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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BLAKE LEIBEL,

Defendant and Appellant.

B291049

(Los Angeles County
Super. Ct. No. BA443859)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Mark E. Windham, Judge. Affirmed.

Sara H. Ruddy, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters and
Susan Sullivan Pithey, Assistant Attorneys General, Joseph P.
Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff
and Respondent.

Defendant and appellant Blake Leibel (defendant) appeals from the judgment entered after he was convicted of murder, aggravated mayhem, and torture. He contends that the trial court abused its discretion by admitting evidence of a graphic novel commissioned by defendant and based upon his concepts of story and characters, and that the alleged error resulted in a denial of his federal constitutional right to due process.¹ We determine that defendant's contentions are without merit, and affirm the judgment.

BACKGROUND

Defendant was charged by indictment with four counts: the murder of Iana Kasian (Kasian), in violation of Penal Code section 187, subdivision (a);² aggravated mayhem, in violation of section 205; torture, in violation of section 206; and assault with intent to commit a felony, in violation of section 220, subdivision (a)(1).

The indictment alleged as special circumstances that the intentional murder involved the infliction of torture within the meaning of section 190.2, subdivision (a)(18), and that it was committed while defendant was engaged in the commission of the crime of mayhem in violation of section 190.2, subdivision (a)(17). The indictment further alleged that defendant personally used a deadly weapon in the commission of the

¹ Defendant originally challenged the trial court's imposition of assessments pursuant to Penal Code section 1465.8 and Government Code section 70373, but has withdrawn that challenge.

² All further statutory references in the Background section are to the Penal Code, unless otherwise indicated.

murder, mayhem and torture, within the meaning of section 12022, subdivision (b)(1).

The assault charge was dismissed at the outset of trial, as the prosecution elected not to proceed on that count. The jury found defendant guilty of all three counts as charged, and found true the two special circumstances and the deadly weapon allegations.

On June 26, 2018, the trial court sentenced defendant on each count to life in prison without the possibility of parole, plus a one-year consecutive term for the deadly weapon finding. The terms on counts 2 (mayhem) and 3 (torture) were stayed pursuant to section 654. The court ordered defendant to pay victim restitution in the amount of \$7,500, as well as a \$10,000 restitution fine. A parole revocation fine of \$10,000 was stayed. A \$30 court facilities fee per count, and a \$40 court operations assessment per count were assessed. A hearing on defendant's ability to pay the fines and fees was held on September 11, 2018.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Events leading to discovery of Kasian's body

In 2016, defendant was living with Kasian in a two-bedroom apartment on Holloway Drive. Kasian was pregnant with defendant's child, and in late April 2016, her mother, Olga Kasian,³ came from her home in Ukraine to help Kasian with the baby. Kasian rented a nearby apartment for her mother. Kasian delivered her baby girl in early May 2016. At first, the baby

³ Due to the shared surname, we henceforth refer to Olga Kasian by her first name to avoid confusion.

stayed with Kasian at the Holloway apartment, but within a couple days she went to live with Olga at her apartment. Kasian often visited Olga to help with the baby but did not live with her. Kasian bought her mother a cellphone which they used to keep in nearly constant telephone communication.

After Kasian and her mother went shopping together for a baby stroller on May 23, Olga never saw her daughter alive again. Their more than seven-minute phone conversation on the afternoon of May 24 was their last. Surveillance videos at the Holloway apartment complex and cellphone data indicated that Kasian returned home at 9:30 p.m., and never left her apartment alive after that time.⁴ On May 25, Olga called her daughter many times with no response.⁵ At about 1:44 p.m., Olga and a friend went to Kasian's apartment to look for her. Olga saw the car that Kasian usually drove parked in the garage of the complex. Olga went to the front of the complex, seeing that the sliding glass door on the balcony was open, she called out, "Blake, open the door for me." She then saw defendant's silhouette and hand as he closed the door.

Olga called and two Los Angeles County Sheriff's deputies came to the location where they remained for two hours to investigate. The blinds on the balcony window were closed and

⁴ The parties stipulated that in May 2016 the video surveillance system at the apartment complex was accurate as to time.

⁵ On May 25 and 26, Kasian failed to respond to 75 texts, 44 notifications, 100 calls, 37 texts, and 16 chats sent to her cellphone. Twenty of the missed calls were from Olga.

the deputies could not see anybody inside the apartment. One deputy knocked on the door of the apartment and rang the doorbell several times without a response. They heard no movement or noises inside. After obtaining defendant's cellphone number from the property manager, both deputies placed calls to him, one at 4:20 p.m. and the other 4:45 p.m., leaving voicemails informing him that they urgently needed to speak to him and asking him to call a certain number. Defendant did not return the calls. Believing they had no justification to go inside the apartment, the deputies left.

Cellphone data and surveillance video showed that on May 23, defendant left the apartment at about 11:20 p.m., returned home shortly after 5:09 a.m. the next morning, and did not leave his apartment again until May 25 at 11:45 p.m. Cell phone data showed that defendant's cell phone remained at his apartment from 11:45 p.m. on May 25 until 1:35 p.m. on May 26. Between shortly before midnight on May 25 and about 1:00 a.m. on May 26, defendant's cell phone records showed seven calls to or from Steven Green, all made at or near defendant's apartment, some going to voicemail.

