The People v. Brandon Jason Manai

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P. v. Manai

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Affirmed.

A jury convicted Brandon Jason Manai (defendant) of first degree murder in violation of Penal Code section 187, subdivision (a).[1] The trial court imposed a sentence of 25 years to life.

Defendant appeals on the grounds that: (1) the erroneous denial of his Marsden[2] motion requires reversal; (2) prosecutorial misconduct resulted in a denial of his rights to a fair trial, due process, and effective assistance of counsel; (3) defense counsel was ineffective; (4) the trial court erred in admitting other crimes evidence; (5) cumulative error requires the granting of a new trial; and (6) there is insufficient credible evidence to sustain the conviction of first degree murder.

FACTS

Prosecution Evidence

On the afternoon of July 3, 2005, Guillermina Rosas (Guillermina) and some family members discovered a body lying on some rocks near the beach. The beach was at the bottom of a cliff in Rancho Palos Verdes. Guillermina's husband called 911. Firefighters arrived and climbed down the trail with Deputy Alma Lopez (Deputy Lopez), who had arrived at the same time.

Deputy Lopez saw no sign of any purse, wallet, cell phone, bag, or other personal items in the area around the deceased woman. The woman wore a black miniskirt, a brown shirt, and black high heels. She had an undamaged French manicure. There were pieces of brush, or "stickers," on the back of the woman's shirt, on the bottom of her skirt, and in her hair. The stickers may have been from foxtail bushes that grew at the top of the cliff. None grew on the face of the cliff or where the body

landed. From the top of the cliff, where the parking lot is located, to the bottom is approximately 150 to 200 feet. The body was later identified as that of Julia Rosas (Rosas), who was called Julie.

An autopsy revealed that Rosas died of multiple blunt force injuries. She had a depressed skull fracture, other head injuries, ruptured and lacerated organs, other internal injuries, and multiple abrasions and fractures in various parts of her body. The injuries were caused on impact. There were no defensive wounds on the hands or arms and no sign of sexual assault. She was fully clothed. Although her clothing appeared to be properly placed, the material in between the cups of her halter bra was twisted. The coroner believed that Julie had been alive when she went over the cliff. He did not believe she fell or jumped, but rather that she was either pushed or thrown over the cliff. The coroner could not, however, be certain that this was what had occurred.

Rosas had resided in Norwalk with her parents, her sister Xochitl, and her brothers Cuauht©moc and Felipe. Defendant and Rosas dated for a few months and married on June 19, 2005, in Las Vegas with no friends or family present. They returned to Los Angeles and continued to live as before with their respective families. Defendant lived in Torrance with his mother and two sisters. Rosas worked at the corporate office of Bally's Total Fitness. Defendant worked as a porter who cleaned cars at the Hertz rental car company. Rosas was last seen by her family on the night of July 2, 2005, and her body was found on the following afternoon.

Xochitl and Rosas were close. Xochitl saw defendant approximately 10 times before Rosas's death. Defendant would not enter their home when he came for Rosas, but would drive up and call her on her cell phone. Xochitl knew that Rosas had programmed a unique ring tone for defendant's calls to her cell phone. Xochitl knew by hearing the ring tone that defendant called and sent text messages to Rosas constantly at all hours of the day and night. Xochitl heard the two arguing over the phone. Xochitl did not know that Rosas planned to marry defendant on June 19, 2005. Rosas showed Xochitl her marriage certificate, and Xochitl was surprised.

Lucia Reyes (Reyes) worked with Rosas up until the time of her death, and they were friends. Reyes knew defendant and was able to recognize his voice. Reyes could hear defendant yelling at Rosas over the phone. He sent Rosas text messages and called her often. Rosas would tell defendant she had to get back to work. As soon as she hung up, he called her back. They often "fought" over the phone. Reyes heard defendant yelling as Rosas held the phone away from her ear.

Reyes saw defendant at Bally's four times while he dated Rosas. He would appear during their break right after Rosas ended a call with him. Rosas seemed upset and frustrated when this occurred. Defendant seemed angry and would say he needed to talk to her. He hovered over Rosas, and his body language was threatening. Rosas was petite and under five feet tall, and defendant was approximately six feet tall. Rosas told Reyes that she was going to marry defendant approximately one week before the wedding. On the Monday after Rosas returned from Las Vegas, Rosas asked Reyes if she thought the Las Vegas marriage was "official." When Reyes said that it was, Rosas asked Reyes if she knew

how she could obtain an annulment.

Nancy Borja (Borja) was Rosas's friend, and they went out together and talked on the telephone frequently. Borja was surprised when she learned that Rosas was going to marry defendant. A week after the wedding, Borja spoke with Rosas, and Rosas did not sound happy. Borja told Detective Robert Taylor (Detective Taylor) that Rosas was happy after the marriage.

On July 2, 2005, Rosas planned to go to a club with four girlfriends. During the day, she and Xochitl went shopping. Rosas bought a miniskirt, a halter top, and high heeled shoes. Defendant telephoned Rosas over and over while she was shopping, and she was annoyed. Defendant and Rosas were supposed to pick everyone up at around 9:30 p.m. When Borja heard that Rosas would not do so, another friend drove Rosas's friends to the club. Rosas and defendant were expected to meet everyone there later on. Defendant and Rosas never showed up, and Rosas's friends never heard from her again.

Rosas was upset at defendant because he was very late in picking her up. When he finally arrived, they argued in front of her house. Rosas nevertheless left with him at approximately 11:30 p.m. She was carrying a black grocery bag containing clothes to change into after the club. She also took a brush, her wallet, car keys, identification, a cell phone, and a clutch purse.

Defendant had a friend named Anselmo Sojo (Sojo). Defendant told Sojo over the telephone at approximately 10:30 p.m. that he would not be going out with Sojo because he was going out with his wife.

Rosas telephoned Cuauht©moc at 12:26 a.m. on Sunday, July 3, 2005, but he did not see the message until after 2:00 a.m. When he returned the call, he was connected to Rosas's voice mail. Rosas did not return home that night.

At approximately 3:00 a.m. on the morning of July 3, defendant's mother, Soo Manai (mother), returned home from work and saw defendant getting into his green Mustang. Mother told defendant that if he was going to get something to eat, she would like something also. Defendant drove off. Defendant returned without food and went to bed. Mother testified that he was gone for approximately 10 minutes. She denied telling Detective Taylor that appellant was gone until approximately 4:00 a.m.

Later on the morning of July 3, Cuauht©moc answered the telephone at his home, and defendant was on the line, asking for Rosas. Cuauht©moc told defendant that he thought Rosas was with defendant. Defendant said that one of Rosas's friends picked her up at defendant's home around midnight, and she left with that friend. Two of Rosas's friends, Borja and Nancy Balino, both tried calling Rosas on July 3, and the calls went to her voice mail. Xochitl tried calling Rosas on July 4 but was unsuccessful. Xochitl twice called defendant to ask about Rosas.

The morning of July 3, defendant called Sojo and said he needed to speak with him. Phone records showed that defendant made a cell phone call to Sojo from the area of Rancho Palos Verdes at 2:31 a.m. He made a second call to Sojo from a position north of the cliff. He called a third time from the vicinity of his home in Torrance. At around noon on July 3, defendant drove to Sojo's house in a black SUV belonging to the Hertz facility in Torrance where defendant worked. Defendant and Sojo went to a restaurant in Redondo Beach. They sat where they had a view of the ocean and the Palos Verdes cliffs. Sojo asked defendant what it was that defendant wanted to tell him, and defendant said, "I threw my wife off the cliff." Defendant was calm. Sojo did not believe defendant and asked, "What?" He thought it was a joke. Sojo asked defendant which cliff he meant, and defendant pointed through the window at the Palos Verdes cliff. Sojo did not call the police because he was afraid and did not want to get involved.

On the evening of July 3, defendant went to a barbecue with Sojo and other friends. Sojo's girlfriend, Diana Gonzalez (Gonzalez), noticed what seemed to be fresh scratches on defendant's lower arm. She asked defendant about them, but he did not answer. He put his jacket back on. Sojo did not notice any scratches.

On Tuesday, July 5, defendant called Xochitl and told her that he and Rosas did not go to the club. He said that Rosas would be home later, and he invited Xochitl to lunch, which he had never done before. On July 6, Xochitl received five text messages from defendant. He had never before sent her a text message. The first two text messages read, "What's the news with my wife?" The third message read, "Let me know what's happening." The fourth read, "Call me and let me know what's going on, please." The fifth message read, "Are you ignoring me on purpose? Tell me, and I'll leave you alone. Just say it."

On July 7, Xochitl used Rosas's password to check her cell phone voice mail. There was only one call on July 3. On July 4, there was a message from defendant asking Rosas to call him when she woke up. On July 5, defendant left a message saying he did not know why he had not heard from her. He asked Rosas to call him and said he hoped she had had a good Fourth of July. Xochitl knew that defendant usually called Rosas 17 to 18 times a day before her death.

Cuauht©moc filed a missing person's report on Rosas on July 6. Deputy Alfred Alcala (Deputy Alcala) went to the family home and spoke to Rosas's siblings. He also spoke with Reyes from Rosas's work. Deputy Alcala learned defendant's name and phone number and called him that evening. Defendant said he had last seen Rosas the previous Saturday night when she left his home with some friends. He said he would meet Deputy Alcala at Rosas's home, but he never showed up. Deputy Alcala telephoned defendant again, and defendant said he did not want to meet him at the family home. Defendant went to the Norwalk Sheriff's station.

When defendant arrived at the Norwalk station, his personal property, including his cell phone, was taken from him. Deputy Alcala learned that the body recovered from Palos Verdes was Rosas's while

defendant was at the station, and the deputy informed Detective Taylor about what he had learned up to that point.

Detective Taylor and Detective Gabrielle Graves interviewed defendant. They told defendant to remove his outer clothing and photographed him. Defendant had relatively fresh scratches on his upper back and on each arm. Defendant's interview was recorded, and the recording was played for the jury. Defendant said he knew his wife was missing, but he did not know she was dead. He said he was with Rosas at his apartment until 1:00 or 2:00 a.m. on July 3. Some friends of hers picked her up from there.

Finally, at 1:10 a.m. on July 7, the detectives read defendant his Miranda rights[3] and recorded a second interview with him. The recording was played for the jury. Defendant said that the Las Vegas wedding without any friends or family present was Rosas's idea. On the night before her body was found, Rosas's friends picked her up at his home at approximately 2:00 a.m. Defendant denied killing Rosas.

Defendant was arrested. Detective Taylor served a search warrant at defendant's apartment that day. The police found nothing to connect defendant to Rosas's death in the apartment, in his Mustang, or in the Hertz SUV he had been recently driving. There was no evidence of a sexual assault either.

Detective Taylor obtained warrants to examine the phone records of Rosas's and defendant's cell phones. Defendant's phone records revealed calls to Sojo. When Sojo met with detectives on July 23, 2005, he said he had not wished to go to the police because he did not want to be involved. Sojo told Detective Taylor about defendant's confession. Sojo's girlfriend, Gonzalez, had talked with Sojo about the matter, but she did not contact police because she was afraid.

Cell phone records showed that calls had been placed from defendant's and Rosas's cell phones near the cliff where her body was found. Defendant's cell phone recorded a call to Consuelo Lara (Lara), who was a friend of defendant's from 1998. Lara lived in San Jose. At 2:48 a.m. on July 3, 2005, defendant called Lara, but Lara did not receive the message. In the week before his trial began, defendant telephoned Lara by means of a three-way call (with his mother). Lara did not pick up the call. Lara received a letter from defendant dated August 6, 2009, when he was housed in the Twin Towers jail. The letter was read to the jury. Defendant wrote, "I know you will never know that when I called you one very late night I needed you more then than I'll ever need anyone in my life. If you could have been available then I would be home where I belong."

The toxicology report on Rosas revealed doxylamine, an antihistamine common in cold and allergy medicine. Doxylamine has a sedative effect and can cause drowsiness. No alcohol was detected in her system.

When defendant was 17 years old, he dated Julissa Preciado (Preciado), who was 20 at the time. They

both lived in San Jose, California. They dated for approximately six months, and Preciado broke up with him over his temper and possessiveness. Defendant subjected Preciado to a long ordeal during which he prevented her from leaving his apartment, threatened her, and choked her into unconsciousness. Preciado eventually escaped by using her wits and testified against defendant at a later criminal proceeding.[4]

Defense Evidence

Deputy Armando Cuevas (Deputy Cuevas), of the Los Angeles County Sheriff's Department, and his partner conducted a traffic stop on Sojo on February 6, 2008. After noticing a strong odor of marijuana coming from the car, Deputy Cuevas searched Sojo and found some marijuana in his pocket and a larger bag of marijuana under the driver's seat. Sojo said someone gave him the marijuana and he planned to share it with friends.

Defendant admitted that Preciado's testimony was all true, and he pointed out that he was only 17 when he dated her in San Jose. Defendant and his family moved to Torrance in 2003, and he lived there with his mother and sister. He began working as a porter for Hertz in May 2005, when he was 23 years old.

Defendant met Rosas in January 2005 at a club. They began dating often. They broke up but got back together. They telephoned and texted each other often and sometimes argued. He sometimes visited her at work. Rosas proposed to him so that she could get legal status in the United States.[5] Defendant agreed because he cared about her, although he did not love her. He never wrote a love letter to Rosas. Rosas never asked defendant for an annulment.

Rosas and defendant did not plan to go out together on July 2, 2005. She was going out with friends and defendant planned to go with Sojo and other friends to a pool hall. He changed his plan when Rosas called, and he agreed to pick up Rosas and her friends at 9:30 p.m. and be the designated driver. Because he gave a ride home to a friend, however, he arrived late at Rosas's home. Rosas was angry and they argued when he arrived. They decided to go out anyway, and Rosas and defendant drove to the club in downtown Los Angeles where her friends had gone. Rosas brought her belongings in a bag.

When defendant and Rosas arrived at the club at midnight, they decided it was too late to go in. They instead went to defendant's apartment. They watched a movie and had sex.[6] Michella Matasso (Matasso) and some other friends of defendant called him, and they agreed to meet at the cliffs. Defendant and Rosas had been there before. Defendant and Rosas met with his friends, who left after approximately 10 minutes.

Defendant and Rosas had heard about a path leading down the cliff. They decided to look for it and climbed through the railing. It was too dark to see anything, so defendant went back to his car to

turn on the headlights. While he was at the car, he heard a scream. Defendant jumped over the railing and went to the edge of the cliff. He called out Rosas's name, but he did not hear or see anything. It was impossible for him to hike down the cliff in the dark. Defendant panicked and drove off. He did not call 911. Instead he called Sojo. Defendant was afraid to call the police because he was still on parole from the incident with Preciado. He just drove home.

Defendant picked up Sojo the next day and went to the restaurant on the pier. Defendant told Sojo about the accident and asked Sojo to report it, since defendant was on parole. Sojo refused to report it because he believed defendant was joking.

Defendant decided that he had to just ignore the accident. For this reason, he lied to the police and left messages on Rosas's voice mail. He also made "fake" calls with Rosas's cell phone approximately an hour and a half after her death and on the following day. Defendant got rid of Rosas's belongings from his car by putting them in a dumpster across the street from Sojo's home. Defendant acknowledged lying to the police during his two interviews. He lied about not knowing Rosas was dead and lied about or omitted other things. He tried to cover up the accident because he was afraid. Defendant had no idea why Sojo would testify that defendant confessed to Rosas's murder. Defendant did not push or throw Rosas from the cliff.

Defendant explained that the scratches on his arms and back were the result of his shaving his body on July 4, 2005. Bianca Anderson (Anderson) was a friend of defendant's who testified that she knew defendant shaved his arms and his back. She had once helped him shave his back. On July 2, 2005, Anderson needed a ride after working late and called defendant. Defendant picked her up in a black SUV at approximately 10:00 p.m. and took her home to San Pedro. Defendant told Anderson that he was going out with Rosas.

Police found no trace of blood, plant debris, or trace evidence in defendant's home, his Mustang, or the Hertz SUV that he used. Examination of the parking area in Rancho Palos Verdes revealed nothing of significance. Defendant's DNA found on Rosas's fingernails could have come from scratching him during a fight or from intimate contact.

The defense called Marc Firestone (Firestone) a forensic engineer, who testified regarding the cause of Rosas's fall. Firestone testified that a person who is pushed from a cliff will end up farther away from the cliff base than someone who falls. Firestone visited the cliff on August 29, 2006, with defendant's attorney, the prosecutor and several police officers. A helicopter took them to the bottom of the cliff. Firestone saw a rocky protrusion or outcropping on the cliff at about 20 feet from the cliff edge. If someone were to go off the top, he or she would strike the protrusion and then start bouncing down the slope, ending up on the beach. This is what most likely happened to Rosas. It was not possible to state with certainty whether Rosas was thrown, jumped, or slipped off the cliff. It would be difficult to carry a struggling person to the cliff edge and throw that person over the edge without going over with that person.

Firestone measured the light level at the top of the cliff at night. The moon was in the same phase as on July 2, 2005. It was pitch black. The light level was .01, or one-one hundredth of a foot candle. The light level of a residential neighborhood with street lights is approximately two tenths of a foot candle. At .01 foot candles, one cannot see color or any kind of detail. It is also difficult to get one's bearings. It was impossible to see anything from the top of the cliff, including the edge.

Firestone did not agree with the coroner's conclusion that Rosas had been pushed or thrown with sufficient force to clear the outward-most rocky outcropping on the cliff face. The outcropping was too long, and the theory did not comport with the laws of physics. A person could not push or throw someone the horizontal distance required to clear the outcropping.

Rebuttal Evidence

Xochitl contacted the prosecutor after hearing defendant testify that he did not love Rosas. She brought the prosecutor a letter on the following morning at 10:00 a.m.[7] Xochitl had known about the letter for years. She found it when she went through her sister's belongings. She had never given it to the police or the prosecutor.

DISCUSSION

I. Denial of Marsden Motion

A. Defendant's Argument

Defendant contends a dichotomy between his and his trial counsel's perceptions reflected a breakdown of the attorney-client relationship. He maintains that the trial court erred in denying his motion to relieve his appointed counsel and that the error deprived him of his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process.

B. Relevant Authority

A defendant's Sixth Amendment right to the assistance of counsel entitles him to substitute appointed counsel """"if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."""" (People v. Welch (1999) 20 Cal.4th 701, 728; People v. Memro (1995) 11 Cal.4th 786, 857.)

We apply the "deferential abuse of discretion standard" when reviewing the denial of a motion to substitute counsel. (People v. Jones (2003) 29 Cal.4th 1229, 1245.) "'Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel.' [Citations.]" (People v.

Hart (1999) 20 Cal.4th 546, 603.)

Disagreements over strategy are insufficient to warrant a substitution of counsel under Marsden. (People v. Welch, supra, 20 Cal.4th at pp. 728-729 ["A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citations.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict'"]; People v. Lucky (1988) 45 Cal.3d 259, 281-282 ["There is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant. [Citations.] Nor does a disagreement between defendant and appointed counsel concerning trial tactics necessarily compel the appointment of another attorney"].)

C. Marsden Motion Properly Denied

Defendant contends that he made it clear to his attorney that there were witnesses "out there" who could help him, and his defense counsel disagreed, thus creating an unresolved and unresolvable conflict between them that deprived him of the effective assistance of counsel. The transcript of the Marsden hearing does not support his contention. Defendant wanted his defense counsel to bring in witnesses "to debate" with the prosecution witnesses' testimony and to speak about defendant's character. Defendant also complained about counsel's insufficient efforts to find a witness that was "going to help exonerate [him]." Defendant could not provide the witness's name or description, having only seen her once. He knew only that she was 19 and a high school graduate, and he wanted counsel to "try to bring [him a] high school yearbook." The witness's connection to the case was that she knew his deceased friend, Matasso. Matasso, defendant's later testimony revealed, was allegedly the person who summoned defendant to the cliff that night to get some photographs from him.

Defendant acknowledged that it was his fault he and his attorney had not agreed upon a defense. He nevertheless complained that counsel did not know what defendant was going to say when he took the stand. He acknowledged that counsel asked him what he was going to testify to, but he did not tell her. He told her a "lot of things," but "nothing solid." When asked why he had not told his attorney what he would be able to testify to, defendant began talking again about the girl he wanted to find who "looks like a white girl to me, you know. That could be anybody . . . young white girl, you know . . . best thing I can think of, hey, you ever seen me; probably went to high school. Recent high school graduate, you know. Let's go with that. She told me flat out no, I'm not going to do all that. You know."

The record reveals that the trial court admirably distilled defendant's inarticulate ramblings regarding his dissatisfaction with trial counsel. The trial court asked defense counsel to address the following issues: whether or not to introduce good character; the search for the witness defendant claimed could provide exculpatory information; whether counsel was communicating effectively with defendant regarding an affirmative defense; and whether counsel believe they were ready for trial.

Counsel responded that she had explained to defendant that character evidence on his behalf would open the door to his extensive juvenile record, with offenses involving violence. These were in addition to the one incident the prosecutor was attempting to introduce (regarding Preciado). Counsel had explained to defendant that it was a strategy call she was entitled to make. With respect to Matasso's friend (the white girl), the defense investigator had spent a lot of time looking for her to no avail. Furthermore, this person had nothing to do with a defense, and counsel believed the girl was not a witness to anything.

Counsel explained to the trial court that defendant had presented to her several significantly different defenses. Counsel had begged defendant to tell her what happened that night so that she could help him present a defense. Everything defendant said about it was vague and ambiguous. It was for that reason that she did not know the content of his future testimony. Defendant seemed paranoid about telling her and was not forthright. Defendant continually changed his mind about his defense. Counsel was ready for trial and did not believe there was any significant investigation or anything else left to be done.

The trial court told defendant that he had not been candid with his attorney and that he had not selected the defense he wished to present. Counsel was waiting to see what the prosecution presented before making a firm decision on how to put on an affirmative defense. Defendant did not have to testify if he did not desire. The trial court did not believe defendant had been forthright with his attorney and he denied the Marsden motion. The trial court strongly recommended that defendant cooperate and be truthful with his attorney.

We conclude the trial court did not abuse its discretion in denying the Marsden motion. The trial court noted with approval counsel's strategy in light of defendant's inability to decide upon what he wished to tell the jury, i.e., that she was "prepared to cross-examine the prosecution's witnesses and see where the case rests at the close of the prosecution case. Then if the defendant wishes to testify, he certainly can. And if you need to call witnesses as part of an affirmative defense, you're prepared to call witnesses based on the information you have thus far." Although it appears defendant had not decided by the time of the Marsden hearing whether he would acknowledge he was present at the time of his wife's death, his counsel showed the trial court that she was effectively preparing the case and that she was able to begin trial without knowing exactly what defendant would say, assuming he testified. Counsel was prepared to support defendant's defense at the moment it was revealed to her.

Furthermore, at no time did defendant indicate he distrusted his attorney, and his failure to reveal his defense did not seem to be related to his counsel, but rather to his inability to decide upon which story he wished to present. It appears that defendant would have been unwilling to show his hand at that stage, no matter who represented him. In any event, a claim of distrust of appointed counsel does not establish a conflict to the degree that counsel must be removed. (People v. Jackson (2009) 45 Cal.4th 662, 688; People v. Smith (2003) 30 Cal.4th 581, 606.)

Finally, the disagreement as to the wisdom of presenting character evidence on defendant's behalf was a disagreement over tactics that is alone not sufficient to require substitution of counsel. (People v. Smith, supra, 30 Cal.4th at p. 606; People v. Welch, supra, 20 Cal.4th at pp. 728-729.) Moreover, counsel's reasoning appears sound.

Defendant failed to demonstrate that his counsel was providing inadequate representation or that they had reached a point of irreconcilable conflict. The trial court did not abuse its discretion in denying the Marsden motion.

II. Prosecutorial Misconduct

A. Defendant's Argument

Defendant contends that there were two instances of prosecutorial misconduct, both related to a love letter defendant wrote to Rosas. The first alleged instance occurred when the prosecutor intentionally concealed discoverable evidence. The second occurred when the prosecutor repeated a question and elicited an answer from defendant after the trial court had sustained an objection to the same question and had stricken the question and answer. Defendant adds that his counsel's ineffective reaction added to the prejudice and argues that he is entitled to a new trial.

B. Relevant Authority

"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'"' [Citations.] 'Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.] 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.]" (People v. Friend (2009) 47 Cal.4th 1, 29.)

Section 1054.1 provides in pertinent part that the "prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] . . . [¶] (b) Statements of all defendants."

Section 1054.5 provides in pertinent part that "[u]pon a showing that a party has not complied with Section 1054.1 . . . a court may make any order necessary to enforce the provisions of this chapter,

including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5, subd. (b).)

"'The court's ruling on a discovery motion is subject to review for abuse of discretion. [Citation.] [Citation.]'" (People v. Prince (2007) 40 Cal.4th 1179, 1232.) "'[A] trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to the prosecution's violation of a discovery order.'" (People v. Ayala (2000) 23 Cal.4th 225, 299.)

C. Proceedings Below

During direct examination, defendant was asked if he was crazy in love with Rosas and if he loved her. Defendant replied "no" to both questions. He also testified that they were not getting married because they were in love. On the following day, defendant's direct testimony resumed and concluded. During cross-examination of defendant, the following exchange occurred:

"Q. And you're telling us that's true, you did not love her?

"A. Yes.

"Q. Then why did you write her love [letters]?

"A. I didn't write her love letters."

The prosecutor approached the bench and stated that Xochitl had brought her a card at 10:00 a.m. that morning. The card, dated June 15, 2005, read, "You are in my thoughts today and in my heart always." Defendant wrote inside, "To my Princess Julie. Thinking of you makes me the happiest man alive. Thinking of you fills my heart with love. Thinking of you motivates me to be the best person I can be. Thinking of you and me spending the rest of our lives together makes me feel like Superman where I can fly to wherever, that I'm simply invincible with you by my side. I hope this brings you joy today. Always with love, Brandon. Also known as your husband to be."

Defense counsel argued that although the prosecutor had the card that morning before defendant resumed his testimony, there had been no attempt to turn it over, despite it being a statement by defendant. After the parties had researched the issue, the prosecutor acknowledged that she should have immediately turned over the card, since it was a statement by the defendant. She asserted that she did not intend to be deceitful.

The trial court stated that under section 1054.1, subdivision (b), the prosecutor had an affirmative obligation to disclose the card containing defendant's statements when she first possessed it that

morning. The trial court found that the prosecutor was credible when she stated that she did not intend to acquire any advantage over the defense by not immediately disclosing the card. The trial court believed, however, that the trier of fact needed to know the information the card contained. Furthermore, defendant had opened the door by testifying that his marriage to Rosas was only for the purpose of assisting in her legalization. The card would have been admitted to impeach defendant and show that this was an untruthful statement in any event. Nevertheless, the defense was deprived of an opportunity to soften the blow of the information in direct examination.

The court determined that the appropriate remedy was to "put us back where we would have been at 10:00 this morning. And that is to prohibit the prosecutor from inquiring on cross-examination until after [the defense had] an opportunity to address that" in redirect. The issue would then be fair game on recross-examination. Even if the defense did not address the card on redirect, the prosecutor would be permitted to address it on recross-examination.

The defense asked the trial court to strike the prosecutor's last question and defendant's answer. The trial court agreed. Defense counsel did not wish the trial court to tell the jury that they were stricken. Defense counsel stated for the record that she felt the remedy was inadequate and moved for a mistrial.

The trial court found that suppression of the card would not satisfy justice from any standpoint; that defendant was not prejudiced; and the issues could be addressed on redirect examination. The trial court denied the mistrial motion.

During redirect examination, defendant was asked if he cared for Rosas, and defendant said he did. The prosecutor then began her recross-examination by mentioning her prior question about why defendant wrote Rosas love letters and defendant's answer that he did not.

Defense counsel asked to approach, and told the trial court that she believed the question and answer had been stricken from the record. The trial court told the prosecutor that she was not to emphasize the fact that defendant had lied when responding to the earlier question. Following the trial court's guidance, the prosecutor stated that she would merely bring up the fact that defendant had said he did not love Rosas and show him the letter.

Defense counsel renewed her request to suppress the letter, arguing that the emphasis on the prior question and answer had caused irreparable prejudice. The trial court concluded that it would tell the jury they were to disregard the questions. Though defense counsel stated she was still seeking suppression, she agreed to the trial court's remedy.

The trial court told the jury it was not to consider the stricken question and answer for any purpose. The trial court went on to say, "However, as it relates to the card itself, there's certain information that may be relevant to your consideration, so I intend to allow counsel to ask questions in that

regard. But with regards to the question that was asked yesterday and the answer that was given yesterday, that's stricken."

The prosecutor proceeded with recross-examination and showed defendant the card. Defendant did not know if the card contained his handwriting, and he did not recognize the card. Defendant said the writing looked similar to the writing in his journal, but it did not look like his writing. He said he had never seen the card. The prosecutor read the contents of the card over the defense objection. Defendant said he did not remember the card.

D. Remedy for Discovery Violation and Stricken Questions Sufficient; Defendant Suffered No Prejudice

We conclude the trial court did not err by refusing to exclude the evidence of the love letter as a sanction for the prosecutor's delayed disclosure. As noted, the trial court has broad discretion in fashioning a remedy for a discovery violation. (People v. Lamb (2006) 136 Cal.App.4th 575, 581.) As the trial court stated, the letter would have been admitted had it been disclosed at 10:00 a.m. when court began, and when defendant's direct testimony was nearly completed. On the previous day, defendant had already made his claims about not loving Rosas. The trial court prohibited the prosecutor from impeaching defendant with the letter on cross-examination after the discovery violation was revealed. The prosecutor was obliged to wait until her recross-examination, allowing defense counsel the opportunity to ask any questions it might have asked had the letter been produced before the end of defendant's direct examination.

In any event, defendant suffered no undue prejudice from admission of the love letter and the prosecutor's questions regarding it, even if we were to consider the reiterated questions as misconduct by the prosecutor. Rosas's office friend, Reyes, had already testified that Rosas had received a love letter from defendant, and that defendant had sent a text message to Rosas to find out what she thought of it. And although the prosecutor's questions about the letter revealed an apparent lie by defendant, many other questions and responses regarding defendant's conduct after Rosas's death revealed defendant's prodigious tendency to lie and deceive. We perceive no reprehensible conduct on the part of the prosecutor, who apparently forgot that any statement by a defendant must be disclosed to the defense prior to using it for impeachment. Furthermore, defendant testified on more than one occasion that he cared for Rosas -- a milder expression of affection that could equally show the jury that he would resist any attempt by her to cut off their relationship. Defendant also said that he and Rosas discussed moving to an apartment together.

