Filed 6/16/16 P. v. Navarro CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ARMANDO NAVARRO, Defendant and Appellant.	B263204 (Los Angeles County Super. Ct. No. NA095316)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur H. Jean, Jr., Judge. Affirmed.

Eisner Gorin, Dmitry Gorin, Alan Eisner, and Brad Kaiserman, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Jose Armando Navarro (defendant) of the attempted murder of his ex-girlfriend Natali[1] and her friend Javier Camacho. The prosecution presented evidence to show defendant entered Natali's apartment without her permission, pointed a gun at her head and attempted to fire it, searched the apartment and found Camacho, and then pointed the gun at his head and attempted to fire it. Fortunately, the gun malfunctioned and did not actually fire in either instance. We consider whether there is sufficient evidence to support defendant's convictions for attempted murder and other charged offenses, whether his life sentence constitutes cruel and unusual punishment, and whether the trial court should have instructed the jury sua sponte on attempted voluntary manslaughter. We also consider whether the absence of a Spanish language interpreter during a pre-trial proceeding warrants reversal, whether the trial court failed to obtain an express waiver of his right to testify, and whether, as defendant claims, his trial attorney was constitutionally ineffective.

I. BACKGROUND

Natali met defendant when she was 15 years old and he was in his thirties. They moved to the United States when Natali was 16 years old and lived together. On December 8, 2010, Natali gave birth to a son, Jorge. Defendant was not the biological father, although he initially believed he was.

When Jorge was four or five months old, Natali had an argument with defendant, in part because she found out that he was going out with someone else. During the argument, defendant brought out a gun and briefly pointed it at her. Natali later moved out of the apartment she shared with defendant, intending to start a new life with Jorge's father. At some point in 2012, after she moved out, Natali told defendant he was not Jorge's biological father.

[1] Coincidentally, Natali has the same last name as defendant. For clarity, we refer to her by her first name.

In early 2013, Natali began to spend time with Javier Camacho, to get to know him to decide if she wanted to have a romantic relationship with him. According to Natali, the two had been friends for about a year. According to Camacho, they had known each for four or five months and just started dating in March 2013.

In the evening on March 27, 2013, Natali was in her apartment with her son Jorge and Camacho. They were planning to go out to dinner. While Natali was in the shower, Camacho heard a knock on the front door. Camacho went into the bedroom, knocked on the bathroom door and told Natali that someone was knocking at the front door. Natali heard the knocking on the front door herself, and she came out of the bathroom and went to the kitchen to get Jorge. Camacho stayed in the bedroom.

In the meantime, defendant, who was the person outside the front door, unlocked it and came inside. Natali had never given defendant keys to the apartment. He had, however, arranged for the apartment's locks to be changed shortly after she moved in. When Natali saw defendant, she was afraid because he previously told her that if she left him, one day he would kill her and Jorge, and also kill himself. Natali told defendant that he could not be in the apartment. Defendant responded by pulling out a gun and putting it up to Natali's head. She heard three clicks, but the gun did not fire. Natali kept her head down at the time, and she was in shock and crying.

After the gun did not fire, defendant moved into the bedroom. Natali stayed in the living room, thinking about what to do. Defendant searched the bedroom and found Camacho in the closet. Natali heard what she described as "blows and yells." Camacho explained that defendant, whom he had never seen before, pointed the gun at his face without saying a word to him. Camacho saw defendant pulling the trigger and heard clicking noises. Camacho tried to take the gun away from defendant, but defendant pushed him and tried to fix the gun. Defendant then began hitting Camacho with the gun. While hitting Camacho with gun, defendant continued to try to fire it.

Natali saw defendant pointing the gun at her while he was struggling with Camacho, and she believed that defendant was going to shoot her. Natali ran out the door by the kitchen with Jorge and asked her neighbors for help. The neighbors called the

police, but would not let Natali inside. Camacho ran past Natali and told her to come with him. She tried, but she was not able to get over a fence with her son. So she went back to the neighbors' door, and defendant came out of Natali's apartment and hit her on the side of the face. Defendant then moved toward the kitchen door of Natali's apartment. Natali believed he went inside and then went out the front door and drove away. Everything occurred "so fast."

Meanwhile, Camacho made it to a nearby gas station and asked the cashier to call police. Just past midnight, Los Angeles Police Department Officer Kishi and his partner Officer Woodward arrived at the gas station and spoke with Camacho. The officers then went to Natali's home.

Natali was waiting outside her home when the officers arrived. Officer Kishi observed redness and swelling on the left side of Natali's face. Officer Kishi went inside the residence and saw signs of a physical disturbance. Once Officers Kishi and Woodward checked the residence to make sure that defendant was not inside, they noticed and retrieved an unspent nine-millimeter bullet on the floor of the living room near the entryway.

During trial, defendant stipulated that he purchased and registered "a nine millimeter semiautomatic pistol with the make of Arcadia Machine Tool and the model of Backup. [¶] No subsequent change of ownership has been registered." In his defense, he called Anthony Paul, a firearms expert, to testify that the bullet found in Natali's apartment would not fit into the AMT Backup handgun that defendant had registered in 1997. On cross-examination, however, the expert admitted that there was no evidence about which version of the handgun defendant had registered, and that there was a model of the firearm that would hold the bullet.

The jury convicted defendant on both counts of attempted murder in violation of Penal Code[2] sections 664 and 187, as well as two counts of assault with a firearm in violation of section 245, subdivision (a)(2), one count of inflicting corporal injury in

[2] All undesignated statutory references that follow are to the Penal Code.

violation of section 273.5, subdivision (a), and one count of being a felon in possession of a firearm in violation of section 29800, subdivision (a)(1). The jury found true allegations that the attempted murders were committed willfully, deliberately, and with premeditation. The jury also found true allegations that defendant personally used a firearm in the commission of the attempted murders within the meaning of section 12022.53, subdivision (b), and personally used a firearm in the commission of the assaults within the meaning of section 12022.5, subdivision (a). The trial court sentenced defendant to life with the possibility of parole on each of the attempted murder convictions, plus a ten-year enhancement term pursuant to section 12022.53. The court ordered the sentences to run concurrently, and imposed but stayed sentence on the remaining four counts pursuant to section 654.

II. DISCUSSION

Defendant presents six claims of error on appeal. He contends (1) there is insufficient evidence to support any of his convictions, or if there is sufficient evidence that he pointed a weapon at the victims, insufficient evidence that he intended to kill them. He asserts (2) there is evidence that he acted in the heat of passion and so the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of attempted voluntary manslaughter. Defendant further claims the court erred in (3) failing to provide him with an interpreter during pre-trial proceedings and (4) failing to obtain an express waiver of his right to testify. And defendant maintains (5) his sentence constitutes cruel and unusual punishment under the United States and California Constitutions and (6) he received ineffective assistance of counsel throughout the proceedings.

We hold defendant's contentions lack merit and we therefore affirm the judgment. Sufficient evidence supports defendant's convictions, including a finding that defendant acted with express malice. There was, on the other hand, insufficient evidence of heat of passion to require the court to instruct on attempted voluntary manslaughter. The record shows that defendant was not prejudiced by the absence of an interpreter at certain pre-

trial proceedings, including a suppression hearing. Under well-established law, an express waiver of defendant's right to testify was not required, and we reject his claim that his life sentence for attempted murder is cruel and unusual punishment. Finally, we hold defendant has not met his burden of showing ineffective assistance of counsel for the various reasons he claims counsel was deficient.

A. Sufficiency of the Evidence

Defendant contends Natali and Camacho were not credible and their testimony was uncorroborated. He further contends the prosecution did not prove he acted with the malice required to support the attempted murder charges.

A conviction for attempted murder requires proof that the defendant committed a direct but ineffectual act toward killing another person and did so with express malice aforethought, that is with the specific intent to kill another person. (See *People v. Lee* (2003) 31 Cal.4th 613, 623.) "Although malice may be express or implied with respect to a charge of murder, implied malice is an insufficient basis upon which to sustain a charge of attempted murder because specific intent is a requisite element of such a charge." (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.)

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) 'This standard applies whether direct or circumstantial evidence is involved.' (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) '[I]t is well settled that intent to kill or

express malice, the mental state required to convict a defendant of attempted murder, may . . . be inferred from the defendant's acts and the circumstances of the crime.' (*People v. Smith* (2005) 37 Cal.4th 733, 741.)" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

1. Witness credibility

Defendant points to inconsistencies in Natali and Camacho's testimony. He is correct that their accounts of what happened are not identical. The two did not agree on how long they had known each other, for example. Defendant is also correct that there are inconsistencies between their preliminary hearing testimony and their trial testimony. Camacho, for example, testified at the preliminary hearing that he never saw defendant point his gun at Natali, but testified at trial that defendant pointed a gun at Natali and her child when they were running outside. Defendant also argues there was no corroboration for their testimony concerning his actions.

The uncorroborated testimony of a single witness is sufficient to sustain a conviction unless the testimony is physically impossible or inherently improbable. (*People v. Scott* (1978) 21 Cal.3d 284, 296.) The testimony in this case is neither. Here, the jury necessarily found Natali and Camacho credible, and well-established precedent requires us to defer to that finding. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1030 ["It is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility"].) Reversal of defendant's convictions because of conflicts in the witnesses' testimony is therefore unwarranted.

2. Express malice

Natali and Camacho's testimony is sufficient to support a finding of express malice. Natali's testimony supports an inference that defendant did not usually carry a

gun.[3] Defendant, however, brought a handgun to the house with him, and the jury could infer he believed it was loaded. Once inside Natali's house, defendant drew the gun, pointed it at Natali's head and immediately tried to fire it. Defendant then began searching the apartment, which suggests that he expected another person to be in the apartment. When defendant found Camacho, he pointed the gun at Camacho's face and pulled the trigger. There is no evidence that defendant did or said anything before taking out the gun and trying to shoot Natali, and then Camacho, almost immediately after entering the apartment. These facts support an inference of prior planning, and intent to kill both Natali and Camacho. (See, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1082.)

Defendant contends that the evidence showed that he acted in the heat of passion, which negated any possibility of a finding that he acted with the express malice required for attempted murder. A defendant who kills during "a sudden quarrel or heat of passion" lacks the express malice necessary to support an attempted murder conviction and instead is guilty of only voluntary manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) As we discuss in more detail in part B, *post*, there is no evidence defendant attempted to shoot Natalie and Camacho in the heat of passion, and there is therefore no reason to disturb the jury's express malice finding.

B. Duty to Instruct on Attempted Voluntary Manslaughter

Defendant's defense to the attempted murder charges was that Natali fabricated the whole incident in retaliation for defendant's eviction of Natali's parents. He did not claim that he acted in the heat of passion and did not request an instruction on attempted voluntary manslaughter. Defendant asserts that the trial court nevertheless had a sua sponte duty to instruct on this offense.

---

[3] Natali described a safe where defendant kept guns and ammunition when they lived together, and mentioned only two or three times during their relationship when she had seen him holding a gun.

1. Duty to instruct on lesser included offenses

"Because heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such a homicide [citation], voluntary manslaughter of these two forms is considered a lesser necessarily included offense of intentional murder." (*People v. Moye* (2009) 47 Cal.4th 537, 549, italics omitted.) Similarly, attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1241.)

A trial court has a sua sponte duty to instruct the jury on a lesser included offense "whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "This substantial evidence requirement is not '"satisfied by *any* evidence . . . no matter how weak,"' but rather by evidence from which a jury composed of reasonable persons could conclude 'that the lesser offense, but not the greater, was committed.'" (*People v. Avila*, *supra*, 46 Cal.4th at p. 705.)

2. *Elements of voluntary manslaughter*

Voluntary manslaughter based on sudden quarrel or heat of passion has both a subjective and an objective component. (*People v. Moye*, *supra*, 47 Cal.4th at p. 549.) "'The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively.'" (*People v. Rountree* (2013) 56 Cal.4th 823, 855.)

a. objective element

"'"To satisfy the objective or 'reasonable person' element of . . . voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.'" (*People v. Wickersham* [(1982)] 32 Cal.3d [307,] 326.)' (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144.) . . . 'The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim (see *In re Thomas C.* (1986)

183 Cal.App.3d 786, 798), or be conduct reasonably believed by the defendant to have been engaged in by the victim. (See *People v. Brooks* (1986) 185 Cal.App.3d 687, 694; see also 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Crimes Against the Person, § 512, p. 579.) The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*People v. Berry* (1976) 18 Cal.3d 509, 515; *People v. Valentine* (1946) 28 Cal.2d 121, 139.)' (*People v. Lee* (1999) 20 Cal.4th 47, 59.)" (*People v. Moye*, *supra*, 47 Cal.4th at pp. 549-550.)

Defendant maintains that it has been well established that "the sight of a wife in adultery, or even a reasonable belief that his wife was committing an act of adultery . . . has been held sufficient evidence to go to the jury as creating 'the heat of passion' in the mind of the defendant." (*People v. Logan* (1917) 175 Cal. 45, 49.) Even if defendant were correct, Natali was not defendant's wife, or the equivalent, and she was not committing adultery, or the equivalent. Defendant was never married to Natali, and they had been living apart for almost a year at the time of the attempted shootings.

Indeed, defendant did not claim at trial that he had been provoked, and he did not offer any evidence on this issue. The evidence shows only that defendant discovered that his former girlfriend had a male friend, or perhaps merely that she had a male guest. This is not something that would cause an ordinary person of average disposition to react from passion and not from judgment.[4]

---

[4] Defendant does not argue Natali's statement that he was not Jorge's biological father was a source of provocation, but we doubt such a statement could constitute sufficient provocation in any event. There is no evidence showing Natali made that statement on or near the night in question. The proximity of any provocation to the defendant's acts is a key consideration in a voluntary manslaughter determination. "'"[I]f sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter. . . . " ([*People v.*] *Wickersham* [1982] 32 Cal.3d [307,] 327.)' (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.)" (*People v. Moye*, *supra*, 47 Cal.4th at p. 550.)

b. subjective element

"'The defendant must actually, subjectively, kill under the heat of passion.' [Citation.]" (*People v. Rountree*, *supra*, 56 Cal.4th at p. 855.) "'Heat of passion 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." [Citations.]' (*People v. Barton* [(1995)] 12 Cal.4th [186,] 201.)" (*People v. Moye*, *supra*, 47 Cal.4th at p. 550.)

Because heat of passion must have been induced by sufficient provocation, and because there is no evidence of such provocation here, defendant's subjective mental state is not relevant to our analysis. If we were to consider defendant's mental state, however, we would find no evidence that he was acting from "passion rather than from judgment." Defendant did not testify, and so there is no direct evidence of his mental state. Natali and Camacho did not testify that defendant made any statements during the attempted murders, and did not describe defendant's demeanor during the crimes.[5] Our reading of the record indicates that both victims provided straightforward descriptions of events. Their testimony shows that defendant came to Natali's apartment, let himself inside, pointed his gun at her head and attempted to fire it when she told him to leave, searched the apartment for anyone else present, pointed his gun at Camacho and attempted to fire it, attempted unsuccessfully to fix the gun, used the gun as a bludgeon, and then left. This is cold, calculated behavior. It does not suggest that defendant was acting under the influence of a strong emotion. Moreover, defendant had threatened to kill Natali before coming to the apartment that evening, which suggests a pre-existing plan to kill, not an emotional reaction to an unexpected situation.

Because there was no evidence sufficient to deserve consideration by the jury that defendant subjectively acted under the heat of passion, and no such objective evidence

---

[5] According to Camacho, defendant did not say a word to him. Natali testified that defendant opened the closet and found Camacho and then "heard blows and yells," but there is nothing to indicate who was yelling or what, if anything, was actually said.

either, the trial court had no duty to give an attempted voluntary manslaughter instruction sua sponte.

C. Lack of an Interpreter

In his opening brief, defendant asserted he did not have the services of a Spanish interpreter until the first day of jury selection, which violated the California Constitution. In his reply brief, however, defendant rightly concedes that the record shows he did have an interpreter at the preliminary hearing and the arraignment. Our examination of the record reveals that defendant also had the services of a Spanish interpreter at certain other pre-trial appearances through the end of 2013—as well as, of course, the entirety of trial that began in March 2015.

We see no indication, though, that a Spanish interpreter was present at several of defendant's pre-trial appearances in 2014 and early 2015. Some of these appearances were pre-trial conferences that merely resulted in continuances. Other appearances, however, did involve matters of some greater substance. During four appearances, the court and counsel addressed discovery issues; the defense made requests to compel the prosecution to produce additional materials, some of which were granted, and the court denied a defense motion to dismiss the case for failure to disclose exculpatory evidence. In addition, no interpreter was present at a January 8, 2015, hearing on defendant's motion to suppress—the most substantive of the proceedings held outside the presence of an interpreter.

Under California's constitution, "[a] person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." (Cal. Const., art. 1, § 14.) Other constitutional rights may also be affected by the absence of an interpreter when required. (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1011 [right to due process, confrontation, assistance of counsel, and presence at trial] (*Rodriguez*).) "At moments crucial to the defense—when evidentiary rulings and jury instructions are given by the court, when damaging testimony is being introduced—the non-English-speaking defendant who is denied the assistance of an interpreter, is unable to communicate with

the court or with counsel and is unable to understand and participate in the proceedings which hold the key to freedom." (*People v. Aguilar* (1984) 35 Cal.3d 785, 790-791.)

There are indications in the record that defendant understood some English. At a September 11, 2014, court appearance where material produced in discovery was discussed, the trial court asked defense counsel whether his client spoke English and counsel responded, "[l]imited, but enough to understand the proceeding right now." The court then asked "[i]s that right, Mr. Navarro," and defendant responded "[y]es, sir," and proceeded to agree in English to waive time for purposes of continuing the trial date. Defendant's statements at this hearing establish there was no need for an interpreter during the pre-trial conferences that merely resulted in continuances.[6] (See *In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1454 [burden on accused to show understanding of English not sufficient to allow him to understand nature of proceedings].)

Despite these indications an interpreter's presence was unnecessary at least at some pre-trial conferences, our Constitution guarantees a defendant unable to understand English the right to services of an interpreter "throughout the proceedings" (Cal. Const., art. I, § 14), and we therefore assume for purposes of our discussion that it was error to proceed without an interpreter at the remainder of the pre-trial appearances at which an interpreter was not present. That there was error, however, does not end our inquiry. Rather, as our Supreme Court has explained, "'circumstances may exist in which there court be no prejudice' resulting from the absence of an interpreter." (*Rodriguez*, *supra*, 42 Cal.3d at p. 1011.) We assess prejudice using the beyond a reasonable doubt formulation in *Chapman v. California* (1967) 386 U.S. 18, examining the entire record to determine whether "the proceedings which took place while the interpreter was absent

---

[6] Later, at the start of trial when defense counsel requested the services of a Spanish interpreter (a request the court granted), counsel explained he was doing so only "out of an abundance of caution . . . so he has a full comprehension of everything that is going on."

may be insubstantial or concern matters which are not possibly prejudicial to the defendant . . . ." (*Rodriguez*, *supra*, 42 Cal.3d at pp. 1012, 1015.)

