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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GARCIA,

Defendant and Appellant.

D036220

(Super. Ct. No. SCN074982)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed.

A jury convicted Jose Garcia of first degree murder (Pen. Code,¹ § 187, subd. (a)) and found true the special circumstances that the murder was committed during the commission of rape and sodomy, in violation of sections 261 and 286, and within the meaning of section 190.2, subdivision (a)(17). The jury also found that Garcia used a deadly or dangerous weapon, a knife, in the commission of the murder. (§ 12022, subd.

¹ All statutory references are to the Penal Code unless otherwise specified.

(b)(1).) The trial court sentenced Garcia to prison for life without the possibility of parole, plus one year.

Garcia appeals, contending the trial court prejudicially erred in admitting evidence of the results of deoxyribonucleic acid (DNA) tests, in admitting expert opinions of forcible penetration for rape and sodomy, and in admitting hearsay statements of the murder victim. Additionally, Garcia claims the court violated his right to due process by failing to sua sponte instruct the jury on reasonable doubt based on third party culpability. Alternatively, Garcia asserts cumulative error compels reversal. We affirm.

FACTUAL BACKGROUND

On January 18, 1997, Garcia's wife of nearly one year, Darcy Garcia (Darcy), was found dead in her Oceanside, California apartment. When a subsequent, lengthy investigation revealed Garcia was the most likely suspect, a nationwide broadcast was sent out for him. Garcia was arrested in Florida on this case in March 1998. The following facts were presented to the jury through stipulations and the testimony of witnesses at the trial in this matter which began June 1, 2000.

Darcy and Garcia were married on February 13, 1996. In August of 1996, Darcy sublet her daughter Oonagh Fitzgerald's (Oonagh's) one bedroom apartment in Oceanside, allowing Oonagh to keep a key to the apartment so she could access some of her clothing left in the bedroom closet.² Oonagh would usually call before she stopped

² Darcy also had another daughter, Tara Fitzgerald, from a previous marriage who lived in Oceanside.

by for her clothing. Although she did not believe Garcia lived with Darcy at the apartment, he was often there when she dropped by. Oonagh did not have a close relationship with Garcia, finding him not talkative or social.

One of Darcy's sisters, Robin Kissel (Robin), who lived and worked in Laguna Hills, California, testified that in mid-December 1996, Garcia came to stay with her for a week to give Darcy a break. Robin explained Darcy had told her that due to what she thought was alcohol-related dementia, Garcia's behavior was changing, he was becoming clingy, dependent and keeping her up all night talking, and just becoming "very difficult to handle." Darcy had also told Robin that she had tried to get Garcia into treatment for his alcohol problem, but he would not go.

When Garcia was staying with Robin, he expressed concern that Darcy was not in love with him anymore and constantly asked her when Darcy was going to come see him or call. Darcy picked Garcia up after Robin called her to come get him. Robin declined to allow Garcia stay with her after Christmas that year when Darcy asked if he could again do so.

In January 1997, Darcy told Robin she sometimes would not let Garcia come into her apartment because he refused to get treatment. On one such occasion, he had slept on her doorstep. Also in early January, Darcy told Robin she was not going to allow Garcia back into the apartment anymore. On cross-examination, Robin said the week before Darcy's murder she was still allowing Garcia into the apartment at times.

Oonagh testified she last talked with her mother on Saturday afternoon January 11, 1997, when she went to the apartment to pick up some clothes. Garcia was not there at

the time, and Darcy was getting ready to take a trip with her good friend Joanne Peterson (Joanne).³ Oonagh and Darcy left at the same time that evening in separate cars, driving to Escondido to drop Darcy's white Volkswagen Jetta off at her sister Wendy Herrera's (Wendy's) house, before Oonagh gave Darcy a ride to Joanne's house.

Oonagh could not remember whether she had gone over to Darcy's apartment on the 13th of January, but said when she did so on January 14, between 7:00 and 8:00 p.m., to pick up some clothes, she used her key to open the apartment doors. As she walked inside, Garcia, who was only wearing pants, a baseball cap, and light brown construction boots, walked out of the bedroom and through the kitchen toward her, saying she had scared him. When she said she had come to get some clothes, he said, "Let me cover your mother up, she is naked." Feeling embarrassed and finding it strange that Garcia was speaking to her, Oonagh waited in the living room for about five minutes before Garcia returned to tell her it was "okay" for her to come into the bedroom. During her wait, Oonagh noticed that the apartment, which her mother usually kept clean, was a disorganized mess with an alcoholic beverage container, snacks and other food items left out, pillows thrown around the room and shoes not put away.

As Oonagh followed Garcia into the dark bedroom, Garcia laid down on the bed next to her mother who was covered with blankets on the edge of the lower right corner of the bed, and snuggled up to her. Oonagh, who could see only her mother's legs, which

³ Although most witnesses referred to Joanne at trial by Peterson, she had married by that time and testified under her new surname of Burgess.

were clothed in white sweatpants and socks from under the blanket, thought she was sleeping and did not speak to her. Being uncomfortable around Garcia, Oonagh walked into the closet, closed the door behind her and turned on the light. After taking about five to ten minutes to grab together her clothes, Oonagh left the apartment. As she did so she noticed Darcy's car was parked in front of the building.

Oonagh returned to the apartment around 9:00 a.m. on Saturday, January 18, 1997, to check on her mother who had not answered or returned her telephone calls. Not seeing her mother's car outside, Oonagh used her key to enter the apartment. Once inside, she noticed a smell in the apartment and that it was "much messier than it had been four days before." When she walked into the bedroom, she noticed that the toilet in the bedroom's bathroom was backed up with feces. As she went to put some clothes in the closet, she also noticed there was someone on the bed covered with a blanket in the same position she had seen her mother four days earlier, except that it appeared the legs had moved a little. Oonagh assumed it was Garcia as she had not seen her mother's car outside. She quickly left the apartment, yelling out that if Garcia was still there when she got back from work, she would call the police. She received no response to her threat.

When Oonagh returned to the apartment close to noon or 1:00 p.m. that day, no one was there. Within a short time, another aunt, Erin Carr (Erin) and her boyfriend, Aram Kenyon, arrived. While Oonagh waited with some children her aunt and boyfriend had with them, Erin and her boyfriend entered the apartment using Oonagh's key. When they entered the apartment there was a "terrible smell." They discovered Darcy's body covered with a blanket, except for her feet with white socks.

The weekend before Darcy's body was found, she had gone with Joanne to Las Vegas, returning to Joanne's house around 6:00 a.m. on Tuesday, January 14, 1997. Darcy left Joanne's around noontime to have rust spots on her car examined by a friend named Rusty Staiton. When Darcy did not return that night to Joanne's home or call her, she became concerned. Joanne called Darcy's apartment three times the next day, leaving messages on her answering machine to call her. On the last call at about 1:00 p.m., Joanne left a message saying she was worried and would come to Darcy's apartment if Darcy did not call back. Within a few minutes, Garcia called Joanne back, telling her Darcy was not there, that her car had broken down near San Clemente, and that she was "up north." When she later tried to call Darcy, the line was busy for about 24 hours.

Staiton next testified, confirming he had met with Darcy for about 15 minutes to discuss fixing the rust spots on her car. He believed he told police that Darcy said she could not have any work done on the car during the week because she had plans. He remembered giving her advice on fixing the spots herself before she drove away.

A number of witnesses then testified about information obtained during the subsequent murder investigation. With the help of Oonagh, police retrieved Darcy's car from the Interstate 5 roadside, about one mile away from Darcy's apartment. An inspection of the car revealed it had a problem with its clutch. In the trunk of the car, police found Darcy's purse and wallet, a suitcase containing female clothing, along with loose female and male clothing and some paperwork with Garcia's name. Garcia's fingerprints were found in the car.

Sometime after January 18, 1997, California Highway Patrol Officer Stevan Turk saw a wanted person's bulletin with Garcia's photograph distributed by the Oceanside Police Department. Because the subject looked similar to a pedestrian Turk had seen walking on the Interstate 5 freeway shoulder on January 15 and 16, 1997, near a white Volkswagen Jetta, he contacted the police. Turk testified at trial that around 9:50 a.m. on January 15, he had contacted a male Hispanic in his 40's about five feet ten inches tall and weighing about 175 pounds who spoke with a Spanish accent.⁴ The man said his car had broken down and pointed to the Jetta. He told Turk the license number, although he may have misstated a letter or a number, and said the car had either a clutch or transmission problem. Even though the man said he was going to have the car towed, Turk put a warning notice on the car stating it would have to be towed within four hours. The next day, at about the same time, Turk again saw the same man and car, but was unable to contact him. Turk was unable to identify Garcia in court as the pedestrian with whom he had spoken nearly three years earlier.

