Filed 3/13/19 P. v. Romero CA5
(unmodified opinion attached)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO MARTINEZ ROMERO, Defendant and Appellant.	F074471 (Super. Ct. No. BF157418A) **ORDER MODIFYING OPINION AND DENYING REHEARING** [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on February 26, 2019, be modified in the following particulars:

1. On page 2, the two paragraphs under the heading "**INTRODUCTION**," are deleted and the following two paragraphs are inserted in their place:

> A jury convicted Fernando Martinez Romero (defendant) of first degree murder (Pen. Code, § 187, subd. (a)) and found true allegations that defendant personally used a firearm (*id*., § 12022.5, subd. (a)) and personally discharged a firearm causing death (*id*., § 12022.53, subd. (d)) when he shot and killed a man during a gathering of friends and family. On appeal, defendant contends his conviction should be reversed because the trial court erred and violated his rights to due process and a fair trial when it excluded certain impeachment evidence and sanitized a prosecution witness's prior felony convictions. He also argues his counsel provided ineffective assistance because he did not request an instruction on voluntary intoxication in violation of defendant's rights to due process, to a fair trial, and to present a defense. He asserts the cumulative effect of these errors

resulted in a violation of his right to due process. Finally, in supplemental briefing, defendant argues remand is required in light of Senate Bill No. 620 (Stats. 2017, ch. 682, §§ 1, 2) to permit the trial court to exercise its discretion and consider whether to strike the firearm enhancements. The People concede remand is appropriate.

Accordingly, we vacate defendant's sentence and remand for resentencing in light of Senate Bill No. 620. In all other respects, we affirm the judgment.

2. On page 14, following the paragraph that reads "We reject defendant's third contention." and before the heading "**DISPOSITION**," insert the following subheading and paragraphs:

IV. Senate Bill No. 620

Defendant's sentence was enhanced by allegations that defendant personally used a firearm (Pen. Code, § 12022.5, subd. (a)) and personally discharged a firearm causing death (*id*., § 12022.53, subd. (d)). The court stayed the additional 10-year sentence for the Penal Code section 12022.5, subdivision (a) enhancement.

At the time defendant was charged, convicted, and sentenced, subdivision (c) of Penal Code section 12022.5 provided:

> "Notwithstanding [Penal Code] Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

Thereafter, the Legislature enacted Senate Bill No. 620. As of January 1, 2018, subdivision (c) of Penal Code section 12022.5 reads:

> "The court may, in the interest of justice pursuant to [Penal Code] Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Similarly, at the time defendant was charged, convicted, and sentenced, subdivision (h) of Penal Code section 12022.53 provided:

> "Notwithstanding [Penal Code] Section 1385 or any other provision[s] of law, the court shall not strike an allegation

> under this section or a finding bringing a person within the provisions of this section."

Senate Bill No. 620 also amended this section providing that, as of January 1, 2018, subdivision (h) of Penal Code section 12022.53 reads:

> "The court may, in the interest of justice pursuant to [Penal Code] Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

In a supplemental brief, defendant asserts Senate Bill No. 620 applies retroactively to his case and a remand for reconsideration of sentencing is proper to permit the trial court to exercise its discretion in determining whether to strike the firearm enhancements. In its supplemental response, the Attorney General agrees remand is appropriate on this basis. We accept this concession and will remand this matter for that limited purpose.

3. At the end of the last inserted paragraph on page 14, after the sentence ending "for that limited purpose," add as footnote 2 the following footnote:

> [2] Defendant also raised this issue in a petition for rehearing. Because in its supplemental briefing the Attorney General agreed defendant is entitled to remand to permit the trial court to exercise its discretion pursuant to Senate Bill No. 620, we conclude a modification of our opinion ordering remand on this basis adequately resolves the issue without the need for rehearing.

4. On page 14, the paragraph under the heading "**DISPOSITION**," is deleted and the following paragraph is inserted in its place:

> The matter is remanded to the trial court to exercise its discretion pursuant to Senate Bill No. 620, and, if appropriate following exercise of that discretion, to resentence defendant accordingly. In all other respects, the judgment is affirmed.

