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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. OMAR WRIGHT, Defendant and Appellant.	B269217 (Los Angeles County Super. Ct. No. GA083406)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Omar Wright was convicted by jury of first degree willful, deliberate, and premeditated murder (Pen. Code, § 187;[1] count 1), attempted willful, deliberate, and premeditated murder (§§ 664/187; count 2), and shooting at an occupied motor vehicle (§ 246; count 4), with findings as to each offense that he personally used a firearm, personally and intentionally discharged a firearm, personally and intentionally discharged a firearm causing great bodily injury or death, and committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§§ 186.22, subd. (b)(1), 12022.53, subds. (b) – (d)); he was also convicted by jury of possession of a firearm by a felon (§ 12021, subd. (a)(1); count 3).

Appellant appeals the judgment entered following his convictions, asserting several arguments for reversal. We reject his arguments and affirm.

FACTUAL SUMMARY

1. Prosecution Evidence

a. Shooting in Pasadena

During the evening of May 25, 2010, Oscar Mendez and Emilio Landaverde, who were not gang members, worked on Mendez's Acura Integra. They took the car for a test drive, intending to race it. Mendez drove to Zanja Street in Pasadena, with Landaverde in the passenger seat. When the car's engine began misfiring, Mendez stopped, and he and Landaverde exited the car; they fixed the problem in perhaps five minutes, and then reentered. Mendez accelerated, screeching the tires as they proceeded down the street.

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

Mendez looked at the tachometer, and when he raised his eyes he saw "somebody Black – light skin brown" and wearing a white shirt, who "popped out." After Mendez noticed the man, he saw "something pop out of his hands and just flash." Mendez saw the shooter "probably like a second before it happened." Mendez did not see the shooter's face but noticed that he was skinny and tall.

Mendez and Landaverde were each shot in the head. Mendez passed out and awoke with blood on his face. Landaverde was unresponsive, and Mendez drove him to a hospital. Landaverde died from a single gunshot to his head. The bullet entered the right side, proceeded on a slightly upward path, and exited the left forehead.

b. Police investigation

Pasadena Police Sergeant Keith Gomez arrived at the shooting scene on Zanja Street about 12:30 a.m. on May 26, 2010. Zanja Street ran east and west, with Pepper Street running parallel one block north. The rear areas of 490 and 500 Pepper Street were adjacent to Zanja Street. Glass debris from the Acura was on Zanja Street to the rear of those addresses. There was a black fence at the rear of 490 and 500 Pepper Street, and a gate led from Zanja Street to the backyard of 500 Pepper Street.

Gomez located a surveillance video from a neighborhood market, which depicted a portion of Zanja Street and showed the following. At 10:20 p.m. on May 25, 2010, someone was walking along the black fence. At 10:21 p.m., the Acura stopped momentarily, then proceeded westbound on Zanja Street, towards the rear of 490 and 500 Pepper Street. As the car approached, someone "popped out" from the black gate and "popped back in." As the Acura traveled westbound past the black fence, the

shooter ran in a southeasterly direction into Zanja Street, and stood in the middle of the street facing the Acura as it drove away. The shooter then ran northwest through the gate leading into the backyard of 500 Pepper Street.

The Acura had a bullet hole in the windshield. One fired bullet was found inside the car, and there were no casings at the shooting scene. Forensic analysis of bullet fragments retrieved from Landaverde's head revealed the bullet had been fired from a .38-Special or a .357-caliber revolver.

Gomez spoke with Mendez in the hospital. Mendez initially said the shooter was a Black male. He then described the shooter as a light-skinned male, possibly Black or Hispanic.

Gomez initially thought that Thurman Matthews was involved in the shooting of Mendez and Landaverde. Matthews was a known gang member in the Pasadena area, whose moniker was "Pooh." On June 9, 2010, Gomez had a confidential informant talk with Matthews.[2] According to the informant, Matthews said that, "10 years ago," he "shot two Mexicans." In that incident, Matthews was at his house at 500 Pepper Street with one of his friends, when they happened to see a car on Zanja Street. Matthews "thought it was some enemies," "and then he just ran up and shot the car anyway," "[e]ven though he knew it wasn't a gang beef or anything like that." Matthews was afraid the recent police activity on Zanja Street had something to do with the incident ten years earlier, so he left the area for Las Vegas.

