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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.

ADRIAN SEDANO,

Defendant and Appellant.

A129245

(San Mateo County
Super. Ct. No. SCO70035)

I. INTRODUCTION

Appellant Adrian Sedano appeals from the judgment following his conviction by a jury of second degree murder (Pen. Code, § 187),¹ use of a deadly weapon (§ 12022, subd. (b)), and active participation in a criminal street gang (§ 186.22, subd. (a)). On appeal, he contends insufficient evidence supports the trial court's finding that he was competent to stand trial; the trial court abused its discretion in admitting gang evidence; prosecutorial misconduct during closing argument; and ineffective assistance of counsel for failing to object during the prosecutor's closing argument. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 11, 2008, the San Mateo County District Attorney filed a felony complaint charging appellant with murder. Appellant pled not guilty.

On February 19, 2009, before the preliminary hearing, the criminal proceedings were suspended pursuant to section 1368 when counsel expressed doubt as to appellant's

¹ All further unspecified statutory references are to the Penal Code.

competence to stand trial. Of three experts appointed by the court to evaluate appellant, two found him incompetent to stand trial; the other found him competent.

Appellant waived jury trial on competency and a court trial was held in November 2009.² The trial court concluded that appellant was competent and reinstated the criminal proceedings.

At the preliminary hearing, appellant's counsel again declared a doubt as to appellant's competency. The court overruled the objection.

On December 28, 2009, an information was filed charging appellant with murder (count one; § 187) and active participation in a criminal street gang (count two; § 186.22, subd. (a)). The information also alleged that appellant personally used a deadly weapon, a knife, within the meaning of section 12022, subdivision (b), and that appellant was a minor at least 16 years old within the meaning of Welfare and Institutions Code section 707, subdivisions (b) and (d)(1).

Appellant pled not guilty on December 30, 2009. On May 5, 2010, he pled guilty to active participation in a criminal street gang as charged in count two.

Jury trial began on May 25, 2010. The jury heard evidence of a series of fist fights between two groups of people over the course of an evening that culminated in the stabbing death of the victim, Ramon Buenrostro.

A. *The First Fight Outside the 7-Eleven.*

In August 2008, appellant was 16 years old.³ On the evening of August 8, 2008, he was at the apartment of Anabel Aguilar, his 20-year-old girlfriend, on Geneva Avenue in Redwood City. Appellant and Aguilar were drinking beer with friends Marcos Moran, Christian Lopez, and Ana Torres. At around midnight, they all walked to the nearby 7-Eleven to buy food for themselves and milk for Aguilar's young son.

² The facts regarding appellant's competence will be described fully in our discussion of appellant's contention that the trial court erred in finding him mentally competent, *post*, section III.A.

³ Appellant turned 17 in September 2008. He was five feet seven inches tall, and weighed 150 pounds.

Jaclyn Mendez and Lisa Brown had spent the evening at a friend's house drinking alcohol, smoking marijuana, and taking ecstasy. Around midnight, they decided to go to the 7-Eleven for food. Samuel Arellano worked there as a clerk and was a close family friend of Mendez's. Mendez and Brown were already at the 7-Eleven when the other group arrived.

Aguilar recognized Mendez from a prior fight. Aguilar hated Mendez, who had punched her in the face when she was pregnant. The rest of Aguilar's group headed back to the apartment to get more money, but Aguilar stayed behind. She got close to Mendez and called her a bitch. Arellano, who recognized Aguilar as a regular customer, walked her out of the store and tried to calm her down. Aguilar waited for Mendez to come out of the store, started insulting her again and then punched her.

Aguilar and Mendez fought until Brown and Arellano separated them. Aguilar then started fighting with Brown; she was separated from Mendez and Brown by Arellano and another customer. Arellano told Aguilar to go home now that she had had her fight.

B. *The Second Fight Outside the 7-Eleven.*

Aguilar headed back to her apartment, crying and still angry. On the way, she ran into appellant and their friends who were headed back to the 7-Eleven to get her. She told the group that she had been jumped at the 7-Eleven by two women and a man. Appellant and Moran were very upset, and the group returned to the 7-Eleven to "get even."

At the 7-Eleven, Mendez and Brown were still outside. The ensuing brawl was captured on a 7-Eleven surveillance camera. Appellant came running over with his shirt off, yelling that he was "North Side Vera" and a Norteño, and said the "bitches jumped my home girl." Arellano told appellant he was not going to hit any girls. Appellant threw a punch at him, and Arellano grabbed appellant in a headlock and took him to the ground. Moran ran over to Mendez and started punching her. When Brown tried to intervene, Torres and Aguilar joined in the fray. Several strangers who had just pulled

into the parking lot intervened when they saw Moran hitting Mendez; they yelled that he should not be hitting a woman.

While Arellano had appellant in a headlock on the ground, appellant said he was a Norteño from Vera Street, he knew where Arellano worked, and that he would come back and shoot him with a .357. Arellano released appellant, who got up and immediately took another swing at Arellano.

Everyone scattered when someone yelled that the police were coming. Appellant, Aguilar, Torres, Moran, and Lopez ran back to Aguilar's apartment. During the fights, no one from either side had used a weapon, and no one from appellant's group was significantly injured.

C. *The Third Fight on Geneva Avenue.*

Mendez and Brown returned to their friend's house. Mendez testified that she was too "high on ecstasy, weed, and drunk" to be upset about the fights. She and her friends got into fights all the time. They drank some more alcohol and called their friend, Ana Helu, to discuss the fight. Helu met up with them at around 1:00 or 2:00 a.m. Helu testified that Mendez was upset and angry. They also called Jennifer McMenemy, who was at a nightclub in San Francisco, but had planned on joining them later that night.

McMenemy had been out with her next-door neighbor, Ramon Buenrostro, and his cousin. When McMenemy told them she was going over to a friend's house to drink with Mendez, Buenrostro asked if he could come along. McMenemy was drunk when she and Buenrostro met up with Mendez, Brown, and Helu. Mendez and Brown had also been drinking and each had taken two Ecstasy pills.

Sometime after 2:00 a.m., Mendez, Brown, Helu, McMenemy, and Buenrostro walked to the 7-Eleven for cigarettes, then walked down Geneva Avenue looking for Aguilar and her friends. McMenemy was yelling as she walked, "Who the fuck hit my home girl? Get out here."

Aguilar heard the yelling, looked out the window, and shouted at McMenemy to shut up because Aguilar's mother and son were inside sleeping. McMenemy kept yelling

for Aguilar to go outside, that she would “whoop [Aguilar’s] ass.” At trial, McMenemy admitted that she was trying to start a fight.

Appellant looked out the window and asked, “[w]ho the fuck is you?” He told McMenemy to shut up. Mendez and appellant yelled and swore at each other, then appellant, Aguilar, Torres, and Moran all went downstairs to the street. On the way out, appellant grabbed a long kitchen knife and Aguilar grabbed a 40-ounce beer bottle.

Appellant waved the knife at the women when he reached the sidewalk, saying “[y’all] need to get the fuck off my property.” Appellant told McMenemy she was “disrespecting his house.” Upon seeing appellant with the knife, the other women backed up, but McMenemy was too drunk to notice. McMenemy kept yelling at Aguilar, who told her to “take it down [to] the corner” because she had kids in the apartment.

McMenemy testified that she turned to walk to the corner when Aguilar suddenly hit her with something and knocked her to the ground. Brown heard a bottle break. Aguilar testified under a grant of immunity that she did not hit McMenemy with the bottle; she dropped it when they started fighting. Helu saw her drop the bottle. Aguilar quickly got the better of McMenemy and was on top of her, beating her.

While Aguilar and McMenemy were fighting, appellant asked Buenrostro, “who is you?” Buenrostro said, “I’m Ramon. I’m Moan. I’m from Redwood.” Appellant said something about being an “XIVer,” which means Norteño. Buenrostro said he knew some people from there and was “cool with them.” Appellant responded, “I don’t give a fuck,” and started fighting with Buenrostro.

Although Aguilar had the upper hand, Moran apparently wanted to intervene in her fight with McMenemy. Buenrostro said, “No, you’re not going to do that; you’re not going to get in,” and grabbed Moran and threw him to the ground. Appellant tried to help Moran, but Buenrostro threw him down, too.

Lopez was still upstairs when the fighting broke out. He grabbed a six-inch diameter metal wheel, ran downstairs and swung it at Buenrostro as he fought with appellant. Buenrostro dodged Lopez’s blow, which shattered the window of a parked car,

setting off the car alarm. Buenrostro punched Lopez once on his left side. Torres pulled Lopez back and away from the fight.

Aguilar was still on top of McMenemy, holding her by the hair and punching her in the face. According to Aguilar, Buenrostro grabbed her by the neck and pulled her off McMenemy. Then appellant tried to pull Buenrostro off of Aguilar. Appellant tried to hit Buenrostro, but Buenrostro was the one landing punches. Helu testified that both appellant and Moran were hitting Buenrostro and appellant had the knife in his hand.

Both groups were concerned that the car alarm would attract the police. Lopez and Brown intervened to break up the fight and separate the women.

While everyone else was focused on the women fighting, appellant and Buenrostro had moved toward the corner, about 100 feet away. No one could see what happened there until Buenrostro leaned on the fence and then fell to the ground.

