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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS TOKAREV,

Defendant and Appellant.

D059956

(Super. Ct. No. RIF154612)

APPEAL from a judgment of the Superior Court of Riverside County, Elisabeth Sichel, Judge. Affirmed.

Dennis Tokarev appeals from a judgment convicting him of voluntary manslaughter. He contends the judgment must be reversed because the trial court erred by: (1) violating his *Doyle*¹ rights when it allowed the prosecutor to cross-examine him based on details that he disclosed at trial but omitted in a postarrest statement to the police; and (2) excluding evidence of (a) the victim's character for violence, and (b) opinion testimony concerning defendant's claims of self-defense and defense of others.

¹ *Doyle v. Ohio* (1976) 426 U.S. 610.

Further, he argues the prosecutor engaged in misconduct by cross-examining him in an argumentative and disparaging manner. Finally, he asserts the cumulative effect of the errors deprived him of a fair trial. We reject his contentions of reversible error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The incident giving rise to defendant's voluntary manslaughter conviction occurred when defendant shot and killed the victim (Vu Tran Dang) at about 3:50 a.m. on December 12, 2009. As we shall detail below, in response to an earlier verbal altercation between Dang and defendant's friend, defendant and a group of males started walking to the house where the argument had occurred. When they encountered Dang outside on the street near the residence, defendant noticed that Dang had a gun held behind his back. Defendant grabbed the gun and shortly thereafter shot Dang. Prosecution witnesses testified that Dang did not act aggressively just prior to being shot. Testifying on his own behalf, defendant claimed that he grabbed the gun to prevent Dang from shooting it; Dang followed him and lunged at him; and the gun accidentally discharged when defendant flinched back. Defendant was charged with first degree murder. The jury rejected the murder charge, and found him guilty of voluntary manslaughter.

In the early morning hours of December 12, victim Dang and Dang's two cousins ("Kenny" and "Thomas") — who did not know defendant — were at Kenny's house

drinking beer with two of defendant's friends (Andrew Martinez and Ernesto Alvarado).² While the group was in front of Kenny's garage drinking beer, two of defendant's other friends (Geoffrey Mata and Steven Lanksbury) walked up and joined the group. During this encounter, Dang made a comment that offended Mata.³ The circumstances culminating in the shooting were described at trial by prosecution witnesses Kenny, Thomas, Martinez, and Alvarado, and by defense witnesses defendant and Lanksbury.

According to prosecution witnesses, after Mata and Lanksbury left Kenny's residence, Martinez told Kenny that his friends did not "mean that. It's cool. They can come back." Kenny agreed that it was "not a big deal" and they could come back. Martinez "[j]ust wanted peace," so he called Mata on the phone and invited him to come back. Mata was drunk and still angry, and he hung up on Martinez. Martinez thought Mata would return and bring other people with him because "[t]hat's what drunk people do. They don't want to let it go." As anticipated, a group of about six males (including defendant, Mata, and Lanksbury) started walking to Kenny's home. Martinez told Kenny

² Kenny's name is Quang Tran and Thomas's name is Tam Tran. We refer to them by the names they regularly use.

³ Lanksbury made a comment that he had "cotton mouth," meaning he wanted another beer, and in response Dang made a joke by saying, "What are you?"; "[A] white cracker[?];" "A meth head?" Mata took the joke seriously, saying that it was not funny because his brother was incarcerated for methamphetamine. Mata threw his beer can down and started walking towards Kenny with his chest "swollen" as if to fight. Alvarado got in between Kenny and Mata, and Kenny told Mata he could not do this at Kenny's house and he needed to go home. As Mata and Lanksbury were leaving, "some profanity [was] exchanged"; Lanksbury made a remark "that this was his neighborhood"; and Kenny responded that Lanksbury should buy a house like Kenny did and then he could say it was his neighborhood.

to go inside the house and to close the garage because "[t]here's some guys coming.'" Kenny stayed outside because his family was inside the house and he did not want the males to come to his home. Dang asked Kenny, "'Where is it at? Where is it at?'" which was a reference to a gun. Kenny responded, "'No, no. We don't need that'"; nevertheless, Dang ran momentarily inside the house, apparently to retrieve a gun.

As they were approaching Kenny's residence, the males in defendant's group were yelling and seemed angry. Martinez went out to the street and tried to defuse the situation. The males stopped in the street and started asking, "'Where is that Asian guy?'" Alvarado also went out to the street, greeted defendant, and asked Mata, "'What are you doing? What's up? Why did you bring a whole crowd over?'"

Meanwhile, Dang had walked out to the street and was approaching the group. Someone in defendant's group said, "'Is this the fucking guy?'" Kenny and Thomas also started moving towards the group. As Dang approached the group, one or both of his hands were behind his back. Dang appeared as if he wanted to fight. Defendant moved quickly around to Dang's back, snatched a gun from Dang's hand, and backed up between two cars. According to Kenny and Thomas, defendant pointed the gun at Kenny and then at Thomas, and said "'What the fuck are you going to do now?'" Kenny told defendant

"to put that shit down" and it was "not funny." Defendant then pointed the gun at Dang and said, "'Who wants this one?'" Dang responded, "I do. I'll take this one.'"⁴

As this was occurring, Dang moved closer to defendant.⁵ However, Dang was not acting aggressively and did not thrust himself or jump at defendant. When Dang said he would "'take this one,'" defendant stepped closer to Dang, extended his hand out, and fired the gun. Defendant and his friends fled from the area, and Kenny called 911.

