EXHIBIT A

Court of Appeal, Sixth Appellate District - No. H047331

S278861

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

GERMAN ALEXIS ARJONA, Defendant and Appellant.

The petition for review is denied.

GUERRERO
Chief Justice

EXHIBIT B

Filed 2/1/2023

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. GERMAN ALEXIS ARJONA, Defendant and Appellant.	H047331 (Santa Clara County Super. Ct. No. C1646260)

Appellant German Alexis Arjona, a member of a Sureño criminal street gang, shot and killed David Escalera, a Norteño rival. Convicted by jury of first degree murder, Arjona argues that the trial court erred by (1) permitting a codefendant to testify as a gang expert, (2) declining to answer the jury's questions about whether it needed to unanimously decide whether the prosecutor disproved specific elements of self-defense, (3) giving several unmodified pattern instructions on self-defense—CALCRIM Nos. 571, 3471, and 3472, and (4) permitting courtroom spectators to wear shirts that displayed photographs of the victim. Arjona further argues that the prosecutor committed misconduct in closing argument and that the cumulative effect of multiple errors requires reversal of the judgment. Although we consider aspects of the prosecutor's rebuttal argument and the spectators' courtroom attire to have risked injecting impermissible

factors into the jury's deliberations, Arjona has not established prejudicial error on this record. We therefore affirm the judgment.

I. BACKGROUND

A. *The Information*

The Santa Clara County District Attorney charged Arjona and three codefendants by information with first degree murder (Pen. Code, § 187).[1] The information also alleged that Arjona personally discharged a firearm (§ 12022.53, subd. (d)) and committed the offense for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(5)). Arjona was charged and tried jointly with codefendants Juan Casas and Humberto Bravo.[2] Codefendant Roque Mora-Villalobos testified as a prosecution witness pursuant to a plea agreement, by which he pleaded to a charge of accessory after the fact to murder and admitted a gang enhancement.

B. *The Trial*

1. *Escalera's Murder*

Arjona, Bravo, and Roque Mora-Villalobos were members of the Varrio Gramercy Locos (VGL), a Sureño gang. Casas, though a Sureño, was not a VGL member. VGL was based in the area around Gramercy Place in San Jose, surrounded by territory controlled by the Norteño Warlochs, a rival gang. VGL members commonly hung out at a shed to the rear of a specific apartment complex on Gramercy, between Madden to the south and Mueller to the north. Arjona lived on Madden, midway between Gramercy and Alexander.

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

[2] Casas and Bravo are not a party to this appeal. Arjona's appellate counsel represents that a fifth named defendant, C.V., was transferred to the juvenile court for adjudication.

On July 28, 2014, Mora-Villalobos, Casas, Arjona, Bravo, and C.V. were in the apartment complex parking lot with another friend who was not a Sureño. Arjona and Bravo left for Arjona's home on Madden to collect his father's SUV, heading south down Gramercy.

Escalera and his girlfriend S.G. were walking on Madden en route to a friend's apartment to go swimming. Escalera, a member of the Norteño Northern Warrior Soldiers and Warloch gangs, was armed with a gun, as was his typical practice, and S.G. knew it. As S.G. and Escalera approached Gramercy, they noticed two Sureño men, later identified as Arjona and Bravo, ahead on Madden. Deciding not to continue toward the two men, S.G. and Escalera instead turned north to walk up Gramercy.

Seeing the cluster of men in the parking lot ahead on Gramercy, S.G. became alarmed. As S.G. and Escalera neared the apartment complex on Gramercy from the south, Arjona and Bravo approached in the SUV from the north end of Gramercy. Arjona parked in the apartment's driveway, though witness accounts differed as to whether the SUV blocked the sidewalk. S.G. recognized Arjona and Bravo as the two men she and Escalera had avoided on Madden.

Arjona and Bravo got out of the SUV, both looking tense and angry. Bravo told the other Sureños that "some buster"—a derogatory term for Norteños—was coming down the street. Arjona went back to the shed, where he kept his gun and ammunition.

Based on his experience with VGL, Mora-Villalobos understood that Escalera was going to be assaulted. M.A., a bystander sitting in a truck bed with her mother, G.A., likewise sensed there would be a fight. Escalera called someone on his phone, saying, "What up? I'm about to get jumped by some scraps." "Scrap" is a derogatory term for Sureños. He said, "I think these fools are going [to] get me."

As soon as Escalera spoke of being jumped, one of the Sureños in the driveway said loudly, "Get this fool," or "Get that n – – a." Escalera briefly turned his back to the

group, and Bravo and Casas started running toward him. As S.G. retreated several steps, Escalera turned back toward Bravo and Casas, now with a gun in hand. Holding the gun at waist level, pointed downward at a 45-degree angle, Escalera said, "What do you think of this, motherfuckers?"

Mora-Villalobos turned and ran. When the first shot rang out, Escalera started to run as well.

Bystander G.A. assumed that it was Escalera who had fired into the ground. M.A. saw a bullet ricochet off the ground and thought she had seen Escalera fire it. But when M.A. looked to see if anyone was hurt, she saw Arjona shooting toward Escalera. G.A. saw Arjona emerge "shooting" from an area near the apartment complex.

Like G.A. and M.A., S.G. also believed it was Escalera who had fired. S.G. was "clear" that she had seen the slide on Escalera's gun retract, but she did not see whether he hit anyone. S.G. believed that she heard Escalera fire his gun a total of three times and that she heard approximately five other gunshots while fleeing.

Mora-Villalobos looked back once to see Escalera following, with his arm extended and his gun pointed toward Mora-Villalobos. The next time Mora-Villalobos looked back, he saw Escalera get hit by gunfire, with blood spraying from the side of his head.

Mora-Villalobos found Bravo in a vacant lot on the ground trying to camouflage himself. Less than a minute later, Arjona entered the lot through a hole in the fence. Arjona was holding his pistol, which now appeared to have an empty magazine because the slide was locked back. Bravo and Mora-Villalobos eventually fled in the latter's truck, picking up Casas along the way, but Arjona left separately.

S.G. turned back and, seeing Escalera on the ground, ran back to him. The men from the apartment parking lot were gone, and she saw the SUV drive off. Blood was

"everywhere" on Escalera's body. He had multiple gunshot wounds, and it was eventually determined that his spinal cord and jugular vein were severed.

2. ***The Investigation***

Police responded to the scene within several minutes of the dispatch report and found Escalera's gun beside him in a pool of his blood. An officer pushed S.G. away from Escalera and stood over the gun to keep anyone from touching it. The gun's safety was engaged. Its chamber was empty, but the 15-round magazine held 14 rounds.

According to a firearms expert, several spent cartridge casings found at the scene had been fired a single firearm, but not Escalera's. The casings matched unused ammunition found in the parking lot shed of the Gramercy apartment building.

Mora-Villalobos, Arjona, and Bravo were subsequently arrested. While in jail, Mora-Villalobos was cellmates with Arjona and Bravo at different times, and each confided to him aspects of their participation in the shooting. Bravo said he feared that Arjona would testify that Bravo had told him to get the gun; Bravo acknowledged having told Arjona to get a gun but denied telling him to shoot or kill anyone. Arjona told Mora-Villalobos that he had gone back to the shed to find his gun, which C.V. had in his waistband; when Arjona told C.V. of the "buster" coming down the street and asked if C.V. planned to use the gun, C.V. looked scared and froze, so Arjona took the gun away from him. Arjona told Mora-Villalobos that he then "came out, heard the shooting and . . . just came out and started shooting."

3. ***Gang Evidence and Escalera's History***

Justin Deoliveira, a criminal investigator employed by the Santa Clara County District Attorney, testified as an expert in Sureño and Norteño street gangs. According to Deoliveira, Sureños constitute a statewide gang with "hoods or subsets" in different counties and cities but are predominant in Southern California, whereas Norteños are "the predominant Hispanic criminal street gang in northern California." Sureños and

Norteños are rivals, and acts of retaliation are common between the two gangs. Officer Matthew Santos, also deemed an expert in criminal street gangs, testified that VGL's primary activities include graffiti, auto theft, auto burglaries, shooting into occupied dwellings, attempted murder, and murder. Both experts opined that a Sureño would be expected to take violent action against a Norteño who went into Sureño territory.

According to Mora-Villalobos, about a week before Escalera's death, Mora-Villalobos had been with Bravo in the shed at the Gramercy apartment complex when they heard the sound of spray cans outside. Outside, they saw several men about to tag the area. Mora-Villalobos assumed the men were Norteño gang members. Bravo fired two or three shots toward the men, who took off in their cars. After the men left, Mora-Villalobos and Bravo saw that the men had spray-painted "fuck VGL" on the side of the street.

Several years before Escalera was killed, Mora-Villalobos and several other men got into a fight with him, and Escalera pulled out a rifle. About six months after that incident, Mora-Villalobos was with two other VGL members when someone in a van shot at them. Mora-Villalobos at the time identified Escalera as the shooter, though at trial he said he might have based his identification on statements of others. Escalera and several of his friends also assaulted Mora-Villalobos when the latter was in middle school.

Several witnesses testified about a house party in 2012 where Escalera fired a gun. Police responded to a report of a fight on October 28, 2012, and the party host asked for help clearing people from the house and backyard. Partygoers started throwing bottles over the fence, and police heard a gunshot. The host testified that he had seen Escalera fire a black handgun into the air.

C. *The Verdict and Sentencing*

On August 27, 2018, the jury found Arjona guilty of first degree murder (§ 187). The jury also found true the allegations that Arjona personally discharged a firearm (§ 12022.53, subd. (d)) and committed the offense for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(5)). The jury acquitted Bravo of first degree murder but found him guilty of second degree murder (§ 187) and found true a firearm enhancement (§ 12022.53) and gang enhancement (§ 186.22, subd. (b)). The jury acquitted Casas of all charges.

Subsequently, the trial court sentenced Arjona to a total term of 50 years to life, composed of 25 years to life for murder and a consecutive term of 25 years to life for the firearm enhancement.

II. DISCUSSION

A. *Qualifying Mora-Villalobos as an Expert*

The one evidentiary objection Arjona raises on appeal is the qualification of Mora-Villalobos as a gang expert and the opinion testimony he gave in that capacity: Mora-Villalobos testified that VGL members have an obligation to back up other Sureños. He also testified he would be obligated to attack a rival gang member if the rival was seen in VGL territory. Mora-Villalobos understood that if he failed to retaliate against the rival, he would be subject to gang discipline. His testimony was thus largely cumulative of testimony by the prosecution's law enforcement gang experts. Arjona, however, argues that the trial court prejudicially erred by permitting Mora-Villalobos to offer this opinion testimony, on the ground that Mora-Villalobos had no special knowledge, skill, training, or education, and his experience as a gang member was no different than "any other gang member." We consider the trial court's admission of this testimony to be within its broad discretion.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) "Expertise . . . 'is relative to the subject,' and is not subject to rigid classification according to formal education or certification." (*People v. Ojeda* (1990) 225 Cal.App.3d 404, 408.) It may be established by showing that the witness " 'has requisite knowledge of, or was familiar with, or was involved in, a sufficient number of transactions involving the subject matter of the opinion.' " (*ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 294.) A witness qualified as an expert may render an opinion that is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (Evid. Code, § 801, subd. (a)), and "[b]ased on a matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing . . . that is of a type that reasonably may be relied by an expert in forming an opinion upon the subject to which his testimony relates . . . ." (*id.*, subd. (b)). We review for abuse of discretion a trial court's determination whether a proposed witness qualifies as an expert. (*People v. Jones* (2013) 57 Cal.4th 899, 949-950 (*Jones*).)

On voir dire of his qualifications, Mora-Villalobos, then 23, testified that his first personal experience with gangs was in middle school, when he was victimized because he was perceived to be a Sureño. At around that time, Mora-Villalobos learned about the differences between "Southern" and "Northern" gang members, and he started hanging out with "Southerners." One of Mora-Villalobos's older brothers was a VGL member, serving a prison sentence for what Mora-Villalobos believed to be a homicide. Because of his brother's experience, Mora-Villalobos refrained for several years from joining VGL but eventually was jumped into VGL at age 18, a few months before Escalera's murder. Having lived on Gramercy since he was five years old, Mora-Villalobos knew

that VGL's "main area" was the area around Gramercy. Mora-Villalobos was also familiar with other Sureño gangs.

Based on this evidence, the trial court acted within its broad discretion in finding that Mora-Villalobos had knowledge and experience sufficient to assist the trier of fact in understanding a subject beyond the common experience. Arjona's claim that Mora-Villalobos's experience as a gang member was no greater than "any other gang member" misconstrues the standard: the issue is not how Mora-Villalobos's knowledge or experience compares to that of other gang members, but whether his knowledge or experience enables him to assist the trier of fact as to as subject beyond common experience. (See Evid. Code, §§ 720, 801.) The extent of his experience relative to that of other gang members goes only to the weight and not the admissibility of his testimony. (*Jones*, *supra*, 57 Cal.4th at pp. 949-950.)

Arjona further claims that ignorance the statute criminalizing participation in a gang (§ 186.22) rendered Mora-Villalobos unqualified as to the subject of his opinion testimony. Mora-Villalobos's testimony did not encompass what "criminal street gang" meant to the Legislature, only what Sureño identity meant for its members. It would have been improper for Mora-Villalobos to testify as to the lawfulness of particular conduct or status. (See, e.g., *Jones*, *supra*, 57 Cal.4th at p. 950; *People v. Torres* (1995) 33 Cal.App.4th 37, 45-46.)

Arjona alternatively argues that the prosecution, by proffering Mora-Villalobos as an expert in gang mores, was improperly vouching for his credibility. This argument likewise suffers from the misconception of expertise within the meaning of Evidence Code section 720: the extent and limits of Mora-Villalobos's qualifications were established in the presence of the jury through direct and cross-examination, not by prosecutorial fiat or the prestige of the prosecutor's office.

Arjona contends in his reply brief that Mora-Villalobos, by testifying as both a percipient witness and an expert witness, improperly rendered an opinion about his codefendants' mental state or motive. But Mora-Villalobos never ventured an opinion as to the specific mental states of any defendant in this case; his expert testimony was limited to his opinion that, as a VGL member, he would be expected to attack a rival gang member seen in VGL territory or to support other Sureños in the same vein.

The trial court accordingly did not abuse its broad discretion when it qualified Mora-Villalobos to testify as an expert.

B. *Jury Question*

Arjona argues that the trial court erred by failing to respond to two jury notes about the pattern instruction on self-defense, CALCRIM No. 505. We find no error: the replacement of one juror with an alternate required the reconstituted jury to deliberate anew.

1. *Background*

CALCRIM No. 505 states in pertinent part: "The defendant acted in lawful [¶] a. self-defense [¶] b. defense of another; if [¶] 1. The defendant reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury. [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger."

During deliberations, the jury sent the following note to the trial court: "If the jury is not unanimous on any one of the three criteria [in CALCRIM No. 505], but every individual agrees on at least one of the criteria, does that constitute a unanimous agreement on the applicability of self-defense as a whole." Asked to "clarify," the jury wrote back, "All of us do not agree on the same criteria. Example: 1) the defendant

reasonably believed that . . . 2) the defendant reasonably believed . . . (3) defendant used no more force . . ." The trial court again responded, "Please provide further clarification."

On the next day scheduled for deliberations, the trial court excused one of the jurors due to illness and replaced that juror with an alternate. Although one of the remaining jurors asked about "the question that will not go away," the trial court instructed the reconstituted jury that it must "begin [its] deliberations again from the beginning" and that it "must set aside and disregard all past deliberations and begin deliberations over again."

Instructed that the jury could again submit a note if the same question arose, the juror asked, "There's no way we could address the question verbally?" The trial court responded, "Possibly, but you've got to start over again." The trial court also stated: "And then you can send [the question out], and I'll meet with the attorneys on the response." The reconstituted jury submitted no questions to the trial court and returned verdicts four days later.

2. *Analysis*

Arjona argues that the trial court should have provided an answer to the original jury's questions because it was obligated to do so under section 1138. Although section 1138 generally requires that a trial court respond to juror questions, it provides no authority to impute a question to a reconstituted jury. When a new juror is impaneled, section 1089 "requires that deliberations begin anew" to "[e]nsure that each of the 12 jurors reaching the verdict has fully participated in the deliberations, just as each had observed and heard all proceedings in the case." (*People v. Collins* (1976) 17 Cal.3d 687, 694 (*Collins*), superseded by statute on other grounds as stated in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.) Thus, a trial court is required to instruct a reconstituted jury "to set aside and disregard all past deliberations and begin deliberating

anew." (*Ibid.*) As the questions raised regarding CALCRIM No. 505 arose during the deliberative process undertaken by the original jury, the reconstituted jury was thus required to disregard those questions. In fact, answering the original jury's question would have risked implying to the reconstituted jury that it should not deliberate anew or should be influenced by the point of contention that animated prior deliberations. (See *People v. Guillen* (2014) 227 Cal.App.4th 934, 1030 [trial court's response to original jury's request for a readback implied that reconstituted jury should not disregard previous deliberations].) Arjona's reliance on cases like *People v. Beardslee* (1991) 53 Cal.3d 68 and *People v. Atkins* (2019) 31 Cal.App.5th 963 for the proposition that the trial court was obligated to answer this question for the reconstituted jury is therefore misplaced; neither of these cases involved a situation where the question left unanswered had been submitted *before* the reconstitution of the jury and its ensuing obligation to deliberate anew.

Arjona argues that even if a reconstituted jury is required to disregard past deliberations as stated in *Collins*, jurors cannot be expected to disregard all their previous thoughts and observations. We agree that jurors are not required, for example, to forget evidence adduced at trial. Yet the jury *is* required to restart the deliberation process so that all jurors have fully participated in the verdict. (*Collins*, *supra*, 17 Cal.3d at p. 694.) Accordingly, the reconstituted jury's consideration of the law and its application to the facts as the reconstituted jury finds them is not to be informed by the original jury's prior disagreement.

To the extent Arjona alternatively invites us to infer that the jury must not have submitted a question because it deemed that doing so would have been futile, we have no basis to do so: the trial court affirmed its willingness to answer the question if it should arise again in the new deliberations. The trial court did not rule out answering or addressing the question in open court, rather than in writing. An equally logical

explanation for the jury's forbearance from repeating the question is that the reconstituted jury in its new deliberations determined that it had no need for further instruction.

For these reasons, we conclude that no error appears on the record. As it was the original jury, not the reconstituted jury, that submitted the questions about CALCRIM No. 505, the reconstitution of the jury ended the trial court's original obligation to provide an answer.

C. *Instructional Error*

Arjona argues that the trial court prejudicially erred when it instructed the jury with CALCRIM No. 571, the pattern instruction on imperfect self-defense, and CALCRIM Nos. 3471 and 3472, the pattern instructions on initial aggressors and the preclusion of self-defense for a defendant that provokes a fight or quarrel. We find no fault with the trial court's administration of these instructions.

1. *Legal Principles*

" '[T]he trial court must instruct on the general principles of law relevant to the issues raised by the evidence.' " (*People v. Smith* (2013) 57 Cal.4th 232, 239.) We review de novo whether the jury instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We examine the challenged instruction "in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

Moreover, under " 'appropriate circumstances' a trial court may be required to give a requested jury instruction that pinpoints a defense theory of case . . . ." (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) "But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence." (*Ibid.*) However, a defendant bears the

burden of requesting a pinpoint instruction; a trial court has no sua sponte duty to provide one. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824 (*Gutierrez*).)

" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.] But that rule does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) Moreover, a failure to object to instructional error will not result in forfeiture if the error affects the defendant's substantial rights. (§ 1259; *People v. Mitchell* (2019) 7 Cal.5th 561, 579 (*Mitchell*).)

2. *CALCRIM No. 571: Imperfect Self-Defense*[3]

"Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. [Citation.] Such a killing is deemed to be without malice and thus cannot be murder." (*People v. Booker* (2011) 51 Cal.4th 141, 182.) Accordingly, CALCRIM No. 571 provides that an otherwise intentional killing constitutes voluntary manslaughter if a defendant killed a person in imperfect self-defense or imperfect defense of another. According to CALCRIM No. 571, "[t]he difference between complete self-defense or defense of another and imperfect self-defense or imperfect defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable." Thus, CALCRIM No. 571 provides in pertinent part that imperfect self-defense applies if: "The defendant acted in imperfect self-defense or imperfect defense of another if: [¶] 1. The defendant actually believed that he or his friends were in imminent danger of being killed

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[3] Arjona did not object to the instruction as given on the ground now raised on appeal. As Arjona's claim is that the trial court incorrectly stated the law and that such an error affected his substantial rights, however, we find no forfeiture and proceed to address the merits of his claims. (§ 1259; *Mitchell, supra*, 7 Cal.5th 561, 579.)

or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] 3. At least one of those beliefs was unreasonable."

We understand Arjona to argue that CALCRIM No. 571 is defective because it fails to instruct the jury that the following unreasonable beliefs negate malice: (1) an unreasonable belief in the necessary use of deadly force or (2) an unreasonable belief in the amount of force necessary to repel an attack.[4] We find no instructional error.

As to the first of Arjona's asserted defects, the pattern instruction does inform the jury that one who kills in the actual but unreasonable belief in the necessity of deadly force is guilty of voluntary manslaughter. As to the second, to the extent Arjona's argument may be that imperfect self-defense applies when the amount of force used to repel an attack is disproportional to the defendant's unreasonable belief as to the amount of danger present, a similar argument was rejected by the First Appellate District in *People v. Morales* (2021) 69 Cal.App.5th 978 (*Morales*).)

In *Morales*, the defendant, like Arjona here, argued that CALCRIM No. 571 was deficient because "it failed to tell the jury that a homicide also qualifies as voluntary manslaughter and not murder when a defendant's beliefs in danger and the need to use deadly force are reasonable but the sort of deadly force he uses is excessive and more

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[4] Arjona asserts in his opening brief that CALCRIM No. 571 is erroneous in what he frames as two distinct ways: (1) CALCRIM No . 571 did not instruct the jury that "[a] defendant could qualify for voluntary manslaughter under imperfect self-defense if he reasonably believed the first two elements [described under CALCRIM No. 505], but if he unreasonably believed the amount of force he used was necessary"; and (2) "[I]t did not allow the jury to convict Appellant of voluntary manslaughter under the theory of imperfect self-defense if he actually and reasonably held the first two beliefs [described under CALCRIM No. 505], but if he actually but unreasonably believed that the amount of force he used was necessary." There arguments appear to be restatements of each other.

than necessary to repel the attack." (*Morales*, *supra*, 69 Cal.App.5th at p. 995.)[5] *Morales* observed that " 'not every unreasonable belief will support a claim of imperfect self-defense'; rather, a defendant can claim imperfect self-defense based only a belief 'that, if reasonable, would support a claim of perfect self-defense.' " (*Ibid.*, quoting *People v. Valencia* (2008) 43 Cal.4th 268, 288 (*Valencia*).) For example, the California Supreme Court in *Valencia*, *supra*, 43 Cal.4th at page 288, observed that "if a defendant unreasonably believe[s that someone was] going to punch him in the arm and stab[s] him to death in response, this belief would not support a claim of imperfect self-defense for the reason that the belief, even if reasonable, would not permit the use of deadly force." (*Id.* at p. 288, fn. 6.) Citing to this example from *Valencia*, the *Morales* court concluded that "[i]n such a scenario, the use of force would be excessive but still would not reduce a homicide to voluntary manslaughter." (*Morales*, *supra*, at p. 995.)

Likewise, if Arjona unreasonably believed that deadly force was necessary, but he applied an *excessive* amount of deadly force that was disproportionate to the danger he unreasonably believed he was in, then he cannot claim imperfect self-defense. (*Morales*, *supra*, 69 Cal.App.5th at p. 995; *Valencia*, *supra*, 43 Cal.4th at p. 288, fn. 6.) Nor does an actual but unreasonable belief at the moment of his first shot necessarily immunize subsequent lethal acts thereafter. (See, e.g., *People v. Hardin* (2000) 85 Cal.App.4th 625, 634, fn. 7 [noting that the defendant, who relied on imperfect self-defense, could no longer entertain the belief that the victim constituted an imminent and deadly peril after the defendant had straddled the victim on the floor]; *People v. Uriarte* (1990) 223

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[5] Arjona argues that the argument raised in *Morales* is different than the one he raises here on appeal. He argues that *Morales* considered that "there was no right to use deadly force in any type of self-defense, to defend against a robbery." Arjona, however, misreads *Morales*, which discussed whether use of excessive force that was more than necessary to repel an attack gives rise to imperfect self-defense. (*Morales*, *supra*, 69 Cal.App.5th at p. 995.)

Cal.App.3d 192, 198 [no error in failing to instruct jury on imperfect self-defense, in part because defendant shot one of the victims after the victim was already incapacitated].)

Arjona relies on a statement in *People v. Wells* (1949) 33 Cal.2d 330, 345, superseded by statute on other grounds as stated in *People v. Saille* (1991) 54 Cal.3d 1109-1112, to the effect that there is no malice aforethought if a defendant "acted only under the influence of fear of bodily harm, in the belief, honest though reasonable, that he was defending himself from such harm by the use of a necessary amount of force . . . ." (*Ibid.*; see also *People v. Flannel* (1979) 25 Cal.3d 668, 675, superseded by statute on other grounds as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 777; *People v. Elmore* (2014) 59 Cal.4th 121, 137.) Under *Wells*, imperfect self-defense applies if a defendant had an actual, though unreasonable, belief that he used the necessary amount of force. Arjona thus seems to distinguish the unreasonable belief as to the amount of force necessary from the unreasonable belief as to the necessity of deadly force as used in CALCRIM No. 571, which states that imperfect self-defense applies if a defendant had an unreasonable belief that "the immediate use of deadly force was necessary to defend against the danger."

In a homicide trial, this distinction would appear to be one without a difference. A homicide defendant—at least where, as here, the defendant's use of deadly force as the cause of the victim's death is undisputed—who has an actual, but unreasonable belief in the necessity of the amount of force used has, as a matter of course, an actual but unreasonable believe in the necessity of deadly force. Furthermore, if the jury concluded that Arjona unreasonably believed that the immediate use of deadly force was necessary, it was already instructed under CALCRIM No. 571 that imperfect self-defense applies.

Based on the foregoing, we reject Arjona's argument that CALCRIM No. 571 incorrectly states the law. We therefore need not reach Arjona's derivative argument that instructional error violated his constitutional rights to due process and to a jury trial.

3. *CALCRIM Nos. 3471 and 3472: Initial Aggressor and Self-Defense*

CALCRIM No. 3471 provides: "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 to communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting."

CALCRIM No. 3472 provides: "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. [¶] 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 stop fighting or communicate the desire to stop to the opponent, or give the opponent the chance to stop fighting."

Arjona argues that the trial court erred when it instructed the jury with CALCRIM No. 3471, the instruction on the right to self-defense for an initial aggressor, and CALCRIM No. 3472, the instruction precluding self-defense if a defendant provokes a fight or quarrel. Arjona claims that the instructions as given misstated the law because the trial court failed to clarify that CALCRIM Nos. 3471 and 3472 applied only if the jury found that Arjona had the same intent as his codefendants, Bravo and Casas, who

allegedly initiated the conflict with Escalera. Considering the instructions as a whole, we find no instructional error.

a. *Analysis*

Arjona claims that CALCRIM Nos. 3471 and 3472 erroneously stated the law because the instructions (1) failed to clarify that they applied only if the jury determined that Arjona had the same intent as his codefendants who initiated the conflict with Escalera and (2) failed to state that they applied only if the jury concluded he was aiding and abetting his codefendants. We see no error in the trial court's instructing the jury as to an initial aggressor's right to self-defense.

First, we consider whether the trial court erred by failing to clarify that Arjona must have shared the same intent as his codefendants when they allegedly initiated the fight with Escalera. In *People v. McCoy* (2001) 25 Cal.4th 1111 (*McCoy*), the California Supreme Court held that "outside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator." (*Id.* at p. 1118.) Thus, " '[w]hen the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator" ' "—that is, "when guilt does not depend on the natural and probable consequences doctrine . . . the aider and abettor must know and share the murderous intent of the actual perpetrator." (*Ibid.*)

The instructions as given were in accord with *McCoy*. CALCRIM No. 3471 specifically applies only to a defendant "who starts a fight." Likewise, CALCRIM No. 3472 applies only if a defendant "provokes a fight or quarrel." The trial court also instructed the jury: "You must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately." (CALCRIM No. 203.) With respect to the theory that Arjona may have been guilty based on an uncharged conspiracy, the trial court also instructed the jury that for a defendant to be a member of an uncharged conspiracy, he or she must have "intended to agree and did

agree with one or more of the other defendants" to commit murder or assault with force likely to inflict great bodily injury, and the defendant and one or more of the other members of the conspiracy intended that one or more of them would commit murder or assault. (CALCRIM No. 416.) CALCRIM No. 416 also specifically provided that "[t]he People must prove that the members of the alleged conspiracy had an agreement and intent to commit Murder or Assault with force likely to inflict great bodily injury."

Read together, the instructions *require* the jury to examine the evidence and determine its applicability as to each defendant in the first instance. And when examining whether Arjona was an initial aggressor, the jury could have concluded, as argued by the prosecutor, that Arjona himself initiated the fight by obtaining the gun and firing the first shot, for example, or that Arjona was a part of the uncharged conspiracy and thus shared with his codefendants an intent to assault or kill Escalera.

Considered in context, the instructions do not support Arjona's contention that the jury would erroneously apply CALCRIM Nos. 3471 and 3472 to him even if it concluded that he was neither an initial aggressor nor intended as part of an uncharged conspiracy to assault Escalera. Under the theory of either an uncharged conspiracy or direct aiding and abetting, the jury was required to find that Arjona had the specific intent to commit assault or murder in order to convict him.[6] We must presume that the jury understood and correlated all instructions given. (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1129 (*Vang*).)

Moreover, as the Attorney General points out, Arjona's argument is more properly characterized as a claim that the trial court should have provided a pinpoint instruction on the crux of his defense—that there was no evidence he was part of the uncharged

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[6] As the jury found Arjona guilty of first degree murder, we presume that it did not rely on a theory of aiding and abetting based on the natural and probable consequences doctrine, because the trial court specifically instructed per CALCRIM No. 403 that the natural and probable consequences theory applied only to second degree murder.

conspiracy or that he was part of the initial fight. Yet Arjona did not request a pinpoint instruction, and the trial court was not obligated to provide one sua sponte. (*Gutierrez*, *supra*, 45 Cal.4th at p. 824.)

Second, we find no merit in Arjona's argument that the trial court should have instructed that CALCRIM Nos. 3471 and 3472 applied *only* if the jury concluded that he was aiding and abetting his codefendants, Bravo and Casas. Arjona's claim incorrectly characterizes the prosecutor's theory of Arjona's guilt and the inapplicability of self-defense as resting solely on aider and abettor liability. The prosecutor specifically argued the defendants were liable for murder based on an uncharged conspiracy—Arjona had driven the SUV a longer route up Alexander to "get the drop" on Escalera, Bravo announced to the rest of the group that a "buster" was coming, and Bravo later told Arjona to get a gun. The prosecutor also argued that each of the codefendants were "initial aggressors" in their own way. Arjona's contrary argument on appeal presupposes that only Bravo and Casas were aggressors and does not account for evidence in the record from which the jury could conclude he, too, was a party to instigating the conflict: Arjona drove Bravo back to the apartment complex, by S.G.'s account, parked on the sidewalk in her and Escalera's path, tacitly agreed with Bravo to fetch his gun, and thereafter took the gun away from one insufficiently committed to using it; knowing that Arjona was close at hand and soon armed, Bravo then accosted Escalera. The forensic and crime scene evidence suggested that it was only Arjona who fired, that he fired multiple times—once while Escalera had his own gun pointed toward the ground—and that Escalera never even released the safety on his gun.

Although there was conflicting evidence in the record about whether Escalera fired first or at all, evaluating the evidence is a task for the jury. On this record, the jury could legitimately find Arjona to be an initial aggressor. Accordingly, instructing the jury that CALCRIM Nos. 3471 and 3472 would apply only if Arjona was aiding and

abetting Bravo and Casas when they allegedly initiated the fight would have impermissibly " 'invite[d] the jury to draw inferences favorable to the defendant . . . from specified items of evidence on a disputed question of fact.' " (*People v. Santana* (2013) 56 Cal.4th 999, 1012.)

For these reasons, we conclude that the trial court did not err when it instructed the jury with CALCRIM Nos. 3471 and 3472 without providing further clarification. We therefore need not reach Arjona's derivative argument that instructional error violated his constitutional rights to due process and to a jury trial.

D. *Prosecutorial Error*

Arjona next argues that the prosecutor committed misconduct multiple times during closing argument when he misstated the law, mischaracterized the evidence, disparaged defense counsel, and improperly appealed to the sympathy and passion of the jury. Many of the claims Arjona now raises he did not preserve in the trial court, but we nonetheless reach the merits, given his alternative claim that any forfeiture indicated ineffective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697.) The prosecutor's misstatements of the law, disparagement of defense counsel, and reference to the impact of Escalera's death on his family were improper, but—on this record—we conclude that these errors did not prejudice Arjona, whether considered in isolation or cumulatively.

1. *Legal Principles*

"[T]he term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Centeno* (2014) 60 Cal.4th 659, 667.) Bad faith is not required. (*Id.* at p. 666.) "A prosecutor's conduct violates the Fourteenth Amendment of the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v.*

Morales (2001) 25 Cal.4th 34, 44.) "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 trial court or the jury." (*Ibid.*)

Although a prosecutor " 'enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom[,]' " it is prosecutorial error to misstate the law or the evidence. (*People v. Fayed* (2020) 9 Cal.5th 147, 204 (*Fayed*).) It is also prosecutorial misconduct to disparage defense counsel in front of the jury (*People v. Young* (2005) 34 Cal.4th 1149, 1193) or to otherwise "appeal to the passions and prejudices of the jury," which is " ' "out of place [in] an objective determination of guilt." ' " (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1342 (*Seumanu*).) But "any allegedly improper statements by the prosecutor must be considered in light of the entire argument." (*People v. Holmes, McClain and Newborn* (2022) 12 Cal.5th 719, 789 (*Holmes*).) " 'A defendant asserting prosecutorial misconduct must . . . establish a reasonable likelihood the jury construed the remarks in an objectionable fashion.' " (*Fayed, supra*, 9 Cal.5th at p. 204.)

In order to preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection to the challenged statement and ask the trial court to admonish the jury to disregard the improper statements. (*Fayed, supra*, 9 Cal.5th at p. 204.) A failure to object below will be excused if the record reflects that either an objection or admonition would have been futile, or if the admonition would not have cured the harm stemming from the misconduct. (*Ibid.*) But the bar for establishing futility is high. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 821 (*Hill*) [excusing failure to object to all instances of a "constant barrage of . . . unethical conduct" creating a "poisonous" atmosphere, where the trial court expressed its "wrath" by comments

before the jury "suggesting [defense counsel] was an obstructionist, delaying the trial with 'meritless' objections"].)

"Although we generally review claims of prosecutorial error for an abuse of discretion [citation], we independently examine what the law is [citations] and 'objective[ly]' examine how a 'reasonable juror' would likely interpret the prosecutor's remarks [citations], bearing in mind that ' "we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" ' [Citation.]" (*People v. Collins* (2021) 65 Cal.App.5th 333, 340.)

Even where a prosecutor commits error, reversal is not required unless a defendant has suffered prejudice. "Error with respect to prosecutorial misconduct is evaluated under *Chapman v. California* (1967) 386 U.S. 18 to the extent federal constitutional rights are implicated, and *People v. Watson* (1956) 46 Cal.2d 818 [(*Watson*)], if only state law issues were involved." (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 564 (*Fernandez*); *People v. Wallace* (2008) 44 Cal.4th 1032, 1070 (*Wallace*).) Under *Watson*, reversal is required when it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 836.)

2. *Misstatement of Law on Initial Aggressors*

Arjona argues that the prosecutor committed misconduct when he misstated the law about self-defense and initial aggressors during closing argument. He cites to multiple instances where he claims that the prosecutor erroneously stated that self-defense never applies to initial aggressors. Some of these instances were fair argument applying the law to the evidence, and defense counsel accordingly did not preserve the claims by objection. As for the rest, we conclude that the prosecutor's misstatements of the law were harmless in view of his correction of those misstatements.

a. *Background*

Initially, during closing argument, the prosecutor asserted that "the self-defense law absolutely does not apply to initial aggressors." The trial court overruled defense counsel's objection that this misstated the law. Immediately after this ruling, the prosecutor stated, "I'm going to go into detail that a defendant's wrongful conduct, when that creates circumstances that give rise to the victim acting in self-defense, the initial aggressor doesn't get self-defense; even if it's legitimate self-defense, doesn't apply to you."

Later, the prosecutor asserted: "Even if you think it was an immediate threat and he used reasonable force and it was necessary, even if you think self-defense otherwise applies, the initial aggressor instruction precludes someone from claiming self-defense. [¶] There is no self-defense or imperfect self-defense for aggressors. If you find . . . that the defendants were the initial aggressors, your verdict is murder. [¶] There is no justification or excuse when you are the initial aggressor. There [are] two types of aggression." Defense counsel again objected, and the trial court held an unreported sidebar.

Immediately following the sidebar, the prosecutor clarified that by "initial aggressor," he meant that "all three of these men were initial aggressors in their own way." The prosecutor then stated that "[a] person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force or self-defense" and that imperfect self-defense did not apply when a "defendant, through his own wrongful conduct, created circumstances that justify the victim's use of force." The prosecutor further acknowledged: "There is an exception to the initial aggressor rule . . . if the defendant used non-deadly force and the victim responded with such sudden and deadly force that the defendant could not withdraw. So if the initial aggressor used

non-deadly force, but then the victim allowed him to withdraw, then they can claim self-defense."[7]

The prosecutor thereafter argued that the initial aggressor doctrine was inapplicable to the three defendants but based the argument on his view of the evidence and the inference that Escalera did not suddenly escalate a nondeadly confrontation into a deadly confrontation. The prosecutor argued, "If you get back there and say, '[Escalera] never fired his gun. All he did was pull it out and point it at the ground to deter an attack by the defendants,' they don't get self-defense because they're initial aggressors. [¶] Their wrongful conduct contributed to it. Certainly not self-defense, because they created it, and that's it." The prosecutor further argued that it did not matter whether Escalera fired a gunshot into the ground, and that "it doesn't matter, because they can't get past the wrongful conduct initial aggressor law. So even under the defense theory, the defendants are guilty." Defense counsel did not object to these arguments.

b. *Analysis*

We see nothing objectionable in the prosecutor's latter comments—that Escalera never fired his gun, and that it did not matter whether Escalera fired a gunshot into the ground—which were fair arguments based on the evidence. (See *People v. Ramirez* (2015) 233 Cal.App.4th 940, 950; *Fayed, supra*, 9 Cal.5th at p. 204 [noting prosecutor's "wide latitude" to make fair comment on evidence].) To the extent these included a brief and therefore elliptical reference to the initial aggressor instructions, we see no risk that a reasonable juror would construe them in an objectionable fashion.

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[7] After the prosecutor finished his closing argument, the trial court clarified some of the objections with defense counsel. Defense counsel stated that she remembered that the prosecutor had commented that "initial aggressors do not have the right to self-defense," which misstated the law. While reviewing the transcript of the proceedings, defense counsel noted that the prosecutor had not initially "cleared it up" at the time, but "he did clear it up eventually" as he finished his argument.

The prosecutor's categorical legal assertions—that "[t]here is no self-defense or imperfect self-defense for aggressors"; "the initial aggressor doesn't get self-defense"; and "self-defense law absolutely does not apply to initial aggressors"—are another matter. "Where, as here, the prosecutor is alleged to have misstated the law to the jury, this constitutes error only if (1) the prosecutor misstated the law, and (2) there is ' "a reasonable likelihood the jury understood or applied the [prosecutor's remarks] in an improper or erroneous manner." [Citations.]' " (*People v. Collins*, *supra*, 65 Cal.App.5th at p. 340.)

That the prosecutor initially misstated the applicable law is clear. (See *People v. Ramirez*, *supra*, 233 Cal.App.4th at p. 947.) Taking the misstatements in isolation, the jury could initially have construed them in an objectionable manner. But considering the misstatements in the context of the entire argument (see *Holmes*, *supra*, 12 Cal.5th at p. 789), we see no reasonable likelihood that the prosecutor thereby misled the jury: it would have been apparent to the jury from the prosecutor's eventual correct restatement of the law and clarification of his argument that his initial statements had strayed too far from the instructions administered by the court. The fact of his self-correction would have been apparent to the jury, prefaced as it was by defense counsel's objection and the unreported sidebar.

Even assuming a reasonable likelihood that the jury nonetheless took the prosecutor's initial misstatements as accurate, his error would have been harmless. In addition to prosecutor's eventual clarification and defense counsel's own correct statements about the law regarding initial aggressors,[8] the trial court properly instructed

[8] During closing argument, defense counsel argued that "even if there is some evidence of . . . Arjona being involved with an initial aggressor, if the defendant uses only non-deadly force and the opponent responds with such sudden and deadly force

the jury on the law regarding initial aggressors and further instructed the jury that in the event of any conflict between the instructions and the attorneys' argument, the jury was to follow the instructions as administered by the court. (See *People v. Boyette* (2002) 29 Cal.4th 381, 436.) Nothing in the record here undermines our customary presumption that the jury followed these instructions. (*Vang, supra*, 171 Cal.App.4th at p. 1129.)

Accordingly, we conclude that the prosecutor's initial misstatements of the law on initial aggressors did not constitute prosecutorial error. (See *Fayed, supra*, 9 Cal.5th 147, 204.)

3. *Claim that Escalera was Entitled to Use Deadly Force in Self-Defense*

Arjona argues that the prosecutor also committed misconduct when he argued that Escalera was entitled to use deadly force in self-defense when he was approached by Bravo and Casas. He argues that the prosecutor's misconduct shifted the burden of proof because it required the defendants to establish that Escalera did not have the right to self-defense. We find no error.

a. *Background*

The prosecution consistently disputed that Escalera ever discharged his firearm, relying on the crime scene evidence and forensic firearm and ballistics analysis. Given the contrary testimony of its percipient witnesses, however, the prosecutor in the alternative argued against the legal significance of that testimony, if believed. Specifically, the prosecutor argued that Escalera had tried to avoid the defendants when he walked down Madden, and his encounter with them on Gramercy threatened from the outset to be deadly. The prosecutor argued, "[Escalera] was allowed to respond with deadly force. He could have pulled out his gun. At that moment if he had a round in the

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[that] the defendant could not withdraw, he has the right to defend himself with deadly force. That's the law."

chamber and the safety was off, legally, [Escalera] could have pulled out his gun and blown these guys away." Defense counsel objected on the ground that this statement misstated the law, which the trial court overruled.

Following the objection, the prosecutor continued his argument by stating: "Based on the self-defense instructions you received, [Escalera] walking down the street is not an immediate threat. Being surrounded by a bunch of gangsters that said 'get that fool,' start running at you to assault you, and then start shooting at you, that's an immediate threat. [¶] He would have been legally permitted—it would have been legal and lawful for him. He had self-defense. He could have shot them. Certainly after Mr. Arjona shot and missed, [Escalera] could have shot Mr. Arjona, but he didn't." This time, defense counsel made no objection.

Finally, the prosecutor commented on Escalera's ability to claim self-defense a third time when he argued: "But even if [Escalera] fired his gun at the ground, there is still no defense because of the initial aggressor doctrine discussed above. There are multiple gangsters that were going to jump him and were going to inflict great bodily injury and death. He had a right to use deadly force under the self-defense law." Defense counsel did not object to this argument.

b. *Analysis*

Treating Arjona's claims as adequately preserved, we consider the prosecutor's comments to be a fair comment on the evidence. (See *Seumanu*, *supra*, 61 Cal.4th a p. 1363.) Given his wide latitude for argument, the prosecutor's reference to how Escalera could have responded with deadly force when approached by Bravo and Casas was not an impermissible inference from the evidence—that the defendants at the outset appeared intent on a deadly confrontation with Escalera, such that Escalera's purported use of deadly force did not permit defendants to claim of either self-defense or imperfect self-defense.

Arjona argues that the prosecutor's argument was misconduct largely because Bravo and his companions were unarmed, and there was some evidence from which the jury might have inferred that Escalera was instigating the conflict. Arjona thus argues that "no reasonable man" in Escalera's position would have believed that he was in imminent danger of being killed or suffering from great bodily injury under the circumstances. The availability of contrary inferences and arguments, however, does not establish that the prosecutor committed misconduct or misstated the law when articulating his evidence-based theories of the case. Although misstating or mischaracterizing the evidence is misconduct, arguing a reasonable inference is not. (*Hill, supra*, 17 Cal.4th at p. 823.)

Finally, Arjona argues that the prosecutor committed misconduct because arguing that Escalera was entitled to self-defense without a pinpoint instruction applying the court's self-defense instructions to Escalera improperly shifted the burden of proof from the prosecutor to the defense. Without an instruction, Arjona argues that the defendants would have been obligated to prove that Escalera did not have the right to self-defense.

It is prosecutorial error to improperly shift the burden of proof to the defendant. (*People v. Osband* (1996) 13 Cal.4th 622, 696.) But Arjona's interpretation of the prosecutor's argument is not a reasonable one.[9] The prosecutor at no point suggested that

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[9] To the extent Arjona predicates his claim on the absence of a pinpoint instruction directing the jury in its consideration of a victim's resort to self-defense, it was at the urging of defense counsel that the trial court declined the prosecutor's request that it instruct the jury on self-defense as applied to Escalera. (See *People v. Harris* (2008) 43 Cal.4th 1269, 1293 [doctrine of invited error bars appellate challenge when defendant has made conscious and deliberate choice to request jury instruction].) Moreover, the lack of a jury instruction on self-defense as applied to Escalera did nothing to shift the burden of proof away from the prosecutor: the jury was expressly instructed that the prosecutor bore the burden of proving beyond a reasonable doubt that the defendants were not acting in either perfect self-defense or imperfect self-defense.

it was the defendants' burden to prove that Escalera had no right to self-defense. Considered in context, we see nothing in what the prosecutor said that could fairly be construed as undermining the jury's comprehension that the prosecution bore the burden of disproving the defense theory that Arjona fired in self-defense or defense of another.

4. *Disparagement of Defense Counsel*

We consider many of the prosecutor's remarks in his rebuttal argument to be improper and reasonably likely to be construed in an objectionable manner, but our review of the record discloses no actionable prejudice from the errors.

a. *Background*

During his rebuttal argument, the prosecutor repeatedly called the jury's attention to his dim view of defense counsel's personal credibility.

First, the prosecutor characterized defense counsel as "two-faced in their reliance on witnesses." He went on to explain: "I told you in my closing argument that they were going to say that the things that [Mora-Villalobos] said that were helpful for them, they said[,] 'oh yeah, that's the truth,' and the things that [Mora-Villalobos] said that hurt them, 'no that's not the truth.' [¶] And the same thing with [S.G.] All the things that [S.G.] said that were helpful for them, 'oh yeah. That was absolutely the truth,' and all the things that hurt them, 'oh, she was lying about that.' "[10]

Second, the prosecutor argued that defense counsel intentionally misrepresented the evidence. For example, the prosecutor argued, "One of the attorneys suggested that Bravo asked [Escalera], 'Why are you doing this?' or, 'Why are you here?' I didn't hear

[10] In a similar vein, however, the prosecutor himself had relied on aspects of the testimony of prosecution witnesses S.G. and G.A., despite their account of Escalera having fired first, which he rejected as unreliable.

any evidence that Mr. Bravo posed that question to [Escalera] at all."[11] Rather than move on to other perceived defects in the defense argument, the prosecutor followed by querying, "So why would they say that if no one said it? Because the defense knows that they have no evidence to support their position; so they'[ve] just got to make it up."