Defendant advances no specific challenge to absence of interpreter at those court appearances where discovery matters were discussed. Nor does he argue on appeal that any of the trial court's rulings on discovery matters were erroneous. We can therefore confidently say these pre-trial appearances were insubstantial and not possibly prejudicial. Indeed, precedent suggests reversal may not be warranted even if defendant himself had been entirely absent from the pre-trial proceedings involving discovery. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 799 [defendant's presence not necessary for proceedings involving "routine legal and procedural matters involving discovery"]; *People v. Fedalizo* (2016) 246 Cal.App.4th 98, 109 [citing *People v. Perry* (2006) 38 Cal.4th 302, among other cases, for the proposition that "it is well established that a represented defendant has no constitutional or statutory right to be present to address purely legal questions or where his or her 'presence would not contribute to the fairness of the proceeding'"].)

That leaves the suppression hearing as the only remaining pre-trial appearance we have yet to discuss. The hearing was held on the defense's motion to exclude from evidence at trial the bullet found by police on the floor of Natali's residence.

In most cases, a suppression hearing will be a consequential proceeding and likely preclude a finding the absence of an interpreter was not prejudicial; after all, a defense attorney does not often go to the trouble of bringing a motion to exclude ancillary evidence unimportant to a jury's determination of guilt or innocence. But this is a case where the defense appears to have done just that.

The motion to suppress the bullet found on the floor of Natali's residence was not just plainly meritless,[7] it also sought to exclude a piece of evidence that we are convinced

[7] Evidence presented at the hearing established police officers had Natali's express permission to enter her residence. Natali's consent to the officer's entry provides a well-recognized exception to the warrant requirement. (See *People v. Woods* (1999) 21 Cal.4th 668, 675.) Even without that permission, the doctrine of exigent circumstances

beyond a reasonable doubt played no important role in the jury's determination of guilt. The key evidence against defendant at trial was the eyewitness testimony of Natali and Camacho that defendant was the assailant (along with their observed injuries). That a nine millimeter bullet was found on the floor was of much less significance.[8] Because the suppression hearing was, on the uncommon facts here, inconsequential as to the course of the trial and the jury's determination of guilt (*Rodriguez, supra*, 42 Cal.3d at p. 1012), the absence of an interpreter at the suppression hearing was harmless beyond a reasonable doubt.

In so holding, we emphasize the result we reach is both limited to the facts here and the product of close scrutiny of the record—scrutiny that would have been unnecessary had defense counsel and the court ensured defendant had an interpreter at all pre-trial hearings, even if just in abundance of caution as at trial. "Sensitivity toward language difficulties is the hallmark of our multilingual state. This sensitivity has been appropriately elevated to constitutional proportions when the state, through the criminal process, places the life and liberty of the non-English speaker in jeopardy." (*People v. Aguilar, supra*, 35 Cal.3d at p. 794.) It should go without saying, but counsel and trial judges alike should remain vigilant in ensuring that an interpreter is available "to aid the accused during the *whole* course of the proceedings." (*Id*. at p. 790, emphasis added.)

D. Waiver of the Right to Testify

Defendant contends the trial court erred in failing to obtain an express personal waiver from him of his right to testify.

As defendant acknowledges, both the California Supreme Court and the United States Court of Appeals for the Ninth Circuit have held that an express personal waiver is

---

would have permitted the officers to enter, and when they did, the bullet was in plain sight and therefore subject to seizure. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156; *People v. Panah* (2005) 35 Cal.4th 395, 465.)

[8] There was not much discussion of the bullet during closing argument, but the defense did argue there was no identification of when it was placed in the living room or who placed it there.

not required. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1052-1053; *United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3d 1089, 1094.) He contends, however, these decisions run counter to United States Supreme Court authority that requires an express waiver of other critical constitutional rights. Defendant specifically cites *Carnley v. Cochran* (1962) 369 U.S. 506, 516 (express waiver of right to counsel) and *Boykin v. Alabama* (1969) 395 U.S. 238, 243 (express waiver of right to jury trial).

Controlling authority from our Supreme Court compels rejection of the premise of defendant's argument. "[A] defendant's right to testify in his own behalf is merely one of many rights guaranteed by the Fourteenth Amendment to the federal Constitution to insure a fair trial [citation]. Like the right to produce evidence and to confront and cross-examine adverse witnesses, it must be exercised with caution and good judgment, and with the advice and under the direction of competent trial counsel. It necessarily follows that a trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy. . . . " (*People v. Mosqueda* (1970) 5 Cal.App.3d 540, 545.)

Of course, defendant was represented by counsel here, but the trial court in fact did go further and asked defendant, "I wanted to confirm that it was your decision not to testify; is that true?" Defendant replied, "Yes." Although the trial judge did not expressly refer to defendant's "right" to testify, this exchange does indicate that defendant was aware that he had the option to testify, and chose not to exercise it.

E. Cruel and Unusual Punishment

Defendant claims that his sentence of life in prison with a minimum parole eligibility period of 17 years constitutes cruel and/or unusual punishment under both the United States and California Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) In the trial court, defense counsel contended that consecutive sentences would not be appropriate, but made no claim that the sentence imposed by the court constituted cruel and unusual punishment. If anything, defense counsel indicated that concurrent

sentences *would* be appropriate, and concurrent life sentences are what the trial court imposed. Under the circumstances here, we hold the cruel and unusual punishment contention is forfeited. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583 [claim of cruel and unusual punishment is forfeited if not raised in the trial court]; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; see generally *People v. Scott* (1994) 9 Cal.4th 331, 356.)

