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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE LOUIS ARMENTA,

Defendant and Appellant.

E054533

(Super.Ct.No. RIF147935)

OPINION

APPEAL from the Superior Court of Riverside County. Richard Todd Fields and Jeffrey Prevost, Judges.\* Affirmed with directions.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

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\* Judge Fields denied the motion for discovery of peace officer records. Judge Prevost presided over the trial and made all of the other challenged rulings.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Lise Jacobson and Vincent P. La Pietra, Deputy Attorneys General, for Plaintiff and Respondent.

Police officers arrived at the home of defendant Joe Louis Armenta to arrest him on an outstanding warrant. One officer claimed that, in addition to knocking on the front door, he announced that they were the police; his supervisor, however, who was also knocking, did not remember this announcement.

Meanwhile, other officers opened a sliding glass door in the rear of the house. This caused an alarm to sound. Defendant started yelling. At this point, officers in both the front and rear announced their identity and purpose. Some officers then entered through the rear sliding glass door.

Defendant fired at least two shots at the officers. They fired back at him. There was a standoff for at least 40 minutes, during which the officers continued to announce their identity and purpose. Defendant fired one last shot before the officers managed to escape the house. It took a police negotiator about four hours to talk defendant into surrendering.

Defendant claimed that he mistook the officers for members of his former gang, which had put out a “green light” on him. When he realized his mistake, he tried to commit “suicide by cop.”

A jury found defendant guilty of four counts of attempted murder of a peace officer, including two counts that it found to be willful, deliberate, and premeditated

(Pen. Code, § 187, subd. (a), 664, subds. (e), (f)), all with personal firearm discharge enhancements (Pen. Code, § 12022.53, subd. (c)); four counts of assault with a firearm on a peace officer (Pen. Code, § 245, subd. (d)(1)), all with personal firearm discharge enhancements (Pen. Code, § 12022.53, subd. (c)); one count of unlawful possession of a firearm (Pen. Code, former § 12021, subd. (a)(1); see now Pen. Code, § 29800, subd. (a)(1)); and one count of unlawful possession of ammunition (Pen. Code, former § 12316, subd. (b)(1); see now Pen. Code, § 30305, subd. (a)).

The trial court sentenced defendant to a determinate term of 62 years 8 months in prison, plus three consecutive indeterminate terms of life in prison with an aggregate minimum parole period of 29 years.

Defendant now contends:

1. The prosecutor committed misconduct in six separate instances.
2. The trial court erred by admitting evidence that, in a previous shootout with another gang member, defendant had killed an “innocent bystander.”
3. The trial court erred by failing to instruct on attempted voluntary manslaughter on a “heat of passion” theory.
4. This court should independently review the materials produced in camera in response to defendant’s *Pitchess* motion.<sup>1</sup>
5. The abstract of judgment is erroneous.

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<sup>1</sup> A “*Pitchess* motion” is a motion for discovery of a peace officer’s confidential personnel records. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

The People concede that the abstract of judgment is erroneous and must be corrected. Otherwise, we find no reversible error. Hence, we will affirm.

## I

### FACTUAL BACKGROUND

#### A. *Prosecution Evidence.*

On January 6, 2009, shortly after 9:00 p.m., six officers from a multiagency task force went to defendant's house in Rubidoux. They were there to arrest defendant pursuant to a felony warrant. Defendant was also on felony probation, with full search terms. The officers were in uniform, including vests with the word "police" on the back.

Sergeant David Amador and Officer Eric Hibbard knocked on the front door and rang the doorbell off and on for at least five minutes. There was no response.

According to Sergeant Amador, they did not say anything, because their standard procedure was to wait until someone answered the door. According to Officer Hibbard, however, toward the end, he said, "Police Department. It's the Riverside Police Department," though he still did not say why they were there.

After a short break, Sergeant Amador started knocking on the front door and ringing the doorbell again. He still did not say anything.

Meanwhile, Officer Hibbard and Officer David Castenada went around to the back of the house. They used a ladder in the back yard to climb up to a second-floor balcony. On the balcony, there was a sliding glass door. Officer Castenada pushed the sliding

glass door to determine whether it was locked or not. It slid open some one to three inches. This caused an alarm to beep.

At that point, defendant started yelling, "What do you want? Who are you? Go away." At the front door, Sergeant Amador and Officer Darrell Hill immediately responded, "The Riverside Police Department. We're here to do a probation search. If you don't answer the door, we will force entry." Defendant replied, "Go away." "Get the fuck out of here . . . ." This exchange was repeated five or six times. Officer Hill and Officer Michael Crawford tried to kick in the front door, but without success.

Meanwhile, back at the sliding glass door, when defendant yelled, "Who is it?," Officer Hibbard responded, "Riverside Police. Probation search." He said it twice. After making this announcement, Officer Hibbard, along with Officer Castenada, entered through the sliding glass door.

They found themselves in the master bedroom. They decided to try to apprehend defendant using a taser. They summoned Officer Crawford, because he was the only officer who had a taser. They waited in the bedroom for several minutes until Officer Crawford came in through the sliding glass door.