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[2] The informant's conversation with Matthews was recorded, but the recording was garbled. Gomez interviewed the informant to clarify what was said, and the parties used a transcript of that interview at trial.

Gomez obtained a cell phone number reportedly belonging to Matthews, and on June 16, 2010, Gomez called the number and confirmed that it belonged to Matthews. Gomez then obtained records for Matthews's phone. The records showed that from 10:12 p.m. to 10:42 p.m. on May 25, 2010, Matthews made calls on the cell phone that were transmitted through a cellular tower located about two blocks from the shooting scene. At 10:43 p.m., Matthews's phone used a different tower for transmission of a call.

On June 16, 2010, appellant was walking in Gardena with Matthews and another person. Appellant fled when officers approached, but he was apprehended. Appellant was carrying a loaded .38-caliber revolver. The revolver was compared with the bullet fragments retrieved from Landaverde's body, but the results were inconclusive.

On August 26, 2010, Gomez showed Mendez a photographic lineup that included Matthews's photograph in position No. 6. Mendez selected the photograph of Matthews and told Gomez he had seen the shooter "around one, two seconds, maybe" but was 90% sure of his identification. On May 27, 2011, Mendez recanted his identification of Matthews, and said he did not get a good look at the shooter. At trial, Mendez testified that the photograph in position No. 6 did not depict the shooter.

c. Appellant's statements

On September 17, 2010, Gomez and his partner interviewed appellant about the shooting of Mendez and Landaverde. Appellant said he was a member of the Squiggly Lane Bloods gang, and one of his monikers was "Little Pooh." He said Matthews was his "big homie," whom he had known for four or five years.

Gomez told appellant that the bullet recovered from Landaverde's head matched the gun appellant had when he was arrested on June 16, 2010. Appellant said he had nothing to do with the shooting. Gomez told appellant the police knew that "Squiggly[s]" members congregated at 500 Pepper Street, appellant was at the location on the night of the shooting, and one of the gang members shot the two victims. As the interview progressed, Gomez identified Matthews as the shooter and pressed appellant for information about the crime.

Appellant eventually told Gomez he was not the shooter but he had been present and had received the gun after the shooting. He said a car pulled up at the corner and flashed its lights. Matthews thought somebody was trying to get him. The car began "smashing down the street" and Matthews shot at the car five or six times. Appellant and Matthews ran away, and appellant went home. Two days before appellant was arrested on June 16, 2010, Matthews gave him a gun, but appellant did not realize it was the murder weapon.

On May 25, 2011, Gomez and his partner interviewed appellant again at his home. Appellant reiterated that he had been present during the shooting. He said the car stopped, and someone went to the trunk. The car drove off quickly, turned on its lights, and Matthews ran to the gate and started shooting. Appellant walked through the gate, went to the street, looked down the street at the car, then ran back inside the gate.

During the May 25, 2011 interview, Gomez drew a diagram of the crime scene, and appellant marked his movements and locations during the shooting. These actions matched the shooter's movements depicted in the surveillance video. Employing a ruse, Gomez told appellant that the Federal Bureau

of Investigation (FBI) had conducted a computer analysis of the video and determined that appellant was the shooter. This did not change appellant's version of the shooting.

Appellant was arrested for the shooting of Mendez and Landaverde, and Gomez interviewed appellant at the police station during the early morning of May 27, 2011. The interview was recorded and played to the jury.[3] Appellant refused to answer substantive questions, and Gomez terminated the interview and walked appellant to his jail cell. While walking together, appellant asked what would happen next, and Gomez said he would file a case against appellant with the district attorney. Gomez told appellant he thought it was a solid case, lacking only a motive for the shooting. Appellant, "looking a bit shocked," responded "[w]ill you still file?" Gomez replied "Yes, I'm still filing the case. It's a solid case against you." A short time later, appellant said, "Fuck it. I did it. I did it, but I was loaded and I was scared."

