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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALLAN JAY MILTON, Defendant and Appellant.	B282447 (Los Angeles County Super. Ct. No. BA441385)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted appellant Allan Jay Milton (defendant) of first degree murder for the death of Phillip Melendez and found defendant used a deadly and dangerous weapon (a knife). The trial court sentenced defendant to 26 years to life in prison. Defendant appealed his conviction.

Defendant does not dispute that he killed Melendez. Rather, on appeal, defendant argues that, due to alleged trial court error, the jury was precluded from considering defendant's theories of self-defense and the jury heard irrelevant and prejudicial evidence of an unrelated prior incident, he was prejudiced by the cumulative effect of the trial court's errors, and substantial evidence does not support his conviction for first degree murder. As explained below, we disagree with each of defendant's arguments and affirm.

BACKGROUND

Defendant does not dispute that, on the night of November 9, 2015, he stabbed and killed Melendez on a city bus in the Eagle Rock area of Los Angeles. Rather, the dispute centers on (1) whether the jury adequately was allowed to consider defendant's theories of self-defense, (2) whether the trial court properly admitted evidence of an earlier incident that occurred on the bus just before the stabbing, and (3) whether the evidence supported a conviction for first degree murder as opposed to second degree murder.

1. Video Evidence

Surveillance cameras placed throughout the bus captured the entire event from multiple angles. At trial, a silent black-and-white video recording of the bus footage was played for the jury and was admitted into evidence. The video depicted an incident on the bus that occurred immediately preceding the

stabbing (earlier incident) as well as the stabbing itself. Together the earlier incident and the stabbing of Melendez spanned approximately three minutes. There is no dispute as to the accuracy of the video evidence.

a. Earlier Incident

The earlier incident involved defendant and three other passengers on the bus. At approximately 10:40 p.m., defendant and his friend Bobby Ruelas walked toward the rear of the bus and sat in seats facing each other. Defendant was wearing a large, baggy jacket with pockets. An unidentified man sat in the same area of the bus where defendant and Ruelas sat. The unidentified man appeared to be intoxicated. Defendant's friend Aaron was also on the bus and was sitting in the middle of the last row of the bus facing forward. Melendez also was sitting in the last row of the bus, in the far corner seat against the curbside window.

A few moments after defendant and Ruelas sat down, the unidentified man reached into a bag. Aaron became upset, stood up, punched the man twice, and threw him onto defendant. Defendant then pushed the man off of him and toward the area of the rear side exit of the bus, where defendant and Ruelas then chased the man off the bus.

During the scuffle, the unidentified man dropped his own bag, which defendant then picked up. Another passenger on the bus, Daniel Hook, spoke with defendant and motioned toward the unidentified man's bag. Defendant tossed the bag to Hook, who then returned it to the unidentified man outside the bus. Hook got off the bus at the next stop.

Other passengers on the bus witnessed the earlier incident and described it at trial (discussed below). Those passengers

were William Doherty and Michael Cooper. Melendez was not involved in the earlier incident.

b. Altercation Between Defendant and Melendez

As Hook returned the unidentified man's bag to him outside the bus, defendant moved to sit next to Aaron in the back row of the bus, putting Aaron between defendant and Melendez. Defendant began to whisper into Aaron's left ear. While defendant and Aaron were huddled together, Melendez leaned over to pick up what looked like a jacket or shirt off the floor and handed it to Aaron, who took it from him without incident. Defendant was still whispering in Aaron's ear.

Approximately 40 seconds after Melendez handed the piece of clothing to Aaron, defendant stood with his hands in his jacket pockets and approached Melendez, who sat somewhat reclined in his corner seat sucking on a lollipop. Defendant made a kicking motion with his foot toward Melendez, then Aaron pulled defendant back. Melendez remained reclined in his seat. About five seconds later, Melendez straightened up in his seat. And a few seconds later, defendant again approached Melendez. Aaron stood between the two of them, and Melendez again assumed a reclined position in his seat, still sucking on his lollipop with his right hand holding the lollipop stick.

Although Aaron remained standing between defendant and Melendez, defendant maneuvered around Aaron and lunged at Melendez. Melendez tried to kick defendant away. Then, holding onto a bus railing near his seat, Melendez stood up for the first time and made a kicking motion toward defendant. Defendant jumped back slightly. Although standing, Melendez remained at his seat in the corner of the back row on the curbside of the bus. Defendant was at the opposite end of the back row in the corner

on the street side of the bus. Aaron remained standing in the middle of the two men.