This modification changes the judgment.

Appellant's petition for rehearing is denied.

_____
DETJEN, Acting P.J.

WE CONCUR:

_____
FRANSON, J.

_____
SNAUFFER, J.

Filed 2/26/19 P. v. Romero CA5 (unmodified opinion)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO MARTINEZ ROMERO, Defendant and Appellant.	F074471 (Super. Ct. No. BF157418A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted Fernando Martinez Romero (defendant) of first degree murder (Pen. Code, § 187, subd. (a)) and found true allegations that defendant personally used a firearm (*id*., § 12022.5, subd. (a)) and personally discharged a firearm causing death (*id*., § 12022.53, subd. (d)) when he shot and killed a man during a gathering of friends and family. On appeal, defendant contends his conviction should be reversed because the trial court erred and violated his rights to due process and a fair trial when it excluded certain impeachment evidence and sanitized a prosecution witness's prior felony convictions. He also argues his counsel provided ineffective assistance because he did not request an instruction on voluntary intoxication in violation of defendant's rights to due process, to a fair trial, and to present a defense. He asserts the cumulative effect of these errors resulted in a violation of his right to due process.

We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Juan Ramirez was shot and killed in his friend Jorge Romero's backyard.[1] Defendant, Jorge's nephew, was charged and convicted of first degree murder in association with the crime.

Jorge testified that on September 21, 2014, he, defendant, and several other family members were at his mother's house (defendant's grandmother) for a get-together. Ramirez and Dagoberto Amaya, Jorge's childhood friends, were also there. According to Jorge, he, Amaya, and Ramirez drank "about a six-pack" each before going to Jorge's house. Defendant arrived at Jorge's house about an hour or hour and a half after Jorge, Amaya, and Ramirez. The four of them hung out in the backyard socializing, barbequing, eating, and drinking. Defendant and Ramirez appeared to be on good terms.

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[1] Because he shares a surname with defendant, Jorge Romero will be referred to by his given name to avoid confusion.

According to Jorge, he ended the get-together because it was getting late and they had to work the next day. Jorge saw the other three men leave the backyard, then he went in the house. Approximately 15 minutes later, Jorge heard gunshots. He went into the backyard, saw Ramirez on the ground, and ran back inside and told his wife to call 911. Jorge did not see anyone else in the backyard.

Jorge's mother-in-law V.P. testified she was at Jorge's house when she heard gunshots. V.P. recalled going outside with Jorge and seeing Jorge speak to Amaya. According to V.P., Amaya seemed very calm. V.P. testified defendant was not there.

At trial, Kern County Sheriff's Deputy Hakker testified he responded to the scene between 7:00 p.m. and 7:30 p.m. on September 21, 2014, and found Ramirez lying on the grass in the backyard without a pulse. He did not find any shell casings around. There was loud music coming from the shed and there were lawn chairs in the yard. Kern County Sheriff's Detective Robins also responded to the scene. He served as the lead detective on the case. Robins testified there were "numerous beer cans around . . . Ramirez's body." Dr. Eugene Carpenter, the pathologist who conducted the autopsy of Ramirez's body, testified Ramirez died from multiple gunshot wounds. He explained the gunshot wounds were consistent with the victim being seated in a chair and the shooter standing above him.

Approximately a week after the shooting, defendant confessed to law enforcement that he shot Ramirez. The prosecution entered into evidence defendant's videotaped confession and the related transcript. Defendant told police he was there because he "killed somebody and [he had] to deal with the consequence[s] now." He admitted to shooting Ramirez three or four times in Jorge's backyard once Jorge went inside and Amaya went around the corner. According to defendant, he shot Ramirez in the chest and "knew he was gonna [*sic*] die." Defendant drew a picture of where he was standing and where Ramirez was sitting when defendant shot him. Defendant explained he shot Ramirez because Ramirez had stolen from him. He denied "taking the rap for someone

else" and stated neither Jorge, Amaya, nor his girlfriend, R.P., had anything to do with the murder. He noted he had been drinking that day, but expressly stated, "I wasn't too drunk. I knew exactly what was going on." Defendant again reiterated he was not too drunk in response to the detective's questioning:

"[DETECTIVE]:	. . . I just wanna [*sic*] make sure because what's gonna [*sic*] happen is your attorney is gonna [*sic*] tell the jury, 'My client was so intoxicated that he did not know what he was doing that day. He had – he was – he was in a different frame of mind, he was in a different state of mind, and he acted out of impulse because he was drunk.' That is what your attorney is gonna [*sic*] tell the jury. Is that the truth or were you not – you knew what you were doing?
"DEFENDANT:	I knew what I was doing.
"[DETECTIVE]:	Okay. You weren't too drunk right? Is that – is that right?
"DEFENDANT:	Yeah that's truth – it's the truth."

Defendant explained he planned out the killing. He went to his house to retrieve a gun before going to Jorge's house. He called R.P., his girlfriend, five minutes before shooting Ramirez so that she would be there to pick him up after it happened. He stated he had been planning the murder "for a while, probably like three days."

Robins also spoke with Amaya the day defendant confessed. According to Robins, Amaya reported to him that after the shooting that night, Amaya received a phone call from defendant asking if Ramirez was dead. Robins stated, at the time of trial, he had not been notified of or otherwise discovered "any sort of evidence whatsoever that anyone other than [defendant] shot Juan Ramirez."

Amaya testified he was at Jorge's house the day Ramirez was shot, but he did not witness the shooting. According to Amaya, he left the backyard while on the phone, leaving defendant and Ramirez alone. Amaya was in front of the house waiting for his

ride when he heard a popping sound as he got in the car and left. He did not learn Ramirez had been shot and killed until the following day. During Amaya's meeting with police a week after the incident, the police informed Amaya that defendant was their only suspect and that defendant had confessed to the crime.

R.P. testified she picked defendant up from Jorge's house on the date of the shooting and "he didn't really seem okay," he was "quiet" and he was "not acting himself." When they got home, defendant left and R.P. did not see him until the next day when she met him at a hotel. He told her "[t]here was an incident" and "he shot someone." R.P. reported to police "defendant told [her] he shot Ramirez because Ramirez had stolen a dog and some stereo speakers from the two of [them]"; but at trial she denied defendant made such express statements. She testified that defendant owned two or three guns when Ramirez was shot. She identified images of a large green gun safe and guns as having belonged to defendant and testified that a week after the shooting, defendant's brother retrieved the gun safe from their house and took it away. That same morning, defendant's brother told R.P. that defendant had turned himself in.

The defense presented testimony from William Moore, an independent firearm examiner who was formerly employed by the Los Angeles Police Department for 30 years. According to Moore, he reviewed the autopsy report, measured angles of projectile paths through the body, and used other evidence including evidence of bullet strikes to develop a report reconstructing the shooting incident; but he lacked the full information necessary for a full reconstruction shooting report. Based on his review, Moore concluded "the origin of the bullets that struck the decedent were from above and behind" and "none of the gunshot wounds described are consistent with the statements and re-enactments of [defendant]." According to Moore, defendant was "telling a [made-up] story. It's not the truth."

The jury convicted defendant of first degree murder (Pen. Code, § 187, subd. (a)) and found true allegations that defendant personally used a firearm (*id*., § 12022.5,

subd. (a)) and personally discharged a firearm causing death (*id*., § 12022.53, subd. (d)). The court sentenced defendant to 25 years to life for first degree murder, enhanced by 25 years to life for the personal discharge of a firearm causing death allegation, for a total term of 25 years to life plus 25 years to life. It stayed a 10-year sentence for the Penal Code section 12022.5, subdivision (a) enhancement.

DISCUSSION

I. Exclusion and sanitization of impeachment evidence

Defendant first contends the trial court erred by excluding some of Amaya's prior convictions and sanitizing certain convictions it held admissible.