A neighbor of Darcy's, Roger Thomas, who was interviewed during the murder investigation, also testified at trial. Thomas, who had lived across the street from Darcy and could see the entry to her apartment from his kitchen and bathroom windows, had identified Garcia from a photographic lineup shown to him in 1999, as appearing similar to the man he saw knocking on Darcy's door late on January 13 or early in the morning

⁴ The probation report shows Garcia was born in January of 1953 and was five feet 10 inches tall and weighed 190 pounds.

on January 14, 1997. Thomas had been awakened by a thumping, irritating noise and had looked out his bathroom window to see what was happening. He saw an unshaven man with long, unkempt hair, wearing Levi's and a t-shirt, at Darcy's apartment door knocking and talking loudly to try to gain entry. Thomas opined the man was "probably" Hispanic. He also believed he had seen the man knocking on Darcy's door two successive nights that January. Thomas was unsure at trial whether Garcia was the man he had seen those nights.

The lead Oceanside Police Department detective investigating Darcy's murder, John Diaz, currently an investigator with the San Diego District Attorney's office, testified, among other things, about the state of Darcy's body and the crime scene. When Diaz arrived on the scene, the apartment smelled strongly of decomposing flesh and a blue blanket saturated with blood was on or near Darcy's head as she laid on the bottom left side of a futon-type bed. Her feet with socks on were on the ground with her legs spread apart, and pants and slightly torn and twisted panties pulled down to her mid-thigh, exposing her vaginal area. The upper portion of Darcy's body was also exposed, her pullover shirt having been cut down the middle and pulled away from her body, showing numerous stab wounds to her front torso. She also had slice wounds to her neck, face, chest and abdomen. Although Darcy's body was in an advanced state of decomposition, Diaz noticed there were bruises on her left leg, her left nipple and nose had been cut off, and most of her hair had been cut close to her scalp in an uneven, "noncosmetic" manner.

Diaz also noticed the bathroom and bedroom windows had been closed with blinds drawn or covered with blankets and that near the entry of the bedroom in a stack of blood-soaked towels there were some scissors and an electrical cord, that had apparently been cut from a clothes iron that was in the bedroom closet. Near the pile of towels he found a pair of men's underwear.

Diaz further noted that records reviewed during the investigation from Darcy's telephone account showed that five minutes after Joanne had called Darcy's apartment on January 15, 1997, at 1:11 p.m., there was a call placed from Darcy's apartment to Joanne's home. The records also showed that telephone calls had been placed on that date from Darcy's telephone to Colorado and Topeka, Kansas. It was stipulated that Garcia had family in Pueblo, Colorado, and a brother who lives in Topeka, Kansas.

Dr. Harry J. Bonnell, the Chief Deputy Medical Examiner and Coroner for San Diego County, who had examined Darcy's body at the crime scene the day after she was discovered and then the following two days during the autopsy, testified about his findings. Because of the state of decomposition of Darcy's body at the crime scene, Bonnell estimated she had been dead for three to five days. Because of petechial hemorrhaging in Darcy's eyes, Bonnell concluded she had been strangled while alive. Of the over 20 stab wounds to Darcy's torso, neck and back, Bonnell found at least two to the lungs and liver would have been fatal. Two of the superficial slice wounds had removed the tip of Darcy's nose and her left nipple. Bonnell could not determine whether the majority of the stab wounds were pre- or post mortem due to the advanced stages of decomposition. Nor could he definitely identify bruising due to the advanced

decomposition. Bonnell determined both strangulation and stab wounds had caused Darcy's death.

In addition, because most of the blood had drained from Darcy's body, Bonnell conducted an analysis of her decompositional fluid. Such toxicology screen showed Darcy had an ethyl alcohol level of .15 percent, which Bonnell opined was higher than any blood alcohol level at the time of her death, and could have even been zero at that time due to the nature of decompositional fluids.

Bonnell also examined Darcy's anus and vagina. With regard to her anus, he saw abrasions and tears in its lining, and when microscopically examined, saw inflammatory cells which indicated the injuries had occurred while Darcy was alive. Bonnell opined the anus had been forcibly penetrated by a firm object, larger in diameter than Darcy's nonrelaxed anal sphincter. Although Bonnell did not see any injuries to Darcy's vagina, he did not examine it microscopically. On cross-examination, Bonnell agreed the injuries to Darcy's anus could have occurred between two days and several hours before her death.

Sexual Assault Response Team (SART) nurse Margaret Whelan, director of forensic services for Pomerado Hospital in San Diego County, also testified about her findings at Darcy's autopsy. Although this was the first time Whelan had examined a dead body, she had over eight years experience in examining women for evidence of sexual trauma and had had forensic training on dead bodies. In examining Darcy's body for possible sexual assault purposes, Whelan took colposcopic photographs of Darcy's genital area which greatly magnified the tissue. From observing the photographs,

Whelan recognized and documented trauma to Darcy's external genital area. Based on her training and experience, the general defined areas of redness, tearing and abrasion were characteristic of what she saw "in cases where there's been a report of forcible penetration." Having observed the "separate and distinct areas of redness that are highly suggestive of force having been used at those specific sites on [Darcy's] genitalia," Whelan essentially disagreed with Bonnell's observation that there was no trauma to Darcy's vagina. Whelan, like Bonnell, had not examined Darcy's internal vaginal area due to the advanced stage of decomposition.

Whelan further testified about seeing trauma to Darcy's anal area. Such injuries were visible both in the photographs taken with an anal scope and without any enhancement magnification. Although there was no active bleeding in the anal area, Whelan had seen remnants of bloody discharge along with numerous sites of tearing, abrasions and redness in the photographs. These were "the type of anal injuries that [Whelan had] been trained to look for in suspected victims of forced sodomy." Whelan also noticed bruising to Darcy's thigh areas.⁵

Both Whelan and an identification (evidence) technician from the Oceanside Police Department, testified about various samples and swabs taken from Darcy's body at the autopsy and the crime scene for purposes of DNA testing.

⁵ Whelan's comment that the site of the bruising was "really suggestive of exactly where the force was applied" was stricken upon defense counsel's objection.

Based on his review of the autopsy report, Whelan's report and the photographs she had taken, Dr. Charles Landon, a medical doctor who taught surgery and who had lectured on sexual trauma, opined the presence of tears around Darcy's anal canal, which were predominately anterior, showed she had been sodomized from behind. He also found the inflammatory changes and bruising around her anal tissue revealed Darcy had been sodomized before she had died. He additionally opined the injuries to Darcy's genitalia and her legs showed she had also been raped from behind while she was alive. Landon believed the injuries Darcy had suffered were "nonconsensual[,] and, if occurring before death, were "torture-type" wounds. Landon conceded he could make no final conclusion about the matter because of the advanced decomposition of Darcy's body shown in the reports and the photographs.

Gary Harmor, a forensic serologist employed by the Serological Research Institute (SERI) in Richmond, California, testified as an expert in DNA typing. Harmor, who had conducted DNA tests on the samples and swabs taken from Darcy's body and the crime scene using polymerase chain reaction (PCR) technology, explained the finding of DNA evidence linking Garcia to Darcy's murder. On one of the vaginal swabs taken from inside Darcy's vagina, Harmor found sperm consistent with that of Garcia, noting only one of every 2.7 billion males had such sperm. Sperm found on two swabs taken from

the outside of Darcy's anal opening also was consistent with that of Garcia and only with one of every 2.7 billion males.⁶

Harmor also noted that fingernail clippings from one of Darcy's fingernails was consistent with a mixture of DNA from Darcy and Garcia, and in the absence of Darcy's DNA was again consistent with only one of every 2.7 billion males. A similar statistical frequency of consistency of Garcia's DNA was found on samples taken from a cigarette butt found in Darcy's bathroom. Additionally, seminal fluid found on the men's underwear in her bedroom contained DNA consistent with that of Garcia, but only with one of every 1.6 million males. Harmor confirmed that Darcy's DNA was consistent with blood smears and drops in the bathroom and from the knife found at her apartment.

In his defense, Garcia called three witnesses. An Oceanside police detective, Christopher J. McDonough, testified he had interviewed Darcy's neighbor Thomas by telephone after she was discovered murdered. Thomas described a male talking to someone and trying to gain entry into Darcy's apartment on January 13, 1997, at around 9:30 p.m., and again on January 14, 1997, between 11:00 to 12:00 p.m., as a "White" male in his 30's. Thomas also told McDonough he had seen the same transient looking man coming and going from the apartment in the past five to six months.

John C. Woodward, a clinical forensic toxicologist then testified that the .15 alcohol level found in Darcy's decompositional fluid would equal approximately seven

⁶ On cross-examination, Harmor conceded that fluids found in the anal area could be drainage from the vaginal area.

and a half four ounce servings of wine in a woman her size.⁷ Although the toxicologist conceded the blood alcohol level could be in part or solely from fermentation, he did not find any indication in the autopsy report of such.

Detective Diaz, who had earlier testified in the prosecution case, also testified in the defense about the telephone messages retrieved from Darcy's answering machine tape and his interview with the mechanic Staiton. Joanne's messages on the tape did not include the statement she planned to come to Darcy's apartment if Joanne did not hear from her. Staiton had told Diaz that Darcy said she was planning to go out of town so he could keep her car to work on it if necessary.

DISCUSSION

I

ADMISSION OF DNA EVIDENCE

In limine, the court considered the prosecution's motion to deem the PCR DNA results admissible as already having been accepted by *Kelly-Frye* (*People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye v. United States* (D.C. Cir. (1923) 293 F. 1013, 1014 (*Frye*))⁸ standards. Garcia's counsel conceded PCR testing was generally accepted in the scientific community, but suggested an evidentiary hearing was still necessary to determine the qualifications and expertise of the witnesses who would be called to

⁷ At the time of death, Darcy weighed approximately 175 pounds.

⁸ Although the federal *Frye* analysis has been superseded by *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, the *Kelly-Frye* formulation continues to apply in California. (*People v. Leahy* (1994) 8 Cal.4th 587, 611 (*Leahy*).)

present the DNA results and to determine whether they utilized the correct procedures in their testing. The prosecutor stated he had no objection to such a limited hearing. The court tentatively ruled that subject to further case review, it was finding PCR testing is generally accepted in the scientific community, but because the prosecutor was intending to admit evidence of polymarkers and short tandem repeats (STR's) of which admissibility had not yet been specifically approved by a published opinion, it would require an Evidence Code section 402 hearing as to each expert witness the prosecution intended to call on such matter. When the court was asked to clarify its ruling, it took the matter under submission, asking the parties to further educate it on the law and "the offer of proof as to what typing [of PCR DNA] is going to be utilized in this case."

Later in the prosecution case, out of the jury's presence, the court returned to the matter of the DNA evidence. After further review and discussion, the court made the following conclusions of law regarding the DNA typing evidence sought to be introduced by the prosecution:

"One: DNA typing has been generally accepted within the scientific community. [¶] Two: PCR method of typing has been generally accepted by the scientific community. [¶] Three: DQ Alpha and Polymarker method of typing, both using variations in the DNA sequence, have been generally accepted by the scientific community. [¶] Four: STR, short tandem repeat method of typing, using variations in the DNA lengths, have been generally accepted by the scientific community. [¶] [Five:] CTT typing has been generally accepted by the scientific community under *People v. Allen* [(1999) 72 Cal.App.4th 1093, 1097 (*Allen*)]. [¶] Six: This court has been unable to find any California appellate decisions addressing the balance of the typing methods sought to be used by the witnesses for the People. [¶] Seven: Accordingly, to the extent that methods of typing not earlier mentioned by this court in its legal conclusions just announced, as to those methods of typing, the defendant is entitled to

a *Kelly-Frye* hearing as to the first prong. That's the general scientific acceptance of these typing methods. [¶] And lastly, as to all of the methods of typing sought to be introduced by the People through their expert witnesses, under [*People v*] *Morganti* [(1996) 43 Cal.App.4th 643, 663 (*Morganti*)], the defendant is entitled to [an Evidence Code section] 402 hearing on the third prong of the *Kelly-Frye* analysis per . . . *Morganti*. That is whether the correct scientific procedures were utilized."

Subsequently, at the end of the prosecution case before the DNA experts were to be called to testify, the court conducted a day and a half *Kelly-Frye* hearing outside the jury's presence. Harmor, a forensic serologist from SERI, a private nonprofit research corporation which was nationally accredited and had quality assurance programs in effect,⁹ testified as to his qualifications and education before extensively explaining the "capillary electrophoresis" (CE) detection system method of STR testing for PCR DNA. Harmor, who had a bachelor of science degree in forensic science, had studied DNA at the University of California at Berkeley and elsewhere, had regularly read the scientific literature on DNA and had attended numerous training seminars, was board certified by the American Board of Criminalists, supervised other forensic serologists and trained new employees regarding DNA testing, and had testified in approximately 100 cases as a DNA expert in 10 different states and 12 different California counties. Harmor had also presented "results for a study on DNA casework using [CE] and the 310 genetic analyzer [(the 310)] in 1998", and had served as "a regular panel member at Perkin-Elmer Applied

⁹ SERI was accredited by the American Society of Crime Laboratory Directors, Laboratory Accreditation Board (ASCLD) and the DNA Advisory Board (DAB). SERI had TWGDAM and DAB guidelines in place. TWGDAM stands for "Technical Work in Groups on DNA Methods in Analysis."

Biosystems Division [(Perkin-Elmer)] with regards to their forensic PCR technical training round-table discussion[.]"¹⁰

Harmor, testified that the STR method of DNA typing and testing, which provided a class of PCR markers, had been in use since around 1996. The CE system, which SERI had used since 1996 or 1997, was "an instrument that's used to separate out amplified [PCR] DNA products through a very small capillary tube that contains a gel and buffers to help separate out these pieces and detect the pieces through the use of fluorescent dyes. The PCR method is a fairly standard method throughout forensic DNA laboratories for amplification of allele-specific types, . . . and also now regions that are amplified are called . . . STR's[, which are] small pieces of DNA scattered throughout the human genome that show differences between people. Differences are shown mainly by the number of a repeat unit that [a person] contain[s]."

Harmor explained the purpose of CE "is to analyze the PCR products obtained from reference samples and evidence items and anything containing human DNA to be able to type those particular markers reliably." He noted the process for preparing the DNA is "virtually the same for any [of the] PCR methods of analysis up to the point of amplification." At that point, the sample is placed "into a cocktail, which is a liquid that contains the building blocks of DNA, . . . as well as buffers and primer sets that identify

¹⁰ After permitting defense counsel to voir dire Harmor further on his qualifications and education, the court overruled counsel's objection to Harmor's credentials and ability to testify regarding the general acceptance in the relevant scientific community of the method of testing used in this case.

the regions that are going to be copied." Once such was done, the prepared DNA cocktail, as in this case, is put into the 310, which "flushes the capillary; loads it with a gel substance; draws up the solution . . .; and then electrophoresis it through the instrument." He explained electrophoresis as "simply the separation of proteins or DNA or enzymes by the use of electricity[,] " which causes the large pieces of DNA to separate from the smaller pieces, going past a laser detector which "excites the fluorescent dyes on various wave lengths." The instrument then interprets the wave lengths, assigning them colors, and analyzes and presents the data in a computer printout that scientists can review and understand.

Harmor described the 310 as "a large, metal box[,] " about three feet wide and four feet tall, that contained software, "as well as a mechanism for sampling tubes; virtually all automated, once its instruction[s] are given to it." He noted it generally took 40 minutes for each sample to run and be analyzed through the machine, before it cleaned itself, and flushed and replaced the gel in the capillary so that another sample could be run and analyzed. The 310 and its Genotyper software were made by Perkin-Elmer for use with various types of kits for particular sets of genetic markers, such as Green I, Blue, and a combination of kits called Profiler Plus which contained Blue, Yellow and Green II kits. Each kit, or cocktail "contains the ability to amplify for more than one genetic marker at a time[,] " with the minimum of markers being three and the maximum 10. Various controls were then used to ensure the accuracy of testing with the kits run through the 310. Once a result was produced by the 310, the person running the test used

that result to calculate the frequency population estimate using the conservative modified product rule method which Harmor discussed.

Harmor also explained the differences between using the CE method for STR DNA typing via a machine like the 310 and other gel-based detection systems involving DQ-Alpha and Polymarker methods of PCR DNA analysis. Harmor preferred to use the 310 because "[i]t is more accurate and it also has more precision for detecting PCR product sizes." Although SERI still used the DQ-Alpha and Polymarker systems, it had run its own tests on the 310 and compared it to known results on the other systems and found the 310 had a greater power to discriminate for more accurate, cleaner results. Harmor estimated SERI had used the CE detection system, with the 310 and the Green I and Blue kits in at least 210 cases, and he personally had used the Green I kit in over 40 cases. Harmor had testified before a jury in court approximately 10 times for the Green I kit and probably four or five times on the Blue kit since 1998.

Harmor opined the CE detection system for finding STR's using the Green I and Blue kits had gained general acceptance from a consensus of the relevant scientific community. The CE system for detecting STR's had generally been supported by scientific literature and endorsed for use in forensic science by the National Research Council. The Blue kit or markers process had been validated in papers published in 1998 and 1999. The manual with the Green I and Blue kits by Perkin-Elmer stated they had been validated in-house following TWGDAM procedures. Based on such scientific endorsement and his own personal experience in using the 310 on a day-to-day basis, plus the passing of proficiency tests on the machine at least twice a year, and the fact the

310 was put into laboratories around the world and used on a routine basis by the scientific community, Harmor opined the equipment had been generally accepted in the scientific community after a type of peer review process. SERI had in fact conducted its own validation studies in its laboratory on the 310.

In this particular case, Harmor, who had been trained on the 310 and its software by his supervisor Brian Wraxall of SERI, who in turn had received training and experience on the 310 from Perkin-Elmer, separately ran the Green I and the Blue kits on the evidence received "in a timely and scientifically correct manner" for testing. The Green I kit contained the genetic "amelogenin markers for sexing between male and female TH01, TPOX and CSF1PO[,]" while the Blue kit contained "D3S1358, VWA and FGA." After noting the results he had obtained by following the described "correct scientific" procedures according to the "User's Guide" provided with each kit and the manual provided with the 310, Harmor said he wrote a report "outlining the testing that was done and the conclusion that [he] drew and frequency types." Such written report was then passed on to his supervisor Wraxall, who checked Harmor's results and analysis. After all the controls revealed the tests run in this case were performed properly, Harmor's report and notes regarding his work and the testing were provided to the prosecutor in this case "in the form of a discovery book," which had in turn been provided to the defense.

Molecular geneticist Dr. Matthew J. McGinniss, who was the Director of the DNA Diagnostic Laboratory for Children's Hospital in San Diego, and held a Ph.D. in cell biology and Master's and Bachelor's degrees in zoology, also testified about his

qualifications in DNA testing and the acceptance of the 310 in performing CE system analysis in the scientific community. McGinniss was board certified in clinical molecular genetics by the American Board of Medical Genetics and had done extensive research on DNA. He was a member of numerous scientific societies and associations, read numerous scientific publications, had had various articles regarding PCR DNA testing published in scientific journals, and had conducted peer review of other articles for such journals. In addition to having taught in pediatrics and pathology, McGinniss had previously testified five times as an expert in molecular genetics and DNA testing.

Basically McGinniss conducted DNA testing at Children's Hospital for purposes of diagnosing prenatal diseases and for paternity or parentage testing. He and his staff employed two methods of typing DNA, the historical "RFLP method[,]"¹¹ as well as "PCR based STR systems using nine different markers provided by Promega Corporation." He was familiar with the CE method of STR's DNA typing because he had researched it since about 1994 when it first arrived on the scene of symposiums and trade shows. McGinniss opined the CE detection system had become "almost the industry standard in both diagnostic . . . and in forensic labs[,]" and had gained general acceptance from the scientific community. He knew of no scientific literature critical of the method.

McGinniss had also researched the 310 for purposes of purchasing one for his laboratory. Although the laboratory had not yet done so and he had not himself used one,

¹¹ The RFLP method refers to the "restriction fragment length polymorphism" type of DNA testing. (*People v. Hill* (2001) 89 Cal.App.4th 48, 57 (*Hill*).)

McGinniss was familiar with the 310 through research, meetings and a visit to the manufacturer. He said the 310 generally obtained the same results as the gel-based PCR detection systems, but used different methods and chemistry. His descriptions of such system was similar to that of Harmor's. Basically, the 310 automated some of the tasks of the other methods, reducing the possibility of error, and was first used at Beta Test Sites before being tested and validated for customers. McGinniss believed the Green I and Blue kits for use with the 310 contained "the same STR loci that have been validated and accepted by the FBI."

McGinniss, who had heard Harmor's earlier testimony, also believed that Harmor had followed appropriate and scientifically acceptable quality assurance procedures in testing the DNA in this case. He likewise opined Harmor had used appropriate and scientifically acceptable population frequency estimates.

In opposition to the prosecution's witnesses at the evidentiary hearing, the defense presented testimony from forensic scientist Marc Scott Taylor, who had a Bachelor's of Science degree in zoology and some graduate work, and owned Technical Associates, Inc., in Ventura, California, a laboratory that does criminalistics and DNA testing in criminal and civil cases. Taylor had testified as an DNA expert over 100 times, including in cases where the results using the Green I kit had been admitted. His laboratory, like many other clinical and forensic ones in Southern California and around the world, owned and used a 310, which cost \$80,000. Nevertheless, Taylor believed "[t]here are a number of problem areas with regard to this system that have not been fully validated."

Taylor conceded the Blue kits for use with the 310 had been validated through published work, the Green I kit had been partially validated by the Department of Justice, and no public study had been critical of the 310's presentation of data. Taylor's overall opinion was that PCR DNA with a validated analyzer system was generally accepted in the scientific community. Because the Green I kit had only been validated in-house and was now included in the Cofiler kits which had been developmentally validated but not published, the Blue kit was no longer used by the scientific community, most studies had used the "377" machine and not the 310, and the process of validation was ongoing, Taylor opined the Green I and Blue kits used with the 310 had no general acceptance in the scientific community. Also, due to Perkin-Elmer's proprietary interest in the 310 and the "lack of information that has gotten out there as far as problems with the systems [used with the 310]", Taylor opined "there cannot be a general acceptance because many of the people in these laboratories aren't aware of what the problems are because they haven't done the developmental validation." Taylor thus believed it was premature to say that the CE method performed on the 310 had gained general acceptance in the scientific community.

With regard to the DNA evidence in this case, Taylor had reviewed Harmor's reports about the testing and subsequent results on the 310, but Taylor did not believe he had conducted any retesting of the matter in his own laboratory. Taylor felt the prosecution witnesses, Harmor and McGinniss, were biased due to the economics involved in owning or trying to purchase the 310.

After hearing arguments, the court found that even though there was "not a plethora of evidence showing peer review scientific validations," it was satisfied by the testimony from Harmor and McGinniss, and the manufacturer's internal and the laboratory proficiency controls, that using the CE methods of DNA testing on the 310 with both the Blue and Green I kits were "methods that enjoy general acceptance within the scientific community." The court found the criticisms by the defense expert regarding the methodology and peer validation "deals more toward the weight of the evidence rather than the admissibility."

In ruling the DNA evidence admissible, the court specifically stated:

"This court is finding that the first prong of the *Kelly-Frye* analysis is satisfied in part because of the testimony that manufacturer and user internal validation processes are available and were available to test the [CE] detection system, using the 310 . . . and the two kits, the Green I and Blue kit, to the satisfaction of this court in finding a basis for the witnesses' concluding that the type of analysis of DNA typing sought to be introduced enjoys general acceptance within the scientific community. [¶] [P]rong two of the *Kelly-Frye* has been met in that the witness Harmor is a senior forensic serologist and lab supervisor with SERI Lab; has testified as a DNA expert in excess of a hundred times; is familiar with and utilizes the PCR method with the STR amplifications; and uses and is familiar with the [CE] detection system, using the 310 . . . and the Blue and Green I kits. [¶] Prong three has been satisfied to this court. The prosecution has indeed made the necessary foundational showing that the witness Harmor utilized correct scientific procedures. [¶] In evaluating the testimony of Harmor and McGinniss, it appears that Harmor testified he followed the established procedures and protocols in his analysis of DNA, as well as the utilization of the modified product rule in statistical analysis, as being a conservative, acceptable approach to statistical analysis, to which Dr. McGinniss concurs. [¶] Nothing herein shall preclude the defense from cross-examining any prosecution expert as to the potential pitfalls in the utilization of any of the methodology in the DNA typing, nor should be construed to preclude the defense from offering for this jury any affirmative

evidence as to either the lack of reliability or validity of the 310 . . . or the Green I kit or the Blue kit, or proffering any opinions as to potentials for error or misreading."

Thereafter, Harmor testified before the jury regarding the DNA evidence. Defense counsel did not cross-examine Harmor regarding the pitfalls in using the CE process, the 310 or the Green I or Blue kits.

On appeal, Garcia challenges the trial court's ruling admitting the DNA evidence. Garcia concedes PCR technology and analysis leading to the matching of DNA samples is generally accepted practice in the scientific community. He argues however that the trial court erred in admitting such evidence in this case after the *Kelly-Frye* hearing because the results were obtained from the 310, an automatic DNA analyzing machine, which had not had its CE technological process generally accepted within the relevant scientific community by the time of trial. Garcia bases this claim on the fact the machine's CE methods and the chemical kits automating the PCR DNA analysis had only been validated in-house by the company manufacturing them, the machine's technology was new and remained a proprietary secret, and had not been validated through peer review research. Garcia further argues that the experts who attempted to establish the machine's reliability at the *Kelly-Frye* hearing were unqualified to independently validate the reliability of the inner workings of the machine and therefore could not properly be confronted and cross examined on the validity of the interpretation of the PCR DNA tests in violation of his Sixth Amendment rights. We find no error in the court's ruling to admit the DNA evidence.

As our Supreme Court has stated, "under the *Kelly-Frye* rule the proponent of evidence derived from a new scientific methodology must satisfy *three* prongs, by showing, first that the reliability of the new technique has gained general acceptance in the relevant scientific community, second, that the expert testifying to that effect is qualified to do so, and, third, that "correct scientific procedures were used in the particular case.'" (*People v. Roybal* (1998) 19 Cal.4th 481, 505 (*Roybal*); see also *Allen, supra*, 72 Cal.App.4th at pp. 1098-1099.) The party offering the evidence has the burden of proving its admissibility by a preponderance of the evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 970 (*Ashmus*).)

Under *Kelly*, "reliability" means the new technique "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." (*Kelly, supra*, 17 Cal.3d at p. 30, italics omitted.) However, general acceptance does not require absolute unanimity of views, but rather a consensus of the relevant, qualified scientific community. (*Leahy, supra*, 8 Cal.4th at p. 612.) In resolving this matter, "[t]he goal is not to decide the actual reliability of the new technique, but simply to determine whether the technique is generally accepted in the relevant scientific community." (*People v. Barney* (1992) 8 Cal.App.4th 798, 810, distinguished on another point in *People v. Soto* (1999) 21 Cal.4th 512, 538.) To do so, the trial court considers the quality, as well as the quantity, of the evidence supporting or opposing the new technique and, in doing so, may consider published appellate decisions and scientific literature relating to the matter. (*Leahy, supra*, 8 Cal.4th at pp. 611-612; *Kelly, supra*, 17 Cal.3d at p. 32.)

Further, "[w]hen, as in DNA testing, the reliability of the technique employed is not readily apparent to lay observation or experience, *Kelly-Frye* requires determination 'whether a laboratory has adopted correct, scientifically accepted procedures' for conducting the test. [Citation.] 'Consideration and affirmative resolution of these questions constitutes a prerequisite to admissibility under the third prong of *Kelly*.' [Citation.]" (*Roybal, supra*, 19 Cal.4th at p. 505.) Thus the third prong is not merely a question of evidentiary weight, but an element of the initial admissibility determination. (See *People v. Axell* (1991) 235 Cal.App.3d 836, 862.)

Such prong involves "further scrutiny of a methodology or technique that has already passed muster under the central first prong of the [*Kelly-Frye*] test, in that general acceptance of its validity by the relevant scientific community has been established. The issue of the inquiry is whether the procedures utilized in the case at hand complied with that technique. Proof of that compliance does not necessitate expert testimony anew from a member of the relevant scientific community directed at evaluating the technique's validity of acceptance in that community. It does, however, require that the testifying expert understand the technique and its underlying theory, and be thoroughly familiar with the procedures that were in fact used in the case at bar to implement the technique. [Citations.]" (*People v. Venegas* (1998) 18 Cal.4th 47, 81 (*Venegas*)). Where it is shown that the correct procedures were followed, objections to the techniques go to the weight of the evidence, not its admissibility. (*People v. Wright* (1998) 62 Cal.App.4th 31, 42.) Likewise, "[s]hortcomings such as mislabeling, mixing the wrong ingredients, or failing to follow routine precautions against contamination[, which] involve 'the degree of

professionalism' with which otherwise scientifically accepted methodologies are applied in a given case, . . . amount only to '[c]areless testing affect[ing] the weight of the evidence and not its admissibility' [citations]." (*Venegas, supra*, 18 Cal.4th at p. 81.)

As for the second prong of the *Kelly* test, "[t]he trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown. [Citations.]" (*Kelly, supra*, 17 Cal.3d at p. 39.) This extends to "the expert who gives testimony on general acceptance--including the issues of his credentials and impartiality [citation]." (*Ashmus, supra*, 54 Cal.3d at p. 971.)

Once a new scientific method of proof has been approved in a published appellate decision in California or out of state, the issue of general acceptance is resolved unless a showing is made that the attitude of the scientific community has changed. (*Allen, supra*, 72 Cal.App.4th at p. 1099; *Kelly, supra*, 17 Cal 3d at p. 32.) However, because the third prong inquiry under *Kelly-Frye* is case specific, "it cannot be satisfied by relying on a published appellate decision." [Citation.]" (*Venegas, supra*, 18 Cal.4th at p. 78.)

On appeal, our standard of review of the "general acceptance" finding under the first prong of *Kelly-Frye* is "a mixed question of law and fact subject to limited de novo review." [Citation.] '[W]e review the trial court's determination with deference to any and all supportable findings of 'historical' fact or credibility, and then decide as a matter of law, based on those assumptions, whether there has been general acceptance.' [Citation.]" (*Morganti, supra*, 43 Cal.App.4th at p. 663.) The resolution of each of the other *Kelly-Frye* prongs is reviewed under the abuse of discretion standard, giving great

deference to the determinations of the trial court. (*Venegas, supra*, 18 Cal.4th at p. 91; *Ashmus, supra*, 54 Cal.3d at p. 971.)

Before applying these standards here, we note as a threshold matter, the court correctly found that California courts have recognized the "general acceptance" or validity in the relevant scientific community of the PCR method of forensic DNA testing, as well as its three subtypes: "DQ-Alpha, which tests a single genetic marker; Polymarker, which tests five genetic markers; and the STR, which tests three or more genetic markers. [Citation.]" (*Hill, supra*, 89 Cal.App.4th at p. 57.) Although the court then held a *Kelly-Frye* hearing on all three prongs for the CE process of the two PCR/STR kits (Green I and Blue) run through the 310, subsequent to Garcia's trial, a published decision has rejected "the argument[, as made in this case below] that each new PCR/STR test kit must, as a matter of law, be subjected to a *Kelly [-Frye]* prong one analysis to determine scientific reliability." (*Hill, supra*, 89 Cal.App.4th at p. 58.) In *Hill*, the court found that the concerns with a particular test kit, specifically the Profiler Plus kit, a successor kit to Green I and Blue, only goes to the third prong of *Kelly-Frye*, "i.e., whether the procedures utilized by the forensic lab were in compliance with PCR/STR methodology. [Citations.]" (*Hill, supra*, 89 Cal.App.4th at p. 58.) Although we agree with this conclusion, because *Hill* was not published authority at the time of the trial here, we review the court's rulings regarding each prong. Having done so, we conclude the trial court rulings culminating in the admission of the DNA evidence were proper.

In finding the first prong of *Kelly-Frye* established, the court relied on the expert testimony of two prosecution witnesses and discounted the conflicting testimony of a defense expert witness with respect to the reliability of the CE detection method, using the 310 and the Green I and Blue kits provided by Perkin-Elmer. It found such testimony established the general acceptance of such method and procedures in the relevant scientific community. Our review of the record confirms this finding. Although the defense expert disagreed the CE detection process, using the 310 and Green I and Blue kits had been generally accepted as reliable in the scientific community, he conceded there was no published study critical of the process, the 310 or the Green I and Blue kits. He also agreed the Blue kit had been validated through a published article, that the Green I kit had been partially validated by the Department of Justice, and both through in-house validation procedures. In addition, the defense expert himself owned and used the 310, as well as other machinery and processes, in his own DNA laboratory and did not retest any of the prosecution expert's tests in this case. Because the testimony of a director or supervisor of a DNA forensic laboratory may alone establish general acceptance in the scientific community (*Hill, supra*, 89 Cal.App.4th at p. 58, citing *Allen, supra*, 72 Cal.App.4th at p. 1099), we find Garcia's arguments the 310 and Blue and Green I kits have not been validated or generally accepted in the scientific community because of the lack of "peer review" research and publication due to Perkin-Elmer's proprietary secrets without merit. (See *Hill, supra*, 89 Cal.App.4th at p. 58.) We also find the trial court's credibility determination in favor of the prosecution expert witnesses supported by the record and independently conclude such evidence supports the court's finding the CE

detection process on the 310 with the Green I and Blue kits is generally accepted as a reliable technique by the relevant scientific community.

Garcia's attack directed at the second prong of *Kelly-Frye* is that neither Harmor's or McGinniss's qualifications were sufficient to permit them to give an opinion on general acceptance. He finds fault with both their credentials and with their impartiality.

On this record, we find no abuse of discretion in the trial court's explicit and implicit determinations each was sufficiently credentialed. "What is required here are 'academic and professional credentials which equip [the witness] to understand the scientific principles involved and any differences of view on their reliability.' [Citation.]" (*Ashmus, supra*, 54 Cal.3d at p. 972.) As the trial court expressly noted, Harmor had extensive professional achievements and experience. Although Harmor "had not earned all the academic degrees usually held by scientists in the field[;] he had in fact done significant scientific work [in the relevant area.]" (*Ibid.*) Harmor had also been found to be a qualified testifying expert regarding DNA in *Morganti*. (*Morganti, supra*, 43 Cal.App.4th at p. 666.) Although the court made no express ruling regarding McGinniss's credentials, the record reflects he had all the academic degrees usually held by a scientist in the field in addition to extensive experience regarding DNA testing.

With regard to Harmor's and McGinniss's impartiality, even though the court did not explicitly rule on such matter, it could have reasonably found neither "'so personally invested in establishing the technique's acceptance that he might not be objective about disagreements within the relevant scientific community.' [Citation.]" (*Ashmus, supra*, 54 Cal.3d at p. 972.) As the court in *Morganti* recognized, "'a certain degree of 'interest"

must be tolerated if scientists familiar with the theory and practice of a new technique are to testify at all. [Citations.]' [Citation.]" (*Morganti, supra*, 43 Cal.App.4th at p. 667.)

Although Harmor worked for SERI which owed two of the 310's and McGinniss had researched the 310 with the hopes to have his company purchase it, we cannot say on this record that the trial court abused its discretion in concluding both witnesses qualified as experts regarding DNA in general and the 310 in particular.

Moreover, we conclude the court did not abuse its discretion in finding that Harmor used the correct scientific procedures for the DNA testing in this case. In addition to Harmor's testimony he had followed the correct procedures in this case, which was found credible and reliable by the court due to his familiarity with the CE detection system, using the 310 and the Blue and Green I kits, the court noted McGinniss, who had reviewed Harmor's work, also testified Harmor had followed "the established procedures and protocols in his analysis of DNA[.]" No contrary evidence was presented. We, therefore, affirm the trial court's finding correct scientific procedures were used to conduct the CE detection process on the 310 with the Green I and Blue kits for PCR/STR forensic DNA evidence.

Garcia's additional argument his Sixth Amendment rights were violated because he could not properly cross-examine or confront the experts on the validity of their interpretations of the PCR DNA tests in this case because the methodology of the 310 is secret and thus immune from challenge is meritless. Not only did Garcia's counsel thoroughly confront and cross-examine both prosecution witnesses during the *Kelly-Frye* hearing regarding the 310 and its use, the court's ruling in no way precluded counsel from

cross-examining Harmor in front of the jury regarding any "potential pitfalls in the utilization of any of the methodology in the DNA typing" or of the reliability and validity of the 310, Blue or Green I kits, or the potentials for error or misreadings of the DNA test results.

In sum, the evidence pertaining to the DNA tests in this case was properly admitted.

II

ADMISSION OF EXPERT OPINIONS OF FORCIBLE PENETRATION

Also in limine, Garcia's counsel orally moved to preclude SART nurse Whelan from "giving opinion testimony" unless an Evidence Code section 402 hearing were first conducted to determine whether she was qualified. The court ruled such hearing would be conducted if the prosecutor decided to use Whelan as an expert witness and admonished the prosecutor not to refer to her as giving an expert opinion in his opening statement. When the prosecutor asked whether the same was true for his sexual assault expert Dr. Landon, defense counsel requested the court order an evidentiary hearing before Landon could testify as an "expert in sexual assault or anything that may have to do with the sexual aspect of this case." Counsel represented that he had consulted with a forensic pathologist who had advised him to question Landon's qualifications as an expert for anything in that area. The court ruled it would conduct an evidentiary on Landon's qualifications before he would be permitted to testify as an expert as to his opinion on forcible rape or sodomy.

Later, outside the presence of the jurors during voir dire, the court held an Evidence Code section 402 regarding Landon's qualifications to testify as an expert and to give an opinion as to whether the victim Darcy had been raped or forcibly sodomized. Landon testified at the hearing he was a retired board certified surgeon who had graduated from medical school in England before doing a residency at the University of California at Los Angeles (UCLA) Veterans Administration Medical Center. Besides having taught surgery at UCLA, he had extensive education and experience in treating trauma, including victims of sexual trauma. For 26 years he also had supervised a UCLA weekly clinic which dealt with colon or rectal disease, including trauma in 20 percent of those cases. Some of the persons he saw for trauma there had been raped or sodomized. In addition he had lectured as a medical expert regarding trauma associated with rape and forceful sodomies.

Beside having belonged to numerous medical associations, Landon had also retired two years before this trial from the United States Navy as a surgeon in the medical corp, having had "trauma surgery" as one of his specialties. Landon currently taught trauma surgery at Balboa Naval Hospital and the University of California at San Diego, as well as lecturing for the last four or five years at the annual SART conference.

With regard to his most recent experiences, Landon said he had not seen many sexual assault victims at Balboa Naval Hospital, having performed only two examinations concerning sexual assault within the last 12 years. He had, however, examined about eight or 10 dead bodies for indications of sexual assault and had previously testified several times as an expert on trauma associated with sexual assault.

In this case, he had not examined Darcy's body, but had only examined the photographs of it.

After giving counsel the opportunity to argue the matter, the court found "Landon possesses sufficient and adequate education, experience and training to qualify as an expert medical witness on the proffered questions concerning whether there was or was not forced penetration vaginally and anally to Darcy[.] And he may so testify."

Right after the prosecutor's opening statement, defense counsel made a side bar motion claiming prosecutorial misconduct and asking the court to either strike the statement or for a mistrial on grounds the prosecutor had mentioned the SART nurse Whelan contrary to the court's earlier ruling. The court denied the motion. Subsequently, the court explained its ruling in limine was only to exclude mention of Whelan if she was called as an expert to give her opinion on whether the sodomy and rape allegations were "forcible penetrations. Nothing in this court's granting of your motion in limine precluded [the prosecutor] from calling the SART nurse and getting from that SART nurse, assuming she has the background, training and education, her clinical observations about the nature of the vaginal and anal areas of the decedent." The court clarified that Whelan could testify about the condition of Darcy's vagina and anus, and could give "some opinion testimony as to whether or not an injury or series of injuries were present[.]" but could not go further and testify as to the cause of the injury without an evidentiary hearing.

When Whelan testified she saw "separate and distinct areas of redness that are highly suggestive of force having been used at those specific sites on her genitalia[.]" in

response to the prosecutor's question of whether Whelan agreed with the medical examiner's statement he did not observe any trauma to Darcy's vagina, the court overruled defense counsel's objection Whelan's answer was "nonresponsive." When she was asked if tearing or abrasions or redness in the anus were the types of injuries she had "been trained to look for in suspected victims of forced sodomy[.]" the court overruled defense counsel's bare objection. However, when Whelan then pointed out sites of bruising in the photographs of Darcy's thighs, as being "really suggestive of exactly where the force was applied," the court sustained defense counsel's objection and granted his motion to strike her answer.

Landon later testified before the jury that the presence of tears around the anal canal and the inflammatory changes around the tissue in the photographs showed Darcy had been sodomized from behind before her death. The injuries to Darcy's genitalia in the photographs also showed she had been raped from behind before she had died.

At the end of the prosecution case, outside the jury's presence, defense counsel conceded he had been "a bit derelict" when the SART nurse testified, allowing her testimony to go beyond the injuries and stating they were done by force. Counsel asked the court for an instruction to have her testimony limited to the nature of the injuries. The court agreed, saying it would read such instruction as prepared by defense counsel.

During instructions, the court thus told the jury:

"Evidence of the nature of the injuries to Darcy Garcia offered by witness Margaret Whelan was admitted for the limited purpose of proving -- of providing a description of what she observed. You are instructed that any statement by this witness as to her opinion of the

cause of what she observed should not be considered for any purpose in your deliberations."

Although the prosecutor mentioned the findings of injuries by SART nurse Whelan during the closing argument, he only referred to force with regard to Bonnell's testimony of finding forcible penetration of Darcy's anus and Landon's testimony Darcy had been raped and sodomized.

On appeal, Garcia contends the trial court erred in admitting Landon's expert opinion of forcible penetration for rape and sodomy because he had no extensive forensic training or experience. Garcia argues the prejudice resulting from the improper admission of Landon's testimony was compounded by SART nurse Whelan's testimony which in essence rendered expert opinions of force and forced sodomy without her being properly qualified as an expert to render such opinions. He also argues the court's failures to sustain his objections to her statements of force prejudicially bolstered her credibility. We find no merit in these various assertions.

Regarding expert testimony, Evidence Code section 720, subdivision (a) provides that, "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. . . ." As noted earlier, in determining the qualifications of an expert, the trial court is given broad discretion and its ruling in this regard will not be disturbed absent a showing of a manifest abuse of that discretion. (*Kelly, supra*, 17 Cal.3d at p. 39; *People v. Bloyd* (1987) 43 Cal.3d 333, 357.)

Here, the court's ruling to allow Landon to testify as an expert on sexual assault was well within its discretion. Although he was retired, he had extensive education and experience regarding trauma associated with rape and forceful sodomies, and had lectured and testified previously on such subject. And even though the majority of his experience had been examining live patients, he had had some forensic experience with dead subjects. Such evidence was sufficient for the court to exercise its discretion to allow Landon's testimony over the objection he had had no experience "necessary for testimony regarding forensic determinations made from decaying corpses." Defense counsel was then free to cross-examine Landon on any deficiencies in his education and experience when he testified before the jury. No error in allowing Landon to testify as an expert regarding sexual assault is shown.

As for SART nurse Whelan, defense counsel acknowledged at trial he was remiss in not specifically objecting to questions asked her during her testimony or to her answers to such questions. As for the answers to which his objections were overruled, no error is shown because counsel did not make the specific objection that Whelan was not qualified to answer which he now raises on appeal.

With regard to the most arguably damaging statement made by Whelan, that the types of injuries she saw on Darcy's thighs were suggestive of where force had been applied, Whelan's answer was stricken and the jury was instructed to not consider any evidence so stricken. In addition, the jury was instructed that Whelan's testimony could only be used for a limited purpose. We presume the jury followed such instructions.

Garcia's attempt to elevate Whelan's testimony to that of an expert, implying she was allowed to give expert opinions without being properly qualified fails. Interestingly, a similar attempt in his new trial motion based on error in the court's denial of his mistrial motion because of the prosecutor's purported improper mention of Whelan as an expert in opening statements was denied. Whelan merely testified as to her qualifications to examine Darcy, make observations of her sexual injuries and take photographs of them at the autopsy to lay a foundation for the expert opinions of Landon. The prosecutor advised the jury as much in his opening statement. He did not in any way argue to the contrary during closing argument.

Moreover, contrary to Garcia's representation otherwise, the medical examiner Dr. Bonnell did testify that the same type of injuries pictured in the photographs taken by Whelan showed Darcy had suffered forcible anal penetration before she died. In addition, a reasonable inference could be drawn from the physical evidence at trial, which showed Darcy's pullover shirt had been cut down the middle and pulled away from her body, her pants and panties had been pulled down to mid-thigh level, exposing her vaginal area, and her panties had a slight tear in the crotch area and had been twisted to one side, that Darcy had been forced to engage in sexual activity while alive. Thus even if we were to find error in the court's rulings or failure to admonish the jury about the limiting effect of Whelan's testimony at the time it struck her answer regarding force instead of during the jury instructions, we would find no prejudice. No reversible error in the admission of Whelan's testimony is shown.

III

ADMISSION OF VICTIM'S STATEMENTS TO HER SISTER

In limine, Garcia also filed a motion to exclude any hearsay statements made to third parties or written in her diary by the victim Darcy. At the hearing on the matter, the court asked the prosecutor to explain the relevancy of such statements for purposes of Evidence Code section 1250. In response, the prosecutor extensively outlined various statements Darcy had made regarding her on again, off again relationship with Garcia to her friend Joanne and her various sisters, arguing such were relevant to Darcy's state of mind because of the domestic violence nature of this case. After hearing opposition, the court stated it did not appear "the victim's state of mind at times prior to the incident can arguably be referred to as relevant. And evidence of her statements at a time prior to the homicide to show circumstantially her state of mind at the time of the homicide can't be used either."

The court then asked the prosecutor to explain why such statements would come in as "non-hearsay, circumstantial evidence." In doing so, the prosecutor explained Darcy's statements were "highly relevant and circumstantially proving [her] state of mind toward the defendant in the time period preceding her murder and her rape and her sodomy . . . because of the domestic violence nature of this case; the status of their marriage; her statements to other people regarding the status of her marriage; all point to circumstantially her state of mind toward[] the defendant." He also argued the statements provided nonhearsay circumstantial evidence of the state of mind of the listeners to the statements, including her friend, sisters and Garcia. Finally, the prosecutor argued the

statements made to others that she did not want Garcia living with her anymore provided nonhearsay circumstantial evidence of motive for Darcy's murder.

After hearing further opposition, the court stated it still did not "find most of the proffered hearsay statements of the decedent to various family members or friends prior to the homicide to be relevant, except that [it was] inclined to permit [the prosecutor] to call as a witness [Darcy's sister] Robin[.]" The trial judge explained:

"It appears, at least in [the prosecutor's] offer of proof that [Robin] was told in mid-December, late December of 1996, with the homicide occurring in January of [1997], about the fact that Mr. Garcia was an alcoholic and was in and out of various rehabilitation centers, due to his resistance to treatment. That [Darcy] was unable to handle the defendant. That he was clingy, insecure, and wanted to be with her 24-hours a day. And that in mid-December of [1996], Mr. Garcia lived with [Robin]. And then [Robin] bec[a]me percipient to what Mr. Garcia told [Robin] about the relationship between [him and Darcy]. [¶] And then, after Christmas of [1996], the offer of proof is that [Darcy] asked [Robin] if the defendant could again stay with her at her residence, 'her' being [Robin]. And that, finally, after January 9th, [Darcy] told [Robin] that [she] wasn't going to allow the defendant into her apartment anymore. [¶] To the extent that [the prosecutor is] able to, through [Robin], establish that these statements were made to [Robin] by [Darcy] during that period of time in that fashion, I find that they have relevance as to [Darcy's] state of mind. [¶] As to the other statements that you have requested various witnesses to testify to, by [Darcy], I'm not going to permit that, finding it is inadmissible hearsay. . . . The domestic violence scenario that is of a date unknown and said at a time unknown will not be admissible. [¶] So the motion under [Evidence Code section] 1250 to exclude hearsay statements of the decedent will be, accordingly, granted in part and denied in part; . . . the denial, permitting [Robin] to testify to December [1996] and January [1997] to the specific statements that [Darcy] made to her."

The court clarified that because such statements were "not true [Evidence Code section] 1250 stuff[, their admissibility] would have to be [based on being] circumstantial evidence from which an inference may be drawn."¹²

In accordance with the court's ruling, when Robin testified during trial she related statements Darcy had made to her in December 1996 and early January 1997, that Garcia's behavior was changing, he was "very clingy and dependent," he was becoming "very difficult to handle," and she thought he was suffering from an "alcohol-related dementia." Robin also testified that while Darcy told her in December 1996, she was considering not allowing Garcia into her apartment because he refused treatment, sometime in early January 1997, Darcy said she was not going to allow him back into her apartment anymore.

Before closing arguments, the court instructed the jury with regard to Robin's testimony that "[e]vidence of statements made by the victim to witness Robin . . . were admitted for the limited purpose of providing circumstantial evidence of the victim's state of mind. Do not consider this evidence for any purpose except for the limited purpose for which it was admitted." Thereafter, during closing argument, the prosecutor stressed that the jury could infer from Darcy's statement in January 1997 made to her sister Robin that she did not want Garcia to live with her anymore, which evidenced her state of mind

¹² The prosecutor's later request during trial attempted to again bring in other statements Darcy had made in her diary, in electronic mail messages and to Joanne and several other sisters, but the trial judge again denied the requests.

toward Garcia at that time, that she also did not want to have sexual relations with him and therefore the intercourse and anal sex before her death were not consensual.