Dang was shot in the face and died at the scene.

Defense

Testifying on his own behalf, defendant stated that after the verbal altercation at Kenny's house, Mata and Lanksbury walked to another nearby residence where defendant and some other friends were attending a birthday party. Mata was upset about the verbal altercation, but calmed down after his phone conversation with Martinez. Mata told defendant and other friends at the birthday party that the incident had just been a "little misunderstanding," and Martinez had invited them to return to drink beer and have a "good time." Defendant joined the group going to Kenny's home to drink beer.

⁴ Martinez testified that defendant moved the gun around and pointed it at Dang, but not at Thomas or Russell. Alvarado testified that defendant "waived [the gun] around the crowd for a second" to show that he had it; defendant then held the gun straight out; Dang was facing defendant; and defendant asked, "'What are you going to do now?'"

⁵ Kenny testified that Dang "was walking slowly toward" defendant. Thomas testified that Dang "speed-walked" in the direction of where Thomas was standing, and stopped in front of defendant. Martinez stated that Dang was either standing still or walking slowly towards defendant. According to Alvarado, Dang might have taken a step forward but he was not approaching defendant, and Dang was "kind of stationary."

According to defendant, his group of friends had been drinking and were acting "loud," but they were not angry; they had no weapons; and they had no intention of "doing anything." As they were walking to Kenny's house, Martinez walked up to Mata and said "'Hey, go back, go back.' . . . [D]on't go further." Mata and the others were standing together as a group, whereas defendant was standing off to the side. The group stopped in the street and did not attempt to push past Martinez. Mata asked Martinez, "'What the heck is going on?'" but Mata did not appear angry. Alvarado then walked up to defendant and they greeted each other with a handshake. A few seconds later, defendant saw Dang coming towards the group. Dang was approaching with a "gangster" style walk, and he had his hands behind his back and an "intense look" on his face.

Defendant asked his friends, "'Hey, is this the guy that you guys were talking about before?'" Although defendant made this inquiry, he testified he was not upset and he did not perceive Dang's earlier remarks as having anything to do with him. Dang walked up close to Mata; pulled one hand out in "the form of a gun"; kept his other hand behind his back; and stated something like, "'Yeah, what's up? What's your problem?'" Defendant walked a few steps and saw that Dang was holding a revolver behind his back. Defendant thought he had "one chance" to try to take the gun out of Dang's hand, and if he did not do this it was "going to turn out bad."

As defendant was running up to grab the gun, he saw Dang pull the hammer back on the gun and start moving his arm out. Defendant thought Dang was going to fire the gun. Defendant "jumped" and snatched the gun out of Dang's hand. Defendant then "back-staggered" about eight feet and ended up between two cars. He raised the gun to

his shoulder height and pointed it to show that he had disarmed Dang. He was not trying to aim the gun at Dang, but Dang was directly in front of him. Defendant told Dang, "That's it. Step back. It's over." His intention was that no one would get hurt and everyone would go home.

However, Dang walked up to defendant and got so close that the gun "muzzle was about to hit [Dang's] face area." Dang lunged with his hands towards defendant in an apparent attempt to take the gun back. Defendant tried to quickly back away, and as he did this, his body "flinch[ed]," which caused his finger to "barely tap[]" the trigger and the gun to discharge. Defendant testified that he had no intention of shooting anyone; he took the gun away to save others and himself; and the discharge of the gun was accidental and he was in "[c]omplete shock" when this occurred.

After the gun fired, defendant noticed two other males there and he saw one of them make a movement "to reach in his pants." Thinking they might have a gun and want retaliation, defendant was "not thinking right" and he ran away along with his other friends. He went back to the party, found his girlfriend and another friend, and told them they had to leave. Because he was in shock, he did not call the police and (following advice from friends) he threw the gun into the ocean. The next day after speaking to his family, he came to his "senses" and realized he should not get in trouble because his actions were defensive and accidental. His parents advised him to turn himself in to the police and tell them what happened. While he was en route to the police station with his parents, he was stopped by the police.

To corroborate defendant's testimony, Lanksbury testified that when Martinez came out on the street and told the group to go back, his group of friends did not try to push past Martinez; they were acting peacefully; and no one had a gun.⁶ When Dang came out to the street, Mata told him how he felt about what happened earlier. Neither Mata nor anyone else in the group made any threats to Dang. Lanksbury could not see the gun that Dang was holding behind his back. After defendant snatched the gun, defendant stepped back and "pointed the gun around" in the air. Defendant was not waving the gun in a threatening manner; he was "just showing" them what he had snatched; and Lanksbury did not feel threatened by defendant's conduct. However, Lanksbury was frightened of the gun itself; he turned around to go to his car; and he then heard a gunshot.⁷

Jury Verdict and Sentence

Defendant was charged with first degree murder. With respect to the lesser offense of voluntary manslaughter, the jury was instructed on heat of passion and unreasonable self-defense or defense of others. The jury found defendant guilty of voluntary manslaughter, with a true finding that he personally used a firearm. The court

⁶ Lanksbury testified he did not tell the police that the group was planning to fight, although he acknowledged at trial that he knew this was a possibility. A detective testified that Lanksbury told him the group was planning to fight.

