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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID EARL GRAY,

Defendant and Appellant.

C064105

(Super. Ct. No. 05F09779)

Defendant David Earl Gray stabbed Hai “Tommy” Dinh to death with a pair of scissors in the early morning of November 6, 2005, outside the Royal 8 Inn on Stockton Boulevard. Following a trial for first degree murder where defendant represented himself claiming self-defense, a jury found him guilty of second degree murder. The court sentenced him to 51 years to life in prison, after a finding he had two prior robbery convictions that qualified as strikes and serious felonies.

Defendant appeals, raising 14 contentions relating to the evidence, instructions, alleged prosecutorial and judicial misconduct, and sentencing. Finding some of these contentions forfeited and the others lacking merit, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Prosecution's Case

In November 2005, Sandy “Mom” Green was living in room 23 of the Royal 8 Inn with her husband, Audie Hogue. Their room was “like a revolving door” with “people going in and out . . . every day.” Dinh was one of Green’s frequent guests, whom she had known for a few years. He was a small-time rock cocaine dealer who often sold drugs in and around room 23. He was also “very small” and “[a]nnoying,” and he would frequently get beaten up by other drug dealers.

Defendant, whom Green had known for about six months, was another frequent guest. He would talk to Green about his problems and occasionally they would do drugs. Dinh never sold drugs to defendant, but sometimes Dinh would give them to defendant for free.

Around November 3, 2005, Dinh asked defendant “to come with him and watch his back” while Dinh sold drugs. Defendant responded, “[O]kay, man, but I want you to pay me. Pay me my money. You are going to pay me my money?” Dinh agreed, and the two left Green’s room together. Green thought this arrangement was “so weird” because defendant did not really like Dinh and they did not spend time together. When the two returned to Green’s room, defendant told Dinh, “ ‘I want my money.’ ”

Over the next few days, defendant went to Green’s room looking for Dinh. When Green initially told defendant Dinh was not there, defendant responded angrily, “I want my money” or “I am going to kill him.” Defendant repeated this threat on multiple occasions.

Early in the morning on November 6, 2005, defendant went to Green’s room a few minutes after Dinh had left. Inside the room were Green, Hogue, Dessie Rhodes (Smith) and Charles “Champ” Gooden. Defendant asked Green for a butcher knife, and when she said she did not have one, defendant grabbed a pair of scissors and left.

Green looked out the door and saw defendant holding the scissors over Dinh's head saying, " 'I told you I was going to kill you.' " Green closed the door.

Green's neighbors, including Shannon Carter and James Wells, Jr., woke up and looked outside. Carter saw defendant sitting on top of Dinh stabbing him "too many" times to count. Defendant ignored Carter's pleas to stop and instead kept repeating, "Die, motherfucker. Die." Wells saw Dinh, who was then face down on the ground, being stabbed by defendant from the back of Dinh's head, down his neck, and across his shoulders. Dinh was trying to escape.

When Green took another look outside, defendant was stabbing Dinh on his back and legs. Green went outside and pleaded, "[P]lease don't kill him." Defendant responded, " 'Ma, go back in the room and close the door.' " Green complied, but she continued to watch defendant "constantly stabbing [Dinh]" for three to five more minutes.

Wells went outside with a baseball bat and told defendant, " 'Stop it.' " Defendant ignored him. Dinh pleaded, " 'Please help me, Jimbo. Please help me.' " Defendant stabbed Dinh some more, "all up around his head and . . . his eyes," while saying, " 'Die, die.' " Wells banged his bat on the ground, trying to stop the attack. Defendant responded, " 'You're next, Jimmy.' "

About five minutes after Wells went outside, Green's husband, Hogue, also stepped outside with a baseball bat. When Hogue approached defendant, defendant told him, "[G]o back in the house if [you] d[o]n't want none of the same thing [I] [ha]d given [Dinh]." Hogue turned around and went back inside room 23.

Wells called 911 and told the dispatcher defendant was stabbing Dinh. As Wells described it, defendant was also "literally tr[ying] to tear [Dinh's] head clear off his body . . . twisting his head . . . back and forth . . ."

While Wells was still on the phone with the dispatcher, he heard police sirens. Just then, defendant stood up, appeared to brush dirt off himself, threw his coat on the

ground near a dumpster, and started walking to the front of the motel. Police arrived at 4:51 a.m. and saw defendant with blood on his clothes, hands, and face, walking very calmly through the parking lot. Police asked defendant, “ ‘Are you hurt? Is that your blood?’ ” Defendant responded, “ [N]o. It’s that other guy[’]s.” Defendant appeared to be under the influence of a stimulant, and he admitted that he had used crack.

Police found Dinh’s body in front of room 23. He was dead. A pair of scissors was on top of his chest. Near Dinh’s head was a closed fingernail knife used for cleaning one’s nails.

Two hours after Dinh died, defendant was interviewed on videotape by police and gave various versions of what happened. These versions included that “[Dinh] is fucking devil” and defendant “just killed him”; defendant killed Dinh because Dinh had previously stabbed him in the back and neck, and later Dinh tried to swing at him and pulled something out of his pocket, but defendant “beat him to the draw”; and defendant did not know if Dinh had a weapon and did not care whether he did.

An autopsy showed Dinh had been stabbed 49 times on his head, chest, arm, back, and eyes. He died from a stab wound to his torso combined with blunt force trauma to the head.

Defendant admitted he had pled no contest to misdemeanor grand theft person in 1995, misdemeanor corporal injury on a spouse or cohabitant in 1997, two felony robberies in 1998, and misdemeanor corporal injury on a spouse or cohabitant in 2003.

B

The Defense

Defendant called 30 witnesses and testified on his own behalf. He claimed he had been attacked a few days or weeks before the stabbing, possibly by Dinh, and also that he killed Dinh in self-defense.

On October 25, 2005, about two weeks before Dinh’s death, defendant was assaulted on his back and neck. At that time, he told a 911 dispatcher that he was

attacked by three “dudes” who he described as black, white, and Hispanic.¹ The police officer who responded to defendant’s 911 call observed a puncture wound on the back of defendant’s neck and another in the middle of defendant’s back.

According to Dessie Rhodes, just before the stabbing, Dinh and defendant were both in room 23. Dinh asked Rhodes for some money, but before she could give it to him, Dinh left the room. When she looked outside, she saw defendant “stabbing [Dinh] to death.” She called 911.

According to Charles Gooden, defendant asked Dinh to come outside. Dinh went, but Dinh acted like, “why you want to talk to me?” Defendant left the room before Dinh did. Gooden closed the door. Forty-five seconds later, Gooden heard a loud bang followed by a holler. When he opened the door, he saw defendant and Dinh tussling, which he described as wrestling or moving around together. Dinh ended up on the ground. Gooden saw scissors in defendant’s hands and “blood everywhere.” Dinh did not pull out any weapons and was trying to block the assault. About 10 minutes later, defendant walked away from Dinh. Thereafter, Gooden did not see anybody except police approach Dinh’s body.

According to defendant, as to the attack on October 25, 2005, he believed Dinh was in the vicinity when he was stabbed. On October 28 into the morning of October 29, 2005, he saw Dinh again and Dinh began swinging something at him from 10 to 15 feet away because Dinh’s acquaintances ordered him to do so. Defendant knew Dinh to be someone who carried weapons and “react[ed] very harshly toward people.”

Around 1:00 a.m. or 2:00 a.m. on November 6, 2005, defendant saw Dinh at a liquor store. They briefly spoke without any problem. But a few minutes later while

¹ Later, defendant claimed he was attacked by three people, including “Asian Tony.” Asian Tony looks nothing like Dinh.

defendant was walking through a field, he heard gunshots and saw bullets hitting the ground near him. He saw Dinh in the vicinity, who was the only one around.

Defendant eventually went to room 23. Dinh was already inside, and upon seeing defendant, Dinh grabbed a gun and knife. Defendant grabbed a pair of scissors. Defendant left the room, and Dinh followed. The two faced each other, and defendant asked Dinh what was happening, but Dinh did not respond. Dinh then fired a gun at defendant and attacked him with a fingernail knife in the chest. Defendant hit Dinh, and Dinh fell to the ground. Dinh told defendant, "I will kill you," and defendant responded, "[N]o . . . you die." Dinh continued moving, so defendant "protect[ed] [him]self" by hitting Dinh with the scissors.

DISCUSSION

I

The Court Did Not Prejudicially Err In Its Handling Of Defendant's Impeachment Evidence And Its Instructions On Impeachment

Defendant contends the court erred when it "impugned [his] credibility by admonishing the jury he had been 'impeached' by prior conduct involving moral turpitude and by refusing to permit [him] to rehabilitate his credibility." As we explain, the court erred in allowing the prosecutor to introduce evidence of defendant's prior misdemeanor convictions but properly refused to allow defendant to testify about the facts of his prior felony and misdemeanor convictions and properly instructed the jury. As we further explain, the error in admitting the evidence of defendant's prior misdemeanor convictions was harmless beyond a reasonable doubt.

A

Factual And Procedural Background

The prosecutor began his cross-examination of defendant by asking him about his convictions for misdemeanor grand theft person in 1995, misdemeanor corporal injury on a spouse or cohabitant in 1997, two felony robberies in 1998, and misdemeanor corporal

injury on a spouse or cohabitant in 2003. Defendant admitted he pled no contest to these crimes, but he repeatedly testified he would not admit he had been convicted of those crimes. At one point when the prosecutor asked if defendant had seen his rap sheet, defendant said, “anything can be doctored in this court” When the prosecutor asked if defendant’s rap sheet had been doctored, defendant responded, “I didn’t say that. I said anything can be.” Defendant and the prosecutor then went back and forth again as to whether defendant’s no contest pleas meant he had been convicted of these offenses, with defendant refusing to admit that they did.

At the end of the questioning about defendant’s prior convictions, the court told the jury the following: “What I will do before we go on, ladies and gentleman, is give you an admonition that the [d]efendant has been impeached with prior conduct going to moral turpitude. You must use that solely for the purposes of veracity or truthfulness. [¶] You will get a jury instruction in that regard. That is something you may consider as to truthfulness.”