Disputing defense counsel's argument that S.G. had been concerned that Escalera would "start something," possibly a fight, with the defendants,[12] the prosecutor asserted: "This, again, is an attempt by the defense to twist words and lie as to what actually was said. . . . [¶] [S.G.] never said she was worried he was going to start something. Never said that, never. But they said it, the defense said it. Doesn't make it true."

Third, the prosecutor argued: "The defense refused to concede that [Escalera] never fired that gun. Absolutely refused. And that really undermines their credibility, ladies and gentlemen."[13]

And fourth, the prosecutor argued: "The defense in this case is a conspiracy theory. They're talking about witnesses [that] are tampering with the gun. There is a missing pool and a missing bathing suit. [Escalera] shot that gun despite no physical

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[11] What defense counsel had actually said was, "They didn't move to attack [Escalera] at that time probably because they saw exactly what everybody—what [Mora-Villalobos] says he saw and probably because [Bravo] was just trying to defuse the situation or get him to maybe turn around or just, 'What are you doing? What are you doing here? Why are you doing this?' "

[12] S.G. had testified that after the SUV pulled up on Gramercy, she asked Escalera to turn back: she "was concerned that something might happen because [Escalera] had a gun[.]"

[13] Two prosecution eyewitnesses—S.G. and G.A.—testified that Escalera fired his gun and fired first: S.G. was "clear" that she saw the slide of Escalera's gun draw back as he fired; G.A. believed Escalera fired "almost instantly . . . right after" drawing his weapon. Two others—Mora-Villalobos and M.A.—testified that Escalera was, at a minimum, poised to fire at the time they heard the first shot, which they took to have been by him.

evidence to support it, and [Escalera] and [S.G.], they had this nefarious motive to be on Gramercy. [¶] It's all conspiracy theory, ladies and gentlemen, without any evidence. So if you believe that, ladies and gentlemen, if you believe these ridiculous arguments made by the defense, then you might as well believe that's not Buzz Aldrin standing on the moon. [¶] Ladies and gentlemen, we weren't there when Neil Armstrong and Buzz Aldrin landed on the moon. But we all know they landed on the moon." Casas's counsel objected to this line of argument but did not request a curative instruction.

After the jury retired to deliberate, defense counsel joined in Casas's counsel's objection to the moon-landing analogy. Casas's counsel argued only that the analogy "water[ed] down the burden of proof." The trial court disagreed, finding no error. Each defense attorney took issue with what they depicted as the disparaging intemperance of the prosecutor's rebuttal argument and moved for a mistrial, which the trial court denied after a lengthy and apparently tumultuous hearing, finding no error.[14]

b. *Analysis*

Preliminarily, we note that because defense counsel made no contemporaneous objection or request for curative admonition in response to these arguments, Arjona has forfeited his claims that the disparagement amounted to prosecutorial error. (*Fayed*, *supra*, 9 Cal.5th at p. 204.) We understand defense counsel's later explanation of the difficulty and perceived futility of pressing for a ruling during their opponent's closing argument. But the California Supreme Court has unambiguously held this to be a prerequisite to preservation of the claim for appeal. (See *Fayed*, *supra*, 9 Cal.5th at p. 204; see also *People v. Bemore* (2000) 22 Cal.4th 809, 845-846 (*Bemore*) [defense counsel did not make timely and contemporaneous objection when challenged comments

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[14]The prosecutor defended his approach on the ground that he was "wiped out" and defense counsel were "frustrating," "absolutely aggravating to no end," and, in the case of Arjona's counsel, "unethical."

took place during an afternoon session and objection was not made until midmorning the following day].) Because all defendants moved for a mistrial on the basis of prosecutorial error after the jury had begun deliberating, however, and because of the persistence of the prosecutor's focus on defense counsel's credibility, we address the merits.

It is prosecutorial error to "engage in such forbidden tactics as accusing defense counsel of fabricating a defense or factually deceiving the jury." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154 (*Zambrano*), disapproved of on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Woods* (2006) 146 Cal.App.4th 106, 116-117 [reversing conviction where prosecutor argued that defense witnesses were "conjured up" for trial].) Although a prosecutor may make a fair comment on the persuasiveness of defense counsel's closing argument, it is error to take aim at counsel personally. (*Zambrano*, *supra*, 41 Cal.4th at p. 1155; but see *People v. Stanley* (2006) 39 Cal.4th 913, 952 (*Stanley*) [no misconduct when prosecutor told the jury that defense counsel " 'imagined things that go beyond the evidence' " and had "told them 'a bald-faced lie' "]; compare *People v. Young* (2005) 34 Cal.4th 1149, 1193 [prosecutor's characterization of defense counsel's argument as " 'idiocy' " was fair comment on argument].)

The harm to be avoided is not the demise of Chesterfieldian politeness, the erosion of courtroom decorum, or injury to the tender sensibilities of seasoned litigators; it is the displacement of the jury's focus from the evidence to the asserted ethical deficiencies of the defense attorney—often, as here, the only voice a defendant has at trial—as the defendant's proxy. (See *Bemore*, *supra*, 22 Cal.4th at p. 846 ["attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters"].) Personal comments about defense counsel in the presence of the jury run the "obvious risk of prejudicing the jury towards [counsel's] client." (*Hill*, *supra*, 17 Cal.4th at p. 821.)

First, the prosecutor's reference to defense counsel as "two-faced" cast an argument ostensibly about the logic of their argument as a comment on their personal character. A first such comment in isolation a jury might be unlikely to construe in an objectionable fashion. But the prosecutor's continuing variations on the theme of defense counsel's subjective intentions and perfidy—"twist . . . and lie," they know "they have no evidence, so they['ve] just go to make it up," "really undermines their credibility"—at a minimum confirm that the cumulative personal frustration the prosecutor later acknowledged was in fact eroding the professionalism of his presentation to the jury.

The Attorney General's suggestion that the prosecutor's "two-faced" comment targeted only the defense theory and not the attorneys is implausible in context, given the prosecutor's initial and repeated focus throughout his rebuttal on the attorneys themselves, extending even to comment on the demeanor of Casas's counsel as compared with his own. Because the tactic the prosecutor derided was also one which he himself liberally employed—discounting, for example, his own eyewitnesses' testimony that Escalera fired his gun and fired first—it is also difficult to construe his castigation of counsel personally for the same approach as a fair comment on the evidence. After all, it is precisely because of the likelihood that witness testimony is fallible that trial courts, as here, routinely to instruct jurors not to "automatically reject testimony just because of inconsistencies or conflicts" and to "[c]onsider whether the differences are improper or not" (CALCRIM No. 226); even where the jury concludes that a witness was willfully false as to a material fact, the jury remains free to reject only those portions of the testimony it considers false and to accept the rest (CALCRIM No. 226 ["if you think the witness has lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest"]. The prosecutor, to be sure, was free to note the inconsistency in the defense characterization of a given witness's reliability—

potentially at his peril, given his comparable approach to demonstrably fallible witnesses—without personalizing the argument.

The prosecutor's comment that defense counsel had attempted to "twist words and lie" likewise recast arguments ostensibly about the merits as conclusions about defense counsel themselves and was therefore not merely responsive to the defense argument. (See *Zambrano*, *supra*, 41 Cal.4th 1082, 1154.) We note as well that assailing the credibility of defense counsel for the failure to concede aspects of the prosecution case is particularly problematic where, increasingly, reviewing courts have constrained counsel's discretion to concede lesser offenses and even discrete elements of uncharged offenses over the defendant's objection. (See, e.g., *People v. Bloom* (2022) 12 Cal.5th 1008, 1036-1042; *People v. Flores* (2019) 34 Cal.App.5th 270, 280-283.)

The prosecutor's reference to the moon landing, however, was not misconduct. During closing argument, the prosecutor " ' " 'may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history, or literature.' " ' " (*Stanley*, *supra*, 39 Cal.4th at pp. 951-952.) The prosecutor's characterization of the defense theory as a "conspiracy theory" also did not disparage defense counsel. In context, the prosecutor's comments are properly understood as an attack on the presentation of the defense's case and a fair expression of the prosecutor's view that scant evidence supported the theory that someone had tampered with Escalera's gun while police were at the scene—not that the defense had fabricated evidence or that defense counsel had conspired to mislead. The prosecutor's argument that the defense's theory lacked little support does not amount to misconduct. (See *Zambrano*, *supra*, 41 Cal.4th at p. 1155.)

Notwithstanding the ad hominem character of the prosecutor's other comments, we find the error to be harmless: on this record, it is not reasonably probable that the jury would have reached a different verdict in the absence of the remarks. (See *Fernandez*,

supra, 216 Cal.App.4th at p. 564.) We note that the substantive defect in each of the prosecutor's improper arguments was patent and unlikely to have been lost on the jury. Given the duration of the trial and the high stakes for the parties, the erosion of professional relations between the attorneys was a phenomenon that—though regrettable, avoidable, and potentially sanctionable—we expect the jury would have neither missed nor misinterpreted as a reflection on the merits. On this record, we detect very little risk that the jury could have been misled by the prosecutor's style of argument: indeed, the full acquittal of Casas and the acquittal of Bravo on the charged greater offense of first degree murder do not suggest a jury swayed by prosecutorial error. It bears noting as well that each of the defendants was represented by counsel whose readiness to object to prosecutorial misconduct was likewise evident in the parties' agreed-upon shorthand objection—"PE," for "prosecutorial error." The defense attorneys' forbearance from contemporaneous objection arguably reflected their later observation that "[m]aybe he wasn't exactly advancing his position at that point" and that "[i]t might even work against him . . . where the jurors did not appreciate it either." The trial court also instructed the jury that the attorneys' statements were not evidence, and that the remarks made by the attorneys during opening and closing statements were not evidence. We presume that the jury followed this instruction. (*Vang, supra*, 171 Cal.App.4th at p. 1129.)

Moreover, the evidence of Arjona's guilt was strong. It was undisputed, of course, that Arjona fatally shot Escalera; as to Arjona's claim of self-defense or defense of others, it was also undisputed that Arjona and Bravo reacted to Escalera's presence in their neighborhood as provocation, that Arjona sought to arm himself before it became apparent that Escalera was armed, and that there was no physical evidence of Escalera ever firing a single shot (or of anyone tampering with the gun or the crime scene after the fact), in contrast to the recovery of multiple casings that matched the ones found in the VGL shed. Assuming Arjona fired any of his multiple shots in the reasonable belief of

the necessity to use deadly force as Escalera was by then brandishing his own firearm, the record evidence is unambiguous that Arjona and Bravo initiated the confrontation by driving back to Gramercy, pointing him out to the others, and agreeing to access a firearm before Escalera had taken any aggressive action. To the extent the defense argued that Arjona went to the parking lot shed before Bravo and Casas confronted Escalera, his purpose in doing so was not withdrawal from the ensuing conflict but escalation, in retrieving the gun from C.V., given C.V.'s hesitation about using it. The jury could likewise have concluded that Arjona's use of force, even if his first shot was actually or apparently justified, exceeded what was necessary to neutralize any threat Escalera appeared to pose.

Accordingly, the record reflects that to the extent misconduct occurred, it was harmless.

5. ***Reference to Victim's Photograph***

Finally, Arjona argues that the prosecutor committed misconduct while he displayed Escalera's autopsy photograph. As we explain, to the extent there was error, it was harmless.

During rebuttal, the prosecutor, while displaying an autopsy photograph of Escalera, argued: "There is a guy that got shot. He got shot in the head, the shoulder and the butt, and he's never coming back[,] and his family is not going to see him again." In delivering this part of the argument, the prosecutor "rais[ed] his voice, pretty much yelling that the family . . . is never going to see him again" while gesturing toward the gallery where the family members were seated, as defense counsel noted without dispute in a later mistrial motion. Defense counsel objected on the ground of prosecutorial error; although the trial court instructed the prosecutor to "move on," it did not otherwise rule on the objection, and counsel sought neither a ruling nor an admonition at the time.

Although defense counsel later explained for the record her objection and reasons for not having asked for a curative instruction, this was two days after the prosecutor made his allegedly improper comment and after the jury had retired to deliberate. It is difficult to envision an admonition the trial court could fairly give the jury at that late stage that would not by its timing only compound the error; notably, defense counsel did not propose one but instead opted to move for a mistrial, the denial of which Arjona does not challenge on appeal.

We nonetheless assume without deciding that Arjona preserved this claim. The prosecutor's use of the autopsy photograph was not by itself misconduct, as the photograph was part of the evidence adduced at trial. (*Holmes* (2022) 12 Cal.5th at p. 788 [prosecutor's reference to victims' photographs during argument was fair discussion of evidence].) But the prosecutor here went further and emphatically invoked the impact of Escalera's death on his family, as though the jury could or should consider the magnitude of the family's loss in evaluating the evidence. This was error. (See *People v. Vance* (2010) 188 Cal.App.4th 1182, 1193.)

Because a prosecutor's improper appeal to the jury's sympathy and passion does not, without more, violate federal constitutional rights, we evaluate prejudice based on the *Watson* standard. (See *People v. Fields* (1983) 35 Cal.3d 329, 363.) And under *Watson*, we determine that it is not reasonably probable that absent this brief remark, in the midst of a much longer closing argument, Arjona would have received a more favorable verdict. The evidence at trial included extensive background information regarding Escalera's gang membership and his own history of violence, which made less likely the jury would be moved by a mere balancing of sympathies. Here, the jury was already instructed to decide the case solely based on the evidence and not to let "bias,

sympathy, prejudice, or public opinion" affect its decision. We presume the jury followed these instructions. (*Seumanu*, *supra*, 61 Cal.4th at p. 1345.)[15]

We thus conclude the prosecutor's improper argument was not reversible error.

6. *Cumulative Prejudice*

Finally, Arjona argues that the cumulative impact of the prosecutor's errors requires reversal of his convictions. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Hill*, *supra*, 17 Cal.4th 800, 844 [reversing judgment after finding cumulative effect of multiple trial error and prosecutorial misconduct caused prejudice].) We have found multiple instances of prosecutorial error—the repeated disparagement of defense counsel and the improper appeal to sympathy for Escalera's family. Although individually harmless, the errors here are mutually reinforcing in their appeal to prohibited considerations, whether sympathy for Escalera's survivors or antipathy for the defense representatives. On this record, however, even if we cumulate these errors, it is not reasonably probable that the jury would have reached a more favorable verdict in their absence. (*People v. Williams* (2009) 170 Cal.App.4th 587, 646; *People v. Doane* (2021) 66 Cal.App.5th 965, 984.)

We note the responsibility a public prosecutor bears as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88, overruled on other grounds in *Stirone v. United States* (1960) 361 U.S. 212.) We understand, too, the particular

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[15] We also note the observation by Casas's counsel that the prosecutor's intemperance risked impairing the prosecutor's own credibility with the jury.

challenge a prosecutor faces in a gang-related homicide trial such as this one, where the gravity of the offense risks being muted by improper factors—potential disapproval of a victim's own background or history, untethered to legitimate issues in dispute; devaluation or dehumanization of lives lost at the margins of society; implicit bias as to victim and defendant alike. And we are acutely aware of the acrimony which protracted and contentious litigation can engender, even without those weighty responsibilities, even without the complication of every testifying eyewitness having believed the victim to have either fired the first shot or been on the brink of doing so. But we are compelled to observe that were it not for the strength of the evidentiary record—particularly the combination of Mora-Villalobos's testimony as to Bravo's and Arjona's jailhouse admissions (establishing their respective roles in instigating the ultimately fatal confrontation) and the unambiguous physical evidence (establishing that Escalera never responded to their aggression with such sudden and deadly force that they could not withdraw)—S.G. and Escalera's family might well have been obliged to endure a retrial as the unfortunate and unintended consequence of the errors here.

On this particular record, we conclude that the prosecutorial errors were cumulatively harmless.[16] In doing so, we echo the observation by counsel for the later-acquitted Casas that it might not have been the People who ultimately profited from the prosecutor's style of argument.

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[16] Since we have addressed Arjona's claims of misconduct on their merits notwithstanding any forfeiture, we do not reach his alternative argument that counsel's failure to object to the misconduct below constituted ineffective assistance. Moreover, after considering the instances of misconduct together, we conclude that the misconduct did not " ' " ' "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process" ' " ' " in violation of federal due process rights. (See *Wallace*, *supra*, 44 Cal.4th 1032, 1071.)

