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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHN ADAM DUFT, Defendant and Appellant.	B265145 (Los Angeles County Super. Ct. No. MA059788)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

John Adam Duft appeals from the judgment entered after a jury convicted him of the second degree murder of his 70-year-old father, John Charles Duft. Both Duft Jr.[1] and his father were gun enthusiasts who, after an argument over an assault rifle Duft Jr. had modified for sale, shot each other at their Palmdale home. Duft Jr. survived and at trial unsuccessfully contended he had shot his father in self-defense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Shooting*

In the early evening of May 25, 2013 Los Angeles County Sheriff's deputies responding to an emergency call found Duft Jr. lying on the sidewalk in front of his parents' home, bleeding profusely from multiple gunshot wounds. He told a deputy his father had shot him and he had shot back. Duft Sr., who had called the emergency hotline and was still conscious, was found in the dining room of the home bleeding from a gunshot wound to the chest. As paramedics worked on him, he told the deputy he had shot at his son and his son had shot back after an argument over an assault rifle. Nadine Duft, Duft Sr.'s wife, who suffered from multiple sclerosis and was confined to a hospital bed in the living room, was unharmed.

The deputies observed blood, expended cartridge casings and bullet holes in the hallway adjacent to the master bedroom and inside the master bedroom. The assault rifle, with blood on its stock, was found on the floor of the master bedroom. An empty Glock .357-caliber pistol was found in the neighboring bedroom used by Duft Jr. Another empty Glock pistol, a .40 caliber, was found in the living room on top of an ottoman. A third bedroom, locked at the time of the shooting, housed two gun safes and shelves of ammunition.

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[1] We refer to the defendant and his father as Duft Jr. and Duft Sr. for convenience and clarity.

Duft Sr. died later that evening. Duft Jr. was placed in an induced coma while his wounds were treated[2] and was not interviewed until several days later in the intensive care unit. He told a deputy his father had been going crazy for several months because of an adverse reaction to medication and had repeatedly threatened to kill Nadine. He had heard his father ranting and raving in his bedroom with the door locked and then heard him "close the slide of a gun." Concerned his father would hurt his mother, Duft Jr. retrieved the .357-caliber Glock and shot the door handle four times. He then placed the gun on the floor and told his father he was unarmed; but, when Duft Sr. began shooting, he returned fire. Duft Jr. admitted he had consumed three 24-ounce cans of beer and some whiskey throughout the day.[3] Asked about the assault rifle, he explained his father had become upset because the rifle was an "80 percenter," a technically legal product lacking a firing mechanism and serial number that can easily be modified into a working, unregistered and illegal weapon.[4] Duft Sr. feared the rifle's presence in the house could jeopardize his certification to teach firearm courses and cause him to forfeit his sizable gun collection. They scuffled over the rifle (the deputy noted scratches on Duft Jr.'s hands), after which Duft Sr. retreated into his bedroom and locked the door.[5]

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[2] Duft Jr. sustained gunshot wounds to the chest, back, left bicep, left forearm and armpit.

[3] Eight hours after the shooting, Duft Jr.'s blood alcohol level measured 0.10 percent.

[4] In a recorded telephone conversation well after Duft Jr.'s arrest, he told his sister, Lisa Chavez, he had been "customizing" 10 "AR type rifles" worth about $25,000 that had been stored in his parents' residence.

[5] Chavez had spoken with her brother at the hospital the day before he was interviewed. He told her their dad had "flipped

When interviewed, Nadine said she had not been able to see the incident but had heard her husband and son shouting at each other before the shooting, as well as doors slamming and things being tossed around. She heard her husband ask her son, "What's the matter?" and "Why are you doing this?" She then heard 10 to 20 shots. At trial she testified there had been a gap of about five minutes between the first and second shots.

2. *Character Evidence and Uncharged Acts*

Duft Jr. was employed by the Los Angeles Department of Water and Power (DWP) but was on disability leave at the time of the shooting. He had lived with his parents for most of his adult life. Nadine had been confined to a bed for approximately 12 years; and Duft Sr., who had retired from the DWP, was her primary caregiver. Tammi Johnson, who had been hired in September 2012 to assist in Nadine's care, described Duft Sr. as patient and reliable and said he never got upset, yelled or complained in her presence. Johnson had little interaction with Duft Jr., who seldom participated in decisions related to Nadine's care.

Both Nadine and her daughter, Lisa Chavez, described Duft Jr.'s relationship with his father as strained. According to Chavez, Duft Sr. had been a strict parent; and Duft Jr. continued to harbor resentment toward his father. Recent disagreements had stemmed from Duft Sr.'s concerns about Duft Jr.'s work ethic and drinking. When Duft Jr. drank, he became belligerent with his father. Nadine was concerned Duft Jr. would hurt his smaller father.

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out" because he believed the assault rifle was illegal and said, "I could lose everything. I could lose my guns. . . . I can't have that here." He then locked himself in the bedroom. According to Duft Jr., after he shot the lock off the door, he told his father he had put the gun down and was unarmed. He put his hands through the door, and his father shot at him.