The parties stipulated that in 2016 defendant used Kasian's cell phone when ordering food. On May 25 at 1:48 a.m., defendant used Kasian's cellphone to order food using Postmates delivery service, with instructions to leave the food at the door after being buzzed in, and not to ring the bell. A few seconds later, defendant texted, "After you buzz up." At 2:11 a.m., defendant texted the delivery person, repeating his request to leave the food at the door and not ring the doorbell. Surveillance video shows the delivery was at 2:14 a.m. Defendant ordered

food from Kasian's phone again on May 26 shortly before 3:00 a.m. and surveillance video shows the delivery 20 minutes later.

On May 26, Olga called, texted, and sent several chats between 1:45 a.m. and 11:00 a.m., all of which went unanswered by Kasian. In one text sent just before 3:00 a.m., Olga said in Russian, "Iana, answer me," and, "Are you alive, my dear daughter? I called the police because his holding you there [meaning against her will]. I came over there and knocked. Answer me." Later that morning, Olga returned to her daughter's apartment, went to the front door and called 911. When Deputy Micah Johnson arrived Olga brought him up to date, and he spoke to a neighbor in the hallway who had not seen anyone in at least a day or two. Deputy Johnson knocked on the door, received no answer, and at 8:44 a.m., he called defendant, left a voicemail telling him that he wanted to know whether he and Kasian were okay, and asking him to have Kasian call her mother or the sheriff's station as soon as possible.

Deputy Johnson obtained a key to the apartment, and when other deputies arrived on the scene, he used the key to unlock the door. Deputy Johnson was unable to open the door because the inside safety latch was engaged, so he turned the investigation over to Deputy Todd Mohr, who consulted their sergeant. It was determined that exigent circumstances existed, so they kicked in the door. The deputies entered the unit and found no one in the living room, dining room, kitchen, or on the balcony. The apartment was completely dark and the door to the hallway was locked. The deputies forced the door open but a mattress was barricading the door. After Deputy Mohr managed to enter the hallway and remove the mattress, the other deputies followed, and checked the guest bedroom and bathroom. Though

they found no one, Deputy Mohr observed blood on the headboard in the bedroom.

Next the deputies went to the master bedroom, where the door was locked. After announcing their presence, the deputies kicked in the door, and found another mattress barricading that door from the inside. The deputies called out, "Come out. If there's anyone inside, come out." A male voice from inside the bedroom responded saying that he was not going to come out because he was afraid the deputies would beat him up. Deputy Mohr said that they were just there to check on his girlfriend and asked where she was. Defendant replied that she was fine, at Cedars Sinai Hospital, and gave them a room or bed number. Defendant also said that his "father" was going to be there soon, and that he would not come out until he arrived.

Defendant apparently referred to Steven Green when he said "father," as Green was both defendant's accountant and his mentor. Defendant had called Green around noon and asked him to come to the apartment. For about one month before he received that call, Green had been unable to contact defendant, which was an unusually long time not to have had a conversation with defendant. Green had called, left voicemails, texted, and emailed numerous times, including a voicemail on May 23 at 2:26 p.m., saying that he was "really worried" about defendant, that he loved him, wanted to help him with whatever was going on, and was hoping to hear from him soon.

When Green arrived at the apartment, he identified himself to the deputies and explained his presence at the scene. Deputy Mohr brought Green into the hallway to speak to defendant through the partially open bedroom door. When Detective Gregory Boagni arrived at the apartment, he found

Green in the living room on the phone with defendant, who was still inside the master bedroom. After Green hung up, Detective Boagni asked him to call defendant back. Detective Boagni then took the phone and spoke to defendant. After a few minutes of conversation, defendant agreed to come out, and when he did, he was wearing only white boxer shorts. Green found some clothing to give to defendant to wear. Deputies first checked the clothing and there found defendant's passport and \$4,000 cash. When defendant came out of the bedroom, Deputy Reyes took his cellphone from his hand.

The deputies had entered the bedroom to search, when one of them screamed, "She's on the bed." Detective Mohr saw Kasian's body on the bed, ordered everyone outside the apartment, and called in the two paramedics who were waiting outside. They pronounced her dead around 1:02 p.m. Kasian's naked body was lying on a clean sheet and was covered by a red Mickey Mouse blanket over a blue polka dotted blanket. Her head was on a pillow. Her scalp had been removed. There was another pillow to her left with an indentation on it. There were dried bloodstains on the mattress beneath the clean sheet.

The investigation

Bloodstains and human flesh were found behind the bed and bloodstains were on the wall near where Kasian's head had been. A portion of an eyebrow was found on the floor near the bed, and there were bloodstains on the mattress of a second bed, a side table, and in other parts of the bedroom. The mattress that had been blocking the door to the master bedroom belonged to a second bed in that bedroom, and it too had bloodstains, including one large one. There was a clump of hair and a bloodstained razor in a trash can.

When the deputies entered, warm water was running in the bathtub of the master bathroom, which was turned off. Bloodstains and hair could be seen in the tub, and the drain later tested positive for blood. The drain of the sink also tested positive for blood. A green paring knife, similar to others found in the kitchen, was found in the top drawer in the bathroom, with blood where the handle met the blade. The mattress that had been blocking the hallway door belonged to the bed in the guest bedroom, and blood was found on it as well. The oval shape of the bloodstains found on the headboard of the bed in the guest bedroom were consistent with having been made from the top of the victim's scalped head. Also, there was blood on two towels, a pillow case, the floor, and the base of the drapes of the guest bedroom. The drain in the tub of the guest bathroom also tested positive for blood. This drain also contained some "freshly cut" hair. Chemical testing confirmed the presence of blood that someone had tried to clean in areas of the dining room, hallway, guest bathroom, and both bedrooms. The kitchen garbage disposal also tested positive for blood.

