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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRYAN MANCILLA, Defendant and Appellant.	B337645 (Los Angeles County Super. Ct. No. TA154485)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol J. Najera, Judge. Affirmed with directions.

Corey J. Robins, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Jonathon J. Kline and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Bryan Mancilla (defendant) was convicted of two counts of murder (Pen. Code,[1] § 187, subd. (a); counts 1 & 2); two counts of attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664; counts 3 & 4); and shooting at an inhabited dwelling (§ 246; count 5). Defendant contends the trial court erred in excluding testimony from his wife and evidence of weapons located at the home where the shooting occurred, thereby violating his federal constitutional rights to due process and to present a defense; the trial court erred in failing to instruct the jury, sua sponte, regarding second degree murder; the trial court erred and defendant's counsel rendered ineffective assistance because the jury was allowed to hear statements regarding punishment; and the cumulative effect of these alleged errors deprived him of his federal constitutional rights to due process and a fair trial. Finally, defendant contends, and respondent agrees, the trial court erred in awarding presentence custody credits. We affirm.

BACKGROUND

Procedural history

Defendant was charged by information with two counts of murder (§ 187, subd. (a); counts 1 & 2); two counts of attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664; counts 3 & 4); and shooting at an inhabited dwelling (§ 246; count 5). The information further alleged, in counts 1 through 4, defendant personally used a firearm within the meaning of section 12022.5, subdivision (a), and, in counts 3 and 4, defendant

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

personally inflicted great bodily injury upon the victims within the meaning of section 12022.7, subdivision (a).

The jury convicted defendant as charged and found the attempted murders were willful, premeditated and with deliberation and the firearm use and great bodily injury allegations to be true. The trial court sentenced defendant to an aggregate prison term of 76 years to life, comprised of 25 years to life on counts 1 and 2, plus three years for the firearm use enhancement in each count; seven years to life, plus three years for the firearm use enhancement in counts 3 and 4; and the midterm of five years, which was stayed pursuant to section 654, on count 5. Defendant was awarded 1,188 days of presentence credit.

Defendant timely appealed.

Statement of facts

Background

Defendant grew up in Compton and was familiar with local gang activity, including the Compton Varrio Segundo gang (CVS), though he was not a gang member or otherwise associated with gangs. In 2017, defendant moved to Lodi with his wife Cristal Dimas and their children in attempt to provide "a better life for [their] children." In early 2021, defendant's mother Martha Mancilla[2] asked him to return to Compton because his 17-year-

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[2] Because defendant and his mother share the same last name, we refer to defendant's mother as Martha. No disrespect is intended.

old brother J.M.[3] had joined CVS and she needed defendant's help. As a result, defendant and his family returned to live with Martha and J.M.

The May 8, 2021 incident

The assault on J.M.

On the morning of May 8, 2021, J.M. was with several CVS members including Javier "Chucky" Ruiz Soto (Ruiz), Carlos Arias, and Salvador Barbosa. Ruiz was 26 years old and had an "ongoing beef" with 17-year-old J.M. over a woman named Anna, who was the mother of Ruiz's daughter. J.M. had previously threatened Ruiz on social media, stating he "was going to kill [Ruiz]" and "he had a .40 [Glock] for" Ruiz.

While the group was drinking beer and smoking marijuana in his truck, Ruiz accidentally tased J.M. with a Taser gun, angering J.M. This led to a physical altercation between Ruiz and J.M. The men exited the truck and J.M. hit Ruiz in the eye with a key; the men moved to nearby tennis courts and J.M. was preparing to fight Ruiz. Ruiz "beat [J.M.] some more," punching him in the face five or six times. J.M. said, "no more," but Ruiz continued punching him. The men stopped fighting and J.M. "mumbl[ed]" as he left the tennis courts. This mumbling "got to" Ruiz, so he "punched [J.M.] in the back of the head like two more times."

J.M. attempted to escape by running away, but Barbosa drove after him and brought him back, telling J.M. he had to fight because he was "making [himself] look bad." J.M. refused to

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[3] Because defendant's brother was a minor at the time of the events surrounding this appeal, we refer to him only by his first and last initials. (Cal. Rules of Court, rule 8.401(a)(2).)

continue fighting and stated the gang could "court [him] out if you . . . want," meaning they could "jump him out" of the gang with a group beating. However, no formal "jump-out" occurred. Ruiz pulled J.M. from Barbosa's car and punched him again in the face. J.M. ran away a second time, with Ruiz giving chase before stopping due to fatigue. While fleeing, J.M. threatened Ruiz and made a "trigger motion" with his hand "[l]ike a gun."

Ruiz went back to CVS's hangout on South Lime Avenue (Lime House) where he was with Barbosa, Arias, and Richard Huerta, and a person referred to as "Marcos." He got food nearby and returned to the Lime House where he stood near the gate to eat his food.

Ruiz testified he was "not a nice guy" when angry, and he was angry while assaulting J.M. that day. Ruiz admitted he punched J.M. in the face 13 to 15 times, causing J.M.'s nose and mouth to bleed. J.M. "got socked up," but Ruiz had not "beat him enough" and "wanted to give him his jump-out." Ruiz acknowledged that J.M. still would have had to suffer "another ass-whooping from . . . like five other cats" to be formally removed from the gang.

J.M. returns home

When J.M. ran, he went to the Mancilla residence, arriving with his face bleeding and looking "really beat up." Dimas testified that when J.M. arrived home, he was "shaking physically," crying, and yelling. Martha was "screaming hysterically" and "in panic mode" while trying to stop J.M.'s bleeding with a towel.

Panicked, Dimas called defendant at his job at a nearby restaurant, telling him J.M. was "beaten up," "bleeding bad," and

"bleeding everywhere," and he needed to come home. Defendant "raced home" within minutes of receiving Dimas's call.

When defendant arrived, he saw J.M. crying with his face "covered in blood[, and] [h]is eyes, nose, and lips were swollen." According to defendant, J.M. told him "Chucky and [CVS] beat him up" and told defendant "we need to get out of here" because "[CVS was] going to come here and hurt us all." Based on J.M.'s injuries, defendant believed his "family was in danger, that [CVS was] gonna come there."

Defendant testified seeing J.M.'s condition brought back traumatic memories of when Martha had been attacked and hit in the face with a hammer by gang members. That prior attack on his mother had made defendant feel "vulnerable" because he "couldn't do anything to defend" his mother.

The confrontation at the Lime House

Defendant drove his Mustang to the Lime House to "stop them" from coming to harm his family. Defendant had a loaded AR-15 rifle in his car that he had recently confiscated from J.M., who had obtained the rifle from CVS. Defendant had never previously used an AR-15 or any firearm.

Dimas, Martha, and J.M. followed defendant to the Lime House in Dimas's white SUV. When they arrived, several CVS members were in the front yard, including Ruiz, Barbosa, Arias, Huerta, and Marcos.

What happened next is disputed. According to Ruiz's testimony, defendant exited his Mustang holding the assault rifle, placed it on the roof of his car, and "point[ed] at everybody" in the yard for about 60 seconds without saying anything. J.M. walked inside the front gate of the Lime House holding a .40-caliber Glock pistol. Barbosa and Ruiz told defendant to "put

that shit down before I fuck you up too." Defendant remained silent. No one "advance[d] on the defendant [or J.M.] in an aggressive manner" and none of the victims were armed with weapons. After Ruiz told defendant he was going to "record [him]" with his phone, defendant "took the first shot."

Defendant testified he went to the Lime House to "see if [he could] try to stop them from hurting [his] family." Defendant initially stood by his car without any weapon and retrieved the rifle only after the men began threatening him and J.M. As Ruiz approached defendant's vehicle, defendant, unarmed, told the men "all I want is for you guys to leave me and my family alone," but the men continued to yell at defendant. Ruiz then threatened, "get out of here or I'm going to fuck you up too, you and your family." Defendant did not see weapons in the men's hands.

Dimas testified defendant stopped his car in front of the Lime House and "got out [of] his car" unarmed. She observed a "heated argument" between defendant and six or seven men who "looked like gang-bangers." Everyone was "screaming" and "arguing" while defendant remained by his car with no weapon.[4] Dimas also saw J.M. get out of her car and walk to the front yard of the Lime House. The men were yelling at defendant, and J.M. was yelling or arguing with someone. Martha exited Dimas's SUV and Dimas "panicked" and "drove off." At that time she did not see weapons in defendant or J.M.'s hands, but she "might have heard" gunshots.

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[4] The trial court excluded Dimas's testimony regarding the specific statements made by the gang members during this confrontation.

The shooting

According to defendant, when Ruiz got "too close" and continued threatening defendant and his family, defendant retrieved the rifle from the backseat of his car. Defendant testified he believed the men were going to harm or kill him and his family. Defendant claimed he "blacked out" during the shooting and could not recall specific details due to trauma.

The video and ballistic evidence showed defendant fired approximately 24 rounds from the AR-15 rifle, and, while he was firing, no one at the house was "offering [defendant] any violence," and "everyone [wa]s running away from [him]." The video showed Dimas drove away "after a few of gunshots ha[d] taken place." J.M. also fired his .40-caliber pistol during the incident. Ballistics evidence confirmed the AR-15 rifle and J.M.'s firearm were the only two firearms discharged during the shooting.

According to Ruiz's testimony, defendant shot Barbosa first as Barbosa was standing outside the gate. Barbosa tried to run inside the gate, but defendant shot him in the back of the head. Defendant then fired at Huerta, hitting him in the jaw. Arias ran out of the gate onto the street, where defendant pursued and shot him in the back.

Ruiz took cover behind a parked car and made eye contact with defendant. According to Ruiz, defendant "smirked" and fired at him as he ran around the car. Defendant shot Ruiz in the back of the left shoulder as Ruiz tried to escape. J.M. also fired his pistol at Ruiz during this time.

Los Angeles County Sheriff's Deputy Roland Busque was patrolling nearby when he heard "two series" of assault rifle gunshots, each series containing eight to 10 shots. Deputy

Busque drove toward the gunfire and saw a Hispanic male holding an assault rifle and "standing over somebody lying on the [ground]" next to a Mustang. The shooter looked toward the deputy before getting into the Mustang and fleeing. Deputy Busque pursued but lost the suspect when the patrol vehicle collided with parked cars.

The aftermath and investigation

The victims and scene investigation

Arias and Barbosa died at the scene. Arias died from a gunshot wound to the upper back that exited his right chest, severing his aorta and fracturing ribs. Barbosa died from a gunshot wound to the back of the head; he also sustained a gunshot wound to the left shoulder. Huerta survived his facial gunshot wound but could not be located after his hospital discharge. Ruiz also survived his shoulder wound.

Detective Alfred Jaime testified when investigators initially walked through the crime scene, "there was no weapon seen at the scene" and "there were no weapons found based on our communication with those detectives" who assisted in processing the scene.

Defendant's flight and arrest

After the shooting, defendant fled in his Mustang and disposed of the AR-15 rifle in an alley. He abandoned his car near the crime scene and called a friend who drove him to Bakersfield. Defendant then returned to Lodi. Investigators found defendant's abandoned Mustang around the corner from the shooting location.

Defendant was arrested in Lodi on May 16, 2021, eight days after the shooting. Detectives Jaime and Kevin Acebedo interviewed defendant at the Lodi Police Department. The

interview was video-recorded, and a modified video of the interview was played at trial.

Defendant's statements to police

During the police interview, defendant initially denied involvement in the shooting, claiming someone had stolen his car and committed the crime. Next, defendant admitted he was present but claimed he did not shoot anyone and, instead, Ruiz "pulled out a gun and then he started shooting. Everybody started shooting. Not— not me though."

Eventually, defendant acknowledged he had shot the victims, explaining he felt threatened and believed the gang members were "dangerous people" who "got guns" and were "shooters." Defendant told detectives, "All of them guys are [shooters]. You guys know about the gangs," and "All of them out there got guns. Every—every gang has guns out there. You guys know this."

Defendant explained he pointed his rifle at the victims because "[he] felt like they were gonna attack [his] brother." He believed the men at the Lime House had previously attacked J.M. and were about to attack J.M. again. Defendant stated he "lost control" and "shit got crazy" and "people started shooting."

DISCUSSION

I. The trial court did not err in limiting Dimas's testimony

Defendant contends the trial court erroneously excluded Dimas's testimony regarding: (1) statements made by J.M. at their home before the group left for the Lime House, (2) J.M.'s scared demeanor, (3) Dimas's feelings about the interactions with J.M., and (4) "threats" Dimas heard the men at the Lime House

yelling at defendant just before the shooting. He argues the statements were admissible hearsay, relevant nonhearsay and, with regard to the threats, "relevant for the truth to rebut" Ruiz's testimony that the men were only trying to get defendant to put down the firearm. (Capitalization & boldface omitted.) He argues the testimony regarding J.M.'s demeanor and Dimas's feelings about J.M. were relevant to Dimas's state of mind. Defendant claims he suffered prejudice as a result of each of these errors. We disagree.

A. ***Hearsay***

1. *Relevant facts*

a. J.M.'s statement "We've gotta get out of here; they're going to come hurt us. They're gonna come do something to us"

During pretrial motions, while discussing admissibility of another piece of evidence, defense counsel mentioned "[J.M.] gets to his mother's home badly beaten, bleeding, yelling at the family, 'We've gotta get out of here; they're going to come hurt us. They're gonna come do something to us.'" Later, during Dimas's testimony regarding J.M. coming home "all beat up from his face," defense counsel inquired about what J.M. said and J.M.'s demeanor. The People objected to any of J.M.'s statements coming in through Dimas as hearsay without an exception.

During sidebar discussion on the objection, defense counsel argued the statement by J.M. was an excited utterance because J.M. had run home from being beaten up and the statement was "contemporaneous with the events of getting beaten up and running home and his mother being hysterical." The People argued it was not contemporaneous because it was after the beating and noted, additionally, the statement cannot come in for

Dimas's state of mind, because only defendant's state of mind is relevant in the case.

