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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURICE NAILS,

Defendant and Appellant.

A128270

(Alameda County
Super. Ct. No. C159180)

Maurice Nails (appellant) was convicted, following a jury trial, of first degree murder. On appeal, he contends (1) the prosecutor committed misconduct when, during both cross-examination of appellant and closing argument, he revealed and later discussed a hearsay statement by appellant's brother, who was not a witness at trial, and the error was compounded by the trial court's admitting the evidence for non-truth; (2) the trial court erred when it denied appellant's request to exclude his custody status, admonished the jury about his custody status, and permitted a deputy to sit near appellant while he testified; (3) appellant's conviction of premeditated and deliberate murder was not supported by substantial evidence; (4) the court erred in failing to instruct the jury sua sponte on voluntary manslaughter premised on unreasonable self-defense; (5) the court and the prosecutor erred and compounded a problematic reasonable doubt instruction by mischaracterizing the reasonable doubt standard; (6) the court erred when it instructed the jury with CALJIC No. 2.21.2 regarding witness testimony; and (7) the cumulative effect of the errors raised on appeal requires reversal of the judgment. Because we conclude the

evidence is insufficient to support appellant's conviction of first degree murder, we shall reduce his conviction to second degree murder. We shall otherwise affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged by information with the murder of Robert Benjamin (Pen. Code, § 187, subd. (a)).¹ The information further alleged personal use of a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)); personal and intentional discharge of a firearm (§ 12022.53, subd. (c)); and personal and intentional discharge of a firearm causing death or great bodily injury (§§ 12022.7, subd. (a), 12022.53, subd. (d)).

Following a jury trial, the jury found appellant guilty of first degree murder and further found all of the enhancement allegations true.

On April 16, 2010, the trial court sentenced appellant to a total term of 50 years to life in prison, comprised of 25 years to life for first degree murder, plus a consecutive term of 25 years to life for the personal and intentional discharge of a firearm causing death.²

Also on April 16, 2010, appellant filed a notice of appeal.

FACTUAL BACKGROUND

Prosecution Case

Rose Hunt testified that, at about 10:00 or 11:00 p.m. on December 29, 2007, she drove in her Lexus automobile to a club called Geoffrey's on Franklin Street in downtown Oakland. Her sister Norlena Davis and her friend Ariana were with her.³ Rose and Ariana went into the club while Norlena went to pick up two other people, Sheretta Henderson and Lorenzo Newell, who joined them at the club later. After Norlena returned with Sheretta and Lorenzo, Rose saw Robert Benjamin (Rob), a friend

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

² The court stayed sentences for the other two enhancements, pursuant to section 654.

³ Because the witnesses to events that night called people by their first names, we will primarily use first names in setting forth these facts.

of Lorenzo's, inside the club. This was the first time she had ever seen him. Rob danced with Sheretta all night.

Before going into the club, Rose had been drinking alcohol and she had more than five mixed drinks while she was at the club. She felt drunk, but not to the point where she could not walk and talk, and the room did not spin. She took many photographs inside the club with a digital camera.

Rose left Geoffrey's at about 1:40 a.m. on December 30, shortly before its 2:00 a.m. closing time. With her were her sister Norlena, Sheretta, Rob and Ariana. Lorenzo was not with them. There were about 100 people leaving at the same time. The five of them went to Rose's car and she, Ariana, and Norlena sat in the car, waiting for Sheretta to finish talking to Rob because Sheretta was going to drive. Rose was sitting in the driver's seat and Norlena was in the front passenger's seat. Ariana, who was in the back passenger-side seat, started throwing up out the open car door. Lorenzo walked up while Ariana was throwing up. Sheretta and Rob were standing and talking on the sidewalk by the rear side of the car.

Rose knew of a man named Maurice or "Reese" who was Ariana's ex-boyfriend. Ariana had talked about him, but Rose had never met him and did not know what he looked like, except from a photograph she saw on Ariana's MySpace page. On the early morning of December 30, as she sat in the car, she did not see the person she knew as Maurice (appellant). Rose remembered talking to an officer later at the Oakland Police Department, but she did not recall telling him that she saw "Maurice" walking towards her car and up to where Rob and Sheretta were talking. She did not see appellant that night and did not see him shoot Rob. She did not remember telling an officer otherwise.

Oakland Police Officer Lisa Ausmus testified that, on December 30, 2007, at approximately 1:48 p.m., she responded to a dispatch regarding shots being fired in the area of 14th and Franklin Streets in Oakland. She arrived at the scene about a minute after receiving the dispatch. There were several hundred people scattered around. She saw an apparent gunshot victim and soon thereafter focused her attention on a young Black female who "just kept yelling, 'Reese . . . did it. Reese did it.'" Ausmus tried to

talk to her, but the woman “was scared, very, very upset, very excited,” and said “ ‘I don’t want to be speaking to the police.’ ” Ausmus was unable to get any identifying information from the woman, who did not appear to be intoxicated. Less than five minutes later, Ausmus saw Sergeant Brizendine talking with the woman.

Ausmus further testified that she had seen Rose in the witness room at court the previous day, waiting to testify. Ausmus recognized her as appearing similar to the person she had overheard yelling, “Reese did it.”

Oakland Police Sergeant Robin Brizendine testified that she was on patrol near Geoffrey’s on the early morning of December 30, 2007, when she heard 10 to 15 rapid gunshots coming from nearby. There was no pause between the gunshots; they came “one right after the other.” This suggested to her that a single firearm was involved. Brizendine went to the scene, where she made contact with a Black female whom another officer had said was a possible witness. The woman, who refused to give her name, was agitated, upset, and uncooperative. But she did give Brizendine her phone number. Brizendine learned much later that the woman’s name was Rose Hunt.

While still at the scene, Brizendine called the woman, who again would not give her name. The woman said she had “seen the whole thing,” but she was scared to be seen talking to the police. She did say, however, that she would be willing to go to the police department to be interviewed by investigators. She also asked several times about getting her car released. Brizendine informed the investigators on the case of this conversation. The woman later called Brizendine back, said she was in the lobby of the police administration building, and was willing to speak to someone, although she still refused to give Brizendine her name. Brizendine directed an officer to meet with her.

Oakland Police Officer Michael Finnicum testified that, on December 30, 2007, he was told that a witness had just come to the police station and was asked to meet with her. The person was Rose, and Finnicum interviewed her, taking notes as they talked. They met for about 45 minutes, from 3:40 a.m. to 4:26 a.m. He took her entire statement and then read it back to her. She did not claim that anything he read was inaccurate. But when he asked her to sign the statement, she said that, before she would sign it, she

needed to know how to get her car back. He said that after she signed the statement, he would take her upstairs to talk to the investigators about how she could get her car back. But Rose refused to sign anything until she knew what was going on with her car. Finnicum therefore took her upstairs to meet with investigators about her car. He did not see her again after that.

In the statement that Finnicum took from Rose, she said she had gone to Geoffrey's with her sister, Norlena, and friends, Ariana, Sheretta, Lorenzo and Rob. When the club closed, they went to her car, and Norlena and Rose got inside while the others stood outside talking. Rose and Norlena were looking at photographs she had taken inside the club when, at about 1:47 a.m., she noticed Maurice walking from 14th Street and Webster towards her car.⁴ She knew Maurice because he had been her friend's boyfriend in the past.

Rose further told Finnicum that Maurice walked up to Rob and stood about five feet away from him. After about one minute, Maurice and Rob got into a verbal dispute. She could not hear what the dispute was about. After another minute or so, Rose saw Maurice reach into his pants pocket and pull out a small black handgun. She then watched Maurice shoot Rob. She heard about three or four gunshots and saw flashes of light coming from the gun. Maurice then turned away and walked on 14th Street back towards Webster. He turned right towards 12th Street and Rose lost sight of him. A few seconds later, the police showed up and she flagged them down. Rose described Maurice as about six feet tall and about 220 pounds. He was wearing a white shirt and blue jeans with writing across the buttocks area.

Oakland Police Sergeant Caesar Basa, who was investigating the homicide, testified that, on December 30, 2007 at 6:01 a.m., he and his partner, Sergeant Louis Cruz, interviewed Rose. She told them that she had been at Geoffrey's with Norlena Davis, Ariana Alberty, Sheretta Henderson and Lorenzo Newell. She said that the

⁴ Rose said she noticed the time because someone called her on her cell phone at 1:47 a.m..

victim, Robert Benjamin, was with them too. They left Geoffrey's at 1:30 a.m. and went to her car. She said that Ariana got into the right rear seat and was throwing up. Norlena got into the front passenger seat and Rose sat in the driver's seat. Rob and Sheretta walked up and stood next to the car, and Lorenzo walked up after them.