Evidence was found in the dumpster under the trash chute located in the hallway about 20 feet from defendant's unit. In trash bags, investigators found bloodstained bedding, towels, clothing, bathmats, placemats, a bed skirt with bloody handprints, human tissue, including some pieces with hair that appeared to be scalp, and an ear. DNA testing revealed Kasian's DNA on items including some of the tissue, the ear, and the bed skirt.

Kasian's DNA was also found in the blood on the green knife, in the master bath drain, on the mattress for the second bed, on the master bed mattress, and in the blood found in

various areas of the master bedroom, including a diluted bloodstain to the left of the bed which contained a mixture of DNA from both defendant and Kasian. In addition, both Kasian and defendant were contributors to the DNA found on the bloodstained guest room mattress (used to barricade the hallway door), and Kasian's DNA was found in the blood on the guest room head board, as well as on the wall behind the toilet and the cabinet in the guest bathroom. Samples taken from defendant's left hand and fingernails also contained Kasian's DNA.

The coroner's testimony

Chief Medical Examiner for the Los Angeles County Coroner, Jonathan Lucas, reviewed the file and photographs of Kasian's autopsy, which was performed by Dr. Ribe, a medical examiner who had retired. Dr. Lucas testified that the time of her death, Kasian was 30 years old, five feet four inches tall, and weighed 152 pounds. She was dead for at least a day before she was examined, which was about 10 or 11 hours after her body was found. The cause of her death was blood loss due to head trauma that cut or tore several arteries and veins. Blood loss is fatal when half the body's original blood volume is lost, and just half or less than half of Kasian's original blood volume was still in her body. It is not possible to drain all the blood from a human body.

Kasian's entire scalp had been removed from the eyebrows almost to the hairline in the back of her head, and a large portion of skin on the right side of her face had also been removed. Skull bone was visible, as all the tissue over the top of her head had been removed. There were cuts across the lower forehead below the eyebrows, on the right side from the cheek to the jaw line, and on the left side toward the ear, which was missing. A bladed

instrument had been used to remove the skin, but some tissue in the face had been torn away manually. Based on the amount of injury to Kasian's face and skull, the difficulty involved the combination of cutting and tearing, it was Dr. Lucas's opinion that this series of injuries would have taken a substantial period of time to inflict.

The injuries Dr. Lucas observed would have been very painful to Kasian, and he found indications on the body that supported a finding that the victim was alive during the infliction of her injuries. Inflammation of the injured tissue was present. Inflammation usually begins a minimum of six hours after injury, and occurs only if the body is alive and pumping blood. Pieces of the scalp, the right ear, an eyebrow, and other soft tissue collected from the crime scene showed hemorrhaging, which was also consistent with Kasian being alive at the time they were cut from her body. In addition, more than half of the blood in Kasian's body was missing, and there was no blood in her heart, veins, or arteries. Dr. Lucas found this absence of blood in Kasian's body to be highly unusual, even in light of her injuries, and such a high level of exsanguination required the heart to be pumping blood, as gravity alone would not have been sufficient.

Dr. Lucas opined that the bloodletting could have been accomplished by placing Kasian in a bathtub with her head lower than her feet, with water running over her scalped head and ear. The water would have washed away the blood in the open areas, increased blood flow, and hindered any type of clotting from occurring in the injured areas. Dr. Lucas's findings and observations were also consistent with Kasian's body being placed on a clean bed sheet after she was washed and dead. The wrinkling of the pads of Kasian's fingers, the absence of blood,

the presence of clear fluid in her vagina, and the presence of foam in her nostrils were consistent with her having been submerged in water for at least 30 minutes. Being found on clean sheets is consistent with her having been washed and dead before being placed there.

Dr. Lucas observed defensive wounds on Kasian's right arm and both hands. There were bruises on the back of her left hand and wrist consistent with her having struggled, blocked, or fought back. There were abrasions and bruising on the left side of Kasian's face, consistent with blunt force trauma. There were abrasions on the upper neck, as well as abrasions and bruising on the left upper arm, left wrist, and hand. The bruising on the left upper arm was consistent with her having been grabbed there. There were human bite marks on Kasian's left jaw and left bicep, and fingernail marks under her jawline.

Testimony of Dr. Habib

Michael Habib, testified as an expert in human cadaveric anatomy and fluid biomechanics (including blood flow in the human body). He was an assistant professor of integrative anatomical science at the University of Southern California school of medicine, where he was the director for human cadaveric anatomy, and in charge of the cadavers used in the instruction of medical students. Dr. Habib had reviewed the autopsy report and photographs, crime scene photographs, and medical literature involving scalping. Based on the medical literature, Dr. Habib determined that even in cases of complete scalping, victims were not usually in immediate danger of dying. The scalping would be very painful and traumatic, but would not ordinarily lead to an enormous amount of blood loss, and Dr.

Habib found no case in the literature of death by scalping alone. Indeed, most patients were able to get themselves to the hospital.

In Dr. Habib's opinion, the injuries suffered by Kasian, which resulted in the removal of more than 80 percent of her scalp, would have been excruciatingly painful, and judging from the different sorts of cut and torn edges, her scalp was not removed all at once but by means of numerous cuts and tears over time. The injuries were also consistent with the initial use of a sharp instrument to cut the scalp and then the use of fingers to remove the remaining parts of the scalp. The deeper wounds that damaged the vessels and would have caused most of the blood loss, appeared to be the torn ones. They were very ragged and uneven, with variable depths, consistent with the work of a person untrained in dissection and anatomy. The presence of hemorrhaging in the edges showed Kasian was still alive and actively bleeding at the time the wounds were made.