As these three officers walked out of the bedroom toward a staircase, Officer Hibbard heard the sound of a zipper. He thought it might be the zipper of a gun case, so he told the others to stop. He then saw defendant, with a gun in his hand, on the first floor, running into a hallway.

Officer Hibbard said, “Gun, gun, he’s got a gun.” He and Officer Castenada retreated back into the bedroom. Officer Crawford ran forward; he was separated from the other officers for several minutes, until he managed to dash back into the bedroom.

Meanwhile, defendant swept the red dot of a laser gunsight around the stairwell and toward the bedroom. Defendant fired two shots. Estimates of the time between the shots varied from one to two seconds to one or two minutes.

After the second shot, Officer Hibbard and Officer Castenada fired back. Before firing, Officer Castenada said, “Riverside police. Riverside police.” After firing, Officer Hibbard yelled, “Police Department. . . . Drop the gun and come out.”

At some point, there was a third volley of shots. It is not at all clear whether defendant fired any of these. According to Officer Hibbard, defendant did fire a third shot, so he (Officer Hibbard) fired back. According to Officer Castenada, however, he noticed the laser dot on his own chest, so he “started throwing rounds down range.”

Defendant barricaded himself inside the laundry room; he moved the dryer to give himself cover. Officer Hill then came in the upstairs bedroom through the sliding glass door. He tried to negotiate with defendant. He talked to defendant for about 40 minutes, telling him, “Nobody wants to hurt you. You need to surrender. . . . We are the police department.”

When Officer Hill addressed defendant as “Joe,” defendant claimed that his name was John. Defendant said there was a “green light” on him, adding, “I can’t go back to prison. You’re going to have to kill me.” He referred to committing “suicide by cop.”

He was also heard saying (presumably on a cell phone), “I love you, dad. The cops are here. They’re shooting at me. They’re trying to kill me.”

Defendant was still turning the laser on and off and moving it around. All of a sudden, he fired one last shot. Both Officer Hill and Officer Crawford fired back.

Meanwhile a helicopter and a Special Weapons and Tactics (SWAT) team had arrived. Around 10:15 p.m., while the SWAT team set off flash-bang grenades as a diversion, the four officers left the house.

Around 11:20 p.m., Investigator Justino Flores, a police negotiator, began talking to defendant by phone. Finally, around 3:30 or 4:00 a.m., defendant left the house and surrendered. He was interviewed by one Investigator LeClair.

Defendant’s gun had one bullet in the chamber, plus two bullets in the seven-bullet magazine. Inside the laundry room, the police found one live bullet matching the ones in defendant’s gun. They found three shell casings matching defendant’s bullets — one in the entryway and two in the hallway to the laundry room. They also found 19 shell casings matching the bullets in the officers’ weapons. Gunshot residue was found on defendant’s hands.

*B. Defense Evidence.*

Defendant testified that he was a former member of the East Side Riva gang. He had an “ESR” tattoo.

In 1995, he left the gang by moving to Arizona. He did not get jumped out, because he knew that that could cause crippling injuries and even brain damage. He

heard through friends and family members that the gang would kill him if they caught him.

In 1999, after defendant moved back to California, an East Side Riva member named Rudy Gil shot him in the face and leg. Defendant shot back and killed an innocent bystander.

Defendant testified against Gil, despite receiving two or three separate threats to kill him and his family. Gil was convicted of first degree murder and sentenced to 65 years to life. Defendant, in exchange for his testimony, was allowed to plead guilty to being a felon in possession of a firearm and sentenced to time served.

Because defendant had testified against Gil, there was a “green light on [his] life.” He believed he would be “a dead man in prison.” He got a gun to protect himself, even though he knew he was not allowed to have one.

On January 6, 2009, around 9:00 p.m., defendant heard knocking at his front door. It went on for five or ten minutes. Whoever was knocking did not say anything.

Then defendant heard an alarm beep. This meant that someone had just opened a door or a window. Once again, no one said anything.

Defendant got his gun and yelled, “Who the fuck’s in my house?” There was no response.<sup>2</sup> He could hear multiple people moving through the upstairs bedroom. He concluded that they were East Side Rivas coming to kill him.

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<sup>2</sup> Defendant had told both Investigator Flores and Investigator LeClair, however, that the intruders responded, “It’s the police . . . .”

Defendant announced that he had a gun; he fired a “warning shot,” without aiming, in the general direction of the bedroom. The people kept coming, so he fired again. They then fired back at him. He retreated into the laundry room. At that point, for the first time, they said, “Police.” However, defendant did not believe them, because he did not think the police would break into his house.

Defendant’s gun had jammed; he cleared it by removing one live bullet. He kept “moving the laser back and forth and up and down” to “keep[] them at bay.”

When defendant heard sirens and a helicopter, he “figured if they weren’t police[,] that would make them leave. . . . But these people kept shooting at me, telling me . . . they’re the police, come out. And that’s when I started to believe them . . . .” He decided that he would rather have the police kill him than go to prison. Later, once he believed the officers were out of the house, he fired a third shot, to shoot out a light. Defendant claimed that the one bullet found in the laundry room, plus the three found in the gun, proved that he fired only three times.

Defendant denied that there was any second round of knocking. He also denied that the officers tried to kick in the front door. He pointed out that the door had glass, which they could have broken to get in.

Defendant admitted that he had “[n]o logical reason” to claim that his name was John. He also could not explain why he did not call 911.

According to defendant, his statements immediately after the shootout were largely consistent with his testimony at trial. However, the negotiator, Investigator

Flores, testified that defendant did not mention East Side Riva, nor did he say that somebody was trying to kill him.

## II

### PROSECUTORIAL MISCONDUCT

Defendant asserts some six separate instances of prosecutorial misconduct.

#### A. *General Legal Principles.*

“The standards governing this claim are well established. A prosecutor’s conduct violates the federal Constitution when it infects the trial with such unfairness as to make the resulting conviction a denial of due process. Conduct by a prosecutor that does not rise to this level nevertheless violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citations.] To preserve a prosecutorial misconduct claim for appeal, the defendant ““must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety”” unless doing so would be futile or an admonition would not cure the harm. [Citation.]” (*People v. Whalen* (2013) 56 Cal.4th 1, 52.)

“A defendant’s conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.] . . . [Citation.]’ [Citation.]” (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) “When a trial court sustains defense objections and admonishes the jury to disregard the comments, we assume the jury followed the

admonition and that prejudice was therefore avoided. [Citation.]” (*People v. Bennett* (2009) 45 Cal.4th 577, 595.)

B. *Opening Statement: Impugning Defense Counsel.*

Defendant contends that the prosecutor committed misconduct in opening statement by impugning defense counsel.

1. *Additional factual and procedural background.*

In her opening statement, the prosecutor said: “I anticipate that you are going to hear some excuses from defense, some made up stories. When people are caught, they try to get out of it. Two years is a lot of time to make up something.”

Defense counsel objected to this, “as argument.” The trial court sustained the objection and granted defense counsel’s motion to strike.

The next day, defense counsel asked the trial court “to assign [the remark] as misconduct.”

The trial court declined “to formally cite [the prosecutor] for misconduct,” but it agreed to give an admonition. Thus, when the jury reconvened, it instructed:

“During her opening statement, [the prosecutor] stated that ‘I anticipate that you are going to hear some excuses from defense, some made up stories. When people are caught, they try to get out of it. Two years is a lot of time to make up something.’

“I did grant the objection to that statement and did strike that entire portion of [the prosecutor]’s opening statement. You’re admonished at this time to completely disregard that portion of [the prosecutor]’s opening statement.

“I’ll remind you that the comments of counsel are not evidence and they’re not to be considered in any way as evidence of any facts in this case.

“I have determined that [the prosecutor]’s comments were to some extent inadvertent, but they were inappropriate, and argumentative, and were not properly part of an opening statement.

“To the extent that a further inference might be made that defense counsel is in any way complicit in possibly fabricating something, such an inference is entirely inappropriate. There is absolutely no suggestion of such at this time, and any suggestion that defense counsel might be engaged in such is inappropriate.

“And I have determined that [the prosecutor] did not so intend, but an inadvertent inference might be made from those comments so that is why I am admonishing you to completely disregard that portion of [the prosecutor]’s opening statement.”

## 2. *Analysis.*

“Personal attacks on opposing counsel, including accusations that counsel fabricated a defense or misstated facts in order to deceive the jury, are forbidden. [Citations.] On the other hand, the prosecutor may vigorously argue his or her case, including the inferences to be drawn from the evidence. [Citation.]” (*People v. Tate* (2010) 49 Cal.4th 635, 692-693.)

In this instance, we need not decide whether the challenged statement constituted misconduct. The trial court declared that the statement was “inappropriate” and “not evidence” and admonished the jury to disregard it. Thus, any prejudice was cured.

(*People v. Bennett, supra*, 45 Cal.4th at p. 595; *People v. Mendoza* (2007) 42 Cal.4th 686, 701.)

C. *Misrepresenting Facts.*

Defendant contends that the prosecutor committed misconduct in direct examination by misrepresenting the layout of defendant's house.

1. *Additional factual and procedural background.*

During her redirect examination of Officer Hibbard, the prosecutor showed him exhibit 97. Exhibit 97 has not been transmitted to us, but it is described as "Photo of stairs inside of home." The prosecutor then asked:

"Q. . . . If you were standing in that front hallway area, would that be the view up to that front hallway area?

"[DEFENSE COUNSEL]: Vague as to 'hallway area.' What hallway area?

"THE COURT: Rephrase.

"Q. (By [the prosecutor]) The hallway area where you saw the gun appearing from the wall, from the corner.

"A. Honestly, this picture looks like it's taken from the hallway."

On recross-examination, defense counsel asked a series of questions about exhibit 97 and three other photos (exhibits B, G, and T). Without having in front of us not only the exhibits but also a floor plan of the house, this testimony is pretty much impossible to follow. Officer Hibbard did repeatedly express uncertainty about what exactly exhibit 97 showed. However, there was this exchange:

“Q. [T]hat’s a photograph that’s taken from inside the front door and over to the left in the living room area, is it not?”

