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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO VALENCIA VILLA,

Defendant and Appellant.

C066853

(Super. Ct. No. 09F02510)

Convicted of the first degree murder of his son, defendant Gerardo Valencia Villa appeals. He contends: (1) a search of his home violated his Fourth Amendment rights; (2) the trial court erred by excluding some of the evidence of the victim's propensity for violence; (3) the court erred by excluding some photographs of defendant and the victim; (4) the jurors may have misunderstood the law supporting the defense's heat-of-passion theory; (5) the court did not sufficiently instruct the jury on subjective heat of passion; (6) the evidence was insufficient to support the first degree murder verdict; (7) the court improperly instructed the jury on consciousness of guilt; and (8) the alleged errors were cumulatively prejudicial. Finding no prejudicial error, we affirm.

## FACTS

In April 2009, defendant was living with his girlfriend Janet Sartain in the home of Janet's elderly mother, Frieda Sartain, in Sacramento. Defendant's son Alex, the murder victim, also lived in the home. Defendant is five feet, ten inches tall and weighs about 240 pounds, according to the probation report. Alex was six feet, two inches tall, and weighed 372 pounds.

On April 3, 2009, defendant's other son, Gerardo, Jr., married Kassandra. After the wedding, which took place in the morning, the family partied and drank. That evening, the party continued at defendant's home. While they were partying, Alex looked for his two Chihuahuas in the backyard. When he found them, he grabbed them by their necks, causing them to yelp. Defendant saw Alex's treatment of the dogs and became angry, saying to Alex, "What is wrong with you?" Alex sharply responded, "Wait till you see what I do to them now."

Alex took the dogs to his bedroom and later returned to where the others were. Defendant saw Alex and said, "What's wrong with you? You're just like your mother." This angered Alex because he was upset about things his mother had done. Alex moved toward defendant and challenged, "Hit me, go ahead and hit me." Defendant grabbed Alex by the throat, but Janet jumped between them and broke it up before anything further occurred.

The next day, April 4, Janet arrived home from work at around 7:00 p.m. She told defendant that Alex had to move out of the house.

Also that evening, at between 10:13 p.m. and 10:36 p.m., Alex and Gerardo, Jr., corresponded by text messages:

Alex: "Dad just said he would knock me out and kill me."

Gerardo, Jr.: "Yup, on the phone with me. We just talked. He thinks you killed the dogs."

Alex: "Why would you talk to him?"

Gerardo, Jr.: “Because I just wanted to know what he had to say.”

Gerardo, Jr.: “He called me like 10 minutes ago and when we were on the phone, he was saying that he was going to knock you out and all that and when he said that, I told him bye.”

In the 10-minute phone conversation with Gerardo, Jr., defendant said, “I haven’t heard from those little dogs yet. He is so crazy, I think he killed those dogs. If he killed those dogs, I’ll kill him.”

After defendant spoke to Gerardo, Jr., on the phone, defendant wrote a note to Alex. He told Alex that he had to move out. Defendant also gave Alex instructions on handing over keys and other matters that would attend Alex’s moving out. Defendant first left the note in the living room for Alex to find, but then took the note out to the garage.

Defendant and Janet talked and drank in the garage. They decided to go to Alex’s room to check on the dogs. Defendant said he needed to protect himself, and Janet said, “[O]f course you do.” Defendant armed himself with a knife that was approximately 14 inches long.

Defendant knocked firmly on Alex’s bedroom door, and Alex opened the door. Defendant saw that the dogs were in the room and were unharmed. Defendant and Alex began to argue. Alex moved toward defendant, and defendant stabbed Alex in the belly.

Alex said, “I can’t believe you did that, Dad.” He then walked out of the house and down the street where he collapsed in the driveway of another home. He died the next morning at 1:44.

The forensic pathologist who conducted the autopsy found that there was one exterior wound but two different tracks inside the body, indicating that the knife was partially removed and redirected. One of the wounds was upward from the belly, through the liver and the diaphragm and into a lung, a total of about 13 inches. The other wound was more left to right into the heart sac.

## PROCEDURE

The district attorney charged defendant by information with one count of murder (Pen. Code, § 187, subd. (a)), with an allegation that defendant personally used a deadly weapon (Pen. Code, § 12022, subd. (b)(1)). A jury found defendant guilty of first degree murder and found true the personal weapon use enhancement. The trial court sentenced defendant to an indeterminate term of 25 years to life, plus a one-year determinate term for the personal weapon use enhancement.

## DISCUSSION

### I

#### *Search of Residence*

Defendant contends that the search of his residence violated his Fourth Amendment right to be free of unreasonable searches. The contested search occurred during the night and was followed by a later search done pursuant to a warrant, which defendant did not contest. Specifically, defendant claims that the consent given by Frieda Sartain, the owner of the residence, for the search during the night was involuntary because she suffers from dementia. The contention is without merit because there is sufficient evidence to sustain the trial court's determination that the consent was voluntary.

