No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

MICHAEL EUGENE WYATT, Petitioner,

v.

JOHN SUTTON, Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF *CERTIORARI*

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APPENDIX A

Ninth Circuit Order Denying Petition for Rehearing and Rehearing En Banc

Michael Eugene Wyatt v. John Sutton

Case No. 20-15203

filed February 1, 2021

FILED

FEB 1 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL EUGENE WYATT, Petitioner-Appellant, v. JOHN SUTTON, Respondent-Appellee.	No. 20-15203 D.C. No. 4:18-cv-06588-PJH Northern District of California, Oakland ORDER

Before: W. FLETCHER, IKUTA, and VANDYKE, Circuit Judges.

The panel judges have voted to deny the appellee's petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellee's petition for panel rehearing and rehearing en banc, (ECF 38) filed January 6, 2021, is DENIED.

APPENDIX B

Ninth Circuit Order Affirming District Court Denial of Habeas Petition

Michael Eugene Wyatt v. John Sutton

Case No. 20-15203

filed December 24, 2020

No. 20-15203
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Wyatt v. Sutton

Decided Dec 24, 2020

No. 20-15203

12-24-2020

MICHAEL EUGENE WYATT, Petitioner-Appellant, v. JOHN SUTTON, Respondent-Appellee.

NOT FOR PUBLICATION

D.C. No. 4:18-cv-06588-PJH MEMORANDUM[*]

Appeal from the United States District Court for the Northern District of California

Phyllis J. Hamilton, Chief District Judge, Presiding Submitted December 11, 2020[**] San Francisco, California Before: W. FLETCHER, IKUTA, and VANDYKE, Circuit Judges.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Petitioner Michael Wyatt appeals the district court's denial of his habeas petition under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we review the district court's decision de novo. *Boyer v.*
2 *Belleque*, 659 *2 F.3d 957, 964 (9th Cir. 2011). We affirm.[1]

[1] Because the parties are familiar with the facts, we recite them here only as necessary. --------

Wyatt's contention that the state court unreasonably applied *Jackson v. Virginia*, 443 U.S. 307, 326 (1979), or reached an unreasonable determination of the facts, cannot overcome the double deference we afford to insufficient evidence claims on habeas review of state court convictions under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. *See Johnson v. Montgomery*, 899 F.3d 1052, 1056-57 (9th Cir. 2018) ("In addition to *Jackson*'s already deferential standard .... we must conclude that the state court's determination that a rational jury could have found each required element proven beyond a reasonable doubt was not just wrong but was objectively unreasonable."); *Coleman v. Johnson*, 566 U.S. 650, 656 (2012) ("[T]he only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality."). If the record supports conflicting inferences, we "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326.

On habeas review of *Jackson* claims, "we ... look to state law only to establish the elements of the crime and then turn to the federal question of whether the state court was objectively unreasonable in concluding that sufficient
3 evidence supported *3 its decision." *Johnson*, 899 F.3d at 1056 (cleaned up) (citation omitted). In California, a defendant commits first-degree murder if the killing was willful, premeditated, and deliberate. *See* Cal. Penal Code § 189; *People v. Sandoval*, 363 P.3d 41, 64 (Cal. 2015).

Specifically, "'[d]eliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance." *Sandoval*, 363 P.3d at 64 (quoting *People v. Koontz*, 46 P.3d 335, 361 (Cal. 2002)). California courts generally look to three non-exhaustive factors as guidelines in determining premeditation and deliberation: planning, motive, and manner of killing. *Sandoval*, 363 P.3d at 65.

Here, the state court reasonably determined that Wyatt's first-degree murder conviction is supported by sufficient evidence. With respect to preexisting motive, it was not unreasonable for the jury to conclude that Wyatt's increasingly violent attempts to quiet his unarmed, mentally handicapped roommate James Nobles evinced a motive to accomplish what Wyatt had previously and repeatedly asked for: peace and quiet free from Nobles's "nagging." *See People v. Boatman*, 221 Cal. App. 4th 1253, 1268 (2013). With respect to the manner of killing, a jury could have reasonably determined that Wyatt considered his previous unsuccessful attempts at quieting Nobles and, instead of continuing to punch Nobles or throw objects at him, deliberately resorted to killing him by stabbing him in the chest to silence him. Wyatt's decision to grab, and then plunge, a
4 knife into Nobles's chest, multiple *4 times, could also reasonably reveal "a method sufficiently 'particular and exacting' to warrant an inference that [Wyatt] was acting according to a preconceived design" of quieting his roommate once and for all. *People v. Thomas*, 828 P.2d 101, 115 (Cal. 1992); *see also People v. Anderson*, 447 P.2d 942, 949 (Cal. 1968) (surveying state law and noting that "directly plunging a lethal weapon into the chest evidences a deliberate intention to kill"). The jury could also have reasonably concluded that Wyatt's additional actions—not immediately seeking aid after he stabbed Nobles, waiting twelve hours with Nobles's corpse before dumping the body at a time least likely to be seen, and lying to others (including the police)—all further evince that Wyatt's conduct was not merely the product of rash impulse. *Cf. Boatman*, 221 Cal. App. 4th at 1269 ("Defendant's actions immediately afterward —directing Brenton to call 911 and attempting to resuscitate Marth and seek medical aid—are not the actions of an executioner."). Likewise, it would be reasonable for the jury to infer that Wyatt's previous murder of a friend after an altercation also supported the conclusion that he carefully weighed the considerations of stabbing Nobles in advance of doing so. *See People v. Steele*, 47 P.3d 225, 234 (Cal. 2002) ("[T]he more often one kills, especially under similar circumstances, the more reasonable the inference the killing was intended and premeditated.").

While Wyatt contends that "[a]ll that was proven here was a 'mere unconsidered or rash impulse' that led to a spontaneous and frenzied lashing out
5 with *5 a knife," the controlling question under AEDPA's double deference standard is whether the state court's different conclusion was objectively unreasonable. *Johnson*, 899 F.3d at 1056-57. As discussed above, it was not. And Wyatt's argument that state law precludes the jury's inferences and conclusions fails because "the minimum amount of evidence ... require[d] to prove the offense is purely a matter of federal law," not state law. *Coleman*, 566 U.S. at 655.

The state court's decision was a reasonable application of the law and based on a reasonable determination of the facts, and therefore the district court properly denied Wyatt's federal habeas petition. *See Moses v. Payne*, 555 F.3d 742, 751 (9th Cir. 2009); 28 U.S.C. § 2254(d).

AFFIRMED.

APPENDIX C

United States District Court, Northern District of California

Order Denying Habeas Petition

Michael Eugene Wyatt v. John Sutton

Case No. 18-cv-06588

filed December 5, 2019

Wyatt v. Sutton

Decided Mar 4, 2019

Case No. 18-cv-06588-PJH

03-04-2019

MICHAEL EUGENE WYATT, Plaintiff, v. JOHN SUTTON, Defendant.

PHYLLIS J. HAMILTON United States District Judge

ORDER FOR RESPONDENT TO SHOW CAUSE

Petitioner, a California prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The amended petition was dismissed with leave to amend and petitioner has filed a second amended petition.

