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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JOHNNIE KEMP, JR., Defendant and Appellant.	B261650 Los Angeles County Super. Ct. No. BA387506

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

David Andreasen, 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, Noah P. Hill and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On August 6, 2011 around 4:00 a.m., defendant Johnnie Kemp, Jr. killed his girlfriend in the van in which they lived. Defendant admitted killing his girlfriend. The only dispute at trial was his intent—that is, whether he premeditated and deliberated the killing, and whether he acted in self-defense. On appeal, defendant contends that there is insufficient evidence of intent to support his first-degree murder conviction and that the court instructed the jury misleadingly about the ways in which it could use evidence of the victim's history of violence. We affirm.

PROCEDURAL BACKGROUND

By amended information dated May 1, 2014, the People charged defendant with one count of murder (Pen. Code, § 187, subd. (a); count 1)[1] and alleged that he personally used a deadly or dangerous weapon (a hammer) in the commission of the offense (§ 12022, subd. (b)(1)). The information also alleged defendant had nine prior felony convictions. Five convictions were alleged as strike priors (§ 667, subds. (b)–(i)) and serious-felony priors (§ 667, subd. (a)(1)); seven convictions, including three of the prior strikes, were alleged as prison priors (§ 667.5, subd. (b)).[2]

Defendant pled not guilty and denied the allegations. After a bifurcated trial at which he testified in his own defense, the

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

[2] The original information, filed September 11, 2012, contained the same substantive charges but fewer prior-conviction allegations. On August 22, 2014, the prosecution filed a second amended information that corrected typographical errors.

jury found defendant guilty of first-degree murder and found the deadly-weapon allegation true.[3] Defendant waived his right to a jury determination of the truth of the prior convictions, and after a bench trial, the court found the allegations true.

The court denied defendant's new trial motions and sentenced him to a determinate term of 16 years followed by an indeterminate term of 75 years to life. For the indeterminate part of the sentence, the court imposed a third-strike term of 75 years to life for count 1—the mandatory base term of 25 years to life, tripled for the strike priors (§ 667, subd. (e)(2)(A)(i); § 1170.12, subd. (c)(2)(A)(i)). For the determinate part of the sentence, the court imposed one year for the deadly-weapon enhancement (§ 12022, subd. (b)(1)) plus five years for each of the three serious-felony priors (§ 667, subd. (a)), to run consecutive.[4] The court imposed and struck a one-year term for each prison prior (§ 667.5, subd. (b)).

Defendant filed a timely notice of appeal.

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[3] We note that although defendant was ultimately convicted of first-degree murder, neither the original, the amended, nor the second amended information referred to section 189 or alleged that defendant deliberated or premeditated the killing. We also note that the People did not argue at the preliminary hearing that the killing was premeditated or deliberate. Because neither party has raised this discrepancy, we do not address it.

[4] The other two serious felonies had not been brought and tried separately.

FACTUAL BACKGROUND

1. Prosecution Evidence

In August 2011, defendant lived with his girlfriend, Louise Savior (hereafter Louise),[5] in the back of a white commercial van. He also used the van for his carpet cleaning business.

The evening of August 5, 2011, shortly before midnight, defendant parked the van on the 4000 block of South Main Street in Los Angeles. He parked next to a school and directly under a streetlight.

Asia Murray lived across the street in a second-floor studio apartment. Her bed was underneath a window facing Main Street. Around 3:00 a.m. on August 6, 2011, Murray's boyfriend called her from New York. She woke up and started talking to him. As they spoke, Murray looked out the open window and fiddled with the string hanging from the blinds. She had an unobstructed view of the van; the street was quiet and well-lit. Murray never saw anyone enter or leave the driver's side of the van—and later surveillance footage confirmed no one exited the passenger's side.

Murray soon heard "moderately loud" moaning sounds coming from the van; the sounds lasted two or three minutes. The moaner was a woman; Murray never heard a man's voice. The sounds didn't concern Murray at first. She thought they were sexual.

The noises soon changed, however. The moans grew "louder," and "a little more active." Suddenly, she heard

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[5] For the sake of clarity, we refer to the victim by her first name throughout this opinion.

"shrieking" that "came out of nowhere." The "woman in the van just—she yelled with … so much pain." The van, which had been rocking gently, "immediately went from soft to rough. It seemed like it was a fight or a tousle." Murray heard a "banging noise … . Like someone was … beating against the van." She speculated that the "tousling caused them to put force and pressure onto the actual van sides." "It looked like [the van] was pretty much about to topple over on to Main Street. That [was] how hard the tousle was inside."

Murray did not hear an argument or conversation. She never heard the woman make any threatening statements. The woman did not even scream for help. It was clear to Murray that the woman was shrieking in pain; she could not have been screaming in anger.

After about three minutes, Murray called the police. A marked police car soon arrived, made a U-turn, stopped in front of the van, and turned on its spotlight. "As soon as the cop pulled up, everything stopped. And I mean, when he pulled up the first time before he even made a U-turn, everything stopped." As the car "approached the van, all movement stopped, like all the tousling. There was no noises. There was no rocking back and forth. Just everything ceased … ."

Eventually, three more police cars arrived. The officers tried to get the people inside the van to come out. They were unsuccessful. Officers ultimately used a shotgun to fire bean bags at the van's rear windows. Then, they approached the van and opened the side passenger doors. The officers found defendant and Louise lying face down on the floor; the bodies were inches apart. Both were motionless and unresponsive to commands.

As officers pulled defendant out by his feet, he yelled, "I was robbed." Defendant was placed face down on the sidewalk but resisted officers' attempts to pull his arms out from underneath him and refused their orders to comply. To get him to release his hands, officers eventually punched him in the arms and shoulders.

Despite those punches, when a detective later inspected defendant's body, the only mark he saw was a scratch to defendant's forehead. Defendant had no visible injuries or defensive wounds. He was not bleeding. His clothes were covered in blood, however. His shorts showed visible blood spatter and smear marks; bloodstains covered his shirt and undershirt. The blood was later identified as Louise's.

Louise lay motionless in the van. Her body was surrounded by blood, and she had fresh wounds to her ear, head, back, and arms. Paramedics pronounced her dead at the scene. Louise had the small end of a marijuana cigarette and a glass crack pipe containing burnt residue tucked in her bra. A later toxicology screen revealed both substances in her system.

The inside of the van was a live-work space containing a mattress, blankets, and tools. It was covered in blood spatter and blood smears. Under the blankets, police discovered a hammer coated with a "substantial amount of blood" and what appeared to be Louise's hair. The blood was later identified as Louise's.

Louise's body was transported to the coroner's office for autopsy. She had deep lacerations, bruising, and abrasions concentrated mainly on her face and head.[6] Louise had several

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[6] A laceration is "a bursting injury of the skin caused by [a] blunt object." Lacerations break the skin and are often accompanied by

bruises on her legs and two bruises on her left arm, one of which appeared to be a human bite mark. She also had several bruises on her right arm. The injuries were consistent with an attempt to shield her head from a blunt object.

Louise's face was fractured in six places—her forehead, left eye socket, both cheekbones, nose, and both sides of her jaw. At least 20 deep lacerations covered her face and scalp. She had two black eyes. Her ear was torn nearly in half. The blow to Louise's ear also fractured the bone at the base of her skull behind the left ear; the fracture radiated up the side of the skull. While this fracture was inflicted with a great deal of force, it was not the only one; the left side of her skull was fractured in at least two more places. The medical examiner also discovered a round depressed fracture on the right side of Louise's head. According to the tool-mark expert, that fracture was caused by a single blow; according to the radiologist, the blow crushed her skull deeply enough to allow air to flow into the brain cavity. Some combination of blows bruised Louise's brain and caused bleeding on its surface. She died of blunt force trauma to the head, leading to a combination of brain trauma and blood loss.

Each injury could have been caused by a hammer.

2. Defense Evidence

Defendant testified in his own defense as follows.

In January 2011, defendant began a romantic relationship with Louise. She "pretty much called the shots," and defendant was afraid of her and intimidated by her. Louise was a drug

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bleeding. An abrasion is a scrape that takes off the outer layer of skin cells.

addict, and became violent when she wanted cocaine or was having withdrawals from it. Louise told defendant about violence she'd committed against others; while working as a prostitute, for example, she sometimes struck clients on the head and robbed them. Once, she said, she smothered a person to death while she was on a long cocaine binge. Louise was also violent with people close to her. She had previously been arrested for inflicting corporal injury on a spouse for beating up her ex-husband. She served time in "state prison for domestic violence."[7] Louise told defendant she would intimidate her ex-husband to try to get him to give her drug money. She did the same thing to defendant.

Louise was frequently violent with defendant; she had threatened him with a knife and lunged at him with tools while he was driving. Louise had repeatedly threatened to kill him when she was high on cocaine. Defendant's mother, Betty Autrey, corroborated this account; she saw Louise attack defendant several times. Once, Louise threatened defendant with a steak knife. Another time, Louise slapped defendant in the face and kicked him in the groin. Louise had also chased defendant around the van while carrying a large wooden stick. Autrey never saw defendant strike Louise, however.

Defendant testified that he had tried to end the relationship by leaving Louise and driving off. Each time, she tricked him into coming back by having someone call him for a carpet cleaning job. When he arrived, Louise would get back in the van. One time this happened, defendant told her to get out of

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[7] Louise's arrest records were admitted into evidence to corroborate this fact.

the van; she responded by threatening to smash the van's windows.

On August 5, 2011, the night of the killing, defendant parked his van in front of a school on South Main Street; he thought it would be a safe place to spend the night. At some point, defendant saw Louise smoke crack and marijuana. He told her she could no longer stay with him; he would take her to a women's shelter in the morning. Defendant fell asleep in the front of the van; Louise fell asleep in the back.

Defendant woke up between 2:00 and 4:00 a.m. It was pitch black inside the van. He went to the back of the van to find his shoes. Louise yelled at him and threatened to kill him, saying, "I'm going to kill you, motherfucker. You ain't putting me out." Then she hit defendant with something heavy. He did not know what the object was. A struggle ensued as Louise yelled at defendant and hit him again and again—in the back, arm, shoulder, legs, knees, and other places. Defendant was scared. He thought Louise was going to kill him.

Eventually, defendant was able to gain control of the object. He started "swinging and swinging and swinging" it in the direction of Louise's voice. He did not know what he was swinging, but knew it was some kind of tool. Defendant could not see in the dark van; he couldn't tell where he was hitting Louise. As the blows landed, Louise grunted and screamed. After 10 or 12 minutes, defendant passed out from exhaustion.

Defendant testified that the night of the killing, he had been taking various medications for his mental health condition, including chlorpromazine. His medication had recently changed, and he was feeling disoriented. Louise had smoked crack and marijuana a few hours before her death. A defense expert

testified that chlorpromazine can cause blackouts, confusion, disorientation, decreased night vision, and memory problems. Cocaine and marijuana can make a person violent and aggressive; using the drugs at the same time enhances their effects.

CONTENTIONS

Defendant contends that there is insufficient evidence of premeditation and deliberation to support his first-degree murder conviction and that the court's use of a modified version of CALCRIM No. 375 allowed the jury to use defendant's prior bad acts to infer that he acted in conformity with his character for violence but did not allow them to make a similar inference about Louise.

DISCUSSION

1. Sufficiency of the evidence of premeditation and deliberation

Defendant contends there is insufficient evidence that the killing was premeditated and deliberate because there was "no evidence the killing was planned ahead of time, no apparent motive other than [self-defense], and" the manner of killing was "at least as consistent with a rash, unconsidered impulse as a deliberate plan." The People contend the timing and manner of killing support the jury's verdict.

1.1. Standard of review

" 'In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found defendant guilty 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 verdict and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citation.] The same standard applies where the conviction rests primarily on circumstantial evidence. [Citation.] We may not reweigh the evidence or resolve evidentiary conflicts. [Citation.] The testimony of a single witness can be sufficient to uphold a conviction—even when there is significant countervailing evidence, or the testimony is subject to justifiable suspicion. [Citation.] Accordingly, we may not reverse for insufficient evidence unless it appears ' "that upon no hypothesis whatever is there sufficient substantial evidence to support …" ' " the verdict. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1157–1158.)

