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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADHEM ABDULLA,

Defendant and Appellant.

A140296

**(Alameda County
Super. Ct. No. C166088)**

Adhem Abdullah appeals from a judgment of conviction on a jury verdict finding him guilty of murder. (Pen. Code, § 187.)¹ In this court, he raises two claims of error; one concerns an evidentiary ruling and the other concerns alleged prosecutorial error. Abdullah contends the trial court improperly limited the testimony of a psychologist regarding the effects stress and fatigue would have on a person's ability to react rationally. In a related argument, Abdullah asserts the trial court erred by refusing to permit his expert to answer a hypothetical question based on the facts of this case. In addition, Abdullah claims he was deprived of due process and a fair trial by the prosecutor's misstatements of the law during her closing argument.

We have examined Abdullah's contentions, and we find them unpersuasive. Accordingly, we will affirm the judgment of conviction.

¹ All statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2011, the Alameda County District Attorney filed an information charging Abdulla with the murder (§ 187) of Willie Turner. The charge also included a personal firearm use allegation (§ 12022.53, subds. (b)-(d)) and a great bodily injury allegation (§ 12022.7, subd. (a)). A jury was sworn to try the case on March 14, 2013. The following facts are taken from the evidence presented at Abdullah's trial:

Abdullah worked as a clerk at the Oakland Discount Store. He and his coworker, Charles Adams, caught Willie Turner's wife, Robin Matthews, shoplifting. Adams instructed Matthews to put back the items she had taken, and he began walking her out the door. Abdullah, who knew this was not Matthews's first time shoplifting from the store, pushed her to the ground and yelled obscenities at her, telling her, " 'I'm tired of you stealing.' " Turner, who was outside the store, came to his wife's defense, saying " 'Not my wife.' " He swung at Abdullah, hitting him in the lip. Abdullah tried to strike back, but Adams and several other people intervened and broke up the fight.

Abdullah threatened Turner, saying, " 'I got something for him. I shoot your ass. You got me fucked up.' " Turner backed away. As he was leaving, Abdullah commented, " 'I got something for you,' " and " 'I'm going to get my gun.' " Abdullah went back inside the store and behind the counter where he retrieved a Glock handgun.² As he came out of the doorway with the gun, he exclaimed, " 'I got something for [his] motherfucking ass.' " He continued, " 'I'm about to kill that motherfucker.' " Abdullah ignored warnings from Adams, who saw him trying to get out the door with the pistol. Adams, who described Abdullah as "hot headed," "arrogant and . . . cocky", told him to go back into the store and tried to dissuade him from doing anything.

Abdullah eventually broke free from those who were attempting to keep him in the store. He walked down the street and around the corner at 77th. Abdullah raised the gun and fired. He discharged a single shot with a hollow point bullet into the back of Willie

² Abdullah had shown the gun to Adams and others numerous times. Abdullah also admitting taking target practice at the San Rafael Bullseye Gun Range.

Turner's head. The shot killed Turner. As many as four to five minutes elapsed between the initial encounter and the shooting.

Immediately after the shooting, Abdullah spoke with relatives who advised him to tell the police he had been robbed. He went back to the store, trashed several shelves and called 911. He told the 911 operator he had just been robbed, but also stated, " 'He busted my lip, but it's okay, I got him.' "

Abdullah later called his mother and asked for her help in getting him out of the country and back to Palestine. The call was made during Abdullah's interview with police. Many of the passages were spoken in Arabic.

Abdullah testified at trial and admitted the shooting. At trial, he presented evidence showing he was under stress and fatigued at the time of the shooting. He also presented a psychologist (Dr. Rahn Minagawa) who testified as to the effects that stress and fatigue would have on the human psyche.

The jury convicted Abdullah of second degree murder on April 18, 2013; it found the firearm allegation true. On November 18, 2013, the trial court sentenced Abdullah to an aggregate term of 40 years to life, comprised of 15 years to life for the murder and a consecutive 25 years to life for the firearm allegation. That same day, Abdullah filed a notice of appeal.

DISCUSSION

Abdullah raises two contentions on appeal. First, he contends the trial court erred by limiting Dr. Minagawa's expert testimony regarding the effects of stress and fatigue on a person's judgment and by refusing to permit the expert to answer a proposed hypothetical question. Second, Abdullah argues the prosecutor committed error by repeatedly misstating the law regarding the provocation sufficient for voluntary manslaughter. We address these issues in turn.

I. *The Trial Court Did Not Abuse its Discretion by Restricting Dr. Minagawa's Testimony.*

Abdullah contends he was deprived of his right to present a complete defense and of his right to a fair trial when the lower court curtailed Dr. Minagawa's testimony. In

Abdullah’s view, the trial court’s error was due to its overly broad reading of sections 28 and 29.³ We will analyze Abdullah’s contentions after setting forth the relevant factual background and our standard of review.

A. *Factual Background*

By written motion, Abdullah’s counsel requested the court to give a modified version of CALCRIM No. 570.⁴ He asked the court to change paragraph 3 of the instruction to read: “3. The provocation ~~would~~ could have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.” Counsel contended the standard instruction misstated the law. He argued that the word “would” in the instruction “tells the jury that heat of passion will reduce a murder to manslaughter only if a reasonable person also would have reacted violently to the provocation. In effect, the jury is told to find manslaughter only if a reasonable person would have done the same thing under similar circumstances.”

The prosecution opposed the request. It pointed out that Abdullah’s request relied heavily on language in *People v. Valentine* (1946) 28 Cal.2d 121, without acknowledging that more recent cases were consistent with the language of the standard instruction.

³ Relevant here is section 28, subdivision (b), which provides: “As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing.”

Section 29 further provides: “In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.”

⁴ CALCRIM No. 570 is entitled “Voluntary Manslaughter: Heat of Passion—Lesser Included Offense.” As relevant here, it states: “A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.”

(See, e.g., *People v. Manriquez* (2005) 37 Cal.4th 547, 583-584 (*Manriquez*) [“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.”], italics added.)

Abdullah’s counsel then announced he would be putting on an expert to testify that the stress and fatigue from which he was suffering caused him to fly into a rage and act under heat of passion. He also offered a hypothetical he intended to pose to the expert. The prosecution filed a motion the following day seeking to exclude the hypothetical because it was “the functional equivalent of asking the expert to give an opinion as to whether the defendant had a required mental state.” Its motion contended Abdullah was effectively “arguing that he had a diminished capacity to handle a confrontation . . . because he was tired and stressed as a result of working long shifts in ‘ghetto stores.’ ” (Fn. omitted.)

The trial court heard argument on the prosecution’s motion. During argument, defense counsel presented a revised hypothetical he proposed to put to the expert. It described a factual scenario in which a worker had been employed for years in stores in violent neighborhoods where he regularly observed criminal activity and saw a store clerk and police officers shot. The hypothetical further described how the worker had to “shoo drug dealers away from the front of the store and stop people from stealing from the store.” It went on to state that the worker had experienced lack of sleep, a heavy work schedule, and extreme fatigue just prior to an incident in which he confronted a “serial thief” whom he put out of the store, after which he was suddenly punched in the face. The worker then returned to the store, retrieved a gun, and shot the man who had punched him. After setting out the hypothetical, counsel proposed to ask the expert, “given that factual scenario, could a person of average disposition, when punched in the face under these conditions just described, be provoked to act from passion rather than reason?”

After a further colloquy with counsel, the trial court ruled it would not permit Abdullah’s counsel to ask the question. It observed that the heat of passion defense has

both a subjective and an objective component. While the court was willing to allow the defense some leeway on the subjective part, by allowing Abdullah himself to testify to things like his sleep deprivation, it would not allow the expert to offer this “as some sort of psychological phenomenon,” because that would violate section 29. The court explained it would allow Dr. Minagawa to testify “about sort of a general phenomenon of people being in violent conditions,” but it refused to permit any attempt “to attach that to Mr. Abdullah and what Mr. Abdullah was thinking[.]”

Dr. Minagawa testified regarding general psychological responses to stress and to the effects of fatigue and other environmental factors on a person’s ability to respond to trauma rationally. The prosecutor objected to questions about whether “these things limit a person’s ability to respond rationally.” She also objected to questions defense counsel posed to Dr. Minagawa about whether certain factors would cause a person to react rationally[.]⁵

B. *Standard of Review*

The trial court’s decision to admit or exclude expert testimony of a mental illness is reviewed for an abuse of discretion. (E.g., *People v. Pearson* (2013) 56 Cal.4th 393, 443; *People v. Vieira* (2005) 35 Cal.4th 264, 292.) “Under the abuse of discretion standard, ‘a trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or

⁵ For example, after Dr. Minagawa testified that someone who was bleeding would experience increased trauma and a heightened level of arousal, the following questions ensued:

“[Defense Counsel:] And when you’re talking about the level of arousal, that’s another factor that makes you think that it’s more likely that someone in that circumstance would react from emotion rather than reason?”