Rose said that, a short time later, three or four guys walked up and they were talking to Rob. About a minute or a minute and a half later, she looked back and saw Rob and Maurice talking.⁵ She said that she then saw Maurice shoot Rob. She also said that Rob did not have a gun. She knew Maurice because Ariana had dated him and also because he was her god-sister's "first love." She told Sergeants Basa and Cruz that Maurice was 21 years old, lived in the area of West Street, and had a brother named "Mac" who used to work at the post office. She said Maurice was six feet tall, 220 pounds, had "tapered" black hair, and a tattoo that says "family first" on his arm. At the time of the shooting, he was wearing a white T-shirt and blue jeans. She had last seen him about a year and a half earlier.

When Basa asked whether she was willing to provide an audiotaped statement, Rose refused. They then discussed her car, which Basa explained had to be processed as evidence before being released to her.⁶

Brandon Brogan testified that he knew appellant because they went to the same high school in Oakland. Brandon was friends with both appellant and his brother Willie. On December 29, 2007, in the early evening, Brandon and his brother Frank went to appellant's house. Appellant, his brother Willie, and a friend named Tribble (or Trib) were also there. They had some drinks and decided to go bowling. They went to a bowling alley, and later decided to go to downtown Oakland. They drove to Oakland, along with additional friends, in several different cars. Frank eventually drove home in

⁵ Rose used both the name "Maurice" and "Reese" when describing the assailant.

⁶ On December 30, 2007, Sergeant Basa also interviewed Ariana Alberty, Sheretta Henderson and Lorenzo Newell.

Brandon's car and Brandon got into a pink car with appellant. Trib was in the back of the car and he was "wasted drunk."

Brandon acknowledged that when he was later interviewed by police, he told them that two young Black men had come up to the car at one point and pulled out a gun, and that appellant had popped out of the car and asked, "What you all going to do? Shoot me?" before the men ran off. Brandon also had told the police that appellant was mad afterwards and that he and "Mac" (appellant's brother Willie Mac) had tried to calm appellant down. Brandon testified, however, that he had made all of this up so the officers "can finish asking me the questions and I can leave."

Brandon further testified that he and his friends eventually parked in downtown Oakland near a club called Geoffrey's. He, appellant, and Willie Mac got out of the car and started walking around. They saw some females near a black car and appellant talked to them. He did not remember appellant talking to a man or having a confrontation. Brandon did tell police that appellant pulled out a gun and shot a man, and that he (Brandon) did not see the gun until it was already in the man's face. He said this because he thought that was what the police wanted him to say and he was scared. But it was a lie. In fact, he never saw appellant with a gun in his hand and never saw him shoot anyone. When he heard the gunshots, they were behind him and he did not see anything. After the first one, he started running. Brandon had met Rose before the night of the shooting and did not recall seeing her that night.

Sergeant Basa testified that he interviewed Brandon on February 14, 2008. Based on information from Charles Tribble, Basa thought Brandon might have been a witness to the December 30, 2007 shooting. Because Brandon did not respond to phone messages, two officers went to his home. Brandon's father called Basa and arranged to bring Brandon to the police station to be interviewed. During the interview, Brandon was cooperative and, at the end, sorrowful about the circumstances of what had happened. He initially told Basa that, after going bowling, he went home. He then agreed to repeat that statement while being audiotaped. The audiotaped statement was played for the jury.

After his statement was recorded, Basa told Brandon that he was telling him the truth, but not the whole story, and advised him that what he really needed to talk about was what had happened in downtown Oakland when a shooting had occurred. Neither Basa nor his partner, Cruz, said or implied that appellant was a suspect in the case. After about five minutes of discussion, Brandon told the details of what had happened in downtown Oakland.

This second interview with Brandon, which was also audiotaped, was played for the jury. In that interview, Brandon said that, after leaving the bowling alley, the friends drove downtown. Once there, Brandon's brother Frank went home and Brandon got into the pink car with Maurice, Willie Mac, and Trib. As they looked for somewhere to park, they saw some females on the corner and tried to "holla" at them. But two young Black "dudes" pulled up to the car and one of them pulled a gun out. Maurice, who had been driving, hopped out of the car and said, "whatchya'll gonna do, shoot me?" The two men ran off.

Maurice then drove his friends to Geoffrey's club in downtown Oakland. The club had just "got out," and there were a lot of people out and about. Maurice parked the car near Geoffrey's and Brandon, Maurice, and Willie Mac got out; Trib was too drunk to get out, so he stayed in the car. As they walked down the street, trying to "get at females," Maurice saw a girl "with some other dude." Maurice and the man, whom Brandon had never seen before, started arguing over the girl. He did not believe the man was one of the men who had pulled the gun on them earlier, although this man "could have been a partna or something, I dunno." The man who had pulled the gun was darker skinned and had longer hair.

Brandon did not remember what Maurice and the other man were arguing about, but they were yelling. They were facing each other, about three feet apart, and the man had his hands in his coat pockets as they argued. Brandon and Willie Mac were standing behind Maurice and their friend "E" was coming down the street, walking toward them. Then, "like before I know it, Maurice shot him." Brandon did not know what kind of gun Maurice used since "[a]ll guns look the same to me." He thought it was gray. When he

saw the gun, Brandon got scared and, after the first shot, he ran. He heard more shots as he ran, but did not see anything else. Brandon did not know if the other man had a gun.

Brandon got a ride home with E. Brandon then went to Willie Mac's house to see if he was all right. Willie Mac went with Brandon to his house and spent the night there. Since the shooting, Brandon had seen Maurice once at a party in San Jose, and Maurice had called him once and asked to borrow some money.

Charles Tribble testified that, on December 29, 2007, after drinking alcohol with friends at appellant's house, they went bowling in Castro Valley, where Tribble drank some more. They talked about going to downtown Oakland, but Tribble had no memory of leaving the bowling alley or anything that happened after that. His next memory was being taken out of the pink car and a police officer asking if he knew what had happened. Tribble had a .38 revolver for protection, which he had earlier left in the pink car. After the police found the gun, he was arrested and ultimately pleaded guilty to misdemeanor possession of the gun.⁷

Sergeant Basa testified that, on February 20, 2008, he interviewed appellant's brother, Willie Mac Nails, and took his statement. Oakland police were unsuccessful in attempting to locate, subpoena, or serve an arrest warrant on Willie Mac Nails to get him to appear in court in this case.⁸

District Attorney Inspector Harry Hu testified that he had been asked to locate a number of witnesses for the preliminary hearing, including Willie Mac Nails. Hu went to an Oakland post office where Willie Mac was working as a contract security guard. He located Willie Mac and served a subpoena on him, which directed him to appear at the preliminary hearing. Willie Mac did not appear pursuant to the subpoena and a no-bail

⁷ Oakland Police Officer Jeffrey Aspillera testified that Tribble was found unconscious in the back of the pink car, which was parked across the street from where Robert Benjamin had been shot. During a search of the car, Aspillera found a loaded .38 caliber Smith and Wesson revolver in a closed armrest in the back seat.

⁸ Sergeant Basa testified that police were also unable to locate and serve subpoenas on, inter alia, Ariana Alberty, Norlena Davis, Sheretta Henderson and Lorenzo Newell.

bench warrant was issued for his arrest. Subsequently, Hu was unable to locate Willie Mac, despite contacting his work, going to his home, and enlisting the assistance of the Oakland Police Department Fugitive Task Force.

Katherine Potter, a civilian evidence technician with the Oakland Police Department, testified that she responded to the crime scene on December 30, 2007. Benjamin was lying on the ground and had already been pronounced dead. She collected nine nine-millimeter cartridge casings at the scene.