A. Relevant Factual Background

Before trial, defendant made a motion in limine to impeach prosecution witness Amaya with his prior convictions. The court held Amaya's 2000 felony convictions and a 2003 misdemeanor conviction for assault with a deadly weapon would be excluded as too remote. It held admissible Amaya's 2004 conviction for spousal abuse, a 2007 conviction for possession of a firearm, a 2007 felony conviction for assault with a deadly weapon on a peace officer, and a 2010 conviction for possession for sale of marijuana. It also held that the 2007 assault with a deadly weapon conviction and the 2007 firearm possession conviction should be sanitized as crimes of moral turpitude to avoid confusion of the issues with the facts of the instant case since it related to "gun play in the backyard."

In accordance with the trial court's rulings, during the prosecutor's direct examination of Amaya, the following exchange took place:

> "[Prosecutor:] Q. . . . [¶] Were you convicted of spousal abuse back in 2004?
>
> "[Amaya:] A. Yeah.
>
> "[Prosecutor:] Q. And were you convicted of two other crimes in 2007?

"[Amaya:] A. Yes, ma'am.

"[Prosecutor:] Q. And then lastly in 2010, were you convicted of selling marijuana or possessing marijuana for sales?

"[Amaya:] A. Yes, ma'am."

During cross-examination, defense counsel further clarified:

"[Defense Counsel:] Q. Now, [the prosecutor] asked you about some of your past. I wanted to clarify a couple of things. [¶] In 2004, in Kern County, the spousal abuse you were convicted of, that was a felony offense. Is that correct?

"[Amaya:] A. Correct.

"[Defense Counsel:] Q. And then in 2007, you were convicted of another felony offense involving moral turpitude. Is that correct?

"[Amaya:] A. I don't know what that means.

"[Defense Counsel:] Q. You were convicted of another felony offense in 2007 in Kern County, correct?

"[Amaya:] A. Yeah.

"[Defense Counsel:] Q. In fact, you were convicted of two felony offenses in Kern County in 2007. Is that correct?

"[Amaya:] A. Yes.

"[Defense Counsel:] Q. And then again in 2010, you were convicted of, basically, marijuana sales. That was also a felony. Is that correct?

"[Amaya:] A. Yes."

B. Standard of Review and Applicable Law

We review for an abuse of discretion a trial court's decision to admit or exclude evidence of a witness's prior offenses for impeachment. (*People v. Clark* (2011) 52 Cal.4th 856, 932.) " '[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in

individual cases is broad.' [Citations.]" (*Id.* at p. 931.) A trial court considers various factors in evaluating the admissibility of a witness's previous conviction. (See *ibid.*; *People v. Burns* (1987) 189 Cal.App.3d 734, 737-738.) "When the witness subject to impeachment is not the defendant, those factors prominently include whether the conviction (1) reflects on honesty and (2) is near in time." (*People v. Clair* (1992) 2 Cal.4th 629, 654.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion." (*Clark*, *supra*, 52 Cal.4th at p. 932.)

A criminal defendant may state a violation of the confrontation clause by showing he was prohibited from engaging in otherwise appropriate cross-examination. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) However, not every restriction on a defendant's desired method of cross-examination constitutes a constitutional violation. (*People v. Hamilton* (2009) 45 Cal.4th 863, 943.) Unless the defendant can show that the prohibited cross-examination would have produced a significantly different impression of the witness's credibility, the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1051.)

C. Analysis

Defendant contends the court erred by excluding three of Amaya's convictions that occurred before 2004—two for statutory rape and one for assault with a deadly weapon—as remote in time. He argues such evidence should have been admissible because Amaya did not lead a legally blameless life thereafter and the convictions established a pattern of criminal activity relevant to his credibility. He also asserts the trial court abused its discretion in sanitizing two of Amaya's prior convictions that were admitted. He contends the exclusion and sanitization of these convictions violated his right to confrontation.

The remoteness of prior convictions is a valid factor for the trial court to evaluate in determining whether to prohibit use of a prior felony conviction for impeachment. (*People v. Clair*, *supra*, 2 Cal.4th at p. 655.) The court is within its discretion to exclude evidence of prior convictions even if such evidence is relevant if the court concludes its potential for prejudice outweighs its probative value. (See *ibid*.)

We cannot conclude the trial court abused its broad discretion in excluding evidence of Amaya's convictions that were over 10 years old. Here, after considering Evidence Code section 352, the trial court denied defendant's request for admission of evidence of Amaya's pre-2004 convictions. Given the remoteness of the pre-2004 offenses and the admission of Amaya's other convictions, we do not conclude the trial court's decision to exclude the pre-2004 offenses, even in light of Amaya's subsequent convictions, "exceed[ed] the bounds of reason." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65; see *People v. Clair*, *supra*, 2 Cal.4th at p. 655 ["It was altogether reasonable for the court to conclude that the conviction was 'highly prejudicial' and only 'marginally relevant' 'because of the remoteness of time.' Surely, another court might have concluded otherwise. That fact, however, reveals nothing more than that a reasonable difference of opinion was possible. Certainly, it does not establish that the court here 'exceed[ed] the bounds of reason . . . .' "]; *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1554 [trial court acted within its discretion in excluding victim's 11-year-old murder adjudication on the grounds of remoteness concluding trial court "establishing 10 years as the presumptive cut-off date for prior convictions *is* an exercise of discretion"]; *People v. Burns*, *supra*, 189 Cal.App.3d at p. 738 ["[t]here is no consensus among courts as to how remote a conviction must be before it is too remote"].)

Similarly, we cannot conclude the trial court erred in sanitizing two of Amaya's convictions. The trial court was entitled to exercise its discretion and "sanitize" the prior convictions, i.e., allow impeachment with felonies involving moral turpitude without allowing the jury to know the specific crimes resulting in the convictions, where the

nature of the unsanitized prior convictions would be more prejudicial than probative of the witness's credibility. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 177-178.) And we cannot conclude it abused its broad discretion in sanitizing such convictions after concluding the underlying facts of those convictions could be confusing to a jury given the involvement of a firearm in those offenses and in the instant case. (See *id.* at p. 178 [concluding "[b]ecause of the similarity of the prior to one of the charged crimes," court did not abuse its discretion in sanitizing defendant's prior conviction "by allowing reference to the conviction only as a prior felony conviction"]; *People v. Massey* (1987) 192 Cal.App.3d 819, 825 [court did not abuse discretion in sanitizing defendant's prior convictions instead of "risking the prejudice inherent in being similar crimes to those charged"].)

Even assuming, arguendo, the trial court abused its discretion in excluding Amaya's pre-2004 convictions or sanitizing two of his admitted convictions, we cannot conclude the exclusion of such evidence prejudiced defendant or resulted in a violation of his right to confrontation. Here, Amaya was impeached with multiple crimes of moral turpitude—one felony conviction for spousal abuse in 2004, two other unspecified felony convictions from 2007, and one felony conviction for selling or possessing marijuana for sale in 2010. The defense further challenged Amaya's credibility by pointing out inconsistencies between his testimony at trial, his statement to police, and the other evidence presented at trial. Thus, the jury was well aware Amaya had numerous prior convictions involving moral turpitude and the procedure did not result in Amaya being clothed with a false aura of veracity such that admission of such evidence would have produced a significantly different impression of Amaya's credibility. (See *People v. Chavez* (2000) 84 Cal.App.4th 25, 28; *People v. Mendoza* (2000) 78 Cal.App.4th 918, 927.) Moreover, the evidence against defendant was strong. The jury had before it defendant's recorded confession as well as evidence that corroborated various facts he offered in his statement to law enforcement. Given this strong evidence inculpating

defendant, defense counsel's other efforts to impeach Amaya, and the admission of other evidence of Amaya's history of criminal activity, we cannot conclude there was a reasonable probability the result of the trial would have been different if the jury had been presented with Amaya's pre-2004 convictions.

We reject defendant's first contention.