Defendant, however, has raised a claim of ineffective assistance of counsel in connection with the sentencing proceedings. Accordingly, we examine defendant's claim to determine if there is a reasonable probability of a more favorable outcome if defense counsel had raised a claim of cruel and unusual punishment in the trial court. (*People v. Carter* (2005) 36 Cal.4th 1114, 1189 [standard for ineffective assistance of counsel claims].) Because we conclude defendant's sentence is not disproportionate to his individual culpability, there is no reasonable probability that defendant would have received a more favorable outcome if his counsel had argued the sentence imposed was cruel or unusual.

Defendant maintains that a sentence is cruel and unusual under the Eighth Amendment when "it proscribes punishment grossly disproportionate to the severity of the crime," citing *Ingraham v. Wright* (1977) 430 U.S. 651, 667. (See also *Solem v. Helm* (1983) 463 U.S. 277, 287.) Defendant also maintains that punishment violates the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 423-424.)

"'To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. (*People v. Dillon* [1983] 34 Cal.3d 441, 479.) If the penalty imposed is "grossly disproportionate to the defendant's individual culpability" (*ibid.*), so that the punishment """shocks the

conscience and offends fundamental notions of human dignity"'" (*People v. Cox* [1991] 53 Cal.3d [618,] 690), the court must invalidate the sentence as unconstitutional.' (*People v. Lucero* [2000] 23 Cal.4th [692,] 739-740.)" (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1300.)

Defendant's offense of premeditated and deliberate attempted murder is quite serious, particularly under the facts here, where the attempts were unsuccessful only because defendant's handgun in some way malfunctioned. Even assuming for the sake of argument that defendant was "deeply moved by the domestic predicament that he found himself in with [Natali] and Jorge," Camacho, the second victim of attempted murder, did not contribute to this predicament. Defendant was not a young man, and he been convicted of criminal activity involving a firearm before. The evidence indicated he had previously menaced Natali with a firearm, and he had threatened to kill her and her child. Thus, nothing about the circumstances of the offense or the personal characteristics of defendant demonstrate that defendant's sentence is disproportionate to his individual culpability.

F. Ineffective Assistance of Counsel

Appellant contends his trial counsel was ineffective in eight different ways, and he also makes a claim of "cumulative error."

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)" (*People v. Carter*, *supra*, 36 Cal.4th at p. 1189.) We presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel." (*Ibid*.)

1. Impeachment of Camacho

Defendant argues his trial counsel told the court at the pre-trial conference that Camacho had used multiple social security numbers and also used aliases. Although counsel did impeach Camacho in other ways, defendant contends counsel was constitutionally ineffective in failing to cross-examine Camacho about the use of multiple identifiers.

Trial counsel raised the possibility of multiple social security numbers and aliases to make sure that the records search the prosecution ran on Camacho was accurate. Counsel stated that "based on the information that we got from our investigator, apparently there were multiple social security numbers. The[re] are alias names and other things." This statement is not proof that Camacho in fact used multiple social security numbers or aliases, and counsel's statement is not a representation that he had admissible evidence of such usage.[9] Absent such evidence, counsel could have later decided as a tactical matter not to question Camacho about the usage because counsel would have been unable to impeach Camacho if he denied it. And even with admissible evidence, counsel could have made a reasonable tactical decision not to impeach Camacho on such collateral matters. "'[W]e accord great deference to counsel's tactical decisions' (*People v. Frye* (1998) 18 Cal.4th 894, 979), and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' (*People v. Scott* (1997) 15 Cal.4th 1188, 1212) 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)" (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Even assuming counsel was deficient in failing to impeach Camacho with his use of multiple social security numbers and aliases, there is no reasonable probability the

---

[9] We do not imply that defense counsel acted improperly in making this statement. Counsel was checking to make sure that the records search done by the prosecution was broad enough to identify Camacho if he used other names or social security numbers. Counsel did not assert that he had admissible evidence of this behavior.

outcome at trial would have been more favorable with such impeachment. Defense counsel did impeach Camacho's testimony with his testimony at the preliminary hearing, and Camacho's testimony was also arguably called into question by differences between his and Natali's testimony about their relationship and the details of the March 27 incident. The jury nevertheless found defendant pointed a gun at Camacho's head and pulled the trigger. There is no reasonable probability the jury would have disbelieved Camacho on the basis of the collateral impeachment proposed by defendant.

2. Presentation of confusing expert testimony

Defendant contends his trial attorney was ineffective because he presented "confusing" expert testimony on the type of firearm registered to Navarro. Specifically, the expert testified on direct examination that the bullet found in Natali's apartment would not fit into the firearm registered to Navarro, but acknowledged on cross-examination that there were two different versions of the firearm, and the bullet would fit in one of them.

