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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MANUEL AMARO,

Defendant and Appellant.

2d Crim. No. B268248
(Super. Ct. No. 2012043259)
(Ventura County)

A jury convicted Jose Manuel Amaro of first degree murder (Pen. Code,¹ §§ 187, subd. (a), 189), possession of a firearm by a felon (former § 12021, subd. (a)(1)), shooting at an occupied motor vehicle (§ 246), and witness intimidation (§ 136.1, subd. (c)(1)). The jury also found true allegations that Amaro perpetrated the murder by discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21)), personally and intentionally discharged a firearm when he committed the murder and

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

shooting (§ 12022.53, subd. (d)), and personally used a firearm when he intimidated a witness (§ 12022.5, subd. (a)(1)). The trial court sentenced him to life in state prison without the possibility of parole on the murder, a consecutive term of 25 years to life on the discharge of a firearm allegation, and a consecutive term of 10 years on the remaining charges and allegation.

Amaro challenges the judgment based on the trial court's finding that his motion to substitute counsel was untimely. He also challenges the court's admission of evidence of prior incidents of domestic violence and gang membership and culture, and raises claims of ineffective assistance of counsel and cumulative prejudice. We affirm.

BACKGROUND

Amaro and his wife, Sylvia Amaro,² separated after seven years of marriage. After the separation, Amaro dated Lupita Gonzalez. Sylvia dated Junior Madrigal. Sylvia's cousin, Eileen Galaviz, dated Junior's brother, Gabriel Madrigal. Amaro had known Gabriel for 10 or 11 years.

In December 2011, Sylvia drove Gabriel, Eileen, and Eileen's daughter to Gabriel's house. They planned to pick up Junior en route. Amaro and Lupita began to follow them in Amaro's truck. When both vehicles stopped at a red light, Gabriel rolled down his window and asked Amaro, "What's up?" Amaro called Gabriel "lame." Eileen told Gabriel, "You guys can do this later." Amaro then asked Gabriel "What's up foo?" and fired a gun at him. Amaro drove off, let Lupita out of the truck, and threw his gun into the ocean.

² We refer to all victims and witnesses by their first names for ease of identification.

Sylvia drove Gabriel to a medical center. Inside the medical center, Sylvia yelled, “Poppa^[3] shot him!” Eileen said, “Oh my god, that motherfucker; I can’t believe he did that!” Gabriel died from his wounds a few days later.

Sylvia’s subsequent behavior

When police arrived at the medical center, Sylvia told an officer that she heard a pop while she drove. She let police review her phone’s contacts and call log, and identified the crime scene to one of the officers. She denied she had seen the shooter.

Sylvia later told Gabriel’s mother that Amaro said she would be assaulted if she did not “keep [her] fucking mouth shut.” Sylvia commented that Amaro had killed the wrong brother because she was dating Junior, not Gabriel. Gabriel’s mother encouraged her to talk to police, but Sylvia was scared because of Amaro’s threats. When her relationship with Gabriel’s family subsequently deteriorated, Sylvia reconciled with Amaro. He told her to say that he did not shoot Gabriel, and that if he did it was in self-defense.

Eileen’s subsequent behavior

Eileen initially told police she did not see Gabriel’s shooter. She later told her brother that Amaro shot Gabriel. A week later when she went to the police station to retrieve her purse, she again said she did not see the shooter. When police followed up a few months later, Eileen said she did not have any

³ “Pops” is Amaro’s gang moniker.

new information, did not want to get “papered,”⁴ and did not want to testify.

After Eileen spoke with police, Amaro drove past her as she walked down the street. He turned around and passed her several more times. Eileen stopped at a stranger’s house and asked to use the phone. The woman at the house told Eileen that Amaro had a gun, and Eileen responded that Amaro wanted to kill her because she saw him murder Gabriel.

Someone reported the incident to police. When questioned several days later, Eileen told police that Amaro murdered Gabriel. Police placed her in witness protection after she began to fear for her safety because of the existence of paperwork documenting her cooperation with the murder investigation.

