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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMES DANIEL SOPER, Defendant and Appellant.	D047875 (Super. Ct. No. SCN193073)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Reversed and remanded.

I.

INTRODUCTION

In the first portion of a bifurcated trial, a jury found James Daniel Soper guilty of both the second degree murder of James Olson (Pen. Code, § 187)[1] (count 1) and the first degree murder of George Rigby (§ 187) (count 2). The jury also found, with respect to

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

each count, that Soper personally used a deadly weapon in the commission of the murders, within the meaning of sections 12022, subdivision (b)(1) and 1192.7, subdivision (c)(23). In the second portion of the trial, the jury found that Soper had served four prior prison terms and that he had suffered one prior strike conviction within the meaning of section 667, subdivision (b-i). The trial court sentenced Soper to a total term of 86 years to life in prison.

On appeal, Soper claims the trial court erred in: (1) denying his motion to sever trial of the two murder charges; (2) failing to instruct the jury regarding involuntary manslaughter; (3) admitting evidence of his pretrial assault on a witness and in instructing the jury pursuant to CALJIC No. 2.06 regarding that assault; (4) instructing the jury pursuant to CALJIC No. 2.52 regarding flight as reflecting consciousness of guilt; and (5) denying his postverdict application to disclose jurors' names, addresses and telephone numbers.

We conclude that the trial court erred in denying Soper's motion to sever. We further conclude that this error requires reversal of the judgment and retrial with respect to both murders. Accordingly, we reverse the judgment in its entirety. In light of our reversal, we need not consider Soper's claim regarding his postverdict application to disclose juror information since that issue is not likely to recur on remand. However, we consider Soper's remaining claims because those issues are likely to recur on remand.

II.

FACTUAL BACKGROUND

A. *The People's evidence*

1. *The Rigby murder*

George Rigby was homeless. He camped in a golf course behind a Sav-On drug store in Oceanside. On Sunday morning, May 23, 2004, at approximately 8:00 a.m., several golfers found Rigby's dead body lying on a piece of cardboard in his campsite.

Oceanside Police Officer Roy Monge responded to the scene. While he was at the scene, a woman named Tina Torres told Officer Monge that a "mean guy" named Jay Soper frequently visited Rigby at his camp.

Among the items found around Rigby's campsite was an unopened package of crackers. Soper's fingerprints were found on the package. A paper bag with a bloodstain on it was found near Rigby's body. DNA taken from the bloodstain matched Soper's DNA. In addition, a bloodstain containing DNA that matched Soper's DNA was found on the cardboard next to Rigby's knee and hip.

A railroad tie that weighed approximately 30 to 40 pounds was on the ground near Rigby's body. DNA taken from bloodied hairs found on the railroad tie matched Rigby's DNA.

There was a depression and a split approximately four inches in length near the left temple on Rigby's head. The medical examiner testified that Rigby had died from blunt force head injuries, and that he had probably died the night before his body was found. According to the medical examiner, the lack of blood around Rigby's body

suggested that he had died from a single blow. In addition, an injury to the back right side of Rigby's head indicated that he had been lying down at the time of the killing.

Several witnesses testified that they had seen Soper with Rigby the day before Rigby's body was discovered. Doris Daniel saw Rigby and Soper together at Rigby's campsite at approximately midnight the night before Rigby's body was found. Jeffrey Nash testified that he had played cards with Rigby and Soper the day before Rigby's body was found. Kenneth Whitaker testified that he had shared a drink with Rigby and Soper on the morning before Rigby's body was discovered.

2. *The Olson murder*

On September 16, 2004, Carlsbad police officers discovered James Olson's decomposing body in his campsite in a drainage ditch on a hillside behind a shopping center. The Olson homicide location was approximately two to three miles from the scene of the Rigby homicide. Olson was lying in a sleeping bag, and there was a large piece of concrete resting on his legs.

According to the medical examiner, Olson had suffered "crushing head injuries." Blood containing DNA that matched Olson's DNA was found on the concrete. Police found a jar of peanuts with Soper's fingerprint on it in Olson's camp.

The medical examiner concluded that Olson had been dead for several days and possibly for as long as a week, before his body was discovered. The examiner further concluded that Olson had died from blunt force head injuries, and that it was likely that these injuries were inflicted with the bloodied concrete found at the scene. Brian

Kennedy, a crime scene reconstruction expert, also testified that in his opinion, Olson probably died from a single blow inflicted with the concrete block.

John Rogers had known Olson for 10 years. Rogers met Soper approximately two weeks before he learned of Olson's death. Soper told Rogers that his name was Richard Perry. Rogers testified that Soper had stolen a pocketknife from him. Among the items police found at Olson's campsite was the pocketknife Rogers claimed Soper had taken from him.

Rogers testified that he had been with Soper and Olson on the Saturday evening before Olson's body was discovered. Rogers said that the group had watched a band perform at a local coffee shop called the Coffee Bean, which was located near Olson's campsite. At approximately 8:30 p.m., Olson left to buy a beer, but soon returned to the Coffee Bean. Shortly thereafter, Olson left to go to his campsite. According to Rogers, as Olson was leaving, Soper told Olson that he was going to accompany Olson to his campsite to have a beer. Olson shook his head no. Rogers said he thought Olson looked scared. Soper followed Olson out of the Coffee Bean. This was the last time Rogers saw Olson.

3. *The investigation*

On September 16, 2004, Carlsbad Police Officer William Michalek responded to the scene of a reported homicide. When he arrived at the scene, Officer Michalek attempted to locate other homeless individuals in the area who might have information about the murder. Officer Michalek encountered Rogers and Soper sitting together at the Coffee Bean where Rogers testified he had been with Soper and Olson the previous

Saturday evening. Officer Michalek asked Rogers and Soper for their names. Rogers gave his real name. Soper told Officer Michalek that his name was Richard Alan Perry. After a brief conversation, Officer Michalek left. Later that same day, after Officer Michalek had gathered more information about the killing, he attempted to locate Rogers and Soper. Michalek was unable to locate Soper and informed other police officers that he would be interested in speaking with Soper.

On September 19, Carlsbad Police Officer Paul Reyes saw Soper standing on a freeway off-ramp holding a sign that read, "Please help if you can. Disabled. God Bless," which Officer Reyes testified, is illegal. Officer Reyes contacted Soper, who told Reyes that his name was Richard Perry. Officer Reyes issued Soper a citation.

Pursuant to this contact, Soper consented to speak with Carlsbad police detectives. The detectives questioned Soper about the Olson killing. Soper denied ever having been in Olson's campsite or knowing "a guy named Jim," who "died behind Sav-On . . . ." Officers learned during a break in their interrogation, through a fingerprint comparison, that the man claiming to be Richard Perry was in fact James Soper. Police determined that there was an outstanding parole violation warrant for Soper and arrested him.

After Soper was given *Miranda*[2] advisements, he agreed to speak further with detectives from the Oceanside and Carlsbad police departments. The detectives conducted several additional audiotaped and/or videotaped interviews of Soper in late September 2004.

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2 *Miranda v. Arizona* (l966) 384 U.S. 436.

With respect to the Rigby killing, Soper told detectives that he had never been at Rigby's campsite. Soper also told police that he had "no clue" how his fingerprint could have been found on a wrapper in Rigby's campsite. Detectives asked Soper to think about whether there was any reason his fingerprints would be found at Rigby's camp and then left the interview room. While Soper was alone in the room, the camera and audio recorder continued to record. Soper groaned and stated, "I'm going to throw up."

Soper made inconsistent statements concerning whether he knew Rigby, and how well he knew him. Soper told the detectives that he did not know a person by the name of "George." However, Soper did say that he recognized a photograph of Rigby, but said he had rarely spoken with him. Soper subsequently stated that he had seen the person depicted in the photograph "a million times."

With respect to the Olson killing, detectives showed Soper a picture of Olson and asked Soper if he knew the name of the person depicted in the photograph. Soper stated that he did not know the person's name. Soper told the detectives that he was familiar with the area behind the Sav-On drug store where Olson had been murdered, but said that he had never been in that area. Soper said that he had known Rogers for "probably a couple of weeks."

While he was in custody awaiting trial, Soper assaulted a witness (see part III.C., *post*). He also initially refused to comply with a court order that directed him to provide police with his fingerprints.

