UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 26 2022

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

ENRIQUE NUNES LOPEZ, Petitioner-Appellant, v. JOSIE GASTELO, Warden, Respondent-Appellee.	No. 21-15774 D.C. No. 3:19-cv-05788-RS Northern District of California, San Francisco ORDER

Before: SILVERMAN and M. SMITH, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 5) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX B

FILED

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ENRIQUE NUNES LOPEZ, Petitioner-Appellant, v. JOSIE GASTELO, Warden, Respondent-Appellee.	No. 21-15774 D.C. No. 3:19-cv-05788-RS Northern District of California, San Francisco ORDER

Before: BENNETT and FORREST, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ENRIQUE NUNES LOPEZ,
Petitioner,
v.
JOSIE GASTELO,
Respondent.

Case No. 19-cv-05788-RS (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner seeks federal habeas relief from his state convictions on grounds of instructional error, cumulative error, and that trial counsel rendered ineffective assistance. These claims lack merit. The petition for habeas relief is DENIED.

BACKGROUND

In 2012, petitioner directed his fellow gang members to beat up another member, Melina, and accused another, Frosty, of being "no good," an offense punishable by death under the rules of the gang. This accusation led to the shooting death of Frosty by Salazar, another member, and petitioner's co-defendant at trial. The state appellate court crisply summarized the central facts:

> Defendants Juan Salazar, Jr. and [petitioner] Enrique Nunez Lopez were members of [La Esperanze Trece, or Espe, a King City] Sureño gang. At a gang meeting on July 28, 2012, [petitioner] directed three gang members to beat up a 17-year-old member of the gang, Melina, as punishment for dating a Norteño. [Her nose was broken and bloody as a result of the attack.[1]] At

[1] This attack was a "checking," a 13-second beating administered by Sureños as a form of gang discipline. Thirteen is significant because M, the first letter of Mexican Mafia, is the

> the same meeting, [petitioner] accused fellow gang member Daniel 'Frosty' Fraga, who was not at the meeting, of being 'no good' because he had been seen associating with Norteños. [A person deemed 'no good' is 'marked for death.']
>
> [¶]
>
> Later that day [at a meeting at the house where Nena and her family lived], Frosty confronted [petitioner] about the accusation at the home where he and several other gang members, including Salazar, were hanging out. [Frosty barged into the meeting asking who was 'talking shit' about him or calling him 'PC' (another term for 'no good.') Dodger and Nina testified that Frosty 'looked like he was high on methamphetamine.'] Hector 'Osito' Reyes, Frosty's friend and a member of another Sureño gang, accompanied Frosty. Frosty punched [petitioner] and a fight ensued between Frosty, [petitioner], Osito, Salazar, and two other gang members. During the fight, Frosty stabbed [petitioner] and Salazar and Osito beat two gang members in the head with the butt of a gun. Salazar shot and killed Frosty and Osito.

(Ans., State Appellate Opinion, Dkt. No. 16-11 at 491-92.) The others present at the house were Dodger (petitioner's brother); Shadow; Baby G.; Nina; and Eunice (Nena), Salazar's girlfriend. All were members of Espe, with the exception of Nena.

The particulars of the fight and shooting are worth noting. Frosty entered the house, with Osito following him, asking who was "talking shit" about him or calling him "PC." (*Id.* at 498.) When no one answered, Frosty asked where petitioner was. (*Id.*) When petitioner came into the living room, Frosty attacked him and threw the first punch. (*Id.*) A fight ensued between Frosty, petitioner, and Dodger. (*Id.*) Osito pointed a gun at the gang members, and instructed them not to move. (*Id.*) Shadow tried to break up the fight, but Osito hit him on the head with the gun, and Shadow "disengaged from the fight." (*Id.*) Dodger punched Osito to disarm him, and Osito repeatedly hit him in the head until he fell to the ground and was bleeding. (*Id.*) Trips, Baby G., Stomper, Nina, and Melina ran

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13th letter of the alphabet. (Ans., State Appellate Opinion, Dkt. No. 16-11 at 493.)

upstairs, along with Cartoon, who paused halfway up the stairs and watched the fight. (*Id.*) Nena came down when she heard the fight, and saw Frosty stab Salazar in the back with a knife. (*Id.* at 499.) Cartoon and Dodger saw petitioner run out of the house prior to the shooting. (*Id.* at 498.)

Dodger testified that after Osito stopped hitting him, Osito ran to the bathroom where Shadow was standing. (*Id.*) Frosty, who was nearby, tried to stab Shadow. (*Id.*) "Salazar came downstairs, passed Dodger on the way to the bathroom, took out a gun, and stood outside the bathroom for four seconds, all the while pointing the gun toward the bathroom." (*Id.*) He then fired the gun repeatedly at Frosty and Osito. (*Id.* at 499-500.)

A person labelled "no good" or "PC" is "marked for death," according to a gang expert who testified at trial. (*Id.* at 493.) That person is "considered a rival of their former gang" and "[e]very Sureño and every member of the Mexican Mafia has an obligation to kill former Sureños who they know have been deemed no good." (*Id.*) Experts also testified that "[a] gang member who is falsely accused of being no good would be expected to confront his or her accusers." (*Id.* at 494.) A gang expert explained that "when you're first deemed no good, there is an opportunity there for you to go and fight that. And immediately upon hearing you've been deemed no good, you need to, for lack of a better term, go defend your honor." (*Id.* at 497.)

Shadow, Dodger, and Nina all testified that "someone who was accused of being no good would be expected to confront the accuser." (*Id.*) Melina testified that if a gang member sees someone deemed no good, "he or she has to "[a]ct on it verbally or . . . physically" and "should" kill the person if opportunity presents itself. (*Id.* at 496.) Nina testified that "someone who is no good can be shot, stabbed, or killed." (*Id.*) Trips testified that gang members can "do anything" to a "no good" person, including killing him. (*Id.*) Cartoon testified that gang members will "kill you, . . . stab you, or do something to you" if you are deemed "no good." (*Id.*) Baby G. testified that "someone who is no good can be shot or stabbed by other gang members." (*Id.*)

In 2013 petitioner was tried alongside Salazar. The prosecutor contended at trial that petitioner was guilty of murder as an aider and abettor "on the theory that the murders were a natural probable consequence of street terrorism," the street terrorism being petitioner accusing Frosty of being "no good." (*Id.* at 492.)

Petitioner was convicted by a Monterey County Superior Court jury of second degree murder of Frosty, battery with serious bodily injury, assault with force likely to produce great bodily injury, child abuse (with the 17-year-old Melina as the victim), and street terrorism.[2] Gang sentencing enhancement allegations were found true. A sentence of 22 years to life was imposed. Petitioner's direct appeals were unsuccessful, and it appears he did not file for state collateral relief. As grounds for federal habeas relief, petitioner alleges (i) there was instructional error; (ii) trial counsel rendered ineffective assistance; and (iii) there was cumulative error.

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 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). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state

[2] Petitioner was charged with Osito's murder, but the jury deadlocked on the charge. (Ans., State Appellate Opinion, Dkt. No. 16-11 at 492.)

court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

DISCUSSION

i. Instructional Error

Petitioner raises two claims of instructional error. To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the disputed instruction by itself so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *Id.* In other words, a federal habeas court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)).

a. Instructions Regarding Self-Defense

Petitioner claims "the trial court improperly instructed the jury per CALCRIM [No.] 3472 (self-defense may not be contrived) in this case because Frosty and Osito were not legally justified in bursting into Salazar's home with deadly weapons to attack [petitioner]

and the occupants of the house."[3] (Pet., Dkt. No. 1 at 6.) He also contends the "court also erred by instructing per CALCRIM [No.] 3471 (self-defense mutual combat) because codefendant Salazar did not agree to fight either victim."[4] (*Id.* at 6-7.)

Petitioner's claims were rejected on appeal because Salazar met none of the requirements of self-defense. "Salazar acted in self-defense or defense of another if he (1) actually and reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; (2) reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and (3) used no more force than was reasonably necessary to defend against that danger." But, the "evidence was weak as to self-defense":

> First, the evidence strongly suggested Salazar could not reasonably have believed that he was in imminent danger of being killed or suffering great bodily injury at the time of the shooting. Shadow, Nena, Dodger, and Cartoon each testified that, in the moments preceding the shooting, Frosty and Osito were in or near the bathroom threatening or fighting with Shadow.

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[3] CALCRIM No. 3472 (Right to Self Defense) reads as follows: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

[4] CALCRIM No. 3471 (Right to Self-Defense: Mutual Combat or Initial Aggressor) reads as follows: "A person who engages in mutual combat or who starts a fight has a right to self-defense only if: 1. He actually and in good faith tried to stop fighting; and 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 to self-defense arose."

> According to Nena, Dodger, and Cartoon, Salazar left a place of relative safety—the living room or upstairs—to approach and shoot the victims. The evidence supported the conclusion that, by the time of the shooting, Osito had dropped his firearm: Shadow heard Osito's gun fall to the ground before the shooting and the magazine was found near the entrance to the bathroom, while Osito's body was several feet away, near the toilet. Frosty remained armed with the scissors, but the physical evidence indicated that Salazar shot the victims from a distance of nine feet, too far for Frosty and his scissors to pose an imminent danger to Salazar, who was armed with a gun. Second, Dodger and Cartoon testified that Salazar stood outside the bathroom for a few seconds before shooting, which suggests he did not reasonably believe that the immediate use of deadly force was necessary to defend himself. Third, there was evidence that Salazar used more force than was reasonably necessary to defend against any danger the victims posed. He fired nine bullets, emptying his gun, and hitting both victims multiple times. The evidence supported the prosecutor's theory that Salazar continued shooting while the victims were down, as Osito was shot once in the back, Frosty was shot between his scrotum and anus, and some of the wounds had a downward trajectory.

(Ans., State Appellate Opinion, Dkt. No. 16-11 at 516-517.)

The state appellate court noted that evidence of self-defense was so weak that Salazar's counsel did not argue it in her closing argument. (*Id.* at 517.) Rather, she raised the possibility of defense of another, in particular Shadow. The state appellate court rejected this claim as well. At the time of the shooting, Shadow was not in imminent danger of being killed or suffering great bodily injury. "Shadow, Dodger, and Nena all testified that Shadow exited the bathroom and fell to the floor before the shooting. Osito was disarmed around the same time. According to Nena, after Shadow fell, Salazar ran from outside the bathroom, to the living room (possibly to retrieve the gun), and back to the bathroom before shooting. Dodger testified that Salazar pointed the gun into the bathroom for four seconds before shooting. Their testimony undermines Salazar's contention that he actually and reasonably believed that Shadow was in imminent danger of being killed or suffering great bodily injury so that he reasonably believed that the immediate use of deadly force was necessary." (*Id.* at 517-518.) Also, the number of bullets fired and the location of the victims' wounds indicate Salazar used more than

reasonably necessary force. (*Id.* at 518.)

Because Salazar could not establish self-defense, the jury would have no need to make use of Nos. 3471 and 3472. As the state appellate court noted, the jury was instructed that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case . . . After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." (*Id.*) The state court "presume[d] the jury followed that instruction by disregarding CALCRIM Nos. 3471 and 3472." (*Id.*) Because the jury made no use of the contested instructions, no prejudice ensued. (*Id.*)

Habeas relief is not warranted here. The state appellate court explained that because the jury could not have found that Salazar acted in self-defense, it would have no need to apply Nos. 3471 and 3472. Therefore, the state court reasonably assumed the jury did not use the instructions at all, let alone in an unconstitutional way. Salazar could have acted in self-defense only if he (1) actually and reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; (2) reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and (3) used no more force than was reasonably necessary to defend against that danger. None of these requirements were met, as the facts show. Salazar was upstairs and out of danger, when Frosty entered the house, and during the time the fight among Frosty, Dodger, Shadow, and Osito ensued. By the time Salazar came downstairs, petitioner and Dodger had fled. Shadow had pushed passed Frosty and Osito, who was no longer in possession of a gun.

There was also no evidence that Frosty posed an immediate threat. Salazar moved from a place of safety (the upstairs) to face and shoot Frosty and Osito. Furthermore, Dodger and Cartoon testified Salazar stood outside the bathroom for a few seconds before the shooting, which indicates there was no immediate need for force. Frosty's later arming himself with scissors does not change this conclusion. Frosty was nine feet away from Salazar when the shots were fired, and Frosty was armed with scissors, and Salazar with a

gun. Furthermore, Salazar used more force than was necessary, having fired nine shots into Frosty and Osito, and continuing to fire after they had fallen to the ground.

Nor was there any basis for defense of another, here Shadow. The state court reasonably determined that Shadow was not in imminent danger of being killed or suffering great bodily injury. He was lying on the floor, and Osito was no longer armed by the time Salazar arrived.

Also, because jurors are presumed to follow a court's instructions, *Richardson v. Marsh*, 481 U.S. 200, 206 (1987), this Court presumes the jury disregarded Nos. 3471 and 3472 per the trial court's instructions to apply the appropriate instructions to the facts. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

b. Jury Instructions on the Right to Use Force to Defend the Home

Petitioner claims the trial court violated his due process rights when it refused to instruct the jury on the right to use force to defend one's home (CALCRIM No. 506). (Pet., Dkt. No. 1 at 8.) He also claims the trial court violated his due process rights when it failed to instruct the jury sua sponte with CALCRIM No. 3477, which, in the words of the state appellate court, "describes a rebuttable presumption that a residential occupant has a reasonable fear of death or great bodily injury when he or she uses deadly force against an unlawful and forcible intruder into the residence." (*Id.*, Dkt. No. 1 at 8; Ans., Dkt. No. 16-11 at 525.)

The relevant facts are as follows: Nena testified that Salazar lived at her house (where the shooting occurred), as well as with his parents, and went back and forth between the residences. (*Id.* at 525.) Salazar's counsel contended that, based on this information, Nena's residence qualified as Salazar's house, and therefore Salazar was entitled to an instruction on defense of the home (CALCRIM 506). (*Id.* at 525-526.) The trial court denied the request. (*Id.* at 526.) There was no request to instruct on CALCRIM No. 3477. (*Id.*)

These claims were rejected on appeal because there was no due process violation and, even if there had been a constitutional error, there was no prejudice. First, "[b]ecause the jury was instructed on self-defense and defense of another with CALCRIM No. 505, any error did not deprive defendants of their federal constitutional right to present a defense, but rather was one of state law only." (*Id.* at 528.) Second, if CALCRIM No. 3477 had been given, the prosecution would have rebutted the presumption of reasonable fear that the instruction provides. "Salazar left a place of relative safety — the living room or upstairs — to approach and shoot the victims from a distance of nine feet after Osito had been disarmed." (*Id.*) Based on this evidence, the jury would have found the prosecution had rebutted the presumption that Salazar had a reasonable fear as to himself. (*Id.* at 529.) Likewise, the prosecution would have rebutted the presumption Salazar had a reasonable fear about Nena being injured or killed. (*Id.*) Nena was not involved in the fight, nor is there anything in the record indicating Frosty or Osito would have attacked her. (*Id.*) "Frosty attacked [petitioner] because he was 'talking shit' and Osito fought Shadow and Dodger because they intervened. Neither of the victims attacked any of the bystanders and Salazar could not reasonably have believed they posed an *imminent* danger to Nena." (*Id.*)

Third, CALCRIM No. 3477 would not have helped petitioner's contention that he was protecting Shadow. (*Id.* at 528.) The No. 3477's presumption applies only if the resident has a reasonable fear that he or a fellow resident is in imminent danger of death or great bodily injury. (*Id.*) Shadow was not a resident of Nena's house. (*Id.*)

Habeas relief is not warranted here. The state appellate court reasonably determined that no due process violation occurred. Salazar was able to present his self-defense defense. Also, the failure to give the desired instructions was not prejudicial. The record supports the state appellate court's interpretation that Salazar could not have had a reasonable fear of death or injury to himself or Nena. He left a safe location before moving within nine feet of Frosty and shooting. Nena was not involved in the fight and

there was no evidence Salazar had any fear that others would attack her or Shadow. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

ii. Ineffective Assistance

Petitioner contends counsel rendered ineffective assistance by failing to (a) discuss adequately a mid-trial plea offer; (b) raise a self-defense and/or an imperfect self-defense; (c) hire a gang expert; (d) hire a methamphetamine expert; (e) make a timely request to reopen argument and request an instruction on intervening cause; (f) object to an argument raised by co-defendant Salazar's counsel; (g) object to prosecutorial misconduct; (h) object to the use of CALCRIM Nos. 3471 and 3472; (i) request an instruction of defense of home; (j) request modification of CALCRIM Nos. 334 and 301; (k) object to gun reference; (l) impeach gang expert; (m) object to potential juror misconduct; (n) object to trial court's failure to settle instructions before argument; (o) introduce evidence of Frosty's violent character; and (p) having a conflict of interest regarding many of these claims.

In order to prevail on a claim of ineffectiveness of counsel, the petitioner must establish two factors. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms, *Strickland v. Washington*, 466 U.S. 668, 687-68 (1984), "not whether it deviated from best practices or most common custom," *Richter*, 562 U.S. at 105 (citing *Strickland*, 466 U.S. at 690). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466 U.S. at 689).

Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine

confidence in the outcome. *Id.* Where the defendant is challenging his conviction, the appropriate question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693).

AEDPA "erects a formidable barrier to federal habeas relief." *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013). The barrier is even more formidable when seeking relief on an ineffective assistance claim. The standards created by *Strickland* and § 2254(d) are "highly deferential." *Strickland*, 466 U.S. at 689. When the two apply in tandem, review is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). When § 2254(d) applies, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

a. Plea Offer

Petitioner claims defense counsel rendered ineffective assistance by failing to "adequately discuss a mid-trial plea offer." (Pet., Dkt. No. 1 at 10.) "During trial, the prosecutor offered [petitioner] a 22-year determinate sentence in exchange for a guilty plea." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 558.) In his new trial motion, petitioner contended counsel took "less than fifteen minutes explaining the terms of the offer," failed to tell him the difference between a determinate and indeterminate term, did not tell him of his maximum exposure if convicted, and did not tell him whether it was in petitioner's best interest to accept the prosecutor's offer. (*Id.* at 558-559.) He also contended he would have taken the offer had he known the difference between the types of terms and had been told the maximum sentence he would face if convicted. (*Id.* at 559.) At the hearing on the new trial motion, counsel testified he spoke to petitioner "several times about the number he was looking for" in a plea bargain, and that number was eight years. "The trial court rejected the ineffective assistance of counsel claim, finding that the

offer was communicated to [petitioner] and that the parties were very far apart." (*Id.* at 559.) The appellate court accepted the trial court's credibility determination and concluded there was no prejudice. (*Id.*)

"In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, 566 U.S. 156, 164 (2012).

Habeas relief is not warranted here because petitioner has not met *Lafler*'s requirement to show he would have accepted the offer, or that the court would have accepted the plea. Counsel's testimony that petitioner was not interested in a sentence greater than 8 years, which was credited by the trial and appellate courts, defeats any attempt to show he would have accepted the 22-year offer. Not only must federal habeas courts accord such credibility determinations deference, *see Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.1986), factual determinations such as credibility are, under 28 U.S.C. § 2254(e)(1), "presumed to be correct." Petitioner also has not shown the trial court would have accepted the offer. The record is bare of any indication the trial court would have found the offer acceptable. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

b. Arguing Self-Defense and Imperfect Self-Defense

Petitioner claims counsel rendered ineffective assistance by failing to investigate and present "a meritorious defense of self-defense and imperfect self-defense." (Pet., Dkt. No. 1 at 10.) He bases this claim on defense counsel's post-trial statement that, in the words of the state appellate court, he "made a mistake by relying on Salazar's counsel to present those defenses." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 560.) The trial

court, however, found nothing deficient in defense counsel's representation, and commented that many attorneys often question their decisions after their client had been found guilty. (*Id.*, Reporter's Transcript, Dkt. No. 16-8 at 155-156, 161-163.)

The state appellate court agreed. The "mere fact that trial counsel second-guessed his decision" in hindsight "does not establish that counsel's performance was deficient." (*Id.*, State Appellate Opinion, Dkt. No. 16-11 at 560.) Furthermore, the trial court need not determine the issue of deficient performance because petitioner "does not show there is a reasonable probability he would have received a more favorable result" had trial counsel investigated and presented those defenses. (*Id.*) Petitioner failed to show how defense counsel "could have presented those defenses in a more persuasive manner than did Salazar's counsel." (*Id.*) He merely asserts in a conclusory manner that the defenses were strong and there was a reasonable probability he would have received a more favorable result. The appellate court found this assertion "unsustainable." (*Id.*) There was no showing how defense counsel could have argued these defenses on petitioner's behalf, when "only Salazar could claim to have acted in self-defense or defense of others." (*Id.*) Finally, "the jury heard the supposedly strong evidence and nevertheless rejected the defenses as to Salazar." (*Id.*) There is no reason to believe defense counsel "could have persuaded the jury to view the evidence differently." (*Id.*)

Habeas relief is not warranted here. Defense counsel's performance was not deficient. His reliance on Salazar's attorney to present those defenses was a reasonable trial tactic. Those defenses were available to Salazar, not petitioner, and therefore Salazar's counsel was the one to raise them. There was also no showing of prejudice, as the state appellate court concluded. Petitioner has not shown how defense counsel could have argued those defenses more persuasively. Also, the jury heard and rejected these defenses when presented by Salazar's attorney. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

c. Hiring a Gang Expert

Petitioner contends defense counsel rendered ineffective assistance when he failed to hire a gang expert. (Pet., Dkt. No. 1 at 10.) According to the state appellate opinion, his post-trial counsel had found a gang expert (former police officer and gang expert Glenn Rouse) who could have testified regarding the meanings of various gang words such as "green light," "order to kill," and "no good." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 560.) According to this expert, "[a]ll these terms have specific meanings and could have been offered to assist the jury in its evaluation" of petitioner's credibility. (*Id.* at 560-561.)

Defense counsel told petitioner's post-trial investigator that he had consulted a gang expert.[5] (Ans., Clerk's Transcript, Dkt. No. 16-1 at 439-440.) When he learned the expert could not provide the opinion counsel wanted, however, he decided not to hire a gang expert. (*Id.*)

This claim was raised in a new trial motion and on appeal, and was rejected:

> [Petitioner] contends that gang expert testimony to the effect that 'greenlight,' 'order to kill,' and 'no-good order' have distinct meanings 'would have aided the defense [since] the prosecution expert asserted that a no-good order was the same as a green light and an order to kill, and . . . opined that the no-good vote was a green light to kill Frosty.' But Rouse's declaration does not define 'greenlight,' 'order to kill,' and 'no-good order.' The mere fact that those terms are not interchangeable does not undermine the prosecutor's theory that the killing of a no-good gang member is the natural and probable consequence of a no-good vote. Rouse's declaration is too vague to establish that trial counsel 'could have presented any favorable expert testimony.' (*People v. Datt* (2010) 185 Cal.App.4th 942, 952.) Therefore, [petitioner] 'has not shown that his trial counsel was deficient in failing to present expert [gang] testimony.' (*Id.* at p. 953.)
>
> [Petitioner's] claim also falters on the prejudice prong. Without knowing the

[5] "[Petitioner] fired trial counsel before sentencing and the trial court appointed him counsel from the Alternate Defenders Office. [Petitioner] then moved unsuccessfully for a new trial." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 502.)