“A. It almost looks like it’s to the right of the front door to me.”

The trial court raised and sustained its own objection to this line of questioning under Evidence Code section 352, stating: “[This witness] was never on the first floor. . . . He’s not in a position to offer an opinion with respect to the layout of the other rooms on the first floor.”

Defense counsel then said, “. . . I would ask the Court to strike his testimony elicited on direct that that picture was taken from the front entrance.” The court denied the motion.

The next day, outside the presence of the jury, defense counsel argued that the prosecutor had committed misconduct by trying to elicit testimony that exhibit 97 showed “the view from the entry,” because it did not. However, he did not ask for any particular relief; to the contrary, he stated, “. . . I just wanted to make a record on that.”

The trial court opined that there was a problem because the various photos had not been authenticated by the person who took them, and none of the officers who had testified so far had been in a position to authenticate any photos taken from the first floor. It ruled: “If proper foundation is not laid at some point for . . . [exhibit] 97, I’ll entertain a motion to strike any testimony relying on that particular photograph as a base for a witness’s opinion . . . .”

Officer Hill later testified that exhibit 97 included a wall that was to the left of the front entry. Defendant testified that exhibit 97 was taken from “the left of the entry.”

2. *Analysis.*

Defendant argues that the prosecutor’s question about whether exhibit 97 showed the view from the “hallway” misrepresented his ability to see the officers.

Defense counsel forfeited the claimed misconduct by failing to request an admonition. (*People v. Whalen, supra*, 56 Cal.4th at p. 52.)

Separately and alternatively, we reject the misconduct claim because the record fails to show that the question was either misleading or prejudicial. From the reporter’s transcript alone, the layout of the house is far from clear. Officer Hibbard testified that exhibit 97 was taken from the front hallway; however, he also testified that it was taken from the right of the front door. We cannot tell whether he meant from the right looking in or the right looking out. We cannot tell whether he was talking about just one location or two. The exhibits themselves have not been transmitted to us. (See Cal. Rules of Court, rules 8.122(a)(3), 8.224(a).) Most significantly, we do not have exhibit 97. Thus, we cannot tell whether the challenged question and answer were misleading or not.

For much the same reason, we cannot tell whether they were prejudicial. Numerous exhibits relating to the layout of the house were admitted. Even assuming the challenged question and answer, standing alone, were misleading, in light of the record in its entirety, for all we know, the jury would have had no trouble understanding the layout of the house.

D. *Eliciting False Testimony.*

Defendant contends that the prosecutor committed misconduct in direct examination by eliciting false testimony regarding his criminal record.

1. *Additional factual and procedural background.*

The prosecutor asked Special Agent Adam Rudolph whether other officers told him that defendant was on probation for “manufacturing[,] importing, selling, an undetectable firearm?” Rudolph answered, “I believe that’s correct, yes.”

After Rudolph was excused, and outside the presence of the jury, defense counsel asserted that defendant’s conviction had actually been for possession of brass knuckles under Penal Code former section 12020, although he conceded that that statute also covered firearms. He further asserted that the prosecutor had committed misconduct.

The prosecutor responded that all that the officers knew was that defendant had been convicted under Penal Code section 12020, subdivision (a)(1), so they reasonably assumed that the conviction related to firearms.

The trial court ruled: “. . . I think it is okay for you to elicit testimony as to what was in the officer’s mind at the time that they approached the house, whether it was erroneous or not, if it was in good faith, which seems to me to be the case. . . . [¶] But, on the other hand, I agree with [defense counsel] that the jury should be apprised of what Mr. Armenta was actually on probation for.”

It therefore instructed the jury that defendant had actually been on probation for unlawfully possessing, manufacturing, importing, or selling metal knuckles.

2. *Analysis.*

“Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 711.)

Here, however, the prosecutor did not present false evidence. Other officers apparently understood, and told Special Agent Rudolph, that defendant was on probation for unlawful possession of a firearm. Even though they were mistaken, this was relevant, as the trial court ruled, to the officers’ state of mind in executing the arrest warrant.

Separately and alternatively, any possible prejudice was cured by the trial court’s admonition to the jury. (*People v. Bennett, supra*, 45 Cal.4th at p. 595.)

E. *Violating the Trial Court’s in Limine Ruling.*

Defendant contends that the prosecutor committed misconduct by violating an in limine ruling.

1. *Additional factual and procedural background.*

Prior to trial, defense counsel indicated that he wanted to introduce evidence that an East Side Rivas member (i.e., Rudy Gil) had shot defendant. He noted that, in the confrontation, defendant shot back and killed a four-year-old child. However, he objected to “any testimony about this four-year-old that died . . . .”

The trial court excluded any evidence that the person who was shot was a four-year-old child.<sup>3</sup> When the prosecutor asked if the trial court was excluding evidence “that the gunfire . . . struck someone,” it said, “No . . . .”

Defense counsel then asked, “[I]s the Court going to allow the People to introduce evidence that it was Mr. Armenta’s shot that killed the individual?” The court responded, “Well, I’m still in the dark about that really.”

