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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHEYNA DOUPREA,

Defendant and Appellant.

A131031

**(Sonoma County
Super. Ct. No. SCR 551716)**

Sheyna Douprea appeals from a judgment of conviction entered after a jury found her guilty of the first degree murder of her boyfriend. She contends: (1) the trial court erred by excluding expert testimony that she is a battered woman and lapsed into a dissociative state on the day of the murder; (2) the court erred by instructing the jury in a manner that restricted its use of intimate partner violence evidence; (3) the prosecutor committed misconduct by using evidence of intimate partner violence for an improper purpose; (4) the court should not have admitted evidence of her prior acts of violence; (5) her trial attorney did not provide effective assistance of counsel because she failed to object to evidence that had been excluded before trial; (6) Evidence Code section 1109 and CALCRIM No. 852 unconstitutionally permit the jury to convict upon proof that is less than beyond a reasonable doubt; and (7) the court erred in not instructing the jury

adequately on the provocation needed to reduce murder from first to second degree under an unreasonable heat of passion theory. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Sheyna Douprea, then 23 years old, stabbed her intoxicated 46-year-old boyfriend to death after he refused to go with her to a Christmas party in December 2008. The essential question at trial was Douprea's state of mind at the time of the killing.

A. *Pretrial and Evidentiary Rulings*

An information charged Douprea with the murder of her boyfriend, Daniel Mooney, and alleged that she perpetrated the murder willfully, deliberately, and with premeditation. (Pen. Code, § 187.) The information further alleged that Douprea personally used a deadly and dangerous weapon (a knife), such that the offense was a serious felony. (Pen. Code, §§ 12022, subd. (b)(1); 1192.7, subd. (c)(23).) In addition, it was alleged that Douprea personally and intentionally inflicted great bodily injury. (Pen. Code, §§ 1203.075, 12022.7, subd. (a)).

In July 2010, the prosecution filed motions in limine seeking admission of numerous prior acts of violence by Douprea. (Evid. Code, §§ 1101, subd. (b); 1109.) Defense counsel opposed the motions in part. The trial court admitted all but two of the prior incidents, a ruling that Douprea challenges in this appeal, as discussed *post*.

Also in July 2010, defense counsel agreed with the prosecutor's motion to preclude a defense expert witness from opining that Douprea suffers from Battered Women's Syndrome (or, as it is also known, "Intimate Partner Violence"). (See Evid. Code., § 1107.) The court later precluded the expert's opinion that Douprea entered into a dissociative state on the date of the crime. As addressed *post*, Douprea challenges these matters as well.

B. *Prosecution Case*

1. *Relationship Between Douprea and Mooney*

Douprea and Mooney started dating in late 2007 or early 2008. At that time, Mooney lived in an apartment in Healdsburg with Matthew Schamens, whom he had met

at an alcohol rehabilitation center. Douprea lived with her two-year-old daughter in Windsor, in a mobile home purchased by her mother, Gena.¹

In August 2008, about four months before the killing, Douprea and Mooney had a physical altercation witnessed by Douprea's neighbor, Jennifer Cardona. Cardona testified that she saw a female quickly leaving Douprea's home around midnight, trying to get away from a male and yelling at him to "leave us alone." The man pulled the woman by the hair toward the house and then toward a car; she pushed him to get away; and then he hit her and she fell to the ground. Cardona called 911, and the police soon arrived.

Questioned by the police, Mooney denied hitting Douprea or any physical violence, while Douprea claimed they had a fight because she wanted him to spend the night. Photographs admitted at trial showed an injury to Douprea's hip and a small scratch on her face. After Mooney was taken away, however, Douprea asked the police how she could bail him out. She did not want him arrested and did not want a restraining order.

At some point, Mooney obtained a restraining order against Douprea. Sometime thereafter, Schamens observed an argument between them at Mooney's apartment: Douprea struck at Mooney's face, removed Mooney's glasses and threw them on the floor, and hit Mooney with a towel rack; Mooney had scratches down his neck and "claw" marks on his chest.

In November 2008, Mooney started drinking again. Schamens saw Mooney intoxicated twice, but on neither occasion was he aggressive or violent. Schamens vacated the apartment in late November, and Douprea accepted Mooney's invitation to move in.

¹ Because Gena Douprea has the same last name as appellant, we refer to Gena by her first name for clarity, without disrespect.

Around 11:00 p.m. on the night before the December 14 killing, Victoria Steel, who lived in the apartment below Mooney's, heard noises upstairs for 15-20 minutes. The noises sounded like something heavy dropping on the floor.²

2. *The Hours Before the Killing*

On the morning of December 14, 2008, Douprea attended church and dropped off her daughter at daycare. At 11:00 a.m., she picked up her daughter and said she was going to a Christmas party. She did not appear distraught.

Around 11:15 or 11:30 a.m., Douprea was observed driving in the direction of Gena's home in Windsor. Gena confirmed that Douprea dropped off her daughter at her house around 11:30 a.m. and was in a pleasant mood.

According to Douprea's cell phone records, Douprea called Nicole Rowan, her sponsor at Alcoholics Anonymous, at 11:31 a.m. and spoke for nine minutes. Rowan testified that Douprea sounded irritated; she had planned to go to a Christmas party with Mooney and he was already drinking at 11:00. The last thing Douprea said was, "I'm going to go and get him cleaned up, see if I can get him cleaned up."

At 11:54 a.m., Douprea called Gena and spoke with her for eight minutes. According to Gena, Douprea said she was locked in the bathroom and Mooney had beaten her, threatened to kill her, and tried to strangle her. Gena heard screaming and pounding on the door, and Douprea sounded terrified and frantic and was "sort of" crying. Douprea said she did not know what to do; she could not leave the apartment, and she did not want to call 911 because she was afraid Mooney would go to jail. After about six minutes, the pounding and screaming subsided, Douprea seemed calmer, and she said she thought everything was going to be alright. Douprea convinced Gena not to call 911.

² As described *post*, Douprea told the police that she had an argument with Mooney the night before he died; initially, she claimed there was no violence; later she asserted that he had swung at her, choked her, threatened to kill her, and twisted her arm behind her back.

According to Douprea's cell phone records, Douprea spoke next to her friend Fulton, from 12:04 to 12:09 p.m. Fulton testified that he had invited Douprea and Mooney to dinner and called Douprea to let her know she did not have to pick up one of the other guests. Although she seemed calm, Douprea told him that Mooney had been drinking and they got into an altercation. At Fulton's request, Douprea put Mooney on the phone; obviously intoxicated, Mooney's speech was so slurred that Fulton could hardly understand him. After Mooney got off the phone, Fulton spoke to Douprea while Mooney was "laughing maniacally" in the background. Douprea said, "Get off of me, Daniel" at least once, but still seemed calm. According to Fulton, Mooney's laugh sounded evil and out of control; he testified that he had never heard Mooney laugh that way before. Douprea said she was scared (or sounded scared) when she talked about Mooney being physical with her, and she asked Fulton if she should call the police. Fulton suggested that Douprea leave the apartment and talk to Mooney when he was sober.

Janet Lopez and Tamara Nolan, who lived in the apartment next to Mooney's, testified that they were returning to their apartment around 12:15 or 12:30 p.m. on December 14th when they met Douprea going up the stairs.³ Douprea was talking on her cell phone, saying "I will get him up or get him out." She did not appear angry.

At some point between 12:09 and 12:32, Douprea killed Mooney.

3. Douprea's Post-Killing Call to Gena; Gena's Call to 911

At 12:33 p.m., Gena received a call from Douprea. Crying and very upset, Douprea said Mooney had been strangling her and tried to kill her, and she stabbed him. Douprea claimed she had tried to call 911 but could not get through. Gena said she would call 911 and hung up.

³ Their time estimate may not be correct, since Douprea's cell phone records indicate that Douprea was on the phone with Fulton from 12:04 to 12:09 p.m. and made calls to Gena at 12:09 p.m., to 911 (apparently without a connection) at 12:29 p.m., and to Gena at 12:33 p.m.

Gena testified that she called 911 when she got off the phone with Douprea and gave the dispatcher Douprea's contact information. She also told the 911 operator that there was probably a knife in the house and that Douprea "[said] he's dead." Police dispatcher Linda Haviland testified that Gena called 911 at 12:32 p.m.⁴

4. *Police Dispatch and Douprea's False Statement to the Dispatcher*

The Healdsburg Police were dispatched to Mooney's apartment at 12:33 p.m., and officers arrived at 12:34. Before they entered, Haviland telephoned Douprea inside the apartment. In a tape of the conversation played for the jury, Douprea told Haviland, "I came in from church and my boyfriend's covered in blood." (At trial, defense counsel conceded that Douprea's statement to the dispatcher was untrue.)

5. *The Crime Scene*

At 12:39 p.m., the police entered Mooney's apartment. Mooney was on his back on the floor of his bedroom, unresponsive, attempting to breathe, and bleeding heavily. A towel saturated with blood was against the left side of his neck. A lot of blood was on the floor around him, particularly close to his head. Emergency medical technicians were unable to revive him; he was transported to the hospital and pronounced dead on arrival.

Douprea was handcuffed and remained with police inside the apartment for 15 to 20 minutes. She had blood on her lip and in her left nostril. She was concerned about Mooney, seemed to be crying, and was breathing heavily or rapidly, but she had no difficulty speaking and did not indicate she was in pain.

A police officer drove Douprea from Mooney's apartment to the Healdsburg police station. Douprea had no difficulty breathing or speaking, she did not cough or gasp, and nothing about her appearance suggested she needed medical attention.

6. *Mooney's Condition*

Mooney had a .35 percent blood alcohol level and a therapeutic level of Benadryl in his blood, which in combination would intoxicate a person much more than either

⁴ It is unclear why records indicate that Douprea's call to Gena was at 12:33 p.m., while Gena's call to 911, supposedly following Douprea's call to Gena, was at 12:32 p.m.

substance would separately. He was 70 inches tall and “relatively slight” and “slighter framed,” weighing 150 pounds.

An autopsy determined that Mooney died from four stab wounds on the left side of his neck. Three of the wounds had the same angle, suggesting they occurred in the same session, while Douprea and Mooney were in the same relative positions. The pathologist could not determine, however, the position of Mooney or Douprea at the time of the injuries. Two of the wounds were about one and a half inches deep, reflected similar paths through the neck and external jugular vein, damaged the internal jugular vein and carotid artery, and would have been fatal individually. A third wound was about one and a quarter inches deep, just below the left jaw bone. The fourth wound was toward the back of the left side of Mooney’s neck and about a half inch deep. Mooney had superficial wounds around his left nostril, on his left forearm, and on his right palm, which could have been caused by a fingernail or a knife. He had abrasions on the left side of his face and the right side of his neck, along with apparent scrapes from fingernails on his arm and bruises on his nose and above his right eyebrow.

7. Physical Evidence

The knife that Douprea used to kill Mooney was a folding pocketknife with a two-inch blade. Police found it in a diaper pail on the patio, under soiled diapers.

The room with the most blood was a bedroom in which Mooney’s wallet was found. Blood was on the bed and saturated the carpet. There was also blood leading to the bathroom and inside the bathroom. Blood in the shower suggested that someone had taken a shower (and Douprea’s hair was wet when the police arrived).

In the kitchen, blood was on the counter, in the sink, on the refrigerator, and next to the sliding glass door. In the trash can was broken glass wrapped in a wet tissue, a shoe with apparent blood stains, and paper towels soaked in blood.

8. Douprea’s Statement to Police

Douprea was interviewed at the police station by Healdsburg Police Detective Shooter for about three hours, starting around 3:00 p.m. The interview was recorded.

Other than a headache, Douprea made no complaints of pain. She had a one-inch red mark above her brow and said she had suffered a nose bleed.

Douprea offered police several inconsistent explanations for Mooney's death. She began by saying that she just found Mooney on his bed, bleeding, when she came home. She tried to help him to the bathroom so she could put a towel on his neck, but he slumped to the floor. She tried to call 911 but could not get through, so she called Gena and said Mooney might be dying.

Douprea next told police that Mooney had been getting drunk lately and was prone to fighting when drunk. Douprea described previous altercations between them, including one the night before.⁵ This time, Douprea claimed, Mooney attacked her by pulling her into the closet, beating her, twisting her arm, and asking her if she wanted to die. She fought back, and he "started bleeding more" from what "might have been some kind of a cut."

Detective Shooter told Douprea that her story was not "lining up." Douprea then claimed that Mooney was choking her, so she used a pocket knife to try to get him off of her and accidentally cut his neck. Eventually, Douprea provided additional details, which we piece together as follows.

On the morning of the killing, Douprea went to church with her daughter, dropped her off afterward at Gena's home in Windsor, and returned to Mooney's apartment so she and Mooney could attend a Christmas party. But when she went into Mooney's

⁵ Douprea told the police that Mooney had assaulted her physically two or three times before the day she killed him. The first time was the August 2008 incident at her home; she claimed that Mooney choked her and said, "I'm gonna kill you." Douprea also stated that she would bite Mooney to get him off of her, and she had a recorded voice message from Mooney saying he would rearrange her face if she ever bit him again. As to the night before the killing, Douprea first told the police they had a non-violent argument in which he did not understand why she wanted to be with him since he was a worthless drunk. Later she claimed that he became angry when she asked him how much he had to drink, and he swung at her and choked her. Holding her throat, he pressed her up against the refrigerator, told her not to get into his business, and said he was going to kill her. Later that night, he twisted her arm behind her back and said she was worthless and drove him to drink.

bedroom, he rolled away from her and said they were not going. She replied that the party was very important to her, but Mooney repeated they were not going. “[V]ery hurt,” Douprea pulled back Mooney’s blanket and said, “Come on, you gotta get ready, let’s go.”

Mooney became very angry and followed her into the kitchen. They punched each other in the nose, and they each had bloody noses. They gave each other a black eye. He banged her head on the floor, twisted her arms, and threatened to break them.

Douprea ran into the bathroom and called Fulton and Gena, telling them she was scared. She did not call the police or ask anyone to do so because Mooney was on parole and would get into trouble. She loved him and knew that “that’s not the sober him.”

Douprea next went into her bedroom. After about a minute and a half, Mooney opened the door, yelled at her, and insulted her. When he left, she thought about what to do. She felt unsafe because the door to her room did not lock, but she felt unable to leave the apartment because her experience was that he would become more angry and something worse would happen.⁶

So Douprea got her knife and put it in her pocket. After about 10 minutes in her bedroom, she went to the bathroom for a few minutes until she said to herself, “Okay, I’m calmed down, I’m gonna go talk to him.”

Douprea went to Mooney’s bedroom to calm him down, as she was usually able to do. She brought her knife along to protect herself and to scare him, because she thought there could be a fight.

Entering Mooney’s room, Douprea tried to reassure Mooney, saying she did not want to fight, she loved him, and everything would be okay. She went to hug him, but Mooney told Douprea she was a worthless whore, pushed her to the floor, and tackled her. On top of her, he twisted her arms and banged her head in the closet; she punched

⁶ When Detective Shooter asked Douprea why she stayed in the apartment to confront a belligerent and violent man, she said she could usually calm Mooney down, she loved him, and she did not want to get him in trouble.

him in the nose again; and he moved his hands to her throat and said he was going to kill her.

Although the knife “was a threat” and she had not originally intended to stab Mooney, that changed when Mooney choked her. Frightened, she pulled out her knife to scare him. But Mooney just laughed and said she could not do anything.

Douprea stabbed Mooney lightly in the side of the neck with a puncturing motion, thinking that “a little poke” would scare him and get him to understand this was serious, without severely hurting him. The knife went into the side of Mooney’s neck and she saw a little blood, but it did not phase him.

Mooney taunted Douprea for another 30 seconds and said he was going to kill her. Believing him, and feeling dizzy and unable to breathe, Douprea stabbed Mooney again. She thought that stabbing him the second time would make him get off her, without seriously hurting him. But “there might have been some aspect of it where I was like I don’t ever want this to happen again”; she did not want Mooney to assault her anymore.

Mooney got up and fell backwards onto his bed. She tried to pull him to the bathroom to get a towel, but he fell down. She retrieved a towel, hoping to stop the bleeding with pressure, and held him for a few minutes. She called 911 but no one answered, so she called her mother, who called the police. She told her mother she did not intend for this to happen and was scared Mooney was going to die.

Douprea put the knife in the diaper pail because she was scared. Then she showered for about two minutes because she was covered in Mooney’s blood; she often took a shower to comfort herself when scared, hurt, or depressed. When she got out of the shower, she put on different jeans (but the same shirt), held Mooney again, and called the police about three more times.

After asking what the process would be if she were charged with murder, Douprea told police, “I think [a jury] would probably be more understanding due to the fact that I was protecting myself.”

9. *Douprea's Condition at the Hospital*

Douprea was brought to the hospital at 7:59 p.m. Dr. Richard Reisman, an emergency room physician, examined Douprea for perhaps 10 minutes to see if she was able to go to jail. According to Dr. Reisman, Douprea was alert, her blood pressure was normal, and her pulse and breathing were a little fast. She complained of a headache and soreness in the back of her head and neck, explaining that she had been choked and thrown to the ground, hitting the back of her head several times. She also stated that she had been hit in the face with a fist and suffered a nose bleed.

Dr. Reisman found the back of Douprea's head tender but not swollen. A small reddened area next to the left nostril did not have much swelling; there was a little blood at the left nostril but no active bleeding. There was dried blood on both sides of the upper and lower lips. A little reddened area on the right side of the forehead had some swelling, but there was no tenderness or deformation in the face.

10. *Douprea's Prior Violence Against Other Men*

Douprea's former husband, Robert Melia, testified that his relationship with Douprea began in 2005. During the two or three months they initially lived together, Douprea had angry outbursts. In the first incident, Douprea threw a box at him, shoved him, and scratched him when he accused her of lying and cheating. The police were called, but Melia declined to have her arrested. Later in Calistoga, Douprea attacked him again, grabbing him and throwing things.

The couple moved to Las Vegas, where Douprea threatened suicide. She was hospitalized twice in a psychiatric ward, the second time voluntarily after she threatened to jump off a hotel parking garage. They also continued to have violent arguments. In September 2005, she ripped Melia's shirt, scratched his face, and punched him because he smoked a cigarette. When she returned from jail on October 2, 2005, Douprea threw a glass at Melia because he was drinking and smoking. Trying to intervene, Schneider pinned Douprea down while Gena called the police; Douprea bit Gena and bit and scratched Schneider. (Schneider and Gena described the altercation similarly at trial.)

At Gena's suggestion, Melia nonetheless married Douprea two or three days later. Subsequently, Douprea attacked Melia for not showing sexual interest in her; she punched, scratched, and kicked him, nearly ripping off his shirt and leaving fingernail scrape marks on his face. She threatened him by brandishing a three-inch knife, from her collection of 20 to 25 knives. Melia walked out and never returned.

Adam Patterson testified that he met Douprea at an Alcoholics Anonymous meeting in 2005, and they had an off-and-on intimate relationship for about five or six months. Douprea's temper was unpredictable and severe, and they broke up about a month before she went to Las Vegas. When she returned, they lived together for perhaps a few months. On one occasion, he awoke to find her hitting him and trying to force him to have sex. In February 2006, after their relationship ended, Douprea dropped off some of Patterson's belongings at his residence; Patterson asked her to leave, and Douprea started yelling and threw a boot through his window. When Patterson opened the door, she punched and bit both Patterson and his roommate, Lawrence Mahoney. At some point, she was holding a small knife. Mahoney called the police, who took photographs of the damage Douprea caused to the apartment and the injuries she inflicted. Douprea later entered a plea to throwing the boot through the window.

Michael Schneider testified that he lived with Gena from 2003 to 2010 and experienced Douprea's violent temper as well. On one occasion, Schneider put Douprea's cat out of Gena's house, and Douprea grabbed a big knife from the kitchen and said she would kill him if he "messed" with her cat. On another occasion on April 11, 2006, Gena asked Schneider to get her a cup of coffee, and when Schneider made a rude comment, Douprea grabbed a knife from the kitchen and rushed at him. Raising his arm to block her, Schneider suffered a cut that required three stitches.

C. Defense Case

1. Mooney's prior violence

In January 2005 – nearly four years before Mooney's death – Mooney was stopped by the police while apparently intoxicated and about to drive. Unable to keep his

balance and unresponsive to voice commands, he was taken to the hospital. Because he resisted when medics tried to insert an “IV” in his arm, he was handcuffed to a gurney.