> definitions Rouse ascribes to the terms 'greenlight,' 'order to kill,' and 'no-good order,' we cannot say that the outcome would have been any different had the jury heard testimony as to those definitions.

(Ans., State Appellate Opinion, Dkt. No. 16-11 at 561.)

Tactical decisions of trial counsel deserve deference when: (1) counsel bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). A court must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (citation and quotation marks omitted).

Habeas relief is not warranted here because the state court reasonably determined petitioner had not shown either deficient performance or prejudice. First, defense counsel's declination to hire an expert was an informed decision based upon investigation. He investigated the option, but found no expert who could provide the testimony he sought. Rouse's declaration does not change this conclusion because he does not define the gang terms. Therefore, there is no showing that failing to hire a gang expert was deficient. Rouse's deficient declaration also militates against any finding of prejudice. Petitioner has offered nothing to indicate that had defense counsel hired a gang expert, there was a reasonable probability of a favorable outcome. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

d. Hiring a Methamphetamine Expert

Petitioner claims defense counsel rendered ineffective assistance when he did not call a methamphetamine expert. (Pet., Dkt. No. 1 at 10.) He believes such testimony would have shown Frosty's attack was a drug-fueled rampage and supported a defense of self-defense, or imperfect self-defense, or defense of others. (Ans., State Appellate

Opinion, Dkt. No. 16-11 at 562.) Defense counsel stated to petitioner's post-trial investigator he wished he had called a methamphetamine expert to say Frosty's behavior was related to his being a meth addict. (*Id.*, Clerk's Transcript, Dkt. No. 16-1 at 448.) Salazar's counsel, however, was dismissive of the idea. (*Id.*) Methamphetamine was found in Frosty's system, a fact the jury was told. (*Id.*, State Appellate Opinion, Dkt. No. 16-11 at 562.)

This claim was rejected on appeal because petitioner failed to show prejudice. Other evidence linked Frosty's violent behavior to methamphetamine. "Dodger testified that Frosty appeared to be on drugs at the time of the fight and that people on drugs are more aggressive and violent." (*Id.*) Nina testified that "Frosty appeared to be on methamphetamine because he looked furious." (*Id.*) Also, the jury heard evidence that Frosty had methamphetamine in his system. (*Id.*) In light of such evidence, the state appellate court concluded it was not reasonably probable the outcome of the trial would have been different. (*Id.*)

Habeas relief is not warranted here. The state court reasonably determined that no prejudice ensued. The jury heard evidence that Frosty had methamphetamine in his system and that to eyewitnesses he appeared to be on drugs, in particular methamphetamine. An expert on methamphetamine would have added little or nothing to the evidence the jury heard. On such a record, Martin's decision constituted neither a deficient performance nor prejudice. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

e. Failure to Request Reopening Argument

Petitioner claims defense counsel rendered ineffective assistance when he failed to make a timely request for a jury instruction on intervening cause and for failing to argue this point to the jury. (Pet., Dkt. No. 1 at 10.) After the jury had been instructed, petitioner's counsel told the trial court that "Frosty's act of violently attacking [petitioner] constituted an independent intervening cause of his own death that absolved [petitioner] of

criminal liability." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 548.) He asked to reopen argument so that he could present this idea to the jury. (*Id.*)

The trial court did not agree. It saw Frosty's act as a reasonably foreseeable consequence of petitioner's act of street terrorism (calling the meeting and encouraging the members to find Frosty no good). (Ans., Reporter's Transcript, Dkt. No. 16-8 at 7-11.) Frosty's act was seen as dependent, not independent, of petitioner's conduct. (*Id.*) Defense counsel's request to reopen argument so he could argue this point to the jury was denied by the trial court: "perhaps you could have argued it. I don't think it follows from what the law depends [*sic*] as an independent, intervening act."[6] (*Id.* at 9.)

Petitioner's ineffective assistance claim was rejected on appeal:

> The jury convicted [petitioner] of second degree murder on a natural and probable consequence theory. In reaching that verdict, it must have concluded that Frosty was likely to be murdered as a consequence of [petitioner's] acts of street terrorism if nothing unusual intervened. Therefore, the jury necessarily concluded that nothing unusual intervened. Put differently, the jury must have concluded that Frosty's act of starting a physical fight with [petitioner] was not 'an extraordinary and abnormal occurrence.' (*Cervantes*, *supra*, 26 Cal.4th at p. 871.) Therefore, it is not reasonably probable that the result of the proceeding would have been different had the jury been instructed on independent intervening cause and heard argument on that point.

(Ans., State Appellate Opinion, Dkt. No. 16-11 at 549).

Habeas relief is not warranted here. The state courts reasonably determined that no evidence supported an intervening cause instruction, and that no prejudice ensued. Petitioner's liability was premised on his act of street terrorism, and that Frosty's act

[6] At trial, on appeal, and here, petitioner invoked a California supreme court case, *People v. Cervantes*, 26 Cal. 4th 860 (Cal. 2001) for the proposition that Frosty's actions were an intervening cause. This is unavailing. First, this Court is bound by the state court's interpretation that state law did not require an intervening cause instruction. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Second, *Cervantes* relates to questions of proximate causation under the provocative act doctrine, whereas petitioner's case related to the question of aiding and abetting liability under the natural and probable consequences doctrine. *Cervantes*, 26 Cal. 4th at 862-863.)

followed from it. Evidence supported just such a theory. As noted above, a person deemed no good is marked for death. Therefore, petitioner's street terrorism constituted a serious threat to Frosty, whose violent actions in response were reasonably foreseeable. The jury was instructed accordingly: "Under all of the circumstances, a reasonable person in defendant's position would have known the commission of Murder was a natural and probable consequence of the Street Terrorism." (Ans., Clerk's Transcript, Dkt. No. 16-1 at 754.) Also, petitioner has not offered any evidence that would support an intervening cause instruction. Because there was no evidence for such an instruction, counsel's failure to argue for such an instruction was not prejudicial. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

f. Failure to Object to Salazar's Counsel's Argument

Petitioner claims defense counsel rendered ineffective assistance when he failed to object to Salazar's counsel's contention that Salazar had committed "justifiable murder." (Pet., Dkt. No. 1 at 11.) In closing argument, Salazar's counsel, Chapman, said the following:

> Shadow, of course, I think is our key witness here because he's the one that's in the restroom at the time that the murder, killing, takes place. And the reason I say murder is because it's the intentional killing of someone. But if it's justified, then the person is not guilty. So I just want to make sure that you understand the context. It's just as if a police officer shoots and kills a bank robber who's shooting at him. He's intending to kill him. And he's thought about it, and he's killing him, but he's justified in doing so. So sometimes when we hear the word murder we're, like, oh, you know, he's guilty and he killed the person without cause. But it is murder, but with justification.

(Ans., State Appellate Opinion, Dkt. No. 16-11 at 539.) Petitioner contends his counsel should have objected. (Pet., Dkt. No. 1-4 at 121-125.) He contends Salazar's counsel not only misstated the law, but conceded Salazar was guilty of murder, which eliminated the possibility of the jury returning a verdict of voluntary manslaughter. (*Id.*)

This claim was rejected on appeal. "Plainly, counsel misspoke" by referring to "murder" rather than to "homicide." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 539.) But, when "murder" is seen in the context of counsel's argument, "no reasonable juror would have understood counsel's misstatement as a concession that Salazar was guilty of murder." (*Id.*) In the opinion of the appellate court, the argument "was that Salazar was 'not guilty' because the killing was 'justified,' an argument counsel repeated at the end of her closing argument":

> The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People don't meet that burden, you must find the defendant not guilty . . . Any[one] . . . in that house . . . would have been justified in grabbing [Salazar's] gun and shooting those people before they stab[bed] or killed [Shadow]. [¶] I'm going to ask you to come back with a verdict of not guilty. As to Mr. Salazar. Thank you.

(*Id.* at 540.) After making this point clear, "jurors could not possibly have believed that Salazar's counsel was conceding his guilt as to the murder charges." (*Id.*) Also, "[s]ignificantly, the prosecutor made no reference to any concession of guilt in rebuttal, as one would expect if such a concession had been made." (*Id.*) Furthermore, any confusion would have been undone by the trial court's instructions on homicide. (*Id.*) The claim foundered, according to the state court, on the lack of showing of prejudice. (*Id.*)

Habeas relief is not warranted here. The state courts reasonably determined that no prejudice ensued. First, Salazar's counsel cleared up any confusion (or invalidated the alleged concession) by the remainder of her argument. Second, the trial court properly admonished the jury that "You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (Ans., Clerk's Transcript, Dkt. No. 16-1 at 719.) Because jurors are presumed to follow a court's instructions, *Marsh*, 481 U.S. at 206, this Court presumes the trial court's instruction eliminated the risk of any impermissible inferences being made from Salazar's counsel's statements. Petitioner's

counsel's failure to object cannot have resulted in prejudice. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

g. Failure to Object to Prosecutorial Misconduct

Petitioner claims defense counsel rendered ineffective assistance by failing to object to two instances of prosecutorial misconduct. (Pet., Dkt. No. 1 at 11.) In the first, (1) the prosecutor stated that Frosty learned of the "no good" decision from Melina, when, as petitioner contends, there was no evidentiary support for this. In the second, (2) the prosecutor said in his closing argument "I don't know what the standard of the law is. It doesn't really matter," thereby inviting the jury to disregard the law.

A defendant's due process rights are violated when a prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation and internal quotation marks omitted). Under *Darden*, the first issue is whether the prosecutor's conduct was improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). It is "the fairness of the trial, not the culpability of the prosecutor" that is the touchstone of the due process analysis. *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

1. Misstatement of Fact

The prosecutor said the following in closing argument, in rebuttal to defense counsel's contention that there hadn't been a "no good" finding regarding Frosty, but there was only a "freeze" on his status pending further inquiry:

> [Salazar] was told this guy's no good. Not a single witness described the vote that happened at the school yard as a freeze. Not a single witness used that word. Only the defense attorneys used the word freeze. Every single witness said, 'You agree Frosty's no good?' Everyone agree Frosty's no good. They didn't say does anybody agree we should investigate this? Not one of them said, oh, does everyone agree we need to freeze Frosty. Does everyone agree to this? The entire discussion is that Frosty's no good.

> You can look at the text messages. You'll have them. There's a few extras that I don't think we actually told you about. But they are admitted into evidence. You can read them later. Melina's telling him, 'Hey, they're saying you're no good.' Not 'They're saying they're investigating you're on freeze, I'm not allowed to talk to you.' She believes they were saying he was no good. Why? Because that [*sic*] the words they were using.

(Ans., State Appellate Opinion, Dkt. No. 16-11 at 541.)

The state appellate court rejected the claim. Even if one assumes the prosecutor misstated the evidence and misled the jury, there was no prejudice.[7] The salient fact is that Frosty was aware of the no good order, whether through Melina or another source. (*Id.* at 542.) Because it is beyond dispute Frosty knew of the no good order, "it is not reasonably probable that the jury would have returned a verdict more favorable to defendants absent the prosecutor's mischaracterization of the evidence." (*Id.*)

The state court's rejection of this claim was reasonable. Even if the prosecutor misstated the evidence, there has been no showing that the fairness of the trial was impugned. First, it is undisputed that Frosty knew of the no good order, even if not through Melina. Second, the jury was instructed that "If either attorney misstates the evidence or the law, you will rely on the evidence presented at the trial and the law as stated by me." (Ans., Reporter's Transcript, Dkt. No. 16-7 at 27.) Because jurors are presumed to follow a court's instructions, *Marsh*, 481 U.S. at 206, this Court presumes the trial court's instructions eliminated the risk of any impermissible inferences being made from the prosecutor's statements. Petitioner's counsel's failure to object cannot have resulted in prejudice. The state court's rejection of this claim was reasonable and therefore

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[7] "There was no evidence that Melina texted Frosty 'Hey, they're saying you're no good.' Nor did she otherwise mention a no-good order or vote in any of the text messages admitted into evidence. Melina testified that she did not update Frosty about what happened at the gang meeting. There was testimony that Melina informed Frosty that at least [petitioner] was accusing him of being no good when she called him on the way to San Ardo, and the prosecutor could conceivably have been referencing that testimony." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 542.)

is entitled to AEDPA deference. This claim is DENIED.

2. Misstatement of Law

In closing argument, the prosecutor addressed the self-defense arguments raised by the defense:

> Again, Frosty's not allowed to come to the house and start a fight. It's a crime. But it was a fistfight he started. And the defense attorney says he grabbed a knife. He turned the fistfight into—just a one-on-one fight into a knife fight because he picked up these scissors. It wasn't one-on-one when he picked up the scissors. He was being beaten by two people when he picked up the scissors.
>
> *I don't know what the standard of the law is. It doesn't really matter.* The point is this wasn't a one-on-one fistfight where [Frosty] escalated the fight. This was a one-on-one fistfight where Dodger escalated the fight and [petitioner] then both jumped him together . . . [Frosty and Osito] were not people out to kill. There was no right to use this lethal force, nine bullets, to stop two people who were stopping fighting. They stopped fighting by this point. No one was getting hit. Dodger's gone. [Petitioner's] gone. Shadow was allowed to walk out of the bathroom. He falls, trips and falls, but no one attacks him when he falls. He'd not been hit by a gun. He'd not been shot at. He'd not been stabbed.

(Ans., State Appellate Court, Dkt. No. 16-11 at 543.) Petitioner contends the prosecutor's statement ("I don't know what the standard of law is. It doesn't really matter") as "an invitation to convict [petitioner] regardless of his guilt under the law." (Pet., Dkt. No. 1-4 at 134.)

This claim was rejected by the appellate court, which found no reasonable likelihood the jury "understood the prosecutor's passing comments as an invitation to convict regardless of the law." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 544.) The comments were made after the prosecutor spoke about the important fact Frosty had grabbed scissors. (*Id.*) After that, the prosecutor continued his response to the defense's self-defense argument by saying that deadly force was unnecessary because the fight had finished. (*Id.*) "In that context, jurors would have understood the prosecutor's statement

that the standard of law doesn't matter to mean that the legal implications of who escalated the fight and when were not relevant to his argument that, by the time of the shooting, there was no need to use deadly force." (*Id.*)

Habeas relief is not warranted here. First, it is not plausible the jury would have understood the prosecutor to mean "convict without regard to the law." It would have been contrary to his behavior and speech throughout trial as a representative of the state. Rather, they would have understood him to mean it was irrelevant how the fight was escalated or by whom. What was relevant was that by the time Salazar shot Frosty, Salazar could not have been acting in self-defense.

Second, the jury was instructed that "[i]f either attorney misstates the evidence or the law, you will rely on the evidence presented at trial and the law as stated" by the trial court. Because jurors are presumed to follow a court's instructions, *Marsh*, 481 U.S. at 206, this Court presumes the trial court's instructions eliminated the risk of any impermissible inferences being made from the prosecutor's statements. Petitioner's counsel's failure to object cannot have resulted in prejudice. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

h. Failure to Object to the Use of CALCRIM Nos. 3471 and 3472

Petitioner claims defense counsel rendered ineffective assistance when he failed to object to the use of CALCRIM Nos. 3471 (mutual combat) and 3472 (contrived self-defense). (Pet., Dkt. No. 1 at 11.) The Court already has addressed and denied petitioner's challenges to the use of these instructions. Because the use of these instructions did not result in prejudice, counsel's failure to object to them cannot have resulted in prejudice. It is both reasonable and not prejudicial for an attorney to forego a meritless objection. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005). The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

i. Failure to Request Instruction on Defense of Home

Petitioner claims defense counsel rendered ineffective assistance when he failed to request an instruction on defense of home. (Pet., Dkt. No. 1 at 11.) The Court already has addressed and denied petitioner's challenge to the failure to request this instruction. Because the absence of such an instruction did not result in prejudice, counsel's failure to request such an instruction cannot have resulted in prejudice. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

j. Request Modification of Instructions on Accomplice Testimony

Petitioner claims counsel rendered ineffective assistance when he failed to request a modification of CALCRIM Nos. 334 (accomplice testimony must be corroborated) and 301 (accomplice testimony requires supporting evidence). (Pet., Dkt. No. 1 at 11.) He contends these instructions were improper because they told the "the jury to view favorable, exonerating accomplice testimony with caution" and "to disregard favorable, exonerating accomplice testimony unless there was corroboration." (Ans., State Appellate Court, Dkt. No. 16-11 at 551.) In petitioner's opinion, counsel should have asked to add the following sentence to both instructions: "Any testimony or statements by an accomplice informant that are favorable to the defendants do not require corroboration and need not be viewed with caution. You are to apply the general rules of credibility when weighing accomplice testimony that is favorable to the defendants." (*Id.* at 551-552.)

This claim was rejected on appeal. First, the version of CALCRIM No. 334 read to petitioner's jury correctly stated the law. (*Id.* at 552.) Second, because the instruction specifically stated that incriminating testimony must be viewed with care and caution, it did not "suggest the jury must apply this standard to all testimony given by an accomplice." (*Id.*) Third, the jurors considered No. 301 in conjunction with No. 334 because both related to accomplice testimony. If read alone, No. 301 "might be read to suggest that all accomplice testimony requires corroboration." But, CALCRIM No. 334

"dispelled any ambiguity in CALCRIM No. 301." (*Id.* at 553.) "We conclude jurors would have understood that CALCRIM No. 301 stated the general rule of witness credibility, and that CALCRIM No. 334 stated the exception to that rule for accomplice testimony." (*Id.*) In light of this, the state appellate court concluded the instructions were adequate, therefore counsel's failure to request a modification was neither deficient nor prejudicial. (*Id.*)

Habeas relief is not warranted here. First, the state court's declaration that the instructions gave the correct state law is not reviewable. *Bradshaw v. Richey*, 546 U.S. at 76. Second, the state court reasonably concluded that the instructions were read together, with No. 334 limiting and the use of No. 301 so that the additional instruction petitioner requested was not necessary. Third, because jurors are presumed to follow a court's instructions, *Marsh*, 481 U.S. at 206, this Court presumes the jury adhered to the instructions and viewed accomplice testimony appropriately. In sum, counsel's failure to request a modification was neither deficient nor prejudicial. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

k. Failure to Object to Gun Reference

Petitioner claims defense counsel rendered ineffective assistance for failing to object to "irrelevant gun evidence." (Pet., Dkt. No. 1 at 11.) The facts are as follows:

> The court posed questions from jurors to Cartoon. After that examination, the court allowed further redirect examination by the prosecutor, during which Cartoon testified that, after the phone call with Frosty in the car on the way to San Ardo, [petitioner] said '[t]hat he wanted to go get his gun.' [petitioner]'s trial counsel objected on the ground that the question was 'beyond the scope' of the court's examination. The court overruled that objection. Thereafter, Cartoon clarified that [petitioner]'s exact words were 'man, I'm wondering if I should go pick up my .38. He'll probably show up.' The prosecutor argued in closing that [petitioner]'s comment proved [petitioner] knew 'what he was doing' when he called Frosty no good; 'knew that he was threatening [Frosty's] life' and that Frosty 'was going to respond angrily, violently.'

(Ans., State Appellate Opinion, Dkt. No. 16-11 at 553.)

This claim was rejected on appeal. The evidence was relevant to prove the prosecutor's theory that "Frosty's death was a natural probable cause of [petitioner] calling Frosty no good because Frosty reasonably could be expected to defend his name using violence." (*Id.* at 555.) Its relevance was not outweighed by its possible prejudicial effect. "An emotional response by jurors to the gun possession evidence was unlikely here because it was undisputed that [petitioner] was a gang member and the gang expert testified more than once that '[g]ang members are known to carry guns.' Accordingly, other admissible evidence gave jurors reason to believe [petitioner] possessed or had access to a gun." (*Id.*)

Habeas relief is not warranted here. First, because the trial court determined the evidence was relevant and not prejudicial, counsel had no basis to object. It is both reasonable and not prejudicial for defense counsel to forgo a meritless objection. *See Juan H.*, 408 F.3d at 1273. Second, petitioner's claim would fail even if the evidence were irrelevant or prejudicial. The Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009); *see also Alberni v. McDaniel*, 458 F.3d 860, 866-67 (9th Cir. 2006) (a petitioner's due process right concerning the admission of propensity or character evidence is not clearly established for purposes of review under AEDPA.) The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

l. Failure to Impeach Gang Expert

Petitioner claims defense counsel rendered ineffective assistance by failing to impeach the gang expert with his prior statement that petitioner would not be charged with murder. (Pet., Dkt. No. 1 at 11.) The facts are as follows. During a police interrogation of petitioner, Sergeant Hoskins, who later testified at trial as a gang expert, made several

statements to petitioner that seemed to promise leniency, e.g., "I can tell you you're not being charged with murder." (Ans., Reporter's Transcript, Dkt. No. 16-6 at 27.) The trial court determined that such statements rendered petitioner's responses in that interrogation inadmissible. (*Id.* at 3669-3670.) "At trial, Hoskins opined in his capacity as a gang expert that there was a no-good order against Frosty that was equivalent to an order to kill him. Hoskins also opined that Frosty was killed as result of the no-good order, citing that '[t]he fact that [Frosty] was killed' as evidence that the gang was treating him as no good." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 556.) Petitioner contends defense counsel should have impeached Hoskins with his prior statements that petitioner was not going to be charged with murder. He believes those statements were not consistent with Hoskins's opinion that the no-good order led to Frosty's death. (*Id.*)

This claim was rejected on appeal. Hoskins's interrogation statements were not inconsistent with his trial testimony. "Hoskins informed [petitioner] that he was not being charged with murder; he offered no opinion as to whether [petitioner] could be held criminally liable for Frosty's death on a natural and probable consequences theory." (*Id.*) Because there was no inconsistency, his statements were "inadmissible for purposes of impeachment." (*Id.*)

Habeas relief is not warranted here. Because the statements were not inconsistent, defense counsel had no reason to attempt to impeach Hoskins, and therefore there was no deficient performance or prejudice. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

m. Failure to Object to Potential Juror Misconduct

Petitioner claims defense counsel rendered ineffective assistance when he failed to object to potential juror misconduct. (Pet., Dkt. No. 1 at 11.) The facts are as follows:

> After closing arguments, prosecution witness Lurz informed the court that he inadvertently had a 20-second conversation with a juror in the hallway. Lurz initiated the conversation by telling the juror—who Lurz did not recognize as a juror—that he looked like a character on a popular television show. The

> juror responded that people told him he looked like a different character on the show and mentioned he 'was applying for a CO position at the prison.' Lurz noticed the juror's juror badge and excused himself. The two did not discuss the case. The court gave all counsel the opportunity to question Lurz, which they declined. All counsel agreed with the court's view that the brief conversation wasn't 'anything that would affect anyone.'