#### *A. Facts from the Suppression Hearing*

Frieda Sartain was 80 years old at the time of the murder, and she owned the residence where the victim was stabbed.

In the suppression hearing, Deputy Kevin Darling testified that he escorted Frieda Sartain to a patrol car and put her in the backseat. As Deputy Darling spoke to her, he noticed that her speech was slurred and she appeared tired. She told him that she had taken her "evening medications," which made her sleepy. She responded appropriately to the deputy's questions about her name and birth date, and she was able to identify the people in the house. She said that defendant and Alex fought and yelled at each other all

the time and that they were yelling at each other that night. Deputy Darling did not notice any cognitive limitations except for those identified as being caused by the medication, although he noted that she had difficulty giving a detailed statement. He did not remember anyone telling him that she suffered from dementia, even though Janet may have told another officer about Frieda's dementia when the officer first contacted Janet.

Deputy Darling filled out a department-issued consent form and explained to Frieda that the form was to obtain her consent to search the residence. It appeared to Deputy Darling that Frieda understood what he was saying and that she understood he was asking her to give consent to search the residence. She signed the form. On cross-examination, Deputy Darling clarified that he had her sign the consent form before he took her statement.

The defense called Frieda to testify in the suppression hearing. The prosecution objected, stating that she presently did not have capacity to testify. But the court overruled the objection. On the stand, Frieda was able to give her name, but was not able to answer other basic questions, such as the current date. The court then found that she would not be able to testify competently about the events around the time of the murder.

Cheryl Stockholm, who is Frieda's daughter and Janet's sister, testified that Frieda suffers from dementia, with a gradual decline over the past 10 years. She believed that Frieda's condition at the time of the suppression hearing, in October 2010, was "pretty close to the same" as her condition at the time of the murder, April 2009. In April 2009, Frieda knew she was living in her own home, but she may not have been able to give the address. At the time, she still recognized people, including her relatives.

The defense also introduced a DVD recording of an interview of Frieda in the early morning hours of April 5, 2009, at the station. During the interview, Frieda was able to give her name and relate some details about the fight between defendant and Alex; however, she made some inconsistent statements.

## B. *Legal Principles*

When we review a trial court's ruling on a motion to suppress evidence under Penal Code section 1538.5, we examine the factual findings of the trial court under the familiar substantial evidence test. "[W]e view the record in the light most favorable to the trial court's ruling, deferring to those express and implied findings of fact supported by substantial evidence. [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.) If the court's findings are supported by the record, we independently apply the relevant legal principles to those facts and determine whether, as a matter of law, the search or seizure was unreasonable. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

A search conducted pursuant to valid voluntary consent does not violate the Fourth Amendment. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222 [36 L.Ed.2d 854, 860]; *People v. Garcia* (1964) 227 Cal.App.2d 345, 350.) Voluntariness is a question of fact determined from the totality of the circumstances. (*Schneckloth v. Bustamonte, supra*, at p. 227.) Impairment of the person's mental faculties should be considered, along with all other circumstances, in assessing the voluntariness of the consent. (*People v. James* (1977) 19 Cal.3d 99, 116, fn. 14.) However, evidence of some impairment, alone, does not necessarily establish involuntariness. (*People v. Garcia, supra*, at pp. 350-351.) We apply an objective standard to whether the consent is valid. (*People v. Gurley* (1972) 23 Cal.App.3d 536, 555.) In other words, we determine whether it was reasonable for the officer to conclude, based on the circumstances, that the consent given was voluntary.

## C. *Analysis*

Here, Deputy Darling's determination concerning the voluntariness of Frieda's consent to search was objectively reasonable. Frieda owned the house. She responded appropriately to questions about her name and who lived at the residence. Her speech was slow and slurred, but she was able to respond to questions. Although another officer may have been notified that Frieda suffered from dementia, that knowledge alone was not

sufficient to establish that the consent was involuntary. The fact that a person may have limited cognitive abilities does not establish involuntariness, but instead is a factor in determining voluntariness. (*People v. Garcia, supra*, 227 Cal.App.2d at pp. 350-351.)

While there was some evidence of Frieda's confusion caused by dementia, there was also evidence that she knew who she was and that this residence was hers, and she was able to respond to basic questions. Deputy Darling's personal observation of Frieda was that she understood that she was giving consent to search the residence. Based on these circumstances, we conclude that Frieda's consent to search the residence was voluntary and, therefore, the search did not violate defendant's Fourth Amendment rights.

We must also discuss two stray contentions defendant makes with respect to the consent issue. In his opening brief, defendant faults the trial court for not observing the DVD recording of the interview of Frieda at the station in the early morning hours of April 5, 2009. The court stated that it had reviewed "most" or "a substantial part" of the interview and "got a good sense of her cognitive abilities in the course of that interview." We perceive no error in the trial court's course of action. It reviewed the interview, as requested, before ruling on the suppression motion.

