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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID LEE MILLENDER, Defendant and Appellant.	B278727 (Los Angeles County Super. Ct. No. TA140190)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Shultz, Judge. Judgment of conviction modified and, as so modified, affirmed; remanded for further proceedings.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant David Lee Millender shot and killed his older brother, Willie. A jury convicted him of first degree murder with the personal use of a firearm, and the trial court sentenced him to 75 years to life in prison, plus five years. Appellant contends admission of a medical examiner's testimony violated his federal confrontation rights; the trial court erred by failing to instruct the jury on voluntary manslaughter on a heat of passion theory; the prosecutor committed misconduct and defense counsel provided ineffective assistance by failing to object; the cumulative effect of the errors requires reversal; and a domestic violence fee should be stricken. In supplemental briefing, appellant contends that the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancements pursuant to recently amended Penal Code section 12022.53, subdivision (h).[1] We affirm appellant's conviction, but order the domestic violence fee stricken and remand the matter to allow the trial court to exercise its discretion and determine whether to strike or dismiss the firearm enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

Brothers David, Theodore and Willie Millender,[2] along with David's girlfriend Rochandra Roberson, lived together in a house located on 120th Street in Los Angeles. Willie, who was in his 60's, was the oldest; David, at 49 years old, was the youngest.

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

[2] For ease of reference, and with no disrespect, we hereinafter refer to the Millender brothers by their first names.

Willie was nicknamed "Spike" or "Spikey." He was a long-term user of crack cocaine, and was unemployed. Theodore also smoked cocaine.

Each brother had his own bedroom. Willie's and Theodore's bedrooms were adjacent to the kitchen; the bedroom David shared with Roberson was at the other end of the house. To reach Willie's and Theodore's bedrooms from David's bedroom, it was necessary to cross through the kitchen. The property included a second house located behind the main house. The main house was equipped with a video surveillance system that filmed the kitchen, a patio area, and the driveway, but not the bedrooms.

Each of the four residents was responsible for a share of the household expenses. David collected the money and he and Roberson paid the bills. Willie's monthly share was $200. Frequently, Willie spent his entire monthly government check on cocaine and was late or unable to pay. When this happened, one of the others would cover Willie's share. Willie's failure to pay made "everybody," including David, "mad."

David insisted Willie and Theodore not smoke cocaine in the main house, because he was concerned that Roberson – who worked for the postal service and was subject to drug testing – might be affected by the fumes. Instead, the men were to smoke in the back house. This created tension because Willie felt he should be able to smoke wherever he wanted to. Additionally, Willie frequently asked other persons, including David's friends, for handouts of change and cigarettes, which sometimes displeased David.

In early May 2016, Willie failed to pay his share of the expenses. David told Roberson, "I'm going to get at Spike about him not wanting to pay."

Video footage from the kitchen surveillance camera showed that at approximately 9:45 p.m. on May 3, 2016, David walked through the kitchen to the area of Willie's room. Approximately a minute and a half later, Roberson hurried through the kitchen to Willie's room because she heard "scuffling" between David and Willie. Moments later, Roberson backed into the kitchen, obviously distraught, as David dragged Willie into the kitchen. While Willie was on his knees, David slammed Willie's face down onto the seat of a chair, and then threw him across the room, causing Willie to fall to the ground on his back. As Roberson pleaded with David to stop, David punched Willie, who was still prone on the floor, twice with his fist. David then left the kitchen, followed by Roberson. According to Roberson, the argument was about Willie's failure to pay his share of the expenses. David also asked Willie to go to the back house to smoke.

Willie got up from the floor and went back to his room. Roberson, either immediately or at some point shortly thereafter, left the house. Theodore then entered the kitchen. Within a minute after the punching incident, David strode back through the kitchen toward Willie's room, with a gun in his right hand. Approximately 15 seconds later, David reentered the kitchen with the gun still in his hand. During the next several minutes, David repeatedly traversed the kitchen, going back and forth between the areas of his and Willie's rooms. Theodore, who had heard what sounded to him like a "firecracker shot," found Willie lying on his (Willie's) bedroom floor. Theodore went to a

neighbor's house, and paramedics were called. Within 10 minutes, David left the house, carrying some clothing.

When sheriff's deputies arrived they found Willie, deceased, lying on his side in his bedroom in a pool of blood. Theodore, who appeared distraught and frightened, told a deputy, " 'My little brother killed him.' " Later that night, Theodore told another deputy that he had been awakened by his brothers arguing about the bills, and saw David holding a black gun in his right hand.[3]

Deputies discovered a loaded nine-millimeter magazine and a "speedy loader" in David's bedroom. A single nine-millimeter shell was found in Willie's room. Two nine-millimeter handguns and ammunition were located in a hallway closet.

An autopsy confirmed that Willie died from a gunshot wound to the forehead. The absence of stippling or soot indicated the shot was likely fired from a distance of over three feet away. The entry wound went upwards at an approximate 70 degree angle. Within the body, the bullet moved front to back and upwards. A toxicology report showed the presence of cocaine in Willie's system, but this had no bearing on the cause of death. There were three lacerations on Willie's forehead which, according to a coroner's investigator's report, were likely caused by Willie's head hitting a nightstand in the bedroom. It could not be determined whether Willie was lying down or standing up when he was shot.

David surrendered to police and was arrested on May 21, 2016.

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[3] At trial, Theodore denied hearing or seeing an argument or seeing David with a gun. He claimed he had been awakened by the gunshot.

a. *Defense evidence*

(i) *David's testimony*

David testified on his own behalf, as follows. Between May 1, 2016, and the day of the shooting, as "punishment" for Willie's squandering his entire check on cocaine and his resultant failure to pay his share of the bills, when Willie's friends arrived to visit and smoke cocaine, David sent them away. This made Willie angry and he said to David, " 'You think you the boss.' "

When David initially went to Willie's room on the night of May 3, 2016, he intended to ask Willie what he meant by that comment. In Willie's bedroom, the men argued. David pointed out that Willie had failed to pay his share of the bills, told him his friends could no longer come over, and insisted that Willie not smoke in the house, due to David's concern about Roberson's drug testing requirement. Willie refused to go to the back house to smoke. Willie "got mad at [David] for what [David] said" and "tried to fight" David. Willie punched David. David tried to "detain" Willie, and they wrestled. David then dragged Willie into the kitchen. Although in the video it appeared that David was punching Willie while he was on the ground, the film did not accurately depict the incident. Willie was "fighting, too" and "wouldn't stop." David punched Willie to get him to stop "acting the way he was acting," but did not hit his face or head. David was "hot at the time. I was just mad. I don't know what I was doing. I was just mad."

David briefly returned to his bedroom. Approximately a week before the shooting, David had purchased a gun. David had the gun with him the entire day on May 3; he did not return to his bedroom to retrieve it. David then returned to Willie's bedroom, intending to display the gun in an effort to scare Willie

into going to the back house. David was not upset about the failure to pay the bills, which was a common occurrence; he was concerned about the smoking issue. When David entered Willie's room, Willie grabbed David and they tussled over the gun. They pushed each other, and David fell backwards. As David fell, the gun discharged accidentally. David did not aim the gun at Willie and did not intend to shoot or kill Willie; he just wanted to scare him. David was shocked and did not know what to do. He saw deputies as he was leaving the house, and discarded the gun in a trash can. He did not speak to police right away because he believed he needed a lawyer first.

David did not think he had chambered a round before entering Willie's room. He had not checked to see if the gun was loaded. He knew how to load a gun and slide the hammer back, but he was not really familiar with firearms operations and was not an expert. He admitted that one of the guns found in the closet was his, and that he had suffered a conviction "involving a firearm" in 2004.

When David told Roberson he was "going to get at" Willie about the bills, he had not meant he intended to hurt him; he meant he would talk to Willie. He and Willie had been "real close." Before that night, he and Willie had "never had a fight a day in [their] li[ves]." There were never problems between the two of them. Willie's failure to pay the bills was "no big deal."

David admitted he occasionally sold cocaine, traded cocaine for cigarettes, and sold cocaine to Willie. He did not possess the gun to protect himself during drug sales.

David was at least 25 pounds heavier than Willie.

(ii) *Other defense evidence*

Three family friends, who knew both David and Willie well, testified they had never heard David say he wanted to hurt Willie.

b. *Prosecution rebuttal evidence*

Semiautomatic pistols typically have a safety mechanism that must be depressed in order to allow the gun to fire. A single action trigger requires four to seven pounds of pressure and a double action trigger requires eight to 13 pounds of pressure. Guns can be accidentally fired. Adequate training and familiarity with firearms are important factors to prevent unintentional firearm discharge.

2. *Procedure*

The jury convicted David of first degree murder (§ 187, subd. (a)) and found he personally and intentionally used and discharged a firearm, proximately causing death. (§ 12022.53, subds. (b), (c), (d).) David admitted suffering a prior "strike" conviction for robbery, a serious and violent felony. (§§ 667, subds. (a)(1), (b)–(i), 1170.12, subds. (a)–(d).) The trial court denied David's *Romero* motion[4] to strike the prior felony conviction allegation and sentenced him to 75 years to life in prison, plus five years. It imposed a restitution fine, a suspended parole revocation restitution fine, a court security fee, a criminal conviction assessment, and a domestic violence fee, and ordered David to pay direct victim restitution. David appeals.

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

DISCUSSION

1. *Admission of the medical examiner's testimony*

a. *Additional facts and contentions*

Deputy Medical Examiner Vladimir Levicky performed Willie's autopsy. After opening statements but before the presentation of evidence, defense counsel expressed concern that a different medical examiner would be testifying at trial. Counsel explained that Dr. Levicky had opined, in his autopsy report, that the gunshot was fired at a 70 degree angle. Counsel believed this evidence supported the defense theory that the shot was accidental, and had expected to elicit Dr. Levicky's opinion regarding the gunshot angle when Dr. Levicky testified for the prosecution. However, counsel had just learned that Dr. Levicky had retired and the People would be calling a different medical examiner in his place. The testifying medical examiner, counsel believed, could not opine regarding the angle of entry and would state that medical examiners generally do not check entry angles. Counsel moved for a mistrial on the ground he was "getting . . . late breaking evidence that is at odds with evidence" he had been provided in discovery.

The prosecutor explained he had learned of Dr. Levicky's retirement a few days earlier; when he asked Dr. Levicky to testify nonetheless, the doctor stated he was going out of the country; and therefore the Medical Examiner's Office had assigned a new deputy medical examiner, Dr. Martina Kennedy, to testify. Dr. Kennedy had not been trained to evaluate angles of entry. The prosecutor had not known that the angle of entry evidence was significant to the defense.

The trial court suggested that Dr. Kennedy could reiterate, during her testimony, Dr. Levicky's findings regarding the

70 degree angle. If asked whether she agreed with those findings, Dr. Kennedy could state she lacked the expertise or foundation to do so. As defense counsel requested, the court precluded Dr. Kennedy from testifying that it was uncommon for medical examiners to check entry angles. Defense counsel indicated he was satisfied with the trial court's suggested solution.

Dr. Kennedy subsequently testified as the parties had agreed. She explained that her testimony was based on her review of the autopsy report and related diagrams, a coroner's investigator's report, photographs, and other documents. On cross-examination, defense counsel elicited that Dr. Levicky's report stated the direction of the gunshot wound was upwards at "approximately 70 degrees to the horizontal plane." Dr. Kennedy also testified, among other things, about Willie's weight, the presence of a metal surgical rod in his leg, and the cause of death.[5] Apart from a one-page coroner's diagram and two photographs, the autopsy report was not admitted into evidence.

Appellant now argues that admission of Dr. Kennedy's testimony and the coroner's diagram violated his Sixth Amendment confrontation right. He complains he was "not afforded an opportunity to cross-examine the pathologist who conducted the autopsy, and made findings that were absolutely essential to the defense." The error was prejudicial, he posits, because Dr. Kennedy lacked the training or experience to confirm Dr. Levicky's conclusions. We discern no error.

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[5] Appellant does not challenge other aspects of Dr. Kennedy's testimony.

b. *Applicable legal principles*

The Sixth Amendment to the federal Constitution gives a criminal defendant the right to confront and cross-examine adverse witnesses. (*People v. Lopez* (2012) 55 Cal.4th 569, 576.) In the seminal case of *Crawford v. Washington* (2004) 541 U.S. 36, the high court overruled its prior precedent and held that the Sixth Amendment "bars the admission at trial of a testimonial out-of-court statement against a criminal defendant unless the maker of the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination." (*People v. Lopez*, at pp. 580–581.) *Crawford* declined to provide a comprehensive definition of "testimonial," and the high court has not articulated one upon which a majority of the court agrees. (*People v. Sanchez* (2016) 63 Cal.4th 665, 687; *People v. Leon* (2015) 61 Cal.4th 569, 602–603.) However, it is clear that a testimonial statement has two " 'critical components' ": it must be made with some degree of formality or solemnity, and its primary purpose must pertain in some fashion to a criminal prosecution. (*People v. Edwards* (2013) 57 Cal.4th 658, 705; *People v. Leon*, at p. 603.) We independently review appellant's confrontation clause claim. (*People v. Hopson* (2017) 3 Cal.5th 424, 431; *People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466; *People v. Sweeney* (2009) 175 Cal.App.4th 210, 221.)

Both the United States Supreme Court and our California Supreme Court have addressed application of *Crawford* in the context of forensic reports. (See *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Bullcoming v. New Mexico* (2011) 564 U.S. 647; *Williams v. Illinois* (2012) 567 U.S. 50.) Our California Supreme Court has considered, in several cases, whether a pathologist may testify about statements in an autopsy report

prepared by another, nontestifying pathologist. In *People v. Dungo* (2012) 55 Cal.4th 608, the court held that factual observations about the condition of the victim's body, made by a nontestifying pathologist and recorded in an autopsy report, were not testimonial because they lacked formality and criminal investigation was not the autopsy's primary purpose. (*Id.* at pp. 619–621.) The court differentiated between statements describing anatomical and physiological observations, and statements setting forth the pathologist's conclusions. (*Id.* at pp. 619–620; *People v. Edwards*, *supra*, 57 Cal.4th at p. 706.) According to *People v. Dungo*, the former "are less formal than statements setting forth a pathologist's expert conclusions" and "are not testimonial in nature." (*People v. Dungo*, at p. 619.) Accordingly, the testifying pathologist's "description to the jury of objective facts about the condition of [the victim's] body, facts he derived from [the nontestifying expert's] autopsy report and its accompanying photographs, did not give defendant a right to confront and cross-examine [the nontestifying expert]." (*Id.* at p. 621.)

Subsequently, *People v. Leon* explained the relevant legal principles in this way: "It is clear that the admission of autopsy *photographs*, and competent testimony based on such photographs, does not violate the confrontation clause. . . . It is also clear that testimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay. [Citations.] . . . The hearsay problem arises when an expert simply recites portions of a report prepared by someone else, or when such a report is itself admitted into evidence. In that case, out-of-court statements in the report are being offered for their truth. Admission of this

hearsay violates the confrontation clause if the report was created with sufficient formality and with the primary purpose of supporting a criminal prosecution." (*People v. Leon*, *supra*, 61 Cal.4th at p. 603.)

People v. Sanchez, *supra*, 63 Cal.4th 665 considered the admissibility of gang expert testimony, rather than statements in an autopsy report, but *Sanchez*'s analysis is relevant nonetheless. *Sanchez* explained that "[i]f an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay." (*Id.* at p. 684.) For example, testimony that "hemorrhaging in the eyes was noted during the autopsy of a suspected homicide victim would be a case-specific fact." (*Id.* at p. 677.) An expert may "*rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so" without violating either hearsay rules or the confrontation clause. (*Id.* at p. 685; *People v. Perez* (2018) 4 Cal.5th 421, 456.)

In the recent cases of *People v. Perez* and *People v. Garton* (2018) 4 Cal.5th 485, our Supreme Court found pathologists' testimony about autopsy reports prepared by nontestifying pathologists did not constitute reversible error. In *People v. Perez*, the testifying pathologist's description of hemorrhaging in the victim's eyes, the depth of knife wounds, and internal injuries "related case-specific facts about the victim's body that were taken directly from [the nontestifying pathologist's] autopsy report and no other sources," and therefore constituted hearsay under *Sanchez*. (*People v. Perez*, *supra*, 4 Cal.5th at p. 456.) Nevertheless, declining to address "*Dungo*'s continued viability," *Perez* concluded that any federal constitutional error was harmless beyond a reasonable doubt. (*Ibid.*) It was undisputed

that the victim had been choked and stabbed, and the depth of the stab wounds, the eye hemorrhages, and the details of the internal injuries were such "minor pieces of evidence" in light of the other evidence presented at trial, that they had no effect on the jury's guilt determination. (*Id.* at p. 457.) Moreover, it was not error for the testifying pathologist to rely upon hearsay in forming his opinion about the cause of death. (*Ibid.*)

People v. Garton held that the testifying coroner's own opinions, based on an autopsy report prepared by a retired coroner, were not objectionable insofar as the testifying coroner did not directly or implicitly convey any statements made by the nontestifying coroner. (*People v. Garton*, *supra*, 4 Cal.5th at p. 506.) Without mentioning *Dungo*, *Garton* reasoned that statements made in the autopsy report and related by the testifying coroner "did communicate out-of-court statements to the jury because the autopsy report contained the out-of-court statements of [the nontestifying coroner]. . . . Because these facts were offered for their truth, they were hearsay." (*People v. Garton*, at p. 506.) But, *Garton* concluded that even if such statements were testimonial, any error was harmless beyond a reasonable doubt. Only a few of the testifying coroner's statements amounted to hearsay, and the state of the victim's body and the manner in which she died were undisputed. (*Id.* at p. 507.)

c. *Forfeiture*

Preliminarily, the People contend appellant has forfeited his Sixth Amendment challenge because he failed to object on this ground below. We agree. (*People v. Redd* (2010) 48 Cal.4th 691, 730 [Sixth Amendment confrontation claim forfeited where defendant failed to object at trial based upon the confrontation

clause].) Defense counsel did not seek exclusion of the autopsy evidence *at all*, let alone on confrontation grounds. Defense counsel's complaint was *not* that the autopsy evidence was inadmissible; instead, counsel's concern was that the defense preferred to examine Dr. Levicky, rather than Dr. Kennedy, because counsel believed Dr. Levicky could provide more favorable testimony.[6] Defense counsel's mistrial motion was not based on a request to exclude the autopsy evidence, but instead stemmed from the defense's concern about Dr. Levicky's unavailability and the potential that Dr. Kennedy would testify that medical examiners do not generally check gunshot entry angles. Defense counsel expressly agreed that the solution proposed by the trial court (i.e., that Dr. Kennedy could simply reiterate Dr. Levicky's statements), was satisfactory. Appellant was the proponent of the 70-degree angle evidence, and defense counsel, not the prosecutor, elicited the 70-degree angle testimony from Dr. Kennedy. Under these circumstances, any

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[6] Indeed, although framed as a confrontation clause challenge, appellant's real complaint is that Dr. Levicky was unavailable. For example, appellant argues that "Dr. Levicky's absence precluded the defense from getting further information about this vital finding [the 70 degree angle]," and Dr. Levicky would have had an opinion about the position of the firearm and Willie's body when the shot was fired. Apart from the fact that these contentions are speculative, appellant cannot now complain about Dr. Levicky's unavailability. Defense counsel did not subpoena Dr. Levicky, did not retain a defense expert to testify about the angle of entry, and did not move for a continuance to allow Dr. Levicky to be subpoenaed. Counsel no doubt felt no need to do so because, as we discuss, the solution put into place by the trial court was highly favorable for the defense.

error was invited and appellant's confrontation claim has been forfeited. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 [if defense counsel intentionally caused the trial court to err, for tactical reasons and not out of ignorance or mistake, invited error doctrine precludes appellate challenge]; *People v. Burgener* (2016) 1 Cal.5th 461, 474; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1138–1139 [where defense counsel first elicited evidence before the jury, invited error doctrine barred defendant from challenging court's ruling that such evidence was admissible].)[7]

Appellant contends defense counsel provided ineffective assistance by failing to object to admission of the autopsy evidence on confrontation grounds. This argument is frivolous. To establish ineffective assistance, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's failings, the result would have been more favorable for defendant. (*People v. Mickel* (2016) 2 Cal.5th 181, 198; *People v. Roa* (2017)

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[7] Appellant argues an objection on Sixth Amendment grounds would have been futile because the trial court had already denied his mistrial motion. But the mistrial motion was made on the ground counsel had just learned of Dr. Levicky's unavailability, and made no mention of the confrontation clause; resolution of the unavailability issue was unrelated to evaluation of a confrontation clause challenge. There is no showing an objection would have been futile. *Crawford v. Washington* was decided over a decade before trial, and the opinions in *People v. Leon* and *People v. Sanchez* had already issued. (Cf. *People v. Garton*, *supra*, 4 Cal.5th at p. 505 [confrontation challenge not forfeited where trial occurred prior to *Crawford*].)

11 Cal.App.5th 428, 454.) We presume counsel's actions fell within the broad range of reasonableness, and afford great deference to counsel's tactical decisions. (*People v. Mickel*, at p. 198; *People v. Bona* (2017) 15 Cal.App.5th 511, 517.)

Here, the record reveals an obvious tactical purpose for counsel's failure to object to the autopsy evidence: counsel reasonably believed that the gunshot angle evidence supported the key defense theory that the shooting was an accident. Appellant argues that the "importance of the angle of the entry of the bullet to the defense cannot be overstated – this evidence was the defense's entire case." Appellant fails to acknowledge that if defense counsel had successfully challenged the autopsy evidence on confrontation grounds, the angle of entry evidence would have been *excluded*. Instead, the ruling counsel obtained was highly favorable for the defense: Dr. Levicky's undisputed observation about the angle of entry was elicited through Dr. Kennedy, and the prosecution had no opportunity to attack or attempt to qualify that evidence through cross-examination. Additionally, the defense relied on several other aspects of the autopsy evidence in support of its theory – evidence that would have been unavailable had counsel successfully moved to exclude it. Appellant has therefore failed to establish ineffective assistance.

d. *The confrontation claim fails on the merits*

In any event, appellant's confrontation claim fails because the challenged portions of Dr. Kennedy's testimony did not violate the Sixth Amendment, and admission of the evidence was harmless beyond a reasonable doubt.

Appellant's primary complaint about Dr. Kennedy's testimony pertains to the angle of entry evidence and the coroner's diagram. He also mentions Dr. Kennedy's testimony

that Willie (1) weighed 132 pounds; (2) had a surgical fixation rod in his right leg; and (3) died from a gunshot to the forehead.[8]

Dr. Levicky's statement in the autopsy report regarding the gunshot's angle of entry was not testimonial hearsay. Under *People v. Dungo*, factual observations about the condition of a victim's body, made in an autopsy report, are not testimonial. (*People v. Dungo*, *supra*, 55 Cal.4th at pp. 619, 621.) The same is true regarding the evidence of Willie's weight and the metal rod in his leg. (*Ibid*.) Appellant argues that *Dungo* was wrongly decided and has been undercut by *People v. Sanchez*, *supra*, 63 Cal.4th 665. (See *People v. Ford* (2015) 235 Cal.App.4th 987, 998 [suggesting that *Dungo*'s holding is difficult to apply and inconsistent with precedent].) Although our Supreme Court did not rely on *Dungo* in its recent decisions in *People v. Perez* and *People v. Garton*, the court has not repudiated or overruled *Dungo*, and we are bound by it. (*Auto Equity Sales*, *Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Ford*, at p. 995.) Nor are we persuaded by appellant's argument that unlike the evidence in *Dungo*, Dr. Levicky's statement about the angle of entry was a conclusion, rather than an observation.

Dr. Kennedy's testimony about the cause of death was based on her own conclusions, drawn from photographic evidence and Dr. Levicky's report. This testimony was not objectionable. Photographs, and expert conclusions drawn from them, are not hearsay. (*People v. Leon*, *supra*, 61 Cal.4th at p. 603.) And, an expert may rely on hearsay in formulating an opinion without

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[8] It is not entirely clear that appellant intends to challenge admission of these three aspects of Dr. Kennedy's testimony, but we address them out of an abundance of caution.

running afoul of the confrontation clause. (*People v. Perez*, *supra*, 4 Cal.5th at p. 457.)

The diagram prepared by Dr. Levicky and introduced into evidence showed the location of the gunshot wound and its measurements, as well as the presence of three lacerations on Willie's forehead. On cross-examination, Dr. Kennedy testified that she observed the lacerations in the autopsy photographs, and believed they were fresh wounds. Dr. Kennedy's testimony about the lacerations did not violate appellant's confrontation rights, as it was based on her own observations of photographs. (*People v. Leon*, *supra*, 61 Cal.4th at p. 603.)

Assuming arguendo that the foregoing evidence was admitted in error, it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Garton*, *supra*, 4 Cal.5th at p. 507; *People v. Perez*, *supra*, 4 Cal.5th at p. 456.) The angle of entry evidence tended to support the defense theory that the shooting was accidental; its admission therefore could not have prejudiced appellant. There was no dispute about the cause of Willie's death; appellant admitted shooting him, and the autopsy photograph clearly shows a bullet wound in the center of Willie's forehead. Willie's weight, and the fact he had a surgical rod in his leg, were also undisputed; the facts he was slender and did not walk in a robust fashion were evident in the video. The coroner's diagram showed nothing more than the placement and size of the gunshot wound and the presence of the three lacerations. The nature of the gunshot wound was already in evidence in the autopsy photograph. The defense relied on the laceration evidence in support of the accidental shooting theory; thus, that evidence helped, rather

than hurt, the defense case. In sum, there was no prejudicial error.

2. *The trial court did not prejudicially err by failing to instruct on voluntary manslaughter*

The trial court instructed the jury on homicide, first and second degree murder, and the lesser included offense of involuntary manslaughter. Defense counsel did not request, and the trial court did not give, a voluntary manslaughter instruction. Appellant now contends the trial court prejudicially erred by failing to sua sponte instruct on voluntary manslaughter on a heat of passion theory. We disagree.

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses, even absent a request. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense, but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68.) This duty is not satisfied by instructing on only one theory of an offense if other theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61.) Substantial evidence is evidence a reasonable jury could find persuasive. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) The existence of *any* evidence, no matter how weak, will not justify an instruction. (*People v. Whalen*, at p. 68.) The testimony of a single witness, including the defendant, may suffice. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.) In determining whether substantial evidence existed, we do not evaluate the credibility of the witnesses, a task for the jury. (*Ibid.*) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense.

(*People v. Nelson* (2016) 1 Cal.5th 513, 538; *People v. Trujeque* (2015) 61 Cal.4th 227, 271.)