B. *Defense evidence*

The defense presented evidence that Soper suffered a serious facial wound in late April 2004 that required surgery and that the wound would have been likely to bleed after surgery. Ronald Marquez, a registered nurse at the Vista Detention Facility, testified that on September 19, 2004, he gave Soper Librium after he observed Soper exhibit symptoms consistent with alcohol withdrawal.

III.

DISCUSSION

A. *The trial court committed reversible error in denying Soper's motion for severance*

Soper claims the trial court erred in denying his motion to sever the two murder charges for trial.

1. *Factual and procedural background*

On April 25, 2005, the People filed a two-count information charging Soper with the murders of Olson and Rigby. On that same day, the People filed a brief in support of consolidation of the charges and against severance. The People also filed a brief in which they addressed the cross-admissibility of the evidence of each murder. The People claimed that the evidence of each murder was cross-admissible under Evidence Code section 1101, subdivision (b) on the issues of intent, motive, common plan or scheme, and identity, and that consolidation of the murders for trial was thus appropriate.

The People asserted the following similarities between the two murders in support of their claim of cross-admissibility:

> "1. Both victims were homeless transients.
>
> "2. Both victims were murdered at their respective transient campsites.
>
> "3. It is extremely rare in Carlsbad and Oceanside for a transient to be murdered by a blow to the head while in [his] bed at [his] campsite.
>
> "4. Both victims were in their 'bed' at their campsites.
>
> "5. Both victims had 'established' campsites that were well known as their campsite[s] in the local transient community.
>
> "6. Although the campsites were well know to other transients, they were not known to the general population.
>
> "7. Neither campsite is a location frequented by the general public.
>
> "8. Both victims' campsites were in undeveloped areas located immediately adjacent to shopping malls that included a Sav-On Drugs store, and were in turn located just off of major streets. . . .
>
> "9. The Carlsbad murder occurred near the city's border with Oceanside. The murder scenes are approximately three miles apart.
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> "10. Both victims were lying on their back[s], face up.
>
> "11. Both victims were nearly fully dressed. Both victims were wearing at least one shirt, a jacket, pants, and socks. George Rigby had his shoes on, but James Olson had his shoes off.
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> "12. Both victims had the lower part of their body partially covered at the time their dead bodies were discovered. George Rigby had his legs partially covered by a blanket; James Olson's legs were covered by a sleeping bag.

"13. Both victims were killed by blunt force trauma to their head, primarily the facial area, as opposed to the top of the head or back of the head. . . .

"14. When [the medical examiner] responded to the Carlsbad homicide scene on September 16, 2004, she almost immediately commented on the similarity to the May 23, 2004 Oceanside homicide.

"15. Both victims were killed by what appears to be a single blow to the head.

"16. Neither victim appeared to put up any defense. There is no evidence of a struggle at either crime scene. There was no evidence of recent substantial injuries to any other part of either victims' body.

"17. Both victims were killed by non-standard deadly weapons, as opposed to more common weapons such a firearm or a knife. The weapon that killed George Rigby was a heavy piece of a railroad tie. The weapon that killed James Olson was a piece of concrete weighing approximately fifty pounds.

"18. In both cases the weapon was left at the scene, near the body of the victim. . . .

"19. In both cases the victims were under the influence of alcohol to the extent that the lay term 'drunk' would apply. . . .

"20. In both cases, James Soper provided a statement to the respective homicides regarding the homicides.

"21. In both cases, James Soper admitted knowing the victims.

"22. In both cases, James Soper admitted being in the general area in the days prior to the homicide. . . .

"23. In both cases, James Soper denied ever being at the victims' campsites.

"24. In both cases, James Soper's latent fingerprints were found on items located at the homicide scene. . . .

> "25. James Soper's initial refusal to comply with a court order to provide additional rolled prints is relevant. [The remainder of this paragraph described the circumstances of Soper's initial refusal to obey a March 1, 2005 court order to provide police with fingerprints.]
>
> "26. James Soper lived at 'Building a Solid Foundation' in Chula Vista from late May until August 21, 2004. In both cases, James Soper said he was working 'under the table' at a construction company, when he was actually at 'Building a Solid Foundation.'
>
> "27. In both cases, James Soper told investigators that he was a 'loner' who was acquainted with other transients, but kept to himself and did not socialize with them. [The remainder of the paragraph stated there was evidence of Soper socializing with other homeless individuals in both cases].
>
> "28. In both cases the jury will have to be educated to the numerous terms that are unique to the transient lifestyle. . . ."

On June 17, 2005, Soper filed a motion to sever the two murder counts. Defense counsel supported the motion with a brief and a declaration. In the motion, defense counsel argued that the murders were not sufficiently similar such that evidence of one murder would be admissible in a separate trial of the other under Evidence Code section 1101, subdivision (b). Counsel stated:

> "The only similarity between the killings is that both individuals were transient[s] and were killed with blunt force trauma. They were found in different cities, and different times of the year, killed with different weapons, and seemingly different motives (as Olson had his money intact.)"

Defense counsel maintained that Evidence Code section 352 would also preclude cross-admissibility of the evidence because the probative value of one murder in a trial of the other was extremely slight, and was outweighed by the possibility of unfair prejudice. Counsel further argued that the joining of the cases reflected a strategy of "bootstrapping,

if not two relatively weak cases, at least one weak case and one stronger case." Defense counsel explained that "in a trial joining these two killings, the evidence against defendant in the Rigby killing will inevitably be used to bolster the murder charge in the Olson killing."

The People filed additional briefs in which they argued that they would have to present various evidence twice if the court were to grant Soper's motion to sever. For example, the same medical examiner would testify in both cases, and the foundational evidence for her expert opinion would be the same. Similarly, foundational evidence for blood spatter evidence in both cases would be identical. The People reiterated their argument that the murders were sufficiently similar to support cross-admissibility of the evidence as to each crime.

On June 22, after hearing argument from the prosecutor and defense counsel, the court denied Soper's motion to sever, reasoning in part:

> "This is how I am going to rule on this. I think the statute is clear that these are supposed to be combined. I don't think the defense has carried their burden to show a substantial likelihood of prejudice. I realize that you can go through the two offenses and find a number of things that are the same and a number that are opposite. I think from my standpoint I would try and look at the entire picture; and when I look at the entire picture, I believe that there are enough similarities so that the prosecutor can under 1101 use in the one case as to the other. [¶] I think this is an easy decision for me to make on the law. They should be combined, and the evidence is admissible under 1101[, subdivision (b)]. Even if I split them, we would end up putting on two trials and using the same evidence at both trials."

2. *Governing law*

a. *The law governing joinder and severance of criminal charges*

Section 954 provides in relevant part: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

Where the statutory requirements for joinder are satisfied, a defendant seeking severance must make a clear showing in the trial court of potential prejudice in joining the charges. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1314-1315 (*Bradford*).) This court reviews a trial court's ruling on such a motion to sever for an abuse of discretion. (*Id.* at p. 1315.)

In *Bradford*, *supra*, 15 Cal.4th at page 1315, the Supreme Court outlined the ways in which a defendant can establish a substantial danger of prejudice from the joinder of different offenses for trial.

> """The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." [Citation.] [¶] "The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so

> that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]'"

If evidence on each of the joined charges would have been admissible in separate trials on the charges, the defendant cannot establish error in the denial of a motion to sever. (*Bradford*, *supra*, 15 Cal.4th at pp. 1315-1316.)

b. *Admissibility of other crimes pursuant to Evidence Code section 1101*

A trial court's ruling on the admissibility of evidence pursuant to Evidence Code section 1101 is reviewed for an abuse of discretion. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123 (*Lenart*).)

In *Lenart, supra,* 32 Cal.4th at page 1123, the California Supreme Court outlined the law governing the admissibility of evidence of other crimes committed by a defendant to prove he committed an offense:

> "Evidence of crimes committed by a defendant other than those charged is inadmissible to prove criminal disposition or a poor character. '[B]ut evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid. Code, § 1101.) Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.] . . . .' [Citation.]"

