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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.

ANTHONY RAY LOPEZ,

Defendant and Appellant.

G050281

(Super. Ct. No. RIF1201101)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, W. Charles Morgan, Judge. (Retired judge of the Riverside Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Helen S. Irza, 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, Steve Oetting and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A jury found Anthony Ray Lopez guilty of first degree murder (Pen. Code, § 187, subd. (a)) of Armando Villalobos. After denying Lopez's motion for a new trial and motion to reduce the conviction to a lesser included offense, the trial court sentenced Lopez to an indeterminate term of 25 years to life in prison.

Lopez argues the evidence was insufficient for the jury to find deliberation and premeditation and, therefore, his conviction for first degree murder must be reversed or reduced to second degree murder. We conclude substantial evidence supported Lopez's conviction for first degree murder and reject Lopez's assertions of reversible prosecutorial misconduct, ineffective assistance of counsel, instructional error, error in exclusion of evidence, and cumulative error. We therefore affirm.

FACTS

I.

Prosecution Evidence

On Sunday, January 15, 2012, Lopez drove his Ford F-150 truck to the home of his friend, Christopher Isenhower, in Riverside, where they drank beer and watched part of a football game. Lopez and Isenhower then drove in Lopez's truck to a restaurant to watch the rest of the game. At the restaurant, they continued to drink.

When the football game ended, at about 11:00 a.m., Lopez and Isenhower left the restaurant and drove to a sports bar/strip club in Corona, called "Racks," where they watched more football and continued to drink heavily. Both Lopez and Isenhower were drunk when they left Racks in the late afternoon.

In the parking lot of Racks, Lopez realized he had locked his car keys in his truck. Isenhower asked Lopez about calling a family member, but Lopez "was afraid that he would probably get scolded because we were drunk at the bar." Lopez tried to punch

open a window with his fist, but was unsuccessful. He called his brother for help but received no answer. Finally, Isenhower found a brick and threw it at the rear passenger window, causing the window to shatter.

Lopez got into the driver's seat of the truck, Isenhower got in the front passenger seat, and Lopez drove eastbound on Magnolia Avenue to take Isenhower home. According to Isenhower, Lopez was driving "pretty quickly" but "all right" (direct examination); "[r]ecklessly" and "fast . . . I thought we were going to hit a couple cars" (later on direct examination); and "erratically" (police report).

As Lopez and Isenhower approached the intersection of Magnolia Avenue and Windsong Street, Isenhower noticed a man, later identified as Villalobos, riding a bicycle with grocery bags hanging from the handlebars. Villalobos crossed Magnolia Avenue in front of the truck, causing Lopez to stop. Villalobos glanced at the truck, prompting both Lopez and Isenhower to comment, "what is this guy looking at?" Lopez turned right onto Windsong Street, which was not on the way to Isenhower's home, and followed Villalobos. Isenhower had not told Lopez to turn right.

After turning onto Windsong Street, Lopez stopped the truck, and Isenhower got out and yelled something at Villalobos. Juan Magana, who was standing near the corner of Magnolia Avenue and Windsong Street, heard screaming coming from the direction of a pickup truck and saw the passenger (Isenhower) get out, throw his cap to the ground, and heard him say, "[t]hat's what I thought." Magana also heard Isenhower say: "Let's go. Let's go for him[,] and other "angry words." Magana did not hear Lopez or Villalobos say anything. Isenhower then got back into the truck. Isenhower testified he had jumped out of the truck, thinking he and Villalobos were going to fight, but "you could tell right off the bat that he didn't want to fight with anybody."

Villalobos continued riding his bicycle down Windsong Street. Lopez drove his truck toward Villalobos and bumped into the rear tire of his bicycle. Villalobos

managed to stay upright on the bicycle and tried to pull to the side of the street, but a parked car blocked his path. Isenhower was surprised and told Lopez “not to run the guy over.” In a later sheriff’s interview, Isenhower said he had asked Lopez, “[w]hat are you going to do? Are you going to run this guy over?”

Deciding he wanted no part of what was going on, Isenhower tried to get out of the truck, but it was too close to parked cars for Isenhower to be able to open the door. A few seconds later, Lopez suddenly accelerated and drove the truck straight into Villalobos. As the truck struck Villalobos, he was pulled underneath the front end of the truck. Isenhower could feel the truck “bounce up and down” and saw Villalobos “pop out” in back. Lopez did not stop; he drove off and turned left at the next street.

Villalobos was taken to a hospital, where he died a short time later. He had suffered abrasions and bruising, a crushed rib cage, a fractured vertebra and pelvis, and a torn esophagus. The cause of death was multiple blunt-force traumatic injuries.

Isenhower was scared, nervous, and in shock. He looked at Lopez, who appeared calm and seemed unaffected by the incident. Lopez said nothing and let out a chuckle. During the drive to Isenhower’s home, Lopez told Isenhower “not to say anything” and, when dropping off Isenhower, told him to “keep [his] lips sealed” while making a zipper-like gesture across his lips.

On returning home, Isenhower and his wife dialed 911 and reported the incident. A Riverside County Sheriff’s corporal arrived about an hour later and transported Isenhower to the Jurupa Valley sheriff’s station, where two sheriff’s detectives interviewed him. After interviewing Isenhower, the detectives asked him to call Lopez to ask specific questions about what had happened. The detectives were able to hear the conversation between Isenhower and Lopez. Isenhower told Lopez to turn himself in.

Riverside County Sheriff’s investigators arrived at Lopez’s home in Anaheim at about 2:20 a.m., on January 16, 2012. The investigators approached Lopez

and his parents, introduced themselves, and asked to speak with Lopez's father. At that moment, Lopez stepped forward and said, "you know it was me."

II.

Lopez's Testimony

Lopez testified in his own behalf as follows.

After leaving Racks, Lopez could not find the keys to his truck. He had intentionally locked the keys inside the truck because he knew he was going to get drunk. Lopez asked Isenhower to call his wife, but Isenhower said she would be angry if she knew they were at Racks, so Lopez called his brother. Although Lopez's brother agreed to come pick them up, Isenhower was impatient and insisted on going home immediately so he would not get in trouble with his wife. Isenhower grabbed a brick or rock and used it to break the back window of the truck.

Lopez drove the truck even though he knew he should not be driving. Lopez and Isenhower travelled down Magnolia Avenue, and, when they reached Windsong Street, a bicycle crossed in front of them, causing Lopez to stop. When the truck came to a stop, Isenhower and Villalobos stared at each other and then had a loud exchange of words—"pretty much asking where he is from." Isenhower said, "[l]et's go get him," and Lopez made a right turn onto Windsong Street to follow Villalobos. Isenhower screamed and yelled as Lopez drove down Windsong Street. Lopez did not know what he was thinking, except that Isenhower was going to get into a fight with Villalobos. On cross-examination, Lopez testified Isenhower's conduct led to Lopez turning onto Windsong Street and driving toward Villalobos, but that Isenhower did not cause Villalobos's death because, Lopez conceded, he was driving the truck.

At some point, Isenhower stepped out of the truck, then stepped back in. Lopez knew he could have turned around and driven away, but chose to continue following Villalobos. When asked why he chose to do so, Lopez testified (on cross-examination): "I can't tell you. The state of mind that I was in, I don't know."

Villalobos said nothing and made no gestures as he continued riding his bicycle down Windsong Street, and Lopez did not feel threatened by him. Lopez, who was focused on Isenhower, accidentally sideswiped a parked car and, at the same time, bumped into Villalobos. Lopez did not intentionally hit Villalobos, but he “hit the car” and then “hit the man.” On cross-examination, when asked whether he knew Villalobos was directly in front of the truck, Lopez testified: “I knew he was on his bike directly in front of me. I hit the car and I hit him. I didn’t know he was on the ground. In my mind when I hit him, I just figured to leave.”

Lopez pressed the accelerator and drove off right away because he was scared. He could sense a “large and hard object” pass underneath the truck and realized he had run over Villalobos. Lopez did not know whether Villalobos was hurt. Lopez testified: “I was scared, panicked, and didn’t want to be there. I just left.” When asked what he was thinking at that time, Lopez testified: “I wasn’t thinking much at all, if you ask me. [¶] . . . [¶] . . . I wasn’t thinking at all. Just to leave.” Lopez did not remember hitting Villalobos more than once, did not remember Isenhower opening the door the second time, and did not remember whether Isenhower said anything to him just before or after hitting Villalobos.

Lopez did not remember dropping off Isenhower at his home and thought maybe Isenhower’s cousin, Bobby McDonald, had been in the truck. Lopez went to a liquor store and bought chips and Gatorade to sober up. McDonald, who was with Lopez at that time, remarked that the truck was not moving. At the liquor store, Lopez purchased engine oil, which either he or the liquor store clerk poured into the truck. After calling his father for instructions on what to do, Lopez drove to a gas station. Although the truck was drivable for a short while, Lopez did not feel comfortable driving it back to his home in Anaheim, so he called his father again and told him the truck was not running and he would drive it to his uncle’s house in Riverside. Lopez drove to his

uncle's home and "crashed[] out" in his truck and tried "to sleep it off." His father later picked him up and drove him to their home in Anaheim.

Lopez remembered receiving two telephone calls from Isenhower after returning home. Sometime later, police officers arrived and handcuffed Lopez.

III.

Rebuttal Testimony

The prosecution called Isenhower's sister, Lillian Isenhower, as a rebuttal witness. Lillian Isenhower and Lopez were close friends, and, as of January 2012, they communicated by text messaging about every day. She telephoned Lopez at about 7:00 or 8:00 p.m., on January 15, 2012, to ask how he was doing. Lopez told her that she would "hate him" because he "hit someone." When she asked him why he had hit someone, he replied that "he felt threatened." Lopez did not tell her that he intended to kill somebody.

The prosecution also called Lopez's father, Ladislado Lopez, Jr., who testified he received a call from his son late in the afternoon of January 15, 2012, about a problem with his truck. Ladislado Lopez drove from his home in Anaheim to Riverside about an hour later to pick up his son. Ladislado Lopez found his son passed out in the truck and had to knock on the window several times before he awakened. Lopez smelled of alcohol but otherwise appeared normal.

DISCUSSION

I.

Sufficiency of the Evidence of Deliberation and Premeditation

A. Standard of Review

Lopez argues the evidence was insufficient to establish deliberation and premeditation necessary for first degree murder. "Review on appeal of the sufficiency of

the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation that was previously set forth. Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.] The standard of review is the same in cases such as this where the People rely primarily on circumstantial evidence. [Citation.]” (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

B. *Legal Principles*

1. *Definitions: First and Second Degree Murder*

Penal Code section 187, subdivision (a) defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.” Murder may be of the first or second degree. (Pen. Code, § 189.) As relevant here, first degree murder is that which is perpetrated by “willful, deliberate, and premeditated killing.” (*Ibid.*) “Second degree murder is defined as the unlawful killing of a human being *with malice aforethought*, but without the additional elements—i.e., willfulness, premeditation, and deliberation—that would support a conviction of first degree murder.” (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)

A murder is presumed to be of the second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 895 (*Thomas*).) The prosecution bears the burden of proving beyond a reasonable doubt the elements or mental state necessary for first degree murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 25 (*Anderson*); *Thomas, supra*, at p. 895.)

2. *Definitions: Deliberation and Premeditation*

“A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. (*People v. Bender* (1945) 27 Cal.2d 164, 183 . . . ; *People v. Thomas*[, *supra*,] 25 Cal. 2d 880, 900 . . . ; see *People v. Perez*[, *supra*,] 2 Cal.4th 1117, 1123-1124 . . . ; CALJIC No. 8.20 (6th ed. 1996).) ‘The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” [Citations.]’ (*People v. Mayfield* (1997) 14 Cal.4th 668, 767)” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080; see *People v. Solomon* (2010) 49 Cal.4th 792, 812; *People v. Harris* (2008) 43 Cal.4th 1269, 1286-1287.)

