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APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 9 2018

FOR THE NINTH CIRCUIT

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

JOSE ANTHONY VERDUZCO,

Petitioner-Appellant,

v.

MARION SPEARMAN, Warden of the
Correctional Training Facility in Soledad,
California,

Respondent-Appellee.

No. 15-55640

D.C. No.
8:11-cv-01804-GHK-SP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted February 5, 2018
Pasadena, California

Before: CALLAHAN and NGUYEN, Circuit Judges, and PRATT,** District
Judge.

Jose Anthony Verduzco (“Verduzco”) murdered his live-in partner’s
paramour, Miguel Angel Martinez-Jimenez (“Martinez-Jimenez”). A jury

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

** The Honorable Robert W. Pratt, United States District Judge for the
Southern District of Iowa, sitting by designation.

convicted Verduzco of first-degree murder with a firearm enhancement in the Orange County Superior Court. The Superior Court sentenced Verduzco to twenty-five years to life on the murder charge and a consecutive twenty-five-years-to-life term for the use of a firearm in committing the murder. The California Court of Appeal denied Verduzco relief on all his claims, the California Supreme Court denied review, and the federal district court rejected his habeas corpus petition under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2254(d).¹ Verduzco now argues that certain remarks the prosecutor made during the closing arguments of his trial denied him due process under the Fourteenth Amendment.² We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). Upon de novo review of the district court’s denial of Verduzco’s habeas petition, we affirm. *Gonzalez v. Brown*, 585 F.3d 1202, 1206 (9th Cir. 2009).

Verduzco argues that, during closing arguments, the prosecutor violated his due process rights. He alleges that the prosecutor (1) referred to voluntary manslaughter, with which the defendant was charged in addition to being charged

¹ “[U]nless the state court’s adjudication of the claims resulted in a decision (1) contrary to, or involving an unreasonable application of, clearly established federal law, as determined by the [United States] Supreme Court, or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding,” AEDPA requires that a habeas petition be denied. *Gonzalez v. Brown*, 585 F.3d 1202, 1206 (9th Cir. 2009).

² Before this Court, Verduzco dropped his earlier-pressed claim of evidentiary insufficiency but retains his prosecutorial-misconduct claim.

with first-degree murder, as a “nothing charge”; (2) told the jury that it would not be able to justify its failure to convict Verduzco of first-degree murder with a firearm enhancement; (3) suggested to the jury that witnesses Cirilo Castaneda (“Castaneda”) and Isadora Macias (“Macias”), who had testified against Verduzco, were telling the truth; and (4) pointed out to the jury that the defense’s theory was not credible. Verduzco forfeited his third and fourth claims by not presenting them to the district court. *See United States v. Flores-Montano*, 424 F.3d 1044, 1047 (9th Cir. 2005). Even so, we conclude that all four of his claims lack merit.

None of the prosecutor’s challenged comments, taken individually or cumulatively, constituted prejudicial misconduct under the Supreme Court’s clearly established decisional law. *See Darden v. Wainwright*, 477 U.S. 168, 181–82 (1986); *see also Greer v. Miller*, 483 U.S. 756, 765 (1987). First, when the prosecutor called voluntary manslaughter a “nothing charge,” he indicated that the jury’s convicting Verduzco only of this lesser crime, instead of first-degree murder, would not adequately capture the gravity of his offense. Second, when the prosecutor told the jury it would be unable to justify its failure to convict Verduzco of first-degree murder, he did not shame the jury into convicting Verduzco but instead argued that a first-degree murder conviction better comported with the evidence. Third, the prosecutor was entitled to tell the jury that he thought Macias’s and Castaneda’s accounts were more believable. Moreover, the

prosecutor did not vouch for them with impermissible information. Fourth, the prosecutor was entitled to challenge the defense’s “heat of passion” theory by arguing that classifying Verduzco’s crime as a “heat of passion” crime would elide the important difference between manslaughter and first-degree murder.

Furthermore, even if there was merit to Verduzco’s claims, the prosecutor’s remarks were not sufficiently prejudicial to undermine the fairness of the trial.

Darden, 477 U.S. at 181–82. Finally, similar to the trial court in *Darden*, the trial court here instructed the jury to consider only the evidence properly presented to the jury; thus, the jurors were aware “that the arguments of counsel were not evidence.” *Id.* at 182.

We conclude that the prosecutorial remarks did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

AFFIRMED.

APPENDIX B

JS-6

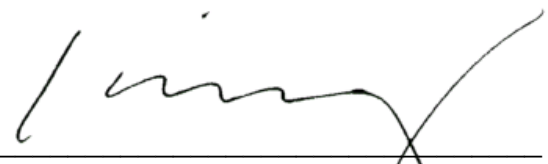
**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JOSE ANTHONY VERDUZCO,	)	Case No. SA CV 11-1804-GHK (SP)
Petitioner,	)	
v.	)	JUDGMENT
WARDEN, Pelican Bay Prison,	)	
Respondent.	)	

Pursuant to the Order Accepting Findings and Recommendation of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

Dated: 3/2/15



HONORABLE GEORGE H. KING
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

APPENDIX D

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 JOSE ANTHONY VERDUZCO,

12 Petitioner,

13 v.

14 WARDEN, Pelican Bay Prison,

15 Respondent.
16
17

Case No. SA CV 11-1804-GHK (SP)

REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

18 This Report and Recommendation is submitted to the Honorable George H.
19 King, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636
20 and General Order 05-07 of the United States District Court for the Central District
21 of California.

22 **I.**

23 **INTRODUCTION**

24 On November 21, 2011, petitioner Jose Anthony Verduzco, proceeding pro
25 se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254
26 (“Petition”). Petitioner challenges his 2009 conviction in Orange County Superior
27 Court for first degree murder and a firearm enhancement allegation, and his
28

1 resulting sentence of fifty years to life in prison.

2 Petitioner raises three grounds for relief: (1) the prosecutor engaged in
3 misconduct during closing argument; (2) the evidence was insufficient to support
4 his murder conviction; and (3) his sentence violates the prohibition against double
5 jeopardy. For the reasons discussed below, none of petitioner's claims merits
6 habeas relief. It is therefore recommended that the Petition be denied.

7 II.

8 FACTUAL BACKGROUND¹

9 Luz Rodriguez and petitioner had four children and lived together for 24
10 years. Angel Martinez-Jimenez was the brother-in-law of Rudolfo Coronado, a
11 neighbor of petitioner and Rodriguez. Coronado had a flooring and tile business
12 and Martinez-Jimenez worked for him on occasion. On November 29, 2005,
13 petitioner shot Angel Martinez-Jimenez multiple times and killed him.

14 Five or six months before the killing, Rodriguez began a romantic, sexual
15 relationship with Martinez-Jimenez. Two months before the killing, petitioner was
16 very upset, confronted Rodriguez, and asked her if she was having an affair with
17 Martinez-Jimenez. Petitioner threatened to kill her and Martinez-Jimenez.
18 Rodriguez denied the affair repeatedly. A couple of weeks later, petitioner brought
19 a shotgun into the house. Rodriguez got rid of the shotgun because she was afraid
20 petitioner would shoot and kill Martinez-Jimenez. Rodriguez called
21 Martinez-Jimenez and unsuccessfully attempted to end the affair.