Voluntary manslaughter is the intentional but nonmalicious killing of a human being, and is a lesser included offense of murder. (§ 192, subd. (a); *People v. Moye* (2009) 47 Cal.4th 537, 549; *People v. Lee*, *supra*, 20 Cal.4th at p. 59.) A killing may be reduced from murder to voluntary manslaughter if it occurs upon a sudden quarrel or in the heat of passion on sufficient provocation. (*People v. Lee*, at p. 59; *People v. Rountree* (2013) 56 Cal.4th 823, 855; *People v. Manriquez* (2005) 37 Cal.4th 547, 583.) "Heat of passion arises if, ' "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." ' [Citation.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 942; *People v. Enraca* (2012) 53 Cal.4th 735, 758–759; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1136–1137.) Heat of passion manslaughter thus has both an objective and a subjective component. (*People v. Moye*, at p. 549; *People v. Enraca*, at p. 759.) As to the former, the "provocation which 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. Lee*, at p. 59; *People v. Manriquez*, at p. 583.) The victim's conduct may have been physical or verbal, but it must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*People v. Moye*, *supra*, at pp. 549–550; *People v. Lee*, at p. 59.) Provocation can arise as a result of a series of events over time. (*People v. Wharton* (1991)

53 Cal.3d 522, 569; *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1245.) To satisfy the subjective component, the defendant must have killed "while under 'the actual influence of a strong passion' induced by [adequate] provocation." (*People v. Moye*, at p. 550.) The passion aroused can be any violent, intense, high-wrought or enthusiastic emotion other than revenge. (*People v. Millbrook*, *supra*, at p. 1139.)

Appellant contends the following aspects of his testimony provided sufficient evidence to support a voluntary manslaughter instruction. Although not shown on the video, Willie hit David first, before they entered the kitchen. Even though Willie was over 60 years old, he was "strong." When David went to Willie's room with the gun after the kitchen incident ended, David was "hot at the time. I was just mad. I don't know what I was doing. I was just mad." When David entered Willie's room, Willie was waiting for him by the door and they scuffled. David further avers that the videotape shows he was acting in the heat of passion.

Accepting for purposes of argument that the evidence was sufficient to support a heat-of-passion instruction (see generally *People v. Ramirez* (2010) 189 Cal.App.4th 1483, 1487; *People v. Millbrook*, *supra*, 222 Cal.App.4th at pp. 1140–1143; *People v. Thomas* (2013) 218 Cal.App.4th 630, 645), its omission was harmless under any standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)[9]

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[9] The parties disagree about the applicable harmless error standard. Appellant recognizes that in general, the failure to instruct on a lesser included offense is state law error subject to the *Watson* standard. (See *People v. Beltran*, *supra*, 56 Cal.4th at p. 955; *People v. Moye*, *supra*, 47 Cal.4th at pp. 555–556; *People v.*

Appellant's jury was instructed on first and second degree murder, as well as on involuntary manslaughter. CALCRIM No. 521 informed the jury, in pertinent part: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he *carefully weighed the considerations for and against his choice* and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill

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Breverman (1998) 19 Cal.4th 142, 169.) He nonetheless contends the *Chapman* standard for federal constitutional error applies to the failure to instruct on heat-of-passion voluntary manslaughter. (See *People v. Thomas*, *supra*, 218 Cal.App.4th at p. 642 ["the failure to instruct on provocation where warranted is an error of federal constitutional dimension that denies the defendant due process because it relieves the prosecution of the burden to prove malice beyond a reasonable doubt"]; *People v. Peau* (2015) 236 Cal.App.4th 823, 830 [*Thomas* does not necessarily resolve whether an error in failing to sua sponte instruct on provocation is of federal constitutional dimension]; *People v. Millbrook*, *supra*, 222 Cal.App.4th at pp. 1143–1146; cf. *People v. Abilez* (2007) 41 Cal.4th 472, 515 [where substantial evidence exists, failure to instruct on involuntary manslaughter would violate defendant's constitutional right to have the jury determine every material issue].) The People disagree, arguing that the *Watson* standard applies and "to the extent" *People v. Thomas* conflicts with binding Supreme Court precedent, it should not be followed. They further contend that appellant has forfeited any claim the error violated his federal due process rights. We need not reach the questions of forfeiture and the appropriate standard of review because we conclude any error was harmless even under the more stringent *Chapman* standard. (See *People v. Franklin* (2018) 21 Cal.App.5th 881, 891.)

before completing the act that caused death. [¶] . . . *A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.* [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder." (Italics added.)

The jury's first-degree murder verdict demonstrates the failure to give a heat-of-passion instruction, if error, was harmless. Error in failing to instruct on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to the defendant under other, properly given instructions. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 582; *People v. Lewis* (2001) 25 Cal.4th 610, 646.) "By finding defendant was guilty of first degree murder, the jury necessarily found defendant premeditated and deliberated the killing. This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion – even if that state of mind was achieved after a considerable period of provocatory conduct – and clearly demonstrates that defendant was not prejudiced . . . ." (*People v. Wharton*, *supra*, 53 Cal.3d at p. 572; *People v. Franklin*, *supra*, 21 Cal.App.5th at pp. 892–894; *People v. Peau*, *supra*, 236 Cal.App.4th at p. 830 [first-degree murder conviction rendered any failure to give heat-of-passion instruction harmless]; *People v. Speight* (2014) 227 Cal.App.4th 1229, 1246; *People v. Millbrook*, *supra*, 222 Cal.App.4th at p. 1138 [finding that a murder was willful, premeditated, and deliberate is manifestly inconsistent with heat of passion];

cf. *People v. Manriquez*, *supra*, at p. 582 [first-degree murder verdict left "no doubt" jury would have returned the same verdict had it been instructed on imperfect self-defense].)

We recognize that "[t]here is some tension in the case law" on this issue. (*People v. Franklin*, *supra*, 21 Cal.App.5th at p. 892.) *People v. Berry* (1976) 18 Cal.3d 509, reversed a defendant's first-degree murder conviction because the trial court erroneously refused to instruct on voluntary manslaughter on a heat-of-passion theory. *Berry* reasoned that the first-degree murder verdict did not necessarily indicate the jury found the defendant was not acting in the heat of passion when he killed. (*Id.* at p. 518.) The instructions given "only casually" referenced provocation and heat of passion, and there was no clear direction to consider the victim's provocatory conduct. (*Ibid.*)

Approximately fifteen years later, *People v. Wharton* concluded, as noted *ante*, that a trial court's error in refusing a pinpoint instruction was harmless because the jury's first-degree murder verdict was inconsistent with a finding the defendant acted under the heat of passion. (*People v. Wharton*, *supra*, 53 Cal.3d at p. 572.) There, the defendant's theory was that the killing resulted from provocation occurring over several weeks. (*Id.* at p. 571.) The jury was instructed on provocation and heat of passion, but the court erred by refusing the defendant's proposed instruction, which raised two points not otherwise covered, i.e., that provocation could occur over time and the jury was required to take this into account when determining the effect of the cooling off period. (*Id.* at p. 570.) *Wharton* – which discussed *Berry*'s analysis on the provocation-over-time issue, but not the prejudice issue – found the error harmless in light of the first-degree murder verdict. (*Wharton*, at p. 572.)

People v. Ramirez, *supra*, 189 Cal.App.4th 1483, rejected the argument that the trial court's error in failing to instruct on heat-of-passion voluntary manslaughter was harmless in light of the jury's first-degree murder verdict. (*Id.* at p. 1484.) Without citing *Wharton*, *Ramirez* concluded the argument "fail[ed] as a matter of law" in light of *Berry*. (*Ramirez*, at p. 1488.)

Since *Ramirez*, at least two appellate courts have reconciled *Berry* and *Wharton* and concluded a first-degree murder verdict renders errors in provocation and heat of passion instructions harmless. In *People v. Peau*, the court instructed that provocation could reduce a murder from first to second degree murder or to manslaughter, but did not instruct that the defendant was guilty of only voluntary manslaughter if he acted in the heat of passion. (*People v. Peau*, *supra*, 236 Cal.App.4th at pp. 828–829.) *Peau* reconciled *Berry* and *Wharton*, reasoning that *Berry* did not discuss the premeditation and deliberation instructions; this "strongly suggests that the sole issue considered in *Berry* was whether the error was harmless because the jury received some instruction on the concepts of heat of passion and provocation, not whether the error was harmless because the jury found the murder was willful, deliberate, and premeditated and such a finding was inconsistent with a finding that the defendant acted in a heat of passion." (*Peau*, at pp. 831–832.) The court concluded any error was harmless in *Peau* "because the jury necessarily rejected the possibility that [defendant] acted in the heat of passion by convicting him of first degree murder." (*Id.* at p. 828.)

In *People v. Franklin*, the jury was instructed on attempted voluntary manslaughter on a heat of passion theory, but the court's erroneous response to the jury's question was inconsistent

with those instructions. (*People v. Franklin*, *supra*, 21 Cal.App.5th at pp. 885, 887–890.) *Franklin* concluded the error was harmless beyond a reasonable doubt because the jury's verdict of willful, deliberate, and premeditated attempted murder demonstrated it necessarily decided the defendant had not acted in the heat of passion. (*Id.* at pp. 891–893.) *Franklin* agreed with *Peau* "that *Berry* and *Wharton* can be reconciled by reference to the specific aspects of the jury instructions at issue. . . ." (*Franklin*, at p. 894.) Focusing on the same language contained in the instructions given here – that a finding of premeditation and deliberation required that the defendant " 'carefully weighed' " the considerations for and against his choice, and a decision made " 'rashly, impulsively, or without careful consideration' " was not deliberate and premeditated – *Franklin* concluded the error was harmless. (*Id.* at p. 894.)

We agree with the analysis in *Franklin* and *Peau*. We recognize that in *Wharton*, *Franklin*, and *Peau* the jury was given some instruction on provocation, whereas here it was not. Nonetheless, in our view this is of no moment. As *Franklin* explained, we "cannot see how a determination that [defendant] carefully weighed his choice to act and did not decide rashly or impulsively can coexist with the heat of passion, which 'arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act *rashly and without deliberation* and reflection, and from such passion rather than from judgment." ' [Citation.] In other words, the jury's finding of premeditation and deliberation is 'manifestly inconsistent with having acted under the heat of passion' and nullifies any potential for prejudice here." (*People v. Franklin*,

supra, 21 Cal.App.5th at p. 894.) Here, if the jury credited appellant's testimony that he was "hot at the time" and did not "know what [he] was doing," it could not simultaneously have concluded he "carefully weighed" his actions and did not act "rashly, impulsively, or without careful consideration." Further, contrary to appellant's argument, his jury was not given an all-or-nothing choice: if it concluded appellant shot intentionally, but rashly and impulsively in anger, it would have convicted him of second degree murder. That it did not do so is evidence that any instructional error was harmless.

Even if the first-degree murder verdict is not dispositive, given the evidence and the nature of the defense theory it is clear beyond a reasonable doubt the instructional omission was harmless. If jurors credited appellant's testimony, he did not shoot intentionally, or because he was acting in the heat of passion. Instead, the gun went off accidentally when the men scuffled. The defense never advanced the theory that appellant killed because he was acting under the influence of a strong passion induced by adequate provocation. While it is theoretically possible the jury could have rejected the entire defense theory and most of appellant's testimony, but credited his testimony that he was "hot at the time," "mad," and did not know what he was doing (see *People v. Barton* (1995) 12 Cal.4th 186, 201–202; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 51–52), we do not think this remotely likely. (See generally *People v. Moye*, *supra*, 47 Cal.4th at pp. 553–554 [in the face of defendant's own testimony, no reasonable juror could conclude he acted rashly or without due deliberation and from passion rather than judgment]; *People v. Rountree*, *supra*, 56 Cal.4th at p. 855 [where defendant claimed his shot was an accident, not a killing in the

heat of passion, evidence of the subjective component was missing].) Contrary to appellant's argument, he does not appear, in the video, to be acting in a rage throughout the incident; in fact, after the shooting he appears rather calm and collected.

Moreover, the evidence of provocation was extraordinarily weak. We think it highly improbable that jurors would conclude a reasonable person would be spurred to homicidal anger by the fact his elderly, cocaine-addicted brother had once again failed to pay his $200 share of the bills, persisted in smoking in the house, or was visited by friends hoping to ingest drugs with him. Indeed, David testified that he was not upset about the bills; that Willie usually went to the back house to smoke when David asked him to, and there "won't be no big problems behind it"; that he and Willie were "real close"; and that he and Willie "never had a fight a day in our life until that night." According to David, Willie was the one who was upset the evening of the murder because David refused to let Willie's friends in the house. Appellant admitted selling a little cocaine himself, occasionally to Willie, undercutting any argument that he was reasonably incensed about Willie's drug use. Legally sufficient provocation "requires more than evidence that a defendant's passions were aroused. The facts and circumstances must be ' "sufficient to arouse the passions of the ordinarily reasonable man." ' [Citation.]" (*People v. Nelson*, *supra*, 1 Cal.5th at p. 539.)

Nor do we find it plausible that jurors would have believed Willie threw the alleged first punch off-camera, or that in the context of this case, such would have amounted to legally adequate provocation. Appellant argues that "there is no doubt David and Willie were in a heated physical altercation that escalated to a shooting." The video evidence starkly belies this

characterization. It does not show a fight *between* the men, but depicts the younger, larger, and stronger David attacking Willie. The relevant portion of the video begins with David striding purposefully through the kitchen toward Willie's bedroom. Less than two minutes later, Roberson rushes through the kitchen toward Willie's room, suggesting she has overheard something troubling. She then comes back into the kitchen, walking backwards, obviously distressed. David follows, dragging Willie, who is on his knees. David forces Willie's face into the seat of a chair, and then throws him across the kitchen, causing Willie to hit another chair and fall to the ground. Although Willie's form is partially obscured by a table, it is clear that he lies on the floor prone and unresisting. David pulls up one of his sleeves, winds up his fist, and punches Willie. He waits a second, and then aims another blow at Willie's body. Meanwhile, Roberson, distraught, stands to the side, with her hands covering her face, apparently pleading with David to stop. David then strides from the kitchen, followed by Roberson. Willie gets to his feet and hobbles back toward his room. Throughout this encounter, Willie appears passive and nonresistant; he takes no retaliatory action against David even after David's punches, but simply goes to his room. Based on the evidence, reasonable jurors would not have concluded that Willie engaged in physical force against David sufficient to provoke heat of passion in a reasonable person. Indeed, the video evidence was so compelling that defense counsel, during argument, suggested that David's assertion Willie punched him first was implausible. While a defendant may be entitled to an instruction "based on [the] theory of his testimony, no matter how implausible" (*People v. Thomas*, *supra*, 218 Cal.App.4th at p. 645), when determining prejudice we need

not assume reasonable jurors would have credited such evidence. In short, in light of the weak evidence of provocation, the nature of appellant's testimony and the defense theory, and the jury's finding that appellant premeditated and deliberated, any instructional error was harmless beyond a reasonable doubt.

3. *Prosecutorial misconduct*

Appellant contends that his conviction must be reversed because the prosecutor committed nine instances of misconduct during cross-examination and argument, depriving him of due process and rendering his trial fundamentally unfair. We disagree.

a. *Applicable legal principles*

"In California, the law regarding prosecutorial misconduct is settled: 'When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.' [Citation.]" (*People v. Masters* (2016) 62 Cal.4th 1019, 1052.) To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. (*People v. Linton* (2013) 56 Cal.4th 1146, 1205.)

Here, with one arguable exception, appellant did not object to the conduct he now asserts was improper. Nothing suggests objections would have been futile, or admonitions inadequate to cure any harm. Accordingly, at least eight of his nine claims

have been forfeited. (*People v. Williams* (2016) 1 Cal.5th 1166, 1188; *People v. Covarrubias* (2016) 1 Cal.5th 838, 893–894.) Recognizing this, David contends his counsel provided ineffective assistance by failing to object. As we have set forth above, to establish ineffective assistance a defendant must show counsel's representation fell below an objective standard of reasonableness, and counsel's deficient performance was prejudicial. (See *People v. Brown* (2014) 59 Cal.4th 86, 109.) Therefore, where appropriate, we consider appellant's claims of misconduct through the lens of ineffective assistance.

b. *Purported misconduct during cross-examination*

Appellant complains of two instances of misconduct during the prosecutor's cross-examination of him.

(i) *Questions regarding David's arrest and drug sales*

The trial court ruled that if David testified, he could be impeached with evidence he sold cocaine. As noted, during direct examination David admitted he sold drugs in the 120th Street house "a couple times"; he would sometimes trade drugs for cigarettes; and he sometimes sold drugs to Willie.

During cross-examination, David denied that he frequently sold drugs. The prosecutor asked whether David had been arrested for selling cocaine in July 2015. David denied being arrested or selling, but admitted a case was pending against him. Defense counsel asked for a sidebar and advised the court that David had not been arrested. The court opined that an arrest was irrelevant for purposes of impeachment, and indicated it would have sustained an objection had one been made. However, because David denied the cocaine sale referenced by the prosecutor, the prosecutor had latitude to question David about it. The court observed that the prosecutor's questions were

inartful, admonished the prosecutor to "get your questions right," and told defense counsel, "If you have objections, make them." When cross-examination resumed, David again denied selling cocaine on two specific dates in 2015 and 2016, but admitted selling cocaine occasionally in 2014 and 2015.

David contends the prosecutor committed misconduct by asking whether he had been arrested, both because this was factually inaccurate and because a witness may not be impeached with evidence of prior arrests. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523 ["evidence of mere arrests is inadmissible because it is more prejudicial than probative"].) The People argue that evidence David sold cocaine was relevant to show his purported concern about Willie's smoking in the house was false, and any prejudice was minimal.

Assuming arguendo defense counsel's request for a sidebar constituted a sufficient objection, no prejudicial misconduct appears. There is no dispute it was proper to impeach David with the fact he sold cocaine. (See *People v. Gabriel* (2012) 206 Cal.App.4th 450, 459 [crimes related to drug trafficking involve moral turpitude]; *People v. Clark* (2011) 52 Cal.4th 856, 931 [a witness may be impeached with any prior conduct involving moral turpitude, whether or not it resulted in a felony conviction].) The prosecutor's brief questions regarding David's arrest and pending case were insignificant in light of David's admissions, during direct examination, that he did in fact sell drugs on occasion, including to Willie. Given these admissions, any implication David had been arrested was not likely to impact the jury's verdict. The prosecutor's questions, while clumsy, were not deceptive or reprehensible, and were not sufficiently

egregious to infect the trial with unfairness or deny David due process.

(ii) *Asking appellant to comment on Roberson's veracity*

David's girlfriend, Rochandra Roberson, testified that on the night of the murder, David and Willie argued about Willie's failure to pay his share of the bills. During cross-examination, David testified that his disagreement with Willie "wasn't about bills." The following questions and testimony ensued:

"[Prosecutor]: You told Rochandra it was about bills?

"[Appellant]: That's what Rochandra told you.

"[Prosecutor]: Okay. *So Rochandra is lying*?

"[Appellant]: That's what Rochandra told you. We talked about . . . the bills, but that's what Rochandra told you."

"[Prosecutor]: You never shared with her that you were upset about that, never came up?"

"[Appellant]: I wasn't upset about [it] because Spike do it all the time. [¶]. . . [¶] . . . It wasn't no big deal." (Italics added.)

Appellant now contends that the question italicized above amounted to misconduct. He avers the question was argumentative, was intended to inflame the jury's passions, and did not call for or receive an answer.

Under California law, questions about whether another witness is lying are not categorically improper. Instead, they must be considered in context. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 97–98, abrogated on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637–643; *People v. Chatman* (2006) 38 Cal.4th 344, 382; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 242.) " 'A defendant who is a percipient witness

to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken.' " (*People v. Hawthorne*, at p. 98; *People v. Chatman*, at p. 382.) "When, as here, the defendant knows the other witnesses well, he might know of reasons those witnesses might lie. Any of this testimony could be relevant to the credibility of both the defendant and the other witnesses." (*People v. Chatman*, at p. 382.) Conversely, where the witness has no personal knowledge of the events or of the reasons another witness may be lying or mistaken, a " 'were they lying' " question is generally improper. (*Id.* at p. 381.) And, when a " 'were they lying' " question is argumentative (that is, "a speech to the jury masquerading as a question"), or is designed to elicit irrelevant or speculative testimony, it is improper. (*Id.* at pp. 381–382, 384.)

Here, the prosecutor's question pertained to a matter about which David had personal knowledge (what David told Roberson) and concerned a witness whom David knew well (his girlfriend, with whom he had lived for over four years). The subject matter (the reason for the disagreement between Willie and David) was highly relevant. Thus, in asking about Roberson's testimony, the prosecutor was making a legitimate inquiry into David's position. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 382 [a party who testifies to facts "contrary to the testimony of others may be asked to clarify what his position is and give, if he is able, a reason for the jury to accept his testimony as more reliable"]; *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 98.) David explained that his version of the facts was accurate because

Willie's conduct was nothing unusual. The prosecutor "only asked the question once and did not repeatedly ask it to berate defendant or force him to call [the witness] a liar in an attempt to inflame the passions of the jury." (*People v. Hawthorne*, at p. 98; *People v. Chatman*, at p. 383.) There was no misconduct.

Because the question was not improper, defense counsel did not provide ineffective assistance. "Failure to raise a meritless objection is not ineffective assistance of counsel." (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836.) Even assuming arguendo the question was improper, David fails to establish the prejudice prong of his ineffective assistance claim. The prosecutor was entitled to cross-examine David regarding the discrepancies between his and Roberson's testimony. The single "was she lying" question was brief and insignificant, and there is no probability it affected the verdict. (See *People v. Zambrano*, *supra*, 124 Cal.App.4th at p. 243.)

c. *Purported misconduct during argument*

Appellant contends the prosecutor committed seven instances of misconduct during argument.

(i) *Purported misstatements of law*

The prosecutor made the following argument to the jury: "Defendant acted with a state of mind called malice aforethought. What is that? Well, there's two kinds. There's express malice, unlawfully intended to kill. And implied malice, intentionally committed the act. [¶] Natural consequences of the act were dangerous to human life. He knew the act was dangerous to human life. And deliberately acted with conscious disregard for human life. [¶] Now, express malice is the first degree murder. Implied malice is second degree. You have to find him not guilty,

okay. It's not like, well, you know, we can't decide whether it was first degree. So you have to decide. You have to acquit him of first degree murder before you even get to second degree murder. [¶] . . . [¶] What that means is you all have to agree that . . . there was no malice aforethought, that you believe his story that it was an accident which we know is ridiculous."

A. *Argument regarding the law of murder*

Appellant argues the foregoing was improper in two respects. First, he avers the prosecutor misstated the law because, to find him guilty of second degree murder, the jury did not have to determine the shooting was accidental; it could have found him guilty of second degree murder even if it disbelieved the accident theory, as long as it concluded he did not act with premeditation and deliberation. The People counter that the prosecutor correctly told the jury it could acquit David of murder only if it found the absence of both implied and express malice, a finding it could make only if it concluded the shooting was accidental.

Murder is an unlawful killing committed with malice aforethought. (§ 187, subd. (a); *People v. Elmore* (2014) 59 Cal.4th 121, 132.) A defendant acts with express malice if he intends to kill. (§ 188; *People v. Beltran*, *supra,* 56 Cal.4th at p. 941; *People v. Elmore*, at p. 132.) Malice is implied when a killing results from an intentional act, the natural and probable consequences of which are dangerous to human life, deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. (*People v. Elmore*, at p. 133; *People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) Murder is of the first degree when it is willful, deliberate and premeditated. (§ 189; *People v. Elmore*, at p. 133; *People v. Beltran*, *supra*, at p. 942.)

Second degree murder is an unlawful killing with malice aforethought, but without the elements of willfulness, deliberation, and premeditation. (*People v. Elmore*, at p. 133.)

It is improper for a prosecutor to misstate the law during argument. (*People v. Whalen*, *supra*, 56 Cal.4th at p. 77; *People v. Mendoza* (2007) 42 Cal.4th 686, 702.)

The cited portion of the prosecutor's remarks was not a model of clarity. However, assuming the remarks can be construed as appellant suggests, his ineffective assistance claim fails because he has not established prejudice. (See *People v. Mickel*, *supra*, 2 Cal.5th at p. 198.) Both defense counsel and the prosecutor correctly stated the elements of premeditation and deliberation during their arguments, and the prosecutor referred jurors to the relevant instructions. The trial court instructed the jury on homicide, first degree murder, and second degree murder. (CALCRIM Nos. 500, 520, 521.) It also instructed that the jury must "follow the law as I explain it to you" and "[i]f you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We presume the jurors understood and followed the court's instructions. (*People v. Cortez* (2016) 63 Cal.4th 101, 131; *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1083 [if prosecutor misstated the law, error was harmless in light of trial court's correct instructions and the absence of evidence of jury confusion]; *People v. Williams* (2009) 170 Cal.App.4th 587, 635.) There is no probability the jury here would have ignored the instructions and the additional portions of both attorneys' arguments, and convicted David of first degree murder even if it found he did not premeditate and deliberate.

B. *Alleged misstatement regarding the sequence of deliberations*

Second, appellant argues the prosecutor erroneously told the jury it must consider the charges in a particular sequence, that is, it could not consider second degree murder until it determined David was not guilty of first degree murder. Under the "acquittal-first" rule, a court may instruct a jury that it cannot *return a verdict* on a lesser included offense until after it has acquitted of the greater offense, but may not prohibit the jury from *considering or discussing* the lesser offenses during deliberations before returning a verdict on the greater offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 324–325, 329; *People v. Brooks* (2017) 3 Cal.5th 1, 81.)

The prosecutor's argument was, at worst, ambiguous. The statements "[y]ou have to *find him not guilty*," "you have to *decide*," and "you have to *acquit him of first degree murder*" (italics added) permissibly suggested the jury had to *return a verdict* on first degree murder before it returned a verdict on second degree murder. The words "before you even get to second degree murder" arguably could have been construed to refer to consideration of second degree murder during deliberations. (See generally *People v. Perez* (1989) 212 Cal.App.3d 395, 399–400.) But when a claim of misconduct is based on the prosecutor's comments before the jury, we consider the complained-of remarks as a whole and do not lightly infer that the jury drew the most, rather than the least, damaging meaning from them. (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 894.)

Assuming the prosecutor's argument can be read as appellant suggests, any misstatement was manifestly harmless. Unlike in most other cases involving the "acquittal first" rule,

here the alleged misstatement was not contained in an instruction or response given by the trial court, but was part of the prosecutor's argument. (Cf. *People v. Kurtzman*, *supra*, 46 Cal.3d at pp. 327–328; *People v. Olivas* (2016) 248 Cal.App.4th 758, 772.) Appellant's jury was properly instructed with CALCRIM No. 640, which unambiguously stated that the jury could consider the charges in whatever order it wished, rather than in a particular sequence.[10] "[A]rguments of counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter . . . are viewed as definitive and binding statements of the law.' " (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 703.) "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former . . . ." (*People v. Osband* (1996) 13 Cal.4th 622, 717.) There is no reasonable probability that jurors here not only misinterpreted the prosecutor's remarks, but also ignored the trial court's clear instructions. (See *People v. Perez*, *supra*, 212 Cal.App.3d at pp. 399–400.)

