

Caires and other officers, including members of the DOJ team, walked through the adjacent field but found nothing of evidentiary value. At around 7:30 that evening, Caires contacted the victim's family to notify them of her death and gather information about possible suspects, such as a husband, boyfriend or other associates. Macias' mother, Margarita, and her boyfriend, Joe Huerta, were not at home, and Caires was informed by a woman at the residence that Margarita and Huerta were "out looking for [Macias] or at the police or in [*sic*] route to the police department." Margarita and Huerta returned shortly thereafter. Huerta told Caires two women, Ceci Rodriguez and Michelle Padrone, had already told him Macias was dead.

During the course of his investigation, Caires interviewed approximately 50 people about the murder, trying to discover people who may have wanted to hurt or kill her. Macias "knew a tremendous amount of people in this town," but she did not "run in the greatest of circles."

Caires learned that Macias had a boyfriend, but he did not immediately follow up on that lead because that individual was incarcerated at the time. Caires interviewed Macias' boyfriend approximately three days later and confirmed he had been in custody for some time.

Joe Huerta also provided Caires with the names of two females with whom Macias associated. Huerta told Caires that Macias was constantly coming and going from the house and would occasionally be away from home for extended periods of time.

According to Huerta, Macias engaged in prostitution, used a variety of drugs, and would steal to support her drug habit. He told Caires that Macias associated with gang members and people who were involved in drugs. Huerta believed Macias may have been killed over a drug debt.[3] At an unspecified later date, Huerta refused to talk to Caires any longer about the investigation.

Early in the investigation, Caires identified three people—Evette Reynoso, Cecelia Rodriguez and Christopher Ray Sosa—as persons of interest and obtained DNA samples from each of them. None of their DNA matched any of the DNA found on Macias' body or clothing.

Caires also received information that a neighbor reported seeing some "gangster-type males" hanging out by the dead-end where Macias's body was found. Caires did not follow up on this information, and said he had never heard of gang members sending a message by leaving a dead body in a neighborhood. The neighbor who reported seeing these men also reported hearing a gunshot the night of the murder, but Caires knew there was no evidence the killer or killers used a firearm. Based on Caires' prior experience investigating gang crimes, nothing led him to believe gangs were involved in this murder.

Caires learned Macias kept most of her possessions in her car at her mother's house, but generally carried a backpack and cell phone with her. On August 15, 2007, Caires interviewed Ricky Saez, who had come to possess Macias's backpack. Saez told Caires he found the backpack while walking home one day. There were a few items

[3] Caires testified that an individual named Rios, at some point in the investigation, told him there was a hit out on Macias related to drug sales and manufacturing, but Caires did not follow up on that statement. On redirect, Caires said the information appeared to be nothing more than a rumor, as there were no leads or names that would corroborate it. Caires testified that the people with whom Macias associated were generally not cooperative with police and were typically unreliable sources of information.

inside the backpack, which he gave to some unidentified girls, then he gave the backpack itself to Rafa Serna. Saez told Caires that Serna subsequently burned the backpack.

When Caires tried to interview Saez again in November, Saez's lawyer intervened, saying Saez would only submit to questioning if he were given written assurances that he would not be implicated in Macias' murder. Caires was unable to provide such assurances and could not further interview Saez about the case, though he made several more attempts to do so.

Caires then interviewed Serna, who told him he and Saez were together in his van when they found Macias's backpack on the side of a road. Serna confirmed that he subsequently destroyed the backpack. Caires later located Serna in Fresno with his van, which Caires seized and searched pursuant to a warrant. That search disclosed no relevant evidence, and there was no indication that Macias herself was ever in the van.

On July 31, 2007, Caires interviewed Jeff Morgan after learning that Morgan had come into possession of a phone that might have belonged to Macias. Morgan was nervous during the interview and said he was concerned about his girlfriend's safety.[4]

A few weeks later, Caires interviewed Summer Garcia over the telephone, who told him she had been given the cellphone in question by someone named Danny Robleto. According to Garcia, Robleto did not want the phone. She went through the phone's memory with a friend of hers who recognized Macias in a photograph. She also came across an audio recording on that phone which was of a woman screaming in Spanish[5] and Garcia thought the recording might be related to the murder. Garcia found a photograph of some unidentified men on the phone.

Caires could not recall whether he subpoenaed the records for the phone, but he never conclusively determined that it actually belonged to Macias. He discovered

[4] The testimony is not entirely clear but it appears that it was Morgan's girlfriend, not Morgan himself, who was in possession of the cellphone.

[5] Garcia told Caires she could not make out what was being screamed.

recordings of a woman speaking Spanish on the phone, but no one could recognize the woman's voice. Besides the one photograph of Macias on the phone, nothing else connected it with her.

On August 19, 2007, Caires interviewed Lee Kuch at the San Benito County Jail, and Kuch said he had known Macias for about three years. Kuch told Caires that Macias called him around 7:00 a.m., the day her body was found, and left him a message asking for his help. Caires did not subpoena Kuch's phone records to see where this call came from because Macias had been killed the night before (and her body was discovered approximately one hour after this call) so he knew the timing was incorrect. Kuch did not say that the call itself had been made from Macias's phone, and he did not recognize the number of the phone that called.

Caires interviewed Macias' friend Rebecca Golindo in June 2007 after he was informed that Golindo might have been with Macias prior to her death. Someone told Caires that Golindo had run into someone's home about 1:30 a.m. the night that Macias was killed and "was acting very nervous . . . as if she saw a ghost."

According to Caires, Golindo is generally not cooperative with law enforcement and, at the time he spoke to her, he believes she had an outstanding warrant for her arrest. Golindo "[had] difficulties . . . telling" Caires about her whereabouts on the night Macias was killed. During the interview, she lost control of her bowels. Golindo told Caires that Macias had been killed in the back of a residence and several people were present at the time. Golindo said she ran several blocks through a park to Steve Kota's house, but Caires did not find that story credible because Golindo, who was between 5 foot 5 inches and 5 foot 7 inches[6] tall and weighed over 200 pounds, was not in condition to run that sort of distance. Golindo was arrested on an unrelated matter following the interview,

[6] The reporter's transcript reads "approximately 55 to 57," but since Caires was just asked about Golindo's "stature," we presume he was referring to her height rather than her age.

and Caires learned that after she got out of jail, she went to Oregon. Caires interviewed her again when he saw her while on patrol in July 2011 as he thought she might have some information relevant to the case.[7]

2. DOJ investigation and autopsy

Lara Walker, a criminalist from the DOJ Bureau of Forensic Services responded to the crime scene with a colleague. They observed Macias lying on her back in the middle of the cul-de-sac. After surveying the area for evidence, they started their examination of the body. Macias's sweatshirt was pulled up over her arms and gathered around her neck, with a large amount of red staining and pieces of what appeared to be bone. Macias had numerous facial injuries, with "round hatch marks . . . that had a waffle pattern."

Because there was no blood on the ground, Walker believed that Macias was killed elsewhere. There was blood on Macias' hands but not on her arms, which meant that either she had been undressed after her death or that her body, except for her hands, was cleaned.

Walker observed that underneath the sweatshirt there were other articles of clothing: a bra, a camisole and a t-shirt.[8] There were two kitchen-size white plastic garbage bags underneath Macias' head, which appeared to have been cut open. The bags had a quilted diamond-shaped pattern, with scalloped tops and edges instead of ties. Walker later searched on the Internet for this type of bag and learned that these were similar to a type of garbage bag made by Glad.

Continuing her examination of the body, Walker noticed a sparkling material in Macias's pubic area and a green gum-like substance on her face and sweatshirt. She used

[7] She did not.

[8] The record does not reference anything that Macias would have worn on her lower body, such as pants, leggings, or panties. Any such articles of clothing were apparently never found.

tape to collect samples of that material for analysis. She then took swabs from Macias's breasts, inner thigh, chest and neck, and collected a control swab from her right ankle. Walker identified semen on the front of Macias's sweatshirt near the bottom as well as on the arms of the sweatshirt. Walker also took swabs from the garbage bag found under Macias's head.

Dr. John Randall Hain conducted the autopsy on Macias. Dr. Hain observed multiple blunt force injuries primarily on the right side of Macias' head and face, and at least six of those impacts penetrated her skin. Several of the wounds had a "grid-like impression consistent with some type of tool mark; meaning, that there was a pattern on the instrument" used to strike Macias.

The impact of the weapon created a hole in Macias' skull and the "fracture lines traveled through the front of the skull and into the base." On the edge of one of the skull fractures, Dr. Hain observed the same grid-like tool mark he saw on Macias's head and face. The "circular nature of the skull injuries [were] suggestive of a hammer." The bones on the right side of her face next to her right eye and cheek were fractured, as were both sides of her jaw. Along with the fractures, Dr. Hain indicated there was considerable damage to the right side of the brain, which caused significant bleeding as well as the expulsion of brain matter. However, Dr. Hain noted there was not much blood remaining in Macias' body at the time of the autopsy.

In addition to the severe head injuries, Dr. Hain saw that Macias had ligature abrasion marks around her neck, as well as broken capillaries in her left eye area and inside her mouth. The marks and broken capillaries indicated that Macias was strangled.

In Dr. Hain's opinion, the cause of death was multiple blunt-force head injuries. He could not determine if strangulation was a contributing cause. Dr. Hain found no defensive wounds on Macias' hands or arms, which he thought remarkable.

Dr. Hain also testified that he took a blood sample from Macias' body, which tested positive for methamphetamine. The level was high enough to cause methamphetamine intoxication, but not high enough to cause her death.

The coroner collected swabs from Macias' vaginal and anal orifices, but no sperm was detected in either sample.

3. Hoffmeister identified as a suspect and the continuing investigation

The swabs Walker collected from Macias and the crime scene were submitted for DNA testing. Katie Swango, a DOJ criminalist, generated DNA profiles for a male based on samples taken from the back of one of the plastic garbage bags and from the semen stain on Macias' sweatshirt. These profiles were consistent with other samples taken by Walker from Macias's body and the interior of a plastic bag.

The profiles Swango generated were entered into and compared against the Federal Bureau of Investigation's national database of offender samples. Swango was subsequently informed that the profile generated from the plastic bag matched the DNA of someone on that database, specifically Hoffmeister. The sperm sample was not matched to Hoffmeister or to any other person in the database. Swango relayed the information to Hollister police.

After Caires received the report that Hoffmeister's DNA matched that found at the crime scene, he located Hoffmeister who was then in custody at the San Benito County Jail. Hoffmeister agreed to an interview. Prior to interviewing Hoffmeister, Caires obtained a search warrant in order to take a blood sample.

On February 1, 2008, Caires interviewed Hoffmeister at the jail. Hoffmeister denied knowing Macias, but told Caires he might have heard about her death from another inmate. Even after Caires told Hoffmeister investigators found his DNA on Macias's body, Hoffmeister continued to deny knowing her and denied ever having any physical contact with her. Caires testified Hoffmeister said "he did not know her, had no contact with her, [and] never spoke to her." Caires asked how Hoffmeister's DNA could

be on the garbage bag, and Hoffmeister initially said his DNA should not be on it. Afterward, Hoffmeister said he must have touched the bags, though he could not explain how that could be if he had never seen Macias.

After he interviewed Hoffmeister, Caires interviewed Hoffmeister's former girlfriend, Jessika Cortes. Caires did not initially inform Cortes that this interview was in relation to Macias' murder.

