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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PEDRO MEDINA CASTILLON, Defendant and Appellant.	H042690 (Santa Clara County Super. Ct. No. C1237338)

Defendant Pedro Medina Castillon[1] was convicted by a jury of two counts of first-degree murder (Pen. Code, § 187)[2] for the murders of Marybel Jimenez and Pedro Jimenez, hereafter referred to by their first names for clarity. The jury also found true the special allegations that Medina personally discharged a handgun causing the death of a person other than an accomplice in the course of the offenses (§ 12022.53, subd. (d)) and that the case involved multiple murders (§ 190.2, subd. (a)(3)). The trial court sentenced Medina to two consecutive terms of life without the possibility of parole, consecutive to an indeterminate term of 50 years to life.

On appeal, Medina argues the trial court erred by: (1) instructing the jury pursuant to CALCRIM No. 570 as that instruction inaccurately states California law regarding manslaughter and refers to "provocation" without defining that term; (2) denying the defense's request for a pinpoint instruction on "cooling off"; and (3) instructing the jury

[1] We henceforth reference defendant by his last name, Medina, rather than his mother's maiden name, Castillon.

[2] Unspecified statutory references are to the Penal Code.

pursuant to CALCRIM No. 520 which fails to require that the prosecution prove the absence of heat of passion and provocation. Medina also contends that even if these claimed errors are not, in and of themselves, sufficient to warrant reversal, their cumulative effect is. Next, Medina argues the trial court erred by refusing to conduct a *Marsden*[3] hearing when he requested one at sentencing. In a supplemental brief, Medina asserts the matter must be remanded so that the trial court may exercise its discretion to strike or dismiss the firearm enhancements, pursuant to section 12022.53, subdivision (h), as amended. Finally, Medina contends the sentencing minute order and abstract of judgment reflect that a parole revocation restitution fine under section 1202.45 was imposed, but such a fine may not be imposed on him as he was sentenced to life without parole.

We find no error, with the exception of the improperly imposed parole revocation restitution fine. Accordingly, we will direct that the fine be stricken from the minute order and abstract of judgment and will affirm the judgment as modified.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Prosecution's case

1. Medina's prior incidents of domestic violence

a. Domestic violence (DV) victim 1

DV victim 1 testified she had known Medina for about 10 years, and dated him for three to four years. While they were dating, he once threatened her with a weapon. She said that Medina came into the house while she was lying in bed, pointed a gun at her and said, " 'If you talk or call the police or you accuse me, I will kill you.' " She was frightened and could not breathe. She did not know why he was upset or why he thought she might talk to the police. Despite this incident, she continued to date Medina for

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

perhaps another year or year and a half. After they broke up, DV victim 1 kept in touch with Medina and would sometimes hold onto property or money for him.

b. Domestic violence (DV) victim 2

DV victim 2 met Medina in 2001 and began dating him that same year. Medina had another place, but "mostly" lived with DV victim 2, and they dated for "a lot of years."

On her birthday, November 17, 2001, she and Medina were out dancing at a nightclub with a group of friends. When they left the club, Medina asked for her keys and DV victim 2 said she had given them to his friend when she got to the club earlier that evening. Medina punched her in the face, repeatedly, knocking her to the ground. He pulled her up by her hair, then punched her again. She grabbed gravel from the ground and threw it at him, but he did not stop beating her. One of Medina's friends came and took him away, while her friends put her in a car and drove her to a family member's home.

DV victim 2 did not call the police that night because she "just wanted it to all go away." However, she did call the police the next day after her neighbor saw the bruises on her face and encouraged her to report the incident. Despite what happened, DV victim 2 continued to date Medina for a total of four years.

c. Erica Espinoza

Espinoza testified that Marybel was her younger sister and Pedro was Marybel's high school sweetheart. Marybel had three children with Pedro, though they were never married. At the time of the trial, the oldest child was 10, the middle child was eight and the youngest was seven.

According to Espinoza, Marybel separated from Pedro for a time, beginning in the summer of 2011. Approximately two months after that, Marybel started dating Medina. Medina did not live with Marybel and her children, but "was in and out" of Marybel's house.

i. 2011 incident

In 2011, before Marybel's murder, Espinoza attended a concert at a club with Marybel and Medina. At one point, Medina began questioning Marybel aggressively about some of Espinoza's male friends who he thought "she was looking at." Medina went to the bathroom, and while he was gone, Espinoza and Marybel were talking to Espinoza's friends. They left soon after Medina returned from the bathroom and, once they were outside, Medina grabbed Marybel and was asking why she was "always flirting."

The three of them got into Medina's truck, with Espinoza driving, Medina in the passenger seat and Marybel between them. As Espinoza was driving home, Medina continued to argue with Marybel and then swung his fist at her face. Espinoza could not tell if the blow landed, but they began arguing more loudly and Espinoza pulled over. She told them to stop arguing, and Medina stepped out of the truck for a moment. When he got back in, he was calmer and Espinoza drove them home without further incident. After they arrived, Medina was still angry and he said a few more things that Espinoza could not remember before he got in his truck and drove away fast. Marybel was crying, but Espinoza did not see that she was physically injured.

ii. 2012 incident

In June or July of 2012, Espinoza went to pick up Marybel for work and she noticed that Marybel had a bump on the left side of her forehead. Espinoza asked how she got injured and Marybel told her Medina got mad at her and "he broke her cell phone in her forehead." Espinoza saw that Marybel seemed frightened as she told her this story, and she urged Marybel to apply for a restraining order against Medina. Espinoza said that Marybel did report the incident to police and obtained a restraining order.

The last Sunday that Espinoza saw Marybel alive, she told Marybel she needed to stay away from Medina because he was aggressive toward her. Marybel agreed and said she could not sleep in her home because she was afraid. She was sleeping at Pedro's

house. When Espinoza asked what made her afraid, Marybel said that Medina told her that he killed people for a living.

San Jose Police Officer Tak Odama testified that he responded to a report of a domestic disturbance at Marybel's residence at 4:23 a.m. on July 13, 2012. Marybel told him that Medina had injured her approximately 11 hours earlier. Odama noticed a visible red bump on her forehead.