(Ans., State Appellate Opinion, Dkt. No. 16-11 at 556.) Petitioner contends counsel should have requested an investigation into the incident, and into why the juror did not disclose during voir dire that he was applying to be a correctional officer. (*Id.* at 557.)

This claim was rejected on appeal. "[T]he communication between the witness and the juror was inadvertent, brief, and unrelated to the trial. Under those circumstances, the trial court did not abuse its discretion in concluding there were no grounds for believing good cause to excuse the juror might exist and declining to investigate the communication further. It follows that trial counsel was not ineffective in failing to request such further investigation." (*Id.*)

Petitioner's voir dire claim was rejected on appeal because he "fails to demonstrate that the juror concealed relevant facts or gave false answers during the voir dire." (*Id.*) Also, while peace officers are ineligible for voir dire, that rule does not cover those who are applying to be peace officers. (*Id.* at 558.) Therefore, defense counsel's performance was not deficient. (*Id.*)

Clearly established Supreme Court precedent "compels a criminal trial court to consider the prejudicial effect of any external contact that has a 'tendency' to influence the verdict, irrespective of whether it is about the matter pending before the jury." *Tarango v. McDaniel*, 837 F.3d 936, 946 (9th Cir. 2016) (citing *Mattox v. United States*, 146 U.S. 140, 150-51 (1892)). Clearly established federal law does not, however, require state or federal courts to hold a hearing every time a claim of juror bias is raised by the parties. *Tracey v. Palmateer*, 341 F.3d 1037, 1045 (9th Cir. 2003).

"[P]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox*, 146 U.S. at 142. *Mattox*'s "presumption is not conclusive, but the burden rests heavily on the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227, 229 (1954).

In determining whether an unauthorized communication raised a risk of tainting the verdict, courts should consider factors such as whether the unauthorized communication concerned the case, the length and nature of the contact, the identity and role at trial of the parties involved, evidence of actual impact on the juror, and the possibility of eliminating prejudice through a limiting instruction. *See Caliendo v. Warden of California Men's Colony*, 365 F.3d 691, 697-698 (9th Cir. 2004) (critical prosecution witness' unauthorized conversation with multiple jurors for 20 minutes was possibly prejudicial under *Mattox*, even if conversation did not concern the trial); *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988) (remark of deputy sheriff that defendant had "done something like this before," made within hearing of two jurors, was directly related to material issue, highly inflammatory and presumptively prejudicial).

Habeas relief is not warranted here. The state court reasonably determined the contact was de minimis: "the communication was . . . inadvertent, brief, and unrelated to the trial." Lurz did not know the juror was a juror, the two men did not discuss the case at all, and the encounter was 20 seconds long. The trial court and counsel reviewed the issue and none thought it worthy of further exploration. Under these circumstances, counsel had no reason to offer an objection. It is both reasonable and not prejudicial for defense counsel to forgo a meritless objection. *See Juan H.*, 408 F.3d at 1273. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

n. Failure to Object to Trial Court's Failure to Settle Instructions

Petitioner claims defense counsel rendered ineffective assistance by failing to object to the trial court's failure to settle instructions before closing argument, as required by state statute. (Pet., Dkt. No. 1 at 11.) He also contends counsel should have asked to reopen argument. (*Id.*) Petitioner contends these errors denied him the right to counsel because they prevented counsel from giving an effective closing argument.

The relevant facts are as follows:

> The trial court did not give counsel final versions of several jury instructions, including CALCRIM Nos. 252, 402, 416, 417, 570, and 3471, until after defense counsel gave their closing arguments. The prosecutor filed a list of proposed jury instructions before trial that included all of those instructions, except for CALCRIM No. 3471, which relates to self-defense. On September 8, 2014, after the conclusion of evidence, the court and counsel discussed jury instructions outside the presence of the jury. At that time, the court decided to instruct with, among other instructions, CALCRIM No. 416, as requested by the prosecutor and over defense counsel's objections, but the language of that instruction was not settled. As to CALCRIM No. 402, the court stated: 'the Court had indicated that 402 may not apply, but we are going to come back to that because that's where target and nontarget offense[s] are both charged.' The court indicated that it would continue to consider whether to instruct with CALCRIM No. 417, to which defense counsel objected. There also was discussion of CALCRIM Nos. 570 and 252, but no final decisions were made regarding those instructions. All of the parties agreed that the jury should be instructed with CALCRIM No. 3471, but the precise language of that instruction was not finalized.
>
> Further discussion took place on September 10, 2014, immediately before closing arguments. At that time, it became clear that there was confusion regarding CALCRIM No. 402. The court indicated that while the prosecutor had originally requested that instruction, it was under the impression that he had withdrawn that request. The court agreed to instruct with CALCRIM No. 402 and indicated CALCRIM No. 252 would have to be revised to be consistent with CALCRIM No. 402. The court and counsel also discussed what possible overt acts would be listed in CALCRIM No. 416 and possible modifications to CALCRIM No. 570. After defense counsel gave their closing arguments, the court gave counsel drafts of CALCRIM Nos. 252, 402, 416, 417, 570, and 3471 as it proposed to give them to the jury. After the prosecutor's rebuttal closing argument, the court gave the parties a

revised draft of CALCRIM No. 252.

(Ans., State Appellate Court, Dkt. No. 16-11 at 503-504.)

These claims were rejected on appeal. First, petitioner's claim that the trial court violated his rights when it refused to reopen argument to address alterations on the jury instructions and verdict forms lacks merit. Counsel's request pertained only to the issue of intervening cause.[8] (*Id.* at 505.) Second, there was no failure to settle instructions within the meaning of the statute. California state statute section 1093.5 requires the court "to advise counsel of all instructions to be given before closing arguments *on request of counsel*." (*Id.* at 507.) Because counsel did not make any such request, there was no violation of section 1093.5. (*Id.*) Third, petitioner's contention that prejudice ensued when the trial court refused to finalize the co-conspirator and aiding and abetting liability instructions was rejected. The trial court had told counsel *before* closing arguments which instructions (by CALCRIM number) would be given. (*Id.* at 508.) Therefore, defense counsel "knew that aiding and abetting, conspiracy, and the natural and probable consequences doctrine were at issue at the time of argument." (*Id.*) Also, petitioner does not explain "how the language of the unsettled instructions changed after closing arguments, nor how trial counsel's argument could have been modified to be more effective with advance knowledge of those changes." (*Id.*)

Habeas relief is not warranted here. Petitioner does not explain what changes were needed to the instructions, what points needed to be argued to the jury, and how these changes and points would have altered the outcome of the trial. Without such specifics,

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[8] The state appellate court noted that in his reply brief in state court, "[petitioner] says that 'any failure by counsel to adequately request to reopen argument deprived him of his federal constitutional right to effective assistance of counsel [citation], or conflict-free counsel.' To the extent he is arguing that trial counsel was ineffective in failing to move to reopen arguments to address the jury instruction and verdict form changes, he forfeited that argument 'by raising it in an untimely and superficial fashion.' (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 109.)" (Ans., State Appellate Opinion, Dkt. No. 16-11 at 505, n.7.) Because this claim was not properly presented to the state courts, it is unexhausted and is DISMISSED. If this federal court were to rule on the merits, the claim would be denied as conclusory.

the claim fails. He has not shown either deficient performance or that counsel's performance resulted in prejudice. A federal habeas petition "is expected to state facts that point to a real possibility of constitutional error." *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (internal quotation marks and citation omitted). Conclusory allegations are not sufficient. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

o. Failure to Introduce Evidence of Frosty's Violent Character

Petitioner claims trial counsel rendered ineffective assistance when he failed to introduce evidence of Frosty's violent character. (Pet., Dkt. No. 1 at 11.) Such evidence, he contends, would have bolstered the self-defense argument. (Ans., State Appellate Court, Dkt. No. 16-11 at 536-537.)

This claim was rejected on appeal. Petitioner suffered no prejudice because there was other significant evidence that Frosty and the other victims were "acting violently in the minutes preceding their deaths." (*Id.* at 537.) "Numerous eyewitnesses testified that Frosty physically attacked [petitioner] in a rage and it was undisputed that Frosty armed himself with scissors and stabbed the defendants. Osito hit Shadow in the head when he tried to break up the fight and hit Dodger in the head with a gun so violently that he required staples in his scalp." (*Id.* at 537.) Counsel's performance did not constitute ineffective assistance. Even if defense counsel had obtained the court's permission to present such evidence, "that evidence of Frosty's character for violence would have been cumulative of all the evidence that Frosty was acting violently prior to his death." (*Id.* at 539.)

Habeas relief is not warranted here. The state appellate court reasonably determined that there was neither deficient performance nor prejudice. Counsel likely did not ask to introduce such evidence because he knew such a request would have been denied as there was other evidence of Frosty's violent character. For this same reason, there was no prejudice. The state court's rejection of this claim was reasonable and

therefore is entitled to AEDPA deference. This claim is DENIED.

p. Conflict of Interest

Petitioner contends his trial counsel, Joseph "Jem" Martin, rendered ineffective assistance because he had a conflict of interest, specifically that he worked at the same firm as the attorney Salazar had representing him at the preliminary hearing. (Pet., Dkt. No. 1 at 10.) Salazar was represented at the preliminary hearing by Timothy Clancy, who was an attorney with the Earl Carter & Associates law firm in San Jose. (Ans., State Appellate Opinion, Dkt. No. 16-11 at 563.) Petitioner was represented by Martin at his preliminary hearing and trial. (*Id.*) Martin "was an independent contractor and later a part-time employee of Earl Carter's Sacramento office." (*Id.*) He worked from his own office, which was separate from the firm's office. (*Id.*) At trial, Salazar was represented by a different attorney, Susan Chapman, who had no connection to Earl Carter. (*Id.*) Petitioner claims the conflict, in the words of the state appellate court, "persisted throughout trial, even though Salazar's trial counsel was not associated with Earl Carter." (*Id.* at 564.)

According to petitioner, the specific instances showing a conflict are the same as the ineffective assistance claims addressed above. He cites Martin's failure to (1) "adequately discuss a mid-trial plea offer"; (2) investigate and argue a meritorious defense of self-defense and imperfect self-defense; (3) hire a gang expert; (4) hire a methamphetamine expert; (5) make a timely request to reopen argument and request an intervening cause instruction; (6) object to Salazar's counsel's statement that Salazar had committed "justified murder"; (7) object to prosecutorial misconduct; (8) request an instruction on defense of home; (9) request a modification to the accomplice testimony instruction; (10) object to gun evidence; (11) impeach the gang expert; (12) object to a detective's contact with a juror; (13) settle instructions before argument and move to reopen argument; (14) introduce evidence of Frosty's violent character; and (15) decline to object to the voluntary manslaughter verdict forms. (Pet., Dkt. No. 1 at 10-11.)

These conflict of interest claims were rejected on appeal. The claim that Martin "may well have refrained from spending time explaining the plea bargain" was "speculative and unsupported by the record." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 564.) "Indeed, it is hard to imagine how Salazar, the undisputed shooter who relied entirely on self-defense and defense of others, benefitted from being tried with [petitioner], whose liability was premised on highly nuanced and complex legal theories." (*Id.*) His claim that the conflict caused Martin to mishandle defense theories was rejected because "Salazar would have been the primary beneficiary of each of the defense strategies petitioner believes Martin would have pursued but for the conflict." (*Id.* at 565.) "Accordingly, we do not see how Martin's alleged loyalty to Salazar adversely affected his handling of these issues." (*Id.*)

Petitioner's claim that Martin should have objected to Salazar's use of "justified murder"; asked to modify the accomplice testimony instructions; and asked for a hearing about juror-witness interaction were rejected by the state appellate court. "[Petitioner] and Salazar's interests were aligned as to each of those proposed actions. Therefore, we cannot conclude that, in failing to undertake them, Martin was pulling his punches to Salazar's benefit and [petitioner's] detriment." (*Id.*) His claim regarding the voluntary manslaughter verdict forms was rejected. "But whether the jury had the option to convict [petitioner] had no impact on Salazar, so it is not plausible that Martin's decision was influenced for any loyalty to Salazar." (*Id.*) His claim that Martin's failure to request a timely instruction on intervening cause was rejected because petitioner conceded this alleged failure "did not impact Salazar." (*Id.*) Petitioner's claim regarding an objection to the gun evidence was rejected because such evidence was irrelevant to Salazar's criminal liability. "Martin could not plausibly have neglected to object to the gun evidence because of any loyalty to Salazar." (*Id.*)

Petitioner's claim that Martin should have impeached Hoskins showed no conflict of interest because Hoskins's prior statement could not be used to impeach. "Martin likely

recognized that Hoskins's interview statements were not inconsistent with his testimony and therefore were not admissible impeachment evidence." (*Id.* at 566.) His claim that counsel should have called a gang expert witness was rejected because Martin had a tactical reason for his inaction: he could not find a gang expert witness willing to give favorable testimony. (*Id.*)

A claim that a conflict produced an adverse impact is not perfected by simply making the claim; petitioner must show that it had an impact that "significantly worsens counsel's representation of the client." *United States v. Mett*, 65 F.3d 1531, 1535-36 (9th Cir. 1995). More precisely, a habeas petitioner must show his "(1) counsel actively represented conflicting interests; and (2) an actual conflict of interest adversely affected counsel's performance." *Rich v. Calderon*, 187 F.3d 1064, 1069 (9th Cir.1999) (citations omitted). An actual conflict of interest means "a conflict that affected counsel's performance — as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

Habeas relief is not warranted here. While petitioner has pointed to alleged conflicts, he has not shown how these conflicts significantly worsened the quality of representation. None of the alleged conflicts, whether considered singly or in the aggregate, show any conflict. While Martin and Clancy being employed by the same firm might raise some concern, the effect of that dissipates when one considers that the two worked in different offices, and that Salazar was represented by a different attorney at trial, one who was not associated with Earl Carter. The alleged refraining from spending adequate time explaining the plea bargain offer is speculative; in many of the instances petitioner cites his and Salazar's interests were aligned, so there was no conflict; other instances (such as objection to the voluntary manslaughter verdict forms) had nothing to do with Salazar; and other instances (such as not introducing Hoskins's statements) were the result of tactics of a reasonable attorney, and not the result of a conflict of interest. Petitioner has not shown that an actual conflict existed. Nor has he shown that any alleged

conflict –"significantly worsen[ed] counsel's representation of the client." *Mett*, 65 F.3d at 1535-36. The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

iii. Cumulative Error

Petitioner claims this Court should grant habeas relief based on "the cumulative prejudice of the multiple constitutional errors." (Pet., Dkt. No. 1 at 12.) On appeal in state court, petitioner contended "the cumulative effect of trial counsel's deficiencies was prejudicial." (Ans., State Appellate Opinion, Dkt. No. 16-11 at 567.) This claim was rejected. In each individual ineffective assistance claim, the court had found that no prejudice resulted. "Our confidence in the outcome of this trial is not undermined when we consider defense counsel's actions in the aggregate." (*Id.*)

The court also rejected petitioner's claim that "the cumulative effect of the alleged errors was prejudicial." (*Id.*) The court noted that in its analysis they assumed instructional errors; assumed the trial court erred in excluding evidence that Frosty and Osito had violent characters; and had "resolved several of [petitioner's] ineffective assistance claims on prejudice grounds." (*Id.*) From this review, it concluded petitioner "received a fair trial." (*Id.*) Therefore, "reversal is not required even considering the cumulative effect of these assumed errors." (*Id.*)

In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a defendant so much that his conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003). Where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (overruled on other grounds).

Habeas relief is not warranted here. There has been no showing that the combined effect of alleged errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

The state court's rejection of this claim was reasonable and is therefore entitled to AEDPA deference. This claim is DENIED.

CONCLUSION

The state court's denial of petitioner's claims did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the petition is DENIED.

A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the Ninth Circuit Court of Appeals. The Clerk shall enter judgment in favor of respondent, and close the file.

IT IS SO ORDERED.

Dated: March 3, 2021

RICHARD SEEBORG
Chief United States District Judge

United States District Court
Northern District of California

APPENDIX D

Filed 5/31/18

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN SALAZAR, JR., Defendant and Appellant.	H041724 (Monterey County Super. Ct. No. SS121859A)
THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE NUNEZ LOPEZ, Defendant and Appellant.	H042227 (Monterey County Super. Ct. No. SS121859B)

Defendants Juan Salazar, Jr. and Enrique Nunez Lopez were members of a Sureño gang. At a gang meeting on July 28, 2012, Lopez directed three gang members to beat up a 17-year-old member of the gang, Melina, as punishment for dating a Norteño.[1] At the same meeting, Lopez accused fellow gang member Daniel "Frosty" Fraga, who was not at the meeting, of being "no good" because he had been seen associating with Norteños. Later that day, Frosty confronted Lopez about the accusation at the home where he and

[1] At trial, the gang members were referred to by their first names or their gang monikers. We follow suit. However, we shall refer to defendants by their last names.

several other gang members, including Salazar, were hanging out. Hector "Osito" Reyes, Frosty's friend and a member of another Sureño gang, accompanied Frosty. Frosty punched Lopez and a fight ensued between Frosty, Lopez, Osito, Salazar, and two other gang members. During the fight, Frosty stabbed Lopez and Salazar and Osito beat two gang members in the head with the butt of a gun. Salazar shot and killed Frosty and Osito.

Salazar and Lopez were charged with street terrorism in violation of Penal Code section 186.22, subdivision (a)[2]; first degree murder of Frosty and Osito; and battery, assault, and child abuse based on Melina's beating. The prosecutor argued that Lopez was guilty of the murders as an aider and abettor on the theory that the murders were a natural and probable consequence of the crime of street terrorism. The prosecutor further argued that all the gang members conspired to commit battery, assault, child abuse, and street terrorism, and that Melina's beating was done to accomplish the goals of the conspiracy, such that Lopez and Salazar were criminally responsible for the charges related to that beating.

Following a joint trial, jurors convicted Lopez of second degree murder of Frosty, street terrorism, battery, assault, and child abuse and found true associated gang enhancement allegations. Jurors deadlocked as to count 1, which charged Lopez with Osito's murder. The court sentenced Lopez to 22 years to life in prison. He asserts claims of instructional error, evidentiary error, ineffective assistance of counsel, and cumulative error in appeal No. H042227. He also challenges the denial of his new trial motion.

Jurors convicted Salazar of all the charges against him and found true associated firearm and gang enhancement allegations. The trial court sentenced Salazar to 100 years to life in prison. On appeal in case No. H041724, Salazar raises instructional error,

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[2] All further statutory citations are to the Penal Code unless otherwise indicated.

ineffective assistance of counsel, cumulative error, and sentencing error claims. He also joins in several of Lopez's appellate arguments and seeks remand so that the trial court can exercise its discretion as to whether to strike the firearm enhancement based on a recent change to section 12022.53 and so that he can make an adequate record for a future youth offender parole hearing.

On our own motion, we ordered the two appeals considered together for the purposes of oral argument and decision. We shall affirm the judgment in case No. H042227. We shall reverse the judgment in case No. H041724 and remand the matter with directions to the trial court to resentence Salazar and to afford him an adequate opportunity to make a record of information that will be relevant to any eventual youth offender parole hearing.

I. FACTUAL BACKGROUND

A. La Esperanza, Relevant Gang Terminology, and Key Players

Defendants were members of La Esperanza Trece, or Espe, a King City Sureño gang. Sergeant Bryan Hoskins of the Monterey County Sheriff's Office testified as a gang expert that Sureño street gangs have their origins in the Mexican Mafia prison gang, which sets "the rules that [Sureños] have to operate under." Hoskins explained that Norteños and Sureños are rivals. Sureños are supposed to attack Norteños on sight if the circumstances allow and will be disciplined for failing to do so. A common form of discipline in Sureño gangs is a 13-second beating, referred to as a "checking." The number 13 is significant to Sureños because M, for Mexican Mafia, is the 13th letter of the alphabet.

Serious violations of Sureño gang rules can result in a gang member being deemed "no good." According to Hoskins, a gang member who has been deemed no good is considered a rival of their former gang and is "marked for death." Every Sureño and every member of the Mexican Mafia has an obligation to kill former Sureños who they know have been deemed no good. "PC" is another term for no good; it refers to the fact

that, in jail or prison, someone who is no good would be in protective custody. Associating with rivals or failing to attack a rival when given the opportunity could result in being deemed no good. A gang member who is falsely accused of being no good would be expected to confront his or her accusers.

Hoskins estimated that there were 40 active Espe members in 2012, about half of whom were in custody at that time. Unlike most gangs, Espe did not have a single "shot caller," or leader. Frosty was an older member of Espe. He and defendant Lopez, who was seen by some as a leader of the gang's younger members, did not get along. The second victim, Osito, was a member of the King City Dukes, another King City-based Sureño gang. Osito and Frosty were close family friends.

All but one of the witnesses to the shooting and the fight that proceeded it were Espe members. They included Melina, who joined Espe at age 11. At the time of the 2012 shooting, she was 17 years old and had been away from the gang for about a year. She was dating a Norteño in violation of gang rules. Osito was her second cousin, although she referred to him as her uncle.

Dodger, Lopez's brother, joined Espe at age 17; he was 23 years old at time of the 2014 trial.

Shadow was 25 years old at the time of trial. By the time of the 2012 shooting, he had not been active in the gang for a few years. However, he saw Dodger regularly because they worked together. Dodger and Lopez invited Shadow to the July 28, 2012 gang meeting and he felt he "had no choice" but to go because he feared for his safety and safety of family if he refused.

Baby G. was 14 years old at the time of the shooting and 16 years old at the time of trial. He joined Espe at age 13.

Trips joined Espe at 14 years old and was 17 years old at the time of trial.

Nina was 20 years old at the time of trial. Her older brother Pato was another Espe member.

Cartoon joined Espe at age 13 and was 16 years old at the time of the 2012 shooting.

The only non-Espe eye witness was Eunice, or Nena, defendant Salazar's then-girlfriend. She dated Salazar for four years, starting when she was 13 years old. At the time of trial, she was 18 years old and was no longer dating Salazar.

B. The First Gang Meeting Where Frosty's Status Was Discussed

About two weeks before the shooting, Pato called an Espe meeting where he accused Frosty of being no good because Frosty had been seen associating with Norteños. Dodger, Lopez, Trips, and Nina also attended that meeting. Pato said he would bring proof that Frosty was no good to a meeting on July 28.

C. July 28, 2012 Gang Meeting – Discussion of Frosty's Status

When July 28 arrived, Pato was in jail. The gang proceeded with the meeting anyway. Shadow drove Lopez, Melina, Nina, Trips, and Cartoon from King City to San Ardo for the meeting. On the way, Lopez said Frosty had been seen associating with Norteños. Melina defended Frosty, who she considered a friend. Melina called Frosty on her cell phone, told him about the accusations, and put him on speaker phone. According to Nina, Melina told Frosty "about . . . how we thought he was no good." Trips likewise testified that the phone call involved a discussion of Frosty being "no good" and "a dropout." Frosty was angry. After the phone call, Melina updated Frosty by text as to her location.

