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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ALAN LEHMANN,

Defendant and Appellant.

G047629

(Super. Ct. No. 11HF1177)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Richard F. Toohey, Judge. Affirmed.

Diane Nichols, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and
Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Robert Alan Lehmann shot and killed his ex-wife, Emily Ford, and Emily's father, Russell Ford.¹ Defendant claimed that he was legally unconscious at the time of the shooting because he had taken an overdose of a prescription medication without any awareness that such a high dose would result in his unconsciousness. Alternatively, defendant argued he was voluntarily intoxicated, or he had acted in the heat of passion. The jury rejected each of defendant's defenses, and convicted him of two counts of first degree murder with special circumstances. We affirm.

On appeal, defendant argues the trial court erred by misinstructing the jury regarding voluntary and involuntary intoxication and legal unconsciousness. Having reviewed all the instructions, as well as the entire record, we conclude the jury was properly instructed, and the trial court did not err.

Defendant also argues the trial court erred by admitting evidence of text messages exchanged between defendant and Emily on the day of the shootings, without proper authentication. The messages were properly authenticated.

Defendant next argues the prosecutor committed misconduct during his cross-examination of defendant and during closing and rebuttal argument. As to the claims of misconduct due to the prosecutor's allegedly argumentative, irrelevant, and speculative questions, we conclude there was no prejudicial misconduct, either when considering the questions individually or when considering them as a whole. As to the claims of misconduct during closing and rebuttal argument, we conclude the prosecutor did not misstate the law.

We also conclude defendant's trial counsel was not ineffective for failing to offer evidence that defendant believed a court hearing, which occurred earlier on the day

¹ We will refer to Emily Ford and Russell Ford by their first names to avoid confusion. We intend no disrespect.

of the shootings, was related to custody of defendant and Emily's daughter. Even if counsel's failure to offer such evidence was deficient, defendant did not suffer any prejudice.

STATEMENT OF FACTS

Background

Defendant and Emily married in 2003, and divorced in 2004. Their daughter, A., was born in 2004 with a rare genetic condition, and has special educational needs. Following their divorce, defendant and Emily shared joint custody of A. In 2009, defendant and Emily began disagreeing about A.'s education, leading to acrimonious court proceedings.

Defendant remarried, and was living in Costa Mesa with his new wife, M., M.'s daughter, C., and A.

Defendant's Use of Clonazepam

Defendant was under the care of a psychiatrist, Dr. Geoffrey Di Bella, between October 2010 and April 2011. Dr. Di Bella prescribed three medications for defendant: Vyvanse for attention deficit disorder, Effexor for depression and anxiety, and clonazepam for anxiety.

Defendant's prescribed dosage of clonazepam was one to three 0.5 milligram tablets per day. According to Dr. Di Bella, the maximum daily dosage of clonazepam that could be safely taken was about forty 0.5 milligram tablets. Dr. Di Bella testified that clonazepam begins taking effect in about 15 minutes and reaches a peak blood level in one or two hours. He described clonazepam as a sedating, calming medication; its common side effects are similar to those produced by alcohol, and include sleepiness, delayed reaction time, slurred speech, unsteady gait, and loss of motor functions. Dr. Di Bella testified that an overdose of clonazepam could cause

hallucinations, confusion, blackouts, stupor, or “sleepwalking-like effects.” When sleepwalking, the conscious centers of the mind are too sedated to register memories. A person who was sleepwalking as a side effect of a clonazepam overdose would probably appear confused and respond to verbal communication with gibberish. Clonazepam could also cause a person to become violent or aggressive; those effects could be increased if the clonazepam was ingested with alcohol. Dr. Di Bella testified he would expect to see clonazepam detected in a urine drug screening or blood screening.

Family Law Court Hearing on May 3, 2011

On May 2, 2011, defendant gave Emily’s family law attorney, Richard Sullivan, ex parte notice of a hearing the next day on a school-related issue. When Sullivan appeared in court at 8:30 a.m. on May 3, defendant could not be located. The court instructed Sullivan to call defendant and tell him to appear in court at 4:00 p.m. that afternoon. Sullivan’s office left a voicemail message on defendant’s cell phone, requiring him to appear at 4:00 p.m. for a hearing relating to a change of custody. When defendant returned home, he called his former family law attorney, Gary Gorczykca, and told Gorczykca that he was afraid he would lose custody of A. Gorczykca could not appear for defendant that afternoon, but advised him the court would not change custody at an ex parte hearing.

A hearing was conducted that afternoon. Defendant attended and claimed Sullivan never provided him with Emily’s responsive papers, and that he had no idea what the hearing was about. Sullivan testified at the trial in the criminal case that he had provided copies of Emily’s papers to defendant. Emily and Russell were present at the hearing. Defendant explained to the court why he had withdrawn A. from her school, and both defendant and Emily explained to the court their positions regarding A.’s ongoing educational needs. The court ruled in favor of Emily, and ordered that A. was to be placed back in the school she had been attending. Defendant was ordered to have A.

ready for Emily to pick up by 6:00 p.m. that evening, so Emily could reenroll her in the school the next day. Sullivan testified the court clearly explained that “50/50 custody” would then resume, and the court’s order did not change the prior custody arrangement, which would resume after A. was reenrolled in school. Defendant, however, interpreted the court’s order to mean Emily would have full physical custody of A. for the next several weeks, which left him “upset” and “devastated.”

Defendant quickly left the courtroom, visibly upset. After Sullivan, Emily, and Russell left the courtroom a few minutes later, defendant approached them. Defendant excitedly asked, “what are we going to do? What are we going to do now?” Sullivan told defendant, “just relax. . . . Emily is going to pick A[.] up at your house. Just have her ready at 6:00. She’s going to put her back in school and you’re going to resume 50/50 custody.” Defendant said he wanted Sullivan to be present at the exchange that evening, but Sullivan responded he did not attend child custody exchanges. Defendant did not appear to be under the influence of any substance during or after the hearing; Sullivan thought defendant was very articulate.

Sara Perez, M.’s niece who regularly babysat A. and C., arrived at defendant’s house about 5:00 p.m., but no one was home. More than 10 minutes later, defendant drove up, “pretty fast down a residential street.” Defendant was speaking clearly, but fast, and did not appear to be drunk. He “seemed angry but he was trying to hide it from [Perez] and keep calm.” Defendant told Perez to call M., ask her where she and the girls were, and join them. Perez drove to a yogurt shop, where she met M., C., and A.

Defendant and Emily exchanged the following text messages on May 3, 2011:

9:23 a.m. from Emily: “Where are you?”

11:30 a.m. from defendant: “Omw home”

11:31 a.m. from Emily: “From where?”

12:00 p.m. from defendant: "Court"

5:11 p.m. from Emily: "Would you like me to pick up A[.]at 5:30 instead so we're not late for parenting class?"

5:32 p.m. from defendant: "You said you were coming right over"

5:38 p.m. from defendant: "ETA?"

5:45 p.m. from defendant: "'Isent [sic] C[.] ans [sic]' . . . 'a[.] away so they didn't have to see it.'"

5:50 p.m. from Emily: "Omw."

The Shootings

About 5:50 p.m. on May 3, 2011, gunshots were heard coming from defendant's home. James Gosliga, who was helping someone move into a house across the street, saw defendant exit his home while loading a gun. Defendant took several steps down the front walkway, pointed the gun toward the ground, and fired four to six shots. Defendant took a couple more steps, again pointed the gun toward the ground, and fired five or six more shots. (Gosliga's view of what was on the ground was blocked by a small hedge.) Gosliga described defendant's demeanor as "reasonably deliberate and calm and angry all at the same time." Defendant did not stagger or fall down, and loaded the gun deliberately. As Gosliga approached, he could see the bodies of Emily and Russell on the walkway; he ran to a neighbor's house and told the resident to call 911.

When Gosliga went back outside, he saw defendant walking across his lawn and heard him speaking to a 911 operator on his cell phone. Defendant did not have the gun in his hand at that point. Gosliga noticed defendant was "a bit groggy," shaky, and wobbly, and collapsed in the driveway. Gosliga thought defendant might have been drunk or high. Gosliga saw a neighbor guarding defendant's gun, which was inside the front door of defendant's house; Gosliga also saw two empty beer bottles and a

prescription pill bottle on a small table to the right of the front door. Defendant was upset and crying.