“A. Yes.

“[The Prosecutor:] Objection, PC 29.

“THE COURT: I’m going to sustain the objection and strike the answer. Okay.

“[Defense Counsel:] Someone who was in a situation with all of the environmental and constitutional factors that we’ve just discussed, would it be difficult for that person to control their reaction?”

“[The Prosecutor:] Objection, PC 29.

“THE COURT: Sustained.

patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]”
(*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

C. *No Abuse of Discretion Appears.*

Before embarking on our discussion, we clarify precisely what we understand Abdullah’s contentions to be.⁶ He asserts “the trial court should have permitted Dr. Minagawa to testify that the punch in the face that [Abdullah] received from Turner was likely to result in a number of physiological and psychological reactions that were inconsistent with a rational and deliberate response to the situation. The trial court erred in precluding that testimony.” He argues his trial counsel was seeking “to present expert testimony that particular factors reduced the likelihood that the contested [mental state] was present, but that left the ultimate determination to the jury.”

In its ruling, the trial court referred specifically to sections 28 and 29. As our state’s high court has explained, “Expert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such intent is not admissible at the guilt phase of a trial. [Citation.] Sections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant *actually formed* a mental state that is an element of a charged offense, *but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state*. An expert’s opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing.” (*People v. Coddington* (2000) 23 Cal.4th 529, 582-583, italics added, fns. omitted.)

⁶ As the People note in their brief, it is not entirely clear whether Abdullah’s argument concerns both his proposed hypothetical and the questions to which the prosecutor objected. We therefore set out his core contentions verbatim and examine them in the context of the testimony his counsel sought to elicit at trial.

Abdullah sought to offer the testimony at issue to show he acted rashly and in response to provocation from the victim. The obvious purpose was to convince the jury he acted in the heat of passion so as to reduce his culpability from murder to manslaughter. (See CALCRIM No. 570 [“A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion”].) “The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. . . . ‘[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,’ because ‘no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253 (*Steele*).)

Put another way, the heat of passion form of voluntary manslaughter requires that: (1) the killer’s reason actually be clouded by some strong passion resulting from provocation by the victim (the subjective component) *and* (2) the victim’s provocative conduct be sufficient to “cause an ordinary person of average disposition to act rashly or without due deliberation and reflection” (the objective component). (*Manriquez, supra*, 37 Cal.4th at pp. 583-584; see also *People v. Breverman* (1998) 19 Cal.4th 142, 163.) Evidence that a defendant “was intoxicated, that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences” may satisfy the subjective element of heat of passion, but “it does not satisfy the objective, reasonable person requirement, which requires provocation by the victim.” (*Steele, supra*, 27 Cal.4th at p. 1253; accord, *People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 [“Because the test of sufficient provocation is an objective one based on a reasonable person standard, the fact the defendant . . . suffers from a mental abnormality or has particular

susceptibilities to events is irrelevant in determining whether the claimed provocation was sufficient”].)

Evidence that a defendant suffered some psychological dysfunction due to prior trauma shows diminished capacity, not heat of passion. (*Steele, supra*, 27 Cal.4th at p. 1253.) “ ‘The essence of a showing of diminished capacity is a “showing that the defendant’s mental capacity was reduced by *mental illness, mental defect or intoxication.*” ’ [Citation.]” (*Ibid.*) Since the Legislature has abolished the defense of diminished capacity, only diminished actuality survives, and the jury may consider evidence of a defendant’s mental condition in deciding whether the defendant actually had the required mental state for the crime. (*Ibid.*) “Even the concept of diminished actuality is circumscribed, however. . . . [T]he law no longer ‘permits a reduction of what would otherwise be murder to nonstatutory voluntary manslaughter due to voluntary intoxication and/or mental disorder.’ [Citation.]” (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1450.) Thus, “sections 25, 28, and 29, while removing a defendant’s ability to use evidence of a mental disorder to negate the capacity to form a requisite mental state, do permit such evidence on the issue of whether the accused actually formed the required mental state.” (*Id.* at pp. 1450-1451.)

