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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID PABLO EDMA, Defendant and Appellant.	F088317 (Super. Ct. No. VCF367162) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Melinda Myrle Reed, Judge.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Charles C. Ragland, Chief Assistant Attorney General, Kimberley A. Donohue, Assistant Attorney General, Ivan P. Marrs and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant David Pablo Edma was found guilty by a jury of two counts of second degree murder and one count of gross vehicular manslaughter while intoxicated; he also pled guilty to charges of driving under the influence (DUI), driving with excessive blood

alcohol content (BAC), and two related misdemeanors. Edma now appeals, asserting a retrial is required on the two murder convictions because: (1) the trial court prejudicially erred and violated federal due process by admitting three photographs of the deceased fetus; (2) the trial court prejudicially erred and violated federal due process by denying a request to modify the jury instruction on implied malice; (3) the prosecutor committed prejudicial misconduct by commenting at closing on Edma's failure to testify; and (4) the cumulative effect of these errors was prejudicial. Edma also contends (5) the abstract of judgment contains a clerical error regarding the imposed fines. The People dispute all of Edma's contentions.

We affirm the judgment and order the issuance of an amended determinate abstract of judgment.

PROCEDURAL HISTORY

On February 27, 2024, the Tulare County District Attorney filed a first amended information charging Edma with two counts of second degree murder of Yadira Selix and her unborn child (Pen. Code, § 187, subd. (a); counts 1 and 2); and one count of gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a);[1] count 3). The first amended information also alleged one count of driving under the influence with a prior DUI causing great bodily injury to Selix's spouse, O.G., and three other children, A.S., R.S., and C.S. (Veh. Code, §§ 23153, subd. (a), 23560, 23558, 23578; Pen. Code, § 12022.7, subd. (a); count 4); and driving with an excessive blood alcohol content (BAC) with a prior DUI causing injury to O.E., A.S., R.S., and C.S. (Veh. Code, §§ 23153, subd. (b), 23560, 23558, 23578; Pen. Code, § 12022.7, subd. (a); count 5). In connection with these five counts, numerous circumstances in aggravation were alleged under the California Rules of Court, rules 4.421(a)(1), (a)(2), (b)(1), (b)(2), and (b)(4).[2]

[1] Undesignated statutory references are to the Penal Code.

[2] Further rules references are to the California Rules of Court.

Edma was also charged with the misdemeanors of driving on a suspended or revoked license and unlawful vehicle operation (Veh. Code, §§ 14601.5, subd. (a), 23247, subd. (e); counts 6 and 7).

Edma pled guilty to counts 4 through 7 and admitted all circumstances in aggravation associated with counts 4 and 5. On March 12, 2024, a jury found him guilty of counts 1 through 3 and found true the circumstances in aggravation alleged under rules 4.421(a)(1), (a)(2), and (b)(1). The trial court found true the circumstances in aggravation alleged under rules 4.421 (b)(2) and (b)(4).

On July 3, 2024, the trial court sentenced Edma to two consecutive terms of 15 years to life on counts 1 and 2, as well as a concurrent term of two years on count 5 plus 12 years for the great bodily injury enhancement on that count. The court stayed the sentence under section 654 on the remaining counts.

Edma filed a notice of appeal on July 3, 2024.

FACTUAL SUMMARY

On June 15, 2018, at about 9:20 p.m., O.G. was driving northbound on a Tulare County two-lane highway at about 60 miles per hour. O.G.'s spouse, Yadira Selix, sat in the front passenger seat, and in the back seat were the couple's 9-year-old son, C.S., their 8-year-old daughter, A.S., and Selix's 10-year-old brother, R.S. Selix was 21 or 22 weeks pregnant.

At the same time, D.P. was traveling southbound on the same highway as a passenger in another car. D.P. noticed headlights "going on and off" in the rearview mirror; he turned around and saw a yellow SUV swerving in its lane. The SUV, traveling between 44 and 56 miles per hour, then crossed the broken yellow line into the northbound lane just as O.G.'s truck approached from the south. O.G. had no time to react and instinctively braked, but the right fenders of his truck and the SUV collided. Law enforcement and paramedics eventually extracted all occupants of O.G.'s truck and transported them to the hospital.

California Highway Patrol Officer Cedric Hughes approached the SUV and observed Edma in the driver's seat, alone and unconscious. Officer Hughes noted the smell of alcohol emanating from Edma. Edma regained consciousness and moaned, and the officer noticed his eyes were red and watery. As Edma was extracted from the SUV, an "[open] beer can fell from between his legs." About an hour after the crash at the hospital, a nurse took samples of Edma's blood. The sample was tested six days later, revealing a BAC of .24%. The sample was retested a little over two years later and revealed a BAC of .21%. An expert forensic toxicologist testified it would take the equivalent of 15 to 16 drinks over a two-hour period to get a hypothetical 200-pound individual to a .24% BAC. He opined Edma's BAC at the time of the collision would have been approximately .26%, which was over three times the legal limit of .08%. The toxicologist testified that at .08% BAC, 70% of the population would be too impaired to drive, and at 15% BAC, 100% of the population would be too impaired to drive.

When Selix arrived by airlift at the hospital, she had no pulse; hospital staff were able to restore a heartbeat, but Selix died on the operating table. Surgeons removed the fetus from Selix's body, but given the extensive damage to Selix's placenta from the crash, the fetus was pronounced dead. O.G. suffered a broken pelvis and was in a wheelchair for four months after the crash. A.S. and C.S. suffered broken collarbones, and R.S. had a ripped intestine, requiring surgery.

Edma had never previously applied for a California driver's license, and at the time of the crash, his driving privileges were suspended because of a 2017 DUI conviction. Because of the prior conviction, he was required to have an ignition interlock device installed in his car; the SUV did not have one. Also because of the prior, he was required to complete a nine-month program for drunk driving offenders, which included information on the lethal dangers associated with drunk driving; he never enrolled.

DISCUSSION

I. Admission of Photos of Deceased Fetus

Edma first appeals the trial court's admission into evidence of People's Exhibits Nos. 60–62: three photographs of Selix's deceased fetus, which were taken after it was removed from Selix's body at the hospital. He contends the evidence was irrelevant because other evidence existed to support the charges and prejudicial because it likely evoked a deeply emotional response from the jury. We disagree.

A. Additional Background

During the prosecutor's direct examination of its expert physician, the court admitted into evidence a pathology report describing the physical characteristics of Selix's fetus, including its weight, height, skin color, appearance, and various body measurements. The physician testified about many of these same details, referencing People's Exhibits Nos. 60 through 62 and noting the fetus died because of damage to Selix's placenta. The physician also described diagrams he composed illustrating the injuries to Selix and the fetus; these were admitted, with no objection from Edma, as Exhibit 58.

The court then heard arguments from the parties, outside the jury's presence, over the relevance and prejudice of the three photos of the fetus. People's Exhibit No. 60 shows the fetus lying on its back; No. 61 shows it lying on its side; and No. 62 shows it lying on its stomach. The prosecutor argued the photos should be admitted because proof beyond a reasonable doubt was required for the murder and gross negligence charges, which included proof of the fetus's development. Edma argued for exclusion of the photographs under Evidence Code section 352 as minimally probative, cumulative of other evidence demonstrating the fetus's development, and unduly prejudicial. The prosecutor acknowledged there had been other testimony and evidence demonstrating the fetus's development, but argued that "[s]eeing it is absolutely, completely different."

The trial court admitted the photos into evidence, reasoning:

> "The death of a fetus is somewhat unusual and does require a particular legal finding by the jury. And the pictures, themselves, are not cumulative in the sense that [exhibit No.] 60 shows the baby laying on its back, [exhibit No.] 61 shows the baby on its side, and [exhibit No.] 62 on its stomach. And the pictures were testified to by the doctor as showing the baby was beyond the embryonic stage. I disagree that the pictures provide undue prejudice over their probative value. They are obviously pictures of a fetus, which, in and of itself, is, of course, difficult to see, but they are not bloody. They are not gruesome. There is nothing that is shown there other than the condition of the fetus in its developed stage."