Over defense objection Chavez testified Duft Jr. had told her about a July 2012 incident in which, during an argument with Duft Sr., Duft Jr. had fired a shot into a futon next to his father's chair to get his attention. Duft Jr. then sat with the gun on his thigh so Duft Sr. would listen to him. When Chavez told her brother he should not have threatened his father with a gun, Duft Jr. replied, "Don't worry, I'm not going to shoot my parents or anything." Duft Sr. denied the incident when Chavez asked about it, but she told him she thought he should lock the guns away from her brother. However, David Hoyt, a childhood friend of Duft Jr.'s who had remained close to the family and thought of Duft Sr. as a second father, testified he learned of the incident directly from Duft Sr. When questioned by Hoyt, Duft Jr. said the gun, which had been resting on his thigh while he spoke with his father, accidentally discharged when he stood up.

Laura Crook, Duft Jr.'s ex-girlfriend and mother of his child, testified they had been living together in June 2009 when, during an argument, Duft Jr. grabbed her cellphone from her hand and smashed it. He then threatened to kill her dog. Two weeks later, he came to Crook's mother's home to discuss their relationship. Duft Jr. told Crook he no longer wanted to be involved with her or the baby. Standing at the door, she asked what he was playing with in his pocket. He pulled out a gun and pointed it around, including at her, with his finger on the trigger. She asked him what the gun was for, and he claimed it was for protection. Disturbed, she asked if he was going to shoot her. Duft Jr. laughed and said, if he killed her, he would have to turn the gun on himself and he was not that stupid. Crook sought a restraining order against Duft Jr. after the incident.

3. *Expert Testimony*

Senior criminalist and firearms expert Manuel Munoz examined the scene of the shooting, as well as the two Glock pistols. Munoz linked three bullet holes in the door of the master

bedroom to the .357-caliber Glock, the weapon used by Duft Jr. He found 11 cartridge casings ejected by that weapon and 12 cartridge casings ejected by the .40-caliber Glock used by Duft Sr. Based on bullet trajectories and the location of bullet strikes and cartridge casings, Munoz opined the person firing the .357-caliber Glock (Duft Jr.) had stood at the threshold, or slightly inside, the master bedroom and the individual who had fired the .40-caliber Glock (Duft Sr.) had fired at the doorway from the corner of the room between a chest of drawers and a closet. A bloodstained "80 percent lower receiver" assault rifle was found on the floor just inside the door to the master bedroom. The bloodstain pattern on the rifle's butt was consistent with a smearing transfer. There were no cartridge cases or bullets associated with the rifle at the scene.

Deputy Medical Examiner Dr. Yulai Wang testified Duft Sr. had died from a single gunshot that entered the right upper chest area, perforated the right lung and exited the lower back on a front-to-back, right-to-left, downward trajectory. Answering the prosecutor's hypothetical, Wang opined the bullet trajectory was consistent with a shooter standing in the doorway, holding a firearm at chest height and firing at a victim who was in a crouched, half-squatting position leaning forward or down, at a distance of 13 feet. Wang also documented abrasions on Duft Sr.'s forehead and a small cut on his right eyebrow area. Duft Sr. also had a bruise on his left shoulder and smaller bruises on the back of his hands. The bruises and cuts were sustained within the same timeframe. Answering the prosecutor's hypothetical, Wang opined the bruises and cuts were consistent with blunt force trauma as a result of a struggle between two individuals but, under cross-examination, agreed the injuries were also consistent with someone falling and hitting their

shoulder, arm and face.[6] Duft Sr. tested negative for drugs and alcohol.

4. *Verdict and Sentencing*

The jury convicted Duft Jr. of second degree murder (Pen. Code, § 187, subd. (a)) and found true the allegation he had personally used and intentionally discharged a firearm that caused death to the victim. (Pen. Code, § 12022.53, subds. (b)-(d).) The trial court sentenced him to an indeterminate state prison term of 40 years to life.

CONTENTIONS

Duft Jr. contends the trial court improperly admitted what he calls "the futon evidence." According to Duft Jr., the futon incident was not a qualifying act of domestic violence or elder abuse under Evidence Code section 1109,[7] which permits a trial court to admit evidence of past incidents of domestic violence or elder abuse to prove a defendant's propensity to commit a similar charged crime. Even if the incident qualified under section 1109, Duft Jr. argues, its admission was barred by the corpus delicti rule; and the trial court failed to assess whether the evidence had been adequately corroborated or was unduly prejudicial.

Duft Jr. also contends the prosecutor engaged in misconduct during closing argument by misstating the law regarding self-defense and homicide and the evidence was insufficient to support the jury's finding of malice.

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[6] The prosecutor argued Duft Sr.'s facial injuries and bruises were inflicted during the struggle over the assault rifle.

[7] Statutory references are to this code unless otherwise stated.

DISCUSSION

1. *The Trial Court Did Not Abuse its Discretion in Admitting "The Futon Evidence" Under Section 1109*

a. *Applicability of section 1109*

Section 1101, subdivision (a), generally "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; accord, *People v. Rogers* (2013) 57 Cal.4th 296, 325 [""[e]vidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition""]; *People v. Foster* (2010) 50 Cal.4th 1301, 1328 [same]; see *People v. Falsetta* (1999) 21 Cal.4th 903, 913 (*Falsetta*) ["'[t]he rule excluding evidence of criminal propensity is nearly three centuries old in the common law'"].)

As *Falsetta* acknowledges, however, "the rule against admitting evidence of the defendant's other bad acts to prove his present conduct [is] subject to far-ranging exceptions." (*Falsetta, supra*, 21 Cal.4th at p. 914.) Evidence of a person's past conduct is generally not admissible to prove his or her propensity to commit the charged crime (§ 1101, subd. (a)) but is admissible to prove facts other than propensity, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. (*Id.,* subd. (b); see, e.g., *People v. Edwards* (2013) 57 Cal.4th 658, 711; *People v. Rogers*, *supra*, 57 Cal.4th at p. 326.) Section 1101, subdivision (a), however, expressly exempts from the general rule evidence offered under section 1109 (as well as other provisions not relevant here), which, provided the evidence is not otherwise inadmissible pursuant to section 352, authorizes the admission of evidence of similar uncharged acts to prove propensity when a defendant is accused of an offense involving

domestic violence (§ 1109, subd. (a)(1)), abuse of an elder or dependent (*id.,* subd. (a)(2)) or abuse of a child (*id.*, subd. (a)(3)). (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 529 [exceptions set forth in §§ 1108 and 1109, "are remarkable not because they allow testimony about prior misconduct, but because they allow the jury to draw propensity inferences from the prior acts"]; *People v. Fruits* (2016) 247 Cal.App.4th 188, 202; *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143.)

Before trial the People moved to admit evidence of several uncharged acts, including Crook's testimony (an incident of domestic violence the People argued was admissible under section 1109, subdivision (a)(1)), and the futon evidence, which the People argued was admissible as an act of elder abuse under section 1109, subdivision (a)(2). Defense counsel challenged the futon evidence as speculative and uncorroborated. Rejecting that argument, the trial court found it admissible under section 1109 but did not specify the relevant subdivision.[8] In addition, the court found the futon evidence was admissible under section 1101, subdivision (b), because it was relevant to "the dynamics of the family," "lack of mistake," intent and motive. With the concurrence of defense counsel the court instructed the jury with versions of both CALCRIM Nos. 852 (uncharged acts of domestic violence) and 853 (uncharged acts of elder abuse), modified to include the futon evidence.

Although it is apparent section 1109's separate provisions for domestic violence, elder abuse and child abuse were intended to complement one another because of the similar dynamics of family

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[8] Duft Jr. does not challenge on appeal the trial court's conclusion the charged offense of murder of an elderly parent constituted an offense involving domestic violence, a conclusion that applies equally to elder abuse. (See *People v. Brown* (2011) 192 Cal.App.4th 1222, 1225 ["'murder is the ultimate form of domestic violence'"].)

abuse,[9] their language is not identical. Section 1109 defines domestic violence as having the meaning set forth in Penal Code section 13700 and, provided the court's analysis under Evidence Code section 352 includes "consideration of any corroboration and remoteness in time," the further meaning set forth in Family Code section 6211 "if the act occurred no more than five years before the charged offense." (§ 1109, subd. (d)(3).) Penal Code section 13700 defines "abuse" as requiring either bodily injury, attempted bodily injury, or placing the victim in "reasonable apprehension of imminent serious bodily injury to himself or herself, or another" (*id.*, subd. (a)) and extends to abuse committed against "a spouse, . . . cohabitant . . . or person with whom the suspect has had a child or is having or has had a dating or engagement relationship" (*id.*, subd. (b)). Family Code section 6211, which applies because the

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[9] For example, in extending section 1109 to encompass elder or dependent abuse, the analysis accompanying Assembly Bill 2063 in 2000 stated: "This bill permits the potential admission of evidence of prior acts of abuse of an elder or a dependent adult in criminal prosecutions for elder and dependent abuse . . . [and] . . . seeks to expand the bases for inclusion of a defendant's character evidence, most specifically to include evidence of a disposition of violence towards an elderly or dependent individual. This approach is consistent with California's evidentiary scheme for combating domestic violence. This bill therefore may substantially assist in the state's efforts to curb the tragic problem of violence against elders and dependent adults." (Assem. Floor Analysis, Conc. in Sen. Amends. to Assem. Bill No. 2063 (1999-2000 Reg. Sess.) as amended June 19, 2000, p. 2; see *People v. Brown* (2000) 77 Cal.App.4th 1324, 1333 ["by enacting sections 1108 and 1109, the obvious intention of the Legislature was to provide a mechanism for allowing evidence of past sexual offenses or acts of domestic violence to be used by a jury to prove that the defendant committed the charged offense of the same type; recidivist conduct the Legislature has determined is probative because of its repetitive nature"].)

incident occurred within the last five years, expands the covered victims to include "[a]ny other person related by consanguinity or affinity within the second degree." (Fam. Code, § 6211, subd. (f).)

Under this broader definition Duft Sr. is a protected victim. Duft Jr. asserts, however, the futon incident itself did not constitute abuse within the meaning of Family Code section 6203, which defines abuse as "any of the following: (1) To intentionally or recklessly cause or attempt to cause bodily injury. [¶] (2) Sexual assault. [¶] (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. [¶] (4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320."[10] Duft Jr. argues nothing in Chavez's or Hoyt's testimony—the only evidence the futon incident occurred—suggested that he had attempted to harm or frighten his father. Instead, he contends, the evidence was insufficient to establish whether the gun had been discharged and, if so, whether it had been discharged intentionally.

While we believe Penal Code section 13700 provides the controlling definition of abuse for purposes of Evidence Code section 1109, subdivision (d)(3), the futon incident constituted abuse under either statutory definition. In his recitation of the

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[10] Family Code section 6320 broadly authorizes a court to "issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating as described in Section 528.5 of the Penal Code, falsely personating as described in Section 529 of the Penal Code, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members."

facts Duft Jr. omits Hoyt's testimony he learned of the incident directly from Duft Sr., who made no mention of the possibility his son had accidentally discharged the gun, as Duft Jr. later claimed. We have no difficulty finding the discharge of a firearm inside a house at a piece of furniture next to the chair in which someone is seated—allegedly to get the person's attention—is a hostile act (or threat) designed to instill fear in that person, that is, placing the victim in "reasonable apprehension of imminent serious bodily injury . . . ." (Pen. Code, § 13700, subd. (a); Fam. Code, § 6203, subd. (a)(3); see *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1118 ["[t]here is no question that her act in pointing the gun at Yu when he refused to talk to her constituted a violent act"]; see also *People v. Colantuono* (1994) 7 Cal.4th 206, 219 ["[a]s this court explained more than a century ago, 'Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault'"].) When told of the incident by her brother, Chavez certainly viewed his actions as unacceptable, suggesting he find somewhere else to live and stating, "I don't think anyone should be threatened with a gun in their own home." The trial court did not err in concluding the incident constituted domestic violence within the scope of section 1109, subdivisions (a)(1) and (d)(3).

Even were there doubt about this conclusion, the court also admitted the futon evidence as an incident of elder abuse under sections 1109, subdivision (a)(2), and 1101, subdivision (b),[11] rulings Duft Jr. fails to contest on appeal. Thus, any error in admitting it also under section 1109, subdivision (a)(1), was harmless. (See *People v. Rowland* (1992) 4 Cal.4th 238, 264 [prejudicial effect of erroneous admission of evidence that is not

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[11] It appears defense counsel did not request instruction with CALCRIM No. 375, which addresses the limited purposes for which the jury can consider evidence admitted under section 1101, subdivision (b).

federal constitutional error is evaluated under *People v. Watson* (1956) 46 Cal.2d 818, 836, standard of whether it is reasonably probable defendant would have received a more favorable result if evidence had been excluded].)

b. *The corpus delicti rule does not bar admission of the futon evidence; the trial court adequately considered corroboration under section 352*

Duft Jr.'s principal challenge to the futon evidence is based on the corpus delicti rule, which requires proof of the occurrence of a crime independent of the defendant's own statements. (See, e.g., *People v. Robertson* (1982) 33 Cal.3d 21, 41 ["California has long adhered to the rule, established at common law and followed in most jurisdictions, that 'evidence of the commission of a prior crime may not be proved by the introduction of evidence of an extrajudicial admission [by the defendant] without proof *aliunde* that such a crime had been committed'"].) According to Duft Jr., controlling Supreme Court precedent requires application of this rule; and, without independent corroboration the incident occurred, the trial court erred by admitting it.

The Attorney General correctly observes Duft Jr. has forfeited this argument because he failed to object to admission of the futon evidence on this ground. (See *People v. Horning* (2004) 34 Cal.4th 871, 899; *People v. Wright* (1990) 52 Cal.3d 367, 404.) We would reject it in any event. In *People v. Alvarez* (2002) 27 Cal.4th 1161, which Duft Jr. selectively quotes to suggest the rule continues to apply to evidence of uncharged acts in the guilt phase of a trial, the Supreme Court summarized one of the effects of Proposition 8 as follows: "Because of the adoption of section 28(d) through Proposition 8, there no longer exists a trial objection to the *admission in evidence* of the defendant's out-of-court statements on grounds that independent proof of the corpus delicti is lacking. If otherwise admissible, the defendant's extrajudicial utterances may be introduced in his or her trial

without regard to whether the prosecution has already provided, or promises to provide, independent prima facie proof that a criminal act was committed." (*Id.* at p. 1180.)[12] Based on *Alvarez*, and parsing *Robertson* and its progeny as well as decisions in other jurisdictions, the court in *People v. Davis* (2008) 168 Cal.App.4th 617 concluded the corpus delicti rule does not apply to evidence of uncharged acts except at the penalty phase of a trial. (*Id.* at pp. 633-639; see also *People v. Martinez* (1996) 51 Cal.App.4th 537, 543-545 [same]; *People v. Denis* (1990) 224 Cal.App.3d 563, 568-570 [same].)

Even were we to accept Duft Jr.'s contention regarding the applicability of the corpus delicti rule to evidence of uncharged acts, he fails to address the effect of Hoyt's testimony that Duft Sr. initially told him about the futon incident. That testimony alone provided the necessary independent basis for admission of Duft Jr.'s statements notwithstanding the corpus delicti rule: "The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to

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[12] The corpus delicti rule survives with respect to the charged offense: "[S]ection 28(d) did not eliminate the independent-proof rule insofar as that rule prohibits *conviction* where the only evidence that the crime was committed is the defendant's own statements outside of court." (*People v. Alvarez, supra,* 27 Cal.4th at p. 1180.)

strengthen the case on all issues." (*People v. Alvarez, supra,* 27 Cal.4th at p. 1171.)

Alternatively, Duft Jr. argues the court failed to adequately evaluate the evidence under sections 352 and 1109, subdivision (d)(3), in particular, whether there was any corroboration that the incident actually occurred. The record reflects that the court properly considered both the probity of the evidence and its potential prejudicial effect. (See *People v. Hinton* (2006) 37 Cal.4th 839, 892 ["'[a] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware and performed its balancing functions under Evidence Code section 352'"].) Chavez and Hoyt each spoke with Duft Jr. and Duft Sr. about the incident, and Duft Sr. admitted to Hoyt the incident had occurred. Moreover, while we recognize the likely impact of the futon evidence, Duft Jr. fails to identify any legally cognizable prejudice he suffered. As the Supreme Court explained in *People v. Karis* (1988) 46 Cal.3d 612, 638, "The prejudice which exclusion of Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (Accord, *People v. Merriman* (2014) 60 Cal.4th 1, 60; see *People v. McCray* (1997) 58 Cal.App.4th 159, 172 ["'Appellant was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship . . . [was] peaceful and friendly,'" quoting *People v. Zack* (1986) 184 Cal.App.3d 409, 415].) The prejudice to Duft Jr. resulted from the persuasiveness of the

evidence, not from the possibility it could be misconstrued or evoke an irrational emotional bias against him.

In sum, the trial court did not abuse its broad discretion in concluding the probative value of the futon evidence substantially outweighed any concerns of undue prejudice, confusion or consumption of time. (See *People v. Clark* (2016) 63 Cal.4th 522, 572 ["'[t]he exercise of discretion is not grounds for reversal unless "'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice"'"].)

2. *The Prosecutor's Closing Arguments Did Not Constitute Prejudicial Misconduct*

a. *Governing law*

"'"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury."'" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332; accord, *People v. Cortez* (2016) 63 Cal.4th 101, 130.)

"Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*).) When a prosecutor's remarks to the jury are at issue, the defendant must demonstrate "'[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In

conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*Id*. at p. 667; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 371.)

"'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 60-61.) Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821; accord, *Lloyd,* at p. 61.) As the Supreme Court has explained, "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.'" (*Centeno, supra,* 60 Cal.4th at pp. 666-667; accord, *Lloyd*, at p. 61.) We review a trial court's ruling regarding prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

Duft Jr. contends the prosecutor misstated the law and improperly attacked his character during closing argument, issues the Attorney General argues he forfeited by failing to object.[13]

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[13] """To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument."'" (*People v. Charles* (2015) 61 Cal.4th 308, 327; accord, *People v. Williams* (2013) 58 Cal.4th 197, 274.) "[F]ailure to request the jury be admonished does not forfeit the issue for appeal" if "a timely objection and/or a request for admonition . . . would be futile" or "'"an admonition would not have cured the harm caused by the misconduct."'" (*People v. Hill, supra*, 17 Cal.4th at p. 820; accord, *People v. Seumanu, supra,* 61 Cal.4th at pp. 1328-1329.)

Recognizing this problem, Duft Jr. alternatively claims his counsel provided ineffective assistance by failing to object in violation of his Sixth Amendment right to counsel.

"'A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel.'" (*Centeno*, *supra*, 60 Cal.4th at p. 674, quoting *People v. Lopez* (2008) 42 Cal.4th 960, 966.) To prevail on his claim of ineffective assistance of counsel, Duft Jr. must show his counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms and those deficiencies resulted in a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674], accord, *Centeno*, at pp. 674, 676.) "'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy."' When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was ""no conceivable tactical purpose"' for counsel's act or omission.' '[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one,' and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.'" (*Centeno*, at pp. 674-675, citations omitted.) If there is "no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance." (*People v. Cudjo* (1993) 6 Cal.4th 585, 616; see *People v. Jackson* (2016) 1 Cal.5th 269, 349; *People v. Weaver* (2001) 26 Cal.4th 876, 931.)

Whether viewed through the lens of improper argument or ineffective assistance of counsel, Duff Jr.'s claim of misconduct fails.

b. *Defense counsel did not provide ineffective assistance by not objecting to the prosecutor's closing arguments*

i. The prosecutor's statements regarding self-defense

Duft Jr.'s first allegation of misconduct is premised on the prosecutor's argument to the jury that, because Duft Jr. fired first, he should be found guilty of murder. The prosecutor argued, "Who was the first shooter? Why is that important . . . ? Because the person who fired the first shot starts this whole chain of tragic events. The person who fires this first shot—unless there's some justification—is the one who's criminally liable for whoever ends up dying." Later, the prosecutor stated, "He started everything. He started everything when he shot those multiple shots into that doorknob." This argument tracked the People's theory that Duft Jr. had provoked the gunfight by shooting into the door; that his father, in fear for his life, had responded in kind; and that Duft Jr. was not entitled to claim he had acted in self-defense.[14]

Duft Jr. contends this argument permitted jurors to find him guilty of murder even if they believed the evidence that, after shooting the doorknob, he had laid down his weapon and showed his empty hands to his father, who then initiated the fatal gun

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[14] "'The concepts of perfect and imperfect self-defense are not entirely separate, but are intertwined. We have explained that "the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances."'" (*People v. Enraca* (2012) 53 Cal.4th 735, 761.)

battle.[15] He argues the prosecutor's comments were contrary to established law permitting a defendant who starts a fight with nondeadly force to defend himself with deadly force if the victim suddenly escalates to deadly force. (See, e.g., *People v. Quach* (2004) 116 Cal.App.4th 294, 301 ["'Where the original aggressor is not guilty of a deadly attack, but of a simple assault or trespass, the victim has no right to use deadly or other excessive force. . . . If the victim uses such force, the aggressor's right of self-defense arises.'"]; *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201 ["when the victim of simple assault responds in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw and may use reasonably necessary force in self-defense"].)

This argument is misplaced. Firing at the doorknob, even if intended merely to strike fear in Duft Sr. or to gain access to the bedroom, constituted deadly force, even without considering the additional evidence suggesting that, minutes earlier, Duft Jr. had struck his father in the head and face with the butt of the assault rifle. The more apt rule, stated in *People v. Gleghorn*, *supra*, 193 Cal.App.3d at page 201, provides, "[I]f one makes a felonious assault upon another, or has created appearances justifying the other to launch a deadly counterattack in self-defense, the original assailant cannot slay his adversary in self-defense unless he has first, in good faith, declined further combat, and has fairly notified him that he has abandoned the affray." In any event, jurors were

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[15] This was not the theory offered by the defense in its closing. Instead, defense counsel argued the evidence showed Duft Sr. had fired the first shot, wounding Duft Jr., who then retrieved a gun from his bedroom to protect himself. Five minutes later, the gun battle resumed when Duft Sr. pursued Duft Jr. into the hallway, was shot and retreated into his bedroom.

instructed under both theories, enabling them to choose the one that most closely tracked the facts as they viewed them.[16]

Duft Jr. does not contend the jury was improperly instructed; he argues the prosecutor's remarks contradicted the law as stated in the instructions. In particular, he relies on the decision in *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*), in which a divided panel of Division Three of the Fourth District concluded, in light of statements made by the prosecutor in closing argument, CALCRIM No. 3472 did not properly state the law under the circumstances presented at trial. In *Ramirez* two members of a gang intentionally provoked a fistfight with a rival gang. When

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[16] The jury was instructed with CALCRIM Nos. 3471 and 3472 regarding mutual combat, as well as CALCRIM No. 571, which addresses imperfect self-defense justifying conviction for voluntary manslaughter. CALCRIM No. 3471 provides: "A person who engages in mutual combat or who starts a fight has a right to self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; [¶] and [¶] 2. He 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. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] However, if the defendant used only non-deadly force, and the 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 or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose."

CALCRIM No. 3472 provides: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

one of them saw a rival gang member raise an object he believed to be a gun, he drew his own gun and shot the rival gang member. (*Ramirez*, at pp. 944-945.) The prosecutor argued, based on CALCRIM No. 3472, even if the defendants had intended only to engage in a fistfight, their intent to provoke a fight foreclosed any claim of self-defense. (*Ramirez*, at pp. 945-946.) Over a dissent by Justice Fybel, the majority reversed the murder conviction, holding that "CALCRIM No. 3472 under the facts before the jury did not accurately state governing law." (*Id.* at pp. 947, 953.)[17] The defect in the instruction, the court explained, had been compounded by the prosecutor's argument, which "erroneously required the jury to conclude that in contriving to use force, even to provoke only a fistfight, defendants entirely forfeited any right to self-defense." (*Id.* at p. 953.)

Dissenting, Justice Fybel defended CALCRIM No. 3472 as an accurate statement of the law and properly given in the case before the court, pointing out it is not intended to apply "to every person who initiates a fight and subsequently claims self-defense. Instead, it applies to a subset of individuals who not only instigate a fight, but do so with the specific intent that they contrive the necessity for their acting thereafter in 'self-defense,' and thus justify their further violent actions. In other words, this

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[17] The *Ramirez* court acknowledged CALCRIM No. 3472 "states a correct rule of law in appropriate circumstances," explaining that "a victim may respond to an attacker's initial physical assault with a physical counterassault, and an attacker who provoked the fight may not in asserting he was injured in the fray claim self-defense against the victim's lawful resistance. [Citation.] And when a defendant contrives a 'deadly' assault [citation], there can be no incommensurate or unjustifiable response by the victim: he or she is fully entitled to use deadly force and the defendant has no right to claim self-defense against those deadly measures." (*Ramirez, supra,* 233 Cal.App.4th at p. 947; see also *People v. Enraca*, *supra*, 53 Cal.4th at p. 761.)

instruction applies, and the right to self-defense is lost, only if an initial aggressor commences combat for the intended purpose of provoking a violent reaction so that he or she can then retaliate with further violence, whether deadly force or nondeadly force, under the guise of self-defense. The defendant's intent is measured at the time the fight or quarrel is provoked." (*Ramirez, supra,* 233 Cal.App.4th at p. 954 (dis. opn. of Fybel, J.).) As Justice Fybel pointed out, the evidence in the case had justified instruction with CALCRIM No. 3472, subject to the jury's decision whether it applied under the circumstances. (*Ramirez*, at p. 956.) Because the prosecutor had argued consistently with CALCRIM No. 3472, his remarks did not improperly prejudice the defendant. (*Ramirez*, at p. 957.)

Justice Fybel's analysis is compelling under the facts presented in this case. Whatever Duft Jr.'s intent in firing at the door, he used deadly force, which the jury reasonably could find vitiated any claim of self-defense. Thus, the prosecutor did not misstate the law of self-defense by arguing that, absent justification, the person who fires first is liable for murder: He offered a theory of the case applying the law of self-defense to the evidence in the record that in his view supported a murder conviction. This was proper argument, and the jury could not have been misled.[18]

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[18] During the course of closing argument the court on several occasions admonished the jury that the arguments of counsel were not evidence; they were simply interpretations of the evidence; and the jury should follow the evidence. The jury was also instructed with CALCRIM No. 200, which provides in part, "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

Accordingly, Duft Jr.'s claim his counsel provided ineffective assistance by failing to object to the prosecutor's statements concerning his right to assert self-defense fails. (See *People v. Huggins* (2006) 38 Cal.4th 175, 207 ["It is not . . . misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence. Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument, and that is essentially what the prosecutor did here. Thus, counsel were not ineffective for failing to object to the comment."].)

ii. The prosecutor's statements regarding malice

Duft Jr. next accuses the prosecutor of having misstated the law by arguing the jury could infer malice from the shots fired into the doorknob. The jury was instructed with CALCRIM No. 520, which allowed them to find Duft Jr. acted with implied malice if: "1. He intentionally committed an act; 2. The natural and probable consequences of the act were dangerous to human life; 3. At the time he acted, he knew his act was dangerous to human life; and 4. He deliberately acted with conscious disregard for human life." (See, e.g., *People v. Knoller* (2007) 41 Cal.4th 139, 156 ["a conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life"]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104 ["[*p*]*hrased in a different way,* malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life"].)

Duft Jr. complains the prosecutor misstated the law of implied malice when he stated the shots Duft Jr. fired into the door constituted implied malice. Comparing the danger inherent in

firing a weapon to that created by dropping a bowling ball over the edge of a 10-story building without regard for the pedestrians who might be walking below, the prosecutor argued, "That activity is so inherently dangerous that it's implied malice. Firing a gun where somebody is around, that conduct, because it's a deadly weapon, is so inherently dangerous—that's implied malice. It equals murder of the second degree." Duft Jr. contends these statements were improper because they required jurors to convict him even if they believed he fired at the doorknob simply to gain access to his father.

Duft Jr.'s argument seriously understates the danger associated with shooting a .357-caliber semiautomatic firearm loaded with hollow point bullets into a door knowing someone is in the room. The jurors, as Duft Jr. acknowledges, were free to disbelieve his contention he only wanted to talk to his father and had no intention of forcing his father to return the assault rifle or otherwise terrorize him. Duft Jr.'s escalation of the fight by retrieving a gun and, as the prosecutor argued, firing it into the door "not once, not twice, but, as we know, at least three times," underscored the inherent danger associated with Duft Jr.'s action. As the Supreme Court has observed, even "[a]n unintentional shooting resulting from the brandishing of a weapon can be murder if the jury concludes that the act was dangerous to human life and the defendant acted in conscious disregard of life." (*People v. Thomas* (2012) 53 Cal.4th 771, 814-815; see *People v. Nieto Benitez, supra,* 4 Cal.4th at p. 91 [brandishing loaded firearm in a threatening manner constitutes a sufficiently dangerous act to support finding of implied malice]; *People v. Navarro* (2013) 212 Cal.App.4th 1336, 1346 ["[i]t requires neither special expertise nor even personal familiarity with firearms to know that guns propel bullets at great speed and force, often penetrating walls and other architectural barriers"].) The prosecutor's statements equating Duft Jr.'s firing a semi-automatic handgun into a locked

door with implied malice was not improper argument under the facts of this case, and defense counsel did not provide ineffective assistance by failing to object to them.

iii. The prosecutor's statements about Duft Jr.'s character

Finally, Duft Jr. contends his counsel provided ineffective assistance by failing to object to the prosecutor's statements allegedly disparaging his character and maligning him as a 40-year-old unemployed drunk living with his parents.[19] According

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[19] After reviewing the evidence of uncharged acts, the prosecutor stated, "The law recognizes that people that are abusers, intimidators, who pick on people who are smaller than them, they're inclined to do that. They're disposed to doing that . . . . Hasn't it always been like, the big picking on the weak, the helpless? Why? Because they can. And it's bad enough to pick on the weak, the elderly, those that are smaller than you, by just your sheer size, but to do it with a weapon on top of it?"

Later, addressing possible motives Duft Jr. harbored against his father, the prosecutor stated, "He's upset about the dispute over the care of his mother, okay? He feels that his mother is not getting enough [care] . . . [and] sends photographs to his sister in Arizona. Well, you know, instead of sending photographs to someone who's taking care of . . . her daughter and her grandchild . . . , why don't you get off your lazy butt and take your mom to the hospital, you know? Why don't you do something more than just run your mouth? Why couldn't he, who is right in that house—he's not working. He's on disability. Why didn't he just get up and take his mom into Palmdale, to have a doctor, instead of spending money and his disability on all those guns that he's building . . . and customizing. Why didn't he spend some of that money on hiring another person to take care of his mom . . . ? That all shows he's the kind of person that just holds things in, blames other people, and holds a grudge." Contrasting him with his sister, the prosecutor continued, "[Chavez] understands, but the defendant, 40-years-old, living at home, sitting in his room, drinking those 24-ounce cans one after

to Duft Jr., these pejorative statements had no relevance to the question whether he murdered his father and were intended solely to appeal to the passions and prejudices of the jury. (See *People v. Redd* (2010) 48 Cal.4th 691, 742 ["'[i]t is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response"'"].)

Prosecutors, however, are granted broad leeway in arguing their case to the jury and may even use "'such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion and prejudice of the jury.'" (*People v. Tully* (2012) 54 Cal.4th 952, 1021.) As the *Tully* Court explained, "[A] prosecutor is not 'required to discuss his [or her] view of the case in clinical or detached detail,'" and "'the use of derogatory epithets to describe a defendant is not necessarily misconduct.'" (*Ibid.*; see, e.g., *People v. Friend* (2009) 47 Cal.4th 1, 32 [defendant described as "'living like a mole or the rat that he is'"]; *People v. Young* (2005) 34 Cal.4th 1149, 1195 [no misconduct where prosecutor characterized crimes as "'serial killing,'" and "'terrorizing and killing'" people] (italics omitted); *People v. Jones* (1998) 17 Cal.4th 279, 308-309 [no ineffective assistance of counsel for failure to object to prosecutor's characterization of defendant's crime as a "terrorist attack" and comparison of defendant to "[t]errorists"]; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 242 [remarks characterizing defendant in negative terms (e.g., creep, society's worst nightmare) were "perhaps unnecessarily colorful" but were consistent with evidence, hence, not improper]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250-

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another after another after another, seeing how, in his mind, his mom is not getting enough care but not doing anything about it."

1251 [no misconduct where prosecutor referred to defendant as a "'perverted maniac'"].) Relying on these cases, *Tully* found no misconduct in the prosecutor's statements referring to the defendant as "'a despicable excuse for a man,'" a "'despicable individual,'" "'garbage'" and "'a sucker.'" (*Tully*, at p. 1021.) By comparison, the prosecutor in this case used relatively mild epithets and arguments firmly grounded in the evidence. Because there was no misconduct, Duft Jr.'s claim of ineffective assistance necessarily fails.

3. *Substantial Evidence Supported the Jury's Verdict*

Duft Jr. contends there was insufficient evidence to support the jury's finding he acted with implied malice, the element distinguishing second degree murder from voluntary manslaughter. In considering this claim, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial

evidence to support'" the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Sandoval* (2015) 62 Cal.4th 394, 423; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*Zamudio*, at p. 358; accord, *People v. Clark*, *supra,* 63 Cal.4th at p. 626.)

The evidence in this case might have supported the conclusion Duft Jr. shot his father in response to his father's attack in the belief (reasonable or not) he needed to do so to protect himself. Other evidence, much of which we have discussed, indicated Duft Jr. was the aggressor who acted belligerently and dangerously with a conscious disregard for human life. Ultimately, the jury determined the evidence of Duft Jr.'s recklessness with guns, which he had used on several occasions to intimidate others into compliance; his drinking; the cuts and bruises on his father's face; the bloody stock of the assault rifle; and his inexplicable act of shooting into the door to gain access to his father, who had locked himself in the bedroom to hide from his son, warranted the finding he had acted with implied malice. We are not empowered to reverse that finding.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J. KEENY, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.