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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN TRAVIS FITCH,

Defendant and Appellant.

A139404

(Contra Costa County
Super. Ct. No. 51203488)

I.

INTRODUCTION

A jury found appellant Brian Travis Fitch guilty of first degree homicide (Pen. Code, § 187) for shooting his best friend, Jeff McCoy. Appellant first claims the trial court erred in admitting evidence of a prior shooting that occurred under similar circumstances resulting in appellant's acquittal on self-defense grounds. He further contends the court improperly instructed the jury about this uncharged offense. He next asserts he was entitled to a jury instruction on heat of passion, even though the jury found the homicide was premeditated. Lastly, he alleges multiple instances of prosecutorial misconduct. We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. Evidence at Trial

Appellant and McCoy were best friends since childhood. They grew up together in Pinole, California. Their relationship began to deteriorate in 2010 because appellant suspected McCoy of having an affair with his wife, Rene.

Appellant's stepbrother, Randy Palutsyn, testified that appellant's behavior began to change in the fall of 2010 due to his use of drugs. In October 2010, Palutsyn spent the night at appellant's home. The next morning appellant confronted him about whether he had sex with Rene. Again, after a trip to Lake Tahoe in December 2010, appellant accused Palutsyn of having sex with Rene. Appellant told Palutsyn he was going to hurt him. After appellant went through drug treatment in February 2011, Palutsyn said appellant was relaxed and happy. Palutsyn met with him and told him directly that he had never slept with his wife. Appellant said "I believe you, so you get a free pass." Palutsyn took this to mean that appellant would not harm him.

Appellant told Palutsyn that he believed his wife was having sex with McCoy and he said he wanted to kill McCoy. Appellant also told one of his lifelong friends, Johnny Caughman, that he thought Rene was having an affair with McCoy.

In May 2011, Palutsyn was riding in the car with appellant and his wife and daughter, when appellant abruptly pulled off the freeway at an exit that could have taken them to McCoy's house. Appellant stopped the car and said, "Fuck it, I don't have my gun." He then started jerking the steering wheel from side to side and ripped it off the steering column. Appellant got out of the car and walked away. Appellant said he was upset because people were not "coming clean" about sleeping with his wife and it was bothering him. On another occasion, appellant told Palutsyn that he was going to go down to the "510" (the area code for Pinole) and "kill them all."

During the summer of 2011, McCoy's neighbor saw appellant and McCoy arguing in McCoy's garage. He saw appellant head butt McCoy in the face, causing McCoy to fall backwards. As a result, McCoy had a broken nose and two black eyes.

The weekend before McCoy's homicide, appellant borrowed Caughman's truck. The truck had an inoperable passenger side door that prevented it from being opened from the inside unless a person knew how to maneuver it in a certain way. Caughman said if a person didn't know the trick to get it open, "you weren't getting out."

Appellant stored his "gun vault" with two handguns and three or four rifles/shotguns at Ellis Cooper's house. The night before the homicide, he told Cooper that he was leaving his wife and going to the "510." He took the gun vault with him.

Appellant went to another friend's house, Darryl Anthony, because he was upset. Anthony tried to calm him down. Anthony saw the butt of a semiautomatic gun in appellant's truck the evening before the homicide.

On the morning of the shooting, several witnesses testified to hearing gun shots at approximately 7:00 a.m. One witness heard two shots and then a few seconds later, when she saw a truck drive away, she heard additional shots. Colin Hill heard gunshots and when he looked outside, he saw a body lying on the sidewalk in front of his house. He saw the person roll from side to side, and then his eyes rolled back in his head and "he was gone."

After the shooting, appellant appeared with blood on him at Cooper's house looking like "he had seen a ghost." He asked Cooper to go to the truck to find the lens to his glasses. When Cooper opened the door to the truck he saw blood and flesh all over the interior. Appellant offered Cooper \$20,000 to put the truck in his backyard. Cooper called the police the following day, and they took the gun vault and appellant's duffel bag from Cooper's house.

Appellant called Caughman and asked him for the phone number of McCoy's neighbor who he said "was the only person that seen me by the house." When Caughman went to pick up his truck later that day, appellant told him his truck had been "used in a crime scene." He then said, "I did him . . . I did Jeff." Appellant said to Caughman: "I put ten slugs in him." Appellant appeared to be unemotional and cold when he said this. Appellant said, "If you fuck with a killer, that's what you get." He encouraged Caughman to report his truck stolen. Caughman decided to go to the police.

Appellant also called Palutsyn that morning and told him to text Rene that appellant had spent the night at Palutsyn's house the night before. Later that day, when he talked to Palutsyn again, he told him "[t]he next time I see you, I'm killing you."

In the late afternoon, appellant went to a salvage yard in Fairfield. Jon Nelson, who knew appellant, was there working on his truck. Appellant offered him \$2,000 to drive Caughman's truck to the salvage yard. Appellant drove Nelson to the truck. The truck was all wet, and appellant said he spilled a Big Gulp in the truck and had hosed it out. Nelson testified that appellant wanted to destroy the truck. Nelson overheard appellant say "[t]hat's what happens when you fuck another man's wife" to the owner of the salvage yard. He also said, "I got that motherfucker."

At trial, the prosecution played telephone calls from appellant to his mother while he was in custody. The phone calls supported Palutsyn's testimony that appellant had repeatedly accused him of having sex with Rene. He stated that he knew Palutsyn had "been fucking my old lady almost a year now. Over a year." He stated: "All's I can say is . . . the reason why he's afraid is because he was fucking my old lady, and who fucking who [*sic*] wasn't." In one call, appellant stated "I know one thing—dude ain't fucking my wife no more, I know that much."

He talked to his mother about Palutsyn's testifying at the bail hearing. He said he needed Palutsyn to show up and if he showed up "it's all good." He told his mother: "Tell him if they corner him, tell him to say 'I want a lawyer' and you'll get him one."

Dr. Ikechi Ogan, a forensic pathologist, performed an autopsy on McCoy. McCoy had two blunt force injuries to the back of his head. The injuries occurred before death and could have been caused by anything heavy with weight including a baseball bat, gun butt, or a fall. McCoy had gunshot wounds to the back of his right calf and right thigh with no evidence of close-range firing. He had gunshot wounds to both his left and right buttocks and the space under his genitals. He also had a gunshot wound in the middle of his back. He had additional gunshot wounds on the front of his body in his abdomen, his right arm, his right calf, and lower left side. Both gunshot wounds to the calves appeared to be consistent with McCoy kneeling with his back to the gun.

Appellant testified at trial. He stated that on the morning of the homicide he went to McCoy's house because he wanted to talk. He had decided to leave his wife because she was sleeping with other people. McCoy wanted appellant to drive him to Richmond to buy heroin. Appellant testified that they got into the truck to drive to Richmond but there was too much traffic, so he headed toward Pinole instead. Appellant said to McCoy, "I guess it's just all right to come up and have sex with my wife," and McCoy responded, "What are you going to do about it?" Then McCoy pointed a gun at him. Appellant had a gun in his sweatshirt and he pulled it out and fired until the gun emptied. He then hit the brakes to try to get the gun out of McCoy's hands.