The court found the probative value of the photos outweighed any prejudicial effect, overruled Edma's objection, and admitted the photos into evidence. (*Ibid.*)

B. Standard of Review

On appeal, the admission of evidence is reviewed under the deferential abuse of discretion standard. (*People v. McKinnon* (2011) 52 Cal.4th 610, 655.)

C. Analysis

" 'Relevant evidence' means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Evidence Code section 352 states: "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."

Undue prejudice under Evidence Code section 352 can result where the evidence uniquely tends to evoke an emotional bias against a party as an individual while being only slightly probative on the issues. (*People v. Heard* (2003) 31 Cal.4th 946, 976 (*Heard*).) However, undue prejudice is not prejudice that naturally flows from relevant, highly probative evidence. (*People v. Salcido* (2008) 44 Cal.4th 93, 148 (*Salcido*).) "The jury can, and must, be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome, but the jury cannot be shielded from an accurate depiction

of the charged crimes that does not unnecessarily play upon the emotions of the jurors." (*People v. Ramirez* (2006) 39 Cal.4th 398, 454 (*Ramirez*).)

Having reviewed the photos in question, we conclude the trial court did not abuse its discretion in weighing the probative and prejudicial value of Exhibit Nos. 60 through 62. Whether the fetus was viable at the time of death was an issue before the jury and therefore relevant. (*People v. Taylor* (2004) 32 Cal.4th 863, 867 ["[T]he state must demonstrate 'that the fetus has progressed beyond the embryonic stage of seven to eight weeks.' "].) The photos show the fetus in a natural pose, lying next to a ruler on an examiner's table with no viscera present, and so are not unduly gory beyond the tragic fact of the death itself. (*Ramirez, supra,* 39 Cal.4th at p. 454.) While there is no question the photos of the fetus are unpleasant and likely harmful to the defense, they did not create the type of unfair prejudice that flows from introduction of marginally probative but emotionally inflammatory evidence. (See *Heard, supra,* 31 Cal.4th at p. 976 [noting victim photographs and other graphic items of evidence in homicide cases are always disturbing].)

Edma relies on *People v. Marsh* (1985) 175 Cal.App.3d 987 (*Marsh*), to argue the trial court abused its discretion in admitting the three photos, but *Marsh* is factually distinguishable. Therein, the trial court admitted seven "particularly horrible" autopsy photographs, which were published to the jury during trial and which displayed: "an interior section of the victim's skull with the residue of heavy blood clots"; "an almost full view of the victim's nude body the closeup portion of which is the exterior surface of the exposed brain below which dangles part of the bloody scalp and in the background of which is the child's blood-splattered torso 'field dressed' with the ribcages rolled back to expose the bowels"; "the victim's neck and head with half of the scalp drawn down over his face and the other half pealed rearward exposing the right hemisphere of the brain"; "the left brain hemisphere with massive blood clotting and a portion of the severed skull plate lying immediately behind the head"; "the top of the victim's head with the scalp

removed and dangling but with the skull plate still intact, depicting extensive hemorrhaging in several areas"; "the right side of the head with the scalp pulled forward and backwards to expose the undersurfaces, showing extensive hemorrhaging"; and "the left side of the head with similar hemorrhaging." (*Id.* at pp. 996–997.) The Fourth District reversed, noting the lack of a need to prove an element of the charges via the photos and concluding "the jury was not enlightened one additional whit by viewing these seven gory autopsy photographs." (*Id.* at p. 998.)