22 Approximately one month before the killing, petitioner and Rodriguez
23

24 ¹ Since petitioner is challenging the sufficiency of the evidence supporting his
25 conviction, the court has independently examined the state court record. *See*
26 *Jones v. Wood*, 114 F.3d 1002, 1008 (9th Cir. 1997). Based on its review, the
27 court adopts the following factual recitation largely taken from the California
28 Court of Appeal's opinion as a fair and accurate summary of the evidence
presented at trial. *See* Lodg. 6 at 2-6.

1 argued once more about the relationship. He again asked her if she was seeing
2 Martinez-Jimenez, and she again denied it. Petitioner again threatened to kill
3 Rodriguez and her lover.

4 On November 27, Rodriguez was at home with petitioner. She told him she
5 was going out with her niece, Sandy, for dinner. Sandy picked her up and drove to
6 a liquor store where the two women picked up Martinez-Jimenez. Rodriguez told
7 Sandy that she (Rodriguez) and Martinez-Jimenez were going to have dinner at a
8 Denny's by Disneyland, so Sandy dropped them off at the restaurant.
9 Martinez-Jimenez and Rodriguez did not go to dinner. They walked from Denny's
10 to a nearby hotel and had sex. About 8:00 that evening, Rodriguez called Sandy
11 and Sandy picked them up at the Denny's. Sandy dropped off Martinez-Jimenez
12 before taking Rodriguez home. Petitioner was suspicious and questioned
13 Rodriguez when she got home.

14 About 2:00 p.m. the next day, Rodriguez saw petitioner with a knife in his
15 waistband. He put the knife on the kitchen counter and Rodriguez asked why he
16 had a knife. Petitioner said, "Because I'm going to kill that M . . . F . . ."
17 Rodriguez asked petitioner why he would kill Martinez-Jimenez. Petitioner said it
18 was because Martinez-Jimenez took his lady. That night, Rodriguez collected all
19 the knives in the house, wrapped them in a towel, and hid them.

20 That same evening, Rodriguez was in the living room with petitioner and
21 their 10-year old son, Angel. The parents again argued and petitioner told their son
22 he was going to kill someone by shooting them in the head.

23 Rodriguez called Martinez-Jimenez a couple hours later. She told him
24 petitioner was very suspicious and they had to stop seeing each other. While she
25 was talking with Martinez-Jimenez, petitioner walked in, startling her, and she
26 dropped the telephone. Petitioner asked who she was talking to and she said it was
27 a friend, Peitra. Petitioner accused Rodriguez of lying, told her that if she loved
28

1 Martinez-Jimenez she should move in with him, and walked out of the room.

2 At midnight, Rodriguez awoke in bed with petitioner sitting on top of her,
3 choking her with both hands. She pushed him off and kneed him in the stomach,
4 ending the physical confrontation.

5 About 8:00 a.m. that morning, the day of the killing, petitioner told her he
6 was going to Townsend Street to get something. As he walked out, he said he was
7 not going to kill her because she was the mother of his children. He also told her
8 she could leave with Martinez-Jimenez if he was going to take care of her.

9 Rodriguez said petitioner appeared to be sad as he walked away.

10 Rodriguez went to a health clinic with a friend later that morning. About
11 noon she telephoned Martinez-Jimenez and told him to be careful because
12 petitioner had threatened to kill him.

13 That same morning, Isadora Macias was visiting her mother, Coronado's
14 wife. Martinez-Jimenez was Macias's uncle. Petitioner asked for lemons to use
15 with some meat Macias's mother had given him a day or two before. Macias gave
16 the lemons to petitioner. He thanked her and gave "a little laugh." Macias thought
17 petitioner looked as if "he was about to [do] something." An hour or two later,
18 Macias saw petitioner again. This time petitioner asked if Martinez-Jimenez was
19 home yet. She said he was not. Petitioner seemed to be "in a rush," but he spoke
20 in a normal voice and was not crying.

21 Rodriguez returned home about 1:00 p.m. and saw petitioner drinking a
22 24-ounce can of beer in the kitchen. They again argued about Martinez-Jimenez.
23 Petitioner said he would let her do what she wanted. After the argument,
24 Rodriguez went into her bedroom.

25 Salvador Castaneda worked for Macias's stepfather, Coronado. He started
26 work at 7:00 a.m. on November 29, by picking up the tools for the day and three
27 other employees, including Martinez-Jimenez, at Coronado's garage. They worked
28

1 eight hours and stopped and had some beers three blocks from Coronado's house.
2 Castaneda saw petitioner as they drove up. Petitioner was on a bike as Castaneda
3 backed into the driveway to unload the tools. Petitioner got off the bike, asked
4 Martinez-Jimenez, "What's up Miguelito?" and Martinez-Jimenez started to run.
5 Petitioner gave chase. They stopped when they were in the front of Castaneda's
6 jeep. Thinking they were going to fight, Castaneda began to step in between them
7 to separate them. But at that moment, petitioner pulled a gun from his waistband
8 and shot Martinez-Jimenez in the stomach area twice. A struggle ensued and they
9 moved toward the garage, Martinez-Jimenez backing up. As Martinez-Jimenez fell
10 to the ground, petitioner fired two shots toward Martinez-Jimenez's face.
11 Castaneda ran into Coronado's house. Castaneda said petitioner appeared calm
12 during the shooting.

13 Macias was in the living room, watching television, when she heard two
14 shots. She went outside and saw petitioner shoot Martinez-Jimenez. Petitioner had
15 a small gray gun. Macias told petitioner to stop. Petitioner looked at Macias and
16 pointed the gun at her, laughing. Martinez-Jimenez, who was on the ground,
17 signaled Macias to go back inside. Macias went back inside and called the police.
18 Petitioner was gone when she returned.

19 While Rodriguez was inside the bedroom she heard two shots. When she got
20 to the living room she heard a third shot. She ran out through a sliding glass door
21 and saw petitioner getting on his bicycle, holding a gray semiautomatic pistol.
22 Martinez-Jimenez was on the ground, not moving, and several feet from where she
23 initially saw petitioner. She saw blood in the area of Martinez-Jimenez's right
24 shoulder. Petitioner rode away without saying anything.

25 Macias said she saw Martinez-Jimenez and petitioner together about two
26 weeks before the shooting. Petitioner had a rifle. They were outside the garage to
27 her parents' apartment. Macias said it appeared petitioner was showing the rifle to
28

1 Martinez-Jimenez.

2 Martinez-Jimenez died at the scene due to multiple gunshot wounds. One of
3 the gunshot wounds was to Martinez-Jimenez's scalp, but that wound was
4 superficial. The pathologist testified Martinez-Jimenez's wounds were consistent
5 with his having been shot, thereafter attempting to run away, and being shot in the
6 back. Martinez-Jimenez had a .19 blood-alcohol level at the time of death.

7 Petitioner fled to Mexico, where he was arrested. The district attorney
8 obtained petitioner's extradition to California in 2007.

9 The defense introduced the testimony of Martinez-Jimenez's ex-wife, Maria
10 Salazar, and a defense investigator who interviewed her. In 2002, she fled to the
11 United States from Mexico to get away from Martinez-Jimenez. He had been
12 abusive. He worked for the government and always carried a revolver and an AK-
13 47 or another rifle with him.

14 III.

15 PROCEDURAL HISTORY

16 Following trial, a jury found petitioner guilty of the first degree murder of
17 Angel Martinez- Jimenez in violation of Cal. Penal Code § 187(a). Lodg. 1
18 (Clerk's Transcript ("CT")) at 290, 348. The jury also found petitioner personally
19 and intentionally discharged a firearm causing death within the meaning of Cal.
20 Penal Code § 12022.53(d). CT at 291, 348. On June 12, 2009, the trial court
21 sentenced petitioner to fifty years to life in prison, consisting of twenty-five years
22 to life on the murder conviction plus a consecutive twenty-five years to life for the
23 firearm enhancement. CT at 341, 348.

24 Petitioner appealed his conviction. Lodgs. 3-5. On January 5, 2011, the
25 California Court of Appeal affirmed petitioner's conviction in a reasoned opinion.
26 Lodg. 6. Petitioner filed a petition for review, which the California Supreme Court
27 summarily denied on April 27, 2011. Lodgs. 7-8.

1 IV.

2 **LEGAL STANDARDS**

3 This case is governed by the Antiterrorism and Effective Death Penalty Act
4 of 1996 (“AEDPA”). AEDPA provides that federal habeas relief “shall not be
5 granted with respect to any claim that was adjudicated on the merits in State court
6 proceedings *unless* the adjudication of the claim –

7 (1) resulted in a decision that was contrary to, or involved an unreasonable
8 application of, clearly established Federal law, as determined by the Supreme Court
9 of the United States; or

10 (2) resulted in a decision that was based on an unreasonable determination of
11 the facts in light of the evidence presented in the State court proceeding.” 28
12 U.S.C. § 2254(d)(1)-(2) (emphasis added).

13 In assessing whether a state court “unreasonably applied” Supreme Court
14 law or “unreasonably determined” the facts, the federal court looks to the last
15 reasoned state court decision as the basis for the state court’s justification.
16 *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Here, the California
17 Court of Appeal’s opinion stands as the last reasoned decision. *See Shackleford v.*
18 *Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000).

19 V.

20 **DISCUSSION**

21 **A. Petitioner Is Not Entitled to Habeas Relief on His Claim of Prosecutorial**
22 **Misconduct**

23 In ground one, petitioner argues that the prosecutor engaged in misconduct
24 during his closing and rebuttal arguments by denigrating the crime of voluntary
25 manslaughter. Petition Attachment (“Pet. Att.”) at 1-3.

26 Prosecutorial misconduct merits habeas relief only where the misconduct
27 infected the trial with such unfairness as to make the resulting conviction a denial
28

1 of due process. *Greer v. Miller*, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d
 2 618 (1987) (citation omitted); *Darden v. Wainright*, 477 U.S. 168, 181, 106 S. Ct.
 3 2464, 91 L. Ed. 2d 144 (1986) (citation omitted); *see also Bonin v. Calderon*, 59
 4 F.3d 815, 843 (9th Cir. 1995) (“To constitute a due process violation, the
 5 prosecutorial misconduct must be so severe as to result in the denial of [the
 6 petitioner’s] right to a fair trial.”) (citation omitted). “[I]t is not enough that the
 7 prosecutor’s remarks were undesirable or even universally condemned . . . The
 8 relevant question is whether the prosecutor’s comments so infected the trial with
 9 unfairness as to make the resulting conviction a denial of due process.” *Darden*,
 10 477 U.S. at 181 (citation, internal citation and internal quotation marks omitted).
 11 In addition, on habeas review, a federal court will not disturb a conviction unless
 12 the alleged prosecutorial misconduct had a substantial and injurious effect or
 13 influence in determining the jury’s verdict. *See Burks v. Borg*, 27 F.3d 1424, 1431
 14 (9th Cir. 1994).

15 Petitioner takes issue with the bolded portions of the following two
 16 arguments made by the prosecutor during his closing and rebuttal arguments. First,
 17 during closing argument, the prosecutor argued as follows:

18 Don’t split the baby out of equity. Don’t decide to feel sorry.
 19 Follow the law, follow the facts, find [petitioner] guilty of murder. **If**
 20 **you want to find him guilty of anything less than murder, just**
 21 **walk him out the door, find him not guilty. This is an everything-**
 22 **or-nothing case.**

23 There is no self-defense. There is no heat of passion when you
 24 plan an execution. Don’t try to do his Honor’s, Judge Froeberg’s, job
 25 for him. **If you don’t want to find him guilty of murder, on behalf**
 26 **of my client, I’m telling you, give him a free ride. He’s guilty of**
 27 **murder.**
 28

1 Lodg. 2 (Reporter's Transcript ("RT")) at 828 (emphasis added).²

2 In rebuttal, the prosecutor argued:

3 But you're going to go home and somebody is going to say to
4 you, okay, can you finally tell me what happened? And you're going
5 to be able to say yes, I can. And you're going to have one of two
6 stories to tell. Boy, one would be fine. One would be, honey, you'll
7 never believe the case I was on. At first you would have thought it
8 was murder, because you see, there was this guy named Verduzco, and
9 his wife was cheating on him with somebody, and he seemed pretty
10 calm and cool and rational. He went over to Townsend Street and got
11 a gun, and tracked the guy down after buying a shotgun, and after
12 making a bunch of threats, and telling his wife he was going to kill
13 that mother fucker who took his woman, and telling his little boy he
14 was going to shoot him in the head.

15 He went to track him down, looking for him, and right in front
16 of the guy, you would have thought it was pretty dumb, maybe a little
17 slow, not dumb, but not real educated, talking about Mr. Castaneda, it
18 turns out he was a conspirator, there was a bunch of conspirators.
19 Isadora Macias, she was a sharp one, she cooked up this lie. There
20 was a puppeteer, ran up this huge conspiracy to frame [petitioner],
21 because none of it really happened.

22 The fact that he shot this guy and he shot him twice in the chest
23

24 ² There are seven lodged volumes of the Reporter's Transcript. The five
25 volumes containing trial testimony and closing arguments cited herein have
26 sequential page numbering from 1-952. There are two additional volumes
27 containing the voir dire and opening statement transcripts, both of which also
28 begin their page numbering with page 1; however, the court does not cite to those
volumes herein.

1 and twice in the back and once in the head and once in a defensive
 2 wound, I believe, we found that it was self-defense, and we walked
 3 him. We found it was imperfect self-defense, even though there is no
 4 evidence that he ever knew about this domestic violence case or – but
 5 we didn't care about that. But somebody should write a novel,
 6 somebody should tell the paper, we found him not guilty. **We found**
 7 **voluntary manslaughter, a nothing case. We didn't find him**
 8 **guilty of murder. You know what? We found him not guilty of**
 9 **murder.** He's a wife beater.