The altercation between Douprea and Mooney in August 2008 was confirmed by Modesta Cardona (Jennifer’s mother). According to Modesta, Mooney pushed Douprea out of the house, then hit her three or four times while she tried to defend herself.

In addition, Michael Cuadra, who met Douprea in December 2007 by answering her Craigslist ad for a “cuddle bunny,” testified that Douprea said in August 2008 that she feared Mooney because he was drinking, belligerent, and mistreating her. She also claimed that she was nervous about doing anything because she did not want to get Mooney in trouble. On December 7, 2008, she sent Cuadra a text message that Mooney had said something like “the next time you bite me . . . I will shatter your face.”

2. Expert Witness Linda Barnard

Linda Barnard, an expert in post-traumatic stress disorder (PTSD) and intimate partner violence (IPV), defined PTSD and IPV and the relationship between them. She testified that Douprea had PTSD from the cumulative effect of multiple traumas or cumulative traumatic stressors in her life. She also testified as to the effects of PTSD, including that PTSD was not consistent with initiating violence against another person. In addition, Barnard described IPV and “dissociation” generally, but she did not opine whether Douprea suffered from IPV and was not permitted to testify that Douprea was in a dissociative state on the day of the killing.

3. Forensic Nurse Diana Emerson

The court recognized Diana Emerson as “a forensic nurse practitioner,” who conducts medical examinations and writes reports describing injuries, their significance, and possible causes. In Emerson’s view, Dr. Reisman’s examination of Douprea was not a forensic examination for manual strangulation, which requires a CT scan of the neck to check for swelling and trauma. In addition, Emerson explained, patients who have experienced only vascular pressure, such as to the jugular and carotid arteries, are likely to revive very quickly afterward; there may be no pain if there is no significant injury, and swelling can take several hours to appear.

Emerson pointed to photographs taken after the killing that, in her opinion, showed injuries on Douprea's neck consistent with strangulation. In addition, the bruising and swelling on Douprea's forehead, and the blood and swelling in her left nostril, were consistent with direct trauma. Bruises on Douprea's forearms were consistent with defensive injuries sustained from warding off blunt force trauma. Emerson concluded that Douprea was in a fight and appeared to have been strangled.

D. Closing Arguments

The prosecutor argued that Douprea attacked and killed Mooney because she was enraged at him for being drunk and refusing to attend the Christmas party. Her claim of self-defense was untrue; she "chose to stay in her room for a period of time, arm herself with a knife, [and] go in and kill" Mooney, while he was in a "stupor" from alcohol.

Defense counsel argued that Douprea suffered from PTSD, was a victim of IPV, and killed Mooney unintentionally or in self-defense. Mooney had attacked Douprea in a drunken rage, and when he choked her to the point she thought she would die, she used the knife to defend herself.

E. Jury Verdict and Sentence

The jury found Douprea guilty of first degree murder and found true the use enhancement under Penal Code section 12022, subdivision (b)(1). The court sentenced Douprea to 25 years to life for first degree murder plus one year for the use enhancement.

This appeal followed.

II. DISCUSSION

We address each of Douprea's contentions in turn.

A. Exclusion of Expert Witness Testimony

Douprea contends the trial court erred by precluding Dr. Barnard from testifying that Douprea was a battered woman (i.e., suffered from IPV) and was in a dissociative state on the day of the killing. She further argues that, to the extent her trial attorney agreed that Barnard could not testify that Douprea suffered from IPV, she received ineffective assistance of counsel.

1. *Background*

In July 2010, at defense counsel's request, Dr. Barnard authored a domestic violence assessment report of Douprea. In her report, Barnard concluded that Douprea was a "battered woman" and described her abusive history with Mooney in the context of IPV. Barnard also described Douprea's history of "dissociation" since childhood, including instances of "cutting," periods when she "lost memories," and "blank periods during the series of events resulting in and subsequent to [Mooney's] death." Barnard suggested that Douprea likely experienced a dissociative state on the day she killed Mooney, concluding that "[m]uch of what occurred was likely in a dissociative state and memory tracks were disrupted."

The prosecutor filed an in limine motion to exclude, inter alia, Dr. Barnard's opinion that Douprea is a battered woman. The prosecutor contended that IPV testimony must be limited to general information about a class of victims, not the ultimate issue of Douprea's mental state at the time of the offense.

An ensuing hearing addressed the extent to which Dr. Barnard could testify regarding IPV, as well as PTSD. As to IPV, the prosecutor acknowledged that Dr. Barnard could testify about IPV "in a general way," but Barnard could not "make the factual finding she's a battered woman." Defense counsel *agreed*, stating: "[Barnard] *cannot say Ms. Douprea is a battered woman,*" but she can opine that Douprea was suffering from PTSD and describe how IPV can affect perception. (Italics added.) Defense counsel added that she would ask Barnard hypotheticals, but that she would "admonish [Barnard] not to blurt out that Sheyna Douprea in her opinion was a battered woman."

As to PTSD, defense counsel asserted that she retained Dr. Barnard to explain that PTSD explained Douprea's "flat affect" in her interview with police, to rebut any prosecution argument that she was being "remorseless or uncaring." The prosecutor agreed with defense counsel that Barnard could testify that "she's got PTSD." In addition, defense counsel said that PTSD explained Douprea's dissociative state during the interview, and the prosecutor agreed that PTSD was "fair game." Thus, by the time

of Barnard’s direct examination, the parties had agreed she could opine that Douprea had PTSD, but not that she was a victim of IPV.

On direct examination, Dr. Barnard testified within these confines. She opined that Douprea suffered from PTSD, but testified only generally about IPV, including the “cycle of violence,” “traumatic bonding,” common myths about abused persons, and the fact that victims commonly remain in abusive relationships even when they could leave.

Dr. Barnard also testified generally about “dissociation.” When defense counsel attempted to elicit Barnard’s opinion that Douprea had entered into a dissociative state, however, the court sustained the prosecution’s objection. Defense counsel then asked Barnard: “Hypothetically, if a person is sitting in an interview and they are . . . questioned about the death of their partner and they have a very flat affect, what would you attribute that to?” Barnard answered: “It could be attributed to shock or . . . dissociation.” Barnard subsequently testified that taking a shower after a traumatic event could be done in a dissociative state as a way to decrease anxiety.

The court later explained, outside the presence of the jury, that it had barred Dr. Barnard from opining that Douprea “was suffering from disassociation [*sic*]” because it “was going to get into PC 29 issues, getting to ultimate facts whether she had intent or didn’t have intent.”⁷

2. *Absence of Opinion That Douprea Was a Battered Woman (IPV Victim)*

Evidence Code section 1107 permits testimony concerning the physical, emotional, or mental effects of IPV upon the beliefs, perceptions, or behavior of domestic violence victims. An expert witness may also offer an opinion as to whether a defendant actually suffers from IPV. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1185 (*Aris*), disapproved on another ground in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 (*Humphrey*).)

⁷ Penal Code section 29 states in part that an expert testifying about a defendant’s mental illness, disorder, or defect may not testify “as to whether the defendant had or did not have the required mental states.”

Here, however, defense counsel expressly agreed that she could not, and would not, elicit Dr. Barnard's opinion that Douprea suffers from IPV. Douprea cannot now claim that the trial court erred because it did not admit evidence that Douprea's attorney declared was inadmissible and elected not to introduce.

In her reply brief, Douprea argues that defense counsel had proffered Dr. Barnard's entire report – which included the IPV opinion – and the court engaged in an analysis and explicitly ruled that the opinion was inadmissible.⁸ But the court's comments came long *after* defense counsel represented that Barnard could not opine that Douprea was a “battered woman,” appearing to be in full agreement with the prosecutor on this point. The court's later remark that such evidence was inadmissible does not establish that an offer of proof and argument for its admissibility would have been futile. (Evid. Code, § 354, subd. (a); see *People v. McKinnon* (2011) 52 Cal.4th 610, 659.) Douprea fails to establish judicial error.

3. *Counsel's Failure to Seek Admission of the Battered Woman/IPV Opinion*

Douprea next argues that her attorney provided ineffective assistance in failing to insist that Dr. Barnard's IPV opinion be admitted. To prevail on a claim of ineffective assistance, a defendant must show that (1) counsel performed incompetently and (2) in the absence of counsel's error, there is a reasonable probability the defendant would have obtained a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 690, 694; *People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Douprea contends her attorney should have sought admission of Dr. Barnard's opinion that Douprea suffers from IPV and rebutted the prosecutor's argument for

⁸ At one point, the court indicated there had been a sidebar discussion as to whether Dr. Barnard would testify that Douprea had IPV, and the court believed such testimony was impermissible because it pertained to an “ultimate decision” and “an opinion on guilt or innocence;” defense counsel stated, however, that she had been arguing for admission of an opinion regarding PTSD, *not* IPV. Later, the court stated that it had excluded the opinion that Douprea was suffering from IPV because the evidence would have been misleading and the record would have been “convoluted,” citing Evidence Code section 352.

excluding it. After all, she argues, the prosecutor had analogized to cases pertaining to other types of expert testimony (child sexual abuse accommodation syndrome and rape trauma syndrome) – an analogy *Aris* rejected (215 Cal.App.3d at p. 1199). Furthermore, Douprea claims, the IPV evidence was relevant to the subjective aspect of imperfect self-defense, the objective aspect of self-defense, Douprea’s credibility, whether Douprea had the mental states for the charged crime, and heat of passion.

Respondent counters that the law at the time of trial was not as clear for defense counsel as Douprea asserts. Moreover, respondent urges, defense counsel had a reasonable tactical purpose for not eliciting an opinion that Douprea suffered from IPV.

We agree there was a reasonable tactical justification for not eliciting Dr. Barnard’s opinion that Douprea suffered from IPV. By introducing IPV evidence about how IPV affects perceptions and explains an IPV victim’s decision to stay with her partner, but *not* attempting to have Barnard opine expressly that Douprea suffered from IPV, defense counsel was able to suggest to the jury that Douprea was an IPV victim and that Barnard thought so, while avoiding a blistering cross-examination of Barnard that would have likely demonstrated Douprea was not an IPV victim and Barnard was wrong to conclude she was. Or, to put it a bit differently, there was so much evidence contrary to the conclusion that Douprea was an IPV victim that it would have made it appear that Barnard was overreaching and thus diminish her credibility.

