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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. MIKE A. CALDERON, Defendant and Appellant.	B278747 (Los Angeles County Super. Ct. No. BA409455)

APPEAL from judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed with directions.

Richard D. Miggins, 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, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Mike A. Calderon appeals the judgment entered following a jury trial in which he was convicted of two counts of first degree murder. (Pen. Code, § 187, subd. (a).)[1] The jury found true the special circumstance allegation that appellant committed multiple murders. (§ 190, subd. (a)(3).) As to count 1, the jury also found true the allegations that appellant personally used and intentionally discharged a firearm (a handgun), causing death. (§ 12022.53, subds. (b)-(d).) As to count 2, the jury found true the allegation that appellant personally used a deadly weapon (a knife) (§ 12022, subd. (b)(1)), but returned a not true finding on the section 186.22, subdivision (b)(1)(C) gang allegation. Following a bench trial, the court found true the prior serious felony allegation pursuant to section 667, subdivision (a)(1).

The trial court sentenced appellant on count 1 to a term of life without the possibility of parole, plus five years consecutive pursuant to section 667, subdivision (a)(1), and an additional 25 years to life pursuant to section 12022.53, subdivision (d). On count 2 the trial court imposed a term of life without the possibility of parole, plus one year pursuant to section 12022, subdivision (b)(1). Appellant received 946 days of presentence custody credit.

Appellant contends: (1) prosecutorial misconduct rendered the trial so fundamentally unfair as to violate appellant's constitutional rights to due process; (2) the trial court's refusal to instruct the jury on self-defense and voluntary manslaughter based on imperfect self-defense or provocation resulted in the

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[1] Undesignated statutory references are to the Penal Code.

denial of appellant's federal and state constitutional rights to present a defense, to due process, and to a fair trial; and (3) the trial court abused its discretion in denying the jury's request to read back defense counsel's closing argument. We disagree and affirm the judgment of conviction.

Appellant further seeks remand for reconsideration of his firearm enhancement pursuant to Senate Bill No. 620,[2] which amended section 12022.53, subdivision (h) to remove the prohibition on striking firearm enhancements. Because we find no realistic possibility that the trial court would exercise its new discretion under section 12022.53, subdivision (h) to dismiss the firearm enhancement in appellant's case, we decline his remand request. However, we do agree with the parties that appellant is entitled to an additional 366 days of presentence custody credits. Accordingly, the trial court is ordered to modify the judgment to reflect a total of 1,312 days' presentence custody credit, and to forward a corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

FACTUAL BACKGROUND

1. *Count 2: The 2005 murder of Gilbert Jaramillo*

On October 29, 2005, Carina Martinez hosted an outdoor Halloween party attended by about 150 to 200 people. Between 1:30 a.m. and 2:00 a.m., Carina broke up a fight in which two or three men were punching Carina's friend Gilbert, who was on the ground. Carina sent Gilbert up to the second level of the patio, and joined him a few moments later. Within seconds, Carina

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[2] Statutes 2017, chapter 682, section 2.

heard two gunshots. At the sound of the gunfire people began to scatter, jumping over the fences or running out the front gate. Carina went to the front yard and saw that someone had been shot. As Gilbert passed Carina on his way out, he said to her, " 'I'm sorry this happened. I'm sorry I messed up the party. I'll talk to you later, I'll give you a call tomorrow, I'm sorry.' " He then disappeared through the front gate.

Jose "Joey" Suarez went to Carina's Halloween party with a group of friends, including Ivan Mainor Banuelos and appellant. Joey had known Mainor since middle school, and was childhood best friends with appellant. During the party, Gilbert told Joey that he and his homies had stabbed "some fool[s]" "a gang of times" at a party the previous year. Knowing that Mainor and appellant had been stabbed at a party a year earlier, Joey related to them what Gilbert had said. A fight broke out, and Joey and Mainor started kicking and punching Gilbert. Mainor was chased from the fight, but returned with a knife and stabbed Gilbert once or twice in his right arm. Gilbert tried to run away but Mainor and appellant chased him. Gilbert tripped Mainor, and appellant continued the pursuit past the gate toward the street.

