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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RENAN LOERA MARTINEZ,

Defendant and Appellant.

H039350

(Santa Clara County

Super. Ct. No. C1111709)

Defendant Renan Loera Martinez was convicted by jury trial of second degree murder, and the court found true allegations that he had suffered a prior serious felony (Penal Code § 667, subd. (a))¹ and strike (§§ 667, subds. (b)-(i), 1170.12) conviction for which he had served a prison term (§ 667.5, subd. (b)). Defendant was committed to state prison to serve a term of 30 years to life consecutive to a five-year determinate term.

On appeal, he contends that the trial court prejudicially erred in (1) failing to exercise its discretion to deny the prosecution's motion to dismiss a vehicular manslaughter count, (2) failing to instruct on various forms of manslaughter as lesser included offenses of murder, (3) precluding defendant's trial counsel from arguing that defendant was culpable for manslaughter rather than murder, (4) admitting evidence of

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

defendant's prior acts to show knowledge, intent, and motive, and failing to provide complete written limiting instructions to the jury, and (5) excluding good character evidence. Defendant also contends that (6) the prosecutor committed prejudicial misconduct. We find no prejudicial errors and affirm the judgment.

I. Facts

At about 8:00 p.m. on June 9, 2010, defendant was driving a green Honda westbound on Tully Road in San Jose. His girlfriend Mayra Barajas was in the passenger seat of the Honda. It was not dark. Two police officers in a marked patrol car noticed that the Honda had a “[c]racked windshield, [and was] straddling lanes, and following too closely.” The Honda was travelling at 30 to 40 miles per hour and was less than a car length from the car in front of it. The speed limit on Tully Road was 40 miles per hour. As the Honda passed through the intersection of Tully Road and Seventh Street, the police officers activated their patrol vehicle's emergency lights and siren and initiated a vehicle stop. The Honda moved to the right, slowed down, and came to a stop. A few seconds later, the Honda moved forward another car length or two and again came to a stop. The patrol vehicle parked behind it.

The two vehicles were about 1000 feet west of the Seventh Street intersection. One police officer had gotten out of the patrol car and the other had begun to get out when the Honda suddenly “just takes off, makes a U-turn, and heads in the opposite direction.” Defendant drove the Honda across three lanes of traffic, up onto the raised median between the westbound and eastbound lanes on Tully, and then skidded across the median before coming down from the median on the other side of the road facing eastbound. The Honda then sped up and proceeded eastbound on Tully back toward the Seventh Street intersection.

Traffic on Tully Road was heavy at this time. There were cars in every lane, and no room to weave around the traffic. All three lanes of eastbound Tully were stopped in

advance of the Seventh Street intersection with at least 20 cars waiting for the red light to change. Traffic was proceeding through the intersection from Seventh Street. Defendant drove the Honda quickly along the shoulder and bike lane and entered the intersection against the red light. The Honda was going between 57 and 66 miles per hour just before the collision occurred.² The front of defendant's vehicle collided with the back of a vehicle that had entered the intersection on a green light. Defendant's vehicle spun around and collided with a light pole. Before the collision, defendant did not honk or brake.

The police did not pursue the Honda because their "pursuit policy" precluded it. Instead, they turned off their emergency lights and watched the Honda head "at a high rate of speed" toward the intersection of Tully and Seventh. The police officers, who could see that the Tully light was red, lost sight of the Honda after it went into the bike lane and became obscured by the vehicles waiting at the intersection. A second later, the police officers heard a "loud collision" and saw "some debris fly through the air and some smoke." They immediately proceeded to the site of the crash, where they found the Honda "literally wrapped around" a pole. Defendant was trying to get out of the driver's side door of the Honda. In order to extract Barajas and defendant from the Honda, the roof of the Honda had to be cut off. Barajas suffered a severe head injury, a broken neck, and other serious injuries. She never regained consciousness and died from her injuries a few days later.

² A GPS unit was found on the floorboard of the Honda after the crash. Data collected by the GPS unit indicated the speed of the Honda.

II. Procedural Background

Defendant was originally charged by information with murder and vehicular manslaughter with gross negligence (§ 192, subd. (c)(1)) plus the prior conviction and prison prior allegations. In April 2012, the prosecutor offered defendant a plea agreement under which he would have pleaded guilty to vehicular manslaughter and assault with a deadly weapon and admitted all allegations in exchange for a 15-year prison term. Defendant rejected the offer. The prosecution later obtained additional evidence that supported the murder count and was no longer willing to accept a plea to anything less than murder. In September 2012, the court granted the prosecutor's request to amend the information to dismiss the vehicular manslaughter count. The prior conviction and prison prior allegations were bifurcated at defendant's request, and defendant waived his right to jury trial on those allegations.

Defendant's trial counsel told the court before the presentation of any evidence that she expected defendant to testify. Defendant testified at trial that Barajas was "[m]y girl," and he "loved [her] deeply." When he pulled over on June 9, 2010, he knew that the police were looking for him and that there was a warrant out for his arrest. Barajas also knew that there was a warrant out for defendant's arrest. He and Barajas were on their way to see an apartment that they hoped to rent so that they could have their own place to live. After the police stopped the Honda, defendant noticed that Barajas was crying. Defendant "just turned" the car around and went over the median. He testified that, at the time, "I don't think I was even thinking." "I just remember I wanted to get away." "I didn't want to lose everything again." Defendant denied "thinking that [he] could hurt anybody," and he insisted that "I didn't think. I wasn't thinking that." He was not trying to hurt anyone. Defendant testified that he was "scared" and thought he was "protecting" Barajas. Asked "then what happened," defendant replied: "I seen cars in front. I pulled to the side. I slowed. And then truth, I don't remember nothing after that."

On cross-examination, defendant claimed that he looked to see if cars were coming when he made the U-turn and when he came down on the other side of the median. He admitted that he wanted to get away from the police and be sure that they did not follow him, so he drove as fast as possible. He also claimed that he checked for bicycles in the bike lane, slowed at the Seventh Street intersection, and “had a good view.”³ Defendant conceded that he knew that the light was red at the intersection and that cars were stopped. He drove the Honda into the intersection anyway. Defendant testified that he proceeded into the intersection even though he could not see if there were cars or pedestrians in it and that he chose to do that because he wanted to get away from the police. Defendant at first insisted that he was unaware that running a red light “could injure or kill,” but he soon admitted that running a red light “is dangerous.” However, he would not at first admit that he knew that on June 9, 2010, instead claiming that he “was blinded then.” Similarly, he at first denied that he was aware that running a red light in a car was dangerous to human life, but he eventually admitted that he did know that long before the June 2010 collision. Defendant also gave conflicting testimony that he “didn’t know the risk the day” of the June 2010 collision because “I wasn’t thinking that day.” He insisted that he “wasn’t thinking” about any of his acts preceding the June 2010 collision except that he wanted to get away from the police. Defendant asserted: “I wasn’t trying to hurt nobody.” Defendant admitted his many prior incidents of moving violations, flight to avoid arrest, and other incidents had made him aware of the dangers of driving.

After a lengthy trial, the jury deliberated for just two and a half hours before returning a guilty verdict on the second degree murder count. The court found true the

³ Defendant’s trial counsel argued to the jury that defendant was “trying to do something that is really risky and he’s trying to do it in as safe a way as he can.”

prior conviction and prison prior allegations. Defendant was sentenced to 30 years to life in prison for the murder count consecutive to a determinate term of five years for the prior serious felony conviction. The court stayed the punishment for the prison prior. Defendant timely filed a notice of appeal.

III. Discussion

A. Dismissal of Vehicular Manslaughter Count

Defendant contends that reversal is required because the trial court failed to exercise its discretion to deny the prosecution's motion to amend the information to dismiss the vehicular manslaughter count.

1. Background

Shortly before trial, the prosecutor moved to dismiss the vehicular manslaughter count. This was not a surprise to the defense, as defendant's trial counsel had "known for some time," at least a month, that the prosecutor intended to dismiss that count. The defense opposed the request. It argued that the vehicular manslaughter count should not be dismissed because, "[i]f dismissed, this action would preclude the jury an opportunity to find Mr. Martinez guilty of this crime as the court is without power to give the instruction for what has been held is that the offense of vehicular manslaughter is a lesser related offense, and would require the prosecutor's consent to instruct the jury upon. Such would be a denial of Due Process under both Federal and State Constitutions."⁴ If this count was dismissed, "the court may be forced to instruct on the law of second degree murder and only that; a choice that leaves the trier of fact with an all-or-nothing gamble." Defendant's trial counsel also argued that it would be "fundamentally unfair

⁴ Defendant's trial counsel at times acknowledged that vehicular manslaughter was not a lesser included offense of murder and at other times contended that it really was a lesser included offense of murder.

to . . . have an opportunity taken away from the defense to have the jury” consider a lesser alternative offense.