For example, in reaching her conclusion that Douprea suffered from IPV in her report, Dr. Barnard apparently spoke only to Douprea and did not consider the evidence that Douprea was more of an abuser than a victim. Barnard did not speak to Patterson and Melia, who testified that Douprea repeatedly assaulted them. Barnard accepted Douprea’s depiction of certain encounters, and did not review the police report from a February 2006 incident when Douprea allegedly attacked Patterson and his roommate Mahoney. Nor did Barnard acknowledge that Douprea entered a plea to vandalizing Patterson’s apartment, or consider Melia’s contention that Douprea attacked him (as documented by the reports Barnard allegedly reviewed) including a time when Douprea brandished a knife. Nor did Barnard’s report note an altercation between Schneider and

Douprea, in which Douprea allegedly became enraged at Schneider for putting out her cat, brandished a knife at him, and threatened to kill him. Nor did the report mention Schamen's account of Douprea violating a restraining order and hitting Mooney over the head with a towel rack. And in applying indicators of IPV to suggest that Mooney was subjecting Douprea to IPV, Barnard accepted Douprea's uncorroborated assertions, including that Mooney controlled the use of their money.

A closer question is whether this tactical reason was, in fact, what prompted Douprea's counsel not to press for admission of Dr. Barnard's opinion, or whether counsel simply misunderstood the law. Douprea argues that, because defense counsel told the court she "didn't highlight the admissible parts [of Barnard's report] because I'm going to try to get *as much as I can*," counsel's agreement that Barnard could not testify that Douprea is a battered woman must have been due to her belief that she could not elicit that opinion under the law. Nonetheless, while defense counsel displayed more of an "I can't get it in" attitude as opposed to an "I don't want to get it in" attitude, the record does not preclude the possibility that defense counsel went along with the prosecutor's position because it furthered the defense strategy. And although Douprea contends that defense counsel did not shy away from eliciting the opinion just to avoid cross-examination of Barnard because Barnard faced vigorous cross-examination anyway, the fact of that vigorous cross-examination only underscores the reasonableness of a defense tactic to avoid yet more fodder for the prosecutor's questioning. In short, the record does not affirmatively show that defense counsel's position was not a matter of tactics.

At any rate, Douprea's ineffective assistance claim fails on the prejudice prong. Even without Dr. Barnard's opinion that Douprea was a battered woman suffering from IPV, the jury had ample evidence with which to determine whether she was a victim of IPV and how it might have affected her behavior. In this light, Barnard's opinion, resulting in a severe cross-examination, would not have helped Douprea much. And because there was so much evidence contrary to Barnard's conclusion that Douprea suffered from IPV, and so many matters Barnard had apparently not considered in

reaching that conclusion, there is no reasonable likelihood that jurors, unconvinced that Douprea suffered from IPV based on the IPV evidence that was admitted, would have become convinced that she did suffer from IPV merely upon Barnard saying so. Accordingly, it is not reasonably probable that Douprea would have obtained a more favorable outcome if Barnard had testified that Douprea was an IPV victim. Douprea fails to demonstrate ineffective assistance of her trial counsel.

4. *Dissociative State*

Douprea contends the court erred in excluding Dr. Barnard's testimony that she entered into a dissociative state. We review the court's ruling for an abuse of discretion. (*People v. Cortes* (2011) 192 Cal.App.4th 873, 908 (*Cortes*.)

To the extent the court precluded such testimony based on Penal Code section 29, the court was mistaken. Penal Code Section 29 provides that an expert witness shall not testify as to whether the defendant had the required mental *states* for the crimes charged. But it does not prohibit an expert witness from opining that the defendant suffers from a mental *disorder or condition*. (*Cortes, supra*, 192 Cal.App.4th at p. 908-911.) The statute therefore did not preclude Dr. Barnard from opining that Douprea was in a dissociative condition on the day of the killing. (*Ibid.*)

The next question, however, is whether the evidence was inadmissible for some other reason or, if not, whether the error was harmless. To decide this question, we must look more closely at the evidence Douprea attempted to elicit. At trial, defense counsel asked Dr. Barnard whether Douprea was in a dissociative state when Detective Shooter interviewed her, and she elicited Barnard's testimony that a person who takes a shower after a killing might be in a dissociative state. Douprea now claims that Barnard should have also been permitted to testify that Douprea dissociated when stabbing Mooney and hiding the murder weapon, although counsel did not attempt to elicit such testimony at trial. We will consider the latter point first.

a. *dissociation when stabbing Mooney and hiding the knife*

Because defense counsel did not ask Dr. Barnard whether Douprea dissociated when she stabbed Mooney or when she hid the knife, or make any offer of proof to that

effect, Douprea cannot now contend that the court erred by excluding such testimony. Nor can it be argued successfully that defense counsel's failure to elicit this testimony was due to the court's refusal to permit other evidence of dissociation, since the record does not indicate that Barnard *would* have testified that Douprea was in a dissociative state when she stabbed Mooney or hid the knife, even if she had been asked to do so.

Dr. Barnard's report did not opine that Douprea dissociated when she stabbed Mooney or hid the knife. In her "Summary of Findings," Barnard mentions that Douprea "has a history of dissociative experiences beginning in childhood," but she concludes that it was the "impact of intimate partner battering" – not dissociation – that played a critical role in Douprea's perceptions at the time of the incident that resulted in Mooney's death. Elsewhere in her report, Barnard reasserts that Douprea has a history of dissociation beginning in childhood, but there is no mention of any dissociation during or after the stabbing except, vaguely, that "[s]he also has blank periods during the series of events resulting in and subsequent to Daniel's death." Barnard does not identify those blank periods, but we know it cannot be Douprea's stabbing Mooney or hiding the knife (or taking a shower, see *post*) because Barnard reports Douprea's distinct recollection of these matters.⁹

Moreover, Dr. Barnard's description of dissociation indicates that Douprea did *not* dissociate when she stabbed Mooney or hid the knife. In her report, Barnard defined dissociation as a "response to severe trauma" in which "the psyche 'splits off'." "[T]he person experiences a sense of detachment from self . . . [during which] there is a persistent or recurrent experience of feeling detached from one's mental processes or body, as if one is outside their own body observing." Barnard said dissociation "can even

⁹ Dr. Barnard's report adds: "In this case, [Douprea] has significant gaps in memory. She has a recollection of the basics of what occurred prior to [Mooney] being stabbed, but many details are lost or out of order. She has even more significant gaps in memory for behavior subsequent to [Mooney] being stabbed. She knows she was frantically moving about but cannot effectively recount her actions or the sequence of her actions. Much of what occurred was likely in a dissociative state and memory tracks were disrupted." But the stabbing and hiding the knife were not forgotten.

take the form of traumatic amnesia, where the person has no memory at all for certain events or actions.” By contrast, Douprea made clear to the police and to Barnard that she was aware of what was happening when she stabbed Mooney and the reasons she did it. That is quite the opposite of the “detachment” indicative of dissociation.

Finally, an opinion that Douprea dissociated at the time of the killing would have been inconsistent with Douprea’s primary defense – that she stabbed Mooney because she *perceived* an imminent deadly threat, not in a detached state of dissociation.¹⁰

For all of these reasons, we find that the absence of any opinion that Douprea dissociated in stabbing Mooney and hiding the knife was not the result of judicial error, and even if it were error, there is no reasonable probability that the opinion, if admitted, would have led to a more favorable outcome for Douprea.

b. *dissociation during interview*

The only time defense counsel specifically asked Dr. Barnard at trial if Douprea was in a dissociative state (during the interview with police), the court sustained the prosecutor’s objection and the defense promptly elicited Barnard’s testimony that a flat affect exhibited by a person being interviewed about the death of her partner “could be attributed to shock . . . or dissociation.” From this evidence, as well as Barnard’s testimony that “dissociation means that the person pretty much has flat affect or they’re

¹⁰ Douprea argues that the dissociation evidence was consistent with her claim of self-defense, because she was aware that she was in a life-threatening situation and intended to use the knife to defend herself but dissociated in response to the trauma. For this proposition, she cites *Cortes, supra*, 192 Cal.App.4th 873, which held it was error to exclude an expert’s opinion that the defendant had entered into a dissociative state, where the expert seemingly opined that the defendant stabbed the victim one time out of self-defense and then additional times in a dissociated state. (*Id.* at pp. 893-894.) *Cortes* is readily distinguishable. There, the expert’s report recounted that the defendant said the “noise around him disappeared,” he saw his hand “stabbing down through silence,” and he lacked memory of his continued stabbing of the victim. (*Id.* at p. 893.) From this the expert drew his opinion of dissociation. (*Id.* at pp. 893-894.) In the matter before us, Dr. Barnard’s report did not specify any particular indication of dissociation during the stabbing. Moreover, unlike the defendant in *Cortes*, Douprea never told the expert or the police that the first stab was for self-defense and the rest were in the context of an out-of-body experience or other circumstance from which dissociation might be inferred.

not feeling what they're talking about or experiencing" due to having experienced something "horrific," the jury could have inferred that Douprea's flat affect during the interview with Detective Shooter was attributable to a dissociative state induced by the trauma of the stabbing incident. The evidence that the defense was able to elicit concerning Douprea's affect during the interview was thus the functional equivalent of the opinion it was not permitted to elicit.

Douprea argues that Dr. Barnard's hypothetical testimony regarding a flat affect and dissociation lacked relevance without her opinion that Douprea dissociated, citing *Cortes, supra*, 192 Cal.App.4th at p. 912 [exclusion of opinion that defendant dissociated, removed the relevance of the expert's testimony about general characteristics of dissociation].) In *Cortes*, however, there were apparently no hypotheticals like the ones asked by Douprea's defense counsel, which elicited expert testimony that persons with certain types of behavior or demeanor – which Douprea displayed – were symptomatic of a dissociated state. (*Id.* at pp. 901, 912.)

Moreover, Douprea was permitted to introduce other evidence to explain why she had displayed a flat affect during the interview. Her main approach to the subject – as defense counsel had told the court before trial—was that her flat affect was *attributable to PTSD*, a topic Dr. Barnard and defense counsel discussed at length. Precluding Barnard's opinion that Douprea was in a dissociative state does not constitute reversible error.

c. dissociated when taking a shower

Similarly, Douprea fails to establish reversible error to the extent she now argues that Dr. Barnard should have been allowed to opine that Douprea was in a dissociated state when taking a shower after the killing.

Dr. Barnard was allowed to testify that a person who takes a shower after a killing might be in a dissociated state. From this evidence, the jury could have found that Douprea, who took a shower after killing Mooney, had entered into a dissociative state. Barnard's opinion would not have added much.

Indeed, there is no indication that Dr. Barnard *would* have opined that Douprea was in a dissociative state when she showered after killing Mooney. In her report, Barnard wrote: “[Douprea] *knew* she was getting frantic so she took a shower, *thinking that would help to calm her down.*” (Italics added.) That reflects a conscious decision, not a dissociative state. And even if Barnard had opined that Douprea was in a dissociative state when she showered, a cross-examination based on her own report would have made it quite unlikely that the jury would have accepted her opinion. Thus, even if Barnard had been permitted to opine that Douprea was in a dissociated state when she showered, there is no reasonable probability that it would have resulted in a more favorable outcome to Douprea.

B. *CALCRIM No. 851: Use of IPV Evidence*

Douprea contends that the court’s instruction on IPV under CALCRIM No. 851 impermissibly limited the jury’s consideration of the IPV evidence to her claim of self-defense and imperfect self-defense, and that the jury should have been explicitly instructed that the evidence could also be considered to assess Douprea’s credibility, to determine whether she harbored the mental state required for murder, and to determine whether the evidence supported a heat of passion finding.

1. *Background*

The prosecution requested that the court use CALCRIM No. 851 to instruct on IPV, without defense objection.¹¹ Tracking the language of CALCRIM No. 851, the court instructed the jury as follows: “You have heard testimony from Linda Barnard regarding the effect of intimate partner battering. [¶] Linda Barnard’s testimony about intimate partner battery is not evidence that the defendant committed any of the crimes charged against her. [¶] *You may consider this evidence only in deciding whether the*

¹¹ Douprea’s trial attorney did not object to the use of CALCRIM No. 851 or request the modification Douprea now espouses. Douprea argues that the court had a sua sponte duty to modify the instruction because the jury needed to know how to use the IPV evidence that was presented. Respondent does not contend that Douprea waived or forfeited her right to challenge the court’s use of the instruction, so we need not and do not decide the issue.

defendant actually believed she needed to defend herself against [an] immediate threat of great bodily injury or death, and whether that belief was reasonable or unreasonable.

[¶] When deciding whether the defendant’s belief was reasonable or unreasonable, consider all of the circumstances as they were known by or appeared to the defendant. Also consider what conduct would appear to be necessary to a reasonable person in a similar situation with similar knowledge.” (Italics added.)

2. Law

There is no dispute that, just as CALCRIM No. 851 states, evidence of IPV may be relevant to the subjective prong of imperfect self-defense (*Aris, supra*, 215 Cal.App.3d at p. 1198) and the objective prong of self-defense (*Humphrey, supra*, 13 Cal.4th at pp. 1085-1086). Nor is there any dispute that the jury was permitted to consider the IPV evidence in this case for those purposes.

But in addition, Douprea claims, the IPV evidence was relevant to three other matters: (1) Douprea’s *credibility*, in the sense that it dispels common misconceptions about battered women (*People v. Brown* (2004) 33 Cal.4th 892, 903); (2) whether Douprea harbored the *intent* for the charged crime (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 98-99)); and (3) a *heat of passion* theory. Douprea argues that the jury would have understood from the instruction that it could consider the IPV evidence “only” for the purpose of evaluating her self-defense claim, and not for purposes of credibility, mental state, and heat of passion.¹²

¹² Douprea points out that the use notes of CALCRIM No. 851 advise that the instruction might need modification if the defense offers IPV testimony on an issue other than whether the defendant actually and reasonably believed in the need for self-defense. Former pattern instruction, CALJIC No. 9.35.1, expressly provided for a modification to state that such evidence could be considered for “proof relevant to the believability of the defendant’s testimony.” In addition, CALCRIM No. 850, the instruction given when a witness (as opposed to a defendant) testifies that IPV evidence is presented, informs the jury IPV evidence is relevant to assess credibility: “You may consider this evidence only in deciding whether or not ___’s conduct was not inconsistent with the conduct of someone who has been abused, and in evaluating the believability of (his/her) testimony.” Douprea claims the jury in her case should have been instructed similarly.

3. *Use of IPV Evidence as to Douprea's Credibility*

Douprea argues that her credibility was at issue, particularly because the prosecution relied heavily upon her interview with the police. During the interview, Detective Shooter told Douprea that her decision to confront Mooney instead of escaping created an inconsistency that ruined her credibility. She replied that she loved Mooney even though he abused her, the abuse was her fault, and she could usually calm him down. Douprea contends that her credibility was buttressed by Dr. Barnard's testimony that it is a common misconception that an IPV victim would leave her abuser if she wanted to. But, Douprea complains, the jury was not told that it could consider this testimony to evaluate her credibility.

We find no error. Although the court's instruction pursuant to CALCRIM No. 851 did not tell the jury that it could use the IPV evidence to assess Douprea's credibility, the jury necessarily did so in following the instruction and considering the IPV evidence as to Douprea's self-defense claims. Specifically, in deciding her self-defense claims, the jury had to decide whether Douprea stabbed Mooney out of an actual and reasonable fear of imminent great bodily injury or death; relevant to this question was why she decided to confront Mooney rather than leave the apartment; and in using IPV evidence pursuant to CALCRIM No. 851 to evaluate her decision to confront Mooney, the jury necessarily used IPV evidence to assess the credibility of her explanation for her decision. Thus, in complying with CALCRIM No. 851, the jury effectively used IPV evidence to assess Douprea's credibility.

4. *Use of IPV Evidence as to Mental State*

Douprea argues that, if the jury had been instructed that it could use IPV evidence to assess her mental state when entering Mooney's bedroom, the jury might have found that IPV caused her to enter the bedroom with the intent to calm him down, rather than with the intent to kill him with premeditation and deliberation. Again, we must disagree.

Douprea stated that she entered Mooney's room because her past *experience* was that she could calm him down. Although Douprea now asserts generally that the evidence showed IPV's affect on perceptions and behavior, and that she loved Mooney

and did not want him to get into trouble, she points to no specific evidence that *IPV* accounted for her perception that she had calmed Mooney in the past or could calm him down this time *and*, further, caused her to enter Mooney's room with an open knife in her pocket and then stab him repeatedly with some mental state other than malice with premeditation and deliberation.

Indeed, the fact that the jury rejected Douprea's self-defense and imperfect self-defense theories shows that it concluded, despite the IPV evidence, that Douprea did not have an actual fear of imminent great bodily injury or death when she stabbed Mooney. (And this was the only reason she had given the police for stabbing him.) Douprea does not explain how, given this finding, the jury could have decided that the IPV evidence meant she did not intend to kill Mooney when she plunged the knife four times into his neck, even if it had been instructed that it could consider IPV evidence for that purpose.

5. Use of IPV Evidence to Decide Heat of Passion

Lastly, Douprea contends that the IPV evidence was relevant to provocation for purposes of a heat of passion theory. Specifically, she argues that IPV evidence might have shown that Douprea was provoked to a state of passion and whether a reasonable person would have been so provoked.

Douprea's argument is unpersuasive. Even if the jury had been instructed that it could use IPV evidence to decide heat of passion issues, there was no relevant IPV evidence for the jury to consider: Dr. Barnard never testified that an IPV victim is more likely than anyone else to be provoked into a heat of passion, and there was no other evidence linking heat of passion to IPV. Furthermore, Douprea's defense theory was not that Douprea stabbed Mooney in a heat of passion, but that she stabbed him in reasonable or unreasonable self-defense.

Douprea fails to establish error in regard to the court's use of CALCRIM No. 851.

C. Failure to Object to Prosecutor's Use of IPV Evidence

Evidence Code section 1107, subdivision (a), makes expert testimony about IPV evidence admissible "except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge."

Douprea argues that the prosecution violated this statute and committed misconduct when it suggested in its cross-examination of Dr. Barnard and in its closing argument that Douprea was more of an IPV perpetrator than an IPV victim. Specifically, Douprea contends the prosecutor (1) elicited evidence from Barnard about female-initiated IPV leading to lethality, (2) argued to the jury that the IPV evidence proved Douprea committed murder, and (3) misled the jury into thinking that Barnard never diagnosed Douprea as a battered woman. Because defense counsel did not object to any of these matters at trial, Douprea couches her arguments as an ineffective assistance claim.

Douprea contends her attorney should have objected to the prosecutor's cross-examination and closing argument, noting that a prosecutor's behavior violates the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 178-179; *People v. Hill* (1998) 17 Cal.4th 800, 819.) A prosecutor's behavior is misconduct under California law when it involves the use of “ ‘ ‘ ‘deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” ” ” (*Hill, supra*, 17 Cal.4th at p. 819.) When a misconduct claim focuses on the prosecution's comments made before 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. Samayoa* (1997) 15 Cal.4th 795, 841.)

1. *Failure to Object to Prosecutor's Cross-Examination*

During cross-examination of Dr. Barnard, the prosecutor elicited evidence about female-initiated IPV. For example, the prosecutor asked Dr. Barnard whether: the IPV dynamics she described on direct examination applied when there was a female aggressor; men are victims of IPV; male victims fail to report abuse; the cycle of violence leads to an increased chance of lethality if uninterrupted; threats of suicide create a potential for lethality; possessing and using weapons is a lethality factor; the phrase “Battered Women's Syndrome” was changed to “Intimate Partner Violence” to account for male victims; the concept of “ownership of the battered partner” might include a feeling of entitlement to control “what parties they might attend”; females use a weapon

as an “equalizer”; women engage in controlling behavior; and controlling behavior is present in female-initiated IPV.

It was not incompetent or unreasonable for defense counsel to refrain from objecting to the prosecutor’s cross-examination. In the first place, defense counsel could have reasonably believed that the evidence was admissible under Evidence Code section 1107 because it was not being offered to prove that Douprea murdered Mooney, or “to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge” (Evid. Code, § 1107, subd. (a)), but merely to rebut the defense argument that Douprea was an IPV victim. The implication of the prosecutor’s questions was that females can be IPV perpetrators and, given the dynamics of the relationships Douprea had with Mooney and other men, she was more of a perpetrator than a victim of IPV. This line of questioning was obviously germane to whether Douprea was an IPV victim.