Another neighbor, Frank Bettner, ran out of his house when he heard gunshots, and saw defendant walking across his lawn. Bettner asked defendant if he had shot someone; defendant said he did because his wife was going to take his child. Defendant complied with Bettner's request to sit down, although he appeared "[s]paced out, lost and in a haze." Bettner found defendant's gun just inside the front door of the house; Bettner also saw a prescription pill bottle on a table inside the front door.

After shooting Emily and Russell, defendant called 911; an audio recording of the call was played at trial. Defendant told the 911 operator he shot his ex-wife and her father when they came to take his daughter, they were dead, and the judge had taken A. away from him. Defendant also said the gun was inside the house. Defendant told the operator he had taken an overdose of something and he was going to lie down. Defendant then handed the phone to a neighbor, Robert Richter, who had come on the scene. Richter told the operator that defendant appeared to have passed out, was lying flat on his back on the driveway and not moving, and had overdosed on something. Richter told the operator he had heard between 10 and 15 gunshots.

A paramedic who attended to defendant at the scene testified defendant was "alert and oriented and answering questions appropriately," but appeared to be lethargic, was answering questions slower than would be expected, and had "heavy eyes." Defendant told the paramedic he had taken "handfuls of clonazepam." Defendant was oriented and responsive to specific questions. He never lost consciousness and did not require additional medical intervention from the paramedics.

At the emergency room, defendant was evaluated for a possible overdose. Dr. William Cloud, the emergency room physician, described defendant as "a little slow to respond" and "act[ing] mildly sedated." Defendant's urine tested positive for amphetamines, but negative for benzodiazepines such as clonazepam. Dr. Cloud testified

that clonazepam is a sedative that tends to cause drowsiness, and, in higher dosages, might cause weakness, imbalance, and sedation to the point of being unable to be aroused or to have breathing difficulties. Dr. Cloud also testified clonazepam begins to have an effect within 30 minutes, and peaks, in terms of its effect, about three hours after ingestion.

The Investigation

A police officer responding to the 911 calls found defendant's semiautomatic pistol just inside the front door of the house. An empty magazine was wrapped in a sweatshirt with the pistol. (Bettner had removed a magazine from the pistol and wrapped them in what he described as a sweater or blanket to make sure no one else was hurt.) Another empty magazine was found in an open drawer in the table by the front door. Each magazine could hold more than 10 rounds.

The police officer testified that to prepare to fire the semiautomatic pistol found at the scene, a person would have to load individual rounds into the magazine, insert the magazine in the magazine well, rack the slide to chamber a bullet, and release the thumb safety. After the magazine was emptied, the slide would be in a locked-back position. To reload the pistol, an individual would need to push a button on the left side of the trigger guard to remove the empty magazine, load a new magazine, and release the slide forward by either pulling the slide back and letting it spring forward or pushing down a slide release lever on the other side of the gun. Seventeen shell casings were found in the front yard of defendant's house.

A gun safe was found on the kitchen island. A box of hollow point ammunition, with 20 rounds missing, was next to the gun safe.² A trigger lock was also

² Full metal jacket target rounds were found elsewhere in the house. Hollow point ammunition is designed to expand when it hits soft matter, such as body tissue, creating a

found on the kitchen island. Before using the pistol, the trigger lock would have to be unlocked, and its two components removed. An open safe was found on the bed in the master bedroom; an open box for the gun safe was also on the bed. To retrieve the gun from the gun safe would require someone to place his or her hand in the imprint of a hand on top of the safe and activate a button inside the imprint of each finger; the police officer testified it is easier to use this type of unlocking mechanism than a key or combination lock in a home defense situation.

An autopsy showed that Emily had been shot seven times. Six of the shots—to her head, chest, and back—would have been independently lethal. The wound to her chest was caused by a shot from close range—six inches or less—while the other shots were from at least two feet away. Russell had suffered nine gunshot wounds; two wounds to his chest and head would have been independently lethal.

Defense Expert's Testimony Regarding Clonazepam

Dr. Rodi Predescu, a forensic toxicologist, testified as an expert witness on behalf of defendant. Dr. Predescu testified that clonazepam is a central nervous system depressant prescribed for anxiety or panic disorders. The therapeutic dose of clonazepam is 0.5 milligrams up to three times per day, for a total of 1.5 milligrams. Four milligrams would be considered an overdose for someone with anxiety disorders, although doses of up to 20 milligrams per day might be prescribed for someone with epilepsy. A therapeutic dose of clonazepam might cause drowsiness, confusion, irritability, lightheadedness, temporary impairment, and blurred vision. A high dose or overdose of clonazepam might cause the patient to exhibit anxiety, nervousness, irritability, confusion, depression, hallucination, psychosis, hostility, aggressive behavior with thoughts of hurting someone or committing suicide, and memory impairment. The side

large wound cavity and transferring all of its energy within the victim's body. Full metal jacket bullets, by contrast, do not expand and tend to go through the target.

effects of such a high dose might cause someone to commit an act he or she otherwise would not choose to do because he or she cannot control his or her urges or feelings. A person experiencing the side effects of an overdose of clonazepam could be aware of his or her actions, and be aware he or she was wrong, but still be unable to overcome the urge to act.

Dr. Predescu also testified that clonazepam is a slow-acting drug, which takes effect in one to two hours and reaches a peak level in the blood in four hours. If someone took repeated doses over the course of a day, a cumulative overdose could occur. Routine drug screening tests will not detect clonazepam in the blood or urine because a specific test is required to do so.

Defendant's Testimony

Defendant testified in his own behalf. Defendant was directed to take one to three clonazepam tablets daily, as needed. Usually, he took one or two tablets per day, and additional tablets on days when he had to attend a court hearing. The clonazepam helped calm him down. The only side effect he experienced when taking clonazepam was sleepiness. On May 3, 2011, defendant took between 22 and 26 clonazepam tablets over the course of the day.

Defendant testified that on his way home from the court hearing, he had called M. to tell her about the hearing, said he wanted to be alone, and asked her to take C. and A. somewhere to give him time to calm down. Defendant could not remember exchanging any text messages with Emily that afternoon. Defendant explained he calmly told Perez to meet M. and the girls so Perez would not be upset. Defendant could not remember anything after he opened a second bottle of beer while trying to figure out how to explain to his family what had happened at the court hearing, until he was being transported to jail two days later.

PROCEDURAL HISTORY

Defendant was charged in an information with the murder of Emily; the information alleged the murder was committed with the special circumstances of lying in wait and multiple murders. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(3) & (15).) Defendant was also charged with the murder of Russell, with the special circumstance of multiple murders. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(3).) The information alleged, with respect to both counts, that defendant personally discharged a firearm causing death. (Pen. Code, § 12022.53, subd. (d).)

A jury convicted defendant of both counts, found all special circumstance allegations to be true, and found the firearm allegations to be true. The trial court sentenced defendant to two terms of life without the possibility of parole, plus two consecutive terms of 25 years to life. Defendant filed a timely notice of appeal.

DISCUSSION

I.

INSTRUCTIONAL ERROR

Defendant argues that the jury was incorrectly instructed regarding unconsciousness, voluntary intoxication, and involuntary intoxication. Defendant also argues the trial court erred by refusing two pinpoint instructions he requested regarding voluntary and involuntary intoxication. We review these arguments de novo to determine whether the jury was fully and fairly instructed on the applicable law. (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1311.) We consider the instructions as a whole to determine whether there was a reasonable likelihood that the jury misunderstood the instructions as defendant claims. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

Defendant claimed he was not guilty of all charges because he was unconscious as a result of involuntary intoxication, or his voluntary intoxication caused

unconsciousness or negated express malice, meaning he could be guilty only of second degree murder or involuntary manslaughter. “Persons who committed the act charged without being conscious thereof” are not capable of committing a crime. (Pen. Code, § 26, par. Four.) If unconsciousness is caused by involuntary intoxication, it is a complete defense to any criminal charge. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417; *People v. Mathson*, *supra*, 210 Cal.App.4th at p. 1313.) “To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist ‘where the subject physically acts but is not, at the time, conscious of action.’” (*People v. Halvorsen*, *supra*, at p. 417.) The prosecution bears the burden of disproving unconsciousness once a defendant has raised it as a defense. (*People v. Babbitt* (1988) 45 Cal.3d 660, 693.)

