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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR RODRIGUEZ, JR., Defendant and Appellant.	B290950 (Los Angeles County Super. Ct. No. VA142311)

APPEAL from judgment of the Superior Court of Los Angeles County, Michael Terrell, Judge. Judgment of conviction affirmed.

Laura S. Kelly, 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, Stephanie A. Miyoshi and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Oscar Rodriguez Jr. appeals his conviction for first degree murder. He raises claims of: (1) insufficiency of evidence, (2) ineffective assistance of counsel, (3) instructional errors on murder and completing the verdict forms, (4) instructional error on unanimity, (5) burden shifting by the trial court during jury selection, (6) prosecutorial misconduct, (7) cumulative error, and (8) improper denial of pretrial discovery.

Rodriguez alternatively requests remand to the trial court with an order that the Los Angeles County Sheriff's Department (Sheriff's Department) disclose whether two witnesses in this case are named on its internal list of deputies with potential exculpatory or impeachment information, in light of *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28 (*Deputy Sheriffs*).

We reject each of Rodriguez's challenges and affirm the judgment of conviction. We also deny his request for remand.

FACTUAL AND PROCEDURAL BACKGROUND

I. Facts

A. The Prosecution Evidence

1. The incident

As of July 2016, Rodriguez had dated Nancy Molina for about two years. Molina and Rodriguez were not living together. But she was spending the July 4th holiday weekend at his house.

On July 3, 2016, Alma Marin and Moises Sanchez went to meet Molina at Rodriguez's house. They arrived at approximately 10:00 p.m. The two couples talked and drank alcohol in the backyard. Rodriguez and Molina drank tequila and beer. Both slurred their speech.

At approximately 1:00 a.m., Marin and Sanchez decided to leave. Molina seemed unsteady when she walked them to their car. Neither Marin nor Sanchez observed any injuries on Molina when they were leaving. Molina was wearing a maxi dress and a bathing suit underneath, which exposed her shoulders, arms, and lower legs.

Rodriguez's brother, Richard Rodriguez,[1] lived next door to him with his girlfriend, Nancy Luque, and their three children. At approximately 4:00 a.m., Richard heard Rodriguez screaming for help and banging on his back door. Richard opened the door and ran after Rodriguez to his house.

In his bedroom, Rodriguez tried to perform CPR on Molina. Vomit was on the bed. Rodriguez told Richard to call 911. Richard ran back to his house to get his phone. He told Luque to help Rodriguez.

Richard called 911 and returned to Rodriguez's bedroom. Rodriguez and Luque attempted to perform CPR on Molina on the bed. The 911 operator instructed Richard to place her on the floor. Rodriguez picked up Molina under her arms. He slid her off the bed and dropped her on the floor. Rodriguez and Luque continued with the CPR. When the 911 operator asked Richard if anyone saw Molina fall unconscious, the call was terminated. He did not call the 911 operator back because the police had arrived.

At approximately 4:22 a.m., South Gate Police Officers Anthony Reyes and Kyle Gonzalez arrived at Rodriguez's house. The officers entered the bedroom and saw Molina lying on the floor. She was bleeding from her nose and mouth, her face was

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[1] To avoid confusion, we will refer to Richard Rodriguez by his first name with no intention of disrespect.

swollen, and her legs were bruised. Blood and vomit were on the bed. Officer Reyes performed CPR on Molina

South Gate Police Officer Adam Cook arrived after Officers Reyes and Gonzalez. Rodriguez told Officer Cook that Molina had fallen from the porch.

Multiple items were scattered on the grass near the porch and driveway of Rodriguez's house, including makeup items and a bra, which belonged to Molina. The bra had blood stains.

A bag was found in the shower of Rodriguez's house. The bag had grass on it and contained women's clothes, haircare items, and makeup items.

When paramedics from the Los Angeles County Fire Department arrived, paramedic Keith Wieczorek asked Officers Reyes and Gonzalez to move Molina into the living room. They carried Molina by her wrists and ankles but did not drop her or bump her into any walls. An intravenous line was inserted into the inside of Molina's left elbow. An interosseous catheter[2] was also inserted into the bone of her right leg. Wieczorek asked Rodriguez, Richard, and Luque what happened and to provide Molina's medical history. None of them responded. They each had "stoic" expressions.

Molina was transported to Saint Francis Medical Center. She was in cardiac arrest when she arrived. She had no blood pressure. She was unresponsive. Her pupils were dilated and fixed. A CT scan showed Molina had severe brain injury.

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[2] An interosseous catheter is used to inject fluids directly into the bone marrow when it is difficult to get to the veins. It is an alternative to an intravenous line. Typically, when a person has lost a significant quantity of blood, the veins will collapse or constrict, making them difficult to locate.

Dr. Edward Sims determined that Molina was "death imminent." Molina also had abrasions and contusions on her head and face, a laceration on the right side of her lip, and abrasions on her elbows, knees, and ankles. She had a blood alcohol level of 0.213 percent. Molina was declared brain dead on July 4. She remained on life support until July 7.

Los Angeles County Sheriff's Deputy Steve Woolum photographed Molina's injuries while she was on life support. The photos showed bruising on her left inner arm, right triceps, right forearm, left hand, upper left thigh, ankles, elbows, wrists, knees, and shin. The photos also depicted scrapes on her elbows, a laceration on her right index finger, and blood on her hands. Sheriff's Department Criminalist Christopher Lee swabbed several areas of Molina's body for DNA samples.

Deputy Woolum also photographed Rodriguez at the South Gate Police station. Rodriguez had scratches on his right forearm, left biceps, and left wrist. He also had bruising on his knuckles and scrapes on his knees. Criminalist Lee swabbed for DNA on various areas of Rodriguez's body, including his knuckles, red marks on his hands and arms, and fingers.

Blood was detected on the front door frame of Rodriguez's house. Blood was also found near the porch and on the grass. Inside the house, blood stains were on the hallway wall near the front door. In the bedroom, multiple items had blood stains, including a white towel, a black and white bag, and the mattress. The trash can also contained vomit with blood.

A surveillance video was recorded across the street from Rodriguez home. Between 3:30 a.m. and 4:30 a.m., it captured a person picking up items around Rodriguez's front yard and going

into the house. The video also showed the police officers arriving at 4:23 a.m.

2. DNA evidence

Sheriff's Department Criminalist Yukie Partos conducted DNA evidence analysis on the samples collected. The DNA profiles of the samples obtained from Molina's fingernails from both her hands and her left ankle contained mixtures of her DNA and Rodriguez's DNA.

The DNA samples from Rodriguez's right and left hand knuckles contained a mixture of his DNA and Molina's DNA. The samples from Rodriguez's fingers and the red areas on his right arm and both wrists contained mixtures of DNA from himself and Molina. A third contributor was detected, but no conclusion was made as to it. Molina was excluded from the DNA profile produced from the sample obtained from a red mark on Rodriguez's left arm.

The DNA profile produced from two makeup items matched Molina's profile. The DNA from the blood on the bra matched Molina's profile. A sample from the inside right cup of the bra contained a mixture of DNA from Molina and Rodriguez.

Molina's DNA profile matched the DNA from the various blood stains including those found on grass near the porch, the front door frame, the hallway wall, the hallway closet door and door frame, and the mattress. No conclusion was made about the vomit in the trash can.

3. The autopsy

Dr. Matthew Miller was a deputy medical examiner for the Los Angeles County Department of Coroner. He performed autopsies to determine the causes and manners of death for

decedents. On July 11, 2016, he performed an autopsy on Molina.

Miller observed fractures to each of Molina's cornu, which is a portion of the thyroid cartilage within the throat or neck area. The cornu is attached to the hyoid bone, which is located at the intersection of the jaw and neck. The thyroid cartilage provides structure for the throat and the larynx. Miller testified that a person had his or her hands on Molina's neck, causing the fractures to the cartilage. For a younger person of Molina's age, the thyroid cartilage would have been flexible because it had not yet calcified. Miller opined that the fractures to the cornua would have required a "fair amount of force."

Hemorrhages associated with these fractures and surrounding soft tissue caused bruising on both sides of Molina's neck. Miller also observed bruising on the inside of her upper and lower lips and under her jaw.

Miller believed that Molina had been strangled based on the fractures to her cornua, bruising on both sides of the neck, and petechiae in her eyes and eyelids. The petechiae—or pinpoint hemorrhages—are caused when there is a rapid increase in pressure on the neck, obstructing the veins from bringing blood to the brain and head. As a result, the small veins are ruptured below the surface of the eyelids and eyes. Miller explained that for irreversible brain damage to occur from strangulation, the blood flow to the brain must be cut off for approximately four minutes.

Miller also observed nasal fractures and bruising around Molina's eyes and on the bridge of her nose. Molina also had brain trauma, indicated by hemorrhaging all around the outside

of the brain.[3] Specifically, Miller located hemorrhaging on the front of the top of Molina's head and on the back and side. Miller believed that this trauma required a "decent amount of force."

Miller testified that the injuries to Molina's face were not consistent with falling and "face-planting" on the ground. He explained that when a person has fallen flat on the ground, abrasions would be sustained on the areas of impact, including the tip of the nose, the eyebrows, or the boney portion of the cheeks. Molina had no abrasions on these areas.

Moreover, the brain hemorrhages were not likely caused by face-planting on the ground. Miller explained that a hemorrhage would have required space for the brain to move in the skull. In significantly older persons or chronic alcoholics, space is available because the brain has reduced in size from atrophy. However, there was no indication that Molina was a chronic alcoholic, nor sufficiently aged to have brain atrophy.

Molina had abrasions and bruising all over her body. These injuries—particularly the bruising across her right upper back, and on her right upper chest, right lower abdomen, buttocks, knees, left leg, arms, and the backs of her hands, and the abrasions on her knees, left ankle, and right elbow—were typically not sustained by medical intervention.[4]

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[3] Specifically, Molina suffered a subdural hemorrhage and a subarachnoid hemorrhage.

[4] Other bruises and punctures—such as those on the front of the elbow and groin—were compatible with medical intervention, such as intravenous lines. There was also bruising to Molina's liver, which could have been caused by CPR. An intratracheal

Miller concluded that the manner of death was homicide. The causes of Molina's death were strangulation and blunt force head trauma. Either the head trauma with the brain hemorrhages or the strangulation could have been fatal.

4. Prior incidents of domestic violence

From 2008 to 2010, Margarita Aragon was in a relationship with Rodriguez. They lived together with their first child. Aragon was pregnant with their second child.

On one or two occasions in 2008, Aragon called the police because she and Rodriguez had a domestic dispute. She applied for a restraining order against Rodriguez based on two incidents. In the first, Rodriguez grabbed her throat tightly, while she was holding their baby. Aragon was unable to speak or breathe. She suffered a mark on her neck from the incident. In the second incident, Rodriguez grabbed Aragon, pushed her against a wall, and pinned her hands behind her back. He threatened to make Aragon disappear.

In May of 2008, Aragon confronted Rodriguez about a condom she found in his wallet. She called the police.

In 2010, Rodriguez ended the relationship with Aragon. Rodriguez locked her out of the house, changed the locks, and threw her clothes out. When she filed for full custody of the children, Aragon included a statement which described an incident which occurred on March 21, 2010. During this incident, Rodriguez grabbed her by the arm and pulled her outside. Rodriguez said he was going to beat her up because she "went overboard." He then grabbed Aragon by the neck and started

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tube may have rubbed against Molina's skin, causing a laceration on the left side of her nose.

choking her. When Aragon started to yell, Rodriguez put his hand over her mouth. She held one of her children during the altercation. The other child was also present.

Aragon did not want to testify. She claimed to not remember the details of each of the incidents, even though she acknowledged they occurred. She also stated she received support from Rodriguez's family because one child requires extensive medical care.

B. Defense Evidence

1. DNA Consultant

Mehul Anjaria was employed as a forensic DNA consultant, assisting attorneys and inmates with DNA evidence in their cases. He explained the ease of transferring DNA from person to person. Anjaria did not conduct an independent testing of the samples collected in this investigation. He did not disagree with any of the results or conclusions reported.

2. Character witness

Sandra Santarosa had known Rodriguez for fourteen years. She described Rodriguez as social and friendly. She further described him as not violent.

3. Rodriguez's testimony

Rodriguez testified in his defense, providing his version of the incident. At about 10:00 p.m. on the night of the incident, Marin and Sanchez arrived at Rodriguez's house. Molina and Rodriguez sat with them in the pool area of the house. At approximately 1:30 a.m., Marin and Sanchez left the house.

Rodriguez and Molina had been drinking throughout the weekend. Rodriguez drank a lot during the day as well, but he did not keep track of the number of drinks he had. He continued

to drink after Marin and Sanchez left. Molina appeared more intoxicated than on other occasions when they had alcohol.

After Marin and Sanchez left, Rodriguez and Molina had sexual intercourse. At Molina's request, Rodriguez put his hands on her neck during the intercourse. She did not complain, lose consciousness, or stop breathing. Afterward, he helped Molina walk to the bathroom.

When Molina and Rodriguez returned to the bedroom, she wanted to go hang out with her friends. Rodriguez told her that it was too late. He stated that they were too drunk, and neither could drive. He believed it was not a good idea to go out. Rodriguez was annoyed that Molina wanted to go out because she could barely walk.

Molina stated that she was going to go for a brief time. Rodriguez did not think that she would leave. He believed that she was "bluffing" because she was too drunk. Rodriguez decided to go along with her bluff. He retrieved Molina's clothing bag and tossed it out the front door. Rodriguez told her that some of her items fell out of the bag.

Molina was annoyed. She went outside. Rodriguez waited inside. He eventually went outside and saw Molina face down on the ground in the front yard. Rodriguez believed that Molina was simply drunk and still "bluffing" or "messing around," so he returned to the bedroom.

After about one minute, Rodriguez went back outside to check on Molina. He asked her if she was okay. Molina did not respond. Rodriguez checked her face and saw blood around the nose and mouth. He picked up Molina from under her arms and dragged her into the house. He placed her on the bed. He believed Molina was "blacked out," but "still breathing." He went

outside to pick up the items that were in the yard because he did not want Molina mad at him.

Rodriguez returned to check on Molina. He did not initially believe she was injured. Rodriguez cleaned her face with toilet paper. He then used a towel. Rodriguez spent about twenty to thirty minutes cleaning Molina. During this time, she vomited. Rodriguez eventually got into bed next to her. She did not say anything to Rodriguez.

After another ten to twenty minutes passed, Rodriguez noticed that Molina was having difficulty breathing. He asked if she was okay. He told her to wake up. Molina did not respond. Rodriguez checked to see if she was breathing, then tried to perform CPR. However, he was not trained in CPR.

Rodriguez did not initially call 911 because his phone was not working. It could send text messages and had internet capability, but it could not make calls. Rodriguez also claimed to be drunk and not thinking. He had stopped drinking about an hour and a half to an hour and forty-five minutes before.

Rodriguez went next door to his brother's house. He asked his brother to call 911. Rodriguez returned to his house and observed that Molina was not breathing. He dropped Molina on the floor. He tried to perform CPR again. Luque and Richard arrived at Rodriguez's house. Luque assisted with the CPR.

The police and paramedics arrived within a couple of minutes after Rodriguez returned to his house. Officer Reyes performed CPR on Molina. Rodriguez told the officers multiple times that Molina "face-planted."

Rodriguez denied the allegations of violence against Aragon.

II. Procedure

A jury convicted Rodriguez of first degree murder. (Pen. Code, § 187, subd. (a);[5] count 1.) The trial court sentenced Rodriguez to 25 years to life in state prison.

DISCUSSION

I. Sufficiency of the Evidence

Rodriguez contends that insufficient evidence supported the conviction for first degree murder committed with deliberation and premeditation. We disagree.

Our standard of review is well settled. For a challenge of the sufficiency of the evidence, the record must contain "substantial evidence to support the verdict—i.e., evidence that 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. Zamudio* (2008) 43 Cal.4th 327, 357; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.) We review the evidence in the light most favorable to the judgment. (*Zamudio*, at p. 357.) We must "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*Ibid.*) We do not resolve credibility issues or conflicts in the evidence. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.)

"The same standard applies when the conviction rests primarily on circumstantial evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also

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[5] All further undesignated statutory references are to the Penal Code.

reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 639.) "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt." (*Kraft*, at pp. 1053–1054; *People v. Bean* (1988) 46 Cal.3d 919, 932–933.)

A willful, deliberate, and premeditated killing is first degree murder. (§ 189.) It requires more than a showing of an intent to kill. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) Premeditated means " 'considered beforehand.' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) Deliberate means " 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citation.]" (*Ibid.*) An intentional killing is deliberate and premeditated if it resulted from "preexisting thought," rather than "rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "The process of premeditation and deliberation does not require any extended period of time." (*Mayfield*, at p. 767.)

Traditionally, to assess the sufficiency of evidence to support deliberation and premeditation, the Supreme Court has established three factors or categories of evidence: planning activity, motive to kill, and the manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*); *People v. Wharton* (1991) 53 Cal.3d 522, 546; *Mendoza*, *supra*, 52 Cal.4th at p. 1069.) Deliberate and premeditated murder typically entails any one of the following: (1) extremely strong evidence of planning, (2) a combination of evidence of motive and either

evidence of planning or evidence of a calculated manner of killing, or (3) evidence of all three factors. (*Anderson*, at p. 27; *Wharton*, at pp. 546–547; *People v. Memro* (1995) 11 Cal.4th 786, 863.)

Rodriguez asserts that because the murder involved no planning, deliberation and premeditation hinged on the second combination of *Anderson* factors which includes motive and manner of killing. He contends that even if motive was established by his history of domestic violence, the manner of killing was insufficient to support deliberation and premeditation.

Preliminarily, the Supreme Court has clarified that the *Anderson* factors need not be present in any special combination. (*People v. Booker* (2011) 51 Cal.4th 141, 173.) The *Anderson* factors remain useful to review the evidence. But they are not required to find first degree deliberate and premeditated murder. (*Koontz*, *supra*, 27 Cal.4th at p. 1081; *People v. Cole* (2004) 33 Cal.4th 1158, 1224.)

We agree that there was no evidence of planning activity.[6] But, as we will conclude, the evidence sufficiently supported premeditation and deliberation based on the manner of killing alone, as well as when combined with motive.

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[6] *Anderson* suggested that planning evidence included the defendant taking measures to avoid detection or subjecting the victim to his or her control. (*Anderson*, *supra*, 70 Cal.2d at p. 27.) Procuring a weapon can also demonstrate planning. (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) No such evidence supported any plan to kill Molina. The Attorney General does not contend otherwise.

Rodriguez strangled Molina. He applied enough pressure to break both cornua, or upper thyroid cartilage, in Molina's throat. The fractures caused hemorrhaging which resulted in bruising on Molina's neck. Dr. Miller testified that the fractures required a fair amount of force because Molina's thyroid cartilage was flexible. The strangulation also caused the small veins in her eyelids and eyes to rupture, forming petechiae, or pinpoint hemorrhages. The prolonged nature of the strangulation provided time for Rodriguez to consider the consequences of his action. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019–1020; *People v. Shamblin* (2015) 236 Cal.App.4th 1, 11.)

Rodriguez argues that the strangulation alone fails to support premeditation and deliberation. He notes that Dr. Miller could not determine how long Molina's neck was compressed.[7] But premeditation and deliberation do "not require any extended period of time." (*Mayfield*, *supra*, 14 Cal.4th at p. 767.) These factors involve "the extent of the reflection," rather than "the

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[7] Dr. Miller testified that the amount of time until Molina died from the strangulation depended on what happened when the injury to the cornua was sustained. The brain could have been affected in three different ways, or a combination of them. First, the arteries could have been blocked, preventing blood from flowing to the brain. If the strangulation cut off the blood flow to the brain, it would have been irreversibly damaged in approximately four minutes. Second, the veins could have been blocked, causing a high pressure system. Third, pressure could have been placed on the arteries, causing the heart rate and blood pressure to drop. Any one of these scenarios supports our conclusion that the strangulation was prolonged and allowed Rodriguez to consider the consequences of his action.

duration of time." (*Koontz*, *supra*, 27 Cal.4th at p. 1080; *People v. Cage* (2015) 62 Cal.4th 256, 276.)

Additionally, strangulation was not the only possible cause of death. Rodriguez also beat Molina. Her DNA was found on his knuckles. Rodriguez did not deliver a single blow to Molina. She had bruising all over her body. She suffered hemorrhaging on her head and nasal fractures. Dr. Miller believed that the hemorrhaging was caused by a "decent amount of force." Moreover, the jurors could have inferred that Molina struggled with Rodriguez. His arms and wrists were scratched, and his DNA was on Molina's fingernails. This struggle only prolonged the attack and provided Rodriguez additional time to deliberate. (*Shamblin*, *supra*, 236 Cal.App.4th at p. 12.)

The commission of multiple acts—namely, strangling and beating—supported a reasonable inference that Rodriguez had "ample opportunity to consider the deadly consequences of his actions." (*Stitely*, *supra*, 35 Cal.4th at p. 544.) Accordingly, the manner of killing alone supports a killing with deliberation and premeditation.

Next, Rodriguez's motive for the killing was based on his history of domestic violence. He has demonstrated that he resorts to violence when disputes arise in his domestic relationships. Rodriguez and Molina were in a dating relationship. A dispute between them occurred prior to the murder. Rodriguez's testimony revealed that the dispute involved Molina wanting to go out with friends, despite her intoxicated condition. He threw her bag out the front door, scattering her belongings onto the front lawn. The dispute turned violent, leading to Rodriguez beating and strangling Molina.

Rodriguez previously committed multiple acts of domestic violence against Margarita Aragon, the mother of his children. Two of the prior acts involved Rodriguez strangling Aragon. These prior acts supported Rodriguez's " ' "larger scheme of dominance and control" ' " over women with whom he had relationships. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1237; *People v. Johnson* (2000) 77 Cal.App.4th 410, 419.) He included Molina within this scheme when he became angry with her. The jurors could reasonably infer from Rodriguez's prior acts of domestic violence that he had a motive to kill Molina.

Based on the manner of killing alone, or when combined with motive, substantial evidence supports deliberation and premeditation. Accordingly, we conclude there was substantial evidence to sustain the first degree murder conviction against Rodriguez.

II. Ineffective Assistance of Counsel

Rodriguez claims that his trial counsel was ineffective because she prepared his defense only against second degree murder, not first degree murder. We reject Rodriguez's claim because he fails to show he was prejudiced by his trial counsel's misunderstanding of the law.

A. Additional Facts

The prosecutor originally requested that the trial court instruct the jury on first degree murder with CALCRIM No. 521. Defense counsel objected to the instruction because the information did not specifically charge first degree murder, nor allege deliberation and premeditation. Acknowledging the omissions from the information, the prosecutor withdrew her request for the instruction.

The next day, the prosecutor renewed her request for CALCRIM No. 521. Defense counsel reiterated her previous objection. She added that she was precluded from arguing for the dismissal of a deliberation and premeditation allegation in her motion to set aside the information, under section 995, subdivision (a), and her motion for judgment of acquittal, under section 1118.1. The trial court noted that the degree and means of murder do not need to be pleaded in the information. The trial court further allowed defense counsel to renew her motion for judgment of acquittal. Defense counsel did so, arguing there was insufficient evidence of deliberation and premeditation. The trial court denied the motion.

The trial court announced that it would instruct the jury with CALCRIM No. 521. Defense counsel objected again, arguing it deprived Rodriguez of a fair trial because she prepared her closing argument to address second degree murder, not a theory of deliberate and premeditated murder. The trial court commented that defense counsel should have known that the prosecutor could argue first degree murder regardless of any specific allegation.

B. No Structural Error

Rodriguez argues that defense counsel was ineffective because she did not realize that the information provided adequate notice of first degree murder without an allegation of deliberation and premeditation. He also contends that defense counsel's ineffectiveness resulted in structural error because he did not know he was facing first degree murder.

Structural error did not result from defense counsel's misunderstanding of the pleading requirement for murder. A structural error affects "the framework within which the trial

proceeds." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) It is not "simply an error in the trial process itself." (*Ibid.*) It deprives a defendant of the " 'basic protections' " of a criminal trial and renders the trial unfair or unreliable for determining guilt or innocence. (*Neder v. United States* (1999) 527 U.S. 1, 8–9.) The United States Supreme Court adopts a categorical approach—and not a case-by-case approach—to determining whether an error is structural. (*Id.* at p. 14; *People v. Mil* (2012) 53 Cal.4th 400, 412.) Thus, structural error occurs in limited situations, such as the complete denial of counsel, a biased trial judge, racial discrimination in grand jury selection, improper denial of self-representation at trial, improper denial of a public trial, or instruction on an incorrect explanation of the reasonable doubt standard. (*Mil*, at p. 410; *Neder* at p. 8; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149.)

None of these situations applies here. Because Rodriguez was represented by counsel and was tried by an impartial judge and jury, there is a strong presumption that any error is subject to harmless-error analysis. (*Neder*, *supra*, 527 U.S. at p. 8; *Rose v. Clark* (1986) 478 U.S. 570, 579.) He cannot overcome this strong presumption.

First, the information provided adequate notice of first degree murder, even though defense counsel failed to appreciate it. Charging only murder with malice, in violation of section 187, permits a conviction of first degree murder. (*People v. Contreras* (2013) 58 Cal.4th 123, 147; *People v. Hughes* (2002) 27 Cal.4th 287, 369 (*Hughes*); *People v. Morgan* (2007) 42 Cal.4th 593, 616.) The information need not specify the degree or the manner in which the murder was committed. (*People v. Jones* (2013) 57 Cal.4th 899, 968; *Contreras*, at p. 147.)

Second, Rodriguez, as well as defense counsel, received notice of the prosecution's theory of the case from the preliminary hearing, which was held nearly a year before trial. (*People v. Diaz* (1992) 3 Cal.4th 495, 557; *Hughes*, *supra*, 27 Cal.4th at pp. 369–370.) Specifically, Dr. Miller's preliminary hearing testimony disclosed the same autopsy evidence—including strangulation, fractures to the thyroid cartilage, head and facial trauma, brain hemorrhages, and injuries to the body—presented at trial. He expressed the same conclusions regarding the causes of death. Well in advance of trial, this testimony informed Rodriguez of the prosecution's theory of the manner and degree of murder. Rodriguez's due process right to notice of the charge was not violated. Accordingly, there was no structural error.

C. No Prejudice

A criminal defendant has the right to assistance of counsel under both the state and federal constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, §15; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) The two-prong test for ineffective assistance of counsel is well settled. The defendant must show that (1) counsel's performance was deficient and (2) he or she suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688; *People v. Mickel* (2016) 2 Cal.5th 181, 198.) Performance is deficient when it falls " ' "below an objective standard of reasonableness . . . under prevailing professional norms." ' " (*People v. Lopez* (2008) 42 Cal.4th 960, 966; *Mickel*, at p. 198.) Prejudice requires a showing of a reasonable probability that the outcome would have been different but for counsel's errors. (*Mickel*, at p. 198.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice

. . . that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697; *In re Welch* (2015) 61 Cal.4th 489, 516.)

Rodriguez asserts that defense counsel made each decision before and during trial under the mistaken belief that he faced only second degree murder.[8] As the sole example, Rodriguez suggests that defense counsel might have emphasized his intoxication as a defense had she known he was facing first degree murder.

Evidence of voluntary intoxication can be considered on whether a defendant acted with premeditation and deliberation to reduce first degree murder to second degree murder. (§ 29.4, subd. (b); *People v. Robbins* (2018) 19 Cal.App.5th 660, 674; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1376–1377.) But evidence of voluntary intoxication is also admissible as to whether a defendant harbored express malice, which is an element of second degree murder. (§ 29.4, subd. (b).)

Defense counsel did present evidence of Rodriguez's intoxication. Rodriguez testified that he had a lot to drink, although he did not account for the number of drinks he had. He further testified that both he and Molina were too drunk to drive. Defense counsel also elicited testimony from Sanchez about Rodriguez's drinking and behavior. In closing, defense counsel argued the applicability of voluntary intoxication as a defense to negate intent. She commented that Rodriguez's actions demonstrated his intoxication. The trial court instructed the jury with CALCRIM No. 625, which permitted the consideration of

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[8] Rodriguez states that the precise consequences of defense counsel's misunderstanding of the law may be difficult to identify.

voluntary intoxication in deciding deliberation and premeditation, as well as intent to kill and unconsciousness. Any additional emphasis on intoxication would not have changed the outcome.

Beyond this sole example, Rodriguez points out that defense counsel only addressed deliberation and premeditation once during closing argument. She argued that there was no proof of deliberation and premeditation, and claimed they were alleged to trick the jurors into convicting Rodriguez of second degree murder as a compromise. But Rodriguez fails to articulate the deficiency of this argument.

Defense counsel's terse rejection of deliberation and premeditation was consistent with her theory of the case. Her strategy was to highlight any shortcomings of the prosecution case, asserting that Rodriguez did not cause Molina's death. Defense counsel instead blamed Molina's fall or the medical intervention as alternative causes of death. She questioned whether Molina's neck was held at all. She also contended that there was no proof that Rodriguez brutally beat Molina. If Rodriguez neither caused Molina's death nor beat her, it logically follows that he did not act with deliberation and premeditation.

We conclude that Rodriguez has failed to establish that counsel's error resulted in prejudice. Accordingly, his claim of ineffective assistance of counsel fails.

III. Instructions on Murder and Completing the Verdict Form

Rodriguez points out omissions in the jury instructions for murder and completing the verdict forms. He complains that the jurors were not told how to return a verdict of guilty of second degree murder if they reached a verdict of not guilty of first degree murder. He asserts that the instructions guided the

jurors toward a choice between first degree murder, deadlock, or acquittal.

A. CALCRIM Nos. 520 and 641

The trial court modified CALCRIM No. 520, the instruction on the elements of murder. However, it omitted the sentence, "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree." (CALCRIM No. 520.)

The trial court also modified CALCRIM No. 641. In its standard form, CALCRIM No. 641[9] explains how to complete the verdict forms when a defendant faces first degree murder and a lesser offense. But here, it did not instruct what the jury should do if it reached a verdict of not guilty of first degree murder and either reached a verdict of guilty of second degree murder or could not agree whether the defendant was guilty of second degree murder. The instruction also omitted what the jury should do if it reached verdicts of not guilty of first and second degree murder.

B. No Prejudice

Even assuming the omissions were erroneous, they were harmless under any standard. (*People v. Moore* (2001) 51 Cal.4th 386, 412 [applying standard under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)]; *People v. Lasko* (2000) 23 Cal.4th 101, 111 [applying standard under *People v. Watson* (1956) 46

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[9] CALCRIM No. 640 discusses the process when the jury is provided with not guilty verdict forms for each level of homicide. CALCRIM No. 641 applied here because only one not guilty verdict form was provided to the jury.

Cal.2d 818, 836]; *People v. Beltran* (2013) 56 Cal.4th 935, 955.) 23 Cal.4th

In general, when substantial evidence in a homicide case presents one or more lesser offenses, the trial court has a sua sponte duty to instruct the jurors on the lesser offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) The trial court must also instruct the jury that it cannot convict of a lesser offense, unless it has concluded that the defendant is not guilty of the first degree murder. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 330 (*Kurtzman*); *People v. Fields* (1996) 13 Cal.4th 289, 303–304; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 (*Stone*).)

Here, the trial court complied with these instructional duties. First, the trial court instructed on the lesser offense of second degree murder with CALCRIM No. 520. CALCRIM No. 521 informed the jurors of the additional proof of deliberation and premeditation required for first degree murder. The modified version of CALCRIM No. 521 added that the prosecutor had "the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime." As these instructions reflect, the jury was adequately informed that second degree murder was available as a lesser offense of first degree murder.[10]

Second, even with the omissions, CALCRIM No. 641 retained the instruction that the court could only accept a verdict of guilty of a lesser crime only if the jurors found the defendant

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[10] The trial court orally specified that the lesser crime was second degree murder and the greater crime was first degree murder.

not guilty of the greater crime.[11] As discussed earlier, the jury was informed that first degree murder was the greater crime and second degree was the lesser. The language in CALCRIM No. 521 also conveyed the requirement that was omitted from CALCRIM No. 641.[12] Specifically, CALCRIM No. 521 stated that a verdict of guilty of second degree murder requires a verdict of not guilty of first degree murder. (*Kurtzman*, *supra*, 46 Cal.3d at p. 330; *Stone*, *supra*, 31 Cal.3d at p. 519.)

Rodriguez also notes that the jury never received a verdict form for not guilty of first degree murder to be used in the event of a verdict of guilty on the lesser offense of second degree murder. Instead, it was given a not guilty form for murder without specifying the degree.

The verdict forms did not prevent the jury from reaching a verdict of guilty of second degree murder. First, the verdict form for guilty of murder allowed the jury to enter the degree. Second, as previously discussed, the trial court properly instructed the

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[11] The trial court's modified version of CALCRIM No. 521 read as follows: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met his burden, but you have found defendant guilty of murder, you must find the defendant not guilty of first degree murder and find him guilty of murder of the second degree."

[12] Although the three omitted paragraphs from CALCRIM No. 641 contained language regarding the unanimity of verdicts specific to first degree murder, the instruction retained language of the unanimity requirement for verdicts in general. CALCRIM No. 3550 also instructed the jury that any verdict must be unanimous.

jurors as to the different degrees of murder. It also instructed that in order to find Rodriguez guilty of second degree murder, they would need to find him not guilty of first degree murder. We presume the jurors were intelligent and capable of understanding and following all instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130.) Had the jury found Rodriguez guilty only of second degree murder, it would have indicated so on the not guilty verdict form, asked for a verdict form for not guilty of first degree murder, or sought other direction from the court. (*People v. Osband* (1996) 13 Cal.4th 622, 689–690.) The jurors never asked any questions about the degrees of murder or how to complete the verdict forms or noted that they were unable to reach a verdict. It is unmistakably clear that the jury intended to convict Rodriguez of first degree murder.

Despite the omissions from CALCRIM Nos. 520 and 641, the retained language, as well as the addition to CALCRIM No. 521, conveyed the availability of the lesser offense of second degree murder. We conclude the omissions in the instructions did not prevent the jurors from reaching a conviction for second degree murder. Accordingly, the omissions were harmless.

IV. Unanimity Instruction

Rodriguez contends the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 3500, the unanimity instruction. He reasons that the jury had to unanimously agree which act—strangulation or blunt force trauma to the head—caused Molina's death. We disagree.

A jury verdict in a criminal case must be unanimous. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) The jurors must unanimously agree the defendant is guilty of a specific crime. (*Russo*, at p. 1132.) When the evidence

supports more than one crime, either the prosecutor must elect among the crimes, or the trial court must require the jurors to agree that the same crime was committed. (*Ibid.*) The purpose of this unanimity requirement is to prevent a conviction when the jurors have not agreed that the defendant committed a particular offense. It further prohibits the jury from "amalgamating evidence of multiple offenses," which has not amounted to proof beyond a reasonable doubt for any individual offense. (*Ibid.*) Where warranted based on the facts of the case, the trial court must instruct sua sponte on unanimity. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 569; *People v. Riel* (2000) 22 Cal.4th 1153, 1199 (*Riel*).)

On the other hand, unanimity is not required when a single discrete crime is based on multiple theories or acts. (*Russo*, *supra*, 25 Cal.4th at p. 1135; *People v. Grimes* (2016) 1 Cal.5th 698, 727–728 (*Grimes*).) It is only required when two or more discrete crimes form the basis of a conviction on a count. Stated another way, if the evidence shows only a single discrete crime but is unclear as to precisely how that crime was committed or what the defendant's role was, the jury need not unanimously agree on the basis. (*Russo*, at p. 1135.)

The court must determine whether: (1) the jurors may divide on two discrete crimes and not agree that any particular crime was committed, or (2) the jurors may divide as to the exact way the defendant is guilty of a single discrete crime. (*Russo*, *supra*, 25 Cal.4th at p. 1135.) Only in the former situation should the trial court instruct on unanimity. The selection of one discrete crime out of multiple crimes requires unanimity. But the theory of how a single crime was committed does not. The guilty verdict will still reflect the jurors' unanimity that the defendant

committed the single discrete crime. (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 73–74.)

We review a claim of instructional error de novo. (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 751.)

Here, the evidence presented two possible methods of how the murder was committed: blunt force trauma to the head and strangulation. They are acts, not discrete crimes, regardless of whether Rodriguez killed Molina one way or the other, or even by a combination of the two. Rodriguez committed one murder, not two. Each juror needed only to have found Rodriguez guilty beyond a reasonable doubt of the single statutory offense of first degree murder. (*People v. Pride* (1992) 3 Cal.4th 195, 249 (*Pride*).)

The discrepancies between the factual details on how Rodriguez killed Molina did not warrant a unanimity instruction. (*Pride*, *supra*, 3 Cal.4th 195, 250–251; *People v Taylor* (2010) 48 Cal.4th 574, 626 (*Taylor*).) The jurors need not have unanimously agreed on the precise factual details of how the killing occurred to convict Rodriguez of first degree murder. (*Pride*, at p. 250.) Even if the evidence presented the possibility that the jurors may have divided as to the exact way Rodriguez was guilty of first degree murder, the two factual theories did not require the trial court to instruct on unanimity.[13]

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[13] The Attorney General additionally points out an exception to the unanimity instruction when the criminal acts occurred as a part of continuous conduct. (*People v. Crandell* (1988) 46 Cal.3d 833, 875; *People v. Stankewitz* (1990) 51 Cal.3d 72, 100 (*Stankewitz*); *Riel*, *supra*, 22 Cal.4th at p. 1199; *People v. Diedrich* (1982) 31 Cal.3d 263, 281–282.) This "continuous conduct" rule applies when: (1) the acts are so closely connected as to form part of one transaction, (2) the defendant offers the

To support his contention, Rodriguez relies on *People v. Dellinger* (1984) 163 Cal.App.3d 284, which involved the defendant's killing of his two-year-old stepdaughter. The cause of death was blunt force trauma to the head. Ingestion of cocaine was a contributing cause. The trial court instructed that the jury could find the defendant guilty of first degree murder by deliberation and premeditation or by poison. However, it did not instruct that the jurors had to unanimously agree on which act constituted murder. The reviewing court stated that the defendant was entitled to a unanimity instruction because there were multiple acts which could constitute the charged offense. (*Id*. at p. 301.)

We decline to follow *Dellinger* since it conflicts with more recent Supreme Court authority. We are bound by *Russo*. (*Russo*, *supra*, 25 Cal.4th at p. 1135; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) *Dellinger* was decided seventeen years before *Russo*. Since *Dellinger*, the Supreme Court has repeatedly held that discrepancies between factual details do not warrant a unanimity instruction for a single, discrete criminal event.[14] (*Russo*, *supra*, 25 Cal.4th at pp. 1134–

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same defense to each of the acts, and (3) the jury cannot reasonably distinguish them. (*Crandell*, at p. 875; *Riel*, at p. 1199; *Stankewitz*, at p. 100.) We need not rely on this exception because only one discrete crime was committed by a single person.

[14] Rodriguez argues that *Dellinger* has continued vitality because it was not overruled in *Grimes*, which involved two different factual theories to establish the felony murder special circumstance. But in *Grimes*, the Supreme Court merely assumed that *Dellinger* was correctly decided only to factually distinguish it. Following *Russo*, *Grimes* reiterated that the

1135; *Pride*, *supra*, 3 Cal.4th at p. 250; *Taylor*, *supra*, 48 Cal.4th at p. 626; *People v. Edwards* (1991) 54 Cal.3d 787, 824; *People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1025.) Moreover, *Dellinger* did not cite to any authority addressing its focus on separate acts, instead of separate offenses.

Even if we assumed the failure to give the unanimity instruction was error, we conclude there was no prejudice. The *Chapman* standard governs our review for prejudice for failure to give a unanimity instruction.[15] (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853 (*Thompson*); *Chapman*, *supra*, 386 U.S. at p. 24.)

The failure to give a unanimity instruction is harmless "[w]here the record provides no rational basis . . . for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any." (*Thompson*, *supra*, 36 Cal.App.4th at p. 853.) Here, the evidence did not separate the strangulation and blunt force trauma to the head, nor reveal the sequence of the acts. Rodriguez also did not offer legally distinct defenses to each act. He merely offered a single

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unanimity instruction is not required where multiple acts may form the basis of a conviction on a discrete criminal event. (*Grimes*, *supra*, 1 Cal.5th at p. 727.)

[15] Some courts have recognized a split of authority on the standard of prejudice in failing to give the unanimity instruction. (*People v. Smith* (2005) 132 Cal.App.4th 1537, 1545; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185–186.) Because the claimed error fails under the more stringent *Chapman* standard, it would also fail under the *Watson* standard. (See *People v. Napoles* (2002) 104 Cal.App.4th 108, 119, fn. 8.)

universal defense to the murder, namely that he did not cause Molina's death.

Additionally, the jurors apparently did not find Rodriguez credible. The failure to give the instruction is also harmless if the record reveals the jury resolved any credibility dispute against the defendant and would have convicted him or her of any offense shown to have been committed. (*Thompson*, *supra*, 36 Cal.App.4th at p. 853; *People v. Jones* (1990) 51 Cal.3d 294, 307.) Accordingly, we conclude that the failure to instruct on unanimity was harmless beyond a reasonable doubt.[16]

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[16] To the extent Rodriguez bases his challenge on federal due process grounds, we reject it. The United States Supreme Court has held that when a defendant's conduct constitutes a single offense that may be committed in different ways, federal due process does not require unanimity on how the crime was committed. (*Schad v. Arizona* (1991) 501 U.S. 624, 630.)

We also reject Rodriguez's claim that the failure to instruct on unanimity violates his "Sixth Amendment guarantee of a unanimous jury." Currently, the Sixth Amendment does not require a unanimous verdict in state criminal cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404, 411; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362–363.) This issue is of no consequence in this case. California already requires unanimity in jury verdicts for felony cases. (Cal. Const., art. I, § 16.)

The California Supreme Court has also held that dispensing with unanimity for how a crime was committed does not violate the Sixth Amendment. (*People v. Taylor* (2010) 48 Cal.4th 574, 626; *People v. Morgan* (2007) 42 Cal.4th 593, 617; *People v. Nakahara* (2003) 30 Cal.4th 705, 712–713.)

V. Comments on the Burden of Proof

Rodriguez complains that during jury selection, the trial court misstated the prosecutor's burden of proof by suggesting the jurors needed to be convinced he was not guilty. He also contends the prosecutor misstated the burden of proof during rebuttal argument. We disagree with both claims.

A. Trial Court's Comments During Jury Selection

During jury selection, the trial court asked jurors 6, 11, and 14, "Assume this, assume that you listened to the evidence . . . and once you've considered all of the evidence and considered all of the law that I give to you and heard the arguments of the lawyers, you are convinced—assume this—all right—you are convinced that the defendant is not guilty, can you vote not guilty?' Defense counsel stated, "Nobody needs to convince anybody that he's not guilty." The trial court responded, "No. No. I'm saying after they heard the evidence and the law convinces them. I'm not saying anybody here necessarily convinces them. After considering the evidence and the law, you're convinced that the defendant is not guilty. Can you vote not guilty, Juror number 14?"

Juror number 14, responded, "If I'm convinced, yes." The trial court responded, "I'm assuming—I'm telling you to assume that." Then the trial court asked juror number 11, "If you're convinced?" Juror number 11 replied, "Then I would say not guilty." Juror number 6 also stated, "If I'm convinced, yes."

The trial court has wide discretion in conducting voir dire on topics that might disclose bias because it is in the best position to evaluate the jurors' statements. (*Taylor*, *supra*, 48 Cal.4th at p. 608.) The trial court's manner of conducting voir dire does not amount to error, or an abuse of discretion, unless it renders the

" 'trial fundamentally unfair,' " or it is " ' "not reasonably sufficient to test the jury for bias or partiality." ' " (*People v. Cleveland* (2004) 32 Cal.4th 704, 737; *Mu'Min v. Virginia* (1991) 500 U.S. 415, 425–426.)

The trial court's questions reasonably tested for bias. The questions were asked in response to personal experiences with the criminal justice system described by jurors 6, 11, and 14. Juror number 6 informed the court that he or she did not believe his brother was treated fairly when arrested for sexual assault. Juror number 11 disclosed that his or her cousin was murdered. Juror number 11 believed that he or she was more likely to convict Rodriguez, even if the prosecutor did not prove his guilt, because he or she would "feel for the family of the person who died." Juror number 14 believed he or she was biased and could not give Rodriguez a fair chance because his or her cousin was killed, and the perpetrator was never caught. Additionally, juror number 14 disclosed that his or her son recently died, and emotions would cloud his or her judgment.

The trial court was merely trying to determine whether these specific jurors could reach a not guilty verdict—rather than a guilty verdict—if the evidence did not prove Rodriguez was guilty. The trial court tried to assess whether the jurors could find Rodriguez not guilty, despite their personal experiences.

The trial court did not misstate the burden of proof, nor render the trial fundamentally unfair. It never suggested that the defense was required to convince the jurors that Rodriguez was not guilty. Contrary to Rodriguez's argument, the trial court specifically clarified that no one needed to convince the jurors that he was not guilty. Instead, the trial court posed a

hypothetical scenario where the jurors would have been certain that Rodriguez was not guilty.

To confirm the proper burden of proof, defense counsel followed up with juror number 11. She asked, "So juror 11, you understand that I, myself and my client, don't have to prove that my client is not guilty?" Juror number 11 replied, "Correct." Defense counsel further asked, "And the law tells you [that] you can't vote guilty, if the prosecution has not met their burden of proof, as the court just mentioned?" Juror number 11 answered, "Right."

Moreover, even if juror number 11 was alone in this understanding, it was unlikely that the trial court's questions would have influenced any of the other jurors.[17] The trial court instructed the sworn jury, after both parties rested, with CALCRIM No. 220, which defined the presumption of innocence, the burden of proof, and the beyond a reasonable doubt standard. Any misunderstanding of the trial court's questions during jury selection would have had no effect on the actual trial proceedings. (See *People v. Medina* (1995) 11 Cal.4th 694, 741.)

Based on the record, we conclude the trial court's comments did not amount to error.

B. Prosecutor's Comments During Closing Argument

Rodriguez flags two portions of the prosecutor's rebuttal argument, where he claims she tried to absolve herself of the burden of proof. As we will discuss, the prosecutor did not

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[17] Jurors 6, 11, and 14, the only jurors asked the hypothetical question, were excused from serving on the jury.

misstate the law and her comments did not amount to prosecutorial misconduct under federal or state standards.[18]

First, the prosecutor discussed Rodriguez's testimony. She asked, "Is there a reasonable alternative? Is the reasonable doubt another version something else that could have happened? Is it reasonable? What is reasonable about what the defendant said happened that day that early morning hour? Nothing is reasonable for you to decide that there is some doubt that he, in fact, did . . . ."

A prosecutor may not misstate the law, particularly to relieve the prosecution from its obligation to overcome reasonable doubt on each element of the charged crime. (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*); *People v. Marshall* (1996) 13 Cal.4th 799, 831.) Specifically, the prosecutor may not argue that the beyond a reasonable doubt standard requires a determination of whether innocence was reasonable. (*People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.) Such a determination improperly implies that a guilty verdict could be reached if innocence was unreasonable. Guilt is reached only with proof beyond a reasonable doubt. Equating innocence with reasonableness—and guilt with unreasonableness—is an improper assessment of proof beyond reasonable doubt.

However, contrary to Rodriguez's argument, the prosecutor did not suggest such an improper assessment of the evidence. The prosecutor made her comments in the context of responding

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[18] Because we conclude that neither the trial court's nor the prosecutor's comments misstated the law, we do not reach Rodriguez's contention that their combined effect amounted to error.

to defense counsel's argument that the jurors were not required to consider Rodriguez's testimony in order to find him not guilty.[19] The prosecutor first stated, "And he gave you the story, his explanation of what happened? And does his explanation make sense?" By asking if Rodriguez's testimony made sense and if it was reasonable, the prosecutor properly questioned his credibility. If the defense opts to produce evidence, the jury must consider it as part of the record. The prosecution may argue that the defense interpretations of that evidence are neither reasonable nor credible. (*Centeno*, *supra*, 60 Cal.4th at p. 673.)

Second, Rodriguez points out the prosecutor's statement that "[i]t's only reasonable doubt if you believe that he didn't do it." But Rodriguez takes this comment out of context. The prosecutor was responding to defense counsel's assertion that the jurors would have reasonable doubt of Rodriguez's guilt, if they wanted to view the entire eight hours of video surveillance footage depicting the outside of his house, in addition to the one hour which was presented.[20] The prosecutor added that the

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[19] Defense counsel argued that the mere fact Rodriguez testified, even if unbelievable, did not minimize the prosecutor's burden. Defense counsel stated, "And whenever I have a defendant testify, I'm always worried well, now you're going to shift the burden. But the burden still stays on the prosecution. Just because the defense calls the defendant to the stand, it doesn't become a contest who to believe more . . . [w]hether you believe what the defendant said or not. You could think he was full of it. Don't believe a single word. The prosecutor still has the burden of proving beyond a reasonable doubt each and every element."

[20] Defense counsel argued, "[I]f you're back in that jury room and you're thinking well, maybe this is what happened; or I sure

jurors must consider the limited video footage along with the entirety of the evidence. We interpret the prosecutor's argument to mean that the jurors would only have reasonable doubt as a result of desiring to view the omitted video footage, if they did not believe the other evidence which supported guilt. "Advocates are given significant leeway in discussing the legal and factual merits of a case during argument." (*Centeno*, *supra*, 60 Cal.4th at p. 666.)

The prosecutor's comments did not amount to misconduct under either federal or state standards. Prosecutorial misconduct constitutes a federal violation under the Fourteenth Amendment of the U.S. Constitution when "it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; *People v. Thomas* (2012) 54 Cal.4th 908, 937; *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Conduct that does not amount to a federal violation is a state violation if it involves "deceptive or reprehensible methods to attempt to persuade . . . the jury." (*Morales*, at p. 44; *People v. Otero* (2012) 210 Cal.App.4th 865, 870; *People v. Wallace* (2008) 44 Cal.4th 1032, 1070–1071.) Because Rodriguez's claim involves the prosecutor's comments before a jury, we must determine whether a reasonable likelihood exists that the jury applied the comments in an erroneous manner. (*Morales*, at p. 44; *Centeno*, *supra*, 60 Cal.4th at p. 667.)

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would like to see that surveillance tape these detectives deprived me because they decided it wasn't important. . . . If you're thinking I want to see that because I'm not sure what really happened, you have a reasonable doubt."

First, the prosecutor included with both comments her explicit recognition of her burden of proof.[21] Second, the trial court's cautionary instructions further prevented any erroneous understanding or application of the law. Immediately when the defense raised objections, the trial court cautioned the jury to follow the law that he provided to them.[22] Third, the trial court provided concluding instructions which repeated this instruction, as well as instructions on the guilty beyond a reasonable doubt standard and the prosecutor's burden of proof. (CALCRIM Nos. 200, 220.)

We presume that the jurors adopted the trial court's instructions as statements of the law and considered the prosecutor's comments as an advocate's effort to persuade them. (*People v. Osband* (1996) 13 Cal.4th 622, 717; *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1083.) We also presume the jurors were able to understand the instructions and followed them.

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[21] The prosecutor prefaced her first comment by stating, "She cannot have it both ways to say well, the People have the burden. They have to present it to you. And we do, beyond a reasonable doubt." After the second comment, the prosecutor stated, "Now, it's reasonable doubt if you don't believe the People have proven the elements."

[22] The trial court stated, "I told you what the law is, ladies and gentlemen. You follow the law that I state to you. What the lawyers say is not evidence. Nor is it the law. I think I told you that. I said the lawyers say a lot of things. Well, these are examples. All right. So you have total recall of the evidence. Rely upon your own memory regarding the evidence. And, as far as the law is concerned, you'll have the law with you when you deliberate."

(*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Here, the jurors never asked any questions to suggest otherwise.

Thus, we conclude the prosecutor's comments did not render the trial fundamentally unfair, nor amount to deceptive or reprehensible attempts to persuade the jury.[23] Considering the context of the comments combined with the trial court's cautionary and concluding instructions, we are also satisfied that it is not reasonably likely the jury was misled.

VI. No cumulative error

Rodriguez claims cumulative error. Although the aggregate prejudice from multiple errors could require reversal even if no single error was itself prejudicial, we have concluded that no errors occurred in this case. (*People v. Hill* (1998) 17 Cal.4th 800, 844.) We have concluded that the modification of CALCRIM No. 520 (murder) and 641 (completion of verdict form), and the omission of CALCRIM No. 3500 (unanimity), even if assumed as errors, were not prejudicial. (*People v. Avila* (2009) 46 Cal.4th 680, 717.) Even when considered cumulatively, the modification of the first two instructions and omission of third did not deprive Rodriguez due process or a fair trial. Thus, no cumulative prejudice exists.

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[23] Because we conclude that the prosecutor's statements did not amount to misconduct under either the federal or state standards, we need not review whether they amounted to prejudicial error.

VII. Denial of Motion for Pretrial Discovery

Defense counsel filed a motion for pretrial discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). She sought disclosure of civilian complaints against Sheriff Sergeants Biddle and Cooper.[24]

The lower court denied the *Pitchess* motion because defense counsel's supporting declaration failed to show specificity regarding misconduct by Biddle and Cooper. It stated that the declaration failed to establish a plausible factual scenario for the allegations, as required by *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*). Rodriguez claims the trial court erred. We disagree.

We review the denial of a *Pitchess* motion for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.) A ruling that falls " ' "outside the bounds of reason" ' " constitutes an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 714; *Sisson v. Superior Court* (2013) 216 Cal.App.4th 24, 34.)

When a defendant seeks discovery from a peace officer's confidential personnel records, he or she must file a motion which establishes good cause for the disclosure sought. (Evid. Code, § 1043, subds. (a), (b); *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 82–83 (*Santa Cruz*); *People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) The trial court must determine if the declaration has established "the materiality of the requested information to the pending litigation." (*Warrick*, *supra*, 35 Cal.4th at p. 1026; *Mooc*, at p. 1226; Evid. Code, § 1043,

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[24] The request sought complaints involving multiple forms of dishonesty.

subd. (b)(3).) As a part of this analysis, the declaration must "describe a factual scenario supporting the claimed officer misconduct."[25] (*Warrick*, at p. 1024.) The factual scenario must be specific and "plausible when read in light of the pertinent documents." (*Id*. at p. 1025; *Santa Cruz*, at pp. 85–86.) A plausible scenario is "one that might or could have occurred." (*Warrick*, at p. 1026.) A motive for the alleged officer misconduct is not required. (*Id*. at p. 1025.) The factual scenario may consist of a denial of the facts in the police report, depending on the circumstances of the case. (*Id*. at pp. 1024—1025.)

At issue here is whether defense counsel's declaration sufficiently described a factual scenario supporting misconduct by Biddle and Cooper. The declaration discussed four acts by Biddle and Cooper which defense counsel claimed entitled her to the requested *Pitchess* discovery.

First, defense counsel had requested a video recording which purportedly depicted a struggle in front of Rodriguez's

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[25] The declaration must also establish a logical link between the proposed defense and the pending charge. Next, it must articulate how the discovery sought may lead to relevant evidence or may itself be impeachment evidence that would support the proposed defense. (*Warrick*, *supra*, 35 Cal.4th at p. 1021; *People v. Hustead* (1999) 74 Cal.App.4th 410, 417.) Finally, it must include a reasonable belief that the agency has the type of information sought. (Evid. Code, §1043, subd. (b)(3); *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 9.) The lower court did not state that the declaration failed to satisfy these other requirements. We need not discuss them because, as we will conclude, the lower court did not abuse its discretion in finding that the declaration failed to describe a factual scenario supporting misconduct by Biddle and Cooper.

house. During a pretrial hearing, Biddle stated that the video had been produced to defense counsel. Cooper elaborated that whether the video depicted a struggle was disputable.[26] Apparently, the video referenced by Biddle and Cooper was not the video requested by defense counsel. Two months after the pretrial hearing, defense counsel received an additional video which was responsive to her request. Defense counsel alleged that Biddle and Cooper lied based on their earlier representations that the recording had been produced to her.

During the hearing on the *Pitchess* motion, defense counsel admitted that she could not show Biddle or Cooper intentionally withheld the video from her. She conceded that it was plausible they made a mistake in failing to produce it. Because Biddle and Cooper did ultimately produce the video prior to trial, it is not plausible that they intentionally withheld it from her.[27] Moreover, because the earlier video appeared to depict a struggle, it is also understandable that Biddle and Cooper believed it was the video being requested by defense counsel.

Second, defense counsel alleged that Biddle and Cooper lied in a report by stating that a *Perkins* agent heard Rodriguez admit to engaging in an argument and physical altercation in his front

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[26] Cooper also testified at trial that he did not think he indicated in his report that the video depicted a struggle in the front yard.

[27] Rodriguez argues that the misconduct consisted of withholding exculpatory evidence. He fails to articulate how the video depicting the altercation was exculpatory.

yard.[28] The *Perkins* agent was apparently deployed in a jail cell with Rodriguez, who presumably had no knowledge of his identity or intentions. Defense counsel claimed the statement was a lie because another unnamed officer stated in his or her report stated that Rodriguez did not incriminate himself during this incident.

As Rodriguez now concedes, there was no support for the allegation that Biddle and Cooper fabricated his statements to the *Perkins* agent. Two other sergeants—not Biddle and Cooper—wrote the report containing Rodriguez's alleged statements.[29]

Rodriguez also claims that Biddle and Cooper failed to disclose the information about the *Perkins* operation until after the preliminary hearing was conducted. Rodriguez appears to argue that the late disclosure of the *Perkins* operation constituted withholding exculpatory evidence. However, he again fails to articulate how his admissions to engaging in a physical altercation with Molina is exculpatory. Moreover, in the *Pitchess* motion and at the hearing, defense counsel never claimed that

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[28] Defense counsel referred to the police agent as a "*Perkins* agent" and to the incident as a "*Perkins* operation," presumably in reference to *Illinois v. Perkins* (1990) 496 U.S. 292, 296. A *Perkins* agent, usually an undercover police officer, poses as an arrestee or jail inmate to witness a suspect's incriminating statements. Because of the absence of police custodial questioning in such a setting, *Miranda* advisements are typically not required. (*Id*. at p. 297; *People v. Williams* (1988) 44 Cal.3d 1127, 1141–1142.)

[29] The two other sergeants were not subjects of the *Pitchess* motion.

Biddle and Cooper delayed discovery of the *Perkins* operation. Even if the disclosure of the *Perkins* operation was delayed, it cannot plausibly constitute misconduct because the information was still disclosed well in advance of trial.

Third, defense counsel alleged that Biddle lied in a search warrant affidavit. Specifically, Biddle stated that South Gate police officers and paramedics, who responded to the crime scene, observed suspicious and unusual behavior by Rodriguez, Richard, and Luque. Defense counsel explained that because the reports written by these first responders did not include observations of suspicious behavior, Biddle's statement must have been fabricated. During the hearing, defense counsel added that Rodriguez, Richard, and Luque were not acting suspiciously because they called 911 and brought the police into the house.

However, defense counsel failed to present any support that the first responders did not observe the suspicious behavior by Rodriguez, Richard, and Luque. She never submitted the first responders' reports or interviews of them.[30] She did not even include statements by Rodriguez, Richard, and Luque, or any contrary assertions about their behavior. She based her claim

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[30] Defense counsel's declaration stated that Biddle and Cooper fabricated information that was "contrary to testimony of first responders." The only testimony available at the time of this declaration was from the preliminary hearing. South Gate Police Officer Kyle Gonzalez was the only first responder to testify. The only two persons he observed were Rodriguez and Nancy M. Gonzalez further testified that Rodriguez did not want to speak with him because he was too intoxicated. This testimony does not support defense counsel's declaration. Instead, it corroborated the allegation that Rodriguez behaved suspiciously.

against Biddle exclusively on omissions in the first responders' reports and the act of summoning the police by Rodriguez, Richard, and Luque. But neither supported the allegation that Biddle lied about the first responders' observations.

Fourth, defense counsel claimed that in another case, Biddle encouraged an informant to lie and withheld discovery. But she did not provide any details about the informant or the other case. During the hearing on the *Pitchess* motion, defense counsel noted that a Huffington Post article revealed Biddle withheld information in another murder investigation. But defense counsel failed to provide any facts about that case or connect it to Rodriguez's case. Because the presented scenario lacked factual details, it is impossible to determine whether it would have supported the alleged misconduct.

For each act described, defense counsel's declaration failed to present a plausible factual scenario to support her allegations of misconduct by Biddle and Cooper. Accordingly, we conclude that the trial court did not abuse its discretion by denying the *Pitchess* motion.

VIII. The Sheriff's Department *Brady* List[31]

In his original brief, Rodriguez asserted that he was entitled to know whether any of the sheriff deputies involved in his case were on Sheriff's Department's internal "*Brady* list."

In late 2016, the Sheriff's Department identified about 300 deputies who had potential exculpatory or impeachment

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[31] The list was named after *Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*), which required prosecutors to disclose to the defense any evidence that is "favorable to [the] accused" and "material either to guilt or to punishment."

information in their personnel files. (*Deputy Sheriffs*, *supra*, 8 Cal.5th at p. 37.) The Sheriff's Department compiled a *Brady* list which contained the names of these deputies. It sought to disclose the identities of deputies on the *Brady* list to prosecutors when they were potential witnesses in pending prosecutions. (*Ibid.*)

The Association for Los Angeles Deputy Sheriffs filed a petition for writ of mandate and a complaint seeking preliminary and permanent injunctive relief to prevent the Sheriff's Department from disclosing the identities of deputies on its *Brady* list, absent compliance with *Pitchess* procedures. (*Deputy Sheriffs*, *supra*, 8 Cal.5th at p. 38.) A trial court issued the preliminary injunction, allowing an exception for disclosure of identities of deputies who were potential witnesses in pending criminal prosecutions. (*Ibid.*)

The Court of Appeal granted a stay. It held that only upon compliance with *Pitchess* procedures could disclosure be made, even for those deputies who were potential witnesses in pending prosecutions. (*Deputy Sheriffs*, *supra*, 8 Cal.5th at p. 38.)

The Supreme Court reversed. It held that the Sheriff's Department may provide prosecutors with information of a deputy on its *Brady* list when he or she is a potential witness in a pending criminal prosecution, without violating the confidentiality provisions of section 832.7, subdivision (a). (*Deputy Sheriffs*, *supra*, 8 Cal.5th at p. 50.)

In light of *Deputy Sheriffs*, Rodriguez now asks us to remand his case with an order that the Sheriff's Department be permitted to disclose to the prosecutor whether Biddle and

Cooper are on its *Brady* list.[32] Rodriguez further requests that if the prosecutor discloses to defense counsel that the *Brady* list includes Biddle and Cooper, the trial court permit him to renew his *Pitchess* and *Brady* motion and to potentially file a motion for new trial.

Rodriguez bases his request on an overbroad interpretation of *Deputy Sheriffs*. He believes that because the original injunction prevented disclosure of information contained in the *Brady* list, he was unable to move the trial court to require the Sheriff's Department to disclose to the prosecutor or defense counsel whether Biddle or Cooper was on its *Brady* list.

The injunction never affected Rodriguez's right to move for disclosure of information of misconduct by Biddle and Cooper. He was simply required to follow the *Pitchess* procedures. Rodriguez did so. He exercised his right and the trial court denied his *Pitchess* motion, as we have discussed. *Deputy Sheriffs* does not require that a *Pitchess* motion must be supported by a *Brady* alert. (*Deputy Sheriffs*, *supra*, 8 Cal.5th at p. 54, fn. 7.)

Accordingly, we deny Rodriguez's requests, under *Deputy Sheriffs*, *supra*, 8 Cal.5th 28, to have his case remanded and have us order the Sheriff's Department to disclose whether Biddle or Cooper are on its *Brady* list.

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[32] The Attorney General has no objection to permitting the Sheriff's Department to disclose to the prosecutor whether Biddle and Cooper are on its *Brady* list.

DISPOSITION

Affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HANASONO, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.