As with other types of circumstantial evidence, the admissibility of other crimes evidence depends upon three principal factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the

material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence. (*People v. Thompson* (1980) 27 Cal.3d 303, 315 (*Thompson*), overruled on another ground by *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

In *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), superseded by statute on other grounds, as stated by *People v. Britt* (2002) 104 Cal.App.4th 500, 505, the Supreme Court explained that there must be a high degree of similarity and distinctiveness between offenses in order for evidence of another offense to be admissible to prove identity:

> "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] '*The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.*' [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at p. 403, italics added.)

Similarly, in *People v. Balcom* (1994) 7 Cal.4th 414, 425 (*Balcom*), the Supreme Court stated that evidence of other crimes is admissible to prove identity only where "[t]he highly unusual and distinctive nature of both the charged and uncharged offenses *virtually eliminates the possibility* that anyone other than the defendant committed the charged offense." (Italics added.) The Court of Appeal has noted that *Ewoldt* established "stringent 'identity' standards," for the admissibility of other crimes evidence. (*People v. Robinson* (1995) 31 Cal.App.4th 494, 503.)

The Supreme Court has also repeatedly cautioned that "evidence of uncharged misconduct "'is so prejudicial that its admission requires extremely careful analysis.'"'

(*People v. Lewis* (2001) 25 Cal.4th 610, 637, quoting *Ewoldt, supra,* 7 Cal.4th at p. 404; e.g., *People v. Medina* (1995) 11 Cal.4th 694, 748.) Further, since " 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value. If there is any doubt, the evidence should be excluded. [Citation.]" (*Thompson, supra,* 27 Cal.3d at p. 318, fn. omitted; see also *People v. Haston* (1968) 69 Cal.2d 233, 244 [other crimes evidence "should be received with 'extreme caution,' and if its connection with the crime charged is not clearly perceived, the doubt should be resolved in favor of the accused"].)

Even if a defendant's commission of other crimes is relevant for some purpose under Evidence Code section 1101, in order to be admissible, such evidence "'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

3. *The trial court abused its discretion in denying Soper's motion for severance*

Soper concedes that the statutory requirements for joinder were satisfied. Accordingly, we must consider whether the trial court erred in determining that Soper failed to make a clear showing of potential prejudice in joining the charges. We consider first whether evidence of each murder would have been cross-admissible in separate trials, so as to dispel any prejudice from the fact that the offenses were tried jointly. (*Bradford, supra*, 15 Cal.4th at pp. 1314-1315.)

a. *The evidence of the murders was not cross-admissible*

(i) *The evidence was not cross-admissible on the issue of the identity of the killer because the pattern and characteristics of the murders were not so unusual and distinctive as to be like a signature*

Although the People have offered a long list of purported similarities between the two murders in claiming that the evidence was cross-admissible on the issue of identity, many of the asserted similarities are generic, redundant, irrelevant, or simply not all that similar. With respect to generic similarities, we place in this category facts such as that both victims were "wearing at least one shirt, a jacket, pants, and socks," and that both victims were murdered at their campsites.

With respect to redundant facts, we agree with Soper that many of the purported similarities stem from the fact that both victims were homeless. Further, many of the claimed similarities were little more than rephrasing of the same basic fact. In this category we would place the following purported similarities offered by the People.

> "5. Both victims had 'established' campsites that were well known as their campsite[s] in the local transient community.
>
> "6. Although the campsites were well know to other transients, they were not known to the general population.
>
> "7. Neither campsite is a location frequented by the general public."

Similarly, the fact that each victim was lying on his back (No. 10), in his bed (No. 3), with legs partially covered (No. 12), and that no defensive wounds were present (No. 16), all stem from the fact that it appears that the victims were asleep at the time they were attacked. (See part III.A.1., *ante*.)

With respect to irrelevant facts, we note that many of the claimed similarities cannot be attributable to the perpetrator of the two crimes, and therefore cannot be deemed to be characteristics "so unusual and distinctive as to be like a signature." (*Ewoldt, supra*, 7 Cal.4th at p. 403.) For example, the fact that both murders occurred in campsites behind shopping centers in which there was a Sav-On drugstore, and that the campsites were well known in the local transient community, do not tend to suggest that the same person committed both murders. Similarly, Soper's post-arrest conduct is not a relevant similarity for purposes of determining the admissibility of the evidence to prove identity. Nor is the fact that any jury weighing the evidence in these two killings would have to be informed about terms unique to the transient lifestyle relevant to this determination.

With respect to asserted similarities that are not particularly similar, we note that different weapons were used (railroad tie vs. concrete block) and that the murder scenes were three miles apart. In addition, Olson was found with money on his person, while Rigby was found with no money on his person. Defense counsel stated in her declaration in support of Soper's motion to sever that Rigby was seen with "a wad of cash" at some time prior to the murder. Thus, there was arguably evidence of a robbery in the Rigby murder, but not in the Olson murder.

Stripped to the truly potentially relevant similarities between the two murders, we are left with the following: Both victims were homeless individuals who were killed by a single blow to the head while they were apparently sleeping. Further, Soper was acquainted with both victims and his fingerprints were found at both scenes. While we

acknowledge that the murders share these similarities, we cannot say that the similarities are so distinctive so as to "virtually eliminate[] the possibility" (*Balcom*, *supra*, 7 Cal.4th at p. 425), that a different person committed the two murders. Because the pattern and characteristics of the murders were not so unusual and distinctive so as to be like a signature (*Ewoldt, supra,* 7 Cal.4th at p. 403), we conclude that the trial court erred in determining that the evidence of the two murders was cross-admissible on the issue of the identity of the killer.

(ii) *The evidence of each murder was not cross-admissible to prove either intent or common plan because the minimal probative value of such evidence would be outweighed by the possibility of prejudice pursuant Evidence Code section 352*

The People argue that the evidence was admissible to prove intent and common plan, in addition to identity.

In *Ewoldt, supra*, 7 Cal.4th at page 406, the Supreme Court explained that evidence of the defendant's commission of one offense is not admissible to prove intent with respect to a second offense, where the admission of such evidence on this issue would be greatly outweighed by the possibility of prejudice:

> "[E]vidence of defendant's uncharged misconduct in the present case is inadmissible for the purpose of proving defendant's intent as to the charges of committing lewd acts. Evidence of intent is relevant to establish that, *assuming the defendant committed the alleged conduct*, he or she harbored the requisite intent. In testifying regarding the charges of lewd conduct, Jennifer stated that defendant repeatedly molested her, fondling her breasts and genitals and forcing her to touch his penis. If defendant engaged in this conduct, his intent in doing so could not reasonably be disputed. [Citations.] As to these charges, the prejudicial effect of admitting evidence of similar uncharged acts, therefore, would outweigh the probative value of such evidence *to prove intent*." (Italics added.)

This was not a case in which the identity of the perpetrator of the two murders could be assumed, and the issue for the jury was the nature of the perpetrator's intent in committing the murders. Rather, the only real issue at trial was the identity of the perpetrator or perpetrators. While the People argue that the evidence of the two murders was probative to establish that the killer had the intent to kill rather than some less culpable intent, it is clear that the probative value of the evidence for this purpose would be substantially outweighed by the danger that the jury would use the evidence for purposes of determining the identity of the killer. This would be an improper and therefore, unduly prejudicial, use of the evidence because the evidence was not properly admissible for purposes of proving identity. Further, as is discussed in part III.A.4., *post*, because the entire theory of the prosecution's case at trial was that the evidence was relevant to prove the killer's identity, the potential for prejudice in this case was overwhelming.

The People also argue that the evidence of other offenses was admissible to prove a common scheme or plan. The argument is also contrary to the holding in *Ewoldt*. In *Ewoldt,* the Supreme Court explained, "Evidence of a common design or plan . . . is *not* used to prove the defendant's intent or *identity* but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*Ewoldt, supra,* 7 Cal.4th at p. 394, italics added.) The *Ewoldt* court observed that the "distinction, between the use of evidence of uncharged acts to establish the existence of a common design or

plan as opposed to the use of such evidence to prove intent or identity, is subtle but significant." (*Id.* at p. 394, fn. 2.)

> "Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, the act is still undetermined . . . .' [Citation.] For example, in a prosecution for shoplifting *in which it was conceded or assumed that the defendant was present at the scene of the alleged theft,* evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that he or she took the merchandise in the manner alleged by the prosecution.
>
> "Evidence of *identity* is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator. For example, in a prosecution for shoplifting in which it was conceded or assumed that a theft was committed by an unidentified person, evidence that the defendant had committed uncharged acts of shoplifting in the same unusual and distinctive manner as the charged offense might be admitted to establish that the defendant was the perpetrator of the charged offense." (*Ewoldt, supra,* 7 Cal.4th at p. 394, fn. 2, second italics added.)