The next morning the court told the jury the following: “[B]oth sides have agreed that I could take judicial notice of Penal Code section 1016,” and both sides said they agreed. The court continued, “A no contest plea is treated as a guilty plea for both a felony and a misdemeanor. The only difference is that in terms of a misdemeanor, that plea cannot be used against you in a civil suit.” Defendant then started reading from Penal Code section 1016.5 regarding inadequate immigration advisements as a basis to vacate the plea. The prosecutor objected, but defendant continued that “[w]hat I’m trying to state is . . . if I knowingly or intelligently did not plead no contest to have it used against me, it’s supposed to be stated in the court on the record.” Defendant then began arguing with the court about whether his plea of no contest could be treated as a guilty plea.

During redirect examination, defendant testified that in 1998 he was sent to prison after he pled no contest to a felony, which he understood to mean, “I’m not guilty of the

crime. I'm not innocent of the crime." The only reason he took the plea bargain was because his attorney told him he would "not [be] considered to be convicted of a crime." Defendant admitted he was incarcerated in 2003 for a misdemeanor based on a domestic dispute with his ex-wife, but he claimed his ex-wife lied to the officer when she told the officer defendant hit her. As to "the charge in 1998," defendant disputed he matched the physical description of the suspect. The prosecutor objected and the court told defendant they were "not going to get into the facts and circumstances of those cases" because "[t]hey are simply offered for the fact that you were convicted of them." The court directed defendant to "move [on] to another area."

Defendant then testified about his view of the meaning of moral turpitude. The prosecutor objected, and the court ordered defendant to "move on," but he would not. The court then told the jury, "I'm just going to have to again admonish you that I told you the limited purpose that these were received for was to determine credibility, if you choose to do so. We're not going to get into these cases. They're offered -- the convictions are offered legally and appropriately."

Defendant then continued, over the prosecutor's objections and the court's admonitions, that he was not allowed to impeach another witness with five convictions for rape, which qualified as crimes of moral turpitude. The court told the jury, "I'm sorry. I can only do so much here."

Defendant then went back to the topic of his prior convictions and testified that nobody proved him guilty beyond a reasonable doubt, and that he was not advised by the court that his no contest plea could be used in "any further court proceedings."

At the end of trial, the court instructed pursuant to CALCRIM No. 226 that in evaluating a witness's credibility, it "may consider" whether "the witness [has] been convicted of a felony."

The court also instructed pursuant to CALCRIM No. 316 as follows:

“If you find that a witness has been convicted of a felony, you may consider that fact only in evaluating the credibility of the witness’ testimony.

“The fact of a conviction does not necessarily destroy or impair a witness’ credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.

“[If] [y]ou find that a witness has committed a crime or other misconduct, you may consider that fact only in evaluating the credibility of the witness’ testimony.

“The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness’ credibility.

“It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.”

B

The Trial Court Did Not Err In Prohibiting Defendant From Introducing Evidence That He Did Not Commit The Prior Misdemeanors And Felonies

Defendant contends the court erred in refusing to allow him to present evidence he did not actually commit the alleged prior felony and misdemeanor acts. We begin with the misdemeanor acts.

“[I]f past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion, as ‘relevant’ evidence. . . .” (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) It is the misdemeanor conduct that is admissible; “a *misdemeanor conviction itself* is inadmissible *hearsay* when offered as evidence that a witness committed misconduct bearing on credibility.” (*Id.* at p. 297.)

The People acknowledge *Wheeler’s* holding that misdemeanor convictions themselves are inadmissible hearsay, but contend its holding no longer applies because in 1996, the Legislature enacted Evidence Code section 452.5. That code section provides, “An official record of conviction certified in accordance with subdivision (a) of

[Evidence Code] Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.” Evidence Code section 452.5 is inapplicable here because it applies to the admission of “[a]n official record of conviction” and that is not what was offered. Here, the prosecutor only asked about the fact of the misdemeanor convictions. He offered no official record.

Therefore, based on *Wheeler*, the trial court erred in allowing the prosecutor to question defendant about his misdemeanor convictions because his testimony about those convictions was inadmissible hearsay. The only facts that would have been admissible were those related to the underlying misdemeanor conduct. Since the prosecutor did not present any proper impeachment evidence with regard to the misdemeanors, the court was correct (albeit for a wrong reason) in prohibiting defendant from rebutting the prosecutor’s evidence by introducing evidence about his misdemeanor conduct.

We turn then to the felonies. The general rule is that if a criminal defendant testifies on his own behalf, he is “subject to impeachment by proof of any prior felony convictions.” (*People v. McClellan* (1969) 71 Cal.2d 793, 809.) However, a defendant opens the door to the facts of the felony conviction if a defendant seeks to “ ‘mislead a jury or minimize the facts of the earlier conviction.’ ” (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1267-1268 [where the defendant pled to rape, but he would not acknowledge he had actually raped the victim, the prosecutor was permitted to call the rape victim to testify that the defendant had raped her].) *Shea*’s holding, however, does not stand for the proposition a defendant is permitted to call into question the veracity of his prior felony conviction (here, defendant’s felony no contest plea) to undermine the conviction’s impeachment value by introducing facts to undermine that felony plea, at least where, as here, defendant’s only claims as to why those convictions were invalid were inadequate advisements as to the collateral consequences of the plea.

Defendant here admitted he had pled no contest to two felony robberies, and this testimony was sufficient to provide impeachment evidence. Defendant cites to *Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 284 for the proposition that, “The plea is not conclusive evidence; it is merely evidence against the party and the party may contest the truth of the matters admitted by his plea and explain why he entered the plea.” *Rusheen* was a civil case for fraud against a car thief, where the trial court erroneously excluded evidence of the thief’s prior no contest plea to felony grand theft of the same automobile, which the plaintiff wanted to use as a party admission. (*Rusheen*, at p. 281.) The appellate court ruled, “[a] defendant’s plea of nolo contendere to an offense *punishable* as a felony, regardless of whether it is ultimately so punished, is admissible as a party admission in a civil action based upon or growing out of the act upon which the criminal prosecution is based,” and “the trial court abused its discretion in excluding evidence of the plea under Evidence Code section 352.” (*Rusheen*, at p. 281.) Defendant does not explain why this applies to a criminal case where the prior conviction is offered for its impeachment value and not as a party admission in a civil action.

On this record, defendant has provided no cogent basis for challenging the validity of his prior felony convictions for impeachment purposes, and the court did not err in refusing to allow him to do so.

C

The Instructions As A Whole Correctly Advised The Jury How To Evaluate Impeachment Evidence

Defendant contends the court erred in instructing the jury, “*the [d]efendant has been impeached with prior conduct going to moral turpitude. You must use that solely for the purposes of veracity or truthfulness. [¶] You will get a jury instruction in that regard. That is something you may consider as to truthfulness.*” (Italics added.)

“We determine the correctness of jury instructions ‘ ‘from the entire charge of the court, not from a consideration of parts of an instruction or from a particular

instruction.’ ” ’ ” (*People v. Rogers* (2009) 46 Cal.4th 1136, 1177.) As we will explain, the entire charge of the court regarding impeachment was not error because the jury would have understood that charge to require the jury to determine whether defendant had been impeached and to determine the weight, if any, to give that impeachment evidence.

It is true the court was factually and legally incorrect in initially orally declaring that defendant “has been impeached” with “prior conduct” going to moral turpitude and the jury “must” use that solely for the purposes of veracity or truthfulness. Factually, the court was incorrect because the prosecutor presented no evidence of defendant’s conduct (as opposed to the convictions) to impeach defendant. Legally, the court was incorrect because whether a witness has been impeached is a question of fact for the jury to decide (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 576-577) and “the court may not . . . otherwise ‘usurp the jury’s exclusive function as the arbiter of questions of fact and the credibility of witnesses’ ” (*People v. Melton* (1988) 44 Cal.3d 713, 735). However, that same initial instruction went on to tell the jury, “[y]ou will get a jury instruction in that regard. That is something you may consider as to truthfulness.” Thus, the jury knew the initial oral instruction it had just received was not the last word on the impeachment evidence.

The later oral and written instructions correctly explained how the jury could use the impeachment evidence. Specifically, the court instructed pursuant to CALCRIM No. 226 that in evaluating a witness’s credibility, it “may consider” whether “the witness [has] been convicted of a felony.” The court also instructed the jury pursuant to CALCRIM No. 316. That instruction told the jury the following: “If you find that a witness has been convicted of a felony, you may consider that fact only in evaluating the credibility of the witness’ testimony.” “The fact of a conviction does not necessarily destroy or impair a witness’ credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.” “[If] [y]ou find that a witness

has committed a crime or other misconduct, you may consider that fact only in evaluating the credibility of the witness' testimony." "The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness' credibility." And "[i]t is up to you to decide the weight of that fact and whether that fact makes the witness less believable." Correct versions of CALCRIM No. 226 and CALCRIM No. 316 were provided to the jury in written form as well, and thus were available to the jury to resolve any confusion on how to use the impeachment evidence caused by the incorrect initial oral advisement.

In sum, we hold that the entire charge of the court related to impeachment correctly advised the jury that it was to determine whether defendant had been impeached and what weight, if any, to give that impeachment evidence.

D

There Was No Prejudice

We have concluded the court erred in allowing in evidence of defendant's prior misdemeanor convictions for impeachment. Thus, the jury should not have heard that defendant was convicted of misdemeanor grand theft person in 1995, misdemeanor corporal injury on a spouse or cohabitant in 1997, and misdemeanor corporal injury on a spouse or cohabitant in 2003. Defendant contends his federal constitutional rights were violated by this error, and therefore, any prejudice from the court's error relating to the impeachment evidence must be judged under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]. *Chapman* holds that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Ibid.*) Even applying this heightened federal standard of review, we hold the error here was harmless beyond a reasonable doubt.

Leaving aside the misdemeanor impeachment evidence, defendant's credibility was irreparably damaged by his own inconsistent and illogical version of events in what was a futile attempt to establish self-defense.

We start with defendant's confession given two hours after he killed Dinh, in which defendant gave three inconsistent versions of what happened. One version was the "real truth" was "that fucking man [Dinh] is fucking devil" and "I just killed him." The second version was that he killed Dinh because Dinh had previously stabbed him in the back and neck. When he encountered Dinh at the motel, Dinh tried to swing and pulled something out of his pocket, but he "beat him to the draw" and stabbed Dinh with scissors and also choked him until he thought Dinh was dead. And the third version (all in the same confession) was he did not know if Dinh had a weapon and did not care whether he did, and it was actually a "Mexican girl" and "Black guy" who tried to stab him in the past and he did not know if Dinh was involved. When he first attacked Dinh, defendant hit him "so hard that [Dinh] hit the ground" and defendant "still tried to hit him." Dinh "already knew" it was coming because as soon as Dinh stepped outside, defendant said to him, "It's time, You ready?"

At trial when the prosecutor presented these three inconsistent and incriminating versions of events that defendant himself gave to the detective only two hours after he killed Dinh, defendant had no credible or consistent explanation for them. At various points in his trial testimony, defendant claimed he "ha[d] no recollection of his videotape at all," the videotape was altered to produce sounds of his voice when he really was not talking, he could not hear himself confessing to a crime on the videotape, and there were exculpatory statements he made on the videotape that were not recorded or transcribed.

Moreover, defendant's trial testimony asserting self-defense was at odds with the physical evidence and the various other theories of the killing he had given in his confession, adding to his confusing and contradictory claim of self-defense. At trial, defendant testified for the first time that Dinh fired a gun at him and attacked him with a fingernail knife before he attacked Dinh with the scissors. As to the knife, defendant testified Dinh stabbed him in the chest with it. However, defendant had no fresh or

bleeding wounds on him when police inspected him after he had killed Dinh. And as to the gun, no such weapon was found after Dinh died.²

In light of defendant's improbable testimony that he attacked Dinh in self-defense, the jury, it appears, was focused on the degree of murder. On the first day of deliberations, the jury asked questions about defendant's "blood analysis," "[s]pecific[al]ly how the law views the actions of a person who is under the influence of drugs" and "how the law views the actions of a person who is mentally ill." The court referred the jury to CALCRIM No. 625 on voluntary intoxication's effect on specific intent and also instructed that the issue of defendant's mental illness (sanity) was not before the jury. On the second day of deliberations, it appeared the jury had settled on a verdict of either first or second degree murder, as the jury asked whether willful, deliberate, and premeditated action can "take place during the event of the crime?" The jury ultimately chose a verdict of second degree murder. Given the jury's earlier questions, the reduced verdict was likely attributable to the jury's doubt over defendant's ability to premeditate and deliberate given his intoxication.

This logical inference and the evidence we have just recounted that established at most a flimsy self-defense claim lead us to conclude the error in allowing the prosecutor to introduce defendant's prior misdemeanor convictions was harmless beyond a reasonable doubt.

² On appeal defendant notes that Dinh's jacket tested positive for gunshot residue. However, the criminalist who tested the jacket testified there were only "[t]wo possible particles . . . but they're not the most characteristic of gunshot residue particles" and if the gun fired was a handgun, she would have expected to find more particles.

II

Defendant Forfeited His Contention Of Five Specific Incidents Of Alleged Judicial Misconduct

Defendant contends the court committed five incidents of judicial misconduct by declaring in the presence of the jury that defendant's testimony was false and misleading. As we explain, defendant forfeited his contention by failing to timely object.

A

The Five Incidents Of Alleged Misconduct

1. *First Incident*

The first incident occurred in the afternoon on Monday, June 4, 2007, right after the testimony of one of the police officers. The incident was as follows:

“THE COURT: You may call your next witness.

“[DEFENDANT]: Dr. Super I have been unable to contact, and since I was unable to interview Patrice Williams per court order --

“THE COURT: You know what, wait a second. *That is not true, and I am not going to allow you to mislead this jury* and state that you were not allowed to interview a witness per court order. That is --

“[Defendant] speaking simultaneously.

“THE COURT: Mr. Gray, you are not going to *mislead the jury* and make that statement in front of this jury. *That is not true.* [¶] Now, you have a witness that you subpoenaed this morning, which has been ordered to reappear. That's --

“[DEFENDANT]: Patrice Williams (sic) --

“THE COURT: Do you want her to testify or not?

“[DEFENDANT]: No. Thank you, your Honor.

“THE COURT: Is she released?

“[DEFENDANT]: Yes, she is.” (Italics added.)

The next day in the morning, defendant told the court he wanted to call Patrice Williams as a witness. When the court told defendant he has “released her as a witness,” defendant said, “No I did not.”

2. *Second Incident*

The second incident occurred in the morning of Wednesday, June 6, 2007, while defendant was on the witness stand:

“Q (By [DEFENDANT]) Were any of your witnesses called on the stand able to visit you at the county jail?

“A I was not allowed to interview not one witness due to the fact --

“THE COURT: Mr. Gray --

“[THE PROSECUTOR]: Objection, your Honor.

“THE COURT: Sustained. [¶] And I am going to strike the question and the answer. [¶] *You are attempting to mislead the jury.* And I am not going to permit that.

“[DEFENDANT]: I understand, Your Honor.

“THE COURT: No, you don’t understand. *You are attempting to mislead the jury. This is not a correct statement.* [¶] I want you to move on, and I am going to strike that from the record.

“Q (By [DEFENDANT]) Mr. Gray, have you ever been able to phone call any witnesses on your behalf?

“A No, I have not.

“[PROSECUTOR]: Objection, Your Honor; *misstates the evidence.*

“THE COURT: *Sustained.* [¶] I am going to strike the answer and the question from the record. [¶] And I direct you, Mr. Gray, to please move on to the facts of the case.” (Italics added.)

Defendant did not move on to the facts of the case, instead he repeatedly pressed the issue of whether he was able to call any of his witnesses. The prosecutor repeatedly objected; the court sustained the objections.

3. *Third Incident*

The third incident also occurred in the morning of Wednesday, June 6, 2007, while defendant was testifying about being stabbed in late October 2005. He testified he wanted to “introduce Officer . . . Marks’ police report, but I don’t know if I’m able to introduce discovery page 212? Am I able to introduce Police Officer Marks’ report?” The court told him the police report was hearsay and that Officer Marks had testified. Defendant then testified he walked into the police station on November 1, 2005, and filed a police report:

“Q Did you file a formal report?

“A Yes I did. [¶] I would like to introduce my police report that I actually filed to you guys so you guys could read it, but I guess that would be called hearsay evidence.

“THE COURT: Mr. Gray, please move on.

“[DEFENDANT]: Your Honor --

“THE COURT: Mr. Gray, *you know that what you are doing is improper, and you are continuing to do it.* Please move on.” (Italics added.)

4. *Fourth Incident*

The fourth incident occurred in the afternoon of Wednesday, June 6, 2007, while defendant was testifying about the 911 calls made after Dinh’s stabbing. The court sustained the prosecutor’s repeated objections that defendant’s questions and answers lacked foundation. Defendant then stated he wanted to introduce the 911 calls. The court told him to “please testify to your personal observations” Then the following exchange occurred:

“Q: (By [DEFENDANT]) Mr. Gray, are you allowed discovery in this matter as being an attorney?

“THE COURT: Mr. Gray, we are not going to go here --

“[THE PROSECUTOR]: Objection, Your Honor.

“THE COURT: -- because you have discovery, and *you are not going to do this, ask yourself these questions and answer the questions in a manner you know is misleading*. Please move on to the facts and testimony. You have discovery.

“[DEFENDANT]: Your Honor, I have discovery --

“THE COURT: Mr. Gray.

“[DEFENDANT]: I’m trying to introduce the 9-1-1 calls I have in discovery.

“THE COURT: Mr. Gray.

“[DEFENDANT]: I have discovery, Your Honor. As an attorney, I’m allowed to introduce these 9-1-1 calls.

“THE COURT: Mr. Gray, you need to follow --

“[DEFENDANT]: I’m not allowed to introduce the 9-1-1 calls that I have in discovery, Your Honor?

“THE COURT: Mr. Gray, the Court has ruled on motions, and you need to testify before the jury as to the facts of the case and *stop willfully violating what you know are orders*. [¶] Please proceed.” (Italics added.)

Thereafter, defendant kept arguing with the court about introducing the 911 call, whereupon the prosecutor waived any objection he had to the introduction of the tapes of the call, and the defendant played the tapes for the jury.

5. *Fifth Incident*

The fifth incident occurred on the afternoon of Wednesday, June 6, while defendant was testifying about which people he had interviewed.

“Q (By [DEFENDANT]) Mr. Gray, were you aware of witnesses at this crime scene?

“A Yes, I was.

“Q Mr. Gray, did you try to interview these witnesses?

“A Yes, I did.

“Q Mr. Gray, were you allowed to interview these witnesses?

“[PROSECUTOR]: Objection.

“THE COURT: Mr. Gray, *you are not going to mislead the jury*. Move on to another area. [¶] I sustain the objection.

“Q (By [DEFENDANT]) Mr. Gray --

“THE COURT: Mr. Gray.

“[DEFENDANT]: Yes, Your Honor.

“THE COURT: Stop for a moment. Please turn and look at me for a moment. [¶] You need to follow my instructions and my orders and *not ask what you know calls for information that is not accurate*. [¶] Move on to another area.” (Italics added.)

B

Defendant Forfeited His Contention Of Judicial Misconduct

Based On These Five Incidents

Defendant contends these five incidents constituted judicial misconduct because the court declared in the presence of the jury that his testimony was false and misleading. These contentions are forfeited by lack of a timely objection.

“[A] defendant who fails to make a timely objection to the claimed [judicial] misconduct forfeits the claim unless it appears an objection or admonition could not have cured any resulting prejudice or that objecting would have been futile.” (*People v. Abel* (2012) 53 Cal.4th 891, 914.) Here, as our recitation of the five incidents demonstrates, at no time during these incidents did defendant object to the court’s behavior about which he now complains on appeal.

Instead, defendant points to a document he filed on June 12, 2007, entitled “Declaration of The Defendant Declaring the bias of the Court,” claiming that document was sufficient to preserve this issue for appeal. It was not. That document was filed six days after the last alleged incident of judicial misconduct. This does not constitute a timely objection to the five instances of alleged misconduct, some of which were alleged to have occurred a week before. Moreover, it did not specify the five incidents of alleged

misconduct. Rather, it alleged issues in a general manner, including the court's failure to give "legal reason why [defendant's] questions [were] being denied or sustained," while at the same time sustaining the prosecutor's objections without requiring the prosecutor to state a reason for the objection. Defendant claimed "[t]his method is improper and bias[ed]!" Defendant "fe[lt] that his credibility in the eyes of the jury has suffered as a result of the series of unsuccessful objections . . . along with your honor['s] facial expression and deme[a]nor toward a pro-per" He further alleged the court stated in front of the jury defendant did not have the right to present certain evidence, "harshly admonish[ed] the defense without good cause," and was not protecting defendant's rights. He did not single out the five incidents about which he now complains.

Realizing the issue of judicial misconduct may have been forfeited, defendant further contends "the nature of the judicial misconduct was so prejudicial that an objection and an admonition could not have cured the prejudice" because it "c[ould not] be assumed that the jury could expunge the impact of the highly partisan remarks from their minds." This was not such a case.

What defendant fails to note is that these five incidents made up a miniscule portion of a lengthy trial that spanned one month and generated approximately 4,000 pages of reporter's transcript. And they were not nearly as inflammatory as defendant suggests. In essence, the court was forced to rebuke defendant on these five occasions because, despite being repeatedly warned by the court, defendant kept testifying untruthfully about rulings that the court had made or did not make, leaving a false impression in the minds of the jurors.

Cases where judicial misconduct have been found and an objection excused have occurred when the court questioned the veracity of the defendant's witnesses simply because it did not like the content of the testimony or its presentation. (See, e.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1233-1236 [the California Supreme Court excused the

defendant's failure to timely object where the trial court repeatedly belittled the defendant's witnesses by telling a defense expert that his receipt of federal grant money " 'contributed to the federal deficit,' " and accusing another defense expert of " 'embellish[ing]' " an answer and trivializing an aspect of her testimony relating to the defendant's mental state.) As we have explained, the case here was much different -- defendant himself was lying to the jury about rulings the court had made, leaving an incorrect impression about the procedural fairness of the case. The failure to timely object to the court's five instances of alleged misconduct forfeited this issue on appeal.

III

The Court Did Not Err In Prohibiting Speaking Objections

Defendant contends that the court erred in prohibiting speaking objections because as a self-represented litigant, he did not understand what this meant and it ended up denying him the opportunity to argue points of law concerning the admissibility of evidence. As we explain, there was no error.

A

Factual Background On Speaking Objections

During a pretrial evidentiary hearing on May 15, 2007, the issue of speaking objections was raised by the court. This came after an exchange between the prosecutor and defendant, wherein the prosecutor objected that defendant's question to the testifying officer was "beyond the scope of [the testifying officer's] expertise." Defendant responded, "Well, your Honor, he said he was going to do a drug test on me because he felt that I was under the influence" The court told the parties there were to be no speaking objections. Defendant did not object.

Throughout the remainder of the hearing that continued through May 16, 2007, the prosecutor raised objections that complied with the court's no speaking objection policy. These included, for example, "Objection, relevance"; "Objection, assumes facts not in evidence"; "Objection, speculation -- calls for speculation." At first, defendant had

difficultly complying with the no speaking objections ruling. For example, when the court sustained some of the prosecutor's objections, defendant would continue talking, adding comments that were not evidence. At one point when he did try to object, defendant had difficulty formulating a legal objection, and when the court pressed him for what the legal ground was for the objection, defendant articulated that in his view the prosecutor was leading the witness. Later, though, defendant seemed to catch on, albeit with a little help from the court. For example, defendant properly phrased the following few objections: "Objection, Your Honor. Hearsay," and "Objection, Your Honor; assuming facts not in evidence."

At times after the court had sustained the prosecutor's objection, defendant would try to follow up on the ruling. The court sometimes would respond by telling defendant, "Don't argue with the Court. If I sustain the objection, please ask your next question." Once, when the court sustained the prosecutor's hearsay objection, defendant asked, "Your Honor, how can it be hearsay if she know[s] firsthand?" The court responded "that's the law." Defendant continued, "I'm saying I'm going to kill somebody, and that's not hearsay?" The court told defendant, "Mr. Gray, I can't teach you the law. I can only sustain appropriate objections." In another example, defendant asked the witness, "Did Mr. Gray advise you what he was a --" The prosecutor objected and the court ruled, "No, Mr. Gray. You may not get in your statements that you have made. They are hearsay. I've admonished you on that." When defendant responded, "Your Honor --" The court told defendant, "Do not -- do not debate the point with me, Mr. Gray. Please ask your next question."

When defendant began testifying as a witness, he stated that he did not "knowingly and intelligently tak[e] the stand because [he] d[id] not know what [he was] truly facing. There's a lot of things inside this courtroom that's happening that you guys don't see." The court sustained the prosecutor's objection. When the court told defendant to "[p]lease focus on the case," defendant insisted that he was. The court then

told defendant the following: “Listen to me carefully. It is improper for you to argue with the Court. You must respect my rulings when an objection is made and I sustain it. You must move on to the next question because you are to comport yourself as an attorney.”

Defendant continued with his testimony that the court would not inform him of his constitutional rights, would tell him only that he had the right to represent himself, and that he was not “advised what laws [he was] being prosecuted under.” The prosecutor objected, and the court sustained the objection. Defendant continued with his testimony that he “truly did not know what laws [he was] being prosecuted under, due to the fact that [he had] asked this court many times --.” The court again sustained the prosecutor’s objection and told defendant, “please testify as to the facts.” Defendant insisted, “These are the facts, Your Honor.” The court told defendant, “You may tell the jury about the facts of the case, but the rulings of the law are within the province of the Court.”

Defendant continued with this testimony that he was “[un]able to prepare a defense” because he was “in the holding tank from 6:00 [a.m.] to 9:00 [a.m.]” The court then told defendant, “I have indicated to you that you need to tell the jury about the facts that you deem appropriate. This is not the forum for you to complain about your Constitutional rights or how you believe you have been treated. Please focus on the facts of the case and you may testify as to the facts.” Defendant again insisted, “these are the facts.” The court then told defendant, “[P]lease do not argue with the Court. Please testify as to the facts. [¶] If you’re just inviting objections, then I have to keep sustaining them when you have already answered them, and that is improper. Please focus on the facts of the case.” Defendant told the court, “the fact of this case is if you [are] representing yourself, you are allowed appropriate materials to view your case on the stand.” The court responded, “Mr. Gray, do not argue with the Court. [¶] Please move on.”

Later in defendant's testimony, defendant testified that Dinh was a male prostitute. He then testified that witness Melvin Crowder dated men, but the court sustained the prosecutor's relevance objection to that testimony. Defendant then testified Crowder testified that he (Crowder) liked defendant, but the court sustained the prosecutor's objection that defendant's answer "misstates the testimony." Defendant then testified witness Olan Bailey stated that Bailey dated men as well, but the court sustained the prosecutor's objection and struck the answer from the record. Defendant asked the court what answers were being stricken, and the court responded, "Everything." When defendant protested that the court "only sustained one thing," the court told defendant "don't argue with me. Please move on." Defendant then told the court, "Your Honor, that's the whole point about being a[n] attorney defending yourself, defending your client, is to persuade the court to go your way." The court told defendant, "no attorney acts like this. Now move on." Defendant responded, "Your Honor. I'm not a normal attorney, okay. Nobody -- nobody -- nobody has to go through this kind of mess that you guys are taking me through either. Okay. [¶] Really. I mean, you making faces behind me is not polite." The court repeatedly told defendant to "move on."

The next day (which was June 12, 2007), defendant filed a declaration "declaring the bias of the court." In it, he alleged the court had failed to give "legal reason why [defendant's] questions [were] being denied or sustained," while at the same time sustaining the prosecutor's objections without requiring the prosecutor to state a reason for the objection. He argued that he had the right to make arguments against the court's rulings and that to prevent him from doing so violated his rights. After hearing defendant's lengthy argument on this declaration, the court ruled as follows, "I have read and considered your motion. Your motion is denied."

B

The Court Did Not Err In Prohibiting Speaking Objections

Defendant contends that the court erred in prohibiting speaking objections because as a self-represented litigant, he did not understand what this meant and it ended up denying him the opportunity to argue points of law concerning the admissibility of evidence. He explains his argument as follows: this “policy allowed the prosecutor to state objections in legal shorthand, without explaining the basis for the objection in a manner that would fairly inform [defendant] of the reason for the objection. And the court would often sustain those objections without explanation. When [defendant] would question or protest a ruling that he did not understand, his response would be treated as . . . ‘sanctionable post-ruling argument with the judge.’ ” He claims the court’s policy violated Evidence Code section 353.

As we explain, defendant’s contention lacks merit because defendant agreed to the no speaking objections policy, he was not entitled to special treatment because he was representing himself, and his own behavior precluded the court from providing longer explanations of rulings or allowing defendant to cure deficiencies in his objections.

Evidence Code section 353 states a verdict shall not be reversed “by reason of the erroneous admission of evidence unless” (1) an objection “was timely made and so stated as to make clear the specific ground of the objection or motion” and (2) the effect of the error resulted in a “miscarriage of justice.” The objection must “ ‘fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.’ ” (*People v. Abel, supra*, 53 Cal.4th at p. 924.)

Here, defendant’s contention that the prosecutor’s shorthand objections failed to fairly inform him of the basis of the prosecutors’ objections and the court’s ruling erroneously sustaining those objections without affording defendant an opportunity to

challenge them was a problem of his own making. Defendant chose to represent himself (see *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562]), and one who so chooses “ ‘assumes the responsibilities inherent in the role which he has undertaken,’ and ‘is not entitled to special privileges not given an attorney . . .’ ” (*People v. Barnum* (2003) 29 Cal.4th 1210, 1221). Acting as his own attorney, defendant then agreed to the no speaking objections policy by failing to object. Defendant’s claim he did not understand what he was agreeing to is belied by the record, which reveals that at various points in the testimony, defendant himself used the legal shorthand that he now complains of to make objections to the prosecutor’s questions, stating, for example, “Objection, Your Honor. Hearsay”; “Objection, Your Honor; assuming facts not in evidence”; “Objection, Your Honor; calls for speculation.”

To the extent defendant wanted longer explanations of the prosecutor’s objections and wanted an opportunity to cure any legal deficiencies, the court’s denial of those explanations or opportunities was neither state court error nor a due process violation. Defendant’s own behavior precluded the court from doing so. The court established the no speaking objections policy because defendant began arguing with the court following the prosecutor’s objection that defendant’s question to the testifying officer was “beyond the scope of [the testifying officer’s] expertise.” Defendant’s argument was that the officer said “he was going to do a drug test on me because he felt that I was under the influence” This did not state a legal basis for allowing in the evidence defendant wanted and the court was not required to help defendant find one. “ ‘[T]he judge ordinarily is not required to assist or advise’ a ‘defendant who chooses to represent himself’ ‘on matters of law, evidence or trial practice.’ ” (*People v. Barnum, supra*, 29 Cal.4th at p. 1222.)

Moreover, defendant’s arguments with the court escalated from simply (but inappropriately) arguing facts as to why he disagreed with the court’s ruling (as opposed to stating a legal disagreement with the prosecutor’s objection or court’s ruling on the

prosecutor's objection) to putting forth inadmissible evidence in front of the jury. For example, over the court's admonition that defendant testify as to the facts of the case, defendant continued to testify about the constitutional rights of which the court had allegedly deprived him, including notice (specifically, defendant's testimony that he "truly did not know what laws [he was] being prosecuted under, due to the fact that [he had] asked this court many times --") and the right to present a defense (specifically, defendant's testimony that he was "[un]able to prepare a defense" because he was "in the holding tank from 6 :00 [a.m.] to 9:00 [a.m.]). At this point, the court was well within its discretion to preclude defendant from responding when the court sustained the prosecutor's objection to defendant's questioning or own testimony. (See *People v. Hendricks* (1988) 44 Cal.3d 635, 643 ["a defendant may not be heard to complain when, as here, such prejudice as he may have suffered resulted from his own voluntary act"].)

As the court noted after the jury's verdict, since defendant knew he was facing a life sentence, he was "fully aware he was immune to sanctions, so he openly, repeatedly and defiantly violated rules of appropriate conduct and demeanor. His conduct exceeded any proper bounds of proper zeal or aggressive and effective advocacy." He "refused to comply with the rules of evidence and procedure and was highly manipulative in getting matters before the jury that he knew to be untruthful and inadmissible. The defendant argued with the court's rulings despite being asked to please stop arguing with the court." Finally, in its extensive history presiding over numerous murder cases, the court noted it "ha[d] never seen any other self-represented litigant even come close to [defendant]'s total lack of respect and professionalism when he felt he did not get his own way."

On this record, the court did not err in precluding speaking objections and refusing to provide defendant with longer explanations of the prosecutor's objections and an opportunity to cure any of defendant's legal deficiencies.

IV

There Was No Cumulative Judicial Misconduct

Defendant contends the cumulative effect of the alleged errors in his first three contentions denied him a fair trial. (For this argument, he phrases the alleged errors all in terms of judicial misconduct.) We have found only one error in the court's ruling (admitting the evidence of defendant's misdemeanor convictions), so there are no multiple errors to accumulate.

V

Defendant Has Forfeited His Contention Of Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct when he "insinuate[d] in closing argument that [defendant] wanted to poke the judge's eyes out with a fingernail file as revenge for the way she conducted the trial." As we explain, defendant has forfeited this contention.

A

Factual Background Of The Alleged Misconduct

The portion of the prosecutor's closing argument that defendant takes issue with is as follows:

"[W]asn't it kind of eerie when [defendant] is describing the fingernail file and trying to suggest that that's a weapon, wasn't it kind of eerie in this courtroom when [defendant] on the stand says, we know this is a deadly weapon? That's why they won't let me have it. I'm sitting a little too close to the judge, and they're afraid I might take it and poke out her eyes or puncture her skin.

"I don't know about you, but when you saw those nail files, were you thinking, you know, poke out somebody's eye? Was that the thought process that's going on in a normal mind?

"That's what thought process is going on with [defendant]'s mind: Poking out people's eyes, poking out people's eyes, poking out the judge's eyes. Talk about

revenge. He made very clear, you know, that when he didn't like certain things that were going on in the courtroom, he's talking about poking out eyes."

The prosecutor's argument referred to portions of defendant's testimony about the fingernail knife found near Dinh's body. The testimony came directly after defendant told the jury that the court was not allowing in his relevant evidence, noting that he "ain't bowing down to nobody but God. I don't care if you got a black robe on or not." Defendant then testified the fingernail knife was not allowed "in [his] hands" because "[i]t can poke your eye out" and he was "too close to the judge and that's a sharp weapon." He continued, "That weapon right there will put her eye out."

B

Defendant Has Forfeited His Contention Of Prosecutorial Misconduct

"To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) The purpose of the rule is to give the trial court the opportunity to admonish the jury and forestall the accumulation of prejudice before a retrial is necessary. (*Ibid.*)

Here, defendant never objected to the challenged statements by the prosecutor and never sought an admonishment from the trial court. Nevertheless, defendant argues his claim is preserved because "the misconduct was so flagrant that an admonition could not have cured the harm." However, in contrast to the cases defendant cites in support of his argument, the prosecutor's comments were isolated and not based on inflammatory matters outside the record that were ruled inadmissible at trial. (See *People v. Teixeira* (1955) 136 Cal.App.2d 136, 146 [failure to object excused where the prosecutor during closing made an "unwarranted, unproved charge of the [defendant's] suppression of evidence" and then "ma[d]e statements of fact not appearing in the record"]; *People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1585-1586 [failure to object excused where the prosecutor invited the jury to convict based on her opinion that defendant was guilty and

on the prestige of her office; suggested to the jury that she had additional evidence of the defendant's guilt that had not been presented; and invited the jury to find credible the only eyewitness in the case based on impermissible factors].) Here, in contrast, the prosecutor's comment occurred one time and was based on defendant's own testimony about the judge and fingernail knife that was presented to the jury. On this record, defendant had no excuse for not objecting and therefore forfeited his appellate contention of prosecutorial misconduct.

VI

Defendant Has Forfeited His Contention That The Court Violated The Evidence Code And The Confrontation Clause When It Denied His Request To Recall Dessie Rhodes

Defendant contends the court violated the Evidence Code and the confrontation clause when it denied his request to recall Dessie Rhodes to question her about her statement that he planned to kill lots of people. As we explain, defendant has forfeited this contention.

A

Factual Background Related To The Recall Of Witness Dessie Rhodes

Dessie Rhodes testified as a defense witness. On cross-examination, the prosecutor asked her if she told the prosecutor's investigator, Michael Sullivan, "that about week before the murder that [defendant] told [her] he had a plan to kill a lot of people." Rhodes testified, "No, I didn't tell him that exactly." At the prosecutor's request, Rhodes was subject to recall.

The defense later called Sullivan to testify. On cross-examination, the prosecutor asked Sullivan if Rhodes "indicate[d] to you that during that conversation [about a week before the murder] [defendant] indicated he was plotting to kill a lot of people?" Sullivan responded, "Yes."

The next morning, the court noted that out in the hallway was witness Melvin Crowder. Crowder was Rhodes's stepfather. The prosecutor said he did not have a

statement from Crowder, and when defendant said he did not have it to give to the prosecutor, the court told defendant to confer with the prosecutor about the contents of Crowder's testimony before Crowder could testify. Defendant told the court that he "personally talked" to Crowder in July 2006, Crowder told him he was present when Rhodes made the 911 call, and that he sent an investigator to talk to Crowder. Defendant said Rhodes was lying on the stand and he could compare her testimony to what Crowder told him.

The court then noted Rhodes was also in the hallway and the court was "disinclined to allow her to retake the stand since she has been subject to direct and cross-examination and has already been called as a witness by the defense." The court invited defendant "to be heard." Defendant stated he wanted to recall Rhodes because she "committed perjury." He testified she had no idea who Marcus Smith and James Smith were, but those two men were her brothers. "She also testified to seeing -- identifying things in her 911 call. When we just heard a 911 call saying, close the window, and keep the door closed. So how could she see things if she said close the window, and keep the door closed? It opens up a new probe things because you're testifying to something that I told you I was going to kill a lot of people. So once she committed the perjury the first time, how do we know when it's going to establish -- or start telling the truth? [¶] Due to the fact her family was all there at this incident and she lied about it, I believe we have to recall her to find out under oath, is these your family members, and were they at the hotel? [¶] Melvin Cr[owder] verified he was there at the scene. So he was there at the scene. She lying that he wasn't and she lying that --" The prosecutor then stated, "Mr. Cr[owder] just informally told me he was not there at the scene at the time of the stabbing." The court denied defendant's request to recall Rhodes, ruling, "This is all information the defense could have covered when the witness testified two days ago."

B

Defendant Has Forfeited His Claim The Court Violated The Evidence Code And Confrontation Clause In Refusing To Allow Him To Recall Rhodes As A Witness

Defendant's argument on appeal regarding the court's ruling on recall of Rhodes is narrow and specific. He claims the court violated the Evidence Code and the confrontation clause by refusing to allow defendant to recall Rhodes to question her about her statement that defendant said he had a plan to kill lots of people. Defendant's contention is forfeited because this is not the reason he gave in the trial court for recalling Rhodes. As we have just recounted, defendant stated he wanted to recall Rhodes to question her about perjury. However, it was not her perjury regarding the statement about defendant's plan to kill lots of people for which he wanted to recall her. Defendant just used that as an example of why he believed Rhodes had committed perjury. Rather, defendant's request to recall Rhodes was raised in the context of Rhodes's stepfather, Melvin Crowder, taking the stand.

According to defendant, he had a conversation with Crowder in 2006 in which Crowder stated he was present when Rhodes called 911 to report Dinh's stabbing. Rhodes, however, testified Crowder was not present when she made that 911 call. When the court asked defendant why he wanted to recall Rhodes, defendant said, "Due to the fact her family was all there at this incident and she lied about it, I believe we have to recall her to find out under oath, is these your family members, and were they at the hotel?" Defendant then referenced his 2006 conversation with Crowder in which Crowder "verified he was there at the scene" and went on to say Rhodes was "lying that he wasn't." It was then the court ruled Rhodes would not retake the stand because "[t]his is all information the defense could have covered when the witness testified two days ago." On this record, defendant has forfeited his claim that the court erred in violation of the Evidence Code and the federal confrontation clause when it refused to allow

defendant to recall Rhodes to question her about her statement that he planned to kill lots of people.

VII

*The Court's Special Instruction That Told The Jury To Decide Only
Whether Defendant Had Been Proven Factually Guilty Was Not Error*

Defendant contends the court erred in giving the following special instruction to the jury:

“Statements made during the course of the trial by the defendant as either witness or counsel regarding allegations of deprivation of his right and other matters of law are legal matters and are not issues for the jury to decide.

“Your sole decision in this case is to determine, factually, whether the charges have been proved and to apply the law in the jury instructions to the facts as you determine them.

“Further, I have commented from time to time to correct the record regarding certain legal rulings or other matters of law or procedure. My comments regarding these are not to be taken as a reflection of whether the case has been proved. This decision is for the jury to make.”

Defendant contends this special instruction “was an erroneous attempt to delegate a judicial function (ruling on the admissibility of evidence) to the jury, and it did so in such a vague and overbroad manner that it permitted the jury to arbitrarily disregard legitimate portions of [defendant]’s testimony and argument, which thus interfered with [his] constitutional right to testify on his own behalf and to give closing argument to the jury as counsel on his own behalf, all in violation of his right to due process.”

When reviewing an instruction, we inquire “ ‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution. . . .” (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 399].) In determining whether an instruction interferes with the jury’s consideration of evidence

presented at trial, the appellate court must determine what a reasonable juror could have understood the charge as meaning. (*People v. Fonseca* (2003) 105 Cal.App.4th 543, 549.)

Here, a reasonable jury would have understood from the special instruction that it was to determine whether the prosecution had proven defendant's guilt for killing Dinh based only on the facts admitted into evidence, regardless of defendant's arguments and testimony about legal errors, and to apply the law from the jury instructions to the facts as the jury determined them.

This plain interpretation of the instruction was reinforced by the prosecutor in his closing argument. During closing, the prosecutor referred to the special instruction and then reminded the jury its job was to "decide: Did Mr. Gray kill Mr. Dinh? Yes or no? If he did kill Mr. Dinh, what level of homicide is it? That's the question for you. Did he use scissors? Not whether he believes his rights have been denied or whether there's been deprivations or other matters of law. [¶] So, if you're back in deliberations and you start saying, well, [defendant] said his investigator didn't do this or his rights were denied, realize the law says your decision is to decide the facts of this case, and the facts are the facts of November 6th and the surrounding days around that, and that's the decision to be made in this case." Thus, the prosecutor's argument correctly summarized the jury's duty as stated in the special instruction, which was to determine whether defendant had killed Dinh, and if so, the degree of homicide.

Nevertheless, defendant contends the special instruction's reference to "matters of law" (i.e., statement made by defendant regarding matters of law are not issues for the jury to decide) and the prosecutor's argument were so overbroad that the jury may have disregarded legitimate portions of defendant's testimony and argument regarding self-defense. This interpretation is not reasonable. The special instruction told the jury to "apply the law in the jury instructions" to the jury's factual findings. The instructions told the jury "[i]f a person kills with a legally-valid justification, the killing is lawful and

he has not committed a crime.” The instructions then laid out definitions of and explanations for self-defense and imperfect self-defense. When considered in context, therefore, it is not reasonable the jury would have applied the special instruction to disregard defendant’s arguments and evidence regarding self-defense.

VIII

There Was Sufficient Evidence Of Mutual Combat

To Support Giving CALCRIM No. 3471

Defendant contends the court erred in giving CALCRIM No. 3471 because there was no evidence of mutual combat. As we explain, there was sufficient evidence of mutual combat to warrant giving this instruction.

As given, the instruction stated as follows:

“A person who engages in mutual combat or who is the first one to use physical force has a right to self[-]defense only if he, one, he actually, and in good faith, tries to stop fighting; two, he indicates, by word or conduct, to his opponents in a way that a reasonable person would understand that he wants to stop fighting, that he has stopped fighting; and, three, that he gives his opponent a chance to stop fighting.

“If a person meets these requirements, then he has a right to self[-]defense if the opponent continues to fight.

“If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to stop fighting.”

As to the evidence of mutual combat, there was a version of evidence, based on testimony of multiple witnesses, that demonstrated there could have been a tacit agreement to fight. (See *People v. Ross* (2007) 155 Cal.App.4th 1033, 1046-1047 [“ ‘mutual combat’ consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. The agreement need not have all the

characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose*”].) According to Dessie Rhodes, before the stabbing, Dinh and defendant were both in the motel room. Dinh asked her for some money, but before she could give it to him, Dinh left the room. According to Green, Dinh owed defendant money for watching his back during a drug deal. According to Charles Gooden, defendant asked Dinh to come outside and Dinh complied. Defendant left the room before Dinh did. Gooden closed the door. Forty-five seconds later, Gooden heard a loud bang and then a holler. When he opened the door, he saw defendant and Dinh tussling, which he described as “[m]oving around together.”

From this evidence, an inference could be drawn that Dinh and defendant had a disagreement about money that Dinh owed defendant, and Dinh agreed to go outside and fight it out, because Dinh had not received any money from Rhodes. This version of events with the evidence we have just recounted supported instructing the jury pursuant to CALCRIM No. 3471 regarding the limited availability of self-defense for those engaged in mutual combat.

IX

Defendant Has Forfeited His Claim The Court Erred In Not Instructing Sua Sponte On The Legal Definition Of Mutual Combat

Defendant contends the court erred in not instructing sua sponte on the legal definition of mutual combat. Defendant has forfeited this contention.

The trial court instructed on mutual combat but did not include a definition of mutual combat. The court also instructed the jury: “Some words or phrases used during this trial have legal meanings that are different from their meanings in every-day use. These words and phrases will be specifically defined in these instructions. [¶] Please be sure to listen carefully and follow the definitions that I give you. [¶] Words and phrases

not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.” (CALCRIM No. 200.)

Defendant argues the court had a sua sponte duty to provide a definition of mutual combat because that term has a meaning peculiar to the law. His argument is based on a posttrial (December 2008) revision to CALCRIM No. 3471 that includes the following definition of mutual combat: “A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose.”

This revision was in response to *People v. Ross, supra*, 155 Cal.App.4th at page 1033, upon which defendant relies. In *Ross*, the court found the everyday meaning of mutual combat did not adequately convey what mutual combat means in the context of self-defense. (*Id.* at p. 1044.) The court in *Ross* formulated the following definition of mutual combat: “not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities*. . . . In other words, it is not merely the *combat*, but the *preexisting intention to engage in it*, that must be mutual.” (*Id.* at p. 1045.)

In *Ross*, the jury was clearly confused by an instruction on mutual combat that had no evidentiary basis. As the appellate court observed, “The trial court, which twice saw the witnesses give their accounts of the incident, appeared to conclude both times that there was *no evidence* of mutual combat.” (*People v. Ross, supra*, 155 Cal.App.4th at p. 1050.) The trial court agreed to give the instruction at the second trial based upon the prosecutor’s insistence that he required it for tactical reasons, a reason which the appellate court thought was clearly erroneous. Rejecting the notion that the jury would have ignored an inapplicable instruction, the court noted, “the record affirmatively shows that jurors did not ignore the instruction. They petitioned the court in vain to clarify it,” thereby demonstrating they misunderstood it. (*Id.* at p. 1056.) The appellate court acknowledged that a failure to request elaboration of an instruction could result in

forfeiture of the issue on appeal. (*Id.* at pp. 1048-1049.) But the issue was not forfeited in *Ross* because the mutual combat instruction was inappropriately given and the confused jury's request for guidance on mutual combat was denied by the trial court. (*Ross*, at pp. 1047-1049.)

Unlike the situation in *Ross*, the instruction was appropriate here (as we have explained in part VIII of the discussion), and neither defendant nor the jury sought clarification of it. Ordinarily, a failure to request clarifying language to an instruction that is a correct statement of law bars appellate review of the issue. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.)

Defendant claims he can raise the issue for the first time on appeal because mutual combat has a technical meaning and a court has a sua sponte "duty to define terms that have a technical meaning peculiar to the law." (*People v. Bland* (2002) 28 Cal.4th 313, 334 [holding that the trial court has a sua sponte duty to define "proximate causation"].) Even if this were the case with respect to the term "mutual combat," which defendant has not demonstrated that it is, defendant has shown no basis for reversal. His prejudice argument is based on the faulty notion there was no evidence of mutual combat, so the jury had a "legally erroneous" path to meet the People's burden of proof. But, as we have explained in part VIII of the discussion, there was substantial evidence to instruct on mutual combat, so defendant also has failed to carry his burden of prejudicial error as a basis for reversing his conviction.

X

CALCRIM No. 3471 On Mutual Combat

Did Not Impermissibly Shift The Burden Of Proof

In his last of three contentions regarding CALCRIM No. 3471 on mutual combat, defendant claims the instruction impermissibly shifted the People's burden of proof because the instruction required defendant to meet certain requirements to claim self-defense. We reject defendant's contention because there is no reasonable possibility the

jury interpreted the instructions and the prosecutor's argument in the manner defendant claims.

“It is well established that the instruction ‘may not be judged in artificial isolation,’ but must be considered in the context of the instructions as a whole and the trial record.” (*Estelle v. McGuire, supra*, 502 U.S. at p. 72 [116 L.Ed.2d at p. 399].) Even in reviewing an ambiguous instruction “we inquire ‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” (*Ibid.*)

Here, the jury was instructed pursuant to CALCRIM No. 3471 that, “A person who engages in mutual combat . . . has a right to self[-]defense only if he, one, he actually, and in good faith, tries to stop fighting; two, he indicates, by word or conduct, to his opponents in a way that a reasonable person would understand that he wants to stop fighting that he has stopped fighting; and, three, that he gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, then he has a right to self[-]defense if the opponent continues to fight.” As defendant notes, the instruction “does not clearly assign the burden of proof on the ‘mutual combat’ issue to the People.” But the opposite is true also: the instruction does not assign the burden to defendant, either.

Viewing the instructions as a whole, as we must, there is no reasonable likelihood the jury would have assigned to defendant the burden of proving he had no legal right to self-defense. The jury was instructed elsewhere that the burden of proving self-defense was not on defendant and the People were required to prove the killing was not justified. For example, in CALCRIM No. 505 regarding justifiable homicide in self-defense, the jury was instructed, “[i]t is not necessary for the defendant to establish self[-]defense” and “[t]he People have the burden of proving beyond a reasonable doubt that the killing is not justified.” Similarly, in CALCRIM No. 571 regarding the lesser included offense of voluntary manslaughter (imperfect self-defense), the jury was instructed, “[t]he People

have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self[-]defense” and “[i]f the People have not met this burden, you must find the defendant not guilty of murder.” From these instructions, the jury would have understood the burden of proving the lack of self-defense was on the People. Accordingly, we reject defendant’s claim of instructional error.

XI

*Defendant Has Forfeited A Challenge To The
Court’s Special Instruction Regarding His Mental Illness And Sanity*

Defendant contends the court’s response to the jury’s question regarding how the law views the actions of a person who is mentally ill was error and violated his right to due process. As we explain, defendant has forfeited this contention by specifically agreeing to the instruction for a tactical reason.

A

The Jury’s Question And The Court’s Instruction In Response

During deliberations, the jury submitted a list of five questions. The fifth was, “[H]ow [does] the law view[] the actions of a person who is mentally ill -- as it pertains to this case[?]”

The court drafted the following response:

“You must consider and discuss only the evidence that was produced in the courtroom. Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence and anything else I told you to consider as evidence (stipulations and a matter of which the court took judicial notice). Anything that does not fall into the category of evidence may not be considered or discussed by you.

“1. [¶] . . . [¶]

“2. [¶] . . . [¶]

“3. [¶] . . . [¶]

“4. [¶] . . . [¶]

“5. The issue of the law on mental illness (sanity) is not before you.”

“It is up to you, the jury, to decide what happened, based only on the evidence that has been presented to you in this trial. Do not let bias, sympathy, prejudice or public opinion influence your decision. You must reach your decision without any consideration of penalty.”

The court asked defendant and the prosecutor if they had a chance to review its proposed response and then if it was “acceptable.” They responded, “Yes, your Honor” to both questions.

B

Defendant Has Forfeited His Contention Regarding The Instruction On Sanity

The People claim the issue of the propriety of the instruction is forfeited because defendant expressly agreed that the court’s proposed response was “acceptable.” We agree because there appears a tactical reason for defendant’s acquiescence to the special instruction.

A defendant’s express consent to a special instruction bars the defendant from challenging it on appeal under the doctrine of invited error. (*People v. Davis* (2005) 36 Cal.4th 510, 539.) After *Davis*, the California Supreme Court clarified, “[t]he invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for requesting or acquiescing in the instruction.” (*People v. Moon* (2005) 37 Cal.4th 1, 28.)

Here, tactical reasons appear for defendant’s acquiescence to the special instruction: he did not believe he had a mental defect, he did not want to rely on a defense based on mental defect evidence, and he instead wanted to rely on a self-defense theory. During pretrial proceedings, when his court-appointed lawyer expressed a doubt about defendant’s competency, defendant became upset with counsel and told the court he wanted counsel fired. In a document defendant filed with the court, he questioned why he was having to be examined by a psychiatrist, noting he “never in [his] life had

any psy problems or ever been institutionalized.” As soon as his competency was established, defendant invoked his right to represent himself. At trial, defendant never claimed to have a mental defect. The closest anyone got to this kind of evidence was testimony from Green that defendant “don’t always talk like you got it all up here” and defendant’s testimony that because he had “just been recently jumped,” he was “getting paranoid” when Dinh tried to hit him before defendant stabbed him with the scissors. Thus, instead of relying on some sort of mental defect theory, defendant chose to rely on a self-defense theory that had some support through defendant’s confession and own testimony. Finally, during closing argument, defendant did not argue that he had a mental defect that impacted his behavior in the stabbing, but rather, that his belief in the need to defend himself made him not culpable for Dinh’s death.

On this record, where defendant was opposed to inquiries into his sanity, chose to forgo presenting evidence of his mental condition and the record shows minimal evidence of it, and he relied on self-defense as his theory of the case instead, we conclude defendant had tactical reasons to acquiesce to the court’s special instruction.

XII

Defendant Invited Any Error In The Court’s Failure To Instruct On Heat Of Passion Voluntary Manslaughter Pursuant To CALCRIM No. 570

Defendant contends the court erred in not instructing on heat of passion voluntary manslaughter pursuant to CALCRIM No. 570. As we explain, any instructional error was invited by defendant.

A

Factual Background Leading To The Court’s Decision Not To Give CALCRIM No. 570

During the jury instruction conference, the court asked about giving CALCRIM No. 570. Defendant stated, “Object. Take out lesser charge.” The court responded that it “believe[d] if the defendant is requesting self-defense, [it] ha[d] to give imperfect self-defense, but the defendant is objecting to voluntary manslaughter, so [it] d[id]n’t know

that [it] would have to give heat of passion.” The prosecutor agreed. The court then confirmed with defendant that he did not want the heat of passion voluntary manslaughter instruction given, and then stated, “All right. Then [the court] will delete that instruction based on the defense request.”

Immediately thereafter, the court asked about CALCRIM No. 571 on imperfect self-defense voluntary manslaughter. Defendant said, “Take that out. I object to that.” The court explained that it “ha[d] to give it if you’re requesting self-defense.” Defendant protested that, “all I want is what you [are] charging me [with], first degree murder” and said that if he failed to object, it would be “regarded as an implied consent.” The court explained it had “looked at the official use notes on Calcrim, which indicates that most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant’s belief in a need for self-defense, there will always be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue.”

B

Defendant’s Challenge To The Court’s Failure To Give CALCRIM No. 570 Is Forfeited

The People claim defendant’s challenge to the court’s failure to give CALCRIM No. 570 is forfeited because defendant invited any error by urging the court not to give the instruction. Defendant replies that “the invited error doctrine does not apply because his objection was overruled.” In support of his argument, defendant cites *People v. Battle* (2011) 198 Cal.App.4th 50 and *People v. Breverman* (1998) 19 Cal.4th 142. In *Battle*, the issue of invited error was not raised. The Supreme Court ruled only that the trial court did not err in giving instructions concerning voluntary manslaughter because there was no substantial evidence to support them. (*People v. Battle, supra*, 198 Cal.App.4th at pp. 72-74.) In *Breverman*, our Supreme Court did state, “the sua sponte duty to instruct on lesser included offenses, unlike the duty to instruct on mere defenses,

arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued." (*People v. Breverman, supra*, 19 Cal.4th at pp. 162-163.) Nevertheless, the claim may be waived under the doctrine of invited error if trial counsel both "intentionally caused the trial court to err" and clearly did so for tactical reasons. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) The rationale behind this doctrine is that a defendant should not gain reversal on appeal because of an error made at his behest. (*People v. Duncan* (1991) 53 Cal.3d 955, 969-970.)

Here, defendant intentionally caused the court not to give CALCRIM No. 570 and did so for a tactical reason. When the court asked defendant about giving CALCRIM No. 570 defendant responded, "Object. Take out lesser charge." When the court followed up, asking, "So, [defendant], you do not want voluntary manslaughter under a heat of passion theory given to the jury?" Defendant said, "No, your Honor." He did so for a tactical reason, as he stated on the record, "[A]ll I want is what you charging me, first degree murder." While the court did not heed his request to give no lesser included offenses (because it had to give CALCRIM No. 571 on voluntary manslaughter imperfect self-defense because it was giving instructions on perfect self-defense), defendant at no time stated that then he wanted the other lesser included instructions given. Rather, a more reasonable reading of the record is defendant wanted the jury to have as few instructions as possible on lesser included offenses. On this record, defendant has forfeited his ability to challenge the court's giving of CALCRIM No. 570.

XIII

Defendant Has Forfeited His Contention That His Confession Could Not Be Used As Substantive Evidence Of His Guilt

Defendant contends the court erred in admitting his postarrest confession as substantive evidence of his guilt because he invoked his right to remain silent under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]. He argues that because of the

Miranda violation, the court should have given a limiting instruction pursuant to CALCRIM No. 356 that the confession could be used only to help jurors “decide whether to believe the defendant’s testimony” and not “as proof that the statement is true or for any other purpose.” As we explain, defendant has forfeited this claim because he did not raise it in the trial court.

A

Background Regarding The Admission Of Defendant’s Confession

Defendant filed a motion to suppress his confession contending the officers did not read him his *Miranda* rights and that he was impaired when he gave his confession, as demonstrated by his slurred speech and involuntary muscle movements. The People responded in writing that defendant was advised of his *Miranda* rights, knowingly waived them, and confessed voluntarily, and all of this was on videotape. Defendant replied in writing that the videotape was faulty, there were portions of the interview missing, and the missing portions “could very well [be him] invoking his constitutional rights, or explaining his self[-]defense.”

At the hearing on the motion to suppress defendant’s confession, the People played a videotape of defendant’s confession, and the officer who conducted the interview, Detective Mark Tyndale, testified it was an accurate recording of the entire interview. The videotape reflected the following: The detective told defendant he had the right to remain silent, anything he said may be used against him in court, he had the right to an attorney before and during questioning, and an attorney would be provided to him if he could not afford one. Defendant said he understood each of these statements. The detective then asked defendant what happened tonight, and defendant responded, “I killed him.” When the detective asked why, defendant responded, “Did you see my back and see my neck” and said Dinh was “basically” responsible for “that.” Defendant asked the detective if he wanted the “real truth” and then told the detective “that fucking man is fucking devil” and “I just killed him.” Immediately after that, defendant said, “Let’s end

this conversation. I did that.” The detective said “Okay” and defendant said, “Anything else?” The detective said, “Okay. But, I mean, he --” Defendant said, “That’s all -- that’s all I’m gonna say.” The detective said, “All right.” Defendant said, “That’s it. That’s it. That’s it. That’s it.” The detective said, “But he never even had a chance, though.” Defendant said, “That’s it.”

The detective then said he had to explain to Dinh’s mother why this happened. Defendant said he killed Dinh because of “what he did to -- to my back.” He continued that Dinh had previously stabbed him in the back and neck.

After viewing the videotape, the court ruled as follows: In response to defendant’s claim that he was impaired, while defendant appeared on the videotape to be “under the influence of a central nervous stimulant,” he was still “focused on what is occurring around him,” “[h]e was clearly able to comprehend and follow the directives of the officers,” and defendant voluntarily waived his *Miranda* rights. In response to defendant’s claim he was not given his *Miranda* rights, the court found to the contrary and further found he understood those rights, understood the consequences of his waiver, and gave a voluntary statement. Finally, in response to defendant’s contention the videotape was faulty, the court ruled if there were any “[t]racking problems” with the videotape, that would “go to the weight and not the admissibility.”

B

Defendant Has Forfeited His Contention On Appeal Regarding The Alleged Miranda Violation

Defendant claims on appeal that the interview appearing on the record demonstrates he invoked his right to remain silent. Specifically, he points to the portion of the videotape where he said, “Let’s end this conversation,” “That’s all -- that’s all I’m gonna say,” and “That’s it.”

This contention is forfeited because it was not raised in the trial court. In defendant’s motion, the only mention of invoking his right to remain silent was that the

missing portions of the record “could very well [be him] invoking his constitutional rights, or explaining his self[-]defense.” That is not what defendant is arguing now. What he is arguing now is that the existing portion of the videotape contains the invocation. Where a defendant on appeal raises a different ground for the suppression of his confession than he did at the trial court, the claim has been forfeited. (*People v. Scott* (2011) 52 Cal.4th 452, 482.) This is because “the trial court had no opportunity to resolve material factual disputes and make necessary factual findings.” (*Ibid.*)

XIV

The Court Did Not Err In Denying Defendant A Full Evidentiary Hearing To Challenge His Prior Convictions For Use During Sentencing

Defendant contends the court erred in denying him a full evidentiary hearing to challenge the constitutional validity of his prior robbery convictions under *People v. Sumstine* (1984) 36 Cal.3d 909. He further contends the court erred in denying him a full evidentiary hearing to challenge the validity of his prior convictions based on a violation of his plea agreement. As we explain, the court did not err.

A

Background Regarding Defendant’s Challenge To His Prior Convictions For Use During Sentencing

Defendant filed a motion “collateral[ly] challeng[ing]” his prior convictions. He claimed he was misadvised that “this no-contest plea would be the same as a guilty plea for sentencing purpose only and that his no contest plea couldn’t be used against him in any future civil or criminal matter.” He claimed that to allow “the State to breach [its] promise that induc[ed] [his] no-contest plea violate[d] [his] due process” and now he was entitled to the specific performance of the plea agreement. Finally, he claimed he did not recall being advised of the constitutional rights he was giving up, including his right to a jury trial and his right to confront witnesses. He therefore “did not knowingly, intelligently, and voluntarily enter a plea agreement.”

The People responded in writing that the record demonstrated defendant knowingly and intelligently waived his rights when he pled no contest to the robberies.

The trial court addressed the issue immediately before imposing sentence. The court stated it had reviewed the transcript of defendant's plea. According to that transcript, defendant, while represented by counsel, pled no contest in October 1998 to two May 1997 robberies. Before pleading no contest, defendant acknowledged the following: By pleading no contest, he was giving up his right to a jury trial, the privilege against self-incrimination, the right to remain silent, the right to have the prosecution prove its case against him beyond a reasonable doubt, the right to have his lawyer confront adverse witnesses, the right to use the court's process to subpoena witnesses and obtain evidence, and the right to a speedy and public trial. Defendant acknowledged that by pleading no contest, he was "admit[ting] the commission of the crime charged against [him]." The court told defendant "that a plea of no contest has the same force and effect as a plea of guilty insofar as I am concerned and insofar as your sentencing here this morning," which defendant acknowledged he understood. The court also stated, "for the Court's purposes the pleas would be pleas of guilty as to those counts." Defendant expressly denied there were any other promises or deals that formed the basis for him entering his no contest pleas. At the plea hearing, the only thing defendant said he did not understand was whether he was going to be charged with additional robberies that occurred in the same "series."

Based on this transcript, the court here "f[ound] the defendant knowingly, intelligently and voluntarily waived his constitutional rights. The prior convictions are constitutional and valid."

B

Sumstine Did Not Require A Full Evidentiary Hearing So Defendant Could Challenge His Prior Convictions

Under *Sumstine*, a prior conviction cannot be used to enhance the punishment for a current offense if in the prior proceeding, either (1) the defendant was completely deprived of the right to counsel; or (2) his guilty plea was obtained without an express waiver of defendant's constitutional rights under *Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274] and *In re Tahl* (1969) 1 Cal.3d 122. (*People v. Sumstine, supra*, 36 Cal.3d at pp. 914, 918-919; *People v. Allen* (1999) 21 Cal.4th 424, 426-427.) *Boykin-Tahl* requires only that "the defendant be advised on the record that, by pleading, the defendant forfeits the constitutional rights to a jury trial, to confront and cross-examine the People's witnesses, and to be free from compelled self-incrimination." (*People v. Gurule* (2002) 28 Cal.4th 557, 633-634.) "In addition, [the California Supreme Court] has required, as a judicially declared rule of state criminal procedure, that a pleading defendant also be advised of the direct consequences of his plea." (*Id.* at p. 634) "If the consequence is only collateral, no advisement is required." (*Ibid.*) Thus, in *Gurule*, the California Supreme Court rejected a challenge to a defendant's prior conviction based on the trial court's failure to inform the defendant that his prior conviction would make him eligible for the death penalty. (*Id.* at pp. 633-634.)

As applicable here, defendant filed a motion "collateral[ly] challeng[ing]" his prior convictions claiming he was misadvised that "this no-contest plea would be the same as a guilty plea for sentencing purpose only and that his no contest plea couldn't be used against him in any future civil or criminal matter." He also claimed he did not recall being advised of the constitutional rights he was giving up, including his right to a jury trial and his right to confront witnesses. He therefore "did not knowingly, intelligently and voluntarily enter a plea agreement."

To obtain an evidentiary hearing under *Sumstine*, defendant must “make[] sufficient allegations that his conviction, by plea, in the prior felony proceedings was obtained in violation of his constitutional *Boykin-Tahl* rights.” (*People v. Allen, supra*, 21 Cal.4th at p. 435.) Here, the only allegations that would have triggered the need for an evidentiary hearing under *Sumstine* were defendant’s allegations that he did not recall being advised of the constitutional rights he was giving up, including his right to a jury trial and his right to confront witnesses. The trial court reviewed the transcript of that no contest plea and determined that defendant indeed was advised of those rights, and the record so reflects. Defendant, on appeal, does not claim otherwise.

As to defendant’s other allegations regarding being misadvised or not advised that “this no-contest plea would be the same as a guilty plea for sentencing purpose only and that his no contest plea couldn’t be used against him in any future civil or criminal matter,” this does not amount to an allegation he was not advised of the “direct consequences of his plea,” as that term is understood in the law. “[T]he ‘possible future use of a current conviction is not a direct consequence of the conviction.’ ” (*People v. Gurule, supra*, 28 Cal.4th at p. 634.) As such, *Sumstine* did not apply to defendant’s contentions here.

C

The Court Did Not Err In Refusing To Give Defendant A Full Evidentiary Hearing Regarding His Contention Of A Breach Of The Plea Agreement

In a related subargument, defendant contends he should have been given a full evidentiary hearing to prove a breach of his plea agreement for his no contest plea. In his posttrial motion filed here, defendant claimed his no contest plea agreement was breached because he was advised, “his no contest plea couldn’t be used against him in any future civil or criminal matter.” He claimed that to allow “the State to breach [its] promise that induc[ed] [his] no-contest plea violate[d] [his] due process” and now he was “entitled to the specific performance of the plea agreement.”

The transcript of the no contest plea demonstrates there was no such inducement. The court specifically asked defendant, “Other than what I have promised you in open court, is there some secret or silent deal that I’m not aware of that forms the basis for you entering these pleas this morning?” Defendant responded, “No, your Honor.” To the extent the defendant’s claim can be understood to rest on the court’s statement, “that a plea of no contest has the same force and effect as a plea of guilty insofar as I am concerned and insofar as your sentencing here this morning,” defendant was not entitled to a full evidentiary hearing to demonstrate the court erred in advising him about the future consequences of his no contest plea. “[A]dvisement error and violation of a plea bargain are two different things,” and a trial court’s allegedly erroneous advisement of a collateral consequence “does not transform [the error] into a violation of the plea agreement.” (*People v. Villalobos* (2012) 54 Cal.4th 177, 185 186.)

DISPOSITION

The judgment is affirmed.

 ROBIE , J.

We concur:

 NICHOLSON , Acting P. J.

 BUTZ , J.