1.2. Premeditation and deliberation

Murder perpetrated by "willful, deliberate, and premeditated killing" is murder of the first degree. (§ 189.) " 'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. … "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. … "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " ' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1224, omissions in *Cole*.)

In *People v. Anderson*, the California Supreme Court set forth three categories of circumstantial evidence sufficient to establish such reflection—planning, motive, and manner of killing. Usually, the People must present very strong evidence of planning, or slightly weaker planning evidence combined with evidence of motive or manner. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*).) These categories are not dispositive, however. "The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

After reviewing the entire record,[8] we conclude that a reasonable jury could infer from the evidence that on the night of the murder, as Louise lay sleeping or passed-out in the back of the van, defendant retrieved a hammer from a nearby drawer, kneeled over her body, and beat her about the face and head for 15 minutes with enough force to split open her skull and detach most of an ear. Louise remained in the same spot throughout her ordeal; she did not manage to inflict any injuries on defendant. As we will discuss, this evidence of planning and manner of killing supported reasonable inferences from which the jury could conclude defendant premeditated and deliberated Louise's murder.

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[8] The trial court's care and attention to detail in this difficult case eased our task significantly. We particularly appreciate that the court ensured the prosecutor's PowerPoint presentation and the documents marked only for identification were placed in the court file for our review.

1.2.1. Manner of killing—bloodstain evidence and Louise's injuries

The jury could have reasonably inferred that the manner in which defendant killed Louise indicated that he acted on a preconceived design rather than from an explosion of violence. (*Anderson*, *supra*, 70 Cal.2d at pp. 28–30.) Louise's wounds reflect an organized, deliberate killer. Defendant bludgeoned her about the face and head for nearly 15 minutes. At least 20 lacerations covered her face and scalp. Using "substantial force," defendant fractured Louise's face in six places—her forehead, left eye socket, both cheekbones, nose, and both sides of her jaw. He punctured her sinus and cleaved her left ear nearly in half. The blow, which also fractured the base of her skull—the thickest part—had to be delivered with "a lot of force." More blows to that side of the head caused additional skull fractures, brain hemorrhages, and brain bruising. On the right side, a single hammer blow crushed Louise's skull deeply enough that air could enter the brain cavity. This concentrated attack required focus and strength. (See *id.* at p. 27 ["particular and exacting" wounds suggest deliberate killing].)

The evidence also supports a conclusion that defendant kneeled over Louise as he killed her. As discussed, many of Louise's injuries were inflicted with extraordinary force—force sufficient, on the left, to crush the thickest part of her skull, and on the right, to break through her skull with a single blow, allowing air to flow into the brain cavity. The jury could have reasonably inferred that to achieve the necessary force, defendant had to swing the hammer in a long arc—and that given defendant's height (six feet) and the small space, he must have been kneeling. Likewise, Louise's defensive wounds—bruises to

her right forearm and a human bite mark on her left upper arm—indicate that she crossed her arms over her face and head in effort to protect herself from an attack from above. Indeed, she was in this position when her body was discovered.

The bloodstain evidence also supports the inference that defendant kneeled over Louise while he bludgeoned her. Most of the bloodstains were concentrated under Louise's head and in low-lying areas adjacent to it, indicating that while she may have struggled, she remained pinned to the floor in roughly one spot throughout the attack. (Indeed, Louise did not even move enough to dislodge the crack pipe from her bra.) The blood spatter on defendant's shorts and the bloodstains covering his shirt and undershirt could reasonably indicate that he struck her from above. (See James et al., Principles of Bloodstain Pattern Analysis (2005) pp. 119–129 [when striking a blood source with a hammer from above, impact spatter is directed toward the assailant].) The blood spatter found on the roof of the van provided additional evidence of both Louise's location and the force of the hammer blows.