In his reply brief, defendant contends that we should preclude the People from arguing that Frieda was competent enough to give her consent to search the residence on April 4, 2009, because 18 months later, on October 10, 2010, the People argued to the court that Frieda did not have the capacity to testify in the suppression hearing. This contention is both too late (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [points raised for first time in reply brief are forfeited]) and not well taken. There is no rational reason to judicially preclude different arguments about a person's mental capacity at points in time that are 18 months apart.

## II

### *Character Evidence*

Defendant moved in limine to introduce evidence of Alex's propensity for violence. The trial court ruled that most of the evidence could be introduced, but the court excluded evidence, under Evidence Code section 352, that Alex molested children at his mother's in-home daycare and threatened to kill one victim and blow up that child's home if the child said anything about the molestation.

On appeal, defendant contends the exclusion of this evidence concerning child molestation and threats was an abuse of discretion. We conclude that the trial court did not abuse its discretion.

#### *A. Procedural Setting*

The motion to introduce evidence included eight separate instances concerning Alex's propensity for violence:

(1) In 2000, a juvenile court petition alleged that Alex molested children attending his mother's in-home daycare and that he threatened to kill one of the victims and blow up the victim's house if the victim said anything about the molestation. The petition was resolved when Alex admitted child annoyance (Pen. Code, § 647.6), which is not a crime of violence.

(2) In 2007, Alex grabbed a knife and said that he was going to kill his mother. The incident resulted in a restraining order against him.

(3) In 2000, Alex was arrested for conspiracy to commit battery.

(4) Several years before the murder, Alex beat up his cousin with a baseball bat.

(5) In February 2009, two months before the murder, Alex became upset with defendant, pulled a kitchen drawer out, grabbed a knife, and challenged defendant to fight.

(6) The night before the murder, Alex mistreated the two dogs and argued with defendant about it.

(7) Around 2006, Alex chased Gerardo, Jr.'s girlfriend around the house and threatened her after Alex caught Gerardo, Jr., and her having sex.

(8) Approximately 10 years before the murder, when Alex was in high school, he punched and kicked another student at school.

Defendant withdrew the motion as to the conspiracy to commit battery. The trial court excluded the child molestation evidence. And the court admitted the remainder of the propensity evidence proffered by defendant, which included six separate incidents.

Concerning the evidence of child molestation and subsequent threats, the court ruled: "I am going to exclude it. It is not probative. The fact he admitted a juvenile petition for [Penal Code section] 647.6, a misdemeanor child annoyance, even if it has any probative value, applying [an Evidence Code section] 352 analysis, the probative value is substantially outweighed by the risk of prejudice." The court also noted that the evidence (1) was cumulative, (2) would result in undue consumption of time, (3) would confuse the jury, and (4) concerned a remote incident.

#### B. *Legal Principles*

"Evidence Code section 1101, subdivision (a) provides that 'evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion.' Evidence Code section 1103, subdivision (a)(1) provides an exception to Evidence Code section 1101, subdivision (a) when a defendant offers evidence regarding the character or trait of a victim 'to prove conduct of the victim in conformity with the character or trait of character.' Of course, the trial court may exclude otherwise admissible evidence pursuant to Evidence Code section 352 if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative. [Citations.] . . . [¶] . . .

"[W]here . . . a discretionary power is inherently or by express statute vested in the trial

judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828, italics omitted.)

C. *Analysis*

Defendant contends the trial court abused its discretion in excluding the evidence of child molestation and subsequent threats. To the contrary, under the circumstances, excluding the evidence was not abuse of discretion because (1) it was cumulative, (2) it would have consumed undue trial time, (3) it may have confused the jury, and (4) the prejudicial effect of the evidence would have outweighed its probative value.

The evidence of child molestation and subsequent threats was cumulative because the jury was already apprised of six other violent episodes in Alex’s life. The specific facts of the child molestation and threats were no more probative of Alex’s propensity for violence, and defendant’s knowledge of Alex’s propensity for violence, than the other incidents. In fact, some of the other events occurred in defendant’s presence, making them more probative of defendant’s knowledge concerning Alex’s propensity for violence. (See *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 449-450 [exclusion of additional evidence not abuse of discretion when victim’s propensity for violence already established].)

As the trial court noted, evidence concerning the molestations and subsequent threats would have consumed trial time, especially if the prosecution challenged whether the molestations and threats occurred. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 290-291 [court has discretion to preclude lengthy evidentiary detours].)

A lengthy detour into whether the victim molested children and threatened them nine years before his death may also have had the effect of confusing the jury and distracting them from the elements of the offense charged in the current case. (See

*People v. Verdugo, supra*, 50 Cal.4th at p. 291 [lengthy evidentiary detours may confuse the jury].)

