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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT BOYD RHOADES, Defendant and Appellant.	A174041 (Alameda County Super. Ct. No. 137859)

In 2007, Robert Boyd Rhoades was convicted of the 1984 murder of 18-year-old Julie Connell — which he committed during her rape — and sentenced to death. (Pen. Code, §§ 187, 190.2, subd. (a)(17)(C), undesignated statutory references are to this code.) In 2024, he was resentenced to life in prison without the possibility of parole, and the California Supreme Court transferred his appeal to this court in August 2025. (§ 1239, subd. (b).) In his appeal, he challenges the composition of the grand jury, evidence admitted during trial, the death qualification process for prospective jurors, and alleges prosecutorial misconduct. We affirm.

BACKGROUND

One afternoon in April 1984, Connell was dropped off at a Hayward park to read while her mother and one of her sisters went to watch a movie. Connell was wearing blue jeans and a purple sweatshirt with "U.S.A." printed on it. The park was close to the theater, and her mother was

supposed to pick her up after the movie. Several people noticed or interacted with Connell while she was at the park. Another of her sisters and a friend visited with her for about 10 to 15 minutes before leaving to see another movie, and an employee from a nearby clothing store noticed a girl matching her description.

After the movie, Connell's mother went to pick her up from the park, but she was not there. Her family could not find her despite extensive searches. They notified police, filed a missing person report, and the local news broadcasted the need for assistance and information. Days later, individuals found several items believed to belong to Connell and notified the police. Among the items were a torn purple shirt with "U.S.A." printed on it and a bra that appeared to be cut off; both belonged to Connell.

Several days after Connell's disappearance, police recovered her body in a horse corral located in a rural area just off the road in Castro Valley. Her blue denim jeans were pulled up, zippered, and her belt was buckled, but she was naked from the waist up, with bruises on her face. There were also four-inch-long and half-inch-deep cuts to the front of her neck. Bruises on her wrist were consistent with being bound — twine was wrapped around her wrist and more was recovered a few feet from her body — and blood was pooled and splattered around various parts of her body. Her underwear contained a red-brown stain, and she had bruising on her inner thigh. There were no drag marks near or around her body, indicating it was not dragged to that location. An autopsy revealed her cause of death was shock and hemorrhage from the neck and wrist injuries. Swabs of her vagina and underwear revealed a large quantity of sperm. The Department of Justice tested the DNA extracts from the underwear 14 years later and matched it to Rhoades.

In January 2000, a grand jury indicted Rhoades for murder (§ 187) with rape-murder and prior murder special circumstances. (§ 190.2, subds. (a)(2), (a)(17)(C).) A jury convicted him of murder and found true the rape-murder special circumstance. He pled no contest to the special circumstance of having a prior murder conviction (for which he had previously been sentenced to death). After a penalty phase trial, the jury sentenced him to death. Appeal to the California Supreme Court was automatic. (§ 1239, subd. (b).) In October 2024, the trial court resentenced him to life without the possibility of parole. The Supreme Court thereafter transferred the appeal to this court.[1]

DISCUSSION

I.

Rhoades argues the indictment must be dismissed because women, Hispanic Americans, and Asian Americans were substantially underrepresented on the grand jury in violation of the equal protection and due process guarantees of the California and federal Constitutions. We disagree.

"The grand jury scheme, which codified prior law, has been in effect for decades." (*People v. Garcia* (2011) 52 Cal.4th 706, 729 (*Garcia*).) "Each county must have at least one grand jury drawn and impaneled every year." (*Ibid.*) "The grand jury consists of 'the required number of persons returned from the citizens of the county before a court of competent jurisdiction,' and sworn to inquire into both 'public offenses' within the county and 'county matters of civil concern.' " (*Ibid.*) Grand jurors "must be citizens age 18 or older and have resided in the county for at least one year immediately before

[1] At our request, the parties conferred and filed a joint statement regarding the issues mooted by Rhoades's resentencing.

their service begins." (*Id.* at p. 730.) "A person who serves on this body also must have sufficient knowledge of the English language to perform the grand jury function," "and be 'in possession of his natural faculties, of ordinary intelligence, of sound judgment, and of fair character.' " (*Ibid.*)

"The Legislature has vested the superior court with responsibility for selecting grand jury members." (*Garcia*, *supra*, 52 Cal.4th at p. 730.) The " 'court shall select the grand jurors required by personal interview for the purpose of ascertaining whether they possess' " the " 'natural faculties,' " " 'ordinary intelligence,' " " 'sound judgment,' " and " 'fair character' " required of grand jurors. (*Ibid.*) "If, 'in the opinion of the court,' these qualifications are met, the person selected must sign a statement declaring that he 'will be available' for the 'number of hours' required of grand jurors in the county." (*Ibid.*) "The court makes a 'list' of the prospective grand jurors it has selected, and gives it to the jury commissioner." (*Ibid.*)

"After receiving and filing the list of prospective grand jurors, the jury commissioner publishes it in a newspaper of general circulation, along with the name of the judge who selected each person on the list." (*Garcia*, *supra*, 52 Cal.4th at p. 730.) "The jury commissioner then randomly draws the names from the ' "grand jury box." ' " (*Ibid.*) "Once drawn, the grand jury is 'certified and summoned,' " "and the grand jury is impaneled." (*Id.* at p. 731.)

Alameda County (county) informed the public about grand jury service. From at least 1990 through 2003, it distributed informational pamphlets to petit jurors. Beginning in 1995 at the latest, it also distributed the pamphlets to libraries, individuals, the League of Women Voters, other community groups, and anyone else who asked. From 1975 through 2000, the grand jury advisor relayed to community members how to apply via television interviews, and speaking at community colleges, universities, and

other educational institutions. He also spoke at Rotary Clubs, Kiwanis clubs, and other service organizations throughout the county, including a women's business group. One of the presiding judges also tried to get minorities to volunteer.

The county subjected potential grand jurors to a selection process. Superior court judges nominated individuals for service, and individuals could volunteer for nomination. The entire court bench shared nominating responsibility. Whether potential grand jurors were already nominated or had just volunteered, the county gave them the same questionnaire, and the judge who interviewed them focused on the statutory requirements. Although some potential grand jurors were eliminated, the jury services manager testified she never eliminated anyone because of race, ethnicity, or gender, nor did a judge ever tell her to. The two judges who testified — Judge Sheppard and Judge McKinstry — stated they were unaware of any issues with the selection procedures. Judge Sheppard nominated individuals who were not his gender or race, and Judge McKinstry — a man — nominated women. Judge Sheppard denied ever nominating persons based on gender or race, and Judge McKinstry believed the bench nominated "a wide variety of folks." The grand jury advisor also held over grand jurors from previous years based solely on their performance of their civil functions. He never considered race, ethnicity, or gender.

On June 6, 2007 — after Rhoades's petit jury convicted and sentenced him — he moved to dismiss the indictment.[2] The parties stipulated to evidence showing the following statistics:[3]

When compared to the 1970 census, the county's grand juries from 1968 through 2000 underrepresented women by 8 percentage points (43 percent of grand jurors were women compared to 51 percent of general population), and Hispanic Americans by 7 percentage points (6 percent of grand jury members, 13 percent of general population described as persons of Spanish language or Spanish surname).[4] There were no statistics on Asian Americans in the 1970 census. When compared to the 1980 census, the county's grand juries underrepresented women by 8 percentage points (43 percent of grand jury members, 51 percent of general population), Hispanic Americans by 6 percentage points (6 percent of grand jury members, 12 percent Spanish origin in general population), and Asian Americans by at least 4 percentage points (4 percent of grand jury members, 8 percent of general population described as Asian or Pacific Islander). When compared to the 1990 census, the county's grand juries underrepresented women by 8 percentage points (43 percent of grand jury members, 51 percent of general population), Hispanic Americans by 7 percentage points (6 percent of grand jury members, 13 percent of general population), and Asian Americans by at least 11

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[2] Ordinarily, challenges to an indictment should be brought prior to trial. (*People v. Quigley* (1963) 222 Cal.App.2d 694, 700.) But given that the prosecutor appears to have agreed to the defense bringing the motion at a later time, we address the merits of Rhoades's claim.

[3] We accept Rhoades's statistical interpretations for purposes of addressing his equal protection and due process claims.

[4] We acknowledge that relying on "Spanish surnames" to discern an individual's race or ethnicity is not particularly precise nor ideal.

percentage points (4 percent of grand jury members, 15 percent of general population Asian American or Pacific Islander).

The county's grand juries from 1989 through 2001 differed from the 1990 census as well. They underrepresented women by 11 percentage points (40 percent of grand jury members, 51 percent of general population), Hispanic Americans by 6 percentage points (7 percent of grand jury members, 13 percent of general population), and Asian Americans by at least 12 percentage points (3 percent of grand jury members, 15 percent of general population).

And finally, the grand jury that indicted Rhoades differed from the 2000 census. It underrepresented women by 10 percentage points (41 percent of grand jury members, 51 percent of general population), Hispanic Americans by 10 percentage points (9 percent of grand jury members, 19 percent of general population), and Asian Americans by 20 percentage points (no Asian Americans in grand jury, 20 percent of general population).

In his motion, Rhoades argued the county's selection procedures and the composition of the grand jury violated his right to equal protection and due process. The prosecutor countered that the county followed California's statutory scheme — and thus used race- and gender-neutral practices — and noted those procedures had repeatedly been upheld. The prosecutor also noted the county's efforts to involve the community in the grand jury selection process.

The trial court denied the motion. It found that Rhoades "failed to show substantial or prolonged race or gender" underrepresentation in the county's grand jury. It also concluded the prosecutor overcame any presumption of prejudice because the selection process "follows the law adequately and in every way."

A.

Rhoades first argues the composition of the grand jury violated his equal protection rights as set forth in *Castaneda v. Partida* (1977) 430 U.S. 482. We disagree.

The "equal protection clause of the Fourteenth Amendment targets discrimination that is 'purposeful' and 'intentional.' " (*Garcia*, *supra*, 52 Cal.4th at p. 733.) To establish a prima facie equal protection violation under *Castaneda*, the " 'first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied.' " (*Garcia*, at p. 733.) " 'Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.' " (*Ibid.*) Finally, " 'a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.' " (*Ibid.*) "Once the requisite showing has been made, and a prima facie case of discriminatory purpose appears, 'the burden then shifts to the State to rebut that case.' " (*Ibid.*)

In *Garcia*, a Los Angeles grand jury indicted the defendant in 1993. (*Garcia*, *supra*, 52 Cal.4th at p. 724.) The defendant argued "that the judicial nomination process long used in Los Angeles County to select prospective grand jurors . . . involved intentional and invidious discrimination, and resulted in the substantial underrepresentation of women and Hispanics in the grand jury pools." (*Id.* at p. 723.) Applying the test set forth in *Castaneda*, the Supreme Court concluded that, "even assuming a prima facie case exists under *Castaneda*, the evidence admitted and considered by the trial court is more than sufficient to 'dispel [any] inference of intentional

discrimination' and to show that no equal protection violation occurred." (*Garcia*, at p. 737.) The court reasoned that California's selection statutes, along with Los Angeles's adopted standard procedures and written guidelines to implement them, rebutted any inference of intentional discrimination. (*Id.* at pp. 737–739.)

Likewise, even assuming that Rhoades made a prima facie showing, the Attorney General has adequately rebutted any presumption of discrimination. (*Garcia*, *supra*, 52 Cal.4th at pp. 727, 733, 737–739.) Put simply, Rhoades provides no discernable difference between the county's method for selecting grand jurors and the system upheld in *Garcia*. Indeed, he only argues that the county did not engage in the same community outreach efforts as Los Angeles did in *Garcia*. There, Los Angeles issued press releases to over 100 newspapers and media organizations, public service announcements in both English and Spanish, and recruitment letters to community groups, public officials, and consulates. (*Id* at p. 727.) Judges also personally consulted with minority groups. (*Ibid.*) Here, the much smaller — both in total area and population — county informed all jurors about grand jury service. It also distributed pamphlets to libraries, individuals, the League of Women Voters, other community groups, and anyone else who asked. The presiding judge tried to get minorities to volunteer. The grand jury advisor did television interviews and spoke at community colleges, universities, and other educational institutions informing the public on how to become grand jury members. He also spoke at Rotary and Kiwanis clubs and other service organizations in the county, including a women's business group. We find these efforts sufficient to rebut a presumption of discrimination. (*Id.* at pp. 727, 733, 737–739.)

More importantly, other evidence "admitted and considered by the trial court is more than sufficient to 'dispel [any] inference of intentional discrimination.' " (*Garcia*, *supra*, 52 Cal.4th at p. 737.) The county's system complied with California's statutory scheme, requirements that "are neither uncommon nor inherently unconstitutional." (*Id.* at pp. 737–738.) Rhoades does not contend the county's selection process did not comply with California selection statutes. As in *Garcia*, "[n]ominating responsibility was shared by the entire superior court bench," and each potential grand juror was given the same questionnaire and interviewed by a judge focused on the statutory requirements — whether they had been nominated or just volunteered. (*Id.* at pp. 737–739.) The grand jury advisor held grand jurors over based solely on their performance of their civil functions. (*Id.* at p. 729 [in California, grand jury's primary function is civil oversight].) He never considered race, ethnicity, or gender. The jury services manager never eliminated a potential grand juror from consideration because of race, ethnicity, or gender, nor did a judge ever tell her to. And the two judges who testified stated they were unaware of any issues with the selection procedures. One judge nominated individuals who were not his gender or race and denied ever nominating persons based on gender or race, and the other male judge nominated women and testified the bench nominated "a wide variety of folks." The evidence did not demonstrate the " 'purposeful' " and " 'intentional' " discrimination the equal protection clause prohibits. (*Id.* at p. 733.)

B.

Next, Rhoades argues the composition of the grand jury violated his due process right to a fair cross-section of the community under the Sixth Amendment. We note at the outset that neither the California nor federal supreme courts have "held that the Sixth Amendment right to a jury drawn

from a fair cross-section of the community, applicable to a petit jury, also applies to a state *grand jury* convened for the purpose of considering issuance of an indictment." (*People v. Carrington* (2009) 47 Cal.4th 145, 177.) Nonetheless, we need not resolve that issue because Rhoades admits he cannot demonstrate actual prejudice.

"A violation of the requirement that a jury be drawn from a fair cross-section of the population is established by showing '(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.' " (*People v. Carrington*, *supra*, 47 Cal.4th at p. 177.) But generally, "a conviction will not be reversed because of errors or irregularities that occurred at a preliminary hearing or grand jury proceeding, absent a showing that the asserted errors 'deprived [the defendant] of a fair trial or otherwise resulted in any actual prejudice relating to [the] conviction.' " (*Id.* at p. 178.) And "an asserted violation of the right to a grand jury drawn from a fair cross-section of the community does not require reversal of a conviction obtained after a fair trial, absent a showing of prejudice." (*Id.* at p. 179; *People v. Corona* (1989) 211 Cal.App.3d 529, 534, 536–537.)

Rhoades cannot demonstrate prejudice. He concedes that even if the composition of the grand jury violated "fair-cross-section requirements, that circumstance would not require reversal of his conviction absent a showing of purposeful discrimination or prejudice." We have already concluded the Attorney General rebutted any presumption of intentional discrimination, and Rhoades concedes "he cannot demonstrate actual prejudice." Thus, we

need not say more about this claim. (*People v. Corona*, *supra*, 211 Cal.App.3d at pp. 534, 536–537.)

II.

Rhoades contends the trial court abused its discretion by admitting evidence of a 1985 sexual offense — his forcible oral copulation and kidnapping of 29-year-old Jane Doe. He argues the evidence was inadmissible under Evidence Code sections 1101 and 1108, and its prejudicial impact outweighed its probative value under Evidence Code section 352. We review the court's ruling for an abuse of discretion and find none. (*People v. Cordova* (2015) 62 Cal.4th 104, 132.)

A.

In August 1985, Doe, a server at a restaurant, was in her apartment in Marysville. Under the guise of being an investor and seeking information regarding competing restaurants, Rhoades gained entry to Doe's apartment — she'd served him at the restaurant and he had cut her hair. They began a conversation about his alleged investment company. At some point, he became aggressive, grabbed Doe by her hair, yanked her head back, and brandished a knife at her chin. He demanded money, and Doe gave him $50 and her debit card. He handcuffed her, forced her into her bedroom, removed her clothing, and forced her to orally copulate him. He said if she refused to do so or made any noise, he would kill her.

After, Rhoades ordered Doe to get dressed and demanded her car. He threatened to kill her if she screamed or tried to get away, again brandishing the knife. He wiped down everything he touched in the apartment with a bandana and forced her out of the apartment and into the passenger seat of her car. He asked her if there was enough gas to get to "river bottoms," an isolated area near a bridge connecting Marysville with Yuba City. While

driving, he made a joke, implying he was going to kill her. They drove through a train underpass, and Doe attempted to jump out of the car. He grabbed her and pulled her back into the car. He said, "I told you not to try to get away from me, you little bitch. Now I'm going to kill you." After a struggle, she managed to escape and ran toward a nearby building for help. Rhoades was subsequently convicted of forcible oral copulation, residential robbery, kidnapping, and the use of a knife.

Before trial for Connell's murder, Rhoades sought to exclude evidence of the 1985 offense. The trial court denied his motion, explaining that Connell's killing and Doe's kidnapping and sexual assault bore similarities in intent: the type of victim subjected to sexual assault, use of threats and a knife for force and persuasion, and a willingness to transport the victims. It also determined any prejudice did not outweigh the evidence's probative value.

At trial, the trial court repeatedly reminded jurors that testimony regarding the 1985 offense was being admitted for a limited purpose not directly related to Rhoades's charged offense — the court did so before testimony from the receptionist who let Doe into the building after her escape and again during a break in Doe's testimony. Before opening arguments, the court instructed the jury that "certain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were admonished that this could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider this evidence for any purpose except the limited purpose for which it was admitted." It further explained that evidence had been introduced showing that Rhoades had committed uncharged crimes and the evidence could be considered only to prove intent, knowledge or means, and lack of consent for sexual relations.

B.

Evidence of Rhoades's sexual offense against Doe was admissible under Evidence Code section 1108. Generally, propensity evidence — evidence of a defendant's bad acts used to prove the defendant's conduct on a specific occasion — is inadmissible. (Evid. Code, § 1101.) But in cases involving sexual offenses, evidence of other sexual offenses may be used to show a defendant's propensity to commit a sexual offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) "[E]vidence of the defendant's commission of another sexual offense" is not inadmissible under "Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, §§ 1108, subd. (a), 1101, subd. (b); *People v. Britt* (2002) 104 Cal.App.4th 500, 505–506, italics omitted [" 'evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of . . . section 1101' "].)

Rhoades's offenses against Doe and Connell are both sexual offenses. Rhoades was charged with murdering Connell during his rape of her. Rape is an enumerated sexual offense under Evidence Code section 1108. (Evid. Code, § 1108, subd. (d)(1)(A); § 261.) Forced oral copulation is also a sexual offense under that statute. (Evid. Code, § 1108, subd. (d)(1)(A); § 287, subds. (a), (c)(2)(A) [defining oral copulation as the "act of copulating the mouth of one person with the sexual organ or anus of another person"]; Stats. 2018, ch. 423, § 49 [renumbering former § 288a to § 287, eff. Jan. 1, 2019].) Rhoades's argument that the evidence was inadmissible because he was charged with murder and not a sexual offense is meritless. Whether certain murder charges qualify as a "sexual offense" within the meaning of Evidence Code section 1108 depends on the conduct at issue. (*People v. Pierce* (2002) 104 Cal.App.4th 893, 898; Evid. Code, § 1108, subd. (d)(1) [defining " '[s]exual

offense' " as a "crime under the law of a state or of the United States" involving conduct proscribed by an enumerated list of offenses].) A "murder during the course of a rape involves conduct, or at least an attempt to engage in conduct, proscribed by Penal Code section 261," the statute defining rape. (*People v. Story* (2009) 45 Cal.4th 1282, 1285.) Thus, a "defendant accused of such a murder is accused of a sexual offense within the meaning of section 1108." (*Ibid.*; see also *Pierce*, at p. 898 [assault with the intent to commit rape is a sexual offense under Evid. Code, § 1108].) Finding otherwise would be absurd. It is unlikely the Legislature intended for Evidence Code section 1108 to "apply when a sexual assault victim survives but not when the defendant kills the victim." (*Story*, at p. 1294.)

C.

Evidence of the 1985 sexual offense and kidnapping was also admissible under Evidence Code section 1101. As Rhoades concedes, prior conduct evidence is admissible to prove some material fact other than a disposition to commit an act — among other things, intent, preparation, knowledge, or common plan. (Evid. Code, § 1101, subd. (b); *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 406.) Evidence of the 1985 offenses was highly probative of several of these facts.

First, as the trial court concluded, Rhoades's crimes against Doe and Connell were sufficiently similar and thus probative of his intent in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*) [for proving intent, "the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance" ' "].) For the rape-murder special allegation, the prosecution must prove Rhoades engaged in sexual intercourse with Connell against her will by, among other things, violence, duress, or fear of immediate and unlawful

bodily injury. (§ 261.) It must also prove he harbored malice when killing Connell — that he acted with willful deliberation and premeditation, or that he had intended to commit the underlying rape for first degree felony murder. (§§ 187, 189.)

In both the charged offense and the 1985 offense, Rhoades used threats or unlawful bodily injury to force his victims to engage in sexual activity. (Compare with *People v. Guerrero* (1976) 16 Cal.3d 719, 727 [evidence of prior rape inadmissible since charged offense did not entail evidence of sexual contact].) He initially brandished a knife to obtain Doe's general compliance and threatened to kill her if she did not orally copulate him. Connell's autopsy revealed several bruises — injuries that are only sustained when a person is still alive — on her arms including on her thighs. The bruises indicate Rhoades used force to engage in sexual intercourse with her. (See, e.g., *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1085 [victim sustaining large bruises after being struck with a blind rod].)

In both offenses, Rhoades attempted to conceal his crimes by transporting or attempting to transport his victims to a remote location to kill them, indicative of his willful, deliberate, and premeditated intent to kill. He did not hide his appearance from Doe when gaining entry to her apartment. After sexually assaulting her, he demanded her car keys and asked if there was enough gas to drive to "river bottoms," an isolated area near Yuba City. He wiped everything down that he touched in her apartment, stating "People who make mistakes get caught. People who don't, don't." While driving, he compared them to Bonnie and Clyde but darkly joked, "Bonnie is not going to make it" — implying he was going to kill her. Altogether, this indicated he intended to kill her. (E.g., *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1218 [intent to kill indicated by bringing carrying weapons into a house after

gaining entry, avoiding leaving fingerprints, making no effort to hide identities from the victims "suggesting [defendants] intended to leave no witness alive"].)

The evidence likewise suggested Rhoades transported Connell from the park in Hayward and then killed her in the corral where her body was found. Investigators found tire marks on the road north of the crime scene, but there were no drag marks between the road and the corral, indicating she was alive when they arrived at the corral. There was a large amount of dried blood on the ground under her neck and arm where her body lay, suggesting he killed her after taking her there. In sum, by taking Connell to a remote location and then killing her, the evidence supports a finding Rhoades engaged in premeditated, deliberate murder. (*People v. Ledesma* (2006) 39 Cal.4th 641, 723.)

The similarities in the two offenses thus indicate Rhoades harbored the same intent in each instance, i.e., committing a sexual assault and then murdering the victims. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.) His claim that the two offenses are not similar — that unlike the circumstances surrounding Connell, Doe was an acquaintance, and the sexual assault happened in Doe's home — fails to persuade. Even accepting these differences, the "least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*Ibid.*) A recurrence of a similar action tends to negate claims the defendant acted accidentally, inadvertently, or with other innocent mental states when committing the charged offense. (*Id.* at pp. 402–403.) The requisite similarity to demonstrate intent exists here, rendering the evidence admissible under Evidence Code section 1101.

Additionally, the similarities between the 1985 offense and Connell's rape and murder were sufficient to show Rhoades maintained a common

design or plan, relevant to show he raped and murdered Connell. (*Ewoldt*, *supra*, 7 Cal.4th at pp. 401–402; *People v. Campbell* (1991) 230 Cal.App.3d 1432, 1443 [affirming ruling on any basis supported by the record, irrespective of whether the trial court relied on it].) Though a "greater degree of similarity is required in order to prove the existence of a common design or plan" than that necessary to establish intent, sufficient similarity exists here. (*Ewoldt*, at p. 402.)

Both Doe and Connell shared characteristics. Both were relatively young, female victims of similar height and weight who were alone, and Rhoades approached them "with the purpose of sexually assaulting them." (*People v. Jackson* (2016) 1 Cal.5th 269, 304.) At the time of the offenses, Doe was 29, Connell was 18; Doe weighed 125 pounds and was five feet, six inches tall, Connell weighed 135 pounds and was five feet, five inches tall. Both attacks occurred in the afternoon. He bound and restrained both victims — handcuffs on Doe, and green twine wrapped numerous times with complicated knots around Connell's wrists. He held a knife at Doe's throat and chin to force her into compliance, while Connell's neck — including her jugular vein — was repeatedly cut. (*People v. Davis* (2009) 46 Cal.4th 539, 603 [use of weapon and bindings and taking victims to remote locations indicative of planned behavior].) Both victims were clothed after their sexual assaults. These common features indicate "the existence of a plan rather than a series of similar spontaneous acts." (*Ewoldt*, *supra*, 7 Cal.4th at p. 403.)

Finally, the evidence was relevant to demonstrate Connell did not consent to sexual intercourse with Rhoades. (Evid. Code, § 1101, subd. (b); *People v. Lewis* (2009) 46 Cal.4th 1255, 1284.) At trial, he presented testimony from his sister that he and Connell were in a relationship before

her murder. In closing arguments, Rhoades's counsel argued the discovery of Rhoades's semen inside Connell only demonstrated they had intercourse, not that he raped her. Counsel argued the testimony of Rhoades's sister "increases the likelihood of consensual sex." Evidence of the 1985 attack on Doe, including his use of threats, violence, a weapon, and bindings, was thus relevant to demonstrate his use of force to engage in nonconsensual sexual intercourse with Connell.

D.

The trial court did not abuse its discretion by concluding the probative value of the evidence was not substantially outweighed by its prejudicial effect. Determining whether a prior sex offense is admissible under Evidence Code sections 1108 or 1101 requires carefully weighing the evidence under Evidence Code section 352. (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) When assessing the admissibility of evidence under that provision, courts must consider factors such as the "nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry." (*Ibid.*) Other factors include "its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission." (*Ibid.*) Courts have broad discretion when determining whether the probative value of evidence is outweighed by undue prejudice — reversal is unwarranted unless the decision was arbitrary, capricious, or patently absurd. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

As a preliminary matter, we reject Rhoades's assertion Evidence Code section 352 does little to protect a defendant's due process rights and the inherent prejudice in admitting propensity evidence. A "trial court's

discretion to exclude propensity evidence under section 352 saves section 1108" from a due process challenge. (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) It acts as a " 'safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial,' " since evidence is subject to the Evidence Code section 352 weighing process. (*Falsetta*, at p. 917.) Indeed, Rhoades's concern regarding the prejudice arising from use of his 1985 offenses is mitigated by the fact he was actually convicted of those offenses. (*Ibid*.) Moreover, " ' " '[p]rejudice' as contemplated by . . . section 352 is not so sweeping as to include any evidence the opponent finds inconvenient." ' " (*People v. Scott* (2011) 52 Cal.4th 452, 490.) Rather, it addresses *undue* prejudice — an objection under Evidence Code section 352 fails unless " ' "the dangers of undue prejudice, confusion, or time consumption ' "substantially outweigh" ' the probative value of relevant evidence." ' " (*Scott*, at p. 491.) It is not designed to avoid " 'the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

We also reject Rhoades's assertion that the trial court failed to properly consider and weigh the appropriate factors. Expressly weighing prejudice against the probative value is unnecessary where, as here, the record reflects "the court was aware of and performed its balancing functions." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) The court expressly determined that the probative value of the 1985 offenses were not substantially outweighed by their prejudicial effect. Indeed, the probative value is apparent. Evidence of the 1985 offenses had a "tendency in reason to show" that Rhoades was "predisposed to engage in conduct *of the type charged*" — forcible rape and murder. (*People v. Earle* (2009) 172 Cal.App.4th 372, 397.) The offense against Doe was not too remote in time since it occurred only 16 months after

Connell's rape and murder. (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) That it occurred *after* Rhoades's charged offense does not diminish its probative value. "[E]vidence of subsequent crimes may bear on a defendant's character at the time of the charged offense," and Rhoades fails to identify any evidence that his character changed between the two offenses. (*People v. Cordova*, *supra*, 62 Cal.4th at p. 133.)

Moreover, the degree of certainty that Rhoades committed the offenses against Doe was high — he was convicted of forcible oral copulation, kidnapping, residential robbery, and the use of a knife before trial for Connell's murder. (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) As a result, "he bore no new duty to defend against the charges" and "the jury would not be tempted to convict" him of the charged crime to punish him for the other offense. (*People v. Cordova*, *supra*, 62 Cal.4th at p. 133.) Evidence of the offense was presented quickly, as the prosecution only proffered testimony from Doe and the receptionist who assisted her after Doe escaped Rhoades. (*Ibid.*) Nor can there be any serious contention that the evidence was likely to mislead or confuse the jurors from the inquiry into Rhoades's charged offense. (*Falsetta*, at p. 917.) The trial court repeatedly reminded the jury that Doe's testimony was not directly related to the current charges and could only be considered for the limited purpose of proving intent, knowledge or means, and lack of consent for sexual relations. We presume the jury followed these limiting instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

Rhoades's argument regarding the evidence's unduly prejudicial effect — that Doe's testimony as a "sympathetic young woman" with "emotional testimony combined to inflame the jury against" him — is not well

taken. The facts of the offense against Doe, "although unpleasant, were not particularly inflammatory compared" to Rhoades's charged offense. (*People v. Loy* (2011) 52 Cal.4th 46, 62.) In addition to signs of forcible rape, Connell died from multiple slashes to her throat and wrists, unlike Doe, who survived. Connell was left to die in a rural area in a horse corral. We also discern no alternative — and Rhoades fails to offer any — to admitting Doe's testimony given the limited purpose of demonstrating intent, common plan, and lack of consent for which the evidence was presented. A stipulation to the fact Rhoades was convicted of certain offenses, for example, would not provide the same details.

Rhoades suggests his crimes against Doe inherently rendered the jury incapable of rationally considering the evidence as probative of his intent for his charged offense. This argument misapprehends the purpose of evidence of other sexual offenses. "The necessity for admitting this particularly probative evidence that exists when the alleged victim's credibility might be questioned can be no greater than the necessity that exists when the victim was killed and thus cannot even tell her story." (*People v. Story*, *supra*, 45 Cal.4th at p. 1293, italics omitted.) Indeed, "[e]vidence of previous criminal history inevitably has some prejudicial effect," and that "alone is no reason to exclude it." (*People v. Loy*, *supra*, 52 Cal.4th at p. 62.)

In sum, we find no abuse of discretion in the trial court's ruling, and none of Rhoades's arguments compel a different conclusion. Thus, we also reject his claim of state and federal constitutional error in admitting this evidence. The "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." (*People v. Brown* (2003) 31 Cal.4th 518, 545.) To the extent he contends Evidence Code section 1108 is unconstitutional, *Falsetta* already rejected this argument and Rhoades

provides no good reason to reconsider this decision. (*Falsetta*, *supra*, 21 Cal.4th at pp. 910–922.)

III.

Rhoades next challenges the death qualification process — "the removal from the venire of all prospective jurors who would automatically vote either for life imprisonment or for death, irrespective of the facts of the individual case." (*People v. Mills* (2010) 48 Cal.4th 158, 171.) Though he is no longer sentenced to death, Rhoades urges us to reverse his conviction because various errors impermissibly resulted in a jury more inclined to convict during the guilt phase of trial. He also challenges the process and related standards as inconsistent with the Sixth Amendment right to an impartial jury, his and the jurors' right to equal protection, and the separation of powers. None of his arguments provide a basis for reversal.

A.

Under the Sixth and Fourteenth Amendments, criminal defendants have the right to a fair trial by a panel of "impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) The "State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 (*Uttecht*).) Jurors may not be "tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Ibid.*) Prospective jurors harboring views on capital punishment that "would prevent or substantially impair the performance" of their duties consistent with their instructions and oath may be dismissed for cause. (*Adams v. Texas* (1980) 448 U.S. 38, 45.)

"The degree of a prospective juror's impairment—that is, his or her inability or unwillingness to perform the duties of a juror and follow the law—must be substantial." (*People v. Thompson* (2016) 1 Cal.5th 1043, 1064

(*Thompson*).) For example, substantial impairment includes the inability " ' "to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate,' " " or voting either for or against the death penalty "without regard to the strength of aggravating or mitigating circumstances." (*People v. Jenkins* (2000) 22 Cal.4th 900, 987; *Thompson*, at p. 1064.) Prospective jurors opposed to the death penalty " 'may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' " (*People v. Leon* (2015) 61 Cal.4th 569, 592 (*Leon*).)

The party seeking to exclude prospective jurors for bias "must demonstrate, through questioning" that they lack impartiality. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.) Establishing bias regarding the death penalty with " 'unmistakable clarity' " is unnecessary. (*People v. Jones* (2017) 3 Cal.5th 583, 615.) Prospective jurors "are not always clear in articulating their beliefs (or accurately assessing their ability to set aside those beliefs)," and they may provide equivocal or conflicting responses to voir dire questions. (*Thompson*, *supra*, 1 Cal.5th at p. 1065.) Thus, "after examining the available evidence, which typically includes the juror's written responses in a jury questionnaire and answers during voir dire, the trial court need only be left with a definite impression that the prospective juror is unable or unwilling to faithfully and impartially follow the law." (*Id.* at p. 1066.) Because the court bases judgments regarding prospective juror bias on demeanor and credibility, we defer to its ruling "regarding the juror's true state of mind" if supported by substantial evidence. (*Thompson*, at p. 1066; *Uttecht*, *supra*, 551 U.S. at p. 7.) We review a court's ruling dismissing a prospective juror for cause for abuse of discretion. (*Leon*, *supra*, 61 Cal.4th at pp. 584, 590.)

We decline Rhoades's invitation to adopt a less deferential review of rulings excusing jurors for cause. Deference to the trial court's findings of prospective jurors' states of mind is appropriate if supported by substantial evidence. (*Thompson*, *supra*, 1 Cal.5th at p. 1066.) A "trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record." (*People v. Stewart* (2004) 33 Cal.4th 425, 451 (*Stewart*).) The court is in "a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht*, *supra*, 551 U.S. at p. 9.) Nothing in Rhoades's cited authorities persuades us to depart from these principles. (*Adams v. Texas*, *supra*, 448 U.S. at pp. 42, 51 [finding Texas statute improperly authorized excusing prospective jurors who were otherwise qualified to serve under federal constitutional standards]; *Gray v. Mississippi* (1987) 481 U.S. 648, 661, fn.10 [deference to state court findings of fact inappropriate where they were internally inconsistent and dependent on a misapplication of federal law]; see also *People v. Schmeck* (2005) 37 Cal.4th 240, 263 [rejecting defendant's arguments that the deference to trial court determination of a juror's state of mind as inconsistent with *Adams* and *Gray*].)

B.

At the outset, we reject Rhoades's constitutional challenges to the substantial impairment standard and the death qualification process, many of which have already been considered and rejected by the California Supreme Court. First, his argument urging us to abandon the *Wainwright v. Witt*, *supra*, 469 U.S. 412, substantial impairment standard and replace it

with a rule prohibiting courts "from excusing prospective jurors due to their views on the death penalty" is unpersuasive. (*People v. Rices* (2017) 4 Cal.5th 49, 79–80.) The United States Supreme Court developed the substantial impairment standard and "has recently reiterated it." (*Id.* at p. 80; *White v. Wheeler* (2015) 577 U.S. 73, 76–77.) "If that standard is to be abandoned or modified, and death qualifying the jury prohibited, it is up to that court to do so." (*Rices*, at p. 80.) To the extent Rhoades advocates discarding that standard on independent state grounds, we remind him we have "long adopted the *Witt* rule as also stating the standard under the California Constitution." (*Ibid.*)

Next, Rhoades argues empirical evidence indicates the death qualification process results in juries more likely to accept prosecution evidence, and thus prone to convict. He asks us to reject *Lockhart v. McCree* (1986) 476 U.S. 162 — upholding the constitutionality of the death qualification process despite criticism in law review articles — as based on outdated facts. This claim has already been considered and rejected. (*People v. Suarez* (2020) 10 Cal.5th 116, 138; *People v. Taylor* (2010) 48 Cal.4th 574, 602 [finding empirical studies that defendant argued established death qualification results in conviction-prone juries "inadequate to warrant disturbing our precedent"].) *Lockhart* remains good law — we " ' "may not depart from the high court ruling as to the United States Constitution," ' " and Rhoades " ' "presents no good reason to reconsider" ' " those rulings as to the California Constitution. (*People v. Mendoza* (2016) 62 Cal.4th 856, 914.)

Nor does the exclusion of prospective jurors who are substantially impaired in their ability to impose the death penalty violate Rhoades's right to a representative jury, as he insists. (*People v. Helzer* (2024) 15 Cal.5th 622, 665; *People v. Mendoza*, *supra*, 62 Cal.4th at p. 914 [" 'Death

qualification does not violate the Sixth Amendment by undermining the functions of a jury as a cross-section of the community participating in the administration of justice' "].) Likewise, the California Supreme Court has also rejected Rhoades's argument — citing empirical studies — that death qualifying juries result in a disproportionate number of racial minorities and women being excluded. (*People v. Taylor*, *supra*, 48 Cal.4th at p. 603.) "[U]nlike the impermissible removal of ethnic minorities or women from jury service," the death qualification process " 'is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.' " (*Ibid.*) " 'There is very little danger . . . that "death qualification" was instituted as a means for the State to arbitrarily skew the composition of capital-case juries.' " (*Ibid.*)

Rhoades's argument that the death qualification process here violated the prospective jurors' statutory rights fares no better. The Code of Civil Procedure provides that all persons have the right to be eligible for jury service, absent the existence of specified exceptions. (Code Civ. Proc., § 203.) But it also permits challenges to prospective jurors for actual bias — "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).) Here, as discussed further below, the trial court excused the identified prospective jurors for cause after establishing their substantial inability to adhere to the law. The court did not deem them ineligible for service on criteria beyond the statute, as Rhoades contends.

We likewise reject Rhoades's argument that death qualification violated the prospective jurors' equal protection rights under the Fourteenth Amendment.[5] As a preliminary matter, we question whether Rhoades has standing to raise third party equal protection claims in this case. While defendants in criminal cases may lodge a third party claim on behalf of jurors excluded because of their race, he makes no such claim here. (*Powers v. Ohio* (1991) 499 U.S. 400, 410–411; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1029.) But even on the merits, there is no equal protection issue here. To begin, death qualification "is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial." (*Lockhart v. McCree*, *supra*, 476 U.S. at pp. 175–176, fn. omitted.) Moreover, prospective jurors are excluded based on their unwillingness to temporarily set aside their beliefs in deference to the law rather than an immutable characteristic. (*Id.* at p. 176.) Finally, removal on that basis does not prevent prospective jurors "from serving as jurors in other criminal cases, and thus leads to no substantial deprivation of their basic rights of citizenship. They are treated no differently than any juror who expresses the view that he would be unable to follow the law in a particular case." (*Ibid.*)

We also reject Rhoades's argument that there is no statutory basis for the death qualification process. The court in *People v. Riser* (1956) 47 Cal.2d

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[5] Rhoades also claims the prospective jurors were improperly deprived of their procedural due process rights but fails to provide supporting argument or citation to authority. Accordingly, this issue is forfeited. (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, fn. 7 [" 'Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived' "].)

566, interpreted former section 1074, which provided that a " 'challenge for implied bias may be taken for all or any of the following causes, and for no other.' " (*Riser*, at p. 573; Code Civ. Proc., § 229.) Subdivision 8 stated, " 'If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.' " (*Riser*, at p. 573.) The court explained that though the literal reading of this provision "does not compel the exclusion of jurors incapable of exercising the discretion" to determine whether to impose a life imprisonment or death sentence, "[i]t would be doing violence to the purpose" of section 190 — the state's death penalty scheme — "to construe section 1074, subdivision 8, to permit these jurors to serve." (*Riser*, at p. 576.) Indeed, the Legislature enacted a procedure for a bifurcated trial, requiring the same jury that determined guilt to also determine the penalty. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 9, fn. 9.) This "legislative 'preference for one jury qualified to act throughout the entire case' " would "seem to be inconsistent with a literal reading of section 1074, subdivision 8, and thus supports the judicial gloss placed on that section by *Riser* and its progeny." (*Ibid.*) Rhoades "provides no persuasive reason to overturn our precedent." (*People v. Suarez*, *supra*, 10 Cal.5th at p. 138.)

Finally, Rhoades fails to demonstrate this construction violates the separation of powers. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632–633 [courts must construe statutes consistent with their plain meaning and legislative intent]; *People v. Gibbons* (1989) 215 Cal.App.3d 1204, 1212 (dis. opn. of Campbell, P. J.) ["A construction which does not comport with statutory language, legislative intent, or case law also violates the foundational constitutional principle of

the separation of powers, except when the construing court overrules a previous judicial construction"].)

C.

Rhoades argues the trial court improperly excused prospective jurors A.S., J.O., A.G., and Z.F. based solely on their equivocal voir dire responses about their ability to serve. According to Rhoades, the court ignored their written questionnaire responses indicating they were willing to set aside their own beliefs and follow the rule of law. The record demonstrates otherwise — substantial evidence supports the court's findings regarding their state of mind, and none of the excusals was an abuse of discretion.

For background, the trial court required all prospective jurors to complete a 43-page written questionnaire to which both Rhoades and the prosecutor agreed. The questions were wide-ranging — asking prospective jurors' names, ages, areas of residence, occupation, level of education, political affiliations and religious beliefs. It asked whether they would follow court orders, such as not engaging in any independent investigations of the law or facts or reading or listening to any media accounts of the case. Six pages of the questionnaire were dedicated to investigating their views on the death penalty. One question was open-ended, asking about general feelings regarding the death penalty. Another explored general feelings about *imposing* the death penalty, particularly for a case involving the murder of one individual. The trial court conducted additional voir dire of each prospective juror called into the jury box. The prosecutor and Rhoades's defense counsel were provided an opportunity to ask additional questions.

1.

In A.S.'s written questionnaire, she stated she was against the death penalty, explaining "I do not believe that one murder should be reason for

another murder." She indicated having moral, philosophical, or religious objections to capital punishment — that although she would "try very hard to be fair, it would be somewhat difficult for me to condemn someone to be killed." But she also stated sometimes it may be the "most reasonable option." Although she acknowledged having doubts or reservations about the death penalty, she would not vote against it in every single case. Rather, she would honestly consider both the death penalty and life in prison without the possibility of parole. In her view, the death penalty was simply a method to "get rid of criminals."

When elaborating on her views during voir dire, A.S. equivocated on her ability to fairly apply the law. She stated she would like to believe she could be impartial and judge the facts based solely on the evidence, but "realistically, I'm not completely sure that I could." She expressed a general preference to sentence a person to life in prison. She noted that she was not completely sure she could ever choose the death penalty. When asked to clarify whether it would be difficult for her to condemn someone to death based on the facts or independent of the facts, A.S. responded "Probably somewhat difficult regardless."

In response to the prosecutor's questions, A.S. expressed an interest in abolishing the death penalty but agreed that in "really heinous" cases involving "multiple offenses, real violent acts," the death penalty "might be the best option." For the murder of a single individual though, she agreed that the death penalty is not truly an option. When asked whether she would impose the death penalty for the murder of a single victim — knowing that there is the option to impose a life without the possibility of parole — she responded "I would try to weigh the evidence fairly, but I can't say 100 percent. But, morally, probably, I would guess that I probably would go for

life without parole." When pressed about whether, even after weighing the evidence, she would choose life without parole or the death penalty, she stated that she would choose life without parole.

This record supports the trial court's ruling that, although A.S. "would not automatically vote only for life without parole," she "demonstrated a substantial impairment to fairly evaluate" whether to impose the death penalty. True, A.S.'s written responses noted that she "would not vote against the death penalty in every case," and that she "would seriously weigh and consider the aggravating and mitigating factors in order to determine the appropriate penalty." But assessing a juror's impartiality also requires examining their voir dire answers. (*Thompson*, *supra*, 1 Cal.5th at p. 1066.) A.S. equivocated on whether she could set aside her personal views — "realistically, I'm not completely sure that I could." She confirmed it would be "somewhat difficult" to condemn a person to death regardless of the facts in the case. When asked pointedly whether she could, after balancing aggravating circumstances against mitigating factors, she responded that she was not completely sure that she could choose the death penalty, *ever*. (Compare with *People v. Armstrong* (2019) 6 Cal.5th 735, 757 (*Armstrong*) ["no substantial evidence that [prospective juror] would have had any difficulty following the court's instructions in determining the appropriate sentence"].) A.S.'s answers to the prosecutor similarly confirmed the death penalty was "not really a true option" for her in a case involving a single murder victim. Instead, the death penalty was reserved for defendants involved in multiple murders, those involving "real violent acts." (*Thompson*, at p. 1070 [leaving "open the possibility of capital punishment only in a rare and extreme case" supported court's assessment of juror state of mind and excusal].)

Rhoades contends these ambiguous responses are insufficient to support her dismissal. But when presented with conflicting or ambiguous responses, the trial court is "entitled to resolve the ambiguity concerning the juror's true state of mind in favor of dismissal." (*Thompson*, *supra*, 1 Cal.5th at p. 1069.) The court "was in the best position to observe [A.S.'s] demeanor, vocal inflection, and other cues not readily apparent on the record." (*People v. Flores* (2020) 9 Cal.5th 371, 388.) The court highlighted A.S.'s hesitation in answering its questions and her presentation — that she did not "pull[] away from things in the questionnaire that really raised these problems." It was thus entitled to conclude her equivocal answers and hesitant demeanor during voir dire undercut her written assurances regarding her ability to vote for the death penalty in appropriate cases. (*People v. Clark* (2011) 52 Cal.4th 856, 897.) The record, as a whole, left a "definite impression that [A.S.] is unable or unwilling to faithfully and impartially follow the law." (*Thompson*, at p. 1066.)

2.

Prospective juror J.O.'s written responses indicated she belonged to the Unitarian Universalist Association and the Unitarian Universalist Service Committee, both who "officially oppose the death penalty and often work on behalf of prisoners' rights." She acknowledged harboring mixed feelings on her Unitarian Universalist religious practice of respecting the life of "every human being" and not considering any person irredeemable. She disavowed any current moral, religious, or philosophical principles that would affect her ability to vote for the death penalty but admitted never needing to make that decision before. She indicated having doubts or reservations about the death penalty but would seriously weigh the applicable factors to determine the appropriate penalty. Her general feeling about the death penalty was

sadness, "that we as a society must take a life & that we make some public notice of these actions – diminishes us." Although she stated she could follow the law and consider the death penalty, even in a single-victim murder case, she noted "it chills me to consider this possibility."

In response to a voir dire question of whether she thought she could fairly sit on a death penalty case, J.O. stated, "I think so." The trial court detected an emphasis on the word "think," to which J.O. elaborated, " 'I think I can do a fair job and will follow the law.' " She acknowledged wanting to abolish the death penalty but noted that after listening to the evidence, she could find that the aggravating factors outweighed any mitigating factors. During later questioning by the prosecutor, J.O. acknowledged her current struggles with her feelings about the death penalty. She also admitted that she did not know whether she could reconcile her religious beliefs with sentencing someone to death. She did not know whether she could ever see herself voting for the death penalty — that she could not assure the prosecutor or the court "that if the aggravation was so substantial when you compare it to the mitigation," that she would ever believe death would be warranted.

Viewed in its entirety, the record supports the trial court's conclusion J.O.'s views would substantially impair her ability to be fair and impartial. Her written questionnaire and voir dire responses acknowledged her religion was anti-death penalty, with the belief that no person was irredeemable. She admitted she never reconciled her beliefs with her purported ability to impose the death penalty. Though J.O. stated in her written questionnaire that she would not vote against the death penalty in every case and that she would weigh the aggravating and mitigating circumstances to determine the appropriate penalty, she admitted during voir dire that if she were required

to impose death in this case, she "would have been gone." These responses indicate more than a firm opposition to the death penalty. (*Leon*, *supra*, 61 Cal.4th at p. 592.) Rather, she could not assure the court she could ever believe that the death penalty would be warranted, even after balancing the mitigating and aggravating factors when imposing a sentence. (*People v. Jones* (2012) 54 Cal.4th 1, 42, italics omitted [jurors firmly against the death penalty may serve " 'so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law' "]; compare with *Armstrong*, *supra*, 6 Cal.5th at p. 757 [court erred by focusing inquiry on whether prospective juror could impose death for an aider and abettor rather than whether "they could follow the law and consider death as an option"].) Striking J.O. for cause was not an abuse of discretion.

Rhoades urges us to focus on J.O.'s various written and oral statements noting her belief that she *could* find that the aggravating factors outweighed any mitigating factors for which death is appropriate. But given J.O.'s contradictory answers, "it was for the trial court to discern [her] true state of mind." (*Thompson*, *supra*, 1 Cal.5th at p. 1070.) The court observed that J.O.'s demeanor and answers reflected her visible struggle with the death penalty issues — a finding supported by substantial evidence. (*Stewart*, *supra*, 33 Cal.4th at p. 451.) Its decision excusing J.O. for cause was not an abuse of discretion.

3.

In her questionnaire, prospective juror A.G. indicated having moral feelings that would interfere with her ability to judge another person. She explained that she was "not perfect and look[s] for the good in others." She indicated she had some doubts or reservations about the death penalty but would seriously weigh and consider the factors to determine the appropriate

penalty. Particularly, for a case involving the sexual assault and murder of an 18-year-old girl, she would honestly consider both the death penalty and life in prison without the possibility of parole as potential punishments. She documented her disagreement with the anti-death penalty view of her religion, noting "nothing is black & white." But she also noted her general feeling about being asked to impose the death penalty "scares me to death."

In her responses to the trial court, A.G. said she could realistically return a death verdict if, after hearing all the evidence and finding that the aggravating factors substantially outweighed the mitigating factors, she believed that penalty to be appropriate. She also noted that although she was not comfortable sentencing someone to death, there "is always the possibility that I could vote for death." But in responses to the prosecutor, A.G. stated that when faced with the option imposing a life sentence without the possibility of parole rather than the death penalty, it would always be her choice to impose a life sentence rather than the death penalty. She could not imagine realistically considering imposition of the death penalty. She confirmed that was the best she could muster, that she could not even imagine doing so.

Substantial evidence supports the trial court's ruling — that while A.G.'s questionnaire "might have left ambiguity here in her answers," she had "fairly unambiguous answers that she didn't want to really consider imposing the death penalty" and excusing her for cause. Though her written responses and early voir dire answers suggested she could seriously weigh the factors and honestly consider both penalties, she later acknowledged that after considering the issues, she could not imagine ever imposing the death penalty. Given a choice, she would always impose a life without parole sentence. This sentiment disqualified A.G. from serving on the jury, contrary

to Rhoades's assertions. (Compare with *Armstrong*, *supra*, 6 Cal.5th at pp. 756–757 [prospective juror did not answer crucial question of whether he was able to set aside his personal views and follow the court's instructions].) Her admitted inability to follow and impose death rendered her " 'substantially impaired' " in the performance of her duties as a juror. (*Thompson*, *supra*, 1 Cal.5th at p. 1064.)

Relying on *Stewart*, Rhoades contends A.G.'s answers simply demonstrated her reluctance to impose death and thus were inadequate to justify exclusion for cause. (*Stewart*, *supra*, 33 Cal.4th at p. 446 ["prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled—indeed, duty bound—to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror"].) Not so. In *Stewart*, the trial court excused prospective jurors based entirely on their written questionnaire responses. (*Id.* at pp. 444, 446–447.) It failed to "elicit sufficient information from which the court properly could determine whether a particular prospective juror suffered from a disqualifying bias." (*Id.* at pp. 447–448.) Here, in contrast, the court "conducted a follow-up examination of each prospective juror and thereafter determined (in light of the questionnaire responses, oral responses, and its own assessment of demeanor and credibility) that the prospective juror's views would substantially impair the performance of his or her duties as a juror in this case." (*Id.* at p. 451.) Its determination is thus entitled to deference. (*Ibid.*)

4.

Prospective juror Z.F. in his written questionnaire expressed having "deeply mixed feelings about the death penalty." Though he had doubts about imposing the death penalty, he stated he would seriously weigh and

consider the relevant factors to determine penalty. In addition, he stated he would honestly consider both life without the possibility of parole and a death sentence.

During voir dire, Z.F. admitted that his philosophical beliefs about the death penalty would affect his sentencing decisions. He would apply standards that "might be significantly higher than maybe what [his] understanding that the law's standards are." When discussing his cultural views, he noted he had internalized certain principles that would make it "almost impossible" to vote to impose the death penalty. Voting for the death penalty in a case involving war criminals, mass murderers, according to Z.F., was possible but in "more normal cases" like the present one he stated, "I don't believe that I could." He further confirmed that his anti-death penalty sentiments became stronger since filling out the written questionnaire after having time to ponder the issue. In response to the prosecutor's question, Z.F. stated the death penalty "most likely is not" an acceptable form of punishment. Z.F.'s "best guess is that [he] could not" imagine any aggravating evidence, in addition to a first degree murder conviction with a rape-murder special circumstance, that would cause him to vote for the death penalty.

The trial court properly exercised its discretion in dismissing Z.F. for cause based on its finding, "He's not going to fairly weigh the death penalty." Excusing a prospective juror for cause regarding death penalty bias does not require a demonstration the juror would automatically vote against the death penalty, as Rhoades contends. (*People v. Whalen* (2013) 56 Cal.4th 1, 25–26.) Rather, the evidence must simply show the juror's views " '*substantially impair* the performance of his duties as a juror.' " (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424, italics added.) Z.F. noted that his "best guess is that [he]

could not" vote for the death penalty, that he "can't imagine additional aggravating evidence such that" could support that sentence. (Compare with *Armstrong*, *supra*, 6 Cal.5th at pp. 756–757.) This was not a clear statement of his willingness to temporarily set aside his own beliefs " 'in deference to the rule of law.' " (*People v. Jones* (2013) 57 Cal.4th 899, 915.) He further expressed difficulty imposing death for crimes that, as here, involved a single murder victim rather than mass atrocities. (*People v. Cash* (2002) 28 Cal.4th 703, 719–720 [requiring inquiry of juror's views on capital punishment impairing or preventing a death verdict "*in the case before the juror*"], italics added.) Substantial evidence supports the court's definite impression that Z.F. would not be able to impartially and faithfully apply the law — his excusal was not an abuse of discretion. (*People v. Martinez* (2009) 47 Cal.4th 399, 431.)

5.

These excusals were not based solely on the prospective jurors' equivocal or conflicting voir dire responses, as Rhoades insists. As discussed above, the court reviewed the written responses and voir dire responses for each prospective juror. (Compare with *People v. Peterson* (2020) 10 Cal.5th 409, 430 [court erroneously excused prospective jurors based solely on one written response in questionnaire without any additional inquiry as to whether they were substantially impaired].) True, each one had various equivocal or ambiguous responses — such responses are expected on death qualification voir dire. (*People v. Jones*, *supra*, 3 Cal.5th at p. 615.) " '[V]eniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.' " (*Uttecht*, *supra*, 551 U.S. at p. 7.) Thus, when there is ambiguity in the prospective juror's statements, the court, " 'aided as it

undoubtedly [is] by its assessment of [their] demeanor, [is] entitled to resolve it in favor of the State.' " (*Ibid.*) The court properly excused the prospective jurors after reviewing their written and oral responses and making firsthand observations of their tone and demeanor to determine whether their views on the death penalty would substantially impair the performance of their duties. (*People v. Schultz* (2020) 10 Cal.5th 623, 652.)

D.

Rhoades challenges the adequacy of the trial court's voir dire to assess the prospective jurors' ability to serve on a capital jury. "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Rosales–Lopez v. United States* (1981) 451 U.S. 182, 188, italics omitted.) But trial courts have " 'great latitude in deciding what questions should be asked' " since they are "in the best position to assess the amount of voir dire required to ferret out latent prejudice, and to judge the responses." (*People v. Earp* (1999) 20 Cal.4th 826, 852; *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314.) Viewing the voir dire record in its entirety, we discern no inadequacy in the court's questions that renders the trial fundamentally unfair. (*Stewart*, *supra*, 33 Cal.4th at p. 458.)

Both parties had — and availed themselves of — the ample opportunity "to probe for hidden bias and to explore any other factor bearing on juror impartiality." (*People v. Contreras* (2013) 58 Cal.4th 123, 144.) The few instances that defense counsel did not pose any additional questions to the prospective jurors indicates "that the trial court's voir dire provided ample basis for ferreting out prospective jurors" whose death penalty views "would interfere with their ability to be impartial." (*People v. Taylor*, *supra*,

48 Cal.4th at p. 639.) And contrary to Rhoades's assertions, nothing required the court to specifically ask whether prospective jurors could set aside their views in deference to the law where voir dire clearly demonstrated a substantial impairment. (*People v. Schultz*, *supra*, 10 Cal.5th at p. 652 [voir dire adequate even though trial court did not ask whether prospective juror could set aside views in deference to rule of law]; compare with *Armstrong*, *supra*, 6 Cal.5th at p. 757 [court erroneously excused jurors after asking whether they would be "willing to impose death on an aider and abettor as on an actual killer, rather than on whether they could follow the law and consider death as an option"].) The court's inquiries also did not simply repeat questions on the written questionnaire. (Compare with *Leon*, *supra*, 61 Cal.4th at p. 593 [voir dire inadequate where court merely repeated questions from questionnaire resulting in prospective jurors repeating their answers without any additional exploration regarding their ability to set aside their anti-death penalty bias].) Rather than simply reaffirming the prospective jurors' questionnaire responses, the voir dire revealed that their death penalty views had evolved since completing the questionnaire. (*Ibid.*)

For example, Z.F.'s written responses stated he would seriously weigh and consider the relevant factors to determine penalty. But his anti-death penalty sentiments grew during voir dire, and he could not envision any set of aggravating circumstances that would persuade him to vote for a death sentence. By doing so, he "effectively repudiated [his] questionnaire responses." (*People v. Schultz*, *supra*, 10 Cal.5th at p. 653.) This unequivocal statement provided the court with sufficient information to conclude Z.F. could not put aside his personal views to impartially and faithfully apply the law in this case. (*People v. Winbush* (2017) 2 Cal.5th 402, 429–430; compare with *Leon*, *supra*, 61 Cal.4th at p. 593 [court erroneously excused prospective

jurors who repeated answers about automatically voting for life imprisonment without exploring whether they could set aside bias if the aggravating factors required it].)

Rhoades insists the trial court treated the prospective jurors with hostility when questioning them regarding their views. He takes issue with the court's questioning of J.O. — asking can you "[a]pply the law in the way you think is fair, even if that means, on these facts, this is more extreme or this is more appropriate, and I . . . really will vote that way, even if it bothers me for the rest of my life?" He suggests the court repeated this questioning more than necessary — badgering the prospective juror.

We see "neither abuse of discretion in the way the trial court conducted voir dire nor any disparity in the standards it used to evaluate the prospective jurors' suitability for service." (*People v. Thornton* (2007) 41 Cal.4th 391, 423.) Courts should be evenhanded when questioning "prospective jurors during the 'death-qualification' portion of the voir dire." (*People v. Champion* (1995) 9 Cal.4th 879, 908–909.) Asking more questions of certain prospective jurors than others during the death qualification process, however, is insufficient to establish violation of the right to an impartial jury. (*Thornton*, at p. 425.) Although J.O. stated in her written questionnaire she could follow the law and consider the death penalty, she disclosed that "it chills me to consider this possibility." The trial court detected J.O.'s hesitation when she stated she *thought* she could follow the law on the death penalty. Her response prompted the court to conduct a broader voir dire into J.O.'s attitudes to determine whether she had anti-death penalty views that would impair her ability to follow the law. (*People v. Mills*, *supra*, 48 Cal.4th at p. 189.) Even Rhoades's counsel probed deeper into J.O.'s views, asking whether she could imagine imposing the death

penalty, to which she responded, "I guess I don't know for sure." In sum, there was no impropriety in the court's voir dire.

E.

Rhoades contends the trial court improperly permitted the prosecutor, during the death qualification voir dire, to characterize his case as a single murder with a rape special-circumstance allegation. His case also involved the aggravating circumstance of a prior murder conviction. Yet, Rhoades argues, the prosecutor repeatedly and improperly questioned prospective jurors regarding their feelings about imposing the death penalty for a case involving only one murder: asking variously, "when it's just a single murder, I don't think that's appropriate for the death penalty. Does that describe you?"; "in the case of a single murder, that that is not the type of case where you would ever see yourself voting for the death penalty; is that true?" The prosecutor, he contends, used these misleading questions to elicit disqualifying responses to justify excusing them for cause. This argument ignores the record.

Before jury selection, the trial court and prosecutor had a colloquy about allowing voir dire on expected penalty phase evidence — the prior murder conviction. The court and the prosecutor noted that parties were allowed to forecast this penalty phase evidence during voir dire and question prospective jurors on whether that evidence would affect their views on the death penalty. On the record, Rhoades's counsel expressed a tactical decision to abstain from disclosing his prior murder conviction to the prospective jurors during voir dire. Respecting this decision and after acknowledging a prior ruling bifurcating the prior murder special-circumstance allegation from the guilt phase of trial, the court precluded the prosecutor from questioning the prospective jurors about this penalty phase evidence. The

record belies Rhoades's assertion that the prosecutor engaged in any deliberate deception.

In sum, there were no errors in the death qualification process, nor did the process violate Rhoades's constitutional rights. Accordingly, there was no structural defect that warrants reversing his judgment of conviction.

IV.

Rhoades raises various claims of prosecutorial misconduct. We provide the standards governing such claims, then address each in turn.

"A prosecutor's conduct ' "violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' " (*People v. Zarazua* (2022) 85 Cal.App.5th 639, 644 (*Zarazua*).) " ' "But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*Ibid.*) "To establish such error, bad faith on the prosecutor's part is not required." (*People v. Centeno* (2014) 60 Cal.4th 659, 666.) " '[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' " (*Id.* at pp. 666–667.)

"To prevail on a claim of prosecutorial misconduct premised on the prosecutor's remarks to the jury, the defendant must show that, in the context of the argument as a whole and the instructions given to the jury, 'there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." ' " (*Zarazua*, *supra*, 85 Cal.App.5th at p. 644.) " ' "In conducting this inquiry, we 'do not

lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." ' " (*Ibid.*)

Absent prejudice, we may not reverse for prosecutorial misconduct. (*Zarazua*, *supra*, 85 Cal.App.5th at p. 644.) We may reverse "under federal law if the error 'was not "harmless beyond a reasonable doubt," ' " and under " 'state law if there was a "reasonable likelihood of a more favorable verdict in the absence of the challenged conduct." ' " (*Ibid.*)

A.

Rhoades argues the prosecutor committed misconduct by describing Connell as her client and by saying the chair next to her was empty because of what Rhoades did to Connell. He forfeited the claim.

" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1219.) But a " 'defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile' " or " ' " 'an admonition would not have cured the harm.' " ' " (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.)

Rhoades failed to object to the prosecutor's comments below and thus forfeited the claim. (*People v. Seumanu*, *supra*, 61 Cal.4th at pp. 1338, 1345 [holding improper reference to victim as client was forfeited since defendant did not object].) He contends we should consider it because any admonition was "extremely unlikely" to cure the harm, the misconduct "appealed to the passions and prejudices of the jury and could not be ameliorated by jury instruction," and any objection would have been futile and have compounded the prejudice. But these conclusory statements are not supported with

reasoning, and he points to nothing in the record that persuades us that an objection, admonition, or instruction would have been futile. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.)

He also argues the trial court's limiting jury instruction — that "[s]tatements made by the attorneys . . . are not evidence" — was ineffective. But contrary to his claims, we presume jurors " 'understand and faithfully follow' " jury instructions, and he has not persuaded us the instruction was inadequate. (*People v. Smith* (2007) 40 Cal.4th 483, 517–518 (*Smith*).)

B.

Rhoades argues the prosecutor committed misconduct by calling him a "monster" and referring to his "filthy hands" during opening and closing arguments.[6] We disagree.

"Prosecutorial argument 'may include opprobrious epithets warranted by the evidence.' " (*Garcia*, *supra*, 52 Cal.4th at p. 759.) " 'Where they are so supported,' " the Supreme Court has " 'condoned a wide range of epithets to describe the egregious nature of the defendant's conduct,' " including " ' "monster." ' " (*Id.* at pp. 759–760 [collecting cases].) Although claims of misconduct are generally reviewed for abuse of discretion, we independently examine the law and objectively examine how a reasonable juror would interpret the prosecutor's remarks. (*People v. Collins* (2021) 65 Cal.App.5th 333, 340.)

Rhoades's claim of misconduct fails. (*Garcia*, *supra*, 52 Cal.4th at pp. 759–760.) Here, "monster" fairly described the egregious nature of

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[6] Rhoades also argues some of the prosecutor's comments during the penalty phase were improper. Given that he is no longer sentenced to death, we conclude he did not suffer prejudice from any alleged misconduct during that phase. (*Zarazua*, *supra*, 85 Cal.App.5th at p. 644.)

Rhoades's conduct.[7] (*Garcia*, at pp. 759–760.) He bound Connell's hands, cut off her clothing, raped her, and killed her by slitting her wrists and throat before leaving her body in an animal corral. And he forfeited any claim concerning the prosecutor describing his hands as "filthy." (*People v. Avila* (2009) 46 Cal.4th 680, 710–711.) He did not object below. (*Ibid.*) Although he asks us to consider the claims anyway, he points us to nothing in the record indicating an objection, admonition, or instruction would have been futile, nor does he persuade us that the limiting instruction was ineffective. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1201; *Smith*, *supra*, 40 Cal.4th at pp. 517–518.)

C.

Rhoades argues the prosecutor committed prejudicial misconduct by misrepresenting his "substantial criminal history" during voir dire. Specifically, he contends the prosecutor erred by stating the case "involve[d] a 'single' murder." We disagree.

As previously set forth, during voir dire, counsel and the trial court discussed whether prospective jurors should hear evidence of Rhoades's prior criminal history. Rhoades argued they should not for tactical reasons. As a result, the court ruled that the prosecutor could not question jurors about Rhoades's criminal history unless Rhoades raised the issue first. The prosecutor agreed with the ruling.

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[7] Before the prosecutor's closing arguments, the trial court ruled that the prosecutor could use the terms "monster," "vulture," "beast," or "snake," and that any objection to those terms would be unsuccessful. Thus, Rhoades's claim regarding the prosecutor's use of "monster" was preserved. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1201.) The court also stated "if [the prosecutor] uses any other terms, you would have to object to preserve your objection."

Nonetheless, Rhoades now argues that two of the prosecutor's exchanges with prospective jurors were misconduct because she did not mention Rhoades's criminal history while she voir dired them.[8] In the first, the prosecutor asked a prospective juror, "I have talked to a lot of jurors over the years that would only consider the death penalty in multiple murders. They said 'if there is more than one person killed, it's a mass murder, if it's a serial murder, then I might consider it. But when it's just a single murder, I don't think that's appropriate for the death penalty.' Does that describe you?" The prospective juror responded, "I think so, yeah." In follow up, the prosecutor asked "Okay. So in the case of a murder of a single individual, the death penalty is not really a true option for you; is that true?" They responded, "yes." Again, the prosecutor asked, "[s]o do you think it's correct to say that in the case of a murder of a single individual, if you always have the option of voting for life without the possibility of parole, that that would be your choice?" They responded, "I would try to weigh the evidence fairly, but I can't say 100 percent. But, morally, probably, I would guess that I probably would go for life without parole." The prosecutor responded that "you will never be told that you must vote for the death penalty, and you will always have the option of voting for life without parole." "[F]or someone like yourself, if you know that you would only consider it for multiple murders and you always have the option of life without parole, it sounds like in this case, the practical answer is that that's what you are going to choose; is that true?" They responded "[y]es."

In the second, the prosecutor asked "in the case of a single murder, that that is not the type of case where you would ever see yourself voting for the

[8] We do not address the claims concerning questions by the trial court that Rhoades mistakenly attributes to the prosecutor.

death penalty; is that true?" The prospective juror responded, "I think 'ever' is a strong word. Again, it's not a situation that I've been put in, but it's hard for me to envision myself in that situation, feeling comfortable imposing the death penalty." The prosecutor responded, "Okay. And the impression I got from you is that you actually don't know if you could ever do it, but that you might be able to consider it in a case of mass atrocities, where there are war crimes or multiple murders?" They responded, "Yes. I think there are certainly rare cases that are of a larger scale where I can certainly consider it."

Rhoades's claim fails. To begin, we disagree with his characterization of the prosecutor's questions. For the most part, they concerned the prospective jurors' willingness to impose the death penalty in cases that do not involve multiple or mass murders — a permissible line of questioning. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1120 [voir dire " 'seeks to determine only the views of the prospective jurors about capital punishment in the abstract' "].) In pursuit of this goal, the prosecutor did use the words "single murder" in one instance. But in doing so, she only complied with Rhoades's strategic decision to not question prospective jurors about his criminal history. He may not benefit from error he invited for tactical reasons. (See *People v. Hardy* (2018) 5 Cal.5th 56, 98–99.) Even assuming error, no prejudice appears. (*Zarazua*, *supra*, 85 Cal.App.5th at p. 644.) He contends otherwise because — in his view — the prosecutor "hoodwinked these prospective jurors into believing that Rhoades' case was *not* one of the worst of the worst for which they could realistically vote for death." Since he has been resentenced to life without the possibility of parole, he did not suffer the prejudice he asserts. (*Ibid.*)

D.

Rhoades contends the prosecutor committed misconduct by referring to Connell as a " 'little girl' " during the guilt phase trial. We are unpersuaded.

"A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence." (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 726.) "Using colorful or hyperbolic language will not generally establish prosecutorial misconduct." (*People v. Peoples* (2016) 62 Cal.4th 718, 793.)

Given the wide latitude prosecutors have to vigorously argue their case, we conclude that the prosecutor calling Connell a little girl was not misconduct. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 726.) Connell was still in high school, and she had just turned 18 the week before she disappeared. Given her relative youth, we believe the language is closer to a "colorful" way of describing her age and a "fair comment" on the evidence than a " ' " ' "deceptive or reprehensible method[] to attempt to persuade." ' " ' " (*People v. Peoples*, *supra*, 62 Cal.4th at pp. 793, 796; *Ledesma*, at p. 726; *Zarazua*, *supra*, 85 Cal.App.5th at p. 644.)

In any event, any assumed error was harmless. (*Zarazua*, *supra*, 85 Cal.App.5th at p. 644.) The evidence clearly established that Connell was 18, and the prosecutor used her exact age during argument. Moreover, the trial court instructed the jury that "[s]tatements made by the attorneys . . . are not evidence," and we must presume jurors understood and faithfully followed that instruction. (*Smith*, *supra*, 40 Cal.4th at p. 517.)

E.

Rhoades argues that the prosecutor's cross-examination of J.C. — his sister — prejudicially violated his due process rights because the prosecutor's

questions were argumentative and assumed facts not in evidence. We disagree.

To support his arguments, Rhoades points to five argumentative objections he made while the prosecutor impeached J.C.'s testimony that Rhoades had brought Connell to J.C.'s house. In the first, the prosecutor asked J.C. about the clothing Connell was wearing. The prosecutor asked "[d]id you tell Francie Koehler" — an investigator who had previously interviewed J.C. — "that this girl was wearing light-colored clothing and blue jeans?" and "[s]o in 2006, when she said 'can you describe this girl,' you didn't tell her?" The court sustained Rhoades's argumentative objection.

In the second, the prosecutor questioned J.C. about whether she read the newspapers and saw the headlines about Connell's disappearance. J.C. testified she did not read the newspapers. The prosecutor asked, "[y]ou testified this morning that you go to certain grocery stores and the way you figure out which one to go to is the ones that have the best sales. Right?" She responded, "[r]ight. We mostly shopped at what was Lucky's then, Albertson's now." The prosecutor responded, "[s]o the way to find out who is having the best sales is to read the paper. Right?" She responded that her ex-husband read the paper. After more exchanges concerning whether J.C. read the paper, the prosecutor asked "[h]ow come your mom said to you: I want to tell you your brother has been indicted before you read it in the paper?" She began responding "[b]ecause my mother doesn't know my reading habits. She didn't then —," before the prosecutor cut her off and said, "[y]ou lived with her." The trial court sustained Rhoades's argumentative objection.

The remaining objections concerned questions about the investigator's interview. The prosecutor stated "[y]es. So you tell the investigator for your

brother's murder trial: I saw him with the dead girl a couple months before she was murdered and it wasn't a big deal." Shortly after, the prosecutor asked "[i]s it true . . . that you had a six to seven hour interview with your brother's criminal defense investigator for the murder that he is on trial for and you said: By the way, I saw him with the girl who got murdered just a couple of months before she was missing and murdered and it wasn't a big deal?" The court ruled both questions were argumentative. Finally, after J.C. testified that she talked with the investigator about all the women Rhoades had been around, the prosecutor stated "[e]xcept" the other women are "still alive." The court sustained Rhoades's objection and struck the statement.

Rhoades fails to demonstrate prejudice arising out of the prosecutor's argumentative comments. (*People v. Riggs* (2008) 44 Cal.4th 248, 317.) The trial court sustained objections to all five, negating any prejudice. (*Ibid.*)

Rhoades's remaining challenges concerning the prosecutor's comments to J.C. are forfeited. (*People v. Earp*, *supra*, 20 Cal.4th at p. 862.) In the first, he challenges another exchange between the prosecutor and J.C. J.C. testified that her "ex-husband had gone wild on Sunday." The prosecutor responded, "[g]one wild, because he knew you were about to commit perjury; right?" She responded "[n]o." Four questions later, the prosecutor asked, your ex-husband "told you what you were doing was morally wrong; correct?" She responded "[n]ope." Rhoades did not object to the questions below and thus forfeited these claims. (*Ibid.*) He also argues the prosecutor's questions assumed facts not in evidence. But he did not object on these grounds below and thus forfeited the objection. (*Ibid.*) Finally, he points to nothing in the record that persuades us his claims fall within an exception to the forfeiture

rule. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1201; *Smith*, *supra*, 40 Cal.4th at pp. 517–518.)

F.

Citing *People v. Seumanu*, *supra*, 61 Cal.4th 1293, Rhoades argues that "similar misconduct by this prosecutor in at least one other capital case tends to prove that it was knowing and deliberate." (Boldface & capitalization omitted.) Rhoades fails to demonstrate how the prosecutor's conduct in another case is relevant.

For additional background, in *People v. Seumanu*, our Supreme Court concluded that the same prosecutor who prosecuted Rhoades committed misconduct, albeit harmless. (*People v. Seumanu*, *supra*, 61 Cal.4th at pp. 1307, 1338, 1344–1345.) In that case, she improperly implied "defense counsel knew his client was guilty, and that counsel 'put forward' a sham defense." (*Id.* at p. 1338.) She also "improperly asked the jury to view the crime" through the victim's eyes and impermissibly referred to the victim as her client. (*Id.* at pp. 1344–1345.)

Be that as it may, Rhoades has not demonstrated the relevance of the prosecutor's conduct in another case to his appeal. He relies on *People v. Hill* (1998) 17 Cal.4th at page 800 to argue the contrary, but that case is inapposite. There, the Supreme Court concluded the prosecutor committed misconduct during defendant's trial. (*Id.* at pp. 847–848.) In doing so, it only considered her conduct during the *defendant*'s trial despite her long history of committing misconduct and "boast[ing]" about it in others. (*Id.* at pp. 823–839, 847–848, fn. 10.) Indeed, the court made clear it only mentioned her conduct in other cases to address an "institutional concern," not as a tool to help determine whether she committed misconduct in the case before it. (*Id.* at p. 847.) *Hill* thus suggests that we should not consider the prosecutor's

conduct in other cases while making our determinations here. (*Id.* at pp. 822–823 [bad faith not required], 823–839, 847–848, fn. 10.)[9]

G.

Finally, Rhoades argues that the errors were cumulatively prejudicial and require reversal. We disagree. (*People v. Hardy*, *supra*, 5 Cal.5th at pp. 98–106; *People v. Bracamontes* (2022) 12 Cal.5th 977, 1007.) He has only identified one potential error, and five successful objections to the prosecutor's questioning. No cumulative prejudice appears. (*Hardy*, at pp. 98–106 [no cumulative prejudice where three errors were not prejudicial individually]; *Bracamontes*, at p. 1007.)

V.

None of Rhoades's remaining arguments convince us that reversal is warranted. First, we reject Rhoades's assertion that the cumulative effect of the trial errors deprived him of due process and a fair trial. (*People v. Williams* (2009) 170 Cal.App.4th 587, 646 [review of each alleged error to assess cumulative effect and whether jury would have rendered more favorable verdict in their absence].) There was only one identified error, it was not prejudicial, so reversal is not warranted. Nor were there any state law errors that implicate a deprivation of his Fourteenth Amendment due process rights.

DISPOSITION

The judgment is affirmed.

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[9] Thus, we deny as irrelevant Rhoades's request for judicial notice, filed August 19, 2025. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 823–839, 847–848, fn. 10.)

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RODRÍGUEZ, J.

WE CONCUR:

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FUJISAKI, Acting P. J.

_____
PETROU, J.

A174041; *People v. Rhoades*