Moments later, appellant came running back, still holding the knife, which was bloody and had been bent. He told Buenrostro's group that they "should call the police" or had "better call someone" because "your homey" or "your nigga" is "leaking." Appellant and his group ran upstairs to the apartment.

McMenemy and Brown ran to the corner as Buenrostro fell to the ground, bleeding, unable to speak or breathe. Mendez ran to the 7-Eleven where Arellano called the police.

Inside Aguilar's apartment, appellant was still holding the bent and bloody kitchen knife. He told his friends he had "fucked up," had stabbed someone, and might go to jail for life for attempted murder. He did not appear to be bragging; he was crying. Aguilar took the knife from him, washed it, and threw it under a bush down the street.

D. *The Investigation.*

Buenrostro was unresponsive when police arrived at around 4:00 a.m. Resuscitation attempts failed and he died at the hospital from multiple stab wounds, one of which penetrated his heart. He had bruises and scrapes on his hands which could have been defensive wounds or could have been caused by striking someone or falling.

Buenrostro was 23 years old, six feet one inch tall, and weighed 255 pounds. His blood alcohol level was .09 percent and he had no narcotics in his system.

Mendez, McMenemy, and Brown all lied to the police, claiming they had just come from a friend's house and had seen nothing. Helu, the most sober and cooperative witness, showed the officers Aguilar's apartment.

At around 7:45 a.m., the police entered Aguilar's apartment where they found appellant, Aguilar, Torres, and Lopez. Appellant was hiding in the bathroom, attempting to wash his hands in the sink. He was placed under arrest. The police recovered the knife from the bushes. The blade was about eight inches long and could have caused Buenrostro's injuries, according to the pathologist.

At the police station, Helu and Brown identified appellant in a photo line-up as the person with the knife. At 2:20 p.m. that same day, Detective Cochran interviewed appellant after advising him of his rights.⁴ Initially, appellant denied being involved in any fights or stabbing anyone. After being informed of the 7-Eleven surveillance tapes, appellant admitted that he instigated the second fight at the 7-Eleven. He maintained, however, that he did not leave the apartment during the last fight and repeatedly denied stabbing anyone.

After Detective Cochran told appellant that Aguilar had already admitted that she took the knife from him, appellant said: "I guess if you say I stabbed the dude it was because self . . . self-defense." He made conflicting statements that he did not stab Buenrostro, and that he did not remember stabbing him, but, if he did, it was an accident or self-defense. After acknowledging that he told his friends in the apartment that he stabbed Buenrostro, appellant admitted stabbing him, but claimed to have stabbed him once and asserted that it was an accident, that he "didn't do it on purpose." Appellant asked several times whether Buenrostro had died. When Detective Cochran stated that he had, appellant started crying.

⁴ Appellant's videotaped statement was played for the jury and a transcript was provided.

Several months later, appellant told Lopez during a jail transport that he did not mean to kill Buenrostro. He just grabbed the knife without thinking. He admitted that he stabbed Buenrostro and said he would take the blame; he did not want his friends to get in trouble.

The autopsy of the victim showed that he had been stabbed six times. Three were superficial cuts; the other three were much more serious. The fatal wound traveled upward through his chest cavity, penetrating his heart. Another serious wound was to his back; the third serious wound to his left torso penetrated six inches, moving up and to the right.

E. *Gang Evidence.*

Appellant pled guilty to active gang participation in count two before trial.

Detective Nick Perna testified as an expert on gangs as it related to appellant's gang membership and gang motivations for committing offenses. He explained that "Vera Street" is a Norteño gang in Redwood City that claims as its turf an area encompassing the 7-Eleven store and Aguilar's apartment. The detective testified that gangs are territorial and will defend their turf. Gang members will announce their gang identity in confrontations. Norteños claim the color red and the number 14.

Detective Perna discussed the gang tagging in Aguilar's garage which depicted numerous Norteño gang symbols and statements in red paint. One tag was the phrase "Norte Controla." Perna had heard that expression once before, from an incident involving appellant at Hillcrest Juvenile Facility in June 2007. Appellant got into a fight with another juvenile. When staff separated them, appellant shouted "puro Norte" (pure north) and "Norte controla" (North controls or Norteños control). The detective noted that the statements were directed at everyone around the confrontation and were typical of a gang member announcing his affiliation in a conflict. A hand-written note found in appellant's space at Hillcrest had Norteño-related references and his gang moniker, "Dumbo."

During Detective Perna's testimony, the defense stipulated that appellant was a Norteño gang member at the time of the offense. The detective opined that Moran was also a Redwood City Norteño based on gang admissions to police during prior arrests.

Detective Perna explained certain gang behavior to the jury. Gangs operate by intimidation, respect, and protecting turf. Getting called out for a fight on one's home turf is an act of disrespect that requires retaliation, as is getting knocked down in a fight on one's home turf. A gang member's act of yelling out "Vera Street" or "Norte" is announcing gang status and reflects that the fight is a gang fight. It is also designed to intimidate the target. Asking a potential rival "who is you?" or "where are you from?" is known as "checking," i.e., checking on the gang status or affiliation of another individual. The act of checking means that a fight is imminent, and a response to the other's statement of identity with "I don't give a fuck," means the one responding has concluded that the other is not an ally and therefore has been targeted for a fight.

Detective Perna also noted that if a combatant knocks a gang member to the ground on his home turf, such as Buenrostro did to Moran, then all fellow gang members must retaliate with greater force. Failure to do so would cause the fellow gang member in Moran's position to be labeled a "punk" within the gang.

In his opening statement to the jury, defense counsel admitted that appellant stabbed Buenrostro. Appellant did not testify. His attorney argued that appellant did not intend to kill Buenrostro and was only guilty of voluntary manslaughter based on provocation, rage, and fear.

On June 4, 2010, the jury found appellant not guilty of first degree murder, but convicted him of second degree murder. The jury also found true the deadly weapon and age allegations.

On July 23, 2010, the trial court denied probation and imposed an indeterminate term of 16 years to life in state prison. On the same day, appellant filed a notice of appeal.

III. DISCUSSION

A. *Competence to Stand Trial.*

Appellant contends that he was not mentally competent at the time he stood trial, and that proceeding with the trial violated his federal constitutional right to due process.

1. *Facts.*

Prior to the preliminary hearing, on February 19, 2009, defense counsel expressed a doubt about appellant's mental competency and the court suspended criminal proceedings. The court appointed Jeff Gould, M.D., a psychiatrist, and David Berke, Ph.D., a licensed psychologist, to evaluate appellant.

Dr. Gould and Dr. Berke both reviewed a May 5, 2008, Psycho-educational Report by school psychologist Michelle Goldman, M.S., part of an Individualized Educational Plan (IEP); a March 17, 2009, Competency Report by Pablo Stewart, M.D.; and a March 31, 2009, Neuropsychological Evaluation by Nell Riley, Ph.D.

Dr. Gould found that appellant was competent to stand trial; Dr. Berke was "inclined to believe that [appellant] might be incompetent to stand trial until and unless he is treated with appropriate medication for his ADHD condition." The court appointed psychologist D. Ashley Cohen, Ph.D., to provide another opinion. Dr. Cohen found that appellant was not competent to stand trial. The defense hired its own evaluator, Dr. Pablo Stewart, who concluded that appellant was incompetent.

Appellant waived jury trial on competency, and a court trial was held in November 2009. In addition to Dr. Berke, Dr. Cohen, and Dr. Stewart, the defense called Michelle Goldman, a school psychologist for juvenile court community schools, and Dr. Nell Riley, a neuropsychologist, as witnesses. The prosecution called Dr. Gould and Officer Guadalupe Flores, appellant's probation officer, as witnesses.

Michelle Goldman testified as an expert on psycho-educational evaluations regarding her evaluation of appellant for special education services at Hillcrest community school. Appellant's existing I.E.P. indicated that he had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), which was described as "non-severe." Goldman conducted intelligence testing in May 2008. Appellant's full scale I.Q. was 75,

with a verbal I.Q. score of 72 and a performance I.Q. of 83. His scores placed him in the low average range for nonverbal ability, but he was in the borderline mentally retarded range for verbal ability. Goldman's overall assessment, based on the I.Q. test and other tests, was that appellant's cognitive skills fell within the borderline range. Appellant had difficulty paying attention and understanding complex information, particularly by auditory means. He reported that English was his primary language, but he spoke Spanish at home with his family, which limited his vocabulary and impacted his verbal scores. On cross-examination, Goldman acknowledged that appellant performed very well academically in 2007 at Hillcrest and Glenwood, both juvenile court community schools, where he received nearly all A's and B's. Goldman stated that he was likely to have "problems following more complex oral directions that utilize inferences, deductions and abstractions."

Dr. Riley, a clinical neuropsychologist, was retained by the defense in late 2008 to evaluate appellant's intellectual and neuropsychological functioning. Based on psychological testing she administered, she concluded that appellant suffered from ADHD, primarily inattentive type, to a very marked degree. During two sessions with appellant, she noted his inattentiveness; he appeared to have difficulty paying attention from the very beginning, and the problem became more prominent over time. She spent a lot more time explaining and repeating instructions than was usually required, and cut the second session short because four or four and a half hours was beyond his capacity. His performance on one test measuring attention span was the worst Dr. Riley had ever seen, and he met the criteria for an ADHD diagnosis with a confidence index of 95 percent, much higher than usual. She noted that appellant has an unfortunate combination of traits: "[H]e's processing information slowly but acting quickly. And that's a bad combination of traits to have."