Finally, the prejudicial effect of the evidence of the victim's molestation of children and subsequent threats substantially outweighed the probative value of the evidence. The " 'prejudice' " referred to by Evidence Code section 352 does not refer to damage " 'that naturally flows from relevant, highly probative evidence' " (*People v. Zapfen* (1993) 4 Cal.4th 929, 958), but instead to "evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome." (*People v. Booker* (2011) 51 Cal.4th 141, 188.) Evidence of child molestation is inflammatory and may have emotionally distracted the jury from its duty to determine whether the elements of murder were proved in this case.

Because there was no error, we need not consider defendant's additional assertion that prejudicial error in excluding the evidence of child molestation and subsequent threats violated defendant's fair trial and due process rights. (See *People v. Hawthorne* (2009) 46 Cal.4th 67, 103, overruled on another point in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

### III

#### *Exclusion of Photographs*

Defendant sought to introduce eight photographs of defendant and Alex in various family settings, including a birthday party and what appear to be other social situations. Defendant argued that these photographs went to whether defendant made a premeditated, cold, calculated decision to kill Alex. He also wanted to show the size disparity between him and Alex. The trial court admitted one of the pictures (showing defendant and Alex, both smiling, standing side-by-side, each with his arm around the other), but the court excluded the remainder of the pictures, saying that they were cumulative and risked distracting the jury. The court also noted that there was testimonial evidence that defendant loved Alex.

On appeal, defendant contends that excluding the photographs was an abuse of discretion under Evidence Code section 352 and violated his state and federal due process and fair trial rights. We disagree.

Exclusion of the additional photographs as cumulative was well within the scope of discretion afforded to a trial court by Evidence Code section 352. There was nothing arbitrary or capricious about excluding cumulative evidence. (See *People v. Gutierrez, supra*, 45 Cal.4th at pp. 827-828 [Evid. Code, § 352 affords trial court wide discretion].)

Also, as the trial court noted, exclusion of the additional photographs did not prevent defendant from arguing that the admitted photograph, along with the testimonial evidence, established that defendant had a loving relationship with Alex. Therefore, exclusion of the additional photographs did not violate defendant's due process and fair trial rights. The trial court was not required to admit any and all evidence related to the issue of whether defendant and Alex had a loving relationship. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684 [no constitutional right to present all relevant evidence, no matter how limited in probative value].)

#### IV

##### *Provocation and Heat of Passion Arguments*

In his heading for this part of his argument, defendant states: "It is reasonably likely that the jurors misunderstood the legal principles governing the defense theory that the killing was voluntary manslaughter, committed without malice due to reasonable heat of passion, and the prosecution's burden of proving the absence of reasonable heat of passion in order to prove malice, in violation of state law and [defendant's] rights under the Fifth, Sixth and Fourteenth Amendments." (Unnecessary capitalization and bold text omitted.)

This heading does not assert trial court error; instead, it asserts what may or may not be prejudice resulting from error, such as misinstruction or prosecutorial misconduct. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [brief must state each point under separate

heading summarizing point].) We point out this deficiency because it is consistent with the 64-page argument under the heading -- long on claims of prejudice, but short on identifying error.

Defendant restates his contention in the first sentence under the heading: “Due to a combination of instructional ambiguities and omissions, prosecutorial misstatements of law during argument and defense counsel errors, it is reasonably likely that the jury misunderstood critical legal principles governing [defendant’s] defense theory that he killed Alex without malice due to heat of passion and that the jury misunderstood the prosecution’s burden of proof in that regard, in violation of state law and [defendant’s] rights to a fair trial, due process of law, to a jury finding that the element of express malice had been proved beyond a reasonable doubt, to a meaningful opportunity to present his defense, and to the effective assistance of counsel, in violation of under [sic] the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.”

Again, this sentence does little to apprise us of error. Defendant’s burden on appeal is to identify error and establish that the error was prejudicial. When there is no error, we need not consider prejudice. (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601; *People v. Coley* (1997) 52 Cal.App.4th 964, 972 [appellant bears burden of showing error and resulting prejudice].) We therefore make an attempt to discern what errors defendant complains of in this part of his discussion.

It appears that defendant argues: (1) prosecutorial misconduct, (2) misinstruction of the jury, and (3) ineffective assistance of counsel. He also argues that (4) the cumulative effect of errors was prejudicial. All of these arguments relate to defendant’s defense of reasonable heat of passion, which, if the jury had credited the defense, would have reduced the murder to voluntary manslaughter. A common thread in the arguments is that because defendant knew about Alex’s propensity for violence the provocation

needed for a heat-of-passion defense occurred over a long period of time rather than a short period of time.<sup>1</sup>

A. *Prosecutorial Misconduct*

While defendant faults the prosecutor at various times in this lengthy part of the opening brief, defendant states that he makes no separate prosecutorial-misconduct contention. Instead, he cites the prosecutor's argument to bolster the misinstruction and effective-assistance-of-counsel contentions. We therefore do not consider, separately, a prosecutorial misconduct contention.

