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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. RAYMOND EARL JACKSON, JR., Defendant and Appellant.	B275834 (Los Angeles County Super. Ct. No. BA435999)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Affirmed.

Gail Harper, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Raymond Earl Jackson, Jr. (defendant) appeals from his murder conviction, contending that the audio portion of a video of the murder should have been excluded as irrelevant and as inadmissible testimonial hearsay based on the United States Constitution; that the trial court erred in failing to give certain sua sponte jury instructions; that the prosecutor committed prejudicial misconduct in closing argument; that defense counsel rendered ineffective assistance by failing to object to the alleged misconduct; that permitting the court reporter to read a response to a jury question in the jury room violated defendant's constitutional rights to a public trial and to be present with counsel; and that the cumulative effect of all such errors requires reversal. Finding no merit to defendant's contentions, we affirm the judgment.

BACKGROUND

Defendant was charged with the murder of Joel Fraticelli (Fraticelli), in violation of Penal Code section 187, subdivision (a).[1] It was also alleged that in the commission of the offense, defendant personally used a deadly and dangerous weapon, a fixed-blade knife, within the meaning of section 12022, subdivision (b)(1). A jury convicted defendant of second degree murder, and found true the deadly weapon allegation. On June 27, 2016, the trial court sentenced defendant to 15 years to life in prison, plus one consecutive year due to the deadly weapon enhancement, for a total of 16 years to life. Defendant was ordered to pay mandatory fines and fees, and was granted 430 actual days of presentence custody credit.

Defendant filed a timely notice of appeal from the judgment.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

Evidence presented

Fraticelli was stabbed to death on April 22, 2015. For a few days before that, defendant spent time with him, Tamira Leeper (Leeper), Austin Sun (Sun), and Gurindeep Bhatti (Bhatti). Leeper and Sun both testified at trial.

Leeper testimony

Leeper testified that she had known defendant and Sun for about a month before Fraticelli's death, that she had met Bhatti through defendant about a week earlier. She met Fraticelli through defendant a few days before Fraticelli's death. Leeper had a sexual relationship with Sun, but denied that he was her boyfriend. She claimed that she paid Sun to drive her around. Leeper, defendant, and the other three men stayed at a motel for two days. During this time they went together to several stores such as Ross, Target, and CVS. On both the day of the stabbing and the day before, all members of the group used drugs. Leeper used heroin and she, defendant, and Fraticelli all smoked methamphetamine together. Sun used only marijuana, occasionally joined by Leeper and defendant. Leeper never saw any of them sober and she thought that whatever clashes the men had during this time were made worse by the drugs.

Leeper testified that Tuesday night, April 21, she went into a Ross store while the others stayed behind in Sun's truck. When she returned Sun was upset because she had taken too long and he wanted to leave. Sun had begun removing her belongings from his truck. The two argued. Sun pulled out a knife and threatened her with it, putting the knife directly to her face until defendant said, "Hey, that's a woman. What are you doing?" Sun turned the knife toward defendant, but defendant managed to calm the situation down. Leeper then fell asleep or passed out, and was not aware of any further interaction between defendant and Sun. She did not recall where they went because she was

high on drugs, but remembered having sex with defendant in the truck after they parked.

Leeper woke up the next day in a parking lot. Defendant was sleeping next to her. Fraticelli was in the driver's seat, holding the same knife Sun had displayed the day before, cleaning his fingernails with it in an "aggressive" manner. Defendant woke up, saw Fraticelli with the knife, got out and went around the truck to the open driver's window, grabbed the knife, and threw it. Leeper thought defendant got out of the truck because Fraticelli was holding the knife, and she explained "it was obvious he didn't know what he was going to do with the knife because he was coming at us in like a mode or way. He was trying to get out of the truck to try to defend himself and I don't know."

After defendant threw the knife, he told Fraticelli to get out of the car and fight like a man, or something to that effect. Fraticelli got out of the truck and they fought with their fists. Leeper began gathering her belongings so she would be prepared to leave if the police came. As a result she did not see defendant pick up the knife or walk toward Fraticelli. She heard Sun yelling at them to stop. Leeper said she saw Fraticelli run toward the area where the knife had been thrown, with defendant chasing him, but did not see anything in defendant's hands.

When Leeper yelled that she had the keys to the truck, Bhatti and defendant got into the truck and defendant drove away, leaving Fraticelli and Sun behind. Bhatti had the knife, which he handed to defendant after they had traveled about two blocks. Defendant then threw it out the window. Defendant drove recklessly a bit after that, causing two flat tires until he finally stopped at the parking lot of an apartment building. The three then took their belongings from the truck and walked to a

bus stop. Bhatti disappeared, and Leeper and defendant took a bus to his grandfather's house where they rested and showered.

That night defendant told Leeper he may have accidentally hurt Fraticelli. Leeper gestured to the area of her heart and testified that defendant said that he had stabbed Fraticelli there. Leeper admitted that she told a detective that defendant said he thought he might have killed someone, but claimed she was pressured to make that statement. Leeper testified that defendant did not say how many times he had stabbed Fraticelli, but she acknowledged telling the police that defendant said that he had stabbed Fraticelli twice.

Sun testimony

Sun testified that he met Leeper about a week before the stabbing, and met defendant three days before, on a Sunday. Sun admitted having sex with Leeper, but denied that they were involved in a relationship. He also denied that Leeper paid him to drive his truck, claiming he did it for her as a favor. They picked up defendant's friend Bhatti on a Sunday, and the three spent the next two nights at a motel. On Tuesday, defendant introduced them to Fraticelli, and they decided to go to a Target store to steal merchandise. Sun and Fraticelli remained in the truck for about four or five hours after the others went into the store. When Sun drove to the front of the store, he found them sitting outside. Sun denied having an argument, claiming that he just told them he was ready to leave because they had been there so long.

They all then went to a Ross store, about nine miles away. Again, defendant, Leeper, and Bhatti went inside while Sun and Fraticelli remained in the truck. Sun and Fraticelli agreed that it would be a good idea to get away from the other three and from the situation, and they both wanted to go home. As they were taking the others' belongings out of the back of the truck, Leeper

came outside, saw what they were doing and became angry. Sun yelled at her that he wanted to leave, and offered to drop the three of them off somewhere. Sun admitted that he had retrieved his knife from inside the truck, but he denied having brandished it, threatened Leeper with it, or held it to her face. Defendant and Bhatti were also upset to see their belongings removed from the truck. Sun admitted that he threatened defendant but claimed he made no attempt to use the knife. He said, "I will cut you with the knife," and "I will kill you." During the confrontation defendant grabbed a bong from the back of the truck, broke it, and raised it up in a threatening manner toward Sun. Fraticelli put his arms around Sun from behind and said, "Don't worry about it. Let's just leave." Bhatti, who had not been involved in the argument, agreed to let Sun drop him off somewhere, and he got into the truck.

Defendant decided that it would be best to leave because they were making a lot of noise and were drawing attention. Sun agreed and they all got into the truck. As Sun started driving defendant, who was sitting next to Sun said, "I can kill you so easily." Sun found the remark upsetting, so he pressed the gas pedal, drove as fast as he could, took his hands of the wheel for a few seconds, and said, "Kill me then." Bhatti, who was in the backseat with the others, told Sun to slow down, but Sun sped on for another quarter mile. After Sun's speed had reached about 80 miles per hour, defendant reached over and punched Sun in the nose. Sun slammed on the brakes, grabbed his bleeding nose, and placed his hand on defendant's throat in an attempt to push him out of the truck. The effort failed as the door was closed. Sun then cooled off and continued driving. Both men pretended that nothing had happened.

At Bhatti's suggestion, they went to Hollywood and parked in a liquor store parking lot where Sun and Bhatti walked around

while defendant, Leeper, and Fraticelli stayed in the truck. When Sun and Bhatti returned, Fraticelli was outside. The three men then waited while defendant and Leeper had sex in the back seat of the truck. Sun was tired, wanted to leave, and asked who had a driver's license. Fraticelli was the only one who did, so Sun asked him to drive, and then fell asleep in the passenger seat. Sun woke up momentarily around 3:00 a.m., and realized they were still in the same parking lot. They were still there when he woke up again at 7:30 a.m.

Fraticelli saw Sun's knife and admired it. He then offered to trade for it with his speaker. Sun agreed, gave Fraticelli the knife, saying it was dirty and should be cleaned. Fraticelli began to clean it with an alcohol wipe. At about 8:00 a.m., defendant awoke and said, "You better be able to use that." Defendant and Fraticelli began arguing, calmly at first and then it became more heated. Defendant got out of the truck, walked to the driver's window, and continued the argument. Fraticelli sheathed the knife and tried to get out of the truck, but defendant stopped him by slamming the door closed.

Sun became upset and picked up a piece of plywood from the ground, planning to use it to hit defendant. Bhatti said "Don't do that," so Sun put down the board and began recording the argument with his phone. Though a few blows were landed by each man, there were no hard punches. Defendant then picked up the knife, pulled it from its sheath and as he walked toward Fraticelli making rotating and thrusting motions with the knife, defendant said, "Are you going to pay me back now, bitch?" Sun then saw the knife make contact. Fraticelli stepped back, grabbed his chest, and stumbled from behind the truck to another car, hit that car, stumbled across the parking lot and collapsed. As Sun called 911, defendant drove off with Leeper in Sun's

truck. Sun applied pressure to Fraticelli's wound and wrapped a bystander's scarf around it, but Fraticelli died.

The videos and other prosecution evidence

Sun's video was played for the jury, in addition to a 40-second video taken by witness Karen Sanchez, who was unavailable to testify. Sun's video shows two men fighting, pushing and backing off occasionally, and then making some contact. Defendant can be heard telling Fraticelli, "I wouldn't walk to the car 'cause literally I will strangle you." Defendant is then filmed walking a few yards away from Fraticelli to the place where he had thrown the knife, picking it up, pulling it out of its sheath, and then walking directly back toward Fraticelli. An off camera voice is then heard saying, "No, no, no, no," just before defendant stabs Fraticelli with a single quick thrust. Defendant then removes the knife just as quickly. Fraticelli immediately backs out of view, followed by defendant.

On the Sanchez video, which was taken through a window screen a distance away, Sun is heard saying, "Get an ambulance!" A voice is heard saying "Oh my God. [Gasp] My god." And then, "My God. The guy -- there's a guy that cut the other one. Uh, he fell."

Members of the Los Angeles Police Department fugitive task force arrested defendant the next day, after defendant emerged on a bicycle from a residence in Pacoima. As police followed him, defendant turned his head toward one of the marked police vehicles and then began to pedal faster away from them, until he crashed his bicycle next to a parked car. As he was taken into custody, blood was observed on his shoes, which were then turned over to detectives. DNA obtained from the blood on the shoes was analyzed and determined to match a DNA sample taken from Fraticelli.

When Deputy Medical Examiner Kevin Young performed an autopsy on Fraticelli, he found two stab wounds, one to the heart and another to the rib cage, near the heart. The two wounds were about inch and a half apart, with a depth of three to four inches. Dr. Young testified that the wounds could have been caused by a single stabbing, if the knife was pulled out at a different angle. If so, the knife had to have been pulled out at least two inches, moved up about an inch and a half, and then back in two inches to create the two wounds. If not, they were two completely separate stab wounds, with just one piercing the heart. There was no way to know which came first. Either wound was consistent with Fraticelli staggering around as he did.

DISCUSSION

I. The Sanchez video

A. Defendant's objection to the Sanchez video

Defendant contends that the audio portion of the Sanchez video should have been excluded as irrelevant, and that playing it violated his constitutional right of confrontation under the Sixth Amendment.

Prior to trial, defendant objected to the audio portion of the Sanchez video on the grounds of relevance, hearsay, and a lack of foundation. The trial court deferred ruling until after it viewed the video. It was at that time that defendant added an objection based upon the Confrontation Clause. The trial court overruled the hearsay and confrontation objections, finding the audio to consist of spontaneous statements. The court ruled that the video could be authenticated by a witness who observed the events, since the witness who recorded the video would not be called to testify, and thus overruled the foundation objection. The court found the audio probative regarding the stabbing.

Although defendant separately argues the relevance and confrontation contentions, he conflates the two claims of error for purposes of discussing the standard of review and prejudice, suggesting that both issues should be reviewed de novo, and that prejudice for both issues should be analyzed under the test applied to federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). We first address the contention that admission of the audio portion of the video violated the Confrontation Clause.

B. Confrontation Clause

The Confrontation Clause bars the use of testimonial hearsay unless the declarant is unavailable to testify and defendant was afforded a prior opportunity to cross-examine that witness. (*Crawford v. Washington* (2004) 541 U.S. 36, 62, 68 (*Crawford*.) "[I]n determining whether a statement is testimonial, 'standard rules of hearsay, designed to identify some statements as reliable, will be relevant.' [Citation.] In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.' [Citation.]" (*Ohio v. Clark* (2015) 576 U.S. __, [135 S.Ct. 2173, 2180], quoting *Michigan v. Bryant* (2011) 562 U.S. 344, 358; see also *People v. Rangel* (2016) 62 Cal.4th 1192, 1214-1215.)

"Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. [Citation.]" (*Ohio v. Clark*, *supra*, 35 S.Ct. at p. 2182.) For example, an "off-hand, overheard remark" is not testimonial, even if it is inadmissible hearsay. (*Crawford*, 541 U.S. at p. 51; cf. *Ohio v. Clark*, at p. 2181 [child's statements to his preschool teachers]; *People v. Riccardi* (2012) 54 Cal.4th 758, 833 [husband's spontaneous statements to his wife],

disapproved on another ground in *People v. Rangel, supra*, 62 Cal.4th at p. 1216; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1270-1271 [abuse victim's spontaneous statement to her brother-in-law]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 813 [child's spontaneous statement to his aunt]; *People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19 [statement made to school friend], disapproved on another point in *People v. Riccardi*, at p. 824, fn. 32.)

In addition, "'[s]tatements are nontestimonial [even] when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,'" such as a 911 call. (*Ohio v. Clark, supra*, 135 S.Ct. at p. 2179, quoting *Davis v. Washington* (2006) 547 U.S. 813, 822 [primary purpose of 911 call is ordinarily to describe current emergency circumstances, not to prove a past fact].) "Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination. [¶] This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements 'relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,' [citations], are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood. [Citations.]" (*Michigan v. Bryant, supra*, 562 U.S. at p. 361.)

In light of these authorities and considering all the circumstances, viewed objectively, it cannot be said that the purpose of Sanchez's excited utterance was testimonial. There is no reason to conclude that Sanchez was speaking to law

enforcement; she was not describing past events, but rather events as they were occurring; and her several exclamations of "Oh my God," indicated that she was recording a crime because the event was shocking, not because she had a future criminal prosecution in mind.

Defendant acknowledges the primary purpose test enunciated by the United States Supreme Court and more expansively explained in *Ohio v. Clark*. However, he argues that because "the prosecutor *treated* Sanchez's comments as testimony . . . , the audio of her statements was 'testimonial.'" (Italics added.) Defendant explains his argument as follows: "Even though Sanchez's statements on the video might not appear to have been testimonial at the time she made them, the government used them to make an end-run around the 'testimonial' rule by asking the jury to speculate about what Sanchez saw after the first stabbing."

In essence, defendant urges a new rule under which recorded statements would be *treated* as testimonial whenever law enforcement *obtains* the recording for purposes of admitting it at trial. Such a rule would, in effect, overturn the United States and California Supreme Court precedents describing testimonial hearsay as a statement which, *at the time it is produced, made, or procured*, is done so "'with a primary purpose of creating an out-of-court substitute for trial testimony.'" (*People v. Dungo* (2012) 55 Cal.4th 608, 624-625, quoting *Bryant*, *supra*, 562 U.S. at p. 358, and other cases; see also *Ohio v. Clark*, *supra*, 135 S.Ct. at p. 2183.) 911 calls would cease to be admissible, in derogation of Supreme Court authority. (See *Ohio v. Clark*, at p. 2179; *Davis v. Washington*, *supra*, 547 U.S. at p. 827.) We decline to adopt defendant's proposed new rule. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

C. The audio was harmless

If the Sanchez statements had been testimonial, we would find any error in admitting them to be harmless beyond a reasonable doubt. The defense never claimed that defendant did not stab Fraticelli. Sun's video clearly shows defendant walking several yards to the knife, returning with it, and quickly stabbing Fraticelli in the area of his heart. Defendant contends that Sanchez's narration filled an evidentiary gap created when Fraticelli backed out of view in Sun's video and defendant followed him. However, neither does the Sanchez video show what happened. Furthermore, the action depicted in that video was taken from an upper floor window on the far side of the parking lot, and was obscured by a screen. The narration did no more than corroborate what was seen in Sun's video. At most, it was cumulative.

Defendant argues that the Sanchez exclamations gave the prosecutor fuel to speculate that defendant stabbed Fraticelli a second time, and that the second stabbing demonstrated intent to kill and premeditation. He argues that without the exclamations and the prosecution's speculation, he might have been convicted of manslaughter under the defense theory of heat of passion. The prosecutor's argument addresses only the possibility that Sanchez had a complete view of the stabbing: "So whether or not she could see behind that truck and saw what the defendant did, it's not clear. She could have been referring to the earlier cut. But in terms of the entirety of what she said, she said it was after he decided to cut the other one. And remember when he falls? 'Oh, he fell.' So based on her statement, it appears she had seen that happen. All right? . . . Who knows how many times the defendant stabbed the victim? Two people. Right? The victim, who's dead, and the defendant. Because everyone else' s attention was there. All right? And possibly the person who

narrated the cell phone *if she saw* that second stabbing." (Italics added.)

As respondent notes, the trial court instructed the jury on two separate occasions that counsel's statements were not evidence. Prior to the prosecution's opening statement, the court instructed: "Nothing that the attorneys say is evidence. In their opening statements and closing argument, the attorneys will discuss the case. But their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence." During the prosecutor's final argument, the trial court again stated, "Ladies and gentlemen, remember counsel's argument is not evidence. You will decide what the facts are, whether they are true or not." "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) This presumption applies equally to the trial court's instruction that the arguments or counsel are not evidence. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469.) The verdict of second degree murder supports the presumption that the jury did not accept the prosecutor's theory that Sanchez might have seen a second stabbing, as it did not find premeditation.

Moreover, the evidence overwhelmingly supported the jury's rejection of defendant's heat of passion defense. Voluntary manslaughter based on heat of passion has both a subjective element, that is, a killing actually done in the heat of passion, and an objective element, which requires that the heat of passion resulted from provocation "'such that an average, sober person would be so inflamed that he or she would lose reason and judgment.' [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 585; § 192, subd. (a).)

Malice was well established here by the manner in which defendant killed the victim. Defendant walked several yards to pick up the sheathed knife, unsheathed it and made rotating and thrusting motions with it before stabbing Fraticelli forcefully into the area of his heart. The medical examiner found two stab wounds, one to the heart and another about an inch and a half away from the heart, with a depth of three to four inches. He testified that while the wounds could have been caused by a single stabbing if the knife had been pulled out at a different angle, moved up, and then thrust back in. Otherwise, they were two separate stab wounds, with just one piercing the heart. Both possible actions are consistent with an intent to kill. Furthermore, Leeper told the police defendant admitted to her that defendant had stabbed Fraticelli twice.

The evidence of heat of passion was weak. To be legally sufficient, "provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim," as measured under an objective standard. (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.) "A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion. The claim of provocation cannot be based on events for which the defendant is culpably responsible. [Citations.]" (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83-84.)

Both the testimony and video evidence suggest that defendant was the initial aggressor and never sought to withdraw from the conflict. Fraticelli was seated in the driver's seat of the truck while defendant slept in the back seat. Though

Leeper thought Fraticelli was aggressively cleaning his fingernails, Sun testified that he was cleaning the knife. Neither witness testified that Fraticelli threatened defendant with the knife. On the contrary, when defendant awoke, he immediately told Fraticelli that he had better be prepared to use it, before aggressively going to the driver's side of the truck. After Fraticelli sheathed the knife, defendant prevented Fraticelli from opening the door, reached through the open window, took the knife, threw it away, and then told Fraticelli to get out of the car and fight like a man. Sun testified that there were no hard punches from either man, and neither landed many blows. The video confirms that defendant and Fraticelli were mostly circling each other, and after sparring in this manner for less than a minute, defendant walked several yards to the knife, picked it up, and walked back to Fraticelli, who was not advancing or threatening defendant, and thrust the knife into Fraticelli's heart. It does not appear from these facts that any rational jury would have found that Fraticelli's behavior amounted to provocation "'sufficient to excite an irresistible passion in a reasonable person; one of ordinary self-control.'" (*People v. Oropeza, supra*, 151 Cal.App.4th at p. 83.)

Moreover, evidence of defendant's subjective state of mind was even weaker than the evidence of provocation. Leeper testified that though she was not certain, she thought defendant got out of the truck to try to defend himself when he saw Fraticelli with the knife, coming at them "in like a mode or way." As defendant did not testify and there was no testimony from any witness regarding defendant's state of mind, at most the evidence showed anger from an aggressive person. We thus conclude beyond a reasonable doubt that the result would not have been different had the Sanchez audio been excluded.

D. Relevance

Defendant contends that the exclamations of "Oh my God," "there's a guy that cut the other one," and "he fell," were irrelevant under the definition of Evidence Code section 210, because the facts that defendant stabbed Fraticelli and that Fraticelli fell were not in dispute. Under that statute, "'[r]elevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "'The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]'" (*People v. Heard* (2003) 31 Cal.4th 946, 973; Evid. Code, § 350.)

Defendant does not argue that the audio had no tendency in reason to prove that Fraticelli was stabbed by a man in the Hollywood parking lot, but argues that the audio was irrelevant because the stabbing was undisputed, while the disputed material issue was whether defendant stabbed Fraticelli twice, which would have rebutted heat of passion. Defendant then suggests that because the Sanchez video failed to resolve that issue, it was irrelevant.

Defendant makes no prejudice argument separate from his contention that the admission of the audio prejudicially violated his right of confrontation. We rejected that claim above, and as "the application of ordinary rules of evidence does not implicate the federal Constitution, . . . we review allegations of error under the 'reasonable probability' standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 336.) As we have already concluded that the admission of the audio portion of the Sanchez video was harmless under the more stringent standard of *Chapman*, we conclude that

if the court erred in admitting the audio, it was harmless under the *Watson* standard as well.

II. *Dewberry* instruction

Defendant contends that the trial court erred in failing to give a sua sponte instruction in the language of CALJIC No. 8.72 or its equivalent.[2] Citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282, defendant further contends that the omission effectively lowered the prosecution's burden of proof and amounted to structural error, thus requiring automatic reversal of all counts without regard to prejudice.

Defendant relies on *People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*), in which the California Supreme Court held that it was error to refuse a similar instruction proffered by the defendant. (*Id*. at pp. 555-557.) The error in *Dewberry* was "[t]he failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, [which] left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder." (*Id*. at p. 557.) The court ruled that "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has

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[2] CALJIC No. 8.72 reads: "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder."

been committed, they must find the defendant guilty only of the lesser offense. [Citations.]" (*Id.* at p. 555.)

As the court later explained, however, *Dewberry* did not require a specific instruction or particular language, so long as the instructions fulfill the same function of requiring "the jury, where it had a reasonable doubt as to *any included or related offenses or degrees*, to find defendant guilty of the lesser included or related offense or lesser degree, that is, to give defendant the benefit of any reasonable doubts it may have had." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262-1263.) In determining the adequacy of the instructions given, the reviewing court considers the entire charge, as "'"[t]he absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole."'" (*Id.* at p. 1248.) We presume that jurors are "able to understand and correlate instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Here, the trial court did not give CALJIC No. 8.72, because it used CALCRIM instructions.[3] The trial court instructed that defendant was presumed innocent and that the People were required to prove his guilt beyond a reasonable doubt (CALCRIM No. 220). The court instructed that murder and manslaughter were types of homicide, that manslaughter was a lesser offense to murder, and the court gave standard CALCRIM instructions regarding first and second degree murder, voluntary manslaughter, as well as the People's burden of proof as to each. (CALCRIM Nos. 500, 505, 520, 521, 570, 571.) As read by the

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[3] In 2005, the California Judicial Council adopted CALCRIM as the official instructions for use in the State of California, added California Rules of Court, rule 2.1050, which states that "'[u]se of the Judicial Council instructions is strongly encouraged.'" (*People v. Thomas* (2007) 150 Cal.App.4th 461, 465.)

trial court, CALCRIM No. 505 instructed in relevant part: "The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter." CALCRIM Nos. 520 and 521 instructed that if the jury found that defendant committed murder, it must be second degree murder unless it found first degree murder beyond a reasonable doubt. In relevant part CALCRIM No. 570 instructed: "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." CALCRIM No. 571 instructed in relevant part: "The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder." The trial court then instructed with CALCRIM No. 640, regarding the verdict forms, stating in part: "You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of second degree murder or voluntary manslaughter only if all of you have found the defendant not guilty of first degree murder, and I can accept a verdict of guilty or not guilty of voluntary manslaughter only if all of you have found the defendant not guilty of both first and second degree murder."[4]

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[4] CALCRIM No. 640 is similar to CALJIC No. 17.10, which has been held to satisfy the requirements of *Dewberry*, as it is the logical equivalent of CALJIC No. 8.72. Thus it is not error to omit CALJIC No. 8.72. (See, e.g., *People v. Barajas* (2004) 120 Cal.App.4th 787, 791 793; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 793-794, disapproved on other grounds in *People*

Considering the instructions as a whole, the CALCRIM instructions adequately provided the jury with all the information needed to base its decision on the principle expressed in *Dewberry*, and did not fail to instruct the jurors to give defendant the benefit of any reasonable doubts. In particular, by following CALCRIM No. 640, the jury could not have convicted defendant of second degree murder unless the prosecution had established every element of second degree murder beyond a reasonable doubt.

Defendant points to evidence of Sun's threats to kill defendant and Leeper with the knife the preceding day, and Fraticelli's apparent alliance with Sun. Defendant argues that he "was entitled to have this evidence considered in the light of the rule of reasonable doubt" on the issues of self-defense, defense of others, and provocation. The omission of CALJIC No. 8.72 did not preclude the jury's consideration of this evidence in determining such issues beyond a reasonable doubt, as the trial court read CALCRIM No. 505, regarding justifiable homicide based on self-defense or defense of others. Within the instruction was the following: "The defendant's belief that he or someone else was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true. . . . If you find that the defendant received a threat from someone else that he reasonably associated with J. Fraticelli, you may consider that threat in deciding whether the defendant was

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v. Kurtzman (1988) 46 Cal.3d 322, 330; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 520-522; but see *People v. Crone* (1997) 54 Cal.App.4th 71, 76-79 [error but harmless]; *People v. Reeves* (1981) 123 Cal.App.3d 65, 69-70 [same], disapproved on a different point in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6.)

justified in acting in self-defense or defense of another." After just two additional sentences, the court read: "The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter."

As the instructions were adequate, we conclude that if the jury had been given the *Dewberry* instruction or CALJIC No. 8.72, in addition to the CALCRIM instructions, it is not reasonably probable that the result would have been different, under the test of *Watson*.

Defendant contends that the length of deliberations,[5] including juror questions, request for additional copies of the instructions, request to view the Sun video in slow motion, and for readback of the coroner's testimony, demonstrated that the case was close and that the jury had great difficulty in reaching a verdict. Where the evidence of guilt is contradicted and not overwhelming, jury questions and relatively long deliberations can provide *additional* indication of the closeness of a case. (See *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1294-1295.) Here however, as previously discussed, the evidence of defendant's mental state was limited, weak and speculative, while stronger evidence established that defendant acted with malice and that there was no legally sufficient provocation by the victim, "'such that an average, sober person would be so inflamed that he or she would lose reason and judgment.' [Citation.]" (*People v. Manriquez, supra*, 37 Cal.4th at pp. 584, 585-586.) Given this state of the evidence, the juror questions and requests "'could as easily be reconciled with the jury's conscientious performance of

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[5] Defendant calculates the time as 13 hours; however if the time for readbacks and breaks is deducted, it appears that the jury deliberated for approximately nine hours after four days of trial over a period of two weeks.

its civic duty, rather than its difficulty in reaching a decision.' [Citation.]" (*People v. Houston* (2005) 130 Cal.App.4th 279, 300-301, quoting *People v. Walker* (1995) 31 Cal.App.4th 432, 438.) Indeed, the state of the evidence was such that we can conclude beyond a reasonable doubt that omission of a *Dewberry* instruction or CALJIC No. 8.72 did not affect the verdict.

III. Mutual combat instruction

Defendant contends that the trial court erred in failing to give a jury instruction sua sponte supportive of his claim of self-defense, such as CALCRIM No. 3471.[6] The trial court instructed the jury on self-defense with CALCRIM No. 505.

CALCRIM No. 3471 *limits* the right to self-defense where one starts a fight or engages in mutual combat, in accordance with section 197, subdivision (3), which provides that homicide is justifiable when committed in lawful self-defense, but if the defendant "was the assailant or engaged in mutual combat, he must really and in good faith have endeavored to decline any further struggle before the homicide was committed." The instruction explains that a fight is mutual combat which began or was continued by express or implied mutual consent or agreement before the claim to self-defense arose; and that a person engaged in mutual combat has a right to self-defense only if he (1) "actually and in good faith tried to stop fighting;" (2) "indicated, by word or by conduct, to [his] opponent, in a way that a reasonable person would understand, that [he] wanted to stop fighting and that [he] had stopped fighting;" and (3) "[he] gave [his] opponent a chance to stop fighting;" however, where the defendant started the fight "used only non-deadly force, and the

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6 While defense counsel indicated to the court toward the end of trial that he *might* request a mutual combat instruction, he did not specify what instruction he would request, or mention it further.

opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend [himself] with deadly force and was not required to try to stop fighting." (CALCRIM No. 3471.)

Defendant argues that CALCRIM No. 3471 was necessary to make clear that even if he started the fight, he could still claim self-defense or unreasonable self-defense, depending on the circumstances. On the contrary; where, as here, the trial court has given an unqualified self-defense instruction and the question presented to the jury was whether defendant exercised that right in a reasonable manner when he stabbed the victim, CALCRIM No. 3471 is unnecessary. (See *People v. Johnson* (2009) 180 Cal.App.4th 702, 711.)

Moreover, a trial court must instruct sua sponte on defenses only "'if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) Requiring ""'*sua sponte* instructions [concerning defenses] which are inconsistent with defense trial theory or *not clearly demanded by the evidence* would hamper defense attorneys and put trial judges under pressure to glean legal theories and winnow the evidence for remotely tenable and sophistical instructions.'" [Citation.]" (*Id.* at p. 158, second italics added.)

Assuming for discussion that defendant and Fraticelli engaged in mutual combat, defendant has pointed to no evidence that Fraticelli used deadly force, or that defendant made any effort to withdraw from the conflict or to offer to stop fighting, and we find no substantial evidence to support any such findings. The Sun video shows that defendant ended any mutuality of the combat by walking over to the only deadly weapon known to be in

the area, picking it up, unsheathing it, and then returning with it to stab Fraticelli, who had stopped fighting, was not approaching or threatening defendant, and was unarmed. Under such circumstances, the use of the knife was necessarily an undue advantage, precluding a mutual combat form of manslaughter. (See *People v. Lee* (1999) 20 Cal.4th 47, 60, fn. 6.) There was thus no duty on the part of the trial court to give this instruction.

Failure to instruct on a lesser included offense or a defense is reviewed for prejudice under the reasonable probability standard of *Watson*. (*People v. Breverman, supra*, 19 Cal.4th at pp. 165, 177-178.)

Defendant contends that the omission of CALCRIM No. 3471 allowed the prosecutor to misstate the law of self-defense by arguing that if the defendant provoked and started the fight, creating the "scenario[,] [h]e cannot then say, oh, but then the victim did something else. If he starts it, if he starts the fight, that is it. You don't go past that. You don't ask about emotions." The prosecutor prefaced those statements with the required elements of a heat of passion defense, and was arguing that there was no legally adequate provocation *by the victim*. The prosecutor was clearly not making this argument in relation to self-defense, as that theory was not argued by either side in summation. There was thus no need to clarify that the argument did not relate to self-defense.

The overwhelming evidence that defendant took unfair advantage of the victim, and the lack of substantial evidence of the elements enumerated in CALCRIM No. 3471, as summarized above, demonstrate the absence of any reasonable probability of a more favorable result had the instruction been given. Indeed, we conclude that no rational jury would have found manslaughter or justifiable homicide under the facts of this case.

IV. Prosecutorial misconduct

Defendant contends that the prosecutor committed prejudicial misconduct in closing arguments, which resulted in a violation of the Sixth and Fourteenth amendments to the United States Constitution.

A prosecutor's improper remarks violate the federal constitution when they are so egregious that they infect the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Otherwise, misconduct violates state law if the prosecutor has used deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Hill*, at p. 819.) Where the prosecutor engaged repeatedly in unprofessional conduct, the "'critical inquiry on appeal is not how many times the prosecutor erred but whether the prosecutor's errors rendered the trial fundamentally unfair or constituted . . . reprehensible methods . . . .' [Citation.]" (*People v. Peoples* (2016) 62 Cal.4th 718, 793-794 (*Peoples*).)

We paraphrase the alleged instances of misconduct asserted by defendant as follows: (1) exploiting the trial court's error in admitting the audio portion of the Sanchez video in violation of defendant's confrontation right, and asking the jurors to speculate about facts not shown in the video; (2) misstatement of legal standards to be applied in deciding whether provocation was legally sufficient to support a heat of passion defense, by arguing that the instigator of a fight may not claim heat of passion, that the required passion is the equivalent of being "blinded by emotion," and by arguing that the provocation must be such that would motivate an average person to kill; (3) taking advantage of the court's failure to give a mutual combat instruction by arguing that if defendant started the fight, he cannot claim self-defense or imperfect self-defense; and (4)

stating that manslaughter was a question of morality or of justice.

During trial defense counsel's objection to the claim that manslaughter was a moral question, was sustained. However, counsel did not assign misconduct and made no request for an admonition. "In order to preserve a claim of prosecutorial misconduct for appeal, the defense must make a timely objection at trial and request an admonition. [Citations.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1146.) One or the other is not enough; both objection and request for an admonition are required. (See *People v. Prieto* (2003) 30 Cal.4th 226, 259-260.) Further, the defendant's objection must have been on the same ground urged on appeal and included an assignment of misconduct, as well as a request that the jury be admonished to disregard the misconduct. (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) The claim is reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct. (*Gutierrez, supra*, at p. 1146.)

Defendant acknowledges that trial counsel did not object to all or most of the instances of alleged misconduct, but claims futility as an excuse for failure, because "the court began to overrule the objections after the first two." Defendant's argument falls short of demonstrating futility. To be excused from the necessity of either a timely objection or a request for admonition on the ground of futility, the defendant must explain with "specificity as to why [a] particular objection would have fallen upon deaf ears." (*Peoples, supra*, 62 Cal.4th at p. 797.) As respondent has aptly argued, a failure to show that a curative admonition would have been ineffective forfeits the issue of misconduct on appeal. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.) Defendant has made no attempt to argue that admonitions would not have been effective. As he has failed to

show the probable overruling of objections or the probable ineffectiveness of admonitions, his claim of futility fails.

Defendant next claims ineffective assistance of counsel for failing to make adequate objections or request admonitions. The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) It is defendant's burden to demonstrate that trial counsel was inadequate and that prejudice resulted. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Prejudice is shown by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, at p. 694.)

We presume that counsel's tactical decisions were reasonable, and where, as here, "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) "[A] mere failure to object to . . . argument seldom establishes counsel's incompetence. [Citations.]" (*People v. Ghent* (1987) 43 Cal.3d 739, 772.) "[C]ompetent counsel may often choose to forgo even a valid objection." (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.)

In particular, it may be a legitimate tactical decision not to repeatedly interrupt the prosecutor's possibly improper argument. (See *People v. Welch* (1999) 20 Cal.4th 701, 764.) After all, "'argument may be vigorous as long as it amounts to fair comment on the evidence, which can include . . . matters not in evidence, but which are common knowledge or are illustrations drawn from common experience . . . .' [Citation.] 'A prosecutor

may . . . "use appropriate epithets . . . ." [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) In this case, defense counsel could easily have made the reasonable tactical decision that his own arguments and the court's instructions were adequate to address some of the prosecutor's statements, and would thus not require objections or admonitions. For example, the prosecutor used the expression, "blinded by emotion," only *after* defense counsel used the expression, "seeing red" to convey the same concept. Defense counsel could reasonably refrain from objecting when the prosecutor correctly stated that heat of passion required the instigator to seek to withdraw from the conflict. (See *People v. Oropeza, supra*, 151 Cal.App.4th at pp. 83-84.)

In any event, we need not reach defendant's contention that the four categories of alleged misconduct were objectionable, as defendant has failed to demonstrate a reasonable probability that a more favorable determination would have resulted absent the alleged counsel errors. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1126.) First, the Sanchez video was not admitted in violation of defendant's right to confrontation, as defendant again contends. In addition, in part I*C* of our discussion, we have already determined that the evidence overwhelmingly supported the jury's rejection of defendant's heat of passion defense, and we concluded beyond a reasonable doubt that the result would not have been different had the Sanchez audio been excluded.

Defendant's second category of alleged misconduct -- that the prosecutor misstated the law regarding legally sufficient provocation to support a heat of passion defense -- was also harmless. Again, we have previously determined that overwhelming evidence supported the jury's rejection of defendant's heat of passion defense. Thus we also conclude that defendant suffered no prejudice from any incomplete statement as to when the instigator of a fight may claim heat of passion; or

from the prosecutor's use of the expression "blind rage" to mean an intense emotion; or from the argument that the provocation must be such that would motivate an average person *to kill*, rather than provocation which would cause a person of average disposition *to react* without due deliberation or reflection.[7] Moreover, the correct statement of this rule was explained in the instructions, along with the trial court's admonition: "You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We presume that the jurors understood and followed this instruction. (*People v. Gonzales, supra*, 51 Cal.4th at p. 940.)

Defendant's third alleged instance of misconduct was that the prosecutor took advantage of the court's failure to give a mutual combat instruction by arguing that if defendant started the fight, he could not claim self-defense or imperfect self-defense. The prosecutor did not so argue. The statements quoted by defendant concerned heat of passion, not self-defense or imperfect self-defense. The statements were made in the prosecutor's *rebuttal* argument, in which there was no mention of self-defense, as defense counsel never argued that the killing was justified. Furthermore the prosecutor did not mention imperfect self-defense, as defense counsel had not done so in his closing argument.

Finally, we not only determined that overwhelming evidence supported the jury's rejection of defendant's heat of passion defense, we concluded in part II of our discussion that

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[7] See *People v. Beltran* (2013) 56 Cal.4th 935, 939 (the question is whether provocation would cause an ordinary person of average disposition "to react from passion and not from judgment," not whether it "would cause an ordinary person of average disposition *to kill*").

overwhelming evidence established that defendant acted with malice. We thus discern no reasonable probability of a different result if the prosecutor had not said that manslaughter was a moral question, or if the jury had been admonished to disregard the statement.

In sum, defendant has failed to preserve the issue of prosecutorial misconduct for appellate review and has failed to demonstrate a violation of his Sixth Amendment right to the effective assistance of counsel.

V. Response to juror question

Defendant contends that the trial court violated his constitutional rights to counsel, a public trial, and to be present during all stages of his trial, when it permitted the court reporter to go into the jury room to instruct the jury in response to jurors' questions, unaccompanied by the court, counsel, or defendant.

The jury requested read back of some of the testimony given. It also asked for clarification of some of the instructions. Outside the presence of the jury, but in the presence of defendant and both counsel, the trial court stated for the record that the court reporter went to the jury room to read back testimony after discussions with both counsel. The court also explained: "[T]hat is exactly what occurred for all of the questions and the responses to their questions. . . . Counsel stipulated and agreed to the portions that were being read." There was no objection to the court's statements.

The only instruction defendant challenges is apparently the agreed-upon answer to the jury's following two requests for clarification of instructions: "What is the definition of a lawful excuse and an unlawful excuse? [¶] Can you provide examples to help us understand"; and, "understand section 520 need to be decided (guilty or not) then move to No. 521 (1st degree murder) and if not decided (guilty or not) then discuss 522

(manslaughter)." On each of the two Juror Request Forms (court's exhibits 1 and 2), the court wrote the following response: "read back of answer by reporter." The reporter did not transcribe the response she read to the jury and there was no express stipulation on the record.[8] With the agreement of both trial counsel, the court later certified the following in a settled statement: "On May 25, 2016, after continued discussions with counsel and stipulation by counsel to permit the reporter to read the statement to the jurors in the deliberation room, the court ordered the court reporter to read the following to the jurors: 'The instructions explain to you lawful and unlawful. The instructions explain to you the process in . . . 520, 521, and 522.'" The settled statement also reflects that the court reporter read the statement, and the entire action took two minutes.[9]

Defendant does not dispute that the court and counsel agreed on giving this response to the jury, but claims that the procedure involved a critical stage of the proceedings and resulted in a violation of his fundamental rights under the Sixth

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[8] After a pause in the proceedings during which the reporter read back the agreed response, the court stated: "The court has asked [both counsel] if they are agreeable [to] permitting our reporter to go back and read to the jurors what the court is giving as answers to their questions. That will be called a read back, if you will, the read back of the answer by the reporter, and then I don't have to get [defendant] up here and get dressed, et cetera and let's see what happens." The minutes state: "9:00 a.m., outside the presence of the jury: court and counsel confer as to jury's questions (court's exhibit #1 and #2). . . . [¶] The parties stipulate that the court reporter may readback the court's formulated response to their questions."

[9] Appellate counsel objected in the trial court to the settled statement and brought a motion in this court to have it stricken. The motion was denied.

Amendment to a public trial and to be present with counsel at such a critical stage. Defendant asserts that reversal is required without regard to prejudice

It is well established that the rereading of testimony is not a critical stage of the proceedings. (*People v. Ayala* (2000) 23 Cal.4th 225, 288.) Thus, due process does not require the defendant's personal waiver of his presence during readbacks. (*People v. Horton* (1995) 11 Cal.4th 1068, 1120-1121; see *People v. Fauber* (1992) 2 Cal.4th 792, 837.)[10] "In general, 'the defendant's absence from various court proceedings, "even without waiver, may be declared nonprejudicial in situations where his presence does not bear a 'reasonably substantial relation to the fullness of his opportunity to defend against the charge.'" [Citations.]' [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 538.) For example, defendant does not have the right to be present during discussion of the law between the court and counsel or discussions regarding appropriate instructions. (*Ibid*.) "[A] 'defendant is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his or her opportunity to defend the charges against him, and the burden is on defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial.' [Citations.]" (*People v. Horton, supra*, at p. 1121.)

We find the reading of an agreed-upon answer to a jury question to be analogous to testimony readback. This is

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10 Defendant has cited no case which has held that the court reporter's reading of an agreed upon response to a jury question is a critical stage of the proceedings, although he has referred to several federal cases which have held that that an agreed upon rereading of testimony or instructions is *not* a critical stage. (E.g., *Musladin v. Lamarque* (2009) 555 F.3d 830, 842 & fn. 9, and cases cited therein.)

illustrated in *People v. Avila* (2006) 38 Cal.4th 491, 597-598 (*Avila*), where the California Supreme Court rejected a claim that the trial court's response to a request for readback, which included an instruction, was a critical stage under the Sixth Amendment. There, after a discussion between the court and all parties, it was determined that there was no testimony directly responding to the jury's request, and that the court reporter would instead read other testimony. As agreed, the judge and the court reporter went into the jury room, the judge told the jury what had been determined, and instructed: "'While she is reading to you, you may not deliberate or discuss the case in her presence. You need to wait until she finishes and has left the room, and then you may resume your deliberations.'" (*Id.* at p. 598.) The court held that any error in failing to obtain defendant's personal waiver in such a circumstance was at most statutory error under section 977, subdivision (b)(1), which calls for a written waiver signed by defendant.[11] (*Avila*, *supra*, at p. 598.) Here as in *Avila*, there was at most a statutory error, as defendant did not sign a written waiver as required by section 977, subdivision (b)(1). It is thus defendant's burden to demonstrate that he would have achieved a more favorable result absent the error. (*Avila*, at p. 598.)

Defendant's comparison with the extreme circumstances of *People v. Bradford* (2007) 154 Cal.App.4th 1390 is unavailing.

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[11] Section 977, subdivision (b)(1) provides that with exceptions not applicable here, "in all cases in which a felony is charged, the accused shall be personally present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present."

There, the judge "entered the jury room while the jury was deliberating, unaccompanied by counsel and with no court reporter, on four occasions. Each time, according to the judge's recollection as stated at the hearing to settle the record, the jurors posed questions to him concerning the instructions he had previously given them, and he responded to their questions." (*Id.* at p. 1413.) Upon finding that this was an unconstitutional intrusion into the jury's deliberative process, the court reviewed it for harmless error under the reasonable doubt standard of *Chapman*. (*Bradford*, at p. 1417; see also *People v. Oliver* (1987) 196 Cal.App.3d 423, 435-436 [court reporter's erroneous but silent presence while jury deliberated was subject to *Chapman* analysis].) Defendant complains that because the proceedings were not reported, it is unknown what the court reporter said to the deliberating jurors, suggesting that we cannot therefore assume that she was silent. On the contrary, the presumption that official duty has been regularly performed applies to court reporters. (*People v. Ayala, supra*, 23 Cal.4th at p. 289; Evid. Code, § 664.) We assume the court reporter followed the court's instructions, and conclude that there was no such intrusion into deliberations here as a result of the court reporter's two-minute reading of the agreed upon response to its questions.

As defendant did not object to the absence of a written waiver below, does not raise the issue here, and makes no effort to demonstrate prejudice, he may not now be heard to complain of the omission. (See *People v. Ayala*, *supra*, 23 Cal.4th at p. 288.) Regardless, as we discern no reasonable probability that defendant's presence would have borne any """reasonably substantial relation to the fullness of his opportunity to defend against the charge,""" we find the procedure to have been harmless. (*Ibid.* at fn. 8.)

VI. Cumulative error

Defendant contends that the judgment must be reversed because of the cumulative effect of all the asserted errors. Because "[w]e have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial," we must reject defendant's claim of prejudicial cumulative effect. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT