IN THE SUPREME COURT OF THE UNITED STATES

CHARLES CHAD GIESE

Petitioner

v.

STATE OF CALIFORNIA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT DIVISION SIX

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did Police Violated Giese's *Miranda* Rights by Interrogating Him While He was in Custody?

II. By Excluding Evidence of the Decedent's Drug Use, Was Giese Deprived of His Constitutional Right to Present a Defense?

III. Did the Prosecutor Commit Prejudicial Misconduct by Misstating the Law During Closing Argument

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Case No.

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES CHAD GIESE

Petitioner

v.

STATE OF CALIFORNIA

Respondent

Petitioner, CHARLES CHAD GIESE, respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division Six (Case No. B292208)

OPINION BELOW

The CCA affirmed Giese's conviction and denied rehearing. (Case No. B292208) (Appendix A) The CSC summarily denied review. (Case No. S261456) (Appendix B)

JURISDICTION

On May 27, 2020, the CSC denied review. (Appendix B) The Court has jurisdiction. 28 U.S.C. § 1257(A).

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const. amends. V, VI, XIV.

STATEMENT OF THE CASE

A. State Trial Court Proceedings

The jury convicted Giese of willful, deliberate, and premeditated murder (Cal. Penal Code, §§ 187, 189) and found true allegations that in committing the murder he used two deadly weapons, i.e., a baseball bat and a knife.[1] (§ 12022, subd. (b)(1)).

The trial court sentenced him to 26 years to life in state prison.

B. State Court Appellate Proceedings

The CCA affirmed Giese's conviction. (Case No. B292208) The CSC denied review. (Case No. S261456))

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[1] All references are to the California Penal Code unless otherwise stated.

STATEMENT OF FACTS
ELICITED FROM THE CCA'S OPINION
(Footnotes Contain Facts that Giese Believes Should Have Been Included)

In early 2015,[2] appellant began renting a room in Walter Vallivero's mobile home. Shortly after appellant moved in, the manager of the mobile home park began receiving complaints from other residents about frequent loud arguments at Vallivero's home.[3] There were also complaints that appellant had urinated in public and was acting strangely.[4] Several residents requested that appellant be ordered to leave the mobile home park. Shawn Reed, the owner of the park, sent Vallivero a letter outlining the complaints regarding appellant and stating that he would be asked to leave the park if his inappropriate behavior continued.

On September 5, the police were called to Vallivero's home regarding a physical altercation between appellant and Vallivero. Appellant told the police that he and Vallivero were arguing about trash

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[2] All date references are to the year 2015.

[3] After appellant moved in with Vallivero, the two engaged in frequent arguments in which Vallivero did most of the arguing and talking, while appellant was pretty quiet. (9RT 2461-2462; AOB 18) Vallivero typically talked down to appellant and said things like, "I hate you." (9RT 2458-2460; 10RT 2729; AOB 18) Neighbor/witness Sarah Demolar heard them argue constantly and heard Vallivero tell appellant, "I'll blow your fucking face off." (10RT 2730; 12RT 3415- 3416, 3425; AOB 19) Neighbor/witness Joshua Demolar heard Vallivero say to appellant: "I will shoot you in the face." (10RT 2770- 2771; AOB 19)

[4] Appellant had been treated by mental health for schizophrenia. (1CT 176; AOB 21)

in the kitchen when Vallivero reached into the cushion on the couch and pulled out a BB gun. Appellant grabbed the hand that was holding the gun and repeatedly punched Vallivero in the face. Vallivero told the responding officers that appellant repeatedly punched him in the face after he confronted appellant about the messy kitchen. According to Vallivero, whose face was bloody and swollen, it was appellant who grabbed the BB gun from the couch cushions before running outside.[5]

A few days later, Reed sent Vallivero a letter referring to the recent incident and revoking Vallivero's right to have appellant as a renter. On September 17, Reed sent Vallivero another letter informing him that appellant had 30 days to vacate the premises. Ten days later, Reed sent Vallivero a letter informing him that appellant had been observed recklessly driving in the mobile home park while intoxicated. Vallivero subsequently told Reed "he was having a hard time getting an agreement with [appellant] to vacate the park." On October 7, appellant was formally served with notice of the eviction proceedings against him.

On the morning of November 16, appellant's mother Brenda Caves called 911 and reported that appellant had hit his roommate with a baseball bat, that the roommate did not appear to be breathing, and that appellant had put him in the bathtub. San Luis Obispo County Sheriff's Deputies Dustin

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[5] In the September 5, 2015 incident in which police were called to the scene, neighbor/witness Barbara Clark testified appellant looked scared, told her Vallivero had attacked him and pulled a gun on him, and asked her to call 911. (10RT 2713-2714; 2717; AOB 19) Vallivero had a .22 blood alcohol count. He asserted appellant had attacked him. (8RT 2249-2251; AOB 20) The responding deputy thought appellant's account was more credible and recommended that assault charges be filed against Vallivero. (8RT 2251; AOB 20)

Phillips and Jason Hall responded to Caves's house. Appellant was outside the house with Caves and his hand was bandaged.[6] Appellant requested medical assistance and Deputy Hall rode with him in an ambulance to the hospital. While they were in the ambulance, appellant said he cut his finger on a glass bottle and that his jaw hurt because he had been hit with a fist.

Vallivero's body was found in the bathtub. He had a laceration to his left arm, a deep incision wound on the back of his neck, lacerations and fractures along the left side of his head, stab wounds to his back, and numerous wounds to his head and body that were consistent with blunt force trauma. Vallivero also had defensive wounds on his forearms, hands, and wrists, and bruises on the right side of his torso. The cause of death was blunt force injuries to the head. Toxicology results showed that Vallivero had a 0.19 blood alcohol level; tests for controlled substances were negative.

Appellant was interviewed at the hospital and later at the sheriff's station.[7] He said he had just finished cleaning the kitchen when Vallivero arrived home after buying beer and told him to "get the fuck

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[6] Deputies ordered appellant to come out of his mother's house and to walk backwards toward the deputies, who patted him down on the street. After he came out of the house, a law enforcement officer (deputy or detective) was with him at all times. (5RT 1210, 1212, 1217, 1224-1225, 1238, 1241-1242; 11RT 3033; 1CT 205; AOB 31-32)

[7] The detectives shut the door to appellant's hospital room during the hospital interview. They accompanied appellant when they allowed him to use the bathroom and take smoke breaks. (5RT 1265; AOB 38)

> out of [his] house."[8] Appellant became "heated" and armed himself with a rock because he was going to walk past Vallivero and was "sick of [Vallivero's] shit." Vallivero told appellant, "I'm going to kill you. You're going to fucking die."[9] Vallivero punched appellant. Appellant hit Vallivero with the rock and struck him approximately three times on the head with a beer bottle. The bottle broke and Vallivero fell backwards onto the couch. Appellant picked up a baseball bat and hit Vallivero with it, causing Vallivero to fall to the floor.
>
> Appellant continued to hit Vallivero with the bat as Vallivero lay motionless on the floor. Appellant then retrieved a knife and tried to stab Vallivero in the chest "to make sure that he was gone." The knife would not penetrate Vallivero's chest, so appellant stabbed him in the neck.
>
> After placing Vallivero's body in the bathtub, appellant drank Vallivero's beer and attempted to clean the house. He also considered fleeing, but ultimately called Caves and told her what had happened.
>
> Appellant believed that he had to defend himself because Vallivero "kept punching" him, but

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[8] Vallivero was drunk and on meth at the time of the incident. (11RT 3036; 1CT 211; 2T 469-471, ,475-477; AOB 22-23, 33)

[9] Appellant was out on the patio, Vallivero was swearing at him and threatened to kill him, and when appellant tried to enter the house, Vallivero blocked his entry and cold cocked him in the jaw. Appellant was scared. When he responded by attacking Vallivero, possibly with a rock, and then with a beer bottle, bat, and knife, he didn't stop and couldn't stop; he was "in overdrive." He thought Vallivero was going to kill him. (11RT 3036; 2CT 469-471, 475-477, 483, 500, 525; AOB 22-24) The incident happened really fast; appellant feared for his life and defended himself against Vallivero who kept coming at him. (2CT 468, 474, 485, 489, 491; AOB 24-25)

> acknowledged that Vallivero had struck him only once or twice. Appellant felt that his conduct was due to feelings of frustration that "went way overboard" and added that if he could "take it back [he] would."

REASONS TO GRANT CERTIORARI

I. Certiorari Should Be Granted to Determine if the Police Violated Giese's *Miranda* Rights by Interrogating Him While He was in Custody

A. Introduction

When the deputies responded to the 911 call to "collect and control" Giese, they kept him under their control and knew he was the only suspect in a reported homicide. (5RT 1222- 1223, 1237) While confined, the deputies subjected him to custodial interrogation without advising him of his constitutional right to remain silent. *Miranda v. Arizona*, 384 U.S. 436 (1966) Because the police significantly deprived Giese of his freedom and then questioned him, the police should have advised him of his privilege against self incrimination. Also, because the deputies violated Giese's *Miranda* rights, Giese's statements should have been suppressed.