BACKGROUND

Petitioner was sentenced to 56 years to life in prison after being found guilty of first-degree murder. *People v. Wyatt*, No. A144872, 2018 WL 1633816, at *5 (Cal. Ct. App. April 5, 2018). His appeals were denied by the California Court of Appeal and California Supreme Court. Docket No. 1 at 3. A pro se habeas petition to the California Supreme Court was also denied. Docket No. 19 at 7-19.

In the California Court of Appeal petitioner contended that: (1) there was insufficient evidence of premeditation and deliberation for first degree murder; (2) the court erroneously admitted evidence of his prior conviction for voluntary manslaughter; (3) the court should have instructed the jury not to use the evidence of the prior homicide unless it made a preliminary finding that the homicide was committed with malice; (4) the court should have instructed the jury on self-defense and imperfect self-defense; (5) the prosecutor committed misconduct by saying that manslaughter was "murder with an *2 excuse;" and (6) cumulative error. *Wyatt*, 2018 WL 1633816, at *1. The claims presented in the pro se petition to the California Supreme Court are difficult to understand but involve ineffective assistance of counsel. Docket No. 19 at 7-19.

DISCUSSION

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court must "specify all the grounds for relief available to the petitioner ... [and] state the facts supporting each ground." Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C. § 2254. "'[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of constitutional error.'" Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970)).

LEGAL CLAIMS

The first two petitions were dismissed with leave to amend because it was not entirely clear the claims petitioner had presented. Liberally construing the second amended petition, petitioner asserts that: (1) the trial court erred by failing to instruct the jury on self-defense and imperfect self-defense; (2) there was insufficient evidence of premeditation and deliberation for first degree murder; and (3) ineffective assistance of counsel for failing to object to improper jury instructions and failing to present a claim of self-defense. These claims are sufficient to require a response. If these are not the claims petitioner wishes to proceed with, he must inform the court within fourteen-days. *3

3

CONCLUSION

1. All claims are dismissed except the claims discussed above. If these are not the claims petitioner wishes to proceed with, he must inform the court within **fourteen-days.**

2. The clerk shall serve by regular mail a copy of this order and the petition (Docket No. 19) and all attachments thereto on respondent and respondent's attorney, the Attorney General of the State of California. The clerk also shall serve a copy of this order on petitioner.

3. Respondent shall file with the court and serve on petitioner, within fifty-six (56) days of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted. Respondent shall file with the answer and serve on petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the court and serving it on respondent within twenty-eight (28) days of his receipt of the answer.

4. Respondent may file a motion to dismiss on procedural grounds in lieu of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a motion, it is due fifty-six (56) days from the date this order is entered. If a motion is filed, petitioner shall file with the Court and serve on respondent an opposition or statement of non-opposition within twenty-eight (28) days of receipt of the motion, and respondent shall file with the court and serve on petitioner a reply within fourteen (14) days of receipt of any opposition.

5. Petitioner is reminded that all communications with the court must be served on respondent by mailing a true copy of the document to respondent's counsel. Petitioner must keep the court informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). *See Martinez v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases). *4

4

IT IS SO ORDERED. Dated: March 4, 2019

/s/

PHYLLIS J. HAMILTON

United States District Judge

APPENDIX D

California Court of Appeal

Opinion Affirming Judgment and Conviction

People v. Michael Eugene Wyatt

Case No. A144872

filed April 5, 2018

A144872
COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FIVE

People v. Wyatt

Decided Apr 5, 2018

A144872

04-05-2018

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL EUGENE WYATT, Defendant and Appellant.

NEEDHAM, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

 (Alameda County Super. Ct. No. CH54361)

Michael Eugene Wyatt appeals from a judgment of conviction and sentence imposed after a jury found him guilty of first degree murder. He contends (1) there was insufficient evidence of premeditation and deliberation for first degree murder; (2) the court erroneously admitted evidence of his prior conviction for voluntary manslaughter; (3) the court should have instructed the jury not to use the evidence of the prior homicide unless it made a preliminary finding that the homicide was committed with malice; (4) the court should have instructed the jury on self-defense and imperfect self-defense; (5) the prosecutor committed misconduct by saying that manslaughter was "murder with an excuse;" and (6) cumulative error. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

An information charged Wyatt with the 2012 murder of James Nobles (Pen. Code, § 187) and alleged that he personally used a deadly weapon in the commission of the offense (Pen. Code, § 12022, subd. (b)(1)). The information also alleged that Wyatt had a prior serious felony conviction for his 1995 voluntary manslaughter of Titus Crowder in 1995 for purposes of Penal Code section 667, subdivisions (a) and (e). *2

2

A. Prosecution Case

On February 8, 2012, the Alameda County Sheriff's office received a report that a dead body had been discovered near the Bay Area Rapid Transit (BART) tracks in Hayward. Detective Joshua Armijo of the Alameda County Sheriff's Office responded to the scene and observed the body of an African-American male at the bottom of a dirt embankment, near the support pillar of the elevated BART tracks. The body and clothing were relatively clean, leading Armijo to conclude that the victim had been killed elsewhere. The victim had two incised puncture wounds on his left chest, a swollen area on his left temple, a blackened eye, jawline swelling, and blood from his nostrils.

1. Investigation

The police did not find identification or personal effects on the body, but used fingerprints to identify the victim as James Nobles. Officers contacted Nobles's cousin, Ioma Nobles. She told them that Nobles had been living with "Mike" in Hayward. Although she did not have the exact

address, she gave officers Mike's telephone number, which she would call if she wanted to reach Nobles. Police traced the phone number to Wyatt, who lived on Hampton Road, approximately a quarter-mile from where Nobles's body was discovered. They also determined this to be Nobles's last known address.[1]

[1] Meanwhile, Ioma attempted to call Nobles; Wyatt answered and said Nobles was at church but he would tell Nobles she called. (Because Ioma Nobles and James Nobles have the same last name, we refer to Ioma by her first name for clarity, without disrespect.)

Police obtained a warrant to search Wyatt's apartment on February 10, 2012. Officers executing the warrant observed blood drops inside the doorway and bloodstains on a mattress. Forensic evidence specialists found trace amounts of blood throughout the apartment. The search lasted approximately 12 hours until the morning of February 11; Wyatt was not there.

2. Forensic Pathologist

Dr. Thomas Rogers conducted an autopsy on Nobles's body. He observed several blunt force injuries, including a bruise to the right eye, a laceration on the right side of the nose, and a bruise on the right arm. There were superficial
3 incised wounds on Nobles's *3 face, neck, and lower right leg, as well as six deeper stab wounds - two in the chest, one in the neck, one near the jawline, and two in the leg - that had been inflicted recently. The two chest wounds penetrated his left lung and caused life-threatening injuries. Dr. Rogers opined that multiple stab wounds and incised wounds were the cause of Nobles's death.

3. Ioma's Testimony

Ioma testified that Nobles was mentally disabled and could be "slow" and "childish." He took medications to control his symptoms, but had trouble remembering to take them. When he did not take his medication, he would behave oddly and mumble things that did not make sense. Even then, however, Nobles was not violent, and Ioma had never seen him behave aggressively or assault anyone.