At trial, Cortes testified that she and Hoffmeister lived together in Hollister in 2006 and 2007.[9] While living together, she and Hoffmeister would occasionally argue. Hoffmeister would "break things . . . with a hammer" when he got upset. He would hit walls or the furniture, with a blue-handled hammer that had a "waffled" face. During her initial interview with Caires, Cortes told him about Hoffmeister breaking things with his blue-handled hammer when they argued. Cortes testified Hoffmeister "liked to buy hammers" because he did construction work and worked at a lumberyard.

Cortes said she was not necessarily frightened when Hoffmeister would break things with a hammer because she "was kind of used to him breaking things." She admitted that one time she called the police about Hoffmeister and he "got really angry about that[, saying] . . . he would kill [her]" if she ever did that again.

Cortes testified that one time she and Hoffmeister were driving around in the evening and they parked in a residential area. Hoffmeister got out of the car and was smoking a cigarette when he said "something along the lines [of] . . . that the area that we were in was . . . a good place to . . . leave a dead body." She described the area they were parked in as having a fence with a field behind it, though there were houses around as well.

On April 1, 2007, Cortes and Hoffmeister were evicted from the room they shared in an apartment on Micah Court, leaving behind "a whole bunch of holes in the walls."

[9] Cortes and Hoffmeister also had a child together.

They subsequently rented a studio apartment on San Benito Street where they lived together until Cortes moved in with her parents on June 19 or June 20, 2007.[10] At the time she moved out, the walls of the apartment were not spray-painted with upside-down crosses or other graffiti.

The night after she moved out, Cortes was asleep at her parents' house when Hoffmeister showed up, knocked on her window and asked her to come outside. Cortes refused. Hoffmeister was crying, and said he wanted Cortes to return to the San Benito Street apartment with him.

Cortes and Hoffmeister kept some of their possessions, including furniture, clothing and miscellaneous items, in a storage facility. She testified the clothing was kept in plastic garbage bags, the "stretchy, force-flex kind." She purchased a box of those garbage bags from Walmart when they moved into the San Benito Street apartment. When she returned to that apartment in early July to retrieve her belongings, the box of garbage bags was still there.

Cortes told Caires about the storage locker she shared with Hoffmeister, and Caires went to the storage facility the following day. After obtaining a search warrant for the unit leased by Cortes and Hoffmeister, Caires returned and searched it. Inside, he found a cardboard Budweiser box with two wooden hammers sticking out of it. One of the handles had the letters "H-O-F-F" inscribed on the end. Caires removed the hammers from the box and saw that both of them had a cross-hatch or waffle-type pattern on the head. Caires did not find a hammer with a blue handle like the one described by Cortes, and Cortes testified that neither of the hammers seized from the storage unit were used by Hoffmeister when he hit the furniture or walls in their apartment. In addition, Caires found six white "flex" garbage bags "consistent with what was at the crime scene."

[10] Cortes testified she left Hoffmeister because he took her car and wrecked it.

Caires also found a box full of books in the storage locker, two of which he seized. The first book, "The Stranger Beside Me," was about Ted Bundy, and the other was called "Serial Killers." In the second book, Caires noticed a scrap of paper stuck between the pages, like a bookmark. Caires testified that, upon opening the book to where the paper was placed, the following passage appeared: "On Easter weekend in 1973 Kemper finally decided to face his nemesis. At 5:15 a.m. he walked into his mother's bedroom while she was asleep and struck her in the head with a claw hammer." Caires forwarded the books to the DOJ to check for fingerprints.

Caires asked Cortes about the books and she told him she thought they belonged to Hoffmeister's sister, Andrea. Cortes testified there were lots of books in the storage locker, some of which Andrea had given them, and she did not know which belonged to Andrea and which belonged to her and Hoffmeister. Andrea did not have a key to the storage locker, however.[11]

Caires found a 2007 calendar at the storage unit and, after examining it, asked Cortes about entries from June 12 and 13. Cortes testified that she wrote an entry on June 12, 2007, which read: "[Hoffmeister] broke our table and tried to choke me out." She explained that, on that day, she and Hoffmeister were arguing and she was yelling. She was "getting . . . hysterical[,] [s]o he tackled me to the ground and . . . put a blanket over my face." Hoffmeister held the blanket against her face so tightly she could not breathe. She struggled but could not get away and finally collapsed. He pulled the blanket away, and she started yelling at him, asking if he was trying to kill her. He said he was merely trying to calm her down and that it would take seven minutes to die from suffocation. Cortes testified that Hoffmeister wrote the following entry in the calendar on June 13, 2007: "I love my baby girl, but I was not trying to kill her."

[11] On recross-examination, Cortes clarified that the storage unit had a combination lock, rather than one requiring a key.

Cortes testified that on June 23, 2007—the day after Macias' body was discovered—she and Hoffmeister were driving around town together. Hoffmeister was talkative and seemed happy. Cortes had gone to junior high school with Macias and she decided to drive down C Street as she had heard that was where her body had been found. When she told him of her plan, Hoffmeister became silent and appeared "scared." As she drove into the cul-de-sac, Cortes asked, "Is this where they left her, they left that body?" but Hoffmeister did not respond. Cortes looked over at him, and saw "he kind of looked a little weird."

After Hoffmeister was arrested in March 2008 for Macias' murder, Cortes asked him if he knew Macias, and he told her he did.

Tony LoBue, a realtor in Hollister, leased the San Benito Street apartment to Hoffmeister in June or July 2007. After Hoffmeister abandoned the apartment within a few months, LoBue entered the property to clean up the items left behind.[12] Along with graffiti painted on the walls, LoBue saw numerous holes in the walls that appeared to have been made by a hammer. A closet door had the word "murder" written on it in marker, and there were some upside-down crosses painted on the walls as well. The carpet had a large black stain on it, covered by a throw rug. LoBue discarded the carpet, but kept the throw rug, which he later turned over to Caires.