Dr. Riley also performed a standard I.Q. test. Appellant's full scale I.Q. was 79, which fell within the borderline range. His verbal I.Q. was 76, also in the borderline range, and his performance I.Q. was 86, in the average range. She confirmed he was not

mentally retarded. She could not assess how much his speaking Spanish at home affected his scoring.

Dr. Riley did not comment on appellant's competency because she was not qualified to conduct a competency evaluation. She acknowledged that ADHD does not necessarily reduce a person's intellectual functioning and that many people with ADHD lead productive lives. When asked about appellant's grades, she stated her belief that the curriculum in those classes is weak and the classes are graded based on a lower standard. She acknowledged knowing nothing about the classes offered at the two schools. She was aware that appellant took and failed the California High School exit exam.

Dr. Riley recommended a trial of ADHD medications, but explained that it is a "fairly lengthy period of trial and error" because people respond differently to different medications, and some people never respond. She also recommended that communications with appellant be broken down into small, simple parts and that appellant be asked to repeat each part to be sure he understood. She acknowledged that this might not be possible in a courtroom. She predicted that appellant would "have a hard time listening to a lengthy oral presentation or instructions and really comprehend what's going on."

Dr. Stewart testified as an expert in forensic psychiatry, including the issue of competency to stand trial. He met with appellant three times in September 2008 and once in March 2009. Appellant presented "with profound cognitive impairment," and "as being very slow intellectually." He seemed sad and anxious, and his anxiety increased over the course of the interviews.

Dr. Stewart administered the MacArthur Competency Assessment Tool-Criminal Adjudication (MacCAT-CA), a standardized test for evaluating competency, in which results are divided into three categories: understanding, reasoning, and appreciation. Appellant scored in the "mild impairment" range for factual understanding of the legal

system; “minimal to no impairment in reasoning” in the reasoning⁵ section; but in the appreciation section, which involves applying rational data to your own case, his score placed him in a “clinically significant impairment range.”

Dr. Stewart diagnosed appellant with borderline intellectual functioning, which would not vary from day to day, and ADHD, the severity of which would vary with the setting. He was unable to understand or answer questions which required abstract thinking due to “cognitive limitations.” Dr. Stewart testified that appellant’s ADHD could be addressed with medication and some training, such as that conducted by “return to competency programs.”

Appellant had never taken medication for ADHD, but had taken antipsychotics. Dr. Stewart did not believe appellant was psychotic. Appellant heard voices, but did not have true auditory hallucinations, according to Dr. Stewart. Rather, his “pseudo-hallucinations” were “just concrete interpretations of his thoughts,” which are commonly experienced by people with mental retardation and borderline intellectual functioning. Someone with borderline intellectual functioning could be competent but the combination of borderline intellectual functioning and ADHD rendered appellant incompetent.

Dr. Berke testified as an expert in forensic psychology including trial competency. He felt that appellant suffered from a major mental illness, although he did not attempt a diagnosis. He concluded that appellant was incompetent to stand trial because of his ADHD and his borderline intellectual functioning, which would make it difficult for him to understand and follow the proceedings. Dr. Berke also opined that the competency hearing was premature; it should be held after attempts to treat appellant’s ADHD with medication. On cross-examination, he acknowledged relying heavily for his opinion on the reports and discussions with Drs. Stewart and Riley. When asked about the statements in his report that appellant “might be incompetent to stand trial,” and that appellant was “not too far from meeting the standard of being found competent,” Dr.

⁵ Dr. Stewart testified that appellant’s responses in the reasoning section showed that appellant was able to assist counsel in the basic factual information, but would be unable to assist with strategy regarding legal issues.

Berke indicated that he would now revise those statements and state definitively that appellant was incompetent.

Probation Officer Guadalupe Flores was appellant's probation officer from February 2007 until September 2009. She met with appellant regularly during that time and had no trouble communicating with him. She questioned appellant in April 2008 after he was arrested in the company of other gang members for auto burglary and possession of stolen property. Appellant admitted the probation violation for being in the company of known gang members; he understood the difference between admitting the probation violation and going to trial to contest the underlying charges. As of June 5, 2008, appellant had eight sustained juvenile petitions from December 2004 to June 2008. Other than auto burglary, the petitions charged appellant with resisting arrest, giving false information to a peace officer, disorderly conduct, petty theft, and misdemeanor criminal threat. When Officer Flores talked with appellant about his pending cases, he seemed to understand the charges, court proceedings, the role of defense counsel, and the choice to either admit or deny the charges.

Dr. Gould testified as an expert on forensic psychiatry, including trial competency, that appellant was competent to stand trial. Dr. Gould had performed 500 to 600 competency assessments and had received legal training on competency through Hastings College of the Law. He noted that appellant gave appropriate responses to all of his inquiries regarding the charged offense and court proceedings.

Dr. Gould opined that the MacCAT was not the best tool for assessing competency. He explained that the MacCAT is too rigid in that it does not allow the tester to deviate from the specified questions to ask the individual about his or her own situation. He further stated that it focuses too much on abstract reasoning, and is "very heavily weighted on verbal processing and ability to reason in a verbal manner," while failing to address the competency standards set forth in *Dusky v. United States* (1960) 362 U.S. 402. He noted that the American Academy of Psychiatry and the Law raised issues about the MacCAT. In addition, the MacCAT was not validated for persons under the age of 18 and was not supposed to be used in that population. Instead, Dr. Gould

used the Evaluation of Competency to Stand Trial-Revised (ECST-R), and integrated those questions into his interview of appellant. He also asked a series of “ ‘atypical presentation questions,’ ” a screening tool for malingering. Appellant was not malingering and he scored in the competent range for all sections of the test, including whether the person can cooperate with counsel and understand the factual issues in court. Dr. Gould concluded that appellant was competent to stand trial.

Dr. Gould was asked about other evaluations of appellant. He noted that Dr. Berke’s report did not plausibly explain how he came to his conclusion that appellant was incompetent. Dr. Gould found Dr. Cohen’s report to be strikingly conclusory: although she concluded that appellant was incompetent, he could find no reference to questions regarding competency issues. Rather, it appeared to be an assessment of overall mental functioning. He also noted that she found appellant to be much more severely impaired than Gould himself had found, but the report contained no data or examples from her conversation with appellant to support her findings. Similarly, Dr. Riley’s report described more severe impairment than Dr. Gould observed.

Dr. Gould noted that the intelligence testing of appellant over the years was consistent and reliable, indicating borderline intellectual functioning. His good grades could be the result of adaptive functioning or grade inflation; Dr. Gould could not say which since he had no information on the academic requirements of appellant’s classes.

Dr. Gould found that appellant had a variety of cognitive problems. He did not diagnose ADHD, but he also did not rule it out. Instead, he diagnosed Broad Cognitive Disorder Not Otherwise Specified because appellant was “very attentive” during their interview, ADHD is a complex diagnosis that requires information from a variety of sources, and there was no evidence of ADHD symptoms before the age of seven as required by the DSM-IV-TR.

Finally, Dr. Cohen opined as an expert on forensic neuropsychology, including competency evaluations, that appellant was incompetent to stand trial. She interviewed appellant for about two and a half hours. She noted that appellant had difficulty expressing himself. He spoke in simple sentences using basic vocabulary. He conveyed

his thoughts in an unfocused, disorganized way, and seemed to blurt out information “almost at random.” To get a coherent history from appellant, Dr. Cohen had to ask him more focused “yes-or-no” kinds of questions. Dr. Cohen described appellant’s statements that alternated between viewing his prospects as worse than they were, such as wondering if he would get the death penalty or life in prison, and then, a few minutes later, discussing what he would do “by summer” when he got out of prison. She viewed these statements as demonstrating a lack of insight into his legal situation and inadequate understanding of the nature of the legal proceedings. Dr. Cohen also concluded that appellant had “clear deficiencies” in intelligence, mental processing, retention and concentration, memory, and executive function such that he could not assist counsel and was incompetent to stand trial.

On cross-examination, she acknowledged that appellant understood the mechanics of courtroom proceedings. She did not administer the ECST-R because Dr. Gould had already done so. She based her conclusion of incompetence to stand trial on low cognitive functioning, possible brain damage from sniffing inhalants and substance abuse, “and then apparently a psychiatric disorder,” which she did not specify. Dr. Cohen acknowledged that there were no medical records indicating brain damage, and she was not making such a diagnosis.

Defense counsel argued that appellant was incompetent but was likely treatable with medication and training. Counsel requested that appellant be sent to the Napa State Hospital competency program or another similar program and that he undergo a medication trial for ADHD.

The prosecutor acknowledged that appellant had some cognitive impairment, a low I.Q., and attention issues, but argued that he demonstrated his understanding of the nature of the proceedings, the roles of the court and the parties, and his legal options, and was able to convey his version of the events in question. Appellant’s probation officer had communicated with him over a two-year period. With respect to an April 2008 auto burglary incident, appellant was able to tell her what his involvement was and that he

planned to take the matter to trial because he was not the one who broke into the car; he was merely caught driving it.

At the conclusion of the hearing, the court issued its ruling from the bench. The court remarked on the experts' subjectivity, in that they interpreted similar facts differently in drawing their conclusions. With respect to the court-appointed experts, the court found Dr. Gould's testimony "quite compelling," while Dr. Berke "seemed confused at points" and "seemed to garble the standard," as did Dr. Cohen. Although the defense-retained experts, Drs. Stewart and Riley and Ms. Goldman, presented their opinions well, the court was more persuaded by Dr. Gould and appellant's probation officer, Ms. Flores. The court found appellant competent to stand trial and reinstated the criminal proceeding.

2. *Legal Principles.*

"Under California law, a person is incompetent to stand trial 'if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' (§ 1367, subd. (a).)" (*People v. Young* (2005) 34 Cal.4th 1149, 1216.) "The due process clause of the federal Constitution's Fourteenth Amendment prohibits trying a criminal defendant who is mentally incompetent. (*Medina v. California* (1992) 505 U.S. 437, 439; *Pate v. Robinson* (1966) 383 U.S. 375, 378) A defendant is deemed competent to stand trial only if he ' "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" ' and ' "has a rational as well as factual understanding of the proceedings against him." ' (*Dusky v. United States*[,*supra*,] 362 U.S. at p. 402.)" (*People v. Ary* (2011) 51 Cal.4th 510, 517 (*Ary*).)

A criminal defendant is presumed mentally competent. The defendant bears the burden of proving incompetence to stand trial by a preponderance of the evidence. (§ 1369, subd. (f); *Ary, supra*, 51 Cal.4th at pp. 517-518.)

In reviewing a finding that a defendant is competent to stand trial, "an appellate court must view the record in the light most favorable to the verdict and uphold the verdict if it is supported by substantial evidence." (*People v. Marshall* (1997) 15 Cal.4th

1, 31 (*Marshall*); *People v. Blacksher* (2011) 52 Cal.4th 769, 797.) “Evidence is substantial if it is reasonable, credible, and of solid value.” (*Marshall, supra*, 15 Cal.4th at p. 31; *People v. Lawley* (2002) 27 Cal.4th 102, 131.)

3. *Analysis.*

In light of the applicable standard of review, the inquiry before us is whether the trial court’s finding that appellant was competent to stand trial is supported by substantial evidence. Dr. Gould testified as an expert in forensic psychiatry and trial competency. His background included subspecialty training in forensic psychiatry which involved attending a program at UC Hastings and working at San Quentin to “refine the skills in doing evaluations and assessments for the medical and legal process.” He articulated the standard for evaluating an individual for competency as “first, is there a mental disease present? Second, do they have an appreciation of the proceedings against them? And then third, can they rationally cooperate with their counsel?” The court expressly indicated that it found Dr. Gould’s understanding of the standard for competency to be superior to that of the other two court-appointed experts, Dr. Berke and Dr. Cohen.

Dr. Gould asked appellant a number of questions in order to determine his mental functioning, understanding of his situation, and ability to assist counsel, and he reported appellant’s answers, all of which demonstrated an understanding of his circumstances, the legal process, and working together with his attorney. Dr. Gould testified that appellant was cooperative, did not appear to have trouble paying attention to the questions, was not fidgeting, and did not appear to be distracted.

Dr. Gould administered a test known as the ECST-R, and explained that it was a better competency assessment instrument than the MacCAT, as determined by the American Academy of Psychiatry and the Law. Dr. Gould pointed out several weaknesses of the MacCAT, including that the MacCAT asks questions based on abstract scenarios rather than the defendant’s specific situation, minimal assessment of the attorney-client relationship, and that the MacCAT was not validated for use with persons

under the age of 18.⁶ Dr. Gould explained that the ECST-R test contains 18 questions regarding competency and that he integrated those questions into his interview with appellant in his effort to “get a full picture of someone’s functional ability regarding competency.” He then pulled out appellant’s responses to the ECST-R questions to score the assessment. Dr. Gould explained that appellant’s score was in the competent range and indicated no malingering. He gave a thorough description of appellant’s answers to his questions, and explained the significance of the responses.

The prosecutor also asked Dr. Gould about the reports submitted by witnesses who concluded that appellant was not competent. With respect to Dr. Berke’s report, Dr. Gould indicated that he was unable to follow Dr. Berke’s reasoning or the link he was making between the data and the conclusion that appellant was incompetent. Dr. Gould noted that Dr. Cohen described her discussion with appellant in a way that made him appear “much more impaired,” that he had a “much more difficult time in his communication style and in making himself understood to her and his processing of information,” but the report contained no actual data or description of competency questions administered to support her conclusion that he was incompetent. From Dr. Riley’s report, which Dr. Gould read before seeing appellant, Dr. Gould expected him to be much more impaired than he presented. Dr. Gould was surprised when he met appellant and discussed the competency-related issues “because he did so well.”

On cross-examination, Dr. Gould acknowledged appellant’s borderline mental functioning and that he “likely suffers some cognitive deficits.” He described the conversation with appellant as “a normal give and take,” but with limited vocabulary and not a lot of abstract discussion or stories compared to other people he had evaluated. Dr. Gould focused on appellant’s functional ability in a very specific sphere regarding competency to stand trial. As he explained, “many people . . . might be psychotic and competent or psychotic and not competent. But the issue is how do they function in this

⁶ Dr. Stewart administered the MacCAT to appellant and relied on those results in concluding that he was incompetent.

specific sphere? So you know, I've documented how he responded to my questions regarding competency in the specific sphere and I didn't see that assessment articulated in any other reports to know whether that was actually different in my report versus others." The trial court found Dr. Gould's articulation and focus on the legal standard for competency to be "compelling." Dr. Gould's report and testimony constitute substantial evidence in support of the trial court's finding that appellant was competent to stand trial.

Appellant contends that the probative value of Dr. Gould's opinion "was severely undercut by undisputed facts compelling a contrary conclusion." The first of these, according to appellant, is his borderline intellectual functioning. However, appellant does not explain how this fact lessens the probative value of Dr. Gould's conclusion. Dr. Gould did not question appellant's IQ test results or that his scores place him in the range of Borderline Intellectual Functioning. "If his IQ was just a few points lower," appellant continues, "he would likely have been diagnosed Mentally Retarded." Again, appellant fails to explain how this undermines Dr. Gould's opinion. None of the experts found appellant to be mentally retarded or questioned the IQ test results. Moreover, mental retardation does not render an individual per se incompetent to stand trial. (See, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 318 ["Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial."].)

Next, appellant points to the fact that Dr. Gould declined to diagnose ADHD while Dr. Riley "found extensive evidence of appellant's ADHD symptoms 'from a fairly early age' in his teacher's comments" and Dr. Stewart testified that an ADHD diagnosis can be made in the doctor's discretion even without evidence of symptoms before age seven in certain circumstances. Once again, appellant does not explain how this affects the probative value of Dr. Gould's opinion. As appellant acknowledges, Dr. Gould recognized that appellant had an attention deficit issue, diagnosed Cognitive Disorder Not Otherwise Specified, and made clear that he was not ruling out ADHD. He also acknowledged that appellant might have trouble maintaining his attention during prolonged court proceedings.

Appellant points out that Dr. Gould only spent one hour with appellant, conducted the interview in a quiet room with no distractions, and asked no complex questions in determining that appellant had an adequate understanding of court procedures and ability to communicate. By contrast, he continues, Dr. Cohen asked complex questions and appellant was not able to understand them or to respond unless she broke them down into simple segments.

However, as respondent notes, Dr. Gould's experience with appellant was consistent with that of Officer Flores, the only witness who observed and interacted with appellant in varying circumstances over a substantial period of time, some two and a half years. Officer Flores testified that appellant had no trouble understanding her or communicating with her during their weekly or bi-weekly meetings.

Also consistent with Dr. Gould's experience with appellant and findings was Officer Flores's testimony about an April 7, 2008, incident in which appellant and several others were arrested for breaking into a vehicle and stealing some of its contents. Appellant informed Officer Flores that he wanted to take the matter to trial because, although he violated a condition of his probation by being with known gang members, he was not involved in the auto burglary. Officer Flores also confirmed that as of June 5, 2008, appellant had a total of eight sustained juvenile petitions. This evidence supports the finding that appellant had sufficient understanding of court proceedings and strategy and ability to assist in his own defense.

Appellant cites *People v. Samuel* (1981) 29 Cal.3d 489, 504 (*Samuel*) in arguing that, although appellant was capable of sitting quietly in court and doing what his attorney told him to do, this was not enough to establish competency. In *Samuel*, the defendant was charged with first degree murder during a robbery attempt. At the pretrial competency hearing, the defense presented "an impressive array of evidence demonstrating Samuel's present inability either to understand the nature of the proceedings against him or to rationally assist in the preparation and presentation of his defense. [Citation.] In all, five court-appointed psychiatrists, three psychologists, a medical doctor, a nurse, and three psychiatric technicians testified on Samuel's behalf. In

addition, four psychiatric reports were admitted into evidence. Without exception, each witness and every report concluded that throughout the period during which the declarant observed the defendant, the latter was incompetent to stand trial. In response, the prosecution offered no expert testimony whatever and only two lay witnesses, neither of whom contradicted any of the defense testimony.” (*Samuel, supra*, 29 Cal.3d at pp. 497-498.) In finding no substantial evidence to support the jury’s finding that Samuel was competent, the appellate court described the prosecution’s evidence as “lay testimony that scarcely did more than indicate that defendant could walk, talk, and at times, recall and relate past events.” (*Id.* at p. 503.)