The *Ewoldt* court further clarified that evidence of common scheme or plan is generally inadmissible in cases that involve crimes such as robbery, where the primary issue is whether the defendant was present at a particular location:

> "[I]n most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime

> occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value." (*Ewoldt, supra,* 7 Cal.4th at p. 406.)

In this case, the primary issue was the identity of the killer. Admitting evidence of one murder in a trial of the other solely for the purpose of proving common design or plan would thus clearly constitute error under Evidence Code section 352.

b. *The benefits of joinder did not outweigh the possibility of prejudice*

Having concluded that the evidence of the murders was not cross-admissible, we must consider whether, notwithstanding this lack of cross-admissibility, the trial court properly denied Soper's motion to sever. (*Bradford, supra*, 15 Cal.4th at p. 1316 ["Cross-admissibility suffices to negate prejudice, but it is not essential for that purpose"].)

The California Supreme Court has instructed that where cross-admissibility of evidence pertaining to two crimes is *not* present, a court must determine "whether the benefits of joinder were sufficiently substantial to outweigh the possible 'spill-over' effect of the 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses." (*People v. Bean* (1988) 46 Cal.3d 919, 938.) In making such a determination, a court must also consider other possible sources of prejudice stemming from joinder, including the inflammatory nature of any of the charges, the possibility that the jury would improperly aggregate the evidence, and the possibility that joinder of the charges would turn the matter into a capital case. (*Bradford, supra*, 15 Cal.4th at p. 1316.)

In this case, the benefits of joinder were minimal. While there was some overlap with respect to foundational evidence relevant to the experts' opinions, there was almost no overlap with respect to the percipient witnesses in the two murders.

On the other hand, as noted above, refusal to sever may constitute an abuse of discretion where a "weak" case is joined with either a "strong" case or with another "weak" case, so that the spillover effect of aggregate evidence on the charges might alter the outcome on one or more of the charges. (*Bradford, supra*, 15 Cal.4th at pp. 1315-1316.) In this case, there was little admissible evidence tending to demonstrate that Soper committed the Olson killing. Aside from the testimony of John Rogers, whose credibility could reasonably have been questioned given his status as a suspect in the murder, the only inculpatory evidence mentioned by the prosecutor in his statement of facts in briefing on the motion to sever was that Soper's fingerprints were found on a jar of peanuts in Olson's camp and Soper denied ever having gone to the camp. Clearly, without the inadmissible evidence pertaining to the Rigby killing, the Olson murder was a "weak" case. Thus, the possibility of improper spillover of the impact from the evidence of the Rigby murder was great.

In addition, the possibility that the jury would consider the inadmissible evidence as to one murder when considering evidence as to the other murder was increased even further since this was the very purpose for which the evidence was offered. Given that evidence of the commission of the Rigby murder was the most important evidence the People had to prove the Olson murder, it was virtually a certainty that the jury would improperly aggregate the evidence of the two crimes. Accordingly, we conclude that

whatever minimal benefits there were to joining the two charges were clearly outweighed by the possibility that undue prejudice would follow from joinder of these two murder charges.[3]

4. *The error in denying the motion to sever requires reversal as to both murder counts*

A trial court's error in denying a motion to sever is reviewed under the standard adopted in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) to determine whether the error requires reversal. (*People v. Pinholster* (1992) 1 Cal.4th 865, 932 ["It is not reasonably probable that a result more favorable to defendant would have been reached if the . . . robbery had been severed"].) Reasonably probable in this context "does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, citing *Watson, supra,* 46 Cal.2d at p. 837.)

The starting point in determining whether the trial court's error in joining the two murders requires reversal is the Supreme Court's repeated admonition that the admission of other crime evidence carries with it the possibility of serious prejudice. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 637.) The possibility of undue prejudice in this case was heightened because the erroneously admitted evidence as to each charge was that of another murder that shared certain characteristics.

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[3] The People's sole argument on appeal with regard to severance is that the evidence was cross-admissible.

As Soper states in his brief, the leitmotif of the People's theory at trial was that whoever committed one of the murders must have committed the other as well. A number of witnesses testified regarding the purported distinctive similarities of the two murders. For example, the People presented the results of two studies of homicides in Carlsbad and Oceanside that were conducted for the stated purpose of determining the uniqueness of the characteristics of the murders charged in this case. Similarly, the prosecution's crime scene reconstruction expert testified that in his opinion, the crime scenes were quite distinctive and similar to one another. The medical examiner testified that she was "struck by the similarities" between the two crime scenes. She further testified that she told Carlsbad police at the scene of the Olson murder that there was a "very similar case in Oceanside. . . ." An investigating police officer also testified as to the purported distinctive similarities of the two crimes.[4]

The prosecutor devoted a large portion of his closing argument to this theme. For example, the prosecutor stated:

> "We're talking about two crimes that are very similar. We're talking about two murders that were so similar they were done by the same person, and that person is James Soper."

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[4] In light of the trial court's ruling as to the cross-admissibility of the evidence of the two murders, the trial court did not instruct the jury to view the evidence of each crime as it pertained to the other for a limited purpose.

The prosecutor repeatedly stressed the alleged distinctive similarities of the two murders throughout his closing argument.[5]

The evidence of Soper's guilt with respect to either murder was not overwhelming. The evidence of Soper's guilt with respect to the Olson killing, apart from the improperly admitted identity evidence, was based largely on the testimony of Rogers.[6] Rogers's credibility was very much in doubt for a number of reasons, including that he himself was a suspect in the Olson murder since a knife that belonged to him was found at the murder scene.

While there was a considerable amount of evidence of Soper's guilt as to the Rigby murder, it was not overwhelming. For example, DNA from neither Soper nor Rigby was found in a blood spot on the railroad tie that was used in the Rigby murder, suggesting that a third party might have killed Rigby. Considering the extremely high potential for prejudice stemming from the improper joinder of the two charges balanced against the evidence of Soper's guilt, we conclude that there is a reasonable probability that a result more favorable to Soper would have been reached with respect to both counts if the cases

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5 By noting that the prosecutor relied heavily on the similarities of the two offenses in proving Soper's guilt, we do not mean to suggest that the prosecutor's reliance was improper. The prosecutor received a favorable, albeit erroneous, ruling from the trial court and was entitled to pursue his theory of the case at trial.

6 While Soper's fingerprint was found on a jar of peanuts at the Olson murder scene, this fact is far from conclusive in establishing Soper's culpability in the Olson murder.

had not been improperly joined for trial.[7] Accordingly, we conclude that the judgment must be reversed as to both counts.[8]

B. *The trial court did not err in failing to instruct the jury regarding involuntary manslaughter*

Soper claims the trial court erred in failing to instruct the jury regarding involuntary manslaughter, based on Soper's voluntary intoxication. Soper argues that because there was substantial evidence that he was voluntarily intoxicated at the time of the offenses, the court was required to instruct the jury that "when a defendant, as a result of voluntary intoxication, kills another human being without premeditation and deliberation and/or without an intent to kill (i.e. without express malice), the resultant crime is involuntary manslaughter." We conclude that the failure to instruct the jury as to involuntary manslaughter was not error since there is no substantial evidence that Soper was intoxicated at the time of the offenses.

1. *Factual and procedural history*

During the trial, the prosecutor filed a brief regarding jury instructions in which he argued that that there was insufficient evidence of Soper's intoxication at the time of the

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7 The People do not attempt to argue that any error in denying the motion to sever was harmless.

8 In light of our conclusion, we need not consider Soper's argument that, assuming the trial court properly denied his motion to sever, an examination of the evidence introduced at trial indicates that his due process rights were violated by the joinder. (See *People v. Grant* (2003) 113 Cal.App.4th 579, 587 ["Where . . . the trial court's ruling on a motion to sever is correct at the time it was made, we must nevertheless reverse the judgment if the "'defendant shows that joinder actually resulted in 'gross unfairness' amounting to a denial of due process." [Citation.]' [Citation]"].)

killings to warrant an instruction as to voluntary intoxication. The prosecutor also argued that there was no basis for the court to give an instruction on involuntary manslaughter based on voluntary intoxication. The prosecutor argued, however, that the involuntary manslaughter instruction "would be relevant if the defense requested instruction on voluntary intoxication is granted."