(ii) *Mischaracterizing the evidence*

To challenge David's testimony that he had not known the gun was loaded, the prosecutor argued, among other things: "Cocaine dealer. Denied a lot of it, but I do a little bit, you know.

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[10] CALCRIM No. 640 provided in pertinent part: "You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of second degree murder as a lesser included offense only if all of you have found the defendant not guilty of first degree murder . . ."

Well, what happens when somebody wants to come take your stuff, take your money? Is it amazing that somebody [who] would sell cocaine would be armed? I'm not talking about what [was] his level of sales. I don't care about that. The only thing I'm telling you is that somebody like this knows firearms and knows if a gun in his pocket is loaded."

Appellant argues that the prosecutor mischaracterized the evidence by referring to him as a "cocaine dealer" and suggesting he "always" or "regularly" carried a firearm to protect his " 'stuff,' " because there was "no evidence to support that accusation." He stresses that he denied being a cocaine dealer and testified he purchased the gun a week before the shooting.

We discern no error. Prosecutors have " ' "wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]" ' [Citation.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 439.) A prosecutor may state matters not in evidence that are common knowledge or drawn from common experience. (*People v. Mendoza* (2016) 62 Cal.4th 856, 908.) Such was the case here. "[I]t is common knowledge that perpetrators of narcotics offenses keep weapons available to guard their contraband." (*People v. Bradford* (1995) 38 Cal.App.4th 1733, 1739.) David admitted he sometimes sold or traded cocaine. Contrary to David's argument, the prosecutor did not state that David "always" or "regularly" carried a gun. Nor did the prosecutor suggest David was a large-scale cocaine dealer; he expressly avoided making any assertion about David's "level of sales." Because the argument was based on a reasonable

inference from the evidence, it was not objectionable, and counsel did not perform deficiently by failing to object.

(iii) *Attacking defense counsel's integrity*

Defense counsel argued that David was not guilty of murder for a variety of reasons, but conceded he was guilty of involuntary manslaughter. Counsel acknowledged that David's conduct of brandishing a gun was reckless and amounted to criminal negligence, supporting an involuntary manslaughter verdict.

In his closing argument, the prosecutor stated: "[Defense counsel] did a fantastic job defending a guilty man. But he's stuck with the facts that he cannot change. *I didn't think that he was going to come up here and ask for a straight acquittal because I think he would lose all credibility if he had asked you to do that.* [¶] *But what he's asking you to do is kind of like be Solomon like, . . . we get to hold someone responsible for this and you can walk out of here with your head held high because . . . you didn't do nothing, right. You convicted him of something.* [¶] . . . [T]hat would not be fair. It would not be right because what you'd be doing is saying . . . although we're not supposed to take punishment, probably going to get something. . . . Not going to go home tomorrow. That would not be what you said you would do. You said that you would weigh the evidence and you would convict him of the crime that was proven to you by the evidence." (Italics added.)

Appellant contends the italicized portions of the prosecutor's argument attacked counsel's integrity by improperly suggesting counsel "did not believe his own client's case, and was asking for a compromise verdict of involuntary manslaughter simply to 'save face.' "

A prosecutor commits misconduct if he or she attacks defense counsel's integrity, casts aspersions on defense counsel, or claims that defense counsel does not believe in his client's innocence or theory of the case. (*People v. Williams*, *supra*, 1 Cal.5th at p. 1188 [it is error for a prosecutor to argue defense counsel knew his client was guilty but proceeded with a sham defense]; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1337; *People v. Edwards*, *supra*, 57 Cal.4th at p. 738.) " 'In evaluating a claim of such misconduct, we determine whether the prosecutor's comments were a fair response to defense counsel's remarks' [citation] and whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion [citation]." (*People v. Edwards*, at p. 738.)

There is no likelihood jurors would have interpreted the argument as appellant suggests. Appellant's reading of the prosecutor's words is strained. The prosecutor did not "engage in such forbidden tactics as accusing defense counsel of fabricating a defense or factually deceiving the jury." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Stitely* (2005) 35 Cal.4th 514, 559–560.) Fairly read, the prosecutor stated only that the defense recognized the evidence was incompatible with a complete acquittal – which was, in fact, precisely what defense counsel argued. These statements did not impugn defense counsel's integrity or suggest he believed appellant was guilty of murder. Contrary to appellant's conclusory contention, nothing about the prosecutor's statements lightened the state's burden of proof.

The authorities David cites in support – *People v. Pitts* (1990) 223 Cal.App.3d 606 and *People v. Bell* (1989) 49 Cal.3d 502

– bear no resemblance to the instant matter. In *People v. Pitts* the prosecutor subtly implied defense counsel knowingly presented perjured testimony. (*People v. Pitts*, at p. 705.) In *People v. Bell*, the prosecutor argued that although counsel averred the defendant did not commit the crime, counsel's attention to special circumstances issues suggested " 'he might be worried that he did commit it,' " implying counsel believed his client was guilty. (*People v. Bell*, at p. 537.) The prosecutor's argument in this case cannot be stretched to imply that counsel suborned perjury or thought David was guilty of murder.

(iv) *Accusing appellant of lying*

Next, appellant complains that the prosecutor improperly argued he lied during his testimony. He points to the prosecutor's statements that 90 percent of his testimony was "ridiculous," and that he lied by testifying (1) he had the gun in his pocket in the kitchen; (2) he did not punch Willie in the head; and (3) the argument between the men regarded Willie's smoking in the house, not the bills.[11]

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[11] The challenged statements are as follows. When arguing the murder was premeditated and deliberate, the prosecutor stated, "How do we know that? Because [David] lied. And I'm going to tell you what all his lies are in a minute. [¶] He lied about having that gun in his pocket. You know why, because he had just beat [Willie] up. Spikey went off to his room. Why did he have to leave the kitchen area? Why? Because he's carefully weighing the considerations before and against his choices, right. [¶] . . . [¶] . . . If he had that gun in his pocket why not just pull it out then[?]"

Referencing the video, the prosecutor urged: "Defense attorney tried to infer that these lacerations [to Willie's] head were not caused [by David's punches]. David lied, I never hit him

Citing *People v. Ellis (*1966) 65 Cal.2d 529, David argues the prosecutor committed misconduct "by arguing that David committed perjury, by lying when he testified." In *People v. Ellis*, the prosecutor repeatedly "reference[d] [defendant] and his alibi witnesses as perjurers." (*Id.* at p. 539.) The court explained that a prosecutor may point out inconsistencies in the evidence, but "tread[s] on dangerous ground" when he or she "resort[s] to epithets to drive home the falsity of defense evidence. [Citation.] The term liar, for instance, implies more than offering untrue testimony; it implies a willful falsehood. [Citation.] The term perjurer has, as its only formal semantic distinction *vis-à-vis* liar, the additional element of the oath. [Citations.] A charge of perjury, however, produces more than moral opprobrium. Perjury is a felony, and the connotation conveyed to the jury is therefore apt to be far more derogatory than that conveyed by the term liar. Particularly when applied to the defendant, it is apt

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in the face. Lined him up. Remember how he pulled up his sleeve and just made sure he had a good shot. What was he aiming for, his chest?"

Referring to defense counsel's acknowledgement that some of David's testimony was "ridiculous," the prosecutor argued, "I would submit to you 90 percent of it was."

Regarding the reason for the argument between the men, the prosecutor continued: "[Theodore testified] no, Willie don't smoke in the house. That's a lie that David told you. It wasn't about that. Rochandra never said that. She said it was about bills. Why is he lying? Why is Rochandra lying? [¶] . . . [¶] Guilty people try to save themselves. That's what they do. They deflect. They make excuses. And they lie. That's what David did up on the stand."

adversely and unnecessarily to affect the ability of the jury dispassionately to weigh the credibility of the accused and the issue of guilt or innocence. Unless the prosecutor is careful to state that his conclusion that perjury was committed is predicated solely on the evidence before the jury, the spectre of jury reliance on prosecutorial access to information outside the record is raised." (*Id.* at pp. 539–540.)

Ellis is inapt here, for the simple reason that the prosecutor in this case did not use the terms perjury or perjured. The prosecutor properly argued that the *evidence* showed appellant was lying, as demonstrated by the video and the testimony of other witnesses. "A prosecutor may vigorously challenge the validity of any defense, and can characterize the testimony of a witness, including the defendant, as untruthful . . ." (*People v. Seumanu*, *supra*, 61 Cal.4th at p. 1337; *People v. Friend* (2009) 47 Cal.4th 1, 32 [when a defendant's testimony contradicts the strong evidence of his guilt, it is not improper to call him a liar]; *People v. Williams*, *supra*, 1 Cal.5th at p. 1189.) The prosecutor's argument was a fair comment on the evidence. (See *People v. Winbush* (2017) 2 Cal.5th 402, 484; *People v. Peoples* (2016) 62 Cal.4th 718, 796.)

(v) *Arguing matters outside the record and appeal to jurors' sympathies*

Defense counsel argued that David waited to turn himself in because he mistrusted police officers. Counsel stated, "in [the prosecutor's] world, all he would have to do is just walk into Century Station" and surrender, and "everything would have been fine. Nothing to be afraid of at all. [¶] I think that's not realistic. I think that police are seen differently for different folks and I think for maybe [the prosecutor], that would not have

been an issue. [¶] But I can understand why perhaps David would not have wanted to just simply walk into Century Station . . . to surrender." The prosecutor responded with a brief anecdote recounting that he had adopted his son from Haiti six years previously; and if his son, who "happen[ed] to be Black," was ever involved in a similar situation, the prosecutor would advise him to turn himself in and tell the truth, because "the truth will come out" and "[t]hat's the right thing to do."

David contends the comments were improper because, first, the prosecutor essentially testified about a matter outside the record; and second, the remarks painted the prosecutor as a hero who rescued a Black child from a life of poverty. The People counter that the prosecutor's statements were a proper response to defense counsel's argument, were not a comment on evidence outside the record, and did not improperly appeal to the jurors' sympathies.

It is improper for a prosecutor to assume or state facts not in evidence. (*People v. Thomas* (2011) 51 Cal.4th 449, 494.) Nor may a prosecutor " 'make arguments to the jury that give it the impression that "emotion may reign over reason," [or] 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. Linton*, *supra*, 56 Cal.4th at p. 1210.) However, illustrations drawn from common experience, history or literature, as well as anecdotes and jokes, are commonly regarded as acceptable during argument. (*People v. Harrison* (2005) 35 Cal.4th 208, 248.)

Trial counsel's decision whether or not to object " 'is inherently tactical, and the failure to object will rarely establish ineffective assistance.' " (*People v. Chatman*, *supra*, 38 Cal.4th at

p. 384; *People v. Livingston* (2012) 53 Cal.4th 1145, 1169–1170.) Even assuming counsel here was derelict for failing to object, appellant has not established the prejudice component of his ineffective assistance claim, that is, a reasonable probability that the outcome of the proceeding would have been different had the challenged argument been excluded. (*People v. Mickel*, *supra*, 2 Cal.5th at p. 198.) As explained, we do not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 894.) The prosecutor's remarks were but a brief and insignificant part of his argument, did not pertain to the most significant evidence against David, and did not reference any out-of-court evidence related to the crime, the parties, or the witnesses. In context, the prosecutor was simply illustrating his point that regardless of a defendant's race, turning oneself in was the right thing to do. This argument was not inflammatory and did not invite an emotional or irrational response. Fairly read, the comments did not suggest the prosecutor was a "hero" because he was an adoptive parent.

Significantly, the jury was instructed that it should not let bias, sympathy, or prejudice (including bias for or against attorneys) influence its decision; that it must decide the case based on the evidence alone; and that "[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence." We presume the jury followed these instructions, which dispelled any possible prejudice. (See *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 821, 859.)

(vi) *Biblical references*

Finally, appellant complains about references to the biblical account of Cain and Abel the prosecutor made during closing argument. After arguing that the shooting was intentional, the prosecutor continued: "I do these cases involving family members quite a bit. And the hardest thing is to convince jurors that family members want to hurt each other. Because we think [to] ourselves that blood is thicker than water. We think to ourselves . . . in times of trouble who is going to be there for me? My family. . . . That's who I can count on. And you know what, you can also count on that people do bad things to each other regardless of blood relations. [¶] I don't mean to get all biblical, but the first recorded murder in the Bible is Cain and Abel." In ruminating about the theme of the Millender case, the prosecutor was reminded of the "line . . . am I my brother's keeper. . . . [E]verybody gets tired of being their brother's keeper at some point. That's where David was at. [¶] What did Cain do? He said, what? Did he say, yeah, I did it[?] No, he didn't. It's human nature, folks. That's what people do. They don't take responsibility for it. [¶] . . . [P]eople do bad things to each other. [¶] It doesn't matter whether they're related or they're not. So when you go back in that jury room, just remember that it's about the actions, not . . . brothers they don't do this to each other – they do."

David argues the prosecutor committed misconduct by using a religious authority as a basis to find him guilty of murder. We disagree.

Appeals to religious authority during argument are impermissible. A jury is charged with deciding questions of historical fact based on the evidence, and religious input has no

role in this process. (*People v. Harrison*, *supra*, 35 Cal.4th at p. 247.) "But not every reference to the Bible is an appeal to religious authority. Not only is the Bible a religious text, but it is also generally regarded as a literary masterpiece; indeed, it is among the oldest and best-known literary works in our culture. . . . [The California Supreme Court] has repeatedly held that in closing argument attorneys may use 'illustrations drawn from common experience, history, or *literature*.' [Citations.]" (*Id.* at p. 248.) However, when "references to the Bible are involved, the line between literary allusion and religious appeal is often a fine one. A prosecutor who mentions the Bible in closing argument runs a grave risk that a reviewing court will find that the line has been crossed and will reverse the defendant's conviction. Because any use of biblical references in argument must be carefully scrutinized, cautious prosecutors will choose to avoid such references. *Nevertheless, so long as they do not appeal to religious authority, prosecutors may refer to the Bible in closing argument to illustrate a point*." (*Ibid.*, italics added.)

Here, a reasonable juror would not have understood the prosecutor's remarks as an appeal to religious authority. Instead, the prosecutor's clear point was that fratricide was known to exist from antiquity, and the fact Willie and David were brothers did not preclude a finding of murder. Likewise, the statement that Cain denied killing Abel was offered to show that, as a matter of common knowledge, it has been true since ancient times that persons guilty of crimes sometimes deny committing them. The prosecutor did not state or imply that biblical doctrine required a murder conviction. To the contrary, the prosecutor stated the jury should remember "that it's about the actions."

Because the prosecutor did not use the biblical allusion as an appeal to religious authority, there was no prosecutorial misconduct. (*People v. Harrison*, *supra*, 35 Cal.4th at p. 248.)

David also argues that the prosecutor offered unsworn testimony, and "portray[ed] himself as some sort of expert in family law matters" by arguing that it was human nature to deny guilt. But a prosecutor may argue facts not in evidence that are common knowledge. (*People v. Mendoza*, *supra*, 62 Cal.4th at p. 908.) It is reasonable to argue, as a matter of common knowledge, that it is not unusual for persons to deny culpability in order to escape liability. (Cf. CALCRIM No. 105 [whether witness has a personal interest in how a case is decided is a factor going to witness credibility].) The jury was, of course, free to reject this argument, but the prosecutor did not become an unsworn witness by making it.

(vii) *Appellant's ineffective assistance of counsel claim fails*

As we have explained, the challenged statements and questions either did not constitute misconduct or were harmless. Contrary to appellant's argument, the prosecutor did not engage in a "pervasive" pattern of misconduct. Accordingly, appellant's ineffective assistance claim fails because he has not shown any prejudicial prosecutorial misconduct.

4. *Cumulative error*

Appellant contends that the cumulative effect of the purported errors deprived him of due process and a fair trial. 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. Henriquez* (2017) 4 Cal.5th 1, 48.) None of the alleged errors, individually or cumulatively, significantly influenced the fairness of appellant's trial or detrimentally affected the jury's verdict. (See *People v. Garton*, *supra*, 4 Cal.5th at pp. 520–521.)

5. *The domestic violence fee must be stricken*

At sentencing, the trial court imposed a $500 domestic violence fee pursuant to section 1203.097. Appellant contends the fee was imposed in error, and the People concede the point. We agree. The domestic violence fee authorized by section 1203.097, subdivision (a)(5) may be imposed only when the defendant is granted probation for the crime. (§ 1203.097, subd. (a); *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520.) Because appellant was sentenced to prison, the fee is unauthorized and must be stricken.

6. *The matter must be remanded to allow the trial court the opportunity to exercise its discretion pursuant to amended section 12022.53*

When appellant was sentenced in 2016, imposition of a section 12022.53 enhancement was mandatory and the trial court lacked discretion to strike it. (See *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.) Consequently, the trial court sentenced David to a consecutive 25-years-to-life term for his use of a firearm. (§ 12022.53, subd. (d).) Effective January 1, 2018, the Legislature amended section 12022.53, subdivision (h) to give trial courts authority to strike firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.)[12]

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[12] As amended, section 12022.53, subdivision (h) provides: "The court may, in the interest of justice pursuant to Section

In supplemental briefing, appellant contends his case must be remanded to allow the trial court to exercise its discretion to strike the firearm enhancement. We agree. As the People correctly concede, the amendment to section 12022.53 applies to cases, such as appellant's, that were not final when the amendment became operative. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306; *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Remand is necessary to allow the trial court an opportunity to exercise its sentencing discretion under the amended statute. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) We express no opinion about how the court's discretion should be exercised.

1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

DISPOSITION

The domestic violence fee (§ 1203.097) is stricken. The judgment of conviction is otherwise affirmed. The clerk of the superior court is directed to modify the abstract of judgment accordingly and to forward a copy to the Department of Corrections and Rehabilitation. The matter is remanded to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 12022.53 firearm enhancements pursuant to section 12022.53, subdivision (h).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.*

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