The meeting began at an elementary school. In addition to Shadow, Lopez, Melina, Nina, Trips, and Cartoon, the meeting was attended by Salazar, Dodger, , and Stomper.[3] The first issue discussed, at Lopez's urging, was whether Frosty should be deemed no good.

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[3] Stomper did not testify at trial and no additional information was provided about him.

Melina, Trips, and Nina testified that the group decided Frosty was no good over the objections of Melina, Shadow, and Salazar.[4] Dodger testified that the group decided to wait for Pato to present proof that Frosty was no good once he got out of jail. Dodger acknowledged having told police that the group had decided to kick Frosty out of the gang because he was no good, but he testified that was not accurate. Cartoon testified that there was a vote and most people voted that Frosty was no good, but they were waiting for Pato to get out of jail and provide proof, so there was no green light on Frosty.[5] Baby G. testified that everyone at the meeting, other than Melina, thought Frosty was no good, but that only gang members in county jail can decide whether a person is no good. Shadow testified that there was no vote as to whether Frosty was no good.

Melina testified that if a gang member sees someone who has been deemed to be no good, he or she has to "[a]ct on it verbally or . . . physically" and "should" kill the person who is no good if given the opportunity. Nina testified that someone who is no good can be shot, stabbed, or killed. Trips testified that gang members cannot hang out with someone who is no good and can "do anything to him" when they see him, including killing him. Cartoon testified that someone who is determined to be no good is greenlighted, meaning gang members will "kill you, . . . stab you, or do something to you" if they see you. Baby G. testified that someone who is no good can be shot or stabbed by other gang members. Shadow said a gang member should "[p]robably beat . . . up" someone who has been declared no good, although he acknowledged that someone could be killed for being no good if the violation was serious enough. Dodger admitted telling police that being no good could get you killed, but he testified that "[t]here's never been someone killed" as a result of a no-good order. Nina, Baby G., and

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[4] Nina testified that Melina and Shadow opposed a no good determination; Melina and Trips testified that Melina, Shadow, and Salazar were against such a decision.

[5] The gang expert testified that being "green lighted" means "you're going to be killed, and you're now an enemy of your former gang." He testified that there is no difference between "no-good order," a "green light," and an "order to kill."

Cartoon were likewise unaware of any Espe gang member being killed as a result of being deemed no good. Melina, Nina, Trips, and Cartoon each testified that they were told to stay away from Frosty, not to kill him.

Shadow, Dodger, and Nina testified that someone who was accused of being no good would be expected to confront the accuser. The gang expert agreed, testifying that the confrontation is usually a fistfight, but "it can lead to stabbing and shooting because the emotions are so high." The gang expert opined that "the violent confrontation" would occur "when you've been declared no good." He explained that "when you're first deemed no good, there is an opportunity there for you to go and fight that. And immediately upon hearing you've been deemed no good, you need to, for lack of a better term, go defend your honor. So you can take it right to that person who's deemed you no good and confront them about this." The gang expert further opined that "generally [other gang members are] not going to jump in [to the ensuing fight] because you have this conflict where someone is—they're both accusing each other of something. One is accusing somebody of doing something that violates the gang's rules, and the other one is accusing the other one of providing false information or false witness against them, which are both violations of the gang rules. And I think that's where the not getting involved comes into play, because you don't want to pick the wrong pony, for lack of a better term."

D. July 28, 2012 Gang Meeting – Melina is Checked

After discussing Frosty's status, the gang left the school because there were police in the area. The group reconvened at a home in San Ardo where Salazar's girlfriend Nena and her family lived. When they arrived, only Nena was home. She stayed upstairs because she was not in the gang and did not want them there. The group went outside where Nina and Melina got into a fistfight to resolve a personal disagreement.

Following that fight, Baby G., Nina, and Trips checked Melina as punishment for dating a Norteño. Lopez ordered the checking and picked the gang members to carry out

the beating. The checking did not last for the full 13 seconds because Baby G. hit Melina in the nose, breaking it and causing significant bleeding. Melina went inside to clean up the blood in the bathroom. The rest of the group followed her in and congregated in the living room.

E. The Fight

Melina called Osito while she was in the bathroom and told him the gang had broken her nose. Within five minutes, she heard the front door slam open.

Frosty barged in asking who was "talking shit" about him or calling him "PC." When no one responded, he asked where Lopez was. Frosty was furious; Dodger and Nina testified that he looked like he was high on methamphetamine. Osito came in behind Frosty.

Lopez entered the living room and Frosty attacked him, throwing the first punch. Dodger came to his brother's defense, punching Frosty. Dodger saw Frosty with what appeared to be a black knife. Osito pointed the gun at the remaining gang members and told them not to move. Shadow tried to break up the fight between Frosty, Lopez, and Dodger. Osito hit Shadow in the head with the butt of a gun. When Shadow realized Osito was armed, he disengaged from the fight. Dodger punched Osito in an effort to disarm him. Osito hit Dodger in the head with the gun several times until Dodger fell to the ground, bleeding.

Trips, Baby G., Stomper, Nina, and Melina ran upstairs when Osito stopped pointing the gun at them to fight Shadow and Dodger.[6] Cartoon ran halfway up the stairs where he stayed to watch the fight. Cartoon saw Lopez run out of the house holding his hand or arm, which appeared to be injured. Dodger likewise saw Lopez run out of the house prior to the shooting.

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[6] Melina said she remained downstairs and saw the shooting. However, multiple other witnesses stated that she went upstairs and her account of the shooting was inconsistent with the accounts of other witnesses and with the physical evidence.

Nena heard the fighting from upstairs and came down. She saw Frosty stab Salazar in the back with a knife. Dodger and Cartoon did not see Salazar involved in the fight.

F. The Shooting

Shadow testified that, at some point, Osito was pointing a gun at him. Shadow backed away into the bathroom; Osito followed, as did Frosty. Shadow saw Frosty with what appeared to be a shank raised above his shoulder. Shadow managed to get around the men and fell to the ground outside the bathroom. As he lay on the ground, he saw Osito take a step towards him. Immediately, Shadow heard gunshots. When they stopped, Shadow ran out of the house.

Nena saw Osito and Shadow fighting outside the bathroom. They went into the bathroom and Frosty followed. Shadow appeared to have been pushed out of the bathroom and fell on the floor. Salazar was standing outside the bathroom. He walked over to the couch in the living room and then returned to outside the bathroom; during that time, Shadow was lying on the floor and Frosty and Osito were in the bathroom. Frosty came towards Salazar, who shot him.

Dodger testified that, after Osito stopped hitting him, he saw Osito run towards the bathroom where Shadow was standing. Frosty was in the same area and tried to stab Shadow. Salazar came down the stairs and passed Dodger on his way towards the bathroom. Salazar took out a gun and stood outside the bathroom for four seconds pointing it towards the bathroom. Salazar fired once, three seconds passed, and Salazar fired at least one more shot. Dodger ran out of the house; he testified that Shadow ran out around the same time. At some point before the shooting, Dodger saw Shadow emerge from the bathroom and fall to the ground.

Cartoon saw Osito hitting Shadow outside the bathroom. Salazar came down the stairs holding a gun. Cartoon heard Nena tell Salazar "don't, don't do it" as she followed him down the stairs. According to Cartoon, Salazar told Frosty and Osito to get into the

bathroom. Cartoon ran out of the house; Dodger was running out in front of him. As he was running, Cartoon heard five to seven gunshots. Cartoon testified that three seconds passed between the time Salazar told Frosty and Osito to get into the bathroom and the time the shots were fired.

G. The Aftermath

Nina, Melina, Baby G., and Trips came downstairs after the shooting. Trips and Baby G. looked in the bathroom and saw two bodies lying by the toilet. Nena and Salazar fled to Mexico. Nina, Cartoon, Dodger, and Lopez met at a motel in King City after the shooting. Dodger and Nina testified that Lopez had been stabbed in the arm. Dodger had to get staples in his head as a result of the beating he received from Osito.

H. The Investigation

Forensic pathologist Jon Smith, M.D., testified that he performed autopsies on Frosty and Osito. Frosty had three gunshot wounds: one to the chest, one to the right thigh, and one that entered between the anus and scrotum and exited the back left upper thigh. Osito had six or seven gunshot wounds which were to the right forearm, the abdomen, the chest, and the right upper back. Some of each victim's gunshot wounds had a downward trajectory; Dr. Smith opined that the victims may have been bending over or on the floor when they sustained those wounds. Both men died as a result of the gunshot wounds. Dr. Smith determined that there was methamphetamine in Frosty's system at the time of his death.

Victor Lurz, the supervising forensic evidence technician with the Monterey County Sheriff's department, testified that a total of nine bullets were recovered at the scene or from the victims' bodies. One was found lodged in the bathroom wall about six inches above the floor, one on Osito's stomach, five from Osito's body, one from Frosty's body, and one from Frosty's clothing. Frosty was found holding eight-inch-long scissors belonging to Nena's mother. The scissors had blood on them. The blood evidence in the bathroom indicated to Lurz that the bodies were not moved after the men

were shot. The distance from the victims' feet to the center of the hallway outside the bathroom measured nine feet.

A gun was found protruding from under a couch in the living room. It had blood on it and a live round in the chamber. The magazine was missing. A magazine was found near the entrance to the bathroom. All parties argued this was Osito's gun. The weapon used to kill Frosty and Osito was found in the possession of Salazar's cousin.

II. PROCEDURAL HISTORY

On August 5, 2013, the Monterey County District Attorney filed an information against Salazar and Lopez, charging them with two counts of murder (counts 1-2; § 187, subd. (a)); battery with serious bodily injury of Melina (count 3; § 243, subd. (d)); assault of Melina force likely to produce great bodily injury (count 4; § 245, subd. (a)(4)); child abuse of Melina (count 5; § 273a, subd. (a)); and street terrorism (count 6; § 186.22, subd. (a)). The information alleged that Salazar and Lopez committed counts 1 through 5 for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by said gang members, within the meaning of section 186.22, subdivisions (b)(1)(A) and (b)(1)(C). It further alleged that Salazar personally used a firearm in the commission of the murders (§ 12022.5, subd. (a)).

A jury trial took place in August and September 2014. The jury rendered its verdicts on September 17, 2014 after deliberating for five days. The jury found Salazar guilty of all counts. Jurors also found true that Salazar committed counts 1 through 5 with the specific intent to promote, further, or assist in criminal conduct by gang members for purposes of section 186.22, subdivision (b)(l)(C). As to counts 1 and 2, jurors found true that Salazar personally and intentionally discharged a firearm causing death, within the meaning of section 12022.53, subdivision (d). With respect to Lopez, jurors were unable to reach a unanimous verdict as to count 1, which charged him with Osito's murder; the court declared a mistrial as to that count. The jury found Lopez

guilty of second degree murder of Frosty and found true the gang allegation attached to that count. The jury also found Lopez guilty of counts 3 through 6 and found true the gang allegations attached to counts 3 through 5.

On December 9, 2014, the trial court sentenced Salazar to a term of 100 years to life in prison: 25 years to life on count 1 plus 25 years to life for the personal use of a firearm enhancement (§ 12022.53, subd. (d)); 25 years to life on count 2 plus 25 years to life for the personal use of a firearm enhancement (§ 12022.53, subd. (d)), to be served consecutively; the middle term of three years on count 3 plus three years for the gang enhancement, stayed pursuant to section 654; the middle term of three years on count 4 plus three years for the gang enhancement, stayed pursuant to section 654; the middle term of four years on count 5 plus three years for the gang enhancement, to be served concurrently; and the middle term of two years on count 6, to be served concurrently. Salazar timely appealed.

Lopez fired trial counsel before sentencing and the trial court appointed him counsel from the Alternate Defenders Office. Lopez then moved unsuccessfully for a new trial. On April 10, 2015, the court sentenced Lopez to an aggregate term of 22 years to life in prison: 15 years to life on count 2; the middle term of four years on count 5 plus three years for the gang enhancement, to be served consecutively; the upper term of four years on count 3 plus three years for the gang enhancement, stayed pursuant to section 654; the upper term of four years on count 4 plus three years for the gang enhancement, stayed pursuant to section 654; and the upper term of three years on count 6, to be served concurrently. The court struck the punishment for the gang allegation attached to count 2 and dismissed count 1 on the district attorney's motion pursuant to section 1385. Lopez timely appealed.

III. DISCUSSION

A. Failure to Settle the Instructions and Charges the Jury Would Consider Before Closing Arguments and Refusal to Reopen Argument

Lopez contends the trial court erred by failing to settle the instructions and verdict forms before closing arguments and by refusing to reopen argument once those issues were finalized. Lopez maintains those errors prevented trial counsel from making an effective closing argument, thereby denying him his right to counsel. Salazar joins that argument pursuant to Rule 8.200(a)(5) of the California Rules of Court.

1. Factual Background

a. Jury Instructions

The trial court did not give counsel final versions of several jury instructions, including CALCRIM Nos. 252, 402, 416, 417, 570, and 3471, until after defense counsel gave their closing arguments. The prosecutor filed a list of proposed jury instructions before trial that included all of those instructions, except for CALCRIM No. 3471, which relates to self-defense. On September 8, 2014, after the conclusion of evidence, the court and counsel discussed jury instructions outside the presence of the jury. At that time, the court decided to instruct with, among other instructions, CALCRIM No. 416, as requested by the prosecutor and over defense counsel's objections, but the language of that instruction was not settled. As to CALCRIM No. 402, the court stated: "the Court had indicated that 402 may not apply, but we are going to come back to that because that's where target and nontarget offense[s] are both charged." The court indicated that it would continue to consider whether to instruct with CALCRIM No. 417, to which defense counsel objected. There also was discussion of CALCRIM Nos. 570 and 252, but no final decisions were made regarding those instructions. All of the parties agreed that the jury should be instructed with CALCRIM No. 3471, but the precise language of that instruction was not finalized.

Further discussion took place on September 10, 2014, immediately before closing arguments. At that time, it became clear that there was confusion regarding CALCRIM No. 402. The court indicated that while the prosecutor had originally requested that instruction, it was under the impression that he had withdrawn that request. The court agreed to instruct with CALCRIM No. 402 and indicated CALCRIM No. 252 would have to be revised to be consistent with CALCRIM No. 402. The court and counsel also discussed what possible overt acts would be listed in CALCRIM No. 416 and possible modifications to CALCRIM No. 570. After defense counsel gave their closing arguments, the court gave counsel drafts of CALCRIM Nos. 252, 402, 416, 417, 570, and 3471 as it proposed to give them to the jury. After the prosecutor's rebuttal closing argument, the court gave the parties a revised draft of CALCRIM No. 252.

The court instructed the jury the following morning without further on-record discussion of the instructions.

b. Verdict Forms

On September 11, 2014, after the jury was instructed and began deliberating, the court and counsel discussed the verdict forms. Lopez's trial counsel argued that Lopez could not be convicted of voluntary manslaughter or second degree murder as a lesser included offense of murder. The discussion of those issues was continued until the next day. At that time, the court agreed not to give the jury voluntary manslaughter verdict forms for Lopez pursuant to a stipulation between the prosecutor and Lopez's trial counsel. The court rejected Lopez's trial counsel's argument that Lopez could not be convicted of second degree murder.

c. Request to Reopen Argument to Argue Intervening Cause

Also on September 12, 2014, after the verdict form discussion, Lopez's trial counsel asserted a new argument—that Frosty's actions were an intervening cause of his own death such that Lopez could not be liable for his murder. The court disagreed that the evidence supported an instruction on intervening cause. Lopez's trial counsel then

asked to "argue the point that's brought up in this discussion" to the jury. The court denied the request to reopen closing arguments.

2. Legal Principles

The federal constitutional right to counsel includes a right to have counsel present closing argument. (*Herring v. New York* (1975) 422 U.S. 853, 860; *People v. Benavides* (2005) 35 Cal.4th 69, 110.) To ensure that the parties have an opportunity to *intelligently* argue the case to the jury, California law requires "the court, on request of counsel, . . . [to] advise counsel of all instructions to be given" "[b]efore the commencement of the argument." (§ 1093.5; see *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 341, disapproved on another ground by *People v. Whitmer* (2014) 59 Cal.4th 733, 742.)

3. Analysis

To the extent Lopez's claim is based on the trial court's refusal to reopen argument, it fails. Lopez contends his trial counsel moved to reopen closing arguments to address changes in the jury instructions and the court's rulings on the verdict forms. Not so. The request to reopen argument was narrow and pertained only to the issue of intervening cause. After unsuccessfully arguing that Frosty's actions were an intervening cause of his own murder, Lopez's trial counsel requested to "argue the point that's brought up in this discussion" to the jury. The record is clear that "the point" counsel was referring to was his intervening cause argument. On appeal, Lopez does not even argue that the court was wrong to deny argument on that point. Accordingly, he does not show the court erred by denying trial counsel's request to reopen argument.[7]

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[7] On reply, Lopez says that "any failure by counsel to adequately request to re-open argument deprived him of his federal constitutional right to effective assistance of counsel [citation], or conflict-free counsel." To the extent he is arguing that trial counsel was ineffective in failing to move to reopen arguments to address the jury instruction and verdict form changes, he forfeited that argument "by raising it in an untimely and superficial fashion." (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 109 (*Fedalizo*).)

Lopez also claims it was error for the court to alter the verdict forms after closing arguments. But he waived that contention by failing to cite any supporting authority. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [" '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' "].)

Even assuming the court erred with respect to the timing of finalizing the verdict forms, Lopez does not demonstrate a prejudicial effect on counsel's closing argument. He claims "[p]rejudice is . . . demonstrated by the fact that defense counsel *never* argued the merits of the second-degree murder charge—which the court ruled on *after* closing argument, and upon which the jury finally agreed." But the jury was instructed with CALCRIM No. 640 that "[f]or each count charging murder, you have been given verdict forms for guilty and not guilty of first degree murder, second degree murder and voluntary manslaughter." Lopez does not contend CALCRIM No. 640 was one of the instructions that was unsettled prior to closing arguments. Accordingly, trial counsel was aware at the time he gave his closing argument that the jury would be permitted to consider second degree murder for Lopez and counsel had the opportunity to argue against a second degree murder conviction. The trial court's later refusal to withdraw the second degree murder verdict forms for Lopez could not have impacted trial counsel's closing argument, and thus was harmless under any standard of review.[8] (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Lopez does not contend the court's withdrawal of the manslaughter verdict forms after closing arguments prevented trial counsel from making an effective

[8] Lopez says the court committed structural error that is per se reversible by denying "counsel the right to argue after the instructions were settled and after counsel was told which charges the jury would be allowed to consider in passing upon Appellant's guilt." As discussed above, the court did no such thing. Lopez does not contend that the court's failures to settle the verdict forms and instructions before argument were structural.

closing argument. Any such argument would fail, as trial counsel did not mention manslaughter in his closing argument.

United States v. Gaskins (9th Cir. 1988) 849 F.2d 454, on which Lopez relies, is distinguishable. There, the court informed counsel before closing arguments that it would not instruct the jury that it could convict the defendant as an aider or abettor. After closing arguments, the court changed course and instructed the jury on aiding and abetting without allowing additional argument to address that theory. By contrast, here, the court did not add a new theory of guilt after closing arguments; it withdrew one that the parties did not argue (manslaughter) and refused to withdraw another (second degree murder). Lopez suffered no prejudice as a result.

Finally, Lopez contends the trial court violated section 1093.5 by failing to settle the instructions before closing arguments. As noted, that statute requires the court to advise counsel of all instructions to be given before closing arguments *on request of counsel.* Lopez points us to no such request in the record. Accordingly, the court's section 1093.5 obligations never were triggered and there was no error.

Even if there had been a violation of the statute, Lopez waived any argument premised on "counsel's lack of opportunity to present an argument [based] on the" final instructions because "defense counsel did not seek leave to reopen arguments to address" the instructional changes. (*People v. Bishop* (1996) 44 Cal.App.4th 220, 235.) Moreover, Lopez fails to show any statutory violation prejudiced his defense. Where a court erroneously fails to settle instructions before argument, "[a] party suffers prejudice if it 'was unfairly prevented from arguing his or her defense to the jury or was substantially misled in formulating and presenting arguments.' " (*United States v. Foppe* (9th Cir. 1993) 993 F.2d 1444, 1451 [addressing violation of Federal Rule of Criminal Procedure 30, which is analogous to section 1093.5]; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 134 [applying same prejudice standard to section 1093.5 violation].) Lopez says the court's failure to finalize the coconspirator and aiding and

abetting liability instructions (CALCRIM Nos. 402, 416, and 417) was prejudicial. But the court informed counsel before closing arguments which instructions would be given by CALCRIM number. Accordingly, trial counsel knew aiding and abetting, conspiracy, and the natural and probable consequences doctrine were at issue at the time of argument. While the language of the instructions had not been finalized, Lopez does not explain how the language of the unsettled instructions changed after closing arguments, nor how trial counsel's argument could have been modified to be more effective with advance knowledge of those changes. In view of the foregoing, we conclude that Lopez was not substantially misled in formulating or presenting closing argument, nor was he unfairly prevented from presenting his defense to the jury.[9]

Salazar joins Lopez's argument. His claim fails for all the same reasons as Lopez's, including failure to demonstrate prejudice.

B. Claims of Instructional Error

1. Standard of Review

"In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.) "We determine whether a jury instruction correctly states the law under the independent or de novo standard of review." (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

"A party is entitled to a requested instruction if it is supported by substantial evidence. [Citation.] Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find

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[9] Lopez contends the trial court's failure to settle instructions before argument "involve[d] deficient performance by trial counsel." While we need not reach that alternative ineffective assistance of counsel argument because we have rejected Lopez's claim on the merits, we note that it is forfeited by the cursory manner in which Lopez raises it on appeal. (*Fedalizo*, *supra*, 246 Cal.App.4th at p. 109.)

persuasive.' [Citation.] At the same time, instructions *not* supported by substantial evidence should not be given. [Citation.] 'It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]' " (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050 (*Ross*).)

"Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 (*Sanchez*).)

2. CALCRIM Nos. 3471 and 347 – Instructions Limiting Self-Defense

Salazar and Lopez contend the trial court erroneously instructed the jury with CALCRIM Nos. 3471 and 3472, both of which address limitations on the right of self-defense. They contend CALCRIM No. 3472 misstates the law and that neither instruction was supported by the evidence.

a. Factual Background

The court instructed the jury with CALCRIM No. 3471, which limits the right of self-defense for one who engages in mutual combat or starts a fight, as follows: "A person who engages in mutual combat or who starts a fight has a right to self-defense or imperfect self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; [¶] and [¶] 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 to self-defense arose."

The court also instructed the jury regarding contrived self-defense with CALCRIM No. 3472, stating "[a] person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

In his rebuttal closing argument, the prosecutor argued that "when Lopez and all the members of the Espe get together in a meeting to declare Frosty no good, to discuss whether Frosty's going to be put on a hit list or not, whether Frosty, the word is going to go up to county, going up to the state prison system that Frosty needs to be killed, you're starting a fight. And this is beyond all reasonable doubt. [¶] Everyone knew that Frosty was -- they were starting a fight with Frosty, that Frosty was going to be angry, that this was a war, that Frosty is not the kind of guy that you can threaten the life of and not expect a reaction. He told him on the phone, 'Come pick me up. You shouldn't be calling me no good. This is not okay.' Did it any way. He started that fight. So when Frosty came that fight had already been started. First punch was thrown by Frosty, but the first threat wasn't. The first threat was [Lopez] saying, 'Frosty's no good. Everyone's got to agree.' . . . [Y]ou can't start a fight and then claim it's not my fault that I had to kill him, that I started the fight."

The prosecutor also argued that the evidence did not support self-defense because Salazar shot "nine times from the distance of nine feet" while the victims were "backed up into the end of the bathroom. They were no longer a threat to him. They were no longer a threat to Shadow. They were complying. . . . [Osito had] dropped his gun." The prosecutor summarized: "There was no right to self-defense because you started it. There was no right to self-defense because the fight had stopped. There was no right to self-defense because they backed away when he pointed a gun at them and dropped—and Osito dropped his gun. That gun was . . . nowhere near him when he died."

b. Forfeiture

Neither defendant objected below to CALCRIM Nos. 3471 and 3472. The Attorney General does not argue forfeiture as to Lopez or as to Salazar's contention that it was error to instruct with CALCRIM No. 3472. However, the Attorney General does argue that Salazar forfeited his claim that the court erred by instructing with CALCRIM No. 3471. Defendant responds that section 1259 permits him to challenge the instruction on appeal.

Section 1259 provides, in relevant part, that a reviewing court "may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." In the context of section 1259, a defendant's substantial rights are affected where the trial court committed reversible error under *Watson*. (See *People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) Thus, "[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice [under *Watson*] if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Therefore, we must consider the merits of Salazar's claim.

c. Ramirez is Distinguishable

Defendants rely on *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*) to argue that CALCRIM No. 3472 misstates the law. But the *Ramirez* majority recognized that "CALCRIM No. 3472 states a correct rule of law in appropriate circumstances," holding only that CALCRIM No. 3472 "did not accurately state governing law" "*under the facts before the jury.*" (*Ramirez, supra*, at p. 947, italics added.) This case is distinguishable, such that *Ramirez* does not govern.

In *Ramirez*, two codefendants provoked a fistfight with rival gang members. (*Ramirez, supra*, 233 Cal.App.4th at p. 944.) One of the defendants fatally shot a rival.

He claimed to have done so in self-defense because the rival drew a gun. The trial court instructed the jury with CALCRIM Nos. 3471 and 3472. (*Ramirez, supra*, at pp. 945, 946.) During closing argument, the prosecutor argued that defendants had forfeited any claim of self-defense by using nondeadly force to start the fight, regardless of whether the victim escalated the conflict to a deadly one. (*Id.* at p. 947.) The prosecutor argued in no uncertain terms that "if [the defendants] . . . *intend*[*ed*] *to provoke a fight and use force* . . .[, then] they are not entitled to [use self-defense]." (*Id.* at p. 946.) She "stress[ed]" that "it [didn't] matter" whether the victim escalated the conflict to a deadly one. (*Ibid.*) She "repeatedly emphasized" that argument, which misstated the law. (*Id.* at p. 950.) A divided panel of Division Three of the Fourth Appellate District reversed, concluding that CALCRIM No. 3472 misstated the law by admitting "no exceptions in foreclosing self-defense where a defendant contrives to start a quarrel as a pretext to use 'force,' whether deadly or nondeadly." (*Ramirez, supra*, at p. 950.)

Here, in contrast to *Ramirez*, the prosecutor did not argue that Salazar and the other gang members provoked a confrontation with the intent to use only nondeadly force. Rather, his theory was that they provoked a deadly encounter by marking Frosty for death. Nor did the prosecutor misstate the law in his closing in the way the prosecutor did in *Ramirez*.

d. Substantial Evidence Challenges

i. There Was Evidence From Which Jurors Reasonably Could Infer That Frosty Knew About the No-Good Vote

The prosecutor's theory was that every Espe member who attended the July 28, 2012 meeting, including Salazar, started (CALCRIM No. 3471) or provoked (CALCRIM No. 3472) a fight with Frosty by participating in a vote that determined he was no good. That theory is viable only if Frosty was aware of the no-good vote. If he wasn't, then that vote could not have started or provoked the ensuing fight. Defendants contend

CALCRIM Nos. 3471 and 3472 were unsupported by substantial evidence because there was no evidence that Frosty knew about the no-good vote.

Defendants correctly note that no direct evidence was presented that Frosty was aware of the outcome of the no-good vote. However, jurors reasonably could have inferred from the evidence presented that Frosty knew the gang had determined he was no good by a majority vote. The gang expert testified that a violent confrontation between a gang member accused of being no good and his or her accuser generally occurs *after* a no-good vote has occurred. Melina had the opportunity to tell Osito (who was with Frosty) about the vote when she called him from the bathroom. While she testified that she did *not* update Frosty about what happened at the meeting, the jury could have disbelieved her. Together, the gang expert's testimony about when a violent confrontation is likely to occur, the fact that Frosty violently confronted Lopez about calling him PC, and the fact that Melina had the opportunity to inform Frosty about the vote, support the inference that Frosty knew about the vote.

ii. Other Substantial Evidence Challenges

Defendants raise other substantial evidence challenges to CALCIM Nos. 3471 and 3472, which we need not definitively resolve, as we find any instructional error was harmless.

Defendants maintain CALCRIM No. 3472 regarding contrived self-defense applies only where the victim's response to the defendant's provocation is legally justified. The prosecutor acknowledged below, as does the Attorney General on appeal, that Frosty's attack on Lopez was not legally justified because Frosty was not in imminent danger.

Defendants rely on *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1, where our Supreme Court noted that "the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a

defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." That court held that, similarly, "the imperfect self-defense doctrine cannot be invoked in such circumstances." (*Ibid.*) Courts have construed *In re Christian S.* to mean that imperfect self-defense "is available when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180.)

Logic would seem to dictate that, similarly, perfect self-defense is available when the victim responds to the defendant's provocation with unlawful force. (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 273 ["Only when the victim resorts to *unlawful* force does the defendant-aggressor regain the right of self-defense."]; see *People v. Valencia* (2008) 43 Cal.4th 268, 288 [noting that "[t]he concepts of perfect and imperfect self-defense are not entirely separate, but are intertwined"].) Accordingly, we question the propriety of instructing with CALCRIM No. 3472 where, as here, the defendants set in motion a chain of events that led the victim to attack using *unlawful* force. We need not decide, however, whether CALCRIM No. 3472 applies only where the victim's response to the defendant's provocation is legally justified because, below, we find that any error in instructing with CALCRIM No. 3472 was harmless.

Salazar contends CALCRIM No. 3471 was unsupported by substantial evidence because there was no evidence that he committed an initial act of physical aggression against the victims or engaged in mutual combat. The Attorney General responds that the phrase "starts a fight" in CALCRIM No. 3471 is not limited to fights started by acts of physical aggression. The Attorney General further argues that "[t]he evidence showed that this was a quintessential instance of mutual combat [because b]oth the gang expert and the gang members testified that the expected response to the gang finding someone to

be no good was for the person to challenge the accuser in a fistfight with a trusted, high-ranking gang member brought along for support."

We are skeptical that there was sufficient evidence that *Salazar* engaged in mutual combat, given the gang expert's testimony that the expected confrontation would be between the accused and the accuser *only*. But we need not determine whether there was sufficient evidence of mutual combat or whether "starts a fight," as it is used in CALCRIM No. 3471, requires *physical* aggression by the defendant because, to the extent the court erred in giving CALCRIM No. 3471, defendants were not prejudiced.

e. Prejudice

We cannot set aside a judgment on the basis of instructional error unless, after an examination of the entire record, we conclude that the error has resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) Defendants and the Attorney General disagree as to the appropriate standard for assessing prejudice. Defendants argue the assured error in instructing with CALCRIM Nos. 3471 and 3472 violated their federal constitutional rights to present a defense and to proof beyond a reasonable doubt of every element of the crime (specifically, the absence of self-defense), such that the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman* applies. The Attorney General says *Watson* applies, such that reversal is required only if it is reasonably probable that the jury would have returned a verdict more favorable to defendants had it not been instructed with CALCRIM Nos. 3471 and 3472.

Generally, giving an instruction that is unsupported by the evidence is an error "of state law subject to the traditional *Watson* test . . . ." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130.) Here, the court instructed on the doctrines of self-defense, defense of another, imperfect self-defense, and imperfect defense of another. Jurors also were instructed regarding the People's burden of proving beyond a reasonable doubt that the killing was not justified by the doctrines of self-defense or defense of another and that defendant was not acting in imperfect self-defense or imperfect defense of another.

Under these circumstances, we conclude defendants' constitutional rights were not implicated by the assumed error such that *Watson* applies.

Watson "review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration." (*People v. Breverman* (1998) 19 Cal.4th 142, 177 (*Breverman*).) "In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Ibid.*) "We also consider the instructions as a whole, the jury's findings, and the closing arguments of counsel." (*People v. Larsen* (2012) 205 Cal.App.4th 810, 831.)

Defendants have not carried their burden on appeal to show it is reasonably probable they would have obtained a more favorable outcome had the trial court not instructed with CALCRIM Nos. 3471 and 3472.

It is not reasonably probable that the jury would have concluded Salazar acted in self-defense or defense of another had the instructions not included CALCRIM Nos. 3471 and 3472. Salazar acted in self-defense or defense of another if he (1) actually and reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; (2) reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and (3) used no more force than was reasonably necessary to defend against that danger. (CALCRIM No. 505.)

The evidence was weak as to self-defense. First, the evidence strongly suggested Salazar could not reasonably have believed that he was in imminent danger of being killed or suffering great bodily injury at the time of the shooting. Shadow, Nena, Dodger, and Cartoon each testified that, in the moments preceding the shooting, Frosty and Osito were in or near the bathroom threatening or fighting with Shadow. According to Nena, Dodger, and Cartoon, Salazar left a place of relative safety—the living room or

upstairs—to approach and shoot the victims. The evidence supported the conclusion that, by the time of the shooting, Osito had dropped his firearm: Shadow heard Osito's gun fall to the ground before the shooting and the magazine was found near the entrance to the bathroom, while Osito's body was several feet away, near the toilet. Frosty remained armed with the scissors, but the physical evidence indicated that Salazar shot the victims from a distance of nine feet, too far for Frosty and his scissors to pose an imminent danger to Salazar, who was armed with a gun. Second, Dodger and Cartoon testified that Salazar stood outside the bathroom for a few seconds before shooting, which suggests he did not reasonably believe that the *immediate* use of deadly force was necessary to defend himself. Third, there was evidence that Salazar used more force than was reasonably necessary to defend against any danger the victims posed. He fired nine bullets, emptying his gun, and hitting both victims multiple times. The evidence supported the prosecutor's theory that Salazar continued shooting while the victims were down, as Osito was shot once in the back, Frosty was shot between his scrotum and anus, and some of the wounds had a downward trajectory.

That the evidence of self-defense was weak is confirmed by the fact that Salazar's trial counsel did not even argue self-defense in her closing, instead arguing that "what this case is about is once Shadow's in that bathroom and we have those two armed men, what reasonable person in [Salazar's] position would not shoot those two people to prevent Shadow from being either hurt seriously or killed?" But the defense-of-Shadow theory finds only weak support in the evidence as well.

The evidence did not support a reasonable belief that Shadow was in imminent danger of being killed or suffering great bodily injury at the time of the shooting. Shadow, Dodger, and Nena all testified that Shadow exited the bathroom and fell to the floor before the shooting. Osito was disarmed around the same time. According to Nena, after Shadow fell, Salazar walked from outside the bathroom, to the living room (possibly to retrieve the gun), and back to the bathroom before shooting. Dodger testified that

Salazar pointed the gun into the bathroom for four seconds before shooting. Their testimony undermines Salazar's contention that he actually and reasonably believed that Shadow was in *imminent* danger of being killed or suffering great bodily injury so that he reasonably believed that the *immediate* use of deadly force was necessary. As noted above, the number of bullets fired and the location and trajectory of the victims' gunshot wounds support the conclusion that Salazar used more force than was reasonably necessary.

The instructions as a whole also persuade us that it is not reasonably probable that the jury would have concluded Salazar acted in self-defense or defense of another had the instructions not included CALCRIM Nos. 3471 and 3472. The court instructed the jury, pursuant to CALCRIM No. 200, that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." We presume the jury followed that instruction by disregarding CALCRIM Nos. 3471 and 3472.

The prosecutor did argue CALCRIM Nos. 3471 and 3472 in his rebuttal closing, saying that everyone at the July 28 gang meeting started a fight with Frosty by participating in a no-good vote. But he also argued that the evidence did not support self-defense because, at the time of the shooting, the victims posed no threat to Salazar or Shadow because they were nine feet away and Osito had dropped his gun. That the prosecutor addressed CALCRIM Nos. 3471 and 3472 does not convince us that defendants suffered prejudice, given the state of the evidence and the instructions as a whole.

Neither defendant contends it is reasonably probable that the jury would have concluded Salazar acted in imperfect self-defense or imperfect defense of another had the instructions not included CALCRIM Nos. 3471 and 3472. Nor is it. Imperfect or

unreasonable self-defense involves a "subjectively" real but "objectively unreasonable" belief in the need to defend. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) No evidence as to Salazar's subjective belief in the need to defend himself or another was presented. Salazar's trial counsel did not argue imperfect self-defense or imperfect defense of another in her closing. Indeed, she initially agreed that the jury need not be instructed with CALCRIM No. 571 regarding imperfect self-defense and imperfect defense of another, although she later reconsidered and the instruction ultimately was given.

In sum, based on the entire record, we conclude it is not reasonably probable that the jury would have accepted Salazar's defense of self-defense or defense of another if the trial court had not instructed with CALCRIM Nos. 3471 and 3472. As such, we conclude neither defendant suffered prejudice as a result of the instructional errors.[10] Defendants' alternative arguments that their trial attorneys were ineffective in failing to object to CALCRIM Nos. 3471 and 3472 likewise fail for lack of prejudice.

3. CALCRIM 520

Salazar argues that, as given to the jury in this case, CALCRIM No. 520 failed to accurately instruct on the prosecutor's burden of proof for malice.

a. Legal Principles of Criminal Homicide

"Criminal homicide is divided into two types: murder and manslaughter." (*People v. Beltran* (2013) 56 Cal.4th 935, 941.) Murder is the unlawful killing of a

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[10] The Attorney General claims that Lopez was not prejudiced by any error in the self-defense instructions because he "was convicted under an aiding and abetting and natural and probable consequences theory." In the Attorney General's view, Lopez could have been convicted of murder as an aider and abettor even if Salazar had been acquitted based on self-defense or defense of another. Lopez disagrees, arguing that he could be convicted under a natural and probable consequences theory only if Salazar was convicted of murder, so the instructions were prejudicial as to him if they were prejudicial as to Salazar. Having concluded that Salazar suffered no prejudice, we need not resolve this dispute.

human being with malice aforethought. (§ 187, subd. (a).) Malice may be either express or implied. (§ 188.) "Express malice is an intent to kill. [Citation.] . . . Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) "[A] finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard." (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.)

Manslaughter is the unlawful killing of a human being without malice. (§ 192.) An unlawful killing constitutes voluntary manslaughter, as opposed to murder, where one of two circumstances precludes the formation of malice: (1) the defendant kills in a sudden quarrel or heat of passion, or (2) the defendant kills in an actual but unreasonable belief in the need for self-defense. (*Ibid.*; *People v. Elmore* (2014) 59 Cal.4th 121, 133-134 (*Elmore*).) Provocation and imperfect self-defense are "mitigating circumstances [that] reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by *negating the element of malice* that otherwise inheres in such a homicide [citation].' " (*People v. Rios* (2000) 23 Cal.4th 450, 461.) "Thus, where the defendant killed intentionally and unlawfully, evidence of heat of passion, or of an actual, though unreasonable, belief in the need for self-defense, is relevant . . . to determine whether *malice has been established,* thus allowing a conviction *of murder,* or *has not been established,* thus precluding a murder conviction and limiting the crime to the lesser included offense of voluntary manslaughter." (*Ibid.*) Accordingly, where "the issue of provocation or imperfect self-defense is . . . 'properly presented' in a murder case [citation], the People must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. [Citations.]" (*Id.* at p. 462.)

b. Instructions Below

The court instructed the jury on the elements of murder with CALCRIM No. 520. Among other things, that instruction informed jurors that, "[t]o prove that a defendant is guilty of this crime, the People must prove that . . . [w]hen the defendant acted, he had a state of mind called malice aforethought . . . ." CALCRIM No. 520 also identified and defined the two kinds of malice aforethought: express malice and implied malice. However, CALCRIM No. 520 did not instruct that the People bore the burden of proving the absence of provocation and imperfect self-defense to establish malice. Instead, jurors were instructed regarding provocation with CALCRIM No. 570, which stated in relevant part: "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." The court instructed jurors regarding imperfect self-defense or imperfect defense of another with CALCRIM No. 571. Among other things, that instruction stated: "The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder."

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

c. Analysis

Salazar says CALCRIM No. 640 allowed the jury to return its guilty of first degree murder verdicts without considering the manslaughter instructions (CALCRIM Nos. 570 and 571). Therefore, he continues, because CALCRIM No. 520 failed to address the People's burden to prove the absence of provocation and imperfect self-defense, jurors likely convicted him without holding the People to that burden.

Our colleagues in the Fourth District considered a similar argument in *People v. Najera* (2006) 138 Cal.App.4th 212. There, the defendant complained that CALJIC No. 17.10, which is analogous to CALCRIM No. 640, improperly permitted the jury to convict a defendant of murder without reaching the manslaughter instructions addressing the People's burden to prove absence of provocation. (*Najera*, *supra*, at p. 227.) The court rejected that argument, reasoning that because "[t]he trial court read the instructions in their entirety to the jury after closing argument[, t]he jury . . . heard the instruction on the prosecution's burden of proving absence of sudden quarrel or heat of passion before retiring to deliberate. We presume, of course, the jury understood and considered all of the instructions as a whole, in whatever order they might have been." (*Id.* at p. 228.)

Likewise, here, the court read the instructions aloud to the jury before deliberations began. Those instructions included CALCRIM No. 200, instructing the jury to "[p]ay careful attention to all of these instructions and consider them together." We presume the jury followed that instruction and correlated and followed all the other instructions, including CALCRIM Nos. 520, 570, and 571. (*Sanchez*, *supra*, 26 Cal.4th at p. 852.) That presumption is not overcome by the fact that Salazar's trial counsel chose not to argue manslaughter in her closing, focusing instead on defense of another, as Salazar suggests. Salazar also contends his theory is supported by the fact that trial counsel conceded he was guilty of murder in her closing argument. But, as discussed in part D.3. below, no reasonable juror could have understood the complained-of argument as a concession of Salazar's guilt.

For the foregoing reasons, we reject Salazar's contention that CALCRIM No. 520 was incomplete. Having rejected Salazar's claim of error on the merits, we need not address the Attorney General's forfeiture argument.

4. Accomplice Testimony Instructions

Salazar maintains the trial court erred by failing to instruct the jury with CALCRIM No. 335, which would have informed the jury that witnesses who were members of Espe (Baby G., Cartoon, Dodger, Melina, Shadow, Smiley, and Trips) were accomplices as a matter of law whose incriminating testimony required corroboration and should be viewed with caution. Instead, the court instructed regarding accomplice testimony with CALCRIM No. 334, which required the jury to decide whether those same witnesses were accomplices and placed the burden on the defendants to prove that witnesses were accomplices by a preponderance of the evidence.

a. Legal Principles and the Standard of Review

Section 1111 provides: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

"The law is clear that '[w]hether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed.' " (*People v. Johnson* (2016) 243 Cal.App.4th 1247, 1269 (*Johnson*).) CALCRIM No. 335 should be given " 'only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice.' " (*Johnson, supra*, p. 1269.) Where a dispute exists as to whether a witness is an accomplice, CALCRIM No. 334 should be given. (*Johnson, supra*, p. 1269.)

"We review a claim of instructional error de novo." (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378.) "Whether or not the trial court should have given a 'particular instruction in any particular case entails the resolution of a mixed question of law and fact,' which is 'predominantly legal.' [Citation.] As such, it should be examined without deference." (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.)

b. Background

Salazar's trial counsel requested CALCRIM No. 334, arguing there was a dispute as to which witnesses were accomplices. The prosecutor argued that CALCRIM No. 335 should be given because "[t]here's absolutely no question [the gang member witnesses] were accomplices. They were all prosecuted for the exact same crimes and convicted. So the question - or many of them. And it's a sua sponte duty to instruct." In view of the dispute, the court opted to instruct with CALCRIM No. 334.

c. Analysis

Salazar contends the trial court was obligated to instruct with CALCRIM No. 335 based on the prosecutor's view that the gang member witnesses were accomplices. In his view, despite the positions taken by counsel below, CALCRIM No. 335 was more favorable to the defense because much of the incriminating testimony came from gang member witnesses; CALCRIM No. 335's requirement that such testimony be corroborated and viewed with caution would have benefited the defense, he reasons.

But the law does not require the trial court to blindly accept the prosecutor's view of the facts in determining how to instruct the jury; nor does it permit the trial court to give instructions requested by the prosecution, regardless of whether they are supported by the evidence, merely because they are favorable to the defense. Instead, "[a] party is entitled to a requested instruction if it is supported by substantial evidence . . . [, but] instructions *not* supported by substantial evidence should not be given." (*Ross, supra*, 155 Cal.App.4th at pp. 1049-1050.) Salazar cites no cases to the contrary.

That the court was required to give CALCRIM No. 335 because the prosecutor agreed to it is the extent of Salazar's claim on appeal. He does not contend that the facts and the inferences to be drawn therefrom undisputedly show that every gang member witness was subject to prosecution for the crimes charged against the defendants (namely, two counts of first degree murder, street terrorism, battery, assault, and child abuse). Any such argument would fail. There was evidence the witnesses attended the gang meeting at which Frosty's status was discussed and Melina was checked; some, including Shadow and Melina, did so reluctantly. Whether that evidence supported criminal liability, particularly for murder, was hardly undisputed. Accordingly, the trial court properly left it to the jury to decide which, if any, gang member witnesses were accomplices. (See *People v. Williams* (1997) 16 Cal.4th 635, 679-680.)

Because we reject Salazar's claim of error on the merits, we do not reach the Attorney General's contention that Salazar forfeited the claim under the invited error doctrine. Likewise, we do not address Salazar's response that, if defense counsel invited the error, Salazar was denied effective assistance of counsel.

5. CALCRIM Nos. 506 and 3477

Lopez contends the trial court erred by refusing to instruct the jury on the habitation defense with CALCRIM No. 506. In a companion argument, he says the court erred by failing to sua sponte instruct with CALCRIM No. 3477, which describes a rebuttable presumption that a residential occupant has a reasonable fear of death or great bodily injury when he or she uses deadly force against an unlawful and forcible intruder into the residence. Salazar joins this argument.

a. Background

Nena testified that, at the time of the shootings, Salazar was living at her house, as well as with his mother and his father, and that he would "go back and forth" between those residences. Based on that testimony, Salazar's trial counsel requested that the court

instruct with CALCRIM No. 506 regarding the defense of habitation. The trial court declined that request. No request for CALCRIM No. 3477 was made.

b. Legal Principles

Section 197, subdivision (2) provides that a homicide is justifiable "[w]hen committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein." That provision is the basis for CALCRIM No. 506.[11] (Bench Note to CALCRIM No. 506.)

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[11] CALCRIM No. 506 provides:

"The defendant is not guilty of murder/ [or] manslaughter/ attempted murder/ [or] attempted voluntary manslaughter if (he/she) killed/attempted to kill to defend (himself/herself) [or any other person] in the defendant's home. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if:

"1. The defendant reasonably believed that (he/she) was defending a home against *<insert name of decedent>*, who (intended to or tried to commit *<insert forcible and atrocious crime>*/ [or] violently[[,] [or] riotously[,]/ [or] tumultuously] tried to enter that home intending to commit an act of violence against someone inside);

"2. The defendant reasonably believed that the danger was imminent;

"3. The defendant reasonably believed that the use of deadly force was necessary to defend against the danger;

"AND

"4. The defendant used no more force than was reasonably necessary to defend against the danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, then the [attempted] killing was not justified.

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"Section 198.5 . . . creates a rebuttable presumption that a residential occupant has a reasonable fear of death or great bodily injury when he or she uses deadly force against an unlawful and forcible intruder into the residence."[12] (*People v. Brown* (1992) 6 Cal.App.4th 1489, 1494.) "By its terms, the presumption benefits only *residents* defending their homes." (*People v. Silvey* (1997) 58 Cal.App.4th 1320, 1326.) CALCRIM No. 3477 describes the presumption created by section 198.5.[13] (Bench Note to CALCRIM No. 3477.)

"[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/<*insert forcible and atrocious crime*>) has passed. This is so even if safety could have been achieved by retreating.]

"The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter)."

[12] Section 198.5 provides: "Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred. [¶] As used in this section, great bodily injury means a significant or substantial physical injury."

[13] CALCRIM No. 3477 provides:

"The law presumes that the defendant reasonably feared imminent death or great bodily injury to (himself/herself)[, or to a member of (his/her) family or household,] if:

"1. An intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;

"2. The defendant knew [or reasonably believed] that an intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home;

"3. The intruder was not a member of the defendant's household or family;

"AND

"4. The defendant used force intended to or likely to cause death or great bodily injury to the intruder inside the home.

"[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

"The People have the burden of overcoming this presumption. This means that the People must prove that the defendant did not have a reasonable fear of imminent death or injury to (himself/herself)[, or to a member of his or her family or household,] when

c. Analysis

The Attorney General does not argue forfeiture, arguing instead that neither instruction was supported by substantial evidence because the evidence showed only that Salazar sometimes stayed at Nena's house, not that it was his residence. The Attorney General further argues that any error was not prejudicial.

Even assuming the court erred in refusing to instruct with CALCRIM No. 506 and failing to sua sponte instruct with CALCRIM No. 3477, those assumed errors are not reversible because they generated no prejudice. Because the jury was instructed on self-defense and defense of another with CALCRIM No. 505, any error did not deprive defendants of their federal constitutional right to present a defense, but rather was one of state law only. Thus, the question is whether it is reasonably probable that instructing with CALCRIM Nos. 506 and 3477 would have changed the outcome of the trial. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

CALCRIM No. 3477 would have had no impact on Salazar's primary defense—that he was defending Shadow. It would have allowed jurors to conclude that there was a presumption that Salazar reasonably feared imminent death or great bodily injury to himself or Nena (the only member of his household that was present). Assuming jurors concluded such a presumption applied, the prosecution would have had the opportunity to rebut that presumption by proving Salazar did not have a reasonable fear of imminent death or injury to himself or Nena at the time of the shooting. It is reasonably probable that the People would have met that burden. The evidence strongly suggested Salazar could not reasonably have believed that he was in imminent danger of being killed or suffering great bodily injury at the time of the shooting. As discussed above, Salazar left a place of relative safety—the living room or upstairs—to approach and shoot the victims

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(he/she) used force against the intruder. If the People have not met this burden, you must find the defendant reasonably feared death or injury to (himself/herself)[, or to a member of his or her family or household]."

from a distance of nine feet after Osito had been disarmed. It is reasonably probable that, based on that evidence, jurors would have concluded that the People rebutted the presumption that Salazar had a reasonable fear of imminent death or injury to himself at the time of the shooting. It is likewise reasonably probable that jurors would have concluded that the People rebutted the presumption that Salazar had a reasonable fear of imminent death or injury to Nena at the time of the shooting. Nena was not involved in the fight. Nor could Salazar reasonably have believed that Frosty or Osito would attack her. Frosty attacked Lopez because he was "talking shit" and Osito fought Shadow and Dodger because they intervened. Neither of the victims attacked any of the bystanders and Salazar could not reasonably have believed they posed an *imminent* danger to Nena.

Even assuming the prosecution did not rebut the CALCRIM No. 3477 presumption, CALCRIM No. 506 would have allowed the jury to find Salazar not guilty of murder only if they also concluded he used no more force than was reasonably necessary to defend against the danger. As discussed above, Salazar emptied his clip into the victims, possibly continuing to shoot while they were down. In view of that evidence, it is not reasonably probable that jurors would have concluded that Salazar used no more force than was reasonably necessary.[14]

6. CALCRIM No. 417

Lopez argues the court's failure to sua sponte modify CALCRIM No. 417 to state that a conspirator is not liable for a murder that is the "fresh and independent product" of a coconspirator's mind was reversible error. That claim has no merit.

a. Background

As given in this case, CALCRIM No. 417 provided, in relevant part: "A member of a conspiracy is criminally responsible for the crimes that he or she conspires to

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[14] Lopez's argument that trial counsel was ineffective in failing to request that the jury be instructed with CALCRIM Nos. 506 and 3477 likewise fails for lack of sufficient prejudice.

commit, no matter which member of the conspiracy commits the crime. [¶] A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. Under this rule, a defendant who is a member of the conspiracy does not need to be present at the time of the act. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan." Neither defense counsel requested that the instruction be modified to address crimes that are the "fresh and independent product" of one coconspirator's mind.

b. Legal Principles – Conspiracy Law

It has long been the law in this state that each coconspirator " 'is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and *not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design*. Even if the common design is unlawful, and if one member of the party departs from the original design as agreed upon by all of the members, and do an act which was not only not contemplated by those who entered into the common purpose, but was not in furtherance thereof, and not the natural or legitimate consequence of anything connected therewith, the person guilty of such act, if it was itself unlawful, would alone be responsible therefor.' " (*People v. Kauffman* (1907) 152 Cal. 331, 334 (*Kauffman*),

italics added.) More recently, in *People v. Smith* (2014) 60 Cal.4th 603, 615-616 (*Smith*), our Supreme Court considered whether the foregoing "*limitation* on conspirator liability for crimes outside of or foreign to the common design also appl[ies] equally to an aider and abettor." The court concluded "that this limitation on conspirator liability does not apply to an aider and abettor." (*Id.* at p. 616.) The court reasoned that, "[b]ecause a conspirator can be liable for a crime committed by any other conspirator, and the defendant need not *do* (or even encourage) anything criminal except agree to commit a crime, it is reasonable to make a conspirator not liable for another conspirator's crime that is ' "a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design." ' " (*Ibid.*) By contrast, "[b]ecause the aider and abettor is furthering the commission, or at least attempted commission, of an actual crime, it is not necessary to add a limitation on the aider and abettor's liability for crimes other principals commit beyond the requirement that they be a natural and probable, i.e., reasonably foreseeable, consequence of the crime aided and abetted." (*Id.* at pp. 616-617.)

c. Legal Principles – Jury Instructions

" 'In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.' [Citation.] That duty extends to ' "instructions on the defendant's theory of the case, including instructions 'as to defenses " 'that the defendant is relying on . . . , 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.' " ' " ' [Citation.] But ' "when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte* instructional duties. While a court may well have a duty to give a 'pinpoint' instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such 'pinpoint'

instructions are not required to be given *sua sponte* and must be given only upon request." ' " (*People v. Anderson* (2011) 51 Cal.4th 989, 996-997 (*Anderson*).)

d. Analysis

Lopez contends *Smith* required the trial court to modify CALCRIM No. 417 to state that a conspirator is not liable for a crime that is the "fresh and independent product" of a coconspirator's mind. His reliance on *Smith*—an aiding and abetting case that merely reiterated long-standing California conspiracy law—is misplaced. *Smith* says nothing about the trial court's instructional duties in conspiracy cases generally, nor about CALCRIM No. 417 specifically.

Smith aside, the trial court had a sua sponte duty to modify CALCRIM No. 417 to include the "fresh and independent product" limitation on a conspirator's liability only if such a modification was required to " 'instruct on [the] general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.' " (*Anderson, supra*, 51 Cal.4th at p. 996.) We conclude the trial court had no sua sponte duty to modify CALCRIM No. 417 because the unmodified instruction adequately informed jurors of the limitation on conspirator liability set forth in *Kauffman* and reaffirmed in *Smith*.

As given in this case, CALCRIM No. 417 explained that "[a] member of a conspiracy is not criminally responsible for the act of another member if that *act does not further the common plan or is not a natural and probable consequence of the common plan.*" (Italics added.) The instruction further defined "[a] natural and probable consequence" as "one that a reasonable person would know is likely to happen if nothing unusual intervenes." The language set forth above properly communicated the *Kauffman* limitation that a conspirator is not liable for crimes that are "a fresh and independent product of the mind of one of the confederates *outside of, or foreign to, the common design.*" (*Kauffman, supra*, 152 Cal. at p. 334, italics added.) Thus, CALCRIM No. 417 properly guided the jury's consideration of any defense that the shootings were the fresh

and independent product of Salazar's mind outside of, or foreign to, the common design, by explaining that a conspirator is not criminally responsible for a coconspirator's act that does not further the common plan or is not a natural and probable consequence of the common plan. The trial court therefore had no sua sponte duty to modify CALCRIM No. 417.[15]

C. Exclusion of Evidence

Lopez asserts the trial court erroneously excluded two categories of evidence: (1) lay witness opinion testimony that Frosty and Osito would have killed everyone in the house had Salazar not shot them and (2) evidence of Frosty's character for violence. Salazar joins this argument.

1. Standard of Review

"We review a trial court's evidentiary rulings for abuse of discretion." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 (*Shaw*).) This court has explained that "[d]iscretion is abused only when in its exercise, the trial court 'exceeds the bounds of reason, all of the circumstances before it being considered.' [Citation.] There must be a showing of a clear case of abuse *and miscarriage of justice* in order to warrant a reversal. [Citation]." (*Ibid.*, italics added.) The erroneous exclusion of evidence causes prejudice to appellant amounting to a " 'miscarriage of justice' " only if "a different result would have been probable if the error had not occurred." (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480; see also Cal. Const., art. VI, § 13; Evid.Code, §§ 353, 354; Code Civ. Proc., § 475.) " 'Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has

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[15] Lopez also asserts that trial counsel was ineffective in failing to request that CALCRIM No. 417 be modified to state that a conspirator is not liable for a murder that is the "fresh and independent product" of a coconspirator's mind. Given our conclusion that CALCRIM No. 417 properly stated the law, counsel could reasonably have concluded that modification was unnecessary. Therefore, Lopez has not carried his burden to show deficient performance.

occurred. [Citations.]' [Citation.]" (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 58.) It likewise is appellant's burden to establish abuse of discretion. (*Shaw, supra*, at p. 281.)

2. Exclusion of Lay Opinion Testimony

a. Background

Salazar's trial counsel sought to elicit opinion testimony from Nena and Dodger that Frosty and Osito would have killed everyone in the house if Salazar had not shot them. The trial court prohibited the proposed line of questioning on grounds it called for speculation and invaded the domain of the jury. The court noted that the "witnesses could testify as to their perceptions at the time" including "what they were thinking" and "if they were afraid they were going to get shot."

Nena testified that she was scared Frosty and Osito might hurt her and that it looked like Frosty was trying to kill people because he was attacking them with a knife. Dodger testified he was afraid of getting shot and killed. Dodger also said he was afraid Shadow was going to be killed when he was in the bathroom with Frosty and Osito.

b. Legal Principles

A lay witness's opinion testimony must be "[r]ationally based on the perception of the witness . . . and . . . [h]elpful to a clear understanding of [the witness's] testimony." (Evid. Code, § 800, subds. (a) & (b).) "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) Speculative or "conjectural lay opinion" is inadmissible because it is not "[h]elpful to a clear understanding of [the witness's] testimony." (*People v. Thornton* (2007) 41 Cal.4th 391, 429 (*Thornton*), quoting Evid. Code, § 800, subd. (b).)

c. Analysis

The trial court did not abuse its discretion in concluding that Salazar's counsel's proposed question—whether Frosty and Osito would have killed everyone in the house if

Salazar had not shot them—called for inadmissible speculative lay opinion. (*Thornton*, *supra*, 41 Cal.4th at p. 429 [stating abuse of discretion standard of review].) *People v. Houston* (2012) 54 Cal.4th 1186 is instructive. There, the defendant claimed one of the victims had molested him. The defendant's best friend testified "that he and defendant often discussed sexual matters," "that defendant never discussed with him the claimed molestation," and "that defendant 'would have told me such a thing.' " (*Id.* at p. 1222.) Our Supreme Court held that the final statement "was speculative and not based on anything [the friend] might have perceived through his physical senses" and should have been excluded. (*Ibid.*) The court explained that "[a]lthough it is reasonable to infer that, in light of the nature of their relationship, defendant would have told [his best friend] about the alleged molestation . . . , it is the role of the trier of fact, not the witness, to make such an inference." (*Ibid.*)

Here, it would have been equally speculative for Nena or Dodger to testify as to what would have happened in a hypothetical world where Salazar did not kill Frosty and Osito. The trial court properly permitted the witnesses to testify to their perceptions during the fight, including the fear they felt as a result of Frosty and Osito's actions. It did not abuse its discretion by preventing them from opining on what might have been.

2. Exclusion of Evidence of the Victims' Character for Violence and Related Character Evidence Ruling

Lopez contends the court erred by excluding evidence of Frosty's violent reputation and prior violent acts. He also challenges an Evidence Code section 1103 ruling and, alternatively, contends trial counsel was ineffective in connection with that ruling.

a. Exclusion of Character Evidence Was Not Prejudicial

Dodger testified that Frosty told him to smuggle drugs into the county jail. Dodger agreed but his first attempt failed. Frosty told him to try again, but Dodger refused. The trial court did not permit Dodger to testify that, in connection with the drug

smuggling scheme, Frosty encouraged Dodger to do a violent act towards police officers so that he would be sent to jail. Lopez's counsel reasoned that the testimony was relevant to show Frosty's character for violence. The trial court disagreed because the incident did not involve Frosty himself engaging in violence.

Dodger also testified that he was afraid Shadow was going to be killed when he was in the bathroom with Frosty and Osito because of "[t]he way they charged at him. The way—I know the reputation of how they are. Aggressive. Violent." The court asked for a new question and cautioned defense counsel he was "going into [Evidence Code section] 1103 evidence." Defense counsel responded, "I'm prepared to move on." The prosecutor moved to strike, and the court granted that motion "as to any reputation what the people are known as . . . ."

In a criminal trial, evidence of the victim's character is admissible when it is offered by the defendant to prove conduct of the victim in conformity with that character trait. (Evid. Code, § 1103, subd. (a)(1).) Where evidence that the victim had a character for violence has been adduced by the defendant under Evidence Code section 1103, subdivision (a)(1), the prosecution may offer evidence of the defendant's character for violence to prove conduct of the defendant in conformity with that character trait. (Evid. Code, § 1103, subd. (b).) Thus, "if . . . a defendant offers evidence to establish that the victim was a violent person, thereby inviting the jury to infer that the victim acted violently during the events in question, then the prosecution is permitted to introduce evidence demonstrating that . . . the defendant was a violent person, from which the jury might infer it was the defendant who acted violently." (*People v. Fuiava* (2012) 53 Cal.4th 622, 696.)

Even assuming the trial court erred in excluding the evidence of Frosty and Osito's character for violence, Lopez suffered no prejudice. The evidence would have been admitted to support the inference that Frosty and Osito acted violently at the time of the shooting, which was relevant to Salazar's claims of self-defense and defense of

others. But there was significant other evidence that the victims were acting violently in the minutes preceding their deaths. Numerous eyewitnesses testified that Frosty physically attacked Lopez in a rage and it was undisputed that Frosty armed himself with scissors and stabbed the defendants. Osito hit Shadow in the head when he tried to break up the fight and hit Dodger in the head with a gun so violently that he required staples in his scalp. "The law is established that the erroneous exclusion of evidence is not *prejudicial* error where the excluded evidence is cumulative to other evidence which is introduced at the trial." (*People v. Valencia* (1938) 30 Cal.App.2d 126, 129 (*Valencia*); see *People v. Helton* (1984) 162 Cal.App.3d 1141, 1146 (*Helton*) [erroneous exclusion of hearsay evidence held harmless where it was "merely cumulative of properly admitted evidence"]; *People v. Harris* (1989) 47 Cal.3d 1047, 1093 (*Harris*) [exclusion of cumulative evidence "could not have been prejudicial"].)

b. Evidence Code Section 1103 Ruling

Lopez's counsel sought to question the gang expert about Frosty's 2009 arrest for robbery and assault on the theory that it showed his character for violence. The court stated that if defense counsel went down that road, he would open the door to evidence regarding Lopez's character for violence. Defense counsel agreed and withdrew his request.

On appeal, Lopez says the court erred in ruling that the admission of evidence of Frosty and Osito's character for violence would permit the admission of evidence of his own character for violence under Evidence Code section 1103, subdivision (b). In Lopez's view, because he was not the shooter, his violent character was not relevant. But because he did not object to the ruling below, he forfeited any challenge to it on appeal. Apparently recognizing that, Lopez contends trial counsel rendered ineffective assistance by withdrawing the request to question the gang expert about Frosty's arrest and by not objecting to the court's Evidence Code section 1103 ruling. We address that contention below along with defendants' other ineffective assistance of counsel claims.

D. Ineffective Assistance of Counsel Claims

1. Legal Principles

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*).) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel's performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The deficient performance component of an ineffective assistance of counsel claim requires a showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Id.* at p. 688.) "If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) With respect to prejudice, a defendant must show "there is a reasonable probability"—meaning "a probability sufficient to undermine confidence in the outcome"—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, at p. 694.) We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697.)

2. Lopez's Character Evidence-Related Claim

As discussed above, Lopez contends trial counsel rendered ineffective assistance by withdrawing his request to question the gang expert about Frosty's assault arrest and by not objecting to the court's Evidence Code section 1103 ruling. That claim falters on the prejudice prong. Assuming trial counsel had persuaded the court to allow him to

introduce evidence that Frosty was once arrested for assault, that evidence of Frosty's character for violence would have been cumulative of all the evidence that Frosty was acting violently prior to his death. Accordingly, it is not reasonably probable that the result of the proceeding would have been different had the evidence been admitted. (See *Valencia*, *supra*, 30 Cal.App.2d at p. 129; *Helton*, *supra*, 162 Cal.App.3d at p. 1146; *Harris*, *supra*, 47 Cal.3d at p. 1093.)

3. Salazar's Counsel's "Justifiable Murder" Argument

a. Background

Salazar's trial counsel stated during closing argument: "Shadow, of course, I think is our key witness here because he's the one that's in the restroom at the time that the murder, killing, takes place. And the reason I say murder is because it's the intentional killing of someone. But if it's justified, then the person is not guilty. So I just want to make sure that you understand the context. It's just as if a police officer shoots and kills a bank robber who's shooting at him. He's intending to kill him. And he's thought about it, and he's killing him, but he's justified in doing so. So sometimes when we hear the word murder we're, like, oh, you know, he's guilty and he killed the person without cause. But it is murder, but with justification."

b. Analysis

Salazar contends his trial counsel rendered ineffective assistance by conceding he was guilty of murder, thereby taking verdicts of voluntary manslaughter based on imperfect self-defense or heat of passion off the table, and incorrectly stating the law by suggesting that murder can be justified. In a related argument, Lopez contends his trial counsel rendered ineffective assistance by failing to object to Salazar's counsel's concession to murder and assertion of a nonexistent defense—justifiable murder.

Plainly, counsel misspoke. She should have referred to homicide, not murder. But, in the context of the argument and trial as a whole, no reasonable juror would have understood counsel's misstatement as a concession that Salazar was guilty of murder.

Focusing solely on the portion of the closing argument on which defendants rely, the gist of counsel's argument was that Salazar was "not guilty" because the killing was "justified." Salazar's counsel reiterated that theory of the case at the end of her closing argument, stating: "The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People don't meet that burden, you must find the defendant not guilty. . . . Any[one] . . . in that house . . . would have been justified in grabbing [Salazar's] gun and shooting those people before they stab[bed] or killed [Shadow]. [¶] I'm going to ask you to come back with a verdict of not guilty. As to Mr. Salazar. Thank you." After hearing that, jurors could not possibly have believed that Salazar's counsel was conceding his guilt as to the murder charges. Significantly, the prosecutor made no reference to any concession of guilt in rebuttal, as one would expect if such a concession had been made.

Any confusion counsel's misstatement may have caused would have been dispelled by the jury instructions. Jurors were instructed with CALCRIM No. 500 that "[h]omicide is the killing of one human being by another. . . . A homicide can be lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter." CALCRIM No. 520 informed jurors that defendant was guilty of murder only if "[h]e killed without lawful excuse or justification."

For the foregoing reasons, there is no reasonable probability that, but for counsel's reference to "murder," the result of the proceeding would have been different. Defendants' ineffectiveness claims therefore fail for lack of sufficient prejudice.

4. Failure to Object to Alleged Prosecutorial Misconduct

a. Legal Principles

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' " (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

b. Alleged Misstatement of Fact by the Prosecutor

Both defense counsel argued in their closings that the gang had not issued an order that Frosty was no good, but had merely placed a "freeze" on him, meaning members needed to stay away while his conduct was investigated. In his rebuttal closing argument, the prosecutor responded as follows: "Not a single witness described the vote that happened at the school yard as a freeze. Not a single witness used that word. Only the defense attorneys used the word freeze. Every single witness said, 'You agree Frosty's no good?' Everyone agree Frosty's no good. They didn't say does anybody agree we should investigate this? Not one of them said, oh, does everyone agree we need to freeze Frosty. Does everyone agree to this? The entire discussion is that Frosty's no good. [¶] You can look at the text messages. You'll have them. There's a few extras that I don't think we actually told you about. But they are admitted into evidence. You can read them later. Melina's telling him, 'Hey, they're saying you're no good.' Not 'They're saying they're investigating you're on freeze, I'm not allowed to talk to you.' She believes they were saying he was no good. Why? Because that [*sic*] the words they were using."

It is misconduct for a prosecutor to mischaracterize evidence during closing argument. (*People v. Valdez* (2004) 32 Cal.4th 73, 133-134.) Both defendants argue the prosecutor mischaracterized the evidence when he claimed that Melina texted Frosty "Hey, they're saying you're no good." Defendants further contend that their trial attorneys rendered ineffective assistance by failing to object to the prosecutor's misstatement of fact.

There was no evidence that Melina texted Frosty "Hey, they're saying you're no good." Nor did she otherwise mention a no-good order or vote in any of the text messages admitted into evidence. Melina testified that she did not update Frosty about what happened at the gang meeting. There was testimony that Melina informed Frosty that at least Lopez was accusing him of being no good when she called him on the way to San Ardo, and the prosecutor could conceivably have been referencing that testimony. Nevertheless, we shall assume the prosecutor mischaracterized the evidence, thereby committing misconduct. We shall further assume that trial counsel's failure to object constituted deficient performance and turn to the prejudice prong of the analysis.

Defendants say the misstatement was prejudicial because it prevented the jury from considering Salazar's defenses of self-defense and defense of others. In defendants' view, the prosecutor's misstatement misled the jury to believe that Melina informed Frosty of the no-good order. As discussed above, Frosty's knowledge of that order was integral to the prosecutor's theory that everyone who attended the July 28, 2012 gang meeting started (CALCRIM No. 3471) or provoked (CALCRIM No. 3472) a fight with Frosty by participating in a vote that determined he was no good, such that they could not claim self-defense. Above, we concluded that even if the court erred by instructing the jury as to that theory with CALCRIM Nos. 3471 and 3472, any error was harmless. For all the same reasons, it is not reasonably probable that the jury would have returned a verdict more favorable to defendants absent the prosecutor's mischaracterization of the evidence.

c. Alleged Improper Argument

During rebuttal closing, the prosecutor reiterated his theory that Frosty and Osito's deaths were a natural and probable consequence of the no-good vote initiated by Lopez. He then addressed Salazar's self-defense argument as follows: "Again, Frosty's not allowed to come to the house and start a fight. It's a crime. But it was a fistfight he started. And the defense attorney says he grabbed a knife. He turned the fistfight into -- just a one-on-one fight into a knife fight because he picked up these scissors. It wasn't one-on-one when he picked up the scissors. He was being beaten by two people when he picked up the scissors. [¶] *I don't know what the standard of the law is. It doesn't really matter.* The point is this wasn't a one-on-one fistfight where [Frosty] escalated the fight. This was a one-on-one fistfight where Dodger escalated the fight and [Lopez] then both jumped him together. . . . [Frosty and Osito] were not people out to kill. There was no right to use this lethal force, nine bullets, to stop two people who were stopping fighting. They stopped fighting by this point. No one was getting hit. Dodger's gone. [Lopez's] gone. Shadow was allowed to walk out of the bathroom. He falls, trips and falls, but no one attacks him when he falls. He'd not been hit by a gun. He'd not been shot at. He'd not been stabbed. [¶] There was no right to self-defense because you started it. There was no right to self-defense because the fight had stopped. There was not right to self-defense because they backed away when he pointed a gun at them and dropped—and Osito dropped his gun." (Italics added.)

Lopez contends that the prosecutor committed misconduct by inviting the jury to disregard the law when he stated "I don't know what the standard of the law is. It doesn't really matter." When alleged prosecutorial misconduct involves argument to the jury, "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. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another point in *Hill, supra*, 17 Cal.4th at pp. 822-823.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the

most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another point by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).)

There is no reasonable likelihood that the jury understood the prosecutor's passing comments as an invitation to convict regardless of the law. The prosecutor made the complained-of statements after briefly addressing the significance of the fact that Frosty armed himself with scissors during the fight. He then returned to his primary response to the self-defense argument—deadly force was not reasonably necessary because the fight was over. In that context, jurors would have understood the prosecutor's statement that the standard of law doesn't matter to mean that the legal implications of who escalated the fight and when were not relevant to his argument that, by the time of the shooting, there was no need to use deadly force.

For the foregoing reasons, we conclude defendants failed to "establish either misconduct or, it follows, ineffective assistance of counsel." (*People v. Marshall* (1996) 13 Cal.4th 799, 832.)

5. Request to Withdraw Manslaughter Verdict Forms

Lopez argues trial counsel rendered ineffective assistance by persuading the trial court to withdraw the manslaughter verdict forms for Lopez. According to Lopez, there was substantial evidence from which the jury could have concluded, under the natural and probable consequences doctrine, that voluntary manslaughter was the foreseeable consequence of the target crime of street terrorism. He says trial counsel's decision to withdraw the manslaughter verdict forms was not a tactical one, but was based on the legally incorrect view that a manslaughter verdict was not possible under the law.

a. Legal Principles – Aider and Abettor Liability Under the Natural and Probable Consequences Doctrine and The Trial Court's Instructional Duties

" ' "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime." ' " (*People v. Chiu* (2014) 59 Cal.4th 155, 161 (*Chiu*).) " '[A]ider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. [Citation.] Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.' " (*Id.* at p. 164.) Under the natural and probable consequences doctrine, "an aider and abettor may be found guilty of a lesser crime than that ultimately committed by the perpetrator where the evidence suggests the ultimate crime was not a reasonably foreseeable consequence of the criminal act originally aided and abetted, but a lesser crime committed by the perpetrator during the accomplishment of the ultimate crime was such a consequence." (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1577 (*Woods*).)

A trial court is required to instruct on all lesser included offenses when the evidence raises a question about whether all the elements of the charged offense are present, regardless of whether defendant requests such instructions. (*Breverman*, *supra*, 19 Cal.4th at p. 155.) "[T]he rule seeks the most accurate possible judgment by "ensur[ing] that the jury will consider the full *range of possible verdicts*' included in the charge, regardless of the parties' wishes or tactics." (*Id.* at p. 155.) An instruction on a lesser included offense is required only when there is evidence the defendant is guilty of that lesser offense that is " 'substantial enough to merit consideration' by the jury, "

meaning evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*Id.* at p. 162.) We shall assume that a trial court has a corresponding sua sponte duty to provide verdict forms for lesser included offenses on which it instructs the jury. (See *People v. Webster* (1991) 54 Cal.3d 411, 443 [concluding "[n]o more was required" from trial court that had both instructed jury on lesser included offenses and provided verdict forms for each lesser included offense]; *People v. Ortega* (1998) 19 Cal.4th 686, 701 (conc. op. of Werdegar, J.), [The trial court has a sua sponte duty to give instructions and verdict forms on [lesser included offenses] . . . if warranted by the evidence].)

In view of the foregoing, where "the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily included offense as part of the jury instructions on aider and abettor liability. Otherwise, . . . the jury would be given an unwarranted, all-or-nothing choice concerning aider and abettor liability." (*Woods, supra*, 8 Cal.App.4th at p. 1593.) Put differently, "in determining aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a consequence." (*Id.* at p. 1588.)

b. There Was Insufficient Evidence to Require Instructions and Verdict Forms on Voluntary Manslaughter

Here, the trial court was required to give the jury voluntary manslaughter verdict forms for Lopez if the evidence "would support a determination that [murder] was not a reasonably foreseeable consequence [of the target offense of street terrorism] but [voluntary manslaughter under a heat-of-passion or imperfect self-defense theory] was

such a consequence." (*Woods*, *supra*, 8 Cal.App.4th at p. 1588.) Because there was not evidence from which a reasonable jury could have concluded that it was reasonably foreseeable that Salazar would kill Frosty in a heat of passion or in imperfect self-defense, the trial court did not err in withdrawing the voluntary manslaughter verdict forms.

A heat-of-passion killing occurs where the victim engages in conduct that is " 'sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection' " and the defendant "actually, subjectively, kill[s] under the heat of passion." (*People v. Manriquez* (2005) 37 Cal.4th 547, 583-584.) There was testimony from gang members and the gang expert that a person accused of being no good likely would violently confront his accuser. The gang expert testified that the confrontation is usually a fistfight, but "it can lead to stabbing and shooting because the emotions are so high." The gang expert also testified that "generally [other gang members are] not going to jump in [to such a fight] because you have this conflict where someone is—they're both accusing each of other of something. One is accusing somebody of doing something that violates the gang's rules, and the other one is accusing the other one of providing false information or false witness against them, which are both violations of the gang rules. And I think that's where the not getting involved comes into play, because you don't want to pick the wrong pony, for lack of a better term." Finally, there was evidence that gang members carry guns and that Lopez and other gang members knew that Salazar had a gun on the day of the shooting.

A rational jury could have concluded from the foregoing evidence that a reasonably foreseeable consequence of Lopez's actions (i.e., holding a gang meeting to vote on Frosty's status) was that Frosty would violently confront Lopez and that one of them might shoot the other due to the high emotions involved. But there was no evidence from which jurors could have concluded that it was reasonably foreseeable that Frosty's conduct in attacking Lopez would provoke *Salazar* into killing Frosty in a heat of

passion. To the contrary, the gang expert testified that other gang members would be expected to remain neutral in a fight between the accused (Frosty) and the accuser (Lopez). In sum, there was insufficient evidence from which a jury could have concluded that it was reasonably foreseeable that Salazar would kill Frosty in a heat of passion, thereby committing voluntary manslaughter.

"Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was imminent danger of death or great bodily injury." (*People v. Booker* (2011) 51 Cal.4th 141, 182.) As discussed above, it was reasonably foreseeable that a violent confrontation would occur between Frosty and Lopez. But there was no evidence from which rational jurors could have concluded that it was reasonably foreseeable that Salazar would become involved in that fight, let alone that he would kill Frosty as the result of an unreasonable belief that his life was in danger.

For the foregoing reasons, the trial court was not obligated to give the jury voluntary manslaughter verdict forms for Lopez. It follows that trial counsel was not ineffective in requesting that the voluntary manslaughter verdict forms be withdrawn.

6. Intervening Cause

As discussed above, after the jury was instructed, Lopez's trial counsel argued that, under *People v. Cervantes* (2001) 26 Cal.4th 860 (*Cervantes*), Frosty's act of violently attacking Lopez constituted an independent intervening cause of his own death that absolved Lopez of criminal liability. Counsel unsuccessfully requested to reopen closing arguments to argue the point to the jury.[16] On appeal, Lopez argues trial counsel's failures to timely request that the jury be instructed on intervening cause and to argue that issue to the jury deprived him of effective assistance of counsel. Lopez fails to show there is a reasonable probability that the result of the proceeding would have been different had the jury been instructed on independent intervening cause and heard

[16] Lopez contends counsel also requested that the jury be instructed on the law of intervening cause, but he points us to no such request in the record and we find none.

argument on that point. We therefore reject his ineffective assistance of counsel claim on lack of prejudice grounds without determining whether he has established deficient performance.

" '[A]n "independent" intervening cause will absolve a defendant of criminal liability.' " (*Cervantes, supra*, 26 Cal.4th at p. 871.) An independent intervening cause is " ' "unforeseeable[,] . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." ' " (*Ibid.*) By contrast, a dependent intervening cause—one that " ' "is a normal and reasonably foreseeable result of defendant's original act" ' "—does not relieve the defendant of criminal liability. (*Ibid.*)

The jury was instructed with CALCRIM No. 252 that "[t]he specific intent or mental state required for the crime of Murder of the Second Degree, as an aider and abettor, is an intent or purpose of committing, encouraging or facilitating the commission of Street Terrorism, a natural and probable consequence of that crime being murder." The jury also was instructed with CALCRIM No. 402 that "[a] natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes."

The jury convicted Lopez of second degree murder on a natural and probable consequence theory. In reaching that verdict, it must have concluded that Frosty was likely to be murdered as a consequence of Lopez's acts of street terrorism if nothing unusual intervened. Therefore, the jury necessarily concluded that nothing unusual intervened. Put differently, the jury must have concluded that Frosty's act of starting a physical fight with Lopez was not " ' "an extraordinary and abnormal occurrence." ' " (*Cervantes, supra*, 26 Cal.4th at p. 871.) Therefore, it is not reasonably probable that the result of the proceeding would have been different had the jury been instructed on independent intervening cause and heard argument on that point.

7. Failure to Request Modification of CALCRIM Nos. 301 and 334

As previously noted, the jury was instructed regarding accomplice testimony with CALCRIM No. 334.[17] That instruction told jurors to determine whether Baby G.,

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[17] As given in this case, CALCRIM No. 334 stated in full:

"Before you may consider the statement or testimony of Baby G., Cartoon, Dodger, Melina, Shadow, Smiley and Trips as evidence against the defendants, you must decide whether Baby G., Cartoon, Dodger, Melina, Shadow, Smiley and Trips were accomplices. A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if:

"1. He or she personally committed the crime;

"or

"2. He or she knew of the criminal purpose of the person who committed the crime;

"and

"3. He or she intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime or participate in a criminal conspiracy to commit the crime.

"The burden is on the defendant to prove that it is more likely than not that Baby G., Cartoon, Dodger, Melina, Shadow, Smiley and Trips were accomplices.

"An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.

"A person may be an accomplice even if he or she is not actually prosecuted for the crime.

"If you decide that a witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her statement or testimony as you would that of any other witness.

"If you decide that a witness was an accomplice, then you may not convict a defendant of any of the crimes charged based on the accomplice's statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if:

"1. The accomplice's statement or testimony is supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's statement or testimony;

"and

"3. That supporting evidence tends to connect the defendant to the commission of the crimes.

Cartoon, Dodger, Melina, Shadow, Smiley, and Trips were accomplices; defined "accomplice"; guided jurors' determination as to whether the Espe witnesses were accomplices; precluded jurors from convicting defendants "based on [an] accomplice's statement or testimony alone"; and admonished them to view "[a]ny statement or testimony of an accomplice that tends to incriminate the defendant . . . with caution." The court also instructed with CALCRIM No. 301 that the testimony of an accomplice requires supporting evidence. As given, CALCRIM No. 301 provided: "Except for the testimony of Baby G., Cartoon, Dodger, Melina, Shadow, Smiley and Trips, which requires supporting evidence if you decide that he or she is an accomplice, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

Lopez argues CALCRIM Nos. 334 and 301 improperly told "the jury to view *favorable, exonerating* accomplice testimony with caution" and "to disregard favorable, exonerating accomplice testimony unless there was corroboration." He contends trial counsel was ineffective in failing to request that the following sentence be added to both instructions: "Any testimony or statements by an accomplice informant that are favorable to the defendants do not require corroboration and need not be viewed with

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"Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.

"Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

caution. You are to apply the general rules of credibility when weighing accomplice testimony that is favorable to the defendants."

" ' " ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' " ' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 905.) "If the charge as a whole is ambiguous, we consider whether there is a [']reasonable likelihood['] the jury misapplied the instruction." (*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1408.)

As given, CALCRIM No. 334 properly stated the law. It told jurors that they could not *convict* defendants "based on [an] accomplice's statement or testimony alone" and admonished them to view accomplices' *incriminating* statements with caution. Accordingly, it was consistent with *People v. Guiuan* (1998) 18 Cal.4th 558, 569, on which Lopez relies and which held that "the instruction concerning accomplice testimony should henceforth refer only to testimony that tends to incriminate the defendant" and should instruct that such testimony be viewed with "caution," not "distrust." Because CALCRIM No. 334 "expressly single[d] out 'incriminating' testimony to be viewed with care and caution, [it did] not suggest the jury must apply this standard to *all* testimony given by an accomplice," as Lopez argues. (*Johnson*, *supra*, 243 Cal.App.4th at p. 1274.)

Unlike CALCRIM No. 334, CALCRIM No. 301 did not distinguish between incriminating and exonerating accomplice testimony. Thus, in isolation, it might be read to suggest that *all* accomplice testimony requires corroboration. However, jurors necessarily considered CALCRIM No. 301 in conjunction with CALCRIM No. 334, not only because they were instructed to consider all the instructions together (CALCRIM No. 200), but because, while both CALCRIM No. 301 and CALCRIM No. 334 addressed the treatment of accomplice testimony, only CALCRIM No. 334 defined "accomplice." Therefore, in determining whether any of the Espe witnesses were accomplices for purposes of applying CALCRIM No. 301, jurors must have looked to CALCRIM No. 334 for help in identifying accomplices.

CALCRIM No. 334 dispelled any ambiguity in CALCRIM No. 301. While CALCRIM No. 301 stated generally that accomplice testimony "requires supporting evidence," CALCRIM No. 334 specified the circumstances under which such supporting evidence is needed: when accomplice statements are used to *convict* a defendant. Applying the presumption that "jurors are intelligent persons capable of understanding and correlating all jury instructions that are given" (*People v. Phillips* (1985) 41 Cal.3d 29, 58), we conclude jurors would have understood that CALCRIM No. 301 stated the general rule of witness credibility, and that CALCRIM No. 334 stated the exception to that rule for accomplice testimony. Put differently, there is no reasonable likelihood the jury misapplied CALCRIM No. 301. (Cf. *People v. Smith* (2017) 12 Cal.App.5th 766, 780-781 [holding that instructing with instruction analogous to CALCRIM No. 301 constituted reversible error where the erroneous instruction "became a point of disagreement between a lone hold-out juror and the other 11 jurors, and that the hold-out juror was ultimately dismissed, in part because the other jurors believed that this juror was unwilling to follow the court's erroneous instruction regarding the need for corroboration of *any* accomplice testimony, regardless of whether that testimony was inculpatory or exculpatory"].)

In view of the foregoing, trial counsel could have reasonably concluded that the trial court's instructions were adequate. Therefore, Lopez fails to demonstrate deficient performance. Moreover, because the given instructions adequately informed the jury of the principles governing accomplice testimony, he fails to demonstrate that there is a reasonable probability the verdict would have been different had defense counsel requested and the trial court given modified instructions.

8. Failure to Object to Gun Evidence as Irrelevant or Under Evidence Code Section 352

The court posed questions from jurors to Cartoon. After that examination, the court allowed further redirect examination by the prosecutor, during which Cartoon

testified that, after the phone call with Frosty in the car on the way to San Ardo, Lopez said "[t]hat he wanted to go get his gun." Lopez's trial counsel objected on the ground that the question was "beyond the scope" of the court's examination. The court overruled that objection. Thereafter, Cartoon clarified that Lopez's exact words were "man, I'm wondering if I should go pick up my .38. He'll probably show up." The prosecutor argued in closing that Lopez's comment proved Lopez knew "what he was doing" when he called Frosty no good; "knew that he was threatening [Frosty's] life" and that Frosty "was going to respond angrily, violently." On appeal, Lopez argues that trial counsel's failure to object to the admission of the gun evidence on relevance and Evidence Code section 352 grounds constituted ineffective assistance.

Generally, "[w]hen the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056 [error to admit evidence of defendant's prior possession of handgun where prosecutor did not claim the weapon was used in charged murders]; see also *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393 [error to admit evidence of knives that were not murder weapon].) In other words, "[e]vidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons—a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant." (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360.) However, "when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible." (*People v. Cox* (2003) 30 Cal.4th 916, 956, disapproved on other grounds by *Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

Here, Lopez did not use any weapon, let alone the .38 caliber handgun Cartoon mentioned, in the commission of any of the charged crimes. However, the prosecutor's

theory of liability against Lopez was that Frosty's death was a natural and probable cause of Lopez calling Frosty no good because Frosty reasonably could be expected to defend his name using violence. We agree with the Attorney General that Cartoon's testimony, which suggested that Lopez expected Frosty to "show up" and wanted to be armed if he did, was relevant to prove the prosecutor's theory. Thus, the evidence was relevant.

Under Evidence Code section 352, the question is whether that probative value was substantially outweighed by the testimony's prejudicial effect. We conclude that it was not, under the facts of this case. With respect to prejudice, "we are concerned only with the possibility of an emotional response to the proposed evidence that would evoke the jury's bias against defendant as an individual unrelated to his guilt or innocence." (*People v. Gunder* (2007) 151 Cal.App.4th 412, 417.) An emotional response by jurors to the gun possession evidence was unlikely here because it was undisputed that Lopez was a gang member and the gang expert testified more than once that "[g]ang members are known to carry guns." Accordingly, other admissible evidence gave jurors reason to believe Lopez possessed or had access to a gun. Because we discern no undue prejudice, we find no error in the admission of the evidence. It follows, then, that trial counsel was not ineffective in failing to raise meritless objections to its admission. (*People v. Cudjo* (1993) 6 Cal.4th 585, 616 ["Because there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance"].)

9. Failure to Impeach Gang Expert with Prior Statements That Lopez Would Not be Charged with Murder

The trial court excluded as involuntary a statement Lopez gave to Sergeant Hoskins, who also testified at trial as a gang expert. The court was persuaded that inducement—namely, multiple statements by Hoskins that Lopez was not being charged with murder—was a motivating cause of Lopez's decision to give a statement.

At trial, Hoskins opined in his capacity as a gang expert that there was a no-good order against Frosty that was equivalent to an order to kill him. Hoskins also opined that Frosty was killed as result of the no-good order, citing that "[t]he fact that [Frosty] was killed" as evidence that the gang was treating him as no good.

Lopez faults trial counsel for not impeaching Hoskins with his assurances to Lopez that he was not being charged with murder on the theory that those assurances were inconsistent with Hoskins's opinion that the no-good order led to Frosty's death. We see no inconsistency between the statements Hoskins made during the suppressed interview and his opinions at trial. Hoskins informed Lopez that he was not being *charged* with murder; he offered no opinion as to whether Lopez could be held criminally liable for Frosty's death on a natural and probable consequences theory. Because Hoskins's interview statements were not inconsistent with his testimony, they were "inadmissible for purposes of impeachment." (*People v. Williams* (2009) 170 Cal.App.4th 587, 608 (*Williams*).) Trial counsel was not ineffective in failing to seek to introduce inadmissible evidence.

10. Failure to Request Further Investigation of Potential Juror Misconduct

After closing arguments, prosecution witness Lurz informed the court that he inadvertently had a 20-second conversation with a juror in the hallway. Lurz initiated the conversation by telling the juror—who Lurz did not recognize as a juror—that he looked like a character on a popular television show. The juror responded that people told him he looked like a different character on the show and mentioned he "was applying for a CO position at the prison." Lurz noticed the juror's juror badge and excused himself. The two did not discuss the case. The court gave all counsel the opportunity to question Lurz, which they declined. All counsel agreed with the court's view that the brief conversation wasn't "anything that would affect anyone."

Lopez argues on appeal that trial counsel rendered ineffective assistance by failing to request a hearing to investigate the encounter and the juror's failure to disclose during voir dire that he was applying to be a correctional officer. Lopez contends that both the unauthorized contact between the juror and the witness and the juror's nondisclosure constitute potential juror misconduct.

We shall consider the contact between the juror and the witness first. " ' "[N]ot every incident involving a juror's conduct requires or warrants further investigation. 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court.' " [Citations.] " '[A] hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.' " [Citation.]' [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 506.) "A juror's unauthorized contact with a witness is improper. [Citations.] However, contact between a juror and a witness . . . may be nonprejudicial if the contact was 'de minimis' [citation] if there is no showing that the contact related to the trial [citations]." (*Id.* at p. 507.)

Here, the communication between the witness and the juror was inadvertent, brief, and unrelated to the trial. Under those circumstances, the trial court did not abuse its discretion in concluding there were no grounds for believing good cause to excuse the juror might exist and declining to investigate the communication further. It follows that trial counsel was not ineffective in failing to request such further investigation.

Lopez also complains about the juror's failure to disclose during voir dire that he was applying to be a correctional officer. "A juror who conceals relevant facts or gives false answers during the voir dire examination . . . commits misconduct." (*In re Hitchings* (1993) 6 Cal.4th 97, 111.) But Lopez fails to demonstrate that the juror concealed relevant facts or gave false answers during the voir dire. And while, as Lopez

notes, peace officers are ineligible for voir dire in civil or criminal matters (Code Civ. Pro., § 219, subd. (b)(1)), he does not demonstrate that that limitation applies to mere applicants for such positions. For these reasons, Lopez fails to demonstrate deficient performance by trial counsel.

E. Denial of Lopez's New Trial Motion

Lopez moved unsuccessfully for a new trial on attorney conflict of interest, ineffective assistance of counsel, and sufficiency of the evidence grounds. Lopez contends the trial court erred in denying that motion on the conflict of interest and ineffective assistance of counsel grounds. We disagree.

1. Standard of Review

At issue on Lopez's new trial motion was whether trial counsel had a conflict of interest or rendered deficient performance such that Lopez was deprived of his Sixth Amendment right to the assistance of counsel. Because the motion was based on an alleged denial of constitutional rights, a two-step process governs our review of the court's denial of the motion. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.) We review the trial court's factual findings, express or implied, for substantial evidence. (*Ibid.*) "[A]ll presumptions favor the trial court's exercise of its power to judge the credibility of witnesses, resolve any conflicts in testimony, weigh the evidence, and draw factual inferences." (*Ibid.*) We review de novo the ultimate issue of whether the defendant's constitutional rights were violated. (*Ibid.*)

2. Ineffective Assistance of Counsel Claims

a. Failure to Adequately Discuss a Mid-Trial Plea Offer

During trial, the prosecutor offered Lopez a 22-year determinate sentence in exchange for a guilty plea. Lopez declared in support of his new trial motion that trial counsel spent "less than fifteen minutes explaining the terms of the offer" and did not advise him as to "the difference between an indeterminate term and a determinate term, the exact amount of time [he] was facing if [he was] found guilty of all charges, or if it

was in [his] best interest to take the offer." Lopez further declared that he would have accepted the offer if he had been advised as to his maximum exposure and the difference between indeterminate and determinate terms. Trial counsel testified under oath at the hearing on defendant's new trial motion that he had talked to Lopez "several times about the number that he was looking for" in a plea deal, and that number was "eight years." The trial court rejected the ineffective assistance of counsel claim, finding that the offer was communicated to Lopez and that the parties were very far apart.

We need not and do not determine whether Lopez established deficient performance because we conclude that even if counsel's performance was deficient, Lopez has failed to sustain his burden on the issue of prejudice. Where the ineffective assistance of counsel is alleged to have caused the defendant to reject a plea offer, "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (*Lafler v. Cooper* (2012) 566 U.S. 156, 164.)

The trial court disbelieved Lopez's declaration that he would have accepted the 22-year offer had he been better advised, instead crediting trial counsel's testimony that Lopez wanted an offer "in the single digits." We accept the court's credibility determinations. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) In view of the trial court's credibility determinations, Lopez failed to establish prejudice. Therefore, the trial court did not err in rejecting his ineffective assistance of counsel claim.

b. Failure to Argue Self-Defense and Imperfect Self-Defense

Lopez contends the trial court erred in failing to grant his new trial motion on the ground that trial counsel was ineffective in allowing Salazar's counsel to handle the

issues of self-defense, defense of others, and imperfect self-defense. In fact, he did not raise that issue in his new trial motion. In any event, it is meritless.

Lopez bases his claim on trial counsel's post-trial statements that, in retrospect, he made a mistake by relying on Salazar's counsel to present those defenses. But the mere fact that trial counsel second-guessed his decision " 'in the harsh light of hindsight,' " does not establish that counsel's performance was deficient. (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) But we need not decide whether trial counsel's performance was deficient because Lopez does not show there is a reasonable probability that he would have received a more favorable result had trial counsel investigated and argued self-defense, defense of others, and imperfect self-defense. Lopez does not indicate how trial counsel could have presented those defenses in a more persuasive manner than did Salazar's counsel. Instead, he says the evidence supporting the defenses was strong such that it is reasonably probable that he would have received a more favorable result had trial counsel argued the defenses on his behalf. That theory of prejudice is unsustainable. It is not clear how trial counsel would have "argued the defenses on [Lopez's] behalf," as only Salazar could claim to have acted in self-defense or defense of others. In any event, the jury heard the supposedly strong evidence and nevertheless rejected the defenses as to Salazar. Lopez gives us no reason to believe his trial counsel could have persuaded the jury to view the evidence differently.

c. Failure to Hire a Gang Expert

Lopez argued in his new trial motion that trial counsel was ineffective in failing to hire a defense gang expert. Lopez supported that contention with a declaration from former Salinas Police Officer and gang expert Glenn Rouse, who declared Lopez would have benefitted from certain types of gang expert testimony. Among other things, Rouse declared that "[a] gang expert called by the defense and not developed or discussed by the prosecution could discuss an 'order to kill', 'greenlight', 'no good order', and 'freeze'. All of these terms have specific meanings and could have been offered to assist

the jury in its evaluation of the Defendant . . . Lopez's culpability." Trial counsel stated that he contacted a gang expert but decided not to call the expert to testify because the opinions he was prepared to give would have damaged the defense.

Lopez contends that gang expert testimony to the effect that "greenlight," "order to kill," and "no-good order" have distinct meanings "would have aided the defense [since] the prosecution expert asserted that a no-good order was the same as a green light and an order to kill, and . . . opined that the no-good vote was a green light to kill Frosty." But Rouse's declaration does not define "greenlight," "order to kill," and "no-good order." The mere fact that those terms are not interchangeable does not undermine the prosecutor's theory that the killing of a no-good gang member is the natural and probable consequence of a no-good vote. Rouse's declaration is too vague to establish that trial counsel "*could have* presented any *favorable* expert testimony." (*People v. Datt* (2010) 185 Cal.App.4th 942, 952.) Therefore, Lopez "has not shown that his trial counsel was deficient in failing to present expert [gang] testimony." (*Id.* at p. 953.)

Lopez's claim also falters on the prejudice prong. Without knowing the definitions Rouse ascribes to the terms "greenlight," "order to kill," and "no-good order," we cannot say that the outcome would have been any different had the jury heard testimony as to those definitions.

d. Failure to Hire a Methamphetamine Expert

Lopez supported his post-trial motion with a declaration from private investigator James Huggins, in which Huggins paraphrased statements Lopez's trial counsel made during a recorded interview. According to that declaration, Lopez's trial counsel "stated he thought he should have brought in a forensic psychologist to say Frosty's behavior was part of methamphetamine addict, even though he was at a 'lull,' Frosty still acting as a meth addict. He said he spoke to [Salazar's trial] Attorney Chapman about this but she was dismissive." Despite what Lopez suggests on appeal, he did not move for a new trial

on the ground that trial counsel rendered ineffective assistance by failing to hire an expert on the effects of methamphetamine. Regardless, the claim lacks merit.

We shall turn directly to the prejudice prong of the analysis. Lopez says expert testimony linking methamphetamine use to violent behavior "would have helped the defense establish that Frosty and Osito's attack with deadly force upon [Lopez] and his friends was a homicidal, drug-induced rampage, and would have helped the defense establish that Salazar acted justifiably in self-defense and defense of others or imperfect self-defense when Salazar shot them." There was evidence at trial that there was methamphetamine in Frosty's system at the time of his death; no such evidence was presented as to Osito.

Lopez fails to show a reasonable probability that the result of the proceeding would have been different had an expert testified that methamphetamine can make the user violent. It was undisputed at trial that Frosty was acting violently immediately prior to the shooting. The many eyewitnesses agreed that Frosty physically attacked Lopez in a rage. Dodger testified that Frosty appeared to be on drugs at the time of the fight and that people on drugs are more aggressive and violent. Nina testified that Frosty appeared to be on methamphetamine because he looked furious. In view of the lay witness testimony at trial, it is not reasonably probable that the result of the proceeding would have been different had the jury heard expert testimony that Frosty's violent behavior may have been partially attributable to the drugs in his system. Accordingly, his ineffective assistance of counsel claim fails.

3. Alleged Conflict of Interest

Lopez contends his trial counsel was burdened by a conflict of interest—specifically, loyalty to Salazar as counsel's firm's former client—that adversely affected the adequacy of his representation.

a. Factual Background

At the preliminary hearing, Salazar was represented by Timothy Clancy, an attorney with the law firm Earl Carter & Associates in San Jose. At trial, Salazar was represented by Susan Chapman, who had no connection with Earl Carter. Lopez was represented by Joseph "Jem" Martin at the preliminary hearing and at trial. Martin was an independent contractor and later a part time employee of Earl Carter's Sacramento office. Martin worked out of his own office, separate from the law firm's office.

In his new trial motion, Lopez contended that the fact that he and Salazar were represented by attorneys from the same firm at the preliminary hearing gave rise to a conflict of interest. The trial court found there was no conflict of interest at the time of the preliminary hearing.

b. Legal Principles

The Sixth Amendment right to the assistance of counsel "includes the correlative right to representation free from any conflict of interest that undermines counsel's loyalty to his or her client." (*Doolin, supra*, 45 Cal.4th at p. 417.) "In order to establish a violation of the Sixth Amendment [based on a conflict of interest], a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 348.) "[A]n ' "actual conflict" ' is 'a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties.' " (*United States v. Wells* (9th Cir. 2005) 394 F.3d 725, 733 (*Wells*).)

"Determining 'whether counsel's performance was "adversely affected" . . . "requires an inquiry into whether counsel 'pulled his punches,' i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict. [Citation.] In undertaking such an inquiry, we are . . . bound by the record. But where a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether

arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission." [Citations.]' " (*People v. Rices* (2017) 4 Cal.5th 49, 65 (*Rices*).)

c. Lopez Fails to Show an Actual Conflict Existed

On appeal, Lopez challenges that trial court's denial of his new trial motion on conflict of interest grounds. He does not allege the conflict impacted the preliminary hearing, but rather that the conflict persisted throughout trial, even though Salazar's trial counsel was not associated with Earl Carter.

Lopez identifies numerous instances in which Martin's supposed lingering loyalty to Salazar, as a former Earl Carter client, allegedly adversely affected his performance. But, as discussed below, the record provides no basis to conclude that the omissions and decisions Lopez points to had anything to do with any conflict of interest.

Lopez claims that Martin "may well have refrained from spending time explaining the plea bargain to [Lopez] for fear that his firm's former client Salazar would have fared worse in a trial without [Lopez]." That claim is speculative and unsupported by the record. (*People v. Mai* (2013) 57 Cal.4th 986, 1018 ["unsubstantiated speculation [does not] allow us to infer that unconflicted counsel would likely have acted differently"].) Indeed, it is hard to imagine how Salazar, the undisputed shooter who relied entirely on self-defense and defense of others, benefitted from being tried with Lopez, whose liability was premised on highly nuanced and complex legal theories.

Lopez also blames the alleged conflict of interest for certain omissions related to the defense theory that Salazar shot Frosty and Osito in self-defense or defense of others, including (1) Martin's failure to investigate and argue those defenses, (2) Martin's failure to hire a methamphetamine expert, (3) Martin's failure to object to the prosecutor's misstatement of fact in closing argument regarding Frosty's awareness of the no-good order, and (4) Martin's failure to object to the prosecutor's statement in closing argument

"I don't know what the standard of the law is. It doesn't really matter." But Salazar would have been the primary beneficiary of each of the alternative defense strategies Lopez says Martin would have pursued absent the conflict. Accordingly, we do not see how Martin's alleged loyalty to Salazar adversely affected his handling of these issues. (See *Wells, supra*, 394 F.3d at p. 734 [to show adverse effect, a defendant must show " 'that some plausible alternative defense strategy or tactic might have been pursued but was not *and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.*' " (Italics added)].)

Lopez posits that unconflicted counsel would have objected to Salazar's counsel's misstatement in closing argument that Salazar committed justified "murder," requested modification of the accomplice testimony instructions, and requested a hearing regarding the juror-witness interaction. Lopez and Salazar's interests were aligned as to each of those proposed actions. Therefore, we cannot conclude that, in failing to undertake them, Martin was pulling his punches to Salazar's benefit and Lopez's detriment.

Lopez also points to Martin's objection to the voluntary manslaughter verdict forms as a decision influenced by his conflict of interest. But whether the jury had the option to convict Lopez of voluntary manslaughter had no impact on Salazar, so it is not plausible that Martin's decision was influenced by any loyalty to Salazar. Similarly, Martin's failure to timely request an instruction on intervening cause, an issue Lopez concedes did not impact Salazar, could not have been caused by any conflict of interest as Lopez posits. Likewise, evidence that Lopez possessed a gun was irrelevant to Salazar's criminal liability, such that Martin could not plausibly have neglected to object to the gun evidence because of any loyalty to Salazar, despite Lopez's suggestion to the contrary.

Lopez says Martin "may have avoided introducing Hoskins's statements that Lopez would not be charged with murder, in order to protect his former client Salazar who apparently received no such assurances from Hoskins." Again, Lopez's argument is speculative and nonsensical. No reasonable juror would have been surprised that

Salazar—the undisputed shooter—was never told he would not be charged with murder. Thus, it is not plausible that Martin refrained from attempting to admit the assurances Hoskins made to Lopez because of his supposed divided loyalties. Rather, Martin likely recognized that Hoskins's interview statements were not inconsistent with his testimony and therefore were not admissible impeachment evidence, as discussed above.

Finally, Martin told the investigator after trial that Salazar's trial counsel, Chapman, was against calling a defense gang expert and that he erroneously accepted her conclusion. Lopez contends Martin's statements to the investigator prove his failure to call a gang expert was the result of his conflict of interest. But, as discussed above, Martin also told the investigator that he contacted a gang expert, who he decided not to call because the opinions the expert was prepared to give would have damaged the defense. Because Martin had "a tactical reason (other than the asserted conflict of interest)" for the omission—namely, that he could not find a gang expert willing to give favorable testimony—Lopez has failed to demonstrate that an actual conflict of interest adversely affected Martin's performance in connection with whether to hire a gang expert. (*Rices*, *supra*, 4 Cal.5th at p. 65.)

F. Cumulative Error

"Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' " (*Williams*, *supra*, 170 Cal.App.4th at p. 646.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

Salazar argues the cumulative effect of the alleged errors was to deprive him of his right to due process. We have assumed two instructional errors: that the trial court erred in instructing the jury with CALCRIM Nos. 3471 and 3472 regarding limitations on the right of self-defense and that the trial court erred in failing to instruct with CALCRIM

Nos. 506 and 3477, which relate to the habitation defense. We also resolved one of Salazar's ineffective assistance of counsel claim—based on counsel's misstatement in closing argument that he committed justifiable murder—on prejudice grounds without determining whether counsel's performance was deficient. In isolation, each assumed error was harmless; they were no more prejudicial together. "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*Hill, supra*, 17 Cal.4th at p. 844.) No such showing had been made here.

Lopez says that the cumulative effect of trial counsel's deficiencies was prejudicial. Where there are "numerous deficiencies in defense counsel's performance," reversal is required if there "exists a reasonable probability that the outcome . . . would have been different but for the cumulative impact of defense counsel's numerous failings." (*In re Jones* (1996) 13 Cal.4th 552, 584, 587.) We have disposed of a number of Lopez's ineffectiveness claims on lack of prejudice grounds without determining whether trial counsel's performance was deficient, an approach endorsed by *Strickland.* In those instances, we have found no prejudice. Our confidence in the outcome of this trial is not undermined when we consider defense counsel's actions in the aggregate.

Finally, Lopez contends the cumulative effect of the alleged errors was prejudicial. As noted, we have assumed instructional errors. We also assumed the trial court erred in excluding the evidence of Frosty and Osito's character for violence. And we resolved several of Lopez's ineffective assistance of counsel claim on prejudice grounds. Based on our review of the record, we conclude that Lopez received a fair trial. Thus, reversal is not required even considering the cumulative effect of these assumed errors.

G. Salazar's Street Terrorism Sentence Must be Stayed Under Section 654

The trial court sentenced Salazar to the middle term of two years on his count 6 street terrorism (§ 186.22, subd. (a)) conviction, to be served concurrently. Citing *People*

v. Mesa (2012) 54 Cal.4th 191 (*Mesa*), Salazar argues that the imposition of separate and unstayed sentences for street terrorism, murder, and the assault on Melina constituted multiple punishment in violation of section 654. The Attorney General concedes that section 654 requires that the sentence on count 6 be stayed.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 186.22, subdivision (a) provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." Thus, " 'willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang' " is an element of the crime of street terrorism. (*Mesa*, *supra*, 54 Cal.4th at p. 197.) Here, the court instructed the jury regarding that element as follows: "[t]he defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: [¶] a. directly and actively committing a felony offense; [¶] or [¶] b. aiding and abetting a felony offense."

In *Mesa*, the defendant was punished three times for the single act of shooting an innocent victim: for assault with a firearm, for possession of a firearm by a felon, and for violating section 186.22, subdivision (a). (*Mesa*, *supra*, 54 Cal.4th at p. 195.) Our Supreme Court held that defendant's sentence for violating section 186.22, subdivision (a) had to be stayed pursuant to section 654, reasoning that section 654 "applies where the 'defendant stands convicted of both (1) a crime that

requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.' " (*Mesa*, *supra*, at p. 198.)

Salazar's argument and the Attorney General's concession are cursory. Based on their reliance on *Mesa*, we understand the argument to be that the evidence that Salazar committed the shootings and conspired to assault Melina was the only evidence that he promoted, furthered, or assisted felonious criminal conduct by members of the gang. We agree that there was no evidence that Salazar committed or aided and abetted any other felony. Therefore, it was the underlying murders and conspiracy to assault " 'that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation' " or street terrorism in violation of section 186.22, subdivision (a). (*Mesa*, *supra*, 54 Cal.4th at p. 197.) Because Salazar was punished for the murders and conspiracy, section 654 precludes him from being separately punished under section 186.22, subdivision (a).

H. The Firearm Enhancements

As noted above, the jury found that, in connection with each murder, Salazar personally and intentionally discharged a firearm causing death, within the meaning of section 12022.53, subdivision (d). The trial court imposed two 25-years-to-life terms for those firearm enhancements, as it was statutorily required to do at the time of Salazar's sentencing. (Stats. 2010, ch. 711, § 5, eff. Jan. 1, 2011, op. Jan. 1, 2012; former § 12022.53, subd. (h) ["Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section"].) Effective January 1, 2018, section 12022.53, subdivision (h) has been amended to empower the trial court "in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section."

In a supplemental brief filed with permission of the court, Salazar contends remand is required to permit the trial court to exercise its discretion to strike the firearm

enhancements under 12022.53, subdivision (h), as recently amended. The Attorney General agrees that the amendment applies retroactively to nonfinal cases such as this, but maintains Salazar is not entitled to remand because the record shows the trial court would exercise its discretion to impose the enhancements.

We agree with the parties that the amendment to section 12022.53, subdivision (h) applies retroactively to this case. Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), "[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) "Here, the amendment to subdivision (h) of Penal Code section 12022.53 . . . necessarily reflects a legislative determination that the previous bar on striking firearm enhancements was too severe, and that trial courts should instead have the power to strike those enhancements in the interest of justice. Moreover, because there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must presume that the Legislature intended the amendment to apply to every case to which it constitutionally could apply, which includes this case." (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679 [finding section 12022.53, subd. (h) to be retroactive].)

We agree with Salazar that remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike the firearm enhancements. This is not a case where the trial court exercised its discretion to maximize Salazar's sentence. For example, the court exercised its discretion to have the sentences on counts 5 and 6 run concurrently. The court also struck the 10-year gang enhancements under section 186.22, subdivision (b)(1)(C) on counts 1 and 2. Under these circumstances, we find remand is necessary to allow the trial court to exercise its discretion.

I. Section 3051

Section 3051, which became effective January 1, 2014, was enacted to bring juvenile sentencing into conformity with the limitations imposed by the Eighth Amendment. (*People v. Franklin* (2016) 63 Cal.4th 261, 268, 277 (*Franklin*).) As originally enacted, it provided that "[a] person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (§ 3051, subd. (b)(3).) That version of section 3051 was in effect at the time of Salazar's sentencing. Because he committed the murders at age 19, it had no application to him.

Effective January 1, 2016, section 3051 was amended to apply to offenders sentenced to state prison for crimes committed when they were under 23 years of age. (Stats. 2015, ch. 471, § 1.) The statute has been amended again and, as of January 1, 2018, it applies to those who committed crimes when they were 25 years of age or younger. (Stats. 2017, ch. 675, § 1.) Our Supreme Court has held that section 3051 applies retrospectively to all eligible youth offenders regardless of the date of conviction. (*Franklin*, *supra*, 63 Cal.4th at p. 278.) Accordingly, the current version of section 3051 makes Salazar eligible for a youth offender parole hearing during the 25th year of incarceration.

In *Franklin*, the court remanded "the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) The court stated that "[i]f the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the

California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.' " (*Ibid.*)

Salazar requests remand for a similar determination and opportunity. The Attorney General agrees that remand for that purpose is appropriate, as do we.

IV. DISPOSITION

The judgment in *People v. Salazar* (H041724) is reversed and the matter is remanded. On remand, the superior court is directed (1) to stay pursuant to section 654 the concurrent term imposed for count 6 and to resentence Salazar; (2) to exercise its discretion under section 12022.53, subdivision (h) during resentencing; and (3) to determine whether Salazar was afforded an adequate opportunity to make a record of information that will be relevant in a future parole eligibility hearing held pursuant to section 3051, and, if not, to allow Salazar and the People an adequate opportunity to make such a record.

The judgment in *People v. Lopez* (H042227) is affirmed.

ELIA, J.

WE CONCUR:

PREMO, Acting P. J.

MIHARA, J.

People v. Salazar; *People v. Lopez*
H041724; H042227