During the jury instruction conference, the trial court asked defense counsel whether she was requesting that the court give an instruction regarding involuntary manslaughter. Defense counsel responded: "I am not requesting that, but I am requesting voluntary intoxication, therefore it sort of dovetails towards each other." In response, the prosecutor reiterated his argument that there was insufficient evidence of intoxication. The court said it would return to the issue at a later time.

Later, during the same conference, the court stated that defense counsel had requested that the court instruct the jury pursuant to CALJIC Nos. 4.21.1 and 4.22, regarding voluntary intoxication and its relationship to the formation of the specific intent required to be found guilty of the charged offenses. The court indicated that it would probably give the instruction, reasoning:

> "The important thing in this case is that I think there is substantial evidence. By that, I mean, evidence worthy of consideration by the jury. Whether its believed or not is something else, which would indicate Mr. Soper is an alcoholic. From that I think one can infer that alcoholics are just drunk most of the time. The fact they drink early in the morning is to top their alcohol level up, and then they go again. There's substantial evidence to believe if Mr. Soper committed these killings, that he had some alcohol in his system. It was of some substantial nature. I don't think, however, there's sufficient evidence to show that Mr. Soper was unconscious . . . .

> But clearly, there's evidence that the jury might consider if he had so much to drink he could not form premeditation and deliberation."

The prosecutor objected, claiming there was no evidence regarding how intoxicated Soper may have been at the time of the killings.

After further discussion of the issue at a conference the next day, the trial court stated that it would instruct the jury pursuant to CALJIC Nos. 4.21.1 and 4.22, over the prosecutor's objection.

The trial court instructed the jury pursuant to CALJIC No. 4.21.1 and CALJIC No. 4.22. CALJIC No. 4.21.1 instructs the jury that it "should consider the defendant's voluntary intoxication in deciding whether the defendant possessed the required specific intent or mental state at the time of the commission of the alleged crime." CALJIC No. 4.22 defines voluntary intoxication.

2. *Governing law*

In *People v. Roldan* (2005) 35 Cal.4th 646, 715 (*Roldan*), the Supreme Court outlined the responsibilities a trial court has to instruct a jury on the law relevant to a criminal case:

> "'[T]he trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case.' [Citation.] In addition, 'a defendant has a right to an instruction that pinpoints the theory of the defense [citations]; however, a trial judge must only give those instructions which are supported by substantial evidence. [Citations.] Further, a trial judge has the authority to refuse requested instructions on a defense theory for which there is no supporting evidence.' [Citation.] 'A party is not entitled to an instruction on a theory for which there is no supporting evidence.' [Citation.]"

The *Roldan* court also outlined the law governing jury instructions pertaining to voluntary intoxication:

> "'Evidence of voluntary intoxication, formerly admissible on the issue of diminished capacity [citation], now is 'admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.' [Citations.] Accordingly, a defendant is entitled to an instruction on voluntary intoxication 'only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.'" [Citations.]" (*Roldan, supra*, 35 Cal.4th at p. 715.)

Courts in several cases have discussed the degree of evidence of intoxication that is necessary to support an instruction regarding such intoxication. For example, in *Roldan*, 35 Cal.4th at page 716, the court held that the following did not constitute substantial evidence of intoxication to warrant an instruction on voluntary intoxication:

> "Defendant relies on the testimony of Jude Barrios, but her testimony fails to provide substantial evidence of intoxication. For example, she testified that Sergio Ayala was intoxicated at the time of the crime and that, due to his heavy drinking, he felt sick after fleeing the scene of the robbery. That information does not establish that defendant also was drinking. Defendant attempts to link Ayala's drinking with himself, noting that Barrios testified defendant told her 'they' had been drinking (meaning he, Ayala, and Zorns) in order to build up their courage before committing the robbery. However, she also testified: 'I don't know if that meant everybody, but he said they had been drinking.' She later clarified her testimony, saying defendant never told her he personally had been drinking. 'He said he felt a little woozy, but that was the extent of it. He didn't say he was drinking or anything.' This evidence is inadequate to support an intoxication instruction. Nor does evidence that defendant was an habitual user of marijuana constitute substantial evidence he was intoxicated or under the influence *at the time* of the crime. Further, testimony that a few hours *after* the crime defendant was 'ecstatic' and on 'cloud nine' does not establish he was intoxicated at the time of the crime."

In *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180 -1181 (*Ramirez*), overruled on another ground by *People v. Saille* (1991) 54 Cal.3d 1103, 1118-1120, the Supreme Court held that the trial court did not err in failing to instruct the jury regarding voluntary intoxication in relation to a first degree murder charge, under the following circumstances:

> "In the present case, defendant testified that he had about four or five beers at the first bar he visited on the night of the offense, and about four or five additional beers during the two and one-half to three hours that he was in Mr. Barry's, and also testified on cross-examination that he 'was higher' on the night of the killing than he was when he was arrested a few days later with a blood-alcohol level measuring .14 percent. [Fn. omitted.] Neither defendant nor any of the other guilt phase witnesses who were at Mr. Barry's on the night in question, however, testified that defendant's beer drinking had had any noticeable effect on his mental state or actions. [Fn. omitted.] Defendant purported to give a detailed account of all of the events of the night in question, and did not suggest that his drinking had affected his memory or conduct. Instead, his defense was simply that he had not sexually assaulted or stabbed Kim at all and that the offenses must have been committed by another individual.

The *Ramirez* court concluded,

> "Given this state of the evidence, the governing authorities support the Attorney General's contention that the trial court had no duty to instruct on intoxication. In *People v. Bandhauer* (1967) 66 Cal.2d 524 [58 Cal.Rptr. 332, 426 P.2d 900], for example, the court concluded that although the evidence demonstrated that the defendant had had six or seven beers in several bars in the hours immediately preceding the crime, because there was 'no evidence that his drinking had any substantial effect on him, or that he was so intoxicated that he did not or could not harbor malice' (*id.* at p. 528), the trial court had not erred in refusing to give an intoxication instruction. Similarly, in *People v. Flannel, supra*, 25 Cal.3d 668, 685-686, the court held that while there was evidence that the defendant had consumed at least six cans of beer and several shots of whiskey on the day of the crime and the defendant had testified

> somewhat equivocally as to his own intoxication, because all of the eyewitnesses had testified that the defendant was 'acting normal' and that the alcohol had 'no effect' on his behavior the trial court did not err in declining to give an intoxication instruction." (*Ramirez, supra*, 50 Cal.3d at p. 1181.)

(See also *People v. Horton* (1995) 11 Cal.4th 1068, 1119 [concluding evidence that the defendant freebased cocaine on the day prior to the crime did not constitute sufficient evidence of voluntary intoxication].)

The Supreme Court has stated that an "intoxication instruction [is] not required 'unless the evidence *also* shows [the defendant] became intoxicated to the point he failed to form the requisite intent.'" (*Roldan, supra*, 35 Cal.4th at pp. 715-716; see *id*. at p. 716 [noting there was "no evidence of the effect, if any, such alleged intoxication had on defendant"]; *Ramirez*, *supra*, 50 Cal.3d at p. 1181 ["Because in this case there was no evidence presented at the guilt phase suggesting that defendant's drinking had affected his mental state in a manner that might negate the specific intent or mental state required for first degree murder, the trial court did not err in failing to instruct the jury pursuant to CALJIC No. 4.21 with regard to the first degree murder charge"].)

3. *There was no substantial evidence that Soper was intoxicated at the time of either killing*

Soper does not identify any evidence that he was intoxicated on the days of the killings, nor does he point to any evidence as to the effect any such intoxication had on his mental state. Our own review of the record reveals that several individuals testified at Soper's trial that they saw Soper drinking unspecified amounts of alcohol the day before Rigby's body was discovered. In addition, Doris Daniel testified that she saw Soper

"drinking a beer" at approximately midnight on the night of the Rigby murder. There is also evidence that Soper had been drinking on September 19, 2004, three days *after* Olson's body was discovered. The record contains evidence that Soper was an alcoholic and that he received treatment for the symptoms of alcohol withdrawal after he was incarcerated on September 19.

However, there was no substantial evidence that Soper was intoxicated "*at the time* of the crime[s]." (*Roldan, supra*, 35 Cal.4th at p. 716, italics added.) Nor is there any evidence as to the effect any such intoxication might have had on Soper's mental state at the time of the killings. (*Ibid.*) We reject Soper's argument that voluntary intoxication instructions were warranted in this case because "the evidence was compelling that appellant was an alcoholic who was intoxicated virtually every day." (See *id*. at p. 716 [stating that evidence that defendant was a "habitual user of marijuana" did not constitute substantial evidence that he was intoxicated at the time of the crime].)

4. *The trial court's error in instructing the jury regarding voluntary intoxication did not prejudice Soper and did not require that the court instruct the jury regarding involuntary manslaughter*

Soper notes that the trial court instructed the jury pursuant to CALJIC Nos. 4.21.1 and 4.22 concerning voluntary intoxication. He claims that because the trial court instructed the jury regarding voluntary intoxication, the court was also required to instruct the jury regarding involuntary manslaughter. Specifically, Soper argues that the trial court should have instructed the jury that if it found that Soper's voluntary intoxication negated his specific intent to commit murder, he should be found guilty of involuntary manslaughter.

Since there was no substantial evidence of Soper's intoxication that would warrant voluntary intoxication instructions, the trial court erred in giving these instructions. However, the trial court's giving of such instructions clearly did not prejudice Soper. Rather, the instructions created the possibility that the jury would find him not guilty of the murders on the ground that he lacked the specific intent to commit the offenses due to voluntary intoxication. We are aware of no authority holding that the trial court was required to compound its error by instructing the jury on involuntary manslaughter based on a theory that was not supported by substantial evidence.

We conclude that the trial court did not err by failing to instruct the jury on involuntary manslaughter.

C. *The trial court did not err in admitting evidence of Soper's assault on a witness and in instructing the jury pursuant to CALJIC No. 2.06*

Soper claims the trial court erred in admitting evidence that prior to trial, Soper assaulted a witness in this case. The court admitted this evidence for the purpose of proving Soper's consciousness of guilt. We review the trial court's decision to admit the uncharged offense evidence of the assault on a witness, an uncharged offense, under the abuse of discretion standard of review. (*Lenart*, *supra*, 32 Cal.4th at p. 1123.)

Soper further claims that the trial court erred in instructing the jury pursuant CALJIC No. 2.06 regarding its consideration of this evidence. In reviewing this claim, we must determine whether there is substantial evidence in the record to support the trial court's giving of the instruction. (*People v. Crandell* (1988) 46 Cal.3d 833, 869

(*Crandell*), overruled on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

1. *Factual and procedural background*

a. *The trial court's ruling regarding admissibility of the evidence of the assault on the witness*

During a conference prior to the evidentiary portion of the trial, the prosecutor informed the trial court that the People intended to offer evidence that Soper had assaulted Kenneth Whitaker, a homeless person who police detectives had interviewed after Rigby's murder. Whitaker told police that he knew Rigby, and that he had had a drink with a man named "Jay" (Soper) on a few occasions. Whitaker was able to pick Jay out of a photo lineup. Whitaker also told police that he had a drink with Rigby and Jay within 24 hours of Rigby's murder. The prosecutor stated that this information had been included in the "original discovery,"[9] that was provided to the defense.

The prosecutor stated that Whitaker later told police that he was in jail on March 1, 2005 for public intoxication. Soper was in the same jail at the time. The two men were placed in the same elevator with several other inmates, without law enforcement supervision. While in the same elevator, Whitaker heard someone say, "You're Kenny Whitaker?" Whitaker responded affirmatively. Soper then began hitting and kicking Whitaker. When the elevator arrived at the next floor, jail personnel saw blood on Whitaker and on his clothing. Jail personnel interviewed everyone who had been in the

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9 The prosecutor did not provide a date on which this discovery was sent.

elevator at the time of the assault. The inmates stated either that they had not seen anything, or that they were unwilling to cooperate.

Defense counsel argued that the attack was not relevant. The trial court inquired of the prosecutor whether the attack was relevant to prove that Soper was attempting to dissuade a witness, and the prosecutor responded that it was. The trial court commented that the evidence was relevant. Defense counsel objected on the ground that the evidence was highly prejudicial and not probative, arguing that it was unlikely that Soper would have attempted to harm Whitaker because Whitaker's potential testimony did not warrant such an attack. The trial court overruled the objection.

b. *The attack*

During Soper's trial, Whitaker testified that he recalled being attacked in a jail elevator on March 1. Whitaker testified that the assault occurred in the following manner: "Somebody asked me if I was Whitaker, and then I said yes. They threw me to the ground and kicked ─ started kicking me in the head and neck." Whitaker said the attacker kicked him about a dozen times. With regard to the identity of his assailant, Whitaker testified, "I think it was Jay, you know. I didn't know him that well, you know." Whitaker testified that he was afraid of Jay.

San Diego County Sheriff's Deputy Jose Estrada, testified that on March 1, 2005 he was working as a corrections deputy at the Vista Detention Facility. Estrada assisted in transporting inmates between court and their housing units. Deputy Estrada explained that it was his customary procedure to place inmates in an elevator and allow them to travel unsupervised to the next floor. This usually took approximately 25 seconds. On

the day in question, Deputy Estrada placed Whitaker and Soper, along with four other inmates, in a jail elevator for the purpose of moving them between floors. Shortly after he placed the inmates in the elevator, Estrada heard a buzzer and noticed that the elevator had stopped. Deputy Estrada explained that it was possible for a passenger to stop the elevator by pressing the emergency stop button. Deputy Estrada yelled down into the elevator shaft, telling the inmates to press the emergency button so that the elevator would continue. When the elevator arrived at the next floor, approximately one minute after it had begun its descent, Whitaker had blood on his nose and shirt, and abrasions on his face. Neither Whitaker nor any of the other inmates would reveal who had inflicted Whitaker's injuries. Whitaker was given an icepack and Motrin for his injuries.

c. *Whitaker's trial testimony regarding the Rigby murder*

Whitaker testified that he had been with Rigby and "Jay" the morning before Rigby was murdered. Whitaker said that he shared some alcohol with Jay and Rigby at approximately 6:00 or 7:00 that morning. Whitaker testified that he had identified Jay in a photographic lineup for police. Whitaker also identified Soper at trial as the man he knew as Jay.

d. *Soper's September 24, 2004 police interview*

During Soper's trial, Oceanside Police Detective Nathanael Brazelton testified that he and Oceanside Police Lieutenant Shawn Murray conducted an audiotaped interview of Soper on September 24, 2004. During the interview, Detective Brazelton showed Soper a photograph of Kenneth Whitaker and asked Soper whether he knew him. Soper responded, "I see this dude all over Oceanside." Detective Brazelton testified that Soper

described Whitaker as "pretty cool" and did not indicate any dislike for Whitaker. However, Soper told Detective Brazelton that "you can't even hold a conversation with [Whitaker]."

Detective Brazelton testified that later in the September 24 interview, Soper referred to various people whose photographs the police had showed him, including Whitaker. Soper stated, "You already showed me that stack of fucking pictures, and I don't know none of these people." Soper then asserted that the individuals depicted in the photographs would be effectively cross-examined:

> "But I know one thing. I know one thing. When these people ─ I'm going to make sure, I'm going to make sure that, you know, I don't have no money and shit these days. I used to but not anymore. I'm going to make sure. I'm going to make sure that I got a fucking good defense attorney, and all the mother-fuckers who are saying this shit, they're going to get fucking crossed up."

e. *Jury instructions and closing argument pertaining to the evidence*

During a jury instruction conference, defense counsel objected to the trial court instructing the jury pursuant to a modified version of CALJIC No. 2.06, on the ground that there was no evidence that Soper had intimidated a witness. The trial court overruled the objection.

The trial court instructed the jury pursuant to a modified version of CALJIC No. 2.06 as follows:

> "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness, or by [the] refusal to obey a lawful court order, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by

> itself to prove guilt, and its weight and significance, if any, are for you to decide."

During closing argument, the prosecutor argued that Soper's attack on Whitaker demonstrated his consciousness of guilt.

2. *Governing law*

a. *Uncharged offense evidence*

As noted in our discussion of the cross admissibility of evidence pertaining to the two murders, Evidence Code section 1101, subdivision (a), generally prohibits the admission of evidence of a person's character or a trait of his or her character when offered to prove his or her conduct on a specified occasion. However, Evidence Code section 1101, subdivision (b) provides that evidence of a person's prior criminal act is admissible when relevant to prove some other relevant fact, other than disposition to commit the charged offense.

b. *A trial court may instruct the jury regarding a defendant's suppression of evidence where there is sufficient evidence to establish by a preponderance that the defendant suppressed evidence*

In *People v. Hart* (1999) 20 Cal.4th 546, 620, the California Supreme Court outlined the quantum of proof that the prosecution must present before a trial court may instruct regarding evidence of a defendant's alleged suppression of evidence:

> "'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. [Citation.] Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. Thus in order for a jury to be instructed that it can infer a consciousness of guilt from

> suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference.' [Citation.]"

In *People v. Carpenter* (1997) 15 Cal.4th 312, 380-383 (*Carpenter*), the Supreme Court considered the standard of proof by which the People must establish a defendant's commission of uncharged crimes. After acknowledging that "[its] pronouncements on the question have not been entirely consistent" (*id*. at p. 381), the Supreme Court held that uncharged offenses must be proved by a preponderance of the evidence:

> "[W]e adhere to the preponderance standard and disapprove any language suggesting the clear and convincing evidence standard. The preponderance of the evidence standard adequately protects defendants. Once the other crimes evidence is admitted, whatever improper prejudicial effect there may be is realized whatever standard is adopted. If the jury finds by a preponderance of the evidence that defendant committed the other crimes, the evidence is clearly relevant and may therefore be considered. [Citations.] The preponderance standard is also consistent with the rule stated in Evidence Code section 115 that 'Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.'" (*Id*. at p. 382.)

c. *Attempts to intimidate a witness as evincing a consciousness of guilt*

Uncharged offense evidence may be introduced to demonstrate that a defendant evinced a consciousness of guilt by intimidating a witness. (*People v. Wilson* (1992) 3 Cal.4th 926, 940 ["Defendant's act of soliciting the murder of a critical prosecution witness was highly probative of defendant's consciousness of guilt, which in turn was probative of his identity as the perpetrator of the charged offenses"].) "A defendant's willful suppression of evidence, or willful attempt to suppress evidence, is admissible to prove consciousness of guilt." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007, citing

Evid. Code, § 413 ["In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case"].)

In evaluating the probative value of evidence of a defendant's consciousness of guilt, one must keep in mind that, "The intent with which a person acts is rarely susceptible of direct proof and usually must be inferred from facts and circumstances surrounding the offense." (*People v. Massie* (2006) 142 Cal.App.4th 365, 371; see also § 21, subd. (a) ["The intent or intention is manifested by the circumstances connected with the offense"].) For example, with respect to witness intimidation, "There is . . . no talismanic requirement that a defendant must say 'Don't testify' or words tantamount thereto, in order to commit the charged offenses." (*People v. Thomas* (1978) 83 Cal.App.3d 511, 514; cf. *People v. Echevarria* (1992) 11 Cal.App.4th 444, 451 [trial court properly instructed the jury regarding defendant's attempt to suppress evidence where defendant shaved his beard and moustache and cut his hair in an apparent attempt to change his appearance to prevent a witness from identifying him].)

3. *The trial court did not abuse its discretion in admitting evidence that Soper assaulted Whitaker*

Soper claims that the People failed to present evidence that he committed the jailhouse assault on Whitaker with the intent to intimidate Whitaker.[10]

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10 Soper also appears to dispute whether he in fact attacked Whitaker. Whitaker testified that he believed it was Soper who had attacked him. Further, Estrada's

At the time of Soper's March 1, 2005 assault on Whitaker, Soper knew that Whitaker could testify that Soper, Whitaker, and Rigby were together on the morning before Rigby's murder. Further, Soper's September 24, 2004 police interview demonstrates that Soper knew that Whitaker was a potential witness against him in the Rigby murder, before the March assault. Both facts support the trial court's conclusion that the jury could have found that Soper attacked Whitaker with the intent to intimidate him from testifying at trial. (See *People v. Young* (2005) 34 Cal.4th 1149, 1211 [stating fact that defendant knew witness could "implicate him in the . . . murder and "was cooperating with the police" supported jury's finding that defendant intimidated a witness].)

Soper stated during the September 24, 2004 interview that Whitaker was "pretty cool." In addition, just prior to committing the March 1 assault, Soper asked the victim whether he was in fact Whitaker. The fact that Soper stated that he harbored no personal animosity toward Whitaker and the fact that he was not certain of Whitaker's identity at the time of the assault, support the inference that Soper did not attack Whitaker out of personal animus based on something other than Whitaker's status as a potential witness against Soper.

While the evidence of Soper's intent in assaulting Whitaker was not overwhelming, given the totality of the circumstances of the assault, a reasonable jury

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testimony constituted strong circumstantial evidence corroborating Whitaker's testimony as to the circumstances of the attack. Thus, the People presented evidence from which the jury reasonably could have found that Soper assaulted Whitaker.

could have inferred that Soper assaulted Whitaker with the intent to intimidate him from testifying against Soper. We conclude that the trial court did not abuse its discretion in admitting the evidence of Soper's assault on Whitaker.

4. *The trial court did not err in instructing the jury pursuant to CALJIC No. 2.06*

Soper claims the trial court erred in instructing the jury pursuant to CALJIC No. 2.06. We conclude, for the reasons stated above, that the People presented evidence which, if believed by the jury, sufficiently supports the inference that Soper intended to intimidate Whitaker from testifying as a witness in this case. (*People v. Hart*, *supra*, 20 Cal.4th at p. 620.)

We reject Soper's argument that the People were required to establish the inference beyond a reasonable doubt. In support of this argument, Soper cites CALJIC No. 2.01 and *People v. Pensinger* (1991) 52 Cal.3d 1210, 1246 (*Pensinger*). CALJIC No. 2.01 provides in relevant part:

> "[E]ach fact which is *essential* to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference *essential* to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt." (Italics added.)

A defendant's consciousness of guilt is not ordinarily *essential* to a finding of guilt beyond a reasonable doubt, and was not essential to a finding of guilt in this case. The jury could have rejected the People's evidence of consciousness of guilt, and still found Soper guilty of the two murders. CALJIC No. 2.01 does not require that *all* inferences on

which a jury may rely in finding a defendant guilty of the charged offense be proven beyond a reasonable doubt. Only those inferences that are *essential* to a finding of guilt, must be established under the reasonable doubt standard.

In *Pensinger*, the California Supreme Court suggested, but did not hold, that a jury may draw an inference of consciousness of guilt only if every fact necessary to support the inference has been proven beyond a reasonable doubt:

> "Defendant also argues that the instruction was defective because it failed to tell the jury that it may only draw an inference of consciousness of guilt if every fact necessary to support the inference has been proven beyond a reasonable doubt. However, if we look at the instructions as a whole, the jury was instructed as defendant desires. The court instructed the jury pursuant to CALJIC No. 2.01 on the use of circumstantial evidence, and this instruction states in pertinent part: ' . . . before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.' Thus the jury was told that before they could use an inference of consciousness of guilt as circumstantial evidence of guilt, they must find any fact upon which the inference rested proved beyond a reasonable doubt." (*Pensinger*, *supra*, 52 Cal.3d at pp. 1246-1247.)

The suggestion in *Pensinger* that *all* inferences of consciousness of guilt must be based only on facts that are established beyond a reasonable doubt, appears to be inconsistent with the *Carpenter* court's subsequent clarification that an uncharged offense need be established by only a preponderance of the evidence. (See *Carpenter, supra*, 15 Cal.4th at p. 382; cf. *People v. Wilson* (2005) 36 Cal.4th 309, 329 [rejecting defendant's argument that there was insufficient evidence that he had solicited the murder of a witness because "the offense of solicitation was not charged, and evidence of such would

have gone solely to prove identity of the perpetrator," citing Evid. Code, § 1101].) In any event, even assuming this suggestion in *Pensinger* were binding precedent, the *Pensinger* court clearly stated that any prejudicial error in this regard is obviated when a trial court instructs a jury pursuant to CALJIC No. 2.01. In this case, as in *Pensinger*, the trial court instructed the jury pursuant to CALJIC No. 2.01.

Accordingly, we conclude that the trial court did not err in instructing the jury pursuant to CALJIC No. 2.06.

D. *There was substantial evidence of Soper's flight, with respect to the Rigby murder only*

Soper claims the trial court erred in instructing the jury pursuant to CALJIC No. 2.52 regarding flight from the scene of a crime because there was no evidence that he fled from the scenes of either of the two murders. We must determine whether there is substantial evidence in the record to support the instruction. (*Crandell*, *supra*, 46 Cal.3d at p. 869.)

1. *Factual and procedural background*

At trial, Detective Brazelton testified that during an audiotaped September 19, 2004, police interview, Soper stated the following:

> "All I know is ─ all I know is one morning I woke up, and a friend of mine, unintelligible, he told me, he goes, 'The fucking cops are looking for you hard-core. You know what I mean?' And I go, 'Okay. Cool. I got a parole violation. I bounced.[11] I bounced parole.'"

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11 Detective Brazelton testified that the word "bounced" is "a street term for 'leave.'"

Detective Brazelton testified that Soper's comment was not prompted by any pending question, and that he had not asked Soper about whether Soper had left the Oceanside area after the Rigby murder, prior to Soper making this statement. Detective Brazelton also stated that during the interview, Soper said that his friend had told him that the police were looking for him:

> "And I go, 'For what?' And he goes, 'I don't know, but they're all over the place. You know what I mean? And they're looking for you.' I am like, 'So what?' So I bounce, and that's . . . and that's it."

Detective Brazelton also testified that when Soper was asked during the September 24, 2004 interview what he had been doing during the period after he learned that the police were looking for him, Soper initially stated that he had been doing "construction" and that he had gone "fucking everywhere man." Despite being asked repeatedly about his whereabouts during this period, Soper never mentioned having been in Chula Vista at a Chula Vista shelter called Building a Solid Foundation.[12] When Detective Brazelton asked Soper whether he had ever worked for Building a Solid Foundation, Soper seemed surprised and responded, "Why? Who told you about that?" Soper repeatedly asked the police how they had learned about his involvement with Building a Solid Foundation. At one point Soper stated: "I wasn't even on an intake, so

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12 Glen Davis, a founder of the Building a Solid Foundation organization, testified that Soper began to reside in the Foundation's shelter in Chula Vista on a Saturday in late May 2004. The organization is occasionally referred to in the record as Building Solid Foundations. For purposes of clarity in this opinion, we use the organization's proper name, Building a Solid Foundation.

how the fuck did you find out? They didn't have my social security number. They didn't have my real name."

Richard Wagner testified that a man named "Jay" had told him approximately three or four months after the Rigby murder that he was "on the run" from authorities because they were looking for him in connection with the Rigby murder. Wagner identified a picture of Soper in a photographic lineup as the man he knew as "Jay."

Carlsbad Police Officer Paul Reyes testified that on September 19, 2004, three days after Olson's body was discovered, Reyes was driving his marked police SUV when he saw Soper standing on an off-ramp to Highway 78 holding a sign, which Reyes testified is illegal. Officer Reyes stated that Soper looked in Reyes direction and then "darted across the freeway." Soper continued "jogging in a northern direction across the lanes of traffic." Officer Reyes continued, "He began to run in a westbound direction away from me." Officer Reyes activated his vehicle's overhead patrol lights, but Soper continued walking. Shortly thereafter, Reyes contacted Soper and issued him a citation.

On cross-examination, defense counsel asked Officer Reyes whether Soper had been "running away from [him]?" Officer Reyes responded, "I never said he was jogging ─ or running away from me or trying to evade me at all."

During a jury instruction conference, the trial court indicated that it intended to instruct the jury pursuant CALJIC No. 2.52, Flight After Crime. Defense counsel objected, claiming that there was no substantial evidence of flight. The trial court referred to a case, *People v. Mason* (1991) 52 Cal.3d 909 (*Mason*), and noted that the

court may give a flight instruction even where there is a time delay between the crime and flight. The trial court overruled the objection.

The trial court instructed the jury pursuant to CALJIC No. 2.52 as follows:

> "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

During closing argument, the prosecutor argued that Soper had admitted to police that he left the Oceanside area shortly after the Rigby murder, upon learning that the police were looking for him. The prosecutor further argued that Soper's claim that he left the area because he believed police were looking for him in connection with a parole violation was not credible. The prosecutor noted that Soper was upset that police had discovered that he had been living in the Building a Solid Foundation shelter in Chula Vista.

2. *Governing law*

Section 1127c provides:

> "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:
>
> "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.
>
> "No further instruction on the subject of flight need be given."

"An instruction on flight is properly given if the jury could reasonably infer that the defendant's flight reflected consciousness of guilt, and flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." (*Crandell, supra,* 46 Cal.3d at p. 869.)

Notwithstanding the use of the word "immediately" in CALJIC No. 2.52., it is well established that there is no strict temporal limit within which flight must commence after a crime is committed, or within which a defendant is accused of committing a crime, before the court may give this instruction. For example, in *Mason*, *supra*, 52 Cal.3d at pages 941–942, the Supreme Court rejected a defendant's claim that the trial court erred in instructing the jury regarding flight when the alleged flight occurred four weeks after a murder:

> "Defendant's flight took place on January 6, 1981, only four weeks after, and in the same jurisdiction as, the murder of Dorothy Lang. Defendant argues that his flight was so remote from the charged offenses that it 'was of marginal probative value, if any.' Common sense, however, suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murders after only a few weeks. Nor do our decisions create inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt. In *People v. Santo* (1954) 43 Cal.2d 319 [273 P.2d 249], for example, we held that the trial court properly admitted evidence of flight occurring more than a month after the charged murder because the facts fairly supported that inference. [Fn. omitted.] (43 Cal.2d at pp. 327-330.)"

(Accord *People v. Carter* (2005) 36 Cal.4th 1114, 1182 ["the instruction [CALJIC No. 2.52] neither requires knowledge on a defendant's part that criminal charges have been

filed, nor a defined temporal period within which the flight must be commenced, nor resistance upon arrest"].)

It is also well established that a "trial court has no sua sponte duty to modify CALJIC No. 2.52." (*People v. Henderson* (2003) 110 Cal.App.4th 737, 742.)

3. *There is substantial evidence of Soper's flight with respect to the Rigby murder*

There is substantial evidence that Soper left the area of the Rigby murder shortly after he learned that police were looking for him. Soper told police that he left the area after a friend told him that police were "all over the place" looking for him. While Soper claimed that he left Oceanside because he believed the police were looking for him in connection with his violation of parole, the jury could have reasonably inferred that he left the area to evade apprehension for the Rigby murder. (See *Mason, supra*, 52 Cal.3d at p. 942 ["existence of other crimes which may explain the defendant's flight goes to the weight, not to the admissibility, of evidence"].)

The jury could also have reasonably inferred that Soper's lack of candor with police about his involvement with the Building a Solid Foundation organization evinced a consciousness of guilt. In addition, the jury could have reasonably found that Soper's statement to Wagner that he was "on the run" from authorities constituted evidence of flight manifesting a consciousness of guilt.

4. *There is not substantial evidence of Soper's flight with respect to the Olson killing*

There was considerably less evidence of Soper's flight with respect to the Olson murder. The People cite no such evidence in their brief. Our review of the record

reveals that Officer Reyes's ambiguous testimony with respect to his initial contact with Soper appears to be the only evidence in the record that could possibly be construed as evidence of flight. We conclude that there was not substantial evidence of Soper's flight with respect to the Olson murder to warrant a flight instruction. However, defense counsel did not request that the trial court modify CALJIC No. 2.52 so as to limit its application, and the court had no sua sponte duty to modify CALJIC 2.52. (*People v. Henderson, supra*, 110 Cal.App.4th at p. 742.) Therefore, the trial court did not err in instructing the jury with respect to flight. However, on remand, in a separate trial on the Olson killing, the trial court must carefully consider the evidence of flight with respect to that count and determine whether an instruction is warranted.

IV.

DISPOSITION

The judgment is reversed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.