Here, by contrast, Dr. Gould’s expert opinion directly contradicts that of Drs. Berke and Cohen, and Officer Flores’s testimony supported the finding that appellant was able to understand court proceedings and strategy to assist in his own defense. The trial court’s finding of competence was amply supported by substantial evidence.

B. *Gang Evidence.*

Appellant contends the trial court abused its discretion in admitting certain gang evidence, specifically, an unrelated attempted murder by another Norteño gang member, Norteño gang graffiti in the garage of Aguilar’s apartment building and appellant’s cell at Juvenile Hall, appellant’s shouting of gang slogans during a fight with another juvenile at juvenile hall, and appellant’s gang statements and threats to Arellano during the fight at the 7-Eleven. He contends that the error rendered his trial fundamentally unfair, in violation of due process. Appellant contends that the court erred in admitting certain evidence pertaining to the Norteños gang in Redwood City and evidence of appellant’s active membership in the gang. He argues that it was minimally probative, cumulative and overly prejudicial under Evidence Code section 352, and violated his constitutional rights to due process and a fair trial.

1. *Facts.*

In addition to the murder count, appellant was charged with active participation in a criminal street gang pursuant to section 186.22, subdivision (a). On May 5, 2010, just before trial, appellant pled guilty to the active participation in a gang count. Also on May

5, 2010, the prosecution's motion to amend the information to allege a gang enhancement was denied as untimely. In motions in limine, the prosecution sought to admit evidence of appellant's gang participation under Evidence Code section 1101, subdivision (b), to show motive, intent, and absence of mistake; the defense sought to exclude much of that evidence.

Appellant acknowledged that some evidence of gang membership and gang culture was relevant to prove motive and intent, and that the prosecution could introduce evidence of appellant's gang membership and the gang statements he made to Buenrostro, as well as some expert testimony regarding gang culture and motivations. Appellant expressly agreed to the admission of evidence that he was an active Norteño gang member, that he identified himself as a Norteño to Buenrostro, and that gang culture promotes retaliation for disrespect.

Appellant objected to admission of other gang-related evidence, specifically: gang graffiti found in the garage of Aguilar's apartment building and appellant's cell at juvenile hall; appellant's threats and gang-related statements made to Arellano prior to the altercation involving Buenrostro; appellant's shouting of gang slogans during a fight with another juvenile at juvenile hall; and prior gang related incidents.

At the hearing on the in limine motions, the parties and the court addressed three categories of gang-related evidence: (1) the night of the incident; (2) the graffiti in the garage; and (3) prior law enforcement contacts relevant to establishing appellant's status as a gang member. Appellant offered to stipulate that he was an active Norteño gang member to foreclose the admission of certain evidence from his past, but acknowledged that the prosecution was not required to accept such stipulation. The prosecution declined to do so, and the court confirmed that the prosecution was not required to accept the stipulation.

The trial court ruled that appellant's gang-related statements the night of the incident were relevant to his motive and intent and that he viewed the fights as gang-related. The court ruled that photographs of the garage graffiti were relevant and admissible to show that the apartment building was within appellant's gang turf. The

court then considered the evidence of appellant's prior gang fights, prior contacts with gang members, and prior contacts with the police. The court ruled that appellant's prior writings in his cell were admissible, as was a prior gang-related fight in Hillcrest Juvenile Facility on June 27, 2007, during which appellant announced his gang status. The court also allowed the prosecution to present evidence of a prior violent crime against a non-gang member by another Redwood City Norteño; the incident did not involve appellant, but appellant had been contacted previously in the presence of that gang member. The court excluded several other prior gang-related fights and criminal offenses involving appellant.

At trial, prosecution gang expert Detective Perna testified about gangs in Redwood City, particularly the Norteños. He described different subsets, or cliques, that claim different areas of territory. The Vera Street clique claimed the area on the west side of Redwood City encompassing the area of Woodside and Hess.⁷ The Redwood City Norteños engage in a wide variety of criminal activity, the main crimes being murder, attempted murder, assault with a deadly weapon, and felony vandalism. They commit violent crimes not only against members of rival gangs, but also against non-gang members. Detective Perna described an incident that took place on June 9, 2007, in Redwood City, involving a Norteño named Armando Martinez. Martinez got into an altercation with a juvenile who was about 17 years old and had no known gang affiliation. During the argument, Martinez produced a knife and stabbed the victim in the chest, almost killing him. Martinez was subsequently convicted of attempted murder. Perna testified that this was a typical attempted murder case for Redwood City Norteños. He also testified that appellant had been with Martinez in Redwood City on an earlier occasion, February 14, 2005, when police made contact with him.

During the testimony regarding Armando Martinez, the defense offered to stipulate that appellant was a Norteño gang member on August 8 and 9, 2008. The

⁷ The 7-Eleven where the first fight occurred is located at Woodside and Hess.

prosecutor accepted the stipulation on condition that he could continue to present the evidence the court had previously ruled was admissible, and the defense agreed.

Detective Perna testified that the majority of gang-related vandalism in Redwood City is graffiti, both spray-paint and with markers, on walls, buildings, fences, and residences. Graffiti and taggings in the turf claimed by Redwood City Norteños are common, according to Perna. He identified a number of different taggings in the garage of Aguilar's apartment building as appearing to be Redwood City Norteño-related taggings. The majority were done in red, the color Norteños identify with, and many contained the Norteño number "14," or Roman numeral "XIV," or hybrids such as "X4." Detective Perna also noted the words "Norte Control, which translates roughly into northern control or controlled by Northerners or Norteños."

He testified that he had only encountered that particular phrase twice: the graffiti in the garage, and in an incident involving appellant at the Hillcrest juvenile facility on June 27, 2007. While incarcerated there, appellant got into a fight with another juvenile. When staff tried to break up the fight, appellant yelled "Puro Norte" and "Norte Controla." It is typical for Norteños to announce their gang affiliation in a conflict. Detective Perna also testified about two writings that were seized from appellant's cell at Hillcrest in 2005. Both included appellant's street name or moniker, "Dumbo," along with other Norteño references. Detective Perna opined, based in part on the Hillcrest incident, that appellant was a Redwood City Norteño.

In response to hypothetical questions, based on his training and experience, Detective Perna stated his opinion regarding the actions and motivations of Norteño gang members in conflict situations. He explained the importance of the gang's turf, the concepts of respect and disrespect, checking, retaliation, and the importance to a gang member of not losing face in front of fellow gang members, i.e., not being considered "a punk."

The trial court gave a limiting instruction regarding the purposes for which the jury could consider the gang evidence: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no

other. You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant had a motive to commit the crimes charged. You may also consider this evidence when you consider the facts and information relied on by an expert witness in reaching his or her opinion. You may not consider this evidence for any other purpose. You may not conclude from . . . this evidence that the defendant is a person of bad character or that he has a disposition to commit crime. . . .”

The court also instructed the jury regarding uncharged behavior by appellant: “If you decide that the defendant committed the acts, you may, but are not required, to consider that evidence for the limited purpose of deciding whether or not the defendant acted with the intent to kill or the defendant had a motive to commit the offense alleged in this case. In evaluating this evidence, consider the similarity or lack of similarity between the acts and the charged offense. Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. . . .”

2. *Legal Principles.*

“ ‘Only relevant evidence is admissible (Evid. Code, § 350; [citations]), and, except as otherwise provided by statute, all relevant evidence is admissible[.] (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).)’ (*People v. Crittenden* [(1994)] 9 Cal.4th [83,] 132.) ‘Relevant evidence is defined in Evidence Code section 210 as evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” 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. Bivert* (2011) 52 Cal.4th 96, 116-117.)

Relevant evidence may, however, be excluded under Evidence Code section 352 if its probative value is substantially outweighed by the danger of undue prejudice. Prejudice in this context means “ ‘evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]’ ” (*People v. Heard* (2003) 31 Cal.4th 946, 976.) In other

words, “ ‘[t]he prejudice which [section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.’ [Citations.] ‘Rather, the statute uses the word in its etymological sense of “prejudging” a person or cause on the basis of extraneous factors. [Citation.]’ [Citation.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

The trial court has broad discretion to determine both the relevance of the evidence and whether the prejudicial effect of that evidence outweighs any probative value. (*People v. Horning* (2004) 34 Cal.4th 871, 900.) A trial court abuses its discretion only if it exercised that discretion in “ ‘an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 828.)

3. *Analysis.*

Appellant contends the challenged gang evidence had minimal probative value, was cumulative and prejudicial, and rendered his trial fundamentally unfair. We find no abuse of discretion. “Although evidence of a defendant’s gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged—and thus should be carefully scrutinized by trial courts—such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; see also *People v. Williams* (1997) 16 Cal.4th 153, 193 [“gang evidence is admissible if relevant to motive or identity”]; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 [“Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related.”].)

Here, the gang evidence tended to establish appellant’s motive and intent, which were key issues at trial. The evidence was relevant to establishing appellant’s status as a Vera Street Norteño, and that both the 7-Eleven store and Aguilar’s apartment building were part of the Vera Street turf. The evidence was also relevant to demonstrating and explaining gang behavior and motivations in responding to perceived challenges to status and perceived disrespect on the gang’s home turf.

Appellant's gang statements and threats to Arellano during the first fight at the 7-Eleven, in addition to establishing appellant's status as a Vera Street Norteño, showed that appellant viewed the fight as gang-related. The statements were relevant to his motive and intent in later stabbing Buenrostro because the fight outside Aguilar's apartment was a continuation of the earlier altercation outside the 7-Eleven.

The gang graffiti, including the phrase, "Norte Control," in the garage of Aguilar's apartment building tended to establish that the building was Norteño turf. The 2007 Hillcrest incident, in which appellant yelled the same phrase during a fight, highlighted the practice of shouting out gang affiliation as a means of confirming status, intimidation, and as reflecting the gang motivation for the member's actions.

Appellant's writings at Hillcrest further demonstrated his gang membership and contained his moniker, "Dumbo," which corroborated Christian Lopez's testimony that appellant was a Norteño known as Dumbo.

The evidence regarding the attempted murder committed by Armando Martinez was relevant to explain the nature of Norteño gangs in Redwood City and to demonstrate that they do not limit their violent actions to rival gang members. From the evidence of Norteño culture and conduct, the jury could reasonably infer that appellant viewed the altercation with Buenrostro as a gang-related fight in which appellant and a fellow gang member had both been "disrespected" by Buenrostro on their own turf, and that appellant retaliated by stabbing Buenrostro in order to save face and to serve the gang's principles of intimidation, retaliation, and respect. The probative value of the gang evidence was substantial on the issue of motive, well in excess of "minimal."

Appellant also contends that the challenged gang evidence was "substantially more prejudicial than probative." We disagree that the evidence was unduly prejudicial. The statements to Arellano were directly and highly probative of appellant's mental state; the high probative value substantially outweighed any potential prejudice. Both the garage graffiti and appellant's writings at Hillcrest had only minimal potential for prejudice, given that they merely stated Norteño slogans and were not threatening or disturbing. The prior fight at Hillcrest was not particularly prejudicial. The expert

testified that two juveniles got into a fight and appellant yelled gang slogans during an incident that was far less inflammatory than the current offense. The jury was already aware from appellant's taped statement that he had previously been in custody and had a warrant out for his arrest. Finally, the expert's testimony regarding Armando Martinez was brief and not overly prejudicial to appellant because it was clear that appellant was not involved in that incident.

In arguing that the evidence was cumulative, appellant relies on *People v. Avitia* (2005) 127 Cal.App.4th 185, 193 (*Avitia*). In *Avitia*, the appellate court reversed the defendant's conviction for grossly negligent discharge of a firearm because the trial court erred in admitting evidence of gang graffiti in the defendant's bedroom. The charged offenses in *Avitia* were not gang-related, and there was no evidentiary link between the gang graffiti and ownership of the guns found in the bedroom. The appellate court further observed that, even if the gang evidence was somehow relevant to proving that the defendant owned the guns, that issue was undisputed, rendering the gang graffiti cumulative at best: (*Avitia, supra*, 127 Cal.App.4th at pp. 193-194.)

Appellant argues that the challenged evidence here was cumulative, as in *Avitia*, because he admitted he was an active Norteño gang member and conceded that evidence of his gang-related statements to Buenrostro and the prosecution expert's testimony explaining disrespect and retaliation in gang culture were admissible. Without the challenged evidence, according to appellant, the prosecution still had ample support for its theory that appellant deliberately and intentionally killed Buenrostro in retaliation for perceived disrespect, rather than in the heat of passion. We disagree. The prosecution is "not obligated to present its case in the sanitized fashion suggested by the defense" when the probative value of the evidence "clearly extended beyond the scope of the defense's offers to stipulate." (*People v. Garceau* (1993) 6 Cal.4th 140, 182, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

Moreover, appellant's reliance on *Avitia* is misplaced. There, the gang evidence was irrelevant to any disputed issue. Here, the challenged gang evidence was relevant to motive and intent, which were central issues at trial. The evidence tended to prove that

Redwood City Norteños did not restrict their violent activities to rival gangs, that appellant was an active Norteño and had been for some time, and that he behaved accordingly in situations involving conflict. It also established that the altercations that evening occurred on Vera Street turf. Despite appellant's announcing his gang status and issuing threats during the fight at the 7-Eleven, the opposing group called out appellant's group at Aguilar's apartment, which the jury could reasonably have interpreted as heightening the disrespect appellant perceived from the situation.

Appellant also contends the gang evidence "served only to show appellant's criminal disposition." Again, we disagree. "Expert testimony repeatedly has been offered to show the 'motivation for a particular crime, generally retaliation or intimidation' and 'whether and how a crime was committed to benefit or promote a gang.'" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.) The evidence was relevant to establishing appellant's motive and intent in stabbing Buenrostro, both disputed issues at trial, as we have discussed. In addition, the court's limiting instructions directed the jury that it could consider the evidence for intent and motive only, and that it should not conclude from the evidence that appellant had a bad character or was predisposed to commit crime. We assume the jury followed the court's instructions. (*United States v. Olano* (1993) 507 U.S. 725, 740 [" '[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.' "].) Nothing in the record suggests that the jury here did otherwise.

In sum, the gang-related evidence had substantial probative value on the issues of motive and intent which was not outweighed by its prejudicial effect, and thus there was no abuse of discretion under Evidence Code section 352.

Finally, even if the court abused its discretion in admitting any or all of the challenged evidence, any error was harmless.

Appellant contends that the erroneous admission of the challenged gang evidence rendered his trial fundamentally unfair in violation of due process. He thus contends that

reversal is required because the error was not harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [standard of review for constitutional error]. We find no due process violation.

“[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair.” (*People v. Partida* (2005) 37 Cal.4th 428, 439.) “To prove a deprivation of federal due process rights, [a defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. ‘Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must “be of such quality as necessarily prevents a fair trial.” [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.’ (*Jammal v. Van de Kamp* [(9th Cir. 1981)] 926 F.2d [918,] 920.) ‘The dispositive issue is . . . whether the trial court committed an error which rendered the trial “so ‘arbitrary and fundamentally unfair’ that it violated federal due process.” [Citations.]’ [Citation.]” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.)

The challenged gang evidence in this case was relevant to appellant’s motive and intent, as we have discussed, and thus, even if it should have been excluded as unduly prejudicial, the error did not render the trial “ “so ‘arbitrarily and fundamentally unfair’ that it violated federal due process.” [Citations.]” (*Albarran, supra*, 149 Cal.App.4th at p. 229.) There was no dispute at trial that appellant stabbed Buenrostro; the issue was his intent in doing so, that is, whether he had the requisite mental state for murder or heat of passion voluntary manslaughter.

Unlike in *Albarran*, where highly inflammatory gang evidence had no bearing on the issues of motive and intent and there was a “real danger” that the jury would improperly infer that the defendant should be punished for a criminal disposition, here the gang evidence had bearing on key issues in the case, was not inflammatory when compared with the charged offense, and posed little danger that the jury would rely on it to improperly infer that appellant was a danger to society and, regardless of his intent in

stabbing Buenrostro, should be punished for murder. The gang evidence was not “ ‘ “of such quality as necessarily prevents a fair trial.” ’ [Citation.]” (*Albarran, supra*, 149 Cal.App.4th at p. 229.)

“Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]” (*People v. Partida, supra*, 37 Cal.4th at p. 439.) We find no such reasonable probability. As discussed above, the prejudicial impact of the challenged gang evidence was minimal in light of the properly admitted gang evidence. By contrast, the evidence of appellant’s guilt of murder was strong: he made gang statements during the lethal altercation with the victim, and he brought a knife to a fist fight. In addition, appellant’s statement to police contained inconsistent statements in which he insisted he was not in a fight, then admitted it, stated he had no knife and stabbed no one, then admitted to stabbing the victim, finally adopting the suggestion that it was self-defense. We find no reasonable probability that, absent the admission of the challenged gang evidence, appellant would have obtained a more favorable verdict. Thus, any error in admitting the evidence was harmless.

C. *Prosecutorial Misconduct.*

Next, appellant contends the prosecutor committed misconduct by misstating the law regarding the heat of passion theory of voluntary manslaughter during closing argument. He argues that the misconduct was prejudicial and violated appellant’s constitutional rights to a jury trial, to present a defense, and to due process.