Once again, defendant moved around Aaron toward Melendez and made a jabbing motion with his right hand, striking Melendez in his upper chest. At this point, Ruelas left the back area of the bus, Aaron was trying to restrain defendant, and Melendez was looking at his chest. Defendant broke free from Aaron, squeezed between Aaron and a bus railing, and again with his right hand jabbed at Melendez, who remained in the back corner of the bus. Melendez kicked defendant away. But for a third time, defendant jabbed with his right hand at Melendez, shoving him against the bus wall and side window. Aaron began to leave the back area of the bus and Melendez used his feet to fight off defendant.

Melendez began to stand up, and defendant followed Aaron toward the rear side exit door. As he moved toward the exit, defendant appeared to hold a knife in his left hand, and possibly another in his right hand. Aaron and defendant ran from the bus and Melendez looked again at his chest. A few seconds later, Melendez fell to the floor next to the row in which Doherty was sitting, still in the back portion of the bus. Doherty tried to help Melendez, but Melendez died at the scene.

2. Testimony[1]

a. Witnesses

Hook testified at trial about the earlier incident. He said that he heard someone say, "Get out of my bag. You stole something from my bag," or "Don't go through my stuff." After the unidentified man left the bus, Hook said he asked defendant

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[1] We summarize the testimony relevant to this appeal only.

and his companions for the unidentified man's backpack. Hook tossed the backpack out the bus door to the unidentified man.

Cooper testified about both the earlier incident and the altercation between defendant and Melendez. His testimony was consistent with the video evidence. Cooper said he heard people at the back of the bus telling the unidentified man, "Get off the bus," and two passengers eventually pushed the unidentified man off the bus. A short time after the unidentified man was pushed off the bus, Cooper said the same passengers started arguing with another passenger (Melendez), who was sitting in the back corner of the bus. Cooper did not see anyone hit anyone else, but he saw Melendez fall to the floor and two men leave the bus.

Doherty also testified about both the earlier incident and the altercation between defendant and Melendez. His testimony also was consistent with the video evidence. Doherty said three men on the bus, including defendant, were acting "pretty rowdy" and, after the earlier incident occurred, Doherty paid "even closer attention" to what was happening in the back of the bus. Doherty testified that during the altercation between defendant and Melendez, he heard Melendez say something like, "Don't start with me." Doherty did not see Melendez provoke defendant. He said it appeared Melendez was going to follow defendant and his two companions off the bus, but then Melendez reached inside his jacket, felt his chest, and stopped in the aisle of the bus. Doherty heard Melendez say, "They stabbed me," before he collapsed in the aisle of the bus next to Doherty's seat.

Doherty tried to help Melendez. Doherty saw that Melendez had a wound on the upper left side of this chest that was bleeding. Melendez was unresponsive and appeared unconscious, although he was breathing normally for a while. At

some point, Melendez started gasping for air, and Doherty saw him take his last breath.

b. Investigators

One of the officers who responded to the scene interviewed Doherty. At trial, the officer testified he did not remember Doherty reporting that Melendez said, "Don't start with me," before he was stabbed. The officer stated that, had he heard that statement, he would have included it in his police report. His report did not include that statement.

Defendant was arrested the day after his altercation with Melendez. When arrested, defendant had one knife in his possession. Detective Judith Luera interviewed defendant twice after his arrest. During the first interview, defendant denied any involvement in Melendez's death. In his second interview, however, defendant accepted a measure of responsibility for Melendez's death. Defendant told Luera that he and Melendez had an ongoing dispute related to defendant's girlfriend, Jan Estrada, who was Melendez's ex-girlfriend. Defendant told Luera that, just before the stabbing, Melendez told defendant, "I see whoever I want to see. If I want to see her I will," and "I'm going to fuck you up," at which point defendant went "ballistic." Defendant also told Luera that he never intended or planned to kill Melendez, but that he "lost it" because of what Melendez was saying and because of their ongoing dispute. Defendant expressed shock and remorse and stated he wished he could take it back.

c. Autopsy

Melendez's autopsy revealed he died from a stab wound to his upper left chest, which went through his left lung and cut his pulmonary artery. In addition, Melendez had a small stab wound

on his nose. The autopsy also revealed that, at the time of his death, Melendez had cocaine, methamphetamine, and alcohol in his body.

d. Defendant

Defendant testified in his defense. He identified himself in the video as the person who stabbed Melendez. Defendant stated he had lived on the streets since 2012, during which time he had been the victim of thefts and assaults at the hands of other homeless people, some of whom defendant stated used methamphetamine. Defendant also identified his friends Aaron and Ruelas in the video. Defendant stated he and Aaron sometimes fought when they were drunk, which one time resulted in defendant suffering a broken jaw and another time resulted in defendant suffering a broken collarbone.

Defendant explained he had known Melendez for two or three years, but they were not friends. At the time of Melendez's death, defendant had been dating Melendez's ex-girlfriend Estrada on and off for approximately two years. While dating Estrada, defendant had four verbal confrontations with Melendez. The first occurred when defendant and Melendez were eating lunch at a church. Defendant testified that because Melendez previously had disrespected defendant by hitting on Estrada when she was with defendant, defendant asked Melendez to respect his relationship with Estrada. Defendant stated Melendez responded by cussing and saying he was going "to fuck" defendant up. Defendant testified he felt threatened and, therefore, left.

Defendant's second encounter with Melendez occurred a couple of weeks later, when they were both getting dinner at a different church. Defendant had heard Melendez was trying to

see Estrada, which made defendant very angry. Although defendant was scared of Melendez because Melendez was stockier and heavier than defendant, defendant felt emboldened to confront Melendez that evening because other people were present. Defendant told Melendez to stay away from Estrada. Melendez responded by saying, "I don't give a fuck if you're seeing her. I'll see her if I want. I'll fuck you up." Defendant moved away from Melendez and stayed away from him the rest of the evening.

The third encounter occurred a few weeks later on a street near the church that served dinner. Defendant was alone and, from a distance, he again told Melendez to stay away from Estrada. Melendez stated he would "fuck [him] up" and started coming toward defendant. Defendant ran away.

The fourth encounter occurred approximately one month later when defendant was walking down a street with Estrada. Defendant testified that Melendez approached them and tried to talk to Estrada. Defendant told him to stop. Melendez also tried to take Estrada's hand, but defendant pulled her hand away. Melendez again told defendant he was going to fuck him up. Defendant testified he ignored Melendez and kept walking.

And, a couple of days before Melendez's death, defendant heard Melendez had kissed Estrada and had given her money. Defendant was angry that Melendez was still trying to see Estrada.

Defendant also testified about the earlier incident on the bus as well as his violent altercation with Melendez. Defendant stated he and Aaron had been drinking most of that day. When they boarded the bus heading to Eagle Rock around 9:00 or 10:00 at night, defendant said he was "pretty intoxicated, but not

totally full-blown." Soon after boarding the bus, defendant noticed Ruelas also was on the bus. Defendant did not notice Melendez until later.

Defendant explained that at some point the unidentified man on the bus started to go through defendant's bag. Defendant asked him to stop and the man apologized, saying he was high. Defendant said he accepted his apology. Defendant explained, however, that Aaron began to argue with and hit the unidentified man. Defendant testified he was surprised when Aaron hit the man. When defendant felt something hit his face, he thought the unidentified man had hit him. As a result, defendant kicked at the man and eventually defendant and Ruelas chased the unidentified man off the bus.

Defendant testified that he first saw Melendez on the bus a few minutes after chasing off the unidentified man. Because defendant was very mad at Melendez and tired of him disrespecting defendant's relationship with Estrada, defendant decided he again would tell Melendez to stay away from Estrada. Defendant told Aaron his plan and asked Aaron to get out of the way because defendant believed Melendez was hostile and might attack him. Defendant also testified that he had his hand on a knife in his pocket not because he wanted to hurt Melendez, but because in light of his previous encounters with Melendez defendant was scared and thought Melendez was hostile and might chase him.

Defendant stated that after explaining his plan to Aaron, defendant approached Melendez and asked him why he was seeing Estrada and to stay away from her. Defendant testified that at that point Melendez had not said anything to or had any interaction with defendant on the bus that night. Defendant

testified that in response to his warning to stay away from Estrada, Melendez said, "Fuck you. I'll fuck you up," and defendant kicked at him. When defendant kicked at Melendez, Aaron stood up and told defendant to relax. Defendant testified he ignored Aaron because he was "really upset" and emboldened because he was buzzed from drinking.

Defendant testified that because Melendez had cursed and said he was going to fuck him up, defendant moved around Aaron and approached Melendez again. However, Melendez stood up, at which time defendant said he believed Melendez was going to follow through on his threat to "fuck [him] up," either by fighting or hitting him. Defendant stated the encounter escalated quickly and "got out of hand" when Melendez cussed at defendant again and said he was going to fuck him up. Defendant testified that at that point he "lost it" and went "ballistic." Defendant stabbed Melendez once and lunged at him twice, while Melendez was kicking at defendant. Defendant said he did not see any weapon in Melendez's hands.

Defendant repeatedly testified he never intended to kill Melendez and he never consciously took out his knife to stab him. Instead, defendant explained it all happened instantaneously. Defendant also explained he ran away and threw the knife in the gutter because he panicked "[b]ecause a crime was committed I guess." Defendant testified he was remorseful and felt "bad, really bad" about what happened and wished it had not happened. He said he had only wanted to warn Melendez verbally to stay away from Estrada. He said he carried the knife for protection.