1.2.2. Planning—the murder weapon, defendant's injuries, and the aftermath

While Louise's injuries reflect the purpose and determination with which defendant executed the attack, the murder weapon and the crime scene indicate that he planned it. Though the van was dirty, it was relatively organized, especially given that two people lived in it. Indeed, defendant himself described the van as "neat like a little house. … Everything was perfection, neat in there." Defendant's tools were stowed, not strewn about the van. Among other storage solutions, the van contained a plastic bureau with multiple drawers; when the

police arrived, one drawer was open. The jury could have reasonably inferred from these facts that the hammer had not been lying about. Rather than grab it impulsively, defendant opened the drawer and removed the hammer as part of a plan to kill the sleeping Louise. (See *People v. Perez*, *supra*, 2 Cal.4th at pp. 1126–1127 [defendant obtained a knife from the kitchen drawer before attacking the victim]; *People v. Sears* (1965) 62 Cal.2d 737, 743, overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 509 ["Defendant's admission that he went into the kitchen, removed a knife from the drawer, returned to the living room and used the knife to stab the little girl affords circumstantial evidence that he deliberately and premeditatedly inflicted the fatal wounds."].)

As discussed, the bloodstain evidence supports an inference that throughout her ordeal, Louise remained in approximately one spot while defendant kneeled over her. The moaning that preceded her screams, the cocaine found in her system, and the crack pipe in her bra supported an inference that Louise was high or asleep before the attack. And despite the brutality of the killing, defendant suffered only minor, superficial injuries. His only apparent injuries were bruises to his knees—bruises consistent with kneeling over or on Louise—and a scratch to his head that he probably received when the police dragged him from the van and pinned him to the sidewalk. Taken together, this evidence supported a reasonable inference that defendant took Louise by surprise. (See *People v. Bloyd* (1987) 43 Cal.3d 333, 349 [absence of evidence of struggle supported finding of premeditation and deliberation].)

Finally, defendant's post-killing behavior provided the jury with additional evidence that he acted deliberately, not

impulsively. (*People v. Thompson* (2010) 49 Cal.4th 79, 113 ["postcrime actions and statements can support a finding that defendant committed a murder for which his specific mental state is established by his actions before and during the crime."].) Eyewitness testimony established that even as defendant beat Louise to death, he had sufficient self-control to listen for the police and to stop the *moment* they approached. Then, he had the presence of mind to conceal the murder weapon under a pile of blankets, wipe his hand on his shorts, and lie quietly next to Louise's corpse while he waited for the police to leave. Though defendant resisted arrest, once he was in custody, he felt relaxed enough to remove his blood-covered collared shirt, ball it into a pillow, rest his head on it, and go to sleep.

To be sure, there was some evidence supporting a different view. We may not resolve such evidentiary conflicts, however. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Though the evidence at trial could have supported different inferences about defendant's mental state, it is sufficient to sustain his conviction for first-degree murder.

2. Failure to modify CALCRIM No. 375 sua sponte

Defendant argues that the version of CALCRIM No. 375 given to the jury erroneously limited jurors' use of Louise's uncharged domestic violence and thereby over-emphasized defendant's prior bad acts. Defendant acknowledges that the self-defense instructions, CALCRIM Nos. 505 and 571, specifically addressed Louise's prior violence. He contends, however, that while those instructions allowed the jury to use Louise's past violence to evaluate whether *defendant's* beliefs and conduct were reasonable, they did not tell "the jury it could use [Louise]'s history of domestic violence as proof she was a violent

person or that she likely acted in conformity with her character on the night in question." That is, the self-defense instructions allowed jurors to infer from the evidence that defendant *reasonably believed* Louise was attacking him, but did not allow them to infer that Louise, as a violent person, *actually* attacked him. Thus, the modified version of CALCRIM No. 375 effectively precluded the jury from considering Louise's violence when evaluating the alternative offenses of second-degree murder (provocation) and voluntary manslaughter (heat of passion). We conclude defendant has forfeited this claim.

2.1. Proceedings Below

At trial, defendant presented evidence that Louise had a violent history, including a prior felony conviction for domestic violence. Defendant relied heavily on this evidence to bolster his contention that the killing was justified as self-defense. The court ruled that by doing so, defendant opened the door for the prosecution to present evidence of defendant's violent character under Evidence Code section 1103, subdivision (b) (hereafter section 1103).[9] Thus, on cross-examination the prosecutor addressed defendant's criminal history—including his prior convictions for assault, robbery, and rape.

Because there is no pattern jury instruction concerning the use of section 1103 evidence, to instruct the jury on the permissible uses of this evidence, the court modified CALCRIM No. 375, which addresses the jury's use of evidence admitted

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[9] Defense counsel objected below to the admission of evidence of defendant's character for violence, but defendant does not challenge the court's ruling on appeal.

under Evidence Code section 1101, subdivision (b).[10] The modified instruction provided:

> The People presented evidence that the defendant committed the offenses of rape, robbery, and assault with a deadly weapon, that were not charged in this case.
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the offenses. …
>
> If you decide that the defendant committed the offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:
>
> The defendant is a violent person.
>
> Do not consider this evidence for any other purpose except for the limited purpose of determining defendant's credibility.
>
> Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.
>
> If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not

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[10] In light of the importance of jury instructions in criminal cases, instruction hearings are often critical to appellate review. We commend the court for conducting the entire hearing on the record.

> sufficient by itself to prove that the defendant is guilty of murder or manslaughter or that the allegation that the defendant personally used a deadly weapon has been proved. The People must still prove the charge and every allegation beyond a reasonable doubt.

Defense counsel said he had no objection to the instruction as modified.

2.2. Forfeiture

In general, the failure to object to an instruction—or to request its modification or amplification—bars a defendant from challenging the instruction on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 326.) Defendant acknowledges that he did not object below but contends the issue is nevertheless cognizable on appeal because the instructions as a whole misstated the law and the error affected his substantial rights.

"A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) Specifically, a criminal defendant "is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230.) "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation]," however, "and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Welch* (1999) 20 Cal.4th 701, 757 [where "the court gives an instruction correct in law, but the

party complains that it is too general, lacks clarity, or is incomplete, he must request the *additional or qualifying instruction* in order to have the error reviewed."] [Internal quotation marks omitted].)[11]

While the trial court has no obligation to give a pinpoint instruction absent a request, if the court chooses to instruct the jury on a particular point of law, it must do so accurately; there is no forfeiture if the instruction as given was an incorrect statement of the law. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Here, the modified instruction correctly expressed the law as it related to defendant, and the self-defense instructions correctly expressed the law as it related to Louise. "If defendant believed the instruction … required elaboration or clarification, he was obliged to request such elaboration or clarification in the

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[11] While a defendant must request instructions pinpointing the *facts* underlying his defense, the court must instruct sua sponte on any affirmative defense. (*People v. Salas* (2006) 37 Cal.4th 967, 984.) Defendant does not dispute that the court in this case properly instructed on provocation, heat of passion, and self-defense. Nor does this appeal involve a failure to instruct on the defense theory of the case generally. To the extent defendant implies a targeted instruction was particularly important in this case because the defense hinged on the jury's evaluation of female on male domestic abuse, we note that the defense did not present expert testimony on intimate partner battering. (Evid. Code, § 1107.) Such testimony would have been relevant to defendant's claim of self-defense and would have required the court to give CALCRIM No. 851 about intimate partner battering and its effects. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1083.)

trial court. [Citations.]" (*People v. Lee*, *supra*, 51 Cal.4th at p. 638.)[12]

2.3. The instructional error, if any, did not affect defendant's substantial rights.

"The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259; *People v. Lewis* (2009) 46 Cal.4th 1255, 1294, fn. 28.) "In this regard, '[t]he cases equate "substantial rights" with reversible error' under the test stated in *People v. Watson* (1956) 46 Cal.2d 818." (*People v. Felix* (2008) 160 Cal.App.4th 849, 857.) Thus, if the asserted instructional error would have prejudiced defendant in a way that denied him a fair trial, the error would affect his substantial rights and we may review the issue on appeal. On the other hand, any error that would be harmless under *People v. Watson* does not affect

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[12] Defendant's argument is unclear about how he believes the court should have instructed the jury differently. In some places, defendant appears to argue that the court should have modified CALCRIM No. 375 by simply extending the rule limiting the jury's consideration of the evidence *against* defendant to the jury's consideration of *defense evidence* of Louise's bad acts. But such a modification would have limited the jury's use of the evidence even more than the instruction as given, by barring it from considering Louise's character for violence unless defendant first proved her prior bad acts by a preponderance of the evidence. Elsewhere, defendant implies that the court should have used the instruction quoted in *People v. Fuiava* (2012) 53 Cal.4th 622—but that instruction would not have required the prosecution to prove defendant's bad acts by a preponderance of the evidence, which the given instruction did.

defendant's substantial rights; such errors are forfeited by the failure to object.

Under Article VI, section 13 of the California Constitution, a judgment may not be reversed on appeal absent a showing that an error resulted "in a miscarriage of justice." As interpreted by the California Supreme Court, this provision means that we may reverse for an error of state law only where a defendant can establish "that it is reasonably probable that a result more favorable to [him] would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836 (*Watson*).) A reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) An error is prejudicial whenever the defendant can " 'undermine confidence' " in the result achieved at trial. (*Ibid*.)

Defendant contends that when combined with the self-defense instructions, the modified version of CALCRIM No. 375 precluded the jury from considering Louise's violence when determining whether provocation, heat of passion, or imperfect self-defense supported a second-degree murder or voluntary manslaughter verdict. As defendant notes, to find him guilty of a lesser form of murder, the jury did not need to be "*convinced* appellant killed [Louise] in response to being attacked by her, but just to believe this was one rational conclusion to draw from the evidence." Because "it would have been reasonable for the jury to accept" his defense, he contends, "the error was prejudicial."

The problem with defendant's argument is that it is apparent from the record that *this* jury did not believe "there was at best weak support" for its verdict. After a 10-day trial that

included several days of testimony by defendant and admission of approximately 75 exhibits, the jury deliberated for just 55 minutes. (See, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberations is evidence of a close case].) The jurors did not request read-back of any testimony. They did not ask any questions. (See *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror questions and requests to have testimony reread are indications the deliberations were close. [Citations.]"].) In short, the jurors signaled that they were sure about their verdict. They simply did not believe defendant.

Given this level of apparent certainty, there is no "reasonable chance" the subtleties of several overlapping jury instructions made a difference here. (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [harmless error analysis requires the court to look at the impact of an error on the jury].) Because the asserted instructional error would not merit reversal under *Watson*, any error did not affect defendant's substantial rights. We therefore conclude defendant has forfeited this claim. (See *People v. Franco* (2009) 180 Cal.App.4th 713, 719.)

2.4. Counsel was not ineffective for failing to object.

Defendant contends that if counsel's failure to object forfeited the issue, that failure deprived him of effective assistance of counsel under the Sixth Amendment. We disagree.

"Under either the federal or state Constitution, '[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).) To establish ineffective assistance, defendant must satisfy two requirements. (*Id.* at

pp. 690–692.) First, he must show his attorney's conduct was 'outside the wide range of professionally competent assistance.' (*Id*. at p. 690.) Then, he must demonstrate the deficient performance was prejudicial—i.e., there is a reasonable probability that but for counsel's failings, the result of the proceeding would have been different. (*Id*. at p. 694.) 'It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a "reasonable probability" that absent the errors the result would have been different.' (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.) We 'need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.' (*Strickland*, *supra*, at p. 697.)" (*People v. Valenti*, *supra*, 243 Cal.App.4th at p. 1168.) We therefore turn first to the question of prejudice.

The California Supreme Court has held that the *Watson* "reasonable probability" standard for state law error (*Watson*, *supra*, 46 Cal.2d 818) discussed above is identical to the similarly phrased prejudice prong for ineffective assistance under *Strickland*. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1058–1059.) As we have explained, there is no reasonable probability the result in this case would have been different if the court had provided different instructions on the section 1103 evidence. (See *Strickland*, *supra*, 466 U.S. at pp. 694, 697.) Accordingly, we find no Sixth Amendment violation. (*Id*. at pp. 690–694.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.