The problem with this argument, as appellant acknowledges, is that defense counsel did not object to the portions of the prosecutor’s closing argument that appellant now claims were misconduct. Ordinarily, an objection is necessary to preserve a claim of prosecutorial misconduct for appeal; a defendant who fails to object and seek an admonition “ ‘is deemed to have waived any error unless the harm caused could not have been corrected by appropriate instructions.’ ” (*People v. Coddington* (2000) 23 Cal.4th 529, 595, superseded by statute on other grounds as stated in *Verdin v. Superior Court*

(2008) 43 Cal.4th 1096, 1107, fn. 4; overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Appellant's reliance on the futility exception set forth in *People v. Hill* (1998) 17 Cal.4th 800, 821 (*Hill*), is unavailing. In *Hill*, the Supreme Court excused defense counsel's failure to object in the face of "a constant barrage" of "unethical conduct" by the prosecutor in front of the jury. "Her continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous that [defense counsel] was thrust upon the horns of a dilemma. On the one hand, he could continually object to [the prosecutor's] misconduct and risk repeatedly provoking the trial court's wrath, which took the form of comments before the jury suggesting [defense counsel] was an obstructionist, delaying the trial with 'meritless' objections. These comments from the bench ran an obvious risk of prejudicing the jury towards his client. On the other hand, [defense counsel] could decline to object, thereby forcing defendant to suffer the prejudice caused by [the prosecutor's] constant misconduct." Here, by contrast, there was no "constant barrage" of "unethical conduct" by the prosecutor, and no support for appellant's suggestion that an objection would have been futile. Not only were there no prior objections in this area which the court had overruled to demonstrate that further objections would be futile, but also the trial court sustained the one objection defense counsel did make during closing argument, which was raised on a different issue. This case is distinctly unlike the extreme situation presented in *Hill*.

Appellant's failure to object or request an admonition deprived the trial court of an opportunity "to consider the claim of misconduct and to remedy its effect" (*People v. Noguera* (1992) 4 Cal.4th 599, 638; see also *People v. Coddington, supra*, 23 Cal.4th at p. 595 [" 'Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations] defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.' "]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1136-1137 ["Because the defense failed to make a timely objection and to request an admonition when such an objection and admonishment would have cured any potential harm, the

claims of prosecutorial misconduct have been waived for purposes of appeal.”.)
Appellant’s prosecutorial misconduct claim has been forfeited.

D. *Ineffective Assistance of Counsel.*

Finally, appellant argues that, if we find that his claim of prosecutorial misconduct was forfeited, defense counsel was ineffective for failing to object to the prosecutor’s misstatements regarding the law of voluntary manslaughter. Appellant contends that, in closing arguments, the prosecutor repeatedly encouraged the jury to consider the reasonableness of appellant’s conduct in reacting to provocation, that is, whether a reasonable person would have reacted with lethal force, rather than whether the provocation was sufficient to cause a reasonable person to react from passion rather than from judgment. This was improper, according to appellant, and reversal is required because there was a reasonable probability of a more favorable verdict absent the prosecutor’s misconduct and defense counsel’s failure to object.

1. *Facts.*

In his opening argument to the jury, the prosecutor addressed heat of passion and provocation:⁸ “You’ve got a very specific instruction on that.^[9] If you find provocation

⁸ Appellant challenges as improper the italicized portions of the following arguments by the prosecutor.

⁹ The court instructed the jury with CALCRIM No. 570 regarding heat of passion voluntary manslaughter: “A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

“Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote

is present, you're going to have to decide what [e]ffect that provocation has and if it was even sufficient. What can provocation do? What [e]ffect does it have on murder? It's basically something that negates the intent for murder. Provocation can reduce a first degree murder to a second degree murder by saying you were so provoked, you were unable to premeditate and deliberate. It can also reduce, if the provocation is great enough, a murder to a manslaughter. If someone was so provoked, it reduces it to a manslaughter. But it's judged very importantly by a reasonable person standard and that's the most important part of this particular instruction. The defendant does not get to set up his own standard of conduct. It's not a standard of whether or not a reasonable Norteño gang member would be provoked in a particular situation; it's not whether or not a 16-year-old or 17-year-old would be provoked in a particular situation; it's whether or not a reasonable person in that situation, knowing all the circumstances, would be provoked; provoked to the point where they couldn't premeditate and deliberate. And you have to decide whether or not that provocation was enough by that reasonable person's standard *and how a reasonable person could react in that scenario.*

“What worst case scenario is he reacting to? If you take the gang member aspect of it out of this by a reasonable person's standard, worst case scenario for him? Marcos Moran has been punched; he falls on the ground at some point. He gets back up, but he

provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

“It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

“If enough time passed between the provocation and the killing for a person of average disposition to ‘cool off’ and regain his clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.

“The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.”

falls down. Is that going to provoke someone to the point of—a reasonable person to the point where they can't think straight? That they can't make a conscious decision *and are going to react with lethal force over that?* Absolutely not.

“What else has the evidence shown potentially? That Mr. Buenrostro grabbed the reasonable person's girlfriend while she was consequently beating somebody else up. All evidence is Anabel Aguilar was definitely getting the better of Jennifer McMenemy; grabbed her by the neck; pulled her off. Is a reasonable person in that situation going to be so provoked that they're not going to be able to think straight? That they're [g]oing to disregard all their faculties and just throw it all out the window and just go rashly and impulsively without any thought pattern whosoever *and respond with lethal force for that?* Absolutely not.” (Emphasis added.)

The prosecutor made his point again on rebuttal: “The issue isn't whether or not he would be provoked; the issue is whether or not a reasonable person would be provoked. *Would a reasonable person in that situation respond with lethal force?* Not the reasonable Norteño, not the reasonable 16-year-old; the reasonable person. *Think about what a proportionate response to someone grabbing your girlfriend by the neck is going to be? Think about what proportionate response to a fist fight is going to be? Is a reasonable person going to then stab someone six times?* No. They're not going to respond. He was not provoked and certainly not provoked to such a legal standard that we reduce a murder to manslaughter. No question.” (Emphasis added.)

The jurors found appellant not guilty of first degree murder but convicted him of second degree murder after deliberating for approximately two and a half hours.

2. *Legal Principles.*

The standard for establishing ineffective assistance of counsel is a well established two-step test: the defendant must establish that counsel's performance was deficient and that the defendant was prejudiced as a result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) Thus, a defendant arguing that counsel was ineffective for failing to object to prosecutorial misconduct must show that counsel's performance, that is, the omission, fell outside the range of an objective standard of reasonableness under prevailing

professional norms. (*People v. Ledesma, supra*, 43 Cal.3d at p. 216; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) As here, when the claim of misconduct is based on counsel’s arguments to the jury, “ ‘the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ ” (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) If the challenged arguments were not erroneous or misconduct, then defense counsel’s failure to object was not unreasonable or outside the range of competent performance. Even if the prosecutor’s arguments were objectionable, the mere failure to object does not establish ineffective assistance. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) The defendant must establish that counsel’s omission involved a critical issue, and that the failure to object could not be explained as a reasonable trial tactic. (*People v. Lanphear* (1980) 26 Cal.3d 814, 828-829, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610,643.) If counsel’s performance does fall outside the range of competent representation, in order to prevail on the claim, the defendant must also establish prejudice. (*People v. Ledesma, supra*, 43 Cal.3d at p. 217.) “ ‘It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding The defendant must show 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 pp. 217-218, quoting *Strickland v. Washington, supra*, 466 U.S. at pp. 693-694.)

3. *Analysis.*

We turn our attention now to whether defense counsel erred in failing to object to certain arguments by the prosecutor. As we have noted, at trial, appellant did not deny killing Buenrostro. Rather, the issue presented for the jury was the type and degree of the homicide. The prosecutor argued that appellant committed either first degree or second degree murder. Appellant argued that, because of provocation, he was guilty only of voluntary manslaughter.

Murder is the unlawful killing of a human being with malice aforethought. (§ 187.) Voluntary manslaughter is the unlawful killing of a human being, committed either with the intent to kill or with conscious disregard for life, but without malice. (§ 192; *People v. Moye* (2009) 47 Cal.4th 537 549 (*Moye*); *People v. Breverman* (1998) 19 Cal.4th 142, 153.) As relevant in this case, malice may be negated by provocation resulting in a “sudden quarrel or heat of passion.” (§ 192, subd. (a).)

The provocation resulting in heat of passion has both a subjective requirement, that the defendant must actually have been provoked, and an objective component, that the provocation must be such as would induce a reasonable person of average disposition and self-control to act out of strong emotion or passion rather than from judgment or rational thought. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252; *People v. Lee* (1999) 20 Cal.4th 47, 60; see 1 Witkin & Epstein, *Cal.Criminal Law* (3d ed. 2000) Crimes Against the Person, § 217, pp. 828-829.)

Appellant contends that the prosecutor improperly argued to the jury that, in determining whether the provocation was sufficient to reduce murder to voluntary manslaughter, they must decide whether a reasonable person would react with lethal force. This focus on conduct, i.e., whether the provocation would induce a reasonable person to kill, was improper, he argues. Rather, the correct inquiry is whether the provocation was sufficient to cause a reasonable person to react from passion and not from judgment. (See *Moye, supra*, 47 Cal.4th at pp. 549-550; *People v. Najera* (2006) 138 Cal.App.4th 212, 223 (*Najera*).)

In *Najera*, the court found arguments by the prosecutor such as, “ ‘[w]ould a reasonable person do what the defendant did?’ ” and “ ‘[w]ould a reasonable person be so aroused as to kill somebody?’ ” were incorrect statements of the law. (*Najera, supra*, 138 Cal.App.4th at p. 223, italics omitted.) The court explained: “An unlawful homicide is upon ‘a sudden quarrel or heat of passion’ if the killer’s reason was obscured by a ‘ ‘provocation’ ’ sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. (*People v. Breverman*[, *supra*,] 19 Cal.4th [at p.] 163.) The focus is on the provocation—the surrounding circumstances—and whether it was

sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion.” (*Najera, supra*, 138 Cal.App.4th at p. 223.)

Respondent contends that the degree of passion required to be engendered in a reasonable person is lethal passion, not mere rashness, and cites a number of cases containing language referring to lethal passion or rage. (See, e.g., *People v. Lee, supra*, 20 Cal.4th at p. 59 [no evidence victim’s conduct “would cause an average person to react with deadly passion”]; *People v. Pride* (1992) 3 Cal.4th 195, 250 [evidence insufficient “to arouse feelings of homicidal rage or passion in an ordinarily reasonable person”]; *People v. Avila* (2009) 46 Cal.4th 680, 706 [insufficient evidence of provocation that would result in a reasonable person becoming “homicidally enraged”]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1307 [referring to “ ‘homicidal rage or passion’ ”]; *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1556 [“homicidal rage”]; *People v. Superior Court (Henderson)* (1986) 178 Cal.App.3d 516, 524, fn. 4 [concept of “heat of passion” can mitigate murder to manslaughter only where “the provocation would trigger a homicidal reaction in the mind of an ordinarily reasonable person under the given facts and circumstances”].)

To the extent that these cases describe a defendant’s emotional state in reacting to the provocation, they appear not inconsistent with appellant’s position. However, respondent also relies on cases that refer to whether a reasonable person would have acted as the defendant did in the same situation. (See, e.g., *Moye, supra*, 47 Cal.4th at p. 551 [victim’s act was insufficient provocation to cause “an ordinarily reasonable person to act out of a heat of passion and kill Mark in response”];¹⁰ *People v. Fenenbock* (1996)

¹⁰ Appellant points out that, in *Moye*, the effect of provocation on a reasonable person was not at issue; the court cited to *Najera* with apparent approval (47 Cal.4th at p. 551; both the dissenting justice and the majority elsewhere in the opinion described the requirement as provocation that would cause a reasonable person to act rashly, from passion rather than from judgment (47 Cal.4th at p. 550, 562, dis. opn. of Kennard, J.); and characterizes the language seized upon by respondent as a “casual misstatement . . . [that] did not effect a substantial change in the modern rule.”

46 Cal.App.4th 1688, 1705 [no evidence of provocation that “would produce a lethal response in a reasonable person”].) The focus on the conduct of a reasonable person invites the jury to consider the reasonableness of the defendant’s conduct. This is an improper consideration because heat of passion does not excuse as reasonable an unlawful killing; rather, “[t]he law finds mitigation in the motivation for the act,” and “[t]he killing is punished [citation], not excused or justified [citations].” (*People v. Coad* (1986) 181 Cal.App.3d 1094, 1107, 1111.)

It bears mention at this point that CALCRIM No. 570, the voluntary manslaughter/heat of passion instruction, used to contain language that contributed to confusion regarding provocation on this exact point. The former version of the instruction stated, in relevant part: “In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.” Notably, this language was modified in December 2008, following a recommendation from the Advisory Committee on Criminal Jury Instructions to the Judicial Council “because of concern that the original draft [of CALCRIM No. 570] could raise a doubt in a juror’s mind about whether the state of mind required for voluntary manslaughter was that an average person similarly situated would have been provoked to kill, or whether provocation resulting in passion rather than judgment was sufficient.” The revised version clarified that the state of mind required was “the latter.” Revised CALCRIM No. 570 states, in pertinent part: “In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.” The trial court in this case instructed the jury with the revised version of this instruction, and there is no claim of instructional ambiguity.¹¹

¹¹ The California Supreme Court recently granted review in *People v. Beltran* (Mar. 30, 2011, A124392) [nonpub. opn.] review granted June 15, 2011 (S192644), a decision by our colleagues in Division Four, to address issues related to provocation and heat of passion, including whether former version of CALCRIM No. 570 was ambiguous

From our review of the prosecutor’s opening and closing arguments, it appears that correct statements of the law of provocation/heat of passion were interspersed with incorrect statements focusing on whether a reasonable person would have acted as appellant did under the circumstances, i.e., the reasonableness of his conduct. We conclude that the latter statements were improper. However, because (1) this is arguably an open issue with *Beltran* pending and (2) it is unnecessary to the resolution of this appeal, we will make no determination as to whether defense counsel’s failure to object amounted to deficient performance.¹²

Appellant’s claim of ineffective assistance fails because appellant cannot establish prejudice, i.e., a reasonable probability that, but for counsel’s failure to object to the prosecutor’s misstatements, appellant would have obtained a more favorable verdict. (See *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1008, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [a reviewing court may reject a claim of ineffective assistance on the basis that the appellant fails to establish prejudice “without determining whether counsel’s performance was deficient”].)

First, the court’s instructions to the jury rendered harmless any misconduct or misstatements by the prosecutor. As discussed above, the court instructed the jury with the revised instruction on involuntary manslaughter in conformity with appellant’s view on the law of provocation. CALCRIM No. 570 sets forth, in clear and unambiguous terms, the objective requirement that the provocation must be sufficient to arouse the passions of a reasonable person, and contains no reference to how a reasonable person would react under the same circumstances. “[W]e presume that the jury relied on the instructions, not the arguments, in convicting [appellant].” (*People v. Morales* (2001) 25 Cal.4th 34, 47; see also *People v. Yeoman, supra*, 31 Cal.4th at p. 139 [“[W]e and others

and whether the prosecutor misstated the law during argument as requiring provocation that would cause a reasonable person to kill.

¹² For the same reasons, we do not address respondent’s contention that appellant’s ineffective assistance claim lacks merit because a decision whether to object to prosecutorial misconduct is inherently tactical and rarely will the failure to object constitute deficient representation.

have described the presumption that jurors understand and follow instructions as “[t]he crucial assumption underlying our constitutional system of trial by jury.” [Citations.]”.)

Furthermore, the court instructed the jury that “[y]ou must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions. Pay careful attention to all of the instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.” The court also instructed that “[n]othing that the attorneys say is evidence;” and “[d]o not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.” The jurors had a copy of the instructions during deliberations and, unlike the situation in *Najera, supra*, 138 Cal.App.4th at pages 223-224, where the jurors were confused about provocation, here there was no indication of any confusion on the part of the jury. “ ‘Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.’ [Citation.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 390; see also *People v. Boyette* (2002) 29 Cal.4th 381, 436 [presuming that the jury followed the court’s instructions on the law, including the instruction that, “to the extent the law as given by the trial court conflicted with the description of the law as given by the attorneys, the jury was to follow the court’s instructions”].)

Second, appellant cannot demonstrate a reasonable probability of a better verdict had counsel objected to the prosecutor’s arguments because the second degree murder verdict is well supported by the law and the evidence, while support for a voluntary manslaughter verdict based on heat of passion is weak. Put another way, we think the evidence in this case was legally insufficient to establish that there was cause for a reasonable person to “become so inflamed as to lose reason and judgment.” (*People v. Manriquez* (2005) 37 Cal.4th 547, 586.)

On the night in question, after starting the second fight at the 7-Eleven to avenge what he thought was his girlfriend’s being “jumped,” appellant and his group were back

at Aguilar's apartment; the fights were over. Then McMenemy, standing outside with her group, called them out. Appellant armed himself with a large kitchen knife to continue what had been a fist fight. He was the only one on either side with a weapon. While Aguilar and McMenemy were fighting, appellant asked Buenrostro, the only male on the opposing side, "Who is you?" and identified himself as Norteño. Buenrostro indicated that he was "cool" with appellant's gang, but appellant responded, "I don't give a fuck," signaling hostility and that he viewed Buenrostro as an adversary. After more conversation with appellant, Buenrostro physically restrained Moran from intervening in the women's fight and threw him to the ground. When appellant tried to help Moran, Buenrostro threw him to the ground, too. Buenrostro grabbed Aguilar by the neck to pull her off McMenemy; appellant and Moran then began fighting Buenrostro.

No one saw appellant and Buenrostro move down the street to the corner, about 100 feet away from everyone else, but from wounds on Buenrostro's back and other injuries that could have been defensive wounds, the jury could reasonably have inferred that appellant forced him down the street with the knife. It was not until Buenrostro and appellant were at the street corner that appellant stabbed Buenrostro. Appellant stabbed him six times, using enough force that the knife was bent. Three of the wounds were severe. One stab wound was inflicted by plunging the knife into Buenrostro's side almost to its hilt in an upward motion, piercing his heart. Buenrostro bled to death. Upon returning to the apartment, appellant told Aguilar he committed attempted murder and would end up going to jail for life.

When interviewed by the police the day after the incident, appellant repeatedly denied being in a fight the night before, denied going to the 7-Eleven, denied having a knife, and denied stabbing anyone. He only admitted having been in a fight at the 7-Eleven when the police told him he was seen on the store video. He admitted having a knife only when the police told him that Aguilar said she took it away from him back at the apartment. After one of the police officers asked appellant about self defense, appellant said, "I guess if you say I stabbed the dude it was because self . . . self defense."

Appellant also said that, if he stabbed Buenrostro, “it was probably by accident. Self defense or something.”

The court did not instruct on self defense. The jury asked no questions during deliberations and returned a second degree murder verdict in approximately two and a half hours.

IV. DISPOSITION

The judgment is affirmed.

Haerle, J.

We concur:

Kline, P. J.

Richman, J.