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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PATRICIA ARAUJO GOMEZ, Defendant and Appellant.	B236372 (Los Angeles County Super. Ct. No. TA114046)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Affirmed.

Kathy Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Patricia Araujo Gomez (Patricia) guilty of the second degree murder of her brother. On appeal, she argues that the trial court improperly refused to instruct the jury on imperfect and perfect self-defense and that evidence relevant to those defenses was improperly excluded. She also argues that the prosecutor committed prejudicial misconduct during closing arguments. We reject these arguments and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution case*.

In August 2010, defendant, Patricia, was living at home with her parents, brothers Ismael (known as Junior) and Jose, and her sister, Anna.[1] Patricia's revelation to the family that she was a lesbian may have contributed to tension between her and Junior, who, according to his brother, had anger management issues. Their fights sometimes became physical, and Junior hit Patricia. They threatened to kill each other.

On the morning of August 27, 2010, Patricia and Anna argued when Anna told Patricia to take her dog outside. The fight escalated, and they hit each other. Anna went to Junior's room, where she called their mother to say she didn't want Patricia in the house anymore.[2]

Overhearing Anna's conversation with their mother, Junior got mad and asked Anna if Patricia had hit her. When Anna confirmed that Patricia had hit her, Junior went to the kitchen and punched Patricia with a closed fist on her jaw. According to Jose who was watching, Junior hit Patricia more than once, and Patricia was also swinging, defending herself. Jose separated them. Junior and Patricia continued to swear at each other, and Patricia pushed Junior and said, more than once, that she would kill him.

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[1] Because some family members share a last name, we use first names.

[2] Patricia had only been living at the house one week. There had been times in the past when Patricia had to leave the house.

Telling her to " 'go for it,' " Junior slid a knife across the floor, repeating, " 'do it.' "[3] Patricia picked the knife up, but when Jose told her to calm down, she put it on the table. After Junior and Patricia argued for about five minutes, Junior went back to his room.

Patricia called her girlfriend, Michelle Martinez. Patricia also called 911 and said, "I have an emergency just 'cause my brother hit me and I'm a diabetic.' "

Wanting Patricia to move out, Anna and Junior put Patricia's clothes into a basket. When Patricia saw her clothes being removed, she and Junior argued again, with Patricia demanding, " 'Who do you think you are to be kicking me out [of] the house?' " Anna told Patricia that their mother told her to leave.

Patricia again told Junior she would kill him. They continued to argue, with Patricia saying she would " 'fucking kill' " him. Pulling a knife from a kitchen cabinet or drawer and repeating she was going " 'to fucking kill' " him, Patricia walked to Junior, who was unarmed, and stabbed him in the chest.[4] When Jose told Patricia to put the knife down, she said she'd kill him and Anna too. Jose picked up a chair, and Patricia dropped the knife. Just before Patricia stabbed Junior, Anna called 911.

From the time Junior first confronted Patricia to the time she stabbed him, about 15 minutes passed. Junior died from a single stab wound to the chest. A coroner's examination revealed no injuries or bruises to Junior's face or upper torso, although his right hand knuckles were bruised.

B. *Defense case*.

Martinez was Patricia's girlfriend at the time of the incident. About one month before Patricia stabbed Junior, Martinez called the house and spoke to Junior, who told her to come and get Patricia, they didn't want her there, he would kill both Patricia and Martinez, and his friends would rape and " 'fuck [her] up . . . in the streets.' " Around

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[3] At some point, Junior also told her, " 'I told you if you ever put your hands on her, I would hit you.' "

[4] She swung at him twice, missing the first time.

9:00 a.m. on August 27, the day Patricia stabbed Junior, Patricia called Martinez, who could hear Junior in the background threatening to have Patricia fucked up in the streets.

At her booking, Patricia had bruising to her right bicep and under her left eye, and she complained of pain.