In comparison, Exhibits Nos. 60–62 are not unduly gory in the same way as in *Marsh*, as described above (*Heard*, *supra*, 31 Cal.4th at pp. 976–977.) While unpleasant and certainly harmful to Edma's case, the photos did not introduce unfair, reversable prejudice. (*Ramirez*, *supra*, 39 Cal.4th at p. 454 [reminding that the jury must be shielded from sensationalized or unnecessarily gruesome aspects of a crime without detracting from "an accurate depiction of the charged crimes[.]"].)

Further, we reject Edma's argument that the photographs became cumulative once the physician testified about the fetus's viability, dimensions, and cause of death. Photos of a murder victim need not be excluded as cumulative to other evidence in the case. (*Heard*, *supra*, 31 Cal.4th at pp. 977–978 [rejecting argument that photos were cumulative merely "by reason of their corroboration of facts independently established by testimony"].) Nor are the pictures cumulative merely because Edma acceded to the admission of other visual evidence of the fetus's development, including the pathology report and diagrams. (*Salcido*, *supra*, 44 Cal.4th at p. 147 ["[T]he prosecution is not required to accept a stipulation 'if the effect would be to deprive the state's case of its persuasiveness and forcefulness,' nor is it 'obligated to present its case in the sanitized fashion suggested by the defense.' "].)

In sum, we find the photographs were neither cumulative nor "unduly gruesome nor inflammatory and 'not of such a nature as to overcome the jury's rationality.' " (*People v. Taylor* (2010) 48 Cal.4th 574, 650.) Accordingly, the trial court did not abuse

its discretion and did not violate Edma's federal constitutional rights in admitting into evidence Exhibit Nos. 60 through 62. (*Heard, supra,* 31 Cal.4th at pp. 976–977.)

II. Jury Instruction on Implied Malice

Edma next contends the trial court prejudicially erred in denying a request for a modified jury instruction on implied malice. We disagree.

A. Additional Background

At trial, Edma sought to modify the instruction defining implied malice murder. The prosecutor proposed the use of CALCRIM No. 520, which read in relevant part:

> "The defendant is charged in Counts 1 and 2 with murder.
>
> "To prove that the defendant is guilty of this crime, the People must prove that:
>
> "1. The defendant committed an act that caused the death of another person or fetus; AND
>
> "2. When the defendant acted, he had a state of mind called malice aforethought.
>
> "There are two kinds of malice aforethought, express malice and implied malice. [¶] … [¶]
>
> "The defendant had *implied malice* if:
>
> "1. He intentionally committed the act;
>
> "2. The natural and probable consequences of the act were dangerous to human life;
>
> "3. At the time he acted, he knew his act was dangerous to human life; AND
>
> "4. He deliberately acted with conscious disregard for human or fetal life."

Edma sought to modify the instruction so the second element of implied malice would read: "The natural and probable consequences of the act were dangerous to human life; *and the act involved a high degree of probability of death.*" The court rejected Edma's

proposed additional language, noting the then-present version of CALCRIM No. 520 correctly reflected the case law.

B. Applicable Law and Standard of Review

A trial court must instruct the jury on all general principles of law that are " ' "closely and openly connected to the facts and that are necessary for the jury's understanding of the case." ' " (*People v. Burney* (2009) 47 Cal.4th 203, 246 (*Burney*).) " ' "In addition, a defendant has a right to an instruction that pinpoints the theory of the defense[.]" ' " (*Ibid.*) "The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing[.]' " (*Ibid.*) We review claims of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1217.)

