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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID IZAGUIRRE, Defendant and Appellant.	B280354 (Los Angeles County Super. Ct. No. NA097956)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Laura S. Skelly, 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, Assistant Attorney General, Stephanie A. Miyoshi and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

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David Izaguirre appeals the judgment following his conviction for the premeditated murder of Alicia Espinoza. He seeks reversal of his conviction on the grounds (1) the prosecutor misstated the reasonable doubt standard during voir dire and rebuttal closing argument; (2) his trial counsel was ineffective for failing to object to the admission of certain autopsy photographs; (3) the trial court erroneously admitted appellant's Honduran identification card; and (4) the prosecutor improperly told jurors to report if other jurors were not "deliberating the way they're supposed to be deliberating." We find no prejudicial error and affirm.

PROCEDURAL BACKGROUND

A jury convicted appellant of the murder of Espinoza (Pen. Code, § 187)[1] and found true allegations appellant committed the murder willfully, deliberately, and with premeditation, and he personally used a deadly and dangerous weapon—a knife (§ 12022, subd. (b)(1)). The trial court sentenced him to 26 years to life.

FACTUAL BACKGROUND

On December 31, 2013, Espinoza and appellant were found in a hotel room. Espinoza was dead; she had been stabbed 28 times, 21 of which were fatal, and had been strangled and beaten. Appellant was alive, but his throat was slit and he had been stabbed in his abdomen. It was determined those wounds were self-inflicted. At trial, there was no real dispute appellant killed Espinoza; the only major issue was his mental state when he did so.

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[1] All undesignated statutory citations are to the Penal Code unless noted otherwise.

1. Prosecution Case

Appellant and Espinoza were in a relationship for six years until they separated in June or July 2013. They stayed at the Oscar Motel together on December 30, 2013. Appellant checked in that night and paid cash for a one-night stay, showing his Honduran identification card to the motel manager. Security footage showed him entering his room at the hotel with Espinoza around midnight. The next morning, the motel manager knocked on appellant's room and received no answer. She eventually used a master key to open the door and saw blood on the bed and a body on the floor. She called 911, and about five to 10 minutes later, police and paramedics arrived.

Clad only in a bra, Espinoza lay face-down on the floor next to the bed. Just off to her side, appellant lay on a comforter and pillow. Espinoza was pronounced dead at the scene and paramedics began medically assisting appellant. A foldable pocket knife was found next to Espinoza's body.

Appellant was transported to the hospital. His throat was slit and he had stab wounds in his abdomen. He had bruises around his knuckles and bloodstains around his nails. He had no defensive wounds on his hands. He told a nurse he had walked in and found his girlfriend dead. He had become so distraught he slit his own throat and stabbed himself. He wanted to die with her.

DNA analysis of blood on the knife revealed only Espinoza and appellant as contributors. DNA samples collected from Espinoza with a sexual assault kit matched appellant (although there was no contention he sexually assaulted her).

Espinoza's autopsy revealed 28 stab wounds in her neck, chest, abdomen, back, and arms consistent with the pocket knife

found at the scene. Twenty-one of the wounds were fatal. The close spacing of the wounds to the back of her neck indicated she probably was not moving when they were inflicted. The wounds to the sides of her neck indicated she could have been moving her head from side to side or fighting when they were inflicted. She had a contusion across her neck and petechial hemorrhages in her eyes, suggesting she may have been strangled and rendered unconscious for a period of time. She had contusions to her skull caused by blunt force trauma. She had defensive wounds to her hands and arms. A toxicology test detected no alcohol or drugs in her system.

At trial, Espinoza's sister Ema Espinoza[2] testified appellant told her in a phone call in June 2013 that he was going to kill Espinoza. In the same month, appellant was with Ema at her house and said he moved out of Espinoza's house because he hated her. He said he wanted to kill her but he was asking God not to do it. Ema asked why he was with Espinoza if he hated her, and he responded that he had a roof over his head and food. Ema relayed these statements to Espinoza. Ema also told the police about these statements in a recorded interview a few days after Espinoza's death.

2. Defense Case

Appellant testified his relationship with Espinoza began between 2005 or 2006 and ended in November 2013. From November 9, 2012, through the end of June 2013, he had had an

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[2] We refer to Ema by first name to distinguish her from the victim.

affair with Ema.[3] When his relationship with Ema ended, he resumed his relationship with Espinoza in July 2013. He denied he ever told Ema he wanted to kill Espinoza or he wanted God's help to prevent him from killing her.

On December 29, 2013, appellant happened to meet Espinoza at a party. Around 10:30 the next morning—December 30, 2013, the day of the murder—they went out to eat and then checked into the Oscar Motel to have sexual relations. They went to their homes, and appellant picked her up again around 5:00 or 6:00 p.m. to go to a night club. During the drive, Espinoza told appellant she held resentment against him. They talked about that, but they did not argue. According to appellant, at the club Espinoza drank at least 12 beers, while appellant drank one.

Around 11:00 p.m., appellant and Espinoza headed again to the Oscar Motel. Espinoza waited in appellant's car as he registered. They went to pick up food and brought it back to the room. After eating, they had sexual relations. During the act, they began arguing. Espinoza again said she felt resentment toward him. He asked her why, and she said, "Because you said some things to Ema." She then said Ema told her appellant was cheating on her. Appellant revealed he cheated on Espinoza with Ema.

Espinoza became angry, yelled at appellant, and slapped his face. He got angry and pushed her. Espinoza reached for the knife appellant habitually carried in the pocket of his pants, which were on the nightstand. She said, "Today you really

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[3] On cross-examination in the case-in-chief, Ema testified she did not know if appellant was having a sexual relationship with someone other than Espinoza in 2013.

fucked up." Appellant grabbed the closed knife to prevent her from getting it, and he either opened it or it opened on its own. Still yelling, Espinoza came at him. He pushed her back with the knife in his hand, and he saw blood on his hand. After that, he did not remember anything until arriving at the hospital. In that moment when he picked up the knife, he was angry but he had no intention to kill her.

Appellant remembered a woman at the hospital asking him about his address and phone number and related questions, but he did not remember her asking him what happened. He did not know how he got the wounds to his throat and abdomen.

The defense called two witnesses to undermine the credibility of Ema's testimony in the case-in-chief. On direct examination, Ema testified she had no further contact with appellant after her conversation with him at her home in June 2013. However, appellant's brother's ex-girlfriend testified she overheard a phone conversation between appellant and Ema in December 2013. Ema also testified on direct examination she never borrowed money from appellant's brother in 2013. But appellant's brother testified Ema called him about two months before the murder and asked for a loan, to which he agreed. She asked him to deliver the money to appellant, who would deliver it to her. She never repaid the loan.

3. Rebuttal

An investigating detective demonstrated the knife's opening and closing functions by pulling a lever or pushing a pin.

DISCUSSION

1. Prosecutorial Error

Appellant contends the prosecutor misstated the People's burden of proof during voir dire and in closing argument.

Defense counsel did not object to any of these statements, so appellant forfeited these contentions. (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*) ["As a general rule, ' "[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety." ' "].) Appellant has not shown his forfeiture should be excused because either the prosecutor's misstatements were so extreme they could not have been cured by an admonition or any objection would have been futile. (*Ibid.* ["The defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct."].)

Appellant alternatively contends his counsel was ineffective for failing to object. (*Centeno, supra,* 60 Cal.4th at p. 674 [" 'A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel.' "].) Appellant must show (1) deficient performance by his counsel and (2) resulting prejudice. (*Ibid.*) While we presume counsel's performance fell within a wide range of professional competence and sound trial strategy, counsel is deficient if there is no conceivable tactical purpose for the failure to object. (*Id.* at pp. 674-675.) Prejudice is shown if there is no " 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*Id.* at p. 676.)

We will set forth the prosecutor's challenged comments, but we need not decide whether those comments were erroneous or defense counsel performed deficiently by failing to object to them.

In the context of the overwhelming case against appellant, we conclude he suffered no conceivable prejudice from his counsel's allegedly deficient performance. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126 [" ' "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." ' "].)

a. Prosecutor's Comments

During voir dire of prospective jurors, the prosecutor used examples of a wedding and the American flag to attempt to illustrate the reasonable doubt standard. First, she stated: "Prospective Juror No. 17, let's say you have a friend who lives in Las Vegas. That friend calls you one day, says, 'Hey, come on down to Vegas. I'm getting married. You go to Vegas. You attend the wedding. You have a good time, but you're a little sad because you and your friend were bachelor buddies. Now he's in the married life. [¶] You have a few drinks. In this hypo, don't worry about DUI, okay? You have a few drinks. You get in your car. You drive down the strip. As you're driving down the strip, you see a woman with a nice white dress. You see a man with a nice suit. You see children throwing . . . rice. You see the woman holding flowers. [¶] What can you reasonably conclude is going on at that moment in time that you're driving down that strip?

"Prospective Juror No. 17: Assume there was a wedding and they just got done.

"[Prosecutor]: Okay. [¶] Why would you make that assumption?

"Prospective Juror No. 17: White dress, black—black suit, kids throwing rice.

"[Prosecutor]: Based on the facts I gave you, that was a reasonable conclusion that you could draw, right?

"Prospective Juror No. 17: Yes, ma'am.

"[Prosecutor]: Okay. [¶] But it's possible they could be shooting a movie. I mean it's Vegas. They do lots of things in Vegas. [¶] It's possible, correct?

"Prospective Juror No. 17: Possible.

"[Prosecutor]: But did you hear me give any facts to support that, such as there was a camera, anybody yelling, 'Action,['] 'Stop,' there was a director's chair, anything?

"Prospective Juror No. 17: No, ma'am.

"[Prosecutor]: It's possible it could be a prom, and it's a theme that these kids are having for their prom. [¶] That's possible, correct?

"Prospective Juror No. 17: Yes, ma'am.

"[Prosecutor]: Did you hear me say anything that the person in white was actually a child?

"Prospective Juror No. 17: No, ma'am.

"[Prosecutor]: Did you hear me say anything about the man being a child?

"Prospective Juror No. 17: No, ma'am.

"[Prosecutor]: Did you hear me say anything about music playing?

"Prospective Juror No. 17: No, ma'am.

"[Prosecutor]: Or dancing?

"Prospective Juror No. 17: No, ma'am.

"[Prosecutor]: So were there facts to support that conclusion that it's a prom?

"Prospective Juror No. 17: No, ma'am.

"[Prosecutor]: It's possible you really had a good time at your friend's wedding, and as you were driving down the strip, you were totally hallucinating the whole thing? That's possible?

"Prospective Juror No. 17: Possible.

"[Prosecutor]: Okay. [¶] It's also possible that it was an alien invasion and that is the only way they can think of to take over the world. Possible, right?

"Prospective Juror No. 17: Yes, ma'am.

"[Prosecutor]: And it's possible because anything in life is possible, correct?

"Prospective Juror No. 17: Yes, ma'am."

The prosecutor then moved on to the flag analogy with Prospective Juror No. 3. She said, "So my burden is proof beyond a reasonable doubt. Not a possible doubt, not a maybe doubt, not a probable doubt, not a more than likely doubt. It's proof beyond a reasonable doubt. And because anything in life is possible, there could always be some doubt regarding something, but the doubt must be reasonable. [¶] For example, Prospective Juror No. 3, you raised your hand, right, that I would have to prove this beyond all doubt? [¶] There's a piece of fabric hanging on a pole, has the color red, has the color white, blue, and some stars. If I were to ask you what that was, what would you say that was?"

"Prospective Juror No. 3: A flag.

"[Prosecutor]: Okay. [¶] How do you know that's a flag?

"Prospective Juror No. 3: Because the way you described it.

"[Prosecutor]: Okay. [¶] But you didn't see the whole thing.

"Prospective Juror No. 3: No.

"[Prosecutor]: Okay. [¶] So flag of what?

"Prospective Juror No. 3: If I was—just based off the description, I would assume that you were describing the American flag.

"[Prosecutor]: Okay. [¶] Why would you make that assumption?

"Prospective Juror No. 3: Because of the colors and the—just the way you described it.

"[Prosecutor]: And you're familiar with the American flag, correct?

"Prospective Juror No. 3: Yes.

"[Prosecutor]: You know that's something that usually hangs up in courtrooms, in official buildings, correct?

"Prospective Juror No. 3: Yes.

"[Prosecutor]: Now, do I have to unhook that flag, lay it out in front of you, count each and every star, each and every stripe, go back in time, get our founding fathers and Betsy Ross, put them on the stand, and ask them questions for you to believe that that's the American flag?

"Prospective Juror No. 3: No, ma'am.

"[Prosecutor]: Okay. [¶] Because proof beyond all doubt would require me to take that kind of action; is that fair to say?

"Prospective Juror No. 3: Yes.

"[Prosecutor]: But my burden is proof beyond a reasonable doubt."

The prosecutor repeated the wedding analogy when questioning potential alternate jurors. In concluding the hypothetical, she again said, "It is possible, maybe, probably, perhaps, more than likely, it could have been, all these things are possible, but it must be a reasonable doubt. That is my burden."

Also during voir dire, in discussing the concept that a conviction could be based on a single credible eyewitness, the prosecutor gave the prospective jurors a hypothetical crime in which a man punched her in a courtroom equipped with cameras, and while fleeing, he hit his head, bled, and touched the podium. At the man's trial, the People put on a witness who saw the incident, but the People did not present any footage from the cameras, any DNA evidence, or any fingerprints. She elicited responses from prospective jurors that they could convict based on the witness alone. She concluded the hypothetical by saying, "So while all these things may exist, you don't know if there truly is evidentiary material. That is why it's important for you to base your decision solely on the evidence presented. So DNA is not presented, you can't base your decision on that, or even a lack of that, unless it comes out in evidence, okay?"

The prosecutor stated later in voir dire: "[I]f you're so focused on the punishment, can you focus on the evidence? Can you focus on what's going on because you're already thinking from the start what's gonna happen? [¶] So you do this thing, what we like to call you then begin looking for doubt. Instead of listening to the evidence and listening to the facts, you begin looking for loopholes. That's not your job. You're looking for doubt. That's not your job. That's part of the reason why you can't consider punishment. So respect that it's hard, but the question is can you do your job?"

Finally, in rebuttal closing argument, the prosecutor argued appellant's testimony that Espinoza drank at least 12 beers was not credible because her toxicology test came back negative for alcohol. In referring to the reasonable doubt standard, the prosecutor stated: "It's not imaginary doubt. It's

doubt based on nothing less than all the evidence. And you—it cannot be unreasonable. It has to be true, and it has to be reasonable. Those are the two things." She went on: "The defense has no burden. I only have the burden. But if they put on a case, ladies and gentlemen of the jury, well, they have to give you meaningful, truthful, and trustworthy evidence. And you have to evaluate the evidence the same you would evaluate the evidence I put on" "which means nobody gets to sit up here and say, 'You know what? Hawaii's part of Australia. Until the People prove it, it's not beyond a reasonable doubt. You have to accept that as true.' [¶] That's not the way it goes. You know that is not true. If it is false, if it's not true, if it's unreasonable, you have to reject it. That is your job."

b. Analysis

Relying primarily on *Centeno*, appellant claims all of these various comments by the prosecutor misstated the People's burden of proof. In *Centeno*, the prosecution's molestation case against the defendant "depended almost entirely on [the young victim's] credibility, which was called into question in several respects." (*Centeno, supra,* 60 Cal.4th at p. 677.) In that context, the court found the prosecutor prejudicially erred in attempting to illustrate the reasonable doubt standard using a diagram of the outline of California and hypothetical facts, some of which were accurate and some of which were inaccurate or incomplete. The court reasoned, "The use of an iconic image like the shape of California or the Statue of Liberty, unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilty beyond a reasonable doubt. These types of images necessarily draw on the jurors' own knowledge rather than evidence presented at trial. They are immediately recognizable and

irrefutable. Additionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the jurors to guess or jump to a conclusion." (*Id.* at p. 669.)

The prosecutor's hypothetical was also misleading because "it failed to accurately reflect the evidence *in this case*, which was far from definitive. There may certainly be cases in which a few particularly strong pieces of information (such as scientific evidence or the testimony of a single reliable witness) are sufficiently compelling to prove the defendant guilty beyond a reasonable doubt. [Citations.] This was not such a case. It involved starkly conflicting evidence and required assessments of witness credibility." (*Centeno, supra,* 60 Cal.4th at p. 670.)

The prosecutor's argument also "strongly implied that the People's burden was met if its theory was 'reasonable' in light of the facts supporting it." (*Centeno, supra,* 60 Cal.4th at p. 671.) "It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt. [Citation.] The prosecutor, however, left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden. The failure of the prosecutor's reasoning is manifest." (*Id.* at p. 672.)

Here, the prosecutor's various attempts to illustrate the reasonable doubt standard appear to violate *Centeno*. But we ultimately need not decide whether her comments were erroneous or appellant's counsel was deficient for failing to object because the prosecutor's comments had no conceivable prejudicial impact on appellant.

Most of the prosecutor's comments came during voir dire, and "errors or misconduct occurring during jury voir dire, prior to the introduction of evidence or the giving of formal instructions, are far less likely to have prejudiced the defendant." (*People v. Medina* (1995) 11 Cal.4th 694, 745.) Further, after the close of evidence, the jury was given the standard instruction on the presumption of innocence, reasonable doubt, and the prosecutor's burden of proof. (CALCRIM No. 220.) The jury was also instructed that nothing the attorneys said was evidence (CALCRIM No. 222), and if the attorneys' comments on the law conflicted with the court's instructions it must follow the instructions (CALCRIM No. 200). This was sufficient "both to explain to the jury the prosecution's burden of proof and to dilute any confusion or uncertainty that may have been created by the prosecutor's" comments during voir dire. (*Medina, supra,* at p. 745 [finding no prejudicial misconduct from use of chart during voir dire purportedly illustrating reasonable doubt standard].)

With regard to the prosecutor's brief Hawaii comment during rebuttal closing argument, " '[a]rguments of counsel "generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." [Citation.]' [Citation.] 'When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words

spoken by an advocate in an attempt to persuade." ' " (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268.)

Also, unlike in *Centeno*, which turned on the challenged credibility of the young victim, the evidence supporting appellant's first degree premeditated murder conviction in this case was overwhelming. Espinoza's autopsy revealed a vicious attack that included a beating, strangulation, and 28 stab wounds in her neck, chest, abdomen, back, and arms, 21 of which were fatal. Some of those wounds were defensive, suggesting she fought back, and appellant possibly rendered her unconscious and stabbed her in the back of the neck multiple times as she lay still. (*People v. Pride* (1992) 3 Cal.4th 195, 247 ["A violent and bloody death sustained as a result of multiple stab wounds can be consistent with a finding of premeditation."].) Inflicting these wounds had to take some period of time, even if brief, and the fact that appellant overpowered her at some point strongly suggested premeditation and deliberation. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658 ["The act of planning—involving deliberation and premeditation—requires nothing more than a 'successive thought[] of the mind.' "].) Appellant also told Espinoza's sister Ema he hated Espinoza and *twice* said he was going to kill her. Though appellant somewhat undercut Ema's credibility, he failed to undermine the veracity of these specific statements.

Appellant's defense was exceedingly weak. He claimed he could not remember what happened after he pushed Espinoza and saw blood on his hand, but he testified in detail to the events leading up to the moment of the stabbing. He also told the nurse at the hospital he had walked in and found his girlfriend dead,

which conflicted with his testimony at trial that he accidentally stabbed her once and did not remember anything after.

Even if the jury believed his version of events, it would not have convicted him of second degree murder or voluntary manslaughter. Heat of passion reduces murder to voluntary manslaughter when " 'the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an " 'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " ' " (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) Provocation can reduce first degree murder to second degree murder if "the defendant in fact committed the act because he was provoked." (*People v. Jones* (2014) 223 Cal.App.4th 995, 1000.)

Appellant testified that during sex, he and Espinoza began arguing, and she said she felt resentment toward him. At that point, appellant revealed he cheated on her with her sister Ema. Espinoza became angry, yelled at him, and slapped his face. In response he angrily pushed her. As Espinoza reached for the knife in appellant's pants pocket, she said, "Today you really fucked up." Then, according to appellant, he got the knife first, may or may not have opened it, and pushed her away. When he looked down at his hand, it was bloody. He remembered nothing after, including inflicting wounds on himself.

These facts do not show a reasonable person would have been provoked into killing without deliberation. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [insufficient provocation from name-calling and urging defendant to use a weapon if he had it]; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 826-827 (*Gutierrez*) [argument, name-calling, and simple assault

insufficient to warrant voluntary manslaughter instruction].) There is also nothing in this testimony showing Espinoza's actions *subjectively* prevented him from deliberating and premeditating. While he claims the wounds he inflicted on himself showed some "emotional turmoil" after the murder, it does not show his subjective mental state *before* the murder. Also, the prosecutor pointed out in closing argument that after appellant stabbed himself, he apparently moved the comforter and pillow to lie on it and placed the knife next to Espinoza to make it seem like she was the last person to touch it. Those actions strongly undercut his claim he was so emotional that he was unable to deliberate.

In sum, even if his counsel performed deficiently by not objecting to the prosecutor's comments, appellant suffered no prejudice, so reversal is not warranted.

2. Autopsy Photographs

During trial, the prosecution introduced crime scene photographs that showed blood throughout the motel room and graphically depicted Espinoza's bloody body clad only in a bra. During the coroner's testimony, the prosecution offered several photographs taken during Espinoza's autopsy, including five depicting Espinoza's head and neck. Trial exhibit No. 95 depicted her skull with the scalp pulled away to reveal bruises, only one of which was visible on her skin. Trial exhibit Nos. 96, 97, and 98 showed forceps holding open the cleaned stab wounds to the back of her neck. Trial exhibit No. 99 depicted a dissection of her neck, which showed a "cut defect" between vertebrae. Defense counsel did not object to the introduction of any of these photographs.

After the coroner discussed trial exhibit Nos. 95 through 98, the trial court had to go to sidebar because a juror felt like he was going to pass out. He explained he had difficulty seeing bloody photographs and he did not think he could proceed with trial. Noting the juror appeared to be hyperventilating and was "close to passing out here," the court excused the juror and replaced him with an alternate. The court did not inform the rest of the jury why the juror was dismissed, and the coroner continued testifying about trial exhibit No. 99.

Appellant contends his counsel was ineffective for failing to object that trial exhibit Nos. 95 through 99 were more prejudicial than probative pursuant to Evidence Code section 352. Because at least two reasonable tactical reasons existed for counsel's failure to object, we must reject his claim. (*Centeno, supra,* 60 Cal.4th at pp. 674-675.)[4]

First, defense counsel could have plausibly decided the photographs supported the defense theory that appellant acted under a heat of passion. (See *People v. Turner* (1990) 50 Cal.3d 668, 706, fn. 19 ["[C]ompetent counsel might conclude that the photos and autopsy testimony, by indicating an 'explosion' of violence, supported the defendant's theory that he reacted in panic and confusion to a sexual attack."].) Indeed, defense counsel argued in closing, "[T]he coroner testified that this entire

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[4] We decline respondent's invitation to summarily reject this claim because appellant failed to request the trial exhibits be included in the clerk's transcript or separately transmitted to this court. Appellant timely requested the superior court transmit the trial exhibits after respondent filed the respondent's brief, and we have received them. (Cal. Rules of Court, rules 8.224(a)(1), 8.320.)

attack could have begun and ended in a matter of seconds. You do not need to stab somebody 28 times, try to strangle them, and hit them on the head to kill them. You don't need to do any of that. Many of these stab wounds were fatal in and of themselves. This was a frenzied out-of-control attack."

Second, counsel could have reasonably concluded any objection based on Evidence Code section 352 was meritless and would have been futile. (*People v. Price* (1991) 1 Cal.4th 324, 387 ["Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile."].) The photographs were highly probative of the nature and severity of the attack and helped illustrate the coroner's testimony regarding Espinoza's many wounds. (See *People v. Gonzales* (2012) 54 Cal.4th 1234, 1272 (*Gonzales*) [" ' "[A] court may admit even 'gruesome' photographs if the evidence is highly relevant to the issues raised by the facts, or if the photographs would clarify the testimony of a medical examiner." ' "]; see also *People v. Booker* (2011) 51 Cal.4th 141, 171 (*Booker*) [photographs of attacks to victims' throats "tended to prove an intent to kill"].) Trial exhibit No. 95 was particularly probative because it showed additional bruising on Espinoza's scalp not visible on her skin.

The photographs posed little risk of undue prejudice. Trial exhibit Nos. 96 through 98 were not particularly graphic—they merely depicted the cleaned stab wounds to the back of Espinoza's neck held open by forceps. Trial exhibit Nos. 95 and 99 were unquestionably graphic, but they were no more gruesome (and arguably less gruesome) than the photographs of Espinoza's bloody, nearly naked body at the crime scene, to which appellant has raised no objection. (See *Gonzales, supra,* 54 Cal.4th at

p. 1271 [autopsy and crime scene photographs properly admitted because they were "highly relevant and no more gruesome than the crime"].)

A single juror's sensitivity to the autopsy photographs does not alter this balance. Nor does appellant's reliance on *People v. Marsh* (1985) 175 Cal.App.3d 987, 996-999, a 30-year-old case finding the trial court erred in admitting autopsy photographs of a toddler murder victim, several of which were more graphic than the photographs in this case. More recent cases "have recognized that photographs of murder victims are relevant to help prove how the charged crime occurred, and that in presenting the case a prosecutor is not limited to details provided by the testimony of live witnesses." (*Booker, supra,* 51 Cal.4th at p. 170.)

Because reasonable tactical choices could have explained defense counsel's failure to object to the autopsy photographs, we reject appellant's ineffective assistance of counsel claim.

3. Honduran Identification Card

Before trial, appellant objected to the introduction of his Honduran identification card he showed to the manager at the motel at check in. Defense counsel contended it was "not particularly probative" and could create prejudice "if someone draws a negative implication from that regarding [appellant's] lawful or unlawful residency status in the United States." The prosecutor responded the card was relevant because the motel manager could not remember appellant's face but remembered the individual who showed this card at the front desk. The court overruled the objection, finding the identification card was relevant and any possible prejudice was speculative.

Appellant argues this ruling was an abuse of discretion and violated his constitutional due process rights. We disagree.

" 'A trial court has "considerable discretion" in determining the relevance of evidence. [Citation.] Similarly, the court has broad discretion under Evidence Code section 352 to exclude even relevant evidence if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects. [Citation.] An appellate court reviews a court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion. [Citation.] We will not reverse a court's ruling on such matters unless it is shown " 'the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " ' " (*People v. Jones* (2017) 3 Cal.5th 583, 609 (*Jones*).)

The trial court reasonably concluded the card was relevant to the motel manager's recollection of appellant's identity since the manager testified she had no independent recollection of appellant's appearance but she remembered appellant's identification card. Appellant argues the identification card's probative value was low because it was cumulative to undisputed evidence that appellant was the one who checked into the motel. Appellant did not object on this ground in the trial court, so he forfeited this argument. (*People v. Brady* (2010) 50 Cal.4th 547, 576.) In any case, the card was not duplicative for the specific purpose of refreshing the manager's recollection of appellant.

The court also reasonably concluded any potential risk that the jury might infer appellant lacked legal status in the United States was speculative. While appellant is correct a reference to a defendant's status as an undocumented immigrant carries significant risk of prejudice (cf. *Velasquez v. Centrome, Inc.* (2015) 233 Cal.App.4th 1191, 1214 [trial court erroneously informed prospective jurors plaintiff was an undocumented immigrant

during voir dire]), the trial court here specifically excluded any evidence that appellant was an illegal immigrant and the parties abided by that ruling. The passing reference to appellant's identification card in context was extremely unlikely to prompt jurors to draw any negative inference about his immigration status.[5]

For the same reasons, the admission of the identification card did not violate appellant's due process rights. (*Jones, supra*, 3 Cal.5th at p. 612.)

4. Juror Refusal to Deliberate

Appellant claims the prosecutor tainted deliberations when she asked a prospective juror during voir dire if the juror would "feel comfortable informing the court that that person is just making up facts and not deliberating the way they're supposed to be deliberating?" Appellant forfeited his argument by failing to object to this comment. (*Centeno, supra*, 60 Cal.4th at p. 674.) Even if we reached the merits we would reject his claim. For that reason, we also reject appellant's claim his counsel was ineffective for failing to object.

Appellant relies on *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*), but in that case our high court concluded there

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[5] Appellant cites the comments of two prospective jurors during voir dire regarding appellant's immigrant status. One asked defense counsel, "Is this a U.S. citizen?" When defense counsel asked why the juror thought that was relevant, the juror responded, "Personal beliefs, yeah." Another prospective juror was "upset" by the question and believed the other juror had a "presumption" already about the case. There was no further discussion about the issue. According to the parties, neither juror served on the jury, so their comments could have had no impact on the case.

was no state or federal constitutional issue with an instruction telling jurors, " 'The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.' " (*Id.* at pp. 441-442.) The court exercised its supervisory power to direct trial courts not to give the instruction because it posed an unnecessary risk to the deliberative process. (*Id.* at p. 449.)

Later, in *People v. Barnwell* (2007) 41 Cal.4th 1038 (*Barnwell*), our high court rejected a challenge to the trial court's comments telling prospective jurors during voir dire: " 'Now, if such a thing were to happen that a juror refused to deliberate, would you be strong [enough] to remind that juror that they were violating their oath?' The jurors answered yes. The court continued: 'Would you be strong enough to bring it to my attention if that behavior persisted?' The jurors again answered yes." (*Id.* at p. 1055.) Even though the case was tried before the instruction in *Engelman* was adopted, the court found no error under *Engelman* because "even the giving of a formal jury instruction on these topics would not have infringed upon defendant's federal or state constitutional rights by jury or his state constitutional right to a unanimous verdict. [Citation.] Moreover, the remarks made by the court and prosecutor did not invite the jurors to act as though they had 'a license to scrutinize other jurors for some ill-defined misconduct rather than to remain receptive to the views of others.' " (*Barnwell, supra*, at p. 1055.)

The prosecutor's comments here did not materially differ from either the instruction in *Engelman* or the comments in *Barnwell*. For the reasons explained in those cases, we reject appellant's claim of error.

5. Cumulative Error

Having assumed only a potential error in the prosecutor's comments on the reasonable doubt standard, which did not prejudice appellant, we find no cumulative error warranting reversal. (See *Gutierrez, supra,* 45 Cal.4th at pp. 828-829.)

DISPOSITION

We affirm the judgment.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.