APPENDIX

TABLE OF APPENDICES

APPENDIX A

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S20A0780. REYES v. THE STATE.

BETHEL, Justice.

A Gwinnett County jury found Herminio Nicolas Reyes guilty of malice murder and other offenses in connection with the stabbing death of Sadot Ozuna-Carmona.[1] Reyes appeals, arguing that the evidence was insufficient to support the jury's verdict on the malice murder count, that the trial court erred by admitting certain evidence pursuant to the "residual" exception to the hearsay rule, and that his trial counsel provided ineffective assistance in several

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[1] The crimes occurred on August 1, 2004. Reyes was indicted by a Gwinnett County grand jury on April 11, 2018, for malice murder, felony murder, and aggravated assault. At a jury trial held from October 8 to 11, 2018, Reyes was found guilty on all counts. On October 16, 2018, the trial court sentenced Reyes to a term of life imprisonment for malice murder. The felony murder count was vacated by operation of law, and the aggravated assault count merged with the malice murder conviction for sentencing. Reyes filed a motion for new trial through trial counsel on October 19, 2018, which he subsequently amended twice through new counsel. The trial court held a hearing on the motion, as amended, on June 6, 2019, and it denied the motion on October 11, 2019. Reyes filed a notice of appeal on November 8, 2019. His appeal was docketed to the April 2020 term of this Court and was orally argued on May 20, 2020.

regards. Finding no error, we affirm.

1. Viewed in the light most favorable to the verdicts, the evidence presented at trial showed the following. In July 2004, Reyes was living in an upstairs two-bedroom apartment in Gwinnett County with his girlfriend, Sadot Ozuna-Carmona. The apartment was leased in both of their names. Several other people lived in the apartment, including members of Ozuna-Carmona's extended family and three of her friends.

On July 31, 2004, a birthday party was held at the apartment for the wife of Ozuna-Carmona's nephew. The party began around 8:00 p.m. Numerous members of Ozuna-Carmona's family attended. During the party, Reyes and Ozuna-Carmona began arguing. Reyes came out of one of the apartment's bedrooms, and Ozuna-Carmona came up behind Reyes and hit him over the head with a beer bottle, which caused the bottle to break and caused Reyes to be upset. After their argument, Reyes went downstairs to talk to another family member and later came back upstairs around 9:00 p.m. He would not talk to anyone at the party, and he was described as acting

"serious." Around 11:00 p.m., Ozuna-Carmona packed up Reyes' belongings, put his suitcases in the living room, and told him to leave. Reyes then grabbed his suitcases and began walking toward the parking lot. He put the suitcases in the trunk of a car that belonged to Ozuna-Carmona and left the apartment complex in that car around midnight. Later that night, he returned to the complex and spoke with a member of Ozuna-Carmona's family in the parking lot.

When Reyes returned to the complex, Ozuna-Carmona was in her bedroom. She later came into the living room, cleaned up some broken glass, and then returned to her room. Later, while dressed in her nightgown, she came back into the living room and told everyone at the party that she was going to bed. She then went back to her room around 1:00 a.m.

Around the same time, Nelson Garcia-Ozuna (Ozuna-Carmona's nephew who also lived at the apartment with his wife and son), went to his bedroom where his wife was already asleep, and went to sleep. At that time, Nelson saw three other family

members in the apartment's living room. At trial, he testified that, after he went to bed, he did not hear any screams or cries for help.

The next morning, Nelson's uncle came to the apartment. Nelson and his uncle went to the grocery store and returned to the apartment around 9:00 a.m. Nelson had not seen Ozuna-Carmona that morning. Nelson's son repeatedly knocked on Ozuna-Carmona's locked bedroom door, but he did not receive an answer. Nelson became concerned. Nelson and another family member were eventually able to pry the door open, and once inside the bedroom, they found Ozuna-Carmona lying on the bed covered in blankets. She appeared to be dead.

The police were called, and officers and an investigator from the medical examiner's office responded to the apartment. Ozuna-Carmona was found lying face-up in the bed with her hands resting at her shoulders. Her feet were resting on the wall beside the bed (the side of which sat flush against that wall), and it appeared to the crime scene investigators as though her feet and legs had been lifted off the floor. Ozuna-Carmona was wearing only a tanktop and had

been covered with a blanket from the chest down. A knife was lying next to her on the bed. Ozuna-Carmona's chest, arms, and head were covered in blood, and she was cool to the touch. She had suffered stab wounds to the base of her neck, the left side of her chest, and her upper lip. Various items of her clothing, some of which had suspected blood on them, were located in the bedroom. The blanket and one of the pillows on the bed appeared to have defects caused by the knife. An examination of the bedroom revealed the possible presence of blood and body tissue in several locations on the walls. There was no suspected blood found anywhere else in the apartment. Jewelry and money appeared to be missing from the bedroom. Ozuna-Carmona's car, to which Reyes had a key, was gone and was never seen again after that night.

Ozuna-Carmona's cause of death was later determined to be stab wounds to the neck and chest, consistent with having been inflicted by a knife. The manner of her death was homicide.

When police arrived at the apartment, everyone who was there had been at the party the night before. After members of Ozuna-

Carmona's family were interviewed, police obtained an arrest warrant for Reyes. Attempts to locate Reyes were unsuccessful for over a decade. No member of Ozuna-Carmona's family saw Reyes again until his trial.

During an autopsy of Ozuna-Carmona conducted the day after her body was discovered, the medical examiner collected a bloodstain card as well as rectal and vaginal swabbings. The GBI later collected blood samples from the knife that had been used to stab Ozuna-Carmona. The bloodstain card and swabbings were submitted to the GBI for analysis. In December 2006, a male DNA profile was obtained from the vaginal swab. A mixture of Ozuna-Carmona's DNA and the same male's DNA was also obtained from the rectal swab. The male profile was placed into the computer database for the national Combined DNA Index System (CODIS). In July 2016, that profile was found to match a DNA profile for Reyes that had been uploaded into CODIS.

Based on the "hit" in CODIS, Reyes was located in California. A Gwinnett County detective and an investigator from the district

attorney's office obtained a search warrant to take a sample of Reyes' DNA. They traveled to California and obtained a reference sample of his DNA. The male profile DNA deduced from the vaginal and rectal swabs taken at Ozuna-Carmona's autopsy was found to match Reyes' DNA. Swabbings from the handle of the knife used to stab Ozuna-Carmona also contained Reyes' DNA.

At trial, Nelson testified that Reyes and Ozuna-Carmona had argued on occasions prior to Ozuna-Carmona's death. Their fighting was both verbal and physical, and when they fought, Reyes would often leave but come back the next day. Ozuna-Carmona told Nelson three times that Reyes had threatened to kill her, the last of which was about a week before her death. Another time, Nelson heard Reyes threaten to kill Ozuna-Carmona. Nelson had also told Ozuna-Carmona that she needed to leave Reyes because of their fights. About a month before she was killed, Ozuna-Carmona bought a knife at a yard sale. That same knife was found beside her body. According to Nelson, Reyes was aware that Ozuna-Carmona kept the knife under her bed. Only Ozuna-Carmona and Reyes had keys

to the bedroom door.

The jury also heard testimony from Angelica Martinez. She met Reyes at the end of 2004 in Mexico, and the two married in 2005. They moved to California in 2006. Martinez testified about two incidents in which Reyes had been physically violent toward her. In the first incident, Reyes threw Martinez to the ground and kicked her after she tried to stop him from leaving their apartment. In the second incident, Martinez told Reyes that she wanted a divorce. She then left the room and went to the bathroom. Reyes followed her inside, grabbed her by the hair and neck, and tried to hit her head against the toilet tank.

Reyes argues that the evidence was insufficient to support the jury's guilty verdict on the malice murder charge because the evidence presented by the State was entirely circumstantial and because the State failed to exclude every other possibility besides his guilt. We disagree.

When evaluating the sufficiency of evidence as a matter of federal due process under the Fourteenth Amendment to the United

States Constitution, the proper standard of review is whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U. S. 307, 319 (III) (B) (99 SCt 2781, 61 LE2d 560) (1979). This Court views the evidence in the "light most favorable to the verdict, with deference to the jury's assessment of the weight and credibility of the evidence." (Citation and punctuation omitted.) *Hayes v. State*, 292 Ga. 506, 506 (739 SE2d 313) (2013).

Further, as a matter of Georgia statutory law, "[t]o warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." OCGA § 24-14-6. Whether alternative hypotheses are reasonable, however, is usually a question for the jury, as this Court will not disturb the jury's finding unless it is insufficient as a matter of law. See *Graves v. State*, 306 Ga. 485, 487 (1) (831 SE2d 747) (2019).

Here, the evidence showed that Reyes and Ozuna-Carmona engaged in an argument on the evening of July 31, 2004, as they had

done on previous occasions. Testimony established that some of their prior confrontations had been physical and that Reyes had threatened to kill Ozuna-Carmona. In their prior confrontations, Reyes had left the apartment but eventually returned.

The evidence also showed that Reyes had a key to Ozuna-Carmona's bedroom and knew that she kept a knife under her bed. Reyes also had a key to her car, which he drove the night of Ozuna-Carmona's death and which was never seen again after Ozuna-Carmona's body was discovered by her family. Reyes was never seen by any members of Ozuna-Carmona's family again until his trial, and the evidence established that he fled to Mexico before eventually settling in California. His DNA was discovered on the murder weapon and in DNA samples taken from Ozuna-Carmona's body during her autopsy. The testimony of Reyes' wife indicated that he had also been violent toward her.

At trial, Reyes put forward the theory that his DNA was left on the knife and in Ozuna-Carmona's body other than in connection with her death. Specifically, Reyes argued that both were the result

of Reyes' sexual relationship with Ozuna-Carmona leading up to her death and the fact that the knife had been kept in the bedroom they shared. However, the evidence presented at trial, though circumstantial, established each element of the offense of malice murder and authorized the jury to reject this theory. The evidence also authorized the jury to reject the theory Reyes asserts on appeal that Ozuna-Carmona was killed outside her apartment with her own knife and then carried back to the apartment where the perpetrator staged her room to appear that she had been killed there. Accordingly, when viewed in the light most favorable to the verdicts, the evidence presented at trial and summarized above was sufficient to support Reyes' conviction for malice murder as a matter of due process and under OCGA § 24-14-6. See *Frazier v. State*, 308 Ga. 450, 454 (2) (b) (841 SE2d 692) (2020). See also *Brown v. State*, 302 Ga. 454, 456 (1) (b) (807 SE2d 369) (2017) ("It was for the jury to determine the credibility of the witnesses and to resolve any conflicts or inconsistencies in the evidence." (citation and punctuation omitted)).

2. Reyes argues that the trial court erred by admitting statements made to Nelson by Ozuna-Carmona regarding her relationship with Reyes. We disagree.

In the first of the statements at issue, Ozuna-Carmona told Nelson that she had once told Reyes to leave the apartment, that he refused, and that he threatened her. In a second statement, Ozuna-Carmona told Nelson that Reyes had threatened to kill her on multiple occasions and that she and Reyes had fought with each other. In the third statement, Ozuna-Carmona told Nelson that she had a knife and that she believed Reyes knew where she kept it. Ozuna-Carmona made this series of statements to Nelson in the two months before her death. Following a hearing, the trial court admitted each of these statements, over Reyes' objections, pursuant to the "residual" hearsay exception set forth in OCGA § 24-8-807, which states in relevant part:

> A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:
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> (1) The statement is offered as evidence of a

> material fact;
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> (2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
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> (3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.
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> . . .

The State offered the statements at issue to show the history of abuse and difficulties between Reyes and Ozuna-Carmona and to show that Reyes was aware that Ozuna-Carmona had a knife and that she kept it in the bedroom they shared. Reyes does not argue that the statements were not offered as evidence of a material fact or that the State, through reasonable efforts, could have procured more probative evidence on these points. Moreover, Reyes has not argued that another exception to the hearsay rule applied to the statements at issue. Instead, Reyes argues that the trial court's ruling to admit the evidence constituted an abuse of discretion because, even though Reyes' trial took place after January 1, 2013, the court applied case law interpreting the "necessity" exception to the hearsay rule in Georgia's former Evidence Code. Reyes also

attacks the trial court's determination that the statements at issue had "equivalent circumstantial guaranties of trustworthiness" sufficient to admit them. We consider these arguments in turn.

(a) In ruling upon Reyes' claim in his motion for new trial that the statements at issue here should not have been admitted pursuant to OCGA § 24-8-807, the trial court referred to this Court's decision in *Williams v. State*, 299 Ga. 209, 212 (2) n.2 (787 SE2d 187) (2016), which applied the "necessity" exception to the hearsay rule set forth in former OCGA § 24-3-1 (b). That exception was not carried over into the current Evidence Code. While eliminating the "necessity" exception, the General Assembly modeled the current version of OCGA § 24-8-807, which took effect on January 1, 2013, and applies to all trials conducted after that date, including the trial in this case, on Rule 807 of the Federal Rules of Evidence. See *State v. Holmes*, 304 Ga. 524, 529 (2) (a) (820 SE2d 26) (2018).

As we have noted many times since the enactment of the current Evidence Code, when Georgia courts consider the meaning of provisions of the Evidence Code that were borrowed from the

Federal Rules of Evidence, they are guided by the "decisions of the federal appeals courts construing and applying the Federal Rules, especially the decisions of the Eleventh Circuit." (Citation and punctuation omitted.) *Jacobs v. State*, 303 Ga. 245, 249 (2) (811 SE2d 372) (2018). Cases decided under the "necessity" exception to the hearsay rule in Georgia's former Evidence Code are thus not applicable to the interpretation of OCGA § 24-8-807 and should not be relied on by trial courts in determining whether to admit evidence. *Holmes*, 304 Ga. at 530 (2) (a).

However, despite its citation to *Williams*, the trial court's order denying Reyes' motion for new trial on this ground relied primarily on *Jacobs*, a decision of this Court setting forth the appropriate factors for the trial court to consider in determining whether to admit evidence under OCGA § 24-8-807.[2] Because the trial court

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[2] The transcripts of the hearings as to whether the statements at issue should be admitted pursuant to OCGA § 24-8-807 indicate that the trial court was aware that *Williams* construed the former Evidence Code but that the trial court thought *Williams* gave some guidance to the court as to the factors it could consider in determining trustworthiness. Later in the hearing, however, the trial court indicated to the parties its belief that "*Jacobs* is the best case"

ultimately applied the appropriate evidentiary standard despite its citation to a case construing the former Evidence Code, it is unnecessary for us to vacate the trial court's denial of Reyes' motion for new trial on this ground. Compare *Holmes*, 304 Ga. at 530 (2) (a) (where trial court does not apply the proper evidentiary standard in analyzing admissibility of evidence under OCGA § 24-8-807, remedy is to vacate order, remand the case, and direct the trial court to apply the correct standard).

(b) We now consider whether the trial court abused its discretion by admitting the statements at issue pursuant to the residual exception. *Tyner v. State*, 305 Ga. 326, 330 (2) (825 SE2d 129) (2019) (admission of evidence pursuant to OCGA § 24-8-807 reviewed for abuse of discretion). This exception applies

> only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present. Such guarantees must be equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history. These categories of hearsay have attributes of

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it had to work with. The trial court later referred to the *Jacobs* case regarding the trustworthiness of statements made in regard to domestic violence.

> trustworthiness not possessed by the general run of hearsay statements that tip the balance in favor of introducing the information if the declarant is unavailable to testify. And they are all considered sufficiently trustworthy not because of the credibility of the witness reporting them in court, but because of the circumstances under which they were originally made.

(Citations and punctuation omitted.) *Jacobs*, 303 Ga. at 249 (2). "[B]ecause the residual exception applies only to statements not specifically covered by any law, trial courts should consider whether a specific exception to the hearsay rule applies before applying [OCGA § 24-8-807]." (Citation, punctuation and emphasis omitted.) *State v. Hamilton*, 308 Ga. 116, 124 (3) (b) n. 10 (839 SE2d 560) (2020). A trial court should consider the totality of the circumstances in determining whether to admit evidence pursuant to OCGA § 24-8-807. *Tanner v. State*, 301 Ga. 852, 856-857 (1) (804 SE2d 377) (2017).

Here, the trial court determined that there were a number of factors that weighed in favor of finding that the statements made by Ozuna-Carmona to Nelson were trustworthy. It noted that the statements concerned violence and abuse, that Ozuna-Carmona had

no motive to fabricate any of the statements, and that she had made them to Nelson shortly before her death. The trial court also took particular note of the fact that Nelson and Ozuna-Carmona were close relatives and that they had been residing in the same apartment for several months when the statements were made. The trial court based this determination on Nelson's proffered testimony, in which he indicated that he and Ozuna-Carmona had a close relationship in which they regularly shared with each other what was happening in their lives. Additionally, Nelson had actually witnessed fights and arguments between Ozuna-Carmona and Reyes (including the argument between them the night Ozuna-Carmona was killed) and had heard Reyes threaten Ozuna-Carmona on one occasion. Because each of these factors support a determination that there were exceptional guaranties of trustworthiness regarding the making of these statements, we see no abuse of the trial court's discretion in permitting Nelson to testify to Ozuna-Carmona's statements to him. See *Tyner*, 305 Ga. at 330 (2) (no abuse of discretion where statement was made in the context

of close family relationship and where declarant had no motive to lie); *Jacobs*, 303 Ga. at 250-251 (2) (no abuse of discretion where statements made to close friends concerned history of threats and violence between domestic partners). See also *Holmes*, 304 Ga. at 529 (2) (a) ("This Court is particularly hesitant to overturn a trial court's admissibility ruling under the residual hearsay exception absent a definite and firm conviction that the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors." (citation and punctuation omitted)). This enumeration of error therefore fails.

3. Reyes also argues that his trial counsel provided ineffective assistance by failing to move to suppress the DNA sample collected from Reyes in California pursuant to a search warrant and by failing to present exculpatory and impeachment evidence from the interview that Nelson gave to police the day after Ozuna-Carmona was killed. To prevail on these claims, Reyes

> has the burden of proving both that the performance of his lawyer was professionally deficient and that he was prejudiced as a result. To prove deficient performance,

> [Reyes] must show that his trial counsel acted or failed to act in an objectively unreasonable way, considering all of the circumstances and in light of prevailing professional norms. To prove resulting prejudice, [Reyes] must show a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. In examining an ineffectiveness claim, a court need not address both components of the inquiry if the defendant makes an insufficient showing on one.

(Citation and punctuation omitted.) *Stuckey v. State*, 301 Ga. 767, 771 (2) (804 SE2d 76) (2017) (citing *Strickland v. Washington*, 466 U. S. 668, 687 (III) (104 SCt 2052, 80 LE2d 674) (1984)). "A strong presumption exists that counsel's conduct falls within the broad range of professional conduct." (Citation and punctuation omitted.) *Ford v. State*, 298 Ga. 560, 566 (8) (783 SE2d 906) (2016). We consider the two claims of ineffective assistance in turn.

(a) Reyes first argues that his trial counsel performed deficiently by failing to file a motion to suppress the DNA evidence collected from Reyes. We disagree.

After learning in 2016 that Reyes was incarcerated in California, Gwinnett County police obtained a search warrant in Santa Clara County, California in order to take a DNA sample from

him that could be matched against DNA taken from the crime scene. The warrant was issued by a judge in that county to a Gwinnett County police officer who then obtained the DNA sample from Reyes. The officer then returned the DNA sample to the Georgia Bureau of Investigation. The GBI later determined that DNA evidence taken from the crime scene (which included semen found inside Ozuna-Carmona's body and skin cells on the knife that had been used to stab her) matched the sample taken from Reyes. Reyes was later extradited to Georgia.

Reyes argues that his trial counsel should have moved to suppress this DNA sample collected from him in California and that a motion to suppress would have been successful because the process by which it was obtained violated several provisions of California law relative to the issuance, execution, and return of search warrants. However, even assuming that Reyes would have been successful in suppressing the DNA sample obtained from him in California, he has still failed to show that his counsel performed deficiently by failing to move to suppress that evidence. That is

because he has failed to show that no reasonable attorney would have decided, as a matter of trial strategy, to forgo moving to suppress the DNA evidence under the circumstances of this case.

Here, Reyes' counsel, who previously served as a prosecutor for 25 years, testified at the hearing on Reyes' motion for new trial that, based on his experience, even if he had successfully suppressed the results of the California search, the State would simply have obtained a new search warrant for Reyes, obtained a new DNA sample from him, and matched it to the DNA found at the crime scene. Counsel also determined that, even though the evidence showed that Reyes' DNA matched the DNA found at the crime scene, counsel could actually use that fact to attack the State's case by showing that the DNA evidence did not actually prove that Reyes killed Ozuna-Carmona and that there were other reasonable explanations for its presence. Counsel thus elected not to move to suppress the DNA sample taken from Reyes but to instead pursue a defense strategy that embraced the DNA evidence while challenging the State's theory as to why Reyes' DNA was at the crime scene.

Specifically, counsel argued to the jury that because Reyes and Ozuna-Carmona shared the bedroom in which Ozuna-Carmona kept the knife and because they had been in an ongoing sexual relationship, the presence of Reyes' DNA at the crime scene could be explained other than by the theory that he killed Ozuna-Carmona. Reyes' counsel also elicited testimony from the State's DNA expert to show that, in light of his relationship to Ozuna-Carmona and his residence in the apartment, the mere presence of Reyes' DNA at the crime scene did not prove that he committed the crimes. Counsel testified at the hearing on the motion for new trial that he believed his explanation for the DNA evidence would undermine the State's claims as to why the DNA was found at the crime scene and that, in light of the State's burden of proof, this would be sufficient to acquit Reyes. He further testified that it was his experience that the jury would find this explanation to be plausible.

In light of the foregoing, we cannot say that the strategy pursued by Reyes' trial counsel was unreasonable. Counsel could reasonably determine that a motion to suppress would not

ultimately have succeeded in excluding evidence that Reyes' DNA matched the DNA samples taken from the crime scene, as it seems likely that, as counsel suggested, the State would have simply sought and executed a new warrant for the collection of a new DNA sample from Reyes had the first sample been suppressed. Reyes has thus failed to "make a strong showing that the damaging evidence would have been suppressed had counsel made the motion." (Citation and punctuation omitted.) *Mosley v. State*, 307 Ga. 711, 720-721 (4) (a) (838 SE2d 289) (2020).

Moreover, "[t]rial tactics and strategy, no matter how mistaken in hindsight, are almost never adequate grounds for finding trial counsel ineffective unless they are so patently unreasonable that no competent attorney would have chosen them." (Citation and punctuation omitted.) *McNair v. State*, 296 Ga. 181, 184 (2) (b) (766 SE2d 45) (2014). Here, even assuming that trial counsel might have ultimately been successful in suppressing the DNA sample taken from Reyes in California, as a matter of trial strategy, it was not patently unreasonable for trial counsel to determine that the best

defense strategy in this case was for Reyes to forgo a motion to suppress, welcome the admission of the DNA evidence, offer a plausible explanation for the presence of Reyes' DNA at the crime scene, and refute claims made by the State as to how that evidence tied Reyes to Ozuna-Carmona's death. See *Gomez v. State*, 301 Ga. 445, 459 (6) (a) (801 SE2d 847) (2017) (no deficient performance where counsel could reasonably determine that best strategy was to forgo objection to certain testimony and instead use it to challenge the State's theory of the case); *Aikens v. State*, 297 Ga. 229, 233 (3) (773 SE2d 229) (2015) (no deficient performance where trial counsel failed to object to certain testimony that was ultimately beneficial to defendant because it showed that he had no motive to commit the charged offenses). This claim of ineffective assistance therefore fails.

(b) Reyes also argues that his trial counsel performed deficiently by not using statements given by Nelson to police investigators the day after Ozuna-Carmona's death to impeach his proffered testimony in regard to the admission of Ozuna-Carmona's statements under OCGA § 24-4-807 and to attack his trial

testimony. We disagree.

As noted above, during Reyes' trial, the trial court held a hearing as to whether it should admit, pursuant to OCGA § 24-8-807, certain statements that Ozuna-Carmona made to Nelson regarding her relationship with Reyes. After Nelson described to the trial court what Ozuna-Carmona had told him and what he had witnessed, he was cross-examined by Reyes' trial counsel. During that cross-examination, Nelson testified that he had given a statement to police the day after Ozuna-Carmona's death in 2004. Nelson testified that he told the police that Ozuna-Carmona and Reyes would argue but that he did not tell the police that Reyes had threatened Ozuna-Carmona. The State provided the trial court with an audio recording of the 2004 interview, which the court listened to after the hearing adjourned. The following morning, the trial court indicated to the parties that little of the recording was "intelligible" and that it could not hear that Nelson had been asked "those questions." Reyes' trial counsel later argued to the trial court that Ozuna-Carmona's alleged statements to Nelson should be excluded

because Nelson said nothing to the police in 2004 about any history of threats and violence between Ozuna-Carmona and Reyes other than the argument they had the night of Ozuna-Carmona's death. The trial court ultimately ruled that the statements were admissible pursuant to OCGA § 24-8-807.

Nelson was called by the State to testify at trial. In that testimony, he stated that Reyes and Ozuna-Carmona had argued on occasions prior to Ozuna-Carmona's death. He also testified that their fighting was both verbal and physical and that, often when they fought, Reyes would leave but come back the next day. Nelson testified that Ozuna-Carmona told him three times that Reyes had threatened to kill her, the last of which was about a week before her death. On another occasion, Nelson heard Reyes threaten to kill Ozuna-Carmona.

Reyes' trial counsel cross-examined Nelson about inconsistencies in his testimony, including inconsistencies between what he testified to on direct examination at trial and the statements he had made in the proffer the day before outside the

jury's presence. In that line of questioning, trial counsel highlighted that Nelson had testified both that he had and had not seen Ozuna-Carmona hit Reyes with a beer bottle the night she was killed. Nelson then testified that he could not remember which of those statements was true. Nelson then testified that he told the police in his 2004 interview that Reyes had threatened Ozuna-Carmona. Nelson then admitted in the presence of the jury that he had testified in a hearing the day before that he had never told the police about threats Reyes made against Ozuna-Carmona.

At the hearing on Reyes' motion for new trial, Reyes' appellate counsel brought forward a Spanish-to-English translation of Nelson's 2004 police interview that was prepared by an interpreter after appellate counsel began representing Reyes.[3] According to the translation offered by appellate counsel, a transcript of which was placed in the record of the hearing on the motion for new trial, Nelson stated in the 2004 police interview that he did not know why

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[3] The interpreter testified that it took her "well over 30 hours" to complete the translation because four voices on the recording spoke over one another, making it "very difficult to make out what was being said."

Ozuna-Carmona had problems with Reyes, that he did not know how Reyes and Ozuna-Carmona "lived their private lives," that neither he nor his wife had talked to Ozuna-Carmona about why she and Reyes had problems or about "what happened," and that Ozuna-Carmona did not "confide" in anyone.

The record shows that an audio recording of the interview included the words of an officer who spoke both English and Spanish and translated questions and responses between Nelson and the English-speaking officers who conducted the interview. Trial counsel testified that, prior to trial, he had an interpreter review the interpretations offered by the bilingual officer that could be heard on the recording. Trial counsel testified that, based on his memory of the interview, there was nothing exculpatory contained in the interview and that his interpreter had not reported any "glaring inconsistencies" in the translation that could be heard on the recording and that he had received only "minor" notes from the interpreter about the accuracy of the officer's translations. Trial counsel further testified that, in his view, he "impeached the dog out

of Nelson" at trial, including by having him admit in front of the jury that his testimony the day before in a hearing outside the jury's presence was inconsistent with what he had just said from the witness stand. He further testified that he did not believe anything in the interview would have helped in excluding Ozuna-Carmona's statements to Nelson under OCGA § 24-8-807.

Reyes argues that, had his trial counsel introduced the translated statements from the interview at the hearings in which Ozuna-Carmona's statements to Nelson were admitted pursuant to OCGA § 24-8-807, the trial court would have been unlikely to determine that the statements at issue were trustworthy. Reyes also argues that trial counsel performed deficiently by not using the translations of the interview to impeach Nelson's testimony at trial. We disagree with both contentions.

The record makes clear that the audio recording of the interview was reviewed by the trial court before it ruled on the admissibility of Ozuna-Carmona's alleged statements to Nelson under OCGA § 24-8-807. Because trial counsel was not aware of any

"glaring inconsistencies" between the translations offered by the bilingual officer on the recording and those of the interpreter he engaged to review the recordings, it was not unreasonable for trial counsel to forgo seeking further translations of the interview. Moreover, the record also makes clear that trial counsel argued that the contents of the interview should be considered by the trial court in determining whether the statements at issue should be admitted pursuant to OCGA § 24-8-807. Thus, Reyes has made no showing that his trial counsel failed to present Nelson's statements in the interview to the trial court.

Moreover, we are not persuaded that further highlighting of Nelson's statements in the interview by trial counsel would have had any effect on the trial court's ruling under the residual exception. To the extent any of Nelson's statements on the recording now highlighted by Reyes conflict with testimony he proffered to the trial court in the hearing, those conflicts go only to Nelson's credibility. But as we discussed in *Jacobs*, the trial court must make its determination of the trustworthiness of the hearsay statements at

issue "not because of the credibility of the witness reporting them in court, but because of the circumstances under which they were originally made." (Citations and punctuation omitted.) 303 Ga. at 249 (2). The record is clear that this was the trial court's focus in reaching its ruling with regard to the admission of the statements. And because Nelson's credibility was not the main factor to be considered by the trial court in evaluating the trustworthiness of the statements Ozuna-Carmona allegedly made to Nelson, Reyes cannot show that no reasonable attorney would have proceeded as his trial counsel did in this case as to this issue.

Reyes has also failed to show that his trial counsel performed deficiently with regard to impeaching Nelson's trial testimony. As trial counsel noted in the hearing on the motion for new trial — and as the trial record makes clear — trial counsel vigorously cross-examined Nelson about what he told the police in 2004, even going so far as to secure an admission from Nelson that he had given different testimony on this subject the day before while under oath in a hearing outside the jury's presence. In light of these efforts by

trial counsel, we cannot say that his use of the 2004 interview constituted deficient performance. This claim of ineffective assistance therefore fails.

Judgment affirmed. All the Justices concur.

DECIDED AUGUST 10, 2020 – RECONSIDERATION DENIED SEPTEMBER 8, 2020.

Murder. Gwinnett Superior Court. Before Judge Davis.

Frances C. Kuo, for appellant.

Daniel J. Porter, District Attorney, Samuel R. d'Entremont, Assistant District Attorney; Christopher M. Carr, Attorney General, Patricia B. Attaway Burton, Deputy Attorney General, Paula K. Smith, Senior Assistant Attorney General, Leslie A. Coots, Assistant Attorney General, for appellee.

APPENDIX B

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v.

HERMINIO NICHOLAS REYES,
Defendant.

Indictment No.
18-B-01333-10

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Pending before this Court is the Defendant's motion for new trial. The Court, having read and considered Defendant's motion, having held an evidentiary hearing on the matter and considering the transcript and the record, said motion, as amended, is hereby DENIED.

PROCEDURAL HISTORY

Defendant was found guilty on October 12, 2018 of one count of murder, one count of felony murder, and one count aggravated assault after a jury trial. The named victim was Sadot Carmona Ozuna. Defendant's sentenced was filed on October 17, 2018. Defendant timely filed a motion for new trial on October 19, 2018, which was subsequently amended. A hearing on the motion for new trial was reset two times at the request of counsel before a final hearing was conducted on June 7, 2019.

FINDING OF FACTS

On July 31, 2004, Sadot Carmona Ozuna was living at an apartment at 503 Ambers Drive, Norcross, Georgia in Gwinnett County. (Transcript of the Jury Trial conducted on October 8, 2018 through October 11, 2018, pages 602-604m 688, hereinafter, "TT."). Defendant, Sadot's nephew, Nelson Garcia-Ozuna, and Nelson's wife, Maribel Mejia, also lived in the same residence with Sadot. (TT. 603). A group of

friends and family came to the apartment around 8:00 p.m. for a birthday party for Maribel. (TT. 610-611). Portions of this birthday party were recorded and later introduced at trial. (TT. 631, State's Exhibit 239). At some point during the evening, Defendant and Sadot had an argument. (TT. 612). Defendant kept leaving the party and going up the stairs and then coming back to the party. (TT. 614-615). At some point, Defendant put his clothes in his bag and left. (TT. 615).

Defendant then came back to the apartment later that night when everyone was asleep. (TT. 615). Nelson initially told police officers that Sadot hit Defendant on the back of the head with the beer bottle but later testified at trial that he could not remember this incident happening. (TT. 755). After the incident, Sadot put suitcases out for Defendant and told him to leave. (TT. 617). Defendant grabbed the suitcases and left walking toward the parking lot. (TT. 618). Nelson never saw Defendant again. (TT. 642). Sadot told Nelson she was going to sleep and she went into her room. (TT. 622).

The next morning, Nelson tried knocking on Sadot's door to wake her but got no response. (TT. 623). Nelson and his uncle were able to force Sadot's bedroom door open and found Sadot dead on her bed. (TT. 625). Nelson also saw a knife next to Sadot's body. (TT. 628, State's Exhibit 202). Maribel called 911 to report that Sadot was dead. (TT. 480-482). Nelson noticed some of Sadot's jewelry and her car was missing. (TT. 641-642). Officers responded to the scene. In addition to interviewing other witnesses, officers, including two District Attorney Investigators, conducted an interview of Nelson which was recorded. (TT. 757).

An autopsy was conducted and it was determined Sadot died from stab wounds

to the neck and chest. (TT. 525). She also had a more superficial stab wound to her face. (TT. 510). The stab wounds were consistent with a knife. (TT. 525-526). Ms. Ozuna did not have any significant injuries on her arms, hands, legs, or feet to suggest a struggle; however, she did have a "small defect" on her thumb which could have been caused by a blade. (TT. 526). A rape kit was also conducted during Sadot's autopsy. No vaginal injuries were observed. (TT. 526). However, male DNA was obtained from the vaginal and rectal swab of Sadot's body. (TT. 538).

Warrants were taken for Defendant; however, officers were not able to locate Defendant for over twelve years. (TT. 695-698). Then, in July 19, 2016, officers received a CODIS hit on Defendant. (T. 699). Detective Restrepo, with Gwinnett County Police, traveled to California. Defendant had been arrested on unrelated charges. Restrepo obtained a search warrant for Defendant's DNA. (TT. 701). Restrepo subsequently obtained Defendant's DNA through a buccal swab. (TT. 702). Defendant's DNA was compared to the male DNA obtained in vaginal and rectal swabs obtained during Sadot's autopsy and they were a match. (TT. 713, 736).

The knife recovered at the scene was taken into evidence and the DNA from the swabs of the knife were tested. (TT. 717). Both the victim's and Defendant's DNA were obtained from the knife. (TT. 717). The forensic biologist testified that a person's DNA could be on the knife from either cutting themselves with the knife or "friction of using the knife can rub off skin cells." (TT. 722).

A Gwinnett County Grand Jury indicted Defendant on June 25, 2015 in indictment number 15-B-02280-10 and charged him with one count of Murder and one

count of Felony Murder. Defendant was then re-indicted on April 11, 2018 and charged with Murder, Felony Murder, and Aggravated Assault in case number 18-B-01333-10. Defendant was tried on this latter indictment.

Prior to trial, on April 19, 2018, the State filed its "Notice of Intent to Introduce Prior Act(s) Evidence under O.C.G.A. Sec. 24-4-404(b)" which sought to introduce two prior acts of battery and terroristic threats against Angelica Martinez-Vazquez, Defendant's wife. (Transcript of Motion Hearing conducted on May 4, 2018, pages 30-31, hereinafter, "MT."). A hearing was conducted on May 4, 2018 in which the State proffered the facts of the other acts. In 2010, while Angelica Martinez-Vazquez was attempting to separate from her husband, Defendant, he "[threw] her on the ground and kicked her two or three times." In 2014, Defendant, while intoxicated, began calling Martinez-Vazquez names. (MT. 34). Defendant then "punched her on the arm and face, pulled her hair, and then attempted to shove her head into the toilet." (MT. 34). During the incident, Defendant told Martinez-Vazquez he "would kill [her] and nobody here will find out." (MT. 34).

This Court granted the State's motion finding there was a similarity between the alleged facts between the acts against Ms. Martinez-Vazquez and the charged crimes. (MT. 43-45). Both cases involved family violence against intimate partners. (MT. 43). This Court further found the other crimes evidence met the criteria for temporal proximity under the circumstances of the pending case and under the proffer presented by the State could be proved by a preponderance of the evidence. (MT. 44-45). The evidence was for the proper purpose of motive and intent, specifically the motive being

the intent to control a domestic partner, rather than character evidence. (MT. 43-44). Finally, under the 403 balancing test, this Court found the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury and would not cause undo delay or needless presentation of cumulative evidence (MT. 45).

Prior to the testimony of Angelica Martinez, this Court gave the following limiting instruction the jury:

> "Sometimes evidence is admitted for a limited purpose. Such evidence may be considered by the jury for the sole issue or purpose against that party for which the evidence is limited and not for any other purpose.
>
> In order to prove its case, the State must show intent and may show motive. To do so, the State has – is offering evidence of other acts allegedly committed by the accused. You are permitted to consider that evidence only insofar as it may relate to those issues and not for any other purpose. You may not infer from such evidence that the defendant is of a character that would commit such crimes.
>
> The evidence may be considered only to the extent that it may show the element of intent that the State is required to prove and the crimes charged in the case now on trial. The evidence may be considered only to the extent that it may show the motive and issue that the State is authorized to prove in the crimes charged in the case now on trial. Such evidence, if any, may not be considered by you for any other purposes.
>
> The Defendant is on trial for the offenses charged in this Bill of Indictment only and not for any other acts. Before you may consider any other acts for the limited purposes stated, either intent or motive, you must first determine whether the accused committed the other alleged acts. If so, you must then determine whether the acts shed any light on the issue of intent or motive for which it was admitted in the crimes charged in the indictment in this trial.
>
> Remember to keep in mind the limited use and the prohibited use of this evidence about other acts of the defendant.
>
> By giving this instruction, the Court in no way suggests to you that defendant has or has not committed any other acts nor whether such acts, if committed, prove anything. This is solely a matter for your determination." (TT. 773-774).

The Court gave an identical charge at the conclusion of the trial during the jury charge.

(TT. 916-917).

Ms. Martinez testified she met Defendant in Mexico in 2004 and then married him in 2005. (TT. 775-776). In 2010, while they were living in California, Defendant and Angelica got into an argument. Defendant grabbed her arm and she ended upon the ground where Defendant kicked her three or four times. (TT. 777). In 2014, Angelica told Defendant she did not want to be with him anymore and she wanted to get a divorce. (TT. 778). Defendant then followed her into the restroom and grabbed her by the hair. (TT. 778). Defendant tried to "smash [Angelica] with force against the box of the toilet." (TT. 778). She was able to get away and took off running. (TT. 778).

The State also filed its "Notice of State's Intent to Introduce Evidence Under the Residual Exception to the Hearsay Rule Pursuant to O.C.G.A. §24-8-807" on October 4, 2018 which sought to introduce certain statements Sadot made to her nephew, Nelson Garcia Ozuna, prior to her death between June and August 2004. First, the State sought to introduce Sadot telling Defendant "if you don't want to be with me just leave" and that Defendant threatened Defendant. Second, the State moved to introduce that Sadot told her nephew Defendant "was always threatening her" and "they would fight and scratch each other." Finally, the State sought to introduce Sadot told Nelson "the knife belonged to her" and "she kept the knife hidden but told Nelson Garcia Ozuna she believed the Defendant knew where the knife was kept."

This Court conducted a hearing on State's motion during the course of trial prior to Nelson's testimony in which Nelson testified and was subject to cross examination. At the conclusion of the hearing, the State provided this Court a copy of Detective Aguilar's

interview with Nelson but had difficulty understanding some of the recording due to the quality of the recording. (TT. 557, 596).

The Court found the State complied with notice requirements and further held under the totality of the circumstances, the inherent aspects to trustworthiness rose to the level for admissibility. (TT. 590, 592). This Court also found the statements were offered as evidence of a material fact and the statements were more probative on point for which they were offered. (TT. 593). The State had no other evidence or witnesses who could testify that they heard Defendant threaten to kill the victim which increased to the probative and relevant nature of the statements as the State could not procure the evidence through any other alternative means. (TT. 593). Finally, this Court held "the interest of justice [were] best served by the admission of the statement into evidence." (TT. 593). Finally, this Court conducted a 403 balancing test and found the probative value of the evidence was not outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. (TT. 594).

A jury trial was conducted on October 8, 2018 through October 11, 2018. At trial, Nelson testified Defendant had on three previous occasions "threaten[ed Sadot] whenever they would argue. That he would all – that he was always going to kill her." (TT. 613). The most recent time was about a week before Sadot died. (TT. 613). Nelson also testified that he had heard Defendant threaten Sadot before and Nelson told Sadot she "had to leave him" and the "relationship could not continue because they would always fight and there was always those threats." (TT. 613-614). Sadot had told Defendant to leave but he always came back. (TT. 614).

Nelson further testified that Sadot had bought a knife at a yard sale approximately a month before she was killed and she kept it under her bed. (TT. 627). Sadot told Nelson Defendant knew where she had kept it. (TT. 628). This was the same knife that was found next to Sadot's body the day she died. (TT. 628).

At the conclusion of the trial, Defendant was convicted of Murder, Felony Murder, and Aggravated Assault

A hearing was conducted on Defendant's motions for new trial on June 6, 2019. Defendant was present with his appellate counsel, Frances Kuo. Defendant's trial counsel, Don Geary, was also present at the hearing. Mr. Geary testified he has worked as a defense attorney for approximately two and half hears. (Transcript of the Motion for New Trial Hearing conducted on June 6, 2019, hereinafter "MT2.," pages 17). Prior to becoming a defense attorney, Mr. Geary was a prosecutor for twenty-five (25) years. (MT2. 17). He has tried approximately two hundred fifty jury trials of which eighty-seven were murder trials. (MT2. 79-80).

Mr. Geary further testified he had researched whether Officer Restrepo had authority to obtain a search warrant for Defendant's DNA in California; however, he did not pursue a motion to suppress for two reasons. (MT2. 24). First, if defense counsel had filed the motion and been successful, the State could move for another search warrant in Georgia where Defendant was housed prior to trial. (MT2. 24, 30, 37). Second, the DNA was consistent with his defense; so, he did not want it suppressed. (MT2. 24).

Specifically, Defendant lived with Sadot which explained why his bodily fluids

were located where they were located. (MT2. 27). The State's expert testified Defendant's bodily fluids could have been there up to 72 hours prior to the murder. (MT. 27). Geary testified by allowing the DNA to come in he "created the question that it could have been from a prior time that [Defendant] handled the knife." Mr. Geary consulted with DNA experts and they agreed this was the best defense strategy given the facts and evidence of the case. (MT2. 82).

Prior to trial, Geary had a Spanish language interpreter review the police interview of Nelson LNU. In this interview two English speaking officer interviewed Nelson. Another, Spanish speaking officer, Detective Aguilar, worked as a translator. (MT2. 105). Rather than have the entire interview translated, Geary asked the Spanish language interpreter to review the video and see if Aguilar correctly translated what was being said. (MT2. 105). If Aguilar's was accurate, then Geary would have the content of the statement. (MT2. 105). The interpreter "made a note or two" but any differences were "minor." (MT2. 105-106). Appellate counsel had the entire interview translated and transcribed which was introduced into evidence at the motion hearing. (MT2. Exhibit 8).

During the trial, defense counsel cross examined Nelson regarding differences in his testimony and statements he made the police. Nelson testified he did not remember if Sadot hit Defendant with a beer bottle the night she died. (TT. 648). Nelson could not remember what time Sadot went to bed that night. (TT. 648). Nelson could not remember the time Nelson left the night Sadot died. (TT. 649).

At the conclusion of the motion for new trial hearing, the parties were given until July 15, 2019 to submit briefs. (MT2. 154). At the request of the parties, both sides were

subsequently given until August 9, 2019 to submit briefs.

CONCLUSIONS OF LAW

1. Sufficient Evidence Exists to Sustain the Guilty Verdict

First, Defendant states the jury verdict is contrary to the law and evidence, and requests a new trial pursuant to O.C.G.A. § 5-5-20 and 5-5-21.

Under O.C.G.A.§ 5-5-21, "the presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding."

On a motion for a new trial, the trial court sits as a "thirteenth juror" and has broad power to "weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted." Ricketts v. Williams, 242 Ga. 303, 304, 248 SE2d 673 (1978). However, the power to grant a new trial on this ground "should be exercised with caution," and "invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." Id.

The Court, having considered the evidence and weighed it accordingly, hereby DENIES the motion on this basis because the Court finds that the verdict is not contrary to the weight of the evidence nor has a miscarriage of justice occurred.

2. This Court did not err in admitting evidence under the residual hearsay exception

This Court permitted the State to introduce certain statements the decedent had made to her nephew prior to her death regarding Defendant pursuant to O.C.G.A. 24-8-807. In Defendant's amended motion for new trial, Defendant contends, "the trial court erred in admitting evidence under the residual hearsay exception." However, this Court finds the statements were properly admitted and for the reasons outlined below Defendant's motion is denied.

As discussed above, the State filed its "Notice of State's Intent to Introduce Evidence Under the Residual Exception to the Hearsay Rule Pursuant to O.C.G.A. §24-8-807" on October 4, 2018. Pursuant to the notice the State first sought to introduce Sadot telling Defendant "if you don't want to be with me just leave" and that Defendant threatened Sadot. Second, Sadot told her nephew, Nelson, that Defendant "was always threatening her" and "they would fight and scratch each other." Finally, Sadot told her nephew "the knife belonged to her" and "she kept the knife hidden but told Nelson she believed the Defendant knew where the knife was kept."

Pursuant to O.C.G.A. 24-8-807:

> "A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:
> (1) The statement is offered as evidence of a material fact;
> (2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
> (3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

> However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

As an initial matter, this Court finds the statements had a guarantee of trustworthiness. The residual exception to hearsay is to be used very rarely and only in exceptional circumstances, and only when there exists certain exceptional guarantees of trustworthiness and high degrees of probativeness and necessity. Miller v. State, 303 Ga. 1, 810 S.E.2d 123 (2018). Analysis under the residual exception to the hearsay rule must consider whether the statements have guarantees of trustworthiness given the circumstances under which they were made. Thompson v. State, 302 Ga. 533, 807 S.E.2d 899 (2017). Trustworthiness is assessed under the totality of the circumstances, including any motives the declarant may have had to be untruthful in making the statement ... and the extent to which the declarant enjoyed a relationship of confidence with the witness." Williams v. State, 299 Ga. 209, 212, 787 S.E.2d 187, 190 (2016).

In Jacobs v. State, 303 Ga. 245, 811 S.E.2d 372 (2018), the Georgia Supreme Court upheld a trial court admission of statements in a murder case of the decedents to her friends describing the nature of her abusive relationship with her husband, the defendant, prior to her death. There, the decedent had told close friends about her husband's controlling and violent behavior toward her and her anxiety connected to her husband's threats and abusive behavior. Id. 251. There, the Court found the decedent's

statements about the abusive threats that her husband made to her, the fact that she would not harm herself, and her fears that [her husband] might to something carried the requisite guarantees of trustworthiness to be admissible, as those statements stemmed from the very domestic abuse about which she had been informing her close confidantes. Id. 251.

Here, this Court found "under the totality of the circumstances, there are inherent aspects of trustworthiness, that rise to the level for admissibility." (TT. 592). This Court further found the decedent did not have any motives to make these statements up. (TT. 592). Temporal proximity existed as the decedents statements were made just a short time before her death. (TT. 592). This Court also noted on the record, "the declarant enjoyed not only a blood relationship with the witness, but also her blood relative had been living with her for several months. (TT. 592). As in Jacobs, this Court found "sharing of confidences in a domestic violence case to a close relative that lived with her does meet the exceptional guarantee of trustworthiness for admissibility." (TT. 593).

Next, this Court finds the statements Sadot made to Nelson were offered as evidence of a material fact. The nature and dynamics of Defendant and Sadot's relationship prior to Sadot's death and the fact that he routinely threatened her with violence is a material fact.

Sadot's statements made to Nelson were more probative on a point than any other evidence. No other evidence was introduced that Defendant had ever threatened Sadot before or that they had fought before. As this Court noted on the record, the State

had no other witnesses or evidence that Defendant had previously threatened to kill the victim with increased the probative and relevant nature of the statements. (TT. 593).

Next, this Court finds the rules of evidence and interests of justice were served by the admission of the statements.

Finally, this Court finds the State gave Defendant proper notice of their intent to introduce these statements through the Residual Hearsay Exception. Here, the State filed its notice on October 4, 2018, prior to the start of the trial on October 8, 2018. This Court finds the State's notice was serve sufficiently in advance of the trial or hearing to provide Defendant with a fair opportunity to prepare to meet it.

This Court further finds the notice itself put Defendant on notice on the specific particulars of the statements that the State was seeking to admit including the name of the declarant, Nelson Garcia Ozuna.

In sum, this Court finds these statements were properly admitted under O.C.G.A. §24-8-807. The State's notice put Defendant on notice of what statements they were seeking to introduce. The statements themselves had the requisite a guarantee of trustworthiness. Further, the introduction of the statements served the rules of evidence and interests of justice. Finally, the statements were offered as evidence of material fact and were probative on a point than any other evidence. Defendant's motion as to this enumeration is DENIED.

3. This Court did not err in admitting other crimes evidence

Defendant next asserts this Court erred in "admitting other crimes evidence." Here, this Court granted the State's motion to introduce evidence pursuant to O.C.G.A.

§24-4-404 and allowed the State to introduce two acts of domestic violence involving Defendant's wife, Angelica Martinez. In his supplemental brief, Defendant alleges this Court erred in admitting this evidence because there was "no similarity between the extrinsic offense and the charged offense and the prior offenses were remote in time, six and eight years after the alleged incident, the extrinsic offense were not probative of Reyes' intent to commit malic murder." For the reasons outlined below, this Court disagrees.

OCGA § 24–4–404(b) provides: "Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...."

For evidence of other crimes or acts to be admissible pursuant to OCGA § 24–4–404(b)(1) it must be relevant to an issue other than defendant's character; (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the acts in question; and (3) the probative value of the evidence cannot be substantially outweighed by undue prejudice. Logan-Goodlaw v. State, 331 Ga. App. 671, 674–75; 770 S.E.2d 899, 902 (2015).

a. The extrinsic evidence is relevant for a proper purpose

First, this Court finds this evidence was relevant to an issue other than Defendant's character. Any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance

serving to elucidate or to throw light upon a material issue or issues is relevant." Woodall v. State, 294 Ga. 624, 632(7), 754 S.E.2d 335 (2014). After conducting a hearing on this matter, this Court found the evidence presented in the State's proffer was relevant to motive intent, specifically the motive being the intent to control a domestic partner. (MT. 43-44).

i. Intent

As to intent, because a plea of not guilty puts the prosecution to its burden of proving every element of the crime—including intent—evidence of other acts that tends to make the requisite intent more or less probable to any extent is relevant." Olds v. State, 299 Ga. 65, 75, 786 S.E.2d 633 (2016). Olds makes clear, however, that a simple plea of not guilty, standing alone, does not categorically allow for the admission of other acts evidence to establish intent. Gerbert v. State, 339 Ga. App. 164, 793 S.E.2d 131, 143 (2016). Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses." Thus, where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404(b) test is satisfied. Bradshaw v. State, 296 Ga. 650, 657, 769 S.E.2d 892, 897 (2015). Wilson v. State, 336 Ga. App. 60, 62, 783 S.E.2d 662, 665 (2016).

As to whether intent is an issue in the case...the test is to ask: under the facts of the case, is there *any* danger that a rational jury could find that although the defendant committed the objective, charged acts, he did not intend to do so?" Chynoweth v. State, 331 Ga. App. 123, 128, 768 S.E.2d 536, 541 (2015).

Here, this Court finds Defendant's state of mind in perpetrating both the extrinsic and charges offenses was identical. As such, this Court finds the evidence was ultimately properly introduced for the purpose of showing Defendant's intent.

ii. Motive

Evidence of another crime may be admitted "to show the defendant's motive for committing the crime with which he is charged," but not to demonstrate "a propensity to act in accordance with the character indicated by that [other crime or] conduct." Amey 331 Ga.App. 244, 770 S.E.2d 321 (2015). To be admitted to prove motive, extrinsic evidence must be "logically relevant and necessary to prove something other than the accused's propensity to commit the crime charged. Harris v. State, 338 Ga.App. 778, 792 S.E.2d 409, (2016).

Further, the fact that motive is not an element of the crime charged does not bar other acts evidence offered for that purpose. Smart v. State, 299 Ga. 414, 788 S.E.2d 442 (2016). The Georgia Supreme Court held in Smart extrinsic evidence of prior domestic violence was relevant in a murder prosecution to explain the impetus behind a defendant's violence. There, the Court elaborated, "while motive is not an element of any of the charged offenses here, [the other acts witness's] testimony was relevant to help the jury understand why Appellant might have used violence against [the decedent]. Through the [the witness's] testimony referenced specific acts of domestic violence, her testimony also revealed the impetus behind that violence; control." Id. 418.

Likewise, here, this Court finds the extrinsic evidence was relevant to show Defendant's motive in controlling his intimate partners with violence.

b. Sufficient evidence exists to prove the extrinsic acts

This Court next finds sufficient evidence was introduced at trial to prove to a preponderance of the evidence that Defendant committed the extrinsic act(s).

Here, Angelica Martinez testified at trial and was subjected to cross examination. Under O.C.G.A. §24-14-8, "the testimony of a single witness is generally sufficient to establish a fact." This Court finds this evidence presented, the testimony of Angelica Martinez, was sufficient to prove by a preponderance of the evidence that Defendant committed these extrinsic acts.

c. The probative value of the extrinsic evidence is not substantially outweighed by the danger of unfair prejudice.

Finally, this Court must consider whether the evidence should be excluded under balancing and relevancy provisions Rule 403 which provides for the exclusion of relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Georgia Supreme Court has explained that "[t]he application of the Rule 403 test is a matter committed principally to the discretion of the trial courts," but it has also found that "the exclusion of evidence under Rule 403 is an extraordinary remedy [that] should be used only sparingly." Harris v. State, 338 Ga. App. 778, 782, 792 S.E.2d 409, 413 (2016).

What is more, the prohibition of evidence under the Rule 403 balancing test is an extraordinary remedy which, as has been noted, should be used only sparingly

inasmuch as it permits the exclusion of concededly relevant evidence; in close cases, balancing under Rule 403 should be in favor of admissibility of the evidence. State v. Jones, 297 Ga. 156, 164 (3), 773 S.E.2d 170 (2015), citing United States v. Merrill, 513 F.3d 1293, 1301 (11th Cir. 2008) and United States v. Terzado-Madruga, 897 F.2d 1099, 1119 (11th Cir. 1990).

Here, Defendant has made no showing that this evidence misled the jury, wasted time, confused the issue or that the probative value of this evidence was substantially outweighed its prejudicial impact. Further, this Court gave the jury a limiting instruction prior to the Angelica Martinez's testimony and at the conclusion of the trial to further minimize the danger of any unfair prejudice to Defendant. (TT. 773-774, 916-917). This Court finds the probative value of this extrinsic evidence was not substantially outweighed by the danger of unfair prejudice to Defendant.

Based upon the foregoing reasons, Defendant's motion for new trial as to this enumeration of error is HEREBY DENIED.

4. Trial counsel was not ineffective

Defendant next argues she should be given a new trial because his trial counsel, Don Geary, provided ineffective assistance of counsel when he failed to file a motion to suppress and by "failing to present exculpatory and/or impeachment evidence." For the reasons outlined below, this Court disagrees.

Don Geary has been an attorney for twenty-seven (27) years. (MT2. 17). During that time period, Mr. Geary has tried two hundred fifty jury trials of which eighty-seven were murder trials. (MT2. 79-80).

The Court finds that Defendant has failed to meet the standard to prove ineffective assistance of counsel. To establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052 (1984), the defendant must show that trial counsel's performance was deficient and there is a reasonable probability that the trial result would have been different if not for the deficient performance. Hill v. State, 284 Ga. 521 (668 SE2d 673) (2008). To meet the first prong of the test, a defendant must overcome the strong presumption that counsel's performance fell within a "wide range of reasonable professional conduct" and that counsel's decisions were "made in the exercise of reasonable professional judgment." Barrett v. State, 292 Ga. 160, 167, 733 S.E.2d 304, 312 (2012). To meet the test's second prong, a defendant is required to show that there is a reasonable probability that, absent counsel's unprofessional errors, the result of his trial would have been different. Id. 167.

a. Trial Counsel was not ineffective for failing to file a motion to suppress

Defendant first contends trial counsel was ineffective for failing to file a motion to suppress evidence challenging the DNA evidence recovered from Defendant. Specifically, Defendant claims because "Officer Restrepo was not a police officer employed by the County of Santa Clara, he illegally executed the search warrant in violation of California law."

Although he had conducted research into the issue, Mr. Geary decided not to pursue a motion to suppress for two reasons. First, if he had filed the motion and been successful, the State could move for another search warrant in Georgia where Defendant was housed prior to trial. (MT2. 24, 30, 37). Second, the DNA was consistent

with his defense; so, he did not want it suppressed. (MT2. 24). Geary consulted with DNA experts and they all agreed the best defense strategy was get the evidence admitted in but then create the question that the DNA could have been there from prior time that Defendant handled the knife. (MT2. 82). There was no issue that Defendant lived in the apartment with Sadot and was involved in a romantic relationship. The DNA expert testified Defendant's bodily fluids could have been in Sadot's vagina up to 72 hours prior to her murder. (MT. 27).

Failure to pursue a futile motion does not constitute ineffective assistance. Davis v. State, 267 Ga. App. 245, 246, 599 S.E.2d 237, 239 (2004). Thus, when trial counsel's failure to file a motion to suppress is the basis for a claim of ineffective assistance, the defendant must make a strong showing that the damaging evidence would have been suppressed had counsel made the motion. Id.

Here, Defendant has made no showing the State could not obtain another search warrant in Gwinnett County for Defendant's DNA if trial counsel had filed a motion to suppress and successfully had the prior collection of DNA suppressed. Unlike other types of evidence, Defendant's DNA would not change or disappear and the State could obtain a search warrant at any time prior to trial. As such, this Court finds Defendant has failed to meet the first prong of the Strickland test.

Further, reasonable trial strategy cannot support a claim for ineffective assistance of counsel. Wright v. State, 285 Ga. 57, 62, 673 S.E.2d 249, 254 (2009). This Court finds trial counsel's strategy, although not successful, was reasonable and well researched. Trial counsel did not take this evidence lightly but instead conducted

research and consulted experts regarding the best possible way to handle the evidence. Defendant cannot show trial counsel's performance was deficient.

Finally, Defendant has offered no evidence she was harmed by the introduction of this evidence; therefore, he has failed to show the second prong of the Strickland test. As trial counsel testified, the jury knew Defendant lived in the residence and was involved in a romantic relationship with Sadot. Trial counsel created the question that the DNA from Sadot's body and from the knife could have been there before the night in question and through non-criminal means.

Defendant's motion as to this enumeration of error is DENIED.

b. Trial Counsel was not ineffective for failing to present exculpatory and/or impeachment evidence

Defendant next contends "trial counsel was ineffective for failing to present exculpatory and/or impeachment evidence" against Nelson Garcia Ozuna. Defendant contends trial counsel should have further impeached Nelson at trial with statements he made in a prior interview which had been conducted in Spanish.

On August 1, 2004, Sadot's nephew Nelson, who did not speak English, was interviewed by two English speaking investigators. Detective Aguilar, who spoke Spanish, acted as a translator between Nelson and the English speaking investigators by repeating back everything Nelson said to them. The recording of this interview was given to trial counsel in discovery. Rather, than have the entire interview translated, trial counsel gave the interview to a translator and had the translator review whether

Aguilar's translation was correct. (MT2. 105). The interpreter reported back to trial counsel that there were only minor discrepancies. (MT2. 105-106).

Appellate counsel then had the entire interview translated and transcribed for the motion for new trial hearing. Defendant counsel contends trial counsel was ineffective for failing get the interview transcribed and using said transcript to impeach Nelson either during this Court's hearing on whether or not to admit residual hearsay or during Nelson's testimony at trial.

During the interview, when asked "Why did your aunt have problems with Hermanio?" Nelson replied, "Well, I don't know. If only I knew." Defendant contends this statement contradicts Nelson testimony that he and his aunt were close and that his aunt talked to him about her relationship with Defendant.

A claim of ineffective assistance of counsel is judged by whether counsel rendered reasonably effective assistance, not by a standard of errorless counsel or by hindsight." Ellison v. State, 296 Ga. App. 752, 756, 675 S.E.2d 613, 617 (2009). Further, "[t]he scope of cross-examination is grounded in trial tactics and strategy, and will rarely constitute ineffective assistance of counsel." Id.

This Court finds trial counsel performance was not deficient but instead trial counsel did a thorough cross- examination of Nelson. Trial counsel was able to impeach Nelson with his statement that he had not previously told the officers about the threats Defendant made to Sadot. During the hearing on residual hearsay, Nelson testified never told officers that Defendant had threatened Sadot. (TT. 553). However, a day later during cross examination at trial, Nelson testified that had told police that

Defendant threatened Sadot. (TT. 649). Trial counsel impeached Nelson's testimony by having the court reporter read back Nelson's prior testimony. (T. 650).

Trial counsel further cross examined Nelson regarding his lack of memory for certain details of the evening in question. (TT. 648-649). Trial counsel also cross examined Nelson regarding the inconsistencies of his testimony and his statement to the police as to whether Sadot ever hit Defendant with a beer bottle. (TT. 648). Nelson testified at trial he did not see Sadot hit Defendant with a beer bottle the night she died; however, trial counsel crossed examined him regarding the fact that he previously told officers that Sadot did in fact hit Defendant with the bottle. (TT. 648).

Defendant has not shown trial counsel's performance was deficient. Further, trial counsel has not shown Defendant was harmed in any way by further cross examining Nelson regarding the prior statement he made to officers.

Defendant's motion as to this enumeration is DENIED.

All other general grounds for a new trial are furthermore denied.

SO ORDERED, this 10th day of Oct, 2019.

WARREN DAVIS, Judge
Gwinnett Superior Court

FILING AND NOTIFICATION

Pursuant to O.C.G.A. 15-6-21, the foregoing Order/Judgment shall be immediately filed with the Clerk of Court and a "stamped filed" copy shall be transmitted by inter-office mail or mailed by the Clerk, pursuant to the addressed envelopes attached hereto, which were prepared in the regular course of business, to the address currently on file to:

Sam D'Entremont, Assistant District Attorney
Frances Kuo, Attorney for Defendant

This 10th day of October 2019.

Warren Davis, Judge,
Gwinnett Superior Court

APPENDIX C

SUPREME COURT OF GEORGIA
Case No. S20A0780

September 08, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

HERMINIO NICOLAS REYES v. THE STATE.

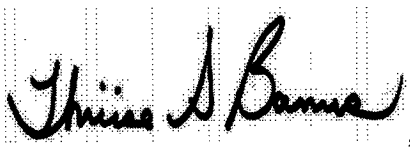
Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.



, Clerk

APPENDIX D

FILED
NOV 14 2016
DAVID H. YAMASAKI
Clerk of the Superior Court
County of Santa Clara
BY DEPUTY

IN THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

CSW 50251

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA
To any Sheriff, Constable, Marshal, Policeman or Peace Officer in the County of Santa Clara:

Proof, by affidavit, having been made before me this day by Lieutenant Edward Restrepo with the Gwinnett County Police Department, Gwinnett County, Georgia that there is probable cause for believing that a thing which tends to show a felony has been committed, described more particularly below will be found on the person described below;

YOU ARE THEREFORE COMMANDED, in the daytime, to make search of the person of **HERMINIO FRANCISCO REYES** described as a Hispanic male adult, born [redacted] being about 5 feet, 5 inches tall, weighing about 250 pounds, having black hair and brown eyes, of the following:

1. A specimen of cells from the inside surface of **HERMINIO FRANCISCO REYES** cheek

And if you find the same or any part thereof, to hold such property in your possession under California Penal Code Section 1536.

Given under my hand this 3 day of November 2016.

JUDGE OF THE SUPERIOR COURT

JUDGE JAVIER ALCALA

IN THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

USW 50251

STATE OF CALIFORNIA }
COUNTY OF SANTA CLARA } ss.

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

Personally appearing before the court this 3 day of November, 2016, I, **Lieutenant Edward Restrepo with the Gwinnett County Police Department, Gwinnett County, Georgia** on oath, make complaint, depose and say that there is just, probable and reasonable cause to believe, and that I do believe, that there is now in the possession of **Herminio Francisco Reyes** described as a Hispanic male adult, born [redacted] being about 5 feet, 5 inches tall, weighing about 250 pounds, having black hair and brown eyes, property described as follows:

1. A specimen of cells from the inside surface of **HERMINIO FRANCISCO REYES'** cheek

I have been employed as a police officer by the Gwinnett County Police Department, Georgia for 19 ½ years. I am currently assigned to the Burglary, Gangs and Motor Vehicle Theft Units as a supervisor. I was assigned to the Homicide Assault Unit as an investigator in 2004 when the case in point was investigated. I have attended multiple training classes to help prepare for investigative work, interviews and interrogations. Training on legal aspects, prosecution, investigative techniques, crime lab and physical evidence, case management, testifying, victim issues and interrogations. During the course of my career, I have participated in the investigations hundreds of criminal cases, including assaults, sexual assaults, robberies, and thefts.

A detailed affidavit containing the information needed to show probable cause will be attached to the application of this search warrant and titled as "Exhibit A".

Though training and experience, I know Criminalists are able to compare DNA extracted from biological materials, including human blood, semen, hair, saliva, skin cells, and other tissues from an unknown source against specimens from a known or other unknown source, and, with great precision, either include or discount the two as having originated from the same individual.

Through training and experience, I know that cells containing DNA can be collected by swabbing the inner surface of a person's cheek with a cotton-tipped swab. This is known as a Buccal [cheek] Cell Swabbing, and is a common technique used in DNA testing. Should the court issue the warrant sought, I ask for authorization to collect a buccal cell swabbing specimen from the individual described above. The sample collected will be submitted to the Georgia Bureau Of Investigations Crime Laboratory to be compared to evidence collected in this case to confirm that there is a match.

I believe that the above-mentioned specimens are lawfully the subjects of a search warrant pursuant to Penal Code Section 1524 as they constitute evidence which tends to show a felony has been committed.

Based upon the above facts, I request that a daytime search warrant be issued with respect to the above person for the seizure of said things, and that the same be held under California Penal Code Section 1536 and disposed of according to law.

Edward Restrepo, AFFIANT

Subscribed and sworn to before me
this 3 day of November 2016.

JUDGE OF THE SUPERIOR COURT
JUDGE JAVIER ALCALA

STATE OF CALIFORNIA – COUNTY OF SANTA CLARA

AFFIDAVIT FOR DNA SAMPLE

(AFFIDAVIT)

CSN 50251

Lieutenant Edward Restrepo swears under oath that the facts expressed by him in the **attached and incorporated statement of probable cause** are true and that based thereon he has probable cause to believe and does believe that the records described below may be lawfully seized pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this search warrant be issued.

STATEMENT OF PROBABLE CAUSE FOR DNA SAMPLE SEARCH WARRANT

My name is **Lieutenant Edward Restrepo** and I am currently employed as a peace officer for the **GWINNETT COUNTY POLICE DEPARTMENT** and have been a peace officer for 19 years. I am presently a **Lieutenant Detective (Officer)** supervising the **Burglary, Gangs and Motor Vehicle Theft Units** and currently assigned to investigate a **HOMICIDE** case that occurred on **Sunday, August 1, 2004** at **503 Amber Drive, Norcross, Gwinnett County, Georgia**. I am requesting a search warrant for a **DNA Sample** from the suspects described on the attached and incorporated Search Warrant and Affidavit. The following facts supporting probable cause to believe the requested DNA sample will tend to show that the particular persons are involved and or have committed a felony in Gwinnett County, Georgia:

PLEASE REFER TO EXHIBIT "A" ATTACHED TO THIS AFFIDAVIT

Based on the facts listed on the aforementioned exhibit, I am requesting **AN ORAL DNA SWAB, MAJOR LATENT CASE FINGERPRINTS AND DETAILED PERSONAL PHOTOGRAPHS OF HERMINIO REYES.**

(Signature of Affiant)

This Statement of Probable Cause document was subscribed and sworn before me on this date of November 3, 2016 in San Jose, California.

Judge of the Superior Court

JUDGE JAVIER ALCALA

Exhibit A

On Sunday, August 1st 2004 at approximately 1300 hours Norcross Police Department received a transferred 911 call from the Gwinnett County Police Department. The caller, Maribel Mejia advised of a domestic fight in progress at 503 Amber Drive, Norcross Georgia. Maribel Mejia advised that the fight was verbal at that time. Maribel Mejia further advised that there was a person dead at the location. Upon arrival the responding Norcross police officers, Hood, Dallepe, and Morgan entered the apartment and in the left rear bedroom was a Hispanic female (mid 40's) who appeared to have severe bleeding and trauma to her head. The female also had a visible laceration to the base of her neck and had no vital signs. The apartment was immediately secured and all occupants were instructed to leave the residence. In speaking with Nelson Garcia and Gabeneo Perez at the location they identified the deceased Hispanic female as Sadot Ozuna who lived in the room with Herminio Reyes (live in boyfriend). Based on the initial findings, there was reasonable probability that Sadot Ozuna was murdered and a search warrant for the residence was secured.

During processing of the victim's bedroom there were a lot of items on the edge of the bed, which seemed to have been placed there after the victim had been murdered. Once those items were removed from the bed a large military style knife was discovered along with a black sheath that lay near the victim's head. The knife's blade had visible blood on it as well as the handle. The knife and sheath were photographed and placed into a cardboard evidence box. The victim was covered by a thick blanket, which hindered examining any other external injuries. Once the blanket was removed the white tank top and bra of the victim had copious amounts of blood on it. A further examination of the victim by the Medical Examiner revealed a large penetrating stab wound to her chest.

While processing of the scene continued, it was learned during interviews that the victim and her boyfriend Herminio Reyes were involved in a domestic dispute in the apartment sometime after midnight. According to the witnesses, the victim, Sadot Ozuna-Carmona struck her boyfriend on the back of the head with a glass bottle, which apparently shattered. The victim then went to her bedroom where she packed some her boyfriend's belongings in luggage and placed them outside of the residence. The victim then proceeded to clean up the shattered glass bottle. Shortly after cleaning up the victim entered her bedroom. The suspect was seen entering the bedroom as well. The suspect exited the bedroom after sometime and said goodbye to the witnesses. The suspect grabbed his luggage and left in his red 1996 Dodge Neon. In the morning several attempts to contact the victim via her cell phone were unsuccessful. The victim's roommates decided to enter her bedroom and discovered her lifeless body. Police were contacted and responded to the residence and immediately secured the scene.

Based on all the initial witness testimonies, physical evidence gathered from the scene, and other circumstantial evidence a warrant for murder was secured against Herminio Reyes. The suspect then fled the area and his whereabouts remained unknown.

On August 3rd, 2004 I constructed a synopsis of my case which was sent to GBI Crime Laboratory requesting the knife used in this killing be examined. My request was to check the murder weapon for DNA Analysis as well as latent prints, which appeared to be present in blood on the handle of the knife. In addition, I requested any other evidence they deemed pertinent be tested for DNA and/or serology.

On July 19th, 2016 nearly twelve years later Lt. S.K. Shaw #609, J.T. Richter #766, with the Homicide-Assault Unit along with Crime scene personnel received an email correspondence detailing that a CODIS (Combined DNA Index System) hit returned to a Herminio F. Reyes Nicolas SID/CII: A36001216, FBI #: 28715XB2, an arrestee from the State of California. The original Georgia Bureau of Investigations / Division of Forensic Sciences was dated 07-10-2016 reference DOFS Case # 2004-1020630. The DNA was retrieved from the original sexual assault kit collected during the autopsy of Carmona Sadot-Ozuna. It was at this time we learned the suspect in our 2004 homicide investigation who had an active warrant for murder had been arrested for the crime of child abuse with corporal injury to a child (felony) which occurred on May 11th, 2016 in San Jose, CA. It was during this time while in San Jose's custody that a DNA sample was retrieved from the suspect (San Jose Booking CEN # 16033895). At some point his DNA profile was entered into CODIS where the GBI in turn received notification. Upon learning of this information Sgt. J.T. Richter made contact with San Jose authorities who provided details of his arrest. Sgt. Richter relayed to them Herminio Nicolas Reyes had an active murder warrant through the Gwinnett County Police Department for the killing of Carmona Sadot-Ozuna. They assured us that they would do everything under their power to track down and apprehend Herminio Nicolas Reyes.

On August 26th, 2016 Herminio Nicolas Reyes was taken into custody by members of the San Jose Police Department without incident. Based on the aforementioned facts dating back to August 1, 2004 to today, I am respectfully requesting a search warrant be granted to collect further evidence into the murder of Carmona Sadot-Ozuna. More specifically, the affiant desires to collect DNA (buccal swabs), major case prints (to include, but not limited to latent palms and fingerprints) and detailed photographs of the suspect.

50251

STATE OF CALIFORNIA – COUNTY OF SANTA CLARA, SW No. ~~50521~~

RETURN TO SEARCH WARRANT

Detective Brian Meeker, being sworn, says that he/she
(Name of Affiant)
conducted a search pursuant to the below described search warrant:
Issuing magistrate: Honorable Javier Alcala
Superior Court, County of Santa Clara
Date of Issuance: November 3rd, 2016
Date of Service: November 4th, 2016
and searched the following location(s), vehicle(s), person(s):

FILED
NOV 14 2016
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of California, County of Santa Clara
By _____ Deputy

The person of Herminio Francisco Reyes-Nicolas by virtue of a search warrant dated November 3rd, 2016, executed by the Honorable Javier Alcala, Judge of the Superior Court of the State of California, Santa Clara County Judicial District, for a specimen of cells from the inside surface of his cheek.

I, **Detective Brian Meeker**, by whom this warrant was executed, do swear that the attached receipt contains a true and detailed account of all the property taken by me under the warrant.

All of the property taken by virtue of said warrant will be retained in custody subject of the order of this Court or of any other court which the offense in respect to which the property or things taken, is triable.

Seized items:

____described in the attached and incorporated inventory.
__X_ described below:

1- **Two swabs from inside of Herminio Francisco Reyes-Nicolas' cheek**

I further swear that this is a true and detailed account of all the property taken by me pursuant to the search warrant, and that pursuant to Penal Code sections 1528 and 1536 this property will be retained in custody, subject to the order of this court or any other court in which the offense in respect to which the seized property is triable.

#3272
(Signature of Affiant)

Sworn to and subscribed before me this 14th **day of** November, 20 16.

JOSE S FRANCO
(Signature of Magistrate)
Judge of the Superior Court, County of Santa Clara

STATE'S EXHIBIT
246