Lupita’s subsequent behavior

Lupita tried several times after the shooting to break up with Amaro, but each time he assaulted her. He told her that she would be in trouble since she was in the truck when he shot Gabriel. When police learned that Lupita may have witnessed the shooting, they requested a statement. She took them on a ride-along of the route Amaro drove prior to the shooting. She feared that she would be labeled a “rat” and would get “papered” by local gang members.

Police arrested Amaro for murder. During his first phone call to Lupita, Amaro said, “You put me in here.” He told Lupita to “say that [she] lied” in any future statements. In another call Amaro said, “[T]hey’re gonna put you up there. And

⁴ “Paper” is a street term for intimidating someone who has been talking to police by leaving copies of police reports or court testimony on the person’s vehicle or at his or her home.

you gotta tell the truth. Tell ‘em that I didn’t do it. [¶] . . . [¶] . . . [T]hat you were lying, I guess.” In another call Amaro asked, “You didn’t see nothing, right?”

Court proceedings

At the preliminary hearing, Eileen testified that Amaro shot Gabriel. A stack of papers, including police reports and her preliminary hearing testimony, was later left on her car. She was frightened because gang members had evidence of her cooperation with police.

Lupita also testified that Amaro shot Gabriel. After the hearing Sylvia called Lupita a “rat.” When Lupita arrived home, one of her house’s windows was broken. Sylvia and one other woman were there. Lupita and Sylvia fought. Lupita did not want to testify again because she did not want to put her and her kids’ lives in danger.

A second altercation between Lupita and Sylvia occurred after another of Amaro’s court appearances, although this one did not become physical. But after a subsequent hearing, Sylvia pulled Lupita’s hair and called her a “rat” again. Lupita was reluctant to testify at trial because she feared that these incidents would become known on the street.

DISCUSSION

Motion to substitute counsel

Amaro argues the trial court should have granted his motion to discharge retained counsel—even though it was untimely—because his attorney’s “subpar” performance outweighed the motion’s untimeliness. We disagree.

A defendant may move to discharge retained counsel for any reason. (*People v. Ortiz* (1990) 51 Cal.3d 975, 984 (*Ortiz*).) The trial court “may deny such a motion . . . if it is not timely, i.e.,

if it will result in ‘disruption of the orderly processes of justice’ [citations].” (*Id.* at p. 983.) To determine whether a motion is timely, the court evaluates the totality of the circumstances, including whether the defendant demonstrated inadequate representation or irreconcilable conflict. (*People v. Maciel* (2013) 57 Cal.4th 482, 513 (*Maciel*).) We review the denial of a motion to discharge retained counsel for abuse of discretion. (*People v. Verdugo* (2010) 50 Cal.4th 263, 311.)

Amaro’s trial was originally set for October 2013. After several continuances, trial was set for February 2015. Eight days before jury selection was to begin, Amaro moved to discharge retained counsel because they no longer saw “eye to eye on situations.” He had no substitute counsel in mind. He asked the trial court to appoint the public defender until he could secure a new attorney.

The prosecutor opposed Amaro’s motion. She said that because the murder happened more than three years ago, some witnesses’ memories had faded, bench warrants had issued for some witnesses to compel their attendance at trial, and others would become unavailable if trial were continued. The trial court asked a public defender present in the courtroom how much time would be needed to prepare for trial if it granted Amaro’s motion. The public defender said his office would need four to six months.

After an in camera hearing with Amaro and counsel, the court considered the factors set forth in *People v. Keshishian* (2008) 162 Cal.App.4th 425, 428-429 (*Keshishian*). It found that granting Amaro’s request would result in a delay of six months to one year, which would cause “significant prejudice” to the People and would disrupt the orderly process of justice. It denied

Amaro's motion as untimely, but granted his request for a short continuance, and set trial for March.

In mid-April, near the end of voir dire, Amaro appeared in court with another attorney who asked to substitute in. The attorney claimed he could be ready for trial in 30 to 45 days. The prosecutor objected because she had a witness in custody. During an in camera hearing, Amaro claimed a communication breakdown with counsel, and said he was concerned with counsel's health problems and performance during voir dire. After considering Amaro's concerns, counsel's health problems, and the prosecutor's objections, the trial court denied the motion to substitute counsel.

The trial court did not abuse its discretion when it denied Amaro's motion to discharge retained counsel because granting the motion would have disrupted the orderly processes of justice. (*Ortiz, supra*, 51 Cal.3d at p. 983.) Amaro first moved to discharge counsel at a late stage in the proceedings, after his case had been pending for more than two years. (*Maciel, supra*, 57 Cal.4th at p. 512; *Keshishian, supra*, 162 Cal.App.4th at p. 429.) The motion came on the eve of jury selection. (*Maciel*, at pp. 512-513; *People v. Hernandez* (2006) 139 Cal.App.4th 101, 109 (*Hernandez*).) Amaro "had no substitute counsel in mind; rather, he requested that the court appoint [the public defender]." (*Maciel*, at p. 513.) But new counsel would have required at least another four months to prepare for trial. (*Ibid.*; *Keshishian*, at p. 429.) Additionally, counsel had not abandoned Amaro, and there was no actual conflict of interest; Amaro merely stated that he and counsel no longer saw "eye to eye" in certain situations. (*Maciel*, at p. 513; *Keshishian*, at p. 429.) "That [Amaro] inexplicably [no longer saw 'eye to eye' with] his experienced and

fully prepared counsel did not constitute good cause for granting the continuance requested, nor justify the disruption to the judicial process that would have ensued.” (*Keshishian*, at p. 429.)

Similarly, there was no abuse of discretion when the trial court denied Amaro’s second motion to discharge retained counsel. Amaro made that motion at an even later stage of the proceedings, near the end of voir dire. (*Maciel*, *supra*, 57 Cal.4th at p. 512; *Keshishian*, *supra*, 162 Cal.App.4th at p. 429; *Hernandez*, *supra*, 139 Cal.App.4th at p. 109.) And although he had retained substitute counsel, that attorney would have required a six-week continuance. (*Maciel*, at p. 513; *Keshishian*, at p. 429.) But the prosecutor already had one reluctant witness in custody, and the court was rightly “concern[ed] that further delay would exacerbate [her] reluctance to testify.” (*Maciel*, at p. 513.) Finally, as before, counsel had not abandoned Amaro; there was simply a “communication breakdown” with counsel during voir dire. (*Maciel*, at p. 513; *Keshishian*, at p. 429.) There was no error under these circumstances.

Admissibility of prior incidents of domestic violence as propensity evidence

Amaro contends the trial court erroneously admitted his prior acts of domestic violence pursuant to Evidence Code section 1109 because the crimes charged were not “offense[s] involving domestic violence” against Sylvia. We disagree.

While Amaro did not object under Evidence Code section 1109 at trial, he did not forfeit his contention because the objections he did raise were “sufficiently specific to encompass” that issue.⁵ (*People v. Williams* (1988) 44 Cal.3d 883, 906.) We

⁵ At the hearing on the motions in limine, counsel argued against the admissibility of the acts of domestic violence because

thus independently review Amaro's contention on the merits, as it hinges on the proper interpretation of the Evidence Code. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.)

That Gabriel was not a victim of "domestic violence" is irrelevant. As Amaro's then-wife, Sylvia could be the victim of his domestic violence. (Evid. Code, § 1109, subd. (d)(3); see § 13700, subd. (b).) And it can reasonably be inferred that she was placed "in reasonable apprehension of imminent serious bodily injury to . . . herself, or another" when Amaro shot into the car she was driving. (§ 13700, subd. (a); cf. *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1118 [pointing a gun at someone puts him or her in reasonable apprehension of bodily injury].) Amaro thus committed an offense involving domestic violence *against Sylvia* when he followed her car and shot Gabriel. Evidence of his prior acts of domestic violence was therefore admissible. (Evid. Code, § 1109, subd. (a)(1); see *People v. Dallas* (2008) 165 Cal.App.4th 940, 958 [if domestic violence evidence admissible, jury can consider it in connection with all charges and allegations].)

Admissibility of prior incidents of domestic violence as evidence of motive

Amaro contends the trial court erred when it admitted prior incidents of domestic violence pursuant to Evidence Code section 1101 because the evidence was not relevant to his motive and intent, and was more prejudicial than

they were not committed against Gabriel: "[I]f you compare [domestic violence] to the crime of murder, you can't prove that [Amaro] had a motive to shoot [Gabriel] because he was violent domestically. That is a non sequitur."

probative.⁶ We need not reach this contention because the evidence was admissible under Evidence Code section 1109. (Evid. Code, §§ 1101, subd. (a), 1109, subd. (a)(1); see *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316.) But even if it were not, it was also admissible under Evidence Code section 1101.

Evidence of a defendant's prior incidents of domestic violence is inadmissible to prove his or her "conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) But such evidence is admissible to prove motive (*id.*, subd. (b)), so long as "there is a direct relationship or nexus between it and the current alleged crimes" (*People v. Cage* (2015) 62 Cal.4th 256, 274 (*Cage*)). To admit evidence of prior incidents of domestic violence, the trial court must determine that the facts to be proved are material, the evidence tends to prove those facts, and another statute (e.g., Evidence Code section 352) does not require exclusion of the evidence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379 (*Carpenter*), abrogated on another point by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190-1191; see also *People v. Kipp* (1998) 18 Cal.4th 349, 371 [undue prejudice cannot outweigh probative value of uncharged crimes].) We review the admission of evidence under Evidence Code section 1101 for abuse of discretion. (*People v. Rogers* (2013) 57 Cal.4th 296, 326 (*Rogers*).)

At trial, the People introduced evidence of several incidents of domestic abuse Amaro committed against Sylvia. In February 2010, Amaro threatened to shoot Sylvia. When a police

⁶ Amaro also argues that admitting domestic violence evidence to assess Sylvia's credibility was "overkill," but he "fails to support [his assertion] with reasoned argument and citations to authority." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784 (*Badie*).) The argument is forfeited. (*Id.* at p. 785)

officer arrived, Sylvia told him that Amaro had a gun, and the officer arrested Amaro.

In November 2011, Amaro told Sylvia “not to be a whore in his car” before kicking and punching her. A few days later he threatened to “blow [her] head off” if he ever found out she was seeing someone else. He told her to “watch [her] head at night when [she was] sleeping.” He brandished a gun and told her that the eight bullets in the clip were for her. He threatened to shoot both her and himself.

Amaro continued to assault and threaten Sylvia into December. He said he would kill her if she ever left him, and if he ever saw her with another man he would shoot them both. Amaro also asked Gabriel if Sylvia was dating his brother.

In the week prior to Gabriel’s murder, Amaro sent Sylvia threatening text messages. He said he did not trust her. He called her names: “stupid fucking fat bitch,” “hoodrat slut,” “hooker,” “sloppy hoe [sic],” “sperm bank,” “fucking tramp,” “trick,” “waste of a lady hoe [sic],” and “dumb sorry hoe [sic].” He asked who she was “being with.” On the day of the murder he called her a “nasty fucking rat bitch” and said he would “see [her] in hell, slutty old hoe [sic].”

The trial court did not abuse its discretion when it admitted evidence of Amaro’s prior incidents of domestic violence against Sylvia because “[t]he evidence was relevant to [his] motive and was thus admissible.” (*People v. Thompson* (2016) 1 Cal.5th 1043, 1115.) It showed Amaro did not trust Sylvia and suspected she had been with other men. It showed he had access to a gun and was willing to shoot Sylvia and any suspected paramour. And he did just that. The sequence of events demonstrates a direct relationship between the domestic violence

evidence (threats to shoot Sylvia and her perceived lover) and Gabriel's murder (carrying out that threat). (*Cage, supra*, 62 Cal.4th at p. 274.) The former tends to prove motive for the latter. (*Carpenter, supra*, 15 Cal.4th at pp. 378-379.)

Admission of the domestic violence evidence was not unduly prejudicial. "The probative value of the evidence to explain [Amaro's] motive to commit the charged crimes was significant" since "the evidence of motive was specific": Amaro stated that, if he ever saw Sylvia with another man, he would shoot them both. (*Cage, supra*, 62 Cal.4th at p. 275.) The evidence also "provided a fuller explanation for" the murder of Gabriel: Amaro's rage toward Sylvia for her perceived infidelity. (*Ibid.*) In contrast, any prejudice to Amaro was minimal given the evidence's direct effect on the issues and the trial court's limiting instructions to the jury.⁷ (*Ibid.* [prejudice results from evidence that has little effect on the issues]; *People v. Lindberg* (2008) 45 Cal.4th 1, 25-26 [jury instructions help to eliminate danger of misleading jury].) The probative value of the evidence thus exceeded its prejudicial value. (*People v. McKinnon* (2011) 52 Cal.4th 610, 655.) It was properly admitted. (*Rogers, supra*, 57 Cal.4th at p. 332.)

Admissibility of gang evidence

Amaro argues the trial court erred when it admitted evidence of gang membership and culture to demonstrate witness intimidation because it was not relevant to witness credibility, and its admission was more prejudicial than probative. We disagree.

⁷ The trial court instructed the jury with CALCRIM No. 852, evidence of uncharged domestic violence.

“Evidence of the defendant’s gang affiliation . . . can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) But even if relevant, the trial court must “carefully scrutinize such evidence before admitting it” because of its potentially “highly inflammatory impact on the jury.” (*People v. Williams* (1997) 16 Cal.4th 153, 193.) We review the admission of gang evidence for abuse of discretion. (*People v. Duff* (2014) 58 Cal.4th 527, 558 [rulings under Evidence Code sections 350 and 352].)

A gang expert testified that Amaro is a member of the Southside Chiques criminal street gang. The gang enforces a code of silence to dissuade members from cooperating with or trusting the police, talking about the gang, or testifying. Nongang members are also subject to the code of silence. If they testify or cooperate with police, they will be labeled “rats” and may receive “paper” from the gang to intimidate them. A “rat” is also subject to violent retribution.

The trial court did not abuse its discretion when it admitted evidence of Amaro’s gang membership and culture because the evidence was substantially probative of Eileen’s and Lupita’s reluctance to testify. (*People v. Ward* (2005) 36 Cal.4th 186, 211.) The evidence permitted the jury to “infer . . . that [Eileen and Lupita] . . . were reluctant to testify and initially fabricated the story that they did not witness [Gabriel’s] murder” out of fear of being labeled “rats” and getting “papered.” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1034 (*Nguyen*).) It was relevant even though Amaro himself did not “paper” Eileen and Lupita because it explains the women’s “desire to distance

themselves from . . . association with the [Southside Chiques's] culture and lifestyle.” (*People v. Merriman* (2014) 60 Cal.4th 1, 87.)

And it was not unduly prejudicial. The expert’s testimony about the Southside Chiques’s code of silence and its common means of intimidating nongang members “had no tendency to evoke an emotional bias against [Amaro].” (*Nguyen, supra*, 61 Cal.4th at p. 1035.) And the court provided a limiting instruction, CALCRIM No. 1403, which further lessened any risk of prejudice. (*People v. Montes* (2014) 58 Cal.4th 809, 860.) The evidence was properly admitted. (*Ibid.*)

This case is unlike *People v. Memory* (2010) 182 Cal.App.4th 835, upon which Amaro relies. In *Memory*, there was a “lack of evidence regarding the criminal nature” of the gang at issue. (*Id.* at p. 860.) Amaro makes no similar claim here. More significantly, in *Memory*, the prosecution offered the gang evidence to show defendants’ criminal dispositions. (*Id.* at p. 863, fn. 9.) Here, the prosecutor introduced the gang evidence to explain inconsistencies in the testimony from Eileen and Lupita. (See Evid. Code, § 1101, subd. (c) [admission of evidence to support or attack witness credibility].)

Ineffective assistance of counsel

Amaro argues trial counsel provided ineffective assistance because he: (1) exhibited confusion and experienced a health crisis during voir dire, (2) did not argue a *Batson/Wheeler*⁸ motion, (3) exhibited confusion on two pretrial motions, (4) misunderstood the first degree murder allegation, (5) had a minimally effective cross-examination, and (6) requested

⁸ *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

irrelevant jury instructions and gave a short closing argument. Amaro claims counsel's failings were so egregious that prejudice should be presumed. (*United States v. Cronin* (1984) 466 U.S. 648, 658.) But counsel's alleged failings were not of the type that results in presumed prejudice. (*Id.* at pp. 659-660 [prejudice presumed where: (1) there is a "complete denial of counsel," (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and (3) the "likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small"].) We thus evaluate Amaro's claim that counsel provided ineffective assistance under the standards set forth in *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*).

1. *Voir dire*

Amaro claims ineffective assistance based on counsel's confusion and health problems during voir dire. But he "fails to support [this claim] with reasoned argument and citations to authority." (*Badie, supra*, 67 Cal.App.4th at p. 784.) This court "is not required to examine undeveloped claims, nor to make arguments for parties. [Citation]." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) The claim is forfeited. (*Badie*, at p. 785.)

2. *The lack of a Batson/Wheeler motion*

Amaro bases his next claim of ineffective assistance on counsel's failure to argue a *Batson/Wheeler* motion. During voir dire, the prosecutor exercised peremptory challenges to five potential jurors of Latino ethnicity. The trial court found a reasonable basis to hold a *Batson/Wheeler* hearing. The prosecutor explained her reasons for excluding the potential jurors: one left several questions on the juror questionnaire

blank; the second had served on a jury where the defendant mounted a defense similar to that the prosecutor expected from Amaro; the third grew up in gang territory and had a “neutral” view of gang members; the fourth served on a jury that acquitted the defendant of attempted murder; the fifth was convicted of vandalism. The court asked counsel if he wished to argue. He declined, and the court found no *Batson/Wheeler* violation.

Amaro demonstrates no prejudice from counsel’s failure to argue the *Batson/Wheeler* motion because the prosecutor had valid, race-neutral reasons for striking the jurors. (*Strickland, supra*, 466 U.S. at p. 687; see *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1167-1168 [neutral view of gang members]; *People v. Jones* (2011) 51 Cal.4th 346, 359-360 [blank questionnaire]; *People v. Lomax* (2010) 49 Cal.4th 530, 575 [prior conviction]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1014 [prior jury service resulting in acquittal]; *People v. Jones* (2017) 7 Cal.App.5th 787, 804-805 [prior jury service with similar defense].) Counsel’s argument on the motion would have been unsuccessful. “The Sixth Amendment does not require counsel to raise [such] futile motions. [Citations.]” (*People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24.)

3. *Pretrial motions*

Amaro next argues ineffective assistance based on counsel’s confusion during argument on the prosecutor’s motions to admit evidence of prior domestic violence against Sylvia and to exclude Gabriel’s criminal history. But he fails to demonstrate prejudice because, as set forth above, the trial court properly admitted evidence of his prior incidents of domestic violence. And the evidence of Gabriel’s status as a parolee was not relevant. (*People v. Hoyos* (2007) 41 Cal.4th 872, 913 (*Hoyos*))

[“even if the murder victim were the most violent person in the world, that fact would not be relevant if the evidence made it clear that the victim was taken by surprise and shot in the back of the head”], disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 920.)

4. First degree murder allegation

Amaro contends counsel rendered ineffective assistance because he misunderstood the prosecution’s theory of first degree murder. But counsel’s argument evidences discontent with the form of the information, not its contents: He objected that the information was “bound to be confusing to the jury because every single count has the same special allegation.” The trial court ruled on that objection, and Amaro does not claim the ruling was incorrect. Amaro fails to demonstrate prejudice from counsel’s alleged confusion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1182.)