Over a period of a year and a half, Dr. Habib studied 70 donated cadavers to determine whether it was possible to exsanguinate someone after death to the extent seen in this case. Dr. Habib and his team used external pumps and cuts to the carotid and femoral arteries to exsanguinate the cadavers, and then selected 14 different vessels from multiple depths and sizes in each of them. He found that the most exsanguinated cadaver still had blood in 12 of the 14 vessels, while most of the cadavers still had blood in every one of the examined vessels, and unlike Kasian's heart, none of the cadaver hearts was fully exsanguinated. Even using a state of the art laboratory and external pumps, Dr. Habib testified that he never came close to exsanguinating any of the cadavers to the same level as Kasian's body.

Dr. Habid concluded that Kasian was alive during the exsanguination and that this exsanguination required a significant amount of time and effort. The exsanguination needed an operational heart and gravitational assistance, such as inversion. As Kasian's injuries were to her head, face, and upper neck, her head needed to be one of the lowest points of her body to accelerate the exsanguination and to keep the heart pumping blood. Kasian needed to be inverted in a bathtub with the water running over her head for a significant period of time to achieve her extraordinary exsanguination level, half her total blood volume. Reopening the wounds and running water over them would have also assisted in the exsanguination.

Evidence of lividity in Kasian's face supported the inversion theory.⁶ It also supported the inference that Kasian was moved after death to the bed where she was found by law enforcement, as the lividity did not match the position in which her body was found. The small amount of blood around her head also supported the inference that she was moved after death. In addition, evidence that blood was cleaned from the hallway between the master bedroom and the guest bathroom tended to show the body was transported between those locations. Dr. Habib thought it probable that Kasian was conscious but immobile during the exsanguination until she was very close to death.

Crime scene reconstruction

The prosecution also presented the testimony of Tom Bevel, a certified crime scene reconstructionist. He reviewed the

⁶ Lividity is settling of blood after death and is seen at the lowest point where the blood stops flowing.

autopsy report and crime scene photographs, a transcript of the medical examiner's testimony, and other evidence. Bevel noted that the mattress on which Kasian's body was found had dried blood on it and a large amount of smeared and wiped blood had been found on the wall right behind this mattress. The circular table next to the bed had a great amount of spatter and was thus closer to the blood source at the time of the transfer than the nearby wall. This spatter evidence was consistent with an inference that the victim was on the bed at the time of the attack. After the attack had taken place, the blood that was deposited on the mattress on which Kasian's body had been found had time to dry, which would have taken a considerable amount of time, as the body was found on top of a clean sheet and the pillow under Kasian's head was clean. Based on the presence of blood in numerous locations around the apartment, Bevel opined that Kasian was moved to different areas after the initial attack and before being placed back on the master bed. Blood in the guest bathroom and tub showed that Kasian had been placed in that tub. Evidence of possible lividity in more than one location of Kasian's body was consistent with her dead body having been placed in one position for several hours and then moved to another position for several hours.

Bevel testified that the blood pattern on the guest bedroom headboard was consistent with Kasian's wounded head making contact in four or five different locations on the headboard, indicating movement of the head. The two bloody hand marks on the bedskirt found in the dumpster were consistent with those of another person lying on the bed with his hands on the bed and fingers facing toward the victim's bloody head, possibly looking at

the head. The little finger of the right handprint was shorter than expected and seemed to be missing the top portion.

Sergeant Robert Martindale, from the Sheriff's homicide bureau, testified that he met with and photographed defendant at the Sheriff's station during the evening of May 26, 2016, after defendant was arrested. Defendant appeared to be clean, and recently washed or bathed. He measured 6'3" with a weight of 210 pounds. Sergeant Martindale observed that defendant had severe bruising to both eyes extending across the bridge of the nose, consistent with his wearing glasses while suffering some type of blunt force trauma to the face. He also had some linear scratches under his left eye, long linear red scratches on his chest, and a diagonal linear scratch along the left side of his face. Defendant had scratches on his neck with punctures that were consistent with having been caused by fingernails, and an elliptical injury on his right bicep consistent with a human bite mark. The bite mark appeared to have been made as he came around behind the victim so that his right bicep was against her mouth. Defendant was missing the tip of his little finger on his right hand. There was bruising on the front shin of both legs at the base of the knee, and an oval shaped deep bruise on the top of the right foot near the ankle. Sergeant Martindale took a buccal swab for DNA, as well as hand and fingernail swabs.

The graphic novel

Robert J. Ryan testified that defendant engaged him and his partner, Daniel Quantz, to write a graphic novel based on defendant's concept, which defendant had originally pitched as a television show three months earlier. Ryan declined. Defendant told them that he had done a lot of research on serial killers and that was what gave him the idea of doing the project.

Defendant's associate Lawrence Longo (Longo) called, asked if they wanted to do it as a graphic novel titled *Syndrome*, and Ryan and Quantz agreed. Ryan and Quantz had experience with graphic novels, and did most of the writing and helped with the art. David Marquez illustrated it. Ryan's name was on the book, as well as those of defendant, Quantz, and Marquez.