Moreover, the trial court admonished the jury regarding the requirement for immediate disclosure of statements by a defendant and the prosecutor's inappropriate questions by stating, "[t]he apparent card that's in question came to the attention of the prosecutor yesterday morning around 10:00. The questions were asked later in the day. So for technical reasons, I struck the question, and I struck the answer. You're not to consider it for any purpose. I'm striking the question that's been asked this

morning regarding whether or not yesterday, a certain question and a certain answer were given, because it's stricken from the record, and you may not consider it. However, as it relates to the card itself, there's certain information that may be relevant to your consideration, so I intend to allow counsel to ask questions in that regard. But with regards to the question that was asked yesterday and the answer that was given yesterday, that's stricken."

Finally, as discussed below in part VI, the evidence of defendant's guilt was strong. Therefore, it is not reasonably probable that the violation of the reciprocal-discovery statute and the prosecutor's repetition of a stricken question affected the trial result, and the slightly late production of the love letter and the questions regarding it were harmless. (People v. Zambrano (2007) 41 Cal.4th 1082, 1135, fn. 13, disapproved on another point in People v. Doolin (2009) 45 Cal.4th 390, 421; People v. Watson (1956) 46 Cal.2d 818, 836 (Watson).)

III. Alleged Ineffective Assistance of Counsel

A. Defendant's Argument

Defendant contends that his counsel's failure to soften the blow of the prosecutor's misconduct when she was invited to do so by the trial court deprived him of his Sixth Amendment right to effective assistance of counsel.

B. Relevant Authority

A defendant claiming ineffective assistance of counsel in violation of his Sixth Amendment right to counsel must show not only that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms but also that it is reasonably probable, but for counsel's failings, the result would have been more favorable to the defendant. (Strickland v. Washington (1984) 466 U.S. 668, 687, 694 (Strickland); In re Jones (1996) 13 Cal.4th 552, 561.) If defendant's showing as to either component is insufficient, the claim fails. (People v. Holt (1997) 15 Cal.4th 619, 703.) Accordingly, if he cannot show prejudice, we may reject his claim of ineffective assistance, and need not address the adequacy of trial counsel's performance. (Strickland, supra, at p. 697; People v. Lawley (2002) 27 Cal.4th 102, 136.)

"'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.' [Citation.]" (People v. Karis (1988) 46 Cal.3d 612, 656.) There is a presumption the challenged action "'might be considered sound trial strategy'" under the circumstances. (Strickland, supra, 466 U.S. at p. 689; accord, People v. Dennis (1998) 17 Cal.4th 468, 541.) On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (People v. Lucas (1995) 12 Cal.4th 415, 442.)

C. Counsel Not Ineffective

Upon redirect examination of defendant, defense counsel did not mention the letter against whose admission she had so vehemently argued. Defendant complains that she did not ask him to refresh his recollection, nor did she attempt in some other way to ameliorate the prejudice caused by the prosecutor's misconduct. According to defendant, counsel demonstrated a "laissez faire attitude" toward the trial court's suggestion that she "soften the blow" of the letter's introduction and she thereby destroyed defendant's credibility.

We note that before redirect examination, after the trial court told defense counsel she could "soften the blow," defense counsel conferred with defendant about the card. On redirect, counsel elicited that defendant's feelings for Preciado, his former girlfriend, were different than his feelings for Rosas, since he had been in love with Preciado. He said he cared for Rosas. Counsel then merely asked if he had harmed, hurt, or killed Rosas, and defendant said, "never." On recross-examination, defendant claimed he did not recognize the writing in the card as his own and he had never seen the card. Defendant, who revealed himself as a difficult and obstinate client during the Marsden hearing, had clearly decided to deny all knowledge of the card. In light of this testimony, defense counsel had no need to attempt to soften the blow of the evidence of the card expressing love for Rosas.

In any event, defendant was not prejudiced by his counsel's failure to ask him about the card. Reyes had already testified that defendant wrote a love letter to Rosas and her testimony showed that defendant, if not in love with Rosas, was clearly obsessed with her. The constant phone calls and text messages defendant sent to Rosas further evidence this obsession. The evidence of the card was merely another part of the same picture of defendant's relationship with Rosas. If anything, the contents of the letter were less damaging to defendant's case than the evidence of his possessive behavior as testified to by Reyes and Xochitl. The fact that defendant expressed love to Rosas arguably showed him in a more favorable light, assuming the jury believed it, than if he were merely an obsessive, controlling man. Defendant's argument is without merit.

IV. Admission of Other Crimes Evidence

A. Defendant's Argument

Defendant contends that the evidence of his act of domestic violence against Preciado, which occurred when he was only 17 years old, should not have been admitted. Defendant claims that the evidence should have been excluded pursuant to Evidence Code section 352 because it was so prejudicial that its admission deprived him of his Fourteenth Amendment right to due process and a fair trial.[8]

B. Testimony Regarding Preciado Incident

Preciado testified that on August 3, 1999, she had been dating defendant for six months. He borrowed her car and told her he would pick her up after work. Preciado was then 20 years old. After her shift, defendant drove Preciado to his apartment where they argued about Preciado's desire to break up with him because of his temper and his possessiveness. Defendant laughed and told her she "wasn't going anywhere." Defendant hid Preciado's keys in his mother's bedroom and blocked her from entering the bedroom. Defendant kept pushing her away from the door. Preciado was frustrated and slapped him. Defendant became angry, pushed her, and punched her twice on the back as she turned away. He pushed her onto the futon bed in the living room and began choking her. She kicked at him and they both fell on the floor. He hit her again and called her "a fucking bitch." She began to cry and went to the bathroom for a time. When she came out, defendant told her to get comfortable because she was not going anywhere. She cried herself to sleep on the futon. Defendant's mother and sister were apparently out of town.

Preciado woke up in the middle of the night and found defendant sleeping. She went to his mother's bedroom and looked for her keys but could not find them. She searched the living room sleeping area and found two kitchen knives under a pillow. She hid the knives beneath the bed. She began to open the front door and it creaked very loudly. She was afraid defendant would wake up, and she jumped back into the bed. Defendant awoke and realized she had tried to get away. When he could not find the knives, he put Preciado in a choke hold and she lost consciousness.

The next morning Preciado pretended she did not remember what had happened. She decided to act loving and then told defendant that she needed to see her parents. Defendant became angry again and told her she was not going anywhere. She asked if he would at least take her to the store for some medicine because she felt ill. So that she could take possession of her keys, she convinced defendant to let her drive them to a nearby supermarket. When they arrived, she told him she needed to use the restroom. He told her he would wait for her at the magazine rack, and the moment he turned his back, Preciado ran out of the store. She had to stop at a gas station, and by the time she got home, defendant was there waiting for her. He yelled at her and ran towards her, but she managed to enter her apartment. Preciado followed her roommate's advice and called police. Preciado heard defendant say that she was going with him dead or alive and he was going to take her out of this world. He said he planned to finish her off.

San Jose Police Department officers responded to Preciado's call. One of them took photographs of Preciado's injuries and the other arrested defendant.

Preciado was treated at a hospital, and photographs of her injuries were shown to the jury. She later testified at a criminal proceeding against defendant about the incident.

C. Relevant Authority

Evidence Code section 1109 provides in pertinent part that "in a criminal action in which the

defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

"Evidence Code section 1109 was added by the Legislature to permit propensity evidence to prove the current charge, and section 1101, subdivision (a), was amended to remove such evidence from the prohibition against use of character evidence to prove conduct on a specified occasion. [Citation.] Such evidence is thus admissible in the case-in-chief, subject to Evidence Code section 352." (People v. Poplar (1999) 70 Cal.App.4th 1129, 1137, fn. 6.)

A trial court has broad discretion to weigh the probative value of evidence against its potential prejudicial impact. A court's decision that the probative value of the evidence outweighs its prejudicial impact will not be disturbed on appeal unless the court exercised its discretion in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citations.]" (People v. Rodrigues (1994) 8 Cal.4th 1060, 1124.)

The California Supreme Court has held that Evidence Code section 1108, which is similar to Evidence Code section 1109, does not violate the due process clause. (People v. Falsetta (1999) 21 Cal.4th 903, 922.)

D. No Abuse of Discretion

When determining whether evidence of other offenses should be allowed under Evidence Code section 352, a court should consider whether "'[t]he testimony describing [the] defendant's uncharged acts [is] stronger and . . . more inflammatory than the testimony concerning the charged offenses.'" (People v. Harris (1998) 60 Cal.App.4th 727, 737-738 (Harris), citing People v. Ewoldt (1994) 7 Cal.4th 380, 405.) Also to be considered is the remoteness of the other offenses, whether introduction of the evidence would require an undue consumption of time, and the probability the jury would be confused by the evidence. (Harris, supra, at pp. 738-739.) In determining whether the evidence is probative, the court must consider whether it "'tends logically and by reasonable inference to prove the issue upon which it is offered,'" whether that issue is material to the prosecution's case, and whether the evidence is not merely cumulative. (Id. at pp. 739-740.)

Evidence of the incident involving Preciado was clearly probative as propensity evidence quite apart from the fact that it logically and reasonably tended to show defendant's intent. Preciado testified that defendant began his series of violent acts upon her and his threats to kill her when she told him that she wanted to end their relationship due to his possessiveness and his controlling nature. In the instant case, there was evidence that Rosas immediately regretted her marriage to defendant and wished to have it annulled. The prior incident was probative of defendant's intent to prevent Rosas from rejecting him and to do so by violence if necessary. In addition, the evidence tended to negate defendant's claim of accident.

On the other side of the scale, defendant's conduct with Preciado was less inflammatory than his conduct in the instant case, which resulted in the horrendous death of the victim. In the Preciado case, there was little possibility of confusion, since the prior acts were described by the victim and there was evidence that defendant was arrested and underwent criminal proceedings as a result of the offenses he committed. The acts against Preciado were not remote, having occurred approximately six years before the offense in the instant case -- in August 1999. (See People v. Campbell (1994) 23 Cal.App.4th 1488, 1497, fn. 14 [10-year-old conviction not too remote to be admissible as evidence].) Evidence Code section 1109, subdivision (e) sets a 10-year outer limit for admission of prior acts, subject to the discretion of the trial court. The evidence was not overly time-consuming, consisting of Preciado's testimony and the very brief testimony of the arresting officer.

We do not find that admission of the evidence caused the jury to "prejudg[e]" defendant or to convict him solely on the basis of his prior acts as occurred in Harris, supra, 60 Cal.App.4th at pages 737, 741. The evidence at trial, discussed below, clearly provided support for the guilty verdict without the evidence of defendant's prior acts. It was not reasonably probable that the jury would have acquitted defendant absent the evidence of the prior act. (See Harris, supra, at p. 741; Watson, supra, 46 Cal.2d at p. 836.) We conclude that the trial court's ruling was reasonable, and there was no abuse of discretion. Hence, the admission of the evidence did not deprive defendant of a fair trial or due process, and his conviction need not be reversed on this ground.

V. Cumulative Error

Defendant contends that the instant case was a close one because of a lack of any hard evidence. He points to the one juror query and the six-hours of deliberations to support this claim. He argues that the trial was fraught with prejudicial errors and that the prejudice should be viewed cumulatively. He urges that in a close case, a lesser showing of error requires reversal.

We find no merit in defendant's cumulative error argument. We do not agree that his was a close case. The record shows that the jury deliberated for little more than five hours. Our review of the record assures us that defendant received due process and a fair trial. (See People v. Ashmus (1991) 54 Cal.3d 932, 1006.) Whether considered individually or for their cumulative effect, none of the errors alleged affected the trial process, deprived defendant of his constitutional rights, or otherwise accrued to his detriment. (See People v. Sanders (1995) 11 Cal.4th 475, 565; People v. Cudjo (1993) 6 Cal.4th 585, 637.) As the California Supreme Court has stated, "A defendant is entitled to a fair trial, not a perfect one." (People v. Mincey (1992) 2 Cal.4th 408, 454.) Defendant received a fair trial. There has been no showing of cumulative prejudicial error of a degree sufficient to permit reversal.

VI. Sufficiency of the Evidence

A. Defendant's Argument

Defendant contends that when the evidence of his alleged confession to an unreliable witness, Sojo, is removed from consideration, the remaining evidence is insufficient as a matter of law to sustain his conviction for first degree murder. Defendant adds that an alternative to outright reversal could be the reduction of defendant's conviction to second degree murder.

B. Relevant Authority

The standard of appellate review for sufficiency of evidence was articulated in People v. Johnson (1980) 26 Cal.3d 557. When an appellate court seeks to determine whether a reasonable trier of fact could have found a defendant guilty beyond a reasonable doubt, it "'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (Id. at p. 576.) The court does not limit its review to the evidence favorable to the respondent, but must resolve the issue in light of the whole record. (Id. at p. 577.) "[S]ubstantial evidence" is evidence that is "reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (Id. at p. 578.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citations.]" (People v. Kraft (2000) 23 Cal.4th 978, 1053.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (People v. Bolin (1998) 18 Cal.4th 297, 331.) "[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (People v. Young (2005) 34 Cal.4th 1149, 1181.)

Although a reviewing court "may not 'go beyond inference and into the realm of speculation in order to find support for a judgment'" (People v. Memro (1985) 38 Cal.3d 658, 695, disapproved on another point in People v. Gaines (2009) 46 Cal.4th 172, 181), "[i]f the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (People v. Ceja (1993) 4 Cal.4th 1134, 1139.)

In reviewing the sufficiency of the evidence of premeditation and deliberation, we do not substitute our judgment for that of the jury. (People v. Pride (1992) 3 Cal.4th 195, 247; People v. Perez (1992) 2 Cal.4th 1117, 1124.) Premeditation and deliberation may be shown by circumstantial evidence. (People v. Anderson (1968) 70 Cal.2d 15, 25.)

"'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' [Citation.]" (People v. Koontz (2002) 27 Cal.4th 1041, 1080.)

C. Evidence Sufficient

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We believe there was sufficient substantial evidence to sustain a verdict of first degree murder in this case. Apart from defendant's confession to Sojo that he threw his wife over the cliff, the evidence showed that none of Rosas's family or friends had seen her alive after she drove off with defendant on July 2, 2005. Defendant admitted on the stand that he knew Rosas was dead and said that she accidentally fell from the cliff after they decided to find a trail that led down to the beach. The jury could reasonably find this evidence incredible when it considered that Rosas was found wearing a mini skirt, halter top, and three and one-half inch high heels. In addition, when Rosas' body was found, her French manicure was perfectly intact. The jury was entitled to infer that anyone who slipped while walking along the edge of a cliff would grab at anything she could to keep from going over the cliff and then to break her fall. Defendant's cell phone records showed that he made a call from the area near the cliff, but defendant did not call 911. He instead returned home, disposed of Rosas's belongings somewhere nearby, and went to sleep. The next day he immediately began a cover-up by leaving Rosas messages and asking her to call him. After Cuauht©moc filed a missing person's report, and defendant was called in to the police station, defendant lied to police in two separate interviews.

Although Rosas went out with defendant on the night of July 2 and apparently engaged in sexual intercourse with him, there was also evidence that she wanted to obtain an annulment of their marriage. The jury heard Preciado's evidence of how defendant reacted when she tried to break off a mere dating relationship due to defendant's temper and possessive behavior. Whether or not defendant actually loved Rosas, he said he did in the letter he sent her. He called Rosas to ask for her reaction to the letter, as testified to by Reyes. Defendant's obsession with Rosas was clearly established as proof of motive, and it is of no moment whether his obsession was caused by love or merely the need to control Rosas -- the resulting behavior was the same.

Defendant's attempt to portray himself as an even-tempered individual who was not possessive of Rosas was not credible. Defendant denied arguing with Rosas over the telephone while she was working, as testified to by Reyes, and claimed that his voice was just loud at that point in his life. Xochitl, however, had also heard Rosas and defendant arguing over the telephone late at night. Reyes's testimony showed that defendant virtually stalked Rosas by phoning her constantly at work and appearing at her workplace when she went on break, often just after she ended a call from him. Defendant's co-worker took a call from Rosas in which she threatened to obtain a restraining order against defendant if he did not stop calling her.

Finally, defendant's testimony regarding the reason for his and Rosas's presence at the top of the cliff also lacked credibility, and his doubtful veracity on this point supported an inference of planning and deliberation on his part. Defendant claimed that Matasso had called him and asked to meet him there so that she could get some photographs from him. This occurred at approximately 2:30 in the morning. Matasso was no longer alive at the time of trial. The people allegedly with Matasso -- Arturo Selagosa, a girl, and a man named George Moran -- did not testify either.

Defendant claims that Sojo's testimony should be discounted because it was patently unreliable due to Sojo's failure to report the crime to police and his conviction for possession of marijuana. Defendant alleges that although Sojo testified that the prosecution did not facilitate his pleading down to mere possession after his arrest for possession for sale, "it is highly likely the pled-down 2008 conviction came at the beneficence of the district attorney." Defendant offers no evidence of the district attorney's meddling in Sojo's prosecution. In any event, jurors are not "'nincompoop[s],'" but rather are presumed to be intelligent beings (see Conservatorship of Early (1983) 35 Cal.3d 244, 253) and were able to make this "fair" inference as well, if they chose to do so. Sojo's testimony was properly admitted, and the jury was entitled to give it the credibility it deserved.

Given the circumstances of Rosas's relationship with defendant, the circumstances of her death in defendant's presence, and the impeachment of much of his testimony, not to mention his confession to Sojo, there was sufficient substantial evidence to support defendant's conviction for first degree murder.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

We concur: Acting P. J. DOI TODD J. ASHMANN-GERST

1. All further references to statutes are to the Penal Code unless stated otherwise.

2. People v. Marsden (1970) 2 Cal.3d 118 (Marsden).

3. Miranda v. Arizona (1966) 384 U.S. 436 (Miranda).

4. Additional evidence on the Preciado incident is discussed below in part IV.

5. The evidence showed that Rosas had entered the United States as part of the Family Unity Program that allows children of legalized aliens to remain in the country with work permits so that they can become permanent residents. Rosas was petitioned by her mother, who was a naturalized citizen. Rosas had to reapply every two years, and she was scheduled to do so in 2006. Her extension would likely have been granted.

6. DNA analysis of the sexual assault kit showed that there was no evidence of sexual assault, but defendant and Rosas had engaged in sexual intercourse at some time after midnight on July 3, 2005.

7. This love letter is the subject of defendant's allegation of prosecutorial misconduct, discussed in part II below.

8. Evidence Code section 352 provides: "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."