The books from the storage locker were examined for latent prints, and Caires was subsequently informed that the only prints found on the books matched Hoffmeister's sister, Andrea. The throw rug Caires obtained from LoBue was extremely dirty. Multiple stains were tested for blood, and one positive stain was processed by the DNA lab. That blood stain was found to contain Macias' DNA. The hammers from the storage

[12] LoBue's photographs of the damages to the apartment were shown to the jury and there was a date on the photographs of July 9, 2007. He testified he believed that was the date on which he took the photos.

locker were also tested, but no blood or DNA evidence could be detected on either of them.

On March 7, 2008, Caires returned to the jail to book Hoffmeister for Macias's murder. In April 2008, Caires listened to recordings of telephone calls Caires made from jail. The first recording he listened to was of a call Hoffmeister placed to his father on March 8, 2008. During this call, Hoffmeister told his father he knew Macias and had been "fooling around" with her the night before her body was found. He told his father "[s]omeone suffocated her, but I had my DNA . . . on her . . . , my sweat."[13]

Caires also listened to a recording of a call placed by Hoffmeister to Cortes on March 10, 2008. During this call, when Cortes asked Hoffmeister if he knew Macias, he said "kind of." He then said they would talk about it later, because the call was being recorded.

Finally, Caires listened to a recording of Hoffmeister's call to someone named "Mallory" which took place on March 11, 2008. Mallory asked Hoffmeister if he knew the victim and Hoffmeister admitted he did. He also told Mallory that "things were not good" and "they have evidence."

B. The defense case

Dr. David Posey, a forensic pathologist, testified that the cause of Macias' death was blunt force trauma to her head and brain, and that her death was a homicide. Because of the lack of blood at the scene, Dr. Posey concluded that Macias had been killed someplace else and placed where she was found.

Dr. Posey testified that most of the injuries had been caused by a "sophisticated" hammer with a cross-hatch face, "not the kind you buy at OSH or . . . hardware stores." He believed it was likely that one or two weapons such as a rock or a pipe, in addition to the hammer, were used to kill Macias. Dr. Posey conceded it was possible some injuries

[13] An excerpt of this recording was played for the jury, but it does not appear that the other two jailhouse recordings to which Caires listened were played in court.

had been inflicted with either the handle or the side of the hammer, but he believed it was more likely other weapons were involved.

With respect to the toxicology report, Dr. Posey testified the amount of methamphetamine found in Macias's system was in the potentially toxic range, but it was clear that she did not die from an overdose. The amount of drugs in her system, however, did explain the lack of defensive wounds since she would not have been able to physically protect herself or possibly even know she was in danger.

Andrea Ruiz, Hoffmeister's sister, testified the two books about serial killers in the storage unit belonged to her. She had purchased those books in relation to a criminal justice course she was taking, and the Kemper case—discussed on the pages where the book was marked—caught her eye because it had happened in Santa Cruz. She had considered writing a report on it for her community college class. She shared that unit with Hoffmeister and Cortes, and a number of her personal possessions, including many books, were stored there.

Jerry Taddie testified he lived in the San Benito Street apartment that Hoffmeister later occupied. Taddie was evicted from that apartment because "too many people [were] living there" and they "used to party a lot" there. When he moved out, he left behind a rug, a television set and a cross.

C. Rebuttal

Tony LoBue and his wife, Marie LoBue Peterson, testified that Taddie did not leave behind a rug when he was evicted. Cortes was also called as a rebuttal witness, and she testified that she bought the throw rug at Target in 2006 and brought it with her when she and Hoffmeister moved into the San Benito Street apartment.

D. Verdict and sentencing

On March 8, 2012, the jury found Hoffmeister guilty of first degree murder. On June 8, 2012, after denying Hoffmeister's motion for a new trial, the trial court sentenced Hoffmeister to a term of 25 years to life in state prison.

Hoffmeister timely[14] appealed.

II. DISCUSSION

A. Sufficiency of the evidence to support first degree murder

1. Standard of review and applicable legal principles

Under the federal Constitution's due process clause, there is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In addressing a claim of insufficient evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

" ' "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.]' [Citation.] ' "Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." ' " ' " (*People v. Solomon* (2010) 49 Cal.4th 792, 812.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), the California Supreme Court described three categories of evidence that can show premeditation and deliberation: motive, planning activity, and manner of killing. These categories are not exclusive of others or invariably necessary or required. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081.) Nor must they "be present in any particular combination to find substantial evidence of premeditation and deliberation. [Citation.] However, '[w]hen the

[14] On October 18, 2013, this court granted Hoffmeister's motion for relief from default for failing to file a timely notice of appeal.

record discloses evidence in all three categories, the verdict generally will be sustained.' " (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

2. Analysis

In this case, the jury was presented no evidence whatsoever in relation to one of the three categories identified in *Anderson*: motive. Consequently, we must examine whether the evidence as to the remaining two categories—planning and manner of killing—was sufficient to support a finding that the killing was carried out with premeditation and deliberation.

The People rely on the following evidence to support the theory that Hoffmeister planned to murder Macias: (1) During a drive with Cortes, prior to the murder, they stopped at a location similar to where Macias' body was found and Hoffmeister commented that it would be a good place to leave a body; (2) inverted crosses were found drawn on the walls of the San Benito Street apartment after he was evicted and Macias' body was positioned in a similar manner on the street; and (3) the books in the storage locker, one of which was marked at a page containing a passage where the killer bludgeoned his victim to death with a hammer.