C. Analysis

Historically, courts had used two different definitions of implied malice: (1) " 'an act, the natural consequences of which are dangerous to [human] life,' " (*People v. Phillips* (1966) 64 Cal.2d 574, 587 *(Phillips*)) and (2) " ' "an act [committed with] a high degree of probability that it will result in death" ' " (*People v. Thomas* (1953) 41 Cal.2d 470, 480 (*Thomas*)). (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–104, 110–111 (*Nieto Benitez*).) However, our Supreme Court has repeatedly explained that " 'an act, the natural consequences of which are dangerous to life' and 'an act [committed] with a high probability that it will result in death' are equivalent and are intended to embody the same standard." (*People v. Watson* (1981) 30 Cal.3d 290, 300 (*Watson*); see also *Nieto Benitez*, *supra*, 4 Cal.4th at p. 111; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1219 ["*Watson* thus made it abundantly clear that the two definitions of implied malice which evolved in the aforementioned cases articulated one and the same standard."].) Thus, the trial court was within its discretion to refuse Edma's request for a modified instruction on implied malice to include "an act [committed] with a high probability that it will result in death" because such language was duplicative. (See *Burney, supra,* 47 Cal.4th at p. 246.)

Edma contends *Nieto Benitez* is not dispositive here because that case's holding interpreted the CALJIC counterpart to CALCRIM No. 520. (*Nieto Benitez*, *supra*, 4 Cal.4th at p. 111 [concluding "the present CALJIC No. 8.31 correctly distills the applicable case law."] Despite this, the reasoning of *Nieto Benitez* is equally applicable to CALCRIM No. 520, as the CALJIC and CALCRIM implied-malice instructions are distilled from the same principles espoused in *Phillips, Thomas, Watson,* and their progeny. (See *Nieto Benitez, supra*, 4 Cal.4th at pp. 103–104.) Thus, we reject Edma's argument that *Nieto Benitez* does not govern here.

In sum, we find no error, and no violation of Edma's due process rights, in the trial court's approval of a jury instruction defining implied malice as focused on "[t]he natural and probable consequences of the act … dangerous to human life"—to the exclusion of the *Thomas* language focused on "act involv[ing] a high degree of probability of death."[3] (*Nieto Benitez*, *supra*, 4 Cal.4th at pp. 110–111.)

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[3] This principle was recently reaffirmed by our Supreme Court in *People v. Reyes* (2023) 14 Cal.5th 981, 989 [reminding that " '[t]he natural and probable consequences' [of an implied malice act is] 'dangerous to human life' " when it " ' "involve[s] a high degree of probability that it will result in death," ' " not just that the act is "merely … dangerous to life in some vague or speculative sense," and that "under the objective component of implied malice, " ' " 'dangerous to life' " ' " means the same thing as a " ' "high degree of probability that [the act] will result in death." ' "].) *Reyes* was published a year prior to Edma's trial.

In response to *Reyes*, the Judicial Council of California Advisory Committee on Criminal Jury Instructions amended the jury instruction to read: "The natural and probable consequences of the (act/ [or] failure to act) were dangerous to human *life in that the (act/ [or] failure to act) involved a high degree of probability that it would result in death.*" (CALCRIM No. 520 (italics added).) The new version of CALCRIM No. 520 went into effect on March 15, 2024. (See Jud. Council of Cal., Criminal Jury Instructions: Revisions and Additions, Invitation to Comment CALCRIM-2023-02, <www.courts.ca.gov/policyadmin-invitationstocomment.htm> [as of Jan. 5, 2026], archived at <https://perma.cc/4AYB-6WP4>.)

The trial court here instructed the jury on March 11, 2024. Thus, the court used the version of CALCRIM No. 520 in effect at the time it read the jury instructions. Regardless, the fact that this jury instruction was modified to match Edma's first point on

III. Prosecutorial Misconduct

Next, Edma contends his two murder convictions should be reversed because the prosecutor committed prejudicial misconduct and violated due process by stating to the jury in closing argument that Edma did not want to take responsibility for his conduct. The trial court informed the jury that the prosecutor's statement was improper and admonished it not to consider the statement; no evidence exists indicating the jury failed to follow the court's curative admonishment, and so we reject Edma's argument.

A. Additional Background

Prior to trial, Edma pled guilty to driving under the influence and driving with an excessive blood alcohol, with a prior DUI, causing great bodily injury to O.G., A.S., R.S., and C.S.; he admitted as true the associated circumstances in aggravation to those counts, and pled guilty to two related misdemeanors.