3. Verdict and Appeal

After deliberating for approximately 40 minutes, the jury returned a guilty verdict. The jury found defendant guilty of first degree murder and found he used a deadly and dangerous weapon. The trial court sentenced defendant to 26 years to life in state prison.

Defendant appealed.

DISCUSSION

1. Limitation Imposed on Defense Counsel's Closing Argument

Defendant argues the trial court improperly limited defense counsel's closing argument. In particular, defendant claims he was prejudiced when in the presence of the jury the trial court prohibited defense counsel from inviting the jurors to put themselves in defendant's shoes. Defendant believes that, as a result of the trial court's restriction, the jury may have disregarded entirely defendant's claims of self-defense and imperfect self-defense. As a result of this alleged error, defendant claims his conviction must be reversed. We disagree.

a. Applicable Law and Standard of Review

Although a criminal defendant enjoys a constitutional right to have counsel present closing argument to the trier of fact, this right is not limitless. (*People v. Simon* (2016) 1 Cal.5th 98, 147 (*Simon*).) "Trial courts have broad discretion to control the duration and scope of closing arguments." (*Ibid.*) A trial court " 'is given great latitude in controlling the duration and limiting the scope of closing' " argument. (*People v. Edwards* (2013) 57 Cal.4th 658, 743.) For example, the trial court "may impose reasonable time limits and may ensure that argument does not 'stray unduly from the mark.' " (*Simon*, at p. 147.) Similarly, our

Penal Code requires the trial court "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." (Pen. Code, § 1044.)

In addition, it is well settled that at the guilt phase of a criminal trial, counsel should not appeal to the jury's passions or sympathies. (*People v. Fields* (1983) 35 Cal.3d 329, 362 (*Fields*); *People v. Botkin* (1908) 9 Cal.App. 244, 259.)

As the parties correctly agree, we review the trial court's decision to limit defense counsel's closing argument for an abuse of discretion. (*Simon*, *supra*, 1 Cal.5th at p. 147.)

b. Relevant Background

i. Defense Counsel's Closing Argument

During closing argument, defense counsel addressed at length the issue of self-defense. For example, early in his closing argument, defense counsel told the jury it should consider and try to understand the world in which defendant lived. Counsel stated, "You have to submerse yourself in that situation. You really, really need to go back there, put yourself in that position and really try to understand what is happening and why it's happening" and "you're going to be called upon to look at [defendant]'s behavior and think about what's going on in his mind and what's happening to him. . . . You have to try to understand what he was going through at that time, at that moment." Defense counsel described defendant's world as one "where he's having to make split-second decisions. He's living in a world where he's literally, you know, going up to churches and trying to get handouts, . . . finding himself in these violent situations because, you know, people get drunk, people get

violent, they end up staying up late. You know, it's a whole different world." Counsel also highlighted and encouraged the jury to consider defendant's testimony that Melendez repeatedly had threatened and been "antagonistic" toward defendant because of Estrada.

More than half way through his closing, defense counsel addressed the reasonableness of defendant's belief that he immediately had to use deadly force to defend against a perceived imminent danger. Counsel stated, "The second element is that [defendant] reasonably believed that the immediate use of deadly force was necessary to defend against the danger. He told you. [Defendant] used no more force than reasonably necessary to defend against the danger." Counsel continued by stating he was not asking the jury "to do something that the law doesn't ask you to do itself. It tells you, consider—and this is in the instruction—consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar position with similar knowledge would have believed. [¶] And this is what I'm telling you, you know, you have to like put yourself in that situation. You . . . are going to evaluate this case as a homeless person who has been attacked, who lives in constant fear. You know, that's [defendant]. You're judging him, so you've got to put yourself in his shoes. [¶] And you and I sitting there would be like, well, I wouldn't do that. You know, if I'm at home and I get into an argument with my wife and she's told me whatever, I'm not going to go stab her. That's not what we're talking about, ladies and gentlemen. [¶] So the law also tells you when you're considering self-defense and you're trying to do what the law is asking you to do, to put yourself in his shoes—"

At this point the trial court interrupted, stating, "I'm objecting to you putting themselves in anyone's shoes. I won't let the prosecutor say to put themselves in the shoes of the victim. I'm not going to let you tell the jury to put themselves in the shoes of the defendant. They are going to follow the instructions that I will instruct on the law. You cannot invite the jury to put themselves in someone's position."

Defense counsel apologized, continued with his closing argument, and explained to the jury they would be following the law as explained in the jury instructions. Counsel explained, without interruption from the court, that in considering imperfect self-defense the jurors would need to determine whether defendant "actually" believed he was in imminent danger and the use of deadly force was necessary. Counsel read a portion of the jury instructions that stated, "In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant." Counsel explained he was "not asking [the jury] to do something that's not required under the law."

Following defense counsel's closing argument, and out of the presence of the jury, the trial court explained its reasoning for limiting counsel's argument. The court stated, "It is the court's view that you should not invite jurors to imagine themselves as someone involved in the case. Jurors are objective arbiters of the facts. They are sworn to try the case and to render a true verdict according to the evidence. It is improper to ask the jurors to imagine themselves as a victim, defendant or partisans. To do so invites them to become partisan advocates and to render a subjective judgment." Citing the "golden rule argument," the trial court further explained that our Supreme Court has "said

that it is improper in the guilt phase to ask jurors to step into the victim's shoes and imagine her suffering." The trial court indicated it had "seen the golden rule argument prohibition applied to criminal cases as well as civil cases. That was why I objected to your inviting the jurors to think of themselves in the defendant's position." The trial court cited *People v. Stansbury* (1993) 4 Cal.4th 1017 and *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757 as support for its ruling.

ii. Jury Instructions

One of the first instructions the trial court read to the jury was: "You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

The trial court also instructed the jury on the law of self-defense. In particular, the trial court instructed, "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed." In addition, the court stated, "If you find that Phillip Melendez threatened or harmed the defendant in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable. [¶] Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person."

With respect to imperfect self-defense, the trial court instructed the jury to consider whether defendant "actually

believed that he was in imminent danger of being killed or suffering great bodily injury" and whether he "actually believed that the immediate use of deadly force was necessary to defend against the danger." And, again, the court stated, "In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant." And, "If you find that Phillip Melendez threatened or harmed the defendant in the past, you may consider that information in evaluating the defendant's beliefs."

Finally, the trial court instructed the jury that it should "not take anything [the court] said or did during the trial as an indication of what [the court] think[s] about the facts, the witnesses, or what your verdict should be."

iii. Motion for New Trial

Just before the trial court sentenced defendant, defense counsel made a motion for new trial. Counsel argued the trial court committed prejudicial error when it interrupted counsel's closing argument. Specifically, counsel claimed the court erred when it precluded counsel from asking the jurors to put themselves in defendant's shoes. Counsel explained his "concern was that when you're looking at the jury instructions with respect to heat of passion,[2] there is an objective standard, but there is a subjective standard as well that does require that they consider the circumstances as they were known to the defendant. [¶] . . . [¶] . . . I think the net practical effect of the comments that the court made in front of the jury was that the jury got the impression that my entire argument or what I was asking them to do was completely improper." Counsel pointed to the swiftness

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[2] The parties agree that when counsel said "heat of passion," he meant to say self-defense.

in which the jury deliberated and reached a guilty verdict: "The jury came back within 20 minutes and it took the court longer to read the jury instructions than it did for the jury to reach a verdict. [¶] . . . [¶] I think that the practical effect was that the jury completely disregarded any argument that I made because they got the impression from the court that what I was doing and what I was asking them to do was completely improper."

The trial court denied the motion for new trial. The court refused to speculate why the jury acted quickly in returning a guilty verdict and stated it stood by its earlier comments, reiterating it believed counsel "had crossed over the line with your argument."

c. The trial court did not abuse its discretion when it limited defense counsel's closing argument.

The trial court correctly limited defense counsel's closing argument so as to prohibit counsel from unduly appealing to the jury's sympathies and passions. As noted above, the law supports this ruling. (E.g., *Fields*, *supra*, 35 Cal.3d at p. 362.)

Nonetheless, as defendant correctly points out, imperfect self-defense includes a subjective element. Thus, to a certain extent, the jury was required to consider the events that unfolded as defendant understood them. In particular, the jury was instructed to consider whether defendant "actually believed that he was in imminent danger of being killed or suffering great bodily injury" and whether he "actually believed that the immediate use of deadly force was necessary."

It is a fine line between, on the one hand, addressing the jury's proper role in determining what defendant actually believed and, on the other hand, improperly appealing to the

jury's sympathies and passions. We conclude the trial court here struck an appropriate balance. The court allowed defense counsel to address at length the jury's role in determining what defendant actually believed. For example, counsel was permitted both to discuss and to encourage the jury to consider the world in which defendant lived as well as to consider defendant's testimony that, prior to Melendez's death, Melendez had threatened defendant many times. However, the court drew the line when counsel invited the jurors to stand in defendant's shoes, which in the court's opinion was an improper appeal to the jury's sympathies and passions. We find the trial court did not abuse its discretion in drawing the line where it did.

Similarly, we do not accept defendant's speculative argument that the trial court's limitation of counsel's closing argument caused the jury to reject defendant's claims of self-defense altogether. Importantly, other than one instruction discussed below, defendant does not contend that the court incorrectly or erroneously instructed the jury. Instead, the jury was unequivocally told to follow the law as explained by the trial court, which included instructions on the law of lawful and imperfect self-defense.

Thus, we conclude the trial court did not abuse its discretion when it limited defense counsel's closing argument. As a result, we need not and do not reach defendant's arguments that the alleged error violated his constitutional rights. " 'No separate constitutional discussion is required, or provided, when rejection of a claim on the merits necessarily leads to rejection of any constitutional theory or "gloss" raised for the first time here.' " (*People v. Solomon* (2010) 49 Cal.4th 792, 811, fn. 8 (*Solomon*).)

In any event, assuming the trial court abused its discretion when it limited defense counsel's closing statement, we conclude it was not prejudicial error. The evidence of defendant's guilt of first degree murder, including the video evidence, was overwhelming. Thus, even if the trial court had allowed defense counsel to invite the jury to stand in defendant's shoes, the jury still reasonably could have concluded defendant was not in, and did not actually believe he was in, imminent danger of being killed or suffering great bodily injury such that the use of deadly force was necessary. It is apparent the jury, as is its right, did not believe defendant's testimony that he considered himself in such danger. Thus, absent the alleged error, it is not reasonably probable that the jury would have reached a result more favorable to defendant. (*Fields*, *supra*, 35 Cal.3d at p. 363; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. CALCRIM No. 3472

Defendant contends the trial court improperly instructed the jury with CALCRIM No. 3472, which provides: "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force" (instruction 3472). Defendant did not object to the trial court's use of this instruction.

Nonetheless, on appeal defendant claims that under the circumstances of this case, the use of instruction 3472 combined with the prosecution's closing and rebuttal arguments effectively precluded the jury from considering the defenses of either lawful self-defense or imperfect self-defense. As a result of this alleged error, defendant claims his conviction must be reversed. We disagree.

a. The issue is forfeited.

Because defendant did not object to the use of instruction 3472 below, he has forfeited his right to raise the issue on appeal. Generally, unless an instruction was an incorrect statement of law or affected the defendant's substantial rights, a party's failure to object to or request clarification of an instruction below forfeits the claim on appeal. (Pen. Code, § 1259; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192 (*Rodrigues*); *People v. Mitchell* (2008) 164 Cal.App.4th 442, 465.)

b. The trial court did not err when it instructed the jury with instruction 3472.

In any event, we conclude the trial court did not err in instructing the jury with instruction 3472. We review de novo whether a jury instruction correctly states the law and whether the instruction directs an adverse finding by removing an issue from the jury's consideration. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

Instruction 3472 is a correct statement of the law. In *People v. Enraca* (2012) 53 Cal.4th 735, our Supreme Court confirmed the legal soundness of CALJIC No. 5.55, which is substantively the same as instruction 3472. The *Enraca* Court explained that the doctrine of self-defense " ' "may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." ' " (*Enraca,* at p. 761.) More recently, Division Five of this District reiterated the reasoning of *Enraca* in holding that instruction 3472 is "generally a correct statement of law." (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333 (*Eulian*).)

As the *Eulian* court recognized, however, instruction 3472 "might require modification in the rare case in which a defendant intended to provoke only a non-deadly confrontation [but] the victim responds with deadly force." (*Eulian*, *supra*, 247 Cal.App.4th at p. 1334.) One such "rare case" is *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*). There, two defendants provoked a nondeadly fistfight, but the victim responded by advancing with what looked like a gun in his hand. In response, one of the defendants fatally shot the victim in an alleged act of self-defense and defense of others. (*Id.* at pp. 944–945.) In that case, the majority reversed the defendants' convictions based in part on the trial court's use of instruction 3472. In the circumstances of that case, the majority held it was error to instruct the jury with instruction 3472 because it "erroneously required the jury to conclude that in contriving to use force, even to provoke only a fistfight, defendants entirely forfeited any right to self-defense." (*Ramirez*, at p. 953.) The court stated that a "person who contrives to start a fistfight or provoke a nondeadly quarrel does not thereby 'forfeit[ ] . . . his right to live.' " (*Id.* at p. 943.)

Relying on *Ramirez*, defendant argues the use of instruction 3472 here was error because it effectively precluded the jury from considering his theories of self-defense. Defendant claims the trial court should have included in its instructions the following language from CALCRIM No. 3471: "[I]f the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend [himself] with deadly force and was not required to try to

stop fighting [or] communicate the desire to stop to the opponent[, or give the opponent a chance to stop fighting]."

First, this case is factually different from *Ramirez*. Most significantly, in contrast with *Ramirez* and contrary to defendant's position on appeal, there is no evidence that Melendez responded to defendant's provocation with unlawful or deadly force. Indeed, the video shows Melendez remained seated for much of the confrontation and only stood up when defendant more aggressively approached Melendez. And even accepting as true defendant's testimony that when Melendez stood up, defendant believed Melendez was going to fight or hit him, fighting or hitting is not the same as deadly force. In addition, defendant testified that Melendez cursed at defendant and said he was going to "fuck up" defendant. But no matter how provocative or aggressive, cursing at or verbally taunting someone is not the equivalent of deadly force. (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 274.) Moreover, Aaron—who just moments before had punched another man on the bus and on more than one previous occasion had broken defendant's own bones—stood in between defendant and Melendez, easily providing a block or deterrent of any potential advances by Melendez. Thus, even accepting defendant's testimony as true, Melendez reacted to defendant's provocation by (1) standing up, (2) cursing at defendant, and (3) giving the impression that he was going to fight or hit defendant. None of those responses escalated the altercation to a potentially deadly encounter necessitating defendant's use of deadly force. "Only when the victim [(here, Melendez)] resorts to *unlawful* force does the defendant-aggressor regain the right of self-defense." (*Id.* at p. 273.)

Second, under instruction 3472, the jury was instructed to consider whether defendant both provoked the altercation with Melendez and did so with the intent to create an excuse to use force against him. If the jury found both facts, instruction 3472 correctly instructed the jury that defendant had no right to self-defense. However, if the jury did not find both facts, the jury could consider defendant's self-defense theories, on which the jury was also instructed. It is apparent the jury determined either that defendant provoked the altercation with Melendez with the intent to create an excuse to use force against him, or defendant did not do so but nonetheless had no right either to lawful or imperfect self-defense. The evidence amply supports both scenarios.

Because we find the trial court did not err in instructing the jury with instruction 3472, we need not and do not consider defendant's argument that the claimed error was prejudicial.

3. The Earlier Incident

Defendant also argues the trial court committed reversible error when it allowed evidence of the earlier incident that took place on the bus moments before defendant stabbed Melendez. Defendant claims the earlier incident either was not relevant or, if relevant, was more prejudicial than probative. We disagree on both counts.

a. Applicable Law and Standard of Review

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210.) Nonetheless, relevant evidence may be excluded if it creates a substantial danger of

prejudicing, confusing, or misleading the jury, or would consume an undue amount of trial time. (*Id.*, § 352.)

As the parties correctly agree, we review the trial court's evidentiary rulings for an abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 597.) We will not reverse the trial court's ruling unless we find the court " 'exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*Rodrigues*, *supra*, 8 Cal.4th at p. 1124.)

b. Relevant Background

As described above, the earlier incident on the bus involved an altercation between an unidentified man, Aaron, Ruelas, and defendant. Defendant made an unsuccessful oral motion in limine to exclude evidence of the earlier incident. In denying the motion, the trial court stated, "I don't see any reason to keep it out. And I think it helps set the stage for what happened next."

c. The trial court did not abuse its discretion in admitting evidence of the earlier incident.

We conclude the trial court did not abuse its discretion in admitting evidence of the earlier incident. First, the earlier incident was relevant. As the trial court stated, it "set the stage" for what happened moments later. It helped to explain why witnesses knew who was in the back of the bus. Indeed, Doherty testified that after the earlier incident occurred, he paid "even closer attention" to what was happening behind him. The earlier incident also showed Aaron's strength as well as his ability to fight, which was relevant to defendant's theories of self-defense.

Second, the earlier incident was not more prejudicial than probative. In fact, it can hardly be described as prejudicial to defendant. The earlier incident shows Aaron as the aggressor

and defendant as simply reacting to the situation as it unfolded. Contrary to defendant's position, we do not believe the earlier incident "portrayed [defendant] as a violent person."

As such, we conclude the trial court did not " 'exercise[ ] its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*Rodrigues*, *supra*, 8 Cal.4th at p. 1124.) Because we find the trial court did not abuse its discretion in admitting evidence of the earlier incident, we need not and do not consider defendant's argument that the claimed error violated his constitutional rights and was prejudicial.

4. Cumulative Error

Defendant also argues his conviction must be reversed because the cumulative effect of the trial court's errors resulted in a denial of his rights to due process and a fair trial. We reject the assertion for the simple reason that, having found no merit in any of appellant's assignments of error, we must conclude there was no cumulative error requiring reversal. (*People v. Beeler* (1995) 9 Cal.4th 953, 994 ["If none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the . . . verdict"]; *People v. Manriquez* (2005) 37 Cal.4th 547, 591.)

5. Sufficiency of the Evidence

Finally, defendant argues the evidence was insufficient to support a conviction for first degree murder. In particular, defendant contends the evidence was insufficient to support findings that he stabbed and killed Melendez willfully, deliberately, and with premeditation. As a result, defendant claims his conviction must be reduced from first degree murder to second degree murder. Again, we disagree.

a. Standard of Review

When considering a claim of insufficient evidence, we review " ' "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*People v. Streeter* (2012) 54 Cal.4th 205, 241 (*Streeter*).) We " 'must accept logical inferences that the jury might have drawn from the evidence even if [we] would have concluded otherwise.' " (*Ibid.*) We do not reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Jones* (1990) 51 Cal.3d 294, 314 (*Jones*).)

b. Applicable Law

The jury was correctly instructed on the elements of both murder generally and murder in the first degree specifically. To find defendant committed murder, the jury was required to find defendant unlawfully killed Melendez with malice aforethought. (Pen. Code, § 187, subd. (a).)

To find defendant committed murder in the first degree, the jury was required to find defendant's murder of Melendez was "willful, deliberate, and premeditated." (Pen. Code, § 189.) " 'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill.' " (*Solomon, supra*, 49 Cal.4th at p. 812.) " ' "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance.' " (*Ibid.*) " ' "Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." ' " [Citation.]' " (*Ibid.*) " 'The true test is not

the duration of time as much as it is the extent of the reflection.' " (*Id.* at p. 813.)

Our Supreme Court has identified three types of evidence commonly shown in cases of premeditated murder: (1) planning, (2) motive, and (3) manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*).) "Drawing on these three categories of evidence, *Anderson* provided one framework for reviewing the sufficiency of the evidence supporting findings of premeditation and deliberation. In so doing, *Anderson*'s goal 'was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citation.] But, as we have often observed, '*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.' " (*Solomon*, *supra*, 49 Cal.4th at p. 812; see *Streeter*, *supra*, 54 Cal.4th at p. 242.) "A first degree murder conviction will be upheld when there is extremely strong evidence of planning, or when there is evidence of motive with evidence of either planning or manner." (*People v. Romero* (2008) 44 Cal.4th 386, 401.)

c. The jury's conviction for first degree murder was supported by sufficient evidence.

Contrary to defendant's position on appeal, the evidence amply supports his conviction for first degree murder.

First, as defendant rightly concedes, there was evidence of motive. Defendant admitted his anger with and jealously toward Melendez. Defendant testified he was very angry with Melendez because, despite defendant's repeated warnings to stay away

from Estrada, Melendez ignored defendant and continued to pursue Estrada.

Second, the manner in which defendant stabbed Melendez supports a finding that defendant acted with premeditation and deliberation. As respondent notes, defendant's fatal blow was made with such force and at such a position on the body that the knife sliced straight through Melendez's lung and into his pulmonary artery. A rational trier of fact could have reasonably inferred from the location and strength of defendant's strike that, rather than randomly thrashing at Melendez with a knife, defendant deliberated and reflected on his course of conduct. (E.g., *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552; *People v. Paton* (1967) 255 Cal.App.2d 347, 352.)

Finally, the evidence supports a finding that defendant planned the murder. The video showed defendant just prior to the stabbing with his hands in his jacket pockets whispering in Aaron's ear. Defendant testified he was whispering to Aaron his plan to confront Melendez (albeit verbally, according to defendant) and that inside his pocket he was holding his knife. Significantly, the video also shows defendant did not have unobstructed access to Melendez. Instead, in order to stab Melendez, defendant had to and did purposefully maneuver around Aaron, who not only stood between defendant and Melendez but also, according to defendant's own testimony, was trying to stop defendant. And defendant maneuvered around Aaron not once, but twice. Thus, contrary to defendant's arguments on appeal, planning was not shown by the fact that defendant had a knife or two with him that night, but rather by what defendant did on the bus prior to stabbing Melendez. And, as noted above, planning does not necessitate an extended

amount of time. (*Solomon*, *supra*, 49 Cal.4th at pp. 812–813.) Thus, although defendant stated he noticed Melendez on the bus only a short time before stabbing him, a rational trier of fact could conclude defendant considered and planned his attack.

Although defendant testified he never intended to kill Melendez, the jury was entitled to, and apparently did, reject that testimony. We do not reconsider the jury's credibility findings. (*Jones*, *supra*, 51 Cal.3d at p. 314.)

Thus, the evidence supports a finding that, although defendant had time to consider his actions, he willfully and deliberately chose to attack and kill Melendez. In other words, it was certainly reasonable for the jury to find defendant's actions were not " 'unconsidered or rash impulses.' " (*Solomon*, *supra*, 49 Cal.4th at p. 812.) Accordingly, using the *Anderson* categories as a guide, we conclude defendant's conviction for first degree murder is supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.