Appellant asked if he could still talk to Gomez, and they conducted an additional interview, which was recorded and played to the jury. In the second interview, Gomez asked appellant what happened on Zanja Street. Appellant said he was paranoid, drunk and "all drugged and popping pills." He thought the men in the car "were gonna come . . . try to shoot . . . us." Matthews gave appellant a gun, a "357." Appellant hid behind a fence, looked out as the car accelerated, and fired about three or four shots when the car got close. When the car slowed, appellant

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[3] The May 27, 2011 interviews are also described in our discussion of appellant's ineffective assistance of counsel claim.

ran into the street to see it. Appellant then ran to the side of the house and at some point returned the gun to Matthews.

While in custody, appellant spoke with his mother on May 28, 2011. Their conversation was recorded and played to the jury. Appellant's mother said Gomez had told her about the shooting, and she asked, "who did the killing?" After a pause appellant responded, "it was a lot going on that you don't know about." Appellant said the police "just wanted a motive. Like, why I did it and what was wrong with me and stuff." His mother asked "why did you do it," and appellant replied, "Cause I was loaded . . . . I thought he was trying to shoot at me too." Appellant's mother said it was "basically self-defense," and appellant responded, "That's why I shot back at them." Later appellant's mother reiterated, "You're telling me that you thought these guys were going to shoot you and that's why you shot them." Appellant responded, "Yeah."

d. Gang evidence

The parties stipulated the "Squiggly Lane Bloods" gang was a criminal street gang within the meaning of section 186.22. Gomez testified as a gang expert. He explained that in 2010, the residence at 500 Pepper Street was within the gang's territory and was a known hangout for the gang. Appellant and Matthews were members of that gang, based on their gang tattoos, personal contacts, and admissions. At the time of the shooting, Matthews (known as "Pooh") was about 30 years old, and appellant (known as "Little Pooh") was about 20 years old.

In response to a hypothetical question based on the evidence, Gomez opined that the shooting of Mendez and Landaverde was committed for the benefit of, at the direction of, and in association with a criminal street gang. Gang members protect their territory by shooting at rivals, and a shooting of this kind would send a message to rivals and community members. Gomez also testified that when an older gang member gave a gun to a younger member, the latter was expected to use it violently to prove loyalty to the gang, defend its territory, and strengthen the gang.

2. Defense Evidence

Appellant called one witness, Dr. Richard Leo, a social psychologist and criminologist. He testified about false confessions. Dr. Leo said there is a significant difference between an interview and an interrogation. An interview is open-ended and geared toward obtaining the truth; an interrogation is accusatory and designed to obtain a confession or an incriminating statement.

Dr. Leo said various techniques used by the police can increase the risk of a false confession. He believed that several of these techniques were used during Gomez's interrogation of appellant, including accusations, attacks on appellant's denials, confronting him with alleged evidence, employing time pressure, and minimizing his culpability. Dr. Leo acknowledged, however, that false confessions are rare.

ISSUES

Appellant claims (1) his trial attorney provided ineffective assistance of counsel by failing to move for exclusion of his confession on *Miranda*[4] grounds, (2) the trial court erroneously precluded appellant from posing hypothetical questions to Dr. Leo, and (3) the trial court erroneously instructed the jury on provocation as it relates to premeditation and deliberation.

DISCUSSION

1. Appellant Did Not Receive Ineffective Assistance

Appellant claims he received ineffective assistance of counsel, because his trial attorney failed to move for the exclusion of his confession on *Miranda* grounds. This claim has no merit.

a. Pertinent facts

As discussed earlier, on May 27, 2011, at 2:00 a.m., Gomez and his partner interviewed appellant at the police station following his arrest. Gomez advised appellant of his *Miranda* rights, including the right to remain silent. Gomez asked appellant, "Do you understand each of these rights I read to you?" Appellant replied, "Uh, yeah."

Gomez asked appellant what changed from yesterday (when appellant had been interviewed at his home) to today, and said they had agreed to talk more. Appellant replied, "I'm not about to incriminate myself." Gomez indicated that appellant had already been incriminated by the FBI's comparison work and appellant's description of his whereabouts during the shooting. Gomez said this established appellant's role as the shooter, and the unanswered question was his motive. Appellant replied, "That's why you all brought me here to ask me that."

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[4] *Miranda* v. *Arizona* (1966) 384 U.S. 436 (*Miranda*).

Gomez continued to encourage appellant to explain the shooting. After several unclear responses to Gomez's statements, appellant said, "Can I go to the holding cell now?" Gomez said, "I thought you were listening. You're just ignoring me then, huh?" Appellant responded, "I heard everything you said. I want to go to a holding cell, though." Gomez replied, "Okay," but added, "You're just gonna roll a dice and . . . let the picture get painted to how people are gonna . . . speculate?" Appellant replied, "That's what they going to do anyway."

Gomez and his partner persisted, raising many points in an effort to persuade appellant to talk. Among other things, they accused him of making bad decisions, hurting himself, and being afraid; they asked why he was afraid to talk, why he was not willing to talk, and why a person with helpful evidence would not volunteer it; and they encouraged appellant to think of his mother and those close to him. Appellant refused to respond to any of their requests, stating ten times that he wanted to go to his jail cell, would not incriminate himself, or otherwise did not want to talk to the police.

Gomez ultimately terminated the interview. He took photographs of appellant's tattoos, and walked him to his jail cell. While en route, appellant asked what would happen next, and Gomez said that he would file a case against appellant with the district attorney. Appellant responded in a shocked manner and suddenly stated, "Fuck it. I did it. I did it, but I was loaded and I was scared." Appellant asked if he could still talk to Gomez, and they went to an interview room.

The second interview took place at about 3:15 a.m. on May 27, 2011. At the beginning, Gomez said, "Alright, Omar, I know . . . ten minutes since we walk downstairs from the interview room, but remember those rights we read to you . . . a little bit earlier? Even though . . . we're down at the jail and not an interview room, those same rights apply to you. You understand that?" Appellant responded, "Alright." They proceeded to talk, and appellant admitted shooting at the car. He stated that he was paranoid, drunk and "all drugged and popping pills," and he feared that the men in the car "were gonna come . . . try to shoot . . . us."

b. Legal proceedings

Appellant had several attorneys in the trial court. On May 10, 2013, his initial attorney filed a pretrial motion to exclude all post-detention statements on *Miranda* grounds. The motion was deferred for hearing by the trial judge, another attorney substituted as appellant's trial counsel, and then a third attorney substituted as counsel.

On September 8, 2015, appellant's third attorney filed a motion to exclude his post-detention statements on the ground they were involuntary. The motion argued that appellant's admissions were the product of threats and improper offers of benefits by the police. The motion was heard by the trial judge on September 8, 2015.

Appellant testified during the hearing. He acknowledged that Gomez advised him of his *Miranda* rights during the first interview at 2:00 a.m., and appellant initially agreed to talk but then asked repeatedly to go to his jail cell. Appellant agreed that he did not ask for an attorney during the first interview. Appellant also acknowledged that Gomez reminded him of his

Miranda rights at the start of the second interview at 3:15 a.m. Appellant also agreed that he did not ask for an attorney during the second interview. Appellant testified that he spoke with Gomez this second time, because Gomez threatened him while walking to his jail cell between the first and second interviews.

Gomez also testified during the hearing. He said he advised appellant of his *Miranda* rights during the first interview, reminded him of his rights during the second interview, and appellant acknowledged that he understood both times. Gomez also testified that appellant never requested an attorney. Gomez denied making any threats to appellant.

The trial court heard argument from the attorneys. Defense counsel argued that appellant's confession was involuntary. The prosecutor argued that appellant received proper *Miranda* warnings, and although he refused to speak during the first interview he never asked for an attorney. The prosecutor also argued that appellant's second statement was given voluntarily and without threats, as appellant never complained of threats to the police or to his mother during their conversation on the following day.

The trial court took the motion under submission so that the recordings could be reviewed. Oddly, neither the clerk's transcript nor the reporter's transcript contains a ruling by the court. However, the parties agree on appeal that the court denied the motion to suppress. Also, the reporter's transcript contains the court's brief denial of appellant's renewed motion to suppress the statements that was made during trial.

c. Applicable law

In order to demonstrate ineffective assistance of counsel warranting reversal of a conviction, a defendant must show counsel's performance was prejudicially deficient. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) This requires a showing that (1) representation by trial counsel fell below a standard of objective reasonableness, and (2) prejudice resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-695 (*Strickland*); *In re Lucas* (2004) 33 Cal.4th 682, 721.)

Under the first prong, judicial scrutiny of defense counsel's performance is highly deferential, and counsel is presumed to have rendered adequate assistance and to have exercised reasonable professional judgment. (*Strickland*, *supra*, 466 U.S. at pp. 690-691.) There must be a showing that defense counsel's conduct was not attributable to a tactical decision that a reasonably competent, experienced criminal defense attorney would make. (*People v. Gurule* (2002) 28 Cal.4th 557, 661.)

Under the second prong, the defendant must establish that the trial was unreliable or fundamentally unfair as a result of counsel's failures. (*In re Visciotti* (1996) 14 Cal.4th 325, 352.) The defendant must show "there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

d. Analysis

Appellant claims he received ineffective assistance of counsel because his trial attorney failed to seek exclusion of his two May 27, 2011 incriminating statements on *Miranda* grounds. In *Miranda*, the high court required "law enforcement officers to advise an accused of his right to remain silent and to have

counsel present prior to any custodial interrogation." (*People v. Jackson* (2016) 1 Cal.5th 269, 339.) Under the holding in *Miranda*, "a person undergoing a custodial interrogation must first be advised of his right to remain silent, to the presence of counsel, and to appointed counsel, if indigent." (*People v. Stitely* (2005) 35 Cal.4th 514, 535 (*Stitely*).) Statements taken in violation of *Miranda* may not be admitted to prove the defendant's guilt. (*Miranda, supra*, 384 U.S. at pp. 444-445; *Stitely*, at p. 535.)

Gomez advised appellant of his *Miranda* rights during the first interview that commenced at 2:00 a.m. on May 27, 2011. Appellant repeatedly invoked his right to remain silent during that interview, refusing to respond to substantive questions and repeatedly stating that he wanted to go to his jail cell or otherwise would not talk. While Gomez did not immediately stop the interview, he eventually did so and then began escorting appellant to his jail cell.

Appellant challenges the incriminating statements that were made after the first interview ended: appellant's sudden statement while en route to the jail cell, and his detailed confession during the second interview that commenced around 3:15 a.m. Appellant argues that he "clearly invoked his right to silence, and since the police continued to interrogate him, any subsequent confession was the fruit of that illegality." This argument is wrong.

It is well-settled that statements by a suspect who invoked his *Miranda* rights may nevertheless be admissible if the statements were made after the suspect voluntarily reinitiated communications with the police. As the Supreme Court has explained, "after the right to counsel has been asserted by an

accused, further interrogation of the accused should not take place 'unless the accused himself initiates further communication, exchanges, or conversations with the police.'" (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 (*Bradshaw*), quoting *Edwards v. Arizona* (1981) 451 U.S. 477, 485 (*Edwards*).) An accused initiates communication with the police "when he speaks words or engages in conduct that can be 'fairly said to represent a desire' on his part 'to open up a more generalized discussion relating directly or indirectly to the investigation.'" (*People v. Mickey* (1991) 54 Cal.3d 612, 648-649, quoting *Bradshaw,* at p. 1045; accord, *People v. San Nicolas* (2004) 34 Cal.4th 614, 642.) And if the defendant has initiated a statement to the police in this manner, "nothing in the Fifth and Fourteenth Amendments . . . prohibit[s] the police from merely listening to his voluntary, volunteered statements and using them against him at the trial." (*Edwards*, at p. 485; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 385-386; *People v. Bradford* (1997) 14 Cal.4th 1005, 1039-1040.)

That is exactly what happened here. After Gomez terminated the first interview and began walking appellant to his jail cell, appellant voluntarily reinitiated communications with the police. Without any prompting, appellant asked what would happen next. When Gomez said he would file a case against him, appellant suddenly admitted that he committed the crime. Appellant asked if he could still talk to Gomez. They went to an interview room, where appellant acknowledged his *Miranda* rights and fully confessed the crime.

Under these circumstances, appellant's statements to the police were properly admitted by the trial court, and a motion to suppress the statements under *Miranda* principles would not

have been successful. The Sixth Amendment does not require counsel to make motions that would have been futile. (*People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24; *People v. Gutierrez* (2009) 45 Cal.4th 789, 804–805.) Appellant's ineffective assistance of counsel argument has no merit.

2. The Trial Court Did Not Err by Precluding Appellant from Asking Hypothetical Questions

Appellant claims the trial court erred by precluding the use of hypothetical questions during the examination of his false confessions expert, Dr. Leo. We disagree.

a. Pertinent facts

Appellant's trial counsel made a number of offers concerning his proposed hypothetical questions to Dr. Leo. During a sidebar conference that occurred during direct examination, appellant's counsel said he wanted to pose "hypothetical circumstances" and elicit Dr. Leo's "opinion, in general, on whether someone *would* just spontaneously say they did something after repeated denials." (Italics added.) The court indicated the question called for speculation and information outside Dr. Leo's expertise, and the question asked the jury to assume that what "someone" did is what happened in the present case.

Appellant's counsel indicated he wanted to pose a hypothetical question that (1) assumed a person made repeated denials but later made a spontaneous admission, and (2) asked Dr. Leo whether, in his experience, that was "how confessions *normally* come about." (Italics added.) The court indicated there were different ways a confession could come about, Dr. Leo was not an expert on that, and the court would not allow that question. Appellant's counsel indicated that, in light of the

evidence, he could ask Dr. Leo, "hypothetically speaking, there's a confession that takes place. What is your opinion of that confession?" The court indicated the question was impermissible and pertained to the "ultimate question here."

Appellant's counsel later indicated that, "based on the hypothetical" that a person made repeated denials before having a "sudden . . . off-the-record epiphany," Dr. Leo would opine as to "what the factors are that *would* cause a person to do such a thing under the circumstances." (Italics added.) The court indicated this was not proper opinion testimony. Appellant's counsel also said he wanted to ask Dr. Leo, "given a certain set of circumstances, do the studies show that an individual . . . *would* confess after that type of interrogation, after those types of factors are applied." (Italics added.) Counsel similarly indicated he wanted to pose a "hypothetical that matche[d] the facts in the case" and wanted to ask if, "in that hypothetical," "the factors are present that *would* lead to a false confession." (Italics added.) The court stated, "You can talk about the factors, but you cannot give a hypothetical."

b. Analysis

"In the case of expert testimony, it is not enough that it is relevant to an issue in the case. It must also satisfy the criteria of Evidence Code section 801, which limits such testimony to that '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (Evid. Code, § 801, subd. (a).) [Fn. omitted.]" (*People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 753.) The trial court has broad discretion to admit or exclude expert testimony, and its rulings are subject to review for abuse of discretion. (*People v. McDowell* (2012) 54 Cal.4th 395, 426.)

In *People v. Page* (1991) 2 Cal.App.4th 161 (*Page*), the Court of Appeal addressed the scope of questions posed to a false confessions expert. In that case an expert on police interrogation was permitted to testify generally about the factors that could lead to a false confession. But the trial court precluded the expert from applying those factors to the defendant's statements to the police and opining about the reliability of the defendant's statements. On appeal, the defendant argued that his examination of the expert had been improperly restricted, but the appellate court found no error. (*Id*. at pp. 188-189.) The court applied our Supreme Court's decision in *People v. McDonald* (1984) 37 Cal.3d 351, 370-371, which set parameters for the examination of eyewitness identification experts. And it held that "nothing in *McDonald* or the Evidence Code required the court to permit [the expert] to discuss the particular evidence in this case or to give his opinion regarding the overall reliability of the confession." (*Page*, at p. 188.)

In *People v. Ramos* (2004) 121 Cal.App.4th 1194 (*Ramos*), this court upheld the exclusion of a false confession expert's testimony *in its entirety*. The court concluded that the jury could understand and evaluate the evidence concerning the defendant's statements without the assistance of an expert on false confessions and police interrogation. (*Id*. at pp. 1204-1207.)[5]

As discussed in our Factual Summary, Dr. Leo testified that various police techniques, including psychological coercion, increased the risk of a false confession. He also testified that several police techniques were employed during appellant's

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[5] The expert in *Ramos* was also Dr. Leo. (*Ramos, supra*, 121 Cal.App.4th at p. 1204.)

interrogations. This testimony provided the jury with adequate information with which to judge appellant's statements in this case. The proposed hypothetical questions went too far, by effectively asking Dr. Leo to discuss how the factors affected appellant and whether appellant's statements were reliable or false. Just as in *Page, supra,* 2 Cal.App.4th at pages 188-189, the trial court did not abuse its discretion in limiting appellant's questions of Dr. Leo.

Even if the trial court erred, there was no prejudice. Dr. Leo's testimony discussed all the relevant factors that can affect the reliability of a defendant's statements during police interrogation. The jury heard full evidence regarding appellant's statements to the police, and defense counsel fully cross-examined Gomez regarding his conduct during the interviews with appellant. Defense counsel was able to present argument regarding the reliability of appellant's statements. In light of this evidence, it is not reasonably likely a different result would have occurred as to any of appellant's offenses, if Dr. Leo had been permitted to respond to the proposed hypothetical questions. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

3. The Trial Court Did Not Commit Instructional Error

Appellant claims the trial court erroneously instructed the jury on provocation as it relates to premeditation and deliberation. We reject this claim.

a. Pertinent facts

The court fully instructed the jury on murder, attempted murder, voluntary manslaughter and provocation. For murder, the court gave CALCRIM No. 520 (First or Second Degree Murder with Malice Aforethought), No. 521 (First Degree

Murder),[6] and No. 522 (Provocation: Effect on Degree of Murder).[7] For attempted murder, the court instructed with CALCRIM No. 600 (Attempted Murder) and No. 601 (Attempted Murder: Deliberation and Premeditation), which are fundamentally the same as CALCRIM No. 520 and No. 521. For voluntary manslaughter and attempted voluntary manslaughter, based on imperfect self-defense, the court instructed the jury with CALCRIM No. 571 (Voluntary Manslaughter: Imperfect Self-

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[6] The pertinent language of CALCRIM No. 521 concerning willful, deliberate and premeditated murder read: "The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time."

[7] CALCRIM No. 522 read: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

Defense) and No. 604 (Attempted Voluntary Manslaughter: Imperfect Self-Defense).

b. Appellant's claims were forfeited

Appellant contends the trial court erred by failing to instruct the jury that "subjective heat of passion (i.e., fear)," whether or not reasonable, could reduce murder from first to second degree and could reduce attempted premeditated murder to attempted murder. He similarly claims the trial court erred by failing to instruct that provocation, whether or not legally adequate to reduce murder to voluntary manslaughter, could reduce murder from first to second degree and could reduce attempted premeditated murder to attempted murder.

There is no dispute the court's instructions on first and second degree murder, attempted murder, voluntary manslaughter and provocation were correct as far as they went. Appellant's claims about subjective heat of passion and provocation are really arguments that the court's instructions should have been modified, clarified, or supplemented to discuss these concepts. Such changes were never requested below.

A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete, unless the party requested appropriate clarifying or amplifying language in the trial court. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) In *People v. Jones* (2014) 223 Cal.App.4th 995 (*Jones*), the defendant made similar arguments on appeal, contending that homicide instructions were misleading because they did not inform the jury that a subjective standard for provocation can reduce the degree of murder. The appellate court

held the defendant's failure to request a pinpoint instruction at trial forfeited the claim on appeal. (*Id.* at p. 1001.)

Appellant contends his claims were not forfeited, because the trial court had a duty to instruct fully and completely "once the court decided to instruct the jury on the relationship between *heat of passion* and deliberation which elevates a murder to first degree." (Italics added.) This argument is wrong, because the court did not provide instructions on that relationship. Appellant also argues that *Jones* was wrongly decided, but his argument is entirely unpersuasive. Like *Jones*, we conclude appellant has forfeited his instructional issues.

c. There was no error

An appellate court determining whether a trial court has erred in giving instructions considers the instructions as a whole and assumes jurors are intelligent persons capable of understanding and correlating all given instructions. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in an impermissible manner. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220.)

Appellant contends the court's instructions permitted the jury to find him guilty of first degree murder and willful, deliberate and premeditated attempted murder even if the evidence established subjective heat of passion or provocation that would negate deliberation and premeditation. This argument has no merit.

The jury was instructed with CALCRIM No. 520, which stated in relevant part: "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 as defined in CALCRIM No. 521." In turn, CALCRIM No. 521 told the jury in relevant part: "The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act that caused death. [¶] . . . A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." These instructions clearly told the jury that all elements of deliberation and premeditation in CALCRIM No. 521 had to be proven beyond a reasonable doubt to return a verdict of first degree murder; if not, it was murder of the second degree. Similar language in CALCRIM Nos. 600 and 601 guided the jury in regard to attempted murder.

Furthermore, the jury was instructed with CALCRIM No. 522, which stated in relevant part: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. . . . If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." This instruction clearly invited the jury to consider provocation in determining the degree of the crime.

The arguments made by appellant have been rejected by other appellate courts. In *People v. Hernandez* (2010) 183 Cal.App.4th 1327 (*Hernandez*), the defendant contended CALCRIM No. 522 was misleading and incomplete because it failed to adequately explain that provocation could reduce

murder from first to second degree. The court held: "CALCRIM No. 522 instructs the jury to 'consider the provocation in deciding whether the crime was first or second degree murder' and 'consider the provocation in deciding whether the defendant committed murder or manslaughter.' Thus, the instruction plainly states the jury should consider provocation for *both* second degree murder and manslaughter." (*Id*. at pp. 1334-1335.)

In *Jones,* the court rejected the very same argument that appellant has made here. The court held: "[T]he instructions [CALCRIM Nos. 520, 521, 522 & 570] are correct. They accurately inform the jury what is required for first degree murder, and that if the defendant's action was in fact the result of provocation, that level of crime was not committed. CALCRIM Nos. 521 and 522, taken together, informed jurors that 'provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.' " (*Jones, supra,* 223 Cal.App.4th at p. 1001, quoting *Hernandez, supra,* 183 Cal.App.4th at p. 1334.)

We accordingly find no error in the instructions given by the trial court.

d. There was no prejudice

Even if there was instructional error, it was harmless. We evaluate under the *Watson* standard whether trial court error in failing to give clarifying or amplifying instructions is prejudicial. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132; *People v. Andrews* (1989) 49 Cal.3d 200, 215; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1054-1055.)

The jury was given full and proper instructions on first degree murder and willful, deliberate and premeditated attempted murder. During argument, the prosecutor explained the differences between the degrees of murder and applied the evidence in urging the jury to find premeditation. In contrast, defense counsel never even mentioned concepts such as subjective heat of passion or provocation – he argued that appellant was not the shooter.

If the jury did find that appellant acted because of a state of mind that did not include premeditation, it was clearly instructed to return a verdict of second degree murder and attempted murder without a finding of premeditation. Moreover, the court instructed the jury on voluntary manslaughter and attempted voluntary manslaughter, based on imperfect self-defense. The jury rejected that theory, which suggests they concluded that appellant did not act with an actual fear of imminent danger of death or great bodily injury. (See CALCRIM Nos. 571 & 604.)

Under all the circumstances, one cannot say it is "reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error." (*Watson, supra*, 46 Cal.2d at p. 836.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, (MICHAEL) 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.