During closing arguments, the prosecutor stated to the jury that "[t]he defendant, he pled guilty to all of those charges, but he doesn't want to take responsibility for the ultimate injury he caused for that exact same event in that exact same transaction between himself and his driving around State Route 63 that night with an open can of beer in his legs." In front of the jury, the trial court sustained Edma's objection, ordered the argument stricken, and stated Edma could formulate a curative instruction if he desired. Edma ultimately requested "just something the court would state to the jury," and the court agreed.

The trial court then discussed the issue with the jury, stating:

> "Yesterday, during the prosecutor's first closing argument, the prosecutor made a comment to the following effect: The defendant, he pled guilty to all of those charges, but he doesn't want to take responsibility for

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appeal, effective four days after the court here gave the instruction, is not dispositive. "[J]ury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.)

the ultimate injury he caused for the exact same event in the exact same transaction between himself and his driving around State Route 63 that night with an open can of beer in his legs.

"That comment was improper. And I'm instructing you now not to consider that comment or use it in any way during your deliberations. [¶] … [¶]

"The part that was improper of the prosecutor's comments yesterday, was the phrase, ['']but he doesn't want to take responsibility for the ultimate injury he caused.['] The rest of her comments was read to you by myself just to give you context about the part of, doesn't want to take responsibility for the ultimate injury he caused.

"The part that you should not consider and let affect your deliberations is the specific part about, ['']doesn't want to take responsibility for the ultimate injury he caused.['] All the rest of her comments, of course, are part of the evidence and properly should be considered by you."

B. Standard of Review

In reviewing whether a prosecutor's comments constitute error, we examine "whether there is a reasonable likelihood that the jurors misconstrued or misapplied the words in question." (*People v. Roybal* (1998) 19 Cal.4th 481, 514.) "A prosecutor's conduct violates a defendant's federal constitutional rights when it comprises a pattern of conduct so egregious that it infects ' "the trial with unfairness as to make the resulting conviction a denial of due process." ' " (*People v. Bennett* (2009) 45 Cal.4th 577, 594–595 (*Bennett*).) When the trial court issues a curative instruction, we presume the jury followed the courts instruction in the absence of evidence otherwise. (*Id.* at p. 595.)

C. Analysis

Under the Fifth Amendment of the United States Constitution, a prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence. (*Griffin v. California* (1965) 380 U.S. 609, 615 (*Griffin*).) "Directing a jury's attention to a defendant's failure to testify at trial runs the risk of inviting the jury to consider the defendant's silence as evidence of guilt." (*People v.*

Lewis (2001) 25 Cal.4th 610, 670.) "*Griffin* error may be committed by either direct or indirect comments on the defendant's failure to testify in his defense." (*People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1273 (*Caldwell*), disapproved on another ground in *People v. Rodriguez* (2020) 9 Cal.5th 474, 485; see also *People v. Denard* (2015) 242 Cal.App.4th 1012, 1021 (*Denard*) [finding *Griffin* implicated where the prosecutor commented in closing argument that the "defendant clearly does not want to take responsibility for his actions"].)

Here, assuming arguendo the prosecutor's statement that Edma "doesn't want to take responsibility for the ultimate injury he caused" implicated *Griffin*, we find it cured by the court's multiple admonitions. Edma immediately objected to the prosecutor's statement, and the court not only sustained the objection in front of the jury, but ordered the statement stricken and allowed for a curative instruction. Edma ultimately requested "just something the court would state to the jury," and the court so instructed.

Further, the jury was provided with the standard CALCRIM No. 355 instruction reminding that Edma had "an absolute constitutional right not to testify," and this should not be considered when deciding his guilt. The court's use of the curative instruction "reinforced to the jury the fact that defendant did not have an obligation to testify, and any inference to that effect from the prosecutor was improper." (*Caldwell, supra,* 212 Cal.App.4th at p. 1274; *People v. Carr* (2010) 190 Cal.App.4th 475, 484 [finding *Griffin* inquiry "unnecessary" where arguably errant comment by prosecutor to jury was objected to and the jury was admonished to ignore the statement, because "[t]his admonition cured whatever prejudice may have arisen from the prosecutor's argument."].) We presume the jury followed the court's curative instruction, and the jury instructions as a whole. (*Bennett, supra,* 45 Cal.4th at p. 595.)

Edma argues his case is one where "the misconduct is of such a character that it cannot be purged of its harmful effect by an admonition." He cites *People v. Johnson* (1960) 178 Cal.App.2d 360, 372, for the proposition that his case "is closely balanced

and guilt has not been so clearly established as to render it improbable that the harmful effect of the misconduct may have turned the scales against [him][.]" Said another way, Edma contends the issue of whether he acted with implied malice was a close call. We disagree.

"[M]alice may be implied when a person drives a motor vehicle under the influence of alcohol and kills someone." (*People v. Lagunas* (2023) 97 Cal.App.5th 996, 1005.) Courts have found the following combination of factors, under "no particular formula," sufficient to support a DUI homicide conviction: "(1) blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." (*People v. Suazo* (2023) 95 Cal.App.5th 681, 692–693.)

Here, Edma drove with a BAC over three times the legal limit, swerved into the opposing lane at highway speeds, and crashed into the truck transporting Selix and her 21-to-22-week-old fetus. CHP Officer Hughes noted the smell of alcohol emanating from Edma, his red and watery eyes, and the "[open] beer can [that] fell from between his legs." The toxicologist testified that at .08% BAC, 70% of the population would be too impaired to drive, and at .15% BAC, 100% of the population would be too impaired to drive; Edma's BAC at the time of the crash was estimated at .26%.

Moreover, at the time of the crash, Edma's driving privileges were suspended because of a prior DUI conviction, and he had never previously applied for a California driver's license. He was required to and did not have an ignition interlock device installed in his car, and the nine-month DUI program he was required to attend due to his previous DUI, but in which he never enrolled, included material on the lethal dangers associated with drunk driving. The crash was the cause of death for both Selix and the fetus. Against this substantial evidence, the prosecutors' statement—which was brief, objected to, stricken from the record, and explicitly identified as an "improper" statement the jury should ignore—was rendered harmless. (*Denard*, *supra*, 242 Cal.App.4th at p.

1023 [finding *Griffin* error harmless beyond a reasonable doubt given the "overwhelming evidence" against the defendant]; *Caldwell, supra,* 212 Cal.App.4th at p. 1274 ["[G]iven the curative instruction, and the prosecution evidence in this case, any misconduct was harmless."].)

IV. Cumulative Error

Edma contends that even if the errors alleged above are not in themselves reversible, they are cumulatively prejudicial. Not so. "A predicate to a claim of cumulative error is a finding of error." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.) Edma's individual arguments fail on the merits, and even assuming arguendo the prosecutor's statements in closing implicated *Griffin*, we found this issue cured by the court's multiple admonitions and not prejudicial in itself. Thus, there is nothing to cumulate. As such, we reject Edma's claim of cumulative error resulting in prejudice. (*People v. Panah* (2005) 35 Cal.4th 395, 479-480 [rejecting cumulative error where the defendant demonstrated few errors, and the court found each possible error harmless when considered individually].)

V. Abstract of Judgment

Lastly, Edma contends the determinate and indeterminate abstracts of judgment incorrectly reflect imposition of fines totaling $32,000, despite the trial court only having imposed an $8,000 restitution fine and an $8,000 parole revocation restitution fine. The People contend the abstract correctly reflects the fines imposed. While trial courts routinely include the total restitution fine and parole revocation restitution fine in both abstracts of judgment, in an abundance of caution and to provide clarity on the total amount imposed, we order the determinate abstract of judgment corrected.

A. Additional Background

At sentencing, the trial court imposed the following fines:

> "Defendant is to pay a restitution fine in the amount of $8,000 pursuant to [s]ection 1202.4 …. I have considered defendant's request to

> lower the fine from the statutory maximum of $10,000, I, in my discretion, lower it to $8,000. I lower it only to $8,000, despite the defendant's lengthy prison term because defendant is clearly able to earn wages while in prison. Also, defendant is ordered to pay a parole revocation restitution fine in the amount of $8,000 under … [s]ection 1202.45 …, but that is suspended pending successful completion of parole."

Here, the abstract of judgment is recorded on two forms: Edma's CR-292 form for his commitment on the indeterminate terms for the two murder charges, and his CR-290 form for his commitment on the determinate terms for counts 3 through 5. Each form records an $8,000 restitution fine and an $8,000 parole revocation fine. Each form used the same header, recording the case as Tulare County case number VCF367162, before Judge Reed, with a sentencing hearing date of July 3, 2024. The indeterminate form noted Edma's additional determinate term, referencing the CR-290 form.

B. Standard of Review

"Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385; *People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.) "[T]he abstract of judgment is not the judgment of conviction and it cannot add to or modify the judgment which it purports to digest or summarize." (*People v. Caudillo* (1980) 101 Cal.App.3d 122, 126.) "Courts may correct clerical errors at any time, and appellate courts … that have properly assumed jurisdiction [can order] correction of abstracts of judgment that [do] not accurately reflect the oral judgments of sentencing courts." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

C. Analysis

A trial court must accurately set forth all fines and fees in the abstract of judgment. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200 ["If the abstract does not specify the amount of each fine, the Department of Corrections cannot fulfill its statutory duty to collect and forward deductions from prisoner wages to the appropriate agency"].)

Here, there is no dispute over whether the trial court had the authority to issue both a restitution fine under section 1202.4 and a corresponding parole revocation restitution fine under section 1202.45. (See *People v. Tillman* (2000) 22 Cal.4th 300, 301–302 [noting a section 1202.4 restitution fine is mandatory in the absence of stated compelling and extraordinary reasons, and noting the mandatory imposition of a parole revocation fine under section 1202.45 where a restitution fine is imposed].) There is also no dispute as to the trial court's intent—that Edma is to pay an $8,000 restitution fine and an equal parole revocation restitution fine, the latter being suspended pending successful completion of parole. Thus, the oral pronouncement reflects that the aggregate amount imposed is $16,000 for these two fines, and even if the trial court intended differently, only a single restitution fine may be imposed in each case. (*People v. McElroy* (2005) 126 Cal.App.4th 874, 885.)

Edma contends the abstract of judgment records his fine at $32,000 because the two $8,000 fines are recorded twice, on both the CR-292 form for his indeterminate term and the CR-290 form for his determinate term. The People contend no correction is needed because the two forms reference the same case: VCF367162, before Judge Reed, with a sentencing hearing date of July 3, 2024. While many trial courts routinely issue abstracts of judgment reflecting the same restitution fine and parole revocation restitution fine on both an indeterminate and determine forms, others include those fines only on the indeterminate abstract of judgment. In an abundance of caution, and because we agree the duplicate reference could possibly lead to confusion (*People v. Frey* (1989) 209 Cal.App.3d 139, 142 [finding ambiguity between the court's order and the statement on the abstract of judgment form required correction]), we direct the clerk of the court issue an amended determinate abstract of judgment, leaving the restitution fine and parole revocation restitution fine reflected only on the indeterminate abstract of judgment, form CR-292.

DISPOSITION

The judgment of conviction is affirmed. The clerk of the superior court is directed to prepare an amended determinate abstract of judgment, form CR-290, deleting the $8,000 restitution fine and $8,000 parole revocation restitution fine. The indeterminate abstract of judgment requires no correction. The court is then to forward certified copies of the amended determinate abstract of judgment and the original indeterminate abstract of judgment to the Department of Corrections and Rehabilitation.

SNAUFFER, J.

WE CONCUR:

DETJEN, Acting P. J.

DE SANTOS, J.