San Jose Police Officer Enrique Márquez testified that he was working as a detective in the domestic violence unit on July 18, 2012, when he was asked by another detective to contact Medina[4] about the July 13 incident involving Marybel. Márquez called Medina's phone and left a voicemail identifying himself and indicating that he needed to speak with him regarding an incident. Medina called back the following afternoon. He asked Márquez if he was calling about the incident with "his girlfriend," and Márquez confirmed that was correct. The lead detective was not available to question Medina so Márquez said that he would call Medina back later to arrange a time for an interview. Medina agreed and said he would call Márquez back that day or the following day, but never did.

After July 19, Márquez made multiple attempts to call Medina, but never reached him. Medina's phone was no longer accepting voicemail messages. The last day Márquez called Medina was on July 24, 2012, and after Márquez learned that Marybel had been killed, he stopped trying to contact Medina.

2. Testimony relating to the killings of Marybel and Pedro

a. Officer Paul Fukuma

Officer Fukuma, who was employed as a police officer with the City of San Jose at the time of the murders, testified that, at around 4:20 a.m. on July 23, 2012, he responded to a report of a disturbance involving weapons at 370 North Seventh Street in

[4] Márquez was asked to contact Medina as he could speak Spanish fluently, and could translate for the other detective.

San Jose. He estimates he arrived on the scene by 4:30 a.m. Fukuma saw a little girl, perhaps four years old, standing on the steps of the residence, with blood on her hands and face. The front door of the residence was open, and a window just to the left of the door was broken.

Officer Fukuma approached the girl and could tell that the blood was not hers. A woman standing off to the side identified herself as a neighbor, so Fukuma and another officer put the girl in her care for the time being. Fukuma and the other officer entered the residence to sweep for suspects and other injured parties.

Officer Fukuma observed signs of a struggle in the living room, with spent shell casings and live ammunition on the floor, along with broken glass from the shattered front window. In the small dining room, Fukuma saw a man slumped on the floor between the table and the wall. When he approached the man, Fukuma saw he had a gunshot wound in his forehead, with brain matter protruding from the wound. The man had no pulse and was unresponsive.

Officer Fukuma and his partner proceeded to check the rest of the residence. His partner located a dead woman face down on the floor in a bedroom.

b. Officer Sean Ancelet

Officer Ancelet testified that he was dispatched to 370 North Seventh Street in San Jose around 2:50 a.m. on July 23, 2012. He and his partner walked up to the door and contacted Marybel at the residence. Marybel appeared "concerned and nervous, scared." After discussing the situation with her, Ancelet determined that "at that time no crime had been committed." Ancelet recalled that, when he spoke with Marybel, the window near her front door was intact and there was no obvious damage to the outside of the residence. After he and his partner left, they drove around the neighborhood looking for the suspect and any vehicles matching the descriptions provided by Marybel but found nothing.

Officer Ancelet was dispatched to the same address around 4:22 a.m. with a report of shots fired. Officers Fukuma and Garcia were already at the house, and Ancelet noticed that the front door was wide open and the front window was smashed. He entered the residence along with the other officers and saw a male victim, whom Fukuma was attending to. Ancelet continued to search the residence along with Garcia. Garcia found a female victim, but Ancelet continued to search for children that he had heard also lived there. A few minutes later, he was notified that the children were at a neighbor's house, so he went to talk to them, taking down their names and dates of birth.

c. Oldest child

The oldest child testified that Medina sometimes spent the night at the house he lived in with his mother and his siblings. His father, Pedro, never spent the night, except once—the night Pedro and Marybel were killed.

The night of the murder, the oldest child was sleeping in his mother's room when he was awakened by the sound of someone pounding on the door and the sound of the front window breaking. He stayed in the bedroom and Pedro went into the kitchen. The oldest son saw Medina shoot Pedro in the leg and in the head. Medina then went into the bedroom and shot Marybel, while the oldest son hit him and yelled at him to stop. As the police were arriving, Medina ran outside.

d. Cesar Gonzalez Orozco

Orozco testified that he and Medina had been good friends and had known each other for more than 10 years. He knew that Medina was dating Marybel and was, at some point before her murder, living with her.

The day before the murders, Orozco was at a barbecue at his sister's home. Medina showed up sometime that afternoon and, after "a while," Orozco and Medina left to go to a restaurant together. After they ate at the restaurant, the two men went to a placed called the Tropicana to "hang out." Three other men, Jaime, Mazatlan, and

Chiquilin, joined them, then the group ended up at a club called Fiesta. They stayed at Fiesta until 1:30 or 2:00 a.m.

Medina drove Orozco, Chiquilin, and Mazatlan back to Jaime's house. The group remained in the car and continued to drink. After a while, Medina started the car and drove to Marybel's house. When they arrived, Medina got out and told Chiquilin to get out of the back seat and get in the driver's seat. Orozco saw Medina go to the door of the house and try to open it. He then saw Medina banging his shoulder into the door and kicking it. Orozco and the others in the car were telling Medina to calm down and come back to the car. Medina got back in the car, and Chiquilin drove off.

As they went around the corner, Medina told Chiquilin to stop the car. Medina got out and went over to a truck that belonged to Pedro that was parked on the street. He slashed two of the truck's tires. Medina got back in the car and they drove back to Jaime's house, where they continued drinking for another hour or so.

Orozco and Medina then left to go to Medina's house. Medina went inside his house, telling Orozco to wait in the car while he went inside to see if he had more beer. When Medina came out a short time later, he had put on a dark sweatshirt and cap, but was not carrying beer or anything else. Medina got back in the car and drove back to Marybel's house. Medina parked the car away from Marybel's front door and got out. He told Orozco to "drive around for a while."

Orozco drove around "[f]or a short time" then parked back in the same place. Medina came back, climbed in the passenger seat and told Orozco to drive. He admitted that he killed Pedro and Marybel. As Orozco drove, Medina began calling people he knew, asking for help and telling them he had killed Pedro and Marybel. He also asked Orozco to drive him "[f]ar away" from San Jose. Orozco drove as far as Gilroy before telling Medina he wanted to go home and could not help him.

It was getting light when Orozco arrived back at his house. He got out of Medina's car, but forgot to take his cell phone with him. As Medina got out of the passenger seat and moved to the driver's seat, Orozco saw a pistol on the passenger seat.

On cross-examination, Orozco testified that he had seen Medina and Marybel together on a few occasions. The last time he saw them together was about a week or two before the murders. Orozco was at Medina's apartment[5] with Medina, when Marybel came home and parked her vehicle behind Medina's. Orozco observed Marybel and Medina arguing for "a while."

e. Melinda Ramirez

Ramirez lived near Marybel's house, and would see her coming and going with her children. On July 23, 2012, Ramirez had been out the prior evening and got home "some time after 2:00 [a.m.]." She was getting ready for bed when she heard glass breaking, a woman screaming, then maybe one or two gunshots, followed a few seconds later by several gunshots in a row. Ramirez called 911 after she heard the first shot.

Ramirez went outside and saw one of the children at the front door of Marybel's house. She heard him yelling, " 'They shot my mom.' " Ramirez got him and the other two children to come outside, then she took them to her house, where she gave them blankets and comforted them. She gave the little girl some clean clothes, because she was "covered in blood and glass." She gave the oldest child some new clothing as well, as he "had an accident in his pants." The oldest child appeared to be in shock, as he kept repeating things, including a name, but she could not really understand him. The children were with her for what seemed like hours before they were all transported to the police station.

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[5] Orozco testified that Medina told him he rented the apartment for himself, Marybel, and her children.

f. Ringo Martinez and Renee Zarate

Martinez and Zarate lived across the street from Marybel. At around 4:20 on the morning of July 23, 2012, they were awakened by noises and yelling. Martinez looked through his blinds across the street and saw that the porch lights and lights inside Marybel's residence were on. He was moving to his living room to look through a larger window when he heard two or three gunshots.[6] Martinez started to get dressed when perhaps 10 seconds after the first shots, he heard two or three more. He finished getting some clothes on and opened the front door a little. He and Zarate saw a man run out of Marybel's house, jump down the front stairs, and run toward Washington Street. The man was wearing a black hooded sweatshirt, with the hood up over his head.

Martinez and Zarate went across the street and saw one of the children standing in the doorway crying. They encouraged him to come out and down the steps. The little girl also came out of the house. Martinez was trying to get them to hurry, in case the man came back. He saw another little boy inside the residence, saying "they shot my mommy and . . . my daddy." Martinez called for him to come out, and when he did, they passed him along to one of the neighbors to watch, along with the other two children.

In the courtroom, Martinez recognized Medina as having been at Marybel's residence before, but could not say that he was the person who came out that morning. Martinez said that he had seen and heard Marybel and Medina arguing or fighting two or three times previously. About a week before the killings, Martinez saw Medina leaving the residence, followed by Marybel. He saw Marybel throw a cell phone at Medina, which broke "into . . . a million pieces." Marybel's hair was "all messed up," and it appeared as if she had been "roughed up."

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[6] Zarate testified she initially heard three or four gunshots, followed by a woman screaming. She then heard another two or three shots.

g. DV victim 1

On the morning of the murders, Medina called DV victim 1 sometime between 4:00 and 5:00 a.m. He told her he had shot Marybel and Pedro and asked if he could stay at her daughter's house in Salinas. DV victim 1 refused. She was frightened and did not know if she should go back to her house. She still had some of his property, as well as approximately $3,000 that belonged to him.

Medina called her several more times that day, asking for her help in getting out of San Jose. She eventually helped Medina's brother[7] find the park where Medina was calling from because she was afraid Medina would kill her if she did not assist him. At the park, she saw Medina get into his brother's truck and they drove off. She turned around and went home.

A month or some weeks later, Medina called her again and asked her to send him some of his money. With the permission of the police, she did so. DV victim 1 did not remember where she sent it other than that the address was somewhere in Mexico.

On cross-examination, DV victim 1 said that when Medina initially called her and said he had killed Marybel and Pedro, he told her it was because "they had made a fool out of him." Medina told her that Pedro had said to him " 'I'm fucking Marybel on the bed that you paid for.' "

h. Autopsy results

Dr. Joseph O'Hara testified about the autopsies he performed on Pedro and Marybel. Pedro had been shot four times: twice in the head, once in the hip, and once in the arm, with the bullet traveling through his arm and into his chest. One of the two shots to Pedro's head generated a contact wound, meaning the barrel of the gun was placed directly against his head before it was fired. Dr. O'Hara testified that Pedro could have survived being shot in the hip, but the other three wounds were fatal.

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[7] Medina's brother had driven up from Los Angeles to pick him up.

Marybel had been shot three times. The fatal shot entered her right shoulder, went through her neck, severing her carotid artery and going through her trachea before exiting her left arm. The other two shots were to her forearm and wrist. The skin around those wounds was lacerated and contained fragments of plastic and circuitry, which meant at least one of the bullets went through an electronic device such as a cell phone, before impact. Dr. O'Hara confirmed that the presence of these fragments was consistent with Marybel holding a cell phone when she was shot.

i. Officer Michael Borges

San Jose Police Officer Borges was called out to Marybel's residence as the primary crime scene investigator for the double homicide. When he and the secondary investigator entered the living room, they noticed blood drops and an unspent cartridge on the floor. There was broken glass from the front window on the floor and blood on the windowsill. Borges collected a sample of the blood, which was later determined to be Medina's.

There was also blood and bloody child-size footprints on the kitchen floor, along with unspent cartridges[8] and spent shell casings. Pedro's body was "sitting up right in a slumped position . . . basically wedged between the wall and the dining table."

In the first bedroom, which appeared to be a child's bedroom, Borges found the main body of a cell phone. There was a hole in the phone consistent with a bullet strike, and there was blood on it as well.

Marybel's body was on the floor of the second bedroom, face down, with her feet toward the wall. Near the wall, there was a small cardboard box with a pool of blood on

[8] Borges explained that the unspent cartridges could have come from Medina unintentionally ejecting a cartridge before firing or racking the gun if a cartridge had jammed or misfired. The cartridges could also have fallen out of Medina's pockets as he moved through the residence.

it. A cell phone battery was in that pool of blood and it also appeared to have been struck by a bullet. The back panel of a cell phone was near her feet, towards the wall.

Very low on the wall near where the battery was found, Borges observed a blood spatter surrounding a bullet strike. There was a misting pattern around the point where the bullet hit the wall, suggesting that Marybel was very close to the wall when she was shot. Given the location and directionality of the blood spatters, along with the location of a void within the spatters, Borges opined that Marybel was in the corner, near the floor, when she was shot.

Borges examined Medina's vehicle and found bloodstains on the arm rest and below the window of the front passenger side. There were bloodstains on the front passenger seat and the center console as well. A baseball cap in the vehicle also tested positive for blood.

j. Sergeant Stewart Davies

San Jose Police Sergeant Davies was part of the homicide unit on July 23, 2012 and was assigned to investigate the murders. After learning from the oldest boy that Medina had shot Marybel and Pedro, Davies directed officers to search Medina's residence, where they discovered a recently-used gun cleaning kit on the floor of the garage. Police found no weapons at the residence, however.

Sergeant Davies obtained Medina's phone records as well, in an effort to locate him. According to those records, Medina called his brother in San Fernando soon after the murders. Davies then obtained Medina's brother's phone records as well, and learned that after Medina called his brother, his brother made multiple calls to Gonzalez and DV victim 1. Davies also tracked the cell phone towers that the brother's phone was contacting, noting that it was hitting towers in the San Fernando area until about 7:30 a.m. on July 23, 2012, but for the next five hours was hitting off cell towers located along Interstate 5 up to the San Francisco Bay Area. At around noon, the brother's phone contacted a cell tower in San Jose. After that, the cell tower records showed that the

phone returned to San Fernando. The last phone call made from the brother's phone was made around 9:00 p.m.

Sergeant Davies interviewed DV victim 1, who told him about leading Medina's brother to the park where Medina was waiting to be picked up. He went to that park and found Medina's car, which was impounded and searched. DV victim 1 also contacted Davies and said she received a call from Medina on or about July 31, asking that she send money to him at an address in Tijuana, Mexico.

Medina was eventually arrested by Mexican authorities in April 2013 and extradited to the United States on March 28, 2014.

B. Defense case

1. Officer Vinh Trinh

San Jose Police Officer Trinh testified that he interviewed Martinez following the murders. Martinez told him that, before he heard gunshots, he heard children crying and two male adults arguing in Spanish.

2. Officer Corey Green

San Jose Police Officer Green testified about an incident which occurred on August 28, 2011, involving Medina,[9] Marybel and Pedro. Marybel had informed the 911 operator that her boyfriend (Pedro) had "tried to kill her by ramming his car into a car she was sitting in." Pedro admitted deliberately crashing his car, a Lincoln Navigator, into Medina's Chevy Silverado pickup truck while Medina and Marybel were inside the truck. Green observed that the right rear quarter panel of Medina's truck was damaged and the tire had been taken off the rim by the collision. Pedro's Navigator sustained serious damage to its front left side.

On cross-examination, Green confirmed that no one was injured in this collision. Medina told Green he did not want to press charges against Pedro and would not testify

[9] When interviewed at the scene by Green, Medina identified himself as "Alonso Arjona Márquez."

in court. He also told Green he did not fear for his safety vis-à-vis Pedro. Medina intended to have his "truck fixed and [he would] move on."

C. Rebuttal

1. Officer Ancelet

Officer Ancelet testified about the first time he went to Marybel's residence at 2:49 a.m. on July 23, 2012, in response to her 911 call. Marybel told him "her ex-boyfriend," Medina, had been outside pounding on the door and shouting. She "believed him to be crazy and . . . was afraid of him." Pedro interrupted Marybel and gave Ancelet details about the vehicle Medina was driving.

2. Officer Raul Corral

Officer Corral, who is fluent in Spanish, assisted Davies in interviewing Medina on March 27, 2014, following Medina's extradition to the United States. After initially denying doing anything other than slashing Pedro's tires on the night of the murders, Medina eventually admitted shooting both Marybel and Pedro. He went over to Marybel's residence because he was "mad . . . she called the police" on him "that week." Medina denied being angry that Marybel was together with Pedro again " 'because [he] didn't want anything to do with her anymore. Like, it was okay like this . . . but [he] was angry 'cause she called the police on [him].' "

When asked why he shot Pedro, Medina said he did not know. Corral did not know about the incident on August 28, 2011, when Pedro rammed his vehicle into Medina's, and therefore did not ask Medina about it. However, Medina did not raise it during the interview either.

3. August 28, 2011 911 call

The prosecution played the recording of the 911 call made by an unidentified witness to the incident in which Pedro crashed his car into Medina's car. The witness, who only spoke Spanish, reported "some people fighting and they are crashing their cars." The witness later clarified that two Hispanic men had crashed their vehicles

together and began fighting. As the 911 call proceeded, the witness reported that one of the men had run off.

D. Verdict and sentencing

On May 11, 2015, following deliberations, the jury found Medina guilty of two counts of first-degree murder (§ 187). The jury also found true the allegations that Medina personally used a firearm in committing both murders (§ 12022.53, subd. (d)), and further found true the special circumstance that Medina had now been convicted of more than one murder within the meaning of section 190.2, subdivision (a)(3).

Medina was sentenced on July 10, 2015, to two consecutive terms of life without the possibility of parole, consecutive to an indeterminate term of 50 years to life.

Medina timely appealed.

II. DISCUSSION

A. CALCRIM No. 570

Medina claims that CALCRIM No. 570, which instructed the jury on manslaughter, misstates the law in two ways: (1) by providing that manslaughter requires that the killing occur under the "direct and immediate influence" of provocation; and (2) by failing to provide a definition of provocation.[10]

CALCRIM No. 570 states: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the

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[10] Because Medina did not object to the challenged instruction below, the People argue that his arguments are forfeited because " 'a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012.) Medina is not arguing the instructions required clarification, but rather that the instruction presents an incorrect statement of law. Accordingly, his arguments are not forfeited for failing to raise an objection below. (*Ibid.*)

provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] *In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it.* While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

1. Standard of review

We review claims that a trial court has misdirected a jury de novo. In reviewing whether the trial court properly instructed the jury, we consider " 'the entire charge of the court' " rather than focusing on only parts of an instruction. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.)

2. "Direct and immediate influence"

In Medina's view, the language of CALCRIM No. 570 which requires that a defendant has "acted under the direct and immediate influence of provocation" is at odds with the statutory definition of manslaughter as set forth in section 192, subdivision (a) which provides that voluntary manslaughter requires "a sudden quarrel or heat of passion." He posits that the phrase "direct and immediate influence of provocation" has three possible meanings, all of which are legally incorrect. First, the phrase could have a temporal meaning, suggesting to the jury that the killing occur "immediately" upon being influenced by the provocation. Second, the phrase could connote a causal connection, suggesting to the jury that the provocation be a proximate cause of the killing. Third, the phrase could combine the temporal and causal meanings. We disagree with each of these arguments.

As to the first possible meaning, where the jury would misinterpret the instruction to require an erroneous temporal link, Medina misreads the instruction, conflating "the influence of provocation" with the "provocation" itself. The words "direct and immediate" modify not the provocation, which as Medina correctly notes, can be something which occurs over an extended period of time. Rather, what must be "direct and immediate" is the provocation's *influence* on the defendant. The jury is instructed to decide whether the defendant's rash and emotional actions, at the time of the killing, were directly and immediately *influenced* by the provocation. The "direct and immediate" language addresses "not the duration of the source of provocation[,] but ' "whether or not defendant's reason was, *at the time of his act*, so disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from passion rather than from judgment." ' " (*People v. Wharton* (1991) 53 Cal.3d 522, 570, italics added.)

Contrary to Medina's suggestion, CALCRIM No. 570 expressly instructs the jury that the necessary provocation itself need not be "direct and immediate," but can "occur

over a short or long period of time." Consequently, it is not reasonably likely that the jury understood the "direct and immediate" language to refer to the period of provocation, rather than the influence of that provocation on Medina's actions at the time of the killings.

Second, there is also no support for Medina's suggestion that the phrase "direct and immediate" could mislead a jury into using the tort law concept of "proximate cause." First, the jury was not presented any instructions referencing the concept of "proximate cause" nor was that phrase introduced to them during the trial. To the extent that any of the jurors may have been familiar with tort law principles in their prior life experiences, they were expressly informed prior to deliberating that they were being "instruct[ed] . . . on the law that applies to this case." The idea that the jury might have disregarded the court's instructions and considered a legal concept that was not discussed at trial is speculative at best.

Second, CALCRIM No. 570 does not, as Medina suggests, instruct the jury that, to find manslaughter, they must find that the provocation was sufficient to prompt a person to kill. Rather, the instruction correctly states only that the provocation must be sufficient to have caused a person "of average disposition" to "act rashly and without due deliberation." (CALCRIM No. 570.) In other words, the defendant's "anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene." (*People v. Beltran* (2013) 56 Cal.4th 935, 949.)

Medina's final contention is that the jury could have interpreted CALCRIM No. 570 to require *both* a temporal and a causal nexus between the provocation and the killings. As we have found no support for Medina's claims that the instruction improperly injected either a temporal or causal nexus, it is equally baseless to argue that a jury would have interpreted the instruction to require both.

3. Provocation

Medina next claims that CALCRIM No. 570 is infirm because it instructs the jury to determine if the defendant "acted under the direct and immediate influence of provocation *as I have defined it*" yet nowhere does the instruction provide a definition of provocation. (Italics added.)

The pertinent portion of the instruction, while admittedly not a model of clarity, refers not to provocation in the abstract, but instead to the specific type of provocation sufficient to support a manslaughter verdict, i.e., that which "would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." (CALCRIM No. 570.) In fact, the very next sentence of the instruction, which informs the jury that "no specific type of provocation is required," suggests that the jury is to think expansively about the concept of provocation. (CALCRIM No. 570.)

Medina's reliance on *People v. Le* (2007) 158 Cal.App.4th 516 is misplaced. In *Le*, the trial court gave CALCRIM No. 570 as one of the instructions. (*Id.* at pp. 523-524.) During deliberations, the jury sent a note to the trial court regarding the instruction, explaining that it " 'could not find a definition of provocation in the jury instructions' " and asked how provocation was " 'legally defined.' " (*Id.* at p. 524.) In response, the trial court provided the definition of provocation as set forth in Webster's Dictionary. (*Id.* at p. 525.) However, on appeal, there was no challenge to this portion of CALCRIM No. 570. The issue addressed in *Le* was whether the trial court erred in instructing under CALCRIM No. 917 that mere words are not a defense to battery *and* permitting the prosecution to argue by extension that mere words cannot be sufficient provocation to reduce murder to manslaughter. (*Id.* at p. 525.) The court was not asked to decide the adequacy of CALCRIM No. 570's language.

A further distinction is that here, unlike in *Le*, the jury did not inquire about CALCRIM No. 570 or indicate that it was confused in any way about how to define

provocation. " '[J]urors are presumed to be intelligent and capable of understanding and applying the court's instructions.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 926.) Consequently, "[i]n the absence of a specific request, a court is not required to instruct the jury with respect to words or phrases that are commonly understood and not used in a technical or legal sense." (*People v. Navarette* (2003) 30 Cal.4th 458, 503.)

4. Any error relating to CALCRIM No. 570 was harmless

Even assuming the jury misapplied or misinterpreted CALCRIM No. 570, based on the language discussed above, it is not reasonably probable the jury would have found him guilty of manslaughter rather than murder, even had it been instructed in the manner Medina suggests. The instructional error, if any, was a state law error subject to California's *Watson* standard of review. (See *People v. Watson* (1956) 46 Cal.2d 818, 836-837; see also *People v. Flood* (1998) 18 Cal.4th 470, 490; Cal. Const., art. VI, § 13.) The *Watson* test "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." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

Medina argues it is reasonably probable the jury would have returned a more favorable verdict had the court: (1) omitted the language regarding acting under the "direct and immediate influence of provocation"; (2) instead instructed the jury to decide if Medina was "actually motivated by passion" when he killed Marybel and Pedro; and (3) provided a definition of the word "provocation." We disagree.

The jury found that Medina committed first degree murder in killing Marybel and Pedro and those verdicts were supported by significant evidence that Medina acted, not in the heat of passion, but with deliberation. After learning that Pedro was with Marybel

that night, Medina drove off with his friends to continue drinking, though he had them stop briefly so he could slash two of Pedro's tires. Orozco testified that everyone, including Medina, seemed to be enjoying themselves as they drank and socialized.

When he drove off with Orozco to go to Medina's house, Medina lied to him and said he was going to look for more beer. Instead, he went into the house, retrieved his gun and changed into dark clothing, putting on a hat as well, suggesting he was trying to disguise himself or make himself less visible to any observers. It is also important to note that Medina concealed the gun from Orozco, suggesting that he thought Orozco might not agree to drive him back to Marybel's house, let alone help Medina flee the scene, if Orozco knew he had a weapon or that he intended to harm Marybel or Pedro.

The way in which Medina carried out the killings is further strong evidence that they were deliberate and not impulsive. The autopsy showed that one of Pedro's wounds was inflicted by having the gun placed directly against his scalp, with the bullet traversing his skull and blowing out two of his teeth. The unspent cartridges scattered throughout the residence demonstrated that Medina had either brought additional ammunition besides what was loaded into his weapon or his weapon jammed multiple times, requiring him to rack it to eject the misfired cartridge. Bringing extra ammunition would be evidence of planning and taking the time to clear a misfire would be evidence that Medina had an opportunity to reflect on what he was doing.

Finally, after killing two people in front of their young children, Medina returned to the car and, as Orozco testified, admitted to the crimes. Rather than expressing remorse, however, Medina's immediate concern is getting Orozco to drive him "far away." When Orozco eventually said he could not help him, Medina called his brother in Los Angeles and arranged to have him drive to San Jose to pick him up.

In contrast, the evidence supporting Medina's heat of passion theory was that he went to Marybel's house that evening, after she supposedly texted him repeatedly, only to find that Pedro was there. According to DV victim 1's testimony, Medina told her soon

after the killings that Marybel and Pedro "made a fool out of him." Medina also said Pedro had taunted him, telling him he was having sex with Marybel in the bed Medina had purchased, though Medina did not say if Pedro said this to him the night of the killings or at some previous point in time.

Medina's interview with police undercut Martinez's testimony, however, as he did not tell police that he killed Marybel and Pedro because they disrespected him in any way. Rather, he said he killed Marybel because she had called the police on him the week before, reporting that he had injured her. When asked why he shot Pedro, Medina said he did not know. He also denied being angry that Marybel and Pedro had reconciled.

Given the compelling evidence supporting the jury's verdicts on the first-degree murder charges, especially as compared to the weak and contradictory evidence that Medina was acting under the heat of passion, it is not reasonably probable that the jury would have reached a different result had they been instructed as Medina suggests. (*People v. Breverman, supra*, 19 Cal.4th at p. 177.)

B. No error in refusing pinpoint instruction on "cooling off"

Medina next argues the trial court erred by denying his request for a pinpoint instruction on the "cooling off" period.

1. Relevant proceedings

Defense counsel proposed the following pinpoint instruction: "No particular period of time need elapse between a passion-producing provocation and the subsequent killing. That approximately two hours elapsed between the provocation and the homicides is not alone sufficient to prove the defendant committed murder with malice aforethought. The length of time elapsed is only one factor you may consider when deciding whether the [P]eople have proved beyond a reasonable doubt that the defendant acted with the required mental state of malice aforethought. If the [P]eople have not met this burden, you must find the defendant not guilty of murder."

In arguing for this instruction, defense counsel indicated that the prosecution would likely argue that the time interval between Medina's two visits to Marybel's residence would be sufficient for him to "cool off." The proffered instruction would make clear to the jury that there is no specific time period in which a person of average disposition can be deemed to have "cool[ed] off" as a matter of law. Defense counsel cited *People v. Brooks* (1986) 185 Cal.App.3d 687 as supporting the proposition that a two-hour period, which coincidentally was approximately the amount of time which elapsed between Medina's visits to the residence, is not per se sufficient.

In response, the prosecutor argued that the first sentence of the proposed instruction was addressed in CALCRIM No. 570, and the second sentence, referring to the two-hour period between Medina's visits, was inappropriate because it was "fact specific."

The court refused the requested pinpoint instruction, finding CALCRIM No. 570 sufficiently instructed the jury on the point defense counsel wished to make. Furthermore, because CALCRIM No. 570 properly did not specify an amount of time that would be sufficient for "cooling off," defense counsel could highlight that for the jury in his final argument.

2. Applicable legal principles

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63.) But a trial court has no duty to provide a pinpoint instruction requested by the defense "if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence." (*People v. Moon* (2005) 37 Cal.4th 1, 30 (*Moon*).) Though the Supreme Court has not specifically announced the standard of review for the denial of a requested pinpoint instruction, we will review this instructional issue de novo.

(Cf. *People v. Cook* (2006) 39 Cal.4th 566, 596 ["We independently review a trial court's failure to instruct on a lesser included offense."].)

3. Analysis

CALCRIM No. 570 provides, in relevant part: "If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis." This was an adequate instruction on the concept of "cooling off" as it left the jury free to decide how long a "person of average disposition" would take to overcome the provocation in question. The proposed pinpoint instruction was duplicative of CALCRIM No. 570's language on cooling off, and accordingly, the trial court was not required to give it. (*Moon, supra*, 37 Cal.4th at p. 30.)

The trial court also was justified in refusing the proposed instruction because it pinpointed specific evidence; i.e., the "approximately two hours [that] elapsed between the provocation and the homicides," rather than a specific theory of the defense. "Upon request, a trial court must give jury instructions 'that "pinpoint . . . the theory of the defense," ' but it can refuse instructions that highlight ' "specific evidence as such." ' [Citations.] Because the latter type of instruction 'invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence,' it is considered 'argumentative' and therefore should not be given." (*People v. Earp* (1999) 20 Cal.4th 826, 886.)

Medina was not deprived of his constitutional rights to due process or present a defense by the denial of this instruction. The trial court gave complete and accurate instructions on the relevant legal theories involved, allowing the jury to objectively evaluate the evidence supporting Medina's defense theory.

4. Any error in refusing the pinpoint instruction was harmless

Even assuming the court erred in refusing to give Medina's proffered pinpoint instruction, any such error was harmless. We review the failure to give a pinpoint

instruction under the harmless error standard set forth in *Watson*. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 830.)

As discussed above, there was overwhelming evidence to support the jury's findings that Medina acted with premeditation, not in the heat of passion, when he killed Marybel and Pedro. On the other side, there was little evidence to support Medina's defense theory that he was acting under the influence of provocation at the time, and even that evidence was contradicted to some extent by Medina's own statements to the police following his extradition. Accordingly, it is not reasonably probable that the jury would have returned a more favorable verdict even if the court had given the pinpoint instruction Medina requested. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

C. CALCRIM No. 520

Medina next argues that the trial court erred in instructing the jury pursuant to CALCRIM No. 520, but failing to sua sponte include language advising that the prosecution had the burden to prove the absence of heat of passion and provocation. In his view, this failure violated his rights to due process and a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution.

1. Instructions Below

The trial court instructed the jury pursuant to CALCRIM No. 520 as follows: "The defendant is charged in Count[s] 1 and 2 with murder in violation of Penal Code section 187. [¶] 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; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought." As noted above, the trial court also gave CALCRIM No. 570 to the jury, which states, in pertinent part: "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

In addition, the court instructed jurors with CALCRIM No. 640, which guides deliberations and addresses completion of the verdict forms in first degree murder cases, where the jury is given forms for *each* level of homicide, i.e., first-degree murder, second degree murder and voluntary manslaughter. That instruction stated, in relevant part, "You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of second degree murder only if all of you have found the defendant not guilty of first degree murder, and I can accept a verdict of guilty or not guilty of voluntary manslaughter only if all of you have found the defendant not guilty of both first and second degree murder."

Finally, the court read CALCRIM No. 200 to the jury, which instructed the jurors to, among other things, "[p]ay careful attention to *all of these instructions and consider them together*." (Italics added.)

2. Applicable legal principles

"We have long held that 'the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*People v. Delgado* (2017) 2 Cal.5th 544, 573-574 (*Delgado*), quoting *People v. Burgener* (1986) 41 Cal.3d 505, 538.) "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." (*People v. Galloway* (1979) 100 Cal.App.3d 551, 567-568; accord, *Delgado*, *supra*, at p. 574.)

3. Analysis

In *People v. Najera* (2006) 138 Cal.App.4th 212, the defendant complained that CALJIC No. 17.10, which is analogous to CALCRIM No. 640, improperly permitted the jury to convict a defendant of murder without requiring it to consider the People's burden to prove the absence of provocation set forth in the manslaughter instruction. (*People v. Najera*, *supra*, at p. 227.) The court rejected that argument because "[t]he trial court read the instructions in their entirety to the jury after closing argument." (*Id.* at p. 228.)

"The jury therefore heard the instruction on the prosecution's burden of proving absence of sudden quarrel or heat of passion before retiring to deliberate. We presume, of course, the jury understood and considered all of the instructions as a whole, in whatever order they might have been." (*Ibid.*)

Likewise, here, the court read the instructions aloud to the jury before deliberations began, including CALCRIM No. 200, which expressly instructed them to pay attention to *all* the instructions as well as "consider them together." We presume the jury followed that instruction and therefore correlated and followed all the other instructions, including CALCRIM Nos. 520 and 570. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) That presumption is reinforced by the fact that counsel's final arguments made clear it was the prosecution's burden to prove malice *and* the absence of heat of passion. For example, the prosecutor argued that Medina's "behavior before, during, and after these murders proves beyond all reasonable doubt that he was acting with judgment . . . not heat of passion." Defense counsel also repeatedly advised the jury that it was the prosecutor's burden to prove that Medina's actions constituted murder, not manslaughter.

Counsel's arguments also made clear to the jurors that they could consider the different kinds of homicide in any order. The prosecution expressly informed the jury that it would have to consider second degree murder and manslaughter as well. On this record, we see nothing which rebuts the presumption that the jurors understood, correlated, and properly applied the trial court's instructions. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

However, even if the court erred by failing to add language to CALCRIM No. 520 explaining the prosecution had the burden of proving Medina did not kill in the heat of passion, the error was harmless, whether reviewed under *Watson* or the more stringent standard set forth in *Chapman v. California* (1967) 386 U.S. 18.

As discussed above, there was substantial evidence that Medina acted with premeditation in killing Marybel and Pedro and comparatively little evidence to support his defense that he acted due to provocation or in the heat of passion. The jury was also properly instructed on the applicable law, and both counsel further explained in argument how the jury was to apply the court's instructions to the evidence. Taking all these things together, it is not reasonably likely that the jury was misled on which party had the burden of proving Medina did not kill the victims while acting in the heat of passion. (*People v. Hughes* (2002) 27 Cal.4th 287, 341.)

D. No cumulative error

Medina contends that, even if the court finds that none of the instructional errors he asserts are individually sufficient to warrant reversal, the cumulative effect of the errors is.

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) As we have found no error in the instructions, we must reject the claim of cumulative error.

E. No error in declining to hold Marsden *hearing*

Medina next argues that the trial court was obligated to conduct a *Marsden* hearing before proceeding to sentencing. We disagree.

1. Relevant proceedings

At the July 2015 sentencing hearing, Medina appeared with his trial counsel. Medina indicated he would like to address the court, and did so against counsel's advice. He said that he wanted to "file a motion," because he was not present in court on May 7, 2015, when the jury asked for readbacks of certain testimony during deliberations.[11] Medina said that his counsel and the prosecution "did this behind my back."

[11] On May 7, 2015, the jury requested the transcript of trial testimony offered by, among other witnesses, Martinez and Orozco. The record reflects that the attorneys were (continued)

The trial court responded that Medina could exercise his right to appeal to address any errors he believed occurred at trial, but that the court would not entertain legal arguments at the sentencing hearing. The trial court asked if he had any statements to make related to sentencing. Medina next said that his attorney was not present in court on the final day of deliberations, May 11, 2015,[12] and he was therefore deprived of a defense. At that point, the trial court indicated it had "heard enough" and that Medina had been adequately advised of his appellate rights.

2. Applicable legal principles

The rule from *Marsden* is well settled: " ' " 'When a defendant seeks to discharge his appointed counsel and substitute another [appointed] attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' " [Citation.] The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would "substantially impair" the defendant's right to effective assistance of counsel.' " (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488.)

It is equally well settled that to invoke a defendant's right under *Marsden* to substitute one appointed counsel for another, "[a]lthough no formal motion is necessary,

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notified and provided copies of the jurors' questions. The questions were discussed off the record in chambers, with everyone agreeing to the responses given to the jury's questions.

[12] The record reflects that when the jury returned its verdicts on May 11, 2015, Medina appeared in court with a deputy public defender, other than the public defender who represented him at trial.

there must be 'at least some clear indication by defendant that he wants a substitute attorney.' " (*People v. Mendoza* (2000) 24 Cal.4th 130, 157.) Grumblings about counsel's performance is insufficient. (*People v. Lucky* (1988) 45 Cal.3d 259, 281; *People v. Lee* (2002) 95 Cal.App.4th 772, 780.)

Finally, even if we assumed for the sake of argument that the court erred in not conducting a *Marsden* inquiry, *Marsden* does not establish a rule of per se reversible error. (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349.) The appellant must show "either that his *Marsden* motion would have been granted had it been heard, or that a more favorable result would have been achieved had the motion in fact been granted." (*People v. Washington* (1994) 27 Cal.App.4th 940, 944.)

3. Analysis

In this case, Medina never invoked *Marsden* by name, and more importantly, he failed to ask that his counsel be replaced. His vague complaints about not being present when counsel discussed responses to the jury's questions and having a different public defender appear with him when the verdicts were read did not amount to a " 'clear indication' " that he wanted a new attorney. (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 157.) Without a more specific indication that Medina was dissatisfied with counsel's representation and wished for him to be replaced, the trial court was not obligated to conduct a *Marsden* hearing.

4. Any error was harmless

However, even if the trial court did err by failing to hold a *Marsden* hearing, that error was harmless beyond a reasonable doubt. (*Marsden*, *supra*, 2 Cal.3d at p. 126 [*Marsden* error reviewed for prejudice under the *Chapman* "beyond a reasonable doubt" standard].) First, Medina had no constitutional right to be present "at discussions that occur outside the jury's presence, whether in chambers or at the bench, concerning questions of law or other matters that do not bear ' " 'a " ' "reasonably substantial relation to the fullness of his opportunity to defend against the charge." ' " ' " ' "

(*People v. Jennings* (2010) 50 Cal.4th 616, 682.) His complaint that another public defender, as opposed to the one who represented him throughout the trial, was representing him when the jury returned its verdicts, does not suggest that he feared incompetent representation at sentencing or had otherwise developed an irreconcilable conflict with trial counsel.

Based on our review of the record, Medina was ably and aggressively represented by his appointed counsel in the face of overwhelming evidence. We cannot see how the appointment of a different attorney at the sentencing hearing would have gained Medina a new trial, or could have had any effect on the sentence imposed.

F. No basis for resentencing on firearm enhancements

In a supplemental opening brief, Medina argues that the matter must be remanded to the trial court so that it may exercise its discretion to strike or dismiss the firearm enhancements, pursuant to section 12022.53, subdivision (h), as amended. As explained below, remanding this matter would be a futile act as it is abundantly clear that the trial court would not grant the relief Medina seeks.

While Medina's appeal was pending, the Legislature enacted Senate Bill No. 620. Senate Bill No. 620 amended section 12022.53, subdivision (h), which now reads: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." Senate Bill No. 620 took effect on January 1, 2018. Prior to its passage, trial courts did not have the discretion to strike or dismiss firearm enhancements imposed under section 12022.53. (Former § 12022.53, subd. (h).) Because Medina's case was not yet final as of January 1, 2018, the amendment applies retroactively. (*People v. Brown* (2012) 54 Cal.4th 314, 323.)

However, even though the amendment is retroactive, we must still determine whether a remand is necessary or if it would be an " 'idle act.' " (*People v. Gamble*

(2008) 164 Cal.App.4th 891, 901.) Generally, "when the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) The rationale for this general rule is that "[d]efendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion." (*Ibid.*) There is an exception to this rule, however, where " 'the record shows that the trial court would not have exercised its discretion even if it believed it could do so,' " in which case, " 'remand would be an idle act and is not required.' " (*People v. Gamble*, *supra*, 164 Cal.App.4th at p. 901.)

In *People v. McDaniels* (2018) 22 Cal.App.5th 420 (*McDaniels*), the court addressed the appropriate standard to "apply in assessing whether to remand a case for resentencing in light of Senate Bill [No.] 620." (*McDaniels*, *supra*, at p. 425.) Relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, which dealt with reconsidering Three Strikes sentencing in light of *Romero*,[13] the *McDaniels* court determined that a "remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*McDaniels*, *supra*, at p. 425.)

The salient question is whether the trial court "express[ed] its intent to impose the maximum sentence permitted." (*McDaniels*, *supra*, 22 Cal.App.5th at p. 427.) "When such an expression is reflected in the appellate record, a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the defendant's favor." (*Ibid.*)

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

Turning to the record in this case, the trial court clearly expressed its intent to impose the maximum allowable sentence on Medina. At the sentencing hearing, the trial court made the following remarks prior to imposing sentence: "[T]he Court sat through this trial and found . . . the actions that you took related to this case . . . to be some of the most cold and heartless actions this Court has seen. [¶] . . . [¶] The Court heard not only the horrific circumstances of this crime but from prior victims . . . that he had also abused. And I will say that as to [DV victim 2], that was perhaps the most frightened reaction the Court has seen by a victim in court having to face her abuser. I don't think the record accurately reflects the fear that she conveyed having to come in and explain how the defendant had previously beaten her unconscious. She was visibly shaking, unable to make eye contact with the defendant, and appeared so scared to the Court that she had a difficult time even stating her name for the record. [¶] To have to have a young boy come in to court and testify how he witnessed his parents being shot in front of him, to know that he pleaded with the defendant before his mother was shot, and then to have to come in court and testify are all horrific circumstances of the crime. [¶] The defendant, after his actions, did not have any acceptance of responsibility . . . but instead fled to Mexico, trying to avoid the consequences of his actions. [¶] The defendant sat through this trial. And while it has been brought to my attention through the probation report that when first interviewed by the police, he showed some emotions. [*Sic.*] The Court will say that the entirety of this case the Court has seen no remorse from the defendant. There have been times in court where he has appeared to, what the Court will [categorize] as almost smirking in the face of two individuals who have lost their lives and three children who have lost their parents. [¶] The recommendations from probation are more than appropriate. . . . The Court will sentence to the full extent allowed by law."

Accordingly, as the trial court made abundantly clear its intent to impose the maximum sentence allowed by law, it would be an idle act to remand this case for resentencing on the firearm enhancements.

G. The parole revocation restitution fine must be stricken

Medina's final argument is that the minute order inaccurately shows that a $10,000 parole revocation restitution fine under section 1202.45 was imposed. Such fines are permissible only when a defendant is sentenced to a determinate term. The People concede the error and we find the concession to be appropriate.

The minute order from the sentencing hearing reflects the imposition of a $10,000 parole revocation restitution fine under section 1202.45. However, the trial court did not orally impose any such fine at sentencing.

Because defendant was sentenced to two consecutive terms of life without the possibility of parole and two consecutive terms of 25 years to life, and not to any determinate terms, imposition of a parole revocation fine is not proper. (*People v. Carr* (2010) 190 Cal.App.4th 475, 482, fn. 6; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1097; see also *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.)

Accordingly, we will direct the trial court to correct the minute order and abstract of judgment to strike the parole revocation restitution fine.

III. DISPOSITION

The minute order and judgment are modified to strike the parole revocation restitution fine under Penal Code section 1202.45. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Grover, J.

People v. Castillon
H042690

Court of Appeal, Sixth Appellate District - No. H042690

S251221

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

PEDRO MEDINA CASTILLON, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice