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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.

ABRAHAM IBRAHIM HADE,

Defendant and Appellant.

A138990

(Alameda County  
Super. Ct. No. H52452)

Defendant Abraham Ibrahim Hade appeals a judgment convicting him of second degree murder and sentencing him to 16 years to life in prison. He contends the court’s alleged evidentiary and instructional errors and the prosecutor’s alleged misconduct require reversal of his conviction. We find no prejudicial error and shall affirm the judgment.

**Factual and Procedural History**

In a one-count information defendant was charged with the murder of Osana Futi. (Pen. Code, § 187, subd. (a).)<sup>1</sup> The information further alleged that defendant had personally used a deadly or dangerous weapon in the commission of the offense (§ 12022, subd. (b)(1)), that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and that the offense carried a mandatory state prison term (§ 1170, subd. (h)(3)).

<sup>1</sup> All statutory references are to the Penal Code.

The following evidence was presented at trial:<sup>2</sup>

On April 28, 2012, Alexandra (Ali) R. attended a party in Fremont. When the party broke up, 30 to 40 people were in the street as she and her friends walked back to their car. Ali spoke briefly with Futi outside the party. Minutes later, while Ali was talking to another friend, she heard people yelling and a girl scream loudly. She ran down the street to where a group had gathered. She saw Futi, who appeared to be angry and as though he had just been in a fight. A Hispanic male on the ground in front of him appeared unconscious. Futi kicked the man on the ground and asked, “Does anyone else want to say to my face that they’re Norte? Does anyone else want to?” Ali explained that Futi was a football player at Newark Memorial High School and that there was a history of violence between members of the football team and the Norteño gang.

Ali approached Futi, put her hand on his arm, and said, “Let’s go.” As Futi began walking with her, Ali thought he had been drinking alcohol. As they walked, two men approached and taunted Futi, saying things like, “Oh, you think you’re tough?” Futi took a couple of steps toward the two challengers. One of the men, a Hispanic male wearing a white T-shirt, tried to punch him. Futi ducked, and then hit the man, causing him to drop to the ground. Futi then looked at the second man, a light-skinned African-American, who continued to say things, but in a quieter voice. The man appeared frightened and began backing up, but continued to taunt Futi. Futi stepped toward him, and the man fell to a sitting position, as if he had either tripped or been pushed, although Ali did not see Futi push him. Neither man had a weapon in his hands.

Ali glanced back at the Hispanic man on the ground and when she looked back at Futi, Futi said, “He stabbed me.” Futi was leaning with knees bent over the African-American man, who was still sitting on the ground. Ali walked over to Futi and saw blood coming from his right thigh. Futi, who was wearing shorts, had both hands on his thigh, covering the wound. Ali called 911.

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<sup>2</sup> Because the jury found the criminal street gang enhancement not true, we limit our recitation of the gang testimony.

Futi ultimately died as a result of a stab wound to the his right groin area, which severed his femoral artery and caused him to bleed to death.

While waiting for the police, Ali heard someone on her left saying, “Yeah, that’s what you get. That’s what you deserve.” She looked and saw a man standing under a streetlight holding a big silver knife at his side. The man looked either Mexican or light-skinned African-American. He was about five feet nine inches tall, had a medium build and short hair that was a little curly, and looked about 18 years old. Ali got a clear look at his face. Although she testified at the preliminary hearing that she thought the man with the knife was the same man Futi had been standing over when he was stabbed, at trial she explained that she did not get a good look at the man on the ground and could not say whether the person with the knife was the same person Futi had earlier knocked to the ground. At trial, she identified defendant as the man she saw with the knife.

Ali spoke to the police at the scene and told the officers that the man she had seen with the knife was wearing a light gray t-shirt and tan cargo pants. She accompanied the officers to an apartment complex nearby where she viewed four or five individuals. She told the officers that one of the men had some similarities to the person with the knife, but did not positively identify anyone.

After she returned home, Ali’s friends came to her house, where they discussed what had happened. Ali described the person with the knife. When her friend brought up on Facebook a picture of the defendant, she thought it was “kind of close,” but it was blurry and something was blocking the person’s face. Ali did not look at it for long because she was thinking about other things, but did have her friend send it to her and she showed it to the police when she returned to the station the following day. At the station, Ali positively identified defendant as the man she saw with the knife. Ali said she identified defendant based on what she saw at the scene, not based on the Facebook picture.

