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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

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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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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

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