Defendant had past experience with a comic series and was the creative overseer of the project. Longo was Ryan's "point person." If he had questions for defendant, Ryan went to Longo. Defendant attended about nine of 50 meetings, and Ryan saw defendant about once every five weeks. Other times, he met with Longo and Jack Latner, who were credited in the book as editors. Defendant was the final arbiter of everything in the book. If he did not like something it was not used. If defendant had not approved of the writing and illustrations, the book would not have been published. Defendant paid Ryan for his work plus a share of the profits. Defendant's production company obtained the publishing deal.

The book cover was photographic art, shot in a studio, with some subsequent modification. It is a picture of a baby doll with the top of the skull sliced off, and a prop brain inserted into the space thus created. Photographer Michael Dahan came up with the concept and presented it to Ryan and defendant. The other 12 proposed covers were all boring in Ryan's opinion. Defendant chose Dahan's concept and Ryan agreed with defendant's choice.

Defendant's concept was the story of a doctor's attempt to treat the most depraved type of killers, presenting the question of how one treats evil. The doctor was originally called Wolfe Brunswick, but defendant changed the last name to Chitel just before it went to press. Seven years later Ryan learned that

Chitel was defendant's mother's maiden name. A character in the book named Karen Oats, is an actress who gets lured into an experiment to treat a serial killer, and she is essentially used by the doctor as bait for the serial killer. She ultimately becomes the killer's target, and he stabs her. Sometime after the book's publication, defendant introduced Ryan to his then girlfriend, whom he later married. He introduced her by her name, but then said that she was the "real Karen." Ryan understood him to mean Karen Oats.

Defendant presented a concept in the book about draining the blood of victims. When he described it defendant used a hand gesture to illustrate what it would look like to hang someone from the ceiling and drain the person's blood, and then he made a whistle sound. After defendant came up with the idea of blood draining, Quantz determined how to incorporate it into the book. Ryan urged defendant to use a flashback in the story to an older killing with the two victims, and defendant approved. The second page of the book depicts two victims being cut and hung upside down, their blood draining, watching each other die. Defendant also approved the illustration of a decapitated female victim's body lying on a bed.

The book was prereleased at Comicon San Diego in 2010, then released in comic stores and bookstores the second week of September 2010. In May 2014, defendant bought Ryan's 12.5 percent profit participation at Ryan's request, leaving defendant as the individual owner of the copyright.

Defense evidence

Dr. Lucas testified that there was an unusual lividity pattern on the left side of Kasian's body, similar to an imprint of the mattress on which Kasian's body was found. The unusually

narrow pattern of the lividity was consistent with the lack of blood in Kasian's body. There were also marks on Kasian's face that were consistent with blunt force trauma. Dr. Lucas disputed Dr. Habib's opinion that the red marks on Ms. Kasian's face were indications of lividity.

Dr. Lucas found no evidence showing that Kasian was or was not conscious at the time she was submerged in the bathtub, and he did not believe that the mere presence of blood in her head was evidence that she was conscious at the time. However, the presence of white blood cells in the injured areas showed Kasian was alive for at least six hours after she was scalped.

DISCUSSION

I. Summary of contentions

Defendant contends that the trial court abused its discretion in admitting into evidence the graphic novel *Syndrome*, and that the error resulted in a violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. In particular, defendant contends that the trial court was required to conduct an evidentiary hearing to determine preliminary facts; that the novel was irrelevant; that it was not admissible as an exception to the hearsay rule; that it was too dissimilar to the facts of this case to be admissible as character evidence; and that the evidence was more prejudicial than probative.

II. The prosecution's motion in limine

Prior to trial, the prosecution brought a motion in limine to admit several pages of the graphic novel into evidence for the purpose of establishing premeditation, intent, and motivation. The motion included a summary of the evidence the prosecution intended to present, and referred to parts of the book that were

similar to the alleged crimes. The prosecution's offer of proof included assertions that defendant wrote or coauthored the book, approved the illustrations, and that a coauthor would be called to authenticate the book as belonging to defendant. Apparently in anticipation of objections on the grounds of relevance, hearsay, and probative value versus potential for prejudice, the motion included arguments relating to such issues.

Before trial began the trial court asked, "Is there going to be argument on the people's motion to admit evidence of the graphic novel?" Defense counsel stated: "There would be an objection. Some of the graphic nature in terms of the illustration weren't done by [defendant]. I'm at a loss. If it wasn't done by him and there was another person that did the illustration, then to equate it to his action and his motive is a little bit stretched." The prosecutor responded: "He is one of three authors in the book and he had to okay not only the illustrations but the cover of the book before his name went in it and before it was published." Defense counsel did not dispute that defendant was one of the authors, but argued: "In regards to [the court's question] whether or not this is a pivotal point in his identity, this is one of many books that have been published. Some of them range from graphic novels and some of them are children's books. To bring this one out that he came up with the concept and the character is drawing too much of a tenuous connection. And I do believe even if he selected the drawings, some other illustrator drew them. Those are that illustrator's imagination." The court ruled as follows: "Okay. It sounds like a question of fact for the jurors. The jurors can disregard if it's not his creation. But if there indeed will be testimony that this was his idea illustrated, that would -- that would make it relevant. I agree that a mere

connection without more might be a problem. But with that testimony, I would allow this to help illustrate the testimony. So I will allow it.”

Defendant complains that some of the prosecutor’s assertions regarding defendant’s authorship of the novel, how much of it was based on defendant’s ideas, and how much control he had over the illustrations were not borne out by the evidence at trial. He contends that the court was required to take evidence in an Evidence Code section 402 hearing (402 hearing)⁷ outside the jury’s presence, and to determine the existence of preliminary facts before ruling that the novel was admissible as relevant. Defendant argues that “[i]f the judge had heard the evidence before letting it go to the jury, he would have learned that defense counsel’s representations about the contents of the graphic novel were much closer to the truth than were those of the prosecutor.”

The purpose of a 402 hearing is to decide preliminary questions of fact upon which the admissibility of evidence depends. (*People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202, 209, fn. 6.) The court did not fail to do so, and its determination was based upon the prosecutor’s offer of proof as stated in her motion in limine. The trial court was not required to conduct an additional 402 hearing without a request, and it was defendant’s burden to make that request. (See *People v. Williams* (1997) 16 Cal.4th 153, 196; *People v. Chavez* (2018) 22 Cal.App.5th 663, 703-704; see § 402, subd. (b).)

⁷ All further statutory references are to the Evidence Code, unless otherwise indicated.

During the discussion of the prosecutor's motion in limine, defense counsel acknowledged that defendant was one of the authors of the novel, but argued that defendant merely supplied the concept and the name of the main character, while someone else drew the illustrations. She argued that the connection to defendant was too tenuous to make the novel admissible, even if defendant selected the drawings. The trial court seemed to understand defendant's argument as objecting to the relevance of the evidence, as its only ruling was directed to that issue. The court agreed with defense counsel that mere connection with the novel was not enough, but found that the offer of proof sufficiently demonstrated that the book illustrated defendant's idea. The court thus rejected defendant's relevance objection, adding, "It sounds like a question of fact for the jurors. The jurors can disregard if it's not his creation." Thus, based upon the prosecutor's offer of proof at the hearing on the motion in limine, the trial court determined that the preliminary facts supported admissibility.

Defendant now summarizes select portions of coauthor Ryan's trial testimony in an effort to demonstrate that there was insufficient evidence to establish the preliminary facts regarding defendant's connection to the novel, and thus the prosecutor failed to show relevance to this case. When Ryan took the witness stand defendant had the opportunity to renew his relevance objection and ask that the foundational facts be demonstrated outside the presence of the jury pursuant to section 402. Indeed, as the trial court had previously ruled the evidence admissible, defendant was *required* to renew his objection in order to preserve the issue for appeal. (See *People v. Jennings* (1988) 46 Cal.3d 963, 976 & fn. 3.) As defendant failed to do so,

he has failed to preserve his objection on the ground of the relevance of the novel's illustrations.

Furthermore, at the motion in limine hearing, the trial court commented that if the evidence did not show that the novel was defendant's creation, the jurors could disregard it. "When the court admits evidence subject to the existence of preliminary facts, it [*m*]ay, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." (Evid. Code, § 403, subd. (c)(1), italics added.) "On its own terms, this provision makes it discretionary for the trial court to give an instruction regarding a preliminary fact unless the party makes a request." [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1198.) Any prejudice could have been dispelled with a request for an appropriate limiting instruction, but defendant did not request such an instruction, and the trial court was not required to give one on its own motion.

In any event, Ryan's testimony established that the graphic novel was defendant's creation, the product of his ideas, executed by others under his direction. Defendant hired writers to write the novel based on his concept, and he was the creative overseer of the project. Although the writers and illustrators made suggestions, defendant was the final arbiter of the book, with the power to veto anything he did not like. It was defendant's company that obtained the publishing deal, and if defendant did not approve of the writing and illustrations, the book would not have been published. Defendant chose the cover art from 13 proposed covers, and also approved the illustration of the decapitated female victim's body on the bed. Defendant named

the main character using his mother's maiden name, and he thought of his then girlfriend as the "real Karen" -- the name of the victim of the novel's serial killer character. Further, it was defendant's idea to include the draining of a victim's blood by hanging the victim upside down, and he described his idea to the writers with hand gestures and a whistling noise. Quantz and Ryan elaborated on the idea and defendant approved their suggestions.

In sum, there was a hearing on the preliminary facts, and defendant could have, but did not, object to the adequacy of such facts and could have, but did not, request a limiting instruction. He has thus not preserved the issue for review.

III. Hearsay

Defendant next contends that the contents of the novel were not admissible as exceptions to the hearsay rule pursuant to section 1220, because they were never intended to be taken for the truth. "Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) As the contents of the book were not offered for the truth of any statements contained within it, no hearsay exception was required.

IV. Relevance

Defendant contends that the contents of the graphic novel were inadmissible because they were irrelevant.

"Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) "The test of relevance is whether the evidence tends

“logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]” . . .’ [Citation.]” (*People v. Heard* (2003) 31 Cal.4th 946, 973.)

Defendant’s relevance argument at the time of the hearing on the prosecution’s motion in limine was that the evidence connecting him to the novel was tenuous because the illustrations were the product of the illustrator’s imagination, not defendant’s. The trial court understood defendant’s argument to be a relevance objection, and its ruling was directed solely at the reasons stated in defendant’s argument. Defendant now contends that *even if* his connection to the graphic novel was sufficient to permit the jury to attribute the contents to him, the contents of the novel were too dissimilar to the charged crimes and that publication of the novel was too remote to be relevant to any issue in the case.