II. Ineffective assistance of counsel

In his second issue defendant contends his counsel was ineffective in failing to pursue the defense of voluntary intoxication.

A. Standard of Review and Applicable Law

A defendant claiming ineffective assistance of counsel must satisfy *Strickland*'s two-part test requiring a showing of counsel's deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) As to deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" measured against "prevailing professional norms." (*Id.* at p. 688.)

In evaluating trial counsel's actions, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland, supra,* 466 U.S. at p. 689; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.) Thus, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy under the circumstances. (*Strickland, supra,* 466 U.S. at p. 689; *People v. Dennis, supra,* 17 Cal.4th at p. 541.) "The constitutional standard of performance by counsel is 'reasonableness,' viewed from counsel's perspective at the time of his challenged act or omission. [Citations.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1243-1244, superceded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) The prejudice prong requires a defendant to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra,* 466 U.S. at p. 694.)

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*)

B. Analysis

Defendant argues his counsel was ineffective because he failed to request a jury instruction on voluntary intoxication in violation of defendant's right to due process, right to present a defense, and right to a fair trial. Defendant contends the evidence showed he had been drinking the entire day prior to the shooting. Specifically, the officers testified there was a pile of beer cans on the ground at the crime scene; Jorge, V.P. and Amaya all testified the group, including defendant, had been drinking since that morning; R.P. testified defendant was intoxicated when she picked him up from Jorge's house; and finally, in his statement to police, defendant stated he had been drinking all day.

" 'Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." ' " (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

The record before us does not reflect why defense counsel did not request a voluntary intoxication jury instruction. Defense counsel was never asked to explain why he did not request such an instruction, and this is not a situation where "there simply can be no satisfactory explanation." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) Rather, defendant's theory of the case at trial was that he did not commit the murder; not that he was too intoxicated to form the requisite intent to commit it. Defense counsel argued parts of defendant's confession were inconsistent with the evidence, suggesting he falsely confessed and that Amaya or someone else shot Ramirez. The defense also relied on Moore's testimony to further undermine defendant's confession and the corroborating evidence. Thus, an involuntary intoxication instruction would have been inconsistent

with the defense theory of the case that defendant did not kill Ramirez. (See *People v. Olivas* (2016) 248 Cal.App.4th 758, 771 [concluding trial counsel had "tactical reason for not requesting a voluntary intoxication instruction" where such an instruction would have been "wholly inconsistent with the primary defense theory" that defendant had not committed the charged offense, noting "[r]equesting an instruction on voluntary intoxication would have implied that defendant committed [the charged offense]"].)

Moreover, in defendant's statement to police which was entered into evidence, defendant expressly indicated he would not pursue a voluntary intoxication defense at trial and he stated he had been planning the killing for days. Defense counsel "reasonably could [have] decide[d] to forgo [such an] instruction for tactical reasons," concluding that, as a tactical matter, it was preferable not to call attention to defendant's alleged intoxication but rather to discredit the evidence supporting a conclusion he was the perpetrator. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 527; see *People v. Cunningham* (2001) 25 Cal.4th 926, 1007 ["counsel does not render ineffective assistance by choosing one or several theories of defense over another"].) Accordingly, we cannot conclude defendant has overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland*, *supra*, 466 U.S. at p. 689.)

We reject defendant's second contention.

III. Cumulative error

Defendant argues that the errors committed were cumulatively prejudicial and deprived him of a fair trial. We disagree.

"A [criminal] defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.) Nevertheless, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.)

In this case, there is no series of errors to cumulate. Accordingly, defendant cannot demonstrate the cumulative effect of the alleged errors resulted in prejudice. (See *In re Reno* (2012) 55 Cal.4th 428, 483 ["As noted, claims previously rejected on their substantive merits—i.e., this court found no legal error—cannot logically be used to support a cumulative error claim because we have already found there was no error to cumulate."].)

We reject defendant's third contention.

DISPOSITION

The judgment is affirmed.

_____
DETJEN, Acting P.J.

WE CONCUR:

_____
FRANSON, J.

_____
SNAUFFER, J.