Voluntary intoxication, as opposed to involuntary intoxication, is only a partial defense; it may negate express malice or a required specific intent, but it cannot completely relieve a defendant of criminal liability. (Pen. Code, § 29.4; *People v. Boyer* (2006) 38 Cal.4th 412, 469; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298.)³ “‘When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter.’” (*People v. Abilez* (2007) 41 Cal.4th 472, 516.)

³ Penal Code section 29.4 provides: “(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. [¶] (c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.”

“Involuntary intoxication can be caused by the voluntary ingestion of prescription medication if the person did not know or have reason to anticipate the drug’s intoxicating effects.” (*People v. Mathson, supra*, 210 Cal.App.4th at p. 1313.) Intoxication under that circumstance is involuntary because of “the innocent mistake of fact by the one made drunk, and an actual ignorance of the intoxicating character of the liquor or drug has the same effect whether the mistake is induced by the artifice of another or not.” (*People v. Chaffey* (1994) 25 Cal.App.4th 852, 856.) Whether a defendant knew or had reason to know of a prescription medication’s intoxicating effects is a question for the jury. (*People v. Baker* (1954) 42 Cal.2d 550, 575; *People v. Chaffey, supra*, at pp. 856-857.) The question before us is whether the trial court was required to modify the pattern instructions or instruct the jury with additional pinpoint instructions to make this principle of law clear.⁴

Defendant argues the trial court erred by failing to instruct the jury with a modified version of CALCRIM No. 3427. As requested by defendant, CALCRIM No. 3427 would have read as follows (with the additional proposed text italicized): “Consider any evidence that the defendant was involuntarily intoxicated in deciding whether the defendant had the required (intent/ [or] mental state) when . . . he acted. [¶] A person is involuntarily intoxicated if he unknowingly ingested some intoxicating liquor, drug, or other substance, or if his intoxication is caused by the force, duress, fraud, or trickery of someone else, for whatever purpose[, without any fault on the part of the intoxicated person]. [¶] *A person can be involuntarily intoxicated if he or she knowingly*

⁴ As is relevant to this argument, the jury was instructed regarding homicide (CALCRIM No. 500), first or second degree murder with malice aforethought (CALCRIM No. 520), first degree murder (CALCRIM No. 521), provocation (CALCRIM No. 522), voluntary manslaughter based on heat of passion (CALCRIM No. 570), the effect of voluntary intoxication on homicide crimes (CALCRIM No. 625), the effect of voluntary intoxication causing unconsciousness on homicide crimes (CALCRIM No. 626), unconsciousness (CALCRIM No. 3425), and involuntary intoxication (CALCRIM No. 3427).

ingested a prescription medication but did not know or have reason to anticipate its intoxicating effects. [¶] The fact that the defendant knew that prescription medications would make him drowsy is insufficient to establish the defendant knew or should have known they would cause intoxication.” (Italics added.)

The trial court refused the instruction because “[i]t is problematic, definitely, in relation to the evidence that’s before this court. And, also, it’s problematic in relation to the state of the law as this instruction is submitted. . . . [¶] The second request regarding drowsiness really gets into the facts, which are not an appropriate pinpoint instruction. And there’s factually, it’s a stretch to give any instructions on involuntary intoxication in this case.”

Of the two sentences defendant requested be added to the pattern instruction, the second sentence is not supported by the law. Whether knowledge that a prescription medication might cause drowsiness was sufficient to give defendant reason to know the medication might cause intoxication, at either a therapeutic level or an overdose level, was a question for the jury. Accordingly, it would have been error for the trial court to have instructed the jury that “[t]he fact that the defendant knew that prescription medications would make him drowsy is insufficient to establish the defendant knew or should have known they would cause intoxication.”

Assuming for purposes of this opinion that CALCRIM No. 3427 is ambiguous without the first sentence of the additional language proposed by defendant, “we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.” (*People v. Smithey* (1999) 20 Cal.4th 936, 963.) In doing so, we consider the instructions “as a whole, in light of the trial record.” (*People v. Mathson, supra*, 210 Cal.App.4th at p. 1330.)

The jury was instructed as follows regarding voluntary and involuntary intoxication: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding

whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation or if the defendant acted by lying i[n] wait or if the defendant acted with malice aforethought or the defendant was unconscious when he []acted. [¶] A . . . person is voluntarily intoxicated if he becomes intoxicated by willingly using any drug, drink or other substance knowing that it could produce intoxicating effects or willingly assuming the risk of that [e]ffect. You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication may cause a person to be not conscious of his actions. [¶] A very intoxicated person may still be capable of physical movement, but may not be aware of his actions or the nature of those actions. A person's voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink or other substance knowing that it could produce intoxicating effects or willingly assuming the risk of that effect. When a person voluntarily causes his own intoxication to the point of unconsciousness the person assumes that risk that while unconscious he will commit acts inherently dangerous to human life. [¶] If someone dies as a result of the actions of the person who was unconscious due to voluntary intoxication then the killing is involuntary manslaughter. Involuntary manslaughter has been proved if you find as a result that; [¶] One, the defendant killed [with]out . . . legal justification or excuse. [¶] Two, the defendant did not act with the intent to kill. [¶] Three, the defendant did not act with a conscious disregard for human life. [¶] And four, as a result of voluntary intoxication the defendant was not conscious of his actions or the nature of those actions. [¶] . . . The People have the burden of proving beyond a reasonable doubt that the defendant was not unconscious. If the People have not met this burden you must find the defendant not guilty of murder or voluntary manslaughter. [¶] And the defendant is not guilty of an unlawful homicide if he acted while legally unconscious. Someone is legally unconscious if he is, someone is legally unconscious if he is not conscious of his actions. Someone may be unconscious . . . even though able to move. Unconsciousness may be caused by a blackout or involuntary intoxication. [¶] The People must prove

beyond a reasonable doubt that the defendant was conscious when he acted. If there is proof beyond a reasonable doubt that the defendant acted as if he were conscious you should conclude that he was conscious. If however based on all the evidence you have a reasonable doubt that he was conscious you must find him not guilty. [¶] Consider any evidence that the defendant was involuntarily intoxicated. In deciding whether the defendant had the required intent or mental state when he acted a person who's involuntarily intoxicated if he unknowingly ingested some intoxicating liquor, drug or other substance or if his intoxication [is] caused by the force, duress, fraud or trickery of someone else [for] whatever purpose without any fault on the part of the intoxicated person.”

When considered in context, immediately after the instruction on *voluntary* intoxication, the instruction on *involuntary* intoxication was not reasonably likely to mislead the jury.

We also consider the closing arguments of counsel in determining whether the jury might have misunderstood or misapplied the instructions. (*People v. Mathson, supra*, 210 Cal.App.4th at pp. 1330-1331.) Defendant's trial counsel explained the concept of involuntary intoxication to the jury as follows: “And what involuntary intoxication in terms of this case means is did Robert Lehmann consume medication? And he is not aware, not aware of the intoxicating effects. He is not warned. He didn't know. It wasn't common sense that clonazepam could cause aggression and violence, suicidal idealization in the overdose, in the overdose that he took. [¶] We talked a lot about side effects on therapeutic levels and controlled substance studies; but this is not about that. It's about a large dose of prescribed medication with unknown and unwarned of side effects. The law recognizes that in that circumstance that can be considered involuntary intoxication.” The prosecutor did not contradict or challenge this explanation in any way. Defendant's counsel's explanation and the prosecutor's lack of disagreement were sufficient to correct any misunderstanding the jury might have had.

The jury's guilty verdict on the first degree murder charges and its true finding on the special circumstance of lying in wait show the jury rejected the defense of voluntary intoxication causing unconsciousness. Had the jury found defendant's willing ingestion of an excessive dose of clonazepam coupled with alcohol had caused him to be unconscious, it could have found him guilty of no more than involuntary manslaughter. Given defendant's theory of why the defense of involuntary intoxication applied—that he knowingly ingested a dose of prescription medication that had unappreciated consequences, not that he unknowingly ingested an intoxicating substance—the jury could not have found in defendant's favor on an involuntary intoxication defense in any event. Because the jury rejected the contention that defendant was unconscious due to the *voluntary* ingestion of clonazepam, it could not have concluded defendant was unconscious due to the *involuntary* ingestion of that substance, based on defendant's theory of involuntary intoxication.

Given the entirety of the instructions, the trial evidence, the arguments of counsel, and the jury's verdicts, it is not reasonably likely that the jury misunderstood or misapplied the pattern instruction on involuntary manslaughter, and the trial court did not err by refusing to include the additional language defendant requested be added to CALCRIM No. 3427.

Defendant also argues the trial court erred in failing to instruct the jury with his proposed pinpoint instruction regarding voluntary and involuntary intoxication. The court refused the proffered instruction because “the issues of intoxication are adequately covered by the instruction packet that the court's given. And I would not give a reiteration of that that is requested in these instructions.”⁵ The trial court is not required

⁵ The two-page, handwritten pinpoint instruction proposed by defendant read as follows: “Intoxication may cause a person to be unconscious of his actions. A very intoxicated person may still be capable of physical movement but may not be aware of his actions or the nature of those actions. [¶] Intoxication can be either (1) voluntary or (2) involuntary. [¶] (1) A person is voluntarily intoxicated if he becomes intoxicated by

to give a pinpoint instruction that merely duplicates other instructions. (*People v. Ramirez* (2006) 39 Cal.4th 398, 470.) Defendant’s handwritten pinpoint instruction was duplicative of the instructions already being given to the jury, or of the other requested addition to CALCRIM No. 3427 that the trial court refused to give; as explained *ante*, the court did not err in refusing that addition to the pattern instruction. The court did not err in refusing defendant’s proposed pinpoint instruction on voluntary and involuntary intoxication.

ingesting a prescription medication knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] (2) A person is involuntarily intoxicated if he becomes intoxicated by ingesting a prescription medication, but did not know or have reason to anticipate its intoxicating [e]ffects. [¶] (1) When a person voluntarily causes his own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter. [¶] (1) Involuntary manslaughter has been proved if you find beyond a reasonable doubt that: [¶] 1. The defendant killed without legal justification or excuse; [¶] 2. The defendant did not act with the intent to kill[;] [¶] 3. The defendant did not act with a conscious disregard for human life[;] [¶] AND [¶] 4. As a result of voluntary intoxication, the defendant was not conscious of his actions or the nature of those actions. [¶] (2) A person is involuntarily intoxicated if he becomes intoxicated by ingesting a prescription medication but did not know or have reason to anticipate its intoxicating [e]ffects. (Intoxication produced by knowingly taking an overdose of prescribed medication could be considered either voluntary or involuntary intoxication. [*People v. Baker, supra*, (1954) 42 Cal.2d at p. 575, 268 P.2d 705] Factual consideration of whether the defendant’s taking of an excessive dose affected what he knew or had reason to know is inherent in the general factual question.) (The unexpected and unwarned adverse effect of a drug taken on doctor’s orders is involuntary; it is not a conscious effect of defendant’s will, is not resulting from defendant’s free and unrestrained choice, and is not subject to control of defendant’s will. [*People v. Hari* (2000) 218 Ill. 2d 275, 300 Ill. Dec. 91, 843 N.E. 2d 349, 359-360] [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not unconscious. If the People have not met this burden, [¶] AND [¶] (1) You find the defendant’s intoxication was voluntary, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter. [¶] OR [¶] (2) You find the defendant’s intoxication was involuntary, you must find the defendant not guilty of all charges and all less[e]r included offenses.”

Finally, defendant argues that CALCRIM No. 3425 “improperly directed a verdict, removed a factual question from the jury’s consideration, lightened the prosecution’s burden of proof, shifted the burden of proof to [defendant], and created an unconstitutional mandatory presumption for the jury.” Defendant’s argument is without merit. Defendant contends that the instruction required the jury to reject the uncontradicted testimony of defendant’s expert witness and treating psychiatrist that clonazepam might cause unconsciousness, despite the patient’s apparent ability to perform normal tasks.⁶

CALCRIM No. 3425 was read to the jury as follows: “And the defendant is not guilty of an unlawful homicide if he acted while legally unconscious. Someone is legally unconscious . . . if he is not conscious of his actions. Someone may be unconscious . . . even though able to move. Unconsciousness may be caused by a blackout or involuntary intoxication. [¶] The People must prove beyond a reasonable doubt that the defendant was conscious when he acted. If there is proof beyond a reasonable doubt that the defendant acted as if he were conscious you should conclude that he was conscious. If however based on all the evidence you have a reasonable doubt that he was conscious you must find him not guilty.”

That instruction clearly told the jury it must find defendant not guilty if, based on all the evidence, which would necessarily include the testimony of defendant’s treating psychiatrist, it had a reasonable doubt that defendant was conscious at the time he shot Emily and Russell. The instruction correctly stated the law and properly instructed the jury. The instruction did not violate defendant’s due process rights.

⁶ Contrary to the argument in defendant’s opening appellate brief, the expert witness in forensic toxicology did not testify that unconsciousness was a possible side effect of an overdose of clonazepam. Only defendant’s former treating psychiatrist, who did not testify as an expert and did not explain the basis of his testimony, testified that an overdose of clonazepam could cause sleepwalking or a blackout in which a person appears to be conscious and is able to perform tasks like a normal person, but is actually unconscious.

(*People v. Mathson, supra*, 210 Cal.App.4th at p. 1317 [the defendant’s due process rights not violated by CALCRIM No. 3425].)

II.

TEXT MESSAGES

Defendant argues the trial court erred by admitting text messages between him and Emily on the day of the murders because they were not sufficiently authenticated. We review the trial court’s order admitting the text messages for abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 128.)

A text message is a writing within the meaning of Evidence Code section 250, which may not be admitted in evidence without being authenticated. (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1027-1028.) A text message may be authenticated “by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing” (Evid. Code, § 1421), or by any other circumstantial proof of authenticity (*id.*, § 1410).

Emily’s cell phone was recovered at the scene. The cell phone was given to FBI Special Agent Stephen Crist, working through the Orange County Regional Computer Forensics Laboratory. Crist imaged the data partition on the phone, where the user data is stored. Crist then used a forensic tool to reconstruct the text messages, downloaded the data, and provided it to Detective Carlos Diaz of the Costa Mesa Police Department. The downloaded text messages showed several text messages exchanged on May 3, 2011, between Emily’s cell phone and the phone number identified as defendant’s cell phone number. The foregoing was sufficient circumstantial evidence to authenticate the text messages.

In addition, the text messages referred to information that would be unlikely to be known to someone other than defendant. Specifically, the messages

tracked defendant's known whereabouts on the day of the murders, and referred to the exchange of A. scheduled for 6:00 p.m. and to the parenting class that defendant regularly attended. The trial court did not abuse its discretion in determining the text messages were sufficiently authenticated to be admissible.

Defendant argues the trial court erred by failing to instruct the jury, sua sponte, that it should disregard the text messages if it did not find the preliminary fact of authenticity had been established. Evidence Code section 403, subdivision (c)(1) provides: "If the court admits the proffered evidence under this section, the court: [¶] (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." No sua sponte duty to instruct the jury as suggested by defendant exists (*People v. Cottone* (2013) 57 Cal.4th 269, 293-294; *People v. Lewis* (2001) 26 Cal.4th 334, 362), and defendant did not request such an instruction.

Even if the trial court erred in admitting the text messages over defendant's objections based on authenticity, we would conclude the error was harmless. We review the erroneous admission of evidence without sufficient foundation under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Lucas* (1995) 12 Cal.4th 415, 468; *People v. Percelle* (2005) 126 Cal.App.4th 164, 183; *People v. Willis* (2004) 115 Cal.App.4th 379, 387-388.)

The issues before the jury related solely to defendant's mental state at the time he shot Emily and Russell. There was ample evidence that defendant was legally conscious and the shootings were premeditated and deliberate, without the evidence of defendant's text messages to Emily. Defendant and Emily had a contentious relationship regarding A., and had had a major disagreement regarding A.'s education in the time leading up to the shootings. Defendant offered no expert evidence that a high dose or overdose of clonazepam can cause unconsciousness.

Defendant's entire defense was based on his claimed belief that he had lost custody of A., despite the testimony of Sullivan and the courtroom deputy that custody remained the same, and defendant's own testimony that Gorczyk had told him custody could not be changed at an ex parte hearing. Defendant sent M., C., A., and Perez away from the house, although the very reason Emily and Russell were coming to defendant's house was to pick up A. Defendant was able to remember personal conversations and phone calls with M. and Perez, while being unable to remember text messages to and from Emily at about the same time. Defendant testified in detail as to how much medication and alcohol he had consumed after returning home from the court hearing, but then could not recall anything about the events immediately before, during, or after the shootings. Defendant claimed that, while in a state of unconsciousness, he had opened the gun safe with a finger imprint mechanism, selected hollow point rather than full metal jacket bullets, loaded at least two magazines, twice prepared the gun to fire, shot Emily at close range, then continued to shoot Emily and Russell as they lay on the ground, placed the gun inside the house, and advised a 911 operator he was unarmed. After the shootings, defendant responded appropriately to paramedics and emergency room personnel, and clonazepam was not detected in a toxicology screening test at the hospital.

We conclude there was no reasonable probability of a more favorable outcome for defendant had the text messages been excluded.

III.

PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct during cross-examination of defendant, and closing and rebuttal argument. “‘A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.’ [Citations.] Under California law, a prosecutor who uses deceptive or reprehensible

methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair. [Citation.]” (*People v. Doolin* (2009) 45 Cal.4th 390, 444.) We review the claimed instances of misconduct to determine ““whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.”” (*People v. Friend* (2009) 47 Cal.4th 1, 29.)⁷

A.

Allegedly Argumentative, Irrelevant, and Speculative Questions

The permissible scope of cross-examination is broad. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 199.) Criminal defendants who take the stand in their own defense place their credibility in issue, and are subject to impeachment in the same manner as any other witness. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139.) At the same time, however, a criminal prosecutor is held to a higher standard of conduct than other attorneys ““because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.”” (*People v. Hill* (1998) 17 Cal.4th 800, 819-820.) Argumentative or irrelevant questions may be prosecutorial misconduct, but, if objections to the questions are sustained, prejudice generally may not be proven. (*People v. Mayfield* (1997) 14 Cal.4th 668, 755.)

We address each claimed instance of misconduct during the cross-examination of defendant in turn. In his reply brief on appeal, defendant argues that separately addressing each improper question inaccurately minimizes the prejudice that accrued to him throughout the entire trial. While considering the alleged misconduct

⁷ The Attorney General correctly notes that most, if not all, of defendant’s prosecutorial misconduct claims have been forfeited. However, because defendant argues alternatively that his trial counsel was ineffective in failing to object to or request appropriate admonishments for these instances of alleged misconduct, we must of necessity address the issues on their merits.

and prejudice in each instance cited by defendant, we also consider the cumulative effect of the alleged misconduct.

Challenge No. 1

“Q. And your daughter’s ADHD [(attention deficit hyperactivity disorder)], was she prescribed medication?

“A. She was never diagnosed with ADHD.

“Q. Never diagnosed with ADHD?

“A. Correct.

“Q. You want to look at those reports?

“A. Yes, sir.

“[Defense counsel]: Objection.

“[The prosecutor]: [¶] Q. She was diagnosed with ADHD—

“The Court: I’m going to strike the comment of the prosecutor. [¶] Let’s restate the question.”

Defendant argues that the prosecutor committed misconduct by suggesting he personally had information showing A. had been diagnosed with ADHD. Defendant also argues the question was argumentative and intended to permit the prosecutor to later argue defendant was “controlling.” On rebuttal, Emily’s mother testified A. was diagnosed with ADHD several months after the shootings, and that A.’s doctor had recommended ADHD medication before the shootings, but Emily and defendant could not agree on use of medication. We do not find the questions regarding a diagnosis of and medication for ADHD constituted misconduct. In any event, the trial court impliedly sustained defendant’s objection by ordering the prosecutor’s comment stricken from the record. We presume the jury followed the trial court’s instruction not to consider testimony that was stricken from the record, and to ignore any question to which an objection was sustained. (*People v. Letner and Tobin, supra*, 50 Cal.4th at p. 152; see CALCRIM No. 222.)

Challenge No. 2

“Q. . . . So that’s regarding the clonazepam?”

“A. No, sir.

“Q. We’re playing games, Mr. Lehmann.

“[Defense counsel]: Objection. Argumentative.

“The Court: I’m going to strike that. [¶] Counsel, let’s just ask questions.”

A sarcastic comment by a prosecutor does not necessarily constitute misconduct (*People v. Mendoza* (2007) 42 Cal.4th 686, 701), and prejudice does not occur when the court sustains an objection to such a sarcastic comment (*People v. Roldan* (2005) 35 Cal.4th 646, 721). Even if the prosecutor’s comment that defendant was “playing games” constituted misconduct, any prejudice was avoided when the trial court struck it and directed the prosecutor to proceed with the cross-examination.

Challenge No. 3

“Q. Okay. Now, with the settlement with the Newport Mesa School District, you refused to sign the documentation they asked you to sign?”

“[Defense counsel]: Objection. Vague as to time.

“The Court: Clarify that. [¶] . . . [¶]

“Q. Regarding the settlement, regarding settlement that you’re waiting for, you refused to settle with the Newport Mesa School?”

“[Defense counsel]: Vague as to ‘settlement.’

“The Court: Do you understand the question?”

“The witness: No, sir.

“The Court: Restate it, counsel. [¶] . . . [¶]

“Q. Regarding the settlement that we’ve just been talking about, the settlement with Newport Mesa?”

“A. Which settlement?

“Q. The settlement that would allow her to go to CDC [(the University of California, Irvine, Child Development Center)] in Irvine?

“A. All right.

“Q. We on the same page?

“A. I understand now.

“[Defense counsel]: Objection. Argumentative.

“The Court: Ask the question.”

As with challenge No. 2, the prosecutor’s sarcastic question, “[w]e on the same page,” does not rise to the level of misconduct.

Challenge No. 4

“Q. . . . [CDC] was willing to extend the acceptance until all the way up in July of 2011. Do you remember that?

“A. I do, sir.

“Q. So you committed the murder of your ex-wife and her father on May 3rd, right?

“[Defense counsel]: Objection. Argumentative, Your Honor.

“The Court: Sustained. Form of the question, sustained.”

The prosecutor’s question was argumentative, but did not necessarily constitute misconduct. As the court held in *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236, when considering an argumentative question by the prosecutor, “we are satisfied that under any standard of prejudice, those questions did not affect the outcome of the trial.” This is true in this case as well. The prosecutor should have used the term “shooting” instead of the term “murder” in his question, but defendant fails to establish any prejudice resulting from the reference to “murder” in this question. Further, the trial court sustained defense counsel’s objection to the prosecutor’s question; “[a] party

generally is not prejudiced by a question to which an objection has been sustained.”
(*Ibid.*; see *People v. Pinholster* (1992) 1 Cal.4th 865, 943.)

Challenge No. 5

“Q. You know what text[] messages, Mr. Lehmann, to the woman you shot and killed.

“[Defense counsel]: Objection. Argumentative.

“[The prosecutor]: Remember those?

“The Court: Form of question is argumentative. Sustained. [¶] Restate the question, counsel.”

The Attorney General contends the prosecutor’s question was not argumentative because the prosecutor was engaged in “a determined inquiry of a recalcitrant and evasive witness.” (*People v. Garland* (1963) 215 Cal.App.2d 582, 586.) We agree with the trial court, which found the question was argumentative and sustained the objection to it. But defendant has not shown he suffered any prejudice, and we cannot see how that question could have affected the outcome of the case.

Challenge No. 6

“Q. In fact, when Mr. Sullivan filed those papers, all of his papers were regarding placement in school, right?