The cited case law persuades us the trial court did not abuse its discretion in limiting Dr. Minagawa’s testimony. Abdullah argues the trial court should have permitted him to present expert testimony that particular factors reduced the likelihood that he could react rationally to provocation. We think this is simply another way of saying the factors would *diminish his capacity* to form the mental state necessary for murder, and thus the trial court acted within its discretion in prohibiting expert testimony on that point. (See § 25, subd. (a) [“evidence concerning an accused person’s . . . trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular . . . mental state required for the commission of the crime charged”]; § 29 [“any expert testifying about a defendant’s mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states”].) We note the trial court permitted *Abdullah* to testify about how his

stress and fatigue affected him, but it forbade Dr. Minagawa from testifying “about what effect these things had on [Abdullah].” It also properly precluded Dr. Minagawa from discussing “a hypothetical person in the same circumstances with the facts of our case.” (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1327 [“To ask whether a hypothetical avatar in defendant’s circumstances would have had the specific intent required for [the charged crime], as counsel appeared to be proposing, would have been the functional equivalent of asking whether defendant himself had that intent.”].) These evidentiary rulings were not so “arbitrary, capricious, or patently absurd” that they “resulted in a manifest miscarriage of justice.” [Citation.]”⁷ (*People v. Hovarter, supra*, 44 Cal.4th at p. 1004.)

II. *The Prosecutor’s Occasional Misstatements of the Law of Provocation Did Not Deprive Abdullah of a Fair Trial.*

Abdullah next contends he was deprived of due process, a fair trial, and the effective assistance of counsel by the prosecutor’s argument to the jury that he was not entitled to a manslaughter verdict unless the provocation was sufficient to incite an average person to kill.⁸ He points out that the Bench Notes to CALCRIM No. 570 clarify that the average person need not have been provoked to kill, just to act rashly and without deliberation. (See *People v. Beltran* (2013) 56 Cal.4th 935, 938-939, 957 (*Beltran*.)) Abdullah claims the prosecutor erred by repeatedly misstating the standard in closing argument.⁹ We will address his arguments after summarizing the relevant facts and explaining our standard of review.

⁷ Since we conclude the trial court’s ruling was not erroneous, we need not address the parties’ contentions on the issue of prejudice.

⁸ Although Abdullah refers to ineffective assistance of counsel in the heading of this argument, he does not discuss the issue in the argument following that heading. We therefore need not address the matter. (*People v. Myles* (2012) 53 Cal.4th 1181, 1222, fn. 14 [where argument heading referred to issue but briefs did not provide either record citations or argument about that issue, court declined to consider it].) Since we conclude below that Abdullah suffered no prejudice, no claim of ineffective assistance of counsel could succeed in any event.

⁹ Abdullah uses the term “prosecutorial misconduct” to describe the prosecutor’s actions, but our Supreme Court finds that term “somewhat of a misnomer to the extent that it

A. *Factual Background*

The trial court and counsel had a lengthy discussion regarding CALCRIM No. 570. Both the prosecutor and defense counsel stated their intent to object if either misstated the law of provocation during closing argument. Defense counsel specifically advised the court, “[W]hen the prosecutor misstates the law, which I think she will, we will also object.”

In her closing argument, the prosecutor at times articulated the appropriate standard, using or paraphrasing the language from CALCRIM No. 570 that provocation is adequate if it drives a person of average disposition to “act rashly” or to act from passion rather than from judgment. In addition to her statements, during her closing the prosecutor displayed a PowerPoint slide summarizing CALCRIM No. 570. The slide read in part: “The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is from passion rather than from judgment.” At other times, however, the prosecutor explained provocation using language that suggested a defendant’s provocation was only adequate if it caused the person of average disposition “to kill” or if someone “ends up dead.” In at least one instance, the prosecutor coupled her description of provocation with a phrase suggesting that provocation was only sufficient if it caused the person of average disposition to kill, stating, “So this is why the law has voluntary manslaughter for situations where the victim has done something so egregious, that any one of us would have reacted so rashly, and that person, the victim, ends up dead.” At no time did defense counsel object to the prosecutor’s remarks on the law of provocation.

After the verdict, defense counsel filed a motion to reduce the murder conviction to manslaughter, or in the alternative, for new trial. Counsel again raised CALCRIM No. 570 and cited the California Supreme Court’s then-recent opinion in *Beltran, supra*, 56 Cal.4th 935, which was filed some two months after the jury reached its verdict. The

suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.’ [Citation.]” (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667.) We use the term “prosecutorial error” in our discussion.

motion argued the prosecutor had misstated the law regarding provocation because she had told the jury “the provocation must be sufficient not only to cause a person of average disposition to act from passion, but it must be enough to cause anyone to act from passion *and kill*.” The prosecution opposed the motion, and the trial court held a hearing on the matter.

At the hearing, the trial court acknowledged the prosecutor had “misstated the standard several times, perhaps five times between the concluding argument and the rebuttal argument. There were [also] times when she stated the legal standard correctly[.]” The court also noted defense counsel’s contention that no objection had been made because it would have been futile. It explained it had reviewed a transcript of its earlier discussion with counsel regarding CALCRIM No. 570, and it pointed out that both the prosecutor and defense counsel had promised to object to any misstatements of the law of provocation. The court reminded counsel that during the prior discussion it had announced its intention to intervene in the event of an objection and admonish the jury if necessary. The court went on, “We had an agreement, express agreement, on the record at the time we settled instructions that if either one of you had issues about how the other was arguing 570, that you would raise an objection, and I promised you that I would deal with it. . . . I went to each place [in the reporter’s transcript] where there was any kind of objection, and I looked carefully, and I didn’t see a single objection to any of her argument on 570 in the areas where she misstated the law. And a timely objection would have resulted in an admonition.” The court therefore ruled defense counsel had forfeited the argument and denied the motion on that ground.

B. *Standard of Review*

A prosecutor’s conduct violates the federal Constitution when it infects the trial with such unfairness as to make the resulting conviction a denial of due process. (*People v. Friend* (2009) 47 Cal.4th 1, 29; see *People v. Vines* (2011) 51 Cal.4th 830, 873.) If a prosecutor’s conduct does not render a trial fundamentally unfair, her actions constitute error under state law only if they involve the use of deceptive or reprehensible methods to persuade the jury. (*People v. Vines, supra*, 51 Cal.4th at p. 873; *People v. Jablonski*

(2006) 37 Cal.4th 774, 835.) “A prosecutor is given wide latitude to vigorously argue . . . her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.)

When a defendant bases his claims of prosecutorial error on a prosecutor’s comments before the jury, we examine whether there is a reasonable likelihood that the jury construed the remarks in an objectionable fashion. (*People v. Friend, supra*, 47 Cal.4th at p. 29; *People v. Jablonski, supra*, 37 Cal.4th at p. 835.) “ ‘[W]e “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’ [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) We must also review the challenged statements “in the context of the argument as a whole.” (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

C. *Abdullah’s Counsel Forfeited the Argument by Failing to Object.*

The trial court expressly found, and we agree, that Abdullah forfeited any claim of prosecutorial error by failing to object below. “To preserve for appeal a claim of prosecutorial misconduct, the defendant must make a timely objection at trial and request an admonition to the jury.” (*People v. Najera* (2006) 138 Cal.App.4th 212, 224 (*Najera*).

In an effort to avoid application of the forfeiture rule, Abdullah contends, as he did below, that an objection would have been futile. We disagree. In *Najera*, the court faced very similar circumstances. In that case, the prosecutor’s closing argument to the jury contained incorrect statements of the law governing heat of passion. (*Najera, supra*, 138 Cal.App.4th at pp. 223-224.) There, as here, “[t]he prosecutor interspersed correct statements of the law with the incorrect ones” but the defendant’s counsel did not object. (*Id.* at p. 224.) The court rejected any argument that an objection would have been futile, stating, “The trial court immediately could have corrected misleading or inaccurate statements of the law and could have warned the prosecutor not to repeat them. Had defense counsel requested admonitions, we are reasonably sure the trial court would have given them.” (*Ibid.*, fn. omitted) The same may be said here.

Abdullah argues an objection would have been futile because the trial court had previously promised that in the event of an objection, it would instruct the jury with CALCRIM No. 200.¹⁰ He argues this instruction would have been a “less effective response than an instruction that expressly tells the jury that the argument they just heard was wrong and should be immediately disregarded.” What Abdullah fails to explain, however, is why his counsel could not have objected and requested just such an instruction. We have found nothing in the record indicating the trial court would have *refused* to give a more pointed curative instruction than CALCRIM No. 200. To the contrary, we have no reason to doubt the trial court’s statement, made at the hearing on Abdullah’s motion for new trial, that it would have admonished the jury had an objection been made. Thus, if Abdullah’s counsel had requested such an instruction, we are confident the trial court would have given it. (*Najera, supra*, 138 Cal.App.4th at p. 224, fn. omitted [“Had defense counsel requested admonitions, we are reasonably sure the trial court would have given them.”].) Indeed, the trial court admonished the prosecutor at least once during her rebuttal argument. Moreover, we must presume jurors treated the prosecutor’s statements as nothing more than the arguments of an advocate who was attempting to persuade. (E.g., *People v. Centeno, supra*, 60 Cal.4th at p. 676.) We must also presume that had an objection been made and sustained and the jury admonished, the jury would have followed the court’s instruction and any prejudice would have been avoided. (*People v. Jones* (1997) 15 Cal.4th 119, 168.) Since a claim of prosecutorial error based on comments to the jury is preserved only if an admonition would not have cured the harm, we hold Abdullah forfeited this argument by failing to object in the trial court. (See *People v. Friend, supra*, 47 Cal.4th at p. 29.)

¹⁰ That instruction, entitled “Duties of Judge and Jury,” states in relevant part: “You must follow the law as I explain it to you, even if you disagree with it. *If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.*” (CALCRIM No. 200, italics added.)

D. *Even if the Argument Had Been Preserved, it Would Fail on the Merits.*

Even if Abdullah's claim had been properly preserved, we would conclude no error occurred. (*People v. Vines, supra*, 51 Cal.4th at p. 873.) To begin with, although some of the prosecutor's comments inaccurately described *current* law regarding provocation, "[u]ntil [the] decision in *Beltran* 'clarif[ied] what kind of provocation will suffice to constitute heat of passion and reduce a murder to manslaughter' [citation], whether the provocation must be such as to cause an ordinary person of average disposition merely to act rashly or to kill was uncertain." (*People v. Trinh* (2014) 59 Cal.4th 216, 233.) Closing arguments in this case occurred two months before *Beltran* was issued, and thus the prosecutor's comments may simply have reflected a then-existing ambiguity in the law.

Moreover, when a prosecutor's comments mix correct and incorrect statements of the law, we ask whether the incorrect statements are remedied by the trial court's instructions. (See *Najera, supra*, 138 Cal.App.4th at p. 224.) Here, as in *Najera*, the trial court instructed the jurors that the statements of counsel are not evidence and are to be disregarded when they conflict with the instructions of the court. (See *ibid.*) The trial court also instructed the jury with CALCRIM No. 570, which accurately reflected the law of manslaughter, including the provocation adequate to negate malice. "[W]e generally presume that jurors are capable of following, and do follow, the trial court's instructions." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 447.) Thus, while some of the prosecutor's comments may have engendered some confusion, in the context of her full argument and the court's instructions, they were not so severe as to deprive Abdullah of a fair trial. (See *People v. Friend, supra*, 47 Cal.4th at p. 30 ["[W]e conclude that none of the asserted instances of misconduct was of such severity, considered alone or together with the other asserted instances of misconduct, that it resulted in an unfair trial in violation of defendant's state and federal constitutional rights".])

Finally, we conclude that even if error occurred, Abdullah was not prejudiced. The evidence showing his crime was murder and not manslaughter was strong, and the evidence gave the jury a number of reasons to reject manslaughter in favor of murder.

First, Abdullah himself admitted he intentionally fired in Turner's direction. Abdullah repeatedly expressed his intention to kill Turner, just prior to firing the fatal shot, and he explained his plan to retrieve his gun and shoot Turner in front of a number of listeners.

Second, while Turner's punch may have been sufficient to actually provoke Abdullah, the jury could reasonably have found it would not have provoked a person of average disposition to act rashly, particularly since Turner walked away from any further altercation. And even assuming Abdullah was indeed provoked, given the time that elapsed between the initial encounter and the shooting, the jury could have concluded he had sufficient time to cool off. (See CALCRIM No. 570 ["If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis"].) After he was struck, Abdullah had time to return to the store to retrieve the murder weapon from behind a counter, and then he made his way past several people who were trying to prevent him from pursuing Turner.

Third, the jury might also have seen Abdullah as the provocateur rather than a person provoked. He was the one who initiated the first physical encounter by throwing the victim's wife to the ground. (See, e.g., *People v. Oropeza*, *supra*, 151 Cal.App.4th at p. 83 ["claim of provocation cannot be based on events for which the defendant is culpably responsible"].) For all of these reasons, the jury could reasonably have found that manslaughter did not apply.

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.