10 **Is that the story you're going to tell?** Or are you going to tell
 11 the more mundane, more ordinary, less exciting story, it was a guy
 12 who was mad because his wife and another guy were cheating on him,
 13 and unlike most people who control their anger, he didn't, and he
 14 decided to commit murder, and despite his anger, he was rational, he
 15 was calculating, he was premeditating, and he went and got a gun and
 16 he did exactly – I'll end this like I started, he did exactly what he told
 17 his little ten year old boy the night before that he was going to do, I'm
 18 going to get a gun and shoot somebody in the head.

19 RT at 889-90 (emphasis added).

20 Based on the foregoing, petitioner contends that the prosecutor committed
 21 misconduct by denigrating the crime of voluntary manslaughter. He argues the
 22 prosecutor essentially told the jurors that they "would be letting petitioner go free if
 23 they came back with a verdict of voluntary manslaughter and by warning the jury
 24 of the probable consequences of its failure to convict the petitioner of first degree
 25 murder." Pet. Att. at 1.

26 The Court of Appeal rejected petitioner's argument because it reasoned that
 27 the prosecutor "did not argue manslaughter was not a real crime. Rather, he argued
 28

1 that [petitioner's] act of shooting Martinez-Jimenez twice in the chest, twice in the
2 back, once in the head, and once in what resulted in a defensive wound, voluntary
3 manslaughter would be a 'nothing charge.'" Lodg. 6 at 10. The Court of Appeal
4 also found that petitioner's argument that "the jury interpreted the prosecutor's
5 statement to mean [petitioner] would go free and the jury would be ashamed to tell
6 anyone they had reached such a verdict" was flawed for two reasons. *Id.* It found
7 that there was "nothing in the record to suggest the jury would have interpreted the
8 prosecutor's remark as stating or implying that [petitioner] would be a free man if
9 the jury found him guilty of voluntary manslaughter instead of murder," and there
10 was "nothing in the record the suggest the prosecutor meant to shame the jurors
11 into finding [petitioner] guilty of murder." *Id.*

12 This court agrees with the California Court of Appeal that a number of the
13 prosecutor's remarks during his closing and rebuttal arguments were not
14 "laudable." *See id.* at 11. But "laudable" is not the standard this court must
15 consider. The question for this court is whether the prosecutor's remarks effected a
16 denial of due process. The court finds petitioner has failed to establish the
17 statements in question "so infected the trial with unfairness as to make the resulting
18 conviction a denial of due process." *See Darden*, 477 U.S. at 181.

19 Even assuming the bolded remarks quoted above were improper, the main
20 thrust of the argument was that the evidence supported a conviction for murder,
21 and that only a farfetched interpretation of the evidence could support of finding of
22 voluntary manslaughter. This is proper argument. Some of the bolded remarks
23 may have come close to, or crossed, the line of improper argument; however, in the
24 context of the prosecutor's entire argument, the Court of Appeal reasonably found
25 the remarks were not unduly inflammatory.

26 Moreover, the trial judge instructed the jury regarding the nature of the
27 attorney's arguments. Specifically, the court instructed the jurors that statements
28

1 by the attorneys during trial are not evidence, that they should decide the case only
 2 on the evidence, and if anything concerning the law said by the attorneys in their
 3 arguments conflicts with the court's instructions on the law, they must follow the
 4 instructions. CT at 209, 211. "A jury is presumed to follow its instructions."
 5 *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000)
 6 (citation omitted). In addition, as discussed in the next section, the evidence of
 7 petitioner's guilt was overwhelming.

8 Consequently, this court cannot conclude that the prosecutor's comments,
 9 even assuming they were improper, infected petitioner's trial with such unfairness
 10 that the conviction resulted in a denial of due process, much less that such remarks
 11 had a substantial and injurious effect or influence in determining the jury's verdict.
 12 *See Donnelly*, 416 U.S. at 645 (finding that an improper statement by a prosecutor
 13 during closing argument did not amount to a due process violation in part because
 14 the judge instructed the jury that the remark was not evidence); *Allen v. Woodford*,
 15 395 F.3d 979, 998 (9th Cir. 2005) (finding that prosecutorial misconduct did not
 16 amount to a due process violation where the trial court gave an instruction that the
 17 attorneys' statements were not evidence and where the prosecutors presented
 18 substantial evidence of the defendant's guilt). This claim does not merit relief.³

19 **B. Petitioner Is Not Entitled to Habeas Relief on His Claim of Insufficient**
 20 **Evidence**

21 In ground two, petitioner asserts that the evidence at trial was insufficient to
 22 support a murder conviction because the prosecution failed to show that petitioner
 23

24 ³ In his Petition, as part of ground one, petitioner also contends that his trial
 25 counsel was ineffective for failing to object to the prosecution's assertedly
 26 improper arguments. *See* Pet. Att. at 3. But petitioner concedes in his Reply that
 27 this portion of his claim is unexhausted, and asks the court to strike this portion of
 28 his claim. Reply at 8. As petitioner has withdrawn his ineffective assistance
 subclaim, the court does not address the issue.

1 did not act in the heat of passion. Pet. Att. at 4-7.

2 It is well established that sufficient evidence exists to support a conviction if,
 3 “viewing the evidence in the light most favorable to the prosecution, any rational
 4 trier of fact could have found the essential elements of the crime beyond a
 5 reasonable doubt.”⁴ *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.
 6 Ed. 2d 560 (1979). In considering a claim of insufficient evidence, a federal
 7 habeas court “must respect the province of the jury to determine the credibility of
 8 witnesses, resolve evidentiary conflicts, and draw reasonable inferences from
 9 proven facts by assuming that the jury resolved all conflicts in a manner that
 10 supports the verdict.” *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995); *see*
 11 *also Jackson*, 443 U.S. at 319, 324, 326. “If confronted by a record that supports
 12 conflicting inferences, federal habeas courts must presume – even if it does not
 13 affirmatively appear in the record – that the trier of fact resolved any such conflicts
 14 in favor of the prosecution, and must defer to that resolution. A jury’s credibility
 15 determinations are therefore entitled to near-total deference under *Jackson*.” *Bruce*
 16 *v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004) (per curiam) (internal quotation
 17 marks and citations omitted).

18 Furthermore, under AEDPA, the court applies “the standards of *Jackson* with
 19 an additional layer of deference” to the state court’s decision. *Juan H. v. Allen*, 408
 20 F.3d 1262, 1274-75 (9th Cir. 2005). The court must determine “whether the
 21 decision of the California Court of Appeal reflected an ‘unreasonable application
 22 of’ *Jackson* and [*In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368
 23 (1970),] to the facts of this case.” *Id.* at 1275 (citations omitted). Thus, a federal
 24 habeas petitioner “faces a heavy burden when challenging the sufficiency of the

25
 26 ⁴ The California standard for determining the sufficiency of the evidence to
 27 support a conviction is identical to the federal standard enunciated by the United
 28 States Supreme Court in *Jackson*. *People v. Johnson*, 26 Cal. 3d 557, 576, 162
 Cal. Rptr. 431, 606 P.2d 738 (1980).

1 evidence used to obtain a state conviction on federal due process grounds.” *Id.* at
2 1274.

3 Since the *Jackson* standard is “applied with explicit reference to the
4 substantive elements of the criminal offense as defined by state law,” the court
5 begins with California law. *See Jackson*, 443 U.S. at 324 n.16. Under California
6 law, “[m]urder is the unlawful killing of a human being . . . with malice
7 aforethought.” Cal. Penal Code § 187(a). Voluntary manslaughter “is the unlawful
8 killing of a human being without malice . . . upon sudden quarrel or heat of
9 passion.” Cal. Penal Code § 192(a). “[H]eat of passion and unreasonable self-
10 defense reduce an intentional, unlawful killing from murder to voluntary
11 manslaughter by *negating the element of malice* that *otherwise inheres* in such a
12 homicide.” *People v. Breverman*, 19 Cal. 4th 142, 154, 77 Cal. Rptr. 2d 870, 960
13 P.2d 1094 (1998) (citation omitted).

14 A “willful, deliberate, and premeditated killing . . . is murder of the first
15 degree.” Cal. Penal Code § 189. “Deliberation” and “premeditation” must be
16 construed to require “more reflection than may be involved in the mere formation
17 of a specific intent to kill.” *People v. Anderson*, 70 Cal. 2d 15, 26, 73 Cal. Rptr.
18 550, 447 P.2d 942 (1968). *Anderson* explains that in reviewing verdicts of first
19 degree murder, the court looks to evidence of (1) planning, (2) pre-existing motive,
20 and (3) facts “from which the jury could infer that the *manner* of killing was so
21 particular and exacting that the defendant must have [had] . . . a ‘preconceived
22 design.’” *Id.* at 26-27. Such verdicts are typically sustained “when there is
23 evidence of all three types”; otherwise, there must be “at least extremely strong
24 evidence of (1) or evidence of (2) in conjunction with either (1) or (3).” *Id.* at 27.

25 This court finds the California Court of Appeal reasonably determined the
26 evidence was sufficient for the jury reasonably to find petitioner “acted with
27 premeditation and deliberation and not in the heat of passion.” *See* Lodg. 6 at 8.
28

1 First, as noted by the Court of Appeal, there was evidence of long-pending
2 motive. Martinez-Jimenez had been having an affair with Rodriguez for months.
3 Lodg. 6 at 8; RT at 240-42, 246. Petitioner first confronted Rodriguez with his
4 suspicions of the affair two months before he killed Martinez-Jimenez, and
5 petitioner and Rodriguez continued to argue about his suspicions of the affair,
6 including on the evening prior to and the day of the shooting. RT at 241-42, 287,
7 340, 385.

8 Second, there was evidence of planning. Petitioner had been “threatening
9 Martinez-Jimenez’s life for months.” Lodg. 6 at 8; *see* RT at 244-45, 248-49, 251-
10 52, 278-80, 378, 380, 383-84, 390. The day prior to and the day of the shooting,
11 petitioner told Rodriguez that he was going to kill Martinez-Jimenez. RT at 364-
12 65, 383-84. Petitioner also told his son the night prior to the shooting that “he was
13 going to kill someone by shooting that person in the head.” RT at 385-86. On the
14 day of the shooting, petitioner went to look for Martinez-Jimenez twice. RT at 93-
15 99, 101. When Martinez-Jimenez returned from work, petitioner, armed with a
16 gun, was there to meet him. RT at 487-88, 492.

17 Finally, the manner of killing also indicates premeditation, because petitioner
18 approached an unarmed Martinez-Jimenez and chased after Martinez-Jimenez
19 when Martinez-Jimenez tried to run. RT at 488-93. When petitioner caught up
20 with Martinez-Jimenez, petitioner pulled a gun out of his waistband and fired
21 multiple shots at Martinez-Jimenez. RT at 492-96, 504-05, 507-11, 588. One
22 witness testified petitioner first shot twice at Martinez-Jimenez’s stomach, then
23 they struggled over the gun, and then as Martinez-Jimenez fell petitioner fired two
24 more shots at his face. RT at 497-504.

25 Thus, there was substantial evidence from which the jury could fairly infer
26 that petitioner acted with premeditation and deliberation. *See People v. Wells*, 199
27 Cal. App. 3d 535, 541, 245 Cal. Rptr. 90 (1988) (defendant’s act of running after
28

1 victim and firing three additional bullets provided strong evidence of premeditation
 2 and deliberation); *see also Jackson*, 443 U.S. at 325 (evidence of shooting at close
 3 range and multiple shots indicates manner of attempted killing consistent with
 4 premeditation and deliberation). This evidence of premeditation and deliberation
 5 also supports a finding that petitioner did not act in the heat of passion. In
 6 addition, there was evidence that prior to and during the shooting petitioner
 7 appeared calm. RT at 472, 488, 513. Of course, given that the undisputed motive
 8 for the killing was the affair between Rodriguez and Martinez-Jimenez, there also
 9 would have been a basis for the jury to find petitioner acted in the heat of passion.
 10 But as the Court of Appeal found, whether petitioner “killed as the result of
 11 premeditation and deliberation or in the heat of passion was for the jury to decide.”
 12 *See* Lodg. 6 at 8.

13 After reviewing the record, this court cannot say that no rational trier of fact
 14 could find petitioner was guilty of murder beyond a reasonable doubt, even after
 15 considering a heat of passion theory. As such, the California Court of Appeal’s
 16 determination that sufficient evidence supported the jury’s conviction was not
 17 contrary to and did not involve an unreasonable application of clearly established
 18 federal law, nor was it based on an unreasonable determination of facts. No relief
 19 is therefore warranted on ground two.

20 **C. Petitioner Is Not Entitled to Habeas Relief on His Double Jeopardy**
 21 **Claim**

22 Petitioner contends in ground three that the trial court erred in imposing a
 23 sentence that punishes him both for the crime of murder and for the sentencing
 24 enhancement under Penal Code § 12022.53(d) that he discharged a firearm in
 25 committing the murder. Pet. Att. at 7-9. According to petitioner, imposing
 26 punishment for both the crime and the enhancement violates the Fifth
 27 Amendment’s prohibition against double jeopardy. *Id.*

1 Petitioner's sentence does not violate the Double Jeopardy Clause. The
2 Double Jeopardy Clause prohibits the imposition of multiple punishments for the
3 same offense. *Ball v. U.S.*, 470 U.S. 856, 864-65, 105 S. Ct. 1668, 84 L. Ed. 2d
4 740 (1985). The protection against multiple punishments for the same offense,
5 however, does not necessarily preclude cumulative punishments in a single
6 prosecution. *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d
7 535 (1983) ("With respect to cumulative sentences imposed in a single trial, the
8 Double Jeopardy Clause does no more than prevent the sentencing court from
9 prescribing greater punishment than the legislature intended."). When, for
10 example, a state legislature intends to impose multiple punishments based on an
11 enhancement, the Double Jeopardy Clause is not offended. *Plascencia v.*
12 *Alameida*, 467 F.3d 1190, 1204 (9th Cir. 2006).

13 This precedent forecloses petitioner's double jeopardy claim. Indeed, in
14 *Plascencia* the Ninth Circuit rejected the very claim petitioner makes here: that a
15 twenty-five years to life sentence for first degree murder plus a twenty-five years to
16 life enhancement for using a firearm under Penal Code § 12022.53(d) constituted
17 cruel and unusual punishment and double jeopardy. *Id.* "[T]he language of
18 California Penal Code § 12022.53 is clear. Subsection (d) provides for a 25 year
19 enhancement when a 'firearm is used' to commit murder. There is, therefore, no
20 question as to what the California legislature intended." *Id.* Accordingly,
21 petitioner's sentence does not violate the Double Jeopardy Clause.

22 To the extent that petitioner argues that the imposition of the section
23 12022.53(d) sentence enhancement violated his rights under *Apprendi v. New*
24 *Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), that claim is also
25 unavailing. *See* Pet. Att. at 9. *Apprendi* did not address whether cumulative
26 punishments for a crime and an enhancement violate the Double Jeopardy Clause.
27 Rather, *Apprendi* held that any fact, other than a prior conviction, that increases the
28

1 penalty for a crime beyond the statutorily prescribed term must be submitted to a
 2 jury and proven beyond a reasonable doubt. 530 U.S. at 489. Here, the jury found
 3 both that petitioner committed murder and that he discharged a firearm, and thus
 4 any concerns raised by *Apprendi* were satisfied.

5 The court therefore concludes that the state courts' denial of this claim was
 6 not contrary to nor did it involve an unreasonable application of clearly established
 7 federal law as determined by the United States Supreme Court, nor was it based on
 8 an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Accordingly,
 9 petitioner is not entitled to habeas relief on this claim.

10 **D. Petitioner Is Not Entitled to an Evidentiary Hearing**

11 Petitioner requests an evidentiary hearing. An evidentiary hearing is not
 12 warranted where, as here, "the record refutes the applicant's factual allegations or
 13 otherwise precludes habeas relief." *Schirro v. Landrigan*, 550 U.S. 465, 474, 127
 14 S. Ct. 1933, 167 L. Ed. 2d 836 (2007); *see also Totten v. Merkle*, 137 F.3d 1172,
 15 1176 (9th Cir. 1998) ("It is axiomatic that when issues can be resolved with
 16 reference to the state court record, an evidentiary hearing becomes nothing more
 17 than a futile exercise"). As such, petitioner's request for an evidentiary hearing
 18 should be denied.

19 **VI.**

20 **RECOMMENDATION**

21 IT IS THEREFORE RECOMMENDED that the District Court issue an
 22 Order: (1) approving and accepting this Report and Recommendation; and
 23 (2) denying the Petition with prejudice.

24
 25 DATED: January 6, 2015

26 
 27 SHERI PYM
 28 United States Magistrate Judge

APPENDIX E

VERDUZCO v. WARDEN, PELICAN BAY
SA CV 11-1804-JSL (SP)
LODGMNT 6

COPY

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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL-4TH DIST DIV 3
FILED

JAN 05 2011

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANTHONY VERDUZCO,

Defendant and Appellant.

Deputy Clerk _____

G042189

(Super. Ct. No. 05CF3963)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Francisco
P. Briseño, Judge. Affirmed.

Christine Vento, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and
Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Jose Anthony Verduzco shot and killed his wife's lover after having made repeated threats to kill him. The jury convicted defendant of first degree murder and found he used a firearm in the commission of the murder. Defendant contends his conviction should be reduced to voluntary manslaughter because the evidence does not support a murder conviction. He also contends the prosecutor committed misconduct during closing argument, his trial attorney was ineffective in failing to object to the misconduct, and the court erred in imposing a consecutive 25 years to life term on the firearm use enhancement. We affirm.

I

FACTS

Luz Rodriguez and defendant had four children and lived together for 24 years. Angel Martinez-Jimenez was the brother-in-law of Rudolfo Coronado, a neighbor of defendant and Rodriguez. Coronado had a flooring and tile business and Martinez-Jimenez worked for him on occasion. On November 29, 2005, defendant shot Angel Martinez-Jimenez multiple times and killed him.

Five or six months before the killing, Rodriguez began a romantic, sexual relationship with Martinez-Jimenez. Two months before the killing, defendant was very upset, confronted Rodriguez, and asked her if she was having an affair with Martinez-Jimenez. Defendant threatened to kill her and Martinez-Jimenez. Rodriguez denied the affair repeatedly. A couple of weeks later, defendant brought a shotgun into the house. Rodriguez got rid of the shotgun because she was afraid defendant would shoot and kill Martinez-Jimenez. Rodriguez called Martinez-Jimenez and unsuccessfully attempted to end the affair.

Approximately one month before the killing, defendant and Rodriguez argued once more about the relationship. He again asked her if she was seeing Martinez-Jimenez, and she again denied it. Defendant again threatened to kill Rodriguez and her

lover.

On November 27, Rodriguez was at home with defendant. She told him she was going out with her niece, Sandy, for dinner. Sandy picked her up and drove to a liquor store where the two women picked up Martinez-Jimenez. Rodriguez told Sandy that she (Rodriguez) and Martinez-Jimenez were going to have dinner at a Denny's by Disneyland, so Sandy dropped them off at the restaurant. Martinez-Jimenez and Rodriguez did not go to dinner. They walked from Denny's to a nearby hotel and had sex. About 8:00 that evening, Rodriguez called Sandy and Sandy picked them up at the Denny's. Sandy dropped off Martinez-Jimenez before taking Rodriguez home. Defendant was suspicious and questioned Rodriguez when she got home.

About 2:00 p.m. the next day, Rodriguez saw defendant with a knife in his waistband. He put the knife on the kitchen counter and Rodriguez asked why he had a knife. Defendant said, "Because I'm going to kill that M. . . F. . ." Rodriguez asked defendant why he would kill Martinez-Jimenez. Defendant said it was because Martinez-Jimenez took his lady. That night, Rodriguez collected all the knives in the house, wrapped them in a towel, and hid them.

That same evening, Rodriguez was in the living room with defendant and their 10-year old son, Angel. The parents again argued and defendant told their son he was going to kill someone by shooting them in the head.

Rodriguez called Martinez-Jimenez a couple hours later. She told him defendant was very suspicious and they had to stop seeing each other. While she was talking with Martinez-Jimenez, defendant walked in, startling her, and she dropped the telephone. Defendant asked who she was talking to and she said it a friend, Peitra. Defendant accused Rodriguez of lying, told her that if she loved Martinez-Jimenez she should move in with him, and walked out of the room.

At midnight, Rodriguez awoke in bed with defendant sitting on top of her, choking her with both hands. She pushed him off and kneed him in the stomach, ending the physical confrontation.

About 8:00 a.m. that morning, the day of the killing, defendant told her he was going to Townsend Street to get something. As he walked out, he said he was not going to kill her because she was the mother of his children. He also told her she could leave with Martinez-Jimenez if he was going to take care of her. Rodriguez said defendant appeared to be sad as he walked away.

Rodriguez went to a health clinic with a friend later that morning. About noon she telephoned Martinez-Jimenez and told him to be careful because defendant had threatened to kill him.

That same morning, Isadora Macias was visiting her mother, Coronado's wife. Martinez-Jimenez was Macias's uncle. Defendant asked for lemons to use with some meat Macias's mother had given him a day or two before. Macias gave the lemons to defendant. He thanked her and gave "a little laugh." Macias thought defendant looked as if "he was about to [do] something." An hour or two later, Macias saw defendant again. This time defendant asked if Martinez-Jimenez was home yet. She said he was not. Defendant seemed to be "in a rush," but he spoke in a normal voice and was not crying.

Rodriguez returned home about 1:00 p.m. and saw defendant drinking a 24-ounce can of beer in the kitchen. They again argued about Martinez-Jimenez. Defendant said he would let her do what she wanted. After the argument, Rodriguez went into her bedroom.

Salvador Castaneda worked for Macias's stepfather, Coronado. He started work at 7:00 a.m. on November 29, by picking up the tools for the day and three other employees, including Martinez-Jimenez, at Coronado's garage. They worked eight hours

and stopped and had some beers three blocks from Coronado's house. Castaneda saw defendant as they drove up. Defendant was on a bike as Castaneda backed into the driveway to unload the tools. Defendant got off the bike, asked Martinez-Jimenez, "What's up Miguelito?" and Martinez-Jimenez started to run. Defendant gave chase. They stopped when they were in the front of Castaneda's jeep. Thinking they were going to fight, Castaneda began to step in between them to separate them. But at that moment, defendant pulled a gun from his waistband and shot Martinez-Jimenez in the stomach area twice. A struggle ensued and they moved toward the garage, Martinez-Jimenez backing up. As Martinez-Jimenez fell to the ground, defendant fired two shots toward Martinez-Jimenez's face. Castaneda ran into Coronado's house. Castaneda said defendant appeared calm during the shooting.

Macias was in the living room, watching television, when she heard two shots. She went outside and saw defendant shoot Martinez-Jimenez. Defendant had a small gray gun. Macias told defendant to stop. Defendant looked at Macias and pointed the gun at her, laughing. Martinez-Jimenez, who was on the ground, signaled Macias to go back inside. Macias went back inside and called police. Defendant was gone when she returned.

While Rodriguez was inside the bedroom she heard two shots. When she got to the living room she heard a third shot. She ran out through a sliding glass door and saw defendant getting on his bicycle, holding a gray semiautomatic pistol. Martinez-Jimenez was on the ground, not moving, and several feet from where she initially saw defendant. She saw blood in the area of Martinez-Jimenez's right shoulder. Defendant rode away without saying anything.

Macias said she saw Martinez-Jimenez and defendant together about two weeks before the shooting. Defendant had a rifle. They were outside the garage to her

parents' apartment. Macias said it appeared defendant was showing the rifle to Martinez-Jimenez.

Martinez-Jimenez died at the scene due to multiple gunshot wounds. One of the gunshot wounds was to Martinez-Jimenez's scalp, but that wound was superficial. The pathologist testified Martinez-Jimenez's wounds were consistent with his having been shot, thereafter attempting to run away, and being shot in the back. Martinez-Jimenez had a .19 blood-alcohol level at the time of death.

Defendant fled to Mexico, where he was arrested. The district attorney obtained defendant's extradition to California in 2007.

The jury found defendant guilty of first degree murder (Pen. Code¹ § 187, subd. (a)) and found that defendant personally discharged a firearm causing the death (§ 22.53, subd. (d)). The court sentenced defendant to 25 years to life on the murder and a consecutive 25 years to life term for the firearm discharge.

The defense introduced the testimony of Martinez-Jimenez's ex-wife, Maria Salazar, and a defense investigator who interviewed her. In 2002, she fled to the United States from Mexico to get away from Martinez-Jimenez. He had been abusive. He worked for the government and always carried a revolver and an AK-47 or another rifle with him.

II

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant contends he was denied due process because the prosecution "failed to present evidence capable of proving [he] did not act in the heat of passion in response to provocation adequate to make the homicide involuntary manslaughter." In

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

other words, defendant contends the evidence is not sufficient to sustain his murder conviction.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) As we stated in *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610: “The standard of review is the same where the prosecution relies primarily on circumstantial evidence. [Citation.]” ““An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citation.]’ [Citation.]” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate ““that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Murder is the killing of a human being with malice aforethought. (§ 187 subd. (a).) Malice is express when “there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.” (§ 188) “Given the manner in which California has structured the relationship between murder and voluntary manslaughter, the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger *plus the absence* of both heat of passion and unreasonable self-defense.” (*People v. Breverman* (1998) 19 Cal.4th 142, 189.)

“No specific type of provocation is required, and ‘the passion aroused need not be anger or rage, but any ““[v]iolent, intense, high-wrought or enthusiastic emotion””[citations] *other than revenge* [citation].’” (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) Conduct adequate to result in heat of passion may occur over a considerable

period of time. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144.) For example, in *People v. Berry* (1976) 18 Cal.3d 509, the court found sufficient to justify an instruction on heat of passion “a two-week period of provocatory conduct by [defendant’s] wife . . . that could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition such as to cause him to act rashly from this passion.” (*Id.* at p. 515.)

There appears no reason for the killing of Martinez-Jimenez other than the fact that defendant’s wife was having an affair with him. However, the existence of a motive — especially a particularly powerful one — does not, as a matter of law, presumptively render a killing a manslaughter. Here, defendant had been threatening Martinez-Jimenez’s life for months. He told his son he was going to kill someone by shooting the person in the head. He even told his wife he would not kill her because she was the mother of his children. Whether defendant killed as the result of premeditation and deliberation or in the heat of passion was for the jury to decide. The jury was aware it could not convict defendant of murder if there was a reasonable doubt whether he acted in the heat of passion. The evidence demonstrates defendant gave plenty of thought to killing. The jury was entitled to conclude defendant acted with premeditation and deliberation and not in the heat of passion.

This same evidence also supports the jury’s conclusion that the killing was not the result of unreasonable self-defense. It is a fact of no small importance that defendant had threatened to kill Martinez-Jimenez, went looking for Martinez-Jimenez earlier that day, and armed himself with a gun. When Martinez-Jimenez returned from work, defendant, armed with the gun, was there to meet him. He approached Martinez-Jimenez, asked him “What’s up?” and gave chase when Martinez-Jimenez tried to run. Moreover, defendant shot Martinez-Jimenez in the back. Accordingly, we find there is substantial evidence to support the murder conviction.

B. Prosecutorial Misconduct

During his argument to the jury, the prosecutor told the jurors they would have one of two stories to tell after rendering their verdict. The one the prosecutor preferred, he referred to as the “more mundane” story of defendant’s conviction for murder. The other story involved acquitting the defendant of murder. In this story, the jurors are asked about the case they served on and they say, “The fact that [defendant] shot this guy and he shot him twice in the chest and twice in the back and once in the head and once in a defensive wound, I believe, we found it was self-defense, and we walked him. We found it was imperfect self-defense, even though there is no evidence that he ever knew about [Martinez-Jimenez’s prior] domestic violence case or — but we didn’t care about that. [W]e found him not guilty. We found voluntary manslaughter, a nothing charge. We didn’t find him guilty of murder. You know what? We found him not guilty of murder. [Martinez-Jimenez was] a wife beater. [¶] Is that the story you’re going to tell?” The prosecutor also made the following statements to the jury: “If you want to find him guilty of anything less than murder, just walk him out the door, find him not guilty. This is an everything-or-nothing case. [¶] If you don’t want to find him guilty of murder, on behalf of my client, I’m telling you, give him a free ride. He’s guilty of murder.” Defendant contends this argument denigrates the crime of voluntary manslaughter and constituted misconduct.

“[O]n claims of prosecutorial misconduct our state law standards differ from those under the federal Constitution. With respect to the latter, conduct by the prosecutor constitutes prosecutorial misconduct only if it ““so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.”” [Citations.] By contrast, our state law considers it misconduct when a prosecutor uses ““deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citations.] . . . ‘A defendant’s conviction will not be reversed for prosecutorial

misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071.)

In *People v. Najera* (2006) 138 Cal.App.4th 212, the defendant was charged with first degree murder and the jury found him guilty of second degree murder. (*Id.* at p. 214.) At least five times during argument "the prosecutor described voluntary manslaughter as a 'legal fiction.'" (*Id.* at p. 220.) We held the argument "misleadingly suggested [voluntary manslaughter] is not a real crime. . . . Describing voluntary manslaughter as a legal fiction could have led the jury to believe it was not a real crime and should not be considered seriously." (*Id.* at p. 221.)

The prosecutor here did not argue manslaughter was not a real crime. Rather, he argued that defendant's act of shooting Martinez-Jimenez twice in the chest, twice in the back, once in the head, and once in what resulted in a defensive wound, voluntary manslaughter would be a "nothing charge." From this defendant extrapolates that there is a reasonable likelihood the jury interpreted the prosecutor's statement to mean the defendant would go free and the jury would be ashamed to tell anyone they had reached such a verdict. There are two flaws in defendant's conclusion. First, there is nothing in the record to suggest the jury would have interpreted the prosecutor's remark as stating or implying that defendant would be a free man if the jury found him guilty of voluntary manslaughter instead of murder. "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 371.)

Second, there nothing in the record to suggest the prosecutor meant to shame the jurors into finding defendant guilty of murder. We do not take the prosecutor's rhetorical question at the end of his argument — "[i]s that the story you're

going to tell?” — as an attempt to shame the jury into convicting the defendant of murder.

The prosecutor did tell the jury: “If you want to find him guilty of anything less than murder, just walk him out the door, find him not guilty. This is an all or nothing case. [¶] If you don’t want to find him guilty of murder, on behalf of my client, I’m telling you, give him a free ride. He’s guilty of murder.” We take this to mean that as far as the prosecutor was concerned, he wanted a murder conviction. While we do not find the prosecutor’s argument laudable, neither was it inflammatory or reprehensible.

(*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

Ordinarily, “[t]o preserve for appeal a claim of prosecutorial misconduct, the defendant must make a timely objection at trial and request an admonition to the jury. [Citation.]” (*People v. Najera, supra*, 138 Cal.App.4th at p. 224.) Defendant did not object to the prosecutors comments about giving the defendant a free ride and voluntary manslaughter being a “nothing charge.” We have addressed the prosecutorial misconduct issue notwithstanding the failure to object. Having done so, defendant’s ineffective assistance of counsel argument is moot.

C. *Firearm Enhancement*

Section 12022.53 applies to 18 specific felonies (including murder), any felony punishable by life in prison, and any attempt to commit such a crime. (§ 12022.53, subd. (a).) It provides three different mandatory firearm enhancements depending upon how the firearm is used in committing a listed felony: a consecutive 10-year term if the defendant “personally uses” a firearm during the offense (§ 12022.53, subd. (b));² a consecutive 20-year term if the defendant “personally and intentionally

² “Simple firearm use may include the threatening display of a gun or its use as a cudgel. Discharge of a firearm requires that the weapon actually be fired. [Citations.]” (*People v. Palacios* (2007) 41 Cal.4th 720, 725, fn. 3.)

discharges a firearm” during the offense (§ 12022.53, subd. (c)); and, a consecutive 25 years to life term if the personal use and discharge of a firearm resulted in great bodily injury or death (§ 12022.53, subd. (d)). The jury found defendant personally and intentionally discharged a firearm resulting in great bodily injury or death.

“The legislative intent behind section 12022.53 is clear: ‘The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.’” [Citations.]” (*People v. Palacios*, *supra*, 41 Cal.4th at p. 725.) Defendant does not contend there is anything constitutionally improper in this purpose. He contends, however, that the imposition of a consecutive 25 years to life term for personally discharging a firearm and causing death (§ 12022.53, subd. (d)) resulted in improper multiple punishment in violation of double jeopardy principles. The theory is that since murder and the enhancement *each require a death*, imposition of both sentences results in a double jeopardy violation.

As defendant acknowledges, California Supreme Court precedent is fatal to his argument. (*People v. Sloan* (2007) 42 Cal.4th 110, 115-123; *People v. Izaguirre* (2007) 42 Cal.4th 126, 130-134; see *People v. Palacios* (2007) 41 Cal.4th 720; see also *People v. Scott* (2001) 91 Cal.App.4th 1197, 1212 [firearm use enhancement consecutive to conviction for assault with a firearm does not violate double jeopardy].) We are bound by our Supreme Court’s decisions. (*Auto Equity Sales Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Even were we not, we would reject defendant’s argument. Assuming the validity of firearm use enhancements in general, we see no constitutional defect in the Legislature enacting a statute that uses a sliding scale of punishment, increasing the severity of the enhancement concomitant with the seriousness of defendant’s conduct and the injury inflicted. Such enhancements “act to increase a sentence ‘because of the

manner in which [the defendant] committed the crime of conviction.’ [Citations.]”
(*Monge v. California* (1998) 524 U.S. 721, 728, italics added.)

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.

ATTORNEY GENERAL
SAN DIEGO
2011 JAN -6 AM 9:36

APPENDIX F

VERDUZCO v. WARDEN, PELICAN BAY
SA CV 11-1804-JSL (SP)
LODGMNT 8

Court of Appeal, Fourth Appellate District, Division Three - No. G042189

S190667

IN THE SUPREME COURT OF CALIFORNIA

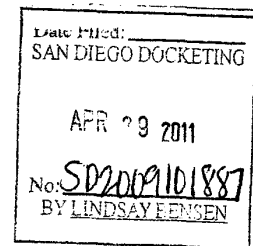
En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOSE ANTHONY VERDUZCO, Defendant and Appellant.

The petition for review is denied.



SUPREME COURT
FILED

APR 27 2011

Frederick K. Ohlrich Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice