namely, that the defendant and his alleged victims were Caucasian, unlike the prospective jurors stricken. Finally, the court found that the prosecution's explanation was "credible," reflecting, at least implicitly, that it had considered whether the prosecutor's stated reasons were factually supported (see *People v. Elliott*, *supra*, 53 Cal.4th at p. 569; *People v. Mills*, *supra*, 48 Cal.4th at pp. 175–176; *People v. Lenix*, *supra*, 44 Cal.4th at pp. 625–626). The court was not required to do more, at least when, as here, the defense disputed neither the accuracy of the prosecutor's observations nor the sincerity of her explanation.

Moreover, the record shows that the trial court was attentive to the demeanor of prospective jurors and knowledgeable about their questionnaires during jury selection. During the parties' challenges to prospective jurors for cause based on their questionnaire responses, the trial court reviewed the responses and voiced its own thoughts about them. Once, for instance, the trial court remarked that one prospective juror's "later answers appear to equivocate indicating that she could impose L.W.O.P. or death and that she could follow the law," before refusing to excuse that prospective juror for cause. The court was also mindful of the questionnaires when conducting *Hovey* voir dire, explaining that it would allow counsel to "have time to prepare to look at those questionnaires prior to . . . *Hovey*." (Italics added.)

The court further remarked about prospective jurors' demeanors during *Hovey* voir dire. It granted the prosecution's for-cause challenges to several prospective jurors based in part on their demeanor. For example, the court noted Prospective Juror No. 8814's "body action" and "shaking of his head," and observed that Prospective Juror No. 8891 "was highly excited, gesturing wildly." The court also denied the defense's for-cause

challenge to Prospective Juror No. 1599 after viewing "his demeanor and body language" and hearing his answers. These indications in the record support an inference that the trial court had in mind the prospective jurors' demeanor and questionnaire answers when it evaluated the prosecutor's strikes of Prospective Jurors R.T. and T.P.

That said, the trial court certainly "could have done more to make a fuller record." (*People v. Miles* (2020) 9 Cal.5th 513, 540.) For example, the trial court could have explicitly brought to bear its general awareness of questionnaire answers and jurors' demeanors when specifically assessing whether the prosecutor's race-neutral reasons for striking Prospective Jurors R.T. and T.P. were credible. "Advocates and courts both have a role to play in building a record worthy of deference. Advocates should bear in mind the record created by their own questioning — where the court and opposing counsel have failed to elicit panelist responses in a certain area of interest — as well as their explanations for peremptory challenges." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1171.) In particular, when a strike is justified based on information that will not appear on a transcript — a prospective juror's tone, visual indicia of demeanor, and the like — a court's description of what it has observed may aid the task of appellate review. (See, e.g., *Snyder v. Louisiana* (2008) 552 U.S. 472, 479.) "[A] more detailed colloquy" than occurred here may also prove useful. (*Miles*, at p. 540; see, e.g., *People v. Smith*, *supra*, 4 Cal.5th at p. 1158 ["The court engaged actively in the third stage analysis, questioning counsel closely on certain points."].) "Providing an adequate record may prove onerous, particularly when jury selection extends over several days and involves a significant number of potential jurors. It can be difficult to keep all the panelists and their responses

straight. Nevertheless, the obligation to avoid discrimination in jury selection is a pivotal one. It is the duty of courts and counsel to ensure the record is both accurate and adequately developed." (*Gutierrez*, at p. 1172.)

The law, however, does not require a court in all circumstances to articulate and dissect at length the proffered nondiscriminatory reasons for a strike. The record in this case reveals that the trial court made a sincere and reasoned effort to evaluate the justifications proffered, and on that basis, deference is appropriate under our precedent.

For its part, defendant's briefing does not explicitly dispute that the court made a sincere and reasoned effort when evaluating the *Batson/Wheeler* motion. The briefing focuses instead on whether substantial evidence supports the motion's denial. At least one of defendant's arguments, however, is properly understood as bearing on this issue. Specifically, he argues that the court erred by relying on its understanding that "[t]here are no racial issues in this case." That reasoning, defendant continues, "is not race-neutral."

Viewing the court's comment in isolation, we understand the basis for defendant's concern about the trial court's "no racial issues" framing. *Batson* and *Wheeler* "are intended to limit reliance on stereotypes about certain groups in exercising peremptory challenges." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1016.) And stereotypes may infect a lawyer's assessment of a prospective juror regardless of the race of others involved in the trial. (See *Powers v. Ohio* (1991) 499 U.S. 400, 416 ["race prejudice stems from various causes and may manifest itself in different forms"]; see, e.g., *U.S. v. Lee* (8th Cir. 2013) 715 F.3d 215, 221 [discussing "stereotype that 'African-

American jurors are less likely to impose death and are more distrustful of the Government than white jurors' "]; *U.S. v. Kehoe* (8th Cir. 2013) 712 F.3d 1251, 1252 [similar]; cf. *People v. Williams*, *supra*, 56 Cal.4th at p. 652 [trial court: " 'in my other death penalty cases I have found that the Black women are very reluctant to impose the death penalty' "].)

Viewing the court's comment in context, however, no error appears. No doubt, a litigant may raise a *Batson/Wheeler* objection regardless of the race of the defendant or the victim. (See, e.g., *Flowers*, *supra*, 139 S.Ct. at p. 2243; *People v. Mills*, *supra*, 48 Cal.4th at p. 173.) But the trial court evinced no confusion on this point, observing that the lack of so-called "racial issues . . . doesn't necessarily defeat a *Wheeler Batson* motion." Nor did the trial court conclude that a lack of "racial issues" was a race-neutral justification for the prosecutor's strikes. Instead, it appears the court relied on that circumstance as a factor relevant to assessing whether the prosecutor's stated race-neutral reasons were genuine — that is, whether the prosecutor's strikes were in fact motivated by concerns about the prospective jurors' views on the death penalty. This was not error. (See *People v. Bell* (2007) 40 Cal.4th 582, 600 ["that defendant was not a member of any of the actual or assumed cognizable groups involved . . . [is] a factor that, because it is absent, fails in this case to support an inference of discrimination"]; see also, e.g., *People v. Rhoades* (2019) 8 Cal.5th 393, 430; *Hardy*, *supra*, 5 Cal.5th at p. 78; *People v. O'Malley*, *supra*, 62 Cal.4th at pp. 980–981; *People v. Bonilla* (2007) 41 Cal.4th 313, 343–345; *People v. Farnam* (2002) 28 Cal.4th 107, 135–137; *People v. Catlin* (2001) 26 Cal.4th 81, 119; *People v. Howard* (1992) 1 Cal.4th 1132, 1156; *Wheeler*, *supra*, 22 Cal.3d at p. 281.) Accordingly, the trial court's

statement is consistent with our conclusion that the trial court made a reasoned evaluation of the justifications offered.

We turn next to the question whether substantial evidence supports the court's conclusion that neither strike was motivated by discrimination.

b. Substantial evidence supports the trial court's conclusion that the strike of Prospective Juror R.T. was not discriminatory

The prosecutor justified her strike of R.T. (No. 7731) based on R.T.'s perceived reluctance to impose the death penalty. The court's finding that the prosecutor was not motivated by impermissible discrimination is supported by substantial evidence. Although many of R.T.'s answers conveyed that she would be able to impose the death penalty, when asked whether she could announce a death verdict, "looking at the defendant right here and now," R.T. replied, "I really don't know. [¶] I don't know if I'd be comfortable or if I'd be scared. [¶] I don't know." The prosecution also described R.T.'s "body language" as "extremely unreceptive both to the prosecution and the idea of having to impose the death penalty." Although the record does not depict R.T.'s body language, and although demeanor-based justifications may in some cases provide a convenient pretext for discrimination, here, the prosecution's description was uncontroverted. The trial court was in a position to observe not only R.T.'s demeanor, but also the demeanor of the prosecutor herself, whom the court found credible. (Cf. *People v. Williams*, *supra*, 56 Cal.4th at p. 658 ["we do not discount the trial court's ability to assess the credibility of the prosecutor, even absent the trial court's personal recollection of R.P.'s demeanor"].)

Defendant, now for the first time, complains that the prosecutor overstated R.T.'s opposition to the death penalty,

arguing that R.T. did not, as the prosecutor claimed, "express[] extreme difficulty in imposing that death penalty." We acknowledge that this is a somewhat strong characterization of R.T.'s answers, viewed on a cold record. But in context, this statement appears to be based on a combination of R.T.'s words and the description of her demeanor. And those words did not so uniformly indicate comfort with imposing the death penalty that the prosecutor's statement was especially suspicious. (Cf. *People v. Vines* (2011) 51 Cal.4th 830, 850 [evaluating whether prospective juror's answer was "reasonably susceptible of the interpretation the prosecutor placed on it"].) In any event, any somewhat strong characterization of R.T.'s answers, during argument over the *Batson/Wheeler* motion, does not reveal that the stated reason for the strike was pretextual.[2]

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[2] Defendant also argues that the strikes cannot be upheld based on the record the prosecutor made after the motion was denied. As noted, after the court found that the prosecutor was "credible" and that her "observations [were] based on race-neutral reasons that are proper . . . peremptory challenges," the prosecutor asked for permission to "raise this topic again and bring out their questionnaires" "once the jury has been let go." The court later asked the prosecutor whether she wished to augment the record. The prosecutor used that record-making opportunity to describe the pattern of her strikes and to explain some of the factual basis underlying her stated concern about the prospective jurors' views toward the death penalty — not to manufacture a new, unrelated reason that "reeks of afterthought." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 246.) For example, the prosecutor explained, "the People exercised our peremptories in this way: A white female; a white female; an Hispanic female; a [B]lack female; a white female; we passed twice; white female; Hispanic female; passed; white female; Hispanic male; we accepted the panel. [¶] With regard to alternates, it was Hispanic male; African American male;

Defendant also complains that R.T. "was never questioned regarding her 'body language.' " We note the record contains no prohibition preventing defense counsel from stating on the record or otherwise preserving his observations of R.T.'s demeanor. It is enough that R.T. was questioned in the presence of the court and the parties, whom we have no reason to doubt could observe her demeanor. (*People v. Jones*, *supra*, (2011) 51 Cal.4th at p. 367.)

Defendant further contends that "the prosecutor asked [R.T.] only four questions," a count apparently limited to *Hovey* voir dire. It is true that "[u]nder certain circumstances perfunctory voir dire can be indicative of hidden bias" (*People v. Edwards* (2013) 57 Cal.4th 658, 698), particularly when there is a dearth of questioning "on a subject a party asserts it is concerned about" (*People v. Huggins*, *supra*, 38 Cal.4th at p. 234; see also, e.g., *Gutierrez*, *supra*, 2 Cal.5th at pp. 1169–1170). But this consideration is "not particularly probative" in this case. (*Hardy*, *supra*, 5 Cal.5th at p. 83.) In addition to her own questioning, the prosecutor "heard questioning during voir dire by the court and defense counsel." (*Ibid.*; see *People v. Melendez*, *supra*, 2 Cal.5th at p. 19.) That questioning gave the prosecutor an opportunity to observe the demeanor on which the strike was partially based. (*People v. Dement* (2011) 53 Cal.4th 1, 20;

Hispanic male; white male; white male; Hispanic male. I don't know that the record would otherwise have any references to that." It suffices to say that the denial of the motion can be upheld based solely on the explanation initially given by the prosecutor, and that none of the statements made during the prosecutor's record-making opportunity calls that conclusion into question, including the prosecutor's slightly inaccurate claim that R.T. "said she *would* be very uncomfortable and scared to impose the death penalty." (Italics added.)

People v. Clark (2011) 52 Cal.4th 856, 906–907.) Finally, even assuming the prosecutor asked R.T. few questions relative to other prospective jurors (which defendant has not established), the prosecutor focused her inquiry on precisely the reason she gave for the peremptory strike: R.T.'s willingness to impose the death penalty.

Defendant asks us to engage in comparative juror analysis for the first time on appeal. We will do so, but " 'need not consider responses by stricken panelists or seated jurors other than those identified by the defendant.' " (*People v. Smith*, *supra*, 4 Cal.5th at p. 1148; see *People v. Winbush* (2017) 2 Cal.5th 402, 442–443.) We also remain " 'mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable' " (*People v. O'Malley*, *supra*, 62 Cal.4th at p. 976), and consider the probative force of such a comparison "in view of the deference accorded the trial court's ultimate finding of no discriminatory intent" (*People v. Lenix*, *supra*, 44 Cal.4th at p. 624).

With respect to Prospective Juror R.T., defendant's comparative juror analysis is not persuasive. Defendant briefly compares R.T.'s answers on her questionnaire to the answers of other jurors. But the prosecutor claimed to strike R.T. based on her answers and demeanor during voir dire. Moreover, none of the questionnaire answers that defendant identifies is similarly equivocal to R.T.'s voir dire statement that she "really [didn't] know" if she would "be comfortable or if [she'd] be scared" to announce a death verdict. And when asked similar questions during voir dire about their ability to impose a death verdict, the other prospective jurors defendant identifies (Nos. 1267, 1599, 1999, 3466, and 6889) indicated that they could do so. This

bolsters rather than undermines our conclusion that substantial evidence supports the trial court's finding that the strike of R.T. was not motivated by impermissible discrimination.

We do not suggest, of course, that any conceivable degree of hesitation about imposing the death penalty is dispositive of a *Batson/Wheeler* claim. The less substantial a prospective juror's reluctance to impose the death penalty, the more reason there may be to believe that a proffered justification based on that reluctance is pretextual. But the ultimate question is whether a strike was motivated by impermissible discrimination. And on this record, substantial evidence supports the trial court's conclusion that the strike of R.T. was not so motivated.

c. Substantial evidence supports the trial court's conclusion that the strike of Prospective Juror T.P. was not discriminatory

The prosecutor also stated that she struck T.P. based on his reluctance to impose the death penalty, noting a "belie[f]" that "he wrote some extremely strong answers in his questionnaire." Here, too, the trial court's finding of no discrimination is supported by substantial evidence. Although T.P.'s questionnaire answers were not consistently opposed to the death penalty, and although the trial court declined to excuse him for cause, his questionnaire provided the prosecutor with reason to doubt T.P.'s willingness to impose the death penalty. He admitted his view that "God is the only one to give life and take life." And he said that he could *not* see himself "in the appropriate case choosing the death penalty instead of life in prison without the possibility of parole." These questionnaire answers support the court's finding that the prosecutor's stated reason was not a pretext for discrimination. (See, e.g., *People v.*

Winbush, supra, 2 Cal.5th at p. 436; *People v. Blacksher* (2011) 52 Cal.4th 769, 802.)[3]

Defendant argues that because the prosecutor said she *believed* T.P. wrote strong answers in his questionnaire, but did not "know[] what those answers were, the prosecutor . . . could not properly rely on those unknown answers." We disagree. Immediately after defendant objected, the prosecutor conveyed her recollection that T.P. had written strong statements in his questionnaire. In the colloquy that followed, the prosecutor offered to augment her explanations with the questionnaires. Ultimately the court agreed to the augmentation after it denied the motion. The prosecutor's recollection was supported by the record. The prosecutor was not required to have T.P.'s precise answers at the ready, and the fact that she did not casts little doubt on the basis for the trial court's finding.

Defendant further contends that the prosecutor did not ask T.P. many questions. This contention also lacks force. The court and defense counsel combined to ask T.P. more than a dozen questions about his ability to impose the death penalty

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[3] Those answers also provide a basis for the prosecution's somewhat strong statement that T.P. "express[ed] extreme difficulty in imposing the death penalty." We further note that, during voir dire, T.P. conveyed that he did not know whether he could impose the death penalty because he thought "that belongs to a higher authority than myself. I don't think I'm — I should be one to decide a man's life." And when informed by the prosecution that felony murder does not require intent to kill and asked whether he would "absolutely refuse to impose [the] death penalty if you believed the defendant did not intend to kill," T.P. replied, "Right. In that case, I don't think death would be merited if it's unintentional," regardless of any aggravating circumstances.

during *Hovey* voir dire. Even after hearing those questions (and answers), the prosecutor asked five more. She also had the benefit of the "lengthy and detailed questionnaire" she cited to explain the strike. (*Hardy*, *supra*, 5 Cal.5th at p. 83.) As the trial court put it when announcing its intention to give each side only a few minutes to question jurors individually during *Hovey* voir dire, "[y]ou are going to have a pretty lengthy questionnaire, so you won't need to do a lot of oral questioning." Under these circumstances, the lack of further questioning is not illuminating.

Finally, defendant asks us to compare T.P.'s questionnaire answers to the answers of several other jurors. "Although jurors need not be completely identical for a comparison to be probative" (*People v. Winbush*, *supra*, 2 Cal.5th at p. 443), the prospective jurors defendant identifies are too different for his comparison to be persuasive. None of the jurors he identified espoused a view similar to T.P.'s position that "God is the only one to give life and take life," and none conveyed an inability to choose the death penalty in an appropriate case. It is true, as defendant claims, that Prospective Juror No. 1599 stated that his religious organization "do[es] not believe in the death penalty." But immediately below that answer, No. 1599 indicated that he did not share the organization's belief. Defendant's comparative juror analysis thus does not undermine our conclusion that the trial court's finding of no discrimination was supported by substantial evidence.

B. Excusing Jurors Based on Their Views about the Death Penalty

A prospective juror may not be excused for cause based on that person's views about the death penalty unless those views would at least substantially impair the person's ability to

perform a juror's duties. (*People v. Erskine* (2019) 7 Cal.5th 279, 297; see *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Witherspoon v. Illinois* (1968) 391 U.S. 510.) A trial court's decision to excuse a juror based solely on written questionnaire answers is reviewable de novo. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 37.) When a prospective juror is excused following voir dire, however, whether that juror "is substantially impaired is an issue for the trial court's determination." (*Armstrong*, *supra*, 6 Cal.5th at p. 751.) We defer to the trial court's decision so long as the trial court applied the correct legal standard and reached a decision supported by substantial evidence. (See *ibid.*; see also *Erskine*, at pp. 299–300; *People v. Spencer* (2018) 5 Cal.5th 642, 659.)

Defendant argues that the trial court erroneously excused two jurors based on their perceived inability to impose the death penalty: Prospective Jurors U.A. (No. 8814) and J.W. (No. 8891). The thrust of his claim is that the trial court's decisions were not supported by substantial evidence.

A review of the prospective jurors' questionnaires and answers during *Hovey* voir dire reveals that the claim lacks merit. U.A.'s questionnaire generally professed an openness to imposing the death penalty. But when asked about the subject during voir dire, he replied, "I think I put on my questionnaire that I could, but this is the first time I'm in a jury and now I have second thoughts. I'm not sure." And although his answers during voir dire were somewhat equivocal, he made several statements evincing reluctance to impose the death penalty, including "[m]y definite response this time is going to be no, I won't vote for the death penalty." Similarly, when asked, "[c]ould you in fact vote to execute this man *if legally you felt it was an appropriate penalty*? Could you actually do that?," U.A.

replied, "I don't know. I just don't know." (Italics added.) These statements provide substantial evidence supporting the trial court's decision to excuse U.A., which the court made "[a]fter observing [U.A.'s] demeanor, his body action, his shaking of his head."

Prospective Juror J.W. wrote on his questionnaire that he "ha[s] problems with the death penalty." When asked how he might resolve a conflict between his beliefs and the court's instructions, he wrote, "I don't know. I will have a hard time sentencing someone to death even if it means countering the judge." At least a dozen of his other answers evinced similar concern about his ability to vote for death. He later volunteered, before voir dire, that he had "problems with the death penalty" "over and above what I've put in the questionnaire," adding, "[y]ou may want to question me about that." During voir dire, J.W. claimed he could be persuaded to impose the death penalty but could not imagine a specific circumstance in which he would vote for that penalty. (Cf. *People v. Beck & Cruz* (2019) 8 Cal.5th 548, 607 [no error in excusing a prospective juror even though she "offered examples of when she believed the death penalty was appropriate"].) When asked whether he would feel comfortable serving as a juror, he indicated that he was "going to have a hard time with my own feelings of guilt if I start to tend towards the guilty aspect." He did, to be sure, convey that he would follow the court's instructions and consider imposing a death sentence. But the court concluded "he could not be a fair and impartial juror in this case," because "his views would substantially prevent his abilities to follow the law and his oath." Substantial evidence supported this conclusion, which was again based in part on the prospective juror's "demeanor,

his affect." Thus, the excusal for cause of J.W., like U.A., was not error.[4]

C. Unbalanced Treatment of Prospective Jurors

Defendant contends that "the trial court questioned prospective jurors differently and exercised its discretion in ruling on cause challenges differently depending on the prospective jurors' view of the death penalty." He disclaims any argument "that the trial court erroneously denied his challenges for cause."

The complaint about the trial court's questioning was forfeited by a failure to object. (*People v. Pearson* (2013) 56 Cal.4th 393, 417.) Defendant contends trial counsel did object, relying on a comment made during the discussion of whether Prospective Juror U.A. should be excused for cause. Counsel inquired whether he could "make one comment for the

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[4] The trial court also remarked that it was "abundantly clear that" J.W. "is anti death penalty." An individual's general opposition to the death penalty is, of course, not an appropriate basis on which to excuse a prospective juror. (See *People v. Peterson* (2020) 10 Cal.5th 409, 427 ["Long-standing United States Supreme Court precedent makes clear that prospective jurors may not be disqualified from service in a capital case solely because of their general objections to the death penalty"]; *People v. Avila* (2006) 38 Cal.4th 491, 529 ["Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law"].) But the trial court did not excuse J.W. based on general opposition to the death penalty; as noted, the court concluded that J.W.'s views "would substantially prevent his abilities to follow the law and his oath," precluding J.W. from being "a fair and impartial juror in this case." It is the finding of substantial impairment that supports the excusal.

record." When permitted to do so, counsel complained that "by allowing this juror to be excused for cause, what is happening is we are selecting jurors that are only predisposed for death without being given the opportunity to hear all of the evidence." This appears to be an objection to the excusal of a particular juror, not a complaint about the evenhandedness of the court's questioning. Regardless, the claim does not warrant reversal. (See *People v. Champion* (1995) 9 Cal.4th 879, 909 [no reversal when defense permitted to participate in voir dire of prospective jurors and "defendants do not contend that the court erroneously refused to excuse any such jurors for cause"]; see also *People v. Whalen* (2013) 56 Cal.4th 1, 31; see also *id.*, at p. 100 (conc. opn. of Liu, J.).)

Defendant has also forfeited his complaint that the trial court "exercised its discretion in ruling on cause challenges differently depending on the prospective jurors' view of the death penalty." This claim is not that the court erroneously granted the prosecution's challenges for cause. Nor is it that the court erroneously denied the defense's challenges for cause. Instead, the argument is that even if the court reached results that were otherwise within its discretion, it did so in an unfair manner. At bottom, then, this is a claim of bias. (Cf. *People v. Mills*, *supra*, 48 Cal.4th at p. 189 ["judicial misconduct"].) Although defendant objected to the content of some of the court's rulings, he has not identified any instance in which trial counsel raised a bias objection. Indeed, a court may be wrong, even repeatedly, without revealing any partiality. (Cf. *People v. Guerra* (2006) 37 Cal.4th 1067, 1112 ["a trial court's numerous rulings against a party — even when erroneous — do not establish a charge of judicial bias, especially when they are subject to review"].) Accordingly, this aspect of the claim is also

forfeited. (See *Armstrong, supra,* 6 Cal.5th at p. 540; cf. *People v. Johnson* (2018) 6 Cal.5th 541, 592 [declining to reach bias claim when, among other things, defense neither objected on that ground nor "move[d] to disqualify the court on the ground of bias"]; *People v. Buenrostro* (2018) 6 Cal.5th 367, 405 ["Defendant forfeited the claim of bias by failing to raise it during the competency trial"].)[5]

D. Admissibility of Evidence of Uncharged Misconduct

Defendant contends the trial court erred by admitting "an unwarranted amount" of evidence that he had committed uncharged offenses. The core of the argument is that this evidence was so prejudicial that it caused the jury to wrongly convict defendant of raping Palmer — though not quite so prejudicial that it prevented the jury from acquitting him of forcible rape (count 11), sodomy by force (counts 9 and 13), or sexual penetration by foreign object (count 15). (See Evid. Code, § 352 (section 352).) There was no error.

1. Legal background

"[E]vidence of a person's character" is generally inadmissible "when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) That general rule does not "prohibit[] the admission of evidence that a person committed a crime . . . or other act" to prove something other than a person's "disposition to commit such an act." (*Id.*, § 1101, subd. (b).) For example, other-acts evidence may be admissible

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[5] Because defendant has not preserved his claim that the court was biased, we also do not address whether any such bias makes it inappropriate to deferentially review the court's excusal of Prospective Jurors J.W. and U.A.

to prove motive, intent, or that "a defendant in a prosecution for an unlawful sexual act . . . did not reasonably and in good faith believe that the victim consented." (*Ibid.*) The general rule against admission of "so-called 'propensity' or 'disposition' evidence" is also subject to exceptions. (*People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 822 (*Daveggio*).) Evidence Code section 1108 provides an exception to the general rule and permits evidence that a defendant accused of a sexual offense has committed another sexual offense, potentially showing a propensity to do so. (See *id.*, § 1108, subd. (a).) The exception set out in Evidence Code section 1109 applies to certain evidence that a defendant accused of an offense involving domestic violence has committed other domestic violence. (See *id.*, § 1109, subd. (a)(1).) Both sections apply only if the evidence "is not inadmissible pursuant to Section 352." (*Id.*, §§ 1108, subd. (a), 1109, subd. (a)(1)).)

Section 352 is the focus of defendant's argument here. As relevant, that section provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." " ' " ' "Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . The prejudice that section 352 ' "is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." ' " ' " ' " (*Daveggio, supra,* 4 Cal.5th at p. 824.) In the

context of Evidence Code sections 1108 and 1109, a defendant's propensity to commit sexual offenses or domestic violence is not an extraneous factor; it is relevant to the guilt of the accused — and evidence tending to show that propensity has probative value.

Aside from claiming an abuse of discretion under section 352, defendant does not argue that the evidence at issue in this section was inadmissible under Evidence Code sections 1101, 1108, or 1109. He does contend, however, that the admission of propensity evidence under sections 1108 or 1109 is unconstitutional.

2. Constitutionality of admitting propensity evidence

We held in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*) that "the trial court's discretion to exclude propensity evidence under section 352 save[d] [Evidence Code] section 1108 from" a "due process challenge." (*Id.*, at p. 917.) Defendant concedes as much, but asks us to "revisit the issue," observing that he must raise his objection now to preserve the issue for federal review. We see no persuasive reason to revisit *Falsetta* and reject his claim on the merits.[6]

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[6] *Falsetta* concerned Evidence Code section 1108. Defendant has preserved his argument that the admission of propensity evidence under section 1108 denied him due process, as well as his argument that the admission of propensity evidence under Evidence Code section 1109 denied him due process. Defendant makes no serious effort to argue, however, that the admission of propensity evidence under section 1109 is unconstitutional even if we decline to overrule *Falsetta*'s analysis regarding section 1108. We do not reach that additional issue. We do note, however, that the Court of Appeal has rejected the view that section 1109 is distinguishable from

The remaining issue is whether the trial court abused its discretion by declining to exclude evidence under section 352.

3. Claim of undue prejudice

Although defendant's briefing catalogs the evidence admitted at trial, he does not appear to argue that any single piece of evidence was inadmissible. Instead, his claim is that the trial court admitted too much evidence in total, some of which he deems especially prejudicial. We will describe the evidence individually and then analyze it collectively.

a. Michelle W.

Defendant and Michelle W. met telephonically in 1982, when she was 17 years old and he was about 20. (She dialed a wrong number, he answered, and after talking several times they eventually decided to meet.) They moved in together when she was around 18 years old. The relationship became rocky; "there were many anger issues" and problems related to defendant's drinking. At some point in 1983, defendant falsely accused her of "fooling around on him." His voice was raised "and he was angry." He threw a vase, which hit and cut her arm, "and he ripped up a couple of things in the house and then he grabbed me by the throat and started to choke me" with both hands. He also spit in her face and called her stupid and ugly.

Michelle moved out. She was approximately 19 years old at the time, in 1983 or 1984, and moved in with her grandmother for a month or two. At some point in 1984, Michelle and defendant had an argument. Defendant wanted to reconcile.

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section 1108 for due process purposes. (See *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024; *People v. Johnson* (2000) 77 Cal.App.4th 410, 412.)

Michelle had decided to move to Wisconsin, where her parents had moved the year prior, and "had a rental van parked in front of [her] grandmother's house." "[D]uring the time that we were moving things in and out of the van, [defendant] was across the street and he had been stalking, watching." At some point he approached her. He was "visibly upset" and confronted her with a raised voice. At some point, he hit her in the face with his fist, striking her nose and eye. She fell and hit her shoulder on a concrete wall, sustaining a scar. Defendant left; he did not assist her. No one saw the incident, but the scar remained by the time of trial. Michelle did not call the police; she explained that, still then only 19, she was "[s]cared," "ashamed," "humiliated."

Defendant and Michelle encountered each other again (still in 1984, during the moving process) at a hamburger stand. Defendant cornered her in the parking lot by her car, saying something to the effect of " '[w]here do you think you're going? You can't leave me.' " He kept her there for "20 minutes to half an hour, and it was just a standstill with no conversation." When she "finally decided to make a move to [her] car to get out of there . . . he kicked [her]" in the upper thigh. He left after that; she returned to her grandmother's house. She did not call the police, in part because she was scared. She moved to Wisconsin as planned.

Due to the temporal remoteness of these incidents, the probative value of this evidence was perhaps the least significant of all the uncharged evidence admitted at trial. As discussed below, however, the trial court understood this evidence to corroborate a pattern of how defendant treated the women with whom he was intimately involved, and particularly those women who attempted to break off their relationships

with him. (Cf. *People v. McCurdy* (2014) 59 Cal.4th 1063, 1099 [no abuse of discretion in admitting evidence of conduct "around 30 years" before charged offense where it appeared defendant's "sexual interest in young girls persisted despite the long passage of time"].) And the danger of *undue* prejudice associated with these incidents was relatively small.

At some point while in Wisconsin, Michelle called defendant. She testified that she missed him and "was still in love with him." She moved back to California at some point in 1985. After she spent a few months at her grandmother's, she and defendant moved into an apartment together. They married in 1986 and moved to Long Beach.

There were some good times during the relationship. When Michelle and defendant argued, however, he would sometimes get violent. He choked her with both hands at least three or four times. He punched her in the face occasionally; she estimated that occurred about once per year. He struggled with drugs and alcohol throughout. The violence correlated with his drinking.

Defendant and Michelle eventually had a son in 1988. Soon after, in 1989, they moved to Wisconsin, to a town near her parents. In August of 1989, Michelle and defendant went to a tavern. The tavern was empty other than the two of them and the bartender. All three were shooting pool. At some point the bartender bumped into her and her bra became unhooked accidentally. Defendant noticed that her bra had become undone and became "extremely angry," asking whether she was having an affair with the bartender. They went home not long after, stopping on the way so that Michelle, who was drunk,

could throw up. When they arrived, Michelle went upstairs to the bedroom.

Defendant followed her. He had vaginal intercourse with her, against her will, before turning her onto her face on the bed. She tried to move away from him. (She was five feet, three inches tall, and weighed approximately 90 pounds; he was six feet tall and weighed approximately 190 pounds.) At some point she fell onto the floor; when she did, he grabbed her hair and banged her head on the floor at least five times. He then threw her on the bed and sodomized her more than once. After he stopped, he bit her on the leg, back, and arm.

She escaped. She ran to a neighbor's house, and at some point, the police were called. She told an officer what happened, including that defendant said he would kill her if she left the house. Michelle went to a hospital as a result of the attack. She had "several bite marks," a "really bad headache," "and some rips" in her "rectum area." This and photographic evidence tended to corroborate that the attack had occurred.

A criminal case was filed; defendant was arrested; and a restraining order was entered that prevented him from coming to her home. Michelle was scared, however, that if she did not let him back in, "he would torment me more, he would show up at my mom's house, or he'd hurt my mom or my other family and take our son away." At some point she informed a prosecutor that she did not want to pursue the case, and it was dismissed.

Michelle, defendant, and their son moved to Florida in 1990 to obtain employment for defendant. They had a daughter while there. Defendant struggled with alcohol and illegal drugs and spent at least part of 1991 in a rehabilitation center. One day, a neighbor called to let her know that defendant was

nearby, "wondering why he wasn't in the treatment center." She spoke with defendant through the neighbor's phone. Defendant informed her that he left rehab because "[h]e was aware of a relationship [she] was having with [a] radio station D.J.," which, in fact, she was not having. He became angry. After this incident, she finally decided to leave him. She left with her two children and moved in with family in California in April 1991. She and defendant divorced in 1993.

Michelle and the children had their own apartment by 1994. Within a few months of the Northridge earthquake that January, she heard from defendant. He asked to move in with her and the kids in approximately June of that year. She was "scared to say no," but also "thought . . . it would be a good idea to have the kid's father in their lives." She told defendant that "it was not to be a permanent move into the house. It was temporary just so he could have a mailing address for his mail and get on his feet." He moved in that June; she made clear she was dating someone and did not want to have a romantic relationship with defendant.

"The first week or so went well. After that, everything fell apart." An incident occurred at Michelle's home on June 12, 1994, with the children present. Defendant was angry. "He thought I was pursuing a relationship with him or leading him on. Basically, that we were together[,] and I was still dating somebody else." "[J]ealous and enraged," he cornered her and threatened to burn her eye with a lit cigarette. Defendant did not ultimately do so; he left. She called her boyfriend, scared that defendant would return. The boyfriend came over. When defendant returned, he and the boyfriend saw each other and began fighting at defendant's instigation. Defendant grabbed the boyfriend, "picked him up in the air and threw him." He also

took out a knife and cut the boyfriend's ear. "The children were just around the corner watching what was going on."

The police eventually arrived, but by then, defendant had departed. Michelle reported what happened and later obtained a restraining order, which tended to corroborate that this incident occurred. Although there were no additional violent incidents in person, defendant would later call her for money, which she would give him because she "didn't want any trouble." Defendant began to leave her alone around the time he started dating other women.

b. Sandra B.

Sandra B. and defendant met in July 1994 at an A.A. meeting. They became friends and eventually started dating. Within a few months of dating, defendant moved into Sandra's apartment — uninvited, and over her objection. She eventually relented, in part; "It was never no, okay, you can live here. It was like you find a place as soon as you can, you need to get out of here."

Defendant was in the process of moving out on about July 24, 1995. They argued. Defendant pulled a telephone cord out of the wall and told her "what a . . . worthless person I was . . . and, you know, I was going to pay for this and I was going to regret it. And it was really quite a terrorizing situation." She found some cards and letters she had given him torn up and shoved into her toilet.

Roughly a week later, defendant called her, "expressing that he was like depressed or upset about what had happened between us and he asked me if I would give him a ride to an A.A. meeting. And I told him that I had somewhere to go and that after I'd done that I would come and get him." He was "irritated

because I wouldn't drop everything and go get him." When she picked him up and he got in the car, he asked where she had gone. She told him that she had given a ride to a friend whose car needed repair, "[a]nd at that point Mr. Baker got really irritated because it was an ex-boyfriend of mine. And he opened the car door and jumped out into traffic . . . ." Sandra, "really upset," pulled over and looked for him, but could not find him.

Sandra picked up the friend and drove him to the repair shop where his car was waiting. As the friend started to walk toward the mechanics, "Mr. Baker was standing about 50 to 100 feet away and he started yelling at me and my friend." "And he was really angry and he threatened my friend and kind of was going between threatening my friend and demeaning me and telling my friend that . . . he had better watch out because he wasn't gonna tolerate him taking me away from him and that I was Mr. Baker's girlfriend and not his anymore and he didn't like this. And then he even came up at one point and started pounding on the hood of my vehicle," causing damage. The ex-boyfriend, who was a deputy sheriff, eventually deescalated the situation.

Sandra broke off her relationship with defendant completely after the incident, if not before, and attempted to get law enforcement involved. At their suggestion, she sought a restraining order in August or September of 1995. Around that time, defendant "would just show up like at my home, in my laundry room, at my apartment building and places that to the best of my knowledge he would have no way to know I was going to be there, but he would just be there." He would also call her "incessantly. Sometimes he would call me 15 times an hour, just keep calling and calling and calling. . . . He would leave threatening messages and they would be escalating in anger and

aggressiveness and threats." Defendant wanted to get back together; Sandra refused. He did not take the refusal well; his response was "[j]ust anger, degrading me, demeaning me, threatening me, telling me I needed to watch my back, telling me I didn't know what he was capable of, and, you know, to always be ever mindful that he could do things to me that would be detrimental to me." Sandra "was terrorized."

Defendant would also show up to A.A. meetings Sandra attended. "[O]ftentimes he would sit . . . directly next to me and almost . . . lean on me and he would — on one occasion, came in with another individual who was wearing something that belonged to me and they would just sit like right next to me, like, you know, make their presence very apparent, and it was just so uncomfortable." At a meeting on August 31, 1995, he became angry with her. "[W]hen I was coming into the meeting, he was coming out the same door and he asked if he could speak to me and I told him no, just leave me alone, I just want to, you know, work on my recovery. And he had a cup of coffee in his hands and he threw it at me and — toward my upper torso and it hit me on my neck and upper chest, and then he kicked me in my leg." A restraining order was in place at that time, but it permitted defendant to come to the A.A. meetings she attended. After that incident, however, an additional ruling prohibited him from visiting that location.

A criminal case was eventually filed against defendant on her behalf. Even in court, "[w]hen he did show up, . . . he would make rude, denigrating comments toward me, toward my behavior, toward my actions, kind of announcing to the whole room that, you know, I was the problem and he didn't know why he had to even be there." "And he would just remind me that he — you know, that I knew what he was capable of and that

I needed to be very careful because he was capable of doing these things to me." Defendant was eventually convicted. The court in this case took judicial notice that "defendant Paul Baker was convicted on August 1st, 1996, . . . of misdemeanor stalking . . . and misdemeanor criminal threats." Sandra had no contact with defendant for several years after the conviction. The fact that defendant was convicted "weighed heavily in favor of admission" of the related evidence. (*Daveggio*, *supra*, 4 Cal.5th at p. 825.)

c. Lorna T.

The jury found defendant guilty of sodomy by force regarding Lorna T. Lorna T. also testified regarding an uncharged incident in mid-1996, in which defendant stole her debit or credit card and was arrested. The court admitted this evidence under at least Evidence Code section 1101, subdivision (b). During closing argument, the prosecution relied on this act as evidence of "what type of intent the defendant had in his acts towards Judy Palmer, his reasons for entering the apartment." Defendant does not dispute that the evidence was relevant for that purpose. Any danger of undue prejudice, in the context of this case, is trivial.

d. Kathleen S.

The jury found defendant guilty of two counts of sodomy by force and one count of forcible rape regarding Kathleen S. Between the first charged incident (in defendant's van) and the second charged incident (in the garage), Kathleen at some point decided she needed to leave her relationship with defendant.

She told defendant she was leaving him in May 1997. She left the van they were living in and crossed a street. By the time she reached the middle, he ran after her, grabbed her hair or

head, and threw her to the ground. Her head hit the asphalt. Fortuitously, "at that same moment a police car was coming up the street toward her." Two officers exited their vehicle and arrested defendant. He was later convicted of misdemeanor battery. (See Pen. Code, §§ 242, 243, subd. (e).)

At some point after the June 1997 incident in the garage, Kathleen returned to work and rented a room from a couple she knew through church. Defendant — uninvited — came to the home she was renting on August 31, 1997. She "was leaving the house and I saw [defendant] coming toward me and I was trying to hurry up and get into the truck. And I don't know what he was yelling, but he grabbed the antenna as I started to pull away and then he hit the windshield and cracked it." She was "terrified," "afraid he was gonna hurt [her] again." The incident was reported to the police and defendant was eventually convicted of misdemeanor vandalism. Here, too, the convictions "weighed heavily in favor of admission" of the related evidence. (*Daveggio*, *supra*, 4 Cal.5th at p. 825.)

e. Laura M.

The jury acquitted defendant of two counts of sodomy by force regarding Laura M. As defendant summarizes the evidence of uncharged acts, "Laura M. testified that, in 2000, [defendant] threatened her and stranded her in Las Vegas. [Citations.] She testified to three acts of sodomy [citations], whereas only two such acts were charged [citations]. She claimed [defendant] threatened to burn down her house."

The testimony regarding the Las Vegas incident was extremely brief and not inflammatory; in essence, it amounted to defendant threatened her and left her in Las Vegas. The evidence regarding a threat to burn down Laura M.'s house was

also quite succinct. And that evidence was relevant to one of the charged offenses; when asked why she informed the police that she did not want to prosecute, Laura M. explained, "I was afraid because, you know, in the past he had said 'I'm gonna burn your house down.' You know, he was — he could be violent." The third act of sodomy regarded an incident in 2000, close in time to the charged offenses about which Laura M. testified. This testimony also was brief. Laura M. testified that she was in a camper and had been drinking; defendant forced her to have anal sex; and she ran away to a nearby A.A. venue where someone helped her get to a hotel. Cross-examination elicited that she did not call the police or seek medical attention and returned to the camper after one night at the hotel.

f. Theresa T.

Much of the testimony by Theresa T. was relevant to the charged murder, separate and apart from any uncharged act. She first met defendant on about November 6, 2003, at an inexpensive hotel. They spent time together for roughly the next week, during which they used drugs. Defendant at some point disclosed that his last romantic relationship had been with Judy Palmer, whom Theresa knew from a sober living meeting and considered to be "an absolutely incredible lady." Near the beginning of the week Theresa and defendant spent together, around November 7 or 8, defendant went to Palmer's apartment. Palmer was not present. Defendant "used his credit card to get into the apartment and told [Theresa that Palmer] was letting him in because she left the deadbolt unlocked." Defendant retrieved a duffel bag, what seemed to be a toothbrush, and possibly some underwear. He seemed "nervous" and "wanted to get out of there"; they left within five minutes of entering.

Theresa never returned to Palmer's apartment. But she and defendant spent time in a model unit, shown to prospective tenants, in Palmer's building. The model unit was directly below Palmer's. Theresa and defendant also occasionally used drugs in a stairwell within the complex during November 2003.

One morning that month, Theresa and defendant were lying side by side in the model unit. They had had sex consensually approximately once by that point and had made a few other attempts that were frustrated by drug use. Defendant said " 'I want some.' " Theresa was uncomfortable. When she said " 'not now,' " "he forced me over [onto her back] and pinned my shoulders down and he goes 'I want it.' " He was "[d]emanding and forceful." She unzipped her pants "and he had intercourse." Afterwards, she was "[v]ery mad, very disgusted." She never saw him after that night. He called her in December 2003. She told him to lose her number. All of these events occurred close in time to Palmer's April 2004 disappearance.

At some point in April 2004, Theresa became aware that Palmer was missing. Her first thought was "oh my God, Paul." She called homicide detectives at a number she saw on a "missing" poster. She did not disclose the rape until approximately November 20, 2007, thinking, at the time she spoke with detectives around April 2004, that finding Palmer was the priority. She also explained that at the time, she "wasn't really ready to face up to" what had happened.

g. Analysis

The issue is whether the trial court abused its " 'broad discretion' " by not excluding some of this evidence as unduly prejudicial. (*People v. Loy* (2011) 52 Cal.4th 46, 64.) Defendant argues that evidence of spousal abuse is especially prejudicial,

as is evidence of acts for which he had not been convicted and punished. But he does not argue that the probative value of any particular evidence was "substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice" (§ 352), nor does he explain why individually admissible pieces of evidence became inadmissible when viewed as a whole.

Without demonstrating that any individual piece of evidence has probative value substantially outweighed by the danger of undue prejudice, it may be difficult for a defendant to establish that adding pieces of evidence together results in an intolerable danger of undue prejudice. We do not hold, however, that a defendant could *never* show that at some point the unduly prejudicial effect of additional evidence would substantially outweigh that evidence's (perhaps cumulative) probative value. We hold only that defendant has not established an abuse of discretion on this record, considered as a whole.

As *Falsetta* explained, courts "must engage in a careful weighing process under section 352" when admitting propensity evidence. (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Ibid.*)

Before trial, the court carefully considered proffered evidence of uncharged misconduct. The court analyzed "each and every" act under Evidence Code sections 1108, 1109, and 1101, subdivision (b). It then evaluated the evidence under section 352, considering, among other things, the probative value of the testimony (including the remoteness of the incidents), its prejudicial effect, and the burden of mounting a defense. Pursuant to that analysis, the court declined to admit evidence that defendant: (i) surreptitiously followed and photographed a former romantic partner; (ii) recorded, without permission, an act of sexual intercourse between himself and another woman; (iii) entered that woman's home without her permission and at some point banged on her windows; (iv) tapped her phone line; (v) poisoned her cat, nearly killing it; (vi) punched his brother at his (defendant's) wedding for kissing the bride; (vii) fought with the husband of a neighbor with whom he (defendant) was having an affair; (viii) killed a puppy in the presence of his wife and two-year-old son because he was angry with her; and (ix) cut her telephone and electrical lines after they separated.

The court concluded that the uncharged acts it deemed admissible shed light on "defendant's propensity to engage in sexual assaults and domestic violence against Judy Palmer and the other victims named pursuant to Evidence Code 1108 and 1109." As it had earlier explained in ruling on some of the evidence, "defendant has a pattern, a very demonstrable pattern of escalating violence towards women that he's been romantically involved with, tending to control these women, assaulting them physically, and sexually assaulting them particularly when they break up with him or rebuff him. [¶] He has an M.O. of preferring sodomy o[r] wanting to tie up women,

breaking into their apartments, taking their property, and this appears to be a long-standing pattern." "Also," the court added, "the evidence is admissible in many instances to prove the defendant's motive, his intent, his common scheme or plan, lack of consent with regard to the sexual offenses, knowledge and in his attack on Judy Palmer and other named victims in the information. [¶] The court finds that the evidence is material, it's relevant, and its probative value outweighs any prejudicial effect on the defendant."

Regarding that prejudicial effect, the court explained, "I felt that all of the acts that I have admitted are not too inflammatory. They are the same or less serious conduct compared to the actual charged offenses, the murder and . . . all the sexual offenses[,] . . . some with convictions. [¶] I don't see any probability of confusion. I think it can be sufficiently laid out in a clear, understandable manner I think by the prosecution, particularly with the convictions, to show what acts are actually being charged . . . . [¶] I don't see undue consumption of time here. This is going to be a long case. Most of these acts are against already charged victims. They don't appear to be lengthy or complicated or will substantially confuse the jurors or consume an undue [amount] of time based upon the seriousness and the length of the case as it already stands." Regarding the remoteness of some of the acts, the court again stressed the similarity of the pattern of domestic violence and abuse, as well as other corroboration, such as "witnesses, whether there were injuries, whether there were restraining orders, police reports filed, or whether there were convictions sought or obtained."

When additional instances of uncharged misconduct were discussed during trial, the court again paid careful attention to

the probative and prejudicial value of that evidence. The court excluded evidence tending to show that defendant had slashed a woman's tires; potentially sodomized Laura M. on two other occasions; and burned down the shed in which Kathleen S. and two others were staying. And the court "certainly will not let in the racial slurs."

The trial court's decision to admit evidence of uncharged acts was bolstered by Palmer's death. "[T]he case for admission of propensity evidence 'is especially compelling' where, as here, '[a] sexual assault victim was killed and cannot testify.' " (*Daveggio*, *supra*, 4 Cal.5th at p. 824.) That principle applies with additional force in this case: the extensive decomposition of Palmer's body inhibited the search for physical evidence of sexual assault and cause of death.

To demonstrate error, defendant must show that the trial court abused its discretion when it did not exclude some unspecified portion of this evidence as having probative value "*substantially* outweighed by the probability that its admission will . . . create *substantial* danger of *undue* prejudice." (§ 352, italics added.) The claim is slippery. Defendant does not identify particular evidence that he thinks should have been excluded under section 352. He does not posit a point at which the evidence crossed the line between acceptable and excessive. And he does not appear to argue that the evidence should have been excluded as confusing or unduly consumptive of time — only that, in the aggregate, it was unduly prejudicial. True, defendant argues that the evidence was significant. But to say that evidence was significant is not enough; as noted, " ' " ' "[e]vidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The

ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice." ' " ' " (*Daveggio*, *supra*, 4 Cal.5th at p. 824.)

It is apparent that the trial court painstakingly reviewed the proffered other-acts evidence and considered whether evidence should be excluded under section 352, as *Falsetta* requires. We conclude that, viewing the other-acts evidence as a whole, the trial court did not abuse its discretion by declining to exclude pieces of evidence based on the collective significance of that evidence. The trial court could have reasonably decided to further limit the other-acts testimony it admitted. But we cannot say that the trial court abused its discretion on this record, in the face of the precise claim of error now raised.

This conclusion makes it unnecessary to decide whether defendant, who at least perfunctorily objected to individual pieces of evidence (for example, "We'd object and submit"), raised an objection of this type below.

E. Admissibility of DNA Evidence

Defendant claims the trial court erred by admitting evidence of DNA testing performed by analysts who were not called as witnesses at trial and, thus, were not subject to cross examination. That evidence included the testimony of Dr. Rick Staub regarding the analysts' testing and reports prepared by the analysts themselves. The focus of the claim is *Crawford v. Washington* (2004) 541 U.S. 36, in which the high court held, as relevant, "that the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses." (*People v. Sanchez* (2016) 63 Cal.4th 665, 670.) Defendant also contends that the reports were not admissible as business records. We assume