Avery B. testified he went to the party with defendant, Xavier S., and Tatiana M. When the party broke up, he was walking away from the party with another man when

Futi approached them and hit the other man in the face. Then, Futi looked at Avery and began running toward him. Avery tried to flee, but Futi caught him, hit him in the face, and pushed him to the ground. Avery told the police that Futi was standing over him as if he were going to beat him up, but instead announced that he had been stabbed, although Avery testified at trial that he did not remember this. Avery also told police that he saw defendant around or behind Futi when Futi was stabbed. The jury viewed his statements in a videotaped interview. The jury was also shown a portion of the interview in which Avery told police that defendant told him later that night that he had stabbed the victim. Avery acknowledged that he did not want to testify, not because he was worried about the repercussions of snitching, but because it was just not his priority. On cross-examination, Avery acknowledged telling the police that Xavier also may have said he stabbed Futi. At trial he claimed that his statements about defendant and Xavier claiming responsibility for the stabbing were not true.

At 1:30 p.m. the next day, April 29, Xavier's grandmother reported to the police that her grandson and three friends had just arrived at her home and tried to return a bloody knife. Officers were dispatched to the home to retrieve the knife. At trial, Xavier's grandfather identified the weapon as his. He testified that on April 29, he noticed that his knife was missing. When Xavier came home, he had the knife. The grandfather noticed a small drop of what appeared to be blood near the handle and asked his wife to call the police. Futi's blood was found on the knife.

Xavier, defendant, Avery, and Tatiana were arrested on April 29. Defendant is six feet one inch tall and at the time of his arrest weighed 180-185 pounds. Xavier is 5 feet 11 inches tall and was 14 years old at the time of his arrest.

Detective Holguin, along with other detectives, interviewed Xavier. Initially Xavier claimed he was not at the party. Later, however, he told Holguin that he had stabbed Futi, but that he did it in self-defense. After giving his statement, Xavier asked to speak with defendant. A video of their conversation was played for the jury. During the conversation Xavier repeated several times that he had told the police he was responsible, and that he was going to take the rap because he was not going to let defendant get locked

up. Defendant told Xavier several times that there would be no charges against anyone because “we weren’t there.” Both men exhibited awareness that there might be a camera in the room. The jury was also shown a video of Xavier talking to himself, saying that defendant was trying to take the rap for him.

Defendant’s cell phone contained texts dated the day after the stabbing. In one exchange, a person named Desirae asked, “What happened at the party last night? Someone got stabbed?” Defendant responded, “Yep. Something like that.” Desirae texted, “You’re hella annoying. You think I’m not gonna find out when it’s all over Facebook and Twitter.” Defendant responded, “Okay. I’d rather talk to you in person. My bad, babe, but fuck that nigga’ anyways. Nigga just got what was coming. Can we talk about something else?” In a phone call made from jail, defendant told Desirae someone had snitched on him. In phone calls to his mother and sister, he claimed that neither he nor Xavier had done anything.

A crime scene technician found a shoe impression left in the blood from Futi’s body near the starting point of the blood trail. The print was made by a size 11.5 shoe and had a pattern on the sole with the same class characteristics as Nike Air Jordans and Nike Air Force shoes. Defendant’s size 11.5 Air Jordans were consistent with the bloody print. Xavier’s size 10.5 shoes and Avery’s size 12 shoes did not match the pattern of the bloody print.

Sergeant Eric Tang testified that defendant, Xavier, and Avery were all members of a Norteño gang. He explained that in gang culture, juveniles sometimes claim responsibility for crimes committed by adults because the juvenile criminal system is more lenient to defendants than the adult system. Tang opined that Xavier’s statements to the police detectives were “symptomatic of a juvenile taking the rap for an adult.”

On cross-examination, the gang expert acknowledged that he had viewed the videotape of Xavier when he was left alone in the interview room, before he confessed to stabbing the victim, in which he stated that defendant “was taking the rap for me.” Based on Xavier’s demeanor on the video, Tang believed Xavier was putting on a show for the camera when he made that statement.

Defendant testified at trial. He denied stabbing Futi and claimed that it was Xavier who did the stabbing. He testified that on April 28, he went to the party with Tatiana, Xavier, Avery, and others. He was wearing jeans and four layers on top: a gray tank top, a white t-shirt, a black t-shirt and a pull-over sweatshirt with the word "California" written on it. When they arrived, instead of going into the house, he went with Xavier to a 7-11 store because Xavier said he had to pick up something. There, they met another friend who handed Xavier a knife, which Xavier put in his right front pocket. As they were returning to the party, he testified, they saw what looked like a big fight going on down the street. He ran ahead to watch. He saw Futi kick a Mexican guy on the ground and yell, "Any Mexican nigga can get it." A girl grabbed Futi and the two walked down the street, passing defendant. Shortly after, he heard something going on behind him, he turned and saw the victim grab his stomach and yell, "I got stabbed." The victim continued limping forward while holding his stomach. Defendant ran past the area where the victim had been stabbed to meet Tatiana. He did not know whether he stepped in any blood while he was running.

Later, according to defendant's further testimony, he and Tatiana met up with Xavier and others. Xavier was wearing the same clothing he was wearing earlier in the evening: a red basketball jersey, a black zipped hoodie, and blue jeans. Xavier said excitedly, "I stabbed him." He said he had to burn his clothes and bury the knife. Very soon thereafter, someone picked Xavier up in a car and they drove away. Still later, defendant, Tatiana, and others met Xavier at a friend's house. Xavier kept bringing up the stabbing, talking about it as if bragging, and acting out what he had done. The group decided that if the police contacted anyone, they would say they were not at the party and knew nothing about it in order to protect Xavier.

The next morning, defendant continued, Xavier showed him the knife, which had blood all over it. Xavier left for 10 to 15 minutes and when he returned the knife was clean. Later, he, Xavier, Avery, and Tatiana walked to Xavier's grandfather's nearby house. When they arrived, Xavier's grandfather yelled at his grandson for taking the knife and grabbed it out of his pocket. He threw it in the garbage and told the group to go

inside. He was arrested later that day and at the police station denied knowing anything about the stabbing in accordance with the group's plan to protect Xavier. He repeatedly said, "We weren't there," on the video of him and Xavier in the interview room because he knew the police were listening.

On cross-examination, defendant admitted telling several people in telephone calls from jail that nobody had done anything. He did not say that Xavier was the one who stabbed Futi because he knew the police were listening and he was still trying to protect Xavier. He knew he had been arrested for murder but did not think anything would come of the case.

Tatiana testified that she went to the party with defendant, Xavier, Avery, and others. After the stabbing, she left the area with defendant. When they met Xavier shortly thereafter, he had blood on his jeans in the upper thigh area. Later that night, Xavier said that he had stabbed Futi, and seemed proud of it. The group agreed that if contacted by the police, they would say they were not at the party. The following morning, after Xavier cleaned the knife, they went to Xavier's grandparents' house. Xavier asked Tatiana to hold the knife and, initially, she put it in her purse, but then handed it back to him. Tatiana was arrested with defendant later that day. Tatiana testified that Xavier was wearing jeans, a black sweater, and a white shirt on the night of the party.

Officer Chahouati interviewed a witness at the scene of the stabbing. The witness was nervous and did not want to talk to the officer. He eventually said he saw a male running with a knife. He described the person as a Hispanic male, 17 to 18 years old, five feet five inches tall, thin build, short black hair, wearing a black zip-up sweatshirt with a red basketball jersey underneath and jeans.

A jury found defendant guilty of second degree murder and found the weapon allegation true. It found the gang allegation not true. The court sentenced defendant to 16 years to life in state prison.<sup>3</sup> Defendant timely filed a notice of appeal.

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<sup>3</sup> Although defendant has not raised the point, the Attorney General notes that the abstract of judgment incorrectly reflects imposition of a life without the possibility of parole sentence. "As with other clerical errors, discrepancies between an abstract and the actual

## Discussion<sup>4</sup>

### 1. Improper Opinion Testimony

Defendant contends the trial court deprived him of due process by allowing the police witnesses to opine that his exculpatory witnesses were lying. “The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert’s opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.)

We shall consider each of the challenged opinions in turn. First, defendant contends police witnesses were impermissibly allowed to testify that Xavier was lying during his police interviews: Officer Holguin testified that he had received training in interviewing and interrogation. He had been taught to look at the body language of the person being interviewed and at the significance of the “defeated slump.” He explained, “a defeated slump is when you’re interviewing someone and you see their posture where they slump over. Head generally will go down, and they just appear to be defeated and worn out. Sometimes they may cover their head or face. They may let out a sigh. And generally from that point, they then begin to start telling the truth.” He had also been taught certain techniques, such as using a ruse, if the interrogator believes a person is lying.

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judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal.” (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.) Accordingly, we shall direct the trial court to amend the abstract and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

<sup>4</sup> In response to many of the asserted errors on appeal, the Attorney General argues that defendant forfeited his objection by failing to object in the trial court or by making a different objection in the trial court than the objection asserted on appeal. Defendant asserts that his objections were sufficient and that any additional objection would have been futile. We need not analyze the sufficiency of each objection because we conclude that none of the rulings were prejudicial errors.

Holguin testified extensively about his interview of Xavier. He explained that he and the other officers continued “to question [Xavier] and listen to his answers and his recollection of the events” even after he confessed to stabbing Futi because they were concerned that “what he was telling us wasn’t matching up with the evidence” or with what the witnesses “had told us already.” Holguin detailed the significant details in Xavier’s statement that did not match statements of other witnesses or the crime scene evidence. Holguin explained that because Xavier’s statements did not correspond to the facts they had already learned, “it shows that he’s possibly being dishonest, not telling us the truth. So it lends us to believe that he is covering up for someone.” For that reason, Holguin continued to question Xavier “[t]o see if he [would] then start telling the truth or change his story.” Holguin confronted Xavier with information that defendant had been identified by a witness and he created a ruse that “there was a video camera at a home and that the event was captured on video.” The purpose of the ruse was to get Xavier to tell the truth. After being confronted with the ruse, Xavier “displayed and [Holguin] observed . . . the defeated slump.” Based on his training and experience, Holguin interpreted this body language as meaning “[t]hat [Xavier] knows that we know what the truth is and that generally afterwards is when they’re going to start telling the truth.” The prosecutor then showed the jury a video clip of Xavier’s interview in which Xavier displays body language Holguin identified as the defeated slump.

In response to defendant’s hearsay objections, the court advised the jury that “everything . . . that Detective Holguin has talked about regarding what the juvenile said is not being offered for the truth of what the juvenile said . . .” and was admitted because “based upon those statements the detective did further things in the investigation . . . so, it’s a non-hearsay purpose that the statements were made by this particular suspect, and based on those statements, the detectives continued to do other things.” Defense counsel also asked that Holguin’s testimony about the defeated slump be stricken because Holguin was unable to establish it as a scientifically reliable phenomenon and as such, it was merely a lay person opining on whether someone else was telling the truth. The court denied the request on the ground that Holguin’s opinion that Xavier was lying “wasn’t

offered for the truth. It was offered for the fact that he had that information and continued with his investigation [of] other people.”

District Attorney Investigator Moreno gave testimony similar to Holguin’s testimony. Moreno interviewed Xavier a couple of days after Holguin. Xavier again claimed that he stabbed Futi. Over defense objections, Moreno testified that Xavier’s story did not match known facts about the case, including that he stabbed Futi in the left abdomen and that at the time he stabbed him, he and Futi were 30 feet away from where Futi had fought Avery.

As set forth above, much of this testimony was offered to explain why officers continued to investigate after Xavier confessed to the crime, and to rebut defendant’s claim that the investigation was inadequate. (See *People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 33 [officers’ opinion of witness’s credibility was properly admitted, not to show witness had been truthful, but “to show the reasonableness of the officers’ conduct”].) The jury was advised that this testimony was introduced for this limited purpose and we presume the jury followed the court’s instruction. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337.)

Holguin’s testimony about the “defeated slump,” even if it should not have been admitted, was not prejudicial. The testimony was offered to support Holguin’s explanation for why he believed Xavier was lying about stabbing Futi and, thus, why he continued to investigate. To the extent that his testimony may have suggested a scientific foundation existed for the defeated slump, defense counsel cross-examined Holguin thoroughly and Holguin acknowledged that he was unaware of any studies confirming the existence of the defeated slump phenomenon and that a person could slump for many reasons. The jury viewed much of Xavier’s interview with Holguin and Moreno, his statements to himself when alone in the interview room, and his conversation with defendant. The jury thus could, and undoubtedly did, make its own determination of the credibility of Xavier’s statements. There is no reasonable probability defendant would have achieved a more favorable outcome had Holguin’s

testimony about the defeated slump not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Defendant also contends Detective Michael Gebhardt was improperly allowed to testify that Avery was untruthful in his police interviews. Over defense relevance and hearsay objections, Gebhardt testified that he believed Avery was not telling the truth in his interview with police. He got this impression because Avery's statements were inconsistent with those of multiple people who were at the party and with those of some of the other suspects. Gebhardt's testimony was also offered for the limited purpose of explaining why he continued to investigate despite Avery's statement that Xavier may have stabbed Futi. The receipt of the testimony for this limited purpose was equally proper.

Next, defendant contends that Holguin was improperly allowed to testify that Xavier had a motive to lie but Ali did not. As set forth above, the jury was shown a clip of a videotaped recording of Xavier alone in the interrogation room in which he is jumping around and saying that defendant "was trying to take the rap for him." On cross-examination, Holguin agreed with defense counsel that spontaneous declarations are generally considered accurate and admitted that Xavier appeared excited and jubilant while in the interview room talking to himself. On rebuttal, Holguin clarified that spontaneous statements by 911 callers are generally considered reliable because that person doesn't have a motive to lie, but in comparison, the statement by Xavier, who had a motive to lie, may not be as reliable.

Contrary to defendant's argument, Holguin's testimony about 911 callers generally being reliable was not vouching specifically for the credibility of Ali, who had called 911 after the stabbing. Ali was not mentioned in this portion of Holguin's testimony. Holguin's testimony that Xavier's statements may not have been reliable was appropriate rebuttal to defense counsel's suggestion that they should be considered reliable because they appeared to be spontaneous. In any event, all members of the jury viewed the videotape and therefore were able to gauge the reliability of Xavier's statements for themselves. There is no reasonable probability defendant would have

achieved a more favorable outcome had Holguin’s testimony about the reliability of spontaneous statements not been admitted. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Finally, defendant contends the prosecution’s gang expert should not have testified that juvenile gang members sometimes “take the rap” for adult gang members. Tang explained that the criminal justice system treats juveniles more leniently than adults. Tang had prior experience with juveniles “taking the rap” for adults. One such experience involved a wiretap phone call involving a different gang in which older members of the gang were looking for younger members specifically so that they could have them accept responsibility for crimes committed by other gang members. Defense counsel interjected at this point, and moved to strike the testimony as nonresponsive and not relevant to the gang at issue in this case. The court then asked, “Is this something that -- the juveniles taking the rap for older people, is that symptomatic of gangs in general, or is it specific to certain gangs?” Tang responded, “It’s pretty much standard across all gangs.”

Contrary to defendant’s argument, Tang’s testimony did not invade the province of the jury by testifying that juveniles take the rap for adults. He provided expert opinion regarding gang culture to help explain why a 14-year old would admit to a crime someone else committed. There was no error in the admission of Tang’s testimony.

## 2. Prosecutorial Misconduct on Cross-Examination

“ ” “A prosecutor’s misconduct violates the Fourteenth Amendment to the United States Constitution when it ‘infects the trial with such unfairness as to make the conviction a denial of due process.’ [Citations.] In other words, the misconduct must be ‘of sufficient significance to result in the denial of the defendant’s right to a fair trial.’ [Citation.] A prosecutor’s misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ [Citations.]” [Citations.] [Citation.] ‘Generally, a claim of prosecutorial misconduct is preserved for appeal only if the defendant objects in the trial court and requests an admonition, or if an admonition

would not have cured the prejudice caused by the prosecutor's misconduct.' ” (*People v. Lopez* (2013) 56 Cal.4th 1028, 1072.)

Here, defendant contends the prosecutor committed prejudicial misconduct by asking him and Tatiana whether the prosecution witnesses were lying or wrong. He argues that “[t]he prosecutor’s ‘questions’ were not questions designed to elicit actual evidence. Rather, they were ‘speech[es] to the jury masquerading as . . . question[s]’ [citation], and served only to suggest to the jury, in a highly improper manner, that [he] lied and [Tatiana] lied. The prosecutor’s tactic in posing these ‘questions’ was improper and intended to make defendant and [Tatiana] look bad in the eyes of the jury.”

In *People v. Chatman* (2006) 38 Cal.4th 344, 384, the Supreme Court held that “courts should carefully scrutinize ‘were they lying’ questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions.” For the reasons discussed below, we reject each of the alleged instances of misconduct identified by defendant.

First, on cross-examination, after defendant admitted that he had lied to his mother, his girlfriend, and his close friend about being at the party, the prosecutor asked “So would you agree with me that someone who can lie to his really good friend that he loves will lie to anybody?” Defendant contends the question is argumentative. Defendant is correct, but the question did not call for an opinion on the veracity of any witness other than himself. More importantly, it did not rise to the level of misconduct. The question did not imply the existence of any facts not in evidence, it did not disregard any ruling of the court, and it did nothing that can be regarded as denying defendant a fair trial. (See, e.g., *People v. Lightsey* (2012) 54 Cal.4th 668, 718; cf. *People v. Trinh* (2014) 59 Cal.4th 216, 247-249.)

Next, during cross-examination, the prosecutor challenged defendant’s assertion that he did not tell anyone that Xavier stabbed the victim, even after his own arrest for

murder, because he claimed, “I didn’t really believe that it would actually go this far because I didn’t do anything.” When the prosecutor pointed out that defendant knew Ali had identified him, defendant explained that he thought the police were lying to him about that. After he acknowledged that the police did tell him the truth about another witness identifying him as being at the party, the prosecutor asked, “My question is, they were telling you the truth about this guy . . . identifying you. Couldn’t they have been telling the truth about [Ali] identifying you?” Contrary to defendant’s argument, the prosecutor’s question did not ask defendant to give his opinion about the officer’s credibility. The prosecutor was challenging the veracity of defendant’s explanation of why he delayed identifying Xavier as the person who committed the crime. There was no misconduct.

Defendant’s next challenge fares no better. As detailed above, testimony was offered that defendant sent a text to his girlfriend about the victim, saying “Nigga just got what was coming,” and Ali testified that after the stabbing a man holding a knife said, “Yeah, that’s what you get. That’s what you deserve.” During cross-examination, the prosecutor asked defendant, over defense objection, “And would you agree with me that that line [in your text] is similar to what [Ali] heard on the street?” The prosecutor followed up: “So of all the words and phrases in the universe, the one that you just happened -- just happened to come across paralleled what [Ali] heard on the night in question, correct?” Defendant acknowledged that it was. Defendant argues that the questions were argumentative and improperly called for an opinion by defendant as to the veracity of Ali’s testimony. We do not understand the questions to have asked defendant whether Ali was lying. The question may have been argumentative, insofar as it suggested the significance of defendant’s text message, but asking the questions did not constitute misconduct.

Finally, defendant contends the prosecutor asked Tatiana a series of argumentative questions. After Tatiana admitted that she “attempted to conceal and cover up this murder once” by trying to sneak the murder weapon back into Xavier’s grandfather’s house, the prosecutor asked “isn’t it possible that a person that’s done it once will also make a

second attempt to try to conceal, or cover up, what happened in the death of Osana Futi?” When Tatiana responded, “but that’s not what I’m doing” the prosecution repeated, “But to get an answer to my question, a person who does it once is likely to do it twice, wouldn’t you [agree]?” Even if argumentative, the questions did not call for an opinion on the veracity of any witness other than herself, nor did they elicit inadmissible information or disregard rulings of the court. There was no misconduct.

### 3. Prosecutorial Misconduct in Closing Argument

Defendant argues that the prosecutor committed prejudicial misconduct throughout closing argument by improperly vouching for witnesses, disparaging defense counsel and appealing to the passions and sympathies of the jury.

First, defendant suggests the prosecutor committed misconduct by improperly vouching for witnesses in the following two statements: (1) “I give you this [willfully false instruction] because the defendant testified. Tatiana testified and it’s my belief that both of them were willfully false in a bunch of areas, particularly the defendant.” (2) “[Ali] didn’t see anyone in a red jersey . . . . She saw a gray shirt. All this is an effort to put Xavier in this -- to create fog and dissension, but only his two witnesses -- own 2 witnesses couldn’t back him on that. The only person who says that is the defendant, and we know he has no credibility.” Contrary to defendant’s suggestion, the prosecutor was not vouching for Ali, or any other witness, in these statements. There was no suggestion that the prosecutor’s belief in the credibility of the testimony of Ali or of any other witness was based on anything other than their testimony at trial. (*Berger v. United States* (1935) 295 U.S. 78, 88 [The prosecutor has a special obligation to avoid “improper suggestions, insinuations, and especially assertions of personal knowledge.”]; *People v. Ward* (2005) 36 Cal.4th 186, 215 [“ [S]o long as a prosecutor’s assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the “facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,” [his] comments cannot be characterized as improper vouching.’ ”].) Here, the prosecutor was arguing that defendant had lied at trial and should not be believed, which is clearly appropriate for closing argument. (*People v. Earp* (1999) 20

Cal.4th 826, 863 [“ ‘The prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence [and] to argue on the basis of inference from the evidence that a defense is fabricated.’ ”].)

Next, defendant identifies 10 instances in which he contends that the prosecutor improperly disparaged defense counsel in closing argument.<sup>5</sup> We need not address each

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<sup>5</sup> The 10 instances were as follows: (1) THE PROSECUTOR: “And so they [the police] confront him [Xavier] with a lot of evidence and . . . slumping his shoulders, and then they expected what they thought was going to be a truthful answer. What did he say? ‘Memphis did it.’ And that image is so damaging to the defense that they didn’t want you even to see it because we had a myriad of clips from Xavier’s interview, a myriad of clips from everything that they wanted to talk about it.” (2) THE PROSECUTOR: “I know Mr. Knutsen wants to play that one clip of where he initially says, ‘I think I got him over here,’ but realize that’s where he stopped, once again, giving half the story. He stopped his clip right there with Detective Gebhardt, and Detective Gebhardt said, ‘It was unclear, that’s why I asked him to show me.’ And so Mr. Knutsen is going to have to answer why he didn’t play the rest of the clip . . . .” (3) THE PROSECUTOR: “You didn’t do it, and they had done it and told the police that you did it, he would have cleaned his clock. But what did he do? Laughed. Laughed. And went, ‘You didn’t do it either.’ That’s why Mr. Knutsen can’t get in front of you now and say, Well, Xavier did it and confront Xavier because his client can’t do it with credibility. Mr. Knutsen can’t do it with credibility when he had all the chance to do it.” (4) THE PROSECUTOR: “That’s why he [defendant] doesn’t -- he didn’t want, and his attorney didn’t want, friends coming to court which happened at the preliminary hearing creating a distraction. No, they were creating a problem. They didn’t want you to see that problem because that’s the real deal.” (5) THE PROSECUTOR: “But he’s [Mr. Knutsen] got to do that [ignore the blood evidence] to get you away from Xavier’s confession because he knows that if [the] Xavier confession falls, his defense falls.” (6) THE PROSECUTOR: “So when Mr. Knutsen says he’s ‘done all that we can do. We can’t do anymore’ That’s not necessarily true. He has the power of subpoena.” (7) THE PROSECUTOR: “And when did he make an attempt to go out and talk to the kid who saw somebody in a red jersey? No defense investigator came up here and said, I tried to talk to him. We got no cooperation. If that was that important to him, why wasn’t there any effort for him to make that connection? Because it’s . . . just smoke and mirrors for you guys, to distract you from the true reality of the situation.” (8) THE PROSECUTOR: “Maybe I missed it, but . . . as we were laying out our case in opening statement, the defense said that that was the defendant’s shoe in the blood as he ran away. Now, it’s changed that we’re not sure, but it’s changed because they don’t want the damaging evidence to come in and overflow them, overrun them. The facts didn’t change, only his explanation changed. [¶] . . . [¶] . . . And so ask yourself why? We’ve been dealing with this case since April, but here we go, and now all of a

alleged improper argument individually, because it is clear that all fall within the permissible scope of closing argument. While it is prosecutorial misconduct to disparage defense counsel in front of the jury (*People v. Young* (2005) 34 Cal.4th 1149, 1193), the prosecutor retains “wide latitude in describing the deficiencies in opposing counsel’s tactics and factual account.” (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) In *People v. Zambrano* (2007) 41 Cal.4th 1082, 1154, overruled on a different ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22, the court rejected a claim of misconduct where the prosecutor called defense counsel’s argument a “ ‘lawyer’s game’ ” that attempted “to confuse the jury by taking the witness’s statement out of context.” The court explained, “It was clear the prosecutor’s comment was aimed solely at the persuasive force of defense counsel’s closing argument, and not at counsel personally. We have found no impropriety in similar prosecutorial remarks. (E.g., [*People v.*] *Stitely* [(2005)] 35 Cal.4th 514, 559-560 [argument that jurors should avoid ‘ ‘fall[ing] for’ ’ defense counsel’s ‘ ‘ridiculous’ ’ and ‘ ‘outrageous’ ’ attempt to allow defendant to ‘ ‘walk’ free’ ’ by claiming he was guilty only of second degree murder]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215-1216 [argument that defense counsel was talking out of both sides of his mouth and that this was ‘ ‘great lawyering’ ’]; *People v. Breaux* (1991) 1 Cal.4th 281, 306-307 [argument that law students are taught to create confusion

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sudden you are in mid-stream and change it. And if you want, he could have tested the shoe, but he didn’t. He basically acknowledged in his opening statement that it was the defendant’s, but he gets up here now and attacks us for not doing more when you conceded in your opening that it was his shoe. That’s double speaking. That’s talking out of both sides of your mouth. That means you’re guilty.” (9) THE PROSECUTOR: “Mr. Knutsen and I have to share all of our information, and he knows what all the witnesses’ statements say. And, yes, if there’s anyone else who could have brought credible evidence to you, it would have been before you. But that does not detract from what you actually do have, the complete picture of what went down.” (10) THE PROSECUTOR: “And there is no doubt, ladies and gentlemen, that I take some offense to this ‘rush to judgment’ argument because nothing about what happened here was a rush to judgment. Fremont Police Department brings in -- gets a call and you have a potential murder weapon. Okay, so what do you do now? You bring in the young woman who says she saw the person holding the knife to identify people.”

when neither the law nor the facts are on their side, because confusion benefits the defense]; *People v. Bell* (1989) 49 Cal.3d 502, 538 [argument that defense counsel's job is to "'confuse[ ]'" and "'throw sand in your eyes,'" and that counsel "'does a good job of it'"].) (*Zambrano, supra*, 41 Cal.4th at p. 1155.) Here, the prosecutor's closing argument was a permissible attack on the merits of defense counsel's contentions and not a personal attack on counsel's character.

Finally, defendant contends the following comments improperly attempted to inflame the passions of the jury: (1) THE PROSECUTOR: "So now he wants you to come in and say, Save me, give me my life back. And what life is that? The life he was telling Justin Pruitt about. What he's going to do once he gets back. Go back to Irvington Park. Sell his marijuana and take care of the turf." (2) THE PROSECUTOR: "Now I guess it's just another coincidence like the text message of all the stuff he raps about. He explains how he killed that man in cold blood. Make no mistake about it, there's nothing innocent going on. That man is guilty of murder. Once again, First Degree? Second Degree? Don't fight over degree, but return a murder verdict because this is a life that he wants to get back to, and this is the life that Mr. Knutsen is getting ready to send him back to." (3) THE PROSECUTOR: "So, yes, let him know he's wrong and he's caught. No more training youngsters on how to get away with murder. You're caught. And now you must give him what he deserves. He must get what is coming to him. He likes to use that phrase. Well, give it to him just like he gave it to Osana and convict him of murder. Thank you."

We do not approve of the argument to the extent it may suggest that defendant should be convicted because of the lifestyle to which he would return if acquitted. However, the argument largely responded to implications suggested by the defense and without dispute was supported by the record. The evidence showed that defendant regularly went to Irvington Park, a known Norteño area, and that he was involved in marijuana sales. There was also evidence that defendant sang a rap song to his friend Erica Hewitt about Futi's murder and told her in a phone call from jail that he could not wait to go back to "real mobbing." Finally, there is no dispute that defendant at 18 years

old was substantially older than the others involved in the incidents, particularly 14-year-olds Xavier and Avery. A prosecutor is permitted to argue his case vigorously and in colorful terms. (*People v. Jones* (1997) 15 Cal.4th 119, 175, overruled on different ground in *People v. Hill* (1998) 17 Cal.4th 800, 822.) Reading the prosecutor's argument in its entirety, its thrust clearly was that defendant should be found guilty because the evidence proved him to be guilty beyond a reasonable doubt, and not for any other reason.

### 3. Self-defense Instructions

Defendant requested instructions on perfect and imperfect self-defense and defense of others. The court gave the instructions on imperfect self-defense and defense of others (CALJIC No. 5.17) but refused to instruct on perfect self-defense and defense of others.<sup>6</sup> Defendant contends the court deprived him of due process, the right to a defense and a fair trial by failing to instruct the jury on self-defense and defense of others.

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<sup>6</sup> It is unclear from the record why the court gave the imperfect self-defense instructions but not the perfect self-defense instructions. The court stated before any argument was made, "based on the facts that we have here, I think [I will instruct the jury on] heat of passion and also what I refer to as the 'moron murder rule' which is *Flannel*." The court's reference was to *People v. Flannel* (1979) 25 Cal.3d 668, 674, in which the court held that "[a]n honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter." (Italics omitted.) The court then asked defense counsel if he was requesting a self defense instruction and counsel said that he was. Counsel emphasized that defendant was not admitting he stabbed Futi. Rather, he was arguing that "there is no evidence to suggest that it wasn't somebody else" who stabbed Futi in self-defense. The court rejected this argument explaining, "that's why you're getting a third party culpability instruction, but you can't get a self-defense instruction for your client unless inferentially it says he was there." Defense counsel clarified, "I'm trying to say that somebody may have had a reasonable self-defense argument, and because it's [the prosecution's] burden to prove beyond a reasonable doubt that [defendant] had the specific intent, if they present a factual scenario that demonstrates that that intent may not have been there just based on the facts that they're arguing, then I think [defendant] ought to be able to say they haven't presented evidence to justify anybody's specific intent, let alone his." Ultimately, the court found that there was no "legal basis" for the instruction.

Defendant's claim of instructional error is reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

Upon request by the defendant, a trial court is required to instruct on a defense that is supported by substantial evidence. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) "Evidence is substantial if a reasonable jury could find the existence of the particular facts underlying the instruction." (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1426.) Doubts as to the sufficiency of the evidence to warrant a requested instruction should be resolved in favor of the defendant. (*People v. Eid* (2010) 187 Cal.App.4th 859, 879.)

Here, defendant argues the court erred in refusing his requested instructions because there was evidence on which the jury could have found the "assailant" believed he would be killed if Futi continued his bloody rampage, or alternatively, the jury could have found the "assailant" stabbed defendant to stop him from killing Avery or others. Although defendant continues to use vague references to an assailant, the jury rejected his defense that the crime was committed by someone other than himself. Accordingly, the challenged instruction must be analyzed based on the jury's finding that defendant committed the killing.

For a killing to be in self-defense or defense of another, the defendant must actually and reasonably believe in the need to defend, the belief must be objectively reasonable, and the fear must be of imminent danger to life or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) "The principles of self-defense are founded in the doctrine of necessity. This foundation gives rise to two closely related rules . . . First, only that force which is necessary to repel an attack may be used in self-defense; force which exceeds the necessity is not justified. [Citation.] Second, deadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury . . . Under these two principles a person may be found guilty of unlawful homicide even where the evidence establishes the right of self-defense if the jury finds that the nature of the attack did not justify the resort to deadly force or that the force used exceeded that which was

reasonably necessary to repel the attack.” (*People v. Clark* (1982) 130 Cal.App.3d 371, 380, overruled on other ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 92.)

Here, there is no evidence to support a finding that defendant was in fear of imminent danger to his life or great bodily injury. The suggestion that defendant may have believed that “he would be killed if Futi continued his bloody rampage” is entirely speculative and without any support in the evidence. However, the evidence arguably would support a finding that defendant acted in defense of Avery. Avery had been pushed or had fallen to the ground and Futi was hovering over him. Considering that Futi had just severely beaten two other people, a jury could find that defendant reasonably believed Avery was in imminent danger of great bodily injury. Contrary to the Attorney General’s argument, the fact that Futi was unarmed does not necessarily establish that defendant’s use of force was excessive. Any error, however, was harmless. Since the jury rejected the defense based on the unreasonable defense of others, there is no likelihood the jury would have credited a defense based on the reasonable defense of others.

#### **Disposition**

The trial court is directed to amend the abstract of judgment to reflect the sentence of 16 years to life in prison as orally pronounced by the court and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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Pollak, Acting P. J.

We concur:

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Siggins, J.

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Jenkins, J.

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