Of these, the most damning evidence is Hoffmeister's comment that the location he and Cortes stopped would be a good place to leave a body. The remark shows that Hoffmeister had at least entertained the notion of what to do after killing someone, either as a thought experiment or in reality. Hoffmeister's argument that there was no evidence that the location he stopped at with Cortes was the same one where Macias' body was found carries little weight, particularly since Cortes described it as being nearly identical; i.e., a cul-de-sac ending at a fence by an open field with some nearby residences. We also think it makes little difference that there was no evidence suggesting he was specifically thinking of Macias when he made the remark. One need not have a particular victim in mind in order to engage in the necessary premeditation for first degree murder.

(See *People v. Edwards* (1991) 54 Cal.3d 787, 814 ["A senseless, random, but premeditated, killing supports a verdict of first degree murder."].)

The inverted crosses on the walls of Hoffmeister's apartment and the position of Macias' body carry less weight, however. Cortes testified that the crosses were not there when she moved out on June 19, meaning they appeared on the walls sometime between that date and the date in early July that Hoffmeister abandoned the apartment. Accordingly, the crosses could just as easily have been painted after the murder, as before. There was no evidence establishing which of these possibilities was true. Furthermore, although Macias' body was found with her legs together and her arms splayed to the side, characterizing this position as an inverted cross depends entirely on the viewer's perspective. Viewed from the side, it is a sideways cross. Viewed from the adjoining field, the body forms an upright cross. The position of Macias' body and the painted crosses could be more than a coincidence, but given the lack of evidence as to when the crosses appeared on the walls of the apartment, that connection is at best tenuous.

Finally, the books found in the storage locker are perhaps the weakest evidence of planning, particularly since the only fact tying them to Hoffmeister is that they were found in a storage locker he shared with Cortes and his sister. The only prints found on those books belonged to Andrea, who testified that she used them in connection with a course she was taking on criminal justice. She also explained that she placed a bookmark at the pages describing how Kemper killed his mother with a hammer because that murder took place in nearby Santa Cruz. It is entirely possible Hoffmeister marked the book in question himself, but the only evidence supporting that conclusion is that the book was found in a storage locker to which he had nonexclusive access.

Acknowledging that there is some evidence of planning, weak as it may be, we turn to the next category of evidence which can support a finding of premeditation: manner of killing. The People cite the evidence that Macias was killed with a hammer,

and perhaps one or two other weapons, per the testimony of the defense witness, Dr. Posey. The People also note that there was evidence Macias was strangled at or near the time of her death, and that, based on her wounds, Macias' death was not quick.

However, the evidence from the autopsy revealed that Macias was struck multiple times in the face and head by a blunt object, most likely a waffle-headed hammer similar to those found in Hoffmeister's storage unit and similar to the hammer described by Cortes as the one he used to bash furniture and the walls of their apartment when he got angry. There was no testimony that these blows were targeted in any fashion, such as an execution-style slaying, as opposed to an indiscriminate brutal beating. While the manner of Macias' death was vicious, "[i]t is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation." (*Anderson*, *supra*, 70 Cal.2d at p. 24.)

As to the evidence of strangling, the testimony was not conclusive that the broad ligature marks around Macias' neck were caused in an attempt to strangle her. Both forensic experts indicated that the marks could have been caused either by the garbage bags tied around her neck or by the clothing that was pulled up and gathered around her head.

Finally, the evidence regarding the length of time associated with killing Macias was also not as clear as the People suggest. Dr. Posey testified that the blows to her head were lethal, although "her heart may have still been beating" for a period of time afterward. He was not asked and did not offer an opinion as to how long that period of time could have been. Dr. Hain was not asked *any* questions regarding how long it may have taken Macias to die from her injuries. Neither expert was asked to offer an opinion as to how many blows were struck or which of the blows was the one which proved fatal. Was Macias effectively dead after the first blow? The third? The eighth? There was no testimony from which the jury could infer at what point during the attack Macias' injuries were irrevocably lethal.

To sum up, the jury in this case was asked to find premeditation and deliberation after being provided absolutely no evidence of motive, some less than compelling evidence of planning and some even less compelling evidence of the manner of killing. Viewing the evidence as a whole, in the light most favorable to the prosecution as we must, we conclude a rational trier of fact could not have found this essential element of first degree murder beyond a reasonable doubt. The evidence suffices only to support a verdict of second degree murder.

B. Evidentiary errors

1. The two books from the storage locker

Before trial, the defense brought a motion in limine seeking to exclude evidence regarding the two books found in Hoffmeister's storage locker. The trial court did not address admissibility of evidence relating to one of the books,[15] but ruled that evidence regarding the other book, where a piece of paper marked a page discussing someone being murdered with a claw hammer, was relevant and therefore admissible under Evidence Code section 352.

Under Evidence Code section 352, "[t]he 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." Ultimately, it is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) The trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear showing of abuse. (*Ibid*.) "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of

[15] The in limine motion states this book is entitled "Ann Rule, The Stranger Beside Me, the Ted Bundy Story."

opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "[D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered." (*Ibid.*)

Hoffmeister cites *People v. Archer* (2000) 82 Cal.App.4th 1380, to support his contention that the evidence of the two books found in the storage locker was more prejudicial than probative and should have been excluded. In *Archer, supra*, at pages 1383 through 1384, the defendant, along with at least one other person, murdered the victim with a knife before dismembering and disposing of the corpse. During trial, the trial court allowed the prosecution to introduce evidence of various catalogues, videos, books and articles seized from the defendant's home and storage locker, some of which involved knife fighting, combat training, etc., but also titles relating to explosives, demolitions, ninjas and silencers. (*Id*. at p. 1393.) The Court of Appeal found that the trial court erred in admitting all those materials that did not deal "with the use or purchase of knives" because those other items were irrelevant to the issues involved in the trial. (*Id*. at p. 1394.) Rather, the materials showed that defendant "had an interest in weapons and methods of using them" and, "given the large amount of materials and their inflammatory nature, there is a strong possibility that the jury could infer that [defendant] had a propensity to act in accordance with his interests." (*Ibid*.)