“[Defense counsel]: Objection. Assumes facts not in evidence. Lacks foundation.

“The Court: Lay some foundation. Sustained. [¶] I’ll strike the answer and you may restate the question.”

After this exchange, defendant testified he never received or read the papers Sullivan had filed and never addressed his concerns regarding those papers with the court during the May 3, 2011 hearing. The Attorney General concedes that the prosecutor’s

question was improper, and the objection to it was properly sustained. But defendant did not suffer any prejudice from a question directed toward disproving defendant's contention that he had reasonably believed the May 3 hearing involved his loss of custody of A.

Challenge No. 7

“Q. Is Mr. Sullivan lying about that, too?”

“[Defense counsel]: Objection, Your Honor. Argumentative. Calls for speculation.

“The Court: Sustained.”

Challenge No. 11 (related to Challenge No. 7)

“Q. All right. So Mr. Sullivan would be inaccurate regarding his testimony on that point?”

“[Defense counsel]: Objection. Asked and answered, Your Honor.

“The Court: We covered that point. Sustained.”

Whether ““were they lying”” questions, such as those posed in challenge Nos. 7 and 11, constitute misconduct is determined by the context in which they are asked. (*People v. Chatman* (2006) 38 Cal.4th 344, 384.) “A defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken. . . . Any of this testimony could be relevant to the credibility of both the defendant and the other witnesses. There is no reason to categorically exclude all such questions. Were a defendant to testify on direct examination that a witness against him lied, and go on to give reasons for this deception, surely that testimony would not be excluded merely because credibility determinations

fall squarely within the jury's province. Similarly, cross-examination along this line should not be categorically prohibited. [¶] Here defendant took the stand and put his own veracity in issue. He urged that a number of witnesses should not be believed, but that he should be. The jury had to determine whose testimony to credit. It is one thing for a witness to assert that he had a better vantage point from which to observe an event, or that his memory is superior to one who was inattentive or has given inconsistent accounts. It is another thing entirely for a witness to claim that witness after opposing witness has lied. Defendant was not asked to opine on whether other witnesses should be believed. He was asked to clarify his own position and whether he had any information about whether other witnesses had a bias, interest, or motive to be untruthful. [¶] It was permissible for the prosecutor to clarify defendant's own position in this regard. It was also permissible to ask whether he knew of facts that would show a witness's testimony might be inaccurate or mistaken, or whether he knew of any bias, interest, or motive for a witness to be untruthful. The cross-examination was legitimate inquiry to clarify defendant's position. The questions sought to elicit testimony that would properly assist the trier of fact in ascertaining whom to believe." (*Id.* at pp. 382-383.)

In *People v. Hawthorne* (2009) 46 Cal.4th 67, 96-97, the prosecutor asked the defendant if the arresting officer was lying when he testified regarding facts related to the arrest. The court concluded that in context, the questions did not constitute misconduct because the defendant was a percipient witness and had personal knowledge whether the other witnesses to the events in question were testifying truthfully. (*Id.* at p. 98.) The court further concluded the "was he lying" question did not constitute misconduct because "[n]othing in the record suggests the prosecutor sought to present evidence she knew was inadmissible . . . [and] only asked the question once and did not repeatedly ask it to berate defendant or force him to call Deputy Fortier a liar in an attempt to inflame the passions of the jury." (*Ibid.*, citation omitted.) Here, too, two separate instances of asking defendant whether Sullivan was lying about what had

happened before, during, or after the court hearing on May 3, 2011, at which both defendant and Sullivan were present, did not constitute misconduct.⁸

Challenge No. 8

“Q. Are you telling this jury you don’t know what time courts close?”

“[Defense counsel]: Objection. Argumentative, Your Honor. Asked and answered.

“The Court: Sustained.”

The prosecutor’s question was argumentative, and the trial court properly sustained defense counsel’s objection. A question regarding defendant’s awareness of the court’s operating hours did not affect the outcome of the case against him.

Challenge No. 9

“Q. At what point did you call [Attorney Gorczykca] to talk about this custody thing?”

“A. I didn’t.

“[Defense counsel]: Objection. Asked and answered, Your Honor.

“The Court: The answer is in. It will remain.”

Defendant did not raise any specific argument regarding this question in his opening appellate brief. The Attorney General contends this was proper cross-examination because defendant had testified about calling Gorczykca after receiving the voicemail message from Sullivan’s office regarding the 4:00 p.m. hearing, and being told by Gorczykca that custody could not be changed at an ex parte hearing. In reply, defendant contends this argument is belied by the record, and the prosecutor was trying to

⁸ Defendant does not challenge the following question, raised in the same context as the questions regarding whether Sullivan was lying: “And Deputy Rodriguez, when he said there was no change in custody, was that also inaccurate?”

badger him. We have reviewed the record and conclude the cross-examination was proper.

Challenge Nos. 12 and 13

“Q. So if Emily is coming to pick up A[.], why would you tell M[.] to stay away?

“A. I didn’t tell her to stay away.

“[Defense counsel]: Objection. Assumes facts not in evidence.

“The Court: Overruled.

“The witness: I didn’t tell her to stay away. [¶] . . . [¶]

“Q. Didn’t you just say that you said, I need some time to cool off. Didn’t you just testify to that?

“A. That’s not the same thing.

“Q. Well, it’s the same thing to me. [¶] So why did you tell her not to come to the house to let you cool off if you knew Emily was coming to get A[.]?

“[Defense counsel]: Objection. Argumentative.

“The Court: Form of the question, sustained.”

The prosecutor’s sarcastic statement might have constituted misconduct. However, the follow-up question was not argumentative, as it merely asked defendant, using his own earlier testimony, why he had instructed his wife to keep C. and A. away when, by the terms of the family court’s order, custody of A. was to be exchanged by 6:00 p.m.

Challenge Nos. 14 and 15

“Q. And what about, she was a Brownie leader as well, isn’t this right?

“[Defense counsel]: Objection. Relevance, Your Honor.

“The Court: Overruled.

“The witness: She was a co-leader. [¶] . . . [¶]

“Q. Is there a difference between a leader and co-leader?

“A. Yes, she did it sometimes, the other woman did it other times.

“Q. She was leader in the Brownies, right? Mr. Lehmann, she was the leader of her daughter’s Brownie troop?

“A. She was co-leader with another woman, yes.

“Q. It’s important to you to designate that as a co-leader as opposed to a leader?

“[Defense counsel]: Objection. Argumentative.

“[The prosecutor]: Last question. Thank you, Your Honor. [¶] . . . [¶]

“Q. Did A[.] have a nickname for her grandfather?

“[Defense counsel]: Objection. Relevance, Your Honor.

“The Court: Sustained. [¶] . . . [¶]

“Q. Did A[.] love her mother, Mr. Lehmann?

“A. Yes.

“[Defense counsel]: Objection. Relevance.

“The Court: Answer is in.”

The Attorney General argues the prosecutor’s question that it was important to defendant to designate Emily’s role in A.’s life as less significant than defendant’s tended to show defendant’s level of animosity toward Emily, even after her death. Defendant’s animosity was a potential motive in the shootings, and the prosecutor was entitled to show defendant had a motive to kill Emily and to counter defendant’s claim he had killed Emily and Russell during a state of unconsciousness. Defendant is correct in arguing the lack of a motive is not an element of a defense based on intoxication or on lack of consciousness. However, the jury was properly instructed it could consider whether defendant did have a motive, and defendant’s motive or lack thereof was a factor

tending to indicate guilt or innocence. (*People v. Brown* (1900) 130 Cal. 591, 594-595; see CALCRIM No. 370.)

Challenge Nos. 16 and 17

“Q. Okay. Would it surprise you to learn, would you be happy to learn she’s been mainstreamed and she’s thriving?

“[Defense counsel]: Objection.

“The Court: It’s irrelevant. [¶] . . . [¶]

“Q. Mr. Lehmann, how—only answer if you can explain it to me, because you were there at your house that day. [¶] How would A[.] getting her mother killed help her prepare for school the next year?

“[Defense counsel]: Objection. Argumentative.

“The Court: Sustained.”

The trial court properly sustained the objections to the questions that were irrelevant and argumentative. These questions, however, did not prejudice defendant because they did not affect the outcome of the case.

Challenge No. 18

“Q. You weren’t sending [Perez] away because you didn’t want her to see the murder, is that right?

“[Defense counsel]: Objection.

“The Court: Overruled.

“The witness: I can’t answer that question. [¶] . . . [¶]

“Q. What do you mean you can’t answer that question, Mr. Lehmann?

“A. Can you restate it?

“Q. You bet. [¶] Did you send her away so she would not witness the murder?

“A. I can’t answer the question that the way you’re asking it.

“Q. I’m going to ask it again. [¶] Did you send Sara Perez away so she would not witness the murder?

“A. I can’t answer the question the way you’re asking.

“[The prosecutor]: Let me ask the court to direct the witness to answer the question.

“The Court: Restate the question. [¶] . . . [¶]

“Q. When you sent her away, Mr. Lehmann, at that point, isn’t it true, sir, you were already planning on killing your ex-wife Emily?

“A. No, sir.”

The prosecutor’s questions challenging defendant’s claim that defendant had told Perez to join M., C., and A. at the yogurt shop did not constitute misconduct. A prosecutor may challenge a testifying defendant’s veracity by contrasting it with other contrary evidence. (*People v. Watkins* (2012) 55 Cal.4th 999, 1031-1032 [prosecutor could challenge the defendant’s claim of remorse through cross-examination]; *People v. Mayfield, supra*, 14 Cal.4th at p. 755; *People v. Milner* (1988) 45 Cal.3d 227, 246 [where the defendant claimed to have amnesia, the prosecutor could properly cross-examine the defendant as to possible malingering].)

Challenge No. 19

“Q. Mr. Lehmann, you know that’s your phone, right?

“[Defense counsel]: Objection. Argumentative.

“The Court: Sustained. [¶] . . . [¶]

“Q. Isn’t it true, sir, that the last two shots you fired were right up against Emily’s head?

“A. I don’t know.

“[Defense counsel]: Objection. Assumes facts not in evidence. Lacks foundation.

“The Court: The answer is in.

“[The prosecutor]: I’m sorry, Your Honor.

“The Court: The answer is in. He’s answered the question.”

Although the tone of the first question regarding defendant’s cell phone was argumentative, the prosecutor was seeking relevant testimony. Defendant had testified that he recalled receiving text messages from Emily and sending messages to her earlier in the day, but he could not remember any of the messages that appeared to indicate he was waiting for Emily and Russell to arrive at his house. The prosecutor was permitted to clarify that all the messages were sent to or from defendant’s cell phone.

The prosecutor might have committed misconduct by asking defendant the question regarding the shots to Emily’s head. The forensic pathologist who conducted Emily’s autopsy had testified it was impossible to determine in what order the lethal shots had been fired, or to say exactly how close the gun was to Emily’s head when it was fired. The eyewitness to the shooting, Gosliga, testified that defendant pointed the gun toward the ground and shot, but did not testify that defendant leaned down to place the gun against the victims’ heads. Defendant argues that the prosecutor’s misconduct prejudiced him because it implied an execution-style killing, which was unsupported by the evidence. This single question, however, could not have prejudiced defendant, in light of the overwhelming evidence of his guilt. Under defendant’s theory, even if he had shot Emily and Russell execution-style, defendant was in a state of unconsciousness and his response to the prosecutor’s question was consistent with that defense.

Challenge Nos. 20 and 21

“Q. Help us out. If A[.] is not home, Mr. Lehmann, what was your hurry?

“A. I have no idea.

“[Defense counsel]: Objection. Assumes facts not in evidence.

“The Court: Can you restate the question?

“[The prosecutor]: You bet.

“The Court: I’ll strike the answer. Restate it. [¶] . . . [¶]

“Q. Mr. Lehmann, A[.] wasn’t home at 5:30, right?

“A. I don’t know.

“Q. Because you have no recollection of that?

“A. That’s correct.

“Q. Okay. Based on your review of everything you read and preparation to come in and testify, sir, you know A[.] wasn’t home at 5:30, is that right?

“A. That’s what I’ve read.

“Q. Okay. When you said a minute ago you don’t know, sir, you know your daughter wasn’t there at 5:30, right?

“[Defense counsel]: Objection. Argumentative. Asked and answered.

“The Court: Sustained. [¶] . . . [¶]

“Q. Sir, only answer if you know. [¶] Mr. Lehmann, if A[.] is not there, why were you so concerned about what time Emily got there? ‘You said you were coming right over’ and then ‘ETA?’ Can you help us out there?

“[Defense counsel]: Excuse me. Objection. Assumes facts not in evidence. Lacks foundation.

“The Court: Overruled.

“The witness: I have no idea. I have no recollection of sending that nor why I sent it. [¶] . . . [¶]

“Q. Just so we’re clear, it’s certainly not because you know you’re about to murder your ex-wife and her father, and you want to make sure she gets there before A[.] comes back?

“[Defense counsel]: Objection. Argumentative.

“The Court: Overruled.

“The witness: I have no idea. [¶] . . . [¶]

“Q. You have no idea, is that right?

“A. That’s right.

“Q. Sir, Emily Jordan, or Emily Ford, she disagreed about the placement of your daughter, isn’t that right?

“A. Yes, sir.

“Q. She do anything else to you, Mr. Lehmann, this is your last chance to tell the jury, anything else horrible, just disagree, kill your dog, anything like that?

“[Defense counsel]: Objection. Argumentative.

“The Court: Last part, sustained. [¶] . . . [¶]

“Q. Mr. Lehmann, is there anything else that she did other than [dis]agree with you that we need to know about? [¶] . . . [¶]

“[Defense counsel]: Objection. Vague.

“The Court: Why don’t you restate it one more time, counsel. [¶] . . . [¶]

“Q. Mr. Lehmann, is there anything else that Emily Ford ever did to you, other than disagree with you concerning the placement of her daughter, that we should know about?

“[Defense counsel]: Objection. Relevance. Lacks foundation. Vague.

“The Court: On the date in question?

“[The prosecutor]: Yes, Your honor.

“The Court: Let’s restate it. Narrow it to that, please. [¶] . . . [¶]

“Q. Sir, on the day that you shot your ex-wife and father-in-law, did she do anything to you on that day, sir, other than disagree with you?

“A. No, sir.”

The form of the prosecutor’s question regarding A. being home was argumentative. However, the prosecutor was entitled to seek the information sought

through the question. The key to defendant's defense was lack of consciousness at the time of the shootings. The prosecutor had the right to test defendant's claims and highlight inconsistencies in what he could or could not remember.

The prosecutor properly questioned defendant about other disagreements he might have had with Emily on the day he shot and killed her. The sarcastic tone of the question about killing defendant's dog, however, was improper, and the trial court properly sustained defense counsel's objection to it. Nothing in this series of questions would support a finding that defendant was prejudiced by the prosecutor's argumentative question.

Cumulative Effect of Argumentative Questions, or Questions Seeking Speculative or Irrelevant Answers

As explained *ante*, none of the individual questions which defendant claims constitute prosecutorial misconduct was sufficient to deny defendant his due process right to a fair trial. We therefore consider whether, in sum, the prosecutor's questions require reversal of defendant's convictions. Overall, we cannot conclude the prosecutor's questions infected the trial with such a level of unfairness that defendant was denied due process. Indeed, most of the truly objectionable questions were dealt with appropriately by the trial court when it sustained the objections, struck the questions, or directed the prosecutor to ask an appropriate question. The prosecutor's questions, while often sarcastic and challenging in tone, did not use deceptive or reprehensible methods of persuasion. On appeal, defendant has identified 20 instances of alleged misconduct, all of which arose from the cross-examination of defendant.⁹ When compared to the lengthy cross-examination of defendant, we cannot say the testy exchanges between the prosecutor and defendant created a reasonable likelihood that the jury construed the prosecutor's questions in an objectionable manner, or affected the outcome of the case.

⁹ In his reply brief, defendant withdrew the claim of misconduct No. 10.

B.

Alleged Misconduct During Closing and Rebuttal Argument

During rebuttal closing argument, the prosecutor argued:

“ . . . A person is involuntarily intoxicated if he unknowingly ingested is [sic] a dangerous drug or some other substance or if his intoxication is caused by the force, duress, fraud or trickery of someone else for whatever purpose without any fault on the part of the intoxicated person. [¶] But I want to say this before anybody thinks about coming back with a voluntary or an involuntary on this just come back with this and let him go because the effect is the same. The effect is the same for justice.

“[Defense counsel]: Objection. [¶] Improper argument, Your Honor.

“The Court: Ladies and gentlemen, as to the statements of counsel on the evidence or the law in the case the court will give you instructions at the conclusion of these rebuttal remarks. And you’re to go by the instructions that the court gives you and not what [the prosecutor] or [defense counsel] state that the law is. It’s what the court states it is.”

The prosecutor’s argument was vigorous argument of the type that has regularly been accepted by the appellate courts. (*People v. Stitely* (2005) 35 Cal.4th 514, 559-560 [the prosecutor characterized the defense counsel’s argument “as a ‘ridiculous’ attempt to allow defendant to ‘walk’ free”; this rebuttal argument “simply used colorful language to permissibly criticize counsel’s tactical approach” and did not “involve such forbidden prosecutorial tactics as falsely accusing counsel of fabricating a defense or otherwise deceiving the jury”]; *People v. Najera* (2006) 138 Cal.App.4th 212, 220 [the prosecutor argued that the jury would be giving the defendant “a break” or throwing him “a bone” by finding him guilty of voluntary manslaughter rather than murder].)

Defendant claims the prosecutor made frequent misstatements as to what is required to establish the killings occurred in the heat of passion, which would have made

the crimes of which defendant was guilty voluntary manslaughter rather than murder. To provide the necessary context, we quote not only the specific language defendant claims constituted prosecutorial misconduct, but also the surrounding arguments. The language that defendant challenges as misconduct is italicized:

“The defendant killed someone, because of a sudden quarrel or in the heat of passion[, i]f the defendant was provoked as a result of the provocation the defendant acted rationally or under the influence of intense emotion that obscured his reasoning and judgment. And the provocation would have caused a person of average disposition to act rationally without due deliberation that is from passion rather than judgment. [¶] In other words, it’s not would it make Robert Lehmann mad? It’s not what would it make the control freak that is sitting over there mad? It’s would it make a reasonable person mad? *Would it make a person of average disposition so mad that we can envision him killing somebody like walking in on your daughter getting molested, like some guy raping [your] wife and then being cocky and arrogant about it. Those are the types of things that could provoke a reasonable person into killing.* [¶] This, ladies and gentlemen, is not one of those situations. And as we go through it you listen to this evidence about family court; right? And what happened to him on that day. And he wants you to think oh, my God, it’s the worst day ever. Every day over there somebody loses custody of their kids. Every single day in that courthouse decisions are made that are far worse for the litigants than what happened to Robert Lehmann on that day. Every day. [¶] And if we start mitigating murders this horrible, this horrific event because he thinks he lost custody for four weeks there will be no more murder out of that. That courthouse might as well as have a free fire zone outside of Betty Lou Lamoreaux Justice Center. [¶] . . . [¶] The defendant is not allowed to set his own standard of conduct. You must understand whether the defendant was provoked and whether the provocation was sufficient[. I]n deciding whether the provocation was sufficient consider whether a person of average disposition and the same situation and knowing the same facts would have reacted from

passion rather than judgment. [¶] All right. [¶] Ladies and gentlemen, that is the law. Robert Lehmann doesn't get to decide to kill and get a mitigated murder. *Robert Lehmann needs to be in a situation so extreme, so profoundly devastating that an average normal person would be moved to kill.*" (Italics added.)

Defendant contends the following argument constituted prosecutorial misconduct: "What did you understand his order to mean? In other words, what was going on in your mind, Mr. Lehmann, when the judge came back with his ruling? Answer, twofold. Twofold, this is a direct quote, one is that A[.] was going to lose her spot in school. Then it hit me. It was my night of custody. And he said A[.] was going to go with her mom. And that they would deal and we would deal with this again in a few weeks. [¶] And to me that meant I wasn't going to have A[.] for at least the next few weeks which on its face, ladies and gentlemen, en mas[se], you can't get to a voluntary manslaughter if we had nothing else to consider other than that. *That's not good enough to murder people. Every one of you in the last month has had a disappointment worse than that.*" (Italics added.)

Defendant also contends the prosecutor committed misconduct by the following italicized portion of his rebuttal argument: "Voluntary manslaughter. The People must prove emotions did not affect them. Okay. Folks, that was just flat out incorrect. Again not [defense counsel] trying to mislead you; but that is not the law. Every killing involves emotions that are angering somebody. That's why people kill each other. The People must prove emotion did not play a role here. Absolutely incorrect. And I ask, please, don't be confused by that. That is not the law. The People have to prove that a reasonable person would not act rashly. [Defense counsel is] half right on that; but the rashly that the law is talking about is a reasonable person of average disposition being in a situation so extreme that we can understand why they kill somebody? [¶] *A normal average reasonable person being moved to violence. That is somebody molesting a daughter. Somebody raping someone's wife. That's the kind of*

provocation that will excuse an intentional killing. Not I thought I was losing custody for a couple of weeks. And again you can act rashly when you're upset. People can send nasty emails or say things that they don't mean. We've all done that before. [¶] But that's far short of killing another human being.” (Italics added.)

A prosecutor commits misconduct by misstating the law during argument, “particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.” (*People v. Hill, supra*, 17 Cal.4th at pp. 829-830.) In context, the prosecutor's argument did not misstate the law regarding voluntary manslaughter in the heat of passion. The prosecutor did not argue that witnessing one's child being molested or one's wife being raped is the only ground justifying a killing in the heat of passion. These were merely examples used by the prosecutor to discredit defendant's claim that his belief in the loss of legal custody of A. would have caused a reasonable person to act so rashly as to shoot two people.

IV.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel provided ineffective assistance of counsel by failing to offer evidence that defendant's belief he had lost custody of A. at the hearing on May 3, 2011 was reasonable. Defendant claims the failure to offer available evidence on this topic was prejudicial because “[a]ll of his defenses—acting rashly in the heat of passion, becoming voluntarily intoxicated with clonazepam, or becoming involuntarily intoxicated with clonazepam—hinged on the events of a stressful day during which he believed the hearing had become about a change of custody and/or his belief, however mistaken, that he had lost custody of A[.]”

As defendant explains in his opening brief, the only evidence about why he believed the May 3, 2011 hearing would involve a decision on custody of A., and why he believed after that hearing that he had lost custody of A., was his own testimony.

Defendant's trial counsel did not offer evidence that the paralegal from Sullivan's office left a message on defendant's cell phone that at 4:00 p.m. on May 3, Emily would be seeking, ex parte, an order for sole legal custody and an order giving Emily sole custody of A. to make all educational decisions for A. Additionally, defendant's trial counsel did not offer as an exhibit Sullivan's pleadings in response to defendant's ex parte order to show cause, which also indicated Emily was seeking sole legal custody of A. and sole decisionmaking authority for A.'s education.

To prevail on a claim of ineffective assistance of counsel, the defendant must prove (1) the attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) the attorney's deficient representation subjected the defendant to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Cain, supra*, 10 Cal.4th at p. 28.) Prejudice means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, at p. 694.)

We do not address whether counsel's representation was deficient because we conclude defendant suffered no prejudice. (*Strickland, supra*, 466 U.S. at p. 697 ["a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies"].)

No explanation why a defendant has become voluntarily or involuntarily intoxicated is required to establish those defenses. Having a possible justification for taking the clonazepam could not have made it more likely that the jury would have found defendant not guilty, or guilty of a lesser degree of homicide. Further, the evidence disproving defendant's claim that he acted in the heat of passion was overwhelming, both with respect to the time that passed between the events in court and the shootings, and the lack of an objectively reasonable justification. Even if the evidence had been admitted, it

showed, at most, that Emily was seeking legal, not physical, custody of A., and the sole right to make decisions regarding A.'s education.

V.

CUMULATIVE ERROR

Because there was no error, there was no cumulative error. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.)

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.