Second, defense counsel could have reasonably perceived that the prosecutor’s cross-examination was not appearing to do a whole lot of damage. When the prosecutor asked whether the dynamics Barnard had described on direct examination applied when the aggression was initiated by a female, she responded that “not all the things are the same.” When the prosecutor asked whether an uninterrupted cycle of violence leads to lethality, Barnard replied that the violence might actually stay at the same level and *not* escalate. When asked whether females use a weapon, Barnard stated that “[i]t can be” but there was very little research. When asked whether controlling behavior is present in female-initiated IPV, Barnard responded that females display controlling behavior “but we don’t see the level of coercive control that we see with male perpetrators.” She added that, in regard to IPV, women are more likely to be assaulted than men. And, Barnard testified: “[S]o far we don’t have anything to show that female perpetrators or violence against male partners includes these same kinds of power and control issues, that most male victims of domestic violence don’t fear for their lives, that the same kind of isolation, power and control socially doesn’t exist and within the relationship doesn’t seem to exist in the same way.”

Since defense counsel's objection would have likely been overruled, it was not incompetent for counsel to refrain from drawing attention to the testimony, and implicitly highlighting its importance, with an objection. And, because the objection likely would have been overruled, Douprea fails to show that the failure to object was prejudicial.

2. Failure to Object to Closing Argument That Douprea Was IPV Perpetrator

In closing and rebuttal argument, Douprea contends, the prosecutor argued that IPV evidence proved Douprea was guilty of murder because she was the perpetrator in the IPV cycle of violence, which escalated to lethality. When the prosecutor's statements are examined in context, however, no reasonable juror would draw the inference Douprea suggests; it was therefore not incompetent for defense counsel to refrain from objecting.

Before closing argument, the court instructed the jury: "You have heard testimony from Linda Barnard regarding the effect of intimate partner battery. Linda Barnard's testimony about intimate partner battery is *not evidence that the defendant committed any of the crimes charged against her*. You may consider this evidence only in deciding whether the defendant actually believed she needed to defend herself against immediate threat of great bodily injury or death, and whether that belief was reasonable or unreasonable." (Italics added.) The court also instructed the jury on the elements of murder and the prosecution's burden to prove each and every element beyond a reasonable doubt. Therefore, before the prosecutor even started his argument, the jury knew it could not use IPV evidence to convict Douprea.

In his closing argument, the prosecutor reminded the jury of the elements that must be proved to convict Douprea of murder according to the court's instructions, telling the jury explicitly that it "[had] to follow" those instructions. The prosecutor explained at great length why the evidence in the case – including the crime scene, Douprea's actions, Mooney's intoxication, her stabbing him four times in the neck and then trying to hide the knife, and her lies to police – established each of those elements. As to premeditation, deliberation and willfulness, the prosecutor reminded the jury that Douprea went to a separate room, armed herself with a knife, remained in the room

several minutes while angry, and then went to Mooney's room and stabbed him repeatedly. The prosecutor next explained why the verdict should not be voluntary manslaughter due to heat of passion and imperfect self-defense and why Douprea's self-defense claim was meritless. Next the prosecutor went through a timeline of what led up to the offense and the day of the murder, discussed at length Douprea's false statements to police, and criticized Dr. Barnard's finding of PTSD.

After all of this – some 30 pages of transcript spent on explaining that Douprea should be convicted of first degree murder based only on the elements of the crime and the lack of any defense – the prosecutor turned to the defense contention that Douprea's actions could be explained by IPV. He stated: “The other important thing that was presented in this case is testimony from Dr. Barnard about intimate partner violence. . . . She explained many of the dynamics of intimate partner violence. In part Counsel wants to rely upon that to portray Ms. Douprea as being a battered woman, that she has been a long suffering victim of intimate partner violence. And she will behave in ways that a person might just on the face of things say that's counterintuitive, like failing to call the cops, or minimizing violence and things of that nature.”

Then the prosecutor made the first statement that Douprea now calls misconduct: “But when you listen to everything that Dr. Barnard was saying about intimate partner violence, and you apply it to Ms. Douprea, a lot of it applies to her as the batterer, as the initiator of aggression time and time again in relationships that she's found herself in.” With that, the prosecutor went on to a different topic.

When considered in context, the prosecutor's statement that Douprea was “the initiator of aggression” was obviously aimed at negating Douprea's claim that she was a victim of IPV, not at proving she committed murder as an IPV perpetrator.

The second statement of which Douprea now complains occurred during the prosecutor's rebuttal argument. Again, we look to its context. The prosecutor argued that it was “not reasonable to believe that Daniel Mooney was the perpetrator of significant violence against Sheyna Douprea” and explained how Mooney was not violent, even when intoxicated.

The prosecutor next contended that it was “not reasonable to believe that Sheyna Douprea is a battered woman for purposes of the intimate partner violence *defense*,” and segued into the IPV factors and how Douprea met those factors as an IPV perpetrator, not an IPV victim. (Italics added.) In *this* context, the prosecutor stated: “Let’s talk about the cycle of violence and how it applies to Sheyna Douprea as the perpetrator. Sheyna Douprea was not economically abused. . . . If economic abuse was being perpetrated, it was being perpetrated by Sheyna Douprea who chose men who had to depend on her completely. [¶] Sexual abuse. We know twice she hit her boyfriends until they had sex with her. One of them while he was dead asleep. Threats. She attacks them, says I’ll kill you. She tells Mr. Schneider I’ll kill you if you touch my cat again. Threats are a way of executing control of the apartment. Ownership of the batterer. [¶] Mr. Waner [the other prosecutor] asked Dr. Barnard, does that mean the perpetrator decides where you go, when you’ll go, what you do? Yes. They were going to that Christmas party, ladies and gentlemen. Sheyna Douprea had had her life worked out. She had a plan. She had an image in her mind of what her life was going to be like. And come hell or high water, she was going to control everything and everyone in it to make that happen. And she chose men that were easier to control because they were not in a position in their lives to stand up for themselves. Men fail to report domestic violence just as often as women. Why are these accounts of the beer cans, of the beating until having sex, of the attacks with the fingernails that weren’t observed by other people unreported? Does that mean they didn’t happen? No. No. It means they were victims of domestic violence and they fell right into that pattern. They fell right into that cycle of violence with Sheyna Douprea as the perpetrator. Dr. Barnard also talked about lethality. Fantasies or threats of suicide. Sheyna Douprea. Fantasies or threats of homicide. Sheyna Douprea. Use of weapons. Fingernails, knives. Sheyna Douprea, if uninterrupted, can lead to lethality.”¹³

¹³ The prosecutor then proceeded to a different topic: “It is not reasonable to believe that Sheyna Douprea stabbed Daniel Mooney out of fear for her life on the afternoon of December 14th, 2008.”

The obvious point of the prosecutor's comments was that Douprea's history showed she was an IPV perpetrator rather than an IPV victim, and thus her conduct in stabbing Mooney to death could not be *defended* on the ground that she was an IPV victim. In *context*, the statements that there was a "cycle of violence with Sheyna Douprea as the perpetrator" and "Sheyna Douprea, if uninterrupted, can lead to lethality," did not say that Douprea killed Mooney because she was a perpetrator of IPV, or suggest that the jury should disregard the court's instructions and convict Douprea of murder on that basis. At the very least, it was reasonable for defense counsel to conclude that it would be inappropriate or unnecessary to object to the prosecutor's argument, and that doing so would be tactically unwise because of the attention it might draw to this portion of the argument. Accordingly, Douprea fails to establish ineffective assistance.

3. *Failure to Object To Prosecutor's Suggestion of No IPV Diagnosis*

Douprea also argues that the prosecutor misled the jury into believing that Dr. Barnard never diagnosed her as a battered woman, when in fact Barnard had made such a diagnosis in her report. To make this argument, she cobbles together two phrases by the prosecutor – that "[p]ost traumatic stress disorder is what [Dr. Barnard] was looking for" and "she was limited in her assignment" – which are separated by nearly 50 pages of reporters' transcript. Douprea adds that the prosecutor's conduct was particularly "egregious" because it was the prosecution's motion that caused Dr. Barnard to be prohibited from offering her diagnosis that Douprea is a battered woman.

Douprea's argument is untenable. In the first place, the reason that Dr. Barnard did not opine that Douprea had IPV was because *defense counsel* did not elicit it. Moreover, no reasonable juror would understand the prosecutor's comments, independently or collectively, in the way Douprea now asserts.

The prosecutor never said that Dr. Barnard had not diagnosed Douprea as a battered woman. In closing argument, he argued that "[p]ost traumatic stress disorder is what she was looking for," but the context shows he was suggesting that Barnard found PTSD because she was supposed to find it, while disregarding a lot of information that led to a contrary conclusion. The prosecutor stated: "[A]mong the things [Dr. Barnard]

talked about was post traumatic stress disorder. And I am not here to impugn the professional integrity or the professional competence of Dr. Barnard. The only impression I was left with that I will share with you is that the focus of her investigation and inquiry into Ms. Douprea's situation was extremely limited. And that she had willfully placed blinders on her. I think that would be a fair characterization of it. Post traumatic stress disorder is what she was looking for. Post traumatic stress disorder is what she found and what she reported to you. What is clear is there is a whole host of other stuff going on in this young woman's mind. She even acknowledged the possibility of various co-occurring disorders. She acknowledged all of the materials that might have been helpful that she was not provided or did not review."¹⁴ In short, the prosecutor was challenging Barnard's methodology in reaching the PTSD diagnosis, not suggesting that Barnard had never made any IPV diagnosis, or that Barnard had found PTSD to the exclusion of IPV.

In rebuttal argument – some 48 pages of transcript later – the prosecutor stated: “It is not reasonable to believe that Sheyna Douprea is a battered woman for purposes of the intimate partner violence defense. Dr. Barnard knows what she's talking about. *She was limited in her assignment.* She was limited in the information she was given. But she gave us very good information. And information she gave us fits Sheyna Douprea.” (Italics added.)

It is extremely unlikely that any lay juror would think “limited in her assignment” referred to the scope of inquiry that defense counsel had granted to Dr. Barnard in the case, rather than what Barnard was to testify at trial. The prosecutor did not indicate that

¹⁴ Douprea also refers us to another page in the transcript, about 40 pages earlier than the prosecutor's first statement, without quoting any particular statement by the prosecutor. On this page, the prosecutor discussed Douprea's threats against her boyfriends, use of weapons, and threats of suicide, and said: “There was a lot of scary things at work with regards to Ms. Douprea. And while their doctor tended to focus on post traumatic stress disorder, I would argue the exclusion of anything else. What's clear from the state of the evidence, there is a lot of stuff going on in this young woman's head.” There is not the remotest suggestion that Dr. Barnard did not diagnose Douprea with IPV in her report.

Barnard had *never* been asked to consider how IPV applied to Douprea, and no reasonable juror would have thought the prosecutor was saying that Barnard had made such an inquiry and determined that Douprea was not an IPV victim. And to the extent the prosecutor's comment could be construed to mean that Barnard was not assigned to testify that Douprea was a victim of IPV, defense counsel herself told the jury the very same thing in opening statement: "[Dr. Barnard] won't render an opinion as to whether or not she thinks Sheyna Douprea has been the victim of intimate partner violence, but she'll tell you about [IPV] and she will dispel some common myths that people hold who don't understand the dynamics."

In sum, it was not unreasonable for defense counsel to refrain from objecting to the prosecutor's statements. Douprea thus fails to establish ineffective assistance.

D. Admission of Evidence of Douprea's Prior Violent Acts

Douprea next contends the court erred in admitting several instances of her prior violence under Evidence Code section 1101, subdivision (b) and Evidence Code section 1109. (Hereafter, all statutory citations are to the Evidence Code unless otherwise indicated.)

1. Section 1101 Evidence

Section 1101, subdivision (b) allows admission of evidence that a person committed a crime or other act when relevant to prove a material fact other than disposition or bad character. (*People v. Abilez* (2007) 41 Cal.4th 472, 500 (*Abilez*)). Even if admissible under section 1101, subdivision (b), the evidence may be excluded under section 352 if its probative value is outweighed by a risk of undue prejudice. (*Abilez*, at p. 500.) We review for an abuse of discretion. (*Ibid.*)

The court admitted evidence of two prior violent incidents under section 1101, subdivision (b): the altercation in June/July 2005, when Douprea grabbed a knife and threatened to kill Schneider if he ever "messed with" her cat again (incident "c"); and part of the October 2005 altercation, in which Douprea bit Schneider when he and Gena

tried to restrain her from attacking Melia (incident “f”). Both incidents were admitted for the purpose of proving that Douprea “acted with intent to kill in this case.”¹⁵

To be admissible for purposes of intent under section 1101, subdivision (b), the prior act must be sufficiently similar to the charged offense so that the evidence of the prior act tends to support the conclusion that the defendant probably harbored the same intent in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) The idea is that, if a person acts similarly in similar situations, he probably harbors the same intent in each instance, such that the prior incident is circumstantial evidence of the intent (including self-defense) in the commission of the charged offense. (*People v. Thomas* (2011) 52 Cal.4th 336, 355; *People v. Robbins* (1988) 45 Cal.3d 867, 879.) Where as here the uncharged act is offered to prove intent, the required degree of similarity between uncharged act and charged offense is less than when an uncharged act is offered to show common plan or identity. (*Ewoldt, supra*, 7 Cal.4th at p. 402.)

Here, both incidents are probative of Douprea’s intent in stabbing Mooney four times with a knife. The June/July 2005 incident indicated that Douprea used a knife to threaten out of anger; that is relevant to whether Douprea displayed and then used a knife to stab Mooney out of anger with an intent to kill or, as the defense insisted, out of fear for her life. The October 2005 incident indicated that Douprea attacked Schneider when he tried to intervene in her attack on Melia; again suggesting a violent reaction that would arguably tend to disprove her position at trial that she stabbed Mooney only because she feared that she would otherwise die.

Douprea argues that the prior incidents were not sufficiently similar for admission under section 1101, subdivision (b). She contends that her act of brandishing a knife and making a threat to Schneider, with whom she did not have an intimate relationship, does not prove that she decided to stab her boyfriend. Further, she contends, biting Schneider

¹⁵ The October 2005 incident was ruled admissible as to Schneider under section 1101, but as to her mother Gena and ex-husband Melia as domestic violence under section 1109. As to the latter ruling, Douprea concedes that trial counsel either did not object to the evidence or ultimately waived the objection.

did not involve a knife and was distinguishable because Schneider placed himself in the midst of an altercation. Nonetheless, although the prior incidents were not identical to the charged offense, they were sufficiently similar and illustrative of intent for us to conclude that the court did not abuse its discretion in finding the prior incidents probative. (See *People v. Spector* (2011) 194 Cal.App.4th 1335, 1380-1381; *Cortes, supra*, 192 Cal.App.4th at pp. 884-885, 916.)

Furthermore, the court did not abuse its discretion in deciding the evidence was not unduly prejudicial under section 352. Neither prior act was particularly inflammatory when compared to the charged crime – Douprea’s repeated stabbing of her boyfriend Mooney in the neck with her knife. There is no basis for concluding that the jury decided to convict Douprea of murdering Mooney out of a need to punish her for threatening Schneider with a knife or biting him.

2. Section 1109 Evidence

Under section 1109, evidence of a prior act of domestic violence is admissible to prove that the defendant had a propensity to commit domestic violence, when the defendant is charged with an offense involving domestic violence. Evidence admissible under section 1109 is subject to exclusion under section 352. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313-1314.)

The trial court admitted the following under section 1109:

(1) In June 2005 in Santa Rosa, Douprea became angry and scratched Melia’s face because Melia was smoking (incident “b”). At trial, Melia’s actual testimony was that Douprea attacked him, threw a box at him, and shoved and scratched him.

(2) On numerous occasions, Douprea battered Melia by scratching, biting, throwing beer cans at him, and brandishing a knife four to five times (incident “d”). At trial, Melia testified that Douprea attacked him when she found him drinking with a friend, threw beer cans at him, punched him in the ribs, scratched his face, and threatened him with a knife.

(3) In November 2005 in Las Vegas, Douprea ripped Melia’s shirt and raked her nails down the side of his face during an argument, causing visible injury (incident “g”).

At trial, Melia testified that Douprea gashed his face with her nails and ripped his shirt after he declined to have sex with her.

(4) In Santa Rosa in February 2006, Douprea attacked Patterson and Mahoney at Patterson's apartment, and threw a boot through his window, resulting in a criminal conviction (incident "h"). At trial, Patterson testified that when Douprea returned his belongings to his apartment and Patterson would not let her in, she punched and bit Patterson and Mahoney and threw a boot through Patterson's window.

(5) Douprea physically attacked Patterson six to seven times, including punching, biting, brandishing a knife and threatening to kill him (incident "i"). At trial, Patterson testified about one incident in which, after he fell asleep when Douprea wanted to have sex, he awoke to Douprea striking him.

All of these prior incidents constituted domestic violence for purposes of section 1109. The evidence of these incidents had probative value, in that they tended to refute Douprea's claim of self-defense, by showing that Douprea often initiated an incident or reacted disproportionately with anger and violence, to the point of inflicting injury, when her boyfriends did not do what she wanted. Brandishing the knife at Melia when she did not get her way arguably suggests that she brandished her knife at Mooney because he would not go to the Christmas party, rather than out of a reasonable response to any violence on his part. (See *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119-1120.) The probative value was buttressed by the fact that the sources of the evidence were independent of one another and of the victim in this case, and were corroborated in part by police reports and photographs. (See *People v. Balcom* (1994) 7 Cal.4th 414, 427.)

Furthermore, none of the events, individually or collectively, posed a risk of undue prejudice. They were not as serious as the charged offense, did not invite the jury to prejudge Douprea based on extraneous facts, were not so inflammatory as to invoke an emotional bias against her, and would not have been confused with the charged offense. (See *Rucker, supra*, 126 Cal.App.4th at p. 1120.) The trial court did not abuse its discretion in ruling this evidence admissible.

Douprea's arguments to the contrary are unpersuasive. First, she argues that not all of the prior acts involved a weapon; but the point is that, weapon or not, she repeatedly acted towards her boyfriends with violence disproportionate to their conduct. Second, she argues that the incidents were cumulative of six other incidents the court ruled admissible; but the evidence was not truly cumulative (as where multiple witnesses testify to a single event without adding to each other's testimony), since witnesses testified to *several* events to illustrate a pattern and propensity for violent reactions inconsistent with Douprea's claimed state of mind when she stabbed Mooney to death. (See *People v. Brown*, (2011) 192 Cal.App.4th 1222, 1224-1225, 1231, 1234, 1237.) Third, Douprea complains that so much of the trial was devoted to her past violent acts that the evidence "poisoned" and "overwhelmed" the trial, diverting the jury's attention so that it was "lured into convicting [Douprea] of first degree murder based on a visceral reaction to her past," and saddled her with "the impossible burden of defending against a host of uncharged crimes." In light of the issues put in play by the defenses Douprea asserted at trial, however, our review of the record discloses no abuse of discretion.

Douprea fails to establish error in the admission of the evidence.¹⁶

E. Ineffective Assistance Claim: No Objection to Prior Cutting Incident

Douprea next contends that her trial counsel provided ineffective assistance of counsel by failing to object when the prosecutor introduced evidence of an incident in which Douprea stabbed Schneider, which the court had ruled inadmissible before trial.

1. *Background*

Before trial, the prosecution had sought admission under section 1101, subdivision (b), of the April 11, 2006 incident involving Douprea and Schneider. In the

¹⁶ Douprea argues that Melia and Patterson testified about incidents that were not first ruled upon by the court and not mentioned in the prosecution's proffer, so the court could not have engaged in the section 352 analysis required as a constitutional safeguard by *People v. Falsetta* (1999) 21 Cal.4th 903. Douprea does not point us to any contemporaneous objection on this ground, however, and our analysis of the record indicates that any error in this regard was harmless beyond a reasonable doubt. Douprea also argues that the prosecutor misused the evidence in closing argument, but again fails to cite any contemporaneous objection on this ground.

proffer, it was alleged that Schneider made a derogatory remark to Gena, and Douprea responded by grabbing a knife and attempting to stab Schneider in the chest. To defend himself, Schneider raised his arm, which Douprea stabbed. Defense counsel opposed the admission of the evidence, and the court excluded it as inflammatory and unduly time-consuming.

At trial, however, the prosecutor on direct examination of Schneider elicited evidence of this very incident, without objection from defense counsel: Schneider testified that Gena asked him to get her a cup of coffee and he made a derogatory comment; Douprea ran towards him, holding a knife at shoulder height in a fist; Schneider used his arm to block the knife from entering his chest, and the knife cut his arm, causing a wound that Schneider showed the jury.¹⁷ On cross-examination, Schneider acknowledged that he kicked Douprea, then pregnant, in the stomach as she approached: “I put my leg up and she ran into my foot.”

Defense counsel also asked Gena about the incident. Gena testified that Schneider made the derogatory comment after she asked him to get her a cup of coffee, she heard his argument with Douprea, but she did not see what happened. Gena recalled that Douprea, who was eight months pregnant at the time, cried out in pain and later appeared with red marks on her stomach.

2. Competence

Douprea contends her trial counsel should have objected to the prosecutor’s elicitation of this evidence – especially since the court had already ruled it inadmissible – and there can be no tactical reason for counsel’s failure because, after all, counsel had originally sought to exclude it.

Respondent counters that Douprea has failed to demonstrate “ ‘ “there simply could be no satisfactory explanation” ’ ” for her trial counsel’s inaction. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Respondent posits that the lack of objection by the defense does not appear to be an oversight, since the subject matter was raised in

¹⁷ The prosecutor also elicited testimony from Patterson that he observed a wound about three inches long on Schneider’s arm.

examinations and argument several times, counsel made other objections, and yet there was no mention by anyone of the court's prior ruling or any contention in Douprea's new trial motion that the elicitation of the evidence was erroneous. Further, respondent argues, the record does not preclude the possibility that the court changed its ruling prior to the elicitation of the evidence, either as relevant to intent under section 1101, subdivision (b), or to rebut evidence of Mooney's violent character under section 1103.

As Douprea points out, however, it would be unusual for such a ruling not to have been reported on the record, since the court on numerous occasions memorialized sidebar discussions. Nor can we imagine any good reason defense counsel would ever agree to admission of the evidence without such an order (unless, perhaps, she decided to allow the evidence in order to show that Douprea acted in self-defense, as she suggested in closing argument). Thus, while this type of uncertainty in the record often leads courts to disfavor ineffective assistance claims on direct appeal, we proceed to the next issue of prejudice.

3. *Prejudice*

Douprea argues that the April 11, 2006 incident was uniquely harmful because it was the only prior instance in which Douprea used a knife to injure someone, for little or no reason, holding it the same way she held the knife in stabbing Mooney. Furthermore, Douprea argues, the April 2006 stabbing was inflammatory and the prosecutor used the incident in closing argument to assert that Douprea had a propensity to commit domestic violence: "If she did it before, she did it here."

We conclude it is not reasonably probable that Douprea would have obtained a more favorable outcome if the defense had objected to the evidence of her cutting Schneider. The fact is, there was already evidence that she had threatened Schneider with a knife, holding it the same way as she held it when stabbing Mooney. And there was also plenty of evidence that she had caused physical harm to several other people on several occasions while enraged for little or no reason. Those other incidents might not have resulted in a scar, but there was on some occasions photographic proof of the injuries she had caused. Accordingly, this additional testimony simply did not add much

to the mountain of evidence indicating Douprea's past violence, and in closing argument defense counsel was even able to suggest that Douprea's use of the knife against Schneider might have been out of self-defense (like her use of the knife against Mooney was supposedly out of self-defense). And although the prosecutor in closing argument did lump this incident in with the prior acts of domestic violence that could be used to show propensity under section 1109, the reference was so fleeting that the record discloses no reasonable possibility that the jury latched on to this point to convict Douprea in any way contrary to the court's instructions. Viewing the record as a whole, including all of the properly admitted evidence against her, Douprea fails to establish a ground for reversal.

F. Evidence Code Section 1109 and CALCRIM No. 852

Douprea contends that section 1109 is unconstitutional, because the admission of prior acts of domestic violence to prove a defendant's propensity to commit charged acts of domestic violence leads to a conviction based on proof less than beyond a reasonable doubt. She recognizes that our California Supreme Court "faced a similar issue when it upheld section 1108 against a Due Process challenge" in *Falsetta, supra*, 21 Cal.4th at p. 903, and that "numerous courts of appeal have found the Court's reasoning in *Falsetta* applicable to section 1109." (See, e.g., *People v. Johnson* (2010) 185 Cal.App.4th 520, 529.) She nonetheless argues that *Falsetta* is incorrect in its reliance on section 352 as a constitutional safeguard, and that its holding should not be extended to section 1109. We are not persuaded that we should part ways with the cited precedent.

Douprea also contends that CALCRIM No. 852 is unconstitutional, arguing that it undercuts the presumption of innocence and the right to proof beyond a reasonable doubt, for reasons our Supreme Court rejected (as to section 1108) in *People v. Loy* (2011) 52 Cal.4th 46, 71-77, and *People v. Reliford* (2003) 29 Cal.4th 1007, 1013-1015 (*Reliford*). Douprea notes that California appellate courts have applied the reasoning in *Reliford* to section 1109 (see, e.g., *People v. Reyes* (2008) 160 Cal.App.4th 246, 251), but contends these cases were wrongly decided. She fails to convince us that these precedents are in error, or that error occurred in this case.

G. *Heat of Passion Instruction*

The malice required for murder is negated completely, and the crime is reduced to manslaughter, where it is shown that the defendant killed when subjectively provoked to the heat of passion and a reasonable person would have been so provoked. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) Where only the subjective prong of heat of passion is satisfied (i.e. the defendant killed in heat of passion, but it was not reasonable for her to be in the heat of passion), the crime is still murder, but only in the second degree, since the subjective mental state of heat of passion is inconsistent with, or prevents the formation of, premeditation and deliberation. (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, overruled on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200-201 (*Wickersham*)). Douprea contends the court's instructions misled the jury as to the provocation necessary to reduce murder from first degree to second degree.

1. *The Court's Instructions*

The court provided a general instruction on first and second degree murder, based on CALCRIM No. 521. At defense counsel's request, the court also instructed the jury using CALCRIM No. 522 and CALCRIM No. 570.

CALCRIM No. 522 provides that "[p]rovocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter," so if the jury concludes the defendant committed murder but was provoked, it must consider the provocation in deciding whether the murder was in the first or second degree and in deciding whether the crime was murder or manslaughter.

CALCRIM No. 570 discusses the provocation needed to reduce murder to manslaughter. Essentially, it instructs that if the defendant was provoked to a heat of passion, and a person of average disposition in the circumstances would have been provoked and reacted from passion, the killing is reduced from murder to voluntary manslaughter. CALCRIM No. 521, 522, and 570 do not specify that the provocation needed to reduce murder from first to second degree need not be objectively reasonable.

2. Analysis

Douprea does not contend that CALCRIM No. 570, which pertains to reducing murder to manslaughter, is incorrect. Instead, she urges that CALCRIM No. 522 is incomplete, and CALCRIM Nos. 522 and 570 when read together are misleading, since they make it seem that the provocation needed to reduce murder from first to second degree must be the “reasonable” provocation to passion that is required to reduce murder to manslaughter. Her argument is unavailing for several reasons.

First, the doctrine of invited error bars Douprea’s arguments to the extent she claims CALCRIM No. 522 (or 570), individually or collectively, are erroneous. “ ‘ ‘The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a ‘conscious and deliberate tactical choice’ to ‘request’ the instruction.” ’ ’ ” (*People v. Harris* (2008) 43 Cal.4th 1269, 1293; see *People v. Wickersham*, *supra*, 32 Cal.3d at p. 330.) Once it is shown that counsel made a conscious, deliberate tactical choice between having the instruction and not having it, the invited error doctrine applies even if counsel did not correctly understand all the legal implications. (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

Here, Douprea’s defense attorney requested the instruction. Since CALCRIM No. 522 is an instruction that need not be given absent a request (*People v. Rogers* (2006) 39 Cal.4th 826, 877-878), defense counsel’s request for it showed a conscious and deliberate tactical choice.

Second, Douprea forfeited her right to argue that an *additional* instruction or modification to CALCRIM No. 522 was necessary. The court had no sua sponte duty to instruct the jury on provocation with respect to first and second degree murder, because provocation in this context negates the element of deliberation, as opposed to serving as a defense to the crime of murder. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 28-33, disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.) Defense counsel’s failure to request an instruction as to the provocation necessary to reduce first degree murder to second degree murder forfeited or waived Douprea’s right to assert error based on the absence of such an instruction. (But see *People v. Hernandez*

(2010) 183 Cal.App.4th 1327, 1331, fn. 2 [failure to object to CALCRIM No. 522 did not forfeit appellate review because a misleading instruction would affect defendant's substantial rights] (*Hernandez*); Pen. Code, § 1259.)

Third, in any event Douprea fails to establish error. CALCRIM No. 522, standing alone or read in concert with CALCRIM No. 570, was neither inaccurate nor reasonably likely to mislead the jury into thinking that a defendant who is subjectively provoked must be convicted of first degree murder unless the provocation was reasonable. CALCRIM No. 522 distinguished between provocation to reduce murder to manslaughter, and provocation to reduce murder from first degree to second degree. CALCRIM No. 570 dealt exclusively with provocation to reduce murder to manslaughter. CALCRIM No. 521 told the jury that first degree murder differs from second degree murder in that the former requires a killing that is intentional, deliberate, and premeditated. Read together, CALCRIM No. 521 and CALCRIM No. 522 showed that provocation can reduce first degree murder to second degree murder by negating this intent, deliberation and premeditation, *without* the proviso of CALCRIM No. 570 (expressly made applicable only to the reduction of murder to manslaughter) that the provocation must be reasonable. (See *Hernandez, supra*, 183 Cal.App.4th at pp. 1333-1335 [CALCRIM No. 522 not incomplete or misleading in failing to specify that provocation can negate premeditation and deliberation, even if insufficient to reduce murder to manslaughter].) Considering the totality of the instructions and the closing arguments of counsel, we find no probability that the jury was misled into legal error.¹⁸

H. *Cumulative Error*

Douprea contends that the cumulative effect of trial court errors and prosecutorial conduct requires reversal. We disagree. To the extent there was error, the cumulative prejudicial effect, in light of the entire record, is insufficient for reversal.

¹⁸ As Douprea asserts: “The record shows that this was a careful jury that paid attention to the instructions and struggled to resolve the critical distinction between first and second degree murder.”

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.