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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ADRIENNE RENEE DAVIDSON, Defendant and Appellant.	B223722 (Los Angeles County Super. Ct. No. KA085559)

APPEAL from a judgment of the Superior Court of Los Angeles County. David C. Brougham, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Lawrence M. Daniels and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Adrienne Renee Davidson appeals from the judgment of conviction following a jury trial in which she was found guilty of first degree murder of her husband (Pen. Code, § 187, subd. (a)).[1] The jury also found true the allegation that appellant personally and intentionally discharged a firearm causing death. (§ 12022.53, subd. (d).) The trial court sentenced appellant to state prison for a total of 50 years to life, by imposing 25 years to life on the murder conviction and a consecutive 25 years to life on the firearm allegation.

Appellant contends that her conviction must be reversed because the trial court erroneously instructed the jury and excluded relevant evidence and the prosecutor engaged in numerous instances of misconduct. We disagree and affirm the judgment.

FACTS

Prosecution Case

In the winter of 2008, appellant and Ezra Davidson (Ezra) had been married for 24 years and had two children, daughter J.D. who was in college, and son M.D. who was in elementary school. Appellant was 46 years old. About ten years earlier when the couple was briefly living in Europe, appellant discovered that Ezra was having an extramarital affair with a stripper. A month later appellant cut holes in all of his shirts. In response, Ezra grabbed appellant by her hair and dragged her down two flights of stairs. Appellant did not report this incident to the police.

On December 14, 2008, when the family was living in Pomona, California, appellant discovered Ezra was having another extramarital affair with a college-age woman after reading his autobiography and personal e-mail account. Appellant told J.D. what she had learned. In one of the e-mails, Ezra indicated that he would pay for his mistress's rent and private college tuition, give her spending money, and mentioned sexual relations. Appellant initially reacted to the affair as though it were a humorous joke, but she discussed it with J.D. nearly every day after that. She gave J.D. updates of

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

the affair and revealed that Ezra had purchased a car for his mistress, at a time when the family was struggling financially and J.D.'s public college tuition remained unpaid. When J.D. advised her mother to get a divorce lawyer, appellant calmly replied that she would handle the matter on her own.

On December 15, 2008, appellant went to a gun shop and told the owner that she was interested in purchasing a handgun for personal protection. She selected a Smith & Wesson nine-millimeter semi-automatic handgun. After the required waiting period, appellant returned to the shop on December 29, 2008 and took possession of the gun. She also purchased snap caps, a gun safe, full metal jacket bullets, and a box of Winchester silver tip, hollow-point bullets.

On the evening of December 31, 2008, J.D. and her boyfriend left the house to attend a New Year's Eve party. Appellant, Ezra and M.D. stayed behind. According to J.D., the family dynamic seemed "fine and normal." At 2:00 a.m. on January 1, 2009, appellant called J.D. and told her to return home, but did not explain why. Appellant was not crying and did not sound hysterical. J.D.'s boyfriend drove her home, and appellant appeared to be fine. Appellant told J.D. to take her brother to their paternal grandparents' house, and asked if J.D.'s boyfriend could drive her to the police station. On the drive to the Walnut Station of the Los Angeles County Sheriff's Department, J.D.'s boyfriend asked appellant if she and M.D. were okay. Appellant replied "yes," but said nothing else and was calm during the car ride.

When appellant arrived at the station, she approached the supervising watch deputy and stated, "I'm here to turn myself in. I shot my husband." Appellant told the deputy that the shooting had occurred in the upstairs master bedroom about an hour earlier, she was uncertain if her husband was dead because the bedroom had been dark, the handgun she used was also upstairs, and her son was the only other person in the house when the shooting occurred. The deputy recalled that appellant was "calm" and "nonchalant" while speaking with him. He searched and handcuffed appellant, who consented to a search of her house.

Meanwhile, J.D.'s boyfriend called her and told her to go to the station. J.D. spoke to her mother in the visiting room, and the videotaped conversation was played for the jury at trial. During their conversation, appellant was distraught and crying. J.D. asked appellant, "[W]hat set you off?" Appellant replied, "He just kept putting me aside. . . ." Appellant stated that "he was going to give it all to [his mistress]." When J.D. stated that the family "could have done other things," appellant apologized and stated, "I love your father. He just broke my heart."

J.D. asked appellant, "Did you buy a gun or something? Did you plan this? I mean, is this what you meant when you told me you were going to take care of things . . . ?" Appellant replied, "I just said that I was going to make sure that I was going to take care of you and [M.D.] again. And I asked your father to—to do certain things so that you and [M.D.] would be first. And he said no. He was going to just continue to give everything he had to that girl." When appellant again expressed her love for Ezra and stated that she was scared because she "was supposed to be with [him]," J.D. stated, "But you had me and [M.D.], mom. We could have figured a way. We would have taken care of things." Appellant replied, "I couldn't live with my heart being broken[.]" Appellant continued to state, "It broke [my heart], every time he left to go see her."

Appellant told J.D. that she was angry when she obtained the handgun she used to shoot Ezra. After J.D. stated that she would never have permitted the shooting to occur, appellant responded, "You wouldn't be able to stop your father anyway, and I wasn't going to let him give everything to that girl . . . . Everything. I can't believe . . . he was going to give everything to her." Appellant stated that Ezra "did . . . things" to her and then told her he loved her, and "then he would say, 'No, [his mistress] is going to be first and I'm going to give her this[.]" Appellant indicated that she had asked Ezra to see their bank account statements to ensure "that he wasn't giving everything to the girl," but he had refused. Appellant stated that even though their family was "struggling" financially, Ezra had given his mistress "all that money."

Although Ezra had spent New Year's Eve with appellant, he also texted his mistress. Appellant was sad "because he couldn't even give [appellant] New Year's Eve

without involving [his mistress]," which broke appellant's heart. Appellant told J.D. that she could not live with that pain every day. Appellant stated, "I meant to kill myself too, so I didn't [unintelligible] but I got scared . . . ." Ezra's failure to spend time with their son also "killed" appellant.

When police officers and other experts searched appellant's house, they found Ezra lying dead in the bed of the master bedroom. An autopsy revealed the cause of death was a single gunshot wound to the back of his head. A nine-millimeter spent bullet casing was found behind the bed and a nine-millimeter handgun was found in a box inside the closet, loaded with one bullet in the barrel and three unspent bullets in the magazine. A tag on the side of the box indicated the gun was sold to appellant on December 15, 2008. A firearms expert concluded that the casing found behind the bed was fired from the gun found in the closet.

Defense Case

Appellant's neighbor for three years testified that appellant always dressed very simply, was a "very submissive woman" who "[a]lmost kept way too much to herself," and spoke very rarely. Ezra told the neighbor he had purchased the family's house for cash. After his death, the neighbor researched the property and was surprised to discover a quitclaim deed signed by appellant relinquishing her interest in the property and a $365,000 mortgage.

Appellant's three sisters, Dana and Monica Peart and Michelle Butler, testified. Dana and Monica lived with appellant and Ezra briefly in the late 1980's. They both testified that appellant was very docile around Ezra, who was domineering and made all business decisions. After Ezra's death, Monica discovered that Ezra was behind on the mortgage and that her sister had signed a quitclaim deed and was not on title. Appellant had self-esteem issues all her life. Michelle testified that appellant had tried to commit suicide while dating Ezra, and Michelle had signed papers to have appellant taken to a mental institution, where she spent one day.

Wendy Connolly represented appellant and Ezra in the purchase of the family house. There was little interaction between appellant and Ezra, who was demeaning to appellant and always in control. Appellant was always dressed in blue jeans and a white T-shirt with no makeup and her hair pulled back. A few days before the closing, Ezra asked Connolly about having appellant taken off the title. Connolly alerted the escrow company to fully advise appellant should there be an attempt to take her off title. After the transaction closed, Connolly ran the property profile and found that appellant was not on title.

Appellant testified on her own behalf. She and Ezra began dating during their sophomore years in college. Appellant was in love with Ezra, who could "do no wrong" and was like a "god" to her. Appellant dropped out of college during her junior year due to stress from not performing up to her father's expectations. Ezra broke up with appellant about six months later. On the same night of the breakup, Ezra had a party at appellant's apartment while she stayed in the bedroom. After the party, appellant tried to commit suicide by first slitting her wrists and then taking sleeping pills. She woke up in a hospital and was later taken to a mental institution for one day.

Within a month, appellant and Ezra were reunited, and they married during his senior year in college. Appellant paid their rent by working as a secretary. At the beginning of their marriage, they decided that if they disagreed about something, Ezra's opinion would be the tiebreaker. Appellant agreed to this arrangement because she believed Ezra was the "greatest" and knew everything.

After the incident of domestic violence in which appellant cut holes in Ezra's shirts, he engaged in about 15 additional acts of violence against her, including the following: pushing her down stairs; deliberately stepping on her toe and possibly breaking it; putting her clothes outside their home and pushing her down when she bent to pick them up, causing her to scrape her face against the sidewalk and get a small scar; hitting her face with his dress shoe, knocking off her glasses; closing the door on her arm until she released car keys; throwing a plastic patio chair at her; twisting her arm during an argument; and grabbing her arms, resulting in a bruise. Ezra also locked appellant out

of the house more than 40 times. She never reported any of these incidents to the police or went to the hospital.

After appellant discovered on December 14, 2008 that Ezra was having an affair, which he confirmed the next day, she offered to have an "open marriage." He refused and said he would do as he pleased. Appellant became distraught and decided to commit suicide. She decided to purchase a gun because her past attempts at suicide had been unsuccessful. Divorce was not an option because she felt she could not live without Ezra. When appellant bought the gun, she had no plans to kill Ezra with it.

On December 27, 2008, Ezra told appellant that she could either divorce him or accept that he had a mistress. Appellant told Ezra that she would live with his extramarital affair, and felt relieved because her marriage was intact and she was happy to still have Ezra. Although appellant no longer wanted to commit suicide, she still picked up the gun on December 29, 2008 because she did not want to lose her down payment. On December 30, 2008, appellant and her sister discussed plans to vacation in Las Vegas in April 2009. Appellant was willing to go on the trip and was not contemplating suicide because she believed her marriage was intact.

On New Year's Eve, appellant felt well, had no thoughts of suicide or murder, and had her hair done. Ezra came home around six or seven with dinner and champagne. Appellant knew that he had been at his mistress's new apartment earlier that day, but she was not upset because she had agreed to accept his affair. After J.D. and her boyfriend left the house, appellant and Ezra talked and had sex.

When midnight struck, Ezra did not kiss appellant because he was busy sending e-mails on his cell phone. Appellant was sad and hurt because she felt unimportant. She expressed her disappointment to Ezra and suggested they go to sleep. Appellant went upstairs to their bedroom and waited for Ezra. When he did not appear, appellant went downstairs and saw him texting in the bathroom. She felt "crushed" and thought, "I can't do this. There's just no way I can . . . go on with this."

Ezra eventually joined appellant in their bed. He fell asleep, but she woke him and told him she needed him to take the following steps—spend holidays with his family,

tell his mistress not to call him on holidays, destroy nude photographs of her, and put his children first and ensure they had what they needed. He refused. Appellant was heartbroken because Ezra did not want her or their children. She felt "there was nothing else," and decided to kill herself.

Appellant got out of bed, retrieved the gun from the closet, loaded it with bullets, and placed it inside her mouth. She contemplated where she should commit suicide and ultimately rejected killing herself in the closet (it would be too messy) and in the bathroom (she did not want her body discovered in the bathroom). Appellant admitted that she was exercising judgment and reason and had no mental deficiencies.

Appellant ultimately decided to kill herself in her bed. As she walked to the bedroom and was about to get into bed, she saw Ezra "laying there like he didn't have a care in the world." Appellant shot him once. At the time she shot him, appellant was still exercising reason and had the ability to determine right from wrong. She then returned the gun to the box in the closet and dressed to go to the police because it was "the right thing to do." She did not render aid to Ezra, nor call 9-1-1.

DISCUSSION

I. Jury Instructions.

Appellant contends the "trial court's instructions on heat of passion and provocation erroneously allowed an objective test when deciding whether to reduce murder to second degree, thereby violating appellant's constitutional rights to jury trial and due process of law, requiring reversal." She argues that the prosecutor compounded the alleged error by emphasizing the objective standard in his rebuttal argument.

A. Relevant Law

While only those circumstances instilling passion in a reasonable person will reduce murder to voluntary manslaughter (*People v. Berry* (1976) 18 Cal.3d 509, 515; *People v. Coad* (1986) 181 Cal.App.3d 1094, 1107), a lesser provocation may negate the premeditation or deliberation necessary for a finding of first degree murder so as to

reduce the offense to second degree murder. (*People v. Valentine* (1946) 28 Cal.2d 121, 144; *People v. Padilla* (2002) 103 Cal.App.4th 675, 677–678; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.)

What would otherwise be deliberate and premeditated first degree murder may be mitigated to second degree murder if the jury finds that the defendant "formed the intent to kill as a direct response to . . . provocation and . . . acted immediately," i.e., without deliberation or premeditation. (*People v. Wickersham* (1982) 32 Cal.3d 307, 329.) The provocation sufficient to mitigate first degree murder to second degree murder requires only a finding that the defendant's subjective mental state was such that he or she did not deliberate and premeditate before deciding to kill. (*People v. Fitzpatrick, supra*, 2 Cal.App.4th at pp. 1295–1296; *People v. Padilla, supra*, 103 Cal.App.4th at pp. 677–678.) Thus, a defendant who is subjectively prevented from deliberating because of provocation is guilty of second degree rather than first degree murder, even if a reasonable person would not have been so precluded. (*People v. Fitzpatrick, supra*, at pp. 1294–1296.)

In contrast, the provocation sufficient to reduce murder to voluntary manslaughter requires not only that the defendant subjectively experienced a heat of passion resulting from the provocation but also that the response was objectively reasonable, i.e., that a person of average disposition would have been provoked to act rashly and without deliberation. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) The "average person" need not have been provoked to kill, just to act rashly and without deliberation. (*People v. Najera* (2006) 138 Cal.App.4th 212, 223.)

In short, "[t]he test of whether provocation or heat of passion can negate malice so as to mitigate murder to voluntary manslaughter is objective. . . . The test of whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder, on the other hand, is subjective." (*People v. Padilla, supra,* 103 Cal.App.4th at p. 678.)

B. Jury Instructions Given

The trial court gave the standard jury instructions on homicide (CALCRIM No. 500), malice aforethought (CALCRIM No. 520), the degrees of murder (CALCRIM No. 521), and provocation (CALCRIM No. 522). At the request of the defense, the trial court instructed the jury on voluntary manslaughter committed in the heat of passion (CALCRIM No. 570).

Regarding the distinction between first and second degree murder, the jury was instructed, pursuant to CALCRIM No. 521, that "[t]he defendant is guilty of first degree murder if the People have proved that she acted willfully, deliberately, and with premeditation," and that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." In accordance with CALCRIM No. 522, the jury was instructed that "[p]rovocation 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. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

With respect to the type of provocation that would reduce murder to manslaughter, the jury was given CALCRIM No. 570, which provides in part: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation the defendant acted rashly and under the influence of intense emotion that obscured her reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] . . . [¶] . . . In deciding whether the provocation was sufficient, consider whether an ordinary person of average disposition, in the same situation, and knowing the same facts, would have reacted from passion rather than from judgment."

C. The Claim is Forfeited

Appellant argues that instructing the jury with CALCRIM No. 522 "confuse[d] the subjective standard of provocation which will reduce a homicide from first to second degree murder with the objective type of provocation which will reduce murder to manslaughter, i.e., it makes no distinction between the *objective* provocation which may reduce a homicide to manslaughter and the *subjective* provocation which may suffice to reduce it to second degree murder." She further argues that CALCRIM Nos. 521 and 522, when given with CALCRIM No. 570, misled the jury to conclude that it "should apply the same objective standard to provocation in the context of voluntary manslaughter and to the determination of the degree of murder, a notion which was reinforced by the prosecution's argument."

Appellant then argues that the predecessor CALJIC instructions (CALJIC Nos. 8.20, 8.42, 8.73) better explained the difference in the requirements for reduction of first degree murder to second degree murder and to voluntary manslaughter based on heat of passion than the CALCRIM instructions given at her trial. But an instruction defining the type of provocation needed to reduce first degree to second degree murder is a pinpoint instruction, which the trial court has no sua sponte duty to give. (*People v. Rogers* (2006) 39 Cal.4th 826, 878; *People v. Mayfield* (1997) 14 Cal.4th 668, 778; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1732–1734; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333.)

Defense counsel did not request a pinpoint instruction defining the type of provocation needed to reduce first degree murder to second degree murder or instructing the jury on the difference between provocation sufficient to reduce first degree murder to second degree murder and provocation sufficient to reduce murder to manslaughter.

"'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 has requested appropriate clarifying or amplifying language.'" (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Lee* (2011) 51 Cal.4th 620, 638.) CALCRIM Nos. 521, 522, and 570 are accurate statements of law. Appellant

"was therefore obligated to request modification or clarification and, having failed to have done so, forfeited this contention." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163; *People v. Canizalez* (2011) 197 Cal.App.4th 832, 849; *People v. Mayfield, supra,* 14 Cal.4th at pp. 778–779; cf. *People v. Hernandez, supra,* 183 Cal.App.4th at p. 1331, fn. 2 [declining to find challenge to CALCRIM No. 522 forfeited].)

But even assuming there was instructional error that affected appellant's substantial rights, it is not reasonably probable that she would have obtained a more favorable outcome absent the error. (*People v. Elsey* (2000) 81 Cal.App.4th 948, 953–954, fn. 2.)

D. Harmless Error

"In reviewing a claim that the court's instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. [Citation.] We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. [Citation.]" (*People v. Hernandez, supra,* 183 Cal.App.4th at p. 1332.)

Here, when considered in context with all of the jury instructions, CALCRIM No. 522 was not misleading. The jury was instructed that the distinction between first degree and second degree murder rested on whether "the People have proved that [the defendant] acted willfully, deliberately, and with premeditation." (CALCRIM No. 521.) The trial court instructed the jury that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." (*Ibid*.) The jury was also instructed that it should consider provocation in determining whether the crime was second degree murder. (CALCRIM No. 522.) Thus, when the instructions are considered as a whole, the jury was apprised that provocation may reduce first degree murder to second degree murder if it found that appellant acted rashly or impulsively as a result of provocation and that she did not deliberate and premeditate. (*People v. Hernandez, supra,* 183 Cal.App.4th at p. 1334 ["Although CALCRIM No. 522 does not expressly state provocation is relevant to the issues of premeditation and deliberation,

when the instructions are read as a whole there is no reasonable likelihood the jury did not understand this concept"].) In *People v. Rogers*, *supra*, 39 Cal.4th 826, the court concluded that the omission of a provocation instruction for second degree murder is not misleading, reasoning that "the jury is told that premeditation and deliberation is the factor distinguishing first and second degree murder" and the manslaughter instruction "does not preclude the defense from arguing that provocation played a role in preventing the defendant from premeditating and deliberating; nor does it preclude the jury from giving weight to any evidence of provocation in determining whether premeditation existed." (*Id*. at p. 880.)

The objective test described to the jury was contained in CALCRIM No. 570, which only applied to voluntary manslaughter. The trial court expressly instructed the jury to "consider the provocation in deciding whether the crime was first or second degree murder." The instructions as a whole do not "suggest[] the jury might have failed to fully consider the provocation evidence for second degree murder based on a rejection of the evidence for manslaughter." (*People v. Hernandez*, *supra*, 183 Cal.App.4th at p. 1335.)

Furthermore, we reject appellant's argument that the prosecutor misled the jury by focusing on the objective test during his rebuttal argument. The record shows that the prosecutor was responding to defense counsel's argument. Defense counsel focused on voluntary manslaughter (CALCRIM No. 570), arguing that appellant was provoked over the long period of 24 years. Defense counsel did not argue to the jury, as he was free to do under the instructions given, that appellant had been unreasonably provoked by Ezra, precluding formation of deliberation and premeditation.

The prosecutor focused on the third element of voluntary manslaughter, stating "Number 3, the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is from passion rather than from judgment. What does that mean? . . . . Would an average, reasonable person do that? And who is an average reasonable person, ladies and gentlemen? It is the citizens of the County of Los Angeles. In the same situation, the same set of facts, would an average, reasonable

person do the same thing." It is "not misconduct for the prosecutor to tell the jury 'And who is the ordinarily reasonable person? You folks are.'" (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.)

Moreover, the prosecutor's summary of the law was correct. CALCRIM No. 570 states in relevant part, "In deciding whether the provocation was sufficient, consider whether an ordinary person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." The prosecutor's statement, "In the same situation, the same set of facts, would an average, reasonable person do the same thing," was a proper summary of the law. The prosecutor also specially directed the jury's attention to CALCRIM No. 570 during argument and the trial court properly instructed the jury on the issue of heat of passion. The jury was also told that it should view the instructions together, that if the attorneys' comments conflicted with the court's instructions, the jury was required to follow the instructions (CALCRIM No. 200), and that nothing the attorneys said was evidence (CALCRIM No. 222). As the People note, appellant has provided nothing to rebut the presumption that the jury followed the court's instructions. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1326.) Thus, considering the context of the prosecutor's entire argument and the trial court's instructions, it is not reasonably likely that the prosecutor's comments were misconstrued or applied incorrectly by the jury.

Finally, there was insufficient evidence of provocation, such that any error in instructing the jury with CALCRIM No. 522 or in failing to give additional instructions could be deemed anything but harmless. Appellant shot her husband while he was asleep. Thus, there was no evidence from which a reasonable jury could have concluded that appellant acted immediately or in direct response to provocation when she murdered Ezra. (*People v. Fitzpatrick, supra*, 2 Cal.App.4th at pp. 1295–1296.) Appellant testified that she first began suspecting her husband was having an affair on December 14, 2008, and he confirmed the affair the next day. After speaking with Ezra several days later, appellant described herself as relieved because her marriage was intact. Appellant thus had sufficient time to cool down after learning of Ezra's affair on December 14, 2008,

and before shooting him in the head on January 1, 2009. Moreover, a week before the shooting, appellant calmly told J.D. that she would handle matters on her own rather than consult a divorce lawyer. Appellant also made vacation plans with her sister.

Significantly, appellant testified that moments before the shooting, she was exercising judgment and reason and had no mental deficiencies, and that at the time she shot Ezra, she was still exercising reason and had the ability to determine right from wrong. Indeed, she turned herself into the police about an hour after the shooting because it was the "right" thing to do.

Additionally, appellant's demeanor after the murder did not show that she had acted while under "the actual influence of a strong passion." (*People v. Wickersham, supra*, 32 Cal.3d at p. 327.) When appellant spoke to J.D. shortly after shooting Ezra, she was not crying or hysterical. She appeared to be fine when J.D. returned to the house. She was calm during the car ride to the sheriff's station, and calmly described the shooting to the officer. Thus, there was no evidence that appellant was under the influence of any "'[violent], intense, high-wrought or enthusiastic emotion.'" (See *People v. Wickersham*, *supra*, at p. 327; *People v. Moye* (2009) 47 Cal.4th 537, 548–555; *People v. Hach* (2009) 176 Cal.App.4th 1450, 1458–1459; *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1245–1246.) Instead, the evidence showed that appellant killed Ezra in revenge because she resented the fact that he was "laying there [in bed] like he didn't have a care in the world" and was lavishing his mistress with expensive gifts while his own family was struggling financially. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 [heat of passion may not be based upon revenge].)

Appellant's defense was further undermined by her testimony that she originally bought the murder weapon to commit suicide. She ultimately selected a semi-automatic handgun over a revolver, and purchased two boxes of different bullets. While in custody, appellant told J.D. that she was angry when she purchased the handgun and that she "wasn't going to let [Ezra] give everything to that girl [his mistress]." Even though only one bullet was needed to accomplish suicide, appellant loaded the handgun with five

bullets immediately before killing Ezra. Such actions demonstrated that she acted willfully, deliberately, and with premeditation.

II. Evidence of Childhood Abuse.

Appellant contends the trial court erred in excluding evidence of childhood abuse by her father, thereby violating her federal constitutional rights under the Fifth Amendment to a fair trial and the Sixth Amendment to present a defense. We disagree.

Prior to trial, the court held a hearing pursuant to Evidence Code section 402 on the admissibility of evidence of appellant's abusive relationship with her father. Specifically, defense counsel wished to present evidence of one incident that occurred when appellant was 16 years old, in which her father beat her in the basement of their house with a tree branch because he had caught her kissing a boy at a party. The prosecutor objected that the evidence was irrelevant and that under Evidence Code section 352 it would confuse the issues, and was also too remote in time. Defense counsel argued that the evidence was relevant to appellant's state of mind when she killed her husband: "This goes directly to the rage she felt, the heat of passion she felt and why it was so deep. It goes directly to what happened that night; it goes directly to her state of mind at the time, how much she invested in this man and why she invested so much in this man and their relationship."

The trial court found that the proposed evidence presented a host of "352" issues and excluded it as collateral. However, the trial court indicated that it would revisit the issue after hearing testimony from appellant and other witnesses to determine whether the evidence was relevant to a battered woman's syndrome defense. Defense counsel represented that he intended to call a psychiatrist to present expert testimony on appellant's "fragile state of mind," and his diagnosis of "major depressive disorder, adjustment disorder with mixed disturbances of emotional conduct and dysthymia, access to personality disorder. Anybody with dependency features and low self-esteem." The trial court ruled that the expert could testify on the issue of appellant's state of mind, and indicated that it would revisit the issue, if necessary, before the expert testimony. During

the trial, the defense never sought to present the expert testimony, and no further argument or motion was made on the trial court's ruling excluding the evidence of childhood abuse as collateral.

"Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or state Constitutions or by statute. [Citations.] The test of relevance is whether the evidence 'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' [Citation.] The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. [Citation.] We review for abuse of discretion a trial court's rulings on the admissibility of evidence. [Citations.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 90.)

Trial courts also have discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *People v. Crew* (2003) 31 Cal.4th 822, 840.) A trial court's exercise of discretion in admitting or excluding evidence "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10; *People v. Giminez* (1975) 14 Cal.3d 68, 72.)

"As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103.)

We agree that evidence of appellant's childhood abuse by her father, particularly a single incident that occurred when she was 16 years old (or 30 years before she shot her husband), was not probative to her state of mind when she killed her husband. As the

People note, acts allegedly committed by appellant's father could not have caused appellant to kill her husband, because the provocation must have been caused by the victim, Ezra. (*People v. Moye*, *supra*, 47 Cal.4th at pp. 549–550.) Furthermore, nothing in appellant's own narrative of events leading up to the homicide suggested she was actually or subjectively under the influence of any strong passion, including childhood abuse, when she killed Ezra. Thus, any connection between appellant's childhood abuse and her state of mind when she killed Ezra was speculative and irrelevant. (*People v. Morrison* (2004) 34 Cal.4th 698, 711 ["Evidence is irrelevant, however, if it leads only to speculative inferences"]; *People v. Stitely* (2005) 35 Cal.4th 514, 548–550.)

Because the trial court reasonably concluded that the proposed evidence of childhood abuse had no probative value to her state of mind when she killed her husband, or alternatively, that any minimal probative value was outweighed by the undue consumption of time or by the substantial danger of confusing the issues, or of misleading the jury, the trial court did not abuse its discretion in excluding this evidence. Nor did the exclusion impermissibly infringe on appellant's rights to a fair trial and to present a defense. (*People v. Fudge, supra*, 7 Cal.4th at p. 1102.) The court's ruling did not prevent appellant from presenting evidence from which the jury might have concluded her killing of Ezra was the result of provocation. The defense presented evidence that appellant had low self-esteem and that Ezra was physically and emotionally abusive during their 24-year marriage, and that he was domineering, an adulterer, and an uncaring father. Thus, the trial court did not prevent appellant from presenting a defense. (*See People v. Cash* (2002) 28 Cal.4th 703, 727–728.)

Accordingly, we reject appellant's contention.

III. Prosecutorial Misconduct.

Appellant contends the prosecutor committed numerous acts of misconduct in his closing and rebuttal arguments that either individually or cumulatively violated her state and federal constitutional rights to due process and a fair trial and therefore require reversal of her murder conviction. Again, we disagree.

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights . . . but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

As an initial matter, we note that all but one of appellant's challenges are forfeited for the failure of her defense counsel to object below and request curative admonitions. "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 made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Nevertheless, to forestall any claims of ineffective assistance of counsel, we reach the merits of appellant's challenges.

A. Alleged Disparagement of Defense Counsel

Appellant contends the prosecutor "engaged in various improper arguments disparaging [defense] counsel and attributing base motives to him and the defense," by (1) claiming defense counsel had deliberately chosen a predominately female jury in order to appeal to jurors' sympathy; (2) accusing defense counsel of hiding the facts; (3) accusing defense counsel of misstating or incompletely stating the law of voluntary manslaughter; and (4) accusing defense counsel of "character assassination" of the victim.

1. Female Jury

In rebuttal argument, the prosecutor noted that the jury was primarily female and without objection stated, "perhaps he's [defense counsel] trying to focus on you, ladies,

to have sympathy, to have pity, to raise his voice and tell you how bad of a man Ezra was. To play with your gender so you'll come back, say yes, I'm sorry for her, come back guilty on a voluntary manslaughter."[2] Appellant argues these comments "accused defense counsel of discriminatory motive in jury selection, which is an ethics violation."

We agree with the People that the gist of the prosecutor's argument was to dissuade the jury from using sympathy or pity for appellant as a basis for the verdict. "[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) "An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47.)

In any event, any impropriety was harmless under any standard. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839; *People v. Riggs*, *supra*, 44 Cal.4th at p. 298.) As the People aptly note, "[t]he prosecutor could have made a similar argument without referencing the female members of the jury, the reference was brief, and there was overwhelming evidence that appellant committed willful, deliberate, and premeditated murder." Moreover, any impropriety was cured when the trial court instructed the jury that argument is not evidence and not to let bias, including bias against the attorneys, defendant, or the alleged victim based on gender, influence its decision. (See *People v. Cash*, *supra*, 28 Cal.4th at pp. 732–733 [no prejudice from alleging dishonesty of defense counsel where trial court instructed jury that argument is not evidence].)

2. "Hiding" and "Painting" Facts

While arguing in rebuttal that appellant was not a weak or docile person, the prosecutor stated without objection: "And counsel, it appears, wants to hide some certain evidence. Not evidence, but the facts. Let's talk about that first mistress incident when [appellant] was dragged down a flight of stairs. Let's talk about that for a moment. What

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[2] It is unclear from the record how many female jurors were impaneled.

preceded that, ladies and gentlemen? What preceded that? [Appellant] cut up all his shirts. Is that a person who is weak?" The prosecutor continued: "And there are other opportunities that [defense counsel] tries to paint the facts a little different in favor for the defense. For example, there was never a conversation about not call[ing] [the mistress] every single night or not see[ing] her every single night. In actuality, the only conversation they had was this: Can you leave the holidays for the family? Can you not call her on the holidays?"

We reject appellant's argument that the prosecutor committed misconduct by stating that it appeared defense counsel wanted to "hide" certain facts and "paint" other facts in favor of the defense. "An attorney, including a prosecutor, is entitled to point out that the opposing side is engaging in what the attorney believes to be an attempt to confuse the issues, and may urge the jury to ignore that attempt and focus on the relevant evidence." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 31–32; *People v. Huggins* (2006) 38 Cal.4th 175, 207 [prosecutor's comment that defense counsel tried to "'smoke one past us'" permissibly criticized counsel's tactical approach]; *People v. Kennedy* (2005) 36 Cal.4th 595, 626 [prosecutor's remarks that defense counsel's "'idea of blowin' smoke and roiling up the waters to try to confuse you is you put everybody else on trial'" were permissible because arguing the defense is attempting to confuse the jury is not misconduct]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [statement, that "'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something,'" did not amount to personal attack on counsel's integrity]; *People v. Valladares* (2009) 173 Cal.App.4th 1388, 1398, 1399 [prosecutor's reference to "'smoke screen'" in rebuttal argument was proper plea to jury not to be misled by defense counsel's argument of insufficient evidence of specific intent].)

3. Elements of Manslaughter

In rebuttal, the prosecutor explained that he had not discussed the elements of voluntary manslaughter during his opening argument because he did not believe the evidence supported that offense. Without objection, the prosecutor stated: "This is the

law for voluntary manslaughter. First element, the defendant was provoked. That's the only thing he [defense counsel] talked about. What about everything else, Mr. [Defense counsel]? What about the rest of the law that you're supposed to follow? It isn't just provocation. . . ." The prosecutor also argued without objection: "There's two more elements, ladies and gentlemen. This is the law, yet he did not go into it. He's just banking on the fact that you rely on this first element oh, guilty of voluntary manslaughter."

Appellant argues these comments improperly accused defense counsel of misrepresenting the law and of trying to trick the jury. But we find these statements fell well within the wide latitude allowed for comment upon deficiencies in opposing counsel's tactics. (*People v. Bemore, supra*, 22 Cal.4th at p. 846.) We agree with the People that taken in context the prosecutor's comments were intended to focus the jury's attention on all the elements required to prove voluntary manslaughter and to persuade the jury to reject a verdict based on that offense. (*People v. Young* (2005) 34 Cal.4th 1149, 1192 [prosecutor's comments describing defense counsel's discussion of the law as "'unintelligible gibberish'" and "'garbage'" were not misconduct].)

4. Character Assassination

In rebuttal, the prosecutor referred to defense counsel's cross-examination of appellant in which he asked whether Ezra had given her a black eye during different instances of domestic violence and appellant answered in the negative. The prosecutor argued that defense counsel attempted to elicit evidence of a black eye to make Ezra look bad. Without objection, the prosecutor then stated: "This was complete character assassination, and that's what it was. [Ezra] got executed in the bed and got assassinated in here before you. That's why it's frustrating. We don't fight back that way. That's not what we're supposed to do."

Appellant argues that the prosecutor improperly characterized defense counsel's attempts to document spousal abuse as "character assassination" of the victim. Again, we find these statements were permissible comment on the deficiencies in opposing

counsel's tactics. (See *People v. Redd* (2010) 48 Cal.4th 691, 736 [comments that defense counsel patronized police officer during cross-examination fell well within latitude allowed for comment upon deficiencies in counsel's tactics].) As the People note, the prosecutor's comments appear intended to persuade the jury that any past incidents of physical abuse perpetrated by Ezra did not warrant his execution while he slept in bed. Accordingly, there was no misconduct.

B. Reasonable Doubt Standard

Appellant argues that the prosecutor's closing argument "trivialized" the reasonable doubt standard and misstated the law by conveying to the jury that it should "view the premeditation element in first degree murder in the same manner as [it] would view the decision to stop at a yellow traffic light."[3] We disagree.

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[3] To illustrate the concepts of willful, deliberate, and premeditated, the prosecutor made the following argument:

"What do we have here? When we talk about willful, the definition is basically on purpose. I'm killing you on purpose. Deliberate, weighed the pros and cons. Know the difference between right and wrong. Know the difference between right and wrong. You weighed those pros and cons, ladies and gentlemen, you're deliberating. And every day we deliberate. We'll get to that. Premeditated, thought about beforehand. This is reflection. If you thought about it before you fired that gun, ladies and gentlemen, that's premeditation. It's simple. And we'll go through that example right now. Everyday decisions, when you see these signs. You see a stop sign, you see a traffic light, what are you doing, ladies and gentlemen, when you approach that stop sign? Better yet, what are you doing when you're approaching that yellow light? You see that yellow light and you're going to make a decision right then and there, either A, I'm going to go through the yellow light, make sure I beat the red light, or I'm going to slow down and stop for that red light. When you approach that intersection, you look to that left side to make sure there isn't a car coming across, look to the right side, making sure there's no car from the right side. You're going to check to see if there's pedestrians on that corner, you're going to see if there's a bicyclist on that corner, you're going to see if there's children present. And you're doing this really, really fast. Just scanning that whole area before you make that decision. You're making a decision whether it's safe to enter that intersection. That split second decision involves deliberation. Is it safe to enter? You're weighing the pros and cons. That is deliberation. If I go, what happens, a car sideswipes

"'[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 829–830, quoting *People v. Marshall* (1996) 13 Cal.4th 799, 831.)

Here, the prosecutor's argument did not misstate the law. The true test of premeditation and deliberation is not the duration of time, but the extent of the reflection. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) The prosecutor's example of quick decisionmaking from everyday life—the decision whether to stop at a yellow traffic light—correctly illustrated the meaning of "deliberate" and "premeditates" by arguing that appellant "weighed the pros and cons" in killing Ezra and "thought about [it] beforehand." This analogy did not misstate the definition of either term. Indeed, the jury was instructed: "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. The length of time alone is not determative." (CALCRIM No. 521.)

We also conclude that the prosecutor did not trivialize the concept of reasonable doubt. As appellant acknowledges, the prosecutor never referred to reasonable doubt when making the traffic light analogy. Nor did the prosecutor misstate the reasonable doubt standard. Thus, appellant's reliance on *People v. Nguyen* (1995) 40 Cal.App.4th

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me and I get hit. Or what happens if I hit somebody else? A child just comes right across the intersection, you strike that child because he's chasing a ball. You're making split second decisions. You're deliberating to determine whether what you're doing is going to be right or wrong. It's simple. And then you have premeditation which is basically weigh beforehand when you get to that intersection, I'm deciding to go through and you go through. You get to that intersection, I decide to stop, and I stop. Each and every one of you, myself included, His Honor, defense counsel, everyone, makes these kinds of decisions on a daily basis."

28 and *People v. Johnson* (2004) 115 Cal.App.4th 1169 is misplaced, because those cases equated everyday decisionmaking to the reasonable doubt standard of proof, rather than to explain the concept of premeditation or deliberation as an element of first degree murder.

In any event, any alleged error was not prejudicial. The trial court properly instructed the jury on the concept of reasonable doubt, reminded the jurors that what the attorneys said was not evidence, and that in case of conflicts, they must follow the law as given by the court. Thus, there is no reasonable likelihood the prosecutor's remarks misled the jury. (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

C. Speaking in Victim's Voice

The prosecutor began his rebuttal argument by speaking in the victim's voice: "I wish I was here. I wish I could tell you my side of the story. Because there's two sides to every story. I'll take out a coin. Heads or tails. There's two sides. I wish I could tell you what happened just before I got my head shot in the back of the head." Defense counsel objected, stating, "There's no evidence of what Mr. Davidson said." The trial court overruled the objection "at this point," and the prosecutor continued: "I wish I could tell you; but I can't, because my wife murdered me. I can't tell you how good of a man I was. I can't tell you how I provided for my family. I can't tell you how I took care of my kids. I can't tell you how much I did for this family. And I can't tell you yes, I did have an affair. I can't tell you that. I can't explain to you why I had an affair." The trial court then interjected stating, "I'm going to sustain the objection at this point. And the jury is to judge the case based on the evidence they've heard, and not speculate on what a victim may or may not have said. I'll sustain the objection at this point."

Appellant argues that speaking in the victim's voice was a "ploy" designed "to inflame the jury and garner sympathy and was an attempt to interfere with the impartial deliberations of the jury." The People assert that the prosecutor's comments were made in rebuttal to defense counsel's statements portraying Ezra as a morally corrupt person who deserved to die, and note that defense counsel referred to Ezra as a "retard and an

ass" approximately seven times during closing argument. The People argue that "the prosecutor's rhetorical use of the victim's voice merely pointed out what was already obvious to the jury: Ezra was not available to refute all of the allegations of physical and emotional abuse testified to by defense witnesses."

It is settled law that it is misconduct to appeal to the jury to view the crime through the eyes of the victim. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 ["We have settled than an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of a trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt"]; *People v. Fields* (1983) 35 Cal.3d 329, 361–362.) It is also misconduct to conduct a soliloquy in the voice of the deceased victim. (*Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712–713.)

Nevertheless, any prosecutorial error was cured by the trial court's immediate admonition to the jury "to judge the case based on the evidence they've heard, and not to speculate on what a victim may or may not have said." "[I]t is assumed the jury followed the admonishment and that prejudice was therefore avoided." (See *People v. Mendoza, supra,* 42 Cal.4th at p. 701 [declining to resolve whether prosecutor's comment was improper where trial court sustained defense objections and admonished the jury to disregard the comments]; cf. *People v. Duncan* (1991) 53 Cal.3d 955, 981 ["the curative effect of the admonition that immediately preceded the statements had a carry-over effect to encompass the latter statements as well"].) The jury was also instructed not to be influenced by "bias, sympathy, prejudice or public opinion."

Appellant argues that the admonition was ineffective in "unringing the bell." But courts have repeatedly held that appeals to victim sympathy can be cured by admonishment. (See *People v. Arias* (1996) 13 Cal.4th 92, 161; *People v. Medina, supra,* 11 Cal.4th at p. 759 [no prejudice caused by prosecutor asking jury to "'do the right thing'" and to "'do justice'" for the victim]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 [trial court's failure to admonish jury to disregard prosecutor's asking jurors to "'[s]uppose . . . this had happened to one of your children'" did not prejudice defendant]; *People v. Velez* (1983) 144 Cal.App.3d 558, 569 [prosecutor's statement that "'we

wouldn't be here if someone were not dead'" was improper argument, but trial court's admonition not to let emotions govern verdict was adequate to cure any potential prejudice].)

Finally, as discussed *ante*, the evidence of appellant's guilt of first degree murder was overwhelming. There is "no reasonable probability that the prosecutor's appeal to the jurors' sympathy for the victim affected the verdict rendered. [Citation.]" (*People v. Fields*, *supra*, 35 Cal.3d at p. 363; see *Drayden v. White*, *supra*, 232 F.3d at pp. 713–714 [no due process violation resulted from prosecutor's soliloquy of victim during closing argument where, had the prosecutor delivered exactly the same speech in the third person, it would have been proper; court instructed jury that attorney's statements were not evidence and jury must not be influenced by sympathy; and evidence of first degree murder was very strong].)

D. Addressing Individual Jurors

Finally, appellant argues that the prosecutor committed misconduct by addressing jurors individually during closing argument.

In discussing the concept of implied malice, the prosecutor stated the following: "Let me give you an example. Juror No. 7, you got an apple on your head. Okay. Juror No. 4, you got a gun in your hand. I'm just kidding Juror No. 7. Juror No. [4] is going to shoot that apple. She has no intent of killing you. But she expends that gun for the sole purpose of shooting that apple. What happens if Juror No. 4 misses? She's guilty of murder. She strikes you. Why, ladies and gentlemen of the jury? Because we know that a gun is dangerous. We know that it's deadly. We know that the natural probable consequences of an act of shooting at somebody could lead to death. That's implied malice. Yes, I know it's dangerous but I don't care. I'm going to try to shoot that apple. And if I strike Juror No. 7, okay. Who cares. But you're still guilty of murder because you harbored that implied malice."

Appellant is correct that "arguments should be addressed to the jury as a body and the practice of addressing individual jurors by name during the argument should be

condemned rather than approved[.]" (*People v. Wein* (1958) 50 Cal.2d 383, 395.) Nevertheless, "it does not follow that such conduct is necessarily prejudicial in any given case." (*Id*. at pp. 395–396; accord, *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 474.) Here, neither the juror's names nor personal characteristics were mentioned. The jury was instructed that the prosecutor's argument was not evidence, and the evidence of express malice was strong. There is no reasonable probability the jury would have reached a verdict more favorable to appellant absent the challenged comments.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