4. Wyatt's Confession

Wyatt surrendered to police on February 12, 2012. His shoes and pants had apparent bloodstains. He waived his *Miranda* rights and agreed to be interviewed by Detective Armijo and Alameda County Sheriff's Sergeant Dave Dixon. (See *Miranda v. Arizona* (1966) 384 U.S. 436.) A redacted recording of the interview was played for the jury.

Wyatt told the officers that he was self-employed and took care of people in their homes. Years earlier he became friends with Nobles, who moved in with him in mid-2010. Nobles usually used his disability checks to pay the rent on the apartment. Wyatt denied they had any romantic involvement, but acknowledged that Nobles may have been interested in one.

Wyatt generally did not have any conflict with Nobles. However, sometimes Nobles would "go off the deep end" and talk to himself, behave in a childlike manner, and at times urinate on himself. Wyatt would let him act out, and Nobles would come back around. Most of the time, "[Nobles] was a gentle, easy-goin' guy regardless of what the circumstances," "he would not harm a fly," and he was "never a threatening person."

Wyatt claimed he did not know Nobles's whereabouts and had not done anything to him. After police said they could prove that Nobles was
4 killed in Wyatt's apartment, *4 however, Wyatt admitted to killing Nobles during a fight. He claimed that Nobles "flipped out," Wyatt tried to subdue him, and "the next thing you know, it just got outa hand and I lost it."

Wyatt recounted the events as follows. Two weeks before the homicide, Nobles started acting out consistently. Nobles acted out so much - every day with constant movement or incessant babbling -

that Wyatt asked him to move to a board and care home. Nobles did so for a while, but Wyatt let him return to the apartment.

Around 2:00 a.m. on Sunday, February 5, 2012, Wyatt received a text from a male friend. Nobles knew it was from a man, and he became upset. Nobles started breathing hard and was constantly moving, making noises, and "acting real bad." Wyatt asked Nobles to "chill out," to no avail. Wyatt repeatedly asked him to "just take it easy" and lie down, but Nobles did not stop. Wyatt told Nobles it would be best for him to leave at the end of the month, "[b]ecause this is gettin' outa hand here . . . [a]nd you constantly makin' it uncomfortable where I'm livin' at." Nobles "rant[ed] and rave[d]." Wyatt was unable to sleep during Nobles's disruption, which continued until around 6:00 a.m. on Sunday.[2]

[2] At one point, Wyatt indicated that the text and subsequent hours of disruption occurred between approximately 2:00 a.m. and 6:00 a.m. on Sunday. At another point, he seemed to indicate it occurred on a Thursday. The parties describe the event as occurring on Sunday, which fits with the rest of Wyatt's narrative. Whether it happened on Thursday or Sunday, our ruling would be the same.

Wyatt awoke around 9:00 a.m. on Sunday. Nobles also awoke and was fine for a while, but then restarted his barrage of noise and movement. Wyatt repeatedly asked Nobles to calm down, but Nobles didn't relent, which "got [Wyatt's] nerves in a frenzy."

Wyatt described Nobles's behavior as "nagging," explaining it as follows: "Words, there was a lot of movements . . . constant - he would get up and then he would write on the floor and then he would kick. It was just a lot of - I - I mean it may seem petty. You know, but it was just a lot of irritation. Just - just talking and you know and just moving around. . . . It just didn't - it just didn't let up." *5

Around 2:00 or 2:30 that afternoon, things "came to boil." Wyatt was watching basketball on television. Nobles "started actin' crazy," and Wyatt asked for quiet. Nobles continued with his "madness" and "just kept on goin' and kept on and just kept on goin."

Wyatt duct-taped Nobles's hands together, duct-taped his ankles, and put duct-tape over his mouth. He also put Nobles in a corner and placed a mattress over him. Nobles broke free, untaping his hands and mouth. Wyatt unwrapped his ankles, but Nobles "started back at his theatrics again." Wyatt told Nobles it was best for him to "leave next month," but Nobles said he did not want to. Nobles's nagging persisted. Wyatt grabbed him by the shoulders and shook him; Nobles flailed around, " 'doin' his little strikin' and, you know, kickin,' " and refused to "act like a civilized person." In Wyatt's words, "it was just a naggin' thing" and "it was just pressin' me and then it blew me up." Wyatt grabbed a container of clear blue cleaning liquid and threw the liquid in Nobles's face. Nobles swallowed some of it, and it began to run out of his nose.

Nobles "seemed like he was just [losin'] it." Nobles kicked and slapped at Wyatt - which Wyatt agreed was Nobles defending himself - and Wyatt punched Nobles in the chin. Nobles came at Wyatt again, and Wyatt punched him in the right eye. Nobles "went to the bathroom" and then "jumped and [] attacked again." Nobles had no weapon, but he was "tryin' to swing and tryin' to grab." Wyatt claimed that Nobles "flipped out" and it "scared" him, although he acknowledged that Nobles never threatened him or approached him in a threatening manner.[3] *6

[3] Wyatt told officers that Nobles did not threaten him, but he "felt threatened" when Nobles snapped and Wyatt realized he was going to keep making noise and acting out. "Q1: Was there ever a point where he threatened you during this incident Michael? [¶] A: No. [¶] Q1: So he never threatened you? [¶] A: No he - he never

> threatened me. [¶] Q1: You never felt threatened by his behavior? [¶] A: No, not until he just - just went - just completely that night. You know he . . . [¶] Q1: No, that's what I'm talking about. The - that - the night of this incident. [¶] A: Mm-hm. [¶] Q1: Was - was there ever a point where you felt threatened by [Nobles]? [¶] A: No, until he just - like I said until that particular moment where he just snapped. [¶] Q1: And when he snapped . . . [¶] A: That's when I felt threatened . . . [¶] Q1: Tell us why you felt threatened Michael? [¶] A: 'Cause I never sel- I never seen him in that kind of outfit before. [¶] Q1: But what about his behavior made you feel threatened? [¶] A: Before? [¶] Q1: At that instant? [¶] A: It seemed like it was just really to the point where he was just unstoppable. You know it was, uh - he - he - regardless of what I tried to do - and he was just gonna be his way - that way, regardless of how anybody else felt. [¶] Q1: But what was he doing? [¶] A: Oh it was just - just a lot of noise, talking and rambling and- and - and just going back, like I say writing in - writing on the floor, writing all these little notes and this and that and . . . [¶] Q1: Did he ever approach you in a threatening manner? [¶] A: No he didn't. [¶] Q1: Okay what - how far away were you guys when he was doing this writing on the floor . . . [¶] A: I was just sitting - I was just sitting in the bunk myself. Watching - watching TV, trying to just - you know trying to see if I can block it out. [¶] Q1: Okay so he never threatened you verbally? [¶] A: No he done - you know [Nobles] was . . . was never a threatening person."

Wyatt grabbed a small "folding-knife" and, in "panic" and "rage," stabbed Nobles twice in the chest. Wyatt heard a "poof" as the air exited Nobles's lungs. Nobles fell down, voided his bowels and bladder, and stopped moving. Wyatt believed Nobles was dead; he attempted chest compressions, but he did not consider calling 911. Wyatt knew, however, that he was in the wrong.