In this case, unlike *Archer*, there was not a mountain of irrelevant material admitted alongside the evidence of the books found in the storage locker. The bookmarked page discussed someone who killed his victim with a hammer, the same type of weapon used to kill Macias. Thus, the evidence was relevant, as it tended to show that Hoffmeister was possibly inspired to use one of his own hammers to kill someone. The fact that the passage in question was in a book entitled "Serial Killers" was somewhat inflammatory, but there was no suggestion by the prosecution that Hoffmeister was a

serial killer or aspired to become one. The trial court did not abuse its discretion in admitting this evidence.

Hoffmeister also argues there was insufficient foundation to admit the evidence because his prints were not found on either of the books, rather only his sister's were found, and she testified the books belonged to her. Assuming without deciding that this objection was forfeited because it was not raised below, the argument has no merit. The books were located, in an unsealed box, inside a storage locker rented to Hoffmeister and Cortes. He certainly had access to that locker and all its contents. The lack of his prints on the books was a matter for the jury to weigh in deciding how much value to place on the evidence.

2. Any error in admitting testimony about the books into evidence was harmless

Even if we assume that the trial court should have granted the in limine motion and excluded evidence of the books, Hoffmeister has not shown prejudice. (Cal. Const., art. VI, § 13 [no reversal for improper admission of evidence unless it resulted in a miscarriage of justice]; Evid. Code, § 353, subd. (b) [same].)

Hoffmeister's DNA was found on the bag which enclosed Macias' head, and her blood was found on the rug which Hoffmeister left in his apartment. Macias had been beaten to death with a relatively uncommon type of hammer.[16] Cortes testified that Hoffmeister possessed several such hammers, because he worked in construction and at a lumberyard. She further testified that Hoffmeister, when angry, would hit the furniture and the walls[17] with one of his hammers. It is true that the specific blue-handled waffle-face hammer described by Cortes was never found and that no DNA or blood

[16] The defense expert testified that this type of hammer was not one which could be purchased at a typical hardware store.

[17] LoBue corroborated this testimony when he testified that, upon entering the apartment to clean it after Hoffmeister abandoned it, he observed holes in the wall, which appeared to have been made by a hammer with a waffle-headed face.

evidence was found on either of the hammers discovered in Hoffmeister's storage locker. However, the jury had photographs of the marks on Macias' head and face and could readily compare those marks to those shown on the walls of Hoffmeister's apartment. The jury could also have reasonably concluded that Hoffmeister used the blue-handled hammer to kill Macias and simply disposed of it afterward. Based on all this other evidence, Hoffmeister has failed to establish that there is a reasonable probability the jury would have reached a different result had the court excluded the evidence of the books. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [a miscarriage of justice is declared when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"]; *id*. at p. 837 [standard is "based upon reasonable probabilities rather than upon mere possibilities"].)

3. Evidence of Hoffmeister's use of hammers[18]

Hoffmeister argues that the evidence he would use a hammer to strike furniture and the walls of his apartment when angry was inadmissible character evidence under Evidence Code section 1101, subdivision (a) and the trial court erred in denying his in limine motion to exclude Cortes' testimony on this subject.

On appeal, the trial court's determination of whether to allow evidence under Evidence Code section 1101, "being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Carter* (2005) 36 Cal.4th 1114, 1147 (*Carter*); see also *People v. Edwards* (2013) 57 Cal.4th 658, 711 [appellate court reviews the trial court's determination under Evid. Code, § 1101 for abuse of discretion in the light most favorable to the trial court's ruling].) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*Carter, supra*, at p. 1149.) Assuming an error in

[18] Hoffmeister also argues the trial court erred by not excluding the evidence of the two hammers found in the storage locker. Given that no objection was raised below, the issue is forfeited. (Evid. Code, § 353, subd. (a); *People v. Demetrulias* (2006) 39 Cal.4th 1, 20.)

admitting evidence is made, however, a defendant is entitled to reversal only if it is "reasonably probable" a more favorable outcome would be obtained had the error not occurred. (*Watson, supra,* 46 Cal.2d at p. 836.)

Under the express terms of Evidence Code section 1101, subdivision (b), evidence of a "crime, civil wrong, or other act" may be relevant to prove identity, and such evidence is not prohibited if offered for those purposes. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*), superseded by statute on other grounds, as stated by *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) In *Ewoldt*, the California Supreme Court examined three categories of evidence admissible under Evidence Code section 1101, subdivision (b) and distinguished "the nature and degree of similarity (between uncharged misconduct and the charged offense) required . . . to establish a common design or plan, from the degree of similarity necessary to prove intent or identity." (*Ewoldt, supra,* at p. 402.) The "greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity." (*Id.* at p. 403.) "Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a ' "pattern and characteristics . . . so unusual and distinctive as to be like a signature." ' " (*People v. Kipp* (1998) 18 Cal.4th 349, 370.)

Viewing the evidence in the light most favorable to the trial court's ruling, Cortes' testimony that Hoffmeister would strike the walls and furniture with a distinctive type of hammer when angry and the evidence of Macias' injuries being caused by an identical hammer supports an inference that Hoffmeister was the person who killed her.

With respect to Evidence Code section 352, we agree with the trial court that the probative value of the evidence regarding Cortes' testimony was not outweighed by the likelihood it would prejudice the jury. (*Ewoldt, supra,* 7 Cal.4th at pp. 404-407.)

Accordingly, the trial court did not abuse its discretion by admitting the evidence under Evidence Code sections 1101, subdivision (b) and 352.