E. *Spectators' Display of Escalera's Photograph*

Arjona argues that the trial court violated his constitutional right to a fair trial and eroded the presumption of innocence by permitting courtroom spectators to wear shirts displaying Escalera's photograph. The California Supreme Court has set a high bar for establishing inherent prejudice from spectator activity. (See *People v. Ramirez* (2021) 10 Cal.5th 983 (*Ramirez*) [attendance of 17-18 uniformed police officers at the jury trial of a defendant for murder of a police officer was not inherently prejudicial].) "Ultimately, our review must be deferential to the trial court, whose handling of the challenged scene we evaluate only for abuse of discretion." (*Id.* at p. 1016.) On this record, moreover, we are unable to discern whether the photographs were in fact visible to jurors or so inherently prejudicial that the trial court abused its discretion in failing to require the spectators to either remove or invert the shirts to conceal the message while in the courthouse.

1. *Background*

On one of the days of closing argument, outside the jury's presence, defense counsel objected to the presence of spectators in the courtroom wearing shirts that displayed Escalera's name and photograph, with the caption "In Loving Memory." Defense counsel argued under Evidence Code section 352 and the due process clause that the shirts were inappropriate because they could "cause bias, prejudice or sympathy in favor of the prosecution's case and in favor of [Escalera]." Defense counsel requested that the trial court either ask the spectators to remove their shirts or give an admonition to the jury.

The prosecutor argued that the spectators had a First Amendment right to expression, and he believed that an admonition would be sufficient. The prosecutor also noted that the spectators wearing the shirts were sitting in the second row, and their shirts

would not be visible to the jury when the spectators were seated. Defense counsel pointed out that the spectators would not always be seated.

The trial court noted the presence in the courtroom of 13 people believed to be Escalera's family members but was unable to see the t-shirt without asking, "Could someone wearing a t-shirt stand up so I can see? I can't see any t-shirt." After making this request, the court noted that six of the spectators believed to be Escalera's family were wearing the shirts in question, and of those six, three were wearing sweaters further obscuring their shirts. The trial court, after having one spectator enter the well and stand near the court reporter, described the shirts in question as bearing the words "In Loving Memory" with Escalera's name and his photograph—"just sitting up with a Chicago Bulls hat, maybe sitting in a car." The trial court thereafter stated: "[T]he Court crafted an instruction which I will read to the jury. I believe they do have a [First] Amendment privilege." The trial court also warned the spectators against "outbursts" and instructed them to "conduct yourself like you're in church."

On the jury's return, the trial court instructed the jury in pertinent part as follows: "You must decide this case on the evidence, not on any outside influences, including spectators who are present in support of the decedent or the defendants." The defense did not object to the adequacy or generality of this admonition.

2. *Legal Principles*

Under the Fourteenth Amendment of the United States Constitution, a criminal defendant is presumed innocent until proven guilty, and " 'courts must be alert to factors that may undermine the fairness of the fact-finding process' " and " 'must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.' " (*People v. Zielesch* (2009) 179 Cal.App.4th 731, 744 (*Zielesch*).) "[A] reviewing court must look 'at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an

unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.' [Citation.]" (*People v. Woodruff* (2018) 5 Cal.5th 697, 757 (*Woodruff*), quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 572 (*Flynn*); *Estelle v. Williams* (1976) 425 U.S. 501, 505 (*Williams*).)

Spectator misconduct, including displays of the victim's likeness, "can violate a defendant's constitutional right to a fair trial if it is ' "so inherently prejudicial as to pose an unacceptable threat," ' " i.e., an " ' "unacceptable risk . . . of impermissible factors coming into play." ' " (*People v. Houston* (2005) 130 Cal.App.4th 279, 311 (*Houston*).) But the degree of prejudice varies and is dependent on factors such as the specific message conveyed by the misconduct in light of the facts and issues before the jury. (*Id.* at pp. 315-316; *Zielesch*, *supra*, 179 Cal.App.4th at pp. 745-746.) Although the United States Supreme Court has not applied the "inherently prejudicial" test of *Flynn* and *Williams* to spectator conduct, the Ninth Circuit Court of Appeal has repeatedly recognized that spectator displays may implicate an accused's right to a fair trial. (*Musladin v. LaMarque* (9th Cir. 2005) 403 F.3d 1072, 1077-1078 [spectator buttons displaying victim's photograph were inherently prejudicial and posed unacceptable risk of impermissible factors coming into play], overruled by *Carey v. Musladin* (2006) 549 U.S. 70-74 (*Carey*) [application of the inherent prejudice test to spectator conduct did not meet the definition of " 'clearly established federal law as determined by the Supreme Court of the United States,' " limiting federal habeas relief]; *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828, 829-831 [spectator buttons that read " 'Women Against Rape' " deprived defendant of fair trial], overruled in part by *Carey*, *supra*, 549 U.S. at p. 76.)

Even where spectator displays merely "evoke[] somber feelings about [a victim himself]," they are "unnecessarily disruptive," and " '[t]rial courts possess broad power to control their courtrooms and maintain order and security.' (*People v. Woodward*

(1992) 4 Cal.4th 376, 385, citing Code Civ. Proc., § 128.) The better practice of any trial court is to order such buttons and placards removed from display in the courtroom promptly upon becoming aware of them in order to avoid further disruption." (*Houston*, *supra*, 130 Cal.App.4th at p. 320.)

Ultimately, however, the California Supreme Court has instructed that "the mere possibility" that jurors "may have been influenced . . . is not enough to render the [appearance of spectators] inherently prejudicial." (*Ramirez*, *supra*, 10 Cal.5th at p. 1017.) In *Ramirez*, the trial court overruled an objection—in the defendant's trial for the murder of a police officer—to the presence of 17 to 18 uniformed police officers during closing arguments and the reading of jury instructions; some of those uniformed officers sat in the gallery row directly behind the defendant; one juror, for unexplained reasons, had to pass through the gallery to reach the jury box. (*Id.* at pp. 1016-1017.) The court further suggested that spectator clothing is not "inherently prejudicial" when worn merely to show support for a victim. (*Id.* at pp. 1018-1019 [citing Florida authority distinguishing spectator clothing that "might merely have shown support for the victim or another party" from spectator officers' uniforms that "directly related" to defense theory that victim was not readily identifiable as an officer].)

Accordingly, "[a] spectator's behavior is grounds for reversal only if it is ' "of such a character as to prejudice the defendant or influence the verdict," ' and the trial court has broad discretion in determining whether spectator conduct is prejudicial." (*People v. Winbush* (2017) 2 Cal.5th 402, 463 [trial court did not abuse its discretion in denying defense request to exclude silently crying members of victims' family during guilt phase].) Though deferential, "[t]he abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is

reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fn. omitted.)

3. ***Analysis***

The wearing of these shirts in the courtroom, if seen and recognized by jurors, could have been construed as an effort to communicate to the jury, to invoke sympathy for Escalera and his survivors, and to potentially reproach any who might otherwise be inclined to consider his death justifiable. It is not apparent on this record whether the trial court understood that the spectators' First Amendment rights did not preclude it from exercising its supervisory authority to prohibit their silent display of loving memory for Escalera in the courtroom or courthouse—whether by directing the spectators to cover or invert their shirts or else to leave. [17] We are unable to conceive of a circumstance in which courtroom spectators' display of a victim's photograph to jurors charged with deciding whether a defendant is guilty of the victim's murder would be proper, let alone compelled by the First Amendment.

The record, however, supports an implied finding that the photograph and text were not readily decipherable to the jurors. The trial court was unable to see the t-shirt words or images from the bench without asking a spectator wearing one first to stand and then to enter the well. The defense did not dispute the prosecutor's characterization of where the spectators were seated or that the jurors' view of the spectators so seated would be obstructed. We understand from the trial court's generic reference to spectators in its admonition to the jury (and the absence of objection to the admonition's generality) that a more pointed reference to the t-shirts or the image of Escalera would have risked directing attention to attire that was otherwise likely to escape the jurors' attention.

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[17] There is "no merit whatsoever to the suggestion that the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding." (*Carey, supra*, 549 U.S. 70, 79 (conc. opn. of Stevens, J.).)

In his reply brief, Arjona makes further claims that are unsupported by the record. First, he argues that "[i]n this particular court building in San Jose, the jurors walked in the same corridors as the spectators, so the jurors could see those spectators, and those t-shirts, outside the courtroom, as well as inside the courtroom." To the extent that Arjona's characterization of the courthouse layout is not based on evidence in the record, we must disregard it. (See, e.g., *People v. Szeto* (1981) 29 Cal.3d 20, 35.) And although the record reflects that some jurors had on occasion waited outside the courtroom, the record does not reflect there was any significant overlap between spectators and jurors that would entitle us to reject the trial court's implicit finding that the jurors did not observe the shirts on the day worn. Defense counsel did not dispute the trial court's practice as "very careful" and "very good" in having kept the jurors and spectators separate, seating the jurors only after spectators were seated and ensuring the jurors departed the courtroom first before spectators did.

Second, Arjona argues that because Escalera was a Norteño gang member, the spectators' shirts could have been intimidating, given that Norteños were predominant in the region. We note this specific objection is not one which counsel who observed the shirts and those wearing them thought necessary to raise with the trial court. (See *People v. Hill* (1992) 3 Cal.4th 959, 1000 [failure of timely objection to spectator misconduct to forfeiture of prosecutorial misconduct claim], overruled on a different point as stated in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Stanley* (2006) 39 Cal.4th 913, 952 [preservation of prosecutorial misconduct claim requires timely objection on the specific ground raised on appeal].) Moreover, this intimidation theory finds scant support in the record.

The better practice is to prohibit spectator displays of a victim's likeness in the courtroom, to foreclose any prejudice. (See *Houston*, *supra*, 130 Cal.App.4th at p. 320.) However, under the totality of these circumstances and our deferential review, we see in

the record no basis to reject either the trial court's implicit factual finding that the likelihood of jurors recognizing the image and message on the shirts was low, or its application of the inherent prejudice standard on these facts. The dearth of evidence that the jury actually or even likely saw the shirts is "insufficient to support a claim of error or prejudice." (*Woodruff, supra*, 5 Cal.5th at p. 757.)

F. *Cumulative Prejudice*

Finally, Arjona argues that the cumulative effect of the errors at trial require reversal of the judgment. (*Hill, supra*, 17 Cal.4th at p. 844.) We are troubled by the circumstances that threatened to divert the jury to impermissible considerations—such as sympathy for Escalera's family via their display of his image and the prosecutor's emphatic reference to their loss, or the prosecutor's repeated references to the perceived deceitfulness of the defendants' representatives—particularly in a trial where the defense theory of self-defense/defense of another put the victim's conduct on this and prior occasions directly at issue. But we have found no abuse of discretion in the trial court's decision to permit the spectators to wear the shirts, given its implied finding that the jurors were unlikely to see them. And based on the strength of the prosecution's evidence as previously discussed, we have concluded that the prosecutor's errors were not prejudicial, whether independently or collectively. This leaves us nothing more to cumulate. We accordingly cannot say that Arjona's trial was fundamentally unfair. (See *People v. Rogers* (2006) 39 Cal.4th 826, 890.)

III. DISPOSITION

The judgment is affirmed.

LIE, J.

WE CONCUR:

GREENWOOD, P.J.

GROVER, J.

People v. Arjona
H047331

EXHIBIT C

IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

The People of the State of California, Plaintiff and Respondent, v. GERMAN ALEXIS ARJONA, Defendant and Appellant	)	no. S278861 (former case no. H047331)

Santa Clara County Superior Court case no. C1646260
Cynthia Sevely, Judge

* * *

PETITION FOR REVIEW

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GERMAN ALEXIS (ALEX) ARJONA

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PETITION FOR REVIEW

Appellant German Alexis (Alex) Arjona (Appellant) seeks review of of the decision by the Sixth District Court of Appeal, affirming his conviction for murder, People v. Arjona, no. H047331, opinion filed February 21, 2023, and modified February 21, 2023. (opinion attached as Appendix A)

QUESTIONS PRESENTED

1. In a self-defense/defense of others case, where all four eyewitnesses unanimously testified that the victim fired the first shot, may an appellate court effectively ignore the eyewitness testimony, and find a multiplicity of trial court errors harmless, solely on the theory that there was some forensic evidence that the victim did not shoot, even though the forensic evidence, at best, was ambiguous and inconclusive?

2. Does a prosecutor commit prejudicial misconduct when in rebuttal jury argument he misstates the law multiple times regarding whether an initial aggressor has the right to self-defense?

3. Does a prosecutor commit prejudicial misconduct when in rebuttal jury argument he repeatedly accuses defense counsel of lying, because counsel contended, consistent with the testimony of all four eyewitnesses, that the victim fired first?

4. Were CALCRIM 3471 and 3472, regarding initial aggressors and self-defense, defective, because they failed to instruct that the defendant cannot be responsible for his co-defendants' acts of initial aggression unless the defendant personally intended that those acts be committed?

5. When a jury poses multiple questions which show that it was not unanimous regarding whether the prosecution had disproven a necessary element of self-defense, may its lack of unanimity be ignored,

because, after an alternate juror was seated, the trial court instructed the jury to deliberate anew?

6. Did the trial court prejudicially err in this self-defense case, when it allowed spectators to wear t-shirts displaying the victim's picture and sympathetic slogans?

GROUNDS FOR REVIEW

Review is warranted under Rule 8.500 to resolve important questions of law, and to clarify conflicts between opinions. In particular:

Review should be granted on questions #1, #2, and #3, because the Court of Appeal violated the most elemental rules of due process when it affirmed Appellant's murder conviction based on a complete fiction.

Appellant defended on self-defense/defense of others. Appellant contended that he fired his pistol only after homicide victim Escalera fired first. Four eyewitnesses unanimously testified that Escalera fired first.

The Court of Appeal found that numerous errors and prosecution misconduct occurred, but it deemed them all harmless, on the theory that self-defense was not warranted, because victim Escalera supposedly did not fire his semi-automatic pistol. In so ruling, the Court of Appeal accepted the prosecutor's contention, contrary to the testimony of all four eyewitnesses, that Escalera did not shoot. The prosecutor's argument was largely based on the fact that no cartridge was found in the chamber, and that ordinarily a semi-automatic pistol will cycle a new cartridge into the chamber after it has been fired. However, there was also police testimony to the contrary that the pistol may have jammed after being fired once, and that is why an additional cartridge was not cycled into the chamber. Accordingly, the forensic evidence was ambiguous and inconclusive.

The Court of Appeal erred when it relied exclusively upon the

ambiguous forensic evidence to find the errors and misconduct harmless, without taking into account the unanimous eyewitness testimony that Escalera fired.

To examine this case properly, the Court of Appeal should have decided the question of prejudice regarding the multiplicity of errors in light of all the evidence. It did not. Instead, it found the numerous errors harmless, based solely on the prosecutor's groundless and fictional claim that the gun was not fired, without considering the unanimous eyewitness testimony that the victim did fire his weapon.

Review is warranted on this issue, or else this Court should grant review and transfer this case back to the Court of Appeal under Rule 8.528(d), so that an appellate court may consider for the first time the question of prejudice in light of all the evidence, including the unanimous eyewitness testimony that Escalera fired first.

On question #5 review should be granted regarding the lack of jury unanimity, because the trial court violated Appellant's constitutional right to a unanimous verdict on every necessary element of the crime. Ramos v. Louisiana (2020) ___U.S. __ , 140 S. Ct. 1390; People v. Smith (2014) 60 Cal.4th 603, 618; People v. Russo (2001) 25 Cal.4th 1124, 1132. That occurred when the jury was allowed to convict Appellant, even though the jury repeatedly showed by three separate questions to the trial court that it was not unanimous as to whether the prosecution disproved any single element of self-defense.

STATEMENT OF THE CASE AND OF THE FACTS

Appellant Arjona was convicted of one count of first degree murder, and personal discharge of a firearm causing death.

Homicide victim David Escalera, a Norteno, walked through a known Sureno neighborhood. Two unarmed Surenos ran toward Escalera, to challenge him. All four eyewitnesses testified that Escalera pulled a semi-automatic pistol from his pocket and fired one shot at his adversaries' feet. Then Escalera chased after a third Sureno, while pointing his pistol at him and other Surenos, including Appellant Alex Arjona. Appellant was standing behind a parked car, holding a pistol. Arjona shot and killed Escalera. Appellant defended on self-defense/defense of others.

I.

THE COURT OF APPEAL FOUND NUMEROUS ERRORS HARMLESS IN THIS SELF-DEFENSE CASE, BASED UPON THE PROSECUTOR'S FICTION THAT HOMICIDE VICTIM ESCALERA DID NOT SHOOT FIRST; THIS WAS A MISCARRIAGE OF JUSTICE, BECAUSE ALL FOUR EYEWITNESSES TESTIFIED THAT ESCALERA FIRED THE FIRST SHOT

A. Introduction

In this self-defense/defense of others case the Court of Appeal found a multiplicity of errors, but found them harmless, based on the prosecutor's fiction that homicide victim Escalera did not shoot. This conclusion was a miscarriage of justice, Cal. Const., Art. VI, §13, because it effectively ignored the unanimous testimony of four prosecution eyewitnesses that Escalera shot, and shot first. Review, or review and transfer, Rule 8.528(d), is warranted to cure this injustice.

B. The Errors and Misconduct Were Not Harmless; Appellant Had a Strong Self-Defense Case in Light of the Unanimous Eyewitness Testimony that Escalera Fired First

Homicide victim David Escalera, a Norteno, walked through a known Sureno neighborhood. Two unarmed Surenos ran toward Escalera, to challenge him. All four eyewitnesses testified that Escalera pulled a semi-automatic pistol from his pocket and fired one shot at his adversaries' feet. Then Escalera chased after a third Sureno, while pointing his pistol at him and at other Surenos, including Appellant Arjona. Appellant was standing behind a parked car, holding a pistol. Arjona shot and killed Escalera.

Under the "initial aggressor" doctrine, if Arjona and his fellow gang members started this fight, then Appellant lacked the right to self-

defense/defense of others. However, under the "escalation doctrine," if Escalera "responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant [regained] the right to defend himself with deadly force." People v. Ross (2007) 155 Cal.App.4th 1033, 1045; People v. Quatch (2004) 116 Cal.App.4th. 294, 301, CALCRIM 3471; CALCRIM 3472;

So, the questions for the jury were i) whether Appellant was an initial aggressor and; ii) if so, whether the escalation doctrine allowed Appellant to shoot back at Escalera in self-defense.

The Court of Appeal found numerous errors. It found prosecution misconduct in repeatedly arguing to the jury, contrary to law, that initial aggressors lacked the right to self-defense. (opinion pp. 24-27) It found prosecution misconduct in repeatedly accusing defense counsel of lying when defense counsel argued that Escalera fired his weapon (opinion pp. 34-38); prosecution misconduct in arguing for sympathy for the victim's family (opinion pp. 38-41); and spectator misconduct for wearing t-shirts with photographs and sympathetic messages regarding the victim (opinion pp. 42-27). Nonetheless, the Court of Appeal found this multiplicity of errors harmless, because it believed the evidence of Appellant's guilt was strong, and that the evidence of self-defense was weak. (opinion pp. 36-38)

In ruling on the question of prejudice, the Court of Appeal effectively ignored the testimony of four eyewitnesses that Escalera fired his weapon. Instead, the opinion wholly relied upon the prosecutor's fiction that Escalera did not shoot. The opinion's reliance upon this fiction was unjust and unwarranted. Review, or grant and transfer (Rule 8.528(d)), is warranted, so an appellate court may for the first time evaluate the question of prejudice in light of the actual evidence, including the unanimous testimony by all four eyewitnesses that Escalera fired his gun, and fired

first.

All four prosecution eyewitnesses, Susana Garcia (Escalera's girlfriend (S.G.)), Gloria Alvarez (G.A.), Maria Alcazar (M.A.), (mother and daughter who lived on that street) and Roque Mora-Villalobos testified that they saw and heard Escalera fire his pistol. Garcia saw the gun's slide move, and saw Escalera's arm recoil. Alvarez saw a bullet fragment from Escalera's gun jump up from the street. (RT:XV:4335-4336) The Court of Appeal gave no explanation of how all four eyewitnesses could be wrong.

The prosecutor asserted, contrary to these four eyewitnesses, that Escalera did not shoot. That meant, according to the DA, that Arjona did not have any right to fire in self-defense. The claim that Escalera did not shoot was based on the facts (i) that when his Taurus pistol was examined approximately two hours after the shooting, its safety was on; (ii) that no round was found in the chamber; and iii) that no shell casing was found near Escalera's body. (RT:XXVII:7895-7914) According to the prosecutor and some of the police testimony, that meant the gun had not been fired.

However, other facts, inferences, and additional police testimony, when combined with the unanimous testimony of the four eyewitnesses, disproved the prosecution's claim that Escalera did not fire.

(i) Regarding the DA's assertion that the safety was "on":

Officer Dellacarpini arrived first. She saw Escalera's pistol lying next to his body. She did not touch it. She did not remember whether the safety was on or off. She stepped aside to interview Susana Garcia. At that point Dellacarpini was no longer watching the firearm. (RT:XV: 4372-4374)

15-20 police officers were present at some time during that day. One of those 15-20 officers most likely switched the Taurus' safety to "on." It is standard police procedure to ensure a safety is on when a firearm is located,

to prevent it from being fired, or discharging accidentally. Before an officer would check that the safety is on, he would put gloves on, to avoid contaminating the gun.

Nonetheless, the prosecution failed to call any of those officers to prove no one handled the firearm in the one hour and fifty minutes after Dellacarpini saw it and stopped paying attention to it, and before officer O'Brien examined it.

(ii) Officer O'Brien testified there was no round in the chamber. He and the prosecutor contended that meant that the pistol had not been fired recently. Normally the slide of a semi-automatic pistol transfers a cartridge into the chamber after a prior round is fired. However, officer Riles, the prosecution's firearms expert, test-fired Escalera's pistol many times. The magazine in Escalera's pistol sometimes did not fit properly. If the magazine did not fit properly, this pistol would sometimes jam and not transfer another cartridge into the chamber after firing. Officer Riles testified that when the magazine had its full complement of 15 rounds, it sometimes did not fit properly.

Riles also explained that several cartridges in Escalara's Taurus had been modified to make them "hollow point" to be more deadly. Such modification could cause the cartridges and magazine not to fit properly. That could explain how the pistol could be fired once, and then jam, without the slide moving another round into the chamber. Riles never attempted to fire the Taurus when it had 15 bullets in the magazine plus one in the chamber.

iii) Regarding the DA's assertion that no shell casing was found near Escalera's body: that did not prove much. Shell casings often bounce and roll. After he fired, Escalera ran some distance before he was shot. So, that shell would not have been near where he fell. Several vehicles,

including an ambulance, drove through the area. Tire treads can easily pick up a shell.

iv) Officer Riles did not examine the pistol to determine if gunpowder residue was present. The presence or absence of gunpowder residue would show whether it had been fired recently. But, because he checked for fingerprints first, that used chemicals which washed away any gunpowder. (RT:XIX:5523-5524)

Because the forensic evidence was inconclusive as to whether the gun was fired, and because all four eyewitnesses testified that Escalera fired his weapon, the prosecutor's claim that Escalera did not fire his weapon was complete fiction.

The most logical explanation for how four witnesses could have seen and heard the gun fire, and yet the chamber was empty, is as follows: The pistol jammed after it was fired once. If the pistol fired once, and then jammed, according to officer Riles, that probably was because it had not been loaded properly, or because the bullets had been modified to make them "hollow point," which made them not fit properly. Because the gun jammed, a new cartridge was not cycled into the chamber.

Because the gun was fired once, and then jammed, the magazine only held 14 rounds, not the full load of 15. The opinion fails to give any explanation for why the magazine only held 14 rounds.

The opinion asserts several times that the "forensic evidence" established that Escalera's gun was not fired. (opinion pp. 21, 37, 41) These assertions are mistaken, contrary to the record, and complete fiction. All four eyewitnesses testified that Escalera fired his gun. The forensic evidence failed to disprove the eyewitnesses' testimony. At best, the forensic evidence was inconclusive. Accordingly, it did not overcome the unanimous testimony of the four eyewitnesses that Escalera fired his

weapon.

The Court of Appeal in its opinion initially characterized the forensic opinion as "unambiguous." (opinion, 41) However, when the Court of Appeal modified its opinion on February 21, 2023, in response to the petition for rehearing, it deleted the word "unambiguous." (The modification order is at the end of Appendix A) Thus, the Court of Appeal implicitly recognized that the forensic evidence was ambiguous. When forensic evidence is ambiguous, it cannot trump the unanimous testimony of four eyewitnesses that Escalera fired his weapon.

C. The Errors and Misconduct Were Cumulatively Prejudicial

The errors and misconduct were cumulatively prejudicial, because this case was close on self-defense. Prior to the substitution of one juror during deliberation, the jury asked multiple questions and showed multiple times it was not unanimous regarding whether the prosecutor had disproven self-defense. (See opinion, pp. 10-11 and sec. IV. below.) That undisputably showed the case was close.

There were two major aspects of prosecution misconduct. First, during rebuttal jury argument the prosecutor wrongly argued five separate times that initial aggressors were not entitled to self-defense.[1] See sec. II, infra.) As the opinion recognizes, portions of that argument were legally wrong. (opinion, pp. 24-27) Under the escalation doctrine, initial aggressors can regain the right to self-defense, if their adversary shoots first. People v. Ross, supra: CALCRIM 3472.

Second, during rebuttal argument the prosecutor repeatedly but wrongly accused defense counsel of lying, and being "two-faced,"

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[1]The prosecutor corrected that error once, but he did not correct it the other four times.

and"twist[ing] words," and making things up, when they contended that Escalera fired his weapon. (See opinion pp. 34-37, and see sec. III, infra.) Those two types of misconduct were cumulatively prejudicial, because they advocated the same premises, namely, (1) that Escalera did not shoot, and (2) that, because Escalera supposedly did not shoot, then Appellant had no right to fire in self-defense.

This misconduct hit Appellant where it hurt, because his defense depended upon the fact that Escalera fired. By contrast, those accusations of lying did not matter to the co-defendants, because they committed their *actus reus* before Escalera drew his pistol.

If the prosecutor could convince the jury that defense counsel lied regarding whether Escalera fired, that would eliminate any right to self-defense. That is because, if Escalera did not fire, then Arjona was probably an initial aggressor, who had no right to self-defense. Accordingly, the misconduct was prejudicial.

This case was close. Before the substitution of the alternate juror, the jury was divided, and not unanimous, on whether the prosecution had disproven delf-defense. The jury deliberated for five days. It asked multiple questions, and returned lesser verdicts for the co-defendants. These factors establish that this case was close. People v. Woodard (1979) 23 Cal.3d 239; Olden v. Kentucky (1988) 488 U.S. 227, 233; People v. Pearch (1991) 229 Cal.App.3d 1282, 1295. Accordingly, the errors and misconduct were prejudicial.

II.

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT

A. The Prosecutor Committed Misconduct in Rebuttal Jury Argument, when He Repeatedly Misstated the Law by Arguing Self-Defense Did Not Apply to Initial Aggressors

A prosecutor commits misconduct when he misstates the law in jury argument. People v. Centeno (2014) 60 Cal.4th 659, 667; People v. Mendoza (2007) 42 Cal.4th 686, 702.

During rebuttal jury argument the prosecutor misstated the law five times regarding self-defense and initial aggressors:

1. He said: February 17, 2023"Self-defense law doesn't even apply to those men. . . The self-defense law absolutely does not apply to initial aggressors." (RT:XXVII:7821) Defense counsel objected. The trial court overruled the objections. (Id.)

2. The prosecutor continued, "A defendant's wrongful conduct, when that creates circumstances that give rise to the victim acting in self-defense, the initial aggressor doesn't get self-defense; even if it's legitimate self-defense, doesn't apply to you." (RT:XXVII:7821-7822) Defense counsel repeated her objection, but it was overruled. (RT:XXVII:7843-7844)

3. The prosecutor argued "There was no self-defense or imperfect self-defense for aggressors. . . . If you find in this case that the defendants were the initial aggressors, your verdict is murder. There is no justification or excuse when you are the initial aggressor." The defense objection was overruled. (RT:XXVII:7885-7886) Shortly afterward, the prosecutor corrected this misstatement by describing the escalation doctrine.

4. The prosecutor argued a fourth time that they do not

get "self-defense because they are initial aggressors." (RT:XXVII:7895-7896)

5. Then the prosecutor argued for the fifth time that initial aggressors do not have the right to self-defense. (RT:XXVII:7914) At a sidebar conference the next morning counsel repeated her objection to the prosecutor's argument that the defendants had no right to self-defense because they were initial aggressors. Again, the objections were overruled. (RT:XXIX:8403-8404)

These arguments were misstatements of law. A defendant who is the initial aggressor can regain the right to self-defense if he initially acts without using deadly force, but if his adversary responds suddenly with deadly force. People v. Ross (2007) 155 Cal.App.4th 1033, 1045; People v. Quatch (2004) 116 Cal.App.4th 294, 301-302; CALCRIM 3471; CALCRIM 3472. Accordingly, the prosecutor spoke a half-truth in his arguments, misstated the law, and committed misconduct.

The trial court multiple times, in front of the jury, overruled defense objections to the prosecutor's arguments that initial aggressors have no right to self-defense. That condoned the prosecutor's arguments. That was equivalent to repeatedly telling the jury the prosecutor's arguments regarding initial aggressors were right. People v. Lloyd (2015) 236 Cal.App.4th 49, 63; People v. Vance (2016) 188 Cal.App.4th 1182, 1202, 1207. That rendered the prosecutor's improper arguments even more prejudicial.

Defense counsel moved for a new trial on several grounds, including this misconduct. The trial court denied the motion. It agreed the prosecutor misstated the law by claiming that initial aggressors never have the right to self-defense. It stated *inter alia*:

> The misstatement of law, if accepted by the jury, might have precluded a defense of lawful self-defense or defense of

> others if the jury also found that the escalation doctrine applied here. Precluding self-defense or defense of others might well have made the element of malice easier to prove for the prosecution. (CT:IV:1008-1009)

However, the trial court found these misstatements of law harmless because, according to the trial court, the prosecutor only made this misstatement once and then supposedly corrected it. (CT:IV1007-1009)

The trial court was wrong when it said the misstatement of law was harmless, because the prosecutor supposedly only made such a misstatement of law once. In fact, he made such misstatements five separate times. And the trial court was wrong when it asserted that the prosecutor corrected his misstatements. He did not. He only corrected one of his five misstatements of law.

Because the prosecutor misstated the law on initial aggressors five separate times, and because the question of whether the defendants had the right to self-defense was the central issue in this case, this misconduct should be deemed prejudicial.

B. The Prosecutor Committed Misconduct When He Disparaged Defense Counsel During Rebuttal Jury Argument

A prosecutor commits misconduct when he personally attacks defense counsel, and when he improperly attacks defense counsel's credibility. People v. Seumanu (2015) 61 Cal.4th 1293, 1337-1338. The prosecutor improperly disparaged defense counsel numerous times during rebuttal jury argument:

1. He argued "Remember, I told you that they [defense counsel] were t*wo-faced* in their reliance on witnesses. I told you in my closing argument that they were going to say that the things that Roque [Mora-Villalobos] said that were helpful for them. They said, 'Oh, yeah, that's the truth.' And the things that Roque said that hurt them 'No, that's

not the truth.'" (RT:XXIX:8497, emphasis added)

"And the same thing with Susana [Garcia]. All the things that Susana said that were helpful for them 'Oh, yeah. That was absolutely the truth.' And all the things that hurt them 'Oh, she was lying about that.'" . . . Unless they can explain why you should believe the things that helped them and disregard the things that hurt them, it just *undermines the defense credibility.*" (RT:XXIX:8497, emphasis added)

2. The prosecutor argued that defense counsel said, [']Susana was concerned David [Escalera] was going to start something.['] You can read her testimony back. This, again, is an attempt by the defense to *twist facts and lie* as to what actually was said. . . She never said she was worried he was going to start something. Never said that, never. But they said it, the defense said it. Doesn't make it true." (RT:XXIX:8514, emphasis added)

3. The prosecutor argued, "The defense refused to concede that David [Escalera] never fired that gun. Absolutely refused. And that ruling *undermines their credibility* ladies and gentlemen. This shows you the weakness of the defense in this case." (RT:XXIX:8527, emphasis added)

4. The prosecutor concluded: "The defense in this case is a conspiracy theory. . . David [Escalera] shot that gun despite no physical evidence to support it. . . .

"It's all conspiracy theory, ladies and gentlemen, without any evidence. . . So if you believe that, ladies and gentlemen, if you believe these ridiculous arguments made by the defense, then you might as well believe that's not Buzz Aldrin standing on the moon." Then the prosecutor showed the jury the famous photograph of the first moon landing in July 1969.

1969.

After the prosecutor concluded his rebuttal, the defense placed on the record objections to these arguments which were made and overruled during non-reported sidebar conferences.

The prosecutor argued defense counsel were not credible because they refused to "admit" that Escalera never fired a gun. (RT:XXIX:8527) This attack on defense counsel's personal credibility for taking such a position on the evidence, and for arguing that Escalera did fire his weapon, was galling. It was prosecution misconduct.

One major factual dispute was whether or not Escalera fired his handgun. Four separate prosecution witnesses testified that they both saw and heard him fire the pistol. (See p. 15, supra)

The prosecutor claimed there was allegedly irrefutable physical evidence that Escalera did not fire his pistol. However, as shown above, the forensic evidence was not irrefutable; it was inconclusive, especially in light of the unanimous eyewitness testimony that Escalera did shoot.

When the prosecutor accused the defense counsel of lacking credibility, and engaging in a conspiracy, when they argued one version of the evidence rather than another, that accusation was misconduct. People v. Seumanu (2015) 61 Cal.4th 1293, 1337-1338. People v. Hill (1998) 17 Cal.4th 800, 831."To state or imply that defense counsel has fabricated a defense is generally misconduct." People v. Bain (1971) 5 Cal.3d 839, 847.

C. The Prosecutor Committed Misconduct When He Appealed to Passion and Sympathy While Showing a Photograph of the Victim Lying on the Autopsy Table

A prosecutor commits misconduct during jury argument when he appeals to sympathy, or to the passion and prejudice of the jury. People v. Fields (1983) 35 Cal.3d 329, 362.

During rebuttal argument, the prosecutor showed a photograph of

Escalera on the autopsy table, and stated "And his family is not going to see him." The defense objection was overruled. When the prosecutor said the victim's family would never see him again, he gestured to the part of the courtroom where the victim's family was sitting.

That argument was misconduct. People v. Vance (2016) 188 Cal.App.4th 1182, 1192 (murder conviction reversed for prosecutorial misconduct after the prosecutor urged jury to consider victim's suffering and the effect of the crime on victim's family.) It is misconduct for the prosecutor to ask the jury to imagine the suffering of the victim. People v. Redd (2010) 48 Cal.4th 691, 742.

D. The Prosecutorial Misconduct Denied Due Process

This repeated prosecutorial misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process under the 5th and 14th Amendments. Darden v. Wainwright (1986) 477 U.S. 168, 181; Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642; People v. Hill (1998) 17 Cal.4th 800, 817. Accordingly, the standard of prejudice is harmless beyond a reasonable doubt under Chapman.

E. These Arguments Are Properly Raised on Direct Appeal; However, If, *Arguendo*, Defense Counsel Did Not Adequately Object to Preserve These Issues, Then Defense Counsel Rendered Ineffective Assistance

Appellant believes trial counsel adequately objected to these prosecution arguments to preserve these issues for appeal. The Court of Appeal reached them on the merits. There is no requirement that an objection be made at the outset of assertedly improper arguments, as long as it is made in sufficient time for correction by the court. People v. Peoples (2016) 62 Cal.4th 718, 801.

However, if, *arguendo*, counsel did not adequately object, counsel rendered ineffective assistance of counsel (IAC). Strickland v. Washington

(1984) 466 U.S. 668; People v. Pope (1979) 23 Cal.3d 412. IAC occurs (1) when trial counsel fails to exercise the proper level of professional competency, and (2) when that failure is prejudicial, meaning that, without the IAC, there was a reasonable probability of a more favorable result.

These issues may be raised on direct appeal because there could not have been any valid strategic reason not to object. People v. Nation (1980) 26 Cal.3d 169, 180.

F. Prejudice - These Acts of Prosecution Misconduct Were Individually and Cumulatively Prejudicial

When the prosecutor argued that self-defense did not apply to initial aggressors, he misstated the law on the central issue. The defendants asserted they had the right to self-defense, because Escalera was the first person to shoot. Four witnesses testified that Escalera fired at the ground near Bravo's feet. Then Escalera chased after Mora-Villalobos and the other defendants while pointing his firearm at them. These facts were more than sufficient to raise a reasonable doubt as to self-defense. However, the prosecutor argued repeatedly that initial aggressors do not have the right to self-defense. That argument misstated the law. An initial aggressor may regain the right to self-defense if the victim is the first to use deadly force. People v. Ross, supra, 155 Cal.App.4th 1033, 1045; CALCRIM 3471. The misconduct undercut the defense of self-defense, as the trial court acknowledged. (see pp. 21-22, supra.)

The trial court found this misconduct harmless, because it believed the prosecutor only made that misstatement once. It was wrong. The prosecutor made such misstatements five separate times. The court was also wrong when it asserted the prosecutor corrected his misstatements. He only corrected his misstatements once.

2. The prosecutor's personal attack on defense counsel

was prejudicial, because he repeatedly accused defense counsel of lying regarding whether Escalera fired his weapon; and whether the defendants had the right to shoot in self-defense. The personal attacks on defense counsel's integrity were prejudicial, because they were unfounded, and because the success of the defense depended upon the jury accepting the credibility of defense counsel's arguments that Escalera did shoot.

3. The prosecutor improperly appealed to passion and sympathy when he showed a photograph of the victim lying on the autopsy table, and when he urged the jury to consider the victim's suffering and the effect of the crime on the victim's family.

4. These improper arguments were individually and cumulatively prejudicial, because they went to the key issues in this case. People v. Hill, supra, 17 Cal.4th at 820. This case was close. Before one juror was substituted out, the jury was divided, and not unanimous, on whether the prosecution had disproved any one of the three elements of self-defense. For all these reasons, this misconduct was prejudicial.

The Court of Appeal found these errors and prosecution misconduct harmless, on the theory that the forensic evidence proved that Escalera did not shoot. However, as shown in sec. I, supra, that conclusion was inaccurate and based upon fiction.

III.

THE TRIAL COURT ERRED IN INSTRUCTING ON CALCRIM 3471 "RIGHT TO SELF-DEFENSE : MUTUAL COMBAT OR INITIAL AGGRESSOR," AND ON CALCRIM 3472 "RIGHT TO SELF-DEFENSE MAY NOT BE CONTRIVED," BECAUSE IT FAILED TO INSTRUCT CORRECTLY REGARDING ARJONA'S PERSONAL INTENT

A. Introduction

CALCRIM 3471 and CALCRIM 3472 state some self-defense principles. There are two parts to these instructions. (1) Someone who starts or provokes a fight ("initial aggressor") does not have the right to self-defense. (2) There is an exception (the "escalation" exception): If the initial aggressor acts with non-deadly force, but if his opponent responds with deadly force so quickly that the initial aggressor could not withdraw from the fight, then the initial aggressor regains the right to self-defense.

Arjona defended in the alternative: First, he did not intend to start or provoke a fight. That means he always had, and never lost, the right to self-defense/defense of others. CALCRIM 3471 and CALCRIM 3472, which discuss a defendant who starts a fight, were defective regarding Arjona, because they failed to tell the jury that it needed to determine Arjona's own personal intent - - including whether he personally intended to start a fight - - separately from that of his co-defendants.

Arjona's second and alternative defense was: If, *arguendo*, he initially lost the right to self-defense, then he regained that right after his opponent, Escalera, escalated the situation, when he used deadly force. That occurred when Escalera pulled out his pistol, fired a shot near Bravo's feet, and then chased after the co-defendants while pointing his pistol at them.

The trial court instructed on CALCRIM 3472:

> 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.
>
> 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 stop fighting or communicate the desire to stop to the opponent, or give the opponent the chance to stop fighting. (CT:III:726)

CALCRIM 3471 was similar.

However, the trial court erred when it failed to instruct that the initial aggressor instructions could only apply to Arjona if the jury found he had the same intent as Bravo and his companion, when they began this fight by encountering Escalera on the sidewalk.

B. A Defendant's Mental State Must Be Evaluated Separately from that of His Co-Defendants

Escalera, a Norteno, walked on the sidewalk through a known Sureno neighborhood. Two unarmed Surenos, Bravo and a companion, walked rapidly toward Escalera. When they were 10-15 feet away, according to four eyewitnesses, Escalera pulled out a pistol, held it a 45° angle, and fired one shot near the feet of one of the men. The Surenos fled. Escalera ran after them, pointing his pistol at them. Appellant stepped out from behind a vehicle. He shot and killed at Escalera.

The trial court erred when it failed to instruct the jury that it could not apply CALCRIM 3471 and CALCRIM 3472 to disqualify Appellant from self-defense, unless it found Arjona personally had the same intent as Bravo and his companion when they encountered Escalera on the sidewalk.

When there is both a direct perpetrator and an aider and abettor, the *mens rea* of the perpetrator must be determined independently from the

mens rea of the aider and abettor. People v. McCoy (2001) 25 Cal.4th 1111; People v. Amezcua and Flores (2019) 6 Cal.5th 886, 917. McCoy held that a perpetrator could have a particular mental state defense, such as self-defense, or heat of passion, even though the aider or abettor did not have the same right to act in self-defense or heat of passion. People v. McCoy, supra, 25 Cal.4th at 1121.

Here, Bravo and his companion could have committed second degree murder on the theory that they intended to assault Escalera, and the natural and probable consequences of that assault was murder. On that theory, they did not have the right to self-defense, because they were initial aggressors, and because they threatened to assault Escalera first.

However, Arjona's situation was different. If Arjona did not initially intend for Bravo and his companion to assault Escalera, then Appellant's *mens rea* was different than that of the co-defendants. Under those circumstances, Appellant would not be an initial aggressor. People v. McCoy, supra. Under those circumstances, Appellant would have the right to shoot at Escalera in self-defense, or defense of others. Alternatively, he had the right to imperfect self-defense if his belief was actual but unreasonable. People v. Elmore (2014) 59 Cal.4th 121.

Further, the mental state of the perpetrator must be evaluated as of the time when he commits his own alleged criminal act(s) (*actus reus*), and not (if that time was different) when the aider and abettor commits his own wrongful acts. People v. Cooper (1991) 53 Cal.3d 1158, 1160, 1164; People v. Lewis (2001) 25 Cal.4th 610, 647. Here, Bravo and his companion confronted Escalera substantially before Arjona fired.

The trial court never told the jury it could only apply CALCRIM 3471 or CALCRIM 3472 to Arjona if it found he was aiding and abetting, or conspiring with, his co-defendants, when they started the fight. Because

the trial court failed to deliver such an instruction, CALCRIM 3471 and CALCRIM 3472 were defective.

The defendant's personal intent to kill is a necessary element of murder. People v. McCoy, supra, 25 Cal.4th at 1118-1121. Because the trial court failed to instruct that the jury must evaluate Arjona's intent separately from that of his co-defendants, CALCRIM 3471 and CALCRIM 3472 were erroneous. The failure to instruct correctly on a necessary element of the crime, such as personal intent, violates the due process clause of the 5th and 14th Amendments. Sandstrom v. Montana (1979) 442 U.S. 510. That also violates the jury trial right under the 6th and 14th Amendments. Neder v. United States (1999) 527 U.S. 1, 12. The standard of prejudice for those constitutional violations is harmless beyond a reasonable doubt. Chapman v. California (1967) 386 U.S. 18.

C. Prejudice

The failure to instruct correctly was prejudicial. The jury may well have convicted Appellant based on the *mens rea* of his co-defendants, rather than on Appellant's own mental state. We know the jury did not convict on a conspiracy theory, because it only convicted Bravo of second degree murder, and because it acquitted Casas.

The error was prejudicial because the central issue was whether Arjona had the right to fire in self-defense/defense of others. He had the right to fire in self-defense if he had not intended to be involved in a fight until after Escalera fired his handgun, and then chased after the co-defendants while pointing his handgun at them.

The instructional error was further prejudicial because this case was close.[2]

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[2]The Court of Appeal found the instructions correct. Appellant disagrees for the reasons stated here.

IV.

THE TRIAL COURT ERRED IN REFUSING TO ANSWER THE JURY'S QUESTIONS IF IT NEEDED TO BE UNANIMOUS WHETHER THE PROSECUTOR HAD DISPROVEN ONE SPECIFIC ELEMENT OF THE THREE ELEMENTS OF SELF-DEFENSE

A. Facts

The trial court instructed the jury on CALCRIM 505, "Justifiable Homicide: Self-Defense or Defense of Another." On the second day of deliberation, the jury sent the following written question:

"If the Jury is not unanimous on any one of the three [self-defense] criteria (page 83), but every individual agrees on at least one of the criteria, does that constitute a unanimous agreement on the applicability of self-defense as a whole[?]"

The trial court asked the jury to "clarify." The jury wrote a second note and said: "All of us do not agree on the same criteria. Example: (1) The defendant reasonably believed that . . . (2) The defendant reasonably believed . . . (3) Defendant used no more force . . ." (CT:III:742)

The jury was referring to the first part of CALCRIM 505 which said:

> "The defendant is not guilty of murder/or manslaughter if he was justified in killing someone in
>
> a. self-defense or
>
> b. defense of another.
>
> The defendant acted in lawful
>
> a. self-defense
>
> b. or defense of others; if
>
> 1. The defendant reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury.

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

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger." (See CT:III:721)

The above-listed elements are the three elements of self-defense.

Just as with the first note from the jury, the trial court refused to answer. Again, it asked the jury to "clarify." Defense counsel asked the court to tell the jury that, in order to convict, it must be unanimous that the prosecution had disproven one of the three elements of self-defense. The trial court refused to give that answer, or any answer.

On the third day of deliberation, a juror was excused. An alternate was seated. Then the jury asked the same question about unanimity a third time. Again the trial court refused to answer. It told the jury to deliberate anew. The jury deliberated for two more days and then returned its verdict.

B. The Jury Cannot Convict the Defendant of Homicide Unless the Prosecution Proves Beyond a Reasonable Doubt that at Least One of the Three Elements of Self-Defense/Defense of Others Was Disproven (Not Established)

Under the 5th and 14th Amendments' due process clause, the prosecution must prove every element of the crime beyond a reasonable doubt. United States v. Gaudin (1995) 515 U.S. 506, 511; People v. Flood (1998) 18 Cal.4th 470, 479-480. In Mullaney v. Wilbur (1975) 421 U.S. 684, 698, 702-703, the Supreme Court held that when self-defense is presented, the prosecution must prove the absence of self-defense beyond a reasonable doubt. Under California law, when, as here, there is sufficient evidence of self-defense, the prosecution must prove beyond a reasonable

doubt the absence of self-defense, namely, that the killing was not justified. People v. Humphrey (1996) 13 Cal.4th 1073, 1082, 1085; People v. Aris (1989) 215 Cal.App.3d 1178, 1193; CALCRIM 505, last paragraph.

Humphrey and Aris hold there are three elements of self-defense/defense of others. They are listed on pp. 32-33, supra. The prosecutor told the jury during closing argument that these were the three elements of self-defense. (RT:XXVII:7868)

C. The Jury Must Be Unanimous on Each Necessary Element of a Crime; That Means here that the Jury Must Be Unanimous on the Specific Element of Self-Defense which the Prosecution Has Disproven

In a criminal case a jury must be unanimous. Ramos v. Louisiana (2020) __ U.S. __, 140 S. Ct. 1390; People v. Russo (2001) 25 Cal.4th 1124, 1132. The unanimity requirement is based upon the 6th Amendment's jury trial right. The unanimity requirement applies to all necessary elements of a crime. People v. Smith (2014) 60 Cal.4th 603, 618; People v. Russo, supra, 25 Cal.4th at 1132. That means Appellant could not be convicted unless the jury was unanimous that the prosecutor had disproven one specific element of the three elements of self-defense.

The trial court erred when it failed to answer the jury's questions. It erred when it failed to instruct the jury that it had to be unanimous on at least one specific element of self-defense which the prosecution had disproven in order to convict. It erred when it failed to disabuse the jury of its non-unanimous position. It erred when it allowed the jury to convict without being unanimous.

Under the 6th Amendment's jury trial right, the jury must render a "complete verdict" on every element of a crime. Neder v. United States (1999) 527 U.S. 1, 12 -13. There was no "complete verdict" here, because the jury failed to be unanimous on the necessary element of self-defense

which it believed the prosecution had disproven.

When the trial court refused three times to answer the jury's questions, it violated its statutory duty to answer questions. Penal Code §1138; People v. Beardslee (1991) 53 Cal.3d 68, 97; People v. Smithey (1999) 20 Cal.4th 936, 985: "Section 1138 . . . creates a '"mandatory" duty to clear up any instructional confusion expressed by the jury.'" People v. Loza (2012) 207 Cal.App.4th 332, 355, quoting People v. Gonzalez (1990) 51 Cal.3d 1179, 1212.

Answering, or not answering, a jury's question during deliberation is the equivalent of instructing the jury. People v. Beardslee, supra, 53 Cal.3d at 97; People v. Nero (2010) 181 Cal.App.4th 504, 513-518.

The trial court erred when it failed to tell the jury its position was legally deficient. The only reasonable inference which the jury could have drawn from the trial court's failure to advise it further was that it was proper to reject self-defense, as long as all twelve jurors agreed that at least one element of self-defense was disproven, and even if the jury was not unanimous as to any single element. That inference and that conclusion were wrong. The jury needed to be unanimous on the one specific necessary element of self-defense which it believed the prosecution had disproven. People v. Smith, supra, 60 Cal.4th at 618; People v. Russo, supra, 25 Cal.4th at 1132-1135; People v. Flood, (1998) 18 Cal.4th 470, 479-480.

If there was something wrong with the jury's divided position, the jurors would expect the trial court to say so. Because the trial court did not say anything, that most likely caused the jury to believe its partial agreement and partial disagreement was satisfactory.

It was constitutional error to allow the jury to convict without being unanimous on a necessary element of the crime. Ramos v. Louisiana, supra, 140 S. Ct. 2d 1390; People v. Flood, supra, 18 Cal.4th at 479-480.

D. Prejudice

When a trial court responds, or fails to respond, to a jury's question, that is the equivalent of delivering an instruction. People v. Beardsley, supra, 53 Cal.3d at 97. The failure to instruct correctly on a necessary element of a crime, or on unanimity, violates the due process clause of the 5th and 14th Amendments. Sandstrom v. Montana (1979) 442 U.S. 510. It also violates the 6th Amendment jury trial right. Ramos v. Louisiana, supra, 140 S. Ct.2d 1390. The standard of prejudice for such error is harmless beyond a reasonable doubt. Chapman v. California (1967) 386 U.S. 18.

A trial court also has the 5th and 14th Amendment due process duty to instruct correctly on the defense theory of the case. Mathews v. United States (1988) 485 U.S. 58, 63. The failure to answer the jury's question constituted the failure to instruct correctly on the defense theory.

The error was prejudicial because there was strong evidence of self-defense/defense of others. Arjona knew Escalera was a Norteno. The fact that a Norteno was walking in a Sureno neighborhood meant trouble. And this was not just theoretical trouble. Escalera, without being touched, pulled out his semi-automatic pistol and fired one shot near Bravo's feet. Then the Surenos fled, because they were terrified that Escalera would shoot at them, too. Mora-Villalobos testified that, as he was running away, he saw Escalera pointing his firearm at him. At this point, Arjona had the right to fire in self-defense, and/or in defense of others.

The failure to answer the jury's question was prejudicial, because the jury stated that it was divided regarding the three elements of self-defense.The jury was probably divided on whether it believed Escalera fired, and/or on whether one or more of the defendants should be considered initial aggressors, and/or whether Arjona acted with malice when he fired.

The error in refusing to answer the jury's question was further prejudicial because the case was close.[3]

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[3]The Court of Appeal rejected this argument, on the theory that the lack of unanimity should be ignored, because the jury was required to deliberate anew after an alternate was impaneled, citing People v. Guillen (2014) 227 Cal.App.4th 934, 1030. (opinion, p. 11-13) That conclusion blinks reality. When the trial court refused three times to answer the jury's question about unanimity, there is only one logical conclusion which a jury could draw, namely, that its position was satisfactory. Nothing in law or logic, or in the instruction to deliberate anew, could have erased that legal misunderstanding by the jury.

V.

THE TRIAL COURT ERRED IN ALLOWING THE COURTROOM SPECTATORS TO WEAR T-SHIRTS WITH PICTURES OF THE VICTIM

On the day of closing arguments, several spectators, sitting in the second row in the courtroom,[4] were wearing shirts with photographs of victim Escalera. Several shirts also bore sympathetic slogans. Defense counsel moved that the spectators be directed to remove those shirts.

The trial court noted 13 people were sitting together on one side of the courtroom, "so I'm assuming they're members of David's family."It stated six of them were wearing clothes with Escalera's picture.

> There's two people in a white t-shirt and one in a black. Some of the ladies have sweaters on, so it's blocking. There is six. Two ladies - - three ladies have sweaters. So I see "In loving memory" and there is a picture of David. (RT:XXVII:7811)

The court noted that the young man in the black t-shirt wore a shirt with a picture of Escalera "just sitting up with a Chicago Bulls hat. . . ."[5]

Defense counsel stated it would be prejudicial to have the spectators wearing shirts in support of Escalera, when the prosecutor gave his closing argument. Defense counsel also noted that the spectators walked in the same corridor in the court building as did the jurors, so the jurors were likely to see those shirts both inside and outside the courtroom.

Counsel requested, in the alternative, that the spectators be asked to go outside the courtroom and turn their shirts inside-out. The trial court denied the motion to remove the shirts. It stated the spectators had a First

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[4]No one was sitting in the first row.

[5]Chicago Bulls hats and uniforms are red. Red was the color of Escalera's gang, the Nortenos.

Amendment privilege to wear those shirts in the courtroom. That ruling was error. When spectators wear items in the courtroom which show support for the victim, that violates a defendant's right to a fair trial under the due process and jury trial rights of the 5th, 6th, and 14th Amendments, and erodes the presumption of innocence.

In Musladin v. LaMarque (9th Cir. 2005) 427 F.3d 653, overruled on other grounds, Carey v. Musladin (2006) 549 U.S. 70, 76, the Ninth Circuit reversed a murder conviction because the trial court allowed spectators in the courtroom to wear buttons with the picture of the victim. It held "such a practice interferes with the right to a fair trial by an impartial jury free from outside influence." Musladin v. LaMarque, supra, 427 F.3d at 654. In Norris v. Risley (9th Cir. 1990) 918 F.2d 828, a rape case, the Ninth Circuit reversed a conviction because spectators wore buttons in the courtroom saying "Women Against Rape." Accord: People v. Houston (2005) 130 Cal.App.4th 279, 309, (spectators improperly wore buttons about three inches in diameter that bore the likeness of the victim.

The Court of Appeal held that the trial court erred in allowing the spectators to wear the shirts, but it found the error harmless. (opinion, pp. 45-48) Appellant disagrees as to harmlessness. The T-shirts were prejudicial for multiple reasons.

(1) The day when the jurors wore their shirts was the day of closing argument. (2) Escalera was a validated Norteno member. There are five times as many Nortenos in San Jose as Surenos. Those T-shirts could well have caused the jurors to be concerned if they were to rule in favor of the members of the smaller gang and against the members of the larger gang. (3) There were 13 spectators in that group, sitting together. The jurors could have inferred that many, if not all, were Norteno supporters. The presence of 13 spectators, and likely Norteno supporters, could have scared and

threatened the jury with adverse consequences if they ruled against the position of Escalera's family and friends.

VI.

THE CONVICTIONS SHOULD BE REVERSED FOR CUMULATIVE ERROR

Assuming, *arguendo*, that two or more arguments established error, or IAC, but that no one, standing alone, was prejudicial, their cumulative prejudice warrants reversal. People v. Hill (1988) 17 Cal.4th 800, 844; People v. Holt (1984) 37 Cal.3d 436. Such cumulative prejudice violated Appellant's 5th and 14th Amendment due process rights. Chambers v. Mississippi (1973) 410 U.S. 284.

WHEREFORE, Appellant prays for review.

Dated: March 1, 2023

/s/ STEPHEN B. BEDRICK
STEPHEN B. BEDRICK
Attorney for Appellant

EXHIBIT A

Appellate Courts Case Information

6th Appellate District

Change court

Docket (Register of Actions)

The People v. Arjona
Case Number H047331

Date	Description	Notes
09/30/2019	Notice of appeal lodged/received (criminal).	NOA filed 09/19/19
10/18/2019	Counsel appointment order filed.	Atty: Stephen Bedrick
11/12/2019	Notice to reporter to prepare transcript.	Filed 11/08/19
11/12/2019	Court reporter extension granted.	CSR: Gonzalez, Barbara H (4646) Extended Due Date: 12/09/2019
06/09/2020	Record omission letter received.	CT- emails, motions by co-defendants, verdicts for co-defendants, Arjona's response filed after 6/19/19, trial minutes of 8/27/18, prelim RT- 8/16/18, 8/23/18, 8/27/18,
10/21/2020	Notice to reporter to prepare transcript.	B. Gonzales #4646 D. Nebolon #9344
03/23/2021	Record omission letter received.	2nd request Atty Stephen Bedrick Appellant requesting CT- emails, motions by co-defendants, verdicts for co-defendants, Arjona's response filed after 6/19/19, trial minutes of 8/27/18, prelim RT- 8/16/18, 8/23/18, 8/27/18,
04/22/2021	Issued order to show cause.	Rebecca Fleming, Chief Executive Officer of the Santa Clara County Superior Court, is ordered to appear in this court on June 7, 2021, and to show cause why the record on appeal in the above entitled case has not been completed in compliance with the California Rules of Court. The notice of appeal in this case was filed on September 19, 2019. The record on appeal has not been completed. Failure to take ameliorative action in compliance with this order to show cause may result in the issuance of an order in re contempt and the attendant consequences set forth in Code of Civil Procedure sections 1212-1216.

05/21/2021	Notice to reporter to prepare transcript.	Filed 5/17/21 B. Gonzalez #4646 D. Nebolon #9344
05/21/2021	Notice to reporter to prepare transcript.	Amended notice to reporter filed 5/17/21 Amended to add CSR Pendergraft #8951
06/08/2021	Requested - extension of time	
06/08/2021	Granted - extension of time.	Good cause appearing, Rebecca Fleming's request for an extension of time to comply with the OSC is granted. The Superior Court shall have until June 11, 2021 to comply with this court's order to show cause dated April 22, 2021.
06/11/2021	Record on appeal filed.	CT-4 , RT-33
06/11/2021	Probation report filed.	
06/11/2021	Confidential document filed*********	
06/11/2021	Filed augmented record pursuant to rule 8.340.	CT-1, RT-4
06/11/2021	Letter sent advising record on appeal has been filed.	AOB due in 40 days.
06/11/2021	Order filed.	Rebecca Fleming, Chief Executive Officer, having now submitted the record on appeal to the Sixth District Court of Appeal Clerk for filing, it is hereby ordered that the order to show cause heretofore issued on April 22, 2021, is discharged.
06/15/2021	Exhibits lodged**********	Exhibit 3
06/23/2021	Appellant's opening brief.	Defendant and Appellant: German Alexis Arjona Attorney: Stephen B. Bedrick
07/20/2021	Granted - extension of time.	1st
08/18/2021	Granted - extension of time.	2nd
09/21/2021	Requested - extension of time	
09/21/2021	Granted - extension of time.	3rd
10/20/2021	Requested - extension of time	
10/20/2021	Granted - extension of time.	4th * No further request will be granted *
01/04/2022	Record omission letter received.	CT- Exhibit 56A, Exhibit Q-1, Exhibit 2A, Exhibit Exhibit 24A & Revised jury instructions
01/20/2022	Respondent's brief.	Plaintiff and Respondent: The People Attorney: Karen Z Bovarnick

02/23/2022	Issued order to show cause.	Rebecca Fleming, Chief Executive Officer of the Santa Clara County Superior Court, is ordered to appear in this court on March 23, 2022, and to show cause why the record on appeal in the above entitled case has not been completed in compliance with the California Rules of Court. The notice of appeal in this case was filed on September 19, 2019. The record on appeal has not been completed, despite a prior Order to Show Cause discharged on June 11, 2021. (Please see the attached omission letter.) Failure to take ameliorative action in compliance with this order to show cause may result in the issuance of an order in re contempt and the attendant consequences set forth in Code of Civil Procedure sections 1212-1216.
03/02/2022	Appellant's reply brief.	Defendant and Appellant: German Alexis Arjona Attorney: Stephen B. Bedrick
03/02/2022	Case fully briefed.	
03/24/2022	Filed augmented record pursuant to rule 8.340.	CT-1
03/25/2022	Order filed.	Rebecca Fleming, Chief Executive Officer, having now submitted the record on appeal to the Sixth District Court of Appeal Clerk for filing, it is hereby ordered that the order to show cause heretofore issued on February 23, 2022, is discharged.
04/18/2022	Record in box.	(1) electronic
05/03/2022	Case on conference list.	May 2022
08/22/2022	Oral argument waiver notice sent.	
08/23/2022	Waiver of oral argument filed by:	Karen Bovarnick, for respondent (waived)
08/29/2022	Request for oral argument filed by:	Stephen Bedrick for appellant (25 minutes).
09/01/2022	Calendar notice sent electronically. Calendar date:	Oral argument in the above-entitled cause will be heard on Tuesday, November 8, 2022, at 9:30 a.m. Courtroom entrance will be restricted to counsel and self-represented litigants presenting in-person oral argument only. Counsel and self-represented litigants appearing in person must wear masks and may remove them when addressing the Court during oral argument. Court staff will be masked, and the Justices will be masked as appropriate during oral argument. Parties who have opted to appear remotely will receive detailed information on how to participate through the BlueJeans Video Conferencing platform.
09/01/2022	Order filed.	Appellant's request for argument time exceeding 15 minutes is granted. Appellant may use a total of 20 minutes to address all issues.
09/21/2022	Errata filed to:	Citation errors in the AOB and ARB.
10/26/2022	Filed additional cites.	Appellant - new authorities for oral argument.
11/08/2022	Cause argued and submitted.	
02/01/2023	Opinion filed.	(Signed Unpublished) The judgment is affirmed. (CCL, MJG & AMG)
02/08/2023	Rehearing petition filed.	Defendant and Appellant: German Alexis Arjona Attorney: Stephen B. Bedrick

02/21/2023	Mod. of opinion filed (no change in judgment).	The opinion filed herein on February 1, 2023, shall be modified as follows: 1. On page 4, the second full paragraph, the sentence beginning "Bystander G.A. assumed" is modified to read as follows: Bystander G.A. saw Escalera draw his firearm and point it toward the ground as she heard the first shot; she concluded that it was Escalera who had fired into the ground. 2. On page 41, line 8, the sentence beginning "But we are compelled" and ending with "of the errors here" is modified to read as follows: But we are compelled to observe that were it not for the strength of the evidentiary record-particularly the combination of Mora-Villalobos's testimony as to Bravo's and Arjona's jailhouse admissions (suggesting their respective roles in instigating the ultimately fatal confrontation) and the physical evidence (suggesting that Escalera never responded to their aggression with such sudden and deadly force that they could not withdraw)-S.G. and Escalera's family might well have been obliged to endure a retrial as the unfortunate and unintended consequence of the errors here. There is no change in the judgment. Appellant's petition for rehearing is denied. (CCL, MJG, AMG)
02/21/2023	Petition for rehearing denied.	See order filed on 2/21/23.
03/06/2023	Service copy of petition for review received.	
04/12/2023	Petition for review denied in Supreme Court.	The petition for review is denied.
04/13/2023	Remittitur issued.	
04/13/2023	Case complete.	

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