On January 1, 2008, forensic pathologist Paul Herrmann performed an autopsy on Robert Benjamin. Benjamin was 25 years old, six feet three inches tall, and weighed 228 pounds when he died. There were a total of 11 bullet wounds in his body, including six entry wounds, one reentry wound, and four exit wounds. The entry wounds included one that went into his middle-left chest, which went through both his lungs and his heart; the bullet had been fired from about 18 inches away. Other entry wounds included one through the upper left shoulder near the neck, one through the groin, one through the lower left side of the body, one just above the left buttock, and one grazing the same area near the left buttock. The cause of death was multiple bullet wounds. The bullet through his heart and lungs and the bullet through his groin, which went through the bladder and tore through the pelvis, causing internal bleeding, were the primary ones responsible for Benjamin's death. Benjamin had several drugs in his system, including methamphetamine, MDMA and MDA (ecstasy drugs), as well as alcohol.

Eric Tyrell, custodian of records for Sprint Nextel Telecommunications, produced records for the dates of December 29 and 30, 2007, for a cell phone number that was billed to appellant. There were numerous calls to and from the phone between 1:20 a.m. and 3:32 a.m. on December 30, using the cell site at Alice and 13th Streets in downtown Oakland.

City of San Pablo Police Officer Jose Barajas testified that, on May 4, 2008, he recovered a nine-millimeter Llama pistol in San Pablo after a juvenile male accidentally shot himself in the leg with the gun.

In the opinion of Mark Bennett, a forensic scientist who qualified as an expert in forensic firearm and tool mark examination, all nine casings and all five whole bullets found in this case were fired from the same semiautomatic gun. He was able to determine from the IBIS (Integrated Ballistics Identification System) that police in San Pablo had recovered the gun used in this case. Bennett compared the casings found in this case with casings fired from the recovered gun and determined that all of the casings and bullets in this case were fired from the recovered gun.

Appellant's former girlfriend, Joann Williams, testified that, in December 2007, she was living with her mother in Tracy. She knew appellant as "Reese" and he had a tattoo of a Reese's peanut butter cup on his chest. In the early morning of December 30, 2007, appellant unexpectedly came to Williams's house and woke her up. He was wearing a white T-shirt and jeans. He smelled like alcohol, but did not seem to be under the influence. He was not talkative and they both went to sleep. The next morning, Williams dropped appellant off at his house in Oakland. He was quiet and did not say anything about events of the night before. A few days later, appellant called her and said he was staying with a friend in Sacramento. She believed he stayed in Sacramento for two or three weeks before returning to Oakland.

Oakland Police Officer Bradley Baker testified that, on February 19, 2008, he stopped a car being driven by appellant and arrested him. The passenger in the car was Joann Williams.

Defense Case

Appellant, who was 23 years old at the time of trial, testified that he had grown up in Oakland. After high school, he had gone to Laney College, where he played football and took general classes. He also worked for a company doing security jobs. In December 2007, appellant was living in West Oakland with his mother, his younger sister, and an older brother known as "Willie Mac."

On December 29, 2007, appellant and Willie Mac got together with some friends, including Charles, "Trick Daddy," Brandon and Frank. In the afternoon, they decided to go bowling. Trick Daddy drove by himself, Brandon drove Frank, and appellant drove

everyone else in the pink car. Before going bowling, appellant had not drunk any alcohol, but most of the others had been drinking.

Appellant, his brother, and his friends bowled in Castro Valley for about two hours, starting at 9:00 or 10:00 p.m. While bowling, they drank alcohol. Appellant had one or two mixed drinks, but did not feel like he was under the influence. After leaving the bowling alley, they decided to go to downtown Oakland because “the club let out at a certain time, so we went down there to talk to females.” At that time, appellant had a girlfriend named Joann Williams, but they were not in an exclusive relationship.

The three cars stayed together as they drove around in Oakland. Appellant was in a car with his brother, who was driving the pink car. They first stopped on Webster near 12th Street. Two African-American men approached the car appellant was in. Appellant heard Brandon say they had a gun. Appellant, who was not drunk, stepped out of the car and asked the men, who did have a gun, what they were going to do. The incident lasted 10 to 15 seconds. It was dark and appellant did not really see their faces, but he saw them run off afterwards. Appellant did not have a gun and did not know that Tribble had a gun or that there was a gun in a compartment in the pink car.

After confronting the two men, appellant got into one of the other cars, a Chrysler 300, with Trick Daddy. Before the confrontation with the two men, Frank had gone home and Brandon was riding in the pink car with Tribble. Trick Daddy then parked on Webster Street. Appellant believed his brother had also parked the pink car, but did not see him at that point. Appellant and Trick Daddy walked toward a club called Geoffrey’s. They turned left from Webster onto 14th Street and appellant saw quite a few people out on the street; many were standing around and talking. There were also police in the area.

While appellant and Trick Daddy were at the corner of 14th Street and Webster, appellant heard gunshots. He saw his brother and Brandon running, and he ran too. Trick Daddy then drove appellant to Joann Williams’s house in Tracy. He spent the night there and Williams took him home the next day. Shortly after that, appellant went to Sacramento for a couple of weeks.

Appellant did not know Robert Benjamin and did not shoot him. He did not know if Benjamin was one of the two men who had pulled a gun on him because he could not see who the two gunmen were. He did not know Rose Hunt, Sheretta Henderson or Norlena Davis either. Ariana Alberty had been a female associate of appellant's earlier that year or the year before, but he had not seen her since then. He had not seen or spoken with a group of women in a Black Lexus. Appellant had a tattoo that said, "Reese." Appellant did not know the current whereabouts of his brother, Willie Mac.

On cross-examination, appellant testified that he had known Brandon since he was a teenager. Brandon was Willie Mac's best friend and appellant did not see him regularly. Willie Mac visited appellant several times in jail after appellant was arrested. Appellant already knew that Willie Mac had given a statement to police when Willie Mac visited. Appellant had read a summary of that statement. The statement did not surprise him, make him angry, or bother him in the least. He did not confront Willie Mac about the statement.

Appellant also read the summaries of Brandon's interviews and saw that Brandon had accused him of firing the shots that killed Benjamin. It upset him when he read that. Brandon's statement was different from Willie Mac's in a lot of ways, although both statements described appellant as the shooter.⁹ Appellant never confronted Willie Mac about the statement. There came a time when appellant stopped seeing Willie Mac at the jail. A few months before trial, appellant and Willie Mac arranged by phone for Willie Mac to come stand outside appellant's window at the jail to wave at appellant.

Appellant acknowledged that, in his brother's statement, Willie Mac admitted seeing appellant produce a gun and shoot Robert Benjamin. Appellant also acknowledged that he had not tried to get any family members or friends to find his brother, so that he could testify at trial about what had happened. He said it was not his job to look for Willie Mac. Appellant did not know where Willie Mac was and did not

⁹ The trial court ultimately admitted evidence of the content of Willie Mac's statement for its effect on appellant, not for its truth.

take any steps to find him. Regarding whether appellant thought it was important for Willie Mac to testify for appellant at trial, appellant said, “It’s on him.” Appellant also had read the statements by Arianna Alberty, Norlena Davis, Sheretta Henderson and Lorenzo Newell. He did not have any of their addresses and was unable to help his attorney find them.

DISCUSSION

I. Prosecutor’s Cross-Examination and Argument

Regarding the Statement by Appellant’s Brother

Appellant contends the prosecutor committed misconduct when, during both cross-examination of appellant and closing argument, he revealed and later discussed a hearsay statement by appellant’s brother, Willie Mac Nails, who was not a witness at trial. He claims the error was compounded by the trial court’s admission of the evidence for non-truth.

A. Trial Court Background

While appellant was on the witness stand, defense counsel questioned him as follows:

“Q. You heard all these testimonies about these witnesses not showing up or not being available. [¶] Willie Mac is your brother?

“A. Yes.

“Q. Have you talked to him since you—well, do you have any information as to where he is?

“A. No.”¹⁰

¹⁰ During the prosecution case, testimony had been presented that Willie Mac had given a tape-recorded statement to the police and had later been subpoenaed by the prosecutor to appear at the preliminary hearing. There was further testimony that Willie Mac had not appeared at the hearing and subsequent attempts to subpoena him were unsuccessful. A bench warrant had been issued for his arrest, but he had not been located. No testimony had yet been presented regarding the content of Willie Mac’s statement to police.

Later, during cross-examination, the following exchange occurred between the prosecutor and appellant:

“Q. [Y]ou knew perhaps by reading a summary by Sergeant Basa that your brother Willie had given a statement to the police, correct?”

“A. Correct.

“Ms. Thomas [defense counsel]: Object. Assumes facts not in evidence.

“The Court: Overruled.

“By Mr. Meehan [the prosecutor]:

“Q. And you had actually read a summary of what Willie had told the police, correct?”

“A. Correct.

“Q. And did that surprise you that he made that statement to the police?”

“A. No.

“Q. Did you think that that—you read that statement?”

“A. Correct.

“Q. And did you read the final statement in terms of who he described as being the shooter?”

“Ms. Thomas: Objection. Calls for speculation. Calls for hearsay.

“The Court: Overruled.

“By Mr. Meehan:

“Q. Did you read his description of who the shooter was?”

“A. Correct.

“Q. And is it true that he told the police that you were the shooter?”

“Ms. Thomas: Objection. Calls for speculation, for hearsay.

“The Court: Calls for hearsay. [¶] Sustained.

“By Mr. Meehan:

“Q. You read the statement—when you read what he said to the police, did that make you angry?”

“A. No.

“Q. Did you ever confront him about that statement?”

“A. No.

“Q. And didn’t bother you in the least?

“A. No.

“Q. And you read Brandon Brogan’s interview summaries, correct?

“A. Correct.

“Q. And you saw that Brandon Brogan had accused you of actually firing the shots that killed this man, right?

“A. Correct.

“Q. Did that upset you when you read that?

“A. Correct.

“Q. Was what you read from the Brandon Brogan paperwork pretty much similar to what you read on the Willie Mac paperwork?

“Ms. Thomas: Objection. Calls for hearsay.

“The court: Overruled.

“The witness: No.

“By Mr. Meehan:

“Q. What was different about it?

“Ms. Thomas: Objection. Calls for hearsay.

“The Court: Not now. [¶] Overruled.

“The witness: A lot of things different.

“By Mr. Meehan:

“Q. Isn’t it true that they were the same with respect to Brandon Brogan’s description that you were the shooter?

“A. Correct.

“Q. Willie said the same thing, right?

“A. Correct.

“Q. And you knew that when you were actually visiting him?

“A. Correct.

“Q. And you didn’t confront him about that?

“A. No.

“Q. You didn’t ask him whether it was true that he told the police that?

“A. No.”

The prosecutor then asked appellant if he remembered the testimony of Investigator Harry Hu that he had served a subpoena on Willie Mac. The prosecutor asked appellant whether he had been trying to get his family or friends to try to locate Willie Mac so he could testify at trial. Appellant responded that Willie Mac was grown and could do what he wanted to do. The cross-examination continued as follows:

“Q. But you understand that, from your review of the paperwork, that he implicated you in this murder?

“A. I understand in my paperwork there’s other witnesses said I didn’t commit the murder.

“Q. Just answer my question about your brother Willie Mac. [¶] You understand from your review of the paperwork that he accused you of doing this murder? [¶] ‘Yes’ or ‘no,’ sir?

“A. It don’t work like that.

“The Court: Answer the question, ‘yes’ or ‘no.’

“The witness: Repeat the question.

“By Mr. Meehan:

“Q. Let me repeat the question. [¶] Based on your review of the paperwork in this case—

“A. Correct.

“Q. —Willie Mac’s statements, your brother’s statements, who comes and waves at you outside the county jail, you understand that in that paperwork he admitted being an eye witness to this murder and seeing you produce a gun and shoot Robert Benjamin?

“A. Correct.

“Q. Correct?

“A. Yes.”

The prosecutor then continued to ask appellant if he thought it would be important for Willie Mac to come to court and tell what he actually saw, and appellant continued to say that it was not his job to look for Willie Mac.

Subsequently, while the prosecutor was questioning appellant about Brandon Brogan, the following exchange took place:

“Q. Can you think of any reason why [Brandon] would tell the police that he saw you do the shooting if it wasn’t true?

“A. No.

“Q. Can you think of any reason why your brother Willie Mac would tell the police you did the shooting if it wasn’t true?

“Ms. Thomas: Objection. Calls for hearsay.

“The Court: Sustained.”

Later during cross-examination, after appellant confirmed that he had Willie Mac’s phone number while he was in jail, the following exchange took place:

“Q. And seeing him that time, still having his phone number, you didn’t try to share that with your mom to say, hey, we got to lineup Willie Mac because this thing is going to be going to trial?

“A. Why would I say that?

“Q. Well, you understood from your review of the paperwork that he had told the police that you did the shooting, right?

“A. Correct.

“Ms. Thomas: Calls for hearsay.

“The Court: Sustained.

[¶] . . . [¶]

“Ms. Thomas: Move to strike.

“The Court: Stricken. [¶] I’m only going to allow that as far as it explains his conduct towards his brother.

“Mr. Meehan: I understand. Thank you, your honor.

“Q. In reviewing that paperwork where that accusation was made, you didn’t think it was important in defense of your own case to have him come and disavow anything that hurt you?”

“A. It was on him. It’s on him.”

Although there was no request for an admonition, the court admonished the jury as follows: “Ladies and gentlemen, the discussion of the questions regarding what was in the statement of Willie Mac is not admissible for the truth of what’s in that statement. It was only admitted to show the reaction of the defendant and his actions and response to that, but not what it actually says.”

Subsequently, during rebuttal closing argument, the prosecutor stated: “And I just want to touch upon it briefly. Recall Willie Mac Nails. Where is Willie Mac? We know from the records that, and the testimony of then—testimony of Inspector Harry Hu that he was subpoenaed. We know from other testimony that he was interviewed. We know from the acknowledgement of [appellant] that he had access to the information related to those interviews of Willie Mac. I would submit that logic, common sense and our own human experiences tells us that you would do anything within your power to help your brother. The only reason Willie Mac Nails ignored the subpoena for the preliminary hearing and did not materialize for this trial, I would submit, is because he knew his presence here would not help his brother. The best and only way to help his brother under the circumstances was to disappear until this trial was over.

[¶] . . . [¶]

“. . . Then even from [appellant’s] perspective in terms of trying to point the finger of accusation the direction other than his own, you would think that he would bring in his brother, Willie Mac, in order to exonerate himself. Why isn’t Willie Mac here? I would submit same reasons [*sic*] why it is so difficult for Rose Hunt and Brandon Brogan to be here.” Defense counsel did not object to these comments.

Following closing arguments, the court instructed the jury in relevant part: “During the trial, certain out-of-court statements were offered, not to prove the truth of the matter contained in the statement, but as relevant evidence to explain the conduct of

the person hearing or reading the out-of-court statement. One such statement was the statement made by Willie Mac Nails to Sergeant Basa about the shooting incident of December 30th, 2007. That statement was offered and admitted not to prove the truth of the contents of the statement, but to explain the actions and conduct of the defendant toward his brother Willie Mac Nails. The contents of that statement should not be considered for any purpose except for the limited purpose for which it was admitted.”

B. Legal Analysis

Respondent argues that appellant has forfeited this issue on appeal due to his failure to object or, in the alternative, that appellant’s claim is without merit. We find, even assuming counsel’s objections to some of the alleged misconduct or error were sufficient to preserve the issue and/or that it would have been futile to object further, that any error or prosecutorial misconduct was harmless under any standard of error. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Although this indirect evidence that appellant’s brother had implicated appellant in the shooting was plainly incriminating, if taken for its truth, any prejudicial impact on the jury was necessarily greatly diminished by the very similar evidence from two other witnesses: Rose Hunt, an acquaintance of appellant’s, and Brandon Brogan, appellant’s old friend and one of his companions that evening. Despite their reluctance to testify at trial and their later efforts to recant their separate identifications of appellant as the shooter, this evidence was extremely powerful. There was no suggestion that these two witnesses even knew each other or had any reason to falsely implicate appellant. Moreover, the idea that they each might have independently and coincidentally falsely accused him of the shooting is absurd.

Before trial, both of these witnesses had unequivocally stated that they saw appellant shoot Robert Benjamin. Indeed, the evidence showed that Rose Hunt did so three times: first, as she repeatedly yelled, “Reese did it” just after the shooting; second, in her statement to Officer Finnicum that appellant was the shooter; and third, in her subsequent interview with Sergeant Basa, in which she said the exact same thing. Thus,

defense counsel's attempts to negate these identifications as lies and/or a case of mistaken identity clearly were not convincing.

The evidence regarding both of these witnesses' identification of appellant as the shooter was extremely strong. Their subsequent reluctance to testify at trial and their attempts to backpedal on their prior identification were understandable in the circumstances.¹¹ That the jury was also informed in general terms that a third person—appellant's brother, Willie Mac—had given a similar statement to police and then disappeared, cannot be said to have affected the impact of the already overwhelming evidence of guilt.

Moreover, the jury already knew that Willie Mac had given a statement to police, had been subpoenaed to appear in court as a prosecution witness, and had not been located. The trial court also admonished the jury that evidence regarding the content of Willie Mac's statement could not be considered for its truth, and later instructed the jury in detail on this point. The court further instructed the jury that questions and statements by attorneys during trial were not evidence. (See *People v. Jones* (2011) 51 Cal.4th 346, 371 [regarding presumption that jury follows trial court's instructions].)¹²

For all of these reasons, we conclude that the alleged errors and misconduct related to appellant's brother's statement to police did not affect the outcome in this case

¹¹ We also observe that appellant's testimony actually corroborated much of what Brandon told police. At trial, Brandon claimed that he had lied, not only when he told police that appellant had shot Benjamin, but also when he said that two men had come and pulled a gun on them and that appellant had gotten out of the car and asked if they were going to shoot him. Appellant, however, testified about his confrontation with the two men who had come up to the car, thus casting great doubt on Brandon's claim of lying to police when he gave his statement.

¹² We also note that the time the prosecutor spent commenting on this point in closing argument was minimal compared with the time he spent commenting on the evidence of Rose and Brandon's identifications of appellant as the shooter. The prosecutor's discussion of Willie Mac's identification covered just over one page of reporter's transcript in rebuttal closing argument, while the discussions of Rose and Brandon's identifications totaled more than 18 pages of reporter's transcript, in both the initial and the rebuttal closing arguments.

and, hence, did not prejudice appellant. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

II. *The Trial Court's Admonition About Appellant's Custody Status and the Deputy's Presence During Appellant's Testimony*

Appellant contends the trial court erred when it denied his request to exclude his custody status, admonished the jury about his custody status, and permitted a deputy to sit near appellant while he testified.

A. *Trial Court Background*

Before jury selection began, defense counsel said that appellant “prefers that the jury not know that he’s in custody.” The trial court responded: “They are going to find out anyway. I tell the jury that. There’s going to be times he’s coming out the side door and they’re going to be there. It’s better that I tell them. Admonish them upfront.”

At the start of jury selection, after introducing the attorneys and appellant, the trial court admonished the prospective jurors: “Now, I want to indicate to you because the way this courtroom is set up, Mr. Nails is in custody, and you may see him entering or exiting the courtroom, if you are on the jury, from that side door which takes you to the holding cell area. You are not to speculate why he is in custody. You are not to consider his custodial status in any way during this trial for any purpose. It is just a matter that is not to be a subject for your consideration.”

Subsequently, during the trial, when appellant took the stand to testify, the court told the jury: “Ladies and gentlemen, before we start, it’s sheriff’s policy that whenever there is a defendant that’s in custody and he testifies that a deputy be seated within proximity. You’re not to infer anything about that. We’re not trying to draw adverse pictures to Mr. Nails. But that’s just their policy.”

B. *Legal Analysis*

“Decisions to employ security measures in the courtroom are reviewed on appeal for abuse of discretion. [Citations.] [¶] Many courtroom security procedures are routine and do not impinge on a defendant’s ability to present a defense or enjoy the presumption of innocence.” (*People v. Hernandez* (2011) 51 Cal.4th 733, 741 (*Hernandez*).

1. Admonition Regarding Custody Status

In *People v. Stevens* (2009) 47 Cal.4th 625, 641 (*Stevens*), in the context of discussing the propriety of the trial court stationing a deputy near the defendant while he testified, our Supreme Court noted that “the jury was properly instructed to disregard the fact that defendant was in custody. We presume the jury followed this instruction. [Citation.]” (Fn. omitted.)

Here, the trial court believed it necessary to give the admonition regarding appellant’s custody status in light of the fact that the jury might see him entering and exiting the courtroom by a side door. The court therefore informed the jury to disregard the fact that appellant was in custody. This admonition was appropriate and, as in *Stevens*, we presume the jury followed the court’s instruction. (See *Stevens, supra*, 47 Cal.4th at p. 641.)¹³ There was no abuse of discretion. (See *Hernandez, supra*, 51 Cal.4th at p. 741.)

2. Presence of a Deputy During Appellant’s Testimony

In *Stevens, supra*, 47 Cal.4th at page 629, our Supreme Court held that stationing a courtroom deputy next to a testifying defendant “is not an inherently prejudicial practice that must be justified by a showing of manifest need.”¹⁴ The court further held, however, that the trial court “may not defer decisionmaking authority to law enforcement officers,” but instead must exercise its own discretion to determine, on a case-by-case basis, whether such a security measure is appropriate. (*Stevens*, at p. 642.) In such a case, the trial court should state its reasons on the record and, although the court imposed no sua

¹³ Appellant cites *State v. Gonzales* (Wash.App. 2005) 120 P.3d 645, 648-651, for the proposition that, “[w]ithout any findings of need stated on the record, applying this blanket policy [of informing the prospective jurors about appellant’s custody status] and highlighting it for jurors from the outset of trial was manifest error.” ~(AOB 40)~ We do not find appellant’s citation to a Washington state case useful in this context, especially given our Supreme Court’s indication that such an admonition is proper in circumstances like the present ones.

¹⁴ Appellant acknowledges this holding in *Stevens*, but nonetheless argues “for purposes of exhaustion of state remedies, that the manifest need standard does indeed apply to the decision to seat a deputy by appellant when he testified.” ~(AOB 40)~

sponte duty for it to do so, the trial court also “should consider, upon request, giving a cautionary instruction, either at the time of the defendant’s testimony or with closing instructions, telling the jury to disregard security measures related to the defendant’s custody status.” (*Ibid.*)

The *Stevens* court found that the trial court had properly exercised its own discretion in determining the appropriateness of stationing a deputy near the defendant while he testified. (*Stevens, supra*, 47 Cal.4th at pp. 642-643.)

Subsequently, in *Hernandez, supra*, 51 Cal.4th 733, 743, the court found that the record there demonstrated that the trial court’s decision to station a deputy near the defendant during the defendant’s testimony “was not based on a thoughtful, case-specific consideration of the need for heightened security, or of the potential prejudice that might result. . . . [The court’s] remarks reveal that the court was following a general policy of stationing a courtroom officer at the witness stand during *any* criminal defendant’s testimony, regardless of specific facts about the defendant or the nature of the alleged crime.” The court concluded: “Where it is clear that a heightened security measure was ordered based on standing practice, the order constitutes an abuse of discretion, and an appellate court will not examine the record in search of valid, case-specific reasons to support the order.” (*Id.* at p. 744.)

The *Hernandez* court further explained, however, that the stationing of an officer at the witness stand during a defendant’s testimony is not an inherently prejudicial practice and that the error in failing to make a record of case-specific reasons for ordering that procedure is one of state law, properly reviewed under *People v. Watson, supra*, 46 Cal.2d 818. (*Hernandez, supra*, 51 Cal.4th at p. 746.) The court concluded that the error in that case was harmless, noting that the “[d]efendant was monitored by a single deputy, and, as in *Stevens*, . . . nothing in the record suggests that this deputy’s demeanor was anything other than respectful and appropriate.” (*Ibid.*)¹⁵

¹⁵ In *Stevens, supra*, 47 Cal.4th 625, 639, the court had stated that, “so long as the deputy maintains a respectful distance from the defendant and does not behave in a

In the present case, there is nothing in the record demonstrating that the trial court made an individualized determination of the need for a deputy's presence at the witness stand. Indeed, the admonition the court gave when appellant took the witness stand described the deputy's presence as "sheriff's policy." ~(RT 767)~ Accordingly, the court abused its discretion. (See *Hernandez, supra*, 51 Cal.4th at pp. 741, 744; *Stevens, supra*, 47 Cal.4th at p. 642.) We conclude, however, that the error was harmless because it is not reasonably probable that appellant would have obtained a more favorable result absent this error. (*Hernandez*, at p. 746; *People v. Watson, supra*, 46 Cal.2d at p. 837.)

The trial court admonished the jury not to draw any adverse inferences from a single deputy's presence, and there is no indication that "this deputy's demeanor was anything other than respectful and appropriate." (See *Hernandez, supra*, 51 Cal.4th at p. 746; *Stevens, supra*, 47 Cal.4th at pp. 639, 640, 642.) In addition, given the court's admonition, the jury likely believed that the deputy's presence was a "routine precaution. Further, the jury was properly admonished to disregard the fact that defendant was in custody," and we presume the jury followed this admonition. (*Stevens*, at p. 641.) Finally, as previously discussed (see pt. I, B, *ante*), the evidence presented at trial strongly supported the jury's verdict. (See *Hernandez*, at p. 747.)¹⁶

In sum, we conclude (1) the trial court's admonition regarding appellant's custody status was proper and (2) while the court abused its discretion in failing to engage in a

manner that distracts from, or appears to comment on, the defendant's testimony, a court's decision to permit a deputy's presence near the defendant at the witness stand is consistent with the decorum of courtroom proceedings." (Fn. omitted.)

¹⁶ Appellant asserts that this case "turned on appellant's credibility as a witness and the admonition regarding custody as well as the presence of the deputy "branded appellant as particularly dangerous and untrustworthy in a credibility case involving a violent crime." However, as the *Hernandez* court explained: "This aspect of the case is not unique. 'In nearly every case when an accused testifies in his own defense, the jury will have to weigh the credibility of the defendant and the alleged victim [or other prosecution witnesses].' [Citation.]" (*Hernandez, supra*, 51 Cal.4th at p 746, quoting *Stevens, supra*, 47 Cal.4th at p. 641.)

case-specific analysis when it positioned a deputy near appellant during his testimony, the error was clearly harmless.

III. Sufficiency of the Evidence of Premeditated and Deliberate Murder

Appellant contends his conviction of premeditated and deliberate first degree murder was not supported by substantial evidence.

In determining whether there is sufficient evidence to support the finding of premeditated and deliberate murder, “ [w]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. [Citations.] [Citation.] ‘ “An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citations.]’ [Citation.]’ ” (*People v. Solomon* (2010) 49 Cal.4th 792, 811-812.) “ ‘Mere conjecture, surmise, or suspicion[, however,] is not the equivalent of reasonable inference and does not constitute proof.’ ” (*People v. Anderson* (1968) 70 Cal.2d 15, 24 (*Anderson*)).

“ ‘A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. . . . “Deliberation” refers to careful weighing of considerations in forming a course of action; “premeditation” means thought over in advance. [Citations.] “The process of premeditation and deliberation does not require any extended period of time. ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.’ [Citations.]’ [Citation.]’ ” (*People v. Young* (2005) 34 Cal.4th 1149, 1182 (*Young*)).

“Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, we must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation*

for an inference of premeditation and deliberation [citation], or whether it ‘leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.’ (Italics added.) [Citation.]” (*Anderson, supra*, 70 Cal.2d at p. 25.)

In *Anderson, supra*, 70 Cal.2d 15, 26-27, our Supreme Court “surveyed prior cases and developed guidelines to aid reviewing courts in assessing the sufficiency of the evidence to sustain findings of premeditation and deliberation. [Citation.] The court identified three categories of evidence pertinent to this analysis: planning, motive, and manner of killing. [Citations.] With respect to these categories, the *Anderson* court stated: ‘ “Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of [planning] or evidence of [motive] in conjunction with [evidence of] either [planning] or [manner of killing].” ’ [Citations.]” (*Young, supra*, 34 Cal.4th at pp. 1182-1183, quoting *People v. Perez* (1992) 2 Cal.4th 1117, 1125.) As the court has repeatedly explained, however: “The *Anderson* guidelines are ‘descriptive, not normative,’ and reflect the court’s attempt ‘to do no more than catalog common factors that had occurred in prior cases.’ [Citation.]” (*Young*, at p. 1183.)

In the present case, the evidence showed that appellant went bowling with friends and his brother and then drove to downtown Oakland in search of females to talk to. Once in Oakland, as they tried to talk to some females on a corner, two young Black men came up to the car and one of them pulled out a gun. When appellant got out of the car and confronted them, they ran off. Then, according to both Brandon and appellant, they parked near Geoffrey’s and walked, along with Willie Mac, to the area of 14th Street and Webster. In his taped interview, Brandon told police that they then walked down the street, trying to “get at females.” He said appellant saw a girl “with some other dude” who Brandon had never seen before. Brandon knew he was not the same man who had pulled a gun on them earlier. According to Brandon, appellant and the other man started yelling at each other, arguing over the girl, although Brandon did not recall what they

were saying. They were facing each other, about three feet apart, and the other man had his hands in his pockets. Then, before Brandon knew it, appellant shot the man.

In her statement and interview with police, Rose—the only other witness to the shooting to testify at trial—said that appellant and some friends walked up to her car and were talking to Robert Benjamin. About a minute later, she heard appellant and Benjamin get into a verbal dispute and, after another minute or so, saw appellant pull a gun out of his pocket and shoot Benjamin.

Finally, the evidence showed that nine bullets had been fired from the same gun, six of which hit Benjamin. The six entry wounds were in his chest, shoulder, groin, lower left side of his body, and near his left buttock.

While this evidence clearly supports a finding of second degree murder, we conclude that there is no substantial evidence in the record to support the jury's verdict of first degree murder.

First, there is no evidence of planning activity, other than appellant already having a gun on his person at the time of the shooting. But appellant's possession of a gun is suggestive of casual possession, rather than intentional arming for the purpose of shooting Benjamin. There is absolutely no evidence that appellant expected to encounter Benjamin outside of Geoffrey's or that he even knew him, much less that he had brought a gun that night with the intent to shoot him. The only evidence of appellant's plan that night showed that he and his friends were still looking for "females" to talk to when appellant came upon Benjamin near Rose's car and got into an argument with him. (Compare, e.g., *People v. Perez*, *supra*, 2 Cal.4th at p. 1126 [evidence of planning activity was shown by defendant's surreptitiously entering house and obtaining a knife from kitchen before attacking victim in another part of house].)¹⁷

¹⁷ Respondent notes, without discussion, that there was "a series of phone calls prior to the shooting." Any inference that these unexplained calls show planning on appellant's part is plainly based on conjecture and speculation, not on the evidence. (See *Anderson*, *supra*, 70 Cal.2d at pp. 24-25.)

As to evidence of motive, first, there is no evidence suggesting that Benjamin had anything to do with the people who had earlier pulled a gun on appellant and his friends. For example, Rose testified that Benjamin had been at the club for several hours, dancing with Sheretta Henderson, before leaving at about 1:40 a.m. Also, Brandon said that Benjamin looked nothing like the man with the gun. Second, Benjamin had been dancing at Geoffrey's with one woman all night, but there is no evidence that appellant was aware of that fact. More importantly, the woman with whom Benjamin had danced and with whom he was talking when appellant walked up—Sheretta Henderson—was not the woman Rose had said was appellant's ex-girlfriend. It was Arianna Alberty—who was in the back seat of Rose's car throwing up when appellant walked up—whom Rose said had previously dated appellant. In addition, although Brandon told police that appellant saw a girl with "some other dude," and that appellant argued with him about the girl, Brandon also said he did not remember what appellant and Benjamin were saying.

In any case, regardless of what the two men were yelling about, the evidence shows only that they got into a spur-of-the-moment argument, in the midst of which appellant quickly pulled a gun and shot Benjamin. This evidence of a sudden argument leading to a spontaneous shooting, with no evidence of a prior relationship or any reason why appellant would target Benjamin, does not demonstrate a motive that would permit a reasonable inference of premeditation and deliberation. (See, e.g., *People v. Craig* (1957) 49 Cal.2d 313, 319 [where there was no evidence of a prior relationship with victim from which a motive could be inferred, evidence showing only infliction of multiple acts of violence did not support finding of first degree murder]; accord, *Anderson, supra*, 70 Cal.2d at p. 33.)

As the prosecutor stated in closing argument, the evidence merely showed that the two men got into a "petty argument over something that no doubt had very little significance." The prosecutor further argued that appellant had "likely [become] agitated by a . . . couple of men that flashed or brandished a gun at him. Within a few moments was when he then encountered Robert Benjamin. I think it is pretty clear that Mr. Benjamin must have said or did something that made [appellant] feel disrespected, said

the magic word, pushed the right buttons, whatever it may have been.” Thus, even the prosecutor’s argument acknowledges the evidence showed only the sudden and unexpected nature of the confrontation, appellant’s likely agitation after the prior encounter with the men with the gun, and “the right buttons” being pushed during his encounter with Benjamin. This evidence clearly supports a finding of an intentional killing with malice aforethought, but does not in any way demonstrate the premeditation and deliberation necessary to support the first degree murder verdict. (See *Anderson, supra*, 70 Cal.2d at p. 26 [“legislative classification of murder into two degrees would be meaningless if ‘deliberation’ and ‘premeditation’ were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill”].)

Similarly, as to manner of killing, there is no substantial evidence from which the jury could reasonably infer that appellant engaged in a careful weighing of considerations and arrived at a “cold, calculated judgment” to kill Benjamin before shooting him. (*Young, supra*, 34 Cal.4th at p. 1182.) Rose stated that, a minute after the dispute began, appellant pulled a gun out of his pocket and shot Benjamin. Brandon said that he watched appellant and Benjamin arguing, and then, “like before I know it, Maurice shot him.” In addition, according to Sergeant Brizendine, all of the shots were fired in rapid succession, without pause. This evidence does not permit a reasonable inference that appellant had the opportunity to reflect and carefully weigh considerations between shots but, instead, suggests only that the shooting occurred on an impulse or in a sudden rage, based on a petty argument. (Compare, e.g., *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957, abrogated on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 109-111 [finding that two shots, fired at close range, to back of victim’s head while victim was kneeling or crouching strongly pointed to an execution-style murder and was sufficient to support a finding of premeditation and deliberation].)

Moreover, that appellant fired nine shots, with six bullets actually hitting Benjamin, does not make an inference of premeditation any more reasonable. As our Supreme Court stated in *Anderson, supra*, 70 Cal.2d 15: “It is well established that the brutality of a killing cannot in itself support a finding that the killer acted with

premeditation and deliberation. ‘If the evidence showed no more than multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations.’ [Citations.]” (*Anderson*, at pp. 24-25; compare, e.g., *People v. San Nicolas* (2004) 34 Cal.4th 614, 658-659 [sheer number of stab wounds on victims body, which alone were suggestive only of rage, together with evidence of both planning and motive, supported a finding of premeditation and deliberation]; *People v. Perez*, *supra*, 2 Cal.4th at p. 1127 [evidence that defendant went to kitchen in search of another knife after knife with which he had been stabbing victim broke was indicative of premeditation and deliberation and “bears similarity to reloading a gun or using another gun when the first one has run out of ammunition”].)

Finally, beyond the dearth of evidence showing planning, motive, or a manner of killing that could possibly support a first degree murder finding, we are unable to locate in the record any other “types” or “combinations” of evidence that would support such a finding. (See *Solomon*, *supra*, 49 Cal.4th at p. 812.)

We are mindful of our Supreme Court’s admonition that reversal of a first degree murder conviction based on lack of substantial evidence of premeditation and deliberation “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) In this case, however, our review of the record compels us to conclude that the evidence presented at trial simply does not constitute “ ‘evidence that is reasonable, credible, and of solid value’ ” (*Solomon*, *supra*, 49 Cal.4th at p. 811), from which the jury could have reasonably inferred that appellant reflected, carefully weighed the considerations, and made the “cold, calculated judgment” to kill Robert Benjamin. (*Young*, *supra*, 34 Cal.4th at p. 1182; see *Anderson*, *supra*, 70 Cal.2d at pp. 33-34.) The jury could only have drawn such a conclusion through speculation. The evidence in the record demonstrates an unlawful killing with malice aforethought, sufficient only to support a second degree murder verdict. (See *Solomon*, at p. 812.)

Therefore, because the jury’s first degree murder verdict was based on “mere conjecture, surmise, or suspicion” (*Anderson*, *supra*, 70 Cal.2d at p. 24), rather than

substantial evidence, it cannot stand. Appellant’s conviction must be reduced to second degree murder.¹⁸

IV. Trial Court’s Failure to Instruct on Unreasonable Self-Defense

Appellant contends the trial court erred in failing to instruct the jury sua sponte on voluntary manslaughter premised on unreasonable self-defense.

A. Trial Court Background

The trial court instructed the jury on first and second degree murder. (CALJIC Nos. 8.10, 8.11, 8.20, 8.30.) It also instructed on voluntary manslaughter based on sudden quarrel or heat of passion. (CALJIC Nos. 8.40, 8.42, 8.43, 8.44.) During discussions with counsel about instructions, the trial court explained its rejection of an instruction on unreasonable or imperfect self-defense, as follows: “And all the manslaughter instructions are being given based upon the testimony of Mr. [Brandon] Brogan that he saw the defendant and the victim arguing and that would be based on the theory of sudden quarrel, heat of passion since there doesn’t appear to be any basis either from the defendant’s testimony or from anybody else that it was an imperfect self-defense situation.”¹⁹

B. Legal Analysis

“ ‘ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citations],

¹⁸ Appellant does not argue that there was insufficient evidence that he committed second degree murder, i.e., that he unlawfully killed Benjamin with malice aforethought. (See §§ 187, subd. (a).) The evidence clearly supports such a finding.

¹⁹ Defense counsel apparently neither requested an unreasonable self-defense instruction nor objected to the trial court’s decision not to give such an instruction.

but not when there is no evidence that the offense was less than that charged.

[Citations.]’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) If there is substantial evidence supporting such an instruction, it must be given even if it is inconsistent with the defense presented. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195 (*Barton*).)

However, “the trial court need not instruct on a lesser included offense whenever any evidence, no matter how weak, is presented to support an instruction, but only when the evidence is substantial enough to merit consideration by the jury. [Citation.]” (*Barton*, at p. 195, fn. 4.) We independently review a claim that the trial court erred in failing to instruct on a lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

“Self-defense requires an actual and reasonable belief in the need to defend against an imminent danger of death or great bodily injury. [Citation.] If, however, the killer actually, but *unreasonably*, believed in the need to defend him or herself from imminent death or great bodily injury, the theory of ‘imperfect self defense’ applies to negate malice. [Citation.] The crime committed is thus manslaughter, not murder. [Citation.]” (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1261; see CALJIC No. 8.40.)

In the present case, appellant asserts there is substantial evidence in the record showing that he unreasonably believed he needed to defend himself from imminent death or great bodily injury when he took out a gun and shot Robert Benjamin. This evidence includes the facts that Charles Tribble had a gun for protection in the pink car, two men had pulled a gun on appellant and his friends earlier that night, there was some evidence that 10 to 15 shots were fired, and Benjamin kept his hands in his pockets during the argument. Assuming the issue is not forfeited for failure to object (see *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172), we do not agree that this evidence was sufficient to require the trial court to give an unreasonable self-defense instruction.

First, appellant testified that he did not know that Tribble had a gun in the pink car. Second, Brandon Brogan told police that the man appellant shot was not one of the men who had pulled a gun on them earlier. Third, Sergeant Brizendine, who testified that she thought she heard 10 to 15 shots being fired, further testified that the rapid, continuous nature of the gunfire, suggested to her that the shots had all come from the

same gun. Finally, the evidence that Benjamin had his hands in his pockets during the argument with appellant—without any suggestion of any threatening gestures or other evidence even suggesting that appellant might have believed he was in imminent danger when he shot Benjamin—did not constitute the *substantial* evidence necessary to require an instruction on this lesser included offense.²⁰

Accordingly, the extremely slight evidence to which appellant refers simply is not sufficient to trigger the trial court’s sua sponte duty to instruct on unreasonable self-defense. (See *Barton, supra*, 12 Cal.4th at p. 195, fn. 4 [trial court is not required to instruct on lesser included offense “whenever *any* evidence, no matter how weak, is presented to support an instruction”].) This is especially so, given that an instruction regarding unreasonable self-defense would have been completely inconsistent with appellant’s defense theory: that he did not have a gun and did not shoot Benjamin. (But cf. *Barton, supra*, 12 Cal.4th at pp. 194-195.)

V. Alleged Mischaracterization of the Reasonable Doubt Instruction

Appellant contends the trial court and prosecutor erred and compounded a problematic reasonable doubt instruction by mischaracterizing the reasonable doubt standard.