Garcia contends on appeal that the court erred in admitting into evidence Darcy's statement to her sister Robin that she was planning to end her relationship with him. He premises this assertion on the assumption the court allowed such evidence because it showed he had a motive to sexually assault and kill Darcy. The record, however, reveals this assumption is wrong. The court only allowed Darcy's statements for the limited purpose of providing circumstantial evidence of her state of mind toward Garcia and the jury was apprised of such limited purpose. Contrary to Garcia's representation on appeal, the prosecutor complied with such limited ruling and did not argue in closing that such evidence provided motive for Garcia to murder Darcy. As for the court's limited purpose admission, we can find no abuse of discretion.

Generally, a trial court has broad discretion in determining the admissibility of evidence, including both its relevance and in weighing its prejudicial effect against its probative value. (*People v. Sanders* (1995) 11 Cal.4th 475, 512; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) This is also "particularly true where, as here, underlying that determination [is a] question[] of . . . the state of mind exception to the hearsay rule [or nonhearsay circumstantial evidence of such state of mind]. [Citations.] The lower court's determination will be reversed only upon a finding of abuse. [Citation.]" (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 386 (*Ortiz*).

Evidence Code section 1250, subdivision (a) provides:

"[E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

If evidence is admitted under this section, it is hearsay offered to prove the truth of the matter stated, and when admitted to prove the declarant's state of mind, it may be introduced without limitation subject to Evidence Code section 352. (See *People v. Noguera* (1992) 4 Cal.4th 599, 622; *Ortiz, supra*, 38 Cal.App.4th at p. 389.)

On the other hand, "a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact of such statement was made is relevant to a determination of the declarant's state of mind. [Citation.] Again, such evidence must be relevant to be admissible--the declarant's state of mind must be in issue. [Citation.] A limiting instruction is required with declarations used as circumstantial evidence of the declarant's mental state; that is, the declaration is not received for the truth of the matter stated and can only be used for the limited purpose for which it is offered. [Citation.]" (*Ortiz, supra*, 38 Cal.App.4th at p. 389.)

Generally, a trial court first determines whether the proffered statement is hearsay and then whether it is admissible as nonhearsay circumstantial evidence. Here, the court did just that. Garcia raised no Evidence Code section 352 objection regarding the subject

evidence at trial. Although, we believe, as the People note in their respondent's brief on appeal, that similar to the statement in *Ortiz, supra*, 38 Cal.App.4th at page 391, where the victim had stated she was "'fed up' with the [defendant] living in her house," the court here could have found Darcy's statement she did not want Garcia in her apartment anymore was a "classic example[] of [Evidence Code] section 1250's exception to the hearsay rule" (*Ortiz, supra*, 38 Cal.App.4th at p. 391), the court did not do so. Rather it found the statement regarding Darcy's attitude or feelings toward Garcia, not to allow him again into the apartment, to have relevance only as circumstantial evidence of her state of mind as to whether she consented to the sexual acts with him in her apartment before her death. On this record, we can thus find no abuse of discretion in such ruling, which essentially inured to the benefit of the defense.

IV

ASSERTED THIRD PARTY LIABILITY INSTRUCTIONAL ERROR

Garcia also asserts the trial court violated his right to due process and a fair trial when it failed to sua sponte instruct the jury on reasonable doubt based on third-party culpability. We disagree.

In limine, defense counsel raised the question of whether he would be allowed to present any third party culpability evidence. At that time counsel had still not determined whether he would do so, but requested he have the opportunity to present such if early investigative reports regarding another "somewhat incoherent" individual who came by the apartment "the morning that the body was found" and was then questioned by the police at the scene proved to provide some evidence of third party liability. Counsel also

mentioned that because the prosecutor was going to present evidence a witness saw someone banging on Darcy's door and that witness had given several descriptions of the person, including that the person was a "white man with a beard," such evidence might be sufficient to argue third-person culpability. Counsel conceded he would not be introducing any statements by any identified third party, but would rely on the conflicting identifications to "give the jury evidence that could [cause] them to believe that there is reasonable doubt as to Mr. Garcia's guilt."

The court stated it was reserving ruling on the motion until the prosecution witness testified and would advise counsel "to the extent to which [he] may cross-examine that witness [on the third-party culpability theory]." Because the defense theory at that time was that "Garcia did not commit the homicide, somebody else did it[.]" the court also noted it could not preclude counsel from saying somebody else committed the murder during opening statements.

During trial, after Darcy's neighbor Thomas testified about selecting Garcia's photograph out of a photo lineup as appearing similar to the "probably Hispanic" unshaven, long, dark, unkempt haired man he had seen trying to enter Darcy's apartment on January 13 and 14, 1997, defense elicited from Thomas on cross-examination that he did not remember telling a police detective two weeks after the murder that the man he saw was "a White guy[.]" Thomas did remember he had told the detective that the man had a beard and was "possibly in his thirties[.]"

Later, in the defense case, the detective was called as a witness and testified Thomas had described the person trying to gain entry to Darcy's apartment as a "White"

male in his 30's. Then in closing argument, defense counsel argued "someone . . . else appears to be involved in this case" based on Thomas's conflicting identification statements and an affirmative answer by the DNA expert to the question "if someone has a vasectomy. . . he is going to have semen and not sperm[.]" Because presumptive DNA testing on an anal swab revealed the presence of semen but not sperm, counsel argued the murderer was not Garcia, but rather a White, bearded man who had had a vasectomy, and the prosecutor had not shown beyond a reasonable doubt Garcia was guilty of killing Darcy. The prosecutor argued there was "not one shred of evidence on this case pointing to anyone else but Mr. Garcia having [raped, sodomized, and murdered Darcy]."

Although the defense did not request any instructions on third party culpability, Garcia now contends that because there was some evidence that raised the possibility a person other than himself committed the crimes, the trial court had a sua sponte duty to instruct the jury on how such evidence affected the prosecution's burden of proof. He reasons this is so based on authorities going to the admissibility of third party culpability evidence that hold "the defendant need not prove the third party guilty but only need raise a reasonable doubt as to his own guilt based on the third party evidence." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1017; *People v. Hall* (1986) 41 Cal.3d 826, 833.) He asserts the reading of CALJIC No. 2.90 on reasonable doubt was not adequate to fulfill such requirement and to inform the jury as to the burden of proof applicable to his third party culpability defense. Alternatively, he claims any failure by his trial counsel to have requested an instruction on "the central argument for reasonable doubt [with regard to his third party culpability defense] would be ineffective assistance of counsel."

None of Garcia's arguments has merit. The jury was adequately instructed under CALJIC No. 2.90 on the burden of proof and the degree of certainty required for a conviction. Such instruction logically commanded the jury to acquit Garcia of the charges if there was a reasonable possibility that someone else was solely responsible for Darcy's murder, rape and sodomy. Given such instruction, there was no possibility the jury could have been misled to believe Garcia had the burden of proof to show a third person committed the charged crimes beyond a reasonable doubt.

Garcia has not supplied any authority for the proposition that a defendant who is arguing third party liability from the evidence in the record is entitled to an instruction on reasonable doubt regarding the issue, and our research has disclosed none. Rather, as the People note in their respondent's brief, our Supreme Court in *People v. Wright* (1988) 45 Cal.3d 1126 held it was proper for a trial court to refuse a special instruction that "[i]t is not necessary for the defendant to prove that another person may have committed the crime, nor is it the burden of the defendant to prove his innocence." (*Id.* at p. 1134, fn. 3.) The court in *Wright* found such requested instruction was "repetitious of instructions already given, and the trial court correctly refused [it] on this ground. [Citations.]" (*Ibid.*) Thus even if Garcia's counsel would have requested an instruction relating reasonable doubt to the third party culpability defense counsel argued to the jury in closing, the trial court could have properly denied such request. Therefore, even the alternative claim of ineffective assistance of counsel for the failure to request such an instruction fails. No due process violation or prejudicial instructional error is shown in this regard.

V

CUMULATIVE ERROR

Lastly, even though we have noted potential harmless error in the trial court's ruling regarding Garcia's objections to Whelan's testimony, such is not sufficient by itself to render his trial unfair. Thus contrary to his assertion otherwise, we cannot find a miscarriage of justice that requires reversal on this record.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

KREMER, P. J.

McINTYRE, J.