The court agreed the statement was not an excited utterance because there was no knowledge of how much time had elapsed between the beating and J.M. coming home and making the statement. Ultimately the court sustained the hearsay objection.

b. Threatening statements made by victims to defendant

Defense counsel asked Dimas questions about the events occurring after defendant and she arrived at the Lime House. A hearsay objection to defense counsel's question about whether Dimas heard defendant "yelling or saying anything to anyone" was made, and the court admonished it was a yes or no question. Dimas responded, "Yes. There was a heated argument," and she saw "six or seven" men who looked like "gang-bangers." The People objected again to defense counsel's question about whether Dimas was "able to make out what the group was saying or yelling."

During sidebar discussions, defense counsel argued the statement was not being offered for the truth of the matter but was admissible as an excited utterance being perceived contemporaneously. The court asked for an offer of proof as to what counsel believed Dimas would say she heard. Counsel replied he believed Dimas would "testify she heard something like, get the 'F' out of the [*sic*] here before we hurt you, or words to that effect. . . . [S]he can't say with any degree of certainty, but she believes there were words to that effect."

The People argued Dimas's state of mind and the statements' effect on her were "not at issue here." The court

noted defendant could testify as to what he heard and Ruiz had already testified he said something to that effect to defendant. The court sustained the objection and held for later a discussion whether Dimas could come back to corroborate the statement in the event defendant testified to the statement.

B. ***Applicable Law***

1. *Excited utterance*

"Evidence Code section 1240 provides: 'Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) was made spontaneously while the declarant was under the stress of excitement caused by such perception.'" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) "'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.'" (*Ibid*.)

2. *Effect on listener*

Effect on the listener is "'"one important category of nonhearsay evidence—evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the

matter asserted in the statement.'"" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162.)

3. *Standard of review*

The appellate court applies the abuse of discretion standard in reviewing the trial court's ruling to exclude a hearsay statement. (*People v. Alexander* (2010) 49 Cal.4th 846, 908.) It will not disturb the trial court's exercise of discretion except upon a showing that it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

C. ***Analysis***

1. *Statements by J.M.*

Based on the information before it, the trial court properly excluded J.M.'s statement to Martha and Dimas about the gang coming to "do something to [them]." The statement was not properly offered as nonhearsay for the effect on Dimas, because, as the court noted, Dimas's state of mind was not relevant. The statement also did not qualify as an excited utterance. There were insufficient facts to determine whether the statement was contemporaneous to the beating by Ruiz and CVS, and the statement did not "'relate to the circumstance of the occurrence preceding it.'" (*People v. Poggi, supra*, 45 Cal.3d at p. 318.) Rather, it was prospective—discussing the need to leave because CVS was going to retaliate. (*Ibid.*)

Any error in excluding the statement was harmless because the jury heard defendant's testimony that J.M. told him "Chucky and [CVS] beat him up" and "we need to get out of here" because "[CVS was] going to come here and hurt us all." The jury heard testimony defendant believed his "family was in danger, [and]

that [CVS was] gonna come there." We will not disturb the court's ruling.

2. *Hearsay statements by Ruiz*

The threats by Ruiz at the Lime House were also properly excluded. At trial, counsel argued the statements, offered through Dimas, were admissible as excited utterances. On appeal, defendant argues the statements were not offered for their truth but "to explain the events leading to the shooting" and "[Dimas's] own action in fleeing the location."

The trial court properly concluded that any effect the statements had on Dimas was not relevant to defendant's state of mind at the time of the shooting. While the statements may be relevant to "*the* critical events in this case," without an exception, hearsay is not permitted regardless of how *helpful* the information might be. Dimas's reasons for fleeing are not relevant to defendant's state of mind—the issue for the jury to determine. The jury was able to see the video and watch Dimas drive away—apparently after the shooting began, not after the threats made by Ruiz.

Defendant argues Dimas's testimony regarding the threats was admissible as it was "relevant for the truth to rebut" Ruiz's testimony that the men were only trying to get defendant to put down the firearm. (Capitalization & boldface omitted.) Preliminarily we note, at trial, defense counsel argued Dimas's testimony would "corroborate[] what [Ruiz] said," rather than rebut. In any event, whether her testimony was going to corroborate or rebut Ruiz's testimony about what he was saying to defendant just ahead of the shooting is of no moment. Ruiz testified he told defendant to "put that shit down before I fuck you up too." Defendant testified Ruiz said, "get out of here or I'm

going to fuck you up too, you and your family." Both "threats" are materially the same; Ruiz threatened to "fuck [him and/or his family] up" if he did not leave.

A. *Demeanor Evidence*

1. *Relevant facts*

Defense counsel elicited testimony from Dimas about J.M.'s demeanor at home after Ruiz beat him up. Dimas testified J.M. "was shaking," "was panicked," "crying," and "yelling." When Dimas testified "[h]e was really scared," the court sustained the People's objection on the grounds the statement would be speculation as to how J.M. was feeling. The court also sustained the People's relevance objection as to "what [Dimas felt] like when [she] saw [J.M. crying, shaking, and yelling]" because how Dimas felt was not relevant to the case.

2. *Applicable law*

"Generally, a lay witness may not give an opinion about another's state of mind. However, a witness may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397; see *People v. Guenther* (2024) 104 Cal.App.5th 483, 527.)

3. *Analysis*

Here, the court allowed Dimas's testimony regarding J.M.'s "objective behavior"—J.M. "was shaking," "was panicked," "crying," and "yelling." (See *People v. Chatman, supra*, 38 Cal.4th at p. 397.) After the court sustained the speculation objection, defense counsel did not attempt to ask Dimas whether J.M.'s behavior was "consistent with" being scared. Instead, counsel focused on J.M.'s feelings. This is not appropriate lay witness testimony and was properly excluded.

The court excluded, as irrelevant, how Dimas felt seeing J.M. in this condition. After both objections were sustained, defense counsel did not seek further discussion on either issue.[5] As discussed, since Dimas's feelings were not relevant, the trial court did not abuse its discretion in disallowing Dimas's testimony in this regard.

Furthermore, any error in excluding this evidence was harmless because the jury was able to consider evidence that J.M. was bleeding, crying, shaking, panicked, and yelling. The jury heard Dimas was also panicked when she "ran back" to her room, "grabbed [her] phone and . . . called [defendant]" to tell him "[t]o come home, his brother was bleeding bad[, and he] just needed to come home." The jury also heard Dimas "was just panicked" and "didn't know what to do." The jury certainly understood J.M. and Dimas were upset and panicked as a result of J.M. coming home badly beaten and bleeding.

II. The trial court did not err in excluding weapons evidence

Defendant contends the trial court erroneously excluded evidence of a "powerful pipe bomb" found outside the Lime House and "a fully-loaded firearm with an extended 30-round magazine found inside of the [Lime] [H]ouse." He argues it was relevant to his reasonable belief the gang was "as dangerous as [defendant] believed they were, and [his] subjective belief deadly force was necessary was reasonable," and supports his statement to police that Ruiz was the first to shoot. He also argues "the evidence

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[5] Because we address this issue on the merits and have not found the issue was forfeited, we need not address defendant's ineffective assistance of counsel claim.

was admissible to counter Detective Jaime's incorrect testimony that no weapons were 'seen' or 'found.'" Because "[t]he presence of the weapons would have bolstered [defendant's] defense by supporting the subjective belief and objective reasonableness components of [defendant's] mens rea," defendant contends he was prejudiced and reversal is warranted.