“The very definition of ‘premeditation’ encompasses the idea that a defendant thought about or considered the act beforehand.” (*People v. Pearson* (2013) 56 Cal.4th 393, 443.) “““Deliberate’ means ‘formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.’ [Citation.]” [Citation.]” (*People v. Houston* (2012) 54 Cal.4th 1186, 1216.) The tests and definitions boil down to this: “[a]n intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.” (*People v. Pearson, supra*, at p. 443.)

3. *Anderson Factors*

In *Anderson, supra*, 70 Cal.2d at page 26, the California Supreme Court surveyed prior cases addressing the sufficiency of the evidence to support findings of deliberation and premeditation. Based on that survey, the court identified three

categories of evidence relevant to deliberation and premeditation: (1) planning activity, (2) motive, and (3) manner of killing. (*Id.* at pp. 26-27.) The court stated: “Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of [planning] or evidence of [motive] in conjunction with [evidence of] either [planning] or [manner of killing].” (*Id.* at p. 27.)

“The *Anderson* guidelines are ‘descriptive, not normative,’ and reflect the court’s attempt ‘to do no more than catalog common factors that had occurred in prior cases.’ [Citation.] In developing these guidelines, the court did not redefine the requirements for proving premeditation and deliberation. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1183; see *People v. Solomon, supra*, 49 Cal.4th at p. 812 [“*Anderson*’s goal ‘was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.’”].)

C. *The Evidence*

Returning to the standard of review, we ask whether the entire record discloses evidence from which a reasonable trier of fact could find beyond a reasonable doubt that Lopez premeditated and deliberated. (*People v. Perez, supra*, 2 Cal.4th at p. 1124.) We conclude the record discloses such evidence.

Isenhower testified that, as he and Lopez were driving along Magnolia Avenue and approached the intersection with Windsong Street, Villalobos rode his bicycle across Magnolia Avenue, causing Lopez to stop the truck. Both Isenhower and Lopez commented, “what is this guy looking at?” Riverside County Sheriff’s Investigator Jason Corey testified that Isenhower said, during his interview, that Lopez and Villalobos “exchanged words.” Lopez testified that Isenhower said, “[l]et’s go get him.” Lopez’s response is telling and legally significant. Lopez, who had control of the

truck, turned right onto Windsong Street, which was not on the way to Isenhower's house, and followed Villalobos. From this act—making a right turn to follow Villalobos—the jury could find that Lopez began the process of premeditating and deliberating the murder of Villalobos. From the evidence that Villalobos had crossed in front of Lopez, and that Lopez and Isenhower were annoyed or angered because Villalobos apparently looked at them the wrong way, the jury could find a motive.

As Lopez followed Villalobos, there was sufficient time for Lopez to carefully think about and weigh considerations for and against the proposed course of action rather than make a rash decision. In addition, there was evidence from which the jury could find that Lopez did think about and weigh such considerations. Isenhower testified Lopez stopped the truck, and Isenhower got out and yelled something at Villalobos. Magana testified he heard Isenhower say, “[l]et's go for him.” Lopez had the option of driving the truck back toward Isenhower's house, which was opposite to the direction in which Lopez was heading. Instead, Lopez chose to follow Villalobos. Evidence that Lopez followed Villalobos, after having stopped the truck, supports a finding of deliberation and premeditation.

Lopez intentionally drove his truck into the rear tire of Villalobos's bicycle. Isenhower testified he told Lopez “not to run the guy over,” and Corey testified that during the interview, Isenhower said he asked Lopez, “[w]hat are you going to do? Are you going to run this guy over?” Isenhower tried to open the truck door to get out, but parked cars blocked his exit. Isenhower testified at trial and told Corey during the interview that Lopez then suddenly accelerated the truck, ran over Villalobos, and sped away. Although Lopez testified he did not hit Villalobos intentionally, and “wasn't thinking at all,” the jury, as the ultimate judge of credibility, was entitled to disbelieve him. (*People v. Avila* (2006) 38 Cal.4th 491, 590; *People v. Baker* (2002) 98 Cal.App.4th 1217, 1226.)

From the evidence, the jury could find that Lopez, after deliberation and premeditation starting at the time he turned right onto Windsong Street, had decided to kill Villalobos by running him over, and carried out that decision. The time from which Villalobos crossed in front of Lopez's truck, to the time at which Lopez ran him over was not lengthy; however, "premeditation can occur in a brief period of time." (*People v. Perez, supra*, 2 Cal.4th at p. 1127.) Isenhower testified that after running over Villalobos, Lopez let out a chuckle. Such conduct is inconsistent with the theory Lopez accidentally ran over Villalobos and supports a finding that Lopez was pleased at having carried out his plan of killing him.

Finally, Lopez sped off after running over Villalobos and twice told Isenhower to keep his mouth shut about the incident. Evidence of flight may be relevant to whether a defendant deliberated and premeditated. (*People v. Moon* (2005) 37 Cal.4th 1, 28 ["We have previously rejected the notion that the flight instruction is improper when an accused concedes the issue of identity and merely contests his mental state at the time of the crime."].)

We conclude the record discloses substantial evidence from which the jury could find that Lopez murdered Villalobos out of "preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Pearson, supra*, 56 Cal.4th at p. 443.)

We reach the same conclusion using the *Anderson* factors. As to planning activity, the evidence showed that Lopez planned to kill Villalobos by running him over. Planning activity commenced no later than the point at which Lopez made the right turn onto Windsong Street to follow Villalobos. Lopez argues no evidence was presented of planning activity and he had no prior relationship with Villalobos to support a motive. Although we find there was sufficient evidence of planning activity, evidence of motive, with evidence of planning activity *or* manner of killing, is sufficient under *Anderson* to support a first degree murder conviction. (*People v. Romero* (2008) 44 Cal.4th 386, 401.)

The evidence of manner of killing was strong: Lopez drove his truck after Villalobos, bumped into his rear bicycle tire, stopped the truck, then suddenly accelerated and ran him over. As to motive, Lopez was angry at Villalobos for causing him to stop his truck and for looking at him in the wrong way. While this motive seems absurd to sensible minds, “the incomprehensibility of the motive does not mean that the jury could not reasonably infer that the defendant entertained and acted on it.” (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1238.)

II.