Confronted with the fact that Nobles had six stab wounds rather than two, Wyatt initially maintained he stabbed Nobles only twice, but eventually agreed he had reached a boiling point and might not have realized all that he did. He acknowledged that a "few times in the past" he had become so angry that he did not remember what he was doing.

Roughly 12 hours after he killed Nobles, Wyatt put Nobles's corpse into one of the apartment building's garbage cans and wheeled it over to the BART tracks, where he dumped it around 3:00 a.m. He also burned some clothing and household items to get rid of the evidence, and threw the knife down a gutter near the apartment. The next day, Wyatt left the apartment and did not return until the search warrant had been executed.

Wyatt admitted to the officers that he "went too far" and stated repeatedly that Nobles did not deserve what happened to him. When asked if he premeditated the homicide, Wyatt responded "No, no, no, I didn't."

Police later found the knife Wyatt used to kill Nobles in the storm drain system, as Wyatt had described. Police also found duct tape and the clear blue cleaning liquid in Wyatt's apartment, as well as the garbage can used to transport Nobles's dead body. *7

7

5. Evidence of Wyatt's Killing of Crowder in 1995

In 1995, the body of Titus Crowder, an African-American man who lived in an Oakland care home for men suffering from HIV, was found face down, bloody, and lifeless in his living room. Crowder was transported to a hospital and pronounced dead. Officers had recovered nine bullet casings near the body. They also found mail and other paperwork bearing Wyatt's name, as well as photographs belonging to Wyatt in a bedroom dresser drawer.

About three weeks after the homicide, Wyatt was arrested and interviewed by David Politzer, at the time a sergeant with the Oakland Police Department. Wyatt told Politzer that he did not have a romantic relationship with Crowder but they were friends. They had not had previous arguments, but Crowder was "agitated" on the day he was killed.

Wyatt recounted that, on the day of the homicide, he and Crowder spent time together at a friend's home and then went to Crowder's apartment, where Crowder cooked dinner. After midnight, as Wyatt got ready to leave, he asked Crowder about $200 that Crowder owed him. Crowder became angry, hit Wyatt in the jaw, and pulled out a gun and pointed it at Wyatt. Wyatt wrestled the gun away from Crowder, aimed it at him, and fired until the gun was out of bullets. Wyatt fled with the gun, walking from Crowder's apartment near Oakland's Lake Merritt to a friend's house in Emeryville. Wyatt threw the gun off of his friend's balcony, where it was later discovered.

Wyatt pled guilty to voluntary manslaughter and served 10 years in prison for killing Crowder.

B. Defense Evidence

Defense investigator Kingston Farady testified that he interviewed Ioma, who told him Nobles was a kind, gentle, and humble person, but he was also a "fighter" who "wouldn't take crap from anyone" and she had seen him become angry and aggressive. In her testimony at trial, however, Nobles denied making such statements.

Dr. David Howard, a forensic psychologist, opined that Nobles suffered from schizophrenia. He explained that schizophrenics can display aggression and hostility and *8 frequently suffer from delusions, hallucinations, and speech disorders. They are more likely than an average person to be violent and to be the victim of violence. Although medications can be used to treat the symptoms of schizophrenia, the symptoms can reoccur if the patient stops taking the medications.

Dr. Howard noted that Nobles had numerous involuntary psychiatric holds and hospitalizations due to his symptoms. According to medical records, when Nobles stopped taking his medication, he would hear voices, his speech and behavior would become disordered, and he would exhibit paranoid delusions, inappropriate affect, fragmented thought processes, impaired speech, and disturbed sleep. After reviewing a transcript of Wyatt's interview, Dr. Howard found the descriptions of Nobles's behavior - constant words, writing on the floor, kicking, moving around, and saying nonsensical things - consistent with psychosis.

The parties stipulated that Nobles had been convicted of misdemeanor battery in 2002, based on his assault of a hospital admitting clerk.

C. Verdict and Sentence

The jury found Wyatt guilty of murder in the first degree and found the weapon enhancement true. The court found the prior conviction allegation true and sentenced Wyatt to 56 years to life in state prison. This appeal followed.

II. DISCUSSION

A. Sufficiency of the Evidence for First-Degree Murder

Wyatt contends there is no evidence he killed Nobles with the deliberation and premeditation required for first degree murder. (See § 189.) We review for substantial evidence.

" ' "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations]. ' " 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great

rapidity and cold, calculated judgment may be arrived at quickly.' " ' [Citation.]' " (*People v. Casares* (2016) 62 Cal.4th 808, 824.) *9

We typically consider three kinds of evidence to determine whether a finding of deliberation and premeditation is adequately supported—preexisting motive, planning activity, and manner of killing. But these factors "are merely a framework for appellate review; they need not be present in some special combination or afforded special weight, nor are they exhaustive." (*People v. Brady* (2010) 50 Cal.4th 547, 561-562.)

In this case, there was no evidence of planning activity. There was, however, other evidence that supported a conclusion of deliberation and premeditation.

1. Preexisting Motive

In his confession to police, Wyatt explained that he killed Nobles after hours of Nobles moving, making noise, babbling incoherently, acting out, and failing to cease this activity no matter how many times Wyatt asked. Despite Wyatt duct-taping Nobles's mouth, hands and ankles, throwing cleaning liquid in his face, telling him to move out, grabbing him by the shoulders and shaking him, and punching him twice in the face, Nobles's "nagging" appeared unstoppable. From this evidence, the jury could reasonably conclude that Nobles had become so annoying to Wyatt, and Wyatt's efforts to quiet him and convince him to stop or move out had proven so fruitless, that Wyatt decided he had to kill Nobles in order to get him to stop.

Wyatt acknowledges that Nobles's conduct gave Wyatt a reason to try to make Nobles stop his behavior, but he argues it was not a motive for Wyatt to actually kill him. Whether it was *reasonable* for Wyatt to want to kill Nobles under the circumstances is not the point, however; the point is that the evidence suggested that Wyatt had determined in his own mind a reason to kill Nobles, even if it was not what most people would consider a good one.

2. Manner of Killing

Evidence indicating that a killing was carried out in a particular and exacting manner may, in combination usually with evidence of planning or motive, support a finding of premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 27.)

Here, Wyatt's killing of Nobles was the culmination of an escalating, hours-long incident, in which Wyatt had ample time for reflection before he inflicted the fatal stab *10 wounds. After binding Nobles with duct tape, throwing cleaning liquid in his face, grabbing him by the shoulders, shaking him, and punching him to no avail, Wyatt picked up the folding knife (it is unclear if he had to unfold it) and plunged the blade twice into Nobles's chest. Wyatt conceded that he might have lost count of how many times he really stabbed Nobles, and indeed, the coroner observed *six* recent stab wounds on Nobles's body. From the manner in which Wyatt killed Nobles - multiple stab wounds to the chest - along with Wyatt's motive for killing him, the jury could reasonably conclude that Wyatt had weighed the considerations and decided to end Nobles's life.[4]

[4] Alternatively, the jury could have reasonably inferred that Wyatt decided to kill Nobles when he continued his barrage of noise and movement as Wyatt tried to watch the basketball game on Sunday afternoon, *before* duct-taping him; if so, Wyatt's acts of duct-taping, throwing cleaning liquid in Nobles's face, and punching Nobles over a span of time could be viewed as acts of torture leading up to the fatal stabbing. Acts of torture may support a conclusion of premeditation and deliberation. (See *People v. Proctor* (1992) 4 Cal.4th 499, 529-530.)