5. Cross-examination

Amaro bases his next claim of ineffective assistance on counsel’s confusion during the cross-examination of Eileen and Sylvia.

a. Eileen

During cross-examination of Eileen, counsel attempted to elicit testimony regarding Gabriel’s alleged habit of carrying a firearm and his tattoos. The trial court sustained the prosecutor’s objections to those questions. During a discussion with the court, counsel admitted that the evidence he was attempting to elicit was inadmissible without a proper foundation.

Counsel’s performance during the cross-examination of Eileen was not deficient and did not prejudice Amaro because

counsel correctly admitted that the evidence he was trying to elicit was inadmissible. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1173 (*McPeters*) [counsel not required to make unmeritorious arguments on a defendant's behalf], superseded by statute on another ground as stated in *People v. Boyce* (2014) 59 Cal.4th 672, 707.) The evidence was not relevant without a showing that Gabriel had a propensity for violence and carried a gun on the day of his murder. (*Hoyos, supra*, 41 Cal.4th at p. 913; see Evid. Code, § 1103, subd. (a) [admissibility of victim character evidence].) And to the extent Amaro claims ineffective assistance due to counsel's failure to make that showing, his claim fails because there is no indication that such a showing was possible. (*People v. Wash* (1993) 6 Cal.4th 215, 269.)

b. Sylvia

To impeach Sylvia's testimony, the prosecutor introduced recordings of her phone calls with Amaro and Eileen into evidence. Before cross-examination of Sylvia, counsel sought a limiting instruction because the conversations could "be used against the defendant." The trial court admitted the phone calls into evidence. It instructed counsel to raise his concerns as timely objections, and noted that it had ruled on all of his previous objections.

Later during cross-examination, counsel asked Sylvia about Amaro's employment during their marriage. The prosecutor said she intended to ask questions about Amaro's drug dealing and gang involvement in rebuttal. Counsel objected on the basis of relevance. The trial court found the questions proper to rebut an inference that Amaro was a productive member of society. The prosecutor could also use such questions to impeach Sylvia's credibility.

Amaro fails to show ineffective assistance during counsel's cross-examination of Sylvia for three reasons. First, counsel's inability to articulate reasons for requesting a limiting instruction regarding Sylvia's phone call with Amaro did not prejudice Amaro because such a request would have been futile. (*McPeters, supra*, 2 Cal.4th at p. 1173.) Sylvia's statements in the phone call recording were admissible as prior inconsistent statements (Evid. Code, § 1235), while Amaro's were admissible as party admissions (Evid. Code, § 1220). Second, Amaro fails to show deficient performance based on counsel's alleged failure to interpose timely objections because the record does not support his claim. (*People v. Mai* (2013) 57 Cal.4th 986, 1013.) Counsel requested a limiting instruction for the phone call recording, and the court acknowledged that he had requested such instructions previously. Finally, counsel's performance was not deficient when he asked Sylvia about Amaro's employment history because the question had the rational tactical purpose of bolstering Amaro's character. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1279-1280.)

6. Jury instructions and closing argument

Amaro claims counsel rendered ineffective assistance because he requested irrelevant jury instructions and gave a short closing argument. But he fails to articulate how either of counsel's actions prejudiced him in any way. His claims are forfeited. (*Badie, supra*, 67 Cal.App.4th at pp. 784-785.)

Cumulative prejudice

Amaro contends the cumulative effect of the trial court's "major legal errors" denied him a fair trial and due process. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303.) But we "rejected his assignments of error." (*People v. Jenkins*

(2000) 22 Cal.4th 900, 1056.) Because “there is no reasonable possibility of a more favorable . . . verdict in the absence of the [alleged] errors,” Amaro was not denied a fair trial and due process. (*People v. Malone* (1988) 47 Cal.3d 1, 56.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Mark S. Borrell, Judge

Superior Court County of Ventura

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