Prosecutorial Misconduct

A. *Background and Relevant Law*

Lopez argues the prosecutor committed misconduct in closing argument by inaccurately describing the elements of deliberation and premeditation. Lopez’s trial counsel did not object to the prosecutor’s asserted misstatements of law, request an admonition to the jury, or seek to counter the prosecutor’s argument. Failure to object or request an admonition leads to forfeiture of a claim of prosecutorial misconduct unless an objection or request for admonition would have been futile. (*People v. Young, supra*, 34 Cal.4th at p. 1188.) Nonetheless, we exercise our discretion to consider Lopez’s claim of prosecutorial misconduct to avert a claim of ineffective assistance of counsel.¹ (*People v. Crittenden* (1994) 9 Cal.4th 83, 146; see *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 [appellate court has discretion to consider issue not preserved for review if issue is based on undisputed facts].)

¹ In part III. of the Argument section of the appellant’s opening brief, Lopez argues his trial counsel was ineffective by failing to object to or otherwise counter the prosecutor’s arguments which, he contends, were misstatements of law. Our decision to consider Lopez’s claim of prosecutorial misconduct on the merits renders it unnecessary for us to address that ineffective assistance of counsel claim.

It is misconduct for the prosecutor to misstate the law during argument (*People v. Huggins* (2006) 38 Cal.4th 175, 253, fn. 21; *People v. Otero* (2012) 210 Cal.App.4th 865, 870; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266), especially when the misstatement of law attempts “to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation]” (*People v. Marshall* (1996) 13 Cal.4th 799, 831). ““When a claim of misconduct is based on the prosecutor’s comments before the jury, “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.”” [Citation.]’ [Citation.]” (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.)

B. *Specific Instances of Asserted Prosecutorial Misconduct*

Lopez argues the prosecutor misstated the law in four ways during closing argument, and any one of those misstatements warrants reversal of the judgment.

1. *Meaning of Deliberate and Premeditated*

In explaining the meaning of deliberate and premeditated, the prosecutor argued: “Premeditation simply means before. He did it before, ‘pre,’ before meditated. ‘Deliberate’ means he thought about it. [¶] There is a difference here. We think of the word deliberation, like the jury, you’re going to be deliberating this case pretty soon. We think of that term as taking a step back, thinking about it, being rational, away from the heat of the moment. [¶] What should we do here? What is the right thing to do, that is what we think about deliberation, that is not what this law is for, because if that first part was true, we no longer [would] have murders, because if everybody deliberated on what they were about to do, take a step back, is it worth it? Why do I need to run over this man? Why do I need to murder this man? Nobody would do it. But that is not what it means. It simply means that they thought about the consequences in some way.”

Lopez argues that portion of the prosecutor's argument inaccurately describes the meaning of deliberation and premeditation in two respects. First, Lopez argues, the prosecutor wrongly told the jury that deliberation does not mean taking a step back and thinking about the consequences of one's actions in a rational way. Second, Lopez argues, the prosecutor's description of the meaning of "deliberated" as merely thinking about the consequences "in some way" was inaccurate.

The prosecutor's description of deliberation and premeditation suffers more from incomprehensibility than it does from inaccuracy. As best as we can make of it, the prosecutor told the jury that deliberation for purposes of first degree murder is not necessarily the same as the formal deliberation the jury would undertake in reaching its verdict. That much is true, as Lopez acknowledges. The prosecutor also told the jury that deliberation does not mean the defendant took "a step back" and considered whether committing murder was the right thing to do and worth the potential consequences. While this description is not inaccurate (a murderer might kill after having fully considered the potential consequences and knowing full well that doing so would be wrong), telling the jury that deliberation means only that the defendant thought about the consequences "in some way" was a misstatement of law. Deliberate, as an adjective, means "formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as, a *deliberate* judgment or plan; carried on coolly and steadily, esp. according to a preconceived design" (*Thomas, supra*, 25 Cal.2d at p. 898) or "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." [Citation.] [Citation.]" (*People v. Houston, supra*, 54 Cal.4th at p. 1216). Thinking about the consequences of a crime "in some way" is not the same as careful thought and weighing of considerations for and against the proposed course of action.

Although the prosecutor misstated the law, the jury was instructed on first degree murder and the meaning of deliberation and premeditation. The jury was

instructed that a defendant acted deliberately “if . . . he carefully weighed the considerations for and against . . . his choice and, knowing the consequences, decided to kill,” which is a correct statement of the law. In addition, the trial court instructed the jury, “[i]f you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.”

We presume jurors are intelligent and capable of understanding and applying the trial court’s instructions. (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) “When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for ‘[w]e presume that jurors treat the court’s instructions as a statement of the law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.’ [Citation.]” (*People v. Osband* (1996) 13 Cal.4th 622, 717.) We conclude the jury in this case followed the clear and direct jury instructions, and not the prosecutor’s muddled argument.

2. *Yellow Light Analogy*

The prosecutor argued the following analogy of deliberation and premeditation:

“Here is a very simple example, very often used, but a very good example. On your way to court today, or on your way somewhere at some time, you were driving your car. You came across a signal, and right at that moment when you—it is hard to decide, that light turns yellow; right? Sometimes it is really early, so you know you should stop; sometimes it is really late, so it is green, you just go.”

Lopez argues the prosecutor’s yellow light analogy inaccurately equates the state of mind necessary for first degree murder with “a routine and virtually automatic thought process that people reflexively perform.” Although the decision whether to drive through a yellow light might, in a given situation, be a reflexive action undertaken with

little or no consideration, as phrased, the prosecutor's analogy is not a misdescription of deliberation and premeditation. The prosecutor's analogy described a situation in which the driver took the opportunity to consider his or her course of action: The driver considered whether to brake or drive through the light, whether police officers were present, whether he or she would be late, and whether the driver might be struck by another car "zooming on the other side." Although the decision whether to drive through a yellow light might be made quickly, in the analogy, it was the product of careful thought and weighing of considerations for and against the proposed course of action. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 ["willful, deliberate, and premeditated murder involves a cold, calculated judgment, including one arrived at quickly"].)

A similar analogy was upheld in *People v. Avila* (2009) 46 Cal.4th 680, 715: "Nor, contrary to defendant's assertion, did the prosecutor argue that 'the "cold, calculated" judgment of murder is the equivalent of deciding whether to stop at a yellow light or proceed through the intersection.' Rather, the prosecutor used the example of assessing one's distance from a traffic light, and the location of surrounding vehicles, when it appears the light will soon turn yellow and then red, and then determining based on this information whether to proceed through the intersection when the light does turn yellow, as an example of a 'quick judgment' that is nonetheless 'cold' and 'calculated.' He then immediately said, 'Deciding to and moving forward with the decision to kill is similar, but I'm not going to say in any way it's the same. There's great dire consequences that have a difference here.'" Here too, the prosecutor used the yellow light analogy as an example of a "quick judgment," based on available information, that is "nonetheless 'cold' and 'calculated.'" (*Ibid.*)

Lopez argues *People v. Avila* is inapt because the prosecutor in that case added that the decision to kill, though similar, is not the same as driving through a yellow light. The difference stipulated by the prosecutor in *Avila* concerned the consequences, not the mental state, of first degree murder and driving through a yellow light. In this

case, as in *Avila*, the prosecutor used the yellow light analogy as an example of quick judgment.

3. *Personal Anecdote Analogy*

The prosecutor offered the following personal anecdote to explain the meaning of deliberate and premeditated:

“ . . . If you were to look back at [y]our own lives, you can think of a near death experience, many of us have had one. You are probably thinking of yours now. [¶] . . . [¶]

“The next one was in college for me. I was driving down on a rainy day about to exit, go to my school, when the car next to me was speeding by, tried to overtake me. When he tried to turn into my lane, he lost traction, and the car started slipping, because of the direction he was going he started spinning. The next thing you know, he turned 180 degrees, and I am looking at the driver right in front of me.

“Now at this point I had a choice. I had a split second, but I had a choice, I could either brake and try to stop and turn, or accelerate, or just leave my pedal alone and turn. A thought occurred to me, if I brake, I may lose traction, and if I start slipping, I am going to crash right into that man in front of me. Because that man, his car all of [a] sudden regained traction and slammed right into my car. In that split second I had [a] choice, and I decided to leave my brakes alone and I just turned. I should press my gas. And I made it out safely. The cars behind me, not so much. There was a pile up on the freeway that day.

“I remember that event clearly. And we all remember our events clearly. And what I remember about that event is that I had a choice, in that split second, I had a choice, brake or gas.”

This personal anecdote is problematic because the prosecutor suggested the act of deliberation and premeditation could occur in a “split second.” Although the space

of time between formation of the intent to kill and the act of killing may be instantaneous, the space of time in which the defendant premeditates and deliberates is not the same. (*Thomas, supra*, 25 Cal.2d at p. 900 [“a murder is of the first degree no matter how quickly the act of killing follows the ultimate formation of the intention if that intention has been reached with deliberation and premeditation”].) There is no stated minimum length of time in which deliberation and premeditation can occur: first degree murder involves “a killing resulting from preexisting reflection, of *any duration*” (*People v. Solomon, supra*, 49 Cal.4th at p.813, italics added) and “[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly” (*Thomas, supra*, at p. 900). But telling the jury that deliberation and premeditation could occur in “a split second” is at odds with the very meaning of those words. (*People v. Valentine* (1946) 28 Cal.2d 121, 134 [rejecting jury instructions that “[a] man may do a thing . . . deliberately . . . from a moment’s reflection”]; *People v. Bender* (1945) 27 Cal.2d 164, 184 [premeditation cannot occur “precipitately,” “in the twinkling of an eye,” or upon a moment’s reflection].)

Two things saved the prosecutor’s personal anecdote analogy from becoming prejudicial misconduct. The first is the detail the anecdote sheds on the driver’s thought process. In the analogy, the driver understands he has the choice of braking and trying to turn, accelerating, or turning. He considers all of those options, realizes he might lose traction if he brakes, and decides to try to turn the vehicle without braking. This is an accurate description of deliberation, with thoughts following each other “with great rapidity,” leading to the calculated judgment of turning without braking. (*Thomas, supra*, 25 Cal.2d at p. 900.)

The second is the prosecutor’s application of the analogy to the facts of this case. Immediately after making the analogy, the prosecutor argued Lopez had a “similar choice, but under much different circumstances, circumstances that he created, not somebody else.” The prosecutor continued: “And yet after all of those things that he did,

he came across choice after choice, and he found himself in front of the victim with a truck at his pedal with a choice. We're here because of the decision he made.” By arguing that Lopez made “choice after choice,” under “much different circumstances,” leading up to the point at which his truck was at Villalobos’s heels, the prosecutor distinguished Lopez’s situation from the “split second” decision of the personal anecdote analogy. The jury therefore was not reasonably likely to have been misled by being told the decision in the personal anecdote analogy was reached in a split second.

4. *Time to Think*

The prosecutor argued: “Premeditation and deliberation boil[] down to this in everyday terms. Did the defendant at the time or at some moment have time to think about what he was doing before he did it?” And later, in the same vein, the prosecutor argued: “What the defendant did is intentionally run over Mr. Villalobos, like he said he would, what does the law call that. The law calls it murder. He had a chance to think about it, so the law calls it first-degree murder.”

The prosecutor misstated the law. Deliberation and premeditation do not mean the defendant merely had the time or the chance to think about the consequences of his or her course of action. Deliberation and premeditation mean the defendant actually *did* think over his or her actions in advance and *did* carefully weigh the considerations in forming a course of action. (*People v. Koontz, supra*, 27 Cal.4th at p. 1080.)

The trial court correctly instructed the jury on the meaning of deliberation and premeditation by giving CALCRIM No. 521, as modified, as follows: “The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. [¶] The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and[,] knowing the consequences[,] decided to kill. The defendant acted with premeditation if he decided to kill before completing the

acts that caused the death. [¶] The length of time that a person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person [and] according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. [¶] On the other hand, a cold[,] calculated decision to kill can be reached quickly. The test is . . . the extent of the reflection, not the length of time.”

The instruction told the jury it had to find Lopez acted deliberately and with premeditation to convict him of first degree murder. The instruction directly and clearly told the jury that (1) Lopez acted deliberately “if he carefully weighed the considerations for and against his choice,” (2) the length of time spent weighing considerations alone does not determine whether the killing was deliberate and premeditated, and (3) the length of time required for deliberation and premeditation varies from person to person. The jury was told to follow the court’s instructions rather than counsel’s comments on the law. We presume the jury was capable of understanding the court’s instructions and followed them rather than counsel’s misstatements of the law. (*People v. Gonzales, supra*, 51 Cal.4th at p. 940; *People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Osband, supra*, 13 Cal.4th at p. 717.)

III.

Instructional Error

The trial court instructed the jury on the elements of murder and of first degree murder with CALCRIM Nos. 520 and 521.² Lopez does not argue those

² The trial court instructed the jury with CALCRIM No. 520, in relevant part, as follows: “The defendant is are charged in Count 1 with murder in violation of Penal Code Section 187. To prove the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant committed an act that caused the death of another person; [¶] And, two, when the defendant acted, he had a state of mind called malice

instructions are erroneous, misleading, or ambiguous standing alone. Instead, he argues: “Read in conjunction with the prosecutor’s improper arguments, the instructions are susceptible of an interpretation by a non-lawyer that allows a jury to improperly convict a defendant of first degree murder based on a theory of implied malice without an affirmative finding of specific intent to kill.” He categorizes his argument as one of instructional error, rather than prosecutorial misconduct, and we will treat it as such. Lopez argues, in effect, CALCRIM Nos. 520 and 521 are ambiguous or misleading.

When reviewing a supposedly ambiguous or misleading jury instruction, we ask whether there was a reasonable likelihood the jury applied the challenged instruction in a way that violates the federal or state Constitution. (*People v. Ayala* (2000) 24 Cal.4th 243, 289; *People v. Clair* (1992) 2 Cal.4th 629, 663.) We consider the instructions as a whole and the entire record of the trial, including arguments of counsel, and assume the jurors were intelligent people capable of understanding and correlating the jury instructions. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 708.) “Instructions should be interpreted, if possible, to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.” (*Ibid.*)

Lopez identifies three passages from the prosecutor’s closing and rebuttal arguments which, he contends, allowed the jury to misconstrue the instructions. The first

aforethought. [¶] There are two kinds of . . . malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. The defendant acted with implied malice if: [¶] One, he intentionally committed an act; [¶] And, two, the natural and probable consequences of the act were dangerous to human life; [¶] . . . [¶] Three, at the time he acted, he knew his act was dangerous to human life; [¶] And, four, he deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will towards the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation with a passage of any particular period of time.” The court then instructed the jury with CALCRIM No. 521, as modified, which is quoted in part II.B.4. of the Discussion section.

was the yellow light analogy, quoted in part II.B.2. of the Discussion section. In the second, the prosecutor argued the meaning of intent to kill, as follows: “There [are] two ways we get to murder. Did he intend to kill, or did he intend to do an act that is dangerous to human life, he knew it was dangerous, but he did it anyway. [¶] Now, as you can see, there is a very very fine line between those two definitions, *and they blend together*. How do you do an act that is so dangerous to human life, you know it is dangerous, but you didn’t intend to kill[?]” (Italics added.) The third passage challenged by Lopez was made in rebuttal, when the prosecutor argued: “[R]unning over a human being, doing so intentionally, that is called in legal terms murder, because you had the intent to kill. You had the intent, you knew what you were doing was so dangerous to human life, and you did it anyway. It is called murder.”

According to Lopez, the prosecutor’s three statements “made it virtually certain” the jury would read CALCRIM Nos. 520 and 521 “in a way that allows the element of intent to kill to be shown by facts that actually establish only the conscious disregard [of] a very high risk of death.” We disagree.

We start with the presumption that jurors treat the court’s instructions “as a statement of the law by a judge” and treat the prosecutor’s arguments “as words spoken by an advocate in an attempt to persuade.” (*People v. Clair, supra*, 2 Cal.4th at p. 663, fn. 8.) Also, “[w]e presume that jurors understand and follow the court’s instructions.” (*People v. Pearson, supra*, 56 Cal.4th at p. 414.) Neither CALCRIM No. 520 nor CALCRIM No. 521 is an incorrect statement of the law, and both are unambiguous. CALCRIM No. 520 very clearly explains the difference between the two kinds of malice—express and implied—and very clearly states the defendant acted with express malice if he “unlawfully intended to kill.” CALCRIM No. 520 then sets forth the elements of implied malice, the last of which is the defendant “deliberately acted with conscious disregard for . . . human . . . life.” CALCRIM No. 521 clearly defines premeditated murder and states the defendant acted willfully “if . . . he . . . intended to

kill.” A jury given those instructions would understand that intent to kill and conscious disregard for human life were different mental states and that intent to kill was necessary to convict for first degree murder.

The prosecutor did not say or argue anything that overcomes the presumption that the jury followed the instructions or that shows a reasonable likelihood the jury interpreted the instructions in a way that violated the federal or state Constitution. As we explained above, the prosecutor’s yellow light analogy was not a misdescription of deliberation and premeditation, and a similar analogy was upheld in *People v. Avila, supra*, 46 Cal.4th at page 715. Arguing to the jury that the definitions of intent to kill and conscious disregard for human life “blend together” and that intent could mean “you knew what you were doing was so dangerous to human life,” would not have led the jury to interpret the very explicit jury instructions in the manner Lopez suggests. Those two challenged statements, though possibly inaccurate or misleading, were fleeting comments within an argument spanning nearly 35 pages of the reporter’s transcript. The theme and emphasis of the prosecutor’s closing argument were that Lopez made a series of intentional choices leading to his decision to kill Villalobos, not that Lopez drove his truck in a manner displaying conscious disregard for human life.

IV.

Evidence of Statements Made During the Telephone Conversations Between Lopez and Isenhower

A. Introduction

Lopez’s trial counsel attempted to ask Lopez, Isenhower, and Corey about the substance of the telephone conversations between Isenhower and Lopez, conducted during Isenhower’s interview at the sheriff’s station on January 15, 2012. Each time, the prosecutor objected on grounds of hearsay, and the trial court sustained the objection. Lopez argues the trial court committed reversible error by sustaining the objections

because his statements made during the telephone conversations were admissible as prior consistent statements under Evidence Code section 1236. We review the trial court's exclusion of evidence under the abuse of discretion standard. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827.)

B. *Background*

After interviewing Isenhower, the sheriff's detectives asked him to call Lopez and ask him questions about what had happened. Isenhower twice called Lopez, and their conversations were recorded.

During the first telephone conversation, Isenhower asked Lopez, "why did you run the guy over." Lopez answered: "I don't know why, dog. I honestly didn't wanna. I wouldn't want to hit him." Later in the conversation, Isenhower again asked, "what were you trying to do . . . by running that fool over." Lopez answered: "I don't know dog. Honestly, I don't know. I don't remember. I don't know what was going on with my head. I was drunk just like that."

During the second telephone conversation, Isenhower once more asked, "why did you have to run him over, dude?" Lopez answered: "I don't know. I don't—I don't know . . . I was drunk. I don't know pretty much. Yeah, I don't know. I don't know, dude." When Isenhower mentioned that Lopez had chuckled after running over Villalobos, Lopez said, "[y]ou know I was drunk, dog!" Isenhower twice asked Lopez whether he ran over Villalobos by accident or on purpose. Lopez answered, "I ran him over on accident dog of course" and "I did it on accident, dude. Come on. Now, you think—you think intentionally in my mind, my right state of mind, you think I'm gonna do it on purpose? Really? You think so?" When Isenhower again mentioned that Lopez had chuckled, Lopez again said he "was drunk."

Lopez's trial counsel asked Isenhower, on cross-examination, several questions about his telephone calls to Lopez. In response, Isenhower testified the

detectives had asked him to ask Lopez specific questions about what had happened and to do so in a manner that would allow the detectives to hear the conversation. Lopez's trial counsel had Isenhower confirm his earlier testimony that when dropping him off, Lopez had told him to "zip it." Lopez's trial counsel then asked, "the two of you kind of discussed that over the phone that evening, did you not, when you were in custody?" The prosecutor posed a hearsay objection, which the trial court granted, adding "[a]nd it's beyond the scope."

During cross-examination of Corey, who had overheard the telephone calls between Isenhower and Lopez, Lopez's trial counsel asked, "[a]fter the first call, did you discuss the contents of the call?" The trial court sustained an unmade objection, stating, "I am not getting into the call." When trial counsel asked, "[a]nd in the second call, were your directions to Mr. Isenhower, get him to describe—," the trial court interjected: "Sustained. [¶] We're not getting in there."

During direct examination of Lopez, the following colloquy transpired:

"Q. [(Lopez's trial counsel)] And these conversations with Chris Isenhower, did they involve discussing what happened that day?

"A. [(Lopez)] Yes.

"[The prosecutor]: Objection. Hearsay.

"The Court: Sustained.

"[The prosecutor]: Move to strike.

"The Court: Ladies and gentlemen, there has been a request made to strike the last answer. I shall grant it. . . ."

At the conclusion of the prosecutor's cross-examination of Lopez, his trial counsel argued he should be permitted to ask Lopez questions about his statements made to Isenhower during the telephone conversations. Counsel argued: "There was a question specific that was posed here, at least a comment, 'That's what you're saying now, based on testimony.' [¶] The recordings that were made provide prior consistent

statements with what is being given on the stand here. Now, obviously, I don't intend to play them. What my questions would be on redirect, have to do with the fact did you ever have a discussion with anybody relative to how this situation happened. And that would have been, yes, later on that evening with my friend Chris. We discussed it. At that point in time, did you tell Chris Isenhower that this was an accident and you didn't mean for it to happen? [¶] I mean, I think we have the door open for prior consistent statements”

C. Evidence Code Sections 791 and 1236 and the Gentry Exception

Evidence Code section 1236 states: “Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.” Under Evidence Code section 791, “[a] prior statement consistent with a witness’s trial testimony is admissible only if either (1) a prior *inconsistent* statement was admitted and the consistent statement predated the inconsistent statement, or (2) an express or implied charge is made that the testimony is recently fabricated or influenced by bias or other improper motive, and the consistent statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.”³ (*People v. Smith* (2003) 30 Cal.4th 581, 630.)

As Lopez concedes, his statements to Isenhower made during the telephone calls do not on the surface appear to satisfy either requirement of Evidence Code

³ Evidence Code section 791 provides: “Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.”

section 791 for admission as prior consistent statements. Lopez contends, however, his prior statements fall within the exception, recognized in *People v. Gentry* (1969) 270 Cal.App.2d 462, 474 (*Gentry*), when a witness's prior silence has been used to impeach his or her trial testimony. "It has long been recognized that when . . . a witness's silence is presented as inconsistent with his or her later testimony, a statement made at the earliest opportunity after the silence that is consistent with the witness's later testimony may be admissible as a prior consistent statement under [Evidence Code] section 791[, subdivision](b). [Citation.]" (*People v. Lopez* (2013) 56 Cal.4th 1028, 1067, citing *Gentry, supra*, 270 Cal.App.2d at p. 474; see *People v. Edelbacher* (1989) 47 Cal.3d 983, 1013 ["Where cross-examination concerning failure to report an incident implies a later fabrication, evidence that the incident was reported shortly after its occurrence is admissible."].)

In *People v. Lopez, supra*, 56 Cal.4th at pages 1067-1068, the Supreme Court explained *Gentry*, as follows: "In *Gentry*, the defendant presented evidence at trial that when the witness, Turner, was first questioned by police he failed to provide them with the damaging information about the defendant's involvement in the crime to which he later testified at trial. To rebut the implication that Turner's trial testimony was fabricated, the prosecution was allowed to introduce evidence of a second statement Turner made to the police the following day in which he did include the information to which he testified at trial. The Court of Appeal held the trial court properly admitted the second statement. As the court observed, at the time of Turner's initial interrogation by the police on the night of the crime he was 'groggy and half asleep,' having gone to sleep drunk. [Citation.] But, 'he had made a full statement to sheriff's officers of what he knew relevant to the case at the earliest opportunity after he had recovered his senses. The explanation was corroborated by one of the officers to whom the statement had been made and by the statement reporter who recorded the statement.' [Citation.]"

D. *The Gentry Exception Is Not Applicable.*

Lopez argues his silence in the truck after running over Villalobos was presented by the prosecutor as being inconsistent with Lopez's trial testimony. The point at which, Lopez argues, the prosecutor implied that Lopez's trial testimony was inconsistent with his silence was during the following part of cross-examination:

"Q. [(The prosecutor)] What did you think was going to happen, sir, when Mr. Villalobos is directly in front of you, because you just hit him, and you gunned the car, what did you think was going to happen?"

"A. [(Lopez)] Well, all I remember is hitting that and took off.

"Q. [(The prosecutor)] *That is what you're saying right now.* But what I am asking you is, Mr. Villalobos is directly in front of your car—

"A. [(Lopez)] Uh-huh.

"Q. [(The prosecutor)] —you just hit him. Like you said in the center right of your car, and you said you didn't wait for anything, you just—not for a chance for him to leave, nothing, immediately after you press on the accelerator; right?"

"A. [(Lopez)] I just figured to leave." (Italics added.)

According to Lopez, the prosecutor used his prior silence, referred to by implication in the italicized language, to impeach his trial testimony. A fair reading of this passage of cross-examination is that the prosecutor was referring Lopez back to the question, which was, what he did he think was going to happen at the time he gunned the truck. The prosecutor was, in effect, asking, "[*t*]hat is what you're saying right now [, but what were you thinking back then, when you gunned the car]." (Italics added.) Under this reading, the prosecutor was not trying to impeach Lopez's trial testimony with Lopez's silence after striking Villalobos, and the *Gentry* exception did not apply.

Lopez also points out that during closing argument, the prosecutor commented on Lopez's silence in the truck, by stating: "To Christopher Isenhower, [Lopez] didn't say much in the car after this happened. Even before this happened, he

didn't say much. What did he say to Christopher Isenhower as Christopher Isenhower is leaving the car? He looks at Mr. Isenhower, he does this, and zips his mouth, don't you talk, don't you talk." The prosecutor then commented on Lopez's telephone conversation with Lillian Isenhower, in which Lopez said he felt threatened by Villalobos. Lopez's trial counsel did not object to this argument or ask to reopen evidence.

We find no ineffective assistance of counsel because Lopez would not have been able to successfully invoke the *Gentry* exception. (*People v. Anderson* (2001) 25 Cal.4th 543, 587 ["Counsel is not required to proffer futile objections."].) In *People v. Lopez, supra*, 56 Cal.4th at page 1068, the court explained, "*Gentry*'s conclusion that Turner's later statement to the police was admissible as a prior consistent statement focuses on two factors: that at the time of his initial silence he suffered from an incapacity that prevented him from speaking and that he made the prior consistent statement at the 'earliest opportunity' after the incapacity was removed." The witness in *Gentry* was "quite intoxicated when he went to bed and had had to be shaken when he was awakened." (*Gentry, supra*, 270 Cal.App.2d at p. 474.) In *People v. Lopez, supra*, 56 Cal.4th at page 1068, the victim failed to report the defendant's assault on her out of fear of repercussions from the defendant.

In contrast, Lopez was not under an incapacity that prevented him from speaking while in the truck after running over Villalobos. Although Lopez was intoxicated when he struck Villalobos and immediately afterwards, Lopez was not half asleep and was alert enough to drive Isenhower home and to tell him to keep quiet about the incident. In addition, the verdict establishes that the jury did not accept Lopez's intoxication defense.

V.

Rule of Completion Argument

Lopez argues his trial counsel was ineffective by failing to assert the rule of completion, codified in Evidence Code section 356, as a ground for admitting evidence of

Lopez's statements to Isenhowe made during the pretext telephone calls. Lopez contends his statements made to Isenhowe during the pretext telephone calls were admissible to complete the conversation between Isenhowe and Corey.

Evidence Code section 356 states in relevant part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party" Section 356's purpose is "to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." (*People v. Arias* (1996) 13 Cal.4th 92, 156.) "Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.'" (*Ibid.*)

In applying Evidence Code section 356, we ask whether Lopez's statements to Isenhowe during the pretext calls were of the same interview or conversation as Isenhowe's interview with the detectives. "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence. . . .' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 334-335.) "[T]he jury is entitled to know the context in which the statements on direct examination were made." (*Id.* at p. 335.)

Lopez contends that his statements made during the pretext telephone conversation with Isenhowe were admissible under Evidence Code section 356 because they were part of this colloquy at trial between the prosecutor and Corey:

“Q. [(The prosecutor)] After the defendant ran the victim over, did Mr. Isenhower tell you what, if anything, was said inside the cab?

“A. [(Corey)] There wasn’t anything said between the two of them.”

The conversation to be placed in context was the one between Corey and Isenhower. Lopez was entitled to have placed in evidence all that was said to or by “““the declarant””” (*People v. Harris, supra*, 37 Cal.4th at p. 335)—Corey or Isenhower—in the course of the conversation between them. Lopez was not the declarant in that conversation. (E.g., *People v. Sanders* (1995) 11 Cal.4th 475, 520 [where defense counsel elicited portions of investigative interview with witness, prosecution not foreclosed from inquiring into context of statements on redirect examination of witness and cross-examination of investigator].) Lopez’s statements to Isenhower during the pretext telephone conversations were not statements made by the declarant admissible under Evidence Code section 356 to provide context to the conversation between Corey and Isenhower.

Any request under Evidence Code section 356 to admit statements made by Lopez during the pretext telephone calls would have lacked merit; therefore, his trial counsel was not ineffective by not advancing such an argument. (*Anderson, supra*, 25 Cal.4th at p. 587 [“Counsel is not required to proffer futile objections.”]; *People v. Price* (1991) 1 Cal.4th 324, 387 [“Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile.”].)

VI.

Cumulative Error

Lopez argues the cumulative effect of errors denied him a fundamentally fair trial. We have found no trial court error, and only two instances of potential prosecutorial misconduct. We therefore conclude there was no cumulative error. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.)

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.