B. Custodian Interrogation

The Fifth Amendment right against self-incrimination

requires the exclusion of statements elicited in a custodial interrogation unless the suspect was first issued warnings pursuant to *Miranda*, 384 U.S. at 444-45. *Miranda* and its progeny govern the admissibility of statements made during custodial interrogation in both state and federal courts. See *id*.

Miranda safeguards are required when a suspect is (1) "in custody" and (2) subject to "interrogation" by the government. *Miranda*, 384 U.S. at 444. A suspect is in custody when "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (quoting *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (per curiam)).

An "interrogation" includes both express questioning and its "functional equivalent." *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). This includes any words or actions that an officer could reasonably have foreseen would "elicit an incriminating response." *Id.*; see also *Pennsylvania v. Muniz,* 496 U.S. 582, 600-01, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990) (plurality opinion).

"[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege...." *Miranda,* 384 U.S. at 478-479.

Incommunicado interrogation in a police dominated atmosphere generates "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

Miranda safeguards exist, in part, "to ensure that the police do not coerce or trick captive suspects into confessing." *Berkemer v. McCarthy,* 468 U.S. 420, 433 (1984).

C. The Deputies Subjected Giese to Custodial Interrogation in Violation of *Miranda*

The deputies took Giese, the only suspect, into custody and confined him until law enforcement could interrogate him. (5RT 1222-1223, 1237) When the deputies arrived, they ordered Giese to come outside and walk backwards toward them. The deputies

then patted Giese down on the street. (5RT 1210, 1212, 1224-1225)

The watch commander, fire department medics, and an ambulance responded to the scene. A deputy confined Giese. (5RT 1217, 1225) A deputy accompanied Giese in the ambulance to the hospital; another deputy followed in a patrol car. (5RT 1217, 1226) Deputies escorted Giese to the emergency room and stayed with him until Detective Marquez arrived. Then, they stationed themselves in the hallway. (5RT 1238; 11RT 3033)

Because Giese said Vallivero was dead, the deputies subjected Giese to prolonged interviews at the hospital and sheriff's station to get him to admit his *degree* of culpability. The officers gave evasive answers when Giese asked if he was being "booked." Detective Paul interrogated Giese at his curtained bedside, with Detective Marquez and the two deputies stationed just outside for more than 30 minutes. (5RT 1206)

Because law enforcement knew Giese was the prime suspect, they confined and extensively interrogated him without advising him of his constitutional right to remain silent. *Miranda,* 384 U.S. at 478-479. Because the police significantly

deprived Giese of his freedom and then questioned him to elicit incriminating responses, the police should have advised him of his privilege against self incrimination. Giese's *Miranda* rights were violated and his statements should have been suppressed.

II. Certiorari Should Be Granted Because, by Excluding Evidence of the Decedent's Drug Use, Giese Was Deprived of His Constitutional Right to Present a Defense

A. Introduction

The trial court excluded all reference to the decedent's drug and alcohol use. (13RT 3611) Giese's defense that, the evidence showed that Giese acted out of fear for his life and did not intend to kill the decedent, had probative value. By excluding the evidence, which reflected why Giese responded to the decedent, Giese was deprived of his right to present his defense to the jury. Giese's perceptions of the decedent's actions proved that Giese acted because he believed the decedent intended to kill him.

B. A Criminal Defendant Has the Constitutional Right to Present a Defense

A criminal defendant has the constitutional right to present a defense, including his version of the facts and witnesses who will testify on his behalf. *Washington v. Texas,* 388 U.S. 14, 19

(1967) In light of this constitutional standard, the trial court may not apply evidentiary rules mechanistically to deprive a defendant of the opportunity to present legitimate exculpatory evidence. *Crane v. Kentucky,* 476 U.S. 683, 690-691 (1986); *Chambers v. Mississippi,* 410 U.S. 284, 302-303 (1973).

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, [*Chambers v Mississippi*, 410 U.S. 284], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, [citations], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.] . . . We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. [Citations.] . . . In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' [Citations.]" *Crane*, 476 U.S. at 690-691; see also *Washington v. Texas*, 388 U.S. at 19; *Chambers v. Mississippi,* 410 U.S. 284.

C. Methamphetamine Adversely Affects a Person's Mind

Methamphetamine use significantly impacts a person's mind and body. Methamphetamine use can cause very severe disturbances in thinking similar to those associated with paranoid psychosis or manic-depressive illness. *People v. Enraca,* 53 Cal.4th 735, 745-46 (2012).

"[P]robably the most common characteristic would be … an irrational fear that someone is trying to hurt you." A minor threat may be perceived as a very severe and life-threatening situation. Methamphetamine use is believed to produce these symptoms by releasing "adrenalin-type chemicals." The half-life of methamphetamine is typically 11 hours. However, the effects of methamphetamine intoxication may last much longer, depending on the individual. *People v. Enraca*, 53 Cal. 4th at 745-46.

Chronic methamphetamine usage can produce a biochemical impairment of the brain. When this occurs, the extent of debilitation cannot be determined by the level of methamphetamine found in the blood, since the effect of the dosages taken over time is cumulative. A "rage reaction" is

essentially a lesser form of amphetamine psychosis in which the biochemically impaired user reacts irrationally or violently to a true sensory stimulus. A person experiencing a rage reaction acts without thought . . .” *People v. Valencia,* 43 Cal. 4th 268, 278 (2008).

D. Giese Was Deprived of His Right to Present a Defense

The decedent’s prior drug use would have corroborated Giese’s belief about the decedent’s behavior. Evidence of the decedents past drug use would have solidified and corroborated Giese’s perception of the decedent and justified Giese’s need to act in self-defense. The evidence and testimony would have undermined the prosecution’s case by reinforcing Giese’s perceptions about the decedent’s dangerousness.

The jury needed to understand Giese’s mind. The jury needed to understand that Giese acted out of fear for his life. The jury’s understanding of Giese’s state of mind was vital to his defenses; excluding the evidence gave the jury an unrealistic picture of the circumstances surrounding the incident. The trial court’s exclusion of the evidence about the decedent’s drug use

and how it affected Giese's perceptions of the decedent deprived Giese of due process, a fair trial, and the right to prepare and present a defense. U.S. Const. amends. V, VI, XIV.

III. Certiorari Should Be Granted Because the Prosecutor Committed Prejudicial Misconduct by Misstating the Law During Closing Argument

A. Introduction

The prosecutor misstated the law several times in closing argument. The prosecutor improperly argues that motive equals murder, that hiding evidence meant Giese committed a murder, that self-defense required that Giese believed he was going to be killed, that what the neighbors believed constituted the "average person" standard for provocation, that Giese committed murder if the jury did not find imperfect self-defense, that premeditation was equivalent to deciding whether to stop at a yellow light, that to justify the killing, Giese would have had to suffer an "annihilated . . . jaw," that reasonable doubt equated to a reasonable decision.

The prosecutor's repeated misstatements of law in closing argument constituted prejudicial misconduct and deprived Giese

of due process and a fair trial. *Berger v. United States,* 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935)

B. The Prosecutor Must Not Commit Misconduct

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States,* 295 U.S. at 88.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially,

assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id.*

C. The Prosecutor Committed Prejudicial Misconduct

The prosecutor engaged in massive, pervasive and consequential conduct:

1. The Prosecutor Improperly Argued That Motive Means First Degree Murder

The prosecutor argued: "There is clear motive in this case, the eviction." Giese was "sick of . . . [Vallivero] trying to ruin his life. Walter was verbally abusive. Claims that he basically had to live out of his car because of this. He claims he got into debt over this. He was in anxiety because of this guy. And when you heard and saw him on that tape, you could feel the anger coming back to him. That anger that you saw is proof of motive, and *if there is motive, there's first degree murder* because it came to him before." (18RT 5113) (Italics added.)

The prosecutor misstated the law. Motive does not turn a homicide into first degree murder. It is not an element of murder or of premeditated murder (*People v. Hillhouse,* 27 Cal.4th 469, 503-504 (2002)) and it does not transform a homicide to first

degree murder. The prosecutor's argument that "if there is motive, there's first degree murder" (18RT 5113) misstated the law and constituted misconduct. *People v. Hill,* 17 Cal.4th 800, 830 (1998).

2. The Prosecutor Improperly Argued That Giese Committed Murder Because He Hid Evidence

The prosecutor argued that Giese's "hiding evidence" by cleaning up the crime scene after killing Vallivero, "as the law tells you, that means he in his own mind knows he is guilty of murder." (18RT 5114) This misstated the law.

Although trying to hide evidence may show consciousness of guilt of *some* homicide charge, where the theory of defense was that Giese was not guilty of premeditated murder, but acted in self-defense or was guilty only of the lesser crime of voluntary manslaughter, the prosecutor's argument misstated the law. Giese's conduct after Vallivero was dead does not mean he knew he was guilty of *murder*. *People v. Yeoman,* 31 Cal.4th 93, 131 (2003).