Defense counsel proceeded to state: “The theory was provocative act murder. [Defendant] was not held culpable or responsible for that. It was simply inadvertent. All I propose to say [i]s that there was an assault on Mr. Armenta that resulted in the death of someone else. Mr. Armenta testified for the People in that prosecution. The individual who was convicted was Rudy Gil.” The trial court responded, “All right. And I’ll limit the references to that incident to the scope that you’ve just suggested . . . unless Mr. Armenta testifies more extensively . . . .”

On direct, defendant testified that Rudy Gil, an East Side Riva member, shot him twice because he left the gang; Gil was charged with murder and attempted murder; defendant testified against Gil; in return, defendant was sentenced to time served for

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<sup>3</sup> The trial court described the excluded evidence in several different ways: (1) “reference to the innocent minor victim”; (2) “identification of the actual victim of the homicide”; (3) “refer[ence] to the four-year-old victim of the homicide as . . . a four-year-old minor” (paragraph breaks omitted); (4) “reference to the minor homicide victim”; and (5) “reference to the status of the homicide victim . . . as being a bystander four-year-old minor.”

unlawful possession of a firearm; and Gil was convicted of murder. The fact that Gil's assault "resulted in the death of someone else," however, was not mentioned.

On cross-examination, the prosecutor asked:

"Q. And when you pulled the trigger, did your firearm kill an innocent bystander?"

"A. Yes, ma'am."

Defense counsel objected and argued, "I thought you made an order that she wasn't supposed to go into this." Defense counsel also asserted that the prosecutor had committed misconduct and requested a mistrial.

The trial court reviewed the transcript of its in limine ruling. It then stated: "It was well understood there would be no reference to a minor homicide victim, but beyond that, I think there was some wiggle room within my order for either party." "[I]t was permissible to show that a third[ ]party . . . was killed . . ." "The use of the term innocent bystander can be somewhat inflammatory, but under all of the circumstances, I believe that it's a minor reference . . ." It therefore denied the motion for a mistrial.

After a break, defense counsel raised the issue again, arguing, "This is . . . the fourth instance of misconduct by the prosecution . . ."

The trial court responded, "I'm treating this as a renewed motion for a mistrial. That is denied. [¶] . . . [¶] I did rule that [the fact that] a person was a victim of a homicide is allowable." "My ruling was unclear. To the extent that there is any blame to be assigned [for] this, I think it is the Court's fault . . ." "[I]t was not clear to me that you asked for an order that there be no reference to Mr. Armenta having fired . . . a

weapon which caused the death of another person. [¶] If I had understood that to be the scope of your motion, I can't say how I would have ruled, but I may very well have let it in because I think the district attorney would be allowed to inquire as to the circumstances of that incident to a full extent . . . .”

B. *Analysis.*

On one hand, defense counsel arguably forfeited the claimed misconduct by failing to request an admonition. On the other hand, it was also arguable that the misconduct (if such it was) was not curable by an admonition. Defense counsel implicitly took that position by moving for a mistrial. Rather than decide whether there was a forfeiture, we will address the merits.

“It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.]” (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Here, however, the trial court found that its ruling was unclear and that it never actually excluded evidence that defendant shot somebody.

We agree that the trial court's ruling was unclear. Defense counsel's original objection was to the fact that a four-year-old child was shot. Thus, the trial court repeatedly stated that what it was excluding was the fact that the victim was a four-year-old child. In response to a question by the prosecutor, it specifically said that it was *not* excluding evidence “that the gunfire . . . struck someone[.]” When defense counsel asked

if the prosecutor could show that defendant fired the fatal shot, it was noncommittal, saying, “Well, I’m still in the dark about that really.”

It is defendant’s position that the evidence was effectively excluded when defense counsel made an offer of proof and the trial court responded, “. . . I’ll limit the references to that incident to the scope that you’ve just suggested . . . unless Mr. Armenta testifies more extensively . . . .” The offer of proof, however, included the fact that “there was an assault on Mr. Armenta that resulted in the death of someone else.” Moreover, the offer of proof was clearly just a summary of the proffered testimony; both sides were allowed to bring out additional details, as long as they were within the scope of the offer of proof. For example, defense counsel went on to show that the “assault” was actually an attempted murder; that it consisted of a shooting; and that defendant was hit in the face and leg. The trial court’s ruling therefore at least implied that the prosecutor was allowed to bring out the details of how the assault “resulted in the death of someone else.”

F. *Misstatement of Law in Closing Argument.*

Defendant contends that the prosecutor misstated the law in closing argument.

1. *Additional factual and procedural background.*

In her rebuttal closing argument, the prosecutor noted that the claimed knock-notice violation occurred when Officer Castenada opened the sliding glass door on the

balcony a couple of inches.<sup>4</sup> She argued, however, that compliance was excused as futile:

“[THE PROSECUTOR:] ‘[A]n officer entering a residence to serve an arrest warrant need not comply with the requirement of demanding admittance and explaining the purpose if the officer has a reasonable suspicion that knocking and announcing, under the particular circumstances, would be dangerous or futile.’