Joey was struck by a small caliber bullet, possibly a .22. After Joey returned home from the hospital, appellant and Mainor reported that Mainor had stabbed Gilbert first, and then appellant caught up to Gilbert and stabbed him "some more." Appellant told Joey he had stabbed Gilbert in the neck and possibly in the heart. According to Mainor, appellant and Mainor threw the knives in the sewer.

Gilbert suffered six stab wounds, including a fatal stab wound to the center of his chest which struck his heart. He also suffered blunt force trauma to his head, back, arms, and legs, consistent with being kicked and punched. Gilbert's body was found the morning after the party in the front yard of a house across the street from Carina's house. He was found lying on his right side with his face in the grass, and the muzzle of a gun protruding from under his face. The gun turned out to be a semiautomatic .40 caliber handgun. It had no round in the chamber, no magazine, and could not be fired. Gilbert was wearing a gun holster on his waist, and it appeared he may have been holding the gun when he died.

Joey and Mainor were both arrested and charged with Gilbert's murder. Both men pleaded guilty to involuntary manslaughter and served prison sentences. Appellant was also arrested in connection with the murder on February 20, 2007, but no charges were filed at that time. During an interview following his arrest, appellant admitted he was at the party, but claimed he arrived after the fighting was over, and was just walking up to the house as shots were fired and people started to run away. Appellant saw his friend Joey had been shot and was lying on the ground.

Appellant also told detectives about a party he attended in 2003 at which he had been stabbed and Joey was beaten. Later in the interview, appellant admitted that during the party Joey had pointed out the person who had stabbed appellant at the previous party. However, appellant denied involvement in any fight, having a knife at the party, or chasing anyone down. He denied stabbing anyone, and claimed, "[t]hat guy didn't attack me and I didn't do nothing to him." Eventually appellant admitted

"fighting with a lot of people," but told the detectives, "[a]ll I did was started swinging at people because I got hit."

2. *Count 1: The murder of Gorgonio Quintanilla on February 4, 2013*

Gorgonio Quintanilla lived with his parents in an apartment on Chanslor Avenue in Los Angeles. The morning of February 4, 2013, Gorgonio's mother, Horalia, noticed appellant sitting in the passenger seat of her son's red Honda del Sol, which was parked on the street. Gorgonio was inside the apartment. Gorgonio's sister, Elizender Moya, also saw appellant seated in the passenger seat of Gorgonio's red car that morning. When she asked Gorgonio who was sitting in his car, he replied, " '[a] friend.' " At one point the women saw appellant get out of the car and stand on the sidewalk as he talked on the phone.

Announcing he would be back soon, Gorgonio left the apartment. Horalia saw Gorgonio get into the driver's seat of his car with appellant in the passenger seat and drive away. That afternoon, Horalia and Elizender tried to call Gorgonio on his cell phone, but he did not answer. In the evening, when Gorgonio still had not returned home and after repeated unanswered calls, Horalia called the police. The next day, on February 5, 2013, shortly before 5:00 p.m., Gorgonio was found dead in his car on Grand Avenue and 74th Street near the 110 Freeway. The vehicle door was closed, and the body was in the driver's seat. Seven latent prints analyzed from Gorgonio's car belonged to appellant.

Cell phone records for February 4, 2013 showed Gorgonio's phone (T-Mobile No. XXX-XXX-3210) pinged off a tower near his apartment at 12:09 p.m., and records for the phone appellant was using that day (Sprint No. XXX-XXX-8531)[3] showed the phone using a tower near Gorgonio's residence between 12:02 p.m. and 12:27 p.m. Thereafter, the cell activity of both phones indicated travel away from Gorgonio's residence, north through Los Angeles, and into Hollywood. Between 3:14 p.m. and 3:29 p.m., both phones were in the area of the crime scene on Grand Avenue.

Gorgonio died from a single gunshot wound to the back of his head. There was no exit wound. No soot or stippling appeared around the wound, indicating the gun was fired from at least a foot and up to 10 feet away from the victim's head. The forensic pathologist who conducted the autopsy opined that a conservative estimate of the time of death was 12 to 20 hours before the discovery of the body, but it could have been several hours more.

A bullet fragment recovered from Gorgonio's head was a .38-caliber projectile, which could have been fired from a nine-millimeter Luger, a .380 automatic, or a ".38 special." The weapon used to kill Gorgonio was never found. But a couple of days before his death, Gorgonio had shown his friend Omar a .40 caliber gray and black semiautomatic handgun. After appellant's

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[3] The cell phone associated with phone number XXX-XXX-8531 was subscribed to appellant's girlfriend, Melissa Lopez. Appellant told a confidential jailhouse informant that the battery had died on his phone, and he was using his girlfriend's phone on the day of the murder.

arrest, police showed Omar a photo recovered from appellant's cell phone depicting a black and silver handgun.[4] The photo was dated February 10, 2013, and was found in a text message sent on February 11, 2013. The handgun appeared to be a .40 caliber and looked like the gun Gorgonio had shown Omar.

3. *Appellant confesses to both murders in recorded conversations with a confidential jailhouse informant.*

Appellant was arrested on March 26, 2013 in connection with Gorgonio's murder. At the police station he was placed in a cell with two confidential jailhouse informants, one of whom was wearing a wire. In the course of over 10 hours of recorded conversations between appellant and the informants, appellant admitted both murders. During these conversations appellant discussed his alibi for Gorgonio's murder, and explained his strategy for misleading the police in their investigation. Appellant said he had thoroughly wiped the car to get rid of his DNA. Appellant also admitted stabbing Gilbert in the chest, and confessed that Gilbert had been unarmed.

DISCUSSION

I. Asserted Prosecutorial Misconduct Based on References to the Charged Offenses as "Murders"

Appellant contends the prosecutor's frequent references to the charged homicides as "murders" constituted prosecutorial misconduct, which rendered the trial so fundamentally unfair as

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[4] Detective Vinluan testified that, in his experience, such a two-toned firearm is quite rare.

to violate appellant's state and federal constitutional rights to due process. He further asserts that the trial court's failure to admonish the prosecutor and to strike the references amounted to judicial misconduct. We conclude appellant forfeited any claim of prosecutorial or judicial misconduct, and because the prosecutor's characterizations of the charged crimes as "murders" did not prejudice appellant, defense counsel's failure to object to the references did not constitute ineffective assistance.

A. *Background*

During the examination of witnesses throughout trial, the prosecutor referred to the killings of both victims as "murders" over 50 times. These references fell into three broad categories: The prosecutor repeatedly used the word "murder" in questions to law enforcement witnesses about their roles in the investigations of both homicides; the prosecutor clarified the timing of certain events in the testimony of three lay witnesses by reference to the day of Gorgonio's murder; and in the course of examining the confidential informant about his conversations with appellant, the prosecutor referred to the "2013 murder," the "2005 murder," the "murder," the "murders," the "murder investigation," and the number of "murders" for which the informant received compensation in connection with this case.

None of these references drew an objection from defense counsel, nor did counsel otherwise bring the references to the court's attention or request any admonition.

B. *Appellant has forfeited his claim of prosecutorial misconduct.*

Our Supreme Court has held that a "killing" should not be "characterized as 'murder' in advance of a verdict so finding." (*People v. Garbutt* (1925) 197 Cal. 200, 209; see also *People v. Price* (1991) 1 Cal.4th 324, 480 ["it would be improper for a prosecutor to use the term 'murder' in questioning a witness about an unadjudicated killing"].) Appellant argues in light of these holdings that the prosecutor's references to the homicides as "murders" in this case constituted misconduct. " 'The standards governing review of misconduct claims are settled. "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial." [Citation.] "In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." ' " (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.)

Appellant acknowledges that the absence of objection and defense counsel's failure to request an admonition and to strike the prosecutor's inappropriate use of the term "murder" to describe the homicides ordinarily forfeits such a claim on appeal. (*People v. Winbush* (2017) 2 Cal.5th 402, 481 [" '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. Fuiava* (2012) 53 Cal.4th 622, 679.) Similarly, as appellant concedes, claims of judicial misconduct are not preserved for appellate review in the absence of any objection on those grounds in the trial court. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.)

A defendant's failure to object and to request an admonition may be excused where it appears on the record that an objection would have been futile or an admonition ineffective. (*People v. Centeno* (2014) 60 Cal.4th 659, 674; *People v. Fuiava*, *supra*, 53 Cal.4th at p. 679.) But nothing in this record indicates an objection would have been futile or that curative action would have been ineffective. (Cf. *People v. Hill* (1998) 17 Cal.4th 800, 820–821.) To the contrary, throughout the trial, the court was responsive to defense objections, giving no indication of any predisposition to overrule a defense objection to the prosecutor's references to the homicides as "murders." Similarly, had the trial court sustained the objection, there is nothing to suggest the court would have refused to admonish the jury or the prosecutor, much less that any such admonition would not have cured any prejudicial effect. "A timely objection allows the court to remedy the situation before any prejudice accrues," (*People v. Taylor* (1982) 31 Cal.3d 488, 496), and an objection in this case would have given the trial court the opportunity to avert any misunderstanding the prosecutor's use of the term "murder" might have caused. (See *People v. Williams* (2017) 7 Cal.App.5th 644, 686.) Appellant has thus forfeited his claim of prosecutorial misconduct.

C. *The failure to object to the prosecutor's references to the homicides as "murders" did not constitute ineffective assistance of counsel.*

Appellant contends that, despite the absence of any objection, the prosecutor's repeated use of the term "murder" warrants reversal because his trial counsel's failure to object and seek an admonition from the trial court amounted to ineffective assistance of counsel, and the prosecutor's misconduct affected appellant's substantial rights resulting in a miscarriage of justice. To prevail on this claim, appellant must show "by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674, citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) Prejudice in this context means " ' "a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant." ' " (*In re Crew* (2011) 52 Cal.4th 126, 150.) A reasonable probability, in turn, "is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, at p. 694; *In re Champion* (2014) 58 Cal.4th 965, 1007.)

Our Supreme Court has held " ' "that '[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected." ' " (*People v. Carrasco* (2014) 59 Cal.4th 924, 982; *People v. Avena* (1996) 13 Cal.4th 394, 418–419.) Because the decision whether to object is inherently tactical, the failure to do

so will rarely establish ineffective assistance. (*People v. Williams*, *supra*, 7 Cal.App.5th at p. 686; *People v. Avena*, *supra*, at pp. 444–445.) Indeed, "competent counsel may often choose to forgo even a valid objection." (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.) The record in this case sheds no light on counsel's tactical decisions, but given appellant's position that he had nothing to do with either of these killings, there was no reason for counsel to object to the characterizations of the slayings as "murder." (See, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1045 [where defendant did not dispute victims had been murdered, but denied he was the murderer, counsel was not ineffective for failing to object to prosecutor's repeated references to victims' deaths as "murders" because there was no reason to do so].)

Even if, as appellant contends, there could be no satisfactory explanation for defense counsel's failure to object to the references to "murder," appellant fails to demonstrate how an objection sustained by the trial court and the striking of these references would have resulted in a more favorable verdict. The jury did not need to hear the prosecutor refer to the killings in this case as "murders" to conclude that the prosecutor believed appellant to be guilty of murder: appellant was charged with two murders, and the prosecutor argued at every turn that he was guilty as charged. Moreover, the trial court gave proper instructions defining the elements of the offenses and reasonable doubt, and correctly informing the jury of its duty to decide appellant's guilt on the charges. We presume that jurors are intelligent people, capable of understanding and applying the jury instructions given. (*People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287; *People v. Henley* (1969) 269 Cal.App.2d 263, 271.)

In sum, appellant's claim of prosecutorial misconduct is forfeited, and we reject his claim of ineffective assistance of counsel.[5]

II. The Trial Court's Refusal to Instruct the Jury on Self-Defense and Voluntary Manslaughter on Count 2

Appellant contends the trial court erred in refusing to instruct the jury with respect to count 2 on self-defense and voluntary manslaughter based on sudden quarrel, "heat of passion," or unreasonable self-defense. According to appellant, the error violated his federal constitutional rights mandating reversal on count 2. We disagree.[6]

A. *The trial court's duty to instruct*

A trial court's refusal to give a jury instruction is subject to de novo review. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) We begin with the general proposition that "[a] trial court must instruct the jury, even without a request, on all general principles of law that are ' "closely and openly connected to the facts and that are necessary for the jury's understanding of the case." ' " (*People v. Burney* (2009) 47 Cal.4th 203, 246; *People v. Moye*

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[5] In light of our conclusion that appellant failed to demonstrate prejudice to support his claim of ineffective assistance of counsel, we find no merit to appellant's assertion that the error was so egregious as to constitute "plain error" which denied appellant his right to a fair trial.

[6] Because we find no error in the trial court's refusal to instruct the jury on self-defense or voluntary manslaughter, we do not reach appellant's contention that the failure to give these instructions infringed his federal constitutional rights.

(2009) 47 Cal.4th 537, 554 (*Moye*).) It is well settled, however, that this obligation extends only to requested instructions that find substantial evidentiary support in the record. (*People v. Marshall* (1997) 15 Cal.4th 1, 39.) Indeed, "[i]t is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1244.) Further, "[a]n instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense but not the greater, charged offense." (*People v. Thomas* (2012) 53 Cal.4th 771, 813; *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162 (*Breverman*).)

Substantial evidence in this context is not just *any* evidence, no matter how weak, but rather " ' "evidence that a reasonable jury could find persuasive." ' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008; see also *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [disapproving prior decisions containing language "to the effect that jury instructions must be given whenever *any* evidence is presented, no matter how weak"], superseded by statute on other grounds as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 777.) Here, the evidence did not support the requested instructions on self-defense or voluntary manslaughter, and the trial court properly refused them.

B. *Legal principles: self-defense and voluntary manslaughter*

"Murder is the unlawful killing of a human being . . . with malice aforethought."[7] (§ 187, subd. (a).) " 'Malice exists' if the 'unlawful homicide was committed with the "intention unlawfully to take away the life of a fellow creature" (§ 188), or with awareness of the danger and a conscious disregard' for the risk to life." (*People v. Taylor* (2004) 32 Cal.4th 863, 872.) An unlawful killing without malice is manslaughter. (*Ibid.*) In circumstances in which a finding of malice is precluded, an unlawful homicide will be limited to voluntary manslaughter, even though the offense was committed with intent to kill. (*People v. Rios* (2000) 23 Cal.4th 450, 460 (*Rios*).)

"Perfect" self-defense is a complete defense to murder (*People v. Anderson* (2002) 28 Cal.4th 767, 782; *People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201), whereas "imperfect" or "unreasonable" self-defense reduces the offense to the lesser included offense of manslaughter. (*Beltran*, *supra*, 56 Cal.4th at p. 951; *People v. Thomas*, *supra*, 53 Cal.4th at p. 813.)

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[7] Murder is of two degrees. "A killing with express malice formed willfully, deliberately, and with premeditation constitutes first degree murder. [Citation.] 'Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.' " (*People v. Beltran* (2013) 56 Cal.4th 935, 942 (*Beltran*).)

For a killing to be justified as self-defense, the defendant must have actually believed in the need to defend based on a fear of imminent harm, and that belief must have been objectively reasonable. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Imperfect self-defense differs in that, while the defendant holds the subjective belief in the need for self-defense in the face of imminent harm, that belief is objectively unreasonable. (*Ibid.*) "Imperfect self-defense obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand." (*Rios*, *supra*, 23 Cal.4th at p. 461, italics omitted.)

Neither the perfect nor imperfect self-defense doctrine may "be invoked 'by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified.' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1226, quoting *In re Christian S.*, *supra*, 7 Cal.4th at p. 773, fn. 1.) Similarly, when the defendant initiates the conflict "which leads to the necessity for killing his adversary, the right to stand his ground is not immediately available to him, but, instead, he must first decline to carry on the affray and must honestly endeavor to escape from it. Only when he has done so will the law justify him in thereafter standing his ground and killing his antagonist." (*People v. Holt* (1944) 25 Cal.2d 59, 66.)

An intentional killing may also be reduced from murder to manslaughter if it occurs upon a sudden quarrel or in the heat of passion on sufficient provocation. (*Beltran*, *supra*, 56 Cal.4th at p. 942; *People v. Manriquez* (2005) 37 Cal.4th 547, 583.) "These

mitigating circumstances reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by negating the element of malice that otherwise inheres in such a homicide [citation].' [Citation.] Provocation has this effect because of the words of section 192 itself, which specify that an unlawful killing that lacks malice because committed 'upon a sudden quarrel or heat of passion' is voluntary manslaughter." (*Rios*, *supra*, 23 Cal.4th at p. 461, italics omitted.)

Our Supreme Court has explained: "A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.] [¶] ' "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.' " [Citation.]' [Citation.] '[T]he factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim . . . . [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.' " (*Moye*, *supra*, 47 Cal.4th at pp. 549–550.) Thus, a "claim of provocation cannot be based on events for which the defendant is culpably responsible." (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) Nor may a defendant "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." (*Ibid.*)

As for the subjective element of voluntary manslaughter based on provocation, the high court has explained that the defendant "must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Moye*, *supra*, 47 Cal.4th at p. 550.) The court has emphasized that where " 'sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter.' " (*Breverman*, *supra*, 19 Cal.4th at p. 163.)

C. *Substantial evidence did not support instructions on self-defense or voluntary manslaughter in the present case*

While "[t]he trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case," instructions based solely on conjecture and speculation should not be given. (*People v. Young* (2005) 34 Cal.4th 1149, 1200; *People v. Day* (1981) 117 Cal.App.3d 932, 936 ["Speculation is not a basis for giving of instructions"].) Here, appellant's self-defense and voluntary manslaughter theories rest on a single piece of evidence: that Gilbert's body was found in a neighbor's yard with a holster on his waistband and an unloaded .40-caliber gun in his hand. Appellant argues that because no one witnessed Gilbert's killing, and no clear picture emerged regarding what exactly transpired between the victim and his killer, this evidence was sufficient to support a reasonable inference that appellant killed Gilbert in self-defense or as a result of sudden quarrel or heat of passion. But evidence that the victim was found apparently holding a gun is not enough by itself to support such an inference, and there is no other evidence to back up a self-defense or voluntary manslaughter theory. Indeed, not only

are these theories contrary to appellant's own denials about *any* involvement in the confrontation with Gilbert, but they are also directly contradicted by his admissions to the informant and other evidence in the case.

Appellant vehemently denied involvement in the fight or having a knife, much less chasing or stabbing anyone. When the officer suggested he might have acted in self-defense, appellant said, "No. That guy didn't attack me and I didn't do nothing to him." On the other hand, in his conversation with the informant, appellant admitted that he stabbed the victim in the chest area after he had chased him from the party. And appellant denied that the victim had "come at [him] first," but instead was trying to hide and was unarmed.

In addition, both Mainor and Joey described a fight in which Gilbert was kicked, punched and stabbed, and then chased down by appellant and stabbed again. Appellant also told Joey that Mainor stabbed first and then appellant "stabbed him some more." Neither Mainor nor Joey indicated that Gilbert ever appeared to pose any threat, and Mainor specifically told police that Gilbert was unarmed. Indeed, nothing in these accounts suggested that appellant was in fear or actually believed he was in imminent danger of being killed or suffering great bodily injury. (See *People v. Humphrey*, *supra*, 13 Cal.4th at p. 1082; *People v. Hill* (2005) 131 Cal.App.4th 1089, 1102 [defendant did not testify to any apprehension of danger, nor did any other witness testify that defendant appeared to act out of reasonable fear], overruled in part on other grounds in *People v. French* (2008) 43 Cal.4th 36, 48, fn. 5; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 ["Substantial evidence of a defendant's state of mind, including an 'honest but unreasonable belief in the

necessity to defend against imminent peril to life' . . . may be present *without* defendant testimony"].)

Finally, the nature of Gilbert's injuries counter any claim that appellant might have acted in self-defense. Gilbert suffered six stab wounds, including the fatal stab wound to the center of his chest. He also suffered blunt force trauma to his head, arms, back, and legs consistent with being kicked or punched. Appellant fails to reconcile his theory of self-defense with the compelling evidence that the victim in this case was kicked, punched, and stabbed by multiple assailants. In short, the record is devoid of any substantial evidence to support a self-defense theory, and the trial court properly refused the proffered instructions.

Similarly, the trial court correctly denied appellant's request for instruction on voluntary manslaughter. First, there was no evidence whatsoever that Gilbert provoked any attack. (See *Moye*, *supra*, 47 Cal.4th at pp. 549–550 [" 'The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim' "].) The fact that appellant may have learned the identity of a person who stabbed him a year earlier does not constitute provocation by the victim. And even if the alleged stabbing by the victim itself could be deemed adequate provocation, the intervening year was more than sufficient time for any cooling off period. (*Id.* at p. 550 [" ' "if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter" ' "].) Indeed, as the trial court observed, "you can't say now today I have heat of passion because of something that happened a year earlier." The trial court properly

rejected appellant's proposed instruction on voluntary manslaughter.

III. The Trial Court's Refusal to Read Back the Defense Closing Argument to the Jury

During deliberations, the jury requested a read-back of the entire defense closing argument. The trial court advised the parties it did not intend to accede to the jury's request on the grounds that statements by the attorneys are not evidence, and reading back only the defense argument would give an unfair advantage to the defense. Defense counsel asked the court nevertheless to exercise its discretion to grant the jury's request. The court refused and informed the jury it could not read back the attorney's argument because it was not evidence in the case. Appellant contends the trial court's ruling constituted an abuse of discretion. We disagree.

"The rehearing of evidence is governed by section 1138.[8] That section 'gives a deliberating jury the right to rehear evidence and instruction on request, but does not extend to argument of counsel.' " (*People v. Gurule* (2002) 28 Cal.4th 557, 649, quoting *People v. Pride* (1992) 3 Cal.4th 195, 266.) Our Supreme Court has held that a trial court has discretion to deny

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8 Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

a jury's request to have a portion of the attorneys' arguments repeated, and does not abuse that discretion when it refuses such a request on the basis of "appropriate concern over diverting the jury's attention from proper consideration of the evidence and instructions." (*Pride*, *supra*, at p. 266.)

Here, the trial court expressed legitimate concern that allowing the jury to rehear only the defense argument would be fundamentally unfair to the prosecution. Contrary to appellant's assertion, this was not a meritless reason, and we find no abuse of the court's discretion in denying the jury's request on this ground.[9]

We also reject appellant's argument that the trial court's refusal to allow the rereading of the argument deprived him of his constitutional rights to a fair trial and to present a complete defense. During trial, defense counsel took full advantage of the opportunities to test the prosecution's case, cross-examine witnesses, and present the defense theory of the case in summation to the jury. The trial court's denial of the jury's request did not impair appellant's constitutional rights. (See

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[9] The trial court did not share with the jury its concern about the unfairness of repeating only the defense argument, but explained that it could not reread the argument "because I'm only supposed to read evidence back, or give you evidence back." Although the court incorrectly suggested that it lacked authority to order read-back of the argument (see *People v. Sims* (1993) 5 Cal.4th 405, 453, overruled on other grounds in *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1032), the court's explanation to the parties constituted a legitimate and appropriate basis for denying the jury's request.

People v. Gurule, *supra*, 28 Cal.4th at p. 649 [finding no error or violation of the defendant's Sixth Amendment rights from the trial court's refusal to allow a read-back of counsel's argument].)

IV. Remand Is Not Warranted Because the Trial Court's Comments at Sentencing and the Sentence Itself Demonstrate that the Trial Court Would Not Exercise Its New Discretion to Strike the Firearm Enhancement

Appellant contends the case must be remanded for reconsideration of his firearm enhancement pursuant to Senate Bill No. 620, which gave trial courts discretion to strike firearm enhancements when the law became effective on January 1, 2018. Respondent concedes that the new legislation applies retroactively to cases in which judgment is not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75–78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].) Nevertheless, the Attorney General maintains that remand in this case is inappropriate because there is no reasonable likelihood the trial court would exercise its new discretion to strike appellant's firearm enhancement. We agree.

Prior to the enactment of Senate Bill No. 620, sections 12022.5 and 12022.53 required the imposition of certain sentencing enhancements based on a true finding that the defendant used a firearm in the commission of a felony; the trial court had no discretion to strike these enhancements.

(§§ 12022.5, subds. (a)–(c), 12022.53, subds. (b)–(d), (h).) The legislation amends section 12022.53, subdivision (h) to remove the prohibition on striking firearm enhancements. The new provision states: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

Relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, and citing the trial court's comments immediately prior to sentencing and in denying appellant's *Romero*[10] motion, the Attorney General asserts that the trial court would not " 'have exercised its discretion to lessen the sentence' by dismissing the 25-year enhancement on appellant's sentence on count 1." (*Ibid.*) In *Gutierrez*, the Court of Appeal declined remand to allow the trial court to exercise its new discretion under *Romero* to strike a prior conviction under the "Three Strikes" law. The court held that *Romero* did not require remand where the sentencing court had unequivocally indicated that it would not have exercised its discretion to strike the three strikes prior even if it had believed it could have done so. (*Ibid.*) Given that the trial court had properly exercised its sentencing discretion to impose the maximum term, the court concluded that "no purpose would be served in remanding for reconsideration." (*Ibid.*)

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[10] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Also in the *Romero* context, our Supreme Court has unequivocally held that remand "is not required where the trial court's comments indicate that even if it had authority to strike a prior felony conviction allegation, it would decline to do so." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944 (*Fuhrman*); *Romero*, *supra*, 13 Cal.4th at p. 530, fn. 13.) Even where the trial court has given no indication of any inclination to grant relief under section 1385, the court has stated that, taking into consideration the defendant's background and the circumstances of the current offense as well as the interests of the administration of justice throughout the state, it would be neither necessary nor even "appropriate, to compel a new sentencing hearing in every pre-*Romero* case in which the record is silent." (*Fuhrman*, *supra*, at pp. 945–946.)

The high court explained: "The procedure urged by defendant, involving a new sentencing hearing in every pre-*Romero* silent record case, would entail an unduly cumbersome and costly process, necessitating the transportation of a large number of inmates from prisons around the state to the various courts (§§ 977, subd. (b)(1), 1193, subd. (a)), because it would require a new sentencing hearing regardless of whether the trial court originally misunderstood the scope of its sentencing discretion and regardless of whether any realistic possibility exists that the trial court would have exercised its discretion to strike one or more qualifying prior convictions. We do not believe that such a remand *en masse* would represent a wise use of scarce judicial resources." (*Fuhrman*, *supra*, 16 Cal.4th at p. 946.)

In the present case, imposition of the firearm enhancement pursuant to section 12022.53, subdivisions (a)(1) and (d) resulted in a consecutive term of 25 years to life added to appellant's

LWOP sentence on count 1. The trial court denied appellant's *Romero* motion on the grounds that the prior strike conviction was violent and not remote in time, and appellant's current offenses were "two heinous murders." Immediately before pronouncing sentence, the trial court again commented on the severity of appellant's crimes:

"We have in front of us someone who appears to be a coldblooded murder[er]. He killed someone he knew for six ounces of coke. He shot him in the head. It was done in a manner without warning. And he killed Mr. Jaramillo by stabbing him in the heart after a fight at a party and after Mr. Jaramillo had been completely disabled. There was no need to carry out the execution of Mr. Jaramillo. [¶] . . . [¶] [Appellant] represents, unfortunately, evil that we sometimes have in our society because he kills freely and without consci[ence]. I really, at least from observing him, have not detected any remorse."

In light of the trial court's denial of the *Romero* motion and its comments prior to imposing sentence, there appears no reasonable likelihood that the trial court would exercise its new discretion under section 12022.53, subdivision (h) to dismiss the firearm enhancement on remand in appellant's case. Accordingly, remand in these circumstances would serve no purpose while representing a squandering of scarce judicial resources. (*Fuhrman*, *supra*, 16 Cal.4th at p. 946.)

V. Presentence Custody Credit

Appellant received 946 days of presentence custody credits based on his actual days in custody. Appellant contends he should be awarded an additional 366 days of presentence credit for a total of 1,312 days of presentence custody credit. We agree.

Actual custody credits are calculated as follows: Credit is given for the day of arrest, the day of sentencing, and all days in custody in between. (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1124.) Partial days are counted as full days. (*In re Jackson* (1986) 182 Cal.App.3d 439, 442–443.) A review of the record in this case reveals that appellant was arrested on March 26, 2013, and sentenced on October 27, 2016, and thus served 1,312 days in actual presentence custody.

"As a general rule, a defendant is supposed to have the trial court correct a miscalculation of presentence custody credits. [Citation.] However, if—as here—there are other appellate

issues to be decided, the appellate court may simply resolve the custody credits issue in the interests of economy. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427–428.)" (*People v. Jones* (2000) 82 Cal.App.4th 485, 493.)

Appellant is entitled to an additional award of 366 days of presentence credit for a total of 1,312 days of presentence custody credit.

DISPOSITION

The matter is remanded to the trial court with orders to correct the presentence custody credit to 1,312 days, prepare a new abstract of judgment, and forward the same to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.