⁷ On cross-examination, Lanksbury testified that after defendant snatched the gun, Dang stood still and he did not see Dang pursue defendant. On redirect examination Lanksbury testified that because he had turned around, he did not see what Dang was doing the instant before he was shot.

sentenced him to nine years in prison (six years for voluntary manslaughter and three years for the firearm enhancement).

DISCUSSION

I. Doyle Error

Defendant argues his due process rights under *Doyle v. Ohio, supra*, 426 U.S. 610 (*Doyle*) were violated when the trial court permitted the prosecutor to cross-examine him regarding his failure to tell the police about certain details of the shooting even though he had invoked his right to remain silent.

Under *Doyle*, when a defendant has been provided the *Miranda*⁸ advisement concerning the right to remain silent, it is improper to thereafter use the defendant's silence for impeachment at trial based on the defendant's failure to tell his or her exculpatory story at the time of arrest. (*Doyle, supra*, 426 U.S. at pp. 611, 619.) The rationale for this rule is that it is fundamentally unfair to use post-*Miranda* silence against the defendant at trial given that *Miranda* warnings implicitly assure that exercise of the right to silence will not be penalized. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.) However, *Doyle* error does not occur if a *Mirandized* defendant freely elects to speak to the police, and then at trial the prosecutor refers to the defendant's statements (including the failure to provide information) as prior inconsistent statements to impeach the defendant's trial testimony. (*Anderson v. Charles* (1980) 447 U.S. 404, 408; *People v. Poon* (1981) 125 Cal.App.3d 55, 62-63, 84-85, overruled on other grounds in *People v.*

⁸ *Miranda v. Arizona* (1966) 384 U.S. 436.

Lopez (1998) 19 Cal.4th 282, 292; *United States v. Ochoa-Sanchez* (9th Cir. 1982) 676 F.2d 1283, 1286-1287.)

A. *Background*

To review defendant's claim of *Doyle* error, we summarize defendant's description of the incident to the police, his description of the incident at trial, and the relevant portions of the prosecutor's cross-examination of defendant.

Description of the Incident During the Police Interview

After the interviewing detective provided the *Miranda* warnings and asked defendant if he wanted to talk to him, defendant responded, "Yeah . . . I'll either answer [the questions] or I won't answer 'em." The detective again asked if defendant would talk to him, and defendant answered, "Yeah . . . , for now." When the detective asked what happened on the night of the incident, defendant stated that there was a "little misunderstanding"; something "went the wrong way" that was not supposed to happen "that way"; he was told *there was "some racial stuff" and then a person threatened to come out with a weapon and use it*; the person premeditated because he made this threat; the person "brought out a weapon"; defendant thought the person was going to use the weapon; defendant was "just try[ing] to help the situation out"; defendant was the victim because he "was looking out" for himself; *it was either defendant "or one of [his] own"*

*that could get hurt; and defendant "tried to stop it" and was "just try[ing] to[] defend" himself "out of impulse."*⁹ (Italics added.)

After making this statement, defendant stated, "That's as much, I'm gonna say right now regarding that." The detective then asked, "What happened out of impulse?" Defendant answered, ". . . I was approached after the fact that . . . they'll be, the guy had, that's why I when, *he should have just stopped right there because it was supposed to be dropped and he approached me and then, you know.*" (Italics added.)

Defendant's Description of the Incident at Trial

As set forth in more detail above, at trial defendant testified that when he and his friends were walking to Kenny's house the earlier incident had been resolved and they were merely going there to drink beer and gave a good time. However, as they were

⁹ In more detail, defendant's statement to the police was as follows: "[I]t was . . . a little misunderstanding basically. Could be something went the wrong way. It wasn't supposed to happen that way. . . . I wasn't supposed to be no where near anything. . . . [¶] . . . [¶] . . . [A]ll I heard is that somebody had something with somebody that I knew that lives near the area and that . . . they were threatened previously . . . by that person. . . . [F]irst . . . there's some racial stuff was said and then they're threatening. They're gonna . . . let him come down. . . . I'm bringing out a weapon and using it, and that was told to me . . . I figure like a joke because . . . supposed to be, I believe he was gonna, whoever, your neighbor He's gonna try to pull that off and then . . . the guy that they're talking about actually, he[] said he'll come out with a weapon. . . . [I]f he hadn't violated first, how he did it, it was all premeditated on his behalf because . . . he threatened to do it, and then he came out with it and . . . like when I'm there, and basically that I thought . . . it's a true things is fast and . . . he's gonna . . . try to use it against us And then . . . I just try to help the situation out, and then . . . some of the shit turned out the way it's not supposed to turn out because of the fact that The person brought out a weapon, who wasn't supposed to do that, so from that I was considered . . . the victim rather than how you guys are . . . considering me right now because I was looking out for myself as well. . . . And I wasn't gonna let me get, it's either me or one of my own, is there somebody else can get hurt. I tried to stop it and then I felt bad with my life and you just try to, defend myself just for out of impulse. . . ."

walking they were told to go back. Dang then approached Mata, made a gun gesture with his hand, and asked Mata what his problem was. Defendant saw the gun in Dang's hand; he thought Dang was going to shoot it; he grabbed it as a defensive action and told Dang to step back and it was over; and the gun accidentally discharged when Dang lunged towards him and he flinched as he tried to back away.

Prosecutor's Cross-examination and Trial Court's Ruling on Doyle Objection

At various points during cross-examination of defendant, the prosecutor sought to impeach defendant's trial testimony based on matters defendant stated during his testimony but omitted from his statement to the interviewing detective. During the course of the cross-examination, the prosecutor asked defendant whether he wanted to tell his story to the detective when he was en route to the police station to turn himself in; whether he was given an opportunity to tell his story; whether there were "quite a bit of things" that he mentioned at trial but never mentioned to the detective; and whether "[b]asically everything [he] told this jury is the first time" it was told. The prosecutor cited several details of defendant's trial testimony and asked if defendant never mentioned them to the detective, including that he was only going to Kenny's house to drink and "hang out"; that Dang made a gun gesture with his left hand; that Dang asked Mata what his problem was; that what defendant did was a courageous act; and that after he got the gun he told Dang it was over and to leave.

In response, defendant acknowledged that he did want to tell his story to the police and that he did not provide all the details to the detective. He explained that his father had advised him to ask for an attorney before he said anything just in case the police "try

to flip [his] story around" to make him incriminate himself. Accordingly, his intent was to tell the police that he was going to turn himself in "for this incident," and that he wanted to talk but he would need an attorney present. He testified that when he spoke with the detective he only made a few statements and then stopped the interview.

The prosecutor also asked defendant if, when speaking to the detective, he never used the term "accident" and he never told the detective that he accidentally shot the victim. Defendant responded that his statement to the detective that something went the wrong way and it was not supposed to happen that way was a reference to the fact that the discharge of the gun was an accident.

At several points during the questioning, defense counsel objected on *Doyle* grounds, arguing that it was improper to cross-examine defendant about his failure to give an exculpatory explanation because he had invoked his right to remain silent. The trial court overruled the objection, ruling that although the prosecutor could not refer to defendant's invocation of his right to remain silent, he could properly question defendant about details omitted from the portion of the interview during which he did provide an explanation of what occurred.

B. *Analysis*

Defendant agreed to speak to the detective and he provided a brief description of what occurred before he invoked his right to silence. Thus, this case falls within the exception to *Doyle* applicable when a defendant elects to speak to the authorities. Generally, a prosecutor is afforded a wide scope when cross-examining a defendant. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1147.) A defendant's omission of important

details in a pretrial statement, and subsequent disclosure of the details for the first time at trial, can properly be used to impeach the defendant's trial testimony based on this inconsistency. (See, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 686-688; *People v. Poon*, *supra*, 125 Cal.App.3d at pp. 62-63, 84; *United States v. Ochoa-Sanchez*, *supra*, 676 F.2d at pp. 1286-1287 [prosecutor may properly "probe all post-arrest statements and the surrounding circumstances under which they were made, including defendant's failure to provide critical details" that arguably render postarrest statements inconsistent with trial testimony].) Because defendant chose to provide the detective with the highlights of his version of the incident, the trial court did not err in permitting the prosecutor to vigorously cross-examine defendant about his omission of critical details that he disclosed for the first time at trial and that could reasonably be construed as creating an inconsistency between his pretrial and trial statements.

For example, defendant claimed at trial that he was informed the prior altercation had been peacefully resolved and he and his friends went to the scene to drink beer and have a good time, which was a fact highly relevant to support that defendant had no aggressive intentions at the scene apart from self-defense. However, when defendant spoke to the detective he focused on the prior threat from the victim without mentioning that he thought the threat was resolved and he and his friends went to the scene with peaceful intentions. Further, he testified at trial that the gun discharge was accidental, which was highly significant to support his claim of innocence. However, during the police interview he never used the word "accident." Because a reasonable trier of fact could find these matters to be of substantial significance in even a short description of the

incident so as to reflect an inconsistency relevant to veracity, the trial court did not err in permitting cross-examination about defendant's omission of them in his summation to the police.

In addition to questioning defendant about the omission of these significant matters, the prosecutor also asked the defendant about his omission of various other details (for example, his failure to tell the detective that the victim made a gun gesture and verbally confronted defendant's friend; that defendant acted courageously; and that after defendant got the gun he told the victim it was over and to leave). These omitted details concerned matters that were intertwined with the matters defendant affirmatively described to the detective. That is, defendant told the detective about the victim's threats and retrieval of a weapon and defendant's response in self-defense, and the prosecutor cross-examined him about various facts *related to these events* that he presented for the first time at trial. The prosecutor did not stray into matters unrelated to the statements that defendant presented to the detective.

Notably, the circumstances here are not comparable to those in *United States v. Canterbury* (10th Cir. 1993) 985 F.2d 483, a case cited by defendant in support of his position. In *Canterbury*, the defendant answered some questions asked by the police but did not attempt to provide an exculpatory explanation, and the reviewing court concluded it was improper to impeach the defendant based on his trial testimony that he was "set up" as compared to his failure to provide this explanation to the police. (*Id.* at pp. 484-486.) In contrast here, defendant *did* provide an exculpatory explanation to the detective,

and the prosecutor was entitled to cross-examine him about details omitted from this explanation.

We recognize that a defendant is entitled to revoke his or her *Miranda* waiver (*People v. Rundle* (2008) 43 Cal.4th 76, 114, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), and in some circumstances the courts have concluded that the revocation insulated the defendant from impeachment based on omissions in his or her statement to the authorities. (See *United States v. Caruto* (9th Cir. 2008) 532 F.3d 822, 824, 827-831 [error to impeach based on omissions in brief statement to police followed by refusal to continue with interview]; see also *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1519, 1525-1527 [error to introduce failure to deny crime as adoptive admission when defendant answered some questions but then asserted right to attorney when asked about crime].) Here, however, because the prosecutor's cross-examination stayed within the subject matter that defendant voluntarily chose to describe to the detective, it did not violate defendant's assertion of his right to remain silent. To hold otherwise would constrain the wide latitude afforded on cross-examination, and this constraint is not required under *Doyle* as long as the cross-examination does not reach subjects outside the matters voluntarily discussed by the defendant prior to the *Miranda* invocation.

Alternatively, even assuming arguendo there was error in this regard, it was harmless beyond a reasonable doubt. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 119; *People v. Delgado* (2010) 181 Cal.App.4th 839, 854.) Error is harmless beyond a reasonable doubt if there is no reasonable possibility it contributed to the jury's

verdict. (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 569.) Under the circumstances of this case, the questioning concerning defendant's omission of the various additional details did not present the jury with information that was of any particular damage to defendant. Defendant's short description of the incident to the detective was videotaped and played for the jury. Further, defendant testified that he only made a brief statement to the police because he wanted an attorney present. Thus, the jury knew that defendant did not provide a lengthy statement to the authorities and could readily deduce that he could not reasonably be expected to set forth all relevant details in such a short time frame. During closing arguments to the jury, the prosecutor did not refer to the matters omitted by defendant in his postarrest statement, and defense counsel told the jury that "[i]t was a very short interview. [¶] So of course [defendant] doesn't go into all the details." To the extent there may have been some *Doyle* error, there is no reasonable possibility it affected the jury's verdict.

To support his *Doyle* challenge, defendant cites a portion of the trial court's ruling where it stated the cross-examination was permitted because defendant had "opened the door" by testifying on direct examination that he was on his way to tell the police what happened when he was arrested. Given our holding that the trial court properly permitted cross-examination concerning significant omissions from defendant's statement to the detective and any overbreadth in the cross-examination was not prejudicial, we need not evaluate this aspect of the court's ruling.

II. *Exclusion of Defense Evidence*

A. *Evidence Concerning Victim's History of Aggression*

Defendant argues the court erred in excluding evidence showing that the victim had a history of aggressive behavior, which was relevant as victim character evidence under Evidence Code section 1103 to support that the victim lunged at defendant before he was shot.¹⁰

During pretrial motions and again during trial, defense counsel made an offer of proof that the victim had a history of assaultive behavior, as shown by his criminal history, convictions, possible prison record, and gang affiliation. Defense counsel stated that although he had to review the information concerning the victim's history in more detail, he believed the victim had a juvenile robbery adjudication approximately 14 years prior to the current incident; a report of a gang-related assault as a minor; and a home-invasion robbery conviction in Arizona in about 2007. Defense counsel asserted that evidence showing the victim was a violent person was relevant under section 1103 to show that the victim acted in conformity with his character when (as claimed by defendant) he acted aggressively and lunged towards defendant even though defendant had a gun in his hand.

During pretrial motions the trial court declined to admit the evidence, but changed its ruling during trial when it learned that defendant's claim that the victim lunged at him was in dispute. The court excluded the victim's juvenile robbery adjudication as too

¹⁰ Subsequent statutory references are to the Evidence Code.

remote, but ruled that evidence showing more recent violent conduct by the victim was admissible under section 1103 to show conduct by the victim in conformity with his character.¹¹ However, the court stated that the evidence must reflect the victim was violent; a bare conviction would not suffice; and there must be evidence showing, for example, "how the robbery occurred."

In response to the court's ruling, defense counsel moved for a mistrial on the basis that he lost the opportunity during the prosecution's case-in-chief to cross-examine the victim's relatives (Kenny and Thomas) about the victim's violent tendencies. The trial court denied the mistrial motion, stating that defense counsel had time to recall these witnesses and present their testimony during the defense case. The court concluded by telling defense counsel that if there was evidence of the victim's violence that was more recent than the remote juvenile robbery adjudication, counsel should "bring it on." Defense counsel responded, "All right."

Defendant has not cited anything in the record reflecting that defense counsel sought to present victim character evidence after the court ruled it was admissible.

In his opening brief on appeal, defendant argues the court erred in refusing to permit him "to introduce evidence of [the victim's] criminal history, prison record, or

¹¹ Section 1103, subdivision (a)(1) states: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (See *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446.)

gang affiliation, and his specific past criminal acts of aggression — including an apparent 2007 Arizona robbery conviction that, unlike his 1995 juvenile conviction, could not be said to be overly remote" The contention is unavailing because the trial court did not prevent defendant from offering this evidence. To the contrary, the court explicitly ruled that defense counsel could present evidence of the victim's violent character that was more recent than the remote juvenile adjudication.¹²

In his reply brief, defendant challenges the court's ruling that a bare conviction (as opposed to witness testimony) would not suffice to show the victim's violent character. Although the record is not entirely clear, it appears the court made this ruling because it wanted to ensure that the evidence showed the victim actually engaged in violence, and that a bare conviction might not show this. Arguably, a robbery conviction, standing on its own, could be sufficient to show a victim's violent character.¹³ However, the court could reasonably request additional information about the conviction to determine whether under the particular circumstances of the case the probative value outweighed

¹² In support of his claim of error, defendant cites a pretrial ruling by the court that the victim character evidence was not relevant because defendant was not aware of the victim's violent propensity (and hence the evidence was not relevant to defendant's state of mind). The ruling is of no import because ultimately the court ruled victim character evidence was admissible to show the victim's conduct in conformity with his character.