A. Trial Court Background

Before trial, during jury voir dire, the trial court told prospective jurors that reasonable doubt is “the highest burden of proof provided for in the law. Now, it doesn’t mean beyond all possible or imaginary doubt . . . [¶] Reasonable doubt means what it says. It’s a doubt based upon a reasonable evaluation of the facts. So that’s what we want you to do is apply common sense and reason.” The court then described reasonable doubt as being like the scales of justice that, when a trial starts, “are tipped like this (indicating), substantially in favor of the defendant because the defendant is presumed to

²⁰ Indeed, the evidence that appellant had jumped out of a car that same evening and confronted men with a gun undercuts appellant’s claim that the evidence showed that, minutes later, appellant was truly concerned about the intentions of a man standing with his hands in his pockets.

be innocent. The burden placed on the prosecution is to present evidence that brings those scales into balance and then substantially tips those scales in favor of the truth of the charges. There's no percentage. There's no number ranking. But you can see that's a fairly substantial movement of those scales, and that's the burden of proof that the people have to meet." The court also emphasized that if jurors are merely "pretty sure" a defendant committed the charged crime, "the law requires a verdict of not guilty."

During closing argument, the prosecutor discussed reasonable doubt, stating, *inter alia*, "What I'd like to do is break down the phrase abiding conviction, beyond a reasonable doubt. And abiding, of course, means enduring, lasting, continuing conviction in this context, to be convinced or to have a strong belief in. [¶] So essentially if you have a strong belief in your state of being convinced, enduring and lasting, it is proof beyond a reasonable doubt."

Following closing arguments, the trial court instructed the jury on the presumption of innocence and reasonable doubt with CALJIC No. 2.90, as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

"Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

B. Legal Analysis

Defense counsel did not object to the court's initial discussion of reasonable doubt, to the prosecutor's remarks during closing argument, or to the court's reasonable doubt instruction. Respondent argues that appellant has therefore forfeited this issue on appeal. Appellant asserts that he has not forfeited his right to raise this issue because the alleged errors affected his substantial rights. (See *People v. Johnson, supra*,

115 Cal.App.4th at p. 1172 [appellate court may review any *instruction* given even if no objection was made thereto in trial court, “ ‘if the substantial rights of the defendant were affected” ’ ”].) The prosecutor’s comments during closing argument were not “instructions,” and appellant forfeited his claim of prosecutorial misconduct on appeal by failing to object to the prosecutor’s comments and request an admonition. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) Appellant asserts, nonetheless, that counsel’s failure to object constitutes ineffective assistance of counsel.

To prove ineffective assistance of counsel, a defendant must show that “counsel’s representation fell below an objective standard of reasonableness . . . under prevailing professional norms.” (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*)). In addition, the defendant must affirmatively establish prejudice by showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.) “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” (*Id.* at p. 697.)

Here, we need not decide if counsel’s representation was inadequate due to her failure to object to the prosecutor’s comments regarding reasonable doubt because we find that appellant suffered no prejudice. (See *Strickland, supra*, 466 U.S. at p. 697.) The prosecutor’s awkward attempt to explain an “abiding conviction” as, *inter alia*, a “strong belief in your state of being convinced, enduring and lasting, it is proof beyond a reasonable doubt” is somewhat incomprehensible. But, in the context of the entire argument and the court’s instructions, it was not prejudicial. The prosecutor prefaced these comments by noting, “Obviously, it is my responsibility to prove guilt beyond a reasonable doubt and you will receive the full instruction from [the trial court] with regard to reasonable doubt. So it’s always perilous for attorneys to stand up here and try to talk about reasonable doubt when there’s a very keen interest in making sure there’s not a mischaracterization or misquoting with regard to an instruction.” Although, unfortunately, the prosecutor did not heed his own advice, these remarks made clear to

the jury that the court would instruct it on reasonable doubt and that attorneys are known to mischaracterize such instructions.

In addition, just after closing arguments, the trial court gave the jury the standard instruction on reasonable doubt, CALJIC No. 2.90 and further instructed with CALJIC No. 1.00: “If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.” The jury presumably followed these instructions (see *People v. Jones*, *supra*, 51 Cal.4th at p. 371), which “were sufficient to dispel any potential confusion raised by the prosecutor’s argument.” (*People v. Jasmin* (2008) 167 Cal.App.4th 98, 116.) Thus, given the prosecutor’s preface to his very brief—and fairly unintelligible—comment on the meaning of an “abiding conviction,” as well as the court’s subsequent instructions, we conclude that it is not reasonably probable that, but for counsel’s comments, the result of the proceeding would have been different. (See *Strickland*, *supra*, 466 U.S. at p. 694.)

Second, as to the trial court’s comments regarding the “scales of justice,” it made those comments while “ ‘conducting voir dire, not instructing the jury; its comments “were not intended to be, and were not, a substitute for full instructions at the end of trial.” ’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 716.) Assuming there was no forfeiture despite counsel’s failure to object or request an admonition (see *People v. Johnson*, *supra*, 115 Cal.App.4th at p. 1172), we conclude that any error in the court’s discussion of the need for “substantial movement” of the scales of justice was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; compare *People v. Johnson*, at p. 1172 [court’s description of reasonable doubt standard as analogous to decisions made in everyday life trivialized standard in a criminal case, which could not be equated with planning vacations and scheduling flights].)

Moreover, as already discussed, the jury was fully instructed with CALJIC No. 2.90, the standard reasonable doubt instruction, which would have dispelled any confusion from the court’s extraneous comments. Hence, appellant has not shown that he was prejudiced by the court’s comments.

Finally, appellant claims that CALJIC No. 2.90, the reasonable doubt standard given to the jury in this case, erroneously conveys “an insufficient standard of proof akin to clear and convincing evidence . . . going only to the jurors’ duration of belief in guilt, not their degree of certainty.” He also claims that the inadequacy of this instruction “seriously compounded the improper comments from the court and the prosecutor.”

First, both the United States and California Supreme Courts have upheld the language in CALJIC No. 2.90. (*Victor v. Nebraska* (1994) 511 U.S. 1, 13-17; *People v. Freeman* (1994) 8 Cal.4th 450, 503-505; see also *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287 [rejecting defendant’s similar “well-worn argument,” noting that this contention “consistently has been rejected by every appellate district”].) These decisions are binding on us. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Second, it is inconceivable that the jury was so confused by the court and prosecutor’s brief comments that it did not follow the reasonable doubt instruction as given.

For all of these reasons, we reject appellant’s contention that errors relating to the reasonable doubt standard require reversal.

VI. Trial Court’s Alleged Error in Giving CALJIC No. 2.21.2

Appellant contends the trial court erred when it instructed the jury with CALJIC No. 2.21.2 regarding witness testimony.

The court instructed the jury with CALJIC No. 2.21.2, as follows: “A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.” According to appellant, the “probability” language in the instruction “permitted jurors to resolve dispositive credibility questions as to prosecution witnesses, as well as appellant’s testimony, by a preponderance standard,” rather than a beyond a reasonable doubt standard.

Our Supreme Court has repeatedly rejected this argument. As the court explained in *People v. Beardslee* (1991) 53 Cal.3d 68, 95: “The instruction at no point *requires* the

jury to reject any testimony; it simply states circumstances under which it *may* do so. [Citation.] The qualification attacked by defendant as shifting the burden of proof (‘unless, from all the evidence you shall believe the probability of truth favors his [or her] testimony in other particulars’) is merely a statement of the obvious—that the jury should refrain from rejecting the whole of a witness’s testimony if it believes that the probability of truth favors any part of it. [¶] Thus, [former] CALJIC No. 2.21 [now 2.21.2] does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute.’ [Citation.]” (Accord, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 714.)

Appellant’s claim that the trial court erred in giving CALJIC No. 2.21.2 cannot succeed.

VII. *Cumulative Effect of the Errors*

Appellant contends that, even if none of the errors in themselves require reversal, the cumulative effect of those errors resulted in prejudicial error. (See *People v. Hill, supra*, 17 Cal.4th at p. 844.) We disagree.

We have concluded that none of the alleged errors were prejudicial.²¹ Nor do we find that the cumulative effect of any errors calls into doubt the jury’s verdict or undermines the fairness of the trial in this case, particularly in light of the strong evidence of guilt. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

²¹ This conclusion is obviously distinct from our determination that there is insufficient evidence to support the first degree murder verdict.

DISPOSITION

Appellant's conviction of first degree murder is reduced to second degree murder. In all other respects, the judgment is affirmed. The matter is remanded to the trial court to pronounce judgment and resentence appellant in accordance with this decision.

Kline, P.J.

We concur:

Lambden, J.

Richman, J.