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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PATRICK PAUL PRINCE, Defendant and Appellant.	F045053 (Super. Ct. No. KF002549A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Clarence Westra, Jr., Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Enic Camps, Louis M. Vasquez and Brian Alvarez, Deputy Attorneys General, for Appellant and Respondent.

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On September 5, 2003, an information was filed in Kern County Superior Court, charging appellant Patrick Paul Prince with various offenses involving five victims:

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the Facts and parts IA, IC, II, III & IV of the Discussion.

- ***B.S., counts 1-3***: residential burglary (Pen. Code, § 460, subd. (a); count 1), attempted commission of a lewd or lascivious act on a child under 14 (*id*., §§ 288, subd. (a), 664; count 2), and assault with a deadly weapon (*id*., § 245, subd. (a)(1); count 3). As to counts 1 and 2, it was further alleged that appellant personally used a knife in commission of the offenses (*id*., § 12022, subd. (b)(1)).

- ***J.G., counts 4-5***: residential burglary (Pen. Code, § 460, subd. (a); count 4), and forcible penetration by a foreign object (*id*., § 289, subd. (a); count 5). As to count 4, it was further alleged that appellant personally used a knife in commission of the offense (*id*., § 12022, subd. (b)(1)). As to count 5, it was further alleged that appellant committed the offense during commission of a residential burglary (*id*., § 667.61, subds. (d)(4), (e)(2)), used a deadly weapon or a firearm (*id*., § 667.61, subd. (e)(4)), committed a specified offense against more than one victim (*id*., § 667.61, subd. (e)(5)), and personally used a knife in commission of the offense (*id*., § 12022.3, subd. (a)).

- ***S.C., counts 6-8***: residential burglary (Pen. Code, § 460, subd. (a); count 6), assault with a deadly weapon (*id*., § 245, subd. (a)(1); count 7), and sexual battery (*id*., § 243.4, subd. (a); count 8). As to counts 6 and 8, it was further alleged that appellant personally used an ice pick in commission of the offenses (*id*., § 12022, subd. (b)(1)).

- ***K.S., counts 9-10***: residential burglary (Pen. Code, § 460, subd. (a); count 9), and commission of a forcible lewd or lascivious act on a child under 14 (*id*., § 288, subd. (b)(1); count 10). As to count 9, it was further alleged that appellant personally used a firearm in commission of the offense (*id*., § 12022.5, subd. (a)). As to count 10, it was further alleged that appellant personally used a firearm during commission of a burglary (*id*., § 12022.53, subd. (b)), committed the offense during commission of a residential burglary (*id*., § 667.61, subds. (d)(4), (e)(2)), and used a deadly weapon or a firearm (*id*., § 667.61, subd. (e)(4)).

- ***E.K., counts 11-12***: residential burglary (Pen. Code, § 460, subd. (a); count 11), and commission of a forcible lewd or lascivious act on a child under 14 (*id*., § 288, subd.

(b)(1); count 12). As to count 12, it was further alleged that appellant committed the offense during commission of a residential burglary (*id*., § 667.61, subds. (d)(4), (e)(2)), and committed a specified offense against more than one victim (*id*., § 667.61, subd. (e)(5)).

Appellant pled not guilty and denied the special allegations. Following a jury trial, he was convicted as charged and all special allegations were found to be true. His motion for a new trial was denied, and he was sentenced to prison for a total unstayed term of 75 years to life plus 23 years 4 months, and ordered to pay various fines, fees, and restitution. He now appeals, raising claims of trial and sentencing error.

In the published portion of this opinion, we will clarify, and reaffirm, our opinions in *People v. Pizarro* (1992) 10 Cal.App.4th 57 (*Pizarro I*) and *People v. Pizarro* (2003) 110 Cal.App.4th 530 (*Pizarro II*). In so doing, we will reject appellant's claim of insufficient evidence. In the unpublished portion of the opinion, we will conclude that the convictions on counts 11 and 12 must be reversed and the matter remanded for further proceedings, but we will reject appellant's remaining contentions.

FACTS[*]

On the night of October 26-27, 2001, E.K., then 10 years old, lived with her mother and older sister in Wofford Heights. E.K. had her own bedroom in the family's residence.

E.K. awakened at 2:00 a.m. to find a man crouching beside her bed. He was wearing a black pullover sweatshirt and black windbreaker pants, and what looked like a ski mask. In addition, he had a yellow flashlight.[1]

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[*] See footnote, *ante*, page 1.

[1] The flashlight itself was yellow. As the man never turned it on, E.K. never saw the color of the light.

When E.K. screamed, the man covered her mouth and told her not to talk or he would hurt her family. She did not recognize his voice. The man said he would only be there five minutes, then told her to pull down the sweat pants in which she had slept. When she did not comply, he pulled down her pants and underwear. He then touched her crotch and the inside of her thigh. His hands felt cold, but she did not feel gloves. When she kept looking at his eyes and telling him to go away, he put a pillow over her head and threatened to strangle her.

The intruder apparently heard something, because he got up. E.K. also rose and pulled up her pants. When the man put his hand over her mouth, she bit it. He said something, then jumped out of her window. E.K. ran into the living room, then heard her mother returning home from an evening out.

E.K.'s mother arrived home to find the back door, which apparently had been accidentally left unlocked that evening, standing wide open. E.K. came running out of her bedroom, screaming, "mommy, run, get out, he has a knife and he'll kill you." E.K. related that a man with a knife was in her room. When her mother went to investigate, she found that the window next to E.K.'s bed was open and the screen was out of it. When E.K.'s mother had left the residence, the window had been closed and the screen intact.[2] E.K.'s mother looked out of the window, but was unable to see anything because

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[2] The window was 38 inches tall and approximately 9 inches wide. E.K.'s mother testified that she once climbed through it, although it was "a little tight." According to Deputy Stephens, however, E.K.'s mother said she could get her upper body through, but not her waist area. Stephens, who was approximately five feet seven and one-half inches tall and weighed 185 pounds, could not get through the window. At the time of Stephens's May 2003 contact with appellant, appellant stood five feet nine inches tall and weighed 240 pounds. Deputy Stratton, who had been acquainted with appellant since the mid-1990's, estimated his weight in 2001 as approximately 155 to 160 pounds. When Sheryl Study met appellant in April 2002, he weighed over 200 pounds. During their time together, he smoked at least a pack of cigarettes a day, and he smelled of smoke. Stratton asked the victims whether they smelled anything unusual about the intruder during the attacks. None reported that the person smelled of cigarettes or smoke.

it was dark. There was a motion-activated light on a nearby shed that had not come on; however, it would have been possible for someone to leave the house without activating the light.

Approximately six months to a year before this incident, E.K.'s mother had contact with appellant on one occasion, when she asked him not to drive through the yard on his motorcycle as he had done several times. His parents lived up Old State Road, which ran past her house.

On December 2, 2001, K.S., then 12 years old, lived in Wofford Heights with her mother and siblings. It was not their habit to lock their doors at night. K.S. had her own bedroom, which was the room closest to the back door. That door opened toward Old State Road, which was right behind the house. The window in K.S.'s room was visible from the road.

K.S. awakened in the early morning hours when a man put a hand over her mouth and got on top of her, straddling her. He told her not to scream or he would hurt her and her family. He said he had a gun, and he put it on her hand so she could feel it. She could also feel that he was wearing latex gloves. He was not carrying a flashlight. When K.S. asked who he was, he said he was a robber. He was wearing a mask that felt like a kind of beanie or ski mask, as well as jeans and long sleeves. K.S. could not recall anything about their color, although the man's jacket felt like it was flannel.

The man unzipped a little pouch, which K.S. believed was on his belt loop, and put duct tape over her mouth. She removed the tape and asked him what he was taking. He did not answer, but instead grabbed at her pajama pants to pull them down. When K.S. told him no and "quivered," the man asked, "are you going to get all stupid and cry on me now?" When she said no, he put down the gun and started to look for the duct tape that she had removed. K.S. grabbed the gun and shot it once. The man got up and she fired another shot. He ripped the gun from her hands, scratching her thumb, then called her a stupid bitch and ran out the back door.

K.S.'s brother was watching television in the living room with a friend when they heard two loud bangs. What sounded like an adult male voice then yelled, "you stupid bitch." The boys heard the back door slam, but no sounds of a vehicle leaving. None of the dogs (several of which were inside and one which was on the front porch) made any noise.

K.S.'s mother awakened to find K.S. standing next to her bed, crying hysterically and screaming that someone had tried to rape her. When K.S.'s mother said K.S. was dreaming, the girl said no, that she had shot at the man. K.S.'s mother went to K.S.'s bedroom, where she could smell gun powder. She found a bullet hole in the wall behind the door. When deputies responded, they found a .22-caliber magnum round lodged in the wall and burn marks on the sheets on K.S.'s bed. They were unable to find a second bullet.

Two days later, Vicki Cawein, who lived on the next street up from K.S., reported to police that she had seen Anthony Kyt heading toward a particular house (not K.S.'s) at night. Kyt, who was perhaps five feet five inches tall, was wearing dark clothes and a cap. As a result, sheriff's deputies searched Kyt's bedroom and seized a ski mask, a black long-sleeved shirt, a pair of black shiny pants, and a pair of lady's panties. Although K.S. told officers that she had underwear missing, the panties found in Kyt's bedroom were not hers, nor did E.K. recognize them. When a tape-recording of Kyt's voice was played for K.S., she said it was not close to the voice she recalled. The tape was also played for E.K., who said it sounded close, but she was not sure.

K.S.'s mother kept her horses at the property of appellant's parents. She did not believe she had seen appellant before this incident. Appellant was a friend of the father of one of K.S.'s friends, and appellant once gave K.S. a ride home. He dropped her off on the back road, which was close to her bedroom. K.S. first saw appellant at her friend's house some time – possibly six months – after the incident.

On October 27, 2002, S.C., then 16 years old, lived in Wofford Heights with her mother and siblings. Around 4:00 or 5:00 that morning, she was asleep in her own bedroom when she awakened to find a man in the windowsill by her bed. When she reached out to see if he was real, he came down on top of her and told her to shut up and not to scream. He was wearing a brown mask that covered his entire face, and a big jacket which S.C. thought had a hood because she could not see any part of the man's face, neck, or hair. He was carrying an ice pick and a small flashlight with a red lens light. He was also wearing dark gloves. They were thick, like snow gloves. When S.C. struggled with him, he cut her neck and lip with the ice pick. He kept telling her to shut up and threatened to kill her if she screamed. She did not recognize his voice, nor did she know appellant.

S.C. stopped struggling. At some point, the man touched her breasts. At his command, she turned over onto her stomach and pulled down her pajama pants and underwear. He wanted to look at her bottom, and he grabbed her buttocks and pulled them apart. He looked at her bottom for five or ten minutes, then took her underwear. He threatened to come back and kill her if she told. He also told her to keep the board in her windowsill.[3] He then left by climbing back through the window.

Although S.C. reported the incident to her mother that night, they did not call the police for several hours because S.C. was afraid the man would come back if he saw any police cars. S.C. described her assailant to Deputy Stratton as being five feet six to seven inches tall. Based on the sound of the person's voice, she estimated he was in his 20's. She also said the mask was brown.

On May 28, 2003, J.G., then in her mid-30s, lived in Wofford Heights with her boyfriend. It was not her habit to lock her doors at night. Between 4:00 and 4:30 that

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[3] S.C. usually put a board in her window to keep it closed, but it had fallen down. Without the board in the window, the window could be opened from the outside.

morning, she was home alone, sleeping, when she was awakened by someone entering the front door of her residence. At first she thought it was her boyfriend; when the person came into the bedroom, however, she realized it was someone wearing a mask like from the movie "Scream." She could see his eyes; they were lighter-colored than the mask. The person was wearing dark clothing and dark-colored gloves. In his hand was a flashlight. The lens was round and bigger than that of a normal flashlight, and it shone red.

The man said he was not going to hurt her, then told her to pull the covers down. When J.G., who had been sleeping in her underwear, complied, the man got closer, and took the flashlight and looked at her. He then had her turn over onto her stomach. About this time, she realized he was carrying a knife. He had her pull down her underwear, then turned his flashlight back on and got close and looked at her. Next, he turned off his flashlight and told her to put her hands down there so he could see better. He told her to "spread it wide, open," then turned the flashlight back on and took a very close look. He had her put her fingers inside her vagina. The man then told J.G. to lean over the side of the bed. Because she was crying, he kept telling her to be quiet, that he would not hurt her. His voice was a monotone and he seemed very calm. J.G. was starting to comply with his demand when her boyfriend drove up. Her assailant left the way he had entered.

J.G. did not report the assault at first, as she was embarrassed. When she heard a week later that it had happened to B.S., however, she went to the police.

J.G. was acquainted with appellant, who was her boyfriend's friend, and had known him for approximately a year before the incident. Appellant had been to their house on several occasions. When the attack happened, J.G. had no suspicion that appellant was her assailant. She did not recognize her attacker's voice as that of appellant. In addition, appellant was almost as tall as her boyfriend, whereas her attacker was a full head shorter than her boyfriend. When J.G. initially reported the attack to the police, she told them that she thought her assailant was her landlord, Larry Speight.

Speight lived near her home and was the same height as the attacker, and, because it sounded as if the attacker was disguising his voice with sort of a monotone, she believed Speight could possibly make his voice resemble the attacker's voice. In addition, Speight had made some remarks that made her wonder whether he was the attacker, and she had heard things about his past that concerned her.[4] J.G. was also acquainted with Everett Dill, who moved in next door to her a night or two after the attack.

On June 3, 2003, B.S., then 12 years old, was living in Wofford Heights with her grandparents. Around 3:30 that morning, she was asleep in her own bedroom when she awakened to find a man standing by her bed. He was wearing a Halloween mask that was green and had red material in the eyes. The back had a black thing that went all the way over the man's head. He was also wearing jeans with a black or dark blue sweater, and latex gloves. He did not have any kind of light that B.S. saw, although there was a lava lamp on in her room.

The man put his hand over her mouth without saying anything, then brought a pocket knife, with a two- to three-inch blade, down to her head. She began to scream and pushed his arms away, and she tried to pull off the mask. She heard her grandfather yell "hey," then the man started to run toward the back door.

B.S.'s grandparents were awakened by her screams. As her grandfather came into the hall, he saw a dark figure come out of B.S.'s room. The person, who appeared to be fairly heavy-set, ran out the back door. B.S.'s grandfather chased him, but did not see anyone once he got outside. He did not hear any vehicles leave the area. The doors to the residence were locked, although there was a key hidden by the garage.

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[4] Speight was outside J.G.'s home when Kristine Howard arrived to take J.G. to report the attack. Speight asked Howard to tell J.G. that he was sorry and that he would never do anything to hurt her. There had been some sort of dispute between Speight (who owned the trailer park) and J.G., who apparently had been asked to leave the property.

B.S.'s grandmother reported the incident to the sheriff's department. Before officers arrived, the woman found what she thought was a rose petal on the floor in an area by which someone leaving B.S.'s room would have to pass. She set it on the table, but did not call it to the officers' attention. Later, she looked at the item more carefully and realized it appeared to be a piece of latex. There were no latex gloves in the home, and so she reported her discovery to the authorities.

B.S. initially told Deputy Stratton that the man was wearing black leather gloves. According to her, she decided the gloves were latex after her grandmother found the piece of latex. According to Stratton, B.S. was unsure of the kind of gloves, but mentioned that they could be latex, which she described as smelling like what doctors wear. When Stratton had her look at latex gloves in a dark room with a red light shining on them, she said they looked similar. She also said they felt similar to those worn by the intruder.

B.S.'s mother, who was incarcerated at the time of the attack, had known appellant for years. B.S. also was acquainted with him. Appellant knew B.S.'s mother was going to be incarcerated and he had been to the grandparents' house on one occasion, although before B.S. began living there. B.S.'s mother also knew Everett Dill, who had seen B.S. at some point, but did not know she would be staying at her grandparents' house. B.S.'s mother had seen a "Scream" mask at Dill's house.

On June 8, 2003, Laura Biagi-Gilchrist reported to authorities that she had found various items on her property in Wofford Heights. The property was mostly wooded and had a creek running through it. A nearby gate, which generally was kept locked, was open. Less than a week earlier, Biagi-Gilchrist's dogs were barking and "just going crazy" between 3:00 and 6:00 a.m. She herself had not been to the back part of her property in at least a month because it was so full of poison oak. The area in which the items were found was very secluded and remote, and trees provided a natural shelter from

view. John Gilchrist had seen appellant on the property in the past, although not within the previous couple of years.

Deputy Newell seized a rolled-up mask made of black cloth and with a green face, a blue bandanna, and a green flashlight with a red lens that would be worn on the head. He did not see any latex gloves. On June 14, however, Deputy Stratton, who had not been at the property initially, asked Biagi-Gilchrist to show him where the items were found. A few feet away was a latex glove with a hole in it.[5] Only fragments of fingerprints, which were insufficient for comparison, were found on the glove. No fingerprints were found on the flashlight.

Stratton had S.C. look at the items found on the Biagi-Gilchrist property. She said the flashlight was similar to the one her assailant used, in that it had a red lens and was about the same size, but she could not recall whether the shape was similar. She never heard the flashlight being turned on or off. The mask was very similar to that worn by the man. It looked like an old man's face, and had wrinkles and a bump in the same place. When Stratton shined the red light on the mask, it appeared brown. When S.C. was shown the mask in the darkness, illuminated by the red flashlight, she gasped, jumped back, started to quiver, and became frightened.

Stratton also showed the items to J.G. She felt it was "real likely" that the flashlight was the one carried by her attacker, especially after she heard Stratton turn it on and off. Although she conceded at trial that she probably would not be able to tell the difference, by sound, between one sliding flashlight switch and another, she told Stratton that, on a scale of one to ten, with ten being most accurate, the flashlight was a ten. The flashlight Stratton showed her had a strap, however, which she did not see at the time of

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[5] A feed sack that Biagi-Gilchrist initially noticed in the vicinity apparently had blown away.

the assault. The only part of the flashlight she saw then was the lens. The mask Stratton showed her was not the one her assailant used.

In her initial interview with authorities, B.S. described her attacker's mask as being black or gray. When Stratton first showed her the mask found on the Biagi-Gilchrist property, B.S. said it did not look the same as that worn by her assailant. However, when he showed her the mask under the conditions of the attack – in her bedroom with the lights off and the lava lamp on – B.S. said the mask was similar to that worn by the intruder. She said the color and hood or black fabric part were the same as she remembered. At trial, B.S. identified the mask as the one worn by her assailant. !

Brenda Smith, a supervising criminalist for the Kern County Regional Crime Laboratory, performed DNA analysis in this case using the short tandem repeat typing method. She examined the bandanna, mask, and latex glove found on the Biagi-Gilchrist property; and the small piece of latex, found by B.S.'s grandmother, that matched the hole in that glove. She also received known reference samples of Michael Prince (appellant's brother), David Coffee, Lawrence Speight, Everett Dill, and appellant.[6]

Smith was able to obtain DNA profiles from the mouth material of the mask and from fuzz she scraped from the bandanna. She obtained a partial profile from the piece of latex.[7] She found a DNA mixture from more than one person – possibly a male and a female – on the latex piece. A comparison of that DNA profile to those of appellant, Michael Prince, and Everett Dill eliminated all three as possible contributors of that

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[6] Each man consented to giving Stratton a buccal swab for purposes of DNA analysis. Dill, Speight, and Coffee were relieved to participate. When Stratton explained to appellant what he was investigating and asked if he would be willing to help, however, appellant's face turned white and he started sweating profusely.

[7] There was no way to tell how long the DNA had been on the items or how it got there.

DNA. With respect to the bandanna and the mask, Dill and Michael Prince were eliminated as possible contributors of the DNA, but appellant could not be eliminated.

Smith next undertook statistical calculations to determine the frequency of appellant's DNA profile in the population. To do so, she looked at two alternative possibilities: either appellant was a source of the DNA that she recovered from the mask and bandanna, or the source of that DNA was some unknown, unrelated male with the same DNA profile as appellant. Smith determined that for the Caucasian population, the DNA profile obtained from the items was approximately 1.9 trillion times more likely to match appellant's DNA profile if appellant was the contributor of the DNA rather than some unknown, unrelated individual; for the Hispanic population, 2.6 trillion times more likely; and for the African-American population, approximately 9.1 trillion times more likely.[8]

After Deputy Stratton received information of the DNA match to appellant, he obtained a search warrant for appellant's residence, which was fairly near the victims' homes.[9] Among the items found inside the residence were a Halloween mask; a black jogging outfit, made of windbreaker material and with a hood; a hooded black or navy blue sweatshirt-type jacket; various types of gloves; cut-out blue and green plastic materials; a flashlight with a blue cut-out lens; a knife with an oval handle; a brown ski

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8 Once Smith obtained a match and determined this likelihood, there was no need to test the additional known samples of Coffee and Speight.

9 According to Sheryl Study, she and appellant moved into the residence in April 2003. Prior to that, beginning in April 2002, they lived at the home of Study's mother in Kelso Valley. Kelso Valley is at the opposite end of Lake Isabella from Wofford Heights and, according to Deputy Stratton, a 15- to 20-mile walk from the victims' homes. Before April 2002, appellant lived in Bakersfield. According to Study, she and appellant were together at the Kelso Valley residence from sometime on October 26, 2002, until noon or later on October 27 (the day of S.C.'s attack). Study remembered the day because she and appellant had dropped her mother off at the airport, and were celebrating being alone.

beanie; duct tape with blue plastic film; an ice pick with a round handle; latex gloves; and a blue knit beanie.[10] In a tool box in the back of a blue Chevrolet pickup truck parked on the property, officers found a cylinder to a .22 magnum revolver. Appellant said the gun it belonged to had been stolen.[11] Appellant's father provided Deputy Stephens with his own .22 magnum revolver and some ammunition for the gun. The ammunition was slightly different than the bullet found following the attack on K.S. The gun could neither be eliminated nor confirmed as the weapon which fired the bullet found in K.S.'s wall. While the cylinder found in the pickup was compatible with the gun, there was no way to determine whether the bullet was ever fired through that cylinder.

Stratton had the victims view the items seized during the search. E.K. was unable to identify anything. K.S. identified, by the sound of its zipper, the pouch from which her assailant obtained the duct tape he used on her. There were latex gloves in the pouch she identified.[12] One of the masks seized from appellant's residence was a ski mask. Although K.S. could not say whether it was the one her assailant wore, it was made of the same material. S.C. believed a jacket seized from the residence could have been the one her assailant wore, as it was "kind of poofy and kinda the same material." She also

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[10] On May 20, 2003, before a suspect was developed in the attacks, Deputy Stephens had contact with Sheryl Study, who was driving appellant's car. Among the items found in the vehicle were a flashlight with a green lens, and some latex gloves. Appellant admitted to Stephens that the items belonged to him, and that he had the flashlight so he could walk around at night without being seen.

[11] Sometime between 12 and 15 years prior to trial, appellant's father gave a .22 magnum revolver to appellant's brother, Michael. Michael was living in Wofford Heights at the time, probably with appellant. Appellant's father had not seen the gun since.

[12] According to Sheryl Study, she had the pouch, which was meant to go on the handle bars of a bicycle, at her mother's house for years. It was not taken to the residence that was searched until April 2003, and appellant did not have access to it until he moved into her mother's house in April 2002.

selected an ice pick that was seized from a pickup on appellant's property, although she was hesitant about identifying it because she did not actually see the weapon during the attack, but instead felt the tip when it touched her. J.G. believed one of the knives was the one used by her attacker; the unusual handle and the blade looked the same. B.S. was not shown any of the items, as she was out of town. However, although no folding knife such as she described was found in the search, appellant had one in his pocket at the time Stratton obtained a buccal swab from him.

DISCUSSION

I

SUFFICIENCY OF THE EVIDENCE

A. Applicable Principles[*]

Appellant challenges the sufficiency of the evidence to sustain his convictions on all counts. The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson*, *supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). Furthermore, an appellate court can only reject evidence accepted by the trier of fact when the evidence is inherently improbable and impossible of belief.

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[*] See footnote, *ante*, page 1.

(*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) "Where the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

B. <u>The DNA Evidence With Respect to the Counts Involving B.S. and S.C.</u>

The identity of the perpetrator was the main issue as to all counts. Appellant was linked to the crimes committed against B.S. and S.C. when DNA matching his was found on a mask that each girl identified as having been worn by her attacker. The prosecution's theory of the case was that the DNA evidence established appellant as the perpetrator of the offenses against B.S. and S.C., and the other charged offenses bore sufficient similarities to each other and to the crimes committed against B.S. and S.C., so as to establish that the same perpetrator was responsible for all of the crimes. Appellant claims that, because the People failed to support the DNA match evidence with a relevant statistical analysis, the match evidence did nothing more than establish appellant's identity as a possible perpetrator; hence, the evidence was insufficient to support the convictions.

In our view, the case thus presents this fundamental question: Is the frequency with which a genetic (DNA) profile occurs in the defendant's racial/ethnic group admissible to establish that the defendant is the perpetrator, where the evidence does not support a finding of preliminary fact that the perpetrator belongs to the same racial/ethnic group? As we will explain in detail, *post*, we conclude that profile frequency evidence cannot be used to prove the defendant is the perpetrator if based on the assumption that the perpetrator and the defendant belong to the same ethnic group because the defendant is part of that ethnic group. The probative value (hence, the relevancy) of a profile's frequency in an ethnic population depends on proof that the perpetrator belongs to that

ethnic group. However, we also conclude that, for purposes of Evidence Code section 403, the preliminary fact determination of the perpetrator's ethnicity may be established by evidence sufficient to support the conclusion that the defendant and the perpetrator likely belong to the same ethnic group (e.g., a witness identifies the perpetrator as African-American and the defendant is African-American) or evidence sufficient to support the conclusion that the defendant likely *is* the perpetrator and hence the defendant's ethnic group appropriately may be utilized to determine profile probability/frequency regarding the perpetrator.[13] Either course of reasoning (perpetrator identified as belonging to an ethnic group or likelihood defendant is the perpetrator) results in the utilization of an ethnic database and resultant statistical evidence that increase the reliability of the ultimate conclusion that defendant *is* the perpetrator.

We explain our reasoning first by revisiting our decisions in *Pizarro I*, *supra*, 10 Cal.App.4th 57 and *Pizarro II*, *supra*, 110 Cal.App.4th 530. In *Pizarro I*, DNA evidence was admitted against the defendant at trial. We reversed and remanded for a full evidentiary *Kelly-Frye* hearing,[14] as we found that, prior to admitting DNA forensic

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13 Further statutory references are to the Evidence Code unless otherwise stated.

"Race" is variously defined as "a class or kind of individuals with common characteristics, interests, appearance, or habits as if derived from a common ancestor" or "a division of mankind possessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type." (Webster's 3d New Internat. Dict. (1986) p. 1870.) "Ethnic" means "relating to community of physical and mental traits possessed by the members of a group as a product of their common heredity and cultural tradition" (*id*. at p. 781), while "ethnicity" means "ethnic quality or affiliation" (*ibid*.). For purposes of our analysis, we ascribe to ethnicity its race-related sense and so refer to race and ethnicity interchangeably.

14 *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F.1013.

Although the federal *Frye* analysis has been superceded by adoption of the Federal Rules of Evidence (28 U.S.C.; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 587), the California Supreme Court has reaffirmed the *Kelly-Frye* test in this

identification, the prosecution should have been required to demonstrate, through the testimony of an impartial expert witness, that the protocols and procedures of the FBI (whose special agent performed the DNA analysis) were generally accepted as reliable within the scientific community. (*Pizarro I*, *supra*, 10 Cal.App.4th at p. 80.) We also raised questions concerning the database used to calculate the statistical significance of the DNA match. In pertinent part, we cautioned against assuming relevancy of a particular racial or ethnic database simply because the suspect (i.e., the defendant) falls within that racial or ethnic group, as the relevance of the statistical probability depends upon the perpetrator being the same racial or ethnic background as the defendant. (*Id*. at p. 92.)[15] We stated:

> "The disputed fact generally is whether the suspect is also the perpetrator. Thus, the evidence is relevant if it tends to prove the suspect is the perpetrator. However, the preliminary fact upon which the relevancy of the proffered evidence depends is the racial/ethnic background of the *perpetrator*, not the suspect. If the only way you can conclude the perpetrator fits a racial/ethnic category is to assume the perpetrator was the same race/ethnic background as the suspect then the reasoning is circular, i.e.: proof of the racial/ethnic background of the perpetrator depends on the racial/ethnic background of the suspect from which we infer a statistical probability that the perpetrator is the suspect. Absent proof sufficient under Evidence Code section 403 to support the preliminary fact as to the racial/ethnic background of the perpetrator, we see no relevancy to a data base selected because of the racial/ethnic background of the suspect/defendant. The problems created by employing assumed relevancy of the database are insidious. A jury hears an astronomical figure that not

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state (*People v. Leahy* (1994) 8 Cal.4th 587, 612). It is now referred to as the *Kelly* test. (*Ibid*.; *People v. Soto* (1999) 21 Cal.4th 512, 515, fn. 3.)

[15] References to "*Pizarro*," without a numerical designation, are to factual and legal circumstances which underlie both opinions.

In *Pizarro*, the analyst calculated the frequency of the DNA profile using the Hispanic database because, when a subject was half-Hispanic and half-Caucasian (as was Pizarro), the FBI used the more conservative statistic. (*Pizarro I*, *supra*, 10 Cal.App.4th at p. 64 & fn. 7.)

> uncommonly depends for its relevance upon the very issue that they have to decide: is the defendant the perpetrator? The same Evidence Code section 403 problem does not appear, however, if the general population data base, which has been created without regard to race or ethnic background, is utilized." (*Id*. at p. 93-94, fns. omitted.)

When the mandated *Kelly-Frye* hearing was held several years after our opinion was filed, new issues concerning the reliability and relevance of the DNA evidence were revealed for the first time. The trial court again ruled the evidence was admissible and reentered the judgment. The defendant again appealed, and we again reversed. (*Pizarro II*, *supra*, 110 Cal.App.4th at p. 540).[16] We summarized the case thus:

> "Reduced to its simplest, this is a case of *insufficient evidentiary foundation*. The admission of DNA evidence to prove Pizarro's identity as the perpetrator raises foundational issues under both *Kelly* and the Evidence Code. Under *Kelly* and section 405, the analysis is one of reliability and trustworthiness. Under section 403, it is one of preliminary fact and relevance. The DNA evidence in this case is foundationally inadequate under both analyses. In addition, recurring thematically throughout the issues in this case are evidentiary violations founded on the improper assumption that *defendant was in fact the perpetrator* and that defendant's traits therefore could be relied upon to provide or clarify those traits of the perpetrator forming the basis of the DNA evidence." (*Id*. at pp. 540-541, fns. omitted.)

Section 400 provides in part: "'[P]reliminary fact' means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence." Pursuant to the pertinent portion of section 403, "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: (1) The relevance of the proffered evidence depends on the existence of the preliminary fact …." As we explained in *Pizarro II*,

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16 The opinion in *Pizarro II* was filed on July 14, 2003, several months before the start of appellant's trial.

"In Pizarro's case, some of the issues arising from the match evidence and the statistical evidence involve preliminary foundational facts upon which the relevance of the proffered evidence rested. Under section 403, subdivision (a), the proponent of such evidence has the burden of producing evidence of the preliminary fact sufficient for a trier of fact to reasonably find by a preponderance of the evidence that the fact exists. [Citations.] Unless the preliminary fact is established, the proffered evidence depending on it is neither relevant nor admissible. [Citations.]

"Here, the relevance of the DNA evidence relied upon the *perpetrator's genetic profile* and the *perpetrator[']s] population* as preliminary facts.[17] First, *the relevance of the match evidence depended on the preliminary fact of the perpetrator's profile*. The match evidence was not relevant to prove defendant's profile resembled the perpetrator's profile unless the match was based on the *perpetrator's profile*. More specifically, defendant's traits were not relevant to prove a match unless the perpetrator's traits were sufficiently established. In the physical profile analogy, if evidence that the defendant has black hair, blue eyes, and 5-foot 8-inch stature is offered to prove he looks like the perpetrator, then the preliminary fact that the *perpetrator* has black hair, blue eyes, and 5-foot 8-inch stature must be established. This simple evidentiary requirement echoes the rule of logic stating: all possible perpetrators have black hair, blue eyes, and 5-foot 8-inch stature; the defendant has black hair, blue eyes, and 5-foot 8-inch stature; therefore, the defendant is a possible perpetrator. If the foundation of the perpetrator's profile is not laid, there is an insufficient basis to conclude the defendant possesses the same profile as the perpetrator.

"Second, *the relevance of the statistical evidence (the profile frequency) depended on the preliminary facts of the perpetrator's profile and the perpetrator[']s] population*. The profile frequency was not relevant to prove the rarity of the perpetrator's profile in the perpetrator['s] population unless the frequency was based on the *perpetrator's profile* and the *perpetrator[']s] population*. In the physical profile analogy, if evidence of the number of people in the Hispanic population who have black hair, blue eyes, and 5-foot 8-inch stature is offered to prove the rarity of the

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17 As printed in the bound volume, *Pizarro II* refers to "the perpetrators' population." Such references are the result of a publication error, and we have changed them to read, correctly, "the perpetrator['s] population." Where there is a single perpetrator, the population from which he or she comes is the perpetrator's population.

perpetrator's profile in the perpetrator['s] population, then the preliminary facts that the *perpetrator* has black hair, blue eyes, and 5-foot 8-inch stature and that the *perpetrator* is Hispanic must be established. Logically, this evidentiary requirement is stated as follows: all possible perpetrators have black hair, blue eyes, and 5-foot 8-inch stature and are Hispanic; a certain (small) number of people in the Hispanic population have black hair, blue eyes, and 5-foot 8-inch stature; therefore, this profile is rare in the Hispanic population. If the foundation of the perpetrator's profile and the perpetrator['s] population is not laid, there is an insufficient basis to conclude the perpetrator's profile is rare in the perpetrator['s] population.

"These foundational preliminary facts regarding the perpetrator's traits must be established by independent proof. In other words, the description of the perpetrator – whether genetic or physical – must be based on evidence of the *perpetrator's* traits. A sketch artist creates an artistic representation of the perpetrator from an eyewitness's description of the *perpetrator's* physical features. *Then* the defendant is held up to that sketch to determine whether he possesses the perpetrator's traits. If the defendant happens to match the sketch of the perpetrator, the match provides evidence against him.

"If the description of the perpetrator is instead based on evidence of the *defendant's* traits – which are simply assumed to be the same as the perpetrator's – the defendant no longer enjoys the presumption of innocence. It is as though the sketch artist sits with the defendant, sketches him as the perpetrator, and the prosecution introduces the sketch at trial as evidence that the defendant looks exactly like the perpetrator. The defendant's traits fill out the perpetrator's description with *facts that are not in evidence*, and the perpetrator's traits are 'proved' by what is in effect a *presumption* that because the defendant possesses certain traits, the perpetrator also possesses those traits. Such a presumption operates as a substitute for proper evidence of the perpetrator's traits, thereby lightening the prosecution's burden of affirmatively proving the defendant's identity as the perpetrator and undermining the defendant's presumption of innocence. The logic is this: *the defendant is the perpetrator*; the defendant possesses certain traits; therefore, the perpetrator also possesses those traits. The defendant's guilt is the premise rather than the ultimate conclusion sought by the prosecution.

"The prosecution's use of such an implicit presumption establishes for the jury, without presentation of any evidence on the topic, that the perpetrator possesses certain traits. The jurors may be either unwitting recipients or active participants in the implementation of the presumption.

> If the jury is unaware of the presumption (i.e., if the jury is simply informed that the perpetrator possesses certain traits), then the prosecution both creates the presumption and implements it for the jury. If, instead, the jury is informed of the presumption (i.e., if the jury is informed that the perpetrator possesses certain traits *because* the defendant possesses those traits), the presumption functions as a silent instruction to the jury: 'If you find that the defendant possesses certain traits, you must also find that the perpetrator possesses those traits.' Implicit is the subtle message that the defendant *is* the perpetrator. This message to the jury even further lightens the prosecution's burden of proving the required facts.
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> "The effect of these evidentiary infractions is severe. For example, since it is presumed that the perpetrator has black hair, blue eyes, and 5-foot 8-inch stature, the jurors willingly infer that because the defendant also possesses those traits, the defendant resembles the perpetrator and probably *is* the perpetrator. This ostensibly logical but entirely circular inference allows the defendant's traits to be used as incriminating evidence without any basis in proof whatsoever. The defendant necessarily possesses those traits – to his prejudice – because it is *his* traits that have been added to the perpetrator's description. The jury's conclusion that the defendant resembles the perpetrator is based only on the fact that the defendant possesses *his own traits*. Ironically, the *defendant* becomes the link between the perpetrator and the defendant – the defendant's own traits establish the perpetrator's traits, and the defendant's inescapable possession of those traits incriminates him." (*Pizarro II*, *supra*, 110 Cal.App.4th at pp. 542-546, fns. omitted.)

Two issues were before us in *Pizarro II*. The first concerned the reliability and, hence, the admissibility, under *Kelly* and section 405, of the FBI's method of determining whether there was a "match" between the genetic (DNA) profiles of Pizarro and the perpetrator. (*Pizarro II*, *supra*, 110 Cal.App.4th at p. 547.) Although DNA testing in *Pizarro* was accomplished by means of restriction fragment-length polymorphism (RFLP) analysis (*Pizarro I*, *supra*, 10 Cal.App.4th at p. 68), whereas the short tandem repeat (STR) typing method was used in appellant's case, we are not concerned with this issue: appellant has not challenged the evidence, including the expert's opinion, that his DNA matched that obtained from the mask found on the Biagi-Gilchrist property and identified by B.S. and S.C. as having been worn by their attacker.

The second issue in *Pizarro II* involved the statistical evidence. There, the jury was told the frequency of the genetic profile in the Hispanic population. We explained that this Hispanic profile frequency was not relevant to prove the perpetrator's profile in the perpetrator's population unless there was sufficient evidence to establish the preliminary fact that the perpetrator was Hispanic. (*Pizarro II*, *supra*, 110 Cal.App.4th at p. 547.) Although we did not decide whether there was in fact sufficient evidence to establish, under section 403, subdivision (a), that the perpetrator was Hispanic, we found the record to clearly demonstrate that the prosecution relied on Pizarro's ethnicity, and not on that of the perpetrator, to establish this preliminary fact. In reality, the perpetrator's ethnicity should have been established independently; reference to the defendant's ethnicity was not permissible for this purpose. (*Id*. at pp. 547-548.)

It is this relevancy issue which is before us in the present case.[18] B.S. and S.C. sufficiently identified the mask found on the Biagi-Gilchrist property so as to permit the conclusion it was worn by their attacker. A bandanna was found in the same area. Brenda Smith, supervising criminalist for the Kern County Regional Crime Laboratory, extracted DNA from the red cloth that was taped over the mouth hole of the mask, and from fuzz she scraped from the bandanna. She obtained DNA profiles from these items, which she then compared with known reference samples from appellant and others. Although she was able to eliminate the others as possible contributors of the DNA on both items, she could not eliminate appellant. This meant that appellant's DNA profile matched that of the evidence DNA at the nine locations for which Smith tested.[19]

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18 As no challenge has been raised to the mathematical calculations themselves, we presume they are accurate and reliable. (See *People v. Venegas* (1998) 18 Cal.4th 47, 82-84 [applying *Kelly* requirements to statistical calculations]; *People v. Brown* (2001) 91 Cal.App.4th 623, 649 [same].)

19 Smith clarified that there are many locations on DNA, the majority of which are identical, or at least very similar, among individuals. A small percentage of locations differ from individual to individual. For STR typing, there are 15 to 17 different

Smith's next step was to perform the statistical calculations by which she determined the rarity of appellant's DNA profile. She testified: "What I need to do is determine how common is this profile in the population, and the way I do that is have a reference population or a sample population. There are a lot of different published population databases that are used in the forensic community. And basically I'll use one of those – well, we use one in particular, one that was developed by the FBI, a published database that was developed by them. [¶] There's – generally we look at different ethnicities because sometimes there's differences in the different ethnicities, so the three populations that I generally look at are Caucasian, Hispanic, African-American. And I have some statistic software to help out with the calculation part. I enter the data in and the statistics [*sic*] will do the calculations for me and determine just how common the profile is, you know, in this reference population, which extrapolates to the population at large."[20] When asked by the prosecutor why, if the evidence DNA profile matched a known sample DNA profile, Smith could not simply say the evidence contained the DNA of the person who contributed the known sample, Smith replied, "Well, we can't say for certain it's that person's DNA because there is, you know, that possibility that it, you know, by chance it's somebody else's DNA that just happens to have the same profile. So it's really important to determine how common or how rare that profile is. If, you know, you've got this profile, but one out of every ten people have that profile, then that's not really all that great maybe."

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locations that are commonly examined in the forensic community. Smith used nine locations that account for individual differences. The DNA profile consisted of the DNA types at the nine locations. The more locations examined, the greater the chance of eliminating someone as a possible contributor.

[20] Smith explained that the FBI analyzed roughly 200 samples from each of the three populations, "then a statistician came in and looked at that data to make sure it fit certain parameters so that it could be used. And once that was established, the database was published so that other people in the community could use that database."

Smith explained that the statistical interpretation took the form of a likelihood ratio that compared two different alternative possibilities, i.e., either the individual contributing the known reference sample contributed the evidence DNA and that is why the profiles matched; or the evidence DNA was contributed by some unknown, unrelated individual who happened to have the same DNA profile. In this case, then, either appellant was a source of the DNA recovered from the mask and the bandanna fuzz; or the source of that DNA was some unknown, unrelated male who had the same DNA profile as appellant. Using the three databases, she calculated that, for the Caucasian population, the evidence DNA profile was approximately 1.9 trillion times more likely to match appellant's DNA profile if he was the contributor of that DNA rather than some unknown, unrelated individual; for the Hispanic population, it was 2.6 trillion times more likely; and for the African-American population; it was about 9.1 trillion times more likely.