Assuming it was error to admit Cortes' testimony about Hoffmeister hitting things with his blue-handled, cross-hatch faced hammer, that error was not prejudicial. (*Watson, supra*, 46 Cal.2d at p. 836.) Both forensic experts testified about the distinctive marks on Macias' skull and face and agreed they were likely caused by a hammer with a cross-hatched face. The jury viewed photographs of those marks. LoBue testified about the holes and distinctive hammer marks in the walls of the San Benito Street apartment and the jury saw photos of those marks, as well. Finally, the jury saw the hammers, both with cross-hatched faces, recovered from Hoffmeister's storage unit. Given this evidence, coupled with the DNA evidence from the garbage bag and the rug, it is not reasonably likely the jury would have reached a different verdict in this case absent Cortes' testimony about Hoffmeister using a hammer to destroy property.

4. No prejudicial error in admitting testimony about choking incident

Hoffmeister also claims the trial court erred in denying his in limine motion to preclude evidence of an incident where he wrapped a blanket over Cortes' head during an argument, and she feared he was trying to suffocate her.

In denying the motion, the trial court found that the act described by Cortes was not particularly unique, but the calendar entry where Hoffmeister wrote he was not trying to kill Cortes "amounts to an adopted admission" that "shows [Hoffmeister]'s awareness of the dangerousness of the act." Thus, the trial court ruled that Cortes could not offer testimony about the choking until the written entries in the calendar were admitted into evidence.

As discussed above, when seeking to introduce evidence of a prior uncharged offense in order to prove identity, that prior offense "must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*Ewoldt, supra*, 7 Cal.4th at p. 403.)

In this case, Macias' body bore marks suggesting she was strangled, either just prior to or at the time of her death. Neither forensic expert could conclusively identify

what caused the ligature marks, but both believed those marks could have been caused by the sweatshirt and other clothing found around her neck.

After testifying about the two calendar entries dated June 12 and 13, 2007, Cortes described the incident, saying they were arguing when Hoffmeister tackled her and put a blanket over her face, holding it "really tight." She could not breath and, after she "kind of collapsed . . . he lifted the blanket up." When she accused him of trying to suffocate her, he denied it and said it would take seven minutes to kill someone that way.

We do not think there is sufficient similarity between Hoffmeister's assault on Cortes with a blanket in which he *may have* attempted to suffocate her and the evidence suggesting Macias *may have been* strangled either just before or at the same time as she succumbed to the severe blows to her head. Although both methods seek to deprive a victim of oxygen, suffocation and strangulation are different acts.

Despite this error, however, we conclude it is not reasonably probable the result would have been more favorable had it been excluded. (*Watson, supra*, 46 Cal.2d at p. 836.) As discussed above, all the evidence in this case, circumstantial though it was, pointed to Hoffmeister. The exclusion of the testimony about Hoffmeister wrapping a blanket over Cortes' head a few days before Macias was killed by someone wielding a cross-hatch faced hammer would not have led to a different result.

C. No ineffective assistance of counsel

Hoffmeister argues that his trial counsel was ineffective for failing to object to the evidence of the two hammers found in the storage locker. We disagree.

The appellant has the burden of proving inadequacy of trial counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) He must establish that no reasonably competent attorney would have done what defense counsel did *and* that he was prejudiced by defense counsel's conduct, i.e., that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) To justify relief on appeal, defendant must show that

defense counsel's actions could not be explained on the basis of any knowledgeable choice of tactics. (*Id*. at p. 484, fn. 16.)

However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

In this case, Hoffmeister has not demonstrated prejudice from counsel's failure to object to the hammers found in his storage locker. The DNA evidence in this case linked him to the killing, as did the distinctive marks on the walls of the San Benito Street apartment which resembled the marks left on the victim's face and head. Excluding the two hammers in question, neither of which could be linked to the murder, would not, in all reasonable probability, have led to a more favorable result here.

D. No cumulative error

Finally, Hoffmeister argues the cumulative effect of the alleged errors was to deprive him of his right to due process. "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' " (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

We have found one possible error, namely the trial court's failure to exclude testimony about the incident where Hoffmeister wrapped a blanket around Cortes' head. However, we found Hoffmeister could not show prejudice resulting from that error. Therefore, Hoffmeister's claim of cumulative error must also fail.

III. DISPOSITION

The judgment is modified by reducing the degree of the crime to murder of the second degree and, as so modified, the judgment is affirmed. The cause is remanded to the trial court with directions to arraign and pronounce judgment on defendant in accordance with the foregoing ruling.

Premo, J.

I CONCUR:

Rushing, P.J.

Grover, J., Concurring and Dissenting

I agree that the first degree murder determination cannot be affirmed, but I reach that conclusion for reasons different than the majority's. In my view, the evidence regarding planning and manner of killing, though not compelling, is sufficient to support a finding that defendant acted with premeditation. But the evidence that a book entitled "Serial Killers" (which defendant's sister testified belonged to her) was found in a storage locker to which defendant had non-exclusive access should have been excluded under Evidence Code section 352. Given the thin evidence of planning and manner, I believe the error likely affected the result on the issue of premeditation.

I. THE RECORD CONTAINS SUFFICIENT EVIDENCE OF PREMEDITATION

The majority finds the record insufficient to support the premeditation element of the first degree murder charge. The evidence regarding planning and manner of killing is not strong, but is nonetheless sufficient to allow a rational jury to conclude that the murder was premeditated.

Defendant's former girlfriend testified that before the murder occurred, defendant had described the precise location where the victim's body was later found as a "good place to leave a body." As the majority recognizes, the jury could reasonably have concluded this statement shows defendant planned to kill someone and leave the body in that location, even if there is no evidence he had identified a particular victim at the time he made the statement. (Maj. Op., II. A. 2.) The evidence regarding the manner of the killing also supports a reasonable inference of premeditation. The killing was accomplished by the use of a weapon—a hammer—and the victim was both beaten numerous times with the hammer, and was strangled: a medical expert testified that abrasion marks around the victim's neck and broken capillaries in her mouth and left eye indicated strangulation. Although the testimony was in dispute regarding whether the victim was alive when the strangulation occurred, the jury was entitled to accept the

evidence pointing to a methodical manner of killing consistent with the theory of premeditation. (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1444 [when a defendant challenges the sufficiency of the evidence to support a conviction, the reviewing court must indulge every reasonable inference the jury could draw from the evidence].)

The evidence of premeditation in the record is by no means overwhelming, but I would find that the statement regarding defendant's plan for disposing of a body, coupled with evidence of a methodical manner of killing, is sufficient to support the first degree murder conviction.

II. THE BOOK ENTITLED "SERIAL KILLERS" SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTION 352

The majority finds no error in the trial court's admission of evidence that the "Serial Killers" book, marked at a page describing a person being killed with a hammer, was found in a storage locker to which defendant had access. The majority also finds that even assuming error in admitting that evidence, the error was harmless. I would find that admitting the book evidence was error under Evidence Code section 352 and that the error was prejudicial because it is reasonably probable the jury would have reached a different result on the issue of premeditation.

Section 352[1] allows for the exclusion of relevant evidence whose probative value is "substantially outweighed" by the probability that admitting it will "create substantial danger of undue prejudice." I acknowledge that a trial court enjoys broad discretion in assessing whether concerns of undue prejudice substantially outweigh the probative value of evidence, and its findings on that point will not be reversed on appeal absent a clear abuse of that discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 572.) Even so, a trial court's discretion is controlled by the relevant legal principles, and must be exercised in conformity with the spirit of the law. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736–737.)

[1] Unspecified statutory references are to the Evidence Code.

By its terms, section 352 requires the trial court to balance the probative value of a particular item of evidence against the risk that admitting it will cause undue prejudice to a party. Evidence does not become inadmissible whenever the risk of undue prejudice simply outweighs its probative value; it must be excluded only where the probative value is "substantially" outweighed by the risk of undue prejudice. I believe that standard is clearly met here.

The majority correctly notes that since the book describes a murder committed with a hammer it is relevant to show that defendant was "possibly inspired to use one of his own hammers to kill someone." (Maj. Op., II. B. 1.). And as the Attorney General points out, the bookmarking of the passage describing the hammer murder is also relevant to show defendant planned the killing. But evidence made inadmissible by section 352 will always be relevant. Were it not, section 352 would not even be reached because the evidence would be inadmissible under section 350 ("[n]o evidence is admissible except relevant evidence."). The first step in a section 352 analysis is therefore not to determine whether certain evidence is relevant, but rather to assess its probative value in the context of the particular case.

The "Serial Killers" book was relevant, but its probative value in the context of the evidence introduced at trial was slight. The book was in a storage locker rented to both defendant and his girlfriend, and the girlfriend told authorities that she believed the book belonged to defendant's sister, not him. Defendant's sister testified that the book was indeed hers, and that she had bookmarked the passage describing the hammer murder. Notably, the only fingerprints found on the book were hers. The somewhat speculative inference required under these circumstances to conclude the book belonged to defendant, and the weight of the evidence against that inference, greatly reduce the probative value of the book. This is not a situation where the evidence strongly establishes the book was possessed by defendant or that he marked the text about killing someone with a hammer—that would be highly probative. The evidence here indicates

only that the book may have been possessed by defendant, making it decidedly less probative. (*People v. Bush* (1978) 84 Cal.App.3d 294, 307 [evidence that merely points to a "possible ground of suspicion" has little probative value under section 352 analysis].) The majority recognizes that the lack of evidence connecting the book to defendant diminishes its probative value. In finding the evidence insufficient to support premeditation, the majority opinion describes the book evidence as "the weakest evidence of planning," since the only thing connecting the book to defendant is that it was found in a storage locker he shared with others. (Maj. Op., II. A. 2.).

The book's diminished probative value must then be weighed against the risk that admitting it would cause undue prejudice. "The 'prejudice' referred to in Evidence Code section 352 is 'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1197.) The statute uses the word "prejudice" in its etymological sense of "prejudging" a person based on extraneous factors. (*People v. Disa* (2016) 1 Cal.App.5th 654, 671; see also *People v. Doolin* (2009) 45 Cal.4th 390, 439 ["In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction."].)

The "Serial Killers" book carried an extreme risk that the case would be decided emotionally rather than on a dispassionate review of the evidence. It is exceedingly unlikely in this particular prosecution that the jury would be able to logically evaluate and dispassionately review all the evidence after learning that defendant possessed a book about a serial killer committing a murder with a hammer. The book evidence is precisely the type that should be excluded under section 352: its impact on the way the jury viewed defendant virtually assured he would be convicted—even though the book itself, as previously discussed, had relatively little probative value.

The balancing a trial court is required to engage in under section 352 is particularly important in a criminal case, where a defendant's liberty is at stake. (*People v. Wright* (1985) 39 Cal.3d 576, 588.) Under the circumstances here, admitting the "Serial Killers" book evidence was error because it created an unacceptable risk of unfairness in the proceedings. (*People v. Waidla* (2000) 22 Cal.4th 690, 724 [evidence should be excluded under section 352 if it "poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.' "].)

The majority finds any error in admitting the book evidence to be harmless under *People v. Watson* (1956) 46 Cal.2d 818, but in so doing focuses solely on evidence establishing the identity of the killer. (Maj. Op., II. B. 2.) That is, the majority finds it is not reasonably probable defendant would have obtained a different result even if the book evidence were excluded, given the other evidence pointing to him as the perpetrator. But the book was also relevant to the issue of premeditation, because it suggests forethought and planning. Because the evidence of premeditation introduced at trial was relatively weak, I find it is reasonably probable the jury would have reached a different result as to premeditation were it not for the book evidence.

I would reverse the judgment and remand the matter to the trial court to allow the District Attorney to either accept the entry of a modified judgment of conviction for second degree murder, or retry the case.

Grover, J.