The excerpts from the graphic novel were offered to raise an inference of intent to commit murder, mayhem and torture, as well as motive and premeditation. Defendant contends that the contents of the novel were irrelevant to those issues because fictional works do not necessarily relate to actual events or truly reflect the author’s state of mind. “The existence of benign explanations does not stand as a bar to admissibility” of a work of art created by the defendant. (*People v. Nelson* (2011) 51 Cal.4th 198, 224.) Whether the evidence is admissible as relevant to the defendant’s state of mind is a matter within the discretion of the trial court, which “would ordinarily consider alternative explanations in conducting an Evidence Code section 352 analysis.” (*Ibid.*)

Defendant’s relevance challenge based on remoteness and similarity are also issues ordinarily raised by an objection

pursuant to section 352. (See, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 402, 405; *People v. Branch* (2001) 91 Cal.App.4th 274, 278, 281, 284-285.) Section 352 provides that the trial “court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

“If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.” (*People v. Partida* (2005) 37 Cal.4th 428, 435.) “[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion. [Citation.] Specifically, it scrutinizes a *decision on a motion* to bar the introduction of evidence as irrelevant for such abuse: it does so because it so *examines the underlying determination* whether the evidence is indeed irrelevant. [Citation.]” (*People v. Alvarez* (1996) 14 Cal.4th 155, 201, italics added.)

Here, there is no underlying determination for this court to examine. Defendant never asked the trial court to determine whether contents of the novel were too dissimilar to the charged crimes or whether the publication of the novel was too remote to be relevant, or that for the same reasons, whether the probative value of the evidence was outweighed by the potential for prejudice. Thus, “we cannot hold the trial court abused its

discretion in rejecting a claim that was never made.” (*People v. Lightsey* (2012) 54 Cal.4th 668, 713.)

V. Probative value versus potential for prejudice

Defendant contends under a separate heading that the trial court abused its discretion and violated defendant’s right to due process of law by admitting evidence of the graphic novel even though it was inflammatory and had virtually no probative value.

Respondent asserts that defendant has forfeited any challenge under section 352. We agree. A judgment may not be reversed by reason of the erroneous admission of evidence “unless . . . [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion.” (§ 353, subd. (a).) “Although no “particular form of objection” is required, the objection must “fairly inform the trial court, as well as the party offering the evidence, of the *specific reason or reasons* the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.” [Citation.]’ [Citation.]” (*People v. Nelson, supra*, 51 Cal.4th at p. 223, italics added.) The only reason defendant gave for opposing the prosecution’s motion was that the foundational facts insufficiently connected defendant to the graphic novel. As we have previously discussed, defendant did not assert that the probative value of the evidence was outweighed by its potentially prejudicial effect.

Defendant contends that he did not forfeit a challenge to the evidence under section 352 because the prosecutor raised the issue in his motion in limine, by arguing that the evidence was more probative than prejudicial. Defendant cites the rationale

given by the California Supreme Court in *People v. Coleman* (1988) 46 Cal.3d 749, 777 and *People v. Partida, supra*, 37 Cal.4th at page 434, for section 353's requirement of a timely and specific objection, which is to give the party offering the evidence an opportunity to cure the defect, and to prevent error by allowing the trial court to consider excluding or limiting the evidence to avoid potential evidence. Defendant then argues that the prosecution's motion satisfied the goals for the rule.

We disagree. Defendant cites no authority for his assertion, or even an example of a case in which such a theory operated to avoid forfeiture. If it had been defendant who brought a motion in limine objecting to the evidence on this ground, the motion could have served "the function of a 'motion to exclude' under Evidence Code section 353 by allowing the trial court to rule on a specific objection to particular evidence." (*People v. Morris* (1991) 53 Cal.3d 152, 188-189.) However, defendant made no such motion, nor did he interpose an objection either at the time of the prosecution's motion or at the time the evidence was presented. Defendant never argued that the probative value of the evidence was outweighed by the potential for prejudice, and he never obtained a definitive ruling on the issue. Under such circumstances, it is not enough that the prosecution suggested section 352 as the basis for a defense objection. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171-1172.)

VI. No prejudicial error

Defendant contends that we must conduct a review for prejudice under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24, which requires reversal for federal constitutional error unless respondent demonstrates "beyond a reasonable

doubt that the error complained of did not contribute to the verdict obtained.”

A decision made under the ordinary rules of evidence does not ordinarily implicate constitutional rights. (*People v. Dement* (2011) 53 Cal.4th 1, 52.) Thus, if we had found error, it would be defendant’s burden to demonstrate a reasonable probability that he would have obtained a more favorable result had the evidence been excluded, under the test for prejudice of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Hernandez* (2011) 51 Cal.4th 733, 746; see § 353, subd. (b); Cal. Const., art. VI, § 13.)

Moreover, as defendant did not make a constitutional argument below, we would not reach his due process claim unless and until he established error under state law. (*People v. Thornton* (2007) 41 Cal.4th 391, 443-444; *People v. Partida, supra*, 37 Cal.4th at pp. 435-439.) And as defendant has failed to demonstrate error under state law, we do not reach his constitutional claim; there is thus no federal constitutional error to review under the standard of *Chapman*.

Regardless, if defendant had demonstrated error, we would find it harmless beyond a reasonable doubt under the *Chapman* standard. A finding that “the error complained of did not contribute to the verdict obtained” means a finding that the error was ““unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” [Citation.] . . . [Citation.]” (*People v. Pearson* (2013) 56 Cal.4th 393, 463, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, fn 4.) “Thus, the focus is on what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is ““whether the . . . verdict actually

rendered in this trial was surely unattributable to the error.”
(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)’ [Citation.]”
(*People v. Pearson, supra*, at p. 463.)