3. Wyatt's Actions after the Killing

After Wyatt stabbed Nobles at least twice in the chest, he heard a "poof" of air exit Nobles's lungs and watched as Nobles collapsed and voided his bladder and bowels. He did not call 911, either for medical assistance or to summon the police. Instead, he waited in the apartment with Nobles's dead body for approximately 12 hours - until around 3:00 a.m. when he would less likely be seen by police or witnesses - and then wheeled the corpse in a garbage can to the BART tracks and dumped it. From this evidence, the jury could reasonably infer that Wyatt's callousness toward Nobles's body reflected not only his state of mind after the stabbing, but his state of mind toward Nobles before and during the stabbing, consistent with his deliberative decision to end Nobles's life.

Based on the evidence of motive, the manner of the killing, and Wyatt's conduct after Nobles's death, there was substantial evidence that the murder of Nobles was perpetrated with premeditation and deliberation - even without consideration of the fact that Wyatt had also killed
11 Crowder in 1995, which we consider next. *11

4. 1995 Homicide

The trial court admitted evidence of Wyatt's 1995 homicide of Crowder under Evidence Code section 1101, subdivision (b) and the doctrine of chances, and subsequently instructed the jury that, if it found that Wyatt committed this uncharged offense, "you may, but are not required to" consider the evidence for the limited purpose of deciding whether or not Wyatt "acted with the *specific intent and/or mental state* required by the charged offense or any lesser offense" and whether Wyatt's explanation for the killing of Nobles was true. (Italics added. See *People v. Steele* (2002) 27 Cal.4th 1230, 1244 (*Steele*).) The court further instructed the jury to "consider the similarity or lack of similarity between the uncharged and the charged offense" in evaluating the evidence. From the proof that Wyatt perpetrated the two homicides, it was permissible for the jury to infer that Wyatt's killing of Nobles was intended and premeditated. (*Ibid.*)[5]

> 5 The court also instructed that the evidence could be considered in deciding whether Wyatt "had a character for violence and acted in conformity with such character on the occasion of the charged incident." That was because, after the court admitted the evidence of Crowder's killing under Evidence Code section 1101, subdivision (b), defense counsel introduced evidence of Nobles's battery conviction, which in turn permitted the jury to consider the evidence of Wyatt's killing of Crowder for the broader purpose of his character for violence. (See Evid. Code, § 1103.) Respondent argues that, due to the admission of the evidence under Evidence Code section 1103, the admission under Evidence Code section 1101, subdivision (b) was not erroneous (or was harmless). Wyatt counters that, had it not been for the admission of the evidence under Evidence Code section 1101, subdivision (b), defense counsel would not have introduced the evidence of Nobles's conviction, so Evidence Code section 1103 would not have come into play. We need not and do not rely on Evidence Code section 1103 to resolve the appeal.

Wyatt insists there was no evidence that the killing of Crowder or the killing of Nobles was premeditated, so the combination of those two killings cannot support a finding that the killing of Nobles was premeditated because "[t]he sum of zeroes is always zero." (Quoting *People v. Haston* (1968) 69 Cal.2d 233, 246, fn.15 (*Haston*).) Our Supreme Court held otherwise in *Steele*, as we discuss further in the context of the admissibility of the evidence, *post*. (*Steele*, *supra*, 27 Cal.4th at
12 pp. 1244-1245.) *12 *Haston* - which preceded *Steele* by over three decades - is plainly inapposite.[6] And as discussed *ante*, Wyatt is

incorrect in his assumption that there was no other evidence of Wyatt's premeditation in killing Nobles.

> [6] In *Haston*, the court observed that the existence of marks common to the charged and uncharged crimes might not be sufficient to be admissible on the issue of *identity* if the marks were not distinctive, as where the robber in both crimes wore trousers and had two ears. (*Haston*, *supra*, 69 Cal.2d at p. 246, fn. 15.) Here, by contrast, the evidence of the two killings was offered to show *intent and deliberation*, inferences requiring less similarity between the crimes. Furthermore, as discussed *post*, the similarities between the killing of Crowder and the killing of Nobles *were* sufficiently distinctive.

5. Wyatt's Arguments Regarding Premeditation and Deliberation

Wyatt insists that the evidence showed he did *not* act with premeditation and deliberation. In his view, he tried "low-level physical efforts to stop" Nobles's disruptions, which led to Nobles charging Wyatt to kick and slap him; immediately before the homicide, Nobles "attacked again," "snapped" "in a rage," and was swinging his hands and trying to grab Wyatt; and Wyatt reacted in a state of "panic" and "rage" by grabbing the knife and stabbing Nobles twice, trying thereafter to revive him. But even if the evidence was reasonably subject to an inference that Wyatt did not premeditate or deliberate, it was also reasonably subject to an inference that he did, choosing to end Nobles's nagging once and for all by stabbing him repeatedly in the chest until he was dead. It is not our role to reweigh the evidence or choose between permissible inferences; we merely determine whether there was substantial evidence to support the jury's verdict, and in this case there was.

Wyatt told the police he did not premeditate the killing and claimed he acted "out of the heat of rage." The jury, however, did not have to believe Wyatt's self-serving depictions of his mental state. To the contrary, the jury could have reasonably concluded that Wyatt's use of a legalistic phrase such as "out of the heat of rage" was a disingenuous attempt to minimize his crime, and that Wyatt's story was so similar to the one he gave police with respect to killing Crowder - a good relationship with his victim until the victim suddenly lashed out - that he lied to police about
13 his mental state in *13 killing Nobles to obtain a deal based on a non-malice killing like he received with respect to Crowder. The jury heard the audiotape of Wyatt's confession, and it was for the jury to determine the credibility of Wyatt's assertions.

Wyatt argues that, if the jury did *not* believe him, there was "no evidence of what happened" and therefore no evidence of first degree murder. Not so. The jury could have rejected Wyatt's depiction of his *state of mind*, while accepting his depiction of *what occurred* to the extent it was consistent with the physical evidence. From the evidence of what occurred, the jury could reasonably conclude that, contrary to Wyatt's claims, Wyatt killed Nobles with deliberation and premeditation.

Wyatt contends the jury *should have* believed him, because his account of the killing of Nobles was borne out by the evidence: his description of the punches he threw to Nobles's jaw and eye corresponded to Detective Armijo's observation of those injuries; his description of stabbing Nobles twice in the chest corresponded with Dr. Rogers's testimony that the fatal wounds were two stab wounds to the same area of the chest; and his description of Nobles's disruptive behavior was consistent with Dr. Howard's testimony of the symptoms Nobles exhibited as a schizophrenic. But that's the point: the jury could have accepted Wyatt's version of what happened to the extent

consistent with other testimony, but concluded that these events and the other evidence demonstrated his premeditation and deliberation.

Wyatt fails to establish that the evidence was
14 insufficient for first degree murder.[7] *14

[7] Wyatt contends in his reply brief that we should not consider a factual theory the prosecutor never argued. The theories we acknowledge here, however, are entirely consistent with the prosecutor's contentions in closing argument. The prosecutor asserted that first degree murder required willfulness, premeditation, and deliberation, explained how his prior depictions of Wyatt's express malice satisfied the elements of willfulness and premeditation, and argued there was evidence of deliberation in Wyatt's decision to kill Nobles in beating him up, picking up a knife, stabbing him in the "lungs," and opting not to summon help for him. The prosecutor specifically stated that "[t]he evidence is there for first degree murder, just like I've explained it to you." --------

B. Admission of Evidence of the 1995 Homicide of Crowder

Wyatt contends the court erred in admitting evidence of his voluntary manslaughter conviction for killing Crowder under Evidence Code section 1101, subdivision (b) (section 1101(b)) and the doctrine of chances. Although there was sufficient evidence of premeditation and deliberation to uphold the first degree murder conviction even without the evidence of the killing of Crowder, we will consider the propriety of this evidence in case it had any effect on the trial.

1. Background

Before trial, the prosecutor sought an order that evidence of Wyatt's 1995 homicide of Crowder would be admitted under section 1101(b). In opposing the motion, defense counsel described the incident in a manner substantially identical to the testimony later given by Sergeant Politzer, set forth *ante*.

The trial court ruled that the evidence was admissible under section 1101(b) to prove Wyatt's intent and premeditation, relying on *Steele* and the doctrine of chances. The court noted the similarities between the two homicides and rejected Wyatt's argument that the killing of Crowder was not probative because it was not itself a premeditated killing. The court also found that, in light of the similarity between the two killings, the evidence of the 1995 homicide was not overly inflammatory and was not precluded by Evidence Code section 352.

2. Section 1101(b)

Subdivision (a) of Evidence Code section 1101 precludes the use of evidence of a defendant's character, including a prior bad act, to prove that the defendant acted in conformity with that character on the occasion of the charged crime. Section 1101(b) clarifies, however, that evidence of a prior bad act may be admitted to establish some relevant fact other than the person's character or predisposition, such as the defendant's mental state. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, 399.)

More specifically, evidence is admissible under section 1101(b) if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.)
15 Of these *15 three potential inferences, the least degree of similarity between crimes is needed to show intent. (*Id.* at pp. 402-403.) Thus, " 'if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and . . . such prior conduct may be relevant circumstantial evidence of the actor's most recent intent." (*People v. Robbins* (1988) 45 Cal.3d 867, 879.)

In *Steele*, *supra*, the defendant was charged with the stabbing murder of his female victim. At trial, the only question was whether he acted with premeditation. The trial court admitted evidence that the defendant was previously convicted of second degree murder for stabbing another woman. Our Supreme Court found no abuse of discretion, noting the similarities between the two crimes: the victims somewhat resembled each other; the defendant manually strangled the victims before he stabbed them; he inflicted eight stab wounds in the chest or abdomen of each victim; and he admitted the killings but supplied an explanation (mescaline in one case, drinking and hearing a helicopter in the other). (*Steele*, *supra*, 27 Cal.4th at p. 1244.) The Supreme Court explained that "the doctrine of chances teaches that the more often one does something, the more likely that something was intended, and even premeditated, rather than accidental or spontaneous. Specifically, the more often one kills, especially under similar circumstances, the more reasonable the inference the killing was intended and premeditated." (*Ibid*.)

a. Wyatt's Two Homicides Had Similar Circumstances

Wyatt's homicide of Crowder and his homicide of Nobles were similar in several respects. First, in both cases, Wyatt's victims were African-American men who suffered from serious medical conditions. Crowder was HIV positive and lived in a care home for men suffering from HIV-related medical issues; Nobles had a documented history of mental illness.

Second, both homicides occurred inside the victim's residence, where Wyatt spent substantial time. Although Wyatt claimed he was not living with Crowder, Wyatt's mail and photographs were found in a bedroom drawer, suggesting he spent enough time there to store some personal belongings; Wyatt was Nobles's roommate. *16

Third, Wyatt claimed he generally had a good relationship with both victims, but the victims became agitated on the day of the homicide and engaged in sudden actions that led Wyatt to kill them. Crowder supposedly pulled a gun on Wyatt when asked about repayment of a loan; Nobles supposedly "snapped" after Wyatt tried to get Nobles to stop his annoying behavior.

Fourth, although Wyatt used a different weapon to kill Crowder and Nobles, in both cases he reached for a murder weapon that was close at hand.

Fifth, in both cases Wyatt made no attempt to seek medical assistance for his victim or alert police to his allegedly justified acts. Instead, he fled and attempted to conceal evidence of his crimes. After killing Crowder, he left the apartment where the killing occurred and threw the gun over a balcony; after killing Nobles, he dumped the body, burned evidence, threw the knife into a gutter, and left the apartment where the killing occurred.

Sixth, in both cases, Wyatt initially denied responsibility but later confessed while blaming his victim. Wyatt claimed Crowder pulled out a gun and aimed it at him; Wyatt claimed Nobles kept up his noise and movements and kicked and grabbed at him.

Collectively, there was a sufficiently high degree of similarity between the two killings to justify the admission of the Crowder homicide evidence under section 1101(b).

Wyatt attempts to minimize these similarities, arguing it is "hardly surprising" the victims were African-Americans he knew well, since Wyatt was an African-American; the fact that Wyatt spent a lot of time with his victims and tried to conceal the killings is too generic; Wyatt's killing of Nobles did not occur in a living room, since Wyatt lived in a studio apartment; and Crowder, although a resident of an HIV care home, was not particularly vulnerable because he had a gun. Wyatt also contends there were differences between the two homicides: for example, Crowder

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was not killed at Wyatt's home, Crowder used a weapon first, and Crowder was killed by a gun rather than a knife. However, the charged and uncharged crimes do not have to be identical for evidence of the uncharged crime to be admissible under section 1101(b). (See *Ewoldt*, *supra*, 7 Cal.4th at p. 402.) Wyatt fails to show an abuse of discretion. *17

b. Wyatt's Reliance on Federal Cases is Misplaced

Wyatt relies on three federal court cases to argue that the evidence of the Crowder killing was inadmissible. (*United States v. Levario Quiroz* (5th Cir. 1988) 854 F.2d 69; *State v. Elmer* (D. Ariz. 1993) 815 F.Supp. 319; *United States v. Greyeyes* (9th Cir. 1991) No. 89-10605 *70733 (unpublished).)

Wyatt's reliance on these cases is misplaced. Federal decisions are not binding on this court. (*People v. Williams* (2013) 56 Cal.4th 630, 668.) None of the cases addressed *Steele*, section 1101(b), or the California law of the doctrine of chances. Moreover, all of the cases are distinguishable on their facts. (*Levario Quiroz*, *supra*, 854 F.2d at pp. 70-73 [defendant, charged with shooting at a border patrol agent, claimed he fired in self-defense after the agent fired first; evidence that the defendant claimed to have acted in self-defense in an earlier shooting was inadmissible because it happened in a different type of setting and appeared to involve a dispute over a woman]; *Elmer*, *supra*, 815 F.Supp. at pp. 320-323 [border patrol agent, charged with unlawfully shooting at people trying to cross the border, asserted that he acted in self-defense; evidence that the agent had claimed self-defense in another similar shooting was inadmissible where he had been acquitted of all wrongdoing in the earlier shooting and the two incidents were only superficially similar]; *United States v. Greyeyes*, *supra*, 1991 WL 70733 [where wife was charged with killing her husband by running over him with a car, a prior incident in which she struck her husband with a car was inadmissible since she maintained it was an accident, she was never prosecuted for it, and her state of mind may have been " 'wholly innocent' "].)

c. The 1995 Homicide Did Not Have to Be Premeditated

Wyatt contends that because he was convicted of the voluntary manslaughter of Crowder, rather than a malice murder requiring premeditation, the homicide of Crowder was not probative of his intent and premeditation in this case.

Our Supreme Court rejected a similar argument in *Steele*: "[T]he doctrine of chances is based on a *combination* of similar events. . . . The fact that defendant killed twice under similar circumstances is logically probative of whether the second killing was premeditated *even if no independent evidence existed that the first killing was itself premeditated*." (*Steele*, *supra*, 27 Cal.4th at pp. 1244-1245. Italics added.) Although the conviction for killing Crowder was voluntary manslaughter and not a malice murder, it was not an accidental killing. The combination of the two killings, under similar circumstances, was probative of whether the killing of Nobles was premeditated. *18

3. Evidence Code Section 352

Wyatt contends the evidence of his killing Crowder should have been excluded under Evidence Code section 352 because there was no substantial showing of probative value. (Citing *People v. Sam* (1969) 71 Cal.2d 194, 206.) As stated *ante*, however, the evidence had substantial probative value as to Wyatt's premeditation and intent in killing Nobles. The court did not abuse its discretion in admitting the evidence.

C. Preliminary Factual Finding

Under Evidence Code section 403, subdivision (a), evidence is inadmissible unless the court finds there is evidence sufficient to sustain a finding of the existence of a preliminary fact required for its admission, such as relevance, personal knowledge,

or authentication. The court "[m]ay, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." (Evid. Code, § 403, subd. (c)(1).) Here, the trial court instructed the jury that it had to determine whether the prosecution proved that Wyatt killed Crowder and, if not, it had to disregard the evidence. The court also instructed the jury that, in evaluating the evidence, it should consider the "similarity or lack of similarity" between the two homicides.

Wyatt contends the trial court should have also instructed the jury, pursuant to Evidence Code section 403, that the jury had to make a preliminary factual finding that Wyatt's killing of Crowder was a *malice* murder before it could use the evidence to determine Wyatt had committed first degree murder. He is incorrect.

Wyatt relies on *People v. Simon* (1986) 184 Cal.App.3d 125 (*Simon*). There, the defendant had shot and killed a man at his girlfriend's apartment. The prosecutor contended that the defendant killed
19 the man out of jealousy, while the defendant *19 contended the man pointed a gun at him and the killing was in self-defense. (*Id*. at p. 127.) The prosecution introduced evidence that Simon had previously pulled a gun on another man (Ashton) at Simon's girlfriend's apartment; the girlfriend previously told police she was having an affair with Ashton, but both she and the defendant testified at trial that he was selling drugs to her. (*Id*. at pp. 128-129.) On appeal, the court ruled that, if the assault on Ashton was motivated by jealousy, it would be sufficiently similar to the charged crime to be admissible on the issue of self-defense; but if the assault on Ashton was motivated by Simon's desire to keep his girlfriend away from drug dealers, the prior incident would not be relevant. Thus, Simon's motive in assaulting Ashton was a critical preliminary factual issue which should have been resolved before the Ashton incident was deemed admissible, and the trial court's jury instruction was deficient in failing to acknowledge the issue. (*Id*. at pp. 130-131.)

Simon is inapposite. There, the previous non-fatal assault was not relevant unless it was motivated by jealousy; here, Wyatt's killing of Crowder was relevant regardless of Wyatt's motivation, and regardless of whether it was a malice murder or another form of homicide. The probative value of the Crowder homicide arises from the fact that Wyatt killed two people under sufficiently similar circumstances, which could warrant a finding that the killing of Nobles was intentional and premeditated. (*Steele*, *supra*, 27 Cal.4th at pp. 1244-1245; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 383 [evidence of other crimes was admissible on the issue of intent, because the more often the defendant killed and raped the more likely he intended and premeditated the result he achieved; this "simple logic required no complex instructions," and *Simon* was inapposite because it involved a prior nonfatal assault, not an actual killing].) Wyatt fails to demonstrate error.

D. Refusal of Self-Defense and Imperfect Self-Defense Instructions

Defense counsel asked the trial court to instruct the jury with CALCRIM No. 505 (self-defense) and CALCRIM No. 571 (unreasonable or imperfect self-defense). Relying on testimony from Dr. Howard that Nobles was suffering a psychotic break, and on Wyatt's statement to police that Nobles "snapped," defense counsel argued that Wyatt acted in self-defense because he reasonably believed he was in imminent danger.
20 *20 Counsel also argued that Wyatt acted in unreasonable self-defense because his statement to police demonstrated that he was in actual fear, even if such a fear was unreasonable.

The trial court declined to give the requested instructions, observing that Wyatt had not indicated in his statement to police that he actually believed Nobles posed a danger to him. Wyatt contends the court erred.

1. Self-Defense and Imperfect Self-Defense

Under the doctrine of self-defense, a defendant who killed his victim with an actual and *reasonable* belief that killing was necessary to avert an imminent threat of death or great bodily injury has a complete justification for the killing. (E.g., *People v. Elmore* (2014) 59 Cal.4th 121, 133-134 (*Elmore*).)

Under the doctrine of imperfect self-defense, a defendant who killed with an actual but *unreasonable* belief that the killing was necessary to avert an imminent threat of death or great bodily injury has no defense for the killing, but because the defendant has not harbored malice, he or she has committed only voluntary manslaughter rather than murder. (*Elmore*, *supra*, 59 Cal.4th at p. 134.)

When a defendant is charged with murder, a trial court has a sua sponte duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165.) Similarly, the court has a sua sponte duty to instruct on imperfect self-defense if the "evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

2. Application

No evidence supported Wyatt's claim of self-defense, because there was no evidence that any belief he had of being in danger of imminent harm was *reasonable*. Nobles did not have a weapon, and although he approached in a "rage," he was merely "doin' his little strikin' and you know, kickin'," and "tryin' to swing and tryin' to grab."
21 *21 There was no evidence of any significant force in Nobles's attempted blows, or any reasonable basis for believing that Nobles was about to cause Wyatt great bodily injury.

Furthermore, no evidence supported Wyatt's claim of self-defense *or* imperfect self-defense, because there was no evidence that Wyatt had any *actual* belief, reasonable or not, that he was in danger of imminent harm. Wyatt repeatedly told officers that Nobles did not have a weapon and that Nobles had not threatened him. Although Wyatt claimed he "felt threatened" at the particular moment when Nobles "snapped," there was no evidence that Wyatt believed he was in imminent threat *of death or great bodily injury*. To the contrary, when asked "what about his behavior" of Nobles made him feel threatened, Wyatt said that Nobles was "unstoppable" in his "*noise*, *talking and rambling and . . . writing on the floor*." (Italics added.) Wyatt insisted that Nobles never approached him in a threatening manner, never threatened him verbally, and "was never a threatening person."

Finally, Wyatt was not entitled to an instruction on self-defense or imperfect self-defense because he was the initial aggressor in the fight. (*In re Christian S.* (1994) 7 Cal.4th 768, 773 fn. 1 [neither self-defense nor imperfect self-defense may be invoked by a defendant who by wrongful conduct such as initiation of a physical assault has created circumstances under which his adversary's attack is legally justified].) Although Wyatt stabbed Nobles to death after Nobles approached him and kicked and slapped him, that occurred only *after* Wyatt had bound Nobles with duct tape, taped over his mouth, put a mattress over him, and threw cleaning solution into his face. Indeed, Wyatt agreed in his interview with police that Nobles's kicking and slapping, before Wyatt punched him, was Nobles *defending* himself against Wyatt.

Wyatt contends his acts of binding Nobles with duct tape and throwing a cleaning solution at him were lawful attempts to resist Nobles's misdemeanor offense of disturbing the peace. (See

Pen. Code, § 415, subd. (2); § 693.) But Penal Code section 693 only allows "[r]esistance sufficient to prevent the offense." Wyatt's binding Nobles with duct tape, dousing him with a cleaning solution, and other acts were more than that. *22

Wyatt also argues that he was not the initial aggressor because, before Wyatt bound him with duct tape, Nobles had made noise for hours. But he provides no authority that Nobles's level of disruption made him the initial aggressor in their fight. In fact, Wyatt characterized Nobles's behavior as "nagging" and conceded that others might consider it petty.

D. Prosecutor's Closing Argument

Wyatt contends the prosecutor committed misconduct by describing voluntary manslaughter as "murder with an excuse" during closing argument.

1. Prosecutor's Statements

Discussing the requirements for conviction of murder and the lesser included offense of voluntary manslaughter, the prosecutor argued: "*Voluntary manslaughter is murder with an excuse*. . . [y]ou have malice whether express or implied. But for voluntary manslaughter you have something else that's going on. There's an excuse, *a partial excuse that society is prepared to recognize that negates the malice and lowers the seriousness of the charge for murder to manslaughter*. [¶] So what is this that's going on that you're going to be told about? Heat of passion, members of the jury. In order to find that the malice for murder is negated and society is going to partially excuse what the defendant did, you have to consider that the defendant was provoked by the victim and as a result of the provocation the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment. [¶] In addition to that you have to find that the provocation would have caused a person of average disposition to act rashly and without due deliberation from passion rather than from judgment. Those are the legal words that define voluntary manslaughter that you will hear from the Judge at the conclusion of our presentation." (Italics added.)

The prosecutor gave examples of adequate provocation, such as where a father attacks a person he saw molesting his child. The prosecutor also gave examples of inadequate provocation, such as someone taking the last item off a grocery store shelf or cutting a person off in traffic. *23

In addition, the prosecutor used a PowerPoint slide outlining these principles, which explained that voluntary manslaughter was a killing with malice aforethought, "BUT there is an excuse that negates the malice."

Defense counsel objected to the prosecutor's argument, stating it was "glib." The court overruled the objection, finding nothing inappropriate in the content or tone of the prosecutor's remarks.

2. Legal Standard

In determining whether a prosecutor's statements to the jury constitute misconduct, " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 1001.) A prosecutor's improper comments violate the federal Constitution if they infect the trial with such unfairness as to make the conviction a denial of due process. (*Id*. at p. 1000.) Comments that do not violate the federal Constitution may still violate state law if they involve the use of deceptive or reprehensible methods to attempt to persuade the court or the jury. (*Ibid*.)

3. Application

There is no reasonable likelihood that the jury understood the prosecutor's comments in an objectionable fashion. In saying that manslaughter was "murder with an excuse . . . a partial excuse

that society is prepared to recognize that *negates the malice and lowers the seriousness of the charge for murder to manslaughter*," the prosecutor was not saying that manslaughter *was* murder, but that a killing which would constitute murder if committed with malice is deemed to be only manslaughter if it was in response to sufficient provocation and, therefore, without malice. (Italics added.) That is indeed the law: "Manslaughter is an unlawful killing without *malice*, the element necessary for the greater offense of murder. . . . [P]rovocation . . . mitigate[s] the offense by *negating the murder element of malice*, and thus *limit[s]* the crime to manslaughter." (*People v. Rios* (2000) 23 Cal.4th 450, 454.) Moreover, the prosecutor's statement was consistent with the law as instructed by the court, which informed the jury of the elements of murder and that "[p]rovocation may . . . reduce a
24 murder to manslaughter," and "[a] *24 killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion," as when the "defendant was provoked" (under specified circumstances). (See CALCRIM Nos. 521, 522, 570.) While it is technically true that provocation or the absence of malice is not a legal "excuse" for murder - in the sense of a justification or complete defense - the upshot of the prosecutor's comment was correct: if the jury found that Wyatt acted upon sufficient provocation that he did not act with malice, the jury should find him guilty of manslaughter rather than murder.

Wyatt argues that by casting voluntary manslaughter as murder with an "excuse," the prosecutor shifted the burden of proof because he implied that Wyatt had to provide an "excuse" as to why the homicide was not murder, even though it is the prosecution's burden to prove the absence of provocation to obtain a murder conviction. The argument is meritless. The prosecutor never stated that Wyatt had the burden of proving an excuse or provocation, and the jury was never instructed to that effect. Although Wyatt contends an "excuse" must be proven by the party asserting it under Evidence Code section 115, the jury was never instructed with Evidence Code section 115. To the contrary, the court instructed the jury, pursuant to CALCRIM No. 570, that the *prosecutor* had the burden of proving the absence of provocation: "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

Wyatt also argues that the prosecutor trivialized the crime of voluntary manslaughter by analogizing it to annoyances during shopping and driving, thereby discouraging the jury from finding Wyatt guilty of manslaughter rather than murder. Not so. The prosecutor used the analogies to explain what was *not* sufficient provocation to kill and what therefore would *not* provide a basis for voluntary manslaughter. Wyatt fails to
25 demonstrate error. *25

E. Cumulative Error

Because Wyatt fails to establish that the trial court committed any error, he is not entitled to relief based on any cumulative effect of the prejudice of errors. He fails to establish any basis for a reversal.

III. DISPOSITION

26 The judgment is affirmed. *26

/s/_____

NEEDHAM, J. We concur. /s/_____
JONES, P.J. /s/_____
SIMONS, J.