3. The Prosecutor Improperly Argued That Self-defense Requires That Giese Reasonably Believed He Was Going to Be Killed

The prosecutor argued: "If you find justifiable homicide as a complete defense to murder, you must find the defendant reasonably believed he was in imminent danger of *being killed*, right then and there, which obviously he wasn't." (18RT 5115) Further: "[T]he defendant acted in imperfect self-defense if he actually believed he was in imminent danger of *being killed* . . . " (18RT 5120) (Italics added.)

The prosecutor misstated the law. The fear must be of Imminent *harm*; the defendant need not fear imminent *death.* "The defendant's fear must be of *imminent* danger to life or great bodily injury." *People v. Humphrey,* 13 Cal.4th 1073, 1082 (1996) (perfect self-defense); *In re Christian S.,* 7 Cal.4th 768, 773 (1994).

4. The Prosecutor Improperly Misstated the "Average Person" Standard for Provocation

The prosecutor stated provocation is what would cause "a person of average disposition to act rashly and without due deliberation," which could be tested by what Giese's neighbors,

Kristy Tolbert and Josh Demolar did in response to the ongoing conflict between Giese and Vallivero. Tolbert "heard it every day" and "was numb to it." Neither Tolbert nor Demolar thought enough about it to call 911. Ergo, "the average person would not have acted rashly and without due deliberation." (18RT 5117-5118)

The prosecutor misstated the standard for provocation, which is not how a threatened person's *unthreatened neighbors* would react. Rather, "[t]he focus is on the provocation – the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly." *People v. Najera,* 138 Cal.App.4th 212, 224 (2006). "If an ordinary person of average disposition, *under the same circumstances*, would also react in this manner, the provocation is adequate." *People v. Wright,* 242 Cal.App.4th 1461, 1482 (2015), citing *People v. Beltran* 56 Cal.4th 935, 950 (2013); emphasis added.) Telling the jury that provocation should be judged by how Giese's neighbors reacted to overhearing the ongoing arguments misstated the law.

5. The Prosecutor Improperly Urged the Jury to Find Murder if the Jury did not Find imperfect self-defense (18RT 5120)

The prosecutor erroneously stated, "If you find there is no imperfect self-defense, then it's murder." (18RT 5120) Although perfect self-defense requires an actual and objectively reasonable belief in the need to defend and imperfect self-defense allows that belief to be objectively unreasonable *People v. Humphrey,* 13 Cal.4th at 1082, the jury still could find Giese guilty of a lesser included offense to murder, i.e., heat of passion voluntary manslaughter, a separate legal theory and separate lesser included offense from perfect and imperfect self-defense. See, *People v. Rios,* 23 Cal.4th 450, 454 (2000).

Unreasonable or imperfect self-defense is based on a defendant's acts under an actual but unreasonable belief in the need to defend himself against imminent peril of death or great bodily harm. *In re Christian S.,* 7 Cal.4th at 779, fn. 3. A heat of passion killing, on the other hand, does not involve an *unreasonable belief* in the need to defend oneself, but rather, actions in response to objectively reasonable provocation. *People v. Wright,* 242 Cal.App.4th at 1481. Telling the jury that if there

is no imperfect self-defense, then it is murder, misstated the law.

6. The Prosecutor Improperly Misstated the Law on Premeditation

The prosecutor likened premeditation to the "every day," of driving through a yellow light. The prosecutor argued premeditation concerns "the extent of the reflection. And in jury selection we talked about the idea of coming to a yellow light, which we do every day. And in that instant, you are looking to see if someone is coming the other way, you are looking to your side, you are looking to the other side, you are checking your speed, you are checking to see how long that light was yellow. And in that instant, you've carefully weighed and considered all of your options and come to a decision." (18RT 5125)

The prosecutor misstated the law because premeditation and deliberate murder differs from an "every day" decision such as deciding to go through a yellow light; it requires "substantially more reflection" than that type of everyday decision. *People v. Boatman,* 221 Cal.App.4th 1253, 1264 (2014)

7. The Prosecutor Improperly Argued That to Justify the Killing, Giese Would Have Had to Suffer an "Annihilated . . . Jaw." (18RT 5192)

In rebuttal, the prosecutor improperly argued that to justify the killing, Giese would have had to suffer an "annihilated his jaw." (18RT 5192) None of Giese's defenses – perfect and imperfect self-defense and heat of passion voluntary manslaughter – require a person to wait until they suffer "annihilating" injuries to respond with force. The defendant must act from fear of "imminent" harm, that is, harm that is "apparent, present, immediate, and must be instantly dealt with." *People v. Lopez,* 199 Cal.App.4th 1297, 1304 (2011). The defendant must face "imminent" harm and is not required to wait until he actually suffers harm of "annihilating" injuries. The prosecutor misstated the law.

8. The Prosecutor Misstated the Reasonable Doubt Standard of Proof

The prosecutor argued. "Reasonable doubt, it's not beyond all doubt . . . It's the same standard used even in traffic court. What it means is if defense scenario is possible, sure possible, but still unreasonable, the law says reject that which is possible but

unreasonable . . . If what the People are saying is reasonable and defense says it's possible but unreasonable, that's a guilty verdict." (18RT 5194)

The argument misstated the law. While the prosecution can argue to the jury that the defense evidence or theory of the case is unreasonable or unbelievable, it is prosecutorial misconduct to argue the beyond a reasonable doubt standard is met if the jury could find defendant guilty based on a "reasonable" account of the evidence. *People v. Centeno,* 60 Cal.4th 659, 673 (2014).

D. The Prosecutor's Multiple Misstatements of Law Constituted Prosecutorial Misconduct

A prosecutor commits misconduct by consistently misstating the applicable law. *People v. Marshall,* 13 Cal.4th 799, 831 (1996); *People v. Boyette,* 29 Cal.4th 381, 426 (2002). The prosecutor's multiple misstatements of law throughout closing and rebuttal argument, unfairly urged the jury to convict Giese of first degree murder.

E. Defense Counsel Rendered Ineffective Assistance by Failing to Object to the Prosecutorial Misconduct

Despite the prosecutor's multiple instances of misconduct,

defense counsel failed to object and ask the court to admonish the prosecutor. *Centeno*, 60 Cal.4th at 663-664; *People v. Fosselman,* 33 Cal.3d 572, 584 (1983). By failing to object, trial counsel's performance fell below professional norms, and prejudice from counsel's deficiency such that a reasonable probability exists that, but for trial counsel's error, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 693-694 (1984).

CONCLUSION

Giese respectfully requests that certiorari be granted.

DATED: September 21, 2020

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

_____
Fay Arfa, Attorney for Appellant

APPENDIX

Filed 2/26/20 P. v. Giese CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHARLES CHAD GIESE, Defendant and Appellant.	2d Crim. No. B292208 (Super. Ct. No. 15F-10827) (San Luis Obispo County)

Charles Chad Giese appeals the judgment entered after a jury convicted him of willful, deliberate, and premeditated murder (Pen. Code,[1] §§ 187, 189) and found true allegations that in committing the murder he used two deadly weapons, i.e., a baseball bat and a knife (§ 12022, subd. (b)(1)). The trial court sentenced him to 26 years to life in state prison and ordered him to pay fines and fees including a $7,800 restitution fine (§ 1202.4, subd. (b)), a $30 criminal conviction assessment (Gov. Code,

[1] All statutory references are to the Penal Code unless otherwise stated.

APPENDIX A

§ 70373), and a $40 court operations assessment (§ 1465.8, subd. (a)(1)). Appellant contends (1) his extrajudicial statements to law enforcement were admitted against him in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*); (2) the evidence is insufficient to support his conviction of first degree murder; (3) the court erred in excluding evidence of the victim's drug use; (4) the jury was erroneously instructed on the right of self-defense available to a person who starts a fight or engages in mutual combat; (5) the prosecutor committed misconduct during closing argument, and defense counsel provided ineffective assistance by failing to object; and (6) the cumulative effect of the alleged errors compels the reversal of his conviction. Appellant also contends the court erred in imposing the criminal conviction and court operations assessments without first determining his ability to pay those assessments, as contemplated in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We affirm.

STATEMENT OF FACTS

In early 2015,[2] appellant began renting a room in Walter Vallivero's mobile home. Shortly after appellant moved in, the manager of the mobile home park began receiving complaints from other residents about frequent loud arguments at Vallivero's home. There were also complaints that appellant had urinated in public and was acting strangely. Several residents requested that appellant be ordered to leave the mobile home park. Shawn Reed, the owner of the park, sent Vallivero a letter outlining the complaints regarding appellant and stating that he would be asked to leave the park if his inappropriate behavior continued.

[2] All date references are to the year 2015.

On September 5, the police were called to Vallivero's home regarding a physical altercation between appellant and Vallivero. Appellant told the police that he and Vallivero were arguing about trash in the kitchen when Vallivero reached into the cushion on the couch and pulled out a BB gun. Appellant grabbed the hand that was holding the gun and repeatedly punched Vallivero in the face. Vallivero told the responding officers that appellant repeatedly punched him in the face after he confronted appellant about the messy kitchen. According to Vallivero, whose face was bloody and swollen, it was appellant who grabbed the BB gun from the couch cushions before running outside.