The record on appeal shows that the expert, Anthony Paul, was well qualified to testify as a firearm expert. Paul explained that his testimony on direct was based on his "misunderstanding" that the firearm involved was the short version produced by the manufacturer and not the long version. Defendant contends that his counsel did not "sufficiently communicate" with the expert witness, and there could be no strategic reason for this failure.

"[E]ven the most carefully prepared witness may give a surprise answer. . . . " (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1031.) Thus, the mere fact that Paul gave what was likely an unexpected answer on cross-examination does not create an inference that defense counsel inadequately prepared Paul, or was deficient in any manner. Further, even if Paul's answer was not as helpful as expected, it was not *un*helpful. As we discuss *post*, there was admissible evidence that defendant owned a type of gun which could potentially have used the bullet. Paul's testimony showed that not all versions of the gun could use the bullet, and so raised a question about what

version defendant owned, a question that was not answered by the prosecution. Because Paul's testimony was not necessarily unfavorable, there is no reasonable probability that defendant would have obtained a more favorable outcome in the absence of Paul's testimony.

3. Character witnesses

Defendant contends his trial counsel was ineffective in failing to call any character witnesses. There is no evidence in the appellate record of the identity of such witnesses or what the substance of their testimony would have been, including whether, in fact, it was likely to be wholly favorable to defendant. This alone is fatal to defendant's ineffective assistance claim on direct appeal. (See *People v. Bolin* (1998) 18 Cal.4th 297, 334 [rejecting claim that counsel was ineffective in failing to call certain witnesses because the record did not establish the witnesses would have provided exculpatory evidence].)

Even if we were to accept defendant's broad, unsupported representation that the witnesses would have testified that "the accusations leveled against [defendant] were inconsistent with his character," defendant has not carried his burden to demonstrate the absence of the character testimony undermines our confidence in the guilty verdict—we have no information about the identity of the witnesses, their relationships to defendant, or the extent of their knowledge of his character. Moreover, even if defendant had called character witnesses who testified favorably, the prosecution would then have been permitted to offer evidence of his bad character. (Evid. Code, § 1102, subd. (b).) Given that defendant had a prior felony conviction and, according to the prosecution, had "in the past conducted criminal activity with a gun," character evidence that defendant was peaceful or nonviolent or nonthreatening was unlikely to have been persuasive.

4. Evidence of defendant's gun ownership

Defendant contends his counsel's decision to stipulate that an AMT Backup handgun was registered to defendant in 1997 constituted ineffective assistance of counsel.

Defendant asserts his counsel should have objected to the introduction of this evidence pursuant to Evidence Code section 352.

The record does not disclose defense counsel's reason for stipulating to the registration evidence. That alone precludes reversal on defendant's ineffective assistance claim on direct appeal; defense counsel could have decided as a tactical matter that it was better to stipulate to what was plainly admissible evidence. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051 [on direct appeal, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, courts will not find ineffective assistance unless there could be no conceivable reason for counsel's acts or omissions].) In any event, defendant has also failed to demonstrate that any objection by his counsel would have been successful. Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Evidence that a defendant possesses a gun of the type used to commit the charged offenses is relevant. (See *People v. Champion* (1995) 9 Cal.4th 879, 924, overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860 [photographs of defendants holding the type of gun used in killing one of the victims were "obviously relevant"]; *People v. Rinegold* (1970) 13 Cal.App.3d 711, 720 ["an implement by means of which it is likely that a crime was committed is admissible in evidence if it has been connected with the defendant"].) The firearm registration, although old, had some tendency to prove that defendant still owned the registered firearm because there was no evidence that defendant had ever transferred ownership of it.

Defendant has not identified any "undue" prejudice from the admission of the registration. """The prejudice which [section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]""" (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.) Accordingly, defendant has not

demonstrated that a motion to exclude the registration would likely have succeeded. "[A d]efense counsel is not required to advance unmeritorious arguments on [a] defendant's behalf." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1173; see also *People v. Grant* (1988) 45 Cal.3d 829, 864-865 [to prevail on ineffectiveness claim based on counsel's failure to make a motion, defendant must show that such motion would have been successful].)

5. Heat of passion instruction

Defendant contends his trial counsel was ineffective in failing to request a jury instruction on heat of passion voluntary manslaughter. As we discuss in part II.B, *ante*, there is no evidence to support such an instruction. Any request by counsel would not have been successful, and an ineffective assistance of counsel claim on that basis necessarily fails. (*People v. McPeters*, *supra*, 2 Cal.4th 1148 at p. 1173; *People v. Grant*, *supra*, 45 Cal.3d at pp. 864-865.)

6. Motion to suppress

Defendant claims his trial counsel was ineffective because, in his view, counsel did not make a "competent" motion to suppress the bullet found in Natali's apartment. "'Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excluded evidence in order to demonstrate actual prejudice.' (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.)" (*People v. Wharton* (1991) 53 Cal.3d 522, 576.) Defendant has not done so here.