¹³ The bare fact of a conviction is hearsay and hence is generally inadmissible to show the underlying conduct absent an applicable statutory exception to the hearsay rule. (See *People v. Ray* (1996) 13 Cal.4th 313, 349 (maj. opn.), 376-377 (conc. opn. of Mosk, J.); *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459-1460.) Section 452.5, subdivision (b) provides a hearsay exception for convictions, allowing an official record of a conviction to be used to show the underlying conduct. (See *People v. Lee* (2011) 51 Cal.4th 620, 650; *People v. Duran, supra*, 97 Cal.App.4th at pp. 1460-1461.)

the potential for prejudice under section 352. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 700 [court retains discretion to evaluate section 1103 evidence under section 352]; *People v. Shoemaker, supra*, 135 Cal.App.3d at p. 448.)

In any event, as stated, defense counsel did not proffer any victim character evidence after the court made its ruling allowing the evidence. During the discussions with the court, defense counsel indicated that he still needed to review the materials concerning defendant's criminal history, and he answered affirmatively when the court stated he could present the victim character evidence if it existed. There is nothing in the record to suggest that defense counsel subsequently *refrained* from presenting an Arizona robbery conviction based on the court's statement that a bare conviction would not suffice.

Generally, to preserve an issue on appeal, a party desiring to introduce evidence must renew its offer of proof after the trial court makes a preliminary ruling. (See *People v. Holloway* (2004) 33 Cal.4th 96, 133.) Absent a contrary showing, we presume that after the court made its ruling allowing nonremote victim character evidence, defense counsel would have proffered the evidence if it existed and there were no tactical reasons for not presenting it. (See *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549 [court presumes that counsel regularly performed his or her duty]; *In re Barbara R.* (2006) 137

Cal.App.4th 941, 954.)¹⁴ Because no such evidence was proffered subsequent to the court's admissibility ruling, defendant has not shown error.

B. *Exclusion of Opinion Evidence that Defendant Acted in
Reasonable Self-defense or Defense of Others*

Defendant argues the trial court erred in excluding opinion testimony from a lay witness and from an expert witness that he acted in reasonable self-defense or defense of others.¹⁵

1. *Lay Opinion About Defendant's Defensive Conduct*

At the conclusion of his direct examination of defense eyewitness Lanksbury, defense counsel asked: "Based on the entire circumstances, everything you saw that was going on, is it your opinion that [defendant] was protecting you?" The prosecutor objected on relevance grounds. The court sustained the objection, stating "[t]hat's the ultimate issue in the case."

¹⁴ With respect to possible tactical considerations by the defense, we note that a defendant's decision to present evidence showing a victim's violent character "open[s] the door" to permit the prosecution to present evidence showing a defendant's violent character. (*People v. Fuiava, supra*, 53 Cal.4th at pp. 694-700; § 1103, subd. (b).) Here, the prosecutor proffered character evidence about the defendant based on a "MySpace" website, which the trial court excluded because the defense had not presented victim character evidence.

¹⁵ To establish a complete defense to murder based on defensive conduct, the jury had to find that defendant actually and reasonably believed in the need to defend. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) If the defendant subjectively believed in the need to defend, but the belief was objectively unreasonable, the offense is (as found by the jury here) voluntary manslaughter. (*Ibid.*)

We agree with defendant that the mere fact that opinion testimony may address the ultimate issue in a case does not require its exclusion. (§ 805; *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 77.)¹⁶ The issue of admissibility of opinion testimony turns not on whether it addresses the ultimate issue in the case, but whether the opinion is of assistance to the trier of fact. (See *Coffman and Marlow, supra*, at p. 77.)

However, we conclude that even if the trial court had recognized that its "ultimate issue" ruling was not a proper ground to exclude the opinion testimony, there is no reasonable probability it would have made a different ruling, nor was there any prejudice from the exclusion of the opinion testimony. (See *People v. Boyette* (2002) 29 Cal.4th 381, 428-429; *S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1016.)

Lay opinion about a person's behavior is admissible if it is "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of [the witness's] testimony." (§ 800; *People v. Farnam* (2002) 28 Cal.4th 107, 153.) However, if the jury is just as competent as the witness to draw a conclusion concerning the matter set forth in the witness's testimony, the trial court should not admit the opinion testimony because in this circumstance the opinion is of no assistance to the jury's understanding of the witness's testimony. (See *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 77.) Thus, a trial court properly admits lay opinion testimony if the matters observed are "difficult to put into words" because of their complexity or subtlety, whereas it properly

¹⁶ Section 805 states: "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact."

excludes lay opinion testimony when the lay witness can adequately describe his or her observations without using opinion wording. (*People v. Hinton* (2006) 37 Cal.4th 839, 889; *People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 33.) The decision concerning admission of lay opinion testimony is a matter that rests within the discretion of the trial court. (*People v. Thornton* (2007) 41 Cal.4th 391, 429; *People v. Brown, supra*, 96 Cal.App.4th Supp. at p. 33.)