“Useless, in other words. Them announcing, after everybody knows they’re outside, the officers have been outside for 10 to 15 minutes knocking on his front door . . .

“Knock and announce is for those situations when officers walk up to somebody’s house, kick a door open, with their guns ablazing, and someone is naked or in the shower and they need to get up and get dressed. We didn’t have that here.

“[DEFENSE COUNSEL]: Objection. Misstates the law.

“THE COURT: All right. ladies and gentlemen, if you believe that counsel have misstated the law, you’re to rely on the instructions . . . .

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<sup>4</sup> Defendant states, “[T]he prosecutor *acknowledged* that a knock notice violation took place. . . .” (Italics added.) Not so. She stated, “*Defense counsel spent quite a bit of time* about how the officers did this illegal breaking. [¶] Just so we’re all clear, the knock notice violation *that we’re talking about* is when Officer Castenada checked the back slider door and cracked it open one inch to three inches. That is the violation. Nothing else is considered a violation.” (Italics added.) She evidently meant that this was the only violation that defense counsel was claiming.

“[THE PROSECUTOR]: ‘A homeowner,’ Mr. Armenta, ‘has no right to prevent officers with a warrant from entering his or her home.’ Defense counsel made a big brouhaha about how the defendant didn’t have to answer the front door. And he’s right, he didn’t. That just gives the officers the ability to break open and use force to enter the house.

“Your officers at RPD decided, instead of smashing through those front windows of the house, to go around the back door to see if they could go in an unlocked door. It’s easier. It was logical to them. That’s what they did. They have a right to do it.

“[DEFENSE COUNSEL]: Objection. Misstates the law.

“THE COURT: All right. Again, ladies and gentlemen, the law is stated in the written instructions you will receive. You must rely exclusively on the instructions of law.

“[THE PROSECUTOR]: In addition, the law tells you, ‘The refusal of entry need not be verbal.’ So at the point where they’ve been knocking and pounding at the front door, and the defendant is not responding, his lack of response for over ten minutes is, in essence, a refusal.

“[DEFENSE COUNSEL]: That is absolutely not the law.”

The trial court then held an unreported sidebar conference. Defense counsel later asserted that, during the sidebar, “the Court advised [the prosecutor] that that was not the law, and that a refusal as a matter of law can’t take place before an announcement.”

The prosecutor then resumed:

“[THE PROSECUTOR]: Here, when the officers go back to the front door and they continue to knock and the beeping happens, and the defendant responds ‘Who is in there?’ and the officers are yelling at him to ‘open the front door or we’re going to force entry,’ him not responding or not opening the front door for the period of time that he waited is a refusal.

“[DEFENSE COUNSEL]: That is not the law.

“THE COURT: Again, ladies and gentlemen, you are to rely upon the written instructions given to you.”

After the jury retired to deliberate, defense counsel argued that the prosecutor had committed misconduct in closing argument, by, among other things, saying “that the officers didn’t need to follow the letter of the statute because Mr. Armenta refused to answer the door, and if there’s a refusal, then strict compliance with the statute is forgiven.” He requested an admonition.

The trial court refused to find misconduct or to grant a mistrial.

## 2. *Analysis.*

Defendant never explains *how* the prosecutor’s quoted remarks misstated the law. He cites no relevant authority. Thus, he has forfeited this contention. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [“[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration . . . .”].)

Even if we were to review the remarks independently, we would find no misstatement of the law. ““To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.’ [Citation.]” (*People v. Gamache* (2010) 48 Cal.4th 347, 371.)

The prosecutor’s statement, “Knock and announce is for those situations when officers walk up to somebody’s house, kick a door open, with their guns ablazing, and someone is naked or in the shower and they need to get up and get dressed” must be taken in context. She was arguing that knock-notice would have been futile. She did not mean that knock-notice literally applies *only* when someone is naked or in the shower. Rather, she gave this as an *example* of a situation in which knock-notice *does* serve a purpose, and she contrasted that with this case.

Next, the prosecutor argued that the officers, rather than breaking the front door in, had the right to try to find an unlocked door. She did not argue that they have a right to open and enter through an unlocked door *without knock-notice*. We perceive nothing legally erroneous about this argument. (See *People v. Hoxter* (1999) 75 Cal.App.4th 406, 410-411 [knock-notice requirements apply to entry through unlocked door].)

Defense counsel’s major objection seems to have been that defendant did not “refuse” entry because the officers had not yet knocked and given notice. However, there was ample evidence that even after the officers *did* knock and *did* give notice of their identity and purpose, defendant still did not respond. This constituted a refusal. (See

*People v. Hoag* (2000) 83 Cal.App.4th 1198, 1207 [“unreasonable delay in responding to a knock and announce is tantamount to a refused admittance”].)

Defense counsel also claimed that the prosecutor had argued that, once there is a refusal, strict compliance with the knock-notice requirement is excused. We find nothing in her argument so stating. In any event, strict compliance is never required; all that is required — refusal or no — is substantial compliance. (*People v. Miller* (1999) 69 Cal.App.4th 190, 201.)

Finally, every time defense counsel objected, the trial court admonished the jury to rely solely on the jury instructions in determining what the law was. We presume that the jury obeyed this admonition. Thus, defendant cannot show prejudice. (*People v. Bennett, supra*, 45 Cal.4th at p. 595.)

G. *Misstatement of Fact in Closing Argument.*

Defendant contends that the prosecutor made a false statement of fact in closing argument.

1. *Additional factual and procedural background.*

In closing argument, the prosecutor stated:

“In order for you to believe the defense, . . . [¶] . . . [¶] . . . you’d have to believe that the defendant is being honest when he’s telling you he thought it was the East Side Rivas, which he never mentioned to [Investigator] Flores for three and a half hours. He never mentioned the words ‘East Side Rivas’ until this trial. He never told that to anyone.” Defense counsel did not object.

During its deliberations, however, the jury requested “Joe Armenta’s interview with Le[C]lair.”

At that point, defense counsel asserted that Investigator LeClair’s interview with defendant would show that the prosecutor’s statement quoted above was “a lie.” He noted that (other than a very short passage) the interview had been not been introduced into evidence. In it, however, defendant had said that he thought the people knocking on his door were from “East Side” and had come to kill him. Defense counsel asked that these portions of the interview be admitted. He also asked that the jury be admonished. The trial court refused both requests.

## 2. *Analysis.*

Defense counsel forfeited the claimed misconduct by failing to object and request an admonition when the misconduct occurred. (*People v. Whalen, supra*, 56 Cal.4th at p. 52.) Defendant argues that, when defense counsel did object, it was not too late to cure the misconduct with an admonition. It is generally recognized, however, that objections made after the jury has already begun deliberating come too late. (*People v. Jenkins* (1974) 40 Cal.App.3d 1054, 1057.)

In any event, the claimed misconduct was not prejudicial. Defendant never mentioned East Side Riva to any of the officers in the house or to Investigator Flores. The prosecutor could and did argue that this showed that defendant was lying. The additional claim that defendant never mentioned East Side Riva “to anyone” “until this trial” was technically false in light of Investigator LeClair’s interview with defendant;

however, it correctly described the state of the record, because Investigator LeClair's interview was not in evidence. Moreover, it was merely an overstatement of a point that the prosecutor was allowed to make more narrowly. It is simply inconceivable that the claimed misconduct affected the verdict.

### III

#### MOTION FOR NEW TRIAL

Defendant filed a motion for new trial, based on most of the same asserted instances of prosecutorial misconduct as he is raising in this appeal.

Defendant discusses the motion in his opening brief. However, he does not appear to contend that it adds anything to his underlying misconduct claims. For example, he does not contend that, if defense counsel failed to preserve a given claim of misconduct, that claim could still be grounds for a new trial. It could not. (*People v. Hinton* (2006) 37 Cal.4th 839, 869.)

In part II, *ante*, we rejected defendant's claims of misconduct. For the same reasons, we conclude that the trial court properly denied defendant's motion for new trial.

### IV

#### FAILURE TO EXCLUDE EVIDENCE THAT DEFENDANT SHOT AN INNOCENT BYSTANDER

In part II.E, *ante*, we discussed defendant's contention that the prosecutor violated an in limine ruling excluding evidence that defendant shot and killed an innocent

bystander; we held that the trial court's in limine ruling was unclear and could have been understood as not excluding this evidence.

Defendant also argues, alternatively, that if the trial court did not exclude this evidence, it erred. Defense counsel contributed to the problem, however, by failing to object to this evidence with sufficient specificity. (Evid. Code, § 353, subd. (a).) Initially, he objected exclusively to the fact that the person defendant shot was a four-year-old child. The trial court sustained that objection. Then he asked, “[I]s the Court going to allow the People to introduce evidence that it was Mr. Armenta’s shot that killed the individual?” He did not indicate that this was actually an objection, rather than a request for clarification, nor did he state any particular grounds for the objection.

Defense counsel further muddied the waters by making an offer of proof that included the fact that “there was an assault on Mr. Armenta that resulted in the death of someone else.” As a result, he did not make it clear to the trial court or the prosecutor that he was in any way objecting to the fact that defendant shot and killed another person.

Defendant relies on the trial court’s remarks to the effect that, even if it had understood that it was being asked to exclude evidence that defendant shot an innocent bystander, it might not have done so. It made these remarks, however, after the evidence had already come in. Moreover, it also stated, “. . . I can’t say how I would have ruled . . . .” Thus, we cannot assume that a specific objection would have been futile.

We therefore conclude that this contention has not been preserved.

V

FAILURE TO INSTRUCT ON

“HEAT OF PASSION” VOLUNTARY MANSLAUGHTER

Defendant contends that the trial court erred by failing to instruct on the lesser included offense of attempted voluntary manslaughter on a heat of passion theory.

The trial court did instruct on attempted voluntary manslaughter on an imperfect self-defense theory. (CALCRIM No. 571.) However, it was not asked to instruct, and it did not instruct, on attempted voluntary manslaughter on a heat of passion theory. (E.g., CALCRIM No. 570.)

“In criminal cases, even absent a request, a trial court must instruct on the general principles of law relevant to the issues the evidence raises. [Citation.] “That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]” [Citation.] “[T]he existence of “any evidence, no matter how weak” will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is “substantial enough to merit consideration” by the jury. [Citations.]’ [Citation.]” (*People v. Taylor* (2010) 48 Cal.4th 574, 623.)

“Voluntary manslaughter is a lesser included offense of murder. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 181.) Hence, attempted voluntary

manslaughter is a lesser included offense of attempted murder. (See, e.g., *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1304, fn. 35.)

“Voluntary manslaughter is ‘the unlawful killing of a human being, without malice’ ‘upon a sudden quarrel or heat of passion.’ [Citation.] An unlawful killing is voluntary manslaughter only ‘if the killer’s reason was actually obscured as the result of a strong passion aroused by a “provocation” sufficient to cause an “ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.”’ [Citations.]’ [Citation.] ‘The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation . . . must be affirmatively demonstrated.’ [Citation.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

We may assume, without deciding, that the trial court erred, because here the error was harmless under any standard. In addition to finding defendant guilty of attempted murder, the jury specifically found that defendant knew or should have known that each victim was a peace officer engaged in the performance of his duties. Moreover, it found defendant guilty of assault with a deadly weapon on a peace officer, as opposed to simple assault with a deadly weapon; thus, once again, it necessarily found that each victim was a peace officer engaged in the performance of his duties. Defendant’s entire provocation argument is that there was evidence that he did not know who was in his house or why they were there. In light of the jury’s findings, however, it plainly rejected this evidence.

As a matter of law, a peace officer's performance of his or her duties cannot constitute legally adequate provocation.

We also note that the jury rejected defendant's claims of self-defense and imperfect self-defense. "Once the jury rejected defendant's claims of reasonable and imperfect self-defense, there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion, and no direct testimonial evidence from defendant himself to support an inference that he *subjectively* harbored such strong passion, or acted rashly or impulsively while under its influence for reasons unrelated to his perceived need for self-defense." (*People v. Moye* (2009) 47 Cal.4th 537, 557.)

We conclude that under other, proper instructions, the jury necessarily resolved the question posed by the assertedly omitted instruction adversely to defendant. (See *People v. Castenada* (2011) 51 Cal.4th 1292, 1359-1360; see also *People v. Jones* (1997) 58 Cal.App.4th 693, 716 [Fourth Dist., Div. Two].)

## VI

### *PITCHESS*

Defendant asks us to review the trial court's in camera ruling on his *Pitchess* motion. The People do not oppose the request.

#### A. *Additional Factual and Procedural Background.*

Before trial, defendant filed a *Pitchess* motion regarding two sheriff's deputies who were not directly involved in the standoff. The Riverside County Sheriff's Department (the Department) opposed the motion.

The trial court found that defendant had shown good cause for an in camera hearing. The hearing was attended only by the Department's attorney and the Department's custodian of records. After swearing in the custodian, questioning him, and reviewing the materials he had brought, the trial court found that there were no discoverable materials.

B. *Analysis.*

Under *Pitchess*, “on a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] . . . If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], ‘the trial court should then disclose to the defendant “such information [that] is relevant to the subject matter involved in the pending litigation.”’ [Citations.]” (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

The record of the in camera hearing is sealed, and appellate counsel for the defendant as well as for the People are not allowed to read it. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330.) Thus, on request, the appellate court must independently review the sealed record. (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.)

Here, the record of the trial court's in camera examination of the officers' personnel files is adequate for our review. It demonstrates that the trial court followed

the proper procedures (see *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229) and that there were no discoverable materials. In sum, we find no error.

## VII

### CLERICAL ERROR IN THE ABSTRACT OF JUDGMENT

The abstract of judgment reflects the following fines and fees: (1) a \$5,000 restitution fine (Pen. Code, § 1202.4, subd. (b)); (2) a \$5,000 parole revocation restitution fine (Pen. Code, § 1202.45); (3) \$400 in court security fees (Pen. Code, § 1465.8, subd. (a)(1)); and (4) \$300 in criminal conviction assessments (Gov. Code, § 70373, subd. (a)).

The trial court, in its oral pronouncement of judgment, did not expressly impose any of these fines and fees.

Defendant does not appear to challenge either the court security fees or the criminal conviction assessments. However, with respect to the restitution fine and the parole revocation restitution fine, he contends that the abstract of judgment is erroneous because the trial court's pronouncement of judgment is controlling, and the prosecution forfeited these fines by failing to request them in the trial court.

The People concede the point. We agree. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [prosecution's failure to object to trial court's omission to impose restitution fines bars prosecution from seeking fines on appeal]; *People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388 [oral pronouncement of judgment not imposing fines controls over conflicting minute order and abstract].) In our disposition, we will direct the trial court clerk to correct the abstract.

VIII

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment that does not include either a restitution fine or a parole revocation restitution fine and to forward a certified copy of the amended abstract to the Director of the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

RICHLI  
J.

We concur:

HOLLENHORST  
Acting P. J.

KING  
J.