II. Procedural background.

On August 26, 2011, a jury found Patricia guilty of second degree murder (Pen. Code, § 187)[5] and found true a dangerous weapon-use enhancement allegation (§ 12022, subd. (b)(1)). The trial court, on September 26, 2011, sentenced Patricia to 15 years to life plus one year for the weapon enhancement, for a total of 16 years to life.

DISCUSSION

I. Exclusion of evidence.

Patricia contends that the trial court violated her federal due process rights to a fair trial and to present a defense under the Fifth and Sixth Amendments by excluding evidence of (a) Junior's prior threats and acts of aggression, (b) Patricia's text message to Martinez that she had been hit, and (c) that Junior was a gang member. We find that Patricia's constitutional rights were not violated by any exclusion of this evidence.

The abuse of discretion standard of review applies to a trial court's rulings on the admissibility of evidence. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Even erroneous evidentiary rulings usually do not violate a defendant's due process rights. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 52-53 [such due process claims, usually citing *Chambers v. Mississippi* (1973) 410 U.S. 284, are often overbroad, as *Chambers* was a fact intensive, specific case]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *People v. Partida* (2005) 37 Cal.4th 428, 433-438; *People v. Tafoya* (2007) 42 Cal.4th 147, 165, fn. 5.)

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[5] All further undesignated statutory references are to the Penal Code.

A. *Prior threats and acts of aggression.*

Patricia first argues that the trial court improperly excluded evidence that Junior had threatened her in the past. Because evidence of his past threats was admitted, we reject Patricia's argument.

The decisive factor in determining what crime—first or second degree murder or voluntary manslaughter—has been committed is the defendant's state of mind at the time of the homicide. (*People v. Danielly* (1949) 33 Cal.2d 362, 385.) Where self-defense or voluntary manslaughter are at issue, prior threats can be relevant to a defendant's state of mind.[6] Self-defense, for example, has two components, an actual subjective belief and objective reasonableness. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1093.) "[T]he objective component is not measured by an abstract standard of reasonableness but one based on the defendant's perception of imminent harm or death. Because his state of mind is a critical issue, he may explain his actions in light of his knowledge concerning the victim. [Citations.] Antecedent threats as well as the victim's reputation for violence, prior 'assaults, and other circumstances [are] relevant to interpreting the attacker's behavior.' " (*Id.* at p. 1094; see also *People v. Minifie* (1996) 13 Cal.4th 1055 [trial court improperly excluded threats made to defendant by third parties close to the victim; such threats were relevant to self-defense, but their exclusion was harmless error].)

Assuming that Junior's prior threats were relevant and admissible to at least the voluntary manslaughter theory, the trial court did not issue an order excluding all such threats. At a pretrial hearing, defense counsel referred to Martinez's statement in "the People's discovery" that on the day of the incident she overheard Junior threatening to get his " 'homeboys' " to beat and rape Patricia. The court asked about "other statements" "concerning things [Patricia] previously told [Martinez] about the family situation and that kind of thing" and their admissibility.

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[6] Of course, self-defense was *not* at issue here, because the trial court refused to instruct on it, an issue we discuss below.

Defense counsel said the issue concerned, first, Patricia's statements to her girlfriend, Martinez, about her family, and, second, Patricia's statements to Martinez about Junior's threats to Patricia. Counsel argued that the statements went to Patricia's state of mind and were admissible under Evidence Code section 1103. The trial court ruled that Martinez could testify about what she overheard on her phone call with Patricia on the morning of the incident. The trial court put "on hold" prior threats Junior made to Martinez, because the court wanted to see what the testimony would be. It does not appear that this issue was directly discussed again.

Defense counsel, however, also alluded to threats of violence Junior made three months before the incident. The trial court excluded those threats: "[T]hings that happened three months, no sooner than three months before, really aren't relevant as to her state of mind unless she makes them relevant and things like that. You can't get character evidence in like that, through the statements of the defendant. [¶] So you can't ask Miss Martinez, 'Did the defendant tell you these things?' That's just inappropriate. It's hearsay and not admissible."

Thereafter, at trial, Martinez testified that one month before Patricia stabbed Junior, he threatened to kill both Patricia and Martinez. On the morning Patricia stabbed Junior, Martinez, who was on the phone with Patricia, heard Junior in the background threatening to have Patricia "fucked up" in the streets.

Therefore, the record shows that prior threats were introduced at trial. The only prior threat the trial court expressly excluded was one that occurred three months before Patricia stabbed Junior. It is unclear, however, what was the exact threat made. Patricia also does not make clear what other *specific* threats were excluded. Given that the precise nature of any excluded threats is not before us, we cannot see how Patricia was prejudiced by their exclusion. This is especially true since other evidence was admitted that Patricia and Junior had a tumultuous relationship and that he had threatened her prior to the incident. This other evidence included Junior's threat to have Patricia and her girlfriend "fucked up" in the streets and that Junior had hit Patricia in the past. Martinez

was allowed to testify not only about threats Junior made the day of the incident but also about past threats.

Moreover, the trial court said it would consider prior threats Junior made to Martinez, but it does not appear that defense counsel obtained further clarification or a ruling.[7] "A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself." (*People v. Holloway* (2004) 33 Cal.4th 96, 133.) Where a trial court reserves its decision, the party desiring to introduce the evidence must renew the motion or remind the court that a ruling is desired. (*Ibid.*)

We therefore reject Patricia's contention her federal due process rights were violated by the exclusion of Junior's prior threats of violence. Even if the trial court abused its discretion by excluding the threat Junior made three months before, there was no order excluding all evidence of Junior's prior threats. To the contrary, evidence of his prior threats was admitted, and it was clear that Junior and Patricia had a rocky, sometimes violent, relationship.

B. *The text message*.

On the morning Junior was stabbed, Patricia sent a text message at 11:59 a.m. to Martinez stating she had been hit. Two minutes later, Anna called 911 to report that her brother had been stabbed. The trial court excluded the text message, finding it did not go to the nonhearsay purpose of Patricia's state of mind.

Under Evidence Code section 1250, an out-of-court statement to prove the declarant's state of mind is not made inadmissible by the hearsay rule when the declarant's state of mind is in issue or if the evidence is offered to explain the declarant's

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[7] Because we find that Junior's prior threats were admitted at trial, and because the record is not clear what was the specific threat or threats the trial court excluded, we do not address Patricia's argument that the threats were admissible under the state-of-mind exception to the hearsay rule, an exception we discuss *infra*.

acts or conduct.[8] (See generally, *People v. Riccardi* (2012) 54 Cal.4th 758, 814, 820 [evidence of a decedent's state of mind can be relevant to a defendant's motive, if there is independent, admissible evidence that the defendant knew of the decedent's state of mind before the crime and may have been motivated by it]; *People v. Kovacich* (2011) 201 Cal.App.4th 863, 884 [prerequisite to this exception is the declarant's mental state or conduct must be placed in issue].)

Here, by virtue of at least the sudden quarrel/heat of passion theory, Patricia's mental state was at issue. Her text message could explain why she stabbed Junior minutes after sending it; namely, he hit her and, in a fit of passion, she stabbed him. Patricia's out-of-court statement that she had been hit showed her mental state and her conduct in conformity with it. (See *People Riccardi, supra,* 54 Cal.4th at pp. 818-819 [the declarant's state of mind must have a relevant connection to some conduct in conformity with it]; *People v. Kovacich, supra,* 201 Cal.App.4th at pp. 888-889 [victim's statements were admissible under state of mind exception because her mental state was placed in issue].)[9]

Even if it was error to exclude the text message, Patricia suffered no prejudice from the error. There was ample other evidence of Patricia's state of mind. There was no dispute, for example, that Junior hit Patricia before she stabbed him. Both Anna and Jose testified that Junior hit Patricia. Patricia called 911 to report that her brother had hit

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[8] "[E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a).)

[9] *Riccardi* concerned statements made by the deceased victim expressing her fear of the defendant. Because there was evidence that the defendant knew of the victim's fear and used his knowledge to ambush and to kill the victim, the declarant-victim's statements were admissible under Evidence Code section 1250. Of course, this case is factually different because the defendant, Patricia, sought to use her own statement to show her fear or passion and her conduct in conformity with her fear or passion.

her. Patricia also had bruising under her eye and on her arm. The text message was merely additional evidence that Junior hit Patricia before she stabbed him.

C. *Evidence Junior was a gang member.*

The defense asked to admit evidence Junior was a gang member, including evidence " 'V' " and " 'L' " were tattooed on his eyelids, based on the argument that the evidence went to Patricia's state of mind, namely, she was afraid of him because of his gang affiliation. Noting it was not necessarily true that people are more afraid of threats from a gang member where, as here, the gang-member victim was the defendant's brother, the trial court excluded the evidence as irrelevant and under Evidence Code section 352, stating it would open "the door to all sorts of things as to whether he's in a gang or not, what the tattoos mean. But really what the most important thing is whether that has effect on the defendant at all. [¶] And I think it's clearly more prejudicial than probative. I think it would take way too much time, and we don't even know if it affected her."

Only relevant evidence is admissible. (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see also *People v. Lee* (2011) 51 Cal.4th 620, 642; *People v. Mills* (2010) 48 Cal.4th 158, 193; *People v. Williams* (2008) 43 Cal.4th 584, 633-634.) Relevant evidence, however, may be excluded, in the trial court's discretion, if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352; *Lee*, at p. 643.) A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*Mills*, at p. 195; *Williams*, at p. 634; *People v. Brown* (2003) 31 Cal.4th 518, 547.) As we have said, the abuse of discretion standard applies to a trial court's rulings on the admissibility of evidence, including those turning on the relevance or probative value of the evidence in question. (*Lee*, at p. 643.)

"Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) Even where relevant, gang evidence should be carefully scrutinized before it is admitted because it may have a highly inflammatory impact on the jury.[10] (*Id.* at pp. 192-193.) We cannot conclude, under Evidence Code section 352, that the trial court abused its discretion by excluding evidence Junior was a gang member. Other than the tattoos on Junior's eyelids (the " 'V' " and " 'L' "), it is not clear what, if any, other evidence there was that he belonged to a gang. Rather, according to defense counsel, Junior's sister, Anna, merely said he hung around the Vatos Locos gang, but he was not "super active." Although Junior told Patricia he would have his "homeboys" "fuck" her up in the streets, there was no evidence "homeboys" referred to gang members; hence, the trial court ordered Martinez not to use the word, "homeboys."

Therefore, other than Junior's tattoos, there was no clear evidence Junior associated with a gang or that any such association affected Patricia's state of mind. Also, the trial court observed that while the general public might be afraid of gang members, it was unclear what impact, if any, Junior's alleged gang membership had on Patricia, who was his sister and lived with him. There simply was no evidence of a connection between Junior's gang membership and the crime. (See, e.g., *People v. Cash* (2002) 28 Cal.4th 703, 726-727 [evidence of the victim's prior use of force was irrelevant to defendant's state of mind because there was no evidence the defendant knew of those violent acts].) Given the familial connection and the lack of evidence that Patricia was specifically afraid of Junior because he was a gang member, we cannot say the court abused its discretion by finding that the effect, if any, of Junior's gang membership on Patricia was speculative and prejudicial when weighed against its low probative value.

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[10] Of course, in most cases, the gang evidence concerns the defendant and not the victim, as is the case here.

II. Self-defense.

Patricia next contends that the trial court's failure to instruct the jury on perfect and imperfect self-defense deprived her of rights guaranteed under the United States Constitution, thereby requiring reversal of her conviction for Junior's murder. We disagree.

A trial court must instruct the jury, sua sponte, on the 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. Moye* (2009) 47 Cal.4th 537, 548; *People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Cook* (2006) 39 Cal.4th 566, 596.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*Manriquez*, at p. 584.) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the trier of fact. (*Id.* at p. 585.) We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*Ibid.*; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

The trial court instructed on first and second degree murder and on voluntary manslaughter under a heat of passion theory. The trial court did not instruct on either voluntary manslaughter under an imperfect self-defense theory or on perfect self-defense. Voluntary manslaughter, a lesser included offense of murder, is the intentional but nonmalicious killing of a human being. (§ 192, subd. (a); *People v. Moye*, *supra*, 47 Cal.4th at p. 549; *People v. Lee* (1999) 20 Cal.4th 47, 59; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 583.) Under imperfect self-defense, a killing may be reduced from murder to voluntary manslaughter where the defendant kills another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. (*In re Christian S.* (1994) 7 Cal.4th 768, 771, 773; *People v. Manriquez*, at p. 583; *People v. Lasko* (2000) 23 Cal.4th 101, 108-110; *People v. Cruz* (2008) 44

Cal.4th 636, 664.) Imperfect self-defense differs from a "perfect" self-defense in that the latter requires an actual and *reasonable* belief in the need to defend one's self. (*People v. Humphrey, supra,* 13 Cal.4th at p. 1082.) For a " 'perfect self-defense,' " "the defendant must actually and reasonably believe in the need to defend. . . . To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable. [Citations.] . . . '[T]he circumstances must be sufficient to excite the fears of a reasonable person . . . .' [Citations.]" (*Ibid.*)

For both perfect and imperfect self-defense, the fear must be of imminent harm. (*People v. Humphrey, supra,* 13 Cal.4th at p. 1082.) " 'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.' [Citation.]" (*Ibid.*; see also *People v. Butler* (2009) 46 Cal.4th 847, 868.) The defendant must fear a harm that must be " ' " '*instantly dealt with*.' " ' " (*People v. Rogers* (2006) 39 Cal.4th 826, 883, italics omitted.) "The danger must be imminent; [the] mere fear that it will become imminent is not enough." (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305; see also *In re Christian S., supra,* 7 Cal.4th at p. 783.) All the relevant circumstances in which the defendant found herself may be considered in determining whether the accused perceived an imminent threat of death or great bodily injury. (*Humphrey,* at p. 1083.)

There was insufficient evidence Patricia feared imminent harm. True, Junior hit Patricia and they violently argued. Junior taunted Patricia to "do it" and pushed a knife across the floor to her. But there is no evidence he wielded the knife against her in a threatening manner at any time. Jose separated them, and Junior left the room. Then, when Patricia saw Junior throwing her clothes into a basket, they argued again, with Patricia repeating her threats to kill Junior. Junior did not, however, hit Patricia again, move towards her or verbally threaten to kill her. He was also unarmed. Although Junior made no threatening gesture, Patricia went to the kitchen drawer, opened it, and removed a knife. She walked to Junior and swung at him twice with the knife, stabbing him the

second time in the chest. Although this evidence could show a heat of passion, it does not show an "imminent" threat to Patricia requiring her to stab her unarmed brother.

Nor do we think that the excluded evidence, discussed above in part I of the Discussion, supplied the missing "imminence." There was no evidence what effect Junior's gang membership had on Patricia. Also, that he was a gang member was irrelevant to the "imminence" of the threat. Junior had, in the past, threatened to have his "homeboys" "fuck" Patricia up. But this was a threat of future harm, not of imminent harm. It therefore would not have helped Patricia prove that element had Martinez been allowed to use the word, "homeboys." Finally, there was ample evidence that Junior and Patricia had a turbulent relationship and that he had hit her in the past and threatened her. Additional evidence of such past threats would not have demonstrated an imminent threat to Patricia.

III. Prosecutorial misconduct.

Patricia contends that the prosecutor committed prejudicial misconduct by vouching for her witnesses, appealing to jurors' passions and prejudices, and misstating the law. We find that no prejudicial misconduct occurred.

A. *Applicable law.*

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] 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 court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Misconduct that infringes upon a defendant's constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18.) A violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant

would have occurred had the district attorney refrained from the untoward comment. (*People v. Watson* (1956) 46 Cal.2d 818.)

Comments by prosecutors are generally treated by juries as words of an advocate in an attempt to persuade. (See *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) The prosecution is given wide latitude during closing argument to make fair comment on the evidence, including reasonable inferences or deductions to be drawn from it. (*People v. Collins* (2010) 49 Cal.4th 175, 213.) When a claim of misconduct focuses on comments the prosecutor made before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) We must place the challenged statement in context and view the argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

"To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and, unless an admonition would not have cured the harm, ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct." (*People v. Martinez* (2010) 47 Cal.4th 911, 955-956.)

B. *Vouching for witnesses*.

Based on comments the prosecutor made about Jose's and Anna's honesty, Patricia contends that the prosecutor improperly vouched for their credibility. We disagree.

A prosecutor may not express a personal opinion or belief in the guilt of the accused, or vouch for the credibility of a witness, when there is a substantial danger that the jury will view the comments as based on information other than evidence adduced at trial, or when the comments will induce the jury to trust the prosecutor's judgment rather than its own view of the evidence. (*United States v. Young* (1985) 470 U.S. 1, 18-19; *People v. Lopez* (2008) 42 Cal.4th 960, 971; *People v. Mayfield* (1997) 14 Cal.4th 668, 781-782; *People v. Martinez, supra*, 47 Cal.4th at p. 958.) Although it is improper to bolster a witness by referring to facts outside the record (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207; *People v. Williams* (1997) 16 Cal.4th 153, 257), a prosecutor is

free to give an opinion on the state of the evidence and has wide latitude to comment on its quality and the credibility of witnesses (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946, disapproved on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *Martinez,* at p. 958 [prosecutor may comment on the credibility of witnesses based on facts contained in the record and on any reasonable inferences that can be drawn from them]; *Mayfield,* at p. 782 [expressing a belief in the defendant's guilt is not improper if the prosecutor makes clear the belief is based on the evidence]). It is not misconduct for a prosecutor "to ask the jury to believe the prosecution's version of events as drawn from the evidence." (*Huggins*, at p. 207.) Using the first person or the phrases " 'I believe,' " " 'I think,' " or "we know" do not constitute improper vouching or opinion where the prosecutor's argument is directed to the state of the evidence and the inferences that may be drawn from it. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1303, fn. 48; *People v. Frye* (1998) 18 Cal.4th 894, 1018-1019, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *U.S. v. Bentley* (8th Cir. 2009) 561 F.3d 803, 812.)

The prosecutor here did talk about Anna's and Jose's honesty, but this did not amount to improper vouching. She said: "Both Anna and Jose testified to these same facts. Both of them agree that there were many minutes between when Junior initially confronted the defendant about decking his little sister. And when the defendant ultimately took it upon herself to cross that kitchen, open that drawer, select the right tool for the task, she had in mind and carried out her vicious plan. [¶] They both also agree that between the time Junior initially confronted the defendant and the time she stabbed him, he never physically approached her again. He never verbally threatened her in that altercation. And they both agree that she was unarmed with his hand at his side at the time that steel was cutting through his flesh. [¶] *And we know they're telling the truth. We know they're telling the truth because they didn't sugarcoat anything. They were honest about her part in screaming and calling names. They were honest that there was cussing and cursing going on. They were honest that there had been arguments in the past between Junior and the defendant.* [¶] They're not hiding anything. At one point[,]

Anna even said, when I asked her about something, I said, 'How did you feel about that?' [¶] And she said, 'She's my sister.' [¶] They weren't here to take sides. They were here to tell the truth, and they did. And that truth is corroborated by all of the other evidence that has been presented to you in this case." (Italics added.)

When the prosecutor said "we" know Anna and Jose told the truth, she was basing the argument on evidence. (See *People v. Cummings, supra,* 4 Cal.4th at p. 1303, fn. 48; *People v. Frye, supra,* 18 Cal.4th at pp. 1018-1019.) Both Anna and Jose, for example, said that Junior and Patricia were cursing and had argued in the past; hence, Anna and Jose were being truthful because they weren't trying to "sugarcoat" what either Patricia or Junior did. The prosecutor did not imply she had extraneous information not presented to the jury. Because the argument was based on the evidence, it did not amount to improper vouching for a witness.

C. *Appealing to the jurors' passions and prejudices*.

Next, Patricia contends that the prosecutor improperly appealed to the jurors' passions and prejudices when she said: "Clearly, she was acting with reasoning and judgment, not under some crazy 'I can't control myself' situation that was just brought on by a sudden quarrel. This was not a sudden quarrel. [¶] And it's not acceptable to murder her brother just cause he hit her. That's what the defense needs you to believe. That's what the defense needs you to find. But it's absolutely unsupported by the facts and the law in this case. [¶] The defendant murdered her brother in front of her siblings in a willful and a deliberate and a premeditated way. [¶] For you to find otherwise means that you're agreeing to live in a community, in a society where you could kill 'just because'—and where anybody can set up their own standard of what they want to do at any given time. [¶] No one wants to live in that kind of world. In fact, the laws of our state are designed to prevent us from descending to doing that, exactly kind of savagery."

It is misconduct for a prosecutor to make comments that are calculated to arouse passion or prejudice. (*People v. Mayfield, supra,* 14 Cal.4th at p. 803.) " 'It 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." [Citation.]' " (*People v. Redd* (2010) 48 Cal.4th 691, 742.) It is, for example, misconduct to ask the jury to put itself in the victim's position and imagine what the victim experienced. (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1192.) It is also misconduct to ask the jury to consider the crime's impact on the victim's family. (*Id.* at p. 1193.)

But it is not misconduct for a prosecutor to comment on the " 'serious and increasing menace of criminal conduct and the necessity of a strong sense of duty on the part of jurors.' " (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 513; cf. *United States v. Monaghan* (D.C.Cir. 1984) 741 F.2d 1434, 1441-1442 [a prosecutor may not suggest that the defendant be convicted to protect community values, preserve civic order or to deter future lawbreaking in an attempt to excite prejudice or passion].) A prosecutor's comments, for example, that the jury could restore "law and order" and "justice" with a guilty verdict was not misconduct. (*Adanandus*, at pp. 511-513.) Such comments were an exhortation to the jury to take its duty seriously. (*Id.* at p. 513; see also *People v. Wash* (1993) 6 Cal.4th 215, 261-262 [no prejudicial misconduct occurred when prosecutor urged the jury to " 'make a statement,' " to "do 'the right thing,' " and to restore confidence in the criminal justice system].)

The comments the prosecutor here made similarly were an appeal to the jury to take its duty seriously, to maintain law and order. The prosecutor argued there was no evidence Patricia acted under a sudden heat of passion and then suggested that the jurors would not want to live in a world where the facts gave rise merely to voluntary manslaughter rather than premeditated murder. This argument related the facts of the case to the law. It was a permissible exhortation to the jury to follow the law.

D. *Misstating the law*.

When arguing before a jury, counsel has "broad discretion in discussing the legal and factual merits of a case," but "it is improper to misstate the law." (*People v. Bell* (1989) 49 Cal.3d 502, 538.) Patricia argues that the prosecutor, in closing argument, misstated the law as to the provocation sufficient to negate malice.

The provocation that incites the defendant to homicidal conduct must be caused by the victim or be conduct reasonably believed by the defendant to have been engaged in by the victim. (*People v. Manriquez, supra*, 37 Cal.4th at p. 583.) It may be physical or verbal, but it must be sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Ibid.*; *People v. Lee, supra*, 20 Cal.4th at p. 59.)

Patricia argues that the prosecutor misstated this law when she argued to the jury:

- "The defendant basically needs you to believe that anyone would have done what she did in that situation. And that's preposterous" and "it's offensive to think that this was how anyone would have acted in the situation. [¶] First off, she had a myriad of other options. She could have left, could have left the house."
- "You may not be comfortable with it [Junior hitting Patricia]. It may not be what you would have done, but it does not rise to that kind of provocation where anyone would have taken that—taken that punch to the face and said, 'That's it. You're gonna get it' and done it. [¶] *That's not how everybody of an average disposition would react to that type of situation.*" (Italics added.)
- "He didn't escalate. He didn't step it up. He didn't make it up so that any average person would have been forced into a position of 'What else could I do?' [¶] Of course, and she's gonna snap and have to drive a knife into his chest? It's preposterous. It's preposterous. [¶] No person of average disposition would act this way. And—and that is the standard, the average disposition."

Patricia analogizes these comments to ones the prosecutor made in *People v. Najera* (2006) 138 Cal.App.4th 212, 223. *Najera* found that the prosecutor misstated the law on heat of passion when he told the jury that whether the defendant acted under a heat of passion was based on the defendant's conduct rather than on the circumstances in which the defendant was placed. (*Ibid.*) The prosecutor, for example, repeatedly asked

what a reasonable person would do in similar circumstances. *Najera* noted that the focus of a heat of passion theory is on provocation—whether the surrounding circumstances were sufficient to cause a reasonable person to act rashly. (*Ibid.*) The reasonableness of the killer's response is not relevant. (*Ibid.*)[11]

The prosecutor's comments here are different. The prosecutor focused on provocation by stating that Junior hitting Patricia "does not [give] rise to that kind of provocation" and that he didn't "escalate" or "step it up." The comments that Patricia did not have an "average disposition" could reasonably be interpreted to mean that the provocation was insufficient to cause her to act rashly. The prosecutor's comments, even if inartful, did not remove the focus from provocation and instead place it on the reasonableness of Patricia's response.

To the extent the prosecutor's comments could be interpreted as a misstatement of the law, the jury was instructed on, among others, voluntary manslaughter, heat of passion and that the jury must follow the instructions even if an attorney's comments conflict with them. (CALJIC No. 570.) Also, placed in the whole context of the argument, we cannot find that these comments prejudiced Patricia to the extent that a more favorable outcome would have resulted. (Cf. *People v. Hill* (1998) 17 Cal.4th 800, 819-839, 845 [prosecutor's wide-ranging and "pervasive campaign to mislead the jury on key legal points," combined with other errors, required reversal of the conviction].)

E. *Ineffective assistance of counsel.*

Patricia's trial counsel did not object to any of these instances of alleged prosecutorial misconduct. She therefore contends that her counsel rendered ineffective assistance. Because we have concluded either that no misconduct occurred or that prejudice did not result from any prosecutorial misconduct, Patricia's ineffective assistance of counsel claim similarly fails. We add that a trial attorney's decision whether to object or to seek a jury admonition is a strategic one, and the failure to do

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[11] The proper instruction on provocation and heat of passion and related prosecutorial misconduct are currently on review in the Supreme Court in *People v. Beltran* (Apr. 25, 2012, S192644) __ Cal.4th __ [2012 Cal. LEXIS 3937].

either seldom establishes constitutionally ineffective assistance of counsel. (See, e.g., *People v. Castaneda* (2011) 51 Cal.4th 1292, 1335; *People v. Collins* (2010) 49 Cal.4th 175, 233.) The "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 we should be reluctant to second-guess defense counsel. (*People v. Padilla, supra,* 11 Cal.4th at p. 942, overruled on other grounds by *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.) "Moreover, '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' " (*People v. Huggins, supra,* 38 Cal.4th at p. 206.)

There are several reasons why defense counsel may not have objected to the prosecutor's closing statements: they were not objectionable, she did not want to draw attention to isolated comments, and she believed that the jury instructions would be adequate to address any misstatement. We therefore cannot conclude that defense counsel rendered ineffective assistance.

IV. Cumulative error.

To the extent Patricia contends that the cumulative effect of the purported errors undermined the trial's fundamental fairness and requires reversal, as we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.