Here, Lanksbury testified at length concerning his observations of what occurred during the incident. He described how defendant and the others were acting peacefully; no one was making any threats to the victim; the victim was holding the gun behind his back in a manner that prevented Lanksbury from seeing it; and after defendant grabbed the gun he pointed it around in the air to show that he had it, but he was not waving it in a threatening manner. This testimony clearly presented the jury with Lanksbury's perception that defendant was not an aggressor. The jury was fully capable of evaluating whether Lanksbury's testimony supported that defendant was protecting him, and Lanksbury's opinion would not have provided any significant clarification on this point. Because Lanksbury's opinion that defendant was protecting him was evident from Lanksbury's description of the incident, there is no reasonable probability the trial court would have exercised its discretion to admit the opinion testimony absent its erroneous reliance on the "ultimate issue" standard.

For essentially the same reason, even assuming *arguendo* the court might have exercised its discretion to admit the opinion testimony, there was no prejudice. Notwithstanding the exclusion of Lanksbury's opinion concerning defendant's protective

conduct, defendant was able to present Lanksbury's detailed testimony describing the defensive nature of defendant's actions. There is no reasonable probability the jury would have reached a different verdict if it had heard Lanksbury's ultimate view that defendant was acting to protect him. (See *People v. Boyette*, *supra*, 29 Cal.4th at pp. 428-429 [state law reasonable probability standard of prejudice applies when evidentiary error did not deprive defendant of meaningful opportunity to present defense].)

2. *Expert Opinion About Defendant's Defensive Conduct*

Defense counsel also introduced opinion testimony from a self-defense expert concerning defendant's self-defense claim. During pretrial discussions, the court stated its view that it was not "appropriate for an expert generally to opine about the ultimate issue on the case" and it had a concern "as to whether an expert would be needed with respect to the reasonableness of the [defendant's] conduct," which was the exact issue the jury had to decide. The court also stated that testimony about the defendant's subjective intent or state of mind was generally not the proper subject of expert testimony. However, the court agreed with defense counsel that the expert could properly testify about the stages people go through when confronted with a life-threatening situation.

When discussing the matter again during trial, defense counsel cited section 805, which permits an expert to testify about the ultimate issue in the case. In response, the trial court stated it understood this rule, but it was also clear that an expert cannot testify about the defendant's subjective intent, and accordingly it was not appropriate for the expert to testify about defendant's subjective perception and state of mind. However, the court stated the expert could "talk about what sort of things go into making a decision by

a human being" and about "threat perception in general," but he should not "talk specifically about this case and give an ultimate opinion."

If expert opinion testimony addresses a matter that is sufficiently beyond common experience that it would assist the trier of fact, the opinion testimony is admissible even if it encompasses an ultimate issue in the case. (§§ 801, subd. (a), 805; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) However, the courts exercise caution to ensure the expert's testimony is "not tantamount to expressing an opinion as to [the] defendant's guilt" because this is a matter that a jury is competent to resolve without expert assistance and the testimony may suggest the issue has been decided and not subject to jury deliberations. (*People v. Ward* (2005) 36 Cal.4th 186, 210; *People v. Prince* (2007) 40 Cal.4th 1179, 1227.) Consistent with this latter principle, an expert generally may not give an opinion about the particular defendant's subjective knowledge or intent, although the expert may provide information from which the jury may infer the defendant's state of mind. (See *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1514; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551; see also *People v. Vang* (2011) 52 Cal.4th 1038, 1047-1049.) For example, in the context of self-defense claims, an expert may testify to explain factors that may affect the reasonableness and/or the subjective existence of a defendant's belief in the need to defend, although the ultimate judgment on these issues is solely for the jury. (See *People v. Humphrey, supra*, 13 Cal.4th at pp. 1088-1089 [discussing battered women's syndrome]; see also *People v. Erickson* (1997) 57 Cal.App.4th 1391, 1400-1402.)

Defendant asserts the trial court erroneously excluded expert opinion testimony based on a ruling that the expert could not testify about the ultimate issue in the case (i.e., whether he acted in reasonable self-defense or defense of others). To the contrary, reading the relevant discussions in their entirety, the court ultimately made clear that it understood the rule that an expert was permitted to testify about an ultimate issue, and it ruled the expert could properly discuss factors that affect a person confronted with a life-threatening situation, subject to the limitation concerning defendant's subjective state of mind.

Consistent with this ruling, the record shows that the self-defense expert called by the defense testified at length about factors that affect a person when faced with a crisis situation involving the need for self-defense. Further, the expert was allowed to extensively opine about how these factors related to the facts of this case. For example, the expert described "five stages of mental awareness" that occur when a person is confronted with a self-defense situation, including the fourth and fifth stages where the person perceives an imminent threat and decides to take responsive action. The expert opined that defendant reached these stages when he saw the gun in Dang's hand and saw Dang cock the weapon and move to pull it out. The expert stated that once defendant grabbed the gun, he did not have much room to retreat in a safe manner; defendant's act of raising and pointing the gun at Dang was a typical response under the circumstances and it showed defendant "was fearful" and "was protecting himself"; when someone lunges towards a gun it would be normal to retreat and draw the gun back to prevent the person from grabbing the gun; and the shooting in this case was likely accidental based

on the placement of the shot and because a cocked revolver can easily discharge. Further, the expert stated that the average person faced with a crisis situation loses 65 percent of his or her mental dexterity and would not typically be able to rationally consider all the available options, and most of the alternative courses of action suggested by the prosecutor on cross-examination of defendant were not safe options.

Defendant has not identified any matters that were improperly excluded from his self-defense expert's testimony. There is no showing of error in this regard.

III. *Prosecutor's Cross-examination of Defendant*

Defendant asserts the judgment must be reversed because the prosecutor repeatedly asked argumentative questions when cross-examining him. Defendant cites numerous instances during the cross-examination when defense counsel objected on grounds that the questions were argumentative or otherwise improper (some of which were sustained), and instances in the early stages of the cross-examination when the trial court told the prosecutor to refrain from using an overly sarcastic and argumentative

tone.¹⁷ Defendant also contends the prosecutor's manner of questioning mocked and degraded him.¹⁸

Although a trial court must control cross-examination to protect a witness from undue harassment or embarrassment, the permissible scope of a prosecutor's cross-examination of a defendant is wide and the prosecutor's questioning may be vigorous. (*People v. Mayfield* (1997) 14 Cal.4th 668, 755; *People v. Cooper* (1991) 53 Cal.3d 771, 822.) To violate a defendant's constitutional rights, the prosecutor must engage in a pattern of conduct so egregious that it renders the trial fundamentally unfair, or the prosecutor's conduct must involve deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Hamilton* (2009) 45 Cal.4th 863, 950; *People v. Riggs* (2008) 44 Cal.4th 248, 298.)

We have reviewed the prosecutor's lengthy cross-examination of defendant, and we are satisfied that the prosecutor did not engage in misconduct that violated defendant's

¹⁷ After telling the prosecutor a couple of times that his tone was argumentative, the court stated to the prosecutor: "I'm having difficulty with your manner and your tone of voice in terms of being overly dramatic and overly argumentative. Sarcasm is dripping from your fingertips. I don't say that with any heat of passion, but you need to ratchet it down a little. I understand the problem. I had it too when I was an attorney as opposed to a judge. [¶] . . . [¶] Just tone it down a little." The prosecutor responded, "Thank you, Your Honor. [¶] . . . [¶] Okay."

¹⁸ In support, defendant cites, for example, several occasions when the prosecutor responded to defendant's testimony by saying (apparently sarcastically), "Because you're a hero." At one point the prosecutor stated: "If you're being savagely attacked by this crazy Asian guy, everyone would understand, and it would be such a clear case of self-defense if you just called the police that day, right, right when it happened?" At another point the prosecutor asked defendant if he believed the victim "deserved to die." Defendant cites numerous other questions by the prosecutor that were similar in tone.

right to a fair trial. Early on during the cross-examination, the trial court gave explicit instructions to the prosecutor to tone down his overly argumentative, sarcastic tone. Thereafter, the court made no further comment on this matter; accordingly, we presume the prosecutor complied with the admonishment. The prosecutor's cross-examination was lengthy, highly detailed, vigorous, and intense, but it was properly confined to probing defendant's version of the facts.¹⁹ Although there were questions that were hard-hitting, colorful, and at times argumentative, the questions individually or in combination did not rise to the level of conduct that was egregious, deceptive or reprehensible. (See *People v. Hamilton*, *supra*, 45 Cal.4th at p. 955.) Importantly, this is *not* a case where the prosecutor's cross-examination raised matters that were *collateral to the issues*. (See, e.g., *People v. Ortega* (1969) 2 Cal.App.3d 884, 902 [prosecutor improperly questioned defendant about narcotics addiction which was collateral issue in robbery prosecution].) Rather, the questions were directly related to the issues in the case.²⁰ Although at times the prosecutor's approach may have been caustic, the record shows that the court monitored it and took appropriate measures to ensure the fairness of the proceedings.

¹⁹ The prosecutor's cross-examination comprised approximately 176 pages of the reporter's transcript.

²⁰ The cross-examination questions concerned such issues as why defendant was at the scene; the circumstances under which defendant seized the gun; the manner in which defendant was pointing the gun and what defendant said to the victim; distinctions between defendant's version and the version of other witnesses; defendant's claim that the gun accidentally discharged; defendant's failure to call the police; defendant's disposal of the gun; and defendant's views about his conduct and the victim's death.

The prosecutor's cross-examination of defendant did not deprive him of a fair trial.

IV. *Cumulative Error*

Defendant contends the cumulative effect of error deprived him of a fair trial. The contention is unavailing. To the extent there may have been errors, none of them were of such significance that, either singly or together, they created a high potential for prejudice or denial of due process. Concerning the arguable *Doyle* error, the jury knew defendant provided only a short statement to the police that would not have been expected to cover all the details. With respect to defendant's other claims of evidentiary error, the trial court ruled that nonremote victim character evidence was admissible; Lanksbury's ultimate opinion about whether defendant acted defensively would not have provided any additional useful information to the jury; and the self-defense expert was allowed to provide extensive information to assist the jury with its decision as to whether defendant acted in reasonable self-defense or defense of others. Finally, when cross-examining defendant, the prosecutor did not engage in a pattern of egregious misconduct or deceptive or reprehensible conduct.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.