When McCoy dropped his gun, appellant grabbed it and then sped off down the street. He said McCoy was screaming, "I should have killed you" and began hitting him. McCoy knocked appellant's glasses off and appellant "turned and I let the gun go. I shot again and again until it [McCoy's gun] emptied." McCoy then jumped out of the window of the truck.

Defense counsel asked appellant if he thought McCoy was going to kill him and he responded: "I was looking at a .45. I was looking down the barrel of a gun. This was my best friend." Appellant testified that he did not intend to kill McCoy when he went to his house, or when they got into the car.

He did not call 911 or stop to help McCoy. He went to Cooper's house and attempted to clean the truck. He offered Cooper money to hide the truck.

On cross-examination, appellant testified about his prior killing of Anthony Davis. He and Davis had both grown up in Pinole. He admitted shooting Davis in the face while they were driving in Davis's truck. He claimed that Davis, who had a poodle sitting on his lap, reached for a gun. After the shooting, he went to his friend Donald McClosky's house with blood all over his clothes and the gun in his waistband.

In regard to McCoy's homicide, the prosecutor asked him why he had a camouflage "ghillie suit" in his duffel bag along with the guns and he said that it just happened to be in the bag. He denied that he took a gun into McCoy's house or forced him into the truck. He claimed he brought a gun with him because of the previous fight

where McCoy allegedly threatened him with a knife and he broke McCoy's nose. He made contradictory statements that even though he felt McCoy was a threat, in his heart he knew he was not a threat.

Pinole Police Sergeant Matt Wallace testified about his interview of appellant after the homicide. Wallace stated that appellant told him McCoy wanted to go buy heroin. He also stated to Wallace that he did not know how McCoy got his .45-caliber semiautomatic gun. Appellant told Wallace that he asked McCoy, "So you think it's okay that you can fuck my ol' lady" and McCoy "popped off," went for his gun, and "I knew the bitch had set me up." He also told Wallace that this was not his "first rodeo"; he had "fought a murder trial, one wagon against three wagons" and "made it out of there with the hair on my ass. This one don't look that good, man."

McCoy's widow, Maria, testified about a prior act of violence by McCoy. She had filed a temporary restraining order against him in 2008. McCoy grabbed her arm and wrist when she was four months pregnant and threw her across the room. He also threatened to kill her. She said he had never done anything like that before.

Tanya Knight, who is the mother of appellant's son, testified about the fight in McCoy's garage. Her testimony contradicted McCoy's neighbor who identified appellant as the aggressor. She stated that appellant and McCoy were arguing and McCoy came into the house and said: "I'm going to fucking kill him," grabbed a butcher knife, and went back to the garage. She saw appellant holding McCoy down and McCoy was bleeding.

Kenton Wong, an independent forensic scientist, analyzed the crime scene reports, photographs, and autopsy. He testified that based on the trajectories of the bullets, McCoy was facing both toward and away from appellant during the shooting. He also identified some inaccuracies in the police crime scene investigation, such as identifying a casing as a bullet and an improperly marked exhibit.

B. Charges and Conviction

The information alleged that appellant murdered McCoy with malice aforethought in violation of Penal Code section 187. It alleged enhancements for personal use and

intentionally discharging a .357-caliber revolver and a .45-caliber pistol in violation of Penal Code section 12022.53. It further alleged that appellant was on bail when he committed the offense in violation of Penal Code section 12022.1.

A jury convicted appellant of all counts and the court found the Penal Code section 12022.1 enhancement to be true. The court sentenced appellant to 52 years to life in state prison.

III. DISCUSSION

A. Admission of Appellant's Prior Shooting Offense

Appellant claims that the trial court erred in admitting evidence of his 1992 acquittal on self-defense grounds for the homicide of an acquaintance, Anthony Davis. He contends it was prejudicial character evidence under Evidence Code section 1101, subdivision (a)¹ and was more prejudicial than probative under section 352, and should have been excluded. Appellant contends that the prior conduct was not sufficiently similar to the charged conduct to support the inference that he harbored the same intent in both instances.

1. The Prior Offense

Prior to trial, appellant filed a motion in limine to exclude evidence of his prior arrests and convictions. This included his trial and acquittal in 1992 for the homicide of Davis on self-defense grounds. In addition to his claim that this prior charge was improper character evidence, appellant argued this 20-year-old charge also should be excluded as more prejudicial than probative under section 352.

During trial, the court held a hearing. The prosecution argued the 1992 homicide should be admitted to disprove a claim of self-defense and to prove intent to kill. The prosecution argued appellant killed Davis, another childhood friend, in similar circumstances, namely shooting him in a car. After the shooting, appellant told a friend, Donald McClosky, about the shooting and sought his assistance in covering up the crime.

¹ All subsequent unspecified statutory references are to the Evidence Code.

In both cases, appellant made statements immediately after the crimes that he had committed, but did not claim self-defense until later. The prosecutor argued also it was admissible to impeach appellant if he testified because it was a prior act of violence and a crime of moral turpitude.

The court ruled that the evidence was admissible to prove a material fact under section 1101, subdivision (b), specifically, appellant's state of mind when he shot McCoy. The court outlined the similarities between the two shootings. After the 1992 shooting, appellant arrived at McClosky's home, covered in blood, gave details of the shooting, and said he killed Davis and that he was in big trouble. He said he was not going to let Davis steal the rims from his car, and that Davis had tried to kill him before so he shot him in the face. In the present case, he went to Caughman's home covered in blood and described shooting McCoy. He said he put "ten slugs" in McCoy and "[i]f you fuck with a killer, that's what you get." The court found he again made no mention of self-defense. "So the Court finds that the evidence of the 1992 shooting is material to disprove Mr. Fitch's claim of self-defense." The court found after evaluating section 352 that the probative value of the evidence outweighed its prejudicial effect.

However, the court ruled the evidence could not be admitted to impeach appellant as a prior act of violence or as a prior act of moral turpitude. The court further ruled that photographs from the 1992 crime scene and autopsy were not admissible.

During appellant's testimony, the prosecutor questioned him about the Davis shooting. He stated that he and Davis grew up together in Pinole but were not friends. He admitted he shot Davis in the face in Davis's truck while Davis was driving with a dog in his lap. He stated that Davis had tried to kill him a few weeks prior to the homicide. He claimed Davis was reaching for what he thought was a gun when he shot him.

2. Admissibility of the Similar Shooting to Show Intent

Section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of

specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.” Subdivision (b) allows evidence of a crime, civil wrong, or other act to prove a fact other than predisposition to commit crimes, “such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.”

We review the trial court’s decision to admit the evidence under an abuse of discretion standard. (*People v. Rogers* (2013) 57 Cal.4th 296, 326 (*Rogers*)). “ ‘ “Under the abuse of discretion standard, ‘a trial court’s ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” [Citation.]’ [Citation.]” (*Ibid.*, quoting *People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329.)

In *People v. Demetrulias* (2006) 39 Cal.4th 1 (*Demetrulias*), our Supreme Court upheld the admission of an uncharged assault under sections 1101 and 352. The defendant was being tried for first degree murder for stabbing the victim, Robert Miller, with a knife and robbing him. The prosecutor introduced evidence that defendant had stabbed another victim, Clarence Wissel, with a knife and taken his wallet. (*Id.* at p. 7.) The Supreme Court held that evidence was admissible under section 1101, subdivision (b) to show the defendant’s motive and intent in attacking the current victim. (*Demetrulias*, at p. 14.) Viewed as motive evidence, the attack on Wissel tended to prove that when the defendant attacked the victim he “did not act in real or perceived self-defense.” (*Ibid.*) “We also conclude the Wissel incident was similar enough to the Miller incident to bear directly on defendant’s intent in stabbing Miller.” (*Id.* at p. 15.) To be relevant, the charged and uncharged crimes need only be “ ‘sufficiently similar to support the inference that the defendant “ ‘probably harbor[ed] the same intent in each instance.’ [Citations.]” ’ . . .” (*Id.* at p. 15, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) The jury could rationally conclude that it was unlikely that defendant would be attacked by two men within a short period of time requiring him to stab them with

knives to repel the attacks. (*Demetrulias*, at p. 16.) This was especially true when the attack of Wissel went “far beyond any conceivable need for self-defense.” (*Ibid.*)

“ ‘[W]hen the other crime evidence is admitted solely for its relevance to the defendant’s intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant. Rather, if the other crime sheds great light on the defendant’s intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive.’ . . .” (*Demetrulias*, *supra*, 39 Cal.4th at pp. 16-17, quoting *People v. Nible* (1988) 200 Cal.App.3d 838, 848-849.)

In reaching its result, our Supreme Court in *Demetrulias* cited this division’s opinion in *People v. Pertsoni* (1985) 172 Cal.App.3d 369 (*Pertsoni*), which involved the introduction of an uncharged prior shooting as relevant to intent in defendant’s later trial for a shooting where he claimed self-defense. *Pertsoni* was charged with killing Fahri Repishti, a man he believed to be a member of the Yugoslavian secret police. *Pertsoni* claimed that he acted in self-defense. The court admitted evidence that *Pertsoni* had previously fired shots at a man he believed to be the Yugoslav ambassador. (*Id.* at p. 372.) We held “the ultimate fact to be proved was appellant’s state of mind when he shot Repishti. The prosecution theory was that the killing was premeditated and with malice aforethought, whereas appellant asserted that he acted in self-defense. Because evidence of appellant’s motive would tend to establish his state of mind, the materiality requirement was satisfied. [Citations.]” (*Id.* at pp. 373-374.) The evidence was admissible because “it tended logically and by reasonable inference to show that [the] appellant’s motive in shooting Repishti was to kill an agent of the detested government, rather than to protect himself against a perceived danger.” (*Id.* at p. 374.) “Evidence of his motive thus was critically important in showing a reason for his criminal behavior and in rebutting his claim of self-defense.” (*Id.* at p. 375; see also *Rogers*, *supra*, 57 Cal.4th at p. 327 [trial court did not abuse its discretion in ruling that the combination of distinctive marks and similarities in the charged homicide with two other homicides was

sufficient to meet the standard for admissibility of the other crimes evidence on the element of intent, specifically whether the homicide was premeditated].)

Like the above cases, the trial court here did not abuse its discretion in admitting the prior homicide of Davis as evidence of intent under section 1101, subdivision (b). The evidence was sufficiently similar to support the inference that appellant harbored the same intent in each shooting. (*Demetrulias, supra*, 39 Cal.4th at p. 15.) In both cases, appellant shot someone he knew within a vehicle. In both cases, appellant arrived at a friend's home covered in blood and admitted his conduct without mentioning he acted in self-defense. Later, appellant claimed that Davis was shot while driving because appellant believed he was reaching for a gun. Similarly, here appellant subsequently claimed that McCoy was shot because McCoy pointed a gun at him. The fact that appellant "readily admitted the killing on both occasions but supplied explanations was relevant to determining whether the explanations were true or merely convenient excuses for intended, premeditated killings." (*People v. Steele* (2002) 27 Cal.4th 1230, 1244.)

Appellant contends the earlier Davis shooting does not assist in evaluating his intent at the time he shot McCoy because there is no "core of similarity" between the Davis homicide and the McCoy homicide. Appellant points to the factual differences between the two events: McCoy was appellant's best friend and Davis was only an acquaintance; appellant believed McCoy was sleeping with his wife, while he believed Davis had stolen rims from his car; and, Davis had threatened appellant previously, while the confrontation with McCoy arose suddenly. Even recognizing these differences, "we disagree that these dissimilarities vitiated the inference that defendant had the same intent in each incident." (*Demetrulias, supra*, 39 Cal.4th at p. 16.) A "distinctive similarity" between the two crimes is not necessary for the other crime to be relevant to intent. (*Ibid.*, italics omitted.)

Appellant further argues that the court erred in admitting an "array" of evidence about the Davis shooting that went beyond establishing intent, specifically, the fact that Davis had a dog on his lap at the time of the shooting and that appellant had used methamphetamine at the time of the incident. The prosecutor cross-examined appellant

about the incident and established what happened in the truck and after the shooting. This included asking appellant about Davis having a poodle sitting on his lap while he was driving and allegedly reaching for a gun. The prosecutor asked appellant if he was using methamphetamine at the time of the Davis incident, claiming it was relevant to the motive and intent issue as there was evidence appellant was using drugs and alcohol around the time of the McCoy shooting. The evidence about the Davis incident was limited to the cross-examination of appellant, and the court did not allow the prosecutor to introduce the crime scene photos.

Appellant contends that even if the court correctly concluded the evidence was material, it must be excluded if its probative value is substantially outweighed by the risk of unfair prejudice to the defendant. (*Rogers, supra*, 57 Cal.4th at p. 331.) We review the trial court's choice to admit prior incidents under section 352 for abuse of discretion. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736–737.) We look to four factors, balancing the probative value of the evidence against undue prejudice, delay or confusion. They are: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of the uncharged offenses. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

The Davis homicide was potentially inflammatory, as any evidence about a homicide might be, but the court took steps to limit the testimony and evidence that was introduced. The court ruled that none of the photographs of the prior homicide could be shown to the jury and the evidence was limited to appellant's testimony. The court also carefully instructed the jury the evidence was being admitted for a limited purpose. As detailed below, the court instructed the jury: "Do not consider this evidence for any other purpose except for the limited purpose of evaluating Mr. Fitch's claim of self-defense. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." (See *Rogers, supra*, 57 Cal.4th at p. 332 [a limiting instruction to the jury ensured the other crimes evidence would not be considered for any improper purpose].)

There was little possibility of confusion of the issues given the presentation of the evidence. Only appellant testified about the prior offense. The prior incident was 20 years old, but given the similarity between the two incidents, the passage of time did not vitiate the relevance to appellant's state of mind. The remoteness affects the weight of the evidence, but not its admissibility. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1388.) Finally, the time involved in introducing the evidence was minimal. The prosecutor questioned appellant during his cross-examination, and discussed the Davis incident for less than a page of transcript in her closing argument.

The trial court did not err in admitting the prior offense, “ ‘[b]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence [citations]’” (*People v. Pertsoni*, *supra*, 172 Cal.App.3d at p. 375, quoting *People v. Lopez* (1969) 1 Cal.App.3d 78, 85.)

3. Even If the Court Erred, Admission of the Evidence Did Not Deny Appellant a Fair Trial

Even if the court erred in admitting the evidence of the 1992 shooting of Davis, any error was harmless, and does not require reversal. Appellant contends that we must apply the harmless-beyond-a-reasonable-doubt test for errors that violate the United States Constitution (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)), while respondent argues for the reasonable-probability test (*People v. Watson* (1956) 46 Cal.2d 818, 836–837 (*Watson*)) that applies to errors under California law. (See *People v. Malone* (1988) 47 Cal.3d 1, 22 [error in admitting evidence pursuant to § 1101 tested by the *Watson* harmless error standard].) We need not resolve the issue because we conclude that any error was harmless under either standard.

The prosecution presented overwhelming evidence for the jury to convict appellant of premeditated murder. Appellant believed both McCoy and Palutsyn were having sexual relationships with his wife. He told Palutsyn that he wanted to kill McCoy. He had confronted McCoy during the summer and broken his nose.

The night before the homicide, appellant went to Cooper's house and picked up his gun vault. He also put a camouflage suit in his duffel bag. He told Cooper he was going to the "510"—the area code where Pinole is located.

Appellant borrowed Caughman's truck that had an inoperable passenger side door. He drove the truck to McCoy's house and got McCoy to go with him to the truck, even though McCoy knew appellant had threatened his life and the last time they saw each other, appellant broke McCoy's nose.

After McCoy jumped or was pushed from the truck, appellant left him on the side of the road. He did not stop to help McCoy or call 911. He did, however, call Caughman to try to get in touch with a neighbor of McCoy's who appellant thought had seen him that morning.

Appellant admitted the homicide to multiple people. He told Caughman, "I put ten slugs" in McCoy. Caughman testified that he was cold and unemotional. He also said, "If you fuck with a killer, that's what you get." There was no mention of self-defense. Nelson also overheard appellant say: "That's what happens when you fuck with another man's wife." Appellant also threatened Palutsyn after McCoy's homicide, telling him that the next time he saw him, he was killing him.

He offered Cooper \$20,000 to hide the truck, and he offered Nelson \$2,000 to help him move it.

McCoy had two gashes on the back of his head that were consistent with being hit with the butt of a gun. Two of the gunshot wounds were to McCoy's abdomen and side and were consistent with being shot while seated in the passenger seat. While McCoy did have shots to the front of his body, he also had multiple shots to the back of his body from which the jury could reasonably infer he was shot while trying to get out of the car. In addition, the forensic evidence that McCoy was shot multiple times in the back of body, refuted appellant's claim that McCoy was the aggressor. The jury could have further concluded the fact that appellant "emptied" the first gun and then "emptied" a second gun, shooting McCoy 10 times in total, did not support a claim of self-defense.

Therefore, we conclude that any error in admitting the limited evidence of the Davis shooting was harmless beyond a reasonable doubt.

B. The Jury Instruction on Other Offenses Did Not Reduce the Prosecution’s Burden of Proof

Appellant contends that the court’s instruction on evidence of uncharged offenses, which strayed from the language of CALCRIM No. 375, improperly reduced the burden of proof allowing the jury to conclude it could convict appellant by a preponderance of the evidence.

The court initially instructed the jury: “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.”

The court instructed the jury pursuant to a modified version of CALCRIM No. 375, as follows:

“The People presented evidence that the defendant committed other offenses that were not charged in this case.

“You may consider *this evidence* only if the People have proved by a preponderance of the evidence that the defendant in fact committed *the offenses*. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

“If the People have not met this burden, you must disregard this evidence entirely.

“If you decide that the defendant committed *the offenses*, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:

“*To evaluate Mr. Fitch’s claim of self-defense.*

“In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offense.

“Do not consider this evidence for any other purpose except for the limited purpose of evaluating Mr. Fitch’s claim of self-defense.

“Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

“If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Murder. *The People must still prove the charge beyond a reasonable doubt.*” (Italics added.)

Appellant first contends that by using the term “the offenses” rather than “the uncharged offenses,” the jury could have improperly concluded that it need only find the charged offense by a preponderance of the evidence.

In determining the correctness of jury instructions, we consider the instructions as a whole. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) “[W]e must view a challenged portion ‘in the context of the instructions as a whole and the trial record’ to determine ‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.’ . . .” (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) While it would have been preferable for the court to use the phrase “the uncharged offenses” throughout the instruction as set out in the model instruction, within the context of the instructions as a whole, it is not reasonably likely the jury would have interpreted the phrase “the offenses” to include the current charges. The first paragraph defines the subject of the instruction as “other offenses that were not charged” and then refers to them as “the offenses” which relates back to this definition. The instruction refers to the present case as “the charge” and reiterates that the charge must be proven beyond a reasonable doubt.

Immediately after reading the uncharged offenses instruction, the court read the self-defense instruction that appellant was not guilty of murder if he was justified in killing in self-defense. The court stated: “The People have the burden of proving beyond a reasonable doubt that the killing was not justified.”

Here, the instructions as a whole informed the jury they must find appellant guilty of the murder charge beyond a reasonable doubt. The court told the jury: “Whenever I tell you the [P]eople must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.” The court further instructed: “The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense.”

In analyzing a jury instruction with similar language regarding the admission of uncharged prior sex offenses, our Supreme Court held: “We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty ‘beyond a reasonable doubt.’ [Citations.] Any other reading would have rendered the reference to reasonable doubt a nullity.” (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1016.)

Appellant’s second objection to the instruction is that it allowed the jury to decide not to consider self-defense at all. The instruction states: “If you decide that the defendant committed the offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: To evaluate Mr. Fitch’s claim of self-defense.” This language is inartfully constructed and it would have been preferable to word it differently, but the instruction still conveys the correct information: if the jury decides that appellant committed the uncharged offense, it may use it for the limited purpose of evaluating his claim of self-defense. Given the court’s instructions on self-defense and imperfect self-defense, and the closing arguments related to self-defense, it is not reasonably probable the jury took this instruction to mean it could disregard the self-defense claim.

When reviewing an ambiguous jury instruction, we ask whether there is a reasonable likelihood the jury misconstrued or misapplied the instruction. (*People v.*

Harrison (2005) 35 Cal.4th 208, 251–252.) We conclude there was no reasonable likelihood the jury took the instruction to mean it could disregard appellant’s self-defense claim.

C. The Court Did Not Err in Refusing to Instruct the Jury on Heat of Passion

Appellant argues there was substantial evidence that he acted in the heat of passion, and therefore the court erred in instructing the jury on self defense and imperfect self defense, but not heat of passion.

At trial, appellant requested the jury be instructed on voluntary manslaughter, heat of passion, and imperfect self-defense. Defense counsel argued that a heat of passion instruction should be given because there was overwhelming evidence of a dispute between appellant and McCoy. Appellant believed McCoy was having an affair with his wife and when he confronted McCoy, McCoy responded in a provocative fashion by asking what he was going to do about it.

The prosecutor argued that a defendant is not allowed to set up a situation that creates the provocation. Appellant carried two guns, entrapped McCoy in a truck with an inoperable passenger side door, and confronted him. The prosecutor argued that the only evidence before the court relevant to a defense was complete self-defense.

The court acknowledged that it had a duty to sua sponte instruct on voluntary manslaughter under either a heat of passion or imperfect self-defense theory when the evidence was substantial enough to merit consideration by the jury. However, the court concluded: “The Court does not believe that, based on what we have before us today, which is that [appellant’s] statement to Mr. McCoy about him sleeping with his wife triggered the response of, ‘What are you going to do about it,’ would be substantial evidence to support the theory of . . . voluntary manslaughter.” The court did, however, find the evidence sufficient for an instruction on imperfect self-defense.

The court further instructed the jury on provocation: “Provocation may reduce murder from first degree to second degree and may reduce murder to manslaughter.” The

court instructed that murder is reduced to voluntary manslaughter if the defendant acted in imperfect self-defense.

“ ‘ “[I]n criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.]” ’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. (*Ibid.*)

“Two factors may preclude the formation of malice and reduce murder to voluntary manslaughter: heat of passion and unreasonable self-defense. [Citations.]” (*People v. Elmore* (2014) 59 Cal.4th 121, 133.) A heat of passion theory of manslaughter has both an objective and a subjective component. (*People v. Moyer* (2009) 47 Cal.4th 537, 549 (*Moyer*)). The objective component requires sufficient provocation to incite a reasonable person. (*Id.* at pp. 549-550.) “The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]” (*Id.* at p. 550.) In determining whether the conduct was adequately provocative, the question is whether it would cause an ordinary person of average disposition “to react from passion and not from judgment,” *not* whether it would “cause an ordinary person of average disposition *to kill.*” (*People v. Beltran* (2013) 56 Cal.4th 935, 938–939, original italics.) The subjective component requires the defendant to show that he killed under the actual influence of a strong passion induced by the provocation. (*Ibid.*)

In *Moyer*, our Supreme Court held that the trial court did not err in refusing to give a heat of passion instruction. (*Moyer, supra*, 47 Cal.4th at p. 551.) *Moyer* and the victim had been in a fist fight the night before the homicide. The following day, *Moyer* claimed he was looking for the victim to “make peace.” The victim ran by and kicked *Moyer*’s car and *Moyer* followed him. He claimed the victim attacked him repeatedly with a baseball bat and he took the bat and hit the victim to protect himself. Neither the fight the

previous night nor the car-kicking incident constituted sufficient provocation to warrant a heat of passion instruction. (*Id.* at p. 552.) Further, Moyer's own testimony did not demonstrate he was subjectively under the influence of a strong passion. (*Ibid.*) The court noted that the thrust of defendant's testimony was self-defense and how he needed to use the bat to hit the victim as the victim continued to attack him. (*Id.* at p. 554.) Once the jury rejected Moyer's claims of reasonable and imperfect self-defense, "there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion." (*Id.* at p. 556.)

Similarly in *People v. Peau* (2015) 236 Cal.App.4th 823 (*Peau*), Division One of this court recently held that the trial court did not err in refusing to instruct the jury on heat of passion in a murder trial. After a dispute about the sale of a stolen car that resulted in several arguments, Peau drove up to the victim's house and shot him 10 times. (*Id.* at pp. 826-828.) The jury was instructed on provocation, self-defense, and unreasonable self-defense. (*Id.* at p. 829.) Peau was convicted of first degree murder. The court concluded that any error in failing to give the instruction was harmless because the murder conviction demonstrated the jury rejected the possibility that Peau acted in the heat of passion. (*Id.* at p. 828.)

Like *Moye* and *Peau*, here the jury's rejection of both self-defense and imperfect self-defense as well as provocation, meant it believed appellant's actions were premeditated. Further, appellant's testimony focused on self-defense rather than provocation. While there was evidence that appellant was upset with McCoy, appellant testified he went to McCoy's house that morning only to talk. He said he was feeling angry and upset at the possibility McCoy was having an affair with Rene. He specifically stated he was not "in a rage." Similarly, his friend Anthony testified that on the night before the homicide, appellant was "a little bit upset" but he was not making any threats and he had calmed down by the time he left.

Instead, appellant's testimony focused on the fact that McCoy pointed a gun at him and McCoy was hitting him and fighting with him. Appellant explained the need to

fire both the first then the second gun to defend himself. Appellant testified that he was hurt, angry and upset but never that he reacted from passion rather than judgment.

Appellant's testimony that when he confronted McCoy about having an affair with his wife, and McCoy responded, "What are you going to do about it?" also does not constitute sufficient provocation for a heat of passion defense. " " "A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter." ' . . .' (*People v. Najera* (2006) 138 Cal.App.4th 212, 226, quoting *People v. Wells* (1938) 10 Cal.2d 610, 623, overruled on other grounds in *People v. Holt* (1944) 25 Cal.2d 59; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [the victim taunting defendant was "insufficient to cause an average person to become so inflamed as to lose reason and judgment" and did not constitute a sudden quarrel or heat of passion].) " "If anything, defendant appears to have acted out of a *passion for revenge*, which will not serve to reduce murder to manslaughter.' " (*People v. Souza* (2012) 54 Cal.4th 90, 115, quoting *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144, original italics.)

As this division stated in *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1138 (*Millbrook*): "If the jury had returned a verdict on the allegation that [the defendant's] attempted murder of [the victim] was willful, premeditated, and deliberate, the finding would have been 'manifestly inconsistent with having acted under the heat of passion.' [Citation.]" Here the jury found appellant guilty of first degree murder, necessarily rejecting a theory that he acted based on provocation, heat of passion, or in self-defense.

Even if there was error in not instructing on heat of passion, we conclude there was no prejudice to appellant. As to the issue of prejudice, appellant again argues the *Chapman* standard applies to this claim. (*Chapman, supra*, 386 U.S. at p. 24.) Respondent counters that the *Watson* standard applies. (*Watson, supra*, 46 Cal.2d at p. 836.) The applicability of the higher *Chapman* standard has not been resolved by our Supreme Court. (*Millbrook, supra*, 222 Cal.App.4th 1122; see, e.g., *Moye, supra*, 47 Cal.4th at p. 541 [applying the *Watson* test to an error to fail to instruct on heat of passion

voluntary manslaughter]; *People v. Thomas* (2013) 218 Cal.App.4th 630, 633 [applying the *Chapman* test to the court’s failure to instruct the jury on the potential effect of provocation to reduce murder to manslaughter].)

For our purposes, it is not necessary to decide which standard of prejudice applies because any error was harmless even under the more stringent *Chapman* standard. (See *Peau, supra*, 236 Cal.App.4th at p. 830.) “Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions. [Citation.]” (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) The failure to give a heat of passion instruction was harmless beyond a reasonable doubt because the jury necessarily rejected the possibility that the defendant acted in the heat of passion by convicting him of first degree murder. (See *Peau, supra*, 236 Cal.App.4th at p. 828.)

D. Prosecutorial Misconduct

Appellant makes multiple allegations of prosecutorial misconduct including presenting inflammatory and inadmissible evidence to the jury and the failure to turn over impeachment evidence.

“ ‘To constitute a violation of the federal Constitution, prosecutorial misconduct must “ ‘so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” . . .” (*People v. Harris* (2005) 37 Cal.4th 310, 341, quoting *People v. Benavides* (2005) 35 Cal.4th 69, 108; *People v. Cunningham* (2001) 25 Cal.4th 926, 1000.)

1. Presenting Inflammatory or Inadmissible Evidence to the Jury

a. The Photographs and Gun Box

During his testimony, the prosecutor asked Palutsyn to describe exhibit 21, and he testified the photograph showed appellant and McCoy in their baseball uniforms at Pinole Junior High School. He also testified exhibit 22 showed appellant, McCoy and him at a birthday party as children. Defense counsel objected to the photographs on the ground

that it was impermissible to introduce a picture of the victim while alive. He also objected that the photographs were left faceup on the podium in view of the jury. The court excluded the photographs under section 352.

During the prosecution's cross-examination of the defense expert, she showed him photos from the 1992 Davis shooting. Defense counsel objected that the prosecutor displayed a "consistent pattern of marking exhibits that haven't been admitted into evidence, flashing them before the jury." The prosecutor responded that the photographs were shown to the witness, not to the jury. The court admonished counsel to be careful in the handling of exhibits to make sure they were not visible to the jury before the court had ruled on their admissibility. Defense counsel stated that the "horse [was] out of the barn" because the jurors saw gruesome photographs of the 1992 Davis homicide scene. The court stated "I don't disagree with you that it's very possible that the jurors were able to see some of the photographs. At this point, the photographs have not in any way been identified to the jury. And so we go forward, the Court's ruling is that the photographs are . . . to be handled very carefully so they are not within the view of the jury." The court stated it would allow the photographs to be shown to the witness and then it would make a ruling on their admissibility. The prosecutor did not discuss further the photographs with the witness. The court ruled the photographs were not admissible because their prejudicial effect would outweigh their probative value.

At a later hearing in objecting to the introduction of photographs from the 1992 shooting, defense counsel again argued that there was a "consistent pattern of behavior of showing prejudicial material to this jury." The prosecutor responded: "I need to state for the record, which I have not done through [defense counsel's] various tirades about prosecutorial misconduct and the intentional showing of inadmissible evidence to the jurors, that it's not true." She argued there was no evidence that the 1992 photographs had been seen by the jury.

Appellant is correct that it is misconduct for the prosecutor to intentionally put inadmissible evidence before the jury. (See *People v. Smithey* (1999) 20 Cal.4th 936, 960 [it is misconduct for a prosecutor to intentionally elicit inadmissible testimony].) But

there is no evidence on this record, other than defense counsel's assertions, that the prosecutor intentionally left the photographs in view of the jury. As respondent points out, there is also no evidence that the jury actually saw any of the photographs. The trial court found it was possible the jurors may have been able to see some of the 1992 photographs, but they were never identified to the jury. The court found that it was highly unlikely the jury saw the two childhood photographs of appellant and McCoy. The court admonished the prosecutor to be careful not to display photographs to the jury prior to them being admitted as exhibits, and it appears from the record that the prosecutor followed the admonishment.

“Although offering evidence the prosecutor *knows* is inadmissible may be misconduct (*People v. Scott* (1997) 15 Cal.4th 1188, 1218 . . .), the adversarial process generally permits one party to offer evidence, and the other party to object if it wishes, without either party being considered to have committed misconduct. The trial court simply rules on the admissibility of the evidence, as the court did here.” (*People v. Harris, supra*, 37 Cal.4th at p. 344.)

In both instances, the prosecutor sought to introduce the photographs and the court ruled them inadmissible at which point, the prosecutor did not introduce them again. The prosecutor's references to the two childhood photos of appellant and McCoy, even if considered references to inadmissible evidence, were not prejudicial. There was ample other evidence at trial about the childhood friendship between McCoy and appellant.

Appellant also claims the prosecutor improperly displayed a gun box to the jury. During appellant's cross-examination, defense counsel objected to the box sitting on counsel table in view of the jury. The judge ordered the box to be kept outside the courtroom. Both the box and the gun were later admitted into evidence, so appellant's contention that the prosecutor displayed inadmissible evidence to the jury is meritless.

b. Questions Regarding Appellant's Hit List

The prosecutor asked Palutyn if appellant had a hit list and he responded: “I never saw it, but I was told there was one.” Defense counsel objected and the court sustained the objection. The prosecutor asked appellant if he had a hit list of people he intended to

kill and he said no. She asked if he had shown a hit list, including McCoy's name, to his stepfather, Daryl Parsons, and he said no. She asked if he had ordered a special camouflage hunting rifle and ghillie suit to go hunting for people on his hit list and he said no.

Defense counsel argued that the prosecution never presented any evidence supporting the hit list. She never subpoenaed Daryl Parsons to testify.

In his closing argument, defense counsel stated that there was no evidence in the record about a hit list, it came simply from the prosecutor's question. He told the jury: "Do not assume that something is true just because one of the attorneys asks a question that suggests it's true."

It is improper for a prosecutor to ask a question without a good faith belief that the facts underlying the question can be proven. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1233 (*Mooc*)). In *Mooc*, the prosecutor asked two inmate witnesses, Le and Vo, about conspiring to blame a guard for a fight. Defense counsel objected that there was no basis for this insinuation. The Supreme Court found that there was a police report describing another inmate, Solis, encouraging others to blame the guard. (*Id.* at pp. 1233-1234.) "We thus may surmise the prosecutor had a good faith belief that he could have produced a witness to provide a factual basis for the questioning of Le and Vo." (*Id.* at p. 1234.) Even if the question was misconduct, it was harmless because it was not argued in closing argument and the court instructed the jury that questions are not evidence. (*Ibid.*)

Like *Mooc*, here even if the prosecutor's question was improper, any error was harmless. The prosecutor did not mention the hit list in closing argument and the court instructed the jury that questions are not evidence. (*Mooc, supra*, 26 Cal.4th at p. 1234.) The court instructed: "Nothing that the attorneys say is evidence. . . . Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they help you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true." "In the absence of evidence to the contrary, we assume the jury followed this

instruction. [Citation.]” (*People v. Lucas* (2014) 60 Cal.4th 153, 321, disapproved on other grounds in *People v. Romero* (2015) 62 Cal.4th 1.)

c. Prosecutor’s Statement in Closing Argument Regarding Appellant’s Prior Offense in Fairfield

During appellant’s cross-examination, the prosecutor asked him if he was out on bail from a criminal case in 2011. Appellant responded that he did not know what he was charged with but told her she could read it back to him. The prosecutor stated that police were called to his home and he pulled up his shirt and showed a gun to a Fairfield police officer. She asked if appellant then pulled the gun out and “racked a round out of the semiautomatic” and was arrested for brandishing a firearm at a peace officer. Appellant stated that he did not point a gun at a Fairfield police officer, but that he had manipulated the gun to eject a live round or a casing.

During her closing argument, the prosecutor stated: “You know that the reason that he’d moved all the guns to Ellis Cooper’s was because he had been released on bail on that assault on a peace officer in Fairfield with a gun.” Defense counsel objected: “That is misstating the evidence in this case. Mr. Fitch was not arrested for assault on a police officer in Fairfield.” The prosecutor responded “No, that is a complete misstatement.” The court stated that it would review the record and the prosecutor should continue with her argument.

After a recess, the court admonished the jury that “what the attorneys say in their argument is not evidence. And we heard during the course of our argument that Mr. Fitch was on bail for assaulting a police officer. And I just wanted to admonish to let you know that there is no evidence of what he was on bail for.”

Appellant testified about the incident with the Fairfield Police Department, but the prosecutor had not introduced the precise criminal charge. Even if the prosecutor’s comment was improper, it did not affect the outcome of the trial. First, the facts about the incident were before the jury. Second, the jury was admonished that there was no evidence that the actual charge was assaulting a police officer. Finally, this was a single statement in a lengthy closing argument. (*People v. Fuiava* (2012) 53 Cal.4th 622, 692

[no reasonable probability that a prosecutor's slight mischaracterization of defendant's criminal history could have affected the jury's verdict].)

“We conclude that the prosecutor's transgression, if any, was minor and neither deceptive nor reprehensible. [Citation] Any prejudice was cured by the court's prompt admonition. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1196.)

d. Prosecutor's Question About Appellant Taking McCoy Against His Will

On cross-examination, the prosecutor questioned appellant about his statement to police that McCoy was agitated in the truck and asked appellant to take him to Darryl Anthony's house. The prosecutor asked appellant: “Mr. Fitch, would you agree that, if you refused to take Mr. McCoy where he was asking to go, that you would be holding him against his will?” Appellant responded: “I was taking him back to his house, once the freeway was packed, because I didn't want to go to Richmond in the first place.” Defense counsel did not object, but raised the issue later with the court stating that the question insinuated that appellant may have kidnapped McCoy. He argued this was a constructive amendment of the information. Defense counsel filed a motion for mistrial.

The prosecution argued that she never suggested that appellant kidnapped McCoy, she was trying to question appellant as to why McCoy would go anywhere with him after appellant broke his nose a few months before, and after McCoy became aware appellant had made death threats against him.

Appellant argues on appeal the prosecutor insinuated facts outside the record by presenting a theory of the case that was different than what was charged. By asking appellant about why McCoy would go with him and if he was taking him against his will, the prosecutor insinuated that appellant had kidnapped McCoy.

As the trial court found, the prosecutor was entitled to ask appellant to explain why McCoy would go with him if he was aware appellant had threatened his life and after appellant had broken his nose. Also, there was evidence in the record that McCoy had two gashes on the back of his head that were caused by blunt force trauma, which could have been caused by the butt of a gun. The prosecutor was entitled to ask appellant

if he forced McCoy to get into the truck with him. This was not insinuating facts outside the record or presenting another crime. The questions went specifically to appellant's claims of self-defense and his assertion that McCoy was armed. (See *People v. Dykes* (2009) 46 Cal.4th 731, 766.)

In a murder trial, the Supreme Court found that a prosecutor's question to the defendant on cross-examination probing the inconsistencies in his explanation of events was not misconduct. The defendant had claimed to have stopped at a particular gas station and the prosecutor asked if he went there to " 'go right by the murder scene to be sure the cops had found the body' " (*People v. Collins* (2010) 49 Cal.4th 175, 207.) The prosecutor was proposing an alternative explanation for defendant's conduct and this was a legitimate form of questioning. (*Id.* at pp. 207-208.)

We conclude that the prosecutor was entitled to ask appellant if he was keeping McCoy in the car against his will. The prosecutor never suggested to the jury that appellant was guilty of the crime of kidnapping, but rather was suggesting that it seemed odd that given their recent history McCoy would go anywhere willingly with appellant. This was not an improper inference and it provided an alternative explanation for appellant's conduct from his claim of self-defense.

Even if the prosecutor's question was improper, it was a single question in a lengthy cross-examination and it is not reasonably probable the jury would have reached a more favorable verdict. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1071.)

2. Prosecutor's Alleged Failure to Turn Over Exculpatory Evidence

In *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' . . ." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*), quoting *Brady*, at p. 87.) The evidence is material if there is a reasonable probability that had the evidence been disclosed, the result of the proceedings would have been different. (*Salazar*, at pp. 1042-1043.) "[T]he individual prosecutor has a duty to learn of any favorable

evidence known to the others acting on the government's behalf in the case, including the police.” (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) To violate *Brady*, the evidence must be favorable to the accused, it must be suppressed by the state, and there must be prejudice. (*Salazar, supra*, at p. 1043.)

a. Impeachment Evidence for Jon Nelson

Jon Nelson was charged with accessory to murder for helping appellant move Caughman's truck to a salvage yard in Fairfield. He testified pursuant to an agreement with the prosecution that he would tell the truth, but he would be provided no benefit for his testimony.

Prior to Nelson's testimony, defense counsel objected that there was no written immunity agreement as required by law. The prosecutor stated that exhibit 23 (exhibit 6 from the preliminary hearing) contained the terms of the agreement. From the exhibit list, it appears the exhibit was an email from the prosecutor to Nelson's defense counsel rather than a formal agreement. The prosecutor listed the terms on the record: Nelson must provide full and truthful testimony and any testimony would not be used against him in his pending case. The court reviewed the exhibit and found the agreement sufficient even if it did not state an agreed-upon outcome for Nelson. The prosecutor confirmed that there were no further terms or offers.

During Nelson's testimony, defense counsel stated that he had requested information about any new charges or arrests for the prosecution's witnesses and no information was provided. Through his own investigation, he discovered that Nelson had been arrested for felony possession for sale of methamphetamine in Solano County. He argued the prosecutor had violated the court's discovery order and *Brady v. Maryland* by not disclosing this arrest. The prosecutor stated that she had run Nelson's criminal history prior to trial and there were no new convictions for him. She said she did not have access to complaints filed in Solano County, but she would re-run his RAP sheet that afternoon and provide it to the court. The prosecutor later represented the RAP sheet contained nothing different from the information provided to the defense. Defense

counsel stated it contained arrests in Napa County that had not been disclosed. The prosecutor and defense counsel disagreed about the prosecution's duty to disclose arrests.

At a hearing on the issue, the court stated that at the time Nelson testified, "even though the People had not actually provided the evidence of the arrest in Solano, that the defense had copies of the Complaints filed against the witness, so that they were able to examine and cross-examine the witness on those arrests." Once the prosecution was aware of the information on the RAP sheet, "they should have pursued it and obtained the information and provided it to the defense."

Defense counsel filed a motion for mistrial based upon the failure to turn over information about Nelson and Daryl Anthony (discussed below). The prosecution argued that appellant had the complaints from Nelson's two arrests and cited to *Salazar, supra*, 35 Cal.4th at p. 1049: "If material evidence is in defendant's possession or is available to a defendant through the exercise of due diligence, then the defendant has all that is necessary to ensure a fair trial."

In denying appellant's motion for a mistrial, the court stated there was no prejudice. The evidence "was already in the possession of the defense before the witness testified through their own diligence."

On appeal, appellant contends that Nelson's criminal history and his immunity agreement were not disclosed in advance of his cross-examination. This is not an accurate characterization of the record. Nelson's immunity agreement was an exhibit at the preliminary hearing and at trial. Defense counsel suggested at trial that there must be an additional deal with prosecution, but the prosecutor stated on the record that the entire agreement was contained in exhibit 23. Appellant was provided with Nelson's criminal history prior to trial but it did not include a recent arrest for sale of methamphetamine in Solano County.

"It is well settled that the prosecution's *Brady* obligation to disclose material evidence favorable to the defense encompasses impeachment evidence. [Citation.]" (*Salazar, supra*, 35 Cal.4th at p. 1048.) "[T]he prosecution has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense. [Citations.]"

(*In re Littlefield* (1993) 5 Cal.4th 122, 135.) Also, a *Brady* violation occurs if there is a reasonable probability that had the information been disclosed to the defense, the result of the trial would have been different. (*Salazar*, at p. 1050.)

In *People v. Letner and Tobin* (2010) 50 Cal.4th 99, the defense discovered a prosecution witness had an outstanding warrant for her arrest on a petty theft charge from a neighboring county and two criminal matters pending in their county. Letner moved for a mistrial because he had been deprived of his opportunity to cross-examine the witness about the pending charges. (*Id.* at p. 175.) The court found the prosecution had an obligation to disclose the pending matters, even if she was not aware of them, especially because the witness was being prosecuted by the same district attorney's office. (*Id.* at p. 176.) The evidence was favorable to the defense because it impacted the witness's credibility, but the evidence was not material. (*Ibid.*) The witness's testimony was helpful in establishing Letner's motive but it was not significant enough to qualify as material under *Brady*. (*Id.* at p. 177.) The charges were also not particularly serious and would not have significantly undermined her credibility. (*Ibid.*) The witness did not speak with the prosecution about the pending charges and did not alter her testimony because of the pending matters. (*Ibid.*)

Nelson's recent arrests were evidence favorable to appellant because they undermined Nelson's credibility with the jury. Appellant argues that the prosecution had a duty to disclose the arrests. A defendant is entitled to learn of any California criminal charges pending against a prosecution witness. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1245.) Respondent argues that the evidence was not in the prosecutor's possession and it was not encompassed within her discovery obligations. "If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence. [Citations.]" (*Salazar, supra*, 35 Cal.4th at p. 1049.) We need not address whether the prosecution was required to seek out Nelson's recent arrests in other counties because defendant was in possession of the information.

Therefore, there was no prejudice to appellant. Appellant had the information about Nelson's recent arrests and his immunity agreement and was able to cross-examine him about both so there is no reasonable probability the result of the trial would have been different. Further, Nelson's testimony about appellant's attempt to clean and destroy the truck was largely duplicative of other testimony at trial. Cooper testified about the blood and flesh all over the truck and the fact appellant offered him money to hide it. Caughman also testified appellant urged him to report the truck as having been stolen.

b. Impeachment Evidence for Darryl Anthony

Darryl Anthony was called by the prosecution to testify that he saw the butt of appellant's semiautomatic gun in appellant's car the night before the homicide. Appellant argues this testimony was significant because appellant testified that he only had his revolver, not his semiautomatic handgun when he went to McCoy's house and McCoy somehow had appellant's semiautomatic .45-caliber gun.

Defense counsel objected to Anthony's testimony because he had no notice Anthony would be called as a witness and he had not received a witness interview summary or a criminal history for Anthony.

The prosecutor stated that she had been searching for Anthony throughout trial and he appeared at the district attorney's office during the lunch hour on the day he testified. Nobody in her office had spoken to Anthony previously. She could not reduce the interview to writing because it occurred just minutes before court resumed. She provided a criminal history for Anthony and she inquired of his prior convictions of moral turpitude during his testimony.

Defense counsel asked to call the district attorney's office investigator who interviewed Anthony, and the court allowed defense counsel to question him under oath. He confirmed that he had been trying to locate Anthony for several days and Anthony came to the district attorney's office a little after noon that day.

Defense counsel requested a continuance to the following day to prepare to cross-examine Anthony. The court stated that it was not prepared to have Anthony come back

the following day but told defense counsel it would give him additional time to prepare. Defense counsel stated that he believed appellant's due process rights were being violated but he would conform to the court's order and requested an hour to prepare. In that hour, Anthony was interviewed by the defense investigator. Anthony was then questioned outside the presence of the jury. He said he had used methamphetamine within the past two days but he had not used heroin. He said the prosecutor had not said anything to him about his parole status. The officers said they would look into it and try to help him out but nobody promised him a warrant would go away.

Defense counsel then cross-examined Anthony before the jury. He inquired about Anthony's misunderstanding of his parole status. Anthony admitted he had used methamphetamine within the past day and a half. Anthony explained that he was close friends with McCoy. He also stated that the officers told him they would talk to his parole officer. Defense counsel called the defense investigator who interviewed Anthony as an expert to testify that Anthony was under the influence of a central nervous system depressant, heroin, in addition to methamphetamine.

As part of appellant's motion for mistrial, he argued that the prosecution failed to provide a criminal history and had allowed Anthony to testify believing there was a warrant for his arrest, when, in fact, there was no warrant. The court concluded there was no prejudice to the defense because appellant was able to cross-examine Anthony and impeach him with his prior convictions. The court found there was no prejudice from appellant not receiving this information sooner given the circumstances surrounding Anthony's testimony.

In *People v. Samayoa* (1997) 15 Cal.4th 795, 839 our Supreme Court held "the trial court's denial of a continuance did not constitute an abuse of discretion, nor did it violate [the] defendant's federal constitutional rights." At the conclusion of the direct testimony of the prosecution's criminalist, the defense asked for a continuance to prepare his cross-examination because he had not been provided with the criminalist's report in advance of the testimony. (*Ibid.*) The prosecution informed the court the criminalist had not prepared a report so the court gave defense counsel time to interview him regarding

the content of testimony. (*Ibid.*) “In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of his or her motion for a continuance does not require reversal of a conviction. [Citations.]” (*Id.* at p. 840.) The court concluded that defense counsel had the opportunity to interview the criminalist prior to his testimony and was able to conduct an effective cross-examination. (*Id.* at pp. 840-841.)

There was no evidence that the prosecution purposely failed to provide an interview report to the defense. The prosecutor explained on the record that Anthony appeared over the lunch break and as soon as the investigator spoke to him, they brought him to court to testify. There was no misconduct. (See *People v. Gurule* (2002) 28 Cal.4th 557, 596 [no prosecutorial misconduct where nothing in the record indicated the prosecution intentionally refrained from taking notes and producing them to defendant].)

With a short continuance, defense counsel was able to interview Anthony prior to his testimony and then to conduct an effective cross-examination where he brought out both Anthony’s drug use and his immunity deal with the prosecution. Therefore, we conclude there was no prejudice to appellant.²

In conclusion, we find that “[c]ontrary to [appellant’s] assertion, when considered together, the instances of alleged prosecutorial misconduct discussed above, which constituted only a fraction of the questions and comments during the lengthy trial on the issue of [appellant’s] guilt, did not adversely affect the fundamental fairness of the trial.” (*People v. Earp* (1999) 20 Cal.4th 826, 865.)

E. Cumulative Error

We have rejected appellant’s arguments that errors occurred during his trial. Accordingly, we reject his contention that the cumulative effect of the errors requires reversal. (See *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

² In his brief, in a bullet point list, appellant raises other allegations of misconduct without providing a detailed argument. He objects to an alleged transcript of an interview that was not disclosed to him for witnesses that were not called at trial, and to an incident of domestic abuse the prosecutor raised with the court outside the presence of the jury. The witnesses did not testify and the domestic incident was not raised in cross-examining appellant so neither of these could have impacted the outcome of the trial.

IV.
DISPOSITION

The judgment is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.