The court took the position that it would violate “separation of powers” for it to “make a decision for [the prosecution] on what to even charge.” “[T]here’s no law that will support your view in terms of the Court having taken over the responsibilities of the prosecutor’s office in terms of separation of power.” “The separation of powers give them the right to charge and dismiss counts. [¶] Penal Code §1009 also gives them a right to dismiss at any time in the proceedings.” The court refused “to deny the People the right to dismiss Count 2” and granted the prosecution’s dismissal request.⁵

2. Analysis

Defendant contends, and the Attorney General concedes, that the trial court erred in ruling that the prosecutor had the right and power to dismiss. “Because nolle prosequi is abolished in California, the prosecutor may not unilaterally abandon a prosecution (Pen. Code, § 1386); only the court may dismiss a criminal charge [citations].” (*Steen v. Appellate Division, Superior Court* (2014) 59 Cal.4th 1045, 1055.) Under sections 1385 and 1386, courts have the “sole authority . . . to dismiss actions in furtherance of justice.” (*People v. Bonnetta* (2009) 46 Cal.4th 143, 148-149; *People v. More* (1887) 71 Cal. 546, 547.) This discretionary power may be exercised by the court even if the prosecutor objects. (§§ 1385, 1386.) Because the trial court believed that the prosecutor had the unilateral right and power to dismiss the vehicular manslaughter count, the court failed to exercise its discretion under section 1385 to decide whether or not to dismiss that count.

Ordinarily, “[w]hen a trial court’s failure to exercise its section 1385 discretion to dismiss or strike is based on a mistaken belief regarding its authority to do so, the appropriate relief on appeal is to remand so that the trial court may exercise its

⁵ The jury was not sworn until more than two weeks later.

discretion” (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 99-100.) Here, neither party seeks a limited remand for the court to exercise its discretion. Defendant claims that a remand is inappropriate because the dismissal of the vehicular manslaughter count by the court would have been an abuse of the court’s discretion. He reasons that the interests of justice could not support depriving the jury of the option of vehicular manslaughter. On this basis, he asserts that he is entitled to reversal and a remand for a new trial on the murder and vehicular manslaughter counts. The Attorney General contends that a limited remand is unnecessary because it is not reasonably probable that the jury would have reached a different verdict if the vehicular manslaughter count had not been dismissed.

We will assume for the sake of argument that the trial court would have abused its discretion if it had chosen to dismiss the vehicular manslaughter count. Defendant contends that such an abuse of discretion cannot be deemed harmless because the prosecutor conceded that the evidence of malice was weak, and there was substantial evidence that he was “guilty only of manslaughter.” Defendant’s contentions fail to acknowledge the standard of review that we must apply. As defendant implicitly acknowledges, the court’s assumed error in dismissing the vehicular manslaughter count was closely akin to a court’s error in failing to instruct on a lesser included offense. The effect is essentially the same: the jury lacks a lesser alternative. Defendant makes no substantial argument that we should apply a different standard of review than we would apply to a failure to instruct on a lesser included offense.

“The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, at pages 836–837 [299 P.2d 243]. [Fn. omitted.] Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of.” (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868.) In *Rogers*, a first degree murder case, the trial court erred in failing to instruct the jury that an

intentional killing could be second degree murder. After finding that defendant's testimony provided substantial evidence to support a second degree murder verdict on that theory, the California Supreme Court nevertheless found that the error was harmless. (*Rogers*, at pp. 866 [substantial evidence], 868 [harmless].) Thus, contrary to defendant's argument, the fact that substantial evidence would have supported a guilty verdict on the vehicular manslaughter count does not lead to a conclusion that the court's assumed error in dismissing that count was prejudicial. Indeed, if there is not substantial evidence to support a verdict on a count or lesser offense, the trial court could not possibly *err* in failing to submit that count or lesser offense to the jury. Our harmless error review focuses not on whether substantial evidence supports the dismissed count but on whether it is reasonably probable that the jury would have determined that defendant was guilty of *only vehicular manslaughter, and not murder*, if the vehicular manslaughter count had been before it.

Defendant also claims that the court's dismissal of the vehicular manslaughter count was necessarily prejudicial because "the trial prosecutor himself recognized that the evidence of malice was so weak and equivocal that it would be difficult to convince twelve jurors to unanimously vote to convict [defendant] of murder." His sole citation in support of this claim is to one page of the prosecutor's trial brief, on which the prosecutor acknowledged that defendant's April 2012 rejection of a plea offer was reasonable "given the risks at trial of getting 12 jurors to agree that the facts of this case are murder." Right after saying this, the prosecutor noted that he had obtained "new evidence" after the plea offer that solidified his position that the offense was murder. Furthermore, we do not evaluate this case based on what the prosecutor thought of his case prior to trial. He could not have anticipated that defendant's trial testimony would provide such strong support for his case. We review all of the evidence presented at trial in determining whether it is reasonably probable that the jury would have rejected the murder count if the vehicular manslaughter count had also been before it.

The undisputed evidence established that the death of Barajas was not the result of a simple failure to heed a red light. Defendant's entry into the intersection against the red light was the apex of a series of very dangerous driving maneuvers that defendant admittedly engaged in for the sole purpose of successfully escaping from the police before they realized that there was a warrant out for his arrest. He abruptly drove away from the traffic stop at high speed across three lanes of heavy traffic, skidded across a raised median, drove across three more lanes of heavy traffic, and maneuvered the Honda at high speed down a narrow bike lane past 20 or more stopped cars *before* entering the intersection. Although he may have slowed slightly just before entering the intersection, he was driving at close to 60 miles per hour at that point and knew that he was entering the intersection against a red light.

Defendant did not dispute that his driving of the Honda in this manner was dangerous to human life. His defense was that he did not *consciously disregard* that danger at the time because he "wasn't thinking that day," "was blinded" by his desire to escape from the police, and "wasn't trying to hurt [any]body." The fact that defendant did not intend to "hurt [any]body" was irrelevant. The mental component of implied malice murder requires only conscious disregard for the danger to human life, not intent to harm. "[S]econd degree murder based on implied malice has been committed when a person does 'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life'" [Citation.] (*People v. Watson* (1981) 30 Cal.3d 290, 300 (*Watson*).

Defendant's own testimony rebutted his "wasn't thinking" and "blinded" claims. He testified that he *looked to see* whether cars were coming before he took off from the traffic stop. He *checked for bicycles* in the bike lane, pulled into the bike lane *to avoid the stopped cars*, *slowed down* as he got to the intersection, and "had a good view" before he entered the intersection. He also admitted that he proceeded into the intersection

knowing that the light was red even though he could not see if there were cars or pedestrians in the intersection and that he chose to do that because he wanted to get away from the police. Defendant acknowledged that he purposely drove as fast as possible in order to ensure a successful escape. The evidence of defendant's prior conduct indisputably demonstrated that defendant knew of the risks that such driving entailed, and defendant admitted as much.

Defendant's own testimony established that he was not blinded and was thinking and making conscious choices based on the conditions that he was encountering throughout his execution of the series of dangerous driving maneuvers that led to Barajas's death. His conscious choices, to make a U-turn across a six-lane road in heavy traffic, to drive as fast as possible around stopped cars down a narrow bike lane and into an intersection against a red light, were all aimed at his calculated goal: a successful escape from the police. His conduct, as demonstrated by his own testimony, reflected a choice to make a pursuit by the police as difficult and dangerous as possible in order to deter it. Defendant's choices demonstrated that he was trying to avoid some risks while accepting others in order to attain his goal. No rational juror could have concluded that he was not conscious of the risk to human life that he created by driving the Honda down a bike lane, past several lanes of stopped traffic, at close to 60 miles per hour into a crowded intersection against a red light. It follows that it was not reasonably probable that the jury would have concluded that he was guilty of only vehicular manslaughter and not murder if it had been given that choice. The trial court's dismissal of the vehicular manslaughter count was not prejudicial.

B. Failure to Instruct on Manslaughter

Defendant contends that he was deprived of his federal constitutional rights when the trial court refused to instruct on involuntary manslaughter.

The prosecutor opposed any instructions on involuntary manslaughter or vehicular manslaughter on the ground that they were not lesser included offenses. The defense asked the court to instruct on involuntary manslaughter. The trial court found that neither vehicular manslaughter nor involuntary manslaughter was a lesser included offense in this case and declined to instruct on either of them.

Defendant asserts that the trial court prejudicially erred in failing to instruct on involuntary manslaughter. Although he claims that this was federal constitutional error, we have already explained that the failure to instruct on a lesser included offense is a state law error that we review under *Watson*. We need not determine whether the trial court was obligated to instruct on involuntary manslaughter in this case⁶ because, for the very same reasons that the court's dismissal of the vehicular manslaughter count was not prejudicial, its failure to instruct on involuntary manslaughter could not have prejudiced defendant. The evidence that was before the jury, particularly defendant's testimony, demonstrates that it is not reasonably probable that a rational juror would have rejected murder and found defendant guilty of only involuntary manslaughter if the jury had been given that choice.

C. Limitation on Defense Counsel's Closing Argument

Defendant claims that the trial court prejudicially erred in limiting his trial counsel's closing argument to the jury.

⁶ Involuntary manslaughter does not apply where the death was the result of an act committed in the driving of a vehicle. "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: [¶] (a) Voluntary—upon a sudden quarrel or heat of passion. [¶] (b) Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. *This subdivision shall not apply to acts committed in the driving of a vehicle.* [¶] (c) Vehicular" (§ 192, italics added.)

1. Background

Defendant sought permission for his counsel to argue to the jury that he was guilty of vehicular and involuntary manslaughter rather than murder even though the jury would not be instructed on these lesser offenses. The defense also asked the court to modify CALCRIM No. 520 to delete the reference to “express malice” as there was no issue of express malice in this case. The prosecutor asked the court to “exclude any reference to evidence presented of or argument by the defense that we either had, could have, or should have charged manslaughter or vehicular manslaughter in this case.” The court “provisionally” granted the prosecutor’s request pending briefing on the issue.

At the instruction conference, defendant’s trial counsel acknowledged that the court was specifying that she “cannot discuss that the charge of vehicular manslaughter was, at some point, charged. Won’t discuss that. [¶] . . . I’m not able to discuss that these elements are the crime of vehicular manslaughter.” “Those are verboten, and I’m not to go near them. That’s what I understand my limitations are.” The court confirmed: “That’s correct.”

The prosecutor asked the court to “prevent the defense from arguing the availability of vehicular manslaughter; that it was previously charged; that it could have been charged; that the defendant is only guilty of that lesser related offense. [¶] The defense should be able to, and, of course, is able to, argue that the crime charged is not proven, whether it be any of the elements or that there’s a reasonable doubt regarding any of the elements.” Defendant’s trial counsel argued that she “should be able to argue that . . . his culpability was as one who was not committing the act of murder but one who was committing the act of some other crime and . . . I submit to the Court, Your Honor, that I can say vehicular manslaughter.” The court found that it would be “inappropriate” for her to “argue vehicular manslaughter.” “So I’m strictly prohibiting you from arguing vehicular manslaughter.”

Defendant's trial counsel then told the court that she intended to "tell this jury that this is not only not the crime of murder, but that this is something else that they're not allowed to consider because that choice was not given to them. That choice was made by the prosecution." The court told her "[t]hat is completely inappropriate." "I'm prohibiting you from doing that and you cannot argue something that was not charged. It's simply not permitted."

The prosecutor argued to the jury, without objection, that the jury was not required to find that defendant had engaged in a "weighing procedure. That's called first degree wilful [*sic*] premeditated and deliberate murder. That is not what is at issue here." Defendant's trial counsel began her closing argument by arguing: "It's not murder. It's many, many things but it's not murder." "The question that is really before you, ladies and gentlemen, is what to label [this case], what to call it. My purpose . . . is to tell you it is not the label of murder. [¶] So the argument basically will focus on the creation of what to call the act. . . . The issue is do you think this is . . . murder, . . . , or whether or not you think it is manslaughter." "You want to assign some culpability. Renan, this is your fault, but it's not murder. I'm not going to stand here and tell [you] he's not guilty. He's absolutely guilty; just not of murder." "If Renan didn't think about what he was doing, if all he thought is I can just get away, I don't know what to call it other than an accident, but it's not murder, right?" "Not all killings are murder, but Renan bears one hundred percent the responsibility for Mayra's death, but, you know, not all homicides when we kill one another, it's not always murder. It's not. This is an accident for which Renan bears complete responsibility." "It's not murder. It's an accident that is one hundred percent Renan's responsibility. I'm not here to tell you that Renan is not at fault, but I can't give you a label of what to call it. By not being able to give you a label of what to call his responsibility, you can't default to the label of murder if you don't believe that's there either." She suggested that the jury find that "it was something but it wasn't murder." The prosecutor responded in his rebuttal: "You can call it by any other

name if that makes you feel better, but the law says that it's murder, and that's all you are here to decide.”

2. Analysis

Defendant contends that the trial court “wholly precluded defense counsel from arguing the defense theory of the case—namely, that the state had failed to prove implied malice beyond a reasonable doubt, but had proven at most that Martinez’s actions and mental state were gross negligence or criminal negligence, and that his crime was better described as gross vehicular manslaughter or involuntary manslaughter, rather than second degree murder.”⁷

The trial court’s restrictions were not nearly as limiting as defendant now claims. The only limitations the record discloses the court imposed were that defendant’s trial counsel could not argue that defendant’s offense was the uncharged offense of vehicular manslaughter and that she could not tell the jury that defendant’s offense was “something else that they’re not allowed to consider because that choice was not given to them. That choice was made by the prosecution.” The court did not preclude defendant’s trial counsel from characterizing defendant’s mental state as gross negligence, criminal negligence, or any other mental state. The question before us is whether the trial court’s refusal to allow defendant’s trial counsel to argue that his offense was vehicular

⁷ Defendant also argues that the court unfairly “granted the prosecutor permission” to argue that defendant had harbored implied malice and to contrast that with “the uncharged mental state of express malice.” This argument lacks substance. The court did not give the prosecutor “permission” to make any particular argument. The passages that defendant cites in support of this argument concerned the defense request that CALCRIM No. 520 be modified to delete the standard language explaining the difference between implied malice and express malice. The court refused to modify the standard language. The prosecutor did point out in his argument to the jury the difference between implied malice and express malice. The defense did not object, so the court made no ruling on the propriety of that argument. Defendant has failed to identify anything unfair in the court’s refusal to modify the standard language of CALCRIM No. 520.

manslaughter or to argue that the prosecution was precluding the jury from having another option was erroneous.

The federal constitutional right to counsel includes a right to have counsel present closing argument. (*Herring v. New York* (1975) 422 U.S. 853, 860 (*Herring*)). However, “[t]his is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He [or she] may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He [or she] *may ensure that argument does not stray unduly from the mark*, or otherwise impede the fair and orderly conduct of the trial. In all these respects he [or she] must have broad discretion.” (*Herring*, at p. 862, italics added.) California law is in accord. “It shall be the duty of the judge to control all proceedings during the trial, and *to limit* the introduction of evidence and *the argument of counsel to relevant and material matters*, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.”⁸ (§ 1044, italics added.)

The trial court did not abuse its “broad discretion” in precluding defendant’s trial counsel from arguing to the jury that defendant was guilty of a crime that was not before the jury. Such an argument would have been irrelevant and confusing to the jury since it was not instructed on any other crimes or given the option to convict defendant of

⁸ Defendant’s reliance on a single line of dicta in *People v. Valentine* (2006) 143 Cal.App.4th 1383 (*Valentine*) is misplaced. In *Valentine*, the court held that the defendant was not entitled to instructions on a lesser related offense for the purpose of permitting his counsel to argue that he was guilty of only the lesser related offense. At the end of the court’s analysis rejecting this contention, the court said: “We do not suggest, however, that Valentine could not argue to the jury that his culpability was as one who was in possession of stolen property but not one who committed a robbery.” (*Valentine*, at p. 1388.) Since this issue was not before the *Valentine* court and was not analyzed or decided by it, this one sentence is entitled to no weight in our analysis.

anything other than murder. The trial court's order that defendant's trial counsel not refer to the dismissal of the vehicular manslaughter count was also well within its discretion. The prosecutor's charging decisions were not material to the issues before the jury.

Furthermore, since we have already concluded that it was not reasonably probable that the jury would have convicted defendant of anything less than murder even if lesser offenses had been before the jury, the trial court's limitations on defendant's trial counsel's argument could not have prejudiced him. There is not a reasonable probability that argument by defendant's trial counsel that defendant was guilty of a lesser offense would have produced an outcome more favorable to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

D. Failure to Instruct on Heat of Passion Voluntary Manslaughter

Defendant contends that the trial court had a sua sponte duty to instruct on heat of passion voluntary manslaughter. He claims that a heat of passion theory was supported by his testimony that he decided to flee the police after seeing that Barajas was crying.

“[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support.”

(*People v. Breverman* (1998) 19 Cal.4th 142, 162.) “A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] ‘there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense’ [citation] *but not the lesser.*” (*People v. Memro* (1995) 11 Cal.4th 786, 871, overruled on a different point in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

“Where an intentional and unlawful killing occurs ‘upon a sudden quarrel or heat of passion’ (§ 192, subd. (a)), the malice aforethought required for murder is negated, and the offense is reduced to voluntary manslaughter—a lesser included offense of murder. [Citation.] Such heat of passion exists only where ‘the killer’s reason was

actually obscured as the result of a strong passion aroused by a “provocation” sufficient to cause an “ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.’”

[Citation.] To satisfy this test, the victim must taunt the defendant or otherwise initiate the provocation. [Citations.]” (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) “To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection. . . . [T]he anger or other passion must be so strong that the defendant’s reaction bypassed his thought process to such an extent that judgment could not and did not intervene.” (*People v. Beltran* (2013) 56 Cal.4th 935, 949.)

Heat of passion instructions were not merited in this case because there was not substantial evidence that Barajas’s crying would have caused “an ordinary person” to experience “an emotion so intense” that he or she would be unable to think and exercise judgment and would instead react without reflection. Witnessing another person crying is the kind of ordinary experience that may be painful but does not cause an *ordinary person* to lose the ability to think and reflect before acting. (*Beltran, supra*, 56 Cal.4th at p. 950.) Since the evidence could not support the objective element of heat of passion, instructions on that theory were not required, and the court did not err in failing to give such instructions.

E. Prior Acts Evidence and Limiting Instructions

Defendant contends that the trial court prejudicially erred in admitting evidence of numerous prior acts under Evidence Code section 1101, subdivision (b) and in failing to give adequate written limiting instructions.

1. Background

a. In Limine Ruling

Defendant's trial counsel brought an in limine motion requesting an Evidence Code section 402 hearing and seeking exclusion of evidence of defendant's "prior driving history."⁹ The defense argued that this evidence was not admissible to show implied malice but should instead be excluded under Evidence Code sections 352 and 1101, subdivision (a) and due process because it was "inadmissible character evidence" that would be used to show "propensity." The motion identified eight prior incidents: two speeding violations; an assault with a vehicle; an infraction for failing to use a turn signal; driving on a suspended license; two incidents of unlawful driving or taking of a vehicle; and two incidents of receiving stolen property involving a vehicle. Defendant's trial counsel asked the court to "do the 352 analysis," and she requested that, if the court decided that these prior acts were admissible, it should "sanitize" them to exclude gang references.

The prosecutor responded by identifying 10 incidents of defendant's prior conduct that it wished to introduce to show that he knew his dangerous driving created a risk to human life: hit and run; reckless driving; unsafe driving; evading; assault with a car; open container; running a red light; speeding; and following too closely.¹⁰ The prosecution also identified five incidents of defendant's prior conduct that it wanted to introduce to show his motive and intent to avoid arrest: running from the police and a

⁹ The defense also sought to exclude evidence of defendant's 2004 assault with a vehicle conviction as impeachment evidence, but defendant's trial counsel essentially withdrew this request. The prosecutor sought to use that conviction and others to impeach defendant. Defendant does not challenge on appeal the trial court's ruling that his convictions were admissible to impeach him.

¹⁰ Some violations occurred multiple times; one incident involved multiple violations.

parole officer; parole misconduct; providing a false name to a police officer; fleeing from the police; and escaping from custody. The prosecutor acknowledged that a limiting instruction would need to be given with regard to this evidence.

The court held an extensive hearing at which it engaged in “a careful weighing process under 352 on every single act requested to be admitted.” The court found that most of the prior acts were admissible under Evidence Code section 1101, subdivision (b) to show defendant’s “knowledge of the risk of death” and “motive and intent.” The court noted that there was a “continuous course of conduct,” and it found that the prior acts were not more prejudicial than probative either individually or in the aggregate.

The court ruled admissible to show knowledge a November 1997 incident during which then 15-year-old defendant stole his parent’s car, crashed it, and fled. He suffered a juvenile adjudication for taking the car, hit and run, and driving without a license. The court limited the evidence to the hit and run and excluded the vehicle theft and driving without a license. The court also ruled admissible on the knowledge issue a February 1998 incident during which defendant stole a car and hit the car of someone who was pursuing him to report the car theft. He suffered a juvenile adjudication for reckless driving and other offenses. The court excluded evidence of the offenses other than reckless driving. The court ruled admissible to show knowledge an April 2002 incident where defendant was detained for unsafe driving due to his “driving less than one car length” from the car in front of him.

The court ruled admissible to show knowledge an August 2004 incident during which defendant ran his car onto the sidewalk and intentionally struck two men on a bicycle before fleeing the scene. This was the event that produced his assault with a vehicle conviction. The court ruled admissible to show knowledge an August 2008 incident during which defendant was driving 88 miles per hour on Highway 101 where the speed limit was 65. The court also ruled admissible to show knowledge evidence that defendant went to driving school in January 2009, where he was told about the dangers of

speeding and that cars are dangerous if not operated properly. The court ruled admissible to show knowledge evidence of an August 2009 incident where defendant was detained for running a red light. The court also ruled admissible to show knowledge evidence of a March 2010 speeding and following too closely incident where defendant was going 80 miles per hour on the highway and was just a few feet behind slower traffic. The court also ruled admissible to show knowledge evidence of a second March 2010 speeding incident.

The court ruled admissible to show defendant's motive and intent a November 1998 incident where defendant, then aged 16, escaped from the Ranch, where he had been committed for the February 1998 reckless driving incident. The court ruled admissible to show motive and intent evidence of a June 2002 incident where defendant fled from the police to avoid arrest and a July 2002 incident where defendant gave a false name to an officer to avoid arrest on a warrant. The court also ruled admissible to show motive and intent a second incident in July 2002 where defendant was a passenger in a car that evaded the police until the police gave up the pursuit. The court also ruled admissible to show motive and intent evidence that, after defendant was detained in August 2009 for failing to stop at a red light, he refused to provide his address and told the officers that it was their job to find out. He was returned to custody for four months for a parole violation. The court ruled admissible to show motive and intent evidence that in February 2010, he violated his parole and told his parole officer that he had considered absconding rather than facing the consequences of his violation. The court ruled admissible to show motive and intent evidence that, in March 2010, defendant was placed on high risk parole supervision, which included a GPS monitor. It also ruled admissible to show motive and intent evidence that, when he was stopped for speeding in March 2010, he fled on foot, the police found the GPS monitor that defendant had cut off during his flight, and a warrant was issued for his arrest for absconding, which was still pending when the current offense occurred.

The court excluded evidence of an incident in June 2009 where defendant was cited for being the driver with an open container of alcohol in the vehicle with Barajas as his passenger. The court also excluded evidence of vehicle thefts.

b. Evidence of Prior Conduct Presented To The Jury

On the afternoon of November 19, 1997, defendant abandoned a vehicle on a center raised median after an accident. In the wee hours of the morning on February 19, 1998, defendant was seen “driving real fast” and failing to stop at a stop sign in a residential area of San Jose. There were very few cars around. A car was following defendant’s vehicle, and defendant turned his vehicle around to face the other vehicle and drove at the other vehicle. The other vehicle backed up in an attempt to avoid defendant’s vehicle, but defendant’s vehicle struck the other vehicle. Defendant then drove away, let someone out of his vehicle, and then drove back toward the other vehicle. The other vehicle left the area. In November 1998, defendant, then 16 years old, was placed at “The Ranch.” He left the Ranch without permission, but he turned himself in three days later and returned to the Ranch. He told his juvenile probation officer that he left the Ranch because he “became frustrated with being incarcerated.”

On the afternoon of April 19, 2002, a San Jose police officer stopped a vehicle with a damaged windshield that defendant was driving for following too closely. The officer warned defendant about following too closely and cited him for the damaged windshield. On July 15, 2002, a San Jose police officer pulled over a vehicle in which defendant was a passenger. Defendant initially provided a false name and birth date; half an hour later, he provided his true name and birth date. Defendant was then arrested on a warrant. On the afternoon of July 24, 2002, a San Jose police officer attempted to stop a vehicle using lights and siren. Defendant was the front seat passenger in this vehicle. The vehicle did not yield, and the officer pursued it. The vehicle sped up and made a sharp turn. Several other police cars joined the pursuit for a mile or two, but the pursuit was terminated due to the San Jose Police Department’s pursuit policy.

On August 5, 2004, defendant drove his car along the road next to two people on a bicycle on the sidewalk in San Jose. After a brief conversation between defendant and the two people on the bicycle, the bicycle reversed directions. Defendant made a U-turn, drove his car up onto the sidewalk into a “lawn area,” and hit the bicycle with his car. Defendant was arrested the following day for this offense. He was convicted of assault with a deadly weapon, a car, and sentenced to seven years in custody.

Defendant’s parole officer, who had been his parole officer since 2008, testified that he “went over” with defendant the conditions of his parole, including his obligation to “obey all laws,” provide his residence address, and notify parole of any contact with police officers concerning a violation of the law, such as a traffic ticket or an arrest.

In August 2008, defendant received a traffic ticket. In January 2009, he went to traffic school for it. During this class, defendant was told that two of the six traffic violations responsible for 80 percent of fatalities were following too closely and running a red light. The teacher of the class told the students that running a red light can result in serious injury or death to the passengers in their cars. Defendant got 12 of 20 correct on the test at the end of the class. A minimum score of 10 was required to pass the class.

On August 5, 2009, just before 6:00 p.m., defendant made a right hand turn at a red light without stopping at the light. He was pulled over by the police. The police asked defendant, who was on parole, where he was living, and he told them “‘that’s your job to figure out.’” When he was told that he could face an additional charge by not telling the police his residence address, defendant replied: “‘oh well. I’m going to jail anyways.’” Defendant was returned to custody for four months for violating his parole. Defendant violated his parole again in February 2010. His parole officer talked to defendant about the violation, and defendant told the parole officer that he “‘considered running.’” The parole officer advised him not to do that.

On March 9, 2010, shortly after noon, defendant was speeding on Highway 87. He was going 20 to 30 miles per hour over the speed limit. He used a right lane to pass

another car. As he was transitioning from Highway 87 to Interstate 280, defendant followed another car very closely, “within a couple of feet.” He was pulled over by the police and cited for “unsafe speed.”

On March 10, 2010, defendant’s parole officer met with defendant to “place him on a GPS.” A GPS monitor was attached to defendant’s ankle. On the afternoon of March 16, 2010, defendant was speeding near a school when he was pulled over by the police. One of the police officers took possession of defendant’s car keys. While his passengers were being searched, defendant suddenly ran across the street and fled. Defendant’s “cut off GPS monitor” was found in some bushes in the area to which defendant had fled. Defendant’s parole officer asked that a warrant be issued for defendant’s arrest, and a no-bail warrant was issued. Defendant had no contact with his parole officer between March 16, 2010 and June 9, 2010.

During his testimony at trial, defendant admitted all of the prior incidents. He affirmed that he had intentionally driven his car into and hit two men on a bicycle. At first he denied that he wanted to hurt them and claimed “I wasn’t thinking.” However, he eventually admitted that he wanted to hurt them but insisted “I wasn’t trying to kill them.” Defendant admitted that he fled the scene of that offense to avoid getting arrested. He also admitted that he had been convicted of assault with a deadly weapon, a car, for that offense and sentenced to seven years in custody.

c. Limiting Instructions

At the beginning of the trial, the court preinstructed the jury: “During the trial, certain evidence will be admitted for a limited purpose. You may consider that evidence only for the purpose and for no other. And when that opportunity comes, I’m going to advise you of what that limited purpose is. I will read you that instruction again, and when that testimony comes in, I will tell you how to use that evidence that comes in for a limited purpose.”

When the jury began receiving testimony about prior acts, the court again instructed it about the limited purpose of this evidence. “Ladies and gentlemen, you have been listening to a number of officers talking about incidents that happened other than on June 9th of 2010. That evidence is coming in for a very limited purpose, and that limited purpose is -- goes toward the defendant’s mental state. And that is the only use that you can use that evidence. [¶] It is not to be used that the defendant is a bad person or of bad character. It is very specific, and I will advise you of that again on what purpose that this evidence -- any evidence that’s coming in for any date other than June of 2010 on when this collision occurred is very limited. [¶] And we’ll talk about it in more detail.”¹¹

In the midst of the testimony about the prior acts, the court again instructed the jury about the limited purpose of this evidence. “I want to review again to make sure that you, as the judges in this case, keep the evidence that comes in in the proper frame, and that all the witnesses who have testified this morning are testifying for a very limited purpose. And the law allows the prosecution to bring in uncharged conduct, and this is conduct that occurred previously. And we call this uncharged conduct, and that conduct comes in for a very limited purpose. [¶] And the limited purpose in which the conduct comes in -- and you’ll get a jury instruction that reflects on this -- and I’m just going to read part of it. [¶] Is that if you decide the defendant committed uncharged acts, you may but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant acted with the intent to flee law enforcement to avoid being arrested or searched, the defendant had a motive [to] commit the offense alleged in this case, and the defendant knew that his driving was dangerous to human life, and [consciously] disregarded that risk. [¶] Do not consider this evidence for any other

¹¹ The court subsequently mentioned outside the presence of the jury that it wanted to again advise the jury “about the limiting instructions” and asked the prosecutor to provide the court with a “clean copy” of CALCRIM No. 375.

purpose except for what I've indicated. And if you conclude the defendant committed uncharged acts, that conclusion is only one factor to consider along with all the other evidence. [¶] It is not sufficient by itself to prove the defendant is guilty of murder. [¶] The People must still prove the charge beyond a reasonable doubt. [¶] So all of this is not to say the defendant is a bad person or bad character. It's simply circumstantial evidence of what I've indicated." Later during the presentation of additional prior act evidence, the court again reminded the jury: "I want to remind all of our judges that this evidence is being admitted for a very limited purpose. This is all uncharged conduct."

The court and the attorneys discussed CALCRIM No. 375 at the instruction conference. The court suggested that the attorneys "list what those intents are" that the jury could use this evidence for, but defendant's trial counsel asked "that we not do that." She was concerned "that unnecessarily highlights the information" The court did not agree with her. The court stated that it would give CALCRIM No. 375. It asked the prosecutor to modify the instruction to identify as to each event whether it would apply to "intent to flee law enforcement or a motive to commit the offense, as well as list the [events relevant to his] knowing his driving was dangerous to human life and consciously disregarding that risk." The court's view was that this would "only give [the jury] more guidance on how to use this evidence." The prosecutor modified CALCRIM No. 375 as requested, and defendant's trial counsel affirmed that it "looks fine."

The court's oral limiting instruction read as follows: "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other. [¶] The People presented evidence of other behavior by the defendant committed prior to June 9th, 2010, that was not charged in [this] case. Specifically: [¶] One, a hit and run on November 17th, 1997. [¶] Number two, reckless driving on February 19 of 1998. [¶] Three, escape from the Ranch in November of 1998. [¶] Four, following too closely on April 19th of 2002. [¶] Five, running from a police officer on June 8th of 2002. [¶] Six, giving a false name to a peace officer on July 15,

2002. [¶] Seven, being a passenger during an evasion of a peace officer in a car on July 24th of 2002. [¶] Eight, assault with a motor vehicle on August 5, 2004. [¶] Nine, speeding on August 30, 2008. [¶] Ten, attending traffic school on January 4th of 2009. [¶] Eleven, running a red light and delaying a peace officer in the performance of the officer's duties on August 5, 2009. [¶] Twelve, speeding and following too closely on March 9, 2010. [¶] Thirteen, speeding and running from the police on March 16 of 2010. [¶] And, fourteen, parole conduct as described by Agent Rodriguez. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged act. . . . [¶] If the People have not met this burden, you must disregard the evidence entirely. If you decide the defendant committed the uncharged act, you may but are not required to, consider the evidence for the limited purpose of deciding whether or not -- and the rest of the instruction on this instruction of Cal Crim 375 the Court has listed different theories on which you can apply this evidence a number that you can go back and relate to under each theory. [¶] For example, defendant acted with the intent to flee law enforcement to avoid being arrested and/or searched. That would include the [un]charged acts of one, two, three, five, six, 11, 13 and 14. And some of these acts you can use the same act for a different theory. For example, on Page 2, the defendant had a motive to commit the offense alleged in this case, you may refer to Items 1, 2, 3, 5, 6, 11, 13, 14, and the defendant knew that his driving was dangerous to human life, and consciously disregarded that risk. You may refer back to Items 1, 2, 4, 7, 8, 9, 10, 11, 12, and 13. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. If you conclude that the defendant committed the uncharged acts, that conclusion is only one factor to consider along with the other evidence. It is not sufficient in itself to prove the defendant is guilty of murder. The People still must prove the charge beyond a reasonable doubt.”

The written limiting instruction given to the jury stated: “During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.” “The defendant had a motive to commit the offense alleged in this case (items 1, 2, 3, 5, 6, 11, 13, and 14); AND [¶] The defendant knew that his driving was dangerous to human life and consciously disregarded that risk (items 1, 2, 4, 7, 8, 9, 10, 11, 12, and 13). [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that defendant committed the uncharged acts, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder. The People must still prove the charge beyond a reasonable doubt.”

d. Closing Arguments Concerning Prior Acts

The prosecutor argued to the jury without objection: “[Y]ou don’t even need all of these prior events to know that the defendant both knew his conduct was dangerous to human life and he consciously disregarded the risk or he accepted the risk. But what the prior conduct makes clear is that he was both aware of the risk and he was a risk taker. He didn’t care or he had prioritized other things, and it wasn’t the safety of others.” Defendant’s trial counsel argued: “With respect to [defendant]’s past the limiting instruction that Judge Chapman [*sic*] read to you, essentially there’s some do’s and don’t’s about [defendant]’s past. You can’t use it to decide you don’t like [defendant] or that he’s may be [*sic*] predisposed to commit a crime. You can only use it contextually to understand what [defendant] may or may not have been thinking and what he understood and what he knew on June 9th.” The prosecutor’s rebuttal argument reminded the jury of the limiting instruction: “You have got a jury instruction, 375. It tells you how to handle [the priors].”

2. Admissibility

Defendant argues that nearly all of the prior acts were erroneously admitted by the trial court because the prior conduct was simply character evidence that lacked substantial probative value as to his knowledge, intent, or motive.

“Evidence Code section 1101, subdivision (a) generally prohibits the admission of evidence of a prior criminal act against a criminal defendant ‘when offered to prove his or her conduct on a specified occasion.’ Subdivision (b) of that section, however, provides that such evidence is admissible when relevant to prove some fact in issue, such as motive, intent, knowledge, identity, or the existence of a common design or plan. [¶] ‘The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.’ [Citation.] Evidence may be excluded under Evidence Code section 352 if its probative value is ‘substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ [Citation.] ‘Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value.’” (*People v. Lindberg* (2008) 45 Cal.4th 1, 22-23.)

a. Knowledge

The trial court ruled admissible 10 prior incidents to show that defendant knew that the charged conduct was dangerous to human life. Defendant does not claim that this was not a material issue. Nor does he claim that the court erred in admitting evidence of the February 1998 reckless driving incident or his January 2009 attendance at traffic school to show knowledge. He challenges the admission of the other eight incidents and claims that these eight incidents lacked substantial probative value on the knowledge issue.

“Whether similarity is required to prove knowledge and the degree of similarity required depends on the specific knowledge at issue and whether the prior experience tends to prove the knowledge defendant is said to have had in mind at the time of the crime. For example, knowledge of the dangers of driving while under the influence can be obtained through the general experience of having suffered a driving under the influence (DUI) conviction [citation], from the knowledge obtained in DUI classes [citations] or from the admonition required by Vehicle Code section 23593 upon a DUI-related conviction. . . . This is so because in any of these examples, the evidence supports an inference that the defendant was aware of the dangers of driving while under the influence at later times when he or she drove.” (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 241, fn. omitted.)

Because alcohol itself impairs one’s ability to drive, prior events of driving under the influence may support an inference that the driver was aware of this impairment and the dangers that it posed. The same inference is not readily available from prior incidents of speeding. The mere fact that a person has previously driven over the speed limit does not provide substantial support for an inference that the person is aware that speeding is dangerous to human life. That a person engaged in certain conduct in the past does not show an awareness of the dangers entailed in that conduct unless the circumstances of the event demonstrated the danger or led to someone informing the person of the danger associated with that conduct. It naturally follows that, where a prior driving event is relied upon to show knowledge of the dangers of such a driving event, a court must scrutinize the circumstances of the prior event to determine whether those circumstances informed the driver of the dangers associated with that event. The experience of being issued a traffic ticket alone generally will not be enough to demonstrate knowledge that one’s conduct was dangerous to human life unless the ticketing officer or the court provided such information. Learning that one’s act violated the law does not necessarily apprise a person that it was dangerous to human life.

We agree with defendant as to four of the eight incidents that he challenges. These four incidents lacked evidence of any circumstances that would have apprised defendant that those acts were dangerous to human life as opposed to merely unlawful. While the November 1997 hit and run incident showed that defendant had crashed a car, there was no evidence of the cause of the crash. The fact that a car has crashed does not mean that the driver of that car has learned that any specific conduct other than driving itself is dangerous to human life. The August 2008 speeding incident did not show that defendant knew that speeding was dangerous to human life, only that he knew it was illegal. There was no collision or other damage. This incident just showed that defendant tended to speed, which is inadmissible propensity evidence. The August 2009 incident where he was ticketed after turning right on red without stopping did not demonstrate that defendant was aware that failing to stop at a red light was dangerous to human life but only that he was aware that it was illegal. There was no evidence that any car had to swerve to avoid his car after he turned or that there was any other event that would have apprised defendant of the dangerousness of his act, rather than merely its illegality. The March 16, 2010 incident was also inadmissible to show knowledge. This incident began when defendant was pulled over for speeding. He fled on foot and cut off his GPS monitor. Like the other speeding incidents, it did not show that he knew speeding was dangerous rather than just that it was illegal. This incident should not have been admitted to show knowledge.¹²

While those four incidents were not admissible to show knowledge, the other six incidents were properly admitted for that purpose. Defendant does not contest the court's admission of evidence of his January 2009 attendance at traffic school to show his

¹² Many of the facts of this incident were otherwise admissible to show that defendant absconded from the stop, resulting in a warrant for his arrest, which he was seeking to evade at the time of the charged offense.

knowledge. Since the traffic school class explicitly informed defendant that running a red light was dangerous to human life, this evidence was plainly admissible. He also does not challenge the admission of evidence of the February 1998 reckless driving incident to show knowledge. The February 1998 reckless driving plainly made him aware of the dangers of a collision from such driving since the other driver was forced to take evasive action.

We reject defendant's challenges to admission of the April 2002 and July 2002 incidents. In the April 2002 incident, defendant was stopped for following too closely, and the officer warned defendant about his dangerous driving. This warning apprised defendant of the dangerousness of following too closely, which was part of the course of conduct that defendant engaged in just before the charged conduct. Defendant's observation of the July 24, 2002 vehicular evasion of the police was also admissible to show knowledge. He claims that this incident should not have been admitted because it did not show that he knew the dangers of reckless driving. This evidence was admissible to show that defendant *knew that reckless driving would cause the police to terminate pursuit*, which was a relevant fact. While the July 24, 2002 incident and the charged conduct were not entirely similar, the similarities were sufficient to support the admission of this incident, and the potential for prejudice was minimal. Defendant was not the driver in the prior incident, so there was little risk that the jury would conclude from evidence of the July 24, 2002 incident that defendant himself had a propensity for reckless driving or flight from the police. Its relevancy regarding defendant's knowledge of the conduct that would lead to a termination of a police pursuit was sufficient to support its admission.

We also reject defendant's challenge to the admission of his August 2004 assault on two men on a bicycle with his car. It is true that the August 2004 incident was not substantially similar to the charged incident. In August 2004, defendant purposely drove his car up on the sidewalk so that he could intentionally hit the men with his car. The

incident did not involve speeding, running a red light, flight from the police, or anything else like the charged conduct. Nevertheless, the trial court could have concluded that this incident showed that defendant knew that a car could be dangerous if driven into human beings. The charged conduct involved defendant driving a vehicle against a red light through an intersection when he knew that other human beings might be in the intersection. Thus, this incident had substantial probative value on the knowledge issue. And the potential for prejudice was reduced since it was also admissible to impeach defendant's testimony.

The court also did not abuse its discretion in admitting evidence of the March 9, 2010 speeding and following too closely incident to show knowledge. At the beginning of the March 9, 2010 incident, defendant was exceeding the speed limit on Highway 87 by 20 to 30 miles per hour. He encountered slower traffic and "began tailgating." After transitioning to Interstate 280, he started following another car "within a couple of feet." It was only at this point that the police pulled defendant over and cited him for "unsafe speed." Since defendant had previously been warned in April 2002 that following too closely was "dangerous," the March 9, 2010 citation for "unsafe" driving provided a reminder to him of the dangerousness of following too closely at high speed, which was also involved in the charged incident. In addition, admission of this evidence was unlikely to be substantially prejudicial since some of the facts regarding this incident were properly admitted to establish the sequence of events that led to defendant being given a GPS monitor on March 10, 2010. Those facts were relevant because his subsequent removal of the GPS monitor on March 16, 2010 was what led to the warrant for his arrest, which led to his motivation to flee the police at the time of the charged conduct on June 9, 2010.

b. Intent and Motive

The trial court ruled admissible eight prior incidents to show that defendant's intent and motive in engaging in the charged conduct was to avoid arrest by police.

Defendant's intent and motive were material because they provided insight into his state of mind when he engaged in the charged conduct, which was a critical issue at trial.

Defendant claims that none of these incidents were substantially probative on those issues and therefore should not have been admitted.

“The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*)). “In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ‘‘probably harbor[ed] the same intent in each instance.’’ [Citations.]” (*Ibid.*)

The trial court erred in admitting evidence of two of the eight incidents to show intent or motive because these incidents lacked substantial probative value on these issues. Although defendant concedes that the February 1998 reckless driving incident was relevant to show knowledge, he contends that it should not have been admitted to show motive or intent. We agree that this incident had no relevance to defendant's intent or motive because it did not involve a flight from the police, which was the critical element of the issue it was supposed to address. Defendant's August 2009 refusal to reveal his residence to the police also lacked substantial probative value. He did not flee, and he did not provide a false name. This incident did not show that he had a motive to avoid arrest as he plainly acknowledged that he was going to be arrested regardless. It showed no more than that defendant was uncooperative with the police, which is prohibited propensity evidence, not admissible evidence under Evidence Code section 1101, subdivision (b).

On the other hand, the trial court did not abuse its discretion in admitting evidence of the other six incidents to show motive and intent. The November 1997 hit and run incident demonstrated defendant's intent to escape from responsibility for the harmful results of his driving. He badly damaged the car and chose to abandon it rather than face the consequences of his act. The charged offense occurred after defendant absconded

from a traffic stop instead of facing the consequences of his bad driving. Defendant's November 1998 escape from the Ranch, although it did not itself involve any driving, demonstrated defendant's long-standing intent to avoid the consequences of his conduct. In fact, he had been placed at the Ranch as result of his November 1997 hit and run and his February 1998 reckless driving, although evidence of the reasons for his Ranch placement were excluded. His flight from the Ranch, like his flight from the police during the current offense, shared the same motivation: to escape from taking responsibility for his offenses..

While defendant's June 2002 flight on foot from the police did not involve a warrant, it, like the charged conduct, involved a flight from a police detention. As such, it had some probative value with regard to defendant's intent and motive to avoid police contact. The July 15, 2002 incident during which defendant provided a false name to a police officer to avoid being arrested on a warrant was also sufficiently similar to support the requisite inference. As was true at the time of the charged conduct, defendant was contacted by the police on July 15, 2002 while there was a warrant out for his arrest. He then engaged in conduct designed to prevent the police from discovering the warrant. While the conduct itself was dissimilar, the circumstances were sufficiently similar to support an inference that defendant harbored the same intent and motive on both occasions.

Evidence of the March 16, 2010 incident was also properly admitted to show intent and motive. This incident began when defendant was pulled over for speeding. He fled and cut off his GPS monitor. The March 16, 2010 incident formed the basis for the warrant that defendant was trying to evade when he took off from the June 2010 traffic stop. It was highly relevant to defendant's intent and motive to evade the police at the time of the charged conduct. Finally, evidence of defendant's conduct on parole was properly admitted to show his intent and motive. The fact that defendant was on parole, with a parole warrant out for his arrest, was relevant to show the basis for his motive to

flee the police in June 2010. Indeed, defendant concedes that most of this evidence was admissible. He challenges only the testimony that he was a “high risk” parolee.

Assuming defendant preserved that specific challenge,¹³ that testimony was relevant to explain why he was fitted with a GPS monitor, which provided relevant background for the sequence of events and was not unduly prejudicial in context.

3. Instructions

Defendant also argues that the trial court’s limiting instructions on the prior acts admitted for knowledge, motive, and intent were inadequate because the written limiting instructions given to the jury regarding the prior acts did not include all of the text of the oral limiting instruction. He claims that the written limiting instruction was inadequate because it failed to adequately identify which of the fourteen incidents could be used for each of the three purposes (knowledge, intent, and motive). Defendant also asserts that the court’s limiting instruction on the prior convictions admitted to impeach his testimony was inadequate because the oral limiting instruction regarding this evidence was not included in the written instructions given to the jury.

The trial court gave repeated and specific oral limiting instructions throughout the trial restricting the jury’s use of the prior acts evidence. During the trial, the trial court told the jury that the evidence of defendant’s prior acts was being admitted for a limited purpose, could only be used with regard to “defendant’s mental state,” and “is not to be used that the defendant is a bad person or of bad character.” The court more particularly

¹³ Defendant does not identify in his opening brief any place in the record that indicates his trial counsel made a specific objection to the parole officer’s “high-risk” testimony. His trial counsel’s in limine argument that the court should “circumscribe the escalation of the parole supervision” was focused on her unsuccessful attempt to persuade the court to exclude evidence that the parole officer decided to have defendant wear a GPS monitor. When defendant’s parole officer testified at trial and confirmed that defendant was “placed on a high-risk supervision caseload,” defendant’s trial counsel did not interpose any objection.

described “the limited purpose” as “whether or not the defendant acted with the intent to flee law enforcement to avoid being arrested or searched, the defendant had a motive [to] commit the offense alleged in this case, and the defendant knew that his driving was dangerous to human life, and [consciously] disregarded that risk.” It also told the jury during the trial: “Do not consider this evidence for any other purpose except for what I’ve indicated.”

Before the final oral instructions were given to the jury at the end of the trial, defendant’s trial counsel objected to greater specificity regarding which prior acts could be used for each purpose as she believed “that unnecessarily highlights the information” The court rejected her objection and gave an oral limiting instruction that identified by factual description each of the 14 prior acts and cross-referenced which of them had been admitted for each of the three limited purposes. The written limiting instruction given to the jury did not contain the factual descriptions of the prior acts that were included in the court’s oral limiting instruction, but the written limiting instruction reiterated that “certain evidence was admitted for a limited purpose,” could be considered “only for that purpose and for no other,” and identified those purposes as “motive to commit the [charged] offense” and that “defendant knew that his driving was dangerous to human life and consciously disregarded that risk.” The written limiting instruction also cross-referenced the numbers that had been assigned to each prior act in the oral instructions (for knowledge, “items 1, 2, 4, 7, 8, 9, 10, 11, 12, and 13,” and for motive, “items 1, 2, 3, 5, 6, 11, 13, and 14),” but it did not include factual descriptions of each of the prior acts. Nor did the written limiting instruction tell the jury that it could use the prior acts to show defendant’s intent. The written limiting instruction did tell the jury that it should “not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.”

Trial courts generally have no obligation to give sua sponte limiting instructions. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.) Nor is there any requirement that

jury instructions be provided to the jury in writing absent a request from the jury. (*People v. Seaton* (2001) 26 Cal.4th 598, 674; *People v. Trinh* (2014) 59 Cal.4th 216, 235 (*Trinh*.) Where the instructions have been given orally, we presume that the jury heard and followed them. (*Trinh*, at p. 235.) In this case, the court gave detailed and complete oral limiting instructions. Defendant's trial counsel opposed the court giving such detailed limiting instructions, and the written limiting instruction was very close to what defendant's trial counsel sought. Indeed, it is possible that the less detailed written limiting instruction was given in belated acquiescence to defendant's trial counsel's objection. Since a defendant's trial counsel's decisions regarding limiting instructions are presumptively tactical (*People v. Maury* (2003) 30 Cal.4th 342, 394), and limiting instructions are not required, belated acquiescence to defendant's trial counsel's objection would not have been erroneous. In any case, the less detailed instruction was plainly more *favorable to defendant* than the more detailed one. The written limiting instruction restricted the purposes for which the prior acts could be used to only knowledge and motive, thereby precluding the jury from using the prior acts to show intent. And defendant could hardly have been prejudiced by the instruction's failure to repeat factual descriptions of the prior acts that his trial counsel was seeking to deemphasize. We presume that the jurors were able to correlate the numbers in the written limiting instruction with the prior acts, particularly since the numbers were assigned chronologically. The trial court did not prejudicially err in giving a more truncated written limiting instruction regarding the prior acts.

Defendant also complains that the jury was instructed only orally but not in writing of the limited purpose for which the convictions that were admitted to impeach his testimony could be used. The trial court ruled admissible six prior felony convictions to impeach defendant's testimony: multiple counts of possession of stolen property, multiple counts of vehicle theft, and the 2004 assault with a deadly weapon, a car. When defendant testified, the prosecutor asked him if he had suffered these convictions, and

defendant admitted that he had. The court told the jury at that time that these convictions “are not like all those separate convictions” because the five vehicle theft and possession of stolen property convictions involved just “three stolen cars.”

Before orally instructing the jury on the limited uses to which it could put the prior acts evidence, the court stated: “During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other.” After orally instructing the jury regarding the prior acts evidence, the court said: “The following is another limited purpose evidence. [¶] If you find that a witness has been convicted of a felony [or committed a crime or other misconduct], you may consider that fact in evaluating the credibility of the witness’s testimony. The fact of a conviction [or that a witness may have committed a crime or other misconduct] does not necessarily destroy or impair a witness’s credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.” The written instructions did not include this limiting instruction (CALCRIM No. 316) regarding prior convictions.

As we have already noted, the trial court has no sua sponte obligation to give limiting instructions or to provide written instructions absent a request from the jury. Here, the court gave a correct oral limiting instruction regarding the prior convictions that were admitted to impeach defendant. We can find no indication in the record that defendant requested a limiting instruction on the prior convictions. In any event, the prior convictions for vehicle theft and possession of stolen property had no significant potential to prejudice the jury against defendant in light of all of the other evidence that had been admitted of his prior acts. The prior conviction for assault with a deadly weapon was covered by the prior acts instruction, so its purpose was already limited. The trial court’s limiting instructions were not erroneous.

4. Prejudice

We have concluded that the trial court erred in admitting some of the prior act evidence but that it did not err in its limiting instructions. The next question is whether

the court's error in admitting some of the prior act evidence was prejudicial. Error in admitting prior act evidence under Evidence Code section 1101, subdivision (b) is evaluated under the *Watson* harmless error standard. (*People v. Malone* (1988) 47 Cal.3d 1, 22.) As we observed earlier, reversal is required under this standard "only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of." (*Rogers, supra*, 39 Cal.4th at pp. 867-868.)

The court erred in admitting four of the 10 prior incidents that were admitted to show knowledge and two of the eight prior incidents that were admitted to show intent and motive. While this was a significant number of prior incidents, the erroneously admitted evidence was not substantively significant for four reasons. First, two of the four incidents erroneously admitted to show knowledge and one of the two incidents erroneously admitted to show intent and motive were properly admitted for other purposes, thereby minimizing any potential for prejudice. Second, the reason that the incidents were erroneously admitted was that they lacked relevance on the issues for which they were admitted, which means that they had little potential to prejudice defendant in light of the limiting instructions. Third, the probative force of the properly admitted prior act evidence was very strong on the issues on which the prior incidents were admitted. Fourth, defendant admitted in his trial testimony that he knew that his conduct was dangerous to human life and that his intent and motive were to escape from the police. In this context, it is not reasonably probable that the jury would have reached an outcome more favorable to defendant in the absence of the erroneously admitted prior act evidence.

F. Good Character Evidence

Defendant contends that the trial court prejudicially erred in excluding "instances of good character evidence offered by the defense."

1. Background

Defendant filed an in limine motion seeking a ruling on his proposed introduction of good character evidence. The proposed evidence was that defendant “cared for Mayra Barajas deeply” and was concerned about her well-being, and that the couple planned to live together, marry, and coparent defendant’s young daughter. The only proposed defense character witness was Barajas’s mother, Juana Mesina-Mendoza. The prosecution opposed the introduction of evidence of defendant’s “love for” Barajas. It claimed that such evidence was irrelevant and should be excluded under Evidence Code section 352. The prosecution also argued that character evidence was limited to “opinion and reputation only” and that it would be permitted to challenge such good character evidence by referring to specific instances of defendant’s prior bad conduct.

The court initially found that the proposed testimony was not relevant and that any probative value was minimal compared to the prejudice. However, the court suggested that Barajas’s mother’s testimony might be relevant if defendant testified. Her testimony was proposed to be solely “about the nature of the relationship between Mayra Barajas and [defendant].” The “purpose was for evidence of character.”

The court held an Evidence Code section 402 hearing at which Barajas’s mother testified that defendant and Barajas had been dating for two and a half years. She said that the couple “got along well,” that defendant “would treat [Barajas] very well,” and that he “would spoil her a lot.” Her observation was that defendant loved Barajas. The court found that Barajas’s mother’s proposed testimony was “not really relevant” or only “marginally relevant,” but “I will allow her testimony to come in only on what she observed in terms of their relationship.” The court refused to allow evidence of defendant’s conduct after Barajas’s death.

The prosecutor asserted that he would question Barajas’s mother about her knowledge of defendant’s gang membership if she offered an opinion on defendant’s character. The court responded that it would not permit any gang evidence to be

introduced because the defense was “not offering any evidence on [defendant’s] reputation in the community” but only “evidence about his relationship with her daughter.” Defendant’s trial counsel confirmed that she was offering Barajas’s mother only “for this limited area of the relationship with Mayra.” The court noted that the prosecution would have “a right to test [Barajas’s mother’s] knowledge of [defendant]” during his relationship with her daughter.

Barajas’s mother testified in front of the jury that defendant had been in a relationship with Barajas for two years before her death. They had lived with her for some of that time. She observed that “they were very happy” and loved each other. Defendant “was always doing what she said.” Barajas’s mother did not believe that defendant would ever do anything to hurt Barajas. She knew that there was a warrant out for defendant’s arrest at the time of Barajas’s death.

The jury was instructed: “You have heard opinion character testimony that the defendant would not do something to hurt Mayra Barajas. You may take that testimony in consideration along with other evidence to consider whether the People proved that the defendant is guilty beyond a reasonable doubt. Evidence of the defendant’s character of not doing something to hurt Mayra Barajas can by itself create a reasonable doubt”

2. Analysis

Defendant claims that the court erred in failing to allow Barajas’s mother to testify that defendant was “not bad” and was a “good person.”¹⁴ However, defendant’s trial counsel explicitly chose not to proffer such evidence because she did not want to open the door to the prosecutor’s introduction of bad character evidence. Defendant claims

¹⁴ Barajas’s mother gave an unresponsive answer to two of defendant’s trial counsel’s questions. In one unresponsive answer, she stated “he seemed like a good person to me.” In the other, she stated that it was “my opinion he was not bad.” The court struck both of these unresponsive answers on its own initiative.

that the trial court unfairly permitted the prosecution to introduce evidence of defendant's "bad character" but barred the defense from introducing evidence of his good character. The jury was explicitly instructed not to use any of the evidence of defendant's prior acts or prior convictions to show defendant's "bad character." Since the jury was permitted to use the prior acts and prior convictions evidence only to show knowledge, intent, motive, and credibility, none of this evidence was admitted as character evidence.

G. Prosecutorial Misconduct

Defendant argues that the prosecutor committed prejudicial misconduct in his cross-examination of defendant and in his closing argument.

Defendant claims that the prosecutor committed misconduct by asking defendant "whether certain police officers were lying when their testimony contradicted" defendant's testimony. During his cross-examination of defendant, the prosecutor asked him why he had come to a stop initially and then moved the car forward after being pulled over by the police. Defendant replied: "I don't think I recall that." The prosecutor then asked: "So when Officer Pina said that's what happened, that's incorrect in your opinion?" Defendant's trial counsel objected that the question "Misstates the testimony." The court overruled the objection, and defendant testified: "I'm not saying he's incorrect. I just don't recall that." The prosecutor later asked defendant if the Honda had a broken windshield on June 9, 2010. Defendant answered: "No, it didn't." The prosecutor then asked: "So Officer Fonseca and Officer Pina's testimony on that point is wrong?" Defendant responded: "I'm just saying what I seen." There was no objection.

The prosecutor's questions were not improper. He did not ask defendant if the police officers were lying but only if their testimony was inaccurate ("incorrect" or "wrong"). "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.” (*People v. Chatman* (2006) 38 Cal.4th 344, 382.) When a percipient witness may be able to provide insight into whether the other witnesses were “merely mistaken,” questions seeking such insight are permissible. (*Ibid.*) In *Chatman*, the defendant was asked whether other witnesses were lying when their testimony differed from his testimony. (*Id.* at p. 378.) The California Supreme Court held that this questioning was not improper because defendant was a percipient witness. (*Id.* at p. 383.) The same is true here. Defendant was a percipient witness to the movement of the Honda after the stop and to the condition of the Honda’s windshield at that time. Consequently, he could provide insight into whether the officers’ testimony on these subjects was “merely mistaken.”

Defendant claims that the prosecutor committed misconduct in his closing argument by denigrating the burden of proof beyond a reasonable doubt. Near the end of his rebuttal argument, the prosecutor argued that defendant’s trial counsel had provided no explanation for defendant’s change in his testimony from admitting his awareness of the danger to human life to denying that he was thinking at all when he drove through the red light. The prosecutor followed this up by stating: “When the law is against you, argue the facts. When the facts are against, argue the law. When the facts and the law are against you, argue reasonable doubt, and that’s what you do. That’s fine. That’s her job.” There was no objection to this argument.

Even if we were to assume that defendant’s trial counsel was deficient in failing to object to this argument, we would find no misconduct. “When, as here, the claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror. [Citations.] If the remarks would have been taken by a juror to state or imply nothing harmful, they obviously cannot be deemed objectionable.” (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

We do not see anything in the prosecutor’s remarks that denigrated the reasonable doubt standard. Indeed, the prosecutor’s argument was that it was defendant’s trial counsel’s “job” to “argue reasonable doubt,” and that this was “fine.” His point seemed to be that defendant’s internally inconsistent testimony did not itself create a reasonable doubt. The trial court had accurately instructed the jury on the reasonable doubt standard, and nothing in the prosecutor’s argument detracted from the court’s instruction.¹⁵ No reasonable juror would have understood the prosecutor’s remarks to imply that the jury should not hold the prosecution to its burden of proving guilt beyond a reasonable doubt.

IV. Disposition

The judgment is affirmed.

¹⁵ The court instructed the jury: “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. . . . [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate [all] possible doubt because everything in life is open to some possible or imaginary doubt.”

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Márquez, J.