A. *Relevant facts*

In limine, the People moved to exclude evidence of a pipe bomb, which was found later in a zipped fanny pack or backpack "on a trash can near" Barbosa's body, as well as a firearm found inside the house. Defense counsel argued evidence of the weapons was relevant to defendant's state of mind in light of both J.M.'s beating and his warning that "We've gotta get out of here; they're going to come hurt us." The People noted defendant told police he never saw the men at the Lime House with weapons and there was no evidence of how the pipe bomb was to be used, if at all. The trial court ruled it was not relevant as long as there was no evidence connecting the bomb to "one of the people" allegedly threatening defendant's family.

During direct examination, Detective Jaime testified he was present with "crime techs" during the "walk through [of] the crime scene." When asked if there "[w]ere any weapons found on any of the victims," he testified "[a]t the time we walked through, there was no weapon seen at the scene" and "there were no weapons found based on our communication with those detectives" who assisted in processing the scene.

However, during a sidebar discussion, counsel asserted a pipe bomb was discovered inside a camouflage backpack (also referred to as a fanny pack) that Ruiz identified as belonging to Barbosa. Counsel told the court, during execution of a search

warrant on the Lime House, detectives "found a Glock fully loaded," and he wanted to question Ruiz about it. However, counsel could not provide an offer of proof defendant knew the firearm was in the house. The court observed defendant's mental state was at issue, and as long as there was no evidence defendant *knew* about the weapons, "it wouldn't be relevant." Ultimately, the court ruled, because defendant was not aware of the firearm or the pipe bomb, their presence was inadmissible.

B. *Analysis*

1. *Evidence of the pipe bomb and firearm was not relevant unless defendant knew of their presence*

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Defendant told detectives he is "pretty sure they have weapons," but he did not see any during their encounter. At trial, he testified to the same. The defense offered at trial was self-defense or imperfect self-defense; either way defendant would have had to reasonably or unreasonably believe his victims were armed and his life or the lives of his family were in imminent danger. Evidence there was a pipe bomb in a zipped bag on top of a trash can near the body of Barbosa and a loaded firearm inside the Lime House was only relevant if defendant knew these weapons were present and feared they would be used against him. (*People v. Lane* (1961) 56 Cal.2d 773, 783 [evidence irrelevant without defendant's knowledge]; *People v. Hoffman* (1925) 195 Cal. 295, 310–311 [self-defense requires defendant's knowledge].)

2. *Evidence of the weapons was not proper impeachment of Detective Jaime*

Defendant asserts the "evidence was admissible to rebut Detective Jaime's testimony that no weapons were seen or

found." (Capitalization and boldface omitted.) Evidence Code "section 780 provides that 'in determining the credibility of a witness' the trier of fact 'may consider . . . [¶] . . . [¶] . . . (i) The existence or nonexistence of any fact testified to by him.'" (*People v. Morrison* (2011) 199 Cal.App.4th 158, 164; see *Green v. Healthcare Services, Inc.* (2021) 68 Cal.App.5th 407 [applying *Morrison*].) "[T]he admissibility of collateral impeachment evidence is subject 'to the trial court's "substantial discretion" under [Evidence Code] section 352 to exclude prejudicial and time-consuming evidence.'" (*Morrison*, at p. 164.) Moreover, "[i]t is well settled that a witness may not be cross-examined for the purpose of impeachment upon an irrelevant and immaterial matter." (*People v. Griffin* (1931) 118 Cal.App. 18, 20.)

Here, the court found the weapons evidence was not relevant if defendant was unaware of their presence. There was no evidence defendant knew the items were at the Lime House and defense counsel said as much during the sidebar on this issue. Thus, because the evidence of the weapons was irrelevant, it was not a proper subject for impeachment of Detective Jaime. Though the court did not make its admissibility ruling based on Evidence Code section 352, it is clear the court found the evidence was lacking a probative quality.

People v. Lang (1989) 49 Cal.3d 991 does not aid defendant on this point. There, a witness testified in a manner that contradicted the defendant's testimony regarding particular conduct that made the defendant angry (or not). The Supreme Court found the "testimony did not violate the rule against impeachment on collateral matters" because the "defendant's mental state during the moments immediately preceding the shooting was not a collateral matter" in the case. (*Id.* at p. 1017.)

Here, impeaching Detective Jaime regarding his statement that no weapons were "seen at the scene" is a collateral issue, not having to do with defendant's mental state or other element of the crime. (See Evid. Code, § 210 ["'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."].)

More fundamentally, during cross-examination, defense counsel failed to ask Detective Jaime if weapons were found during *subsequent* searches of the scene. If Detective Jaime was not cross-examined as to whether weapons were found during a later search, it is not the proper subject of impeachment through Ruiz later.

3. *Evidence of weapons later found is not relevant to defendant's state of mind*

Defendant argues "[t]he presence of these weapons would have supported [his] defense, that he acted in the face of a deadly threat posed by the gang members, that the gang and its members were as dangerous as [defendant] believed they were, and that [defendant's] subjective belief deadly force was necessary was reasonable." Not so. During his interview heard by the jury, defendant repeatedly told officers he did not see any weapons on the victims who were standing outside the Lime House, but he understood CVS to be armed. The jury also heard testimony J.M. was armed with a firearm he obtained from CVS and the very gun used by defendant was taken from J.M., who received it also from CVS. The message was clear: whether or not CVS actually kept weapons, defendant had reason to believe they did.

Learning the police later found a firearm inside the home, nowhere near any of the victims, would only confirm that gang members keep firearms; it would not bolster the reasonableness of defendant's belief in his need to defend himself or his family from *imminent* harm in that moment. The jury likely understood defendant's fear and credited this testimony; however, it was not enough to overcome his testimony the victims were not armed at the time of the shooting.

Similarly, learning a pipe bomb was found in a zipped backpack on top of a trashcan located near the body of Barbosa does not bolster the reasonableness of defendant's actions: learning from J.M. they should "get outta here" because CVS was going to come for them and, instead of leaving town or calling the police, *going to* the CVS hangout despite understanding CVS is "known to" and defendant "believe[d] they carry weapons." When defendant arrived at the Lime House, the men were in front eating food and "hanging out." There is no evidence of plans to use the pipe bomb or that the men were leaving the house to go to the Mancilla home. In short, evidence of the pipe bomb was not relevant to the reasonableness of defendant's claims of perfect or imperfect self-defense.

Regardless, any error was harmless. The jury heard evidence CVS was known to carry weapons, defendant's actual belief they carried weapons, the weapons used by defendant and J.M. came from CVS, and defendant was scared of and hated gangs. Evidence of weapons at the Lime House, but not on the victims' bodies, would have corroborated defendant's testimony he believed CVS to be armed, but it did not bolster the reasonableness of defendant's actions.

III. Evidentiary rulings did not violate defendant's federal constitutional rights

Defendant claims the trial court's exclusion of certain evidence violated his federal constitutional rights to due process and to present a defense under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Specifically, he avers the exclusion of (1) Dimas's testimony regarding J.M.'s statements and demeanor after the gang beating, (2) Dimas's testimony regarding the threats by the victims, and (3) evidence of weapons found at the Lime House, deprived him of the ability to present his defense and rendered his trial fundamentally unfair. We disagree.

A. *Applicable law*

The due process clause of the Fourteenth Amendment "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; see *California v. Trombetta* (1984) 467 U.S. 479, 485.) This right includes the ability to call witnesses and present evidence in one's favor. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Washington v. Texas* (1967) 388 U.S. 14, 19.)

This right, however, is not absolute. Both the federal Constitution and California law permit reasonable restrictions on the admission of evidence to accommodate other legitimate interests in the criminal trial process. (*United States v. Scheffer* (1998) 523 U.S. 303, 308 (*Scheffer*); *Montana v. Egelhoff* (1996) 518 U.S. 37, 42.) As the Supreme Court has observed, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." (*Scheffer*, at p. 308.)

The exclusion of evidence violates a defendant's constitutional rights only when it is "'arbitrary' or 'disproportionate to the purposes [the exclusion is] designed to serve.'" (*Scheffer, supra*, 523 U.S. at p. 308.) Constitutional error occurs only when state evidentiary rules are applied in a manner that is so grossly unfair as to deprive the defendant of due process. (*People v. Boyette* (2002) 29 Cal.4th 381, 427–428 ["'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense."'"].) "[O]nly rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." (*Nevada v. Jackson* (2013) 569 U.S. 505, 509.)

B. ***Analysis***

1. *Forfeiture*

As a threshold matter, the People argue defendant forfeited his constitutional claims by failing to raise them in the trial court. (*People v. Burgener* (2003) 29 Cal.4th 833, 886 ["It is elementary that [a] defendant waive[s] [an argument based on the United States Constitution] by failing to articulate an objection on federal constitutional grounds below."].) Defendant contends his constitutional claims are preserved because the objections made below "fairly inform[ed] the court of the analysis it [was] asked to undertake." (*People v. Partida* (2005) 37 Cal.4th 428, 437.) We need not resolve any issue of forfeiture because, as explained below, defendant's constitutional claims lack merit.

2. *Exclusion of hearsay evidence*

Defendant claims the exclusion of Dimas's testimony regarding J.M.'s statements and the gang members' threats violated his constitutional rights. As we discussed in detail above,

the trial court properly excluded this evidence under state hearsay rules. J.M.'s statements to Dimas and Martha did not qualify for the excited utterance exception because there was insufficient evidence regarding the amount of time between the beating and the statements. Also J.M.'s statements were predictive rather than descriptive of past events. Similarly, the victims' threatening statements were properly excluded as hearsay offered for their truth and inadmissible as nonhearsay effect on the listener—here Dimas—because her state of mind was not relevant.

The application of well-established hearsay rules does not violate due process merely because it results in the exclusion of evidence favorable to the defense. (See *Chambers v. Mississippi, supra*, 410 U.S. at p. 302 [constitutional violation occurs when evidence rules are applied mechanistically to defeat clearly valid due process claims].)

Here, in addition to the evidence being properly excluded for the reasons stated *ante*, the evidence was largely cumulative of other properly admitted evidence. Specifically, the jury heard J.M.'s similar statements made directly to defendant—"[J.M.] said we need to get out of here; I think Compton Varrio Segundos are going to come here and hurt us all." They also heard Ruiz and defendant's testimony about threats directed at defendant just before the shooting. The exclusion of additional hearsay versions of these same communications did not significantly undermine defendant's ability to present his theory of self-defense.

3. *Exclusion of weapons evidence*

Defendant contends the exclusion of evidence regarding the loaded firearm and pipe bomb found at the Lime House violated

his constitutional rights. Again, as discussed, the trial court properly excluded this evidence under established relevance standards because defendant was unaware of them and they played no role in contributing to defendant's state of mind.

The Supreme Court has made clear the Constitution permits judges "to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326.) Here, the trial court reasonably determined that evidence of weapons defendant never saw which were never used had minimal probative value to his claims of self-defense and imperfect self-defense.

Moreover, these exclusions did not prevent defendant from presenting his core defense theory. Defendant was permitted to testify extensively about his belief CVS was dangerous and armed, his fear for his family's safety, and his perception of threats at the scene. Ruiz's account was largely the same as defendant's.

4. *Any error was harmless beyond a reasonable doubt*

In any event, any error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. The evidence of defendant's guilt was overwhelming. Video footage showed defendant systematically shooting unarmed victims, many of whom were shot in the back while fleeing. He fired 24 rounds from a high-powered rifle at people who posed no immediate threat to him. The ballistics evidence confirmed only defendant and J.M. fired weapons during the incident.

The excluded evidence would not have materially strengthened his defense. The jury heard evidence of J.M.'s beating and defendant's stated motivations. As discussed,

additional hearsay versions of J.M.'s statements or evidence of weapons defendant never saw would not have changed the fundamental calculus: defendant chose to arm himself with an assault rifle and confront gang members at their hangout, then opened fire on the unarmed individuals. The jury's rejection of defendant's voluntary manslaughter and self-defense theories demonstrates it was not persuaded by his claims. The excluded evidence would not have altered this conclusion.

IV. Any error in failing to instruct regarding second degree murder was invited

Defendant claims the trial court erred by failing to sua sponte give lesser-included offense instructions regarding second degree murder and with CALCRIM No. 522 regarding provocation. Respondent argues this claim is barred by the invited error doctrine. We agree with respondent.

A. *Relevant facts*

The jury was instructed with CALCRIM Nos. 500, defining homicide; 505, defining self-defense or defense of another; 520, defining murder and malice aforethought; 521, defining first degree murder and deliberation and premeditation; 522, dealing with provocation; 570, dealing with manslaughter and heat of passion; and 571, dealing with manslaughter and imperfect defense of self or defense of others.

From the outset, defense counsel argued this was a "state-of-mind case," and defendant "didn't go there to retaliate; he went there to defend his family because he had an honest actual belief that these gang members were gonna come and harm his family." As the parties discussed this theory with the court, the court noted the "whole defense basically hinges on the imperfect self-defense" and counsel agreed. Counsel argued, "I believe that my

client had an honest actual belief that the family faced an imminent threat of death or serious bodily injury, and the reason is, he sees his brother badly beaten and bleeding profusely, the mom hysterical, and the brother yelling out, we gotta get out of here; they're going to come get us. That is imminent. [¶] [Defendant] doesn't know if they're outside. He doesn't know if they're en route. [¶] [H]e had an actual honest belief that his family was in imminent danger and there was an imminent threat of harm to all of the members of his family."

As the trial was ending, the parties worked with the court to finalize jury instructions. In discussing the homicide instructions, the court said CALCRIM No. 500,[6] "I'm going to give that. [W]e're going to put that one in. [¶] And with the manslaughter, because manslaughter is a lesser offense to murder . . . ." When asked, defense counsel had no objection. Defense counsel asked for CALCRIM No. 505, "regular self-defense" because "based on the evidence where the jury could

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[6] As given to the jury, CALCRIM No. 500 read: "Homicide is the killing of one human being by another. Murder and manslaughter are types of homicide. The defendant is charged with murder and manslaughter. Manslaughter is a lesser offense to murder. [¶] A homicide can be lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter. You must decide whether the killing in this case was unlawful and, if so, what specific crime was committed. I will now instruct you in more detail on what is a legally permissible excuse or justification for homicide. I will also instruct you on the different types of murder and manslaughter."

conclude, based on the testimony of [defendant], that it was a perfect self-defense." After discussion, the court agreed to give perfect self-defense.

Next, the parties discussed CALCRIM No. 520, "First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187)." The court ascertained whether "anyone [is] asking for second," at which point the People said, "I don't think a second has been requested" and defense counsel stated, "I'm not asking for a second" and "the [d]efense is not requesting a second." The court confirmed, "[Counsel], are you requesting it?" and counsel said, "[n]o."

At that point, the court, "out of an abundance of caution," asked, "[Counsel], you've talked this over with your client, you've discussed all of your theories of the case, your legal strategies, everything else; correct?" and, when queried by defense counsel, defendant agreed. The court asked defendant directly whether he "agreed that you do not want a second as an option here?" Counsel asked for "a moment" and reaffirmed, "My client agrees, Your Honor." The court again asked defendant directly, "Is that correct, Mr. Mancilla?" and he replied, "Yes, Your Honor."

Next, defense counsel requested CALCRIM No. 522 regarding provocation. The court granted the request and gave a modified version[7] of the instruction to reflect defense counsel's

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[7] CALCRIM No. 522 states, "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second

desire not to seek second degree murder as a lesser-included offense.

B. ***Applicable law***

1. *Standard of review*

"In reviewing a challenge to jury instructions, we must consider the instructions as a whole." (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1294.) """A claim of instructional error is reviewed de novo."" (*People v. Howard* (2024) 104 Cal.App.5th 625, 661.) "We [also] review the trial court's refusal to give a requested jury instruction de novo." (*People v. Speck* (2022) 74 Cal.App.5th 784, 791.)

2. *Homicide*

"California law separates criminal homicide into two classes: the greater offense of murder and the lesser offense of manslaughter. [Citation.] Murder is defined as 'the unlawful killing of a human being . . . with malice aforethought' (§ 187, subd. (a)), while manslaughter is defined as 'the unlawful killing of a human being without malice' (§ 192)." (*People v. Schuller* (2023) 15 Cal.5th 237, 252.) "'[A] finding of malice may be precluded, and the offense limited to manslaughter, even when an unlawful homicide *was* committed with intent to kill'

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degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]"

Here, the pinpoint instruction was modified per counsel's request to read, "Provocation may reduce a murder from first degree to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first degree murder or manslaughter."

[citation.]: (1) when a person kills ""in a "sudden quarrel or heat of passion" [citation], or . . . [(2) when a person] kills in "unreasonable self-defense"—the unreasonable but good faith belief in having to act in self-defense [citations].""" (*Ibid.*)

Provocation may also reduce murder from first to second degree when there is a reasonable doubt whether defendant acted with premeditation or deliberation. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [provocation might "'be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree"'].) "[T]he existence of provocation which is not adequate to reduce the crime of murder to manslaughter 'may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation.'" (*People v. Fitzpatrick, supra*, 2 Cal.App.4th at p. 1294.) "The test of whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder . . . is subjective." (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678.)

3. *Duty to instruct and "invited error" doctrine*

"'A trial court has a sua sponte duty to "instruct on 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. Mitchell* (2019) 7 Cal.5th 561, 586), including "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present" (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*), disapproved on another ground by *People v. Schuller* (2023) 15 Cal.5th 237, 260). "[I]nsofar as the duty to instruct applies regardless of the parties' requests or objections,

it prevents the 'strategy, ignorance, or mistakes' of *either* party from presenting the jury with an 'unwarranted all-or-nothing choice,' encourages 'a verdict . . . no harsher *or more lenient* than the evidence merits' [citation], and thus protects the jury's 'truth-ascertainment function.'" (*Breverman, supra*, at p. 155.)

"However, we have never intimated that the rule is satisfied once the jury has *some* lesser offense option, so that the court may limit its sua sponte instructions to those offenses or theories which seem strongest on the evidence, or on which the parties have openly relied. On the contrary, as we have expressly indicated, the rule seeks the most accurate possible judgment by 'ensur[ing] that the jury will consider the *full range of possible verdicts*' included in the charge, regardless of the parties' wishes or tactics. [Citation.] The inference is that *every* lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (*Breverman, supra*, 19 Cal.4th at p. 155.)

The court's duty, therefore, exists even when "a defendant not only fails to request the instruction but expressly objects to its being given." (*Breverman, supra*, 19 Cal.4th at p. 154; see also *People v. Beames* (2007) 40 Cal.4th 907, 926.) However, ""'[a] defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction."'" (*People v. Beames, supra*, at p. 927, quoting *People v. Horning* (2004) 34 Cal.4th 871, 905 (*Horning*).) "[T]he record must show only that counsel made a

conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

C. *Analysis*

The record is clear the court had a sua sponte duty to instruct the jury regarding second degree murder. (*Breverman, supra,* 19 Cal.4th at p. 154.) The record is also clear, however, defendant is barred from raising this claim on appeal because he invited the error. (*People v. Beames, supra*, 40 Cal.4th at p. 927.) Defendant argues trial counsel's decision to eliminate the second degree murder instruction was not "a *rational* tactical choice," but instead was based on mistake or ignorance. That, in hindsight, the "tactical choice" turned out not to be "a *rational*" one, does not change the fact it was a "'conscious, deliberate tactical choice'" (*People v. Wader* (1993) 5 Cal.4th 610, 657) made by the defense and far "'more than mere unconsidered acquiescence' " (*Horning, supra*, 34 Cal.4th at p. 905; compare *People v. McKinnon* (2011) 52 Cal.4th 610, 675 [silence or "the absence of a request is not equivalent to an express tactical objection"]).

The record reflects defense counsel's "conscious tactical choice" to not present the jury with the lesser included offense of second degree murder in favor of presenting it with various theories supporting acquittal or voluntary manslaughter—likely "to guard against a compromise verdict." (*People v. Cooper,*

supra, 53 Cal.3d at p. 827.) The parties and the court discussed the defense theories at length throughout the trial, and the court accepted and modified various instructions at defendant's request. Not only did counsel affirm his desire that the jury not be instructed on second degree murder, but defendant, after discussing the option with his attorney, affirmatively stated this wish as well. Thus, the record clearly establishes defendant and defense counsel were aware of the option to have the jury instructed on second degree murder, but specifically declined it. Because the court granted defendant's request not to instruct on the lesser included second degree murder, "[d]efendant may not now complain that the court did exactly what he insisted upon." (*Ibid.*)

D. *Harmless error*

In any event, any error in failing to instruct as to second degree murder was harmless. Generally, "[t]he failure to instruct on lesser included offenses supported by substantial evidence [i]s state law error" (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196) analyzed under the harmless error standard from *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). "'[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.'" (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) "[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration.' " (*Id.* at p. 956.)

The jury instructions given in this case and the jury's findings reflect it is not reasonably likely they would have convicted defendant of the lesser included offense of second degree murder. The combination of instructions given required

the jury to "find that the intent to kill was not formed under a condition which precluded deliberation." (*People v. Fitzpatrick, supra*, 2 Cal.App.4th at p. 1295.)

First, the jury was instructed with CALCRIM No. 521 as to the meaning of "willfully, deliberately, and with premeditation" and informed "[t]he People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime." The jury was also instructed using CALCRIM No. 522: "Provocation may reduce a murder from first degree to manslaughter. . . . [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first degree murder or manslaughter." Using CALCRIM No. 570, the jury was instructed regarding an objective standard of provocation sufficient to "cause[] a person to act without due deliberation and reflection." Here, because the jury convicted defendant of first degree murder, it clearly found defendant was not reasonably provoked. (See *ibid.*)

Second, using CALCRIM No. 505, the jury was instructed regarding self-defense—the reasonable belief in the "immediate" need to "use . . . deadly force"—as well as, CALCRIM No. 571, informing the jury they could convict defendant of voluntary manslaughter if they found he acted on an "unreasonable" but honest belief that he or his family were in imminent danger and he "actually believed that the immediate use of deadly force was necessary to defend against that danger." By convicting defendant of first degree murder, the jury rejected the idea defendant's belief in the need to defend himself was reasonable or honest but unreasonable.

Third, and finally, the jury found defendant guilty of two counts of willful, deliberate, and premeditated attempted murder. To establish those counts, the jury necessarily found defendant "intended to kill" (CALCRIM No. 600) the two victims and then separately found defendant did so after "he carefully weighed the considerations . . . and, knowing the consequences, decided to kill" (CALCRIM No. 601). In doing so, the jury rejected the idea that defendant's decision to shoot at the men was "made rashly, impulsively, or without careful consideration." (*Ibid.*) Accordingly, the jury necessarily rejected defendant's claim the attempted murders were the result of a "sudden quarrel or in the heat of passion," and that the provocation in this case "would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment" and "[t]he attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment." (CALCRIM No. 603.)

Under this set of instructions, the jury necessarily found defendant's actions of shooting at the group of men were subjectively and objectively unreasonable and he acted willfully, deliberately, and with premeditation, rather than "rashly, impulsively, or without careful consideration." Therefore, it is not "reasonably probable" he would have achieved a different result had the jury been instructed regarding second degree murder. (*People v. Gonzalez, supra*, 5 Cal.5th at p. 201.)

V. There was no prejudicial error in overruling defendant's objection to references to punishment in the interview tape played for the jury

Defendant contends the trial court erred, and defense counsel rendered ineffective assistance of counsel (IAC) because

the jury was allowed to hear portions of defendant's interview with detectives regarding his potential punishment and Detective Acebedo's statements regarding sentencing schemes. Specifically, he contends counsel failed by "not objecting before the recording was played, for not objecting to Detective Acebedo's statement and [defendant's] second statement after they were played, and for not requesting sufficient admonitions and that CALCRIM No. 706 be given." Defendant avers the trial court abused its discretion by overruling defendant's objection. The People contend the claims have been forfeited, and any error was harmless. The People also argue any IAC was not prejudicial under the standard set forth in *Strickland v. Washington* (1984) 466 U.S. 668.

A. *Relevant proceedings*

Defendant's interview with the detectives was played for the jury. Beforehand, the parties discussed which portions of the interview should be excised from the video and corresponding transcript. Among the deletions were multiple statements by defendant and/or detectives that made reference to defendant's potential punishment. Following this discussion, the court noted that after the prosecutor made "appropriate edits," defense counsel would have an opportunity to review them and once "everyone agrees that's exactly what I put on, then we'll be able to play it." Defense counsel said, "Okay." After edits were complete defense counsel confirmed, "I just need to check the changes. I've already read the whole thing." Counsel made no further objections or requests for edits.

During the portion of the police interview played for the jury, defendant made statements about his potential punishment, saying "I'm never coming outta jail, huh?" Detective Acebedo

responded that "in the State of California, anything can happen" because "people that used to get long prison sentences are not anymore, and they're being let out on parole and things like that." Defense counsel objected to these statements. During sidebar discussions, the court reminded defense counsel the parties litigated what portions of the interview would play and there was no objection to this portion. Defense counsel stated, "I stand corrected. I thought that was [part of the deleted portion of the interview]." Ultimately, counsel stated, "It's on me. Like the kids say nowadays, 'It's my bad.'"

Noting another reference to punishment was forthcoming, the trial court inquired, "I will admonish the jury, or do you want me not to admonish the jury when he says, 'I'm never gonna get out of jail, that's punishment, I don't know.'" Once proceedings continued before the jury, the court overruled the objection and admonished the jury to "disregard [defendant's] statement" about never getting out of jail. It appears the jury understood the court's instruction because they "nodd[ed] their heads yes."

After the admonition, as the interview continued to play for the jury, defendant stated, "I know they're gonna press charges and I'm never coming out." No objection was made to this reference.

During closing jury instructions, the court read CALCRIM No. 3550, which instructs the jury, "You must reach your verdict without any consideration of punishment." Finally, the court instructed the jury with CALCRIM No. 200, which instructs the jury they "must not let bias, sympathy, prejudice, or public opinion influence your assessment of the evidence or your decision."

B. *Applicable law*

"'As an ordinary rule in a criminal case the jury is not to be concerned with the punishment.'" (*People v. Allen* (1973) 29 Cal.App.3d 932, 935 (*Allen*); see *People v. Shannon* (1956) 147 Cal.App.2d 300, 306 ["the jury not to involve the question of guilt with a consideration of the penalty"].) "In a criminal case, improper reference to penalty or punishment is generally held reversible because such references are irrelevant, the jury is likely to be misled in determining the issue of guilt or innocence upon the basis of such improper considerations, and, if permitted, it would lead to involvement in collateral matters the probative value of which, if any, would be far outweighed by the prejudicial effect thereof." (*Allen, supra*, at pp. 936–937.)

"A timely objection is statutorily required to preserve a claim of error in the admission of evidence. (Evid. Code, § 353.) Failure to comply with this statutory requirement may not be excused on the ground that a timely objection would be inconvenient or because of concerns about how jurors might perceive the objection." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1181.)

C. *Analysis*

1. *Forfeiture*

The People contend defendant has forfeited his claim with regard to these statements because he failed to make a timely objection before the evidence was presented to the jury. We agree.

Preliminarily, defendant places the first two references to punishment by defendant and Detective Acebedo in a different category than the final reference by defendant. Because the time to object to any part of the interview video was during the in

limine discussions between the court and the parties—before the video was edited and the transcript prepared and printed for the jury—they are in the same category. By failing to timely object to the statements, defendant has forfeited objection about these statements by defendant and Detective Acebedo.

2. *Harmless error*

Even if the trial court erred in overruling counsel's objection during the trial, any error was harmless. The offending statements by defendant and Detective Acebedo were a few short lines in a 161-page interview.

Moreover, the jury is presumed to have followed instructions given it by the court. (*People v. Mendoza* (2007) 42 Cal.4th 686 [presumption jury follows instructions].) Here, the court admonished the jury after the first two statements and specifically included the third, yet to be heard, statement that they were to "disregard [defendant's] statement" about never getting out of jail. The jury was also instructed they "must reach [their] verdict without any consideration of punishment." The jury is presumed to have followed the court's instructions. (See *ibid.*)

3. *IAC*

Defendant claims counsel was ineffective by failing to object to the statements before the video was played for the jury and again by failing to object after the second statement regarding punishment was made by defendant. He also claims IAC for counsel's failure to request the reading of CALCRIM No. 706. We disagree.

Counsel admitted he erred in failing to notice the offending statements during the admissibility hearing regarding the interview video. To establish a claim of IAC, "[f]irst, the

defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." (*Strickland v. Washington, supra*, 466 U.S. at p. 687.)

Here, it is clear counsel erred with regard to the interview video. He clearly missed the statements both during the hearing and again when he was told to ensure the transcript prepared by the People properly excluded everything counsel wished to be excluded. Therefore, the next question is whether the error was "so serious as to deprive the defendant of a fair [and reliable] trial." (*Strickland v. Washington, supra*, 466 U.S. at p. 687.) For the reasons discussed *ante*, we find the error harmless.

Defendant argues "more was required to avoid prejudice" than simply instructing the jury with CALCRIM No. 3550. Defendant suggests the cure would have been to instruct the jury with CALCRIM No. 706, which states, "In your deliberations, you may not consider or discuss penalty or punishment in any way when deciding whether a special circumstance, or any other charge, has been proved." Defendant also points to *Allen, supra*, 29 Cal.App.3d 932 and *People v. Moore* (1985) 166 Cal.App.3d 540 (*Moore*) in support of his view that such consideration by the jury is grounds for reversal. We disagree.

First, CALCRIM No. 706, "Special Circumstances: Jury May Not Consider Punishment," would not have been appropriate as this was not a case involving a special circumstance. Moreover, CALCRIM No. 706 is nearly identical to CALCRIM No. 3550. To give it and improperly add the element of "special circumstances" would have only confused the jury.

Second, the cases relied upon by defendant are distinguishable. In *Allen*, the defendant was involved in a "quasi-criminal" proceeding wherein he could be found to be a mentally disordered sex offender and institutionalized for treatment, in which case, all criminal proceedings would be suspended. (*Allen, supra*, 29 Cal.App.3d at pp. 934–935.) There, "[o]ver appellant's objections, the court permitted the district attorney during the *voir dire* examination of the jurors, during the interrogation of psychiatric witnesses and in his argument to the jury to refer to the treatment appellant would be compelled to receive at a state institution if he were found to be an M.D.S.O.," and the court made statements regarding treatment versus resumption of criminal proceedings. (*Id.* at p. 934.) Not only were statements regarding potential punishments heard by the jury, but the benefits of one over the other were actually discussed and argued by the prosecutor during various stages of trial and reiterated by the court. Thus, the potential outcomes were highlighted and discussed at multiple points throughout the trial. That was not this case.

Moore concerned the sanity phase of a criminal trial. There, the trial court refused a defense instruction regarding the potential effect of a finding of not guilty by reason of insanity in part because such an instruction "'focus[ed] the jurors' attention on the matter of punishment or the flip side of punishment . . .

[which] is certainly not the function of the jury.'" (*Moore, supra*, 166 Cal.App.3d at p. 549.) The holding is not relevant to our discussion here, however, on appeal, the court reiterated "barring unusual circumstances no other allusion should be made to the defendant's post-verdict disposition." (*Id.* at p. 556.)

Here, the prosecutors, defense counsel and the court had no discussion regarding the various potential punishments. Instead, there were two statements by defendant that he was "never gonna get out" and Detective Acebedo's comment that "anything can happen" because "people that used to get long prison sentences are not anymore, and they're being let out on parole and things like that." These were a few statements in a long video interview and transcript.

Clearly defendant was scared and discussing a shooting in which two people were killed and two others injured; it is reasonable he would make such statements out of fear, regardless of whether or not he was actually "never coming out[]." It is reasonable the jury could have understood Detective Acebedo's statement was an effort to allay defendant's fears and keep him talking. The jurors nodded when the court specifically instructed them to disregard the statements about never getting out of jail and were instructed with CALCRIM No. 3550. Jurors are presumed to follow the court's instructions. (*People v. Mendoza, supra*, 42 Cal.4th 686.) Nothing has rebutted that presumption.

VI. Defendant's trial did not suffer from cumulative error

Defendant contends the "multiple errors" discussed above have resulted in cumulative error. The People aver there were no individual errors and thus no cumulative error; alternatively, they argue any alleged errors, "whether considered individually

or cumulatively, were not prejudicial." We find no cumulative error.

"A judgment shall not be reversed for the erroneous admission of evidence unless the result is a miscarriage of justice." (*People v. Yang* (2021) 67 Cal.App.5th 1, 52.) "'Under the cumulative error doctrine, the reviewing court must "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." [Citation.] When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required.'" (*Ibid.*) "[O]ur review "'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.'" [Citation.] The cumulative prejudice doctrine is based on an examination of the 'entire record.'" (*Id.* at pp. 52–53.)

Here, "[w]e have rejected nearly all of defendant's claims of error. Where we [assumed] error, we have determined defendant was not prejudiced. Whether such claims are considered individually or together, we find no prejudicial error . . . ." (*People v. Streeter* (2012) 54 Cal.4th 205, 268, overruled on other grounds as stated in *People v. Harris* (2013) 57 Cal.4th 804, 834.)

VII. Trial court erred in calculating defendant's custody credits

The parties agree defendant is entitled to additional custody credits. We concur.

Upon conviction, a criminal defendant is entitled to credit for actual time served. (§ 2900.5, subd. (a).) This time includes confinement "from the date of arrest to the date when the sentence commences." (§ 4019, subd. (a)(1).) Generally, "a term of four days will be deemed to have been served for every two days spent in actual custody." (§ 4019, subd. (f).) When a defendant is convicted of a violent felony as defined by section 667.5, subdivision (c), however, work time is accrued at a rate of "no more than 15 percent." (§ 2933.1, subd. (a).) Any miscalculation of credits results in an unauthorized sentence, and an unauthorized sentence may be corrected upon discovery. (*People v. Taylor, supra*, 119 Cal.App.4th at p. 647.)

Here, the court awarded defendant 1,033 days of actual presentence custody credit, plus 155 days of good time/work time, for a total of 1,188 days. Defendant was arrested on May 16, 2021, and sentenced on April 19, 2024. As noted by the parties, 2024 was a leap year. Defendant was thus entitled to 1,070 days of actual custody credit and 161 days of good time and work credit under section 2933.1, for a total of 1,231 days. As defendant's credits were calculated in error, we award defendant an additional 43 days of presentence custody credit and direct the trial court to issue a corrected abstract of judgment and minute order reflecting the correct award.

DISPOSITION

The judgment is affirmed. Defendant is awarded an additional 43 days of presentence custody credit. The trial court is directed to prepare a corrected abstract of judgment showing the award of custody credit and to forward a certified copy to the Department of Corrections and Rehabilitation.

CHAVEZ, Acting P. J.

We concur:

RICHARDSON, J.

SIGGINS, J.*

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* Retired Presiding Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.