Relying on *Pizarro II*, appellant now contends this statistical evidence was irrelevant because the prosecution failed to present substantial evidence to prove that the perpetrator was Caucasian, Hispanic, or African-American. Because the match evidence does not establish identity without a relevant statistical analysis, the argument runs, and because the People's case relied almost exclusively on DNA evidence for all counts, the convictions on all counts fail for lack of substantial evidence. Respondent, on the other hand, acknowledges that appellant's claim is "bolstered" by *Pizarro II*, but asks us to reexamine that opinion. Respondent says the premise that an ethnic database can be used only if it matches the perpetrator's identified ethnicity is flawed because (1) it overlooks sections 801 and 802, which permit an expert to testify about the factual bases for his or her opinions (in this case, scientifically-accepted and routinely-used databases sorted by race and ethnicity); (2) DNA profile frequency estimates which are reported over a range of generally representative ethnic databases are relevant because the estimates produce some evidence of a DNA profile's rarity in the population as a whole and so assist the

trier of fact in assessing the significance of a DNA profile match; and (3) unlike the situation that existed in *Pizarro*, in the present case neither the prosecutor nor the expert witness referred to appellant's genotype or ethnicity to prove the perpetrator's genotype or ethnicity, and so appellant's traits or race were not relied upon to establish the preliminary fact needed to render the DNA evidence relevant.

For reasons we will explain, we are not persuaded by respondent's contentions, and we decline to reassess our reasoning in *Pizarro II*. On the other hand, we also reject appellant's claim that the statistical evidence was irrelevant. However fortuitously it may have occurred, jurors properly were allowed to consider that evidence.[21]

The rules of admissibility with respect to relevant evidence do not change simply because DNA evidence is involved. "'Relevant evidence' means evidence … having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) Thus, evidence is relevant if it "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177, disapproved on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) When evidence

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21 Respondent preliminarily argues that appellant failed to challenge the statistical evidence at trial and so should be deemed to have forfeited the issue for purpose of appeal. (§ 353.) A failure to object at trial to the admission of evidence on grounds that it is irrelevant or inadmissible under *Kelly* forfeits such a claim for appeal. (E.g., *People v. Combs* (2004) 34 Cal.4th 821, 847 [relevance]; *People v. Ochoa* (1998) 19 Cal.4th 353, 414 [*Kelly-Frye*].) The same holds true with respect to the improper use of statistical probability figures. (E.g., *People v. Pride* (1992) 3 Cal.4th 195, 242; *People v. Coleman* (1988) 46 Cal.3d 749, 776-777.) Here, however, appellant contends the admitted evidence, being irrelevant and therefore having no reasonable tendency to prove any fact of consequence (see § 210), could not constitute substantial evidence of his identity as the perpetrator. A claim that a judgment is not supported by substantial evidence is not waived by a failure to object or otherwise raise the issue in the trial court. (E.g., *People v. Butler* (2003) 31 Cal.4th 1119, 1126 & fn. 4; *People v. Saunders* (1993) 5 Cal.4th 580, 602 (dis. opn. of Kennard, J.); 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 396, p. 487.) Appellant's claim is properly before us.

leads only to speculative inferences, however, it is irrelevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.)

Evidence is either relevant or it is irrelevant. If it is relevant, it is presumptively admissible (§ 351); if it is irrelevant, it is inadmissible (§ 350; *People v. Babbitt* (1988) 45 Cal.3d 660, 681).[22]

To say that relevance is an all-or-nothing proposition can be misleading, however, because whether a particular item of evidence is relevant depends upon what that evidence is offered to prove. Thus, evidence may be relevant for one purpose, but irrelevant for another. For example, if it is offered to prove the ultimate fact, it must be probative of that fact in order to be relevant. If it is not probative of the ultimate fact, it still may be probative of some intermediate fact and so be relevant if it is offered to prove *that* fact, and yet be irrelevant if it is offered *only* to prove the ultimate fact. Similarly, "[s]ometimes the relevance of evidence depends on the existence of a preliminary fact. [Citations.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 466.) In other words, evidence may be irrelevant to prove a particular fact if certain preliminary facts are not established. Section 403 recognizes this. The admission of DNA "match" or profile evidence, as well as the admission of statistical probability or frequency calculations, present both of these facets of relevance.

To be probative of a defendant's identity as the perpetrator, the DNA evidence, including the statistical calculations, must demonstrate the rarity of the perpetrator's genetic profile in the perpetrator's population (i.e., the population of possible perpetrators), and that the defendant's genetic profile matches that of the perpetrator.

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[22] Section 350 provides: "No evidence is admissible except relevant evidence." Section 351 states: "Except as otherwise provided by statute, all relevant evidence is admissible." Statutes such as section 352, which gives a trial court discretion to exclude evidence if its probative value is substantially outweighed by its prejudicial effect, limit the admissibility of otherwise-relevant evidence.

Standing alone, a match between a defendant's DNA profile and that of the evidence (perpetrator's) DNA is relevant because it has some tendency in reason to prove identity: the defendant cannot be excluded as the person who contributed the evidence DNA; hence, he (or she) *could* be the perpetrator.[23] It appears settled, however, that profile frequencies vary among racial/ethnic groups, and that experts consider this variance to be statistically significant. Because of this, evidence of the *perpetrator's* ethnicity is critical to the analysis. Without evidence establishing the rarity of the profile in the perpetrator's population, evidence of a match does not tend to prove anything more than that the defendant *could* be the perpetrator: it does not establish a sufficient likelihood that the defendant *is* the perpetrator, so that jurors properly may conclude the defendant's identity has been established by the DNA match alone. The fact that the matched genetic profile is rare *in some ethnic population(s)* cannot exclude an unknown member of another ethnic group as being an equally (or significantly) likely contributor of the evidence DNA. The matched profile must be rare in the *perpetrator's* population, and the *perpetrator's* population cannot be presumed from the *defendant's* ethnicity. The mere fact the defendant is Hispanic, for example, does not establish that the perpetrator is Hispanic. To make such an assumption uses the traits of the individual on trial to establish who committed the crime, instead of using the traits of the individual who committed the crime to establish who should be on trial and convicted. Such use of the evidence is improper. (*Pizarro II*, *supra*, 110 Cal.App.4th at pp. 544-546.)

As a result, where the perpetrator's ethnicity is unknown, it is not enough merely to establish that the matched genetic profile is rare in the *defendant's* population, i.e., the population that corresponds to *his* ethnicity. Instead, there must be evidence that the

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23 Although our analysis applies equally to female defendants and perpetrators, we use male pronouns in our discussion because each victim in the present case described her attacker as a man.

profile is rare in the *perpetrator's* population, i.e., the population that corresponds to the *perpetrator's* ethnicity. In short, the preliminary fact of the perpetrator's ethnicity must be established before the frequency evidence may be deemed to be relevant if ethnicity is the basis of the probability analysis.

As a practical matter, this evidence of rarity in the perpetrator's population depends for its relevancy on proof that the defendant's ethnicity is the same as that of the perpetrator. For instance, suppose jurors are told that the profile frequency is one in one billion in the Hispanic population. If the defendant is Hispanic *and the perpetrator is Hispanic*, jurors now have a basis upon which they can determine the likelihood that the defendant, and not someone else, contributed the evidence DNA and is, therefore, the perpetrator. If the perpetrator's ethnicity is *unknown*, however, frequency statistics for the Hispanic population permit jurors to assess the likelihood the defendant is the perpetrator *only if, fortuitously, the perpetrator is also Hispanic* – a conclusion that cannot be drawn from the evidence. Jurors may *speculate* that the perpetrator is Hispanic because the defendant is Hispanic, but the defendant's ethnicity, standing alone, does not provide a scintilla of proof of the perpetrator's ethnicity. In our hypothetical, the defendant may be Hispanic, *but the perpetrator could actually be Asian*. Without more information on the subject (likely in the form of expert testimony), lay jurors simply are not equipped to determine whether, because a profile is extremely rare with respect to one ethnic group, it is also extremely rare with respect to another specific ethnic group or with respect to *all* ethnic groups, i.e., the general population. (See *People v. Barney* (1992) 8 Cal.App.4th 798, 817-818 [discussing why *Kelly* requirement of general scientific acceptance applies to statistical calculation step of DNA analysis].) Because of this, in our example, the frequency statistics for the Hispanic population do not tell jurors anything about probability if the perpetrator belongs to some other ethnic group. They are, therefore, irrelevant *on the question of the defendant's identity as the perpetrator*: they have no tendency in reason to prove or disprove the fact for which they are offered,

i.e., that it is so unlikely the defendant and another individual have the same DNA profile as the evidence DNA, that the defendant must be the perpetrator.

Thus, only if the perpetrator's ethnicity is sufficiently established does evidence of a profile's frequency in *that* ethnic population become relevant to prove the rarity of the perpetrator's profile. The relevance of the frequency evidence depends upon the preliminary fact of the perpetrator's ethnicity. Because of the way the evidence is presented, however, use of the defendant's ethnic population without reference to that of the perpetrator, as occurred in *Pizarro*, ineluctably points the finger at the defendant, even though it does not truly prove anything. On the other hand, it presents jurors with a very subtle, but very insidious, form of racial profiling: the assumption that the perpetrator and the defendant are the same race and, therefore, that the defendant is the perpetrator.[24]

The use of three ethnic databases, as occurred in the present case, is not as unmistakably prejudicial, as the link to the defendant is less direct and there is a greater chance that, by luck, the perpetrator's ethnic group has been included. Where the perpetrator's ethnicity is unknown, however, neither the expert witness(es) nor the jurors have any way of knowing whether the profile frequency statistics *in fact* include the perpetrator's population, or whether, once again, *the relevance of that evidence depends upon the unsupported assumption that the perpetrator and the defendant are the same race*. The calculation of frequency probabilities using three ethnic databases, without more, thus does not cure the core problem or render the resulting statistics relevant to prove the fact for which they are offered – again, that the rarity of the profile in the perpetrator's population renders the likelihood someone other than the defendant

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24 As we will discuss *post*, the perpetrator's ethnicity need not be absolutely established – or even established by direct evidence – in order for statistical evidence concerning a particular ethnic database to be relevant.

contributed the evidence DNA so small that the defendant must be the perpetrator. In order to identify the defendant as the perpetrator, it is not enough to show that his genetic profile matches that of the evidence DNA, or that the matched profile is rare in his ethnic group. Instead, it must be shown to be rare *in the perpetrator's population*, and that the defendant is a member *of that population*. Absent additional information, jurors cannot extrapolate the requisite rarity from only three of the possible racial populations.

The rarity of the matched profile does not derive from any individual ethnic database or databases, because any that do not represent the perpetrator's racial group are irrelevant, of themselves, to establish that the defendant is likely the perpetrator. By contrast, the perpetrator necessarily must come from the general population. Thus, in our view, when the perpetrator's ethnicity is unknown, the most appropriate solutions would appear to be (1) to present the one most conservative frequency, without mention of ethnicity, or (2) assuming this method is scientifically valid and results in a frequency that is considered conservative, to present a single frequency calculation based on a general, nonethnic population database. (*Pizarro II*, *supra*, 110 Cal.App.4th at p. 633, fn. 85.) When frequency calculations that do not reference ethnicity are employed, the profile frequency evidence no longer tells jurors that *if* the defendant and the perpetrator *share ethnicity*, the likelihood the defendant is the perpetrator is some number. Instead, the evidence tells jurors that *regardless of the perpetrator's ethnicity*, the likelihood the defendant is the perpetrator is some number. Jurors then have to decide whether, in their minds, the genetic profile is sufficiently rare so as to be persuasive as to identification of the defendant as the perpetrator. The selection of three individual ethnic databases, even assuming they represent the three largest population groups, is insufficient for this purpose because they have no value independent of the ethnicity of the perpetrator. All such evidence tells the jury is that the DNA profile is statistically rare in those population groups. It neither excludes nor includes the perpetrator as a member of any of those

groups, nor does it specifically identify the defendant as being in the same population group as the perpetrator.

As previously noted, to be probative of a defendant's identity as the perpetrator, the evidence must show both the rarity of the perpetrator's profile (or traits) in the population of possible perpetrators, and that the defendant shares that profile (or traits). We will attempt to illustrate our reasoning using the .22 magnum cylinder found in the pickup truck parked on appellant's property.[25] Evidence that appellant possessed a .22 magnum cylinder is relevant because it has some tendency in reason to show that he is among the individuals who *could* have been the perpetrator of the attack on K.S., in which a .22-caliber magnum firearm was used. In a similar vein, appellant's genetic match to the evidence DNA is relevant because it has some tendency in reason to show that he is among the individuals who *could* have worn the mask which B.S. and S.C. identified as having been used by the perpetrator.

Suppose there is one firearms manufacturer, A, in California that makes guns in which .22 magnum cylinders can be used. Further suppose A only makes one such gun out of every billion weapons it produces, and that appellant owns and uses one of those guns. This evidence is relevant to show that *if* the perpetrator's gun (the gun used in the attack) was made by A, then the probability is such that it would be unreasonable to conclude anyone other than appellant used it. Now, suppose that, in addition to A, there are two other manufacturers of such firearms, B and C, in California. A makes one such gun out of every billion weapons it produces, B makes one such gun out of every five billion weapons it produces, and C makes one such gun out of every ten billion weapons it produces. This evidence is probative of the rarity of a perpetrator with this kind of gun

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25 For purposes of our analogy, we assume the cylinder belonged to appellant and only he had access to it. We recognize that significant differences exist between our example and the statistical evidence at issue in the present case, and we offer it for illustrative use only.

in the population of possible perpetrators *if* the weapon used was made by A, B, or C. To identify appellant as the perpetrator, however, the evidence must also show that appellant's gun was made by the same manufacturer as the perpetrator's gun.

The problem is that the evidence does *not* establish that the weapon used in the attack was made by A, B, or C. Thus, because we do not know how many such guns are manufactured and sold by *other* companies, the evidence is insufficient to establish the rarity of a perpetrator with this kind of gun in the population of possible perpetrators, because there is no way of knowing how many other people have such a gun. For all the evidence shows, there could be 15 firearms manufacturers in Nevada who make millions of such guns each year; thus, in stark contrast to the impression given by the statistics presented, in reality one person in every five might own such a gun.

Because the rarity of a perpetrator with this kind of gun in the population of possible perpetrators is not established, evidence that appellant's gun "matches" that of the perpetrator with respect to the "trait" of kind – .22 magnum – is not probative on the ultimate question of appellant's identity as the perpetrator. Instead, there must also be a match between guns with respect to the "trait" of manufacturer. Even if one in every five people own a .22 magnum firearm, if A only makes one such gun out of every billion weapons it produces, and if the perpetrator's gun and appellant's gun are both made by A, then the evidence is probative of appellant's identity as the perpetrator. No longer is appellant merely a *possible* perpetrator; now, it can be determined that he is *almost certainly* the perpetrator.

In the context of DNA evidence, showing that a profile is rare among, for example, Caucasian, Hispanic, and African-American populations is probative of identity *if* the perpetrator belongs to one of those populations *and if* the defendant shares the trait of membership in that population. If the evidence shows the defendant is a member of one of those populations but establishes nothing about the perpetrator, the profile frequency evidence is not probative of the defendant's identity as the perpetrator: it

neither establishes the rarity of the perpetrator's profile in the population of possible perpetrators (since, for example, the perpetrator could belong to a population in which the profile appears in one in every five people) nor that the defendant matches the perpetrator's trait. The rarity of the defendant's profile in those populations, without more, establishes nothing with respect to his identity as the perpetrator: the defendant's profile and ethnicity cannot be used to establish those of the perpetrator.

Turning back to our gun example, if, on the other hand, statistics are presented to show that, in all the guns manufactured in this country, only one in one million is the kind used by the perpetrator, and appellant's gun is the same kind, then the frequency evidence is relevant with respect to identification of appellant as the perpetrator. The question then becomes one of sufficiency of the evidence, i.e., whether a frequency of one in one million is sufficiently rare, and thus the likelihood that someone other than appellant used the gun so small, that it can be said appellant is the perpetrator. The existence of other evidence has an effect on this final question, since the stronger the other evidence, the less critical to the ultimate question the frequency of the match (i.e., the probability) becomes.

Nothing we say here or in either *Pizarro* opinion means that, where the perpetrator's ethnicity is unknown, profile frequency evidence can *never* be relevant. We emphasize again that, as is true with respect to any evidence, relevance depends upon the purpose for which the evidence is offered.

Respondent says sections 801 and 802 permit an expert witness to refer to racial and ethnic databases which are reasonably relied upon by experts in establishing a range of random match probability estimates for DNA evidence profiles.[26] We have no quarrel

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26 Section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill,

with the principles that apply to expert testimony in general: "Expert testimony may … be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' [Citation.] [¶] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter … upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.) We further take no issue with the notion that the ethnic databases used here are the type of matter that reasonably may be relied upon by an expert in forming an opinion. (See *People v.*

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experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

Section 802 states: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

Bui (2001) 86 Cal.App.4th 1187, 1196 [expert properly relied on scientific literature, statistical data, and epidemiological study].)

With respect to the present case, respondent says, "Smith's expert opinion was that there is a range of applicable profile frequency estimates (in the trillions) … and that these estimates permit her conclusion that the case evidence DNA profiles are extremely rare in three major United States populations. As support for her opinion regarding random match probability, Smith permissibly used and referenced the FBI's databases, all sorted by race, according to accepted practice. [Citations.] Under the Evidence Code's generous provision for expert witness testimony, Smith was able to describe that material to the jury." Respondent ignores the fact that, if the perpetrator is not a member of one of those "three major United States populations," Smith's conclusion that the evidence DNA profile is extremely rare in those populations does not, without more, tend to establish appellant's identity as the perpetrator. "[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based. [Citations.]" (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510; see *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [opinion testimony which is conjectural or speculative does not constitute substantial evidence].)

Respondent argues that the DNA profile frequency estimates to which Smith testified, were reported over a range of generally representative ethnic databases and were therefore relevant because such estimates provided some evidence of the DNA profile's rarity in the population as a whole. We do not know whether Caucasian, Hispanic, and African-American databases are "generally representative" of the population as a whole. For such evidence to be admissible, as an initial matter an expert witness would have to be able to testify that extrapolation from specific ethnic populations to the population as a whole is scientifically appropriate and that, for

example, a DNA profile which is shown to be rare in three major ethnic populations will be equally (or comparatively) rare in the general population. It is conceivable that, depending on the circumstances, such evidence could be relevant for some purpose. This is not, however, the evidence that was presented in the case before us. Smith testified that there are many different published population databases that are used in the forensic community, and that she used the ones developed by the FBI. She acknowledged the need to look at different ethnicities because there can be differences among them, then stated that she generally looked at Caucasian, Hispanic, and African-American populations. She did not explain why she chose those three beyond them being the databases published by the FBI. She did state that her statistical software would calculate the rarity of the profile in the reference population, which would extrapolate to the population at large; however, taken in context and in light of her subsequent reference to "the *different* populations" (italics added), we read this as meaning that the frequency calculated based upon the sample (reference) *Caucasian* population extrapolates to the *Caucasian* population at large, the frequency calculated based upon the sample *Hispanic* population extrapolates to the *Hispanic* population at large, and the frequency calculated based upon the sample *African-American* population extrapolates to the *African-American* population at large. We find nothing in Smith's testimony upon which to base a conclusion that the frequencies calculated from the three sample populations extrapolate to the general population – i.e., the population as a whole – without reference to a particular ethnic group. Nor do we find anything beyond conjecture from which a jury could conclude that, because a DNA profile is rare in these three ethnic populations, it necessarily is rare in other ethnic populations or, because these are three large population subgroups, in the general population.

Calculation of the probability of a random match in a population depends in part upon the assumption that the correct population has been identified. (*People v. Axell*

(1991) 235 Cal.App.3d 836, 865.) Smith's testimony does not support such an assumption in this case.

Respondent contends that "generally representative ethnic database estimates are indeed relevant where they provide evidence of a DNA profile's rarity in the *population as a whole*." Whatever the validity of this statement, as presented at appellant's trial (and that of Pizarro), the statistical calculations did not provide such evidence, nor were they proffered for that purpose.

In making the foregoing claim of relevance, respondent takes issue with our reiteration, in *Pizarro II*, that "an ethnic profile frequency relies for its relevance on the foundational showing that the perpetrator is a member of the particular ethnicity." (*Pizarro II*, *supra*, 110 Cal.App.4th at p. 623.) As we have pointed out, however, the ethnic frequency presented at Pizarro's trial was based on Pizarro's ethnicity, not on that of the perpetrator. In *Pizarro I*, we explained that the problem before us arose because "[t]he selected racial or ethnic data base is predicated upon the *suspect's* [defendant's] racial or ethnic background. However, the relevancy of the statistical probability depends on the *perpetrator* being the same racial or ethnic background as the suspect [defendant]." (*Pizarro I*, *supra*, 10 Cal.App.4th at p. 92.)

In *Pizarro II*, we noted that "[t]he profile frequency estimates how many people in the *relevant* population match the perpetrator's profile. The *relevant* population … is the perpetrator's population – the population to which possible perpetrators belong. [Citations.]" (*Pizarro II*, *supra*, 110 Cal.App.4th at p. 627, fn. 76.) We made clear that the relevant population cannot properly be determined simply by reference to the defendant's ethnicity. (*Id*. at p. 628.) In part, we stated:

> "On rehearing, the People … assert[] that an ethnic frequency based on the defendant's ethnicity is relevant for two reasons. First, they contend it is relevant because it assists the jury in assessing the rarity of the profile. We disagree. Such a frequency only tells the jury the rarity of the perpetrator's profile in the *defendant's* population – a population to which

the *perpetrator* has not been shown to belong. The calculation *assumes* the perpetrator, like the defendant, is Hispanic; but if the perpetrator is not, the frequency is irrelevant and does not assist the jury in any way. For example, the jury is not assisted by knowing how many Hispanics possess the perpetrator's traits if the perpetrator is actually Asian.

"Second, the People claim a frequency based on the defendant's ethnicity is relevant because it simply includes the defendant within the class of possible perpetrators, in the same way a finding that the defendant matches the perpetrator's blood type includes the defendant in the class of possible perpetrators. Again, we disagree. The procedural step that simply includes defendant within the class of possible perpetrators is the determination that the defendant's profile *matches* the perpetrator's profile, like the determination that the defendant's blood type matches the perpetrator's blood type. These are the findings that render the defendant a possible perpetrator and include him in that class. [Citation.]

"By comparison, the procedure we address here is the subsequent determination of the *frequency* or *rarity* of the perpetrator's profile or blood type in the relevant population – to provide meaning to the match. The match includes the defendant in the class; the frequency calculation estimates the size of that class so that membership in it has meaning. The fewer the members, the more incriminating the membership.

"The appropriation of the defendant's trait into the perpetrator's profile changes the description of the possible perpetrators, who are now described according to the defendant rather than the perpetrator. This spuriously redefined class is no longer the perpetrator['s] population, but the defendant's, and inclusion of the defendant in this class simply includes him in his *own* class. Thus, defendant's own Hispanic ethnicity could not properly include him in the class of possible perpetrators unless all possible perpetrators were Hispanic, a determination which relied on proof that the actual perpetrator was Hispanic.

"In sum, we do not take issue with procedural steps that simply include the defendant in the class of possible perpetrators, if that is indeed what they do. Our concern is with procedural steps that add to the perpetrator's profile a trait (here, defendant's ethnicity …) that the perpetrator has not been shown to possess, and then judge the rarity of possible perpetrators according to that unjustifiable, irrelevant trait." (*Pizarro II*, *supra*, at pp. 628-629, fn. omitted.)

We then turned to an argument which is similar, in many respects, to the one respondent makes in the current case. Noting that only two ethnic frequencies (Hispanic and Caucasian) were mentioned at Pizarro's trial (expressly because Pizarro was half Hispanic and half Caucasian), and that the Caucasian frequency was not presented as part of a range of ethnic frequencies (*Pizarro II*, *supra*, 110 Cal.App.4th at p. 631, fn. 81), we stated:

> "The People argue … that the calculation and presentation of several frequencies derived from various ethnic databases is a satisfactory and commonly used alternative. For example, the jury might be told the perpetrator's genetic profile is found in 1 in 1 million Caucasians, 1 in 2.5 million Blacks, 1 in 10 million Hispanics, and 1 in 5 million Asians. The People assert that this practice provides the jury with an accurate range of frequencies over a continuum of ethnic populations, and that all ethnic frequencies are relevant because they tend to prove the significance of the match.
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> "Although presentation of a range of ethnic frequencies may in fact accurately provide the range of all possible frequencies, we see three problems with this practice. First, in the absence of sufficient evidence of the perpetrator's ethnicity, *any* particular ethnic frequency is irrelevant. The problem is again one of preliminary fact – now occurring multiply and simultaneously. It does not matter how many Hispanics, Caucasians, Blacks, or Native Americans resemble the perpetrator if the perpetrator is actually Asian. If various ethnic frequencies are presented to the jury, each will have been admitted without adequate foundation. [¶] … [¶]
>
> "Second, the improper mention of ethnicity unfairly and unjustifiably encourages the jurors to focus on ethnicity and race – specifically the ethnicity and race of the defendant, the only suspect before them.
>
> "Third, the jury hears unjustifiably damaging evidence because the various ethnic frequencies create a range extending from the most conservative and beneficial to the defendant to the most rare and damning to the defendant. In our example, the evidence against the defendant includes not only the most favorable 1-in-1-million (Caucasian) frequency, but also the most damaging 1-in-10-million (Hispanic) frequency. If the perpetrator is actually Caucasian, only the most favorable 1-in-1-million (Caucasian) frequency is relevant, but the jury nevertheless will hear – and

> likely focus on – the more damaging 1-in-10-million figure. If the perpetrator is actually Black, only the 1-in-2.5-million (Black) frequency is relevant, but the jury will hear – and likely focus on – the more damaging 1-in-10-million figure. The greater the disparity between the perpetrator's true frequency and the range's most damaging extreme, the greater the prejudice the defendant will suffer from mention of that extreme. Without adequate evidence of the perpetrator's ethnicity, there is no justification for presenting the most damaging frequency." (*Pizarro II*, *supra*, 110 Cal.App.4th at pp. 631-633, fns. omitted.)

Respondent seeks to take frequency calculations derived from disparate individual ethnic databases and say that, because more than one ethnic database is used and the profile frequency is rare in each, the evidence from the ethnic databases is relevant because it tends to prove the profile's rarity in the population as a whole. *We emphasize again that the evidence simply was not proffered for this purpose in the present case*. Moreover, respondent's argument begs the question: If this is so, why would the prosecution not simply present frequency calculations derived from a general population database, without regard to ethnicity? And are we really to believe that, if the defendant is, for example, Asian, a prosecutor is likely to present statistics calculated only from Caucasian, Hispanic, and African-American population databases, on the theory that such evidence demonstrates the profile's rarity in the population as a whole?

If an expert could testify, for example, that in terms of profile frequency, the Caucasian database is representative of the population as a whole without regard to ethnicity, then calculations derived from that database would be probative no matter what the ethnicity of the perpetrator: the perpetrator necessarily would be a member of the group of people represented by the database, i.e., the entire population. The database estimate would then be relevant because it would provide evidence of a DNA profile's rarity in the population as a whole. No longer would the relevance of any particular ethnic frequency depend upon evidence of the perpetrator's ethnicity; instead, relevance would exist regardless of the perpetrator's particular ethnicity (and even if the absence of any evidence thereof) since the profile frequency presented would be, in essence, that of

the general population. The evidence would now have an adequate foundation because it would permit jurors to assess the likelihood of a random match of the defendant's genetic profile in the general population, regardless of the perpetrator's ethnicity and, more importantly, without reference to that of the defendant. This is not the same, however, as presenting jurors with evidence concerning the rarity of a DNA profile in three major population groups, then asking them to infer that this profile must be similarly rare even if *the perpetrator* does not fall into one of those groups. The frequency evidence, as presented in this latter way, is irrelevant because it lacks the necessary foundation of the perpetrator's ethnicity.

Respondent cites *People v. Wilson* (2004) formerly 124 Cal.App.4th 38, as support for the proposition that this court erred in the *Pizarro* cases by requiring that the database used to calculate profile frequency be drawn from the perpetrator's racial group. On February 16, 2005, shortly before respondent's brief was filed in the present matter, the California Supreme Court rendered the case noncitable as authority (Cal. Rules of Court, rules 976, 977) by granting review (S130157) on the following issue: "May a DNA expert testify to a match between the perpetrator's and defendant's genetic profiles based on different racial databases if the prosecution has not first provided independent evidence of the perpetrator's race?"

For purposes of the case before us, we would reframe the question in the following manner: If a DNA expert's testimony is offered to prove the probability of a match between the perpetrator's and defendant's genetic profiles based on different racial databases, is such evidence probative of guilt if other evidence is not sufficient to support the preliminary fact that the perpetrator is of the same racial/ethnic group as the defendant? Put in practical terms, if there is an objection to the DNA expert's probability testimony based on a lack of foundation that the perpetrator was the same ethnicity/race as the defendant, should the objection be sustained if there is an insufficient offer of proof or specific evidence that the perpetrator and the defendant are the same

ethnicity/race? In our view, the answer turns on a combination of the purposes for which the evidence is offered, as well as ultimate proof of the preliminary fact upon which the evidence depends for its relevance and probative value.[27]

We understand respondent to be arguing that the relevant group for determining random-match probabilities is the population of possible suspects, not the perpetrator's population. This is because the purpose of determining profile frequencies is to assess the rarity of the profile match in the population from which the evidence DNA may have come, which may be a much broader population than the perpetrator's ethnic group. The population of possible suspects will often include a range of potential perpetrators, whose numbers and race depend on what is known about the circumstances of the crime. When the perpetrator's race is unknown, the rarity of the profile may be ascertained by reference to the various frequencies with which the matched profile occurs in the different racial groups to which the perpetrator might belong.

In our view, however, the population from which the evidence (perpetrator's) DNA may have come is the population of possible perpetrators, i.e., the perpetrator's population. The population of possible suspects would, logically speaking, be a smaller group, since it would include not anyone who *could* have committed the crime, but only those persons *against whom enough evidence exists* to make that individual a suspect. In any event, it seems to us that, if indeed the population of possible suspects is broader than

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27 We find it important to distinguish between testimony concerning the fact of the match itself, and testimony concerning the statistical frequency (probability) with which such a match occurs. Determining whether a defendant's genetic profile matches a perpetrator's genetic profile does not involve the use of racial databases, and we are hard-pressed to envision circumstances under which testimony concerning the existence or nonexistence of a match would be irrelevant. As we discussed *ante*, a match itself tends to prove the defendant could be the perpetrator, while the absence of a match exonerates him. Either way, such evidence is relevant. It is evidence concerning the ethnic probability prong of DNA evidence that is in question here.

the perpetrator's population, then the presentation of profile frequencies based on a particular ethnic database or databases is still irrelevant, absent expert testimony that said database or databases represent the frequency among all ethnic groups, i.e., the population as a whole.[28] Otherwise, how can it be said that jurors have been presented with profile frequencies for the different racial groups to which the perpetrator might belong? If nothing is known about the perpetrator's ethnicity, presumably he could belong to any racial group, unless the crime took place on an island which is inhabited by members of only one ethnic population who have no contact with anyone but themselves. And, if jurors have not been presented with profile frequencies for the different racial groups to which the perpetrator might belong, how can they validly assess the rarity of the match evidence before them? If indeed the population of possible suspects is broader than the perpetrator's population, then logically the result should be use of a broader database, not merely a selection of databases from three (or another number of) ethnic groups which include the defendant, but none of which may include the perpetrator.

Again, it is essential to analyze relevance in terms of what the evidence is offered to prove. For example, suppose the victim was killed with a gun, and the defendant owns a gun. The gun arguably has some slight probative value because, without further information, it tends to show the defendant *could* have been the killer. However, it does *not* tend to prove the defendant *was indeed* the killer, absent evidence that this particular gun was used, or could have been used, to kill the victim.[29] Moreover, if it is

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28 As previously noted, we had no such testimony in the present case. Accordingly, we have no occasion to determine the nature of the testimony that would be required to render relevant evidence concerning profile frequencies in what might be termed exemplar databases.

29 Even then, the gun's probative value as a means of identifying the defendant as the killer will vary, depending upon other evidence. For instance, evidence that the gun was in fact the murder weapon provides a stronger link to the defendant than evidence simply that the gun could have been the murder weapon.

demonstrated the victim was killed with a .45-caliber weapon and the defendant's firearm is .22 caliber, the gun ultimately has no probative value as incriminating evidence because it could not have been the weapon used to commit the crime. We recognize that evidence is frequently admitted to prove propositions which are ultimately conclusively disproved. However, from an evidentiary standpoint that consequence simply means that disproving the preliminary fact makes the evidence not probative of any fact in issue. In effect it is rendered irrelevant by subsequent dispositive facts.

In the case of DNA evidence, the genetic profile match is relevant because it places the defendant within the pool of possible perpetrators. In order to identify the defendant as *the* perpetrator, however, each link in the evidentiary chain must be completed. In order to complete the final link – identification of the defendant as the perpetrator – it is not enough to show that the genetic profile is rare in a certain number of ethnic populations. Instead, it must be shown either that the genetic profile is rare in the *perpetrator's* ethnic group or in the general population, as these are the *perpetrator's* populations. Without that final link, while frequency evidence may be relevant for some purpose, it is not probative, standing alone, of the defendant's identity as the perpetrator.

What should be borne in mind is that ethnic database evidence such as used here *does not establish the ethnicity of the perpetrator,* only the frequency of occurrence of the matched genetic profile within an ethnic group. Therefore, use of various ethnic databases shows what the frequency (probability) of a matched profile would be if the perpetrator belonged to one of those ethnic groups. Because neither the statistical evidence nor the defendant's ethnicity establishes the ethnicity of the perpetrator, however, and because the frequency with which a genetic profile occurs varies according to ethnicity, it cannot be concluded the defendant likely left the biological evidence at the crime scene or on inculpatory matter absent some evidence that the person who left it belongs to the same ethnic group as the defendant. Thus, frequency evidence derived from ethnic groups without reference to the perpetrator's ethnicity, or without a showing

that they represent not just major population groups but the general population as a whole, is not probative when offered to prove the ultimate disputed issue, i.e., the identity of the defendant as the perpetrator.

Relying on cases such as *People v. Soto*, *supra*, 21 Cal.4th 512, *People v. Axell*, *supra*, 235 Cal.App.3d 836, and *United States v. Bonds* (6th Cir. 1993) 12 F.3d 540, respondent says that even if a percipient witness misidentifies the race of the perpetrator, DNA evidence is helpful to a jury because it provides an association between a defendant and a crime scene sample within a highly probative range or degree of statistical certainty. Respondent says: "[T]o presume that each ethnic database used requires its own evidentiary foundation, as corroborated by other witnesses, turns to [*sic*] the objective nature of the DNA evidence on its head because it is the statistical evidence over a range of ethnic and racial databases that provides the jury with necessary information about profile rarity in the *general population*." The particular issue before us was not raised in any of the cited cases. Moreover, in each, there was at least some independent evidence of the defendant's complicity, such that the preliminary fact of the perpetrator's ethnicity was established through that evidence and not merely by virtue of the defendant's ethnicity itself. (See, e.g., *People v. Soto, supra,* 21 Cal.4th at pp. 516-517; *People v. Axell, supra,* 235 Cal.App.3d at pp. 842-844; *United States v. Bonds, supra,* 12 F.3d at pp. 546-549.)

In cases in which the perpetrator's race, as described by percipient witnesses, differs from the race of the defendant, profile frequency evidence based on databases derived from both ethnic populations may be relevant because there is evidence of the preliminary fact of the perpetrator's ethnicity with respect to each ethnic group. The evidence comes in the form of eyewitness identification, or through other independent evidence (i.e., evidence which does not depend on the fact of the profile match itself or on mere reference to the defendant's ethnicity) that the defendant is the perpetrator. As a result, the profile frequency evidence is not based simply on major population groups,

which may or may not include the population of possible perpetrators, or on the defendant's ethnicity *without reference to the perpetrator's ethnicity*. Thus, situations could exist in which statistics based on more than one ethnic database would be admissible; what is known about the circumstances of the crime (including eyewitness identification and other evidence, whether direct or circumstantial) would sufficiently establish the preliminary fact that the perpetrator is, for example, *either* Caucasian *or* Hispanic. The prosecutor could, if desired, introduce profile frequency statistics with respect to each ethnic group, not simply to give jurors a range of profile rarity, but to give jurors information from which to assess the rarity of the match within the perpetrator's possible populations.[30]

We question respondent's assertion that "it is the statistical evidence over a range of ethnic and racial databases that provides the jury with necessary information about profile rarity in the *general population*." Unfortunately, too often the purported range of ethnic and racial databases is not presented to jurors so that they can assess profile rarity in the general population or, as would be proper, in the perpetrator's population, but so that they can assess it in *the defendant's* ethnic population. If the preliminary fact of *the perpetrator's* ethnic population has been established, and if it is the same as that of the defendant, there is no problem. If, however, jurors are presented with statistics based on the defendant's population without reference to the perpetrator's population, such evidence does not truly establish the rarity of the profile match, and so is not probative when, as is the usual case, it is offered to prove the defendant's identity as the perpetrator.

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30 Moreover, if the prosecution chose to proffer frequency evidence with respect only to the defendant's ethnic group, nothing we say would prevent the defense from seizing on the eyewitness description of the perpetrator as belonging to a different racial group as a basis for proffering frequency evidence with respect to that ethnic group.

Respondent says that, in any event, *Pizarro II* is distinguishable from the present case because here, neither the prosecutor nor the expert witness referred to appellant's genotype or ethnicity to prove the perpetrator's genotype or ethnicity. While we agree that *Pizarro* involved statistics based solely on the defendant's ethnicity, in light of our foregoing discussion, we do not agree that this is sufficient to render the reasoning of the *Pizarro* opinions inapplicable to appellant's case.

In addition to arguing that the evidence presented in this case was admissible under sections 801 and 802, respondent presents myriad reasons why we should reexamine *Pizarro II*'s reasoning on relevance. We decline to do so. Respondent's discussion either misinterprets our opinion, raises anew points which were considered and rejected in *Pizarro II* (see, e.g., *Pizarro II*, *supra*, 110 Cal.App.4th at p. 631, fn. 82 [discussing *People v. Soto*, *supra*, 21 Cal.4th 512]), or relies on authority which we find unpersuasive.

In a footnote in *Pizarro II*, we stated, in part: "In summary, we think prosecutors have three options in presenting profile frequencies: (1) establish that the perpetrator more likely than not belongs to a particular ethnic population, then present only the frequency in that particular ethnic population; (2) present only the most conservative frequency, without mention of ethnicity; or (3) present the frequency in the general, nonethnic population. These options promote the goals of admitting only relevant evidence and eliminating unjustifiable and potentially prejudicial references to ethnicity and race." (*Pizarro II*, *supra*, 110 Cal.App.4th at p. 633, fn. 85.) Despite the fact this clearly was not our holding (which respondent recognizes), respondent argues the suggested alternatives are unreasonable and asks us to reexamine them in favor of a cautionary instruction.

We can conceive of cases in which the evidence is presented in such a way that a cautionary instruction will be sufficient to prevent any potential misperception by jurors concerning the evidence's probative force. That said, we decline to reexamine the

options we suggested. We note, however, that as the science of DNA advances, some of the perceived problems with the alternatives may disappear, while other problems may arise. We assume that, at some point in the future, DNA analysis will involve testing for a sufficient number of locations so that genetic certainty will be achieved: experts will be able to testify that no two people (or perhaps only twins or clones) have the same genetic "fingerprint," and so evidence of statistical probabilities will no longer be necessary.

We emphasize that our holding does not limit the admissibility of DNA profile evidence per se. It simply requires that the statistical evidence used to establish the frequency of the match be based on the ethnicity of the *perpetrator*, and not on that of the *defendant*, unless there is sufficient non-DNA evidence to establish, for section 403 purposes, that the defendant *is* the perpetrator.[31]

We turn now to the evidence presented in appellant's case. Where the relevance of proffered evidence rests upon preliminary foundational facts, "the proponent of such evidence has the burden of producing evidence of the preliminary fact sufficient for a trier of fact to reasonably find by a preponderance of the evidence that the fact exists. [Citations.]" (*Pizarro II*, *supra*, 110 Cal.App.4th at pp. 542-543; see § 403.) In other words, "there [must] be sufficient evidence to enable a reasonable jury to conclude that it is more probable that the fact exists than that it does not. [Citations.]" (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61.)

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31 Moreover, nothing we say precludes the use of a so-called "cold hit" DNA match, which most commonly occurs when crime scene DNA from an unknown perpetrator is compared to the genetic profiles maintained in a DNA database. Law enforcement officials clearly may use the fact of the match to point them to a suspect and to new avenues of investigation. The evidence they develop will then determine whether, at trial, jurors properly may be given profile frequency statistics based on a particular ethnic database, or whether another means of assessing frequency (for instance, use of a general population database or use of the single most conservative frequency without mention of ethnicity) is required. (See *Pizarro II*, *supra*, 110 Cal.App.4th at p. 633, fn. 85.)

Here, the proffered evidence is the statistical rarity of the match between appellant's genetic profile and that of the evidence (perpetrator's) DNA. What this really means is that the perpetrator's genetic profile occurs with a certain rare frequency in the population of possible perpetrators, and appellant's genetic profile matches that of the perpetrator. The preliminary fact is the perpetrator's ethnicity since, as we have discussed, absent some evidence of that fact, statistics derived from particular ethnic databases have no tendency in reason to prove the fact for which the evidence is proffered, i.e., that the perpetrator's profile is so rare in the population of possible perpetrators that, because appellant's profile matches that of the perpetrator, appellant *is* the perpetrator.

In the present case, there was no direct evidence of the perpetrator's ethnicity. However, direct evidence, such as a description from a percipient witness, is not the only means of establishing the preliminary fact. Instead, the requisite fact can also be established through other independent evidence (evidence not dependent upon the profile match, match frequency, or the defendant's ethnicity per se) that the defendant is the perpetrator. The logic is as follows: If independent evidence establishes that the defendant more likely than not is the perpetrator, and the defendant is Caucasian, then independent evidence establishes, for purposes of section 403, that the perpetrator more likely than not is Caucasian. The preliminary fact of the perpetrator's ethnicity is thus sufficiently established so that match frequency statistics, computed from a Caucasian database, are relevant to prove the defendant's identity as the perpetrator.[32]

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32 We stress that in our example, the Caucasian database statistics are relevant not merely because the defendant is Caucasian, but because sufficient non-DNA evidence establishes him as the perpetrator so that a trier of fact reasonably can conclude it is likely that he and the perpetrator share ethnicity. The Caucasian database statistics are not deemed relevant without reference to the perpetrator's ethnicity, but because the perpetrator's ethnicity is sufficiently established. If there is insufficient non-DNA evidence to establish that the defendant is, more likely than not, the perpetrator, then the

This means of establishing the preliminary fact does not, unlike the situation in *Pizarro*, render the defendant's guilt the premise rather than the ultimate conclusion; the description of the perpetrator is not based on evidence of the defendant's traits, which are simply assumed to be the same as those of the perpetrator and which fill out the perpetrator's description with facts not in evidence, nor are the perpetrator's traits established by a presumption that because the defendant possesses those traits, so does the perpetrator. (See *Pizarro II*, *supra*, 110 Cal.App.4th at pp. 544-546.) Instead, no assumption is made concerning whether the perpetrator shares the defendant's traits, but the actual evidence is examined to see whether it sufficiently establishes that defendant *is* the perpetrator to meet the requirements of section 403, subdivision (a). For example, it is not presumed that, because appellant possessed a ski mask and flashlights with colored lenses, those must have been the types of items used by the perpetrator. Instead, evidence presented by means of victim testimony showed that the perpetrator wore a ski mask and used a flashlight with a colored lens. Appellant possessed such items; therefore, the evidence establishes that appellant could be the perpetrator.

In *Pizarro II*, we expressly did not address the issue of whether independent evidence was sufficient to support the determination of the preliminary fact. (*Pizarro II*, *supra*, 110 Cal.App.4th at p. 546, fn. 12.) Here, we reach the question and conclude sufficient non-DNA evidence was presented to establish, for purpose of a section 403 analysis, that appellant was the perpetrator with respect to the crimes committed against B.S. and S.C. We have set out the evidence at length in the unpublished portion of our opinion, *ante*, and decline to repeat it here. Suffice it to say that items seized from appellant's residence and car, as well as appellant's reaction when asked to give a buccal

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defendant's ethnicity establishes nothing with respect to the perpetrator's ethnicity, and does not render relevant statistics derived from any particular ethnic database.

swab, are pertinent to our analysis. Although none is sufficient standing alone, when considered cumulatively, they meet the section 403 standard.

Since the record sufficiently establishes that appellant is the perpetrator and therefore shares the perpetrator's race, and appellant is Caucasian, the profile frequency statistics derived from the Caucasian database, as testified to by Smith, were relevant. The evidence with respect to the other ethnic databases was not; however, its admission did not prejudice appellant. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Venegas, supra*, 18 Cal.4th at p. 93.)[33]

C. The Evidence as a Whole[*]

We have determined that the DNA evidence was properly considered by the jury and established the rarity of appellant's genetic profile. When viewed in accordance with the applicable legal principles, *ante*, the evidence thus was sufficient to establish appellant as the perpetrator of the offenses against B.S. and S.C. Accordingly, we uphold his convictions on counts 1-3 (B.S.) and 6-8 (S.C.), and we reject his argument that all convictions, being dependent on the DNA evidence, must fall.

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33 In light of this conclusion, we reject appellant's related claim that defense counsel was ineffective for failing to object to the admission of irrelevant DNA statistical evidence. Briefly stated, the burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, "a defendant must show that counsel (1) performed at a level below an objective standard of reasonableness under prevailing professional norms; and thereby (2) subjected the defense to prejudice, i.e., in the absence of counsel's failings a more favorable outcome was reasonably probable." (*People v. Hamilton* (1988) 45 Cal.3d 351, 377.) Since the Caucasian database evidence was relevant, counsel had no grounds upon which to object to its admission. He had no obligation to raise a meritless objection. (*People v. Farnam* (2002) 28 Cal.4th 107, 186, fn. 36; *People v. Catlin* (2001) 26 Cal.4th 81, 163.) Although statistical evidence based on the other ethnic databases was irrelevant and presumably would have been excluded had an objection been made thereto, it is readily apparent that a more favorable outcome would not have been reasonably probable.

***** See footnote, *ante*, page 1.

Appellant further contends, however, that even taking the DNA evidence into account, the evidence was insufficient to identify him as the perpetrator of the crimes against J.G. (counts 4-5), K.S. (counts 9-10), and E.K. (counts 11-12). He says that, because, as jurors were instructed, evidence of other crimes is insufficient to prove commission of a particular charged offense, the convictions cannot be sustained unless there is independent evidence of guilt, other than an inference of guilt based on other crimes evidence, as to each specific incident.[34]

We assume appellant is correct in his interpretation of the law. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013 [upholding instruction]; but see *People v. Quintanilla* (2005) 132 Cal.App.4th 572, 582-583 [jury should not be permitted to draw inference of criminal propensity from evidence pertaining to other *charged* offenses,

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34 Jurors were told that each count charged a distinct crime, and that they had to decide each count separately. Pursuant to a modified version of CALJIC No. 2.50.01, they were further instructed: "Now evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions. If you find that the defendant committed a sexual offense, you may but are not required to infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant has this disposition, you may but you are not required to infer that he was likely to commit and did commit other crimes of which he is accused. [¶] For you to consider evidence of one sexual incident as evidence relevant to the other incidents shown by the evidence, you must first determine if that incident and the defendant's involvement was proved by a preponderance of the evidence. If the defendant's involvement in that incident was not shown by a preponderance of the evidence, you cannot consider evidence of such incident for any purpose as to any of the other crimes charged arising out of the other incidents shown by the evidence. [¶] However, if you find by a preponderance of the evidence that the defendant committed a sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed any one or more of those crimes charged arising from the four other occasions reflected in the evidence. [¶] If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of any of the charged crimes arising from any one or more of the other occasions."

which cannot be excluded under section 352].)[35] Respondent does not contend otherwise. Nevertheless, we have examined the evidence in accordance with the applicable principles of appellate review, *ante*, and conclude independent evidence existed.

Wofford Heights is a small, rural community. At various times, appellant lived in the same area as the victims, had access to a residence in the area, and/or his parents lived nearby. There was evidence from which it reasonably could be inferred that the perpetrator was on foot and familiar with each victim's home and specific location within that home, and that appellant could have had this knowledge. Although this evidence, standing alone, merely shows appellant had the opportunity to commit the offenses (see *People v. Boyce* (1980) 110 Cal.App.3d 726, 737), it can be considered in conjunction with other evidence. In that regard, K.S. identified a pouch seized from appellant's residence. There were latex gloves in the pouch. Her attacker carried a pouch and wore latex gloves. During the assault, K.S. touched her assailant's beanie- or ski-type mask, which felt like it was made from cotton material. A ski mask seized from appellant's residence appeared to her to be made of the same material. A .22 magnum cylinder was seized from a vehicle on appellant's property. The bullet recovered from K.S.'s wall was a .22 magnum. Years earlier, appellant's father gave such a gun to appellant's brother, who lived with appellant. J.G. believed that one of the knives seized from appellant's house was the same as that used by her assailant. She identified the flashlight found near the discarded mask bearing appellant's DNA. It had a red lens. Latex gloves and a flashlight with a green-colored lens were found in appellant's car, and he admitted they were his and that he used the flashlight so he could walk around at night without being seen. E.K.'s assailant wore a black pullover sweatshirt and black windbreaker pants and

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35 It appears the modified instruction given in the present case was requested by the defense.

a ski mask. Among the items seized from appellant's residence were dark clothing (including a jogging outfit made of windbreaker material), colored plastic cut-outs, and a flashlight with a blue cut-out lens.

We find this circumstantial evidence highly incriminating. (See *People v. Wallace* (1993) 14 Cal.App.4th 651, 661.) Appellant points to weaknesses in the various identifications, including the fact that a number of the items identified were not distinctive and could have been possessed by other people as well as appellant. He also argues that the independent evidence in fact tends to eliminate him as the perpetrator, or at least make such a conclusion doubtful. However, these were issues for the jury to resolve. We conclude there was sufficient evidence to sustain all convictions.

II

IMPROPER ADMISSION OF HEARSAY*

Appellant contends the trial court erroneously admitted, over his objection, hearsay with respect to the crimes committed against E.K. Respondent concedes the error, but argues it was harmless. We conclude reversal of the pertinent counts is required.

A. Background

At trial, E.K. testified, in part, that her assailant had a yellow flashlight, but that he never turned it on. He pulled down her sweatpants and underwear, then touched her crotch and the inside of her thigh. On redirect examination, the prosecutor elicited that, a few days after the incident, a social worker interviewed E.K. about what took place. Although E.K. remembered the interview, she testified that she did not remember the lady asking her what the assailant did with the flashlight, or telling the lady that he shined the flashlight on her crotch area. E.K. testified that she did not remember whether that happened.

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* See footnote, *ante*, page 1.

The prosecutor subsequently questioned Senior Deputy Stephens about this interview, which he arranged and observed, and which was conducted on November 8, 2001, by a Ms. Garcia. The prosecutor elicited that Garcia asked E.K. about the assailant's use of the flashlight, and that E.K. responded that he had shined it in her crotch area for about five seconds. Defense counsel's hearsay objection was overruled.

Defense counsel subsequently moved for acquittal, pursuant to Penal Code section 1118.1, on counts 4, 5, 9, 10, 11, and 12. The prosecutor argued that the offenses all were committed by the same person, and that his actions were unique. Specifically with respect to counts 11 and 12, which involved E.K., the prosecutor relied on the testimony she elicited from Stephens to impeach E.K. The prosecutor noted that E.K. told the interviewer that the person shined the flashlight on her crotch, and that this conduct by the perpetrator was "strikingly similar" to the attacks on J.G. and S.C. She argued: "The touching on [E.K.] again is a person who is interested, for lack of a better word, in her, in her buttocks and her vagina, which this person on each of the attacks is interested in. And to imagine another attacker could be copying this person or we have two attackers with the same sexual interest is, is a bit of a stretch." The trial court denied the motion, finding sufficient similarities among the incidents so as to infer that the person who committed the other four also committed the one involving E.K. In part, the court pointed to the voyeuristic nature of the offenses and the use, in almost every instance, of a light source to expose the victims' genitals.

In arguing the evidence on the various counts to the jury, the prosecutor said, with respect to counts 11 and 12: "You remember what he did to [E.K.], he again pulled down her pants and her panties, touched her vaginal area, touched her buttocks, and she didn't remember on the stand, if you remember the course of direct examination, I asked her about the flashlight and the touching and do you remember what he did with the flashlight? She didn't even at this point remember him turning on that flashlight. [¶] But remember when deputy Stephens testified …. What was important about that was

that I asked him, what did she say [in the interview] about that flashlight? And he said she said he shined that flashlight in her crotch, and what does that sound like? Every other offense, except [K.S.] who managed to get ahold of his gun and fire it off and scare him out of there, every other offense involves him going after these girls' private parts, buttocks and lower part of the body. [¶] It's not as if we're dealing with one count of rape which is sexual intercourse, of course, and then another count of touching and another count of penetration. We are dealing with sexual behavior, that sexual behavior alone tells us this is the same person each time."

In her rebuttal, the prosecutor conceded weaknesses in the investigation of the incident involving E.K., but returned to the same theme: "Now with regards to [E.K.'s] incident, deputy Kadel didn't find anything because deputy Kadel didn't look for anything. He did say he looked outside for footprints. It was raining, there was nothing there, and no, he didn't take prints from around the window. And that would have been nice. Because we know if somebody had left fingerprints, then we could match those fingerprints and match them up to the defendant. [¶] *But what did the defendant leave at [E.K.'s] house? He left his signature. The way he inspected her crotch with that light is the same way he assaulted the rest of these women. That is his signature. You don't need a fingerprint or DNA from that case, because he left his signature.*" (Italics added.)

B. <u>Analysis</u>

"A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.[**36**] The 'fundamental

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36 "Evidence Code section 1235 provides as follows: 'Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.'

"Evidence Code section 770 provides that: 'Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent

requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

As respondent recognizes, the record contains no support for a conclusion that E.K.'s forgetfulness was evasive, feigned, or untruthful. (See *People v. Ervin* (2000) 22 Cal.4th 48, 85; *People v. Johnson, supra,* 3 Cal.4th at p. 1220.) "[T]here is no 'testimony' from which an inconsistency with any earlier statement may be implied when the witness honestly has no recollection of the facts." (*People v. Rios* (1985) 163 Cal.App.3d 852, 864.) Accordingly, the trial court erred by admitting Stephens's hearsay testimony over appellant's objection.

The error does not require reversal unless it is reasonably probable that admission of the evidence affected the verdict. (*People v. Johnson, supra,* 3 Cal.4th at p. 1220; *People v. Watson, supra,* 46 Cal.2d at p. 836.) Respondent says the error here was harmless despite the prosecutor's reference to the evidence during her opposition to

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with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action.'"

appellant's Penal Code section 1118.1 motion. He calls the unchallenged modus operandi evidence linking appellant to the E.K. assault "compelling."

We cannot agree with respondent's proposition that a "nocturnal home intrusion sexual assault, perpetrated against sleeping victims," is necessarily distinctive, even in a small community. (Compare *People v. Wallace, supra,* 14 Cal.App.4th at p. 661 [fact same person perpetrated all offenses "undeniable" where incidents shared very distinctive similarities including use of flex-ties, cutting of clothing with a knife, covering of victims' heads, digital penetration with use of lubricant, and tracing of shapes on victims' torsos].) Factors that might have added to the distinctiveness, such as the use of latex gloves and a flashlight with a colored lens, were missing from the offenses involving E.K.[37] Respondent describes the assailant's conduct as "voyeuristic, touching-type conduct," but again, we do not find fondling to be particularly distinctive. Voyeuristic conduct, on the other hand, especially when considered with the other evidence and the size of the community, can provide a signature. The problem is, the properly-admitted evidence did not establish the presence of voyeuristic conduct in E.K.'s case. All the evidence established was that the perpetrator pulled down E.K.'s sweatpants and underwear, and then touched her crotch. Significantly, the prosecutor here did not merely refer to the evidence during her opposition to appellant's acquittal motion; she emphasized the evidence to the jury in her comments concerning counts 11 and 12. Simply put, the prosecutor relied on the voyeuristic conduct as appellant's sexual signature. (See *People v. Pantoja* (2004) 122 Cal.App.4th 1, 14-15.)

Although we have upheld appellant's convictions on counts 11 and 12 against a claim of insufficient evidence, the evidence concerning those counts was the weakest of

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37 Respondent's assertion that a flashlight with a colored lens was used in E.K.'s case, is incorrect. E.K. testified that her assailant never turned on the flashlight, and so she never saw the color of the light. All she could say was that the flashlight itself was yellow.

the lot individually, and was the least similar in terms of modus operandi. In assessing the probable effect of the erroneously-admitted evidence on the jury, we must also take into consideration that E.K. thought Anthony Kyt's voice sounded close to that of her assailant, although she was not sure, and that, when his residence was searched a few weeks after the attack on E.K., Kyt was in possession of a ski mask, long-sleeved black shirt, and a pair of shiny black pants. E.K. described her assailant as wearing a black pullover sweatshirt, black windbreaker pants, and what looked to be a ski mask.

We cannot say no reasonable juror would have convicted appellant on counts 11 and 12 absent admission of the challenged evidence. However, we cannot, on the record before us, assume the jury treated that evidence as any less crucial than the prosecutor treated it. (See *People v. Failla* (1966) 64 Cal.2d 560, 566; *People v. Cruz* (1964) 61 Cal.2d 861, 868.) We regretfully conclude that it is reasonably probable the jury would have made a finding more favorable to appellant on counts 11 and 12, absent erroneous admission of the challenged evidence. (See *People v. Pantoja, supra,* 122 Cal.App.4th at p. 15.) Accordingly, the convictions on those counts are reversed.[38]

III

JOINDER OF COUNTS*

Appellant next claims error based on the fact the charges arising out of all five incidents were tried together. He says the trial court abused its discretion by denying his pretrial severance motion, and that, even assuming the court's ruling was correct when made, reversal is required because joinder actually resulted in gross unfairness amounting to a denial of due process.

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38 Since the properly-admitted evidence is legally sufficient to sustain the convictions, retrial on those counts is not barred. (See *Burks v. United States* (1978) 437 U.S. 1, 18.)

***** See footnote, *ante*, page 1.

A. Denial of Motion to Sever Counts

Prior to trial, appellant moved to sever counts into five separate groups, so that he would receive a separate trial with respect to each victim. He contended that the five events did not share sufficient common marks so as to be cross-admissible; the charges involving victims who were 10 and 12 years old were much more inflammatory than those in which the victims were a teenager and an adult woman; and the charges that involved DNA evidence were somewhat stronger than those that did not. The People opposed the motion, claiming the evidence from each group of charges was cross-admissible as to the remaining groups; the charges were sufficiently similar so that none was more inflammatory than the others; and the charges involving DNA evidence were not necessarily any stronger than those in which property seized from appellant's residence was identified.

Following argument, the trial court denied the motion. Relying on *People v. Britt* (2002) 104 Cal.App.4th 500, the court found that evidence on the various charges would be cross-admissible in separate trials, as section 1108 permitted the use of such evidence not only to show propensity, but also to establish identity. In terms of a section 352 analysis, the court noted that all of the offenses occurring during the early morning hours; all involved uninvited entry into the residence; all involved specific efforts by the perpetrator to block identification by use of a mask or other headgear; all, with minor exceptions, appeared to be a combination of voyeurism and sexual conduct in the nature of touching and digital penetration; and all occurred within a small geographical area and within approximately two miles of appellant's residence, and within a small community as opposed to a large metropolitan area. The court concluded that no aspect of the charges was of such a prejudicial impact that, if jointly tried, it would likely prejudice a fair consideration of the other charges; hence, it found very little potential prejudice to appellant, balanced against the considerable savings of time to be gained by a joint trial.

Appellant now contends the trial court erred. He argues that cross-admissibility is not established, even under section 1108, where the other crimes cannot be proven by a preponderance of the evidence, or where the other crimes would be excluded pursuant to section 352. He further contends that weak cases (those not involving DNA evidence) were joined with considerably stronger ones (those involving DNA evidence), and that the three weakest cases were the most serious and most inflammatory. We disagree.

Penal Code section 954 provides, in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, … or two or more different offenses of the same class of crimes or offenses, under separate counts …. [T]he defendant may be convicted of any number of the offenses charged …; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

"Whether offenses properly are joined … is a question of law and is subject to independent review on appeal …." (*People v. Cunningham* (2001) 25 Cal.4th 926, 984-985.) There is no question that joinder was proper under the statute in the present case, and appellant does not claim otherwise. The sexual offenses were of the same class of crimes, and the remaining charges were connected to those offenses in their commission. (See *People v. Poggi* (1988) 45 Cal.3d 306, 320; *People v. Grant* (2003) 113 Cal.App.4th 579, 586.)

"[T]he decision whether separate proceedings are required in the interests of justice is reviewed for an abuse of discretion. [Citations.]" (*People v. Cunningham, supra,* 25 Cal.4th at pp. 984-985.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 850.) In determining whether the trial court abused its discretion in denying the severance motion, we examine the record before that court at the time of its ruling.

(*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120.) Since the law prefers consolidation of charges (*People v. Ochoa* (2001) 26 Cal.4th 398, 423, disapproved on other grounds in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14), "[w]hen exercising its discretion, the court must balance the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial. [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 126.) Where, as here, the statutory requirements for joinder are met, an appellant "must make a clear showing of prejudice to establish that the trial court abused its discretion in denying [his] severance motion." (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.)

The California Supreme Court has "developed criteria to guide evaluations of trial court decisions on severance motions. '"Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joined of them turns the matter into a capital case.'"' [Citation.]" (*People v. Ochoa, supra,* 26 Cal.4th at p. 423.) The four-part test is stated in the conjunctive. (*Ibid*.)

"Cross-admissibility of evidence is sufficient but not necessary to deny severance. [Citation.]" (*People v. Ochoa, supra,* 26 Cal.4th at p. 423.)[39] While the California Supreme Court has "held that cross-admissibility ordinarily dispels any inference of prejudice, [they] have never held that the absence of cross-admissibility, by itself,

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39 Penal Code section 954.1 provides in relevant part: "In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, …, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact."

sufficed to demonstrate prejudice." (*People v. Mason* (1991) 52 Cal.3d 909, 934; see *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1286.) "Because of the factors favoring joinder, a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial. [Citation.]" (*People v. Arias, supra,* 13 Cal.4th at p. 127; see *People v. Bean* (1988) 46 Cal.3d 919, 938-939; *People v. Matson* (1974) 13 Cal.3d 35, 41.) "In determining potential prejudice from the joint trial of non-cross-admissible charges, the court should evaluate whether (1) certain of the charges are unduly inflammatory, (2) a 'weak' case will be unfairly bolstered by its joinder with other charges, and (3) any of the charges carries the death penalty. [Citations.]" (*People v. Arias, supra,* at p. 127.)

We conclude the trial court did not abuse its discretion in denying the severance motion. Despite appellant's protestations to the contrary, we are unconvinced that none of the evidence would have been cross-admissible. (See *People v. Britt, supra,* 104 Cal.App.4th at pp. 504-506.) Moreover, regardless of the extent of cross-admissibility, there would be at least some overlap of evidence in separate trials. Furthermore, the evidence was not of markedly different strength with respect to the different incidents; leaving aside E.K., the remaining victims either identified items seized from appellant's residence, or identified the mask on which his DNA was found. None of the identifications, however, was overwhelmingly strong when compared to the others or unassailable by the defense. No set of charges was significantly more likely to inflame the jury than the others; although, generally speaking, sexual offenses committed against 10- and 12-year-olds might be considered more heinous than such offenses committed against a teenager (S.C.) and an adult woman (J.G.), here the actual conduct was more

egregious where S.C. and J.G. were concerned.[40] (See *People v. Mayfield* (1997) 14 Cal.4th 668, 721; *People v. Wright* (1998) 62 Cal.App.4th 31, 45.)

Here, the trial court weighed all the pertinent issues, and even undertook a section 352 analysis as best it could without having heard the actual evidence. Its ruling was reasonable. (See *People v. Memro, supra,* 11 Cal.4th at p. 850.) "To demonstrate that a denial of severance was reversible error, defendant must '"clearly establish that there [was] a substantial danger of prejudice requiring that the charges be separately tried."' [Citations.]" (*People v. Arias, supra,* 13 Cal.4th at p. 127.) Appellant has failed to carry this burden.

B. Joinder as a Denial of Due Process

Appellant moved for a new trial in part on the basis that, regardless of whether the trial court properly denied severance prior to trial, developments during trial established that joinder actually resulted in gross unfairness amounting to a denial of due process. The People opposed the motion. Following argument, in which defense counsel asserted that most of the charges would have resulted in acquittals if tried separately, the court denied the motion, stating in part:

> "[I]t would appear that a material factor in this case … is the reality that all of these incidents took place in a mountain community, or at least a mountain enclave relatively isolated from other major locations, population that the relative distances between the various locations of the five incidents were certainly within a couple of miles, … which makes the conduct of the respective incidents certainly more significant than, for instance, if these events occurred in a large metropolitan area such as Bakersfield at various locations in the city.

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[40] For instance, appellant cut S.C. with an ice pick, while his conduct with J.G. went well beyond mere fondling and voyeurism.

> "It is extremely probative, in the Court's estimation, for the jurors to consider, … the location, relative locations of the five incidents, relative nearness in distance of the various locations where these five incidents took place and the fact that the community … is located in a relative, relatively isolated – and I don't mean that it is impossible to get there, but what I do mean is that the distance from any other larger community certainly is significant in evaluating whether or not the reasonable likeness of the way these crimes were committed has less or more significance than if committed in some larger community.
>
> "I think that's very probative evidence and highly significant evidence, which …, when taken with the relative similarity of the offenses, such as in each incident … an item of some type of offensive character …, that has significance, and I'm sure the jurors considered that.… [I]n three of the incidents there was a flashlight which was in the possession of the person accused, in all but one of the incidents there was some type of glove being worn by the perpetrator, in all of the incidents some type of facial covering was worn by the individual involved. And certainly, in the Court's estimation, given the physical nearness of the locations of the five incidents, the similarity in the way the person committed the crimes, prepared himself for the commission of the crimes, … presents highly significant evidence from which, amongst other details, but certainly details which jurors, themselves, would have had [*sic*] been in position to correctly or properly analyze in terms of the weight of such detail …."

Appellant now contends that because the three non-DNA cases turned out at trial to be weaker than contemplated, such that the People could not independently prove his guilt on any offense by a preponderance of the evidence and so those cases were not cross-admissible, misjoinder resulted in gross unfairness amounting to a denial of due process.

"Where, as here, the trial court's ruling on a motion to sever is correct at the time it was made, we must nevertheless reverse the judgment if the '"defendant shows that joinder actually resulted in 'gross unfairness' amounting to a denial of due process." [Citation.]' [Citation.] '[E]rror involving misjoinder "affects substantial rights" and requires reversal … [if it] results in actual prejudice because it "had substantial and injurious effect or influence on determining the jury's verdict."' [Citations.] [¶] The

issue is not whether the evidence is sufficient to support the convictions on the joined counts, independent of the evidence on other counts. '"The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."' [Citation.] [¶] In other words, the defendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts. [Citation.]" (*People v. Grant*, *supra*, 113 Cal.App.4th at pp. 587-588.)

In assessing appellant's claim concerning the impact at trial of the joinder, "we look to the evidence actually introduced at trial to determine whether 'a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law.' [Citation.] Having done so, we find neither actual nor potential prejudice such as to render the trial grossly unfair and thus deny due process." (*People v. Bean*, *supra*, 46 Cal.3d at p. 940.) Our reasoning with respect to the claimed erroneous denial of severance is also applicable here, and we find the trial court's analysis persuasive. There was no deprivation of due process.

IV

SENTENCING ISSUES*

A. *Blakely*

Appellant was sentenced to the upper determinate term on counts 1, 2, 3, 4, 6, 7, 8, 9, and 11.[41] The trial court found three circumstances in aggravation (appellant's prior convictions as an adult were numerous, he was on felony probation at the time he committed the instant offenses, and his prior performances on misdemeanor probation were unsatisfactory) and none in mitigation.

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* See footnote, *ante*, page 1.

41 The sentences imposed on counts 2, 3, 4, 7, 8, 8, and 11 were stayed pursuant to Penal Code section 654. Consecutive terms of 25 years to life were imposed, pursuant to Penal Code sections 667.6 and 667.61, on counts 5, 10, and 12.

Relying on *Blakely v. Washington* (2004) 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466, appellant contends the trial court violated his Sixth Amendment right to trial by jury by imposing upper terms based on factors not admitted by appellant or found to be true by the jury beyond a reasonable doubt. The California Supreme Court recently undertook an extensive analysis of these cases (and *United States v. Booker* (2005) 543 U.S. 220) and concluded that the imposition of an upper term sentence, as provided under California law, is constitutional. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261.) Accordingly, appellant's contention fails.

B. Errors in Abstract of Judgment

Appellant notes, and respondent concedes, that the determinate sentencing abstract of judgment incorrectly reflects the determine sentence carried over from the indeterminate sentencing abstract of judgment, and that the entry for total time incorrectly shows a total determinate terms of 98 years 4 months. In light of our reversal of the convictions on counts 11 and 12, an amended abstract of judgment must be prepared regardless of whether the People decide to retry those offenses, and the complained-of errors can be corrected at that time.

DISPOSITION

The judgment of conviction on counts 11 and 12 (residential burglary and forcible lewd act, respectively, involving victim E.K.) are reversed and the matter is remanded to the trial court. In all other respects, the judgment is affirmed. If the People do not file and serve a written request for a new trial on counts 11 and 12 within 30 days of the date the remittitur is filed in the trial court, the trial court is directed to prepare and transmit to the appropriate authorities an amended abstract of judgment reflecting no conviction or sentence on counts 11 and 12, and correcting the errors contained in the original abstract of judgment, in accordance with our opinion.

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Ardaiz, P.J.

WE CONCUR:

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Dibiaso, J.

_____
Harris, J.