As we noted in part II.C, *ante*, it was undisputed that Natali lived in the apartment and gave police officers permission to enter it. Further, the officers had reason to suspect that defendant might still be in the apartment and so were justified by exigent circumstances in entering the apartment. The bullet was in plain sight on the floor. The appellate record does not reveal any basis to suppress the bullet.

7. Grounds for a motion for new trial

Defendant contends his trial counsel was ineffective in failing to postpone sentencing to review any possible grounds for a new trial motion. Sentencing occurred almost immediately after the jury returned its verdict.[10] Defendant does not identify any grounds for a new trial that his counsel should have raised.

We do not presume prejudice from "'the mere fact of counsel's alleged inaction.' (*People v. Jackson* (1980) 28 Cal.3d 264, 289.)"[11] (*People v. Bess* (1984) 153 Cal.App.3d 1053, 1060.) Reversal is warranted only if a defendant "can demonstrate he was denied an adjudication on potentially meritorious issues due to counsel's inadequate preparation. (*People v. Shaw* (1984) 35 Cal.3d 535.)" (*Ibid*.) Defendant has not so demonstrated.

8. Sentencing preparation

Defendant contends his counsel was ineffective in failing to request a continuance of sentencing to prepare arguments, witnesses, and evidence for sentencing.

At the sentencing hearing, counsel made a brief argument that the terms of imprisonment imposed on the counts of conviction should run concurrently rather than consecutively but did not otherwise argue mitigating factors were present. Defendant argues that if counsel had presented letters of support from Navarro's friends and family and information about Navarro's background, the court may have imposed a different sentence. There is no evidence in the record showing that such letters would have been forthcoming or what in Navarro's background they would have highlighted.

---

[10] We do not find the timing significant. Although sentencing occurred almost immediately after the jury returned its verdict, those two events occurred on Monday, March 9, 2015. The jury began their deliberations on Friday, March 6, 2015, and so defense counsel therefore had time to consider possible grounds for a new trial over the weekend.

[11] Overruled on other grounds by *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.

Just as important, defendant has not shown prejudice, that is, a reasonable probability that a more favorable sentence would have been imposed. The court expressed some empathy at sentencing, stating, "I think that [defendant] wrongly, but was deeply moved by the domestic predicament that he found himself in with [Natali] and Jorge." As the trial court correctly explained, however, the sentence for attempted murder with premeditation and deliberation is life imprisonment, and the court had "no choice with respect to the gun allegation. So the choices aren't broad." Within those constraints, the trial court sentenced defendant to as short a sentence as possible by doing precisely what defense counsel suggested: sentencing the two attempted murder convictions concurrently rather than consecutively. Sentence on all other counts was imposed but stayed pursuant to section 654.

9. "Cumulative error"

Defendant contends that even if no deficiency alone was prejudicial, the cumulative effect of the multiple deficiencies was. Defendant relies on *Harris By and Through Ramseyer v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 to support the idea that prejudice can be shown as a result of counsel's cumulative alleged deficiencies.

Defendant has not cited any controlling authority for the proposition that ineffective assistance of counsel claims can be assessed cumulatively and prejudice found even where it does not individually appear. Our Supreme Court has, however, addressed a similar issue in *People v. Ochoa* (1998) 19 Cal.4th 353.

In that case, the court confronted a claim that defense counsel was ineffective in failing to make an argument or submit papers in support of defendant's automatic application to modify the death verdict. The court held, "Despite this probably deficient performance . . . there was no ineffective assistance of counsel." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 470.) The court reached this conclusion because the trial court was very engaged and familiar with the facts and so there was no reasonable probability of a different outcome if defense counsel had done more to support the modification application. (*Ibid*.) Notably, the *Ochoa* court explained that defendant claimed that that

"the cumulative effect of instances of ineffective assistance of counsel requires reversal" but rejected the claim because "we have found no instances of ineffective assistance of counsel at all . . . and therefore the predicate for his claim is absent." (*Ibid*.) We reject defendant's claim for the same reason. We have found no instances of ineffective assistance of counsel, prejudice being a necessary element of such a claim, and the necessary predicate for defendant's cumulative error claim—multiple errors—is therefore absent.

Even if we were somehow to consider defendant's claims of deficient performance cumulatively, we would still reject his claim of prejudice. As we discuss above, defendant has at most shown inaction by his counsel in a number of areas. He has not shown that action was possible (for example, that there was a basis to suppress evidence), what the action would have looked like (for example, what the character witnesses' testimony would have been) or how the action would have made a more favorable result reasonably probable. His claim of cumulative error would necessarily suffer from the same deficiencies.

G. *Cumulative Error - Trial as a Whole*

In addition to his claim that counsel's cumulative deficiencies were prejudicial, defendant contends that even if no other error in the trial requires reversal standing alone, the cumulative effect of the errors does demand reversal. We have found only one error, the absence of an interpreter at the motion to suppress, and it did not result in a miscarriage of justice under the circumstances. There is therefore no basis for reversal on a cumulative error theory.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KUMAR, J.*

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