B. *Misinstruction*

Defendant contends that the trial court erred by not clarifying or amplifying its instructions on provocation and heat of passion to guide the jury in applying the law to the facts of this case. The contention is without merit.

We address defendant's argument on appeal that the instructions were erroneous in view of his contention that his substantial rights were affected by the instruction. (Pen. Code, § 1259.) In considering a claim of instructional error, "[t]he test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) A party may not complain on appeal that an instruction correct in law and responsive to the evidence was flawed unless the party requested appropriate clarifying or amplifying language. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) No such clarifying language was requested here.

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<sup>1</sup> The Attorney General also found it difficult to identify defendant's arguments in this part of the brief. To the extent that we were unable to identify any particular argument in this part, defendant has forfeited consideration of that argument by failing to state it clearly and under a separate heading. (See *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830, fn. 4.)

The trial court based its instructions concerning provocation and heat of passion on the CALCRIM model instruction, and defendant makes no argument concerning any deviation from those model instructions. Those instructions, given consecutively, were as follows:

“[CALCRIM No.] 522. Provocation: Effect on Degree of Murder

“Provocation may reduce a murder from [*sic*] first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide.

“If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.

“[CALCRIM No.] 570. Voluntary Manslaughter: Heat of Passion (Lesser Offense)

“A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

“The defendant killed someone because of a sudden quarrel or in the heat of passion if:

- “1. The defendant was provoked;
- “2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and
- “3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

“Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

“In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

“It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether an ordinary person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

“If enough time passed between the provocation and the killing for an ordinary person of average disposition to ‘cool off’ and regain his clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.

“The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.”

We know from the verdict that the jury rejected defendant’s provocation and heat-of-passion defense, but, of course, we do not know why. Defendant posits that it may have been that the jury did not understand the defense fully, even though the model instructions were given. On appeal, he restates the trial court defense theory:

“[R]easonable heat of passion negating malice and premeditation was the primary defense theory and the core of that defense theory was that the cumulative effect of Alex’s long and consistent history of violent and provocative conduct culminated in [defendant’s] explosion of reasonable passion in which he killed Alex.”

## 1. Provocation Over a Long Period of Time

Defendant contends that the trial court's instructions concerning provocation and heat of passion were inadequate. However, it is difficult to discern from the briefs what exactly the trial court should have done differently.

Defendant states that he "*does not argue* that the instruction provided was generally correct but should have been amplified, an argument that might be waived by his counsel's failure to request further instruction. His argument is that the instruction provided was not responsive to the evidence and arguments, ambiguous, and potentially misleading." (Italics added.) From this, it appears that defendant is conceding that the instruction was generally correct and not in need of amplification, but then he contradicts himself by saying that it was not responsive to the evidence.

In any event, the argument that the instruction was not responsive to the evidence is without merit. The evidence here supported an argument, made by defendant in the trial court, that Alex's provocation occurred over a long period of time. The instruction given to the jury stated: "Sufficient provocation may occur over a short or long period of time." That instruction allowed the jury to consider defendant's argument concerning provocation.

Not satisfied with that answer, defendant asserts that the arguments of the prosecution required the court to give further instruction on the subject. He claims that the prosecutor misled the jury by saying that Alex's history of violence was irrelevant. We disagree. As we read it, the prosecutor's argument was factual, not legal. In other words, the prosecutor argued that Alex's history of violence was factually irrelevant because it did not actually provoke defendant at the time of the murder.

The prosecutor argued: "[W]hat bothered me about [defense counsel's] whole argument, heat of passion was applied to the February incident. . . . Look at the February incident, and it was applied to the dog incident on April 3rd, but it was never applied to April 4th when the murder happened, and that's when it's important. That's when it's

important is what happened that night, and whether or not there was heat of passion that night that it happened, not 24 hours later.” The prosecution made other factual arguments concerning provocation and heat of passion, such as the provocation being too remote and there being sufficient time for defendant to cool off.

These prosecution arguments were neither improper, nor did they require the trial court to modify its instructions. Therefore, defendant’s contention has no merit.

## 2. Heat of Passion

Defendant contends that the heat-of-passion instruction was improper because it did not inform the jury that the victim’s prior conduct is relevant to whether the defendant killed in the heat of reasonable passion. We disagree because, on its face, the heat-of-passion instruction informs the jury that provocation can take place over a long period of time. No further instruction was required for defendant to be able to argue to the jury that Alex’s conduct, over a long period of time, was what provoked defendant and caused the heat of passion.

## 3. Intoxication

Defendant contends that the instruction on intoxication misled the jury because it prohibited the jury from considering the effect of his intoxication on whether he harbored express malice. The contention is without merit.

The trial court instructed the jury on intoxication using CALCRIM No. 625, as follows:

“You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with intent to kill, or the defendant acted with deliberation and premeditation.

“A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

“You may not consider evidence of voluntary intoxication for any other purpose.”

Defendant argues: “The court’s instruction told the jurors that they could *only* consider [defendant’s] intoxication in determining whether he ‘acted with an intent to kill, or the defendant acted with deliberation and premeditation,’ *not* whether he harbored express malice aforethought. (Pen. Code, [former] § 22.) Because the instruction expressly prohibited the jurors from considering the evidence for any other purpose not mentioned, the instruction prohibited them from considering the evidence in determining whether [defendant] harbored express malice even if they found that he formed the intent to kill.” (Original italics.)

The trial court’s instruction was consistent with Penal Code former section 22, subdivision (b), which stated that “[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.”

Although the intoxication instruction did not mention “express malice,” it told the jury that it could consider intoxication when determining whether defendant had the intent to kill. And “proof of an unlawful intent to kill is the functional equivalent of express malice. (*People v. Swain* (1996) 12 Cal.4th 593, 601.)” (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386-387.) Therefore, the intoxication instruction was proper, even though it did not mention the words “express malice.”

### C. *Effective Assistance of Counsel*

Defendant asserts that his trial counsel was constitutionally deficient in three ways: (1) failing to request adequate instruction, (2) failing to object to the prosecutor’s argument, and (3) making a legally incorrect argument. We conclude that trial counsel was not constitutionally deficient.

“To succeed in a claim of ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness under

prevailing professional norms and that, but for counsel's error, the outcome of the proceeding, to a reasonable probability, would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)” (*People v. Lawley* (2002) 27 Cal.4th 102, 133, fn. 9.)

#### 1. Failing to Request Adequate Instruction

Again relying on his argument that the trial court's instructions concerning provocation and heat of passion were not responsive to the evidence and the prosecutor's arguments, defendant contends that trial counsel should have requested clarifying or amplifying instructions. He argues: “[O]bjective standards of reasonable competence demanded that defense counsel *should* have [requested further instruction] in order to prevent the jury's misunderstanding of the law vital to his primary defense and the prosecutor's burden of proving the absence of heat of passion in order to prove malice.” (Original italics.)

This contention has no merit. The trial court properly instructed the jury, including its instruction that “[t]he People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion.” And the prosecutor's arguments were proper factual arguments, not legal arguments contradicting the law as set forth by the trial court.

#### 2. Failing to Object to the Prosecution's Argument

Defendant also contends that defense counsel should have objected to the prosecutor's arguments. We reiterate that the prosecutor's arguments were not improper; therefore, an objection would have been futile.

#### 3. Making Legally Incorrect Argument

Defendant contends that defense counsel made a “fatal error” when he told the jury, “The provocation has got to come from the person who is eventually assaulted. That's the law.” We conclude that, even if this isolated statement was incorrect, it was

not prejudicial because it is not reasonably probable that the outcome would have been different if defense counsel had not made the statement.

It is not necessary for the court to examine the performance prong of the test before examining whether the defendant suffered prejudice as a result of counsel's alleged deficiencies. (*Strickland v. Washington, supra*, 466 U.S. at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Ibid.*)

Viewed in context, counsel's statement was part of his strategy to convince the jury that defendant armed himself because of Alex's violent character and was provoked by Alex's actions and words. Counsel said: "I'm telling you folks he was intentionally provoked. And he did it, Alex did it on purpose." Most of defense counsel's closing argument focused on Alex's violent character and his reputation for violence. In this context, defense counsel said:

"Was [defendant] acting under heat of passion[?] They have to prove beyond a reasonable doubt he wasn't. And can we hear one day that Alex had had a good day, and was not violent to somebody, and somebody that was not scared of him[?] So I want to talk to you now about heat of passion. You can't make up heat of passion. I can't start a fight so I can kill you. That's true. [The prosecutor] talked to you about provocation. The provocation has got to come from the person who is eventually assaulted. That's the law. And let's talk about that. That's exactly what Alex does. That's exactly who Alex is. And exactly what he did that night. His brother told him, dad wants to know if you killed the dogs. . . . So, it's not reasonable at all to think that he wasn't acting under heat of passion."

On appeal, defendant argues: "[D]efense counsel effectively told the jurors that they could *not* consider Janet's words that 'pumped' [defendant] up into the 'seething' rage in which he killed Alex as 'provocation' because *Janet* was not [] 'the person who [was] eventually assaulted.'" (Original italics.)

To the contrary, the prosecution did not argue that the jury could not consider Janet's role in the events on the evening of the murder. And defense counsel, as noted, argued that Alex's actions -- violent actions -- over time were what provoked defendant. Also, the jury was instructed to determine whether defendant "was provoked," without saying who must be the source of that provocation. Accordingly, it is not reasonably probable that, if defense counsel had refrained from saying anything about the law concerning provocation and who can provoke the defendant, the jury would have reached a different verdict. And we need not determine whether counsel's representation fell below an objective standard of reasonableness. (See *Strickland v. Washington, supra*, 466 U.S. at p. 697.)

D. *Cumulative Effect*

Defendant also contends that, if the errors with respect to provocation and heat of passion were not prejudicial by themselves, considered together the errors were prejudicial. This contention also is without merit. The trial court did not err. At most, defense counsel made a stray, erroneous comment about the law of provocation, but that comment did not prejudice defendant.

V

*Subjective Heat of Passion*

Defendant contends: "A series of instructional errors . . . removed from the jury's consideration evidence critical to the subjective heat of passion defense which would have negated the premeditation and deliberation required for first-degree murder, in violation of state law and [defendant's] rights under the Fifth, Sixth, and Fourteenth Amendments."<sup>2</sup> We conclude there was no error.

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<sup>2</sup> Defendant also states that "misleading arguments" caused prejudice here. However, he does not identify any arguments that were misleading. And, in any event,

Before discussing defendant's contention, we must debunk defendant's assertion that the prosecution conceded facts that were inconsistent with premeditation and deliberation. According to defendant, "the prosecutor astonishingly conceded that the jury could find that Alex's conduct the night before the killing was sufficiently provocative to have satisfied both the objective and subjective components of heat of passion, that immediately before the killing Janet had 'pump[ed]' [defendant] into a 'seething rage' with her expressions of fear and anger over Alex's violent and threatening conduct, and that it was in this heat of this 'seething,' intense emotional state that [defendant] 'snapped,' formed the intent to kill Alex, and acted upon it."

Most of the words defendant now parses out of the prosecutor's arguments were the prosecutor's recounting of the statements and testimony of defendant and Janet. But the prosecutor argued that the killing was premeditated, not that defendant just "snapped" and killed Alex. The prosecutor then told the jury that, if it did not find express malice, it could find defendant guilty of second degree murder. In this context, the prosecutor said defendant "was seething[;] he was upset."

In this light it is apparent that the prosecutor did not concede facts inconsistent with first degree murder. Indeed, the prosecutor conceded nothing with respect to the facts supporting a first degree murder conviction, and it was the jury's obligation to find the facts and apply the law to the facts found, as it was instructed.

Defendant's main argument, however, does not require that we accept his claim that the prosecutor conceded facts amounting only to second degree murder. We therefore move to a consideration of the main argument.

What would otherwise be deliberate and premeditated first degree murder is reduced to second degree murder if the jury finds that the defendant "formed the intent to

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we presume the jury followed the court's instructions and did not credit contrary statements about the law by counsel. (CALCRIM No. 222.)

kill as a direct response to . . . provocation and . . . acted immediately,” that is, without deliberation or premeditation. (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Provocation sufficient to reduce a first degree murder to second degree murder requires only a finding that the defendant’s subjective mental state was such that he did not deliberate and premeditate before deciding to kill. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th at 1285,1295-1296; *People v. Padilla* (2002) 103 Cal.App.4th 675, 677-678.) Thus, a defendant who is subjectively prevented from deliberating because of provocation is guilty of second degree rather than first degree murder, even if a reasonable person would not have been provoked under the circumstances. (*People v. Fitzpatrick, supra*, at pp. 1294-1296.)

The trial court instructed the jury in this case that provocation may play a role in reducing an otherwise first degree murder to either second degree murder or voluntary manslaughter. The court added, as relevant to defendant’s contention: “If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder.” (CALCRIM No. 522.)

The court also instructed that first degree murder requires premeditation and deliberation (the only theory asserted by the prosecution in this case) and that “[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.” (CALCRIM No. 521.) After instructing on first degree murder, the court told the jury that “[a]ll other murders are of the second degree.” (CALCRIM No. 521.) Putting these instructions together, the jury was informed that, if defendant was provoked to the extent that he acted rashly, impulsively, or without careful consideration, he could not be convicted of first degree murder.

Defendant nonetheless argues that the instructions “removed from the jury’s consideration evidence critical to the subjective heat of passion defense which would have negated the premeditation and deliberation required for first-degree murder.” That

simply is not true. Although the trial court neither used nor defined the term “subjective heat of passion,” the effect of the instructions was to properly inform the jury that, if defendant acted in unreasonable but actual heat of passion, he was guilty only of second degree murder.

Apparently ignoring the actual instructions, defendant claims that the trial court did “not even mention the defendant’s subjective mental state, much less explain that if the defendant kills in an actual, but unreasonable, heat of passion, that mental state is inconsistent with or negates premeditation and therefore the crime is second-degree murder.” To the contrary, the court instructed the jury that one who acts rashly, impulsively, or without careful consideration does not act deliberately or with premeditation. Those are mental states.

Defendant also claims that the jury was misled because the instruction on voluntary manslaughter stated that provocation must lead to both subjective heat of passion and objectively reasonable heat of passion. In that instruction, the court stated as one of the elements of a voluntary-manslaughter heat-of-passion defense the following: “The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than judgment.” (CALCRIM No. 570.) That instruction, however, was clearly applicable to voluntary manslaughter only; it did not prevent the jury from properly considering whether the first degree murder should be reduced to second degree murder because defendant actually but unreasonably acted rashly, impulsively, or without careful consideration.

When we review a challenge to jury instructions as being incorrect or incomplete, we evaluate the instructions given as a whole, not in isolation, to determine whether there is a reasonable likelihood they confused or misled the jury and thereby denied the defendant a fair trial. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 182; *People v. Richardson* (2008) 43 Cal.4th 959, 1028; *People v. Huggins* (2006) 38 Cal.4th 175, 192.) We also presume jurors are intelligent and capable of understanding and correlating jury

instructions. (*People v. Richardson, supra*, 43 Cal.4th at p. 1028; *People v. Carey* (2007) 41 Cal.4th 109, 130.)

Applying these principles here, and considering the challenged instructions in context, we conclude they did not mislead the jury concerning mental states associated with second degree murder. Since the jury was not misled, the instructions did not violate defendant's due process and fair trial rights.

## VI

### *Sufficiency of Evidence*

Defendant contends that his due process rights were violated because the evidence was insufficient to sustain a first degree murder conviction. The contention is without merit.

Before considering the sufficiency of the evidence, we must again debunk defendant's claim that the prosecutor's closing argument has anything to do with our analysis of the sufficiency of the evidence. Defendant focuses on the prosecutor's argument, quoting various words used by the prosecutor, such as "pumped," "seething," and "snapped," to describe defendant's mental state. The prosecutor's argument, however, was not evidence, as the jury was instructed. (CALCRIM No. 222.)

" 'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' ([*People v.*] *Rowland* [(1992)] 4 Cal.4th [238,] 269 . . . .) We apply an identical standard under the California Constitution. (*Ibid.*) 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)" (*People*



In his discussion concerning the sufficiency of the evidence to support a first degree murder conviction, defendant cites only the evidence favorable to him. He refers to evidence that he was “emotionally distraught”; he was in a rage; he was scared; and Alex was in his face. He then concludes: “Even viewed in the light most favorable to the judgment, the evidence presented at [defendant’s] trial does not support a finding of premeditated and deliberated killing.” He does not mention his threats to kill Alex or that he grabbed a large knife and went to Alex’s room to confront Alex or that he stabbed Alex in a manner that penetrated vital organs. This is an argument for a jury, not an appellate court.

“In making his argument concerning the sufficiency of the evidence of [premeditation and deliberation], [defendant] restricts his analysis to the evidence most favorable to himself. Such an approach is a nonstarter and, indeed, forfeits consideration of the issue. [Citation.]” (*People v. Battle* (2011) 198 Cal.App.4th 50, 62.)

In any event, the evidence was sufficient to support a first degree murder conviction, including that defendant premeditated and deliberated. The prosecution introduced evidence of all three *Anderson* categories: planning, motive, and preconceived design. Defendant, who had been angry at Alex and wanted him out of the home, threatened to kill Alex, grabbed a large knife, confronted Alex, and stabbed him in a motion that penetrated vital organs. That defendant may be able to assert less culpable thought processes to explain these actions does not diminish the evidentiary value of these circumstances to show premeditation and deliberation. Therefore, the conviction did not violate defendant’s due process rights.

Defendant also contends that California Supreme Court precedent on how little time it can take to premeditate and deliberate violates federal due process rights. (See *People v. Solomon* (2010) 49 Cal.4th 792, 812-813.) However, he concedes that we are bound by the precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

## VII

### *Consciousness of Guilt Instructions*

The trial court instructed the jury that it could infer consciousness of guilt from defendant's false and misleading statements, using CALCRIM No. 362. On appeal, defendant contends that this was an improper pinpoint instruction because it was unfairly partisan and argumentative. We disagree.

The court instructed the jury:

“If the defendant made a false or misleading statement before his trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crimes and you may consider it in determining his guilt.

“If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.” (CALCRIM No. 32.)

CALCRIM No. 362 is the successor to CALJIC No. 2.03, which provided that if the jury found defendant made a willfully false or misleading statement, it could be considered as “a circumstance tending to prove consciousness of guilt.” (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1103.) “The California Supreme Court has consistently upheld CALJIC No. 2.03 against various and sundry attacks. [Citations.]” (*Id.* at p. 1104, fn. 3; *People v. Benavides* (2005) 35 Cal.4th 69, 100; see also *People v. Page* (2008) 44 Cal.4th 1, 49-50; *People v. McWhorter* (2009) 47 Cal.4th 318, 377.) “Although there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362 . . . , none is sufficient to undermine our Supreme Court's approval of the language of these instructions.” (*People v. McGowan, supra*, 160 Cal.App.4th at p. 1104.)

VIII

*Cumulative Effect*

Defendant contends that, if we do not find any of the asserted errors prejudicial individually, we must reverse because the errors were cumulatively prejudicial. Since we have not found multiple errors, we need not consider whether any errors were cumulatively prejudicial.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

MAURO, J.