As respondent notes, *Syndrome* was not a significant part of the prosecution’s case. It was not the primary evidence against defendant and was not used (or necessary) to fill any “holes” in the prosecution’s case. Ryan’s testimony about the book lasted about an hour, and covered approximately 35 pages of reporter’s transcript out of the nearly six volumes of prosecution testimony given over six days. The illustrations in the novel were stylized, unrealistic drawings, and compared to the many gruesome and horrific photographs of the crime scene and autopsy, the illustrations were not inflammatory. Just five pages of illustrations, the cover, and the credit page were in evidence, not the entire graphic novel.⁸

Although the book was based on defendant’s idea and commissioned by defendant, it was the product of a collaborative effort involving others. The novel shared some concepts with defendant’s crime, such as exsanguination, positioning the body on the bed, and cutting the skull, but it was not identical to defendant’s crime, and it was presented as fiction. The prosecutor argued that it demonstrated premeditation and intent to commit the crimes, and that it revealed what ideas had been in defendant’s mind. As respondent notes, the overwhelming forensic and expert evidence was more significant than anything in the novel.

⁸ The *Syndrome* excerpts thus consisted of seven exhibits among the People’s 304 exhibits admitted into evidence. Defendant did not object to the admission of these seven exhibits.

Compelling evidence established that defendant was in the Holloway apartment when Kasian's injuries were inflicted. Surveillance videos at defendant's apartment complex and cellphone records indicated that from 9:30 p.m. on May 23 until her body was found on May 26, Kasian never left her apartment. Olga's testimony and cellphone records established that she and Kasian were in nearly constant telephone communication, but Kasian never contacted her mother again after the afternoon of May 24. Surveillance video suggested that defendant was in his apartment after approximately 5:00 a.m. on May 24. Cellphone data regarding the location of his cell phone indicated that he left for a short time a few minutes before midnight on May 25, and then remained at home until 1:35 p.m on May 26. Dr. Lucas testified that Kasian died about a half day to a day before her body was found on May 26, and that her injuries would have taken a substantial period of time to inflict.

In addition, the evidence of blood and washed blood residue detected in the dining room, kitchen, hallway, guest bathroom, and both bedrooms, indicated that defendant was not locked in some room of the apartment and unaware of the attack on Kasian. Nor did he come home to find the crime had been committed by someone else, as the front door security latch had been engaged from the inside and he was found behind three doors barricaded by mattresses placed on the side of the doors facing his location.

Compelling evidence indicated that defendant intended his victim to die and to suffer before she died. Chief medical examiner Lucas testified that his observations of Kasian's injuries suggested that she was alive during her scalping, and that she fought her attacker. Dr. Lucas testified that her injuries

would have been very painful, and would have taken a long time to inflict, as her assailant accomplished the scalping with a combination of cutting and tearing. A green paring knife, similar to others found in the kitchen, was found in the master bathroom, with Kasian's blood on it. Dr. Habib, the expert in human cadaveric anatomy and fluid biomechanics (including blood flow in the human body), had conducted 70 experiments with human cadavers. Dr. Habib concluded that Kasian was alive during the exsanguination and that this exsanguination required a significant amount of time and effort, as it needed an operational heart and gravitational assistance, such as inversion. He testified that reopening the wounds and running water over them would have assisted in the exsanguination, which would also have taken time.

Evidence that Kasian fought back for some time came from Sergeant Martindale's testimony that soon after defendant's arrest, he observed that defendant (who normally wore glasses) had severe bruising to both eyes extending across the bridge of the nose, consistent with some type of blunt force trauma to the face, a deep bruise near his right ankle, and bruises on both shins. He had scratches on his face, chest, and neck, consistent with having been made by fingernails, and a human bite mark on his arm. Also defendant's right hand was missing the tip of his little finger. Swabs of defendant's left hand and fingernails contained Kasian's DNA.

Finally, as respondent also notes, evidence of defendant's consciousness of guilt, such as lying about Kasian's wellbeing and whereabouts, attempts to clean blood from various parts of the apartment, disposing of and the destruction of incriminating evidence, give rise to the compelling inference that he was

Kasian's assailant. In light of the evidence outlined above, the jury could reasonably and most likely did infer that defendant was the person who attempted to clean the blood from the various rooms of the apartment, that he cleaned blood from himself prior to his arrest, and that he attempted to dispose of other incriminating evidence, all indications of a consciousness of guilt. (See *People v. Dement, supra*, 53 Cal.4th at p. 53 [disposing of evidence and cleaning], disapproved on another point in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Hiding from deputies, refusing to emerge from his bedroom, and lying to the deputies about Kasian's whereabouts and her condition also demonstrate a consciousness of guilt. (See *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [jury may reasonably infer consciousness of guilt from the defendant's false and misleading statements about victim's whereabouts and condition]; *People v. Tripp* (2007) 151 Cal.App.4th 951, 956 [attempt to hide].) In addition, clothing found in the living room which contained defendant's passport and \$4,000 cash, are facts from which the jury could reasonably infer that defendant had intended to flee the country, also suggesting a consciousness of guilt. (See *People v. Williams* (2018) 23 Cal.App.5th 396, 411.)

We conclude that the excerpts of the graphic novel were “unimportant in relation to everything else the jury considered on the issue” of defendant's guilt, and the verdict was surely unattributable to the asserted error of its admission. (*People v. Pearson, supra*, 56 Cal.4th at p. 463.) In sum, if defendant had demonstrated error in the admission of the evidence, we would find it harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT