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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EARL KESTER,

Defendant and Appellant.

A137402

(Mendocino County  
Super. Ct. No. SCUKCRCR 1118709)

In re JAMES EARL KESTER,

on Habeas Corpus.

A142763

A jury convicted defendant James Earl Kester of second degree murder for strangling Jason Blackshear. Kester claims that his trial counsel was ineffective for allowing the introduction of irrelevant and prejudicial statements during his taped interview with police and during his testimony at trial, for stipulating to the admission of the victim's declaration supporting a restraining order, and for failing to address key defenses in her closing argument. Kester also asserts that the court should have awarded him one additional day presentence custody credit. We agree that Kester is entitled to an additional day of credit, but in all other respects affirm the judgment. Although some tactical decisions of Kester's counsel appear to be objectively unreasonable, in light of his taped confession they caused him no conceivable prejudice.

Kester reiterates his claims of ineffective assistance of counsel in a petition for writ of habeas corpus which we have consolidated with this appeal. The petition fails to present a prima facie case and we therefore summarily deny the writ of habeas corpus.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Kester was charged with one count of murder for the killing of Jason Blackshear enhanced by five prior convictions. (Pen. Code, §187, subd. (a).) The jury found him guilty of second degree murder. The court sentenced him to 30 years to life, plus five consecutive years for a prior felony strike.

#### ***Prosecution Evidence***

Blackshear lived on a large compound in Fort Bragg, California owned by Glen Arnold, and Kester often visited his friend “Pops,” Herman “Keith” Harrington, who also lived there.

In June 2011, Kester got into an altercation with Blackshear that caused Blackshear to obtain a restraining order against him. The declarations for the restraining order were completed by Arnold and signed by Blackshear. In them, Blackshear stated that Kester assaulted him by punching and kicking him for no reason, and, “I fear for my life.”

Two months later, on the day of the murder, Blackshear was upset because someone had uprooted his marijuana plants. Blackshear told a friend of Arnold’s he was being chased by Kester and Harrington with “a can of gas.” Blackshear blamed Kester and Harrington for ripping up his marijuana plants, and said that someone should pour gas on Kester and light him on fire.

Arnold testified that just before dark that afternoon, he heard a commotion and Blackshear say: “Leave me alone. Get out of here.” Then he heard the sound of someone or something being slammed into the building. Arnold ran to the phone and called 911.

Sheriff’s Deputy Stephen Gray arrived at the property and found Blackshear dead, lying on his back with an extension cord wrapped around his neck and tied to the latch on the door. The following morning, sheriff’s deputies took Kester to the station for

questioning. In a recorded interview, he initially denied killing Blackshear but when confronted with evidence against him, he later confessed.

In the interview, Kester explained that he was off parole. He described his prior offenses as “Just stupid stuff” and Detective Porter said “Stupid stuff. Kid stuff?” He mentioned two specific convictions: (1) he was sentenced to three years and 8 months on his “first beef” when he was 18 years old; and (2) he had been on parole for grand theft auto. Kester was then 41 years old and had spent 21 years in the criminal justice system. He explained that Blackshear’s restraining order was based on a “disrespect issue” between them over Blackshear stealing. Kester stated that he used methamphetamine three days prior to the interview and was drinking the day before. Kester explained that he tried “to stay away from that crap [meth] for the most part.” He described Blackshear using “crank” and as a dealer.

At the time of Blackshear’s death, Kester and Blackshear had resolved their disagreement over the restraining order and were getting along. But there were a lot of people unhappy with Blackshear. The day he died, Blackshear was mad at one of the older men on the property for uprooting his marijuana plants. In his interview, Kester claimed he told Blackshear that he pulled the plants so Blackshear would stop yelling and not direct his anger to the older men. Then, Kester said he left the property and did not return that day.

When the detective told Kester that blood was found on an extension cord at the scene of the crime, Kester replied “my ass is grass” and said it was his blood. Kester went on to explain that he went to Blackshear’s to talk. He asked to turn down the radio, and when he did so, Blackshear swung at him with some sort of weapon. A violent struggle ensued, and Kester claimed he several times called for help. The fight ended when Kester choked Blackshear “out” with his hands for a “couple minutes.” Then he put the extension cord around Blackshear’s neck “to make sure he’s not breathing.” When the detective asked if he choked him until he stopped breathing and moving, Kester said “yeah.”

Kester then explained that Blackshear had been stealing from the old guys on the property and had punched Harrington in the nose, so Kester went to Blackshear's shed the afternoon of the crime and Blackshear started the fight. The detective asked him about a water bottle found under Blackshear's head and how it got there and Kester said "I have no idea."

Deputy Bryan Arrington photographed the crime scene and collected evidence. He found the cord wrapped around Blackshear's neck "rather taught, meaning it's tight in between the cord and/or the bolt and the decedent's neck." Blackshear had a bottle under his head and removing the bottle did not change the tension in the cord. Investigator Alvarado testified that the extension cord around Blackshear's neck was "very taught, very tight . . . it was pinching his neck area."

DNA testing showed Kester's blood on the extension cord. The medical examiner testified that the cause of death was blunt force trauma with ligature strangulation. Blackshear was "beaten to death" and "strangled by . . . a noose." He had a high level of methamphetamine in his system at the time of death.

### ***Defense Evidence***

Immediately upon taking the witness stand, Kester's counsel asked him what he meant when he said, in the recorded interview, he had spent 21 years in prison. Defense counsel framed her inquiry about his prior convictions stating: "we are going to talk about it before the DA talks about it, so the jury has all the information." Kester admitted he had a prior strike for first degree burglary. Defense counsel asked him if he had a problem with narcotics in his youth and he said yes. Kester explained that he committed his last felony when he was around 30 years old. He was convicted of grand theft auto that arose out of an incident when Kester was trying to run from his parole officer. He was released around age 35 and successfully completed parole.

Defense counsel asked him what he meant in the interview when he said he wanted to get rid of his number. He explained that he had been in trouble throughout his life and he wanted to "do well in society." Kester also explained a statement in the interview when he told detectives that he "held the keys for whites" in prison. He

described prison as a “gang world” and he refused to join a gang which earned him respect. He described the various white gangs (skin heads, Nazi low riders, Aryan Brotherhood) and said he would not “do their bidding.” He would represent all of the factions when racial tensions came up and talk to the black and Latino gangs. He acted as a “mouthpiece” for “all of the whites in the prison.” He explained that in order to “earn his stripes” in prison he would beat up rapists and child molesters.

Defense counsel then asked Kester about his tattoos and he explained that he drew everything on his body because he is an artist. He made clear he had no gang tattoos.

Kester testified about the events leading up to the restraining order. He stated that three older men on the property told him Blackshear was stealing their property. Kester went to Blackshear’s shed to retrieve it the following day and confronted Blackshear. Kester testified that Blackshear “got really violent” and Kester kicked him in the side of the head. Sheriff’s deputies contacted Kester later that day about the restraining order and told him to stay away from Blackshear.

On the day of the murder, Kester was drinking with Harrington. He said that Harrington had stumbled and fallen on Blackshear’s marijuana plants and Blackshear punched “Pop’s” in the nose.

That evening Kester entered Blackshear’s shed to talk and music was blaring. He sat down on the bed and turned to lower the volume on the stereo, when Blackshear hit him with something in the right armpit and jumped on top of him. The struggle turned into a lengthy fight. Kester tried to leave the shed, but Blackshear continued to pursue him. Blackshear then tried to choke him and Kester pushed Blackshear into furniture and walls to try to get him to loosen his grip. Kester got Blackshear in a chokehold, grabbed the extension cord and looped it twice around his head. Kester testified that he was not trying to kill Blackshear. He testified “I couldn’t tell you what I was doing. I couldn’t describe that I had any plan.” He slid a water bottle under Blackshear’s head to make sure he was breathing before he left the shed.

Kester explained that he had a chance to flee after the fight and he had “a history of running from the law,” but he stayed on the property all night even though he knew

law enforcement would come. Kester testified that he originally lied in the police interview because he did not know what to do and was “disoriented and afraid.”

On cross-examination, Kester acknowledged his prior convictions and violations of parole. The prosecutor asked him about being involved with the Aryan Brotherhood and he denied being a “shot caller” but said he acted as a mouthpiece. Kester acknowledged that he did not wrap the electrical cord around Blackshear's neck until after he had choked him with his hands, that he didn't tell the police he placed the water bottle under Blackshear's head, and that he wrapped the cord around Blackshear's neck because he “didn't want to take a chance” that Blackshear would wake up. The prosecutor reviewed each of Kester's false statements to police in the recorded interview and Kester acknowledged lying in nearly all of them.

Defense counsel cross-examined Detective Arrington and Investigator Alvarado in detail about how they collected the evidence. One of the defense witnesses, Terri Haddix, a forensic pathologist, testified about irregularities in the collection of evidence and examination of Blackshear's body. She stated that it was unusual for a body to be naked when it arrived at the medical examiner as it was here. She testified that the ligature around a victim's neck should be “preserved as intact as possible” with the same degree of tightness and should not have been removed. She also remarked that if there is evidence of a fight, it would be typical to take fingernail scrapings which was not done. It was unusual that the medical examiner did not measure the injuries on Blackshear's body. She testified one possible scenario for the abrasions on Blackshear's hands was he was conscious and struggling to remove the cord from his neck.

## **DISCUSSION**

### **I. Kester Cannot Demonstrate He Suffered Prejudice as a Result of His Attorney's Performance**

Kester claims that his trial counsel was ineffective for failing to redact portions of his taped interview with police, for the topics she covered with him in direct examination, for stipulating to admission of all the documentation supporting the restraining order, and for failing to adequately present a defense in her closing argument.

Although, counsel adopted a risky trial strategy and made some unreasonable choices to allow damaging evidence that could have been excluded, given Kester's confession and the strong evidence against him, he cannot demonstrate prejudice.

To establish ineffective assistance of counsel, a "defendant must demonstrate that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to the defendant." (*People v. Stanley* (2006) 39 Cal.4th 913, 954 citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid.*) "To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

**A. Admission of the Entire Police Interrogation Interview**

At a hearing over the admissibility of Kester's interview with police, the prosecutor explained to the court that Kester made statements about his time in prison and his prior offenses. Defense counsel stated that she was contemplating testimony from Kester, and he would be confronted on cross-examination with his status as a convicted felon. She was "concerned about the context. That's the whole reason [for] playing the whole thing." She explained that redacting the transcript of the interview would "take everything else out of context." "I think the context is absolutely imperative. . . . [T]he comments by Mr. Kester, I don't think are so damaging that if the tape is played in whole, that I am going to be that much prejudiced . . . . He talks about being in prison. He talks about spending 21 years of his adult life behind bars. And—and certain roles that he may or may not have had while in prison. The fact that he was at the time of the interview with Detective Porter no longer on probation or parole, I don't think all of those things in this context really damage me even if Mr. Kester weren't to testify. Because I think the whole point is I want the jury to hear the whole thing." She further

explained that the transcript would not specifically say Kester had a prior strike or the specific offenses supporting his prior convictions.

Kester argues that introduction of the entire interview without redaction of potentially prejudicial statements constituted ineffective assistance of counsel. He relies on *People v. Guizar* where the court reversed a murder conviction for ineffective assistance because counsel allowed a witness's tape-recorded statement to be played to the jury. (*People v. Guizar* (1986) 180 Cal.App.3d 487 (*Guizar*)). Although the statement was played to demonstrate why the witness did not come forward immediately after the murder, the witness statement included that he heard someone say the defendant had “ ‘committed some murders before.’ ” (*Id.* at p. 490.)

The court ruled a defense attorney would not make a tactical decision to admit a statement that the defendant had committed unproven crimes. “[I]t was counsel's responsibility to edit out at least the portion of the tape and transcript referring to other murders. Ignoring other possible objections, it is inconceivable to us that defense counsel did not object to the introduction of this portion of the tape and transcript on the ground that it was more prejudicial than probative.” (*Guizar, supra*, 180 Cal.App.3d at p. 492, fn. 3; see also *People v. Hines* (1964) 61 Cal.2d 164, 174, disapproved on other grounds *People v. Murtishaw* (1981) 20 Cal.3d 733, 774 fn. 40 [“[T]he trial court erroneously allowed the jury to hear tape recordings of defendant's confession without erasing, or otherwise deleting, the portions of the tape in which defendant mentioned prior criminal offenses involving narcotics violations and a purse snatching.”].)

*Guizar* involved references to unproven serious offenses that were not relevant to the issues presented at trial. Here, Kester's statements involved two references to his convictions for less serious crimes. Kester mentioned an offense at age 18 for “stupid kid stuff” and a more recent conviction for grand theft auto. Counsel made a tactical decision that these prior offenses were not unduly prejudicial in light of the murder charge and were necessary to give the full context of the police interview. She also correctly figured the existence of these convictions would be raised in the prosecution's cross-examination

of Kester. (See *People v. Ardoin* (2011) 196 Cal.App.4th 102, 120.) As we explain in the next section of this opinion, we do not fault the decision to raise Kester's prior crimes.

Moreover, the recording included statements that were helpful to Kester. He said he went to Blackshear's to talk, and that a violent struggle ensued after Blackshear took a swing at him with a weapon. Kester called for help several times, and tried to get away from Blackshear. He said Blackshear came on him like a "monster" or "rabid dog." However, even if counsel's strategy was to allow the jury to hear the whole story, as we will later explain, it was unreasonable not to redact unfavorable evidence, such as Kester's prison history, that was unrelated to the crime.

In this case, because Kester had to admit he killed Blackshear, it was not an unreasonable strategy to allow the bulk of the recording to come in to give Kester's explanation necessary context and to show the jury that he had nothing to hide. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 927–928 [Trial counsel's decision "can be fairly characterized as a reasonable tactical choice designed to demonstrate defendant's candor and honesty to the jury."].) However, this goal could have been accomplished while still redacting extraneous damaging information.

#### **B. Kester's Direct Examination**

Kester argues that his trial counsel was ineffective because she elicited damaging information about him in her direct examination. Specifically, he says his prior convictions, his experiences on parole, his time in prison, and his tattoos should not have been explored before the jury. Many of these questions were necessitated by trial counsel's decision to allow the full police interrogation to be played for the jury. If she had sought to redact the details of Kester's life behind bars, his experiences on parole and in prison she would not have had to address these issues during Kester's testimony.

As soon as Kester took the witness stand, counsel asked if he had seen the recorded interview and then she stated "And I want to talk about something that I know is probably going to be on the jury's mind. There was a question about how much time you have spent behind bars." She asked him about his 21 years in prison and about his first conviction at age 18. Defense counsel stated: "we are going to talk about it before the

DA talks about it, so the jury has all the information.” It is a valid tactical decision to bring out prior offenses on direct examination. (*People v. Mendoza, supra*, 78 Cal.App.4th 918.) In *People v. Mendoza*, the defendant alleged ineffective assistance of counsel because his trial counsel did not try to exclude evidence of prior convictions and instead brought them out on direct examination. (*Id.* at 923–924.) The court held “the trial counsel’s decision to voluntarily bring the priors out before the jury can be fairly characterized as a reasonable tactical choice designed to demonstrate defendant’s candor and honesty to the jury. In fact, the trial counsel stated on the record that he chose to bring the priors out on direct as a trial tactic.” (*Id.* at p. 928; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260 [counsel’s decision to elicit information about prior crimes was an informed and calculated risk].)

Kester also objects to trial counsel’s questions about his tattoos. Kester’s entire body, except his face, was covered with tattoos. He said that he was “fascinated by the art” and he drew everything on his body. He explained one represented his family’s love of dirt bike riding and another represented his sister, and none of them were gang tattoos. Counsel elected to allow Kester to explain his tattoos to the jury, in a positive light and to make clear they were not gang symbols. This was a reasonable tactical decision.

Defense counsel was faced with a situation where the jury heard Kester admit that he killed Blackshear in the recorded police interrogation. He first denied being involved and lied to the detective, but when confronted with the possibility his blood was on the electrical cord used to strangle the victim, he said “my ass is grass” and admitted the crime. She could not undo these admissions or Kester’s criminal record, so she decided to allow Kester to tell his story fully, admitting both the good and bad about his past conduct. Much of this strategy was a valid tactical choice, but even pursuing this strategy, counsel was ill-advised not to attempt to limit the scope of the information about Kester’s prior involvement with the criminal justice system. While defense counsel’s strategy to “front” Kester’s prior convictions was a sound tactical decision, she could have done so without bringing out other prejudicial information such as the amount of his life Kester had spent in prison, his unsuccessful efforts on parole, his contact with

gangs while in prison, his assaults on child molesters and his history of drug and alcohol use. We see no tactical value in exploring all these facets of Kester's life experience before the jury. Showing that he had previous felonies and was trying to turn his life around could have been accomplished without reference to these potentially prejudicial experiences.

### **C. Admission of the Restraining Order**

Prior to trial the prosecutor moved in limine for the court to take judicial notice of the restraining order Blackshear obtained against Kester. The prosecution moved to admit the documents related to the restraining order under Evidence Code, section 1280 (official records) and admit the victim's statements pursuant to Evidence Code, section 1250 (state of mind). Defense counsel opposed both motions arguing only the fact that a restraining order was issued should be presented to the jury.

The court took judicial notice of the restraining order and the related court documents. Defense counsel argued that handwritten declarations by Blackshear in support of the restraining order were not properly admissible under Evidence Code, section 1280. The declarations contained the following statements: (1) "Mr. Kester assaulted me yesterday"; (2) "I was walking by Mr. Kester when he jumped me, punching and kicking me for no reason"; (3) "I fear for my life[.] James Kester told others on the property that I had the assault 'coming . . . for a long time.' "

At the hearing on the motion, the court stated it would review the matter, but the victim's state of mind would be admissible if Kester was claiming self-defense. The court stated it was inclined to admit both the declarations and the court transcript of the hearing on the restraining order. The court instructed the prosecutor not to make reference to the declarations in his opening statement until defense counsel had affirmatively raised the issue of self defense. Then, defense counsel confirmed that there was going to be a claim of self defense, and the prosecutor and defense counsel conferred off the record. After the conference, the prosecutor stated that by stipulation all of the documents supporting the restraining order would be admitted. Defense counsel stated that the prosecutor "understands that through Mr. Counterman the statement made

by Mr. Blackshear as to threatening my client is also going to come in. I think we are just wanting everything out in front of the jury.” The court accepted the stipulations.

Kester argues this stipulation constituted ineffective assistance of counsel because the evidence in the declarations was not properly admissible. Although, counsel initially objected, she later agreed to the admissibility of the statements and never requested a limiting instruction. While counsel may have been stuck with evidence that there was a restraining order issued against Kester requiring him to stay away from Blackshear, we cannot conceive of a valid reason for stipulating to the admission of the statements contained in the declarations and other documents supporting the restraining order. The admission of this evidence raised serious constitutional questions. (See, *Crawford v. Washington* (2004) 541 U.S. 36.) Moreover, we agree with Kester that even if counsel stipulated to the admissibility of the documents, she should have requested a limiting instruction. (See *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.) “A clear limiting instruction can, in large part, dispel prejudicial misuse of such evidence.” (*Id.* at p. 390.)

The record reflects that counsel made a tactical decision to stipulate to the admissibility of the declarations, so she could gain a stipulation from the prosecution to admit Counterman’s testimony that Blackshear threatened to pour gasoline on Kester. The fact that Blackshear made a threatening statement about Kester was important to both the self-defense theory and to demonstrate that Blackshear was the aggressor in the fatal fight. But it was not necessary for counsel to stipulate to the admission of the documents supporting the restraining order to get this testimony from Counterman before the jury. It was independently admissible to show Kester had reason to fear Blackshear, not for the hearsay purpose of its truth. We see no reasonable basis to allow the introduction of all the documents supporting the restraining order in exchange for the prosecution's agreement to allow the evidence from Counterman that was independently admissible

#### **D. Defense Counsel’s Closing Argument**

Kester argues that his trial counsel gave a “rambling unproductive closing argument.” Without any citation to authority, he argues it was reversible error for

counsel to fail to argue for a verdict of manslaughter, properly explain the doctrine of imperfect self-defense, and explain the concept of reasonable doubt.

Counsel made the tactical decision to focus her argument on self defense and the weaknesses of the prosecution's case. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1190 [finding reasonably competent counsel could have determined that it was unwise to argue an implausible defense and instead focused upon challenging the testimony of the prosecution witnesses].) Counsel went through the details of the fight and Kester's fear. She argued Blackshear who was "high on crank, pissed off about his weed plants, keeps going after Mr. Kester." Kester grabbed the electrical cord in the heat of the moment, and did not plan on using it.

She also sought to portray Kester as a changed man, the "new James," who told the truth and wanted to be a productive member of society. She applied her defense strategy to be open about Kester's past and described his previous behavior as the "old James." Counsel explained that Kester did not have to talk to Detective Porter, he did not have to take the stand, and he did not have to openly display his tattoos, but he did so because he was not trying to hide anything from the jury. Kester admitted that the "old James" would lie and did not have respect for authority, but he had changed his ways. She argued Kester was truthful. "He could have hidden his past. He didn't even have to testify. But he testified so you learn about all his felonies."

In *People v. Williams*, the defense raised arguments similar to those raised here: counsel's argument about the applicable degree of murder was incorrect and confusing and counsel failed to argue the reasonable doubt principle to the jury. (*People v. Williams* (1997) 16 Cal.4th 153, 219.) Williams' counsel's decision to argue for an acquittal rather than second degree murder, was a " 'matter of trial tactics' " that should not be second-guessed by the reviewing court. (*Ibid.*) Williams also complained that counsel did not adequately argue reasonable doubt. "Defendant concedes counsel's argument covered the significant items of evidence presented by the prosecution, but faults counsel for failing actually to use the words 'reasonable doubt' at particular junctures. Surely such matters of diction fall within the range of tactical decisions to

which we ordinarily defer. In any event, counsel did not fail altogether to argue ‘reasonable doubt.’ Twice, in summarizing, counsel expressly invoked that principle.” (*Ibid.*) The Court found counsel was not ineffective in closing argument.

Here, defense counsel failed altogether to argue reasonable doubt in her closing argument, nor did she mention the law of self-defense or the difference between first and second degree murder. But trial counsel's decision of how to argue to the jury after the evidence has been presented is an inherently tactical decision. (*People v. Freeman* (1994) 8 Cal.4th 450, 498.) “[D]eference to counsel's tactical decisions in his [or her] closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should ‘sharpen and clarify the issues for resolution by the trier of fact,’ [citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. [Citation.]” (*Yarborough v. Gentry*, (2003) 540 U.S. 1, 6.) “Reversals for ineffective assistance of counsel during closing argument rarely occur; when they do, it is due to an argument against the client which concedes guilt, withdraws a crucial defense, or relies on an illegal defense.” (*People v. Moore* (1988) 201 Cal.App.3d 51, 57.)

Our Supreme Court has held the fact that defense counsel did not specifically argue for a verdict of manslaughter was not deficient performance. (*People v. Thomas* (1992) 2 Cal.4th 489, 531 [“Failure to argue an alternative theory is not objectively unreasonable as a matter of law.”].) In *People v. Thomas*, defense counsel only argued defendant’s innocence without differentiating between first and second degree murder. The court held that even if it was error there was no prejudice because the jury was instructed on first and second degree murder. (*Id.* at 532.) It was clear from the verdicts that the jury was able to distinguish the two because it found defendant guilty of second degree murder on one count and first degree murder on another. (*Ibid.*; *People v. Cunningham* (2001) 25 Cal.4th 926, 1005 [counsel was not ineffective for arguing identification rather than an offense other than first degree murder].)

We conclude that even with “the demonstrated risks and disadvantages of defense counsel’s strategy . . . counsel was [not] incompetent for adopting it.” (*People v. Hayes* (1990) 52 Cal.3d 577, 624.) “In light of defendant’s confessions, trial counsel were severely restricted in presenting a defense” (*People v. Rich* (1988) 45 Cal.3d 1036, 1097.) It is true counsel, provided no “roadmap” for the jury to evaluate the evidence and apply the law. She failed to discuss the elements of self-defense. But “[t]he mere circumstance that a different, or better, argument could have been made is not a sufficient basis for finding deficient performance by defense counsel.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 748.)

### **E. Counsel’s Unreasonable Strategic Choices**

Defense counsel’s choice to stipulate to the admission of the documents supporting the restraining order was unreasonable. So was the failure to ask for an instruction limiting the use of this evidence. We can conceive of no valid basis for these tactical decisions. As we said above, there was no need to secure a stipulation from the prosecution that Counterman could testify to Blackshear’s threats against Kester. They were admissible for a non-hearsay purpose, to simply show that Kester had some reason to fear Blackshear.

We also see no strategic value in allowing testimony of the amount of Kester’s life spent behind bars or under supervision of the criminal justice system. The fact that he acknowledged his prior convictions, would seem sufficient to provide context for his life and his willingness to admit responsibility for his past. The same holds true for his prison experience as a mouthpiece for the white inmates, his familiarity with prison gangs and his past assaults on child molesters. These details seem to us unnecessary to set the stage for Kester to argue that his prior offenses were in his past and he was a changed man. The strategic reasons voiced to support their introduction into evidence do not withstand a reasoned analysis. The choices to allow these topics to remain in Kester’s statement to police that was presented to the jury and explore them in direct examination were unreasonable.

## **F. Counsel's Unreasonable Tactical Decisions Caused Kester No Conceivable Prejudice**

Even though aspects of Kester's trial counsel's performance were unreasonable, her deficiencies caused Kester no possible prejudice. Kester admitted killing Blackshear. According to him, he did so in the course of a violent struggle that Blackshear initiated when he came at Kester with some sort of stabbing instrument. But the struggle started to subside when Kester "choked him out." Then, he wrapped the electrical cord around Blackshear's neck "to make sure he's not breathing" and left him there.

"Second degree murder is defined as the unlawful killing of a human being *with malice aforethought*, but without the additional elements-i.e., willfulness, premeditation, and deliberation-that would support a conviction of first degree murder." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Malice may be express or implied. "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. [Citation.] Implied malice is present 'when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' " (*Ibid.*)

"[S]econd degree murder with implied malice has been committed 'when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. ... [Citations.] *Phrased in a different way*, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life. [Citation.]" (*People v. Nieto Benitez, supra*, 4 Cal.4th at p. 104.) Homicide by strangulation indicates malice. (*People v. La Vergne* (1966) 64 Cal.2d 265, 271-272.) Here, Kester's own words show he was guilty of second degree murder. He applied the extension cord to Blackshear's neck after choking him with his hands in order to make sure Blackshear couldn't breathe. Kester acted in wanton disregard for life when any imminent danger to him had passed. No reasonable jury would conclude him guilty of any lesser crime.

The discussion of Kester's role in prison, his previous failure on parole and the facts surrounding the issuance of the protective order did not affect the verdict. Any deficiencies in counsel's performance were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

## **II. Kester's Sentencing Credits**

The court awarded Kester 465 days credit for the time he spent in custody from his date of arrest on September 6, 2011 to his sentencing on December 14, 2012. Kester argues, and the People agree, that he should have been awarded 466 days credit. (Pen. Code, § 2900.5; *People v. Frausto* (2009) 180 Cal.App.4th 890, 903.) The abstract of judgment should be amended to reflect 466 days of credit.

## **III. Petition for Writ of Habeas Corpus**

Kester asserts in a petition for writ of habeas corpus that he was deprived of his right to effective assistance of counsel at trial. The petition does not establish a prima facie case for relief, so we summarily deny it.

We review a petition for a writ of habeas corpus by evaluating “whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition.” (*People v. Duvall* (1995) 9 Cal.4th 464, 474–475.)

Kester claims for the first time in the petition that trial counsel failed to conduct an adequate investigation. In a declaration, Kester asserts that he gave his counsel the names of Mike Carter, Earl Craighill, and Harrington who could present character evidence on his behalf. Mike Carter stated in a declaration that he was never interviewed prior to trial but he would have testified for Kester. He stated that Kester lived and worked on his property for three to four weeks and he had no problems with him. Similarly, Eric Craighill stated that Kester worked on his property for two to three weeks and never displayed any signs of being violent. Harrington stated in his declaration that he was assaulted by Blackshear one week before the murder. He further stated that Blackshear told another person that he was sharpening a machete to use on both Kester and him.

Trial counsel explained that she contacted some of the witnesses identified by Kester and they did not provide any information that would have been helpful at trial. None of the witnesses could establish that Kester and Blackshear had positive interactions since the restraining order was issued or that Blackshear was violent or injured anyone in the past. She stated that Blackshear's criminal history contained "no signs of violent tendencies." The information trial counsel received during the defense investigation "was negative not useful." Her declaration stated: "Mr. Kester's criminal case was investigated thoroughly and no avenue of investigation that was suggested by Mr. Kester reaped any benefit to Mr. Kester. In fact, more often than not witnesses provided information that would be negative for Mr. Kester."

Selecting whom to use as a witness at trial is generally considered a tactical decision, which is accorded great judicial deference not usually rising to the level of reversible error. (See *People v. Bolin* (1998) 18 Cal.4th 297, 333–334 ["Whether to call certain witnesses is . . . a matter of trial tactics, unless the decision results from unreasonable failure to investigate."].) A reviewing court generally may not second-guess counsel's decision whether to call at witness a trial. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.)

Even though there could have been some positive character witnesses for Kester, given their short acquaintance with him and limited ability to testify about key issues in the case, trial counsel could reasonably have concluded it was not beneficial to have them testify. As the People point out, any testimony about Kester's character for non-violence or the victim's character for violence would have opened the door for the prosecution to introduce rebuttal evidence. (Evid. Code, §§ 1102, 1103; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 357 ["A defendant who elicits character or reputation testimony opens the door to the prosecution's introduction of hearsay evidence that undermines testimony of his good reputation or of character inconsistent with the charged offense."].)

Kester, also contends that trial counsel did not adequately prepare him to testify. He submitted a declaration stating: "My attorney did not prepare me to testify about the

events leading to the victim's death. She did not prepare me to deal with testimony regarding my past history.”

“We also reject defendant's contention that his trial counsel was ineffective for failing to adequately ‘prepare’ defendant to testify. Assuming for the sake of argument that competent counsel has such a duty, the record in this case does not show what steps counsel took to prepare defendant for taking the witness stand (see *People v. Wilson* (1992) 3 Cal.4th 926, 936), or that defendant's testimony would have been different had there been greater preparation.” (*People v. Hines* (1997) 15 Cal.4th 997, 1032.) Kester presents no evidence about what steps counsel did or did not take in preparing him to testify and he cannot demonstrate that additional preparation would have altered his testimony. The jury heard a recorded confession detailing the events leading to Blackshear's death so there does not appear to be any additional preparation by counsel that could have changed or improved Kester's recitation of the events leading to the murder. We therefore conclude counsel's preparation did not fall below an objective standard of reasonableness.

Finally, Kester asserts counsel was ineffective for failing to object to photographs of the victim “being left in plain view during long periods of the trial.” Kester presents no evidence to support his claim that the photographs were on display for excessively long periods of time. Declarations from Kester, his mother, and step-father all state that the photographs showed the victim with the cord wrapped around his neck and that the images were displayed every day during trial, but none of them state the images were in plain view for extended periods. Trial counsel's declaration stated that when any of the photographs “remained up for too long, there was a request to remove them from view.” Trial counsel had filed a motion in limine to limit the number of autopsy and crime scene photographs that were published to the jury. The court ruled prior to trial that it would limit the number of photos because the repetition can become gruesome. Counsel requested a further ruling that if a photograph is shown to the jury, “I don't want it sitting there for minutes at a time.”

On this record, there is no evidence that counsel was ineffective in her handling of the photographs or that the photos were, in fact, displayed for excessively long periods of time.

**DISPOSITION**

The trial court is ordered to correct the abstract of judgment to reflect an award of 466 days presentence custody credit. As amended, the judgment is affirmed. The petition for writ of habeas corpus is denied.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.