A few days later, Reed sent Vallivero a letter referring to the recent incident and revoking Vallivero's right to have appellant as a renter. On September 17, Reed sent Vallivero another letter informing him that appellant had 30 days to vacate the premises. Ten days later, Reed sent Vallivero a letter informing him that appellant had been observed recklessly driving in the mobile home park while intoxicated. Vallivero subsequently told Reed "he was having a hard time getting an agreement with [appellant] to vacate the park." On October 7, appellant was formally served with notice of the eviction proceedings against him.

On the morning of November 16, appellant's mother Brenda Caves called 911 and reported that appellant had hit his roommate with a baseball bat, that the roommate did not appear to be breathing, and that appellant had put him in the bathtub. San Luis Obispo County Sheriff's Deputies Dustin Phillips and Jason Hall responded to Caves's house. Appellant was outside the house with Caves and his hand was bandaged. Appellant

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requested medical assistance and Deputy Hall rode with him in an ambulance to the hospital. While they were in the ambulance, appellant said he cut his finger on a glass bottle and that his jaw hurt because he had been hit with a fist.

Vallivero's body was found in the bathtub. He had a laceration to his left arm, a deep incision wound on the back of his neck, lacerations and fractures along the left side of his head, stab wounds to his back, and numerous wounds to his head and body that were consistent with blunt force trauma. Vallivero also had defensive wounds on his forearms, hands, and wrists, and bruises on the right side of his torso. The cause of death was blunt force injuries to the head. Toxicology results showed that Vallivero had a 0.19 blood alcohol level; tests for controlled substances were negative.

Appellant was interviewed at the hospital and later at the sheriff's station. He said he had just finished cleaning the kitchen when Vallivero arrived home after buying beer and told him to "get the fuck out of [his] house." Appellant became "heated" and armed himself with a rock because he was going to walk past Vallivero and was "sick of [Vallivero's] shit." Vallivero told appellant, "I'm going to kill you. You're going to fucking die." Vallivero punched appellant. Appellant hit Vallivero with the rock and struck him approximately three times on the head with a beer bottle. The bottle broke and Vallivero fell backwards onto the couch. Appellant picked up a baseball bat and hit Vallivero with it, causing Vallivero to fall to the floor.

Appellant continued to hit Vallivero with the bat as Vallivero lay motionless on the floor. Appellant then retrieved a knife and tried to stab Vallivero in the chest "to make sure that

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he was gone." The knife would not penetrate Vallivero's chest, so appellant stabbed him in the neck.

After placing Vallivero's body in the bathtub, appellant drank Vallivero's beer and attempted to clean the house. He also considered fleeing, but ultimately called Caves and told her what had happened.

Appellant believed that he had to defend himself because Vallivero "kept punching" him, but acknowledged that Vallivero had struck him only once or twice. Appellant felt that his conduct was due to feelings of frustration that "went way overboard" and added that if he could "take it back [he] would."

DISCUSSION

Miranda *Motion*

Appellant contends the trial court erred in denying his motion to exclude the statements he made at the hospital and sheriff's station on the ground they were obtained in violation of *Miranda*. We are not persuaded.

Miranda provides that a person questioned by law enforcement after being "taken into custody" must first be warned that he or she has the right to remain silent, that any statements that he or she makes may be used against the person, and that he or she has a right to the presence of retained or appointed counsel. (*Miranda*, *supra*, 384 U.S. at p. 444.) For the *Miranda* rule to apply, there must be an interrogation by the police while the suspect is in police custody. (*Id.* at p. 478.)

Whether a person is in custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (*Stansbury v. California* (1994) 511 U.S. 318, 323 [128 L.Ed.2d 293].) "The question whether [the] defendant was

in custody for *Miranda* purposes is a mixed question of law and fact." (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) "[A]n appellate court must 'apply a deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.)

"To determine whether an interrogation is custodial we consider a number of circumstances, including: 'whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation.'" (*People v. Torres* (2018) 25 Cal.App.5th 162, 172-173.)

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At the hearing on appellant's suppression motion, Deputy Hall testified that appellant was subjected to a patdown search for the deputies' safety when they first encountered him at Caves's house. Appellant was never handcuffed and Deputy Hall never asked him any questions about Vallivero's killing. Deputy Hall rode with appellant in the ambulance to the hospital to ensure the paramedics' safety while Deputy Phillips followed in the patrol car.

Detective David Marquez arrived at the hospital and introduced himself to appellant as he lay in a bed in the emergency room. Detective Marquez asked appellant if he needed anything and told him he would speak to him after he was treated.

Detective Nathan Paul subsequently arrived and introduced himself to appellant. Detective Paul told appellant he was there to find out what had happened and asked if appellant was willing to accompany him to the sheriff's station to talk. Appellant said "okay" then added, "I don't know my rights. . . . I defended myself." Detective Paul responded "you're not under arrest. If you defended yourself, that's what I want to hear about." Appellant replied: "My mom's working on an attorney . . . and [she] told me not to talk to anyone cause I could incriminate myself . . . . I don't know my rights, so um, I was in a fight and I defended myself and – and it got really bad and then I didn't know what to do after that point. I tried to clean up the mess." Appellant proceeded to provide a detailed account of what had happened. At one point during the interview, appellant was allowed to use the bathroom.

After appellant had been treated, Detective Paul asked if he was still willing to accompany him to the sheriff's station for

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further questioning. Appellant asked if he could smoke a cigarette after they arrived at the sheriff's station and the detective replied, "When we get there we'll let you . . . stand outside and . . . smoke as many as you need." Appellant then asked, "I know you've probably gotta book me, right?" The detective replied in the negative and told appellant he was not being handcuffed and was a "free walking man."

After they arrived at the sheriff's station, appellant was allowed to smoke a cigarette outside and use a restroom without any supervision. Before conducting the interview, Detective Paul confirmed with appellant that he was there voluntarily and reiterated he was not under arrest. During the interview, appellant took at least three cigarette breaks and a bathroom break. Near the end of the interview, appellant was told he was being detained for killing Vallivero.

In denying appellant's suppression motion, the court found that appellant had voluntarily agreed to be interviewed; that there was no custodial interrogation because a reasonable person in appellant's position would have felt free to terminate the interview until the point he was told he was being detained; and that appellant had never unequivocally indicated that he wanted an attorney. The court further found that law enforcement had not dominated or controlled the course of the interrogation and that appellant had "set the pace" of the interview.

The court did not err in denying appellant's motion. At both the hospital and the sheriff's station, appellant was free of physical restraints and was advised he was not under arrest and was free to leave. Moreover, no weapons were displayed and there is nothing to indicate that the deputies and detectives who spoke to him were aggressive or accusatory or employed special

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techniques to pressure him. On the contrary, every effort was made to ensure that appellant was comfortable and that his needs were accommodated. The court thus correctly found, under the totality of the circumstances, that appellant's statements at the hospital and the sheriff's station were not the result of a custodial interrogation. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1400.) The cases appellant cites in support of his claim are plainly inapposite.[3]

To the extent appellant claims that his statements were involuntary because the detectives exploited his mental illness and unduly prolonged his interview at the sheriff's station, those were not raised below and are thus forfeited. In any event, appellant fails to establish that the detectives who interviewed him engaged in coercive conduct. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [recognizing that "[c]oercive police activity is a necessary predicate" to a finding that a confession was involuntary].) Moreover, the identified circumstances that allegedly rendered appellant's statements involuntary took place at the sheriff's station. Because appellant had already provided a detailed account of the incident while he was at the hospital, any error in admitting the statements he subsequently made at the sheriff's station was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]; *People v. Case* (2018) 5 Cal.5th 1, 22 [*Miranda* violations subject to harmless error standard of review set forth in *Chapman*].)

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[3] Appellant also fails to inform us that one of the cases upon which he relies, *People v. Boyer* (1989) 48 Cal.3d 247, has been disapproved to the extent it "may be read to suggest that an officer's subjective focus of suspicion is an independently relevant factor in establishing custody for the purposes of *Miranda* . . . ." (*People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

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Sufficiency of the Evidence

Appellant claims that his murder conviction must be reversed because the evidence is insufficient to prove he killed Vallivero with premeditation and deliberation. In reviewing this claim, we "must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054-1055, internal quotation marks omitted.) We "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid.*)

The "mental state [for first-degree murder] is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*People v. Chiu* (2014) 59 Cal.4th 155, 166.) The process of premeditation and deliberation does not require any extended period of time. (*People v. Watkins* (2012) 55 Cal.4th 999, 1026.) The test is one of the extent of reflection rather than the duration of time. (*Ibid.*)

Our Supreme Court has identified three categories of evidence relevant to establishing premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; *People v. Brooks* (2017) 3 Cal.5th 1, 58-59; *People v. Houston* (2012) 54 Cal.4th 1186, 1216.) The categories include events occurring before the

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killing that indicate planning, motive to kill, and manner of killing that reflects a preconceived design to kill. (*Anderson*, at pp. 26-27.) The factors are neither exclusive nor invariably determinative. (*Brooks*, at p. 59; *Houston*, at p. 1216.) Evidence of each category is not required to affirm a judgment of first degree murder. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605.) The factors are merely a guide in determining whether the evidence supports an inference that the killing occurred as a result of preexisting reflection rather than a rash impulse. (*Brooks*, at p. 59.)

Sufficient evidence supports appellant's conviction of attempted premeditated and deliberate murder. Appellant's arguments to the contrary fail to acknowledge the standard of review, which compels us to view the evidence in the light most favorable to the judgment. (*People v. Nguyen*, *supra*, 61 Cal.4th at pp. 1054-1055.)

Prior to the killing, appellant armed himself with a rock. After Vallivero allegedly punched appellant, appellant hit him on the head with the rock and proceeded to break a beer bottle over his head, causing him to fall on the couch. Appellant then armed himself with a baseball bat and repeatedly hit Vallivero in the head as he lay motionless on the ground. To make sure Vallivero was dead, appellant retrieved a knife and stabbed him in the neck. The circumstances and manner of the killing amply support the jury's findings of premeditation and deliberation. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1128 [recognizing that defendant's use of a second knife to inflict post mortem wounds, when considered in conjunction with the manner of killing, "could easily have led the jury to infer premeditation and

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deliberation"].) Appellant also expressed a motive for the killing by acknowledging he was angry about being evicted, was "sick of [Vallivero's] shit," and wanted him "gone." Appellant's claim of insufficient evidence thus fails.

Evidence of Vallivero's Drug Use

Appellant also contends the court abused its discretion and violated his due process rights by excluding evidence of Vallivero's drug use. We disagree.

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court has discretion to exclude relevant evidence when its prejudicial effect substantially outweighs its probative value. (Evid. Code, § 352.) Evidentiary rulings are reviewed for abuse of discretion, and a court's decision will be upheld unless it exceeds the bounds of reason. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197; see also *People v. Stitely* (2005) 35 Cal.4th 514, 550.)

When appellant was interviewed, he stated that Vallivero used methamphetamine and was "drinking and on meth" when the crime occurred. Prior to trial, the prosecution moved in limine to exclude any reference to Vallivero's methamphetamine and cocaine use as irrelevant and substantially more prejudicial than probative under Evidence Code section 352. The court granted the motion after finding that the evidence was both irrelevant and unduly prejudicial because no methamphetamine, cocaine, or other illicit drugs were found in Vallivero's system after his death. Later in the proceedings, defense counsel moved to admit Vallivero's medical records showing that Vallivero had admitted using methamphetamine and had been diagnosed as a

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chronic user of the drug. The court denied the motion and reiterated its prior ruling that evidence of Vallivero's methamphetamine use was unduly prejudicial under Evidence Code section 352.

The court did not err. Appellant contends that "his statements about how he personally experienced Vallivero to act unreasonably and violently *when Vallivero was using or high on meth* were relevant to show the reasonableness of appellant's fear and resulting actions." It is undisputed, however, that Vallivero was not under the influence of methamphetamine or any other illicit drug when he was killed. Moreover, it is not reasonably probable that appellant would have achieved a more favorable result had the challenged evidence been admitted. As the People aptly put it, "appellant's alleged belief that Vallivero was under the influence of methamphetamine, as opposed to just alcohol, had minimal or no probative value to any claim of self-defense." Accordingly, any error in excluding evidence of Vallivero's drug use was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Mullens* (2004) 119 Cal.App.4th 648, 659 [error in excluding evidence under Evidence Code section 352 reviewed under the harmless error standard set forth in *Watson*].)

Mutual Combat/Initial Aggressor (CALCRIM No. 3471)

The trial court instructed the jury on the doctrines of self-defense (CALCRIM No. 505) and imperfect self-defense (CALCRIM No. 571). Over appellant's objection, the jury was also instructed on the limitations of the right of self-defense to one who engaged in mutual combat or acted as the initial aggressor, as provided in CALCRIM No. 3471.[4] Appellant

[4] The jury was instructed as follows: "A person who engages in mutual combat or who starts a fight has a right to

contends the court committed prejudicial error and violated his federal constitutional rights by giving the mutual combat instruction. This contention lacks merit.

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Error in giving an inapplicable instruction is one of state law subject to the *Watson* test for prejudice, under which reversal is required if it is reasonably probable the defendant would have obtained a more favorable result in the absence of the error. (*Id.* at p. 1130; *Watson*, *supra*, 46 Cal.2d at p. 836.)

The court did not err in giving the challenged instruction. There was evidence from which the jury could have found that appellant not only engaged in mutual combat with Vallivero, but also acted as the initial aggressor. Although appellant offers his

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self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; [¶] 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; [¶] AND [¶] 3. He gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting, or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim of self-defense arose." (Italics omitted.)

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self-serving assertion that Vallivero initiated the incident by punching him, the jury was entitled to reject that assertion. According to Vallivero, appellant had been the initial aggressor of a prior fight between the two regarding the cleanliness of the kitchen. Moreover, appellant admitted that he approached Vallivero with a rock in his hand because he "knew" the two of them were going to fight. The jury could thus reasonably find that appellant intended to fight with Vallivero before Vallivero allegedly punched him.

Even if the instruction should not have been given, the error would be harmless. The jury was separately instructed pursuant to CALCRIM No. 3474 that "[t]he right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends." Appellant continued to use deadly force against Vallivero well after he had rendered Vallivero incapable of inflicting any injury upon him. No reasonable juror thus would have found that appellant killed Vallivero in self-defense or imperfect self-defense. (*People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201-202.)

The jury was also instructed pursuant to CALCRIM No. 200 that "[s]ome of the[] instructions may not apply, depending on your findings about the facts of the case." Because of this instruction, "the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381.) Because appellant does not rebut this presumption or otherwise demonstrate a reasonable probability that he would have achieved a more

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favorable result had the challenged instruction not been given, his claim fails. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.)

Prosecutorial Misconduct; Ineffective Assistance of Counsel

For the first time on appeal, appellant contends the prosecutor committed misconduct by misstating the law eight times in his closing argument. Anticipating our conclusion that these claims are forfeited because defense counsel did not object to any of the alleged misstatements, appellant alternatively contends that counsel's failure to object amounts to ineffective assistance.

Prosecutorial misconduct exists "'under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (*People v. Earp* (1999) 20 Cal.4th 826, 858.) In more extreme cases, a defendant's federal due process rights are violated when a prosecutor's improper remarks ""'infect[] the trial with unfairness,'"' making it fundamentally unfair. (*Ibid.*) ""'To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument.'" [Citation.] A court will excuse a defendant's failure to object only if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 349.)

Here, defense counsel did not object to the prosecutor's alleged misstatements and made no requests that the jury be admonished. Moreover, appellant has not established that objections or admonition would have been futile. Because the alleged misconduct consisted of purported misstatements of law,

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they could have easily been corrected by the trial court with an admonition. (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*).) Appellant's claims of prosecutorial misconduct are thus forfeited. (*Ibid*; *People v. Jackson*, *supra*, 1 Cal.5th at p. 349.)

We also reject appellant's claims that trial counsel provided ineffective assistance by failing to object. "A party claiming ineffective assistance must first demonstrate that his counsel's performance was deficient. [Citations.] In reviewing counsel's performance, we 'exercise deferential scrutiny.' [Citations.] To that end, it is up to [appellant] to show his counsel's performance was deficient because his '"representation fell below an objective standard of reasonableness . . . under prevailing professional norms."' [Citation.] Second, even after a party demonstrates ineffective assistance, he must also show he has been prejudiced, i.e., 'that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.] If [appellant's] showing as to either component is insufficient, the claim fails. [Citation.] Accordingly, if he cannot show prejudice, we may reject his claim of ineffective assistance, and need not address the adequacy of trial counsel's performance. [Citations.]" (*People v. King* (2010) 183 Cal.App.4th 1281, 1298; *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [80 L.Ed.2d 674].)

Moreover, "[t]he appellate record . . . rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) "'[T]he

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decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one' [citations], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence' [citation]." (*Centeno*, *supra*, 60 Cal.4th at p. 675.)

Appellant contends that during closing argument the prosecutor misstated the law by asserting (1) that "if there is motive, there's first degree murder"; (2) that appellant's efforts to clean up the crime scene after he killed Vallivero "means [that] he in his own mind knows he is guilty of murder"; (3) that appellant could not be found to have acted in self-defense unless he "reasonably believed he was in imminent danger of being killed"; (4) that the provocation element of voluntary manslaughter based on sudden quarrel or heat of passion was not established by evidence that Vallivero had previously threatened appellant, because two neighbors who allegedly heard Vallivero make such threats were not concerned enough to call the police; (5) that "if you find there is no imperfect self-defense, then it's murder"; (6) that the extent of reflection required for a finding of premeditation is similar to the extent of reflection a driver engages in when approaching a yellow traffic signal; (7) that for appellant's claim of self-defense to be valid, Vallivero "better have" hit appellant so hard that he "annihilated his jaw"; and (8) that reasonable doubt means "[i]f what the People are saying is reasonable and [the] defense says it's possible but unreasonable, that's a guilty verdict."

Even assuming that defense counsel provided deficient performance by failing to object to these arguments, appellant was not prejudiced because the jury was instructed that counsel's arguments were not evidence (CALCRIM No. 222) and that the

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jury was to follow the instructions given by the court even if counsel's comments conflicted with those instructions (CALCRIM No. 200). The jury was also properly instructed on reasonable doubt (CALCRIM Nos. 103, 220), motive (CALCRIM No. 370), hiding evidence as consciousness of guilt (CALCRIM No. 371), justifiable homicide based on self-defense (CALCRIM No. 505), provocation (CALCRIM No. 522), and voluntary manslaughter based on sudden quarrel or heat of passion (CALCRIM No. 570) and imperfect self-defense (CALCRIM No. 571). Absent evidence to the contrary, we presume the jury followed these instructions. (*People v. Johnson* (2015) 61 Cal.4th 734, 770; see also *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 ["We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate"].) Appellant offers no such evidence here, so his claim of ineffective assistance of counsel fails.

Dueñas

For the first time on appeal, appellant contends, in reliance on *Dueñas*, *supra*, 30 Cal.App.5th 1157, that the trial court erred by ordering him to pay a $30 criminal conviction assessment (Gov. Code, § 70373) and a $40 court operations assessment (§ 1465.8, subd. (a)(1)) without first determining his ability to pay those assessments. In *Dueñas*, the court held that imposing these assessments without a hearing on the defendant's ability to pay violates due process of law under both the federal and state constitutions. (*Dueñas*, at p. 1168.) Neither statute expressly prohibits the court from considering the defendant's ability to pay. By contrast, section 1202.4, subdivisions (b)(1) and (c) expressly prohibit the trial court from considering a defendant's ability to pay a restitution fine unless the fine exceeds $300.

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If the court imposes a restitution fine above the $300 statutory minimum, it may consider the defendant's ability to pay. (§ 1202.4, subd. (c).) Appellant was ordered to pay a $7,800 restitution fine, so he had the opportunity to bring to the court's attention any factors relevant to his ability to pay. (*People v. Avila* (2009) 46 Cal.4th 680, 729.) He did not do so, so he forfeited any challenges to the restitution fine. (*Ibid.*) Appellant likewise did not object to the two assessments he now challenges. We need not decide whether he forfeited his claims because under the circumstances present here, where appellant did not object to the $7,800 restitution fine, "he surely would not complain on similar grounds regarding an additional" $70 in assessments. (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.)

Cumulative Error

Appellant contends that the cumulative effect of the alleged errors deprived him of his due process rights and resulted in the denial of a fair trial. We reject this contention because there is no prejudicial error to cumulate. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1094.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J. TANGEMAN, J.

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Jacquelyn H. Duffy, Judge
Superior Court County of San Luis Obispo

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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Filed 3/25/20 P. v. Giese CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHARLES CHAD GIESE, Defendant and Appellant.	2d Crim. No. B292208 (Super. Ct. No. 15F-10827) (San Luis Obispo County) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed on February 26, 2020, be modified as follows:

1. On page 11, the first sentence of the first full paragraph beginning "Sufficient evidence" is deleted and replaced with the following:

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Sufficient evidence supports appellant's conviction of willful, premeditated and deliberate murder.

2. On page 19, the last sentence of the first partial paragraph beginning "Appellant offers no such evidence" is deleted and replaced with the following:

Moreover, the prosecutor's allegedly improper arguments were brief and the evidence of appellant's guilt was overwhelming. (See, e.g., *People v. Centeno* (2014) 60 Cal.4th 659, 676-677 [applying harmless error analysis to claim that trial counsel provided ineffective assistance by failing to preserve clam that prosecutor repeatedly misstated the law on reasonable doubt during rebuttal].) Appellant's claims of ineffective assistance of counsel thus fail.

This modification does not change the judgment.

Appellant's petition for rehearing is denied.

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Filed 2/26/20 P. v. Giese CA2/6 (unmodified opinion)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHARLES CHAD GIESE, Defendant and Appellant.	2d Crim. No. B292208 (Super. Ct. No. 15F-10827) (San Luis Obispo County)

Charles Chad Giese appeals the judgment entered after a jury convicted him of willful, deliberate, and premeditated murder (Pen. Code,[1] §§ 187, 189) and found true allegations that in committing the murder he used two deadly weapons, i.e., a baseball bat and a knife (§ 12022, subd. (b)(1)). The trial court sentenced him to 26 years to life in state prison and ordered him to pay fines and fees including a $7,800 restitution fine (§ 1202.4, subd. (b)), a $30 criminal conviction assessment (Gov. Code,

[1] All statutory references are to the Penal Code unless otherwise stated.

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§ 70373), and a $40 court operations assessment (§ 1465.8, subd. (a)(1)). Appellant contends (1) his extrajudicial statements to law enforcement were admitted against him in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*); (2) the evidence is insufficient to support his conviction of first degree murder; (3) the court erred in excluding evidence of the victim's drug use; (4) the jury was erroneously instructed on the right of self-defense available to a person who starts a fight or engages in mutual combat; (5) the prosecutor committed misconduct during closing argument, and defense counsel provided ineffective assistance by failing to object; and (6) the cumulative effect of the alleged errors compels the reversal of his conviction. Appellant also contends the court erred in imposing the criminal conviction and court operations assessments without first determining his ability to pay those assessments, as contemplated in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We affirm.

STATEMENT OF FACTS

In early 2015,[2] appellant began renting a room in Walter Vallivero's mobile home. Shortly after appellant moved in, the manager of the mobile home park began receiving complaints from other residents about frequent loud arguments at Vallivero's home. There were also complaints that appellant had urinated in public and was acting strangely. Several residents requested that appellant be ordered to leave the mobile home park. Shawn Reed, the owner of the park, sent Vallivero a letter outlining the complaints regarding appellant and stating that he would be asked to leave the park if his inappropriate behavior continued.

[2] All date references are to the year 2015.

On September 5, the police were called to Vallivero's home regarding a physical altercation between appellant and Vallivero. Appellant told the police that he and Vallivero were arguing about trash in the kitchen when Vallivero reached into the cushion on the couch and pulled out a BB gun. Appellant grabbed the hand that was holding the gun and repeatedly punched Vallivero in the face. Vallivero told the responding officers that appellant repeatedly punched him in the face after he confronted appellant about the messy kitchen. According to Vallivero, whose face was bloody and swollen, it was appellant who grabbed the BB gun from the couch cushions before running outside.

A few days later, Reed sent Vallivero a letter referring to the recent incident and revoking Vallivero's right to have appellant as a renter. On September 17, Reed sent Vallivero another letter informing him that appellant had 30 days to vacate the premises. Ten days later, Reed sent Vallivero a letter informing him that appellant had been observed recklessly driving in the mobile home park while intoxicated. Vallivero subsequently told Reed "he was having a hard time getting an agreement with [appellant] to vacate the park." On October 7, appellant was formally served with notice of the eviction proceedings against him.

On the morning of November 16, appellant's mother Brenda Caves called 911 and reported that appellant had hit his roommate with a baseball bat, that the roommate did not appear to be breathing, and that appellant had put him in the bathtub. San Luis Obispo County Sheriff's Deputies Dustin Phillips and Jason Hall responded to Caves's house. Appellant was outside the house with Caves and his hand was bandaged. Appellant

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requested medical assistance and Deputy Hall rode with him in an ambulance to the hospital. While they were in the ambulance, appellant said he cut his finger on a glass bottle and that his jaw hurt because he had been hit with a fist.

Vallivero's body was found in the bathtub. He had a laceration to his left arm, a deep incision wound on the back of his neck, lacerations and fractures along the left side of his head, stab wounds to his back, and numerous wounds to his head and body that were consistent with blunt force trauma. Vallivero also had defensive wounds on his forearms, hands, and wrists, and bruises on the right side of his torso. The cause of death was blunt force injuries to the head. Toxicology results showed that Vallivero had a 0.19 blood alcohol level; tests for controlled substances were negative.

Appellant was interviewed at the hospital and later at the sheriff's station. He said he had just finished cleaning the kitchen when Vallivero arrived home after buying beer and told him to "get the fuck out of [his] house." Appellant became "heated" and armed himself with a rock because he was going to walk past Vallivero and was "sick of [Vallivero's] shit." Vallivero told appellant, "I'm going to kill you. You're going to fucking die." Vallivero punched appellant. Appellant hit Vallivero with the rock and struck him approximately three times on the head with a beer bottle. The bottle broke and Vallivero fell backwards onto the couch. Appellant picked up a baseball bat and hit Vallivero with it, causing Vallivero to fall to the floor.

Appellant continued to hit Vallivero with the bat as Vallivero lay motionless on the floor. Appellant then retrieved a knife and tried to stab Vallivero in the chest "to make sure that

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he was gone." The knife would not penetrate Vallivero's chest, so appellant stabbed him in the neck.

After placing Vallivero's body in the bathtub, appellant drank Vallivero's beer and attempted to clean the house. He also considered fleeing, but ultimately called Caves and told her what had happened.

Appellant believed that he had to defend himself because Vallivero "kept punching" him, but acknowledged that Vallivero had struck him only once or twice. Appellant felt that his conduct was due to feelings of frustration that "went way overboard" and added that if he could "take it back [he] would."

DISCUSSION

Miranda *Motion*

Appellant contends the trial court erred in denying his motion to exclude the statements he made at the hospital and sheriff's station on the ground they were obtained in violation of *Miranda*. We are not persuaded.

Miranda provides that a person questioned by law enforcement after being "taken into custody" must first be warned that he or she has the right to remain silent, that any statements that he or she makes may be used against the person, and that he or she has a right to the presence of retained or appointed counsel. (*Miranda*, *supra*, 384 U.S. at p. 444.) For the *Miranda* rule to apply, there must be an interrogation by the police while the suspect is in police custody. (*Id.* at p. 478.)

Whether a person is in custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (*Stansbury v. California* (1994) 511 U.S. 318, 323 [128 L.Ed.2d 293].) "The question whether [the] defendant was

in custody for *Miranda* purposes is a mixed question of law and fact." (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) "[A]n appellate court must 'apply a deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.)

"To determine whether an interrogation is custodial we consider a number of circumstances, including: 'whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation.'" (*People v. Torres* (2018) 25 Cal.App.5th 162, 172-173.)

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At the hearing on appellant's suppression motion, Deputy Hall testified that appellant was subjected to a patdown search for the deputies' safety when they first encountered him at Caves's house. Appellant was never handcuffed and Deputy Hall never asked him any questions about Vallivero's killing. Deputy Hall rode with appellant in the ambulance to the hospital to ensure the paramedics' safety while Deputy Phillips followed in the patrol car.

Detective David Marquez arrived at the hospital and introduced himself to appellant as he lay in a bed in the emergency room. Detective Marquez asked appellant if he needed anything and told him he would speak to him after he was treated.

Detective Nathan Paul subsequently arrived and introduced himself to appellant. Detective Paul told appellant he was there to find out what had happened and asked if appellant was willing to accompany him to the sheriff's station to talk. Appellant said "okay" then added, "I don't know my rights. . . . I defended myself." Detective Paul responded "you're not under arrest. If you defended yourself, that's what I want to hear about." Appellant replied: "My mom's working on an attorney . . . and [she] told me not to talk to anyone cause I could incriminate myself . . . . I don't know my rights, so um, I was in a fight and I defended myself and – and it got really bad and then I didn't know what to do after that point. I tried to clean up the mess." Appellant proceeded to provide a detailed account of what had happened. At one point during the interview, appellant was allowed to use the bathroom.

After appellant had been treated, Detective Paul asked if he was still willing to accompany him to the sheriff's station for

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further questioning. Appellant asked if he could smoke a cigarette after they arrived at the sheriff's station and the detective replied, "When we get there we'll let you . . . stand outside and . . . smoke as many as you need." Appellant then asked, "I know you've probably gotta book me, right?" The detective replied in the negative and told appellant he was not being handcuffed and was a "free walking man."

After they arrived at the sheriff's station, appellant was allowed to smoke a cigarette outside and use a restroom without any supervision. Before conducting the interview, Detective Paul confirmed with appellant that he was there voluntarily and reiterated he was not under arrest. During the interview, appellant took at least three cigarette breaks and a bathroom break. Near the end of the interview, appellant was told he was being detained for killing Vallivero.

In denying appellant's suppression motion, the court found that appellant had voluntarily agreed to be interviewed; that there was no custodial interrogation because a reasonable person in appellant's position would have felt free to terminate the interview until the point he was told he was being detained; and that appellant had never unequivocally indicated that he wanted an attorney. The court further found that law enforcement had not dominated or controlled the course of the interrogation and that appellant had "set the pace" of the interview.

The court did not err in denying appellant's motion. At both the hospital and the sheriff's station, appellant was free of physical restraints and was advised he was not under arrest and was free to leave. Moreover, no weapons were displayed and there is nothing to indicate that the deputies and detectives who spoke to him were aggressive or accusatory or employed special

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techniques to pressure him. On the contrary, every effort was made to ensure that appellant was comfortable and that his needs were accommodated. The court thus correctly found, under the totality of the circumstances, that appellant's statements at the hospital and the sheriff's station were not the result of a custodial interrogation. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1400.) The cases appellant cites in support of his claim are plainly inapposite.[3]

To the extent appellant claims that his statements were involuntary because the detectives exploited his mental illness and unduly prolonged his interview at the sheriff's station, those were not raised below and are thus forfeited. In any event, appellant fails to establish that the detectives who interviewed him engaged in coercive conduct. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [recognizing that "[c]oercive police activity is a necessary predicate" to a finding that a confession was involuntary].) Moreover, the identified circumstances that allegedly rendered appellant's statements involuntary took place at the sheriff's station. Because appellant had already provided a detailed account of the incident while he was at the hospital, any error in admitting the statements he subsequently made at the sheriff's station was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]; *People v. Case* (2018) 5 Cal.5th 1, 22 [*Miranda* violations subject to harmless error standard of review set forth in *Chapman*].)

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[3] Appellant also fails to inform us that one of the cases upon which he relies, *People v. Boyer* (1989) 48 Cal.3d 247, has been disapproved to the extent it "may be read to suggest that an officer's subjective focus of suspicion is an independently relevant factor in establishing custody for the purposes of *Miranda* . . . ." (*People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

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Sufficiency of the Evidence

Appellant claims that his murder conviction must be reversed because the evidence is insufficient to prove he killed Vallivero with premeditation and deliberation. In reviewing this claim, we "must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054-1055, internal quotation marks omitted.) We "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid.*)

The "mental state [for first-degree murder] is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*People v. Chiu* (2014) 59 Cal.4th 155, 166.) The process of premeditation and deliberation does not require any extended period of time. (*People v. Watkins* (2012) 55 Cal.4th 999, 1026.) The test is one of the extent of reflection rather than the duration of time. (*Ibid.*)

Our Supreme Court has identified three categories of evidence relevant to establishing premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; *People v. Brooks* (2017) 3 Cal.5th 1, 58-59; *People v. Houston* (2012) 54 Cal.4th 1186, 1216.) The categories include events occurring before the

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killing that indicate planning, motive to kill, and manner of killing that reflects a preconceived design to kill. (*Anderson*, at pp. 26-27.) The factors are neither exclusive nor invariably determinative. (*Brooks*, at p. 59; *Houston*, at p. 1216.) Evidence of each category is not required to affirm a judgment of first degree murder. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605.) The factors are merely a guide in determining whether the evidence supports an inference that the killing occurred as a result of preexisting reflection rather than a rash impulse. (*Brooks*, at p. 59.)

Sufficient evidence supports appellant's conviction of attempted premeditated and deliberate murder. Appellant's arguments to the contrary fail to acknowledge the standard of review, which compels us to view the evidence in the light most favorable to the judgment. (*People v. Nguyen*, *supra*, 61 Cal.4th at pp. 1054-1055.)

Prior to the killing, appellant armed himself with a rock. After Vallivero allegedly punched appellant, appellant hit him on the head with the rock and proceeded to break a beer bottle over his head, causing him to fall on the couch. Appellant then armed himself with a baseball bat and repeatedly hit Vallivero in the head as he lay motionless on the ground. To make sure Vallivero was dead, appellant retrieved a knife and stabbed him in the neck. The circumstances and manner of the killing amply support the jury's findings of premeditation and deliberation. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1128 [recognizing that defendant's use of a second knife to inflict post mortem wounds, when considered in conjunction with the manner of killing, "could easily have led the jury to infer premeditation and

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deliberation"].) Appellant also expressed a motive for the killing by acknowledging he was angry about being evicted, was "sick of [Vallivero's] shit," and wanted him "gone." Appellant's claim of insufficient evidence thus fails.

Evidence of Vallivero's Drug Use

Appellant also contends the court abused its discretion and violated his due process rights by excluding evidence of Vallivero's drug use. We disagree.

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court has discretion to exclude relevant evidence when its prejudicial effect substantially outweighs its probative value. (Evid. Code, § 352.) Evidentiary rulings are reviewed for abuse of discretion, and a court's decision will be upheld unless it exceeds the bounds of reason. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197; see also *People v. Stitely* (2005) 35 Cal.4th 514, 550.)

When appellant was interviewed, he stated that Vallivero used methamphetamine and was "drinking and on meth" when the crime occurred. Prior to trial, the prosecution moved in limine to exclude any reference to Vallivero's methamphetamine and cocaine use as irrelevant and substantially more prejudicial than probative under Evidence Code section 352. The court granted the motion after finding that the evidence was both irrelevant and unduly prejudicial because no methamphetamine, cocaine, or other illicit drugs were found in Vallivero's system after his death. Later in the proceedings, defense counsel moved to admit Vallivero's medical records showing that Vallivero had admitted using methamphetamine and had been diagnosed as a

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chronic user of the drug. The court denied the motion and reiterated its prior ruling that evidence of Vallivero's methamphetamine use was unduly prejudicial under Evidence Code section 352.

The court did not err. Appellant contends that "his statements about how he personally experienced Vallivero to act unreasonably and violently *when Vallivero was using or high on meth* were relevant to show the reasonableness of appellant's fear and resulting actions." It is undisputed, however, that Vallivero was not under the influence of methamphetamine or any other illicit drug when he was killed. Moreover, it is not reasonably probable that appellant would have achieved a more favorable result had the challenged evidence been admitted. As the People aptly put it, "appellant's alleged belief that Vallivero was under the influence of methamphetamine, as opposed to just alcohol, had minimal or no probative value to any claim of self-defense." Accordingly, any error in excluding evidence of Vallivero's drug use was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Mullens* (2004) 119 Cal.App.4th 648, 659 [error in excluding evidence under Evidence Code section 352 reviewed under the harmless error standard set forth in *Watson*].)

Mutual Combat/Initial Aggressor (CALCRIM No. 3471)

The trial court instructed the jury on the doctrines of self-defense (CALCRIM No. 505) and imperfect self-defense (CALCRIM No. 571). Over appellant's objection, the jury was also instructed on the limitations of the right of self-defense to one who engaged in mutual combat or acted as the initial aggressor, as provided in CALCRIM No. 3471.[4] Appellant

[4] The jury was instructed as follows: "A person who engages in mutual combat or who starts a fight has a right to

contends the court committed prejudicial error and violated his federal constitutional rights by giving the mutual combat instruction. This contention lacks merit.

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Error in giving an inapplicable instruction is one of state law subject to the *Watson* test for prejudice, under which reversal is required if it is reasonably probable the defendant would have obtained a more favorable result in the absence of the error. (*Id.* at p. 1130; *Watson*, *supra*, 46 Cal.2d at p. 836.)

The court did not err in giving the challenged instruction. There was evidence from which the jury could have found that appellant not only engaged in mutual combat with Vallivero, but also acted as the initial aggressor. Although appellant offers his

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self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; [¶] 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; [¶] AND [¶] 3. He gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting, or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim of self-defense arose." (Italics omitted.)

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self-serving assertion that Vallivero initiated the incident by punching him, the jury was entitled to reject that assertion. According to Vallivero, appellant had been the initial aggressor of a prior fight between the two regarding the cleanliness of the kitchen. Moreover, appellant admitted that he approached Vallivero with a rock in his hand because he "knew" the two of them were going to fight. The jury could thus reasonably find that appellant intended to fight with Vallivero before Vallivero allegedly punched him.

Even if the instruction should not have been given, the error would be harmless. The jury was separately instructed pursuant to CALCRIM No. 3474 that "[t]he right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends." Appellant continued to use deadly force against Vallivero well after he had rendered Vallivero incapable of inflicting any injury upon him. No reasonable juror thus would have found that appellant killed Vallivero in self-defense or imperfect self-defense. (*People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201-202.)

The jury was also instructed pursuant to CALCRIM No. 200 that "[s]ome of the[] instructions may not apply, depending on your findings about the facts of the case." Because of this instruction, "the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381.) Because appellant does not rebut this presumption or otherwise demonstrate a reasonable probability that he would have achieved a more

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favorable result had the challenged instruction not been given, his claim fails. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.)

Prosecutorial Misconduct; Ineffective Assistance of Counsel

For the first time on appeal, appellant contends the prosecutor committed misconduct by misstating the law eight times in his closing argument. Anticipating our conclusion that these claims are forfeited because defense counsel did not object to any of the alleged misstatements, appellant alternatively contends that counsel's failure to object amounts to ineffective assistance.

Prosecutorial misconduct exists "'under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' (*People v. Earp* (1999) 20 Cal.4th 826, 858.) In more extreme cases, a defendant's federal due process rights are violated when a prosecutor's improper remarks ""'infect[] the trial with unfairness,'"' making it fundamentally unfair. (*Ibid.*) ""'To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument.'" [Citation.] A court will excuse a defendant's failure to object only if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 349.)

Here, defense counsel did not object to the prosecutor's alleged misstatements and made no requests that the jury be admonished. Moreover, appellant has not established that objections or admonition would have been futile. Because the alleged misconduct consisted of purported misstatements of law,

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they could have easily been corrected by the trial court with an admonition. (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*).) Appellant's claims of prosecutorial misconduct are thus forfeited. (*Ibid*; *People v. Jackson*, *supra*, 1 Cal.5th at p. 349.)

We also reject appellant's claims that trial counsel provided ineffective assistance by failing to object. "A party claiming ineffective assistance must first demonstrate that his counsel's performance was deficient. [Citations.] In reviewing counsel's performance, we 'exercise deferential scrutiny.' [Citations.] To that end, it is up to [appellant] to show his counsel's performance was deficient because his '"representation fell below an objective standard of reasonableness . . . under prevailing professional norms."' [Citation.] Second, even after a party demonstrates ineffective assistance, he must also show he has been prejudiced, i.e., 'that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.] If [appellant's] showing as to either component is insufficient, the claim fails. [Citation.] Accordingly, if he cannot show prejudice, we may reject his claim of ineffective assistance, and need not address the adequacy of trial counsel's performance. [Citations.]" (*People v. King* (2010) 183 Cal.App.4th 1281, 1298; *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [80 L.Ed.2d 674].)

Moreover, "[t]he appellate record . . . rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) "'[T]he

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decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one' [citations], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence' [citation]." (*Centeno*, *supra*, 60 Cal.4th at p. 675.)

Appellant contends that during closing argument the prosecutor misstated the law by asserting (1) that "if there is motive, there's first degree murder"; (2) that appellant's efforts to clean up the crime scene after he killed Vallivero "means [that] he in his own mind knows he is guilty of murder"; (3) that appellant could not be found to have acted in self-defense unless he "reasonably believed he was in imminent danger of being killed"; (4) that the provocation element of voluntary manslaughter based on sudden quarrel or heat of passion was not established by evidence that Vallivero had previously threatened appellant, because two neighbors who allegedly heard Vallivero make such threats were not concerned enough to call the police; (5) that "if you find there is no imperfect self-defense, then it's murder"; (6) that the extent of reflection required for a finding of premeditation is similar to the extent of reflection a driver engages in when approaching a yellow traffic signal; (7) that for appellant's claim of self-defense to be valid, Vallivero "better have" hit appellant so hard that he "annihilated his jaw"; and (8) that reasonable doubt means "[i]f what the People are saying is reasonable and [the] defense says it's possible but unreasonable, that's a guilty verdict."

Even assuming that defense counsel provided deficient performance by failing to object to these arguments, appellant was not prejudiced because the jury was instructed that counsel's arguments were not evidence (CALCRIM No. 222) and that the

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jury was to follow the instructions given by the court even if counsel's comments conflicted with those instructions (CALCRIM No. 200). The jury was also properly instructed on reasonable doubt (CALCRIM Nos. 103, 220), motive (CALCRIM No. 370), hiding evidence as consciousness of guilt (CALCRIM No. 371), justifiable homicide based on self-defense (CALCRIM No. 505), provocation (CALCRIM No. 522), and voluntary manslaughter based on sudden quarrel or heat of passion (CALCRIM No. 570) and imperfect self-defense (CALCRIM No. 571). Absent evidence to the contrary, we presume the jury followed these instructions. (*People v. Johnson* (2015) 61 Cal.4th 734, 770; see also *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 ["We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate"].) Appellant offers no such evidence here, so his claim of ineffective assistance of counsel fails.

Dueñas

For the first time on appeal, appellant contends, in reliance on *Dueñas*, *supra*, 30 Cal.App.5th 1157, that the trial court erred by ordering him to pay a $30 criminal conviction assessment (Gov. Code, § 70373) and a $40 court operations assessment (§ 1465.8, subd. (a)(1)) without first determining his ability to pay those assessments. In *Dueñas*, the court held that imposing these assessments without a hearing on the defendant's ability to pay violates due process of law under both the federal and state constitutions. (*Dueñas*, at p. 1168.) Neither statute expressly prohibits the court from considering the defendant's ability to pay. By contrast, section 1202.4, subdivisions (b)(1) and (c) expressly prohibit the trial court from considering a defendant's ability to pay a restitution fine unless the fine exceeds $300.

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If the court imposes a restitution fine above the $300 statutory minimum, it may consider the defendant's ability to pay. (§ 1202.4, subd. (c).) Appellant was ordered to pay a $7,800 restitution fine, so he had the opportunity to bring to the court's attention any factors relevant to his ability to pay. (*People v. Avila* (2009) 46 Cal.4th 680, 729.) He did not do so, so he forfeited any challenges to the restitution fine. (*Ibid.*) Appellant likewise did not object to the two assessments he now challenges. We need not decide whether he forfeited his claims because under the circumstances present here, where appellant did not object to the $7,800 restitution fine, "he surely would not complain on similar grounds regarding an additional" $70 in assessments. (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.)

Cumulative Error

Appellant contends that the cumulative effect of the alleged errors deprived him of his due process rights and resulted in the denial of a fair trial. We reject this contention because there is no prejudicial error to cumulate. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1094.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J. TANGEMAN, J.

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Jacquelyn H. Duffy, Judge
Superior Court County of San Luis Obispo

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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Court of Appeal, Second Appellate District, Division Six - No. B292208

S261456

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CHARLES CHAD GIESE, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX B

APPENDIX B