IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **SHAUN ALEXANDER MOORE,** Defendant and Appellant.	No. H046446 (Santa Clara County Superior Court No. C1364062)

The Honorable Julia Alloggiamento, Judge

PETITION FOR REVIEW

After the Decision of the Court of Appeal, Sixth Appellate District, Filed January 19, 2022, Reversing the Sentence but Otherwise Affirming the Judgment

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **SHAUN ALEXANDER MOORE,** Defendant and Appellant.	No. H046446 (Santa Clara County Superior Court No. C1364062)

PETITION FOR REVIEW

TO: The Honorable Tani Cantil-Sakauye, Chief Justice, and the Associate Justices of the California Supreme Court:

Shaun Alexander Moore, appellant in the Court of Appeal, respectfully petitions this Court for review of the unpublished decision by the Court of Appeal, Sixth Appellate District, filed on January 19, 2022, and attached as exhibit A to this petition.

Issues Presented

1. Since a felon is allowed to possess temporarily a firearm in self-defense (see *People v. King* (1978) 22 Cal.3d 12, 24-26), was counsel ineffective for failing to exclude evidence appellant was prohibited from possessing a firearm?

2. Did the prosecution commit misconduct in cross-examining the defendant by asking argumentative questions and other questions that called for speculation, and in argument by misstating the law concerning voluntary manslaughter?

3. Does cumulative prejudice require reversal?

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STATEMENT OF THE CASE

An information was filed on November 12, 2015. (1CT 72-74.) As amended, appellant was charged with murder with personal use of a firearm leading to great bodily injury. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).) It also alleged he suffered a prior "strike" conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)). (1CT 75-77.)

After five days of testimony, the jury convicted appellant of first degree murder and found the firearms enhancement to be true. (3CT 541-544.) The court found the status enhancements to be true. (3CT 550.)

The court sentenced appellant on October 26, 2018 to serve 80 years to life in prison. It imposed 25 years to life for murder, which was doubled because of the strike, and added 25 years to life for the firearms enhancement. A determinate term of five years was added because of the prior serious felony conviction. (3CT 591-594.) A notice of appeal was filed the same day. (3CT 595.)

On January 19, 2022, the Court of Appeal reversed the judgment because of insufficient evidence appellant suffered a prior strike conviction and a prior serious felony conviction. The Court of Appeal otherwise rejected appellant's arguments. (Opn. at pp. 17-19.) No petition for rehearing was filed.

STATEMENT OF FACTS

For purposes of this petition, appellant relies on the Background information in the Court of Appeal opinion. (opn. at pp. 2-6.)

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In a nutshell, appellant was convicted of murdering Ramon Juarez Garcia. Prosecution witnesses heard a commotion and saw events after the incident had started. They reported seeing appellant chase Garcia down a street while a crowd followed. Appellant obtained a gun from a person in a car and shot Garcia six times, and then appellant ran off.

Appellant testified that he was having a picnic at a park with his family and friends when Garcia came asking for drugs. (6RT 1505-1509.) Appellant made a comment that Garcia interpreted as an insult. (6RT 1510.) Garcia eventually left but returned with some friends, and one of them behaved as if he had a gun. (6RT 1511-1512.) Appellant was concerned about the safety of his baby son and agreed to a one-on-one fight away from the park. (6RT 1513.) The two and the group went toward a carport. After an exchange of a few blows, appellant conceded the fight, but Garcia wanted to continue to fight; at one point, Garcia cut appellant's lip with a sharp instrument. (6RT 1515-1519.) Appellant said he was scared, and one in the crowd appeared to be reaching for a gun. (6RT 1513, 1584.) Appellant tried to run away, but Garcia and the crowd followed. (6RT 1523-1524, 1549.) Appellant picked up an axe handle from the ground (6RT 1523-1524, 1549) and hit Garcia, but he got back up. (6RT 1524-1525, 1550-1551.) Someone appellant knew, called Demo, drove to the scene and gave him a gun. (6RT 1527, 1555.) Garcia rode off on a bicycle, and appellant was afraid Garcia was about to retrieve another weapon. (6RT 1553, 1560.) Appellant followed Garcia and shot him when he was crouching between two cars. (6RT 1529.) It

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appeared Garcia had an ice pick in his hand. (6RT 1529.)

Reason to Grant Review

I. Counsel Was Ineffective for Failing to Exclude Evidence Appellant Was Prohibited from Possessing a Firearm.

In cross-examining appellant, the prosecution elicited that appellant was a convicted felon not allowed to possess a firearm and that he failed to follow a court order not to possess a firearm. (6RT 1558-1559, 1588.) Appellant received ineffective assistance of counsel for failing to object because the evidence was inadmissible. Appellant was not charged with illegal possession of a firearm. Although there was a firearms enhancement alleged, he admitted using the firearm to shoot Garcia (6RT 1529, 1561) and the event was video recorded (4RT 1004-1008, 5RT 1245). Whether appellant was not permitted by law or by a court order to possess a gun was irrelevant to the charges. It was irrelevant to whether he was credible or acting in self-defense. The inference that appellant might be less credible because he disobeyed the court for possessing the gun during the incident was improper because felons are permitted to possess a firearm temporarily for purposes of self-defense (*King, supra,* 22 Cal.3d at pp. 24-26), though this was never explained to the jury. The evidence also could have been excluded under Evidence Code section 352 because it permitted the jury to make an inference that was unreasonable as a matter of law

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A. Background.

The prosecution asked appellant without objection that because he was a convicted felon, he was not allowed to possess a gun:

> Q. And when you received the gun, you knew that you had a conviction for dealing dope; right?
> A. Yeah.
> Q. You knew you were not supposed to handle a gun; right?
> A. Yes.
> Q. In fact, you had been convicted of being a felon in possession of a gun before, hadn't you?
> A. Yes.

(6RT 1558-1559.)

Later, the prosecution ended its cross-examination by asking without objection if appellant knew he was "not supposed to be a felon in possession" of a firearm; he said he did know. (6RT 1588.) He was asked if he was ordered not to possess a gun, and he said that was true.[1] (1588.) He was also asked if he disobeyed a court order by possessing the gun, and he said he did. (6RT 1588.)

The court instructed the jury that a witness's credibility can be judged on, among other things, whether "the witness [has] been convicted of a felony" and whether "the witness [has] engaged in other conduct that reflects on his or her believability[.]" (2CT 491, 9RT 2437, reciting CALCRIM No. 226.)

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[1] The prosecution was apparently referring to the advisement routinely given by the court when one is convicted of a felony that he or she is not permitted to possess a firearm. (See Pen. Code, § 29800, subd. (a)(1), formerly § 12021, subd. (a)(1).)

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B. Trial Counsel's Performance was Deficient for Failing to Object to Inadmissible Evidence.

The right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by article I, section 15 of the California Constitution, entitling a defendant to "the reasonably competent assistance of an attorney acting as his [or her] diligent, conscientious advocate." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215; *Strickland v. Washington* (1984) 466 U.S. 668, 684.) This is measured by objective standards of reasonableness under prevailing professional norms. (*Strickland*, at p. 688.)

In order to show ineffective assistance of counsel, it must be shown that (1) counsel's representation was deficient in that it fell short of prevailing professional standards of reasonableness; and (2) there was a reasonable probability that but for counsel's errors, the result of the case would have been different. (*Strickland, supra*, 466 U.S. at pp. 687, 694.) On appeal, it must also be shown that there was no reasonable explanation for trial counsel's conduct. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

Trial "counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest . . . the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." (*Strickland, supra*, 466 U.S. at p. 688.) "[C]ounsel has a

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duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Id.*, at p. 691.) Trial counsel has a duty to object to inadmissible and prejudicial evidence. (*In re Jones* (1996) 13 Cal.4th 552, 573-578; *In re Wilson* (1992) 3 Cal.4th 945, 955-956.) "A criminal defense attorney should be on guard against the improper impeachment of his or her own witnesses." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1524 [counsel ineffective for failing to object to inadmissible evidence elicited by the prosecution in cross-examination].)

Trial counsel should have objected, because the evidence was inadmissible, as it was not relevant or material to the allegations or to appellant's credibility.

"Relevance is a two-part inquiry. First, the fact sought to be proven must be 'of consequence to the determination of the action.' (Evid. Code, § 210.) Second, the proffered evidence must have some 'tendency in reason' to prove that fact. (*Ibid.*)" (*People v. O'Shell* (2009) 172 Cal.App.4th 1296, 1307.) The evidence was not relevant or material to show appellant personally used a firearm. He already admitted using a firearm to shoot Garcia. (6RT 1529, 1561.) And a surveillance video showed him shooting a gun at Garcia. (4RT 1004-1008, 5RT 1245.) Evidence that it was not lawful for him to possess a firearm did not make it any more likely he personally used a firearm. Conversely, when a defendant can lawfully possess a firearm generally, this would not be a defense to the enhancement.

The evidence was not relevant to whether appellant acted in self-defense. Whether he was generally allowed to possess a

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firearm did not make it less likely he reasonably or actually believed that the immediate use of force was necessary to defend against imminent danger or whether the force he used was reasonable.

Further, appellant's use of a firearm in self-defense was not unlawful if he was in imminent danger of harm and there were no reasonable alternatives. (*King, supra*, 22 Cal.3d at pp. 24-26.) In that case, a group of up to ten uninvited men crashed a party and began fighting with the invited guests. (*Id*. at p. 16.) The host announced the party was over, and most left. (*Ibid*.) However, the defendant, two other men including one who was confined to a wheelchair, and five women remained at the apartment complex. (*Id*. at p. 17.) Three or four of the women were hiding in an apartment as the crashers tried to break in. (*Id*. at p. 17.) A woman handed the defendant a gun, which he fired to scare off the intruders. (*Id*. at p. 18.) He was charged with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and being a felon in possession of a concealable firearm (former Pen. Code, § 12021). (*Id*. at p. 19.) Although the court instructed on self-defense for the assault charges, it refused to do so for the possession count. (*Ibid*.) He was found not guilty of assault but convicted of possession. (*Ibid*.)

This Court reversed. "Use of a concealable firearm in self-defense is neither a crime nor an unlawful purpose. Section 12021 was not therefore enacted to prevent possession of these firearms during such use." (*King, supra*, 22 Cal.3d at p. 24.) "Thus, when a member of one of the affected classes is in imminent peril of great

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bodily harm or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate section 12021." (*Ibid.*)

The statute at the time banned felons from possessing concealable firearms, and it has been amended to ban possessing unconcealable firearms as well. (Stats. 1989, ch. 254, § 1.) While the Legislature sought to prohibit felons from generally possessing all types of firearms, it did not follow that it intended to prohibit them from properly using self-defense. Thus, appellant gaining possession in the middle of the incident of a firearm for the purposes of defending himself was not in itself illegal or a violation of the court's advisement that he was not permitted to possess a firearm.

The evidence was also not relevant to appellant's credibility. A defendant can be impeached by acts of moral turpitude. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) But a felon may possess a firearm when necessary to defend himself. (*King, supra*, 22 Cal.3d at pp. 24-26.) Since it was not illegal for appellant to possess a firearm for self-defense, there was not a reasonable inference that his possession of a firearm made make his claim of self-defense any less credible. Because the evidence was admitted unchallenged, however, the jury was permitted to make this improper inference.

There could be no rational justification for trial counsel's failure to object. It is often said that the choice whether to object to

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evidence in inherently tactical, as trial counsel might find some usefulness from the evidence or not wish to draw attention to certain facts. (See *People v. Bona* (2017) 15 Cal.App.5th 511, 521.) But the evidence was not just an isolated statement in passing. The prosecution dwelled on it twice. (6RT 1558-1559, 1588.) It was the close of the cross-examination of appellant, earning it additional attention. (6RT 1588.)

Furthermore, there was a distinct danger the jury would draw the impermissible inference that appellant had a character or disposition to disobey court order's and the law and to be violent. The evidence thus should have been excluded under Evidence Code section 352, even if it had some probative value, because the "probative value [wa]s substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "[E]vidence is probative if it is material, relevant, and necessary. '[H]ow much "probative value" proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).' " (*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. 20.) In this context, prejudice is not synonymous with damaging. "Evidence is substantially more prejudicial than probative . . . if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690,

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724.) One is not permitted to infer the defendant has a character or disposition to commit certain crimes because of the prior convictions. (Evid. Code, § 1101, subd. (a); *People v. Gurule* (2002) 28 Cal.4th 557, 608 [prior murder and rape inadmissible in capital murder jury trial]; see also *Old Chief v. United States* (1997) 519 U.S. 172, 185 [when the court erroneously admits evidence of a prior conviction for a similar offense, the risk of prejudice is "especially obvious"].)

As explained above, the probative value of the evidence was minimal because the evidence did not lead to a reasonable inference appellant was not credible or that he was any more likely to be guilty of the allegations. But the evidence invited the jury to make the unreasonable inference appellant was more likely to be guilty because he had a character for violence, could not possess a firearm even in self-defense, and could not follow court orders to testify truthfully. In short, the evidence was harmful, not at all helpful, and the failure to object did not lessen the prejudicial impact of the evidence.

C. Admission of the Evidence Deprived Appellant of a Fair Trial.

"The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra,* 466 U.S. at p. 694.)

The Court of Appeal decided there was no prejudice because appellant was impeached with other convictions. (Opn. at p. 8.) However, allegedly possessing a firearm illegally and against a

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court order showed not only that he did suffer another felony convictions, but also "[h]e actually offered up that he has disregarded Court's orders before." (9RT 2470.) Thus, he "was ordered by the Court to say the truth, but he's disobeyed prior court orders." (9RT 2470.)

The prosecution's argument was reinforced by the court's instruction that a witness's credibility can be judged on whether "the witness [has] engaged in other conduct that reflects on his or her believability[.]" (2CT 491, (9RT 2437.)

The prosecution's argument, in combination with the court's instruction, permitted the jury to infer appellant was less likely to be credible because he illegally possessed a firearm in this case. As explained above, this was an unreasonable inference because him possessing a firearm to defend himself was not illegal. But the jury was not informed of this or the circumstances for determining when such possession would be lawful.

The Court of Appeal decided there was no prejudice because the case did not depend on appellant's credibility. Instead, there were several witnesses who saw him kill Garcia. (Opn. at p. 9.) While several witnesses saw the end of the incident, however, no one saw how it began. In assessing a claim of self-defense, the danger need not be real, so long as a reasonable person would believe it to be real. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.) Thus, "a jury must consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge . . . .' As we stated long ago, '. . . a defendant is entitled to have a jury take into consideration all the elements in

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the case which might be expected to operate on his mind . . . .' [Citation.]" (*Ibid*.) If the defendant's honest belief in self-defense is unreasonable, then his claim of imperfect self-defense renders him not guilty of murder but is guilty of voluntary manslaughter. (*People v. Flannel* (1979) 25 Cal.3d 668, 674, 679.)

Appellant explained how the incident started, how Garcia returned with friends and a weapon, and how at least one of his friends behaved as if he had a gun. (6RT 1511-1512, 1513, 1517-1518, 1519, 1584.) Appellant explained how he was scared and just reacting to the situation (6RT 1589, 1590), however rashly. If believed, his testimony was sufficient to show perfect self-defense, or at least imperfect self-defense or provocation leading to voluntary manslaughter. Thus, the prosecution case did depend on discrediting appellant.

Appellant's fear of Garcia returning with a weapon was reinforced by him hitting Garcia with the axe handle only to find Garcia get back up. (6RT 1524-1525, 1527, 1550-1551.) This scared appellant because he thought he hit Garcia hard, and Garcia's apparent failure to feel as much pain as he should would indicate he was under the influence and prone to act more unpredictably and violently. (6RT 1525-1527.) Indeed, he had alcohol and methamphetamine in his blood, and the defense expert testified that such a person could act more violently. (7RT 1848-1849, 1866.)

While one witness said Garcia put his hands up as if to surrender (5RT 1241), appellant said Garcia turned toward him, possibly with an ice pick in his hand which prompted him to shoot.

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(6RT 1529.) Indeed, an ice pick was found in the area Garcia went to after he was shot. (5RT 1272-1273.) This was consistent with appellant's theory that Garcia discarded the weapon after being shot.

Even if the jury were not to believe appellant honestly acted in self-defense, it could infer he acted in the heat of passion. Willful, premeditated, and deliberate murder in the first degree usually exhibits evidence of planning, motive, and method, though they are not essential elements to the offense. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) On the other hand, a killing with malice aforethought but without premeditation or deliberation is murder in the second degree. (Pen. Code, § 188; *People v. Rivera* (2019) 7 Cal.5th 306, 328.) And an intentional killing which is done "upon sudden quarrel or heat of passion" is voluntary manslaughter. (Pen. Code, § 192, subd. (a); *People v. Breverman* (1998) 19 Cal.4th 142, 163-164.)

There was no evidence of planning or a motive. There was no evidence appellant knew Garcia. There was no reason to believe appellant had a pre-existing desire to harm Garcia. The prosecution case depended on appellant following Garcia with a gun, but no prosecution witness saw how the incident began. Appellant acting in the heat of moment after being provoked by Garcia was a more reasonable explanation than him simply deciding to kill Garcia for no apparent reason. The prosecution's case in securing a conviction for murder depended on not just discrediting appellant but burying his credibility. Evidence of him disobeying a court order was key to this project.

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The record supports the conclusion that the jury found this to be a close case and wrestled with the questions of how the fight began, what reason would appellant have to attack Garcia. Among the jury's first set of questions was a request for readback of appellant's testimony. (3CT 529.)[2] The Court of Appeal said this only showed the jury considered the case carefully. (Opn. at p. 9.) However, this showed that at least some of the jurors considered his testimony and his explanation of his fear and rash behavior but also the reasons for not believing him, including those improperly presented by the prosecution. The jury also asked in the second set of questions for the times of the 911 calls and a readback of one of the witnesses. (3CT 529.) This was significant because the witness and the 911 calls were the first accounts of the incident, aside from appellant's.

Jury question # 3 was for a readback of another witness's testimony. (3CT 533.) His testimony was significant because he was one of the few, other than appellant, who described what occurred after the shooting. (See 5RT 1215-1220.) This indicated the jury was considering how the incident started and tried to infer appellant's possible motives from his behavior after the shooting. Jury question # 4 was a set of questions concerning the definition of murder, specifically clarification of the term deliberation in

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[2] The questions at 3CT 529 are labeled jury question # 1, though it appears the page after jury question # 2 at 3CT 528, which was a request for more written copies of the instructions. It appears both set of questions were submitted to the court around the same time.

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CALCRIM No. 521 and the interplay of this instruction with CALCRIM No. 520, defining murder and malice. (3CT 532.) This indicates that at least some of the jurors, at least initially, had difficulty concluding beyond a reasonable doubt appellant acted with malice aforethought.

At least some of the jurors found it questionable that the prosecution proved beyond a reasonable doubt appellant was guilty of murder. But their doubt depended upon appellant's credibility. It was not enough for the jury not to believe some of what appellant said. The prosecution needed the jury to disregard everything he said, including how the incident started. This was why it was important for the prosecution to dwell as it did in discrediting appellant in every way possible. There was a "reasonable probability" that had trial counsel objected to exclude the evidence, appellant would not have been convicted of first degree murder. The judgment must be reversed.

II. The Prosecution Committed Misconduct in Cross-examining Appellant and in Misstating the Law Concerning Voluntary Manslaughter.

The prosecution committed misconduct by telling appellant in front of the jury his testimony did not make sense and asking appellant argumentative questions that called for him to speculate about information he had no personal information of. While most of the objections were sustained, the prosecution persisted in asking the same question repeatedly, conveying to the jury that it did not believe appellant's defense. It also misstated in argument the law concerning heat of passion for voluntary manslaughter by

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asserting the law requires a reasonable person to react in the same manner appellant did. This created an impossible standard for the defense to apply. While there was no objection to the argument or to the argumentative nature of some of the improper questions, appellant received ineffective assistance of counsel.

A. Background.

Appellant described on direct examination a crowd following him and Garcia to a carport before any fighting occurred. (6RT 1515.) The prosecution asked him if it was just a coincidence they stopped following at that point. (6RT 1546.) The court overruled the defense objection that the question called for speculation. (6RT 1546.) Nonetheless, the prosecution rephrased the question without objection: "So this group of people that are following you, they stop for no particular reason and you go into this carport area and there is no else there?" (6RT 1546-1547.) Appellant confirmed there was no one else there, except Garcia. (6RT 1547.) The prosecution later asked about the axe handle appellant found to defend himself: "It's just on the ground on the sidewalk?" Appellant said it was. (6RT 1549.) "Just randomly when you needed it?" The court sustained the objection it was argumentative. (6RT 1549.)

Appellant described a short fist fight at the carport. (6RT 1546-1553.) He explained he then followed Garcia because he was afraid Garcia would be getting another weapon. (6RT 1553.) The prosecution replied without objection, "that doesn't make sense to me." (6RT 1553.) Later, appellant again explained he followed Garcia with a gun because he was afraid of what Garcia might do

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next. (6RT 1559-1560.) "You followed him with a gun?" the prosecution asked. (6RT 1560.) "Yes," appellant replied, " I did." (6RT 1560.) "How does that make sense?" the prosecution asked. (6RT 1560.) Appellant's objection that it was argumentative was sustained. (6RT 1560.)

The prosecution asked if one called Demo knew appellant needed a gun; the court sustained an objection that it called for speculation. (6RT 1554.) The prosecution asked again if Demo knew appellant needed a gun; the court sustained an objection that it called for speculation. (6RT 1556.) The prosecution then asked: "How would he know?" (6RT 1556.) Again, the court sustained an objection that it called for speculation. (6RT 1556.) After appellant explained he had not seen Demo earlier that day, the prosecution asked "[b]ut he was able to know that you were at 3rd and Julian right when you needed a gun he was there?" (6RT 1556.) The court sustained the objection that the question called for speculation and was argumentative. (6RT 1556-1557.) Appellant explained Demo was a passenger in the car (6RT 1527, 1557) and appellant did not know who the driver was. (6RT 1557). "Demo knew you were at 3rd and Julian," the prosecution asked again, "he was in the passenger seat, and he was able to hand you a gun?" (6RT 1557.) The court sustained the objection that the question called for speculation. (6RT 1557.)

Appellant explained he was reacting to the situation and not thinking. (6RT 1589, 1590.) The prosecution asked a series of questions whether he chose to do certain things during the incident. (6RT 1568, 1594-1595.) On recross-examination, the

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prosecution asked: "Are you saying right now, as you sit here, when you were talking to your lawyer, that you accidently shot Garcia?" Appellant objected, and the court directed the prosecution to rephrase the question, and so the question became whether Garcia was shot by accident. Appellant said it was not an accident. (6RT 1596.)

In closing argument, the prosecution argued, concerning heat of passion: "this is the standard. Would an average – would a reasonable person run after someone that had a screwdriver and shoot him down because they had an unreasonable fear of that person? No. There's nothing that shows heat of passion, nothing." (9RT 2508-2509.) It later said:

> This isn't heat of passion. It can't just evoke the defendant's emotions. It has to be a person of average disposition. Would a normal person have acted the way Shaun Moore did? No. That's not how the average person – person of average disposition would have acted.

(9RT 2511.) There was no objection.

B. The Prosecution Committed Misconduct in Cross-Examining Appellant with Questions that Were Argumentative and Called for Speculation.

The prosecution commits misconduct when it infringes on a defendant's constitutional rights. (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375; see, e.g., *Brecht v. Abrahamson* (1993) 507 U.S. 619, 63-633 [commenting on the defendant exercising the right to remain silent].) Misconduct also violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due

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process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Misconduct that does not violate the federal Constitution nevertheless violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Navarette* (2003) 30 Cal.4th 458, 506, internal quotation marks omitted.)

It is misconduct for the prosecution to indicate it believes or disbelieves certain witnesses or in the defendant's guilt. (*United States v. Young* (1985) 470 U.S. 1, 18-19; *People v. Bain* (1971) 5 Cal.3d 839, 846.) It is misconduct because it suggests the prosecution has personal knowledge of the defendant's guilt from information not in evidence. (*People v. Kirkes* (1952) 39 Cal.2d 715, 723.) In *People v. Hill* (1998) 17 Cal.4th 800, it was misconduct when the prosecution audibly laughed at defendant's testimony to show disbelief. (*Id*. at p. 834; see also *United States v. Rangel-Guzman* (9th Cir. 2014) 752 F.3d 1222, 1224-1225 [manner in which prosecutor referred to defendant's answers when she interrogated him amounted to vouching].)

The problem of implying the prosecution is in possession of facts not in evidence is that the prosecution arrogates for itself the position of an unsworn witness in violation of the defendant's constitutional right to confront and cross-examine witnesses against him. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *People v. Harris* (1989) 47 Cal.3d 1047, 1083; *People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) It also places the prestige of the district attorney's office in place of the facts that are in evidence.

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(See *United States v. Hermanek* (9th Cir. 2002) 289 F.3d 1076, 1098.) This violates due process by lessening the burden of proof (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15) by encouraging the jury to convict on the prestige of the prosecutor even when the evidence is not convincing beyond a reasonable doubt. (*Rangel-Guzman, supra*, 2014) 752 F.2d at p. 1225.)

It is also misconduct to elicit inadmissible evidence. (*People v. Bonin* (1988) 46 Cal.3d 659, 689.) A witness cannot testify about matters of which he has no personal knowledge. (*People v. Anderson* (2001) 25 Cal.4th 543, 574.) Most of the sustained objections concerned the prosecution asking appellant to provide information or to speculate about things of which he had no personal knowledge. Appellant lacked personal knowledge of what Demo knew when he offered appellant a gun (6RT 1554), for example, because there was not a rational inference that appellant could accurately perceive what Demo knew.

The Court of Appeal decided the prosecution did not imply it had superior knowledge. (Opn. at p. 13.) This was not a reasonable conclusion based on the record. The prosecution did not just accidentally stray by asking an isolated improper question. It asked the question five times, despite the court repeatedly sustaining appellant's objections. (6RT 1554-1557.) It was an argument conveyed to the jury through questions the prosecution knew would not and could not be answered. Thus, there was harm even though the court sustained the objections.

While it is presumed the jury would follow the court's instructions that the questions of the lawyers are not in

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themselves evidence (see *People v. Lindberg* (2008) 45 Cal.4th 1, 25-26; but see *Bruton v. United States* (1968) 391 U.S. 123, 135 ["there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."]), the not so subtle message conveyed by the prosecution could not be missed: it believed appellant was not credible.

In other words, the prosecution's questions were argumentative. "An argumentative question is designed to engage a witness in argument rather than elicit facts within the witness's knowledge." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1125.) It "is a speech to the jury masquerading as a question." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.)

The prosecution's statement, "that doesn't make sent to me" (6RT 1553), was purely argumentative, as it was simply a statement of the prosecution's view of appellant's testimony.

The prosecution's question that the axe handle was on the ground "[j]ust randomly when you needed it?" was deemed argumentative by the court. (6RT 1549.) There was no way a witness could answer the question.

The prosecution's question near the close of its recross-examination, "[a]re you saying right now, as you sit here, when you were talking to your lawyer, that you accidently shot Garcia?" (6RT 1596) was argumentative for two reasons. First, it improperly placed for the jury's consideration that appellant is providing his story for the first time at trial after counsel had been appointed.

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"With respect to postarrest silence, the court found that a variety of factors may cause the defendant to remain silent (e.g., intimidation by situation, fear, or unwillingness to incriminate another). In light of these factors, it would not have been 'natural' to offer an explanation. The court therefore concluded that postarrest silence lacked probative value. [Citation.]" (*People v. Fondron* (1984) 157 Cal.App.3d 390, 398-399, citing *United States v. Hale* (1975) 422 U.S. 171, 177, fn. omitted.)

Even if appellant had not been warned of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, it is improper to infer a defendant's refusal to disclose certain facts that are presented at trial shows consciousness of guilt or lack of credibility. "The *Miranda* warnings and an arrestee's right to remain silent have been widely publicized. In many cases, the silence of an unwarned arrestee will be based on his personal knowledge of his *Miranda* rights. Therefore, the 'implicit assurance' that his silence will not be used against him, which has been made known to the general public via the media and other methods of communication, is inherently present. The privilege against self-incrimination would indeed be 'reduced to a hollow mockery' if exercising it results in self-incrimination just as much as not exercising it." (*Fondron, supra*, 157 Cal.App.3d at p. 399.)

Second, the question was not aimed to clarify appellant's testimony or to bring forth facts. Appellant did say he was acting out of fear without an opportunity to think things through (6RT 1589, 1590), and the prosecution sought to challenge the assertion by asking if he made deliberate decisions to do certain things

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during the incident (6RT 1568, 1596). But appellant never contended Garcia was shot by accident. The question was a mischaracterization of appellant's testimony with the primary aim to suggest by innuendo the testimony was contrived after the appointment of counsel. This created the basis for the prosecution to argue to the jury that appellant saying he was afraid what was going to happen was insufficient because "[h]e didn't tailor his answers correctly." (9RT 2467.)

The cross-examination of appellant amounted to a violation of due process. (*Darden, supra*, 477 U.S. at p. 181.) The improper questions were not isolated. Instead, the prosecution repeatedly asked the same improper questions, even after objections were sustained. This reflected a pattern of misconduct designed to achieve an unfair advantage with argumentative questions and inaccurate descriptions of the law.

C. The Prosecution Committed Misconduct in Misstating the Law Concerning Voluntary Manslaughter.

It is misconduct to misstate the law. (*Hill, supra,* 17 Cal.4th at pp. 830-831.) The effect is to lessen the prosecution's burden of proof in violation of the due process clause of the Fourteenth Amendment. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 486-488.) "[T]he court and the prosecutor, as officers of the court, have a duty not to misstate the law, whether intentionally or not." (*People v. Goodwillie* (2007) 147 Cal.App.4th 695, 734-735.) The test is "whether there was a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion," or in a

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manner which reduced the prosecution's burden of proof. (*People v. Booker* (2011) 51 Cal.4th 141, 184-185; *Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The prosecution's comment that there was not heat of passion because a reasonable person would not react in the manner appellant did was a misstatement of law. The comment reduced its burden of proving appellant guilty of murder by creating a higher standard for the heat of passion defense than what exists under the law.

" 'An unlawful homicide is upon " 'a sudden quarrel or heat of passion' " if the killer's reason was obscured by a " 'provocation' " sufficient to cause an ordinary person of average disposition to act rashly and without deliberation.' (*Breverman, supra,* 19 Cal.4th at p. 163.) The focus is on the provocation – the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*People v. Najera* (2006) 138 Cal.App.4th 212, 223.)

"The proper focus is placed on the defendant's state of mind, not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply react, without reflection. . . . [T]he anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene. . . . [T]he question is whether the average person would react in a certain way: with his reason and

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judgment obscured." (*People v. Beltran* (2013) 56 Cal.4th 935, 949.)

Because provocation is judged by whether a reasonable person would act rashly, it is misconduct for the prosecution to argue voluntary manslaughter requires an average person to act the same way the defendant did. (*People v. Forrest* (2017) 7 Cal.App.5th 1074, 1085; *Najera, supra*, 138 Cal.App.4th at p. 223.)

The prosecution's argument that appellant had no claim of "heat of passion" unless "a normal person have acted the way Shaun Moore did" (9 RT 2511) misstated the law. Similarly, the statement, "[t]hat's not how the average person – person of average disposition would have acted" (9RT 2511) misstated the law. This is because "The prosecutor's remarks incorrectly informed the jury that provocation is sufficient to reduce a murder to manslaughter only if a reasonable person would have done what appellant did . . . [but] such remarks amount to a misstatement of the legal standard regarding provocation under *Beltran, supra*, 56 Cal.4th 935 . . . . " (*Forrest, supra*, 7 Cal.App.5th at p. 1085, internal quotation marks omitted.)

The misconduct reduced the prosecution's burden of proof. Due process under the Fourteenth Amendment requires every element proven beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) Comments that reduces the prosecution's burden of proof is misconduct. (*Hill, supra*, 17 Cal.4th at pp. 831-832.) The prosecution's comment created an artificial barrier for appellant to overcome to prevail on his defense, one that was nearly unsurmountable. "[S]ociety expects the average person not to kill, even when provoked." (*Beltran, supra*, 56 Cal.4th at p. 954.)

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This is why provocation mitigates murder to manslaughter, but does not justify it. (*Ibid.*) Since no reasonable person would kill when provoked, the prosecution erected an unsurmountable barrier for appellant to overcome in violation of his right to due process under the Fourteenth Amendment.

D. Trial Counsel was Ineffective for Failing to Properly Object to the Prosecution Misconduct.

As described above, trial counsel did not object to the prosecution misstating the law concerning heat of passion. When trial counsel did object to the prosecution's cross-examination, it was usually on the grounds the questions called for speculation, not that they were argumentative. Some of the questions were made without any objection.

To the extent trial counsel failed to properly object, appellant received ineffective assistance of counsel. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) Again, it must be shown that (1) counsel's representation was deficient in that it fell short of prevailing professional standards of reasonableness; and (2) there is a reasonable probability that but for counsel's errors, the result of the case would have been different. (*Strickland, supra*, 466 U.S. at pp. 687, 694.) On appeal, it must also be shown that there was no reasonable explanation for trial counsel's conduct. (*Pope, supra,* 23 Cal.3d at p. 426.)

"Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." (*Strickland, supra*, 466 U.S. at p. 688.) Trial counsel has a duty to object to inadmissible and prejudicial evidence. (*Jones,*

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supra, 13 Cal.4th at pp. 573-578; *Wilson, supra*, 3 Cal.4th at pp. 955-956.) Trial counsel has a duty to object to prosecutorial misconduct. (*People v. Centeno* (2014) 60 Cal.4th 659, 675-676; *People v. Anzalone* (2006) 141 Cal.App.4th 380, 395-396; *Zapata v. Vasquez* (9th Cir. 2015) 788 F.3d 1106, 1115-1116.)

There could be no tactical reason for failing to object. It is sometimes said that a decision whether to object is inherently tactical. But objecting to prosecution's questions without stating the proper grounds for excluding the evidence was not a tactical decision. (*Jones, supra*, 13 Cal.4th at pp. 571-573; *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366 ["The fact that counsel objected . . . at all, however, refutes any inference that he was pursuing some tactical advantage by withholding [the meritorious] argument."].) For the same reason, objecting to some questions but not other improper questions on the same topic could not have been tactical. Similarly, there could be no tactical reason for presenting a heat of passion of defense but failing to object to the prosecution explaining to the jury that the defense only applies if certain things are required that are not actually required by law.

E. The Misconduct was Prejudicial.

Because the prosecution misconduct violated appellant's constitutional rights, reversal is required unless it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Ineffective assistance of counsel is prejudicial if it is "reasonable probability" a better outcome would have occurred without the error. (*Strickland, supra*, 466 U.S. at p. 694.) Even under the state standard, reversal is required if it is "reasonably

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probable" a better outcome would have occurred without the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Reversal is required under any standard.

There was no evidence appellant had seen Garcia before. Something started the dispute. Actions by Garcia to make appellant fear for his safety would justify the use of self-defense, or at least create imperfect self-defense. Such provocation by Garcia would logically lead to a conviction of voluntary manslaughter. The prosecution case depended on thoroughly discrediting appellant. This was achieved by asking improper questions that amounted to the prosecution arguing in cross-examination that appellant's defense "doesn't make sense" (6RT 1553, 1650) and was not to be believed. But the reasons for not believing appellant were improper: because the prosecution did not think his story made sense, repeatedly suggested appellant was acting in concert with Demo, and discounted appellant's account as being created after he lawyered up.

The prosecution also required creating an unsurmountable barrier to finding appellant acted in the heat of passion. The focus on heat of passion is also on how the fight began. The focus "is on the provocation – the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*Najera, supra*, 138 Cal.App.4th at p. 223.)

The jury often gives significant weight to the prosecution's summary of the law. (*People v. Pitts* (1990) 223 Cal.App.3d 606,

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694 [because it comes from the official representative of the People, the prosecutor's closing argument carries significant weight with the jury].) After all, the prosecution is "entrusted with the enforcement of the law," and this creates inherent trust in its explanation of the law. (*People v. Rodriguez* (2018) 26 Cal.App.5th 890, 907.)

While one might assume the jury followed the court's instructions, not the contradictory statements of the prosecution, a court's instruction does not mitigate a misstatement of the law if the prosecution's misstatement does not contradict the instruction but instead appears to a layperson as a reasonable explanation of the instruction. (See *Deck v. Jenkins* (9th Cir. 2014) 814 F.3d 954, 982.) This is what occurred here. The instruction on heat of passion stated that the provocation must have been significant enough to cause "a person of average disposition to act rashly and without due deliberation . . . ." (2CRT 512; 9RT 2447, reciting CALCRIM No. 570.) The prosecution's argument elaborated on this language but did not contradict it. The prosecution told the jury that, in determining if the provocation was sufficient, it should consider whether the provocation would cause the average person to act rashly in the same way as appellant. Nothing in CALCRIM No. 570 contradicted the misstatement. The effect of the prosecution's argument on provocation was to make it impossible for appellant to fulfill the artificial test that was created, even though there was substantial evidence for the jury to find the defense applied.

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The Court of Appeal decided there was no prejudice because the evidence was overwhelming. (Opn. at p. 16.) But this ignores that there was no information about how the incident started, other than appellant's testimony. If believed, a rational jury could have concluded he acted in the heat of passion, even if it fully credited the prosecution witnesses. Accordingly, reversal of the judgment is required.

III. Cumulative Prejudice Requires Reversal.

When the combined effect of individual errors "denied [the defendant] a trial in accord with traditional and fundamental standards of due process," relief is compelled. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298.) Thus, *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation" under the Fourteenth Amendment to the United States Constitution. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53; see also *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 & fn. 15 ["the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"].)

"[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 p. 844.) When some errors violated the federal constitution, reversal is required if, with the cumulative effect of all errors, it cannot be shown beyond a reasonable doubt the errors did not influence the outcome. (*Id*. at pp. 844-845; see *United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6 (en banc) ["If any of the errors

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being aggregated are constitutional in nature, . . . *Chapman* should be used. . . . "].)

When trial counsel acts deficiently in multiple instances, the prejudice from counsel's actions is judged from the cumulative their effect. (*Jones, supra*, 13 Cal.4th at pp. 583-584; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc); *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

Reversal is required under any standard. The erroneously admitted evidence and the prosecutorial misconduct worked in tandem to diminish the prosecution's burden of proof and to permit the jury to completely disregard appellant's testimony and arrive at a guilty verdict by using improper logic, unreasonable inferences, and an incorrect description of the law.

CONCLUSION

For the foregoing reasons, appellant respectfully requests this Court to grant review.

DATED: February 18, 2022

Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: /s/ Jonathan Grossman
Jonathan Grossman
Attorney for Appellant
Shaun Alexander Moore

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CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached Petition for Review contains 8230 words.

/s/ Jonathan Grossman
Jonathan Grossman

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EXHIBIT A

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Filed 1/19/2022

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SHAUN ALEXANDER MOORE, Defendant and Appellant.	H046446 (Santa Clara County Super. Ct. No. C1364062)

A jury rejected defendant's self-defense claim, and convicted him of first degree murder for killing Ramon Garcia. Defendant argues that trial counsel rendered ineffective assistance by not objecting during defendant's cross-examination to questions eliciting that he violated court orders by taking possession of the gun used to kill Garcia just before shooting him. He also argues the prosecutor committed prejudicial misconduct during defendant's cross-examination by posing a series of argumentative and speculative questions, and during closing argument by misstating the law on heat of passion voluntary manslaughter. He further asserts that his prior conviction for active participation in a criminal street gang was not shown to be a prior serious felony or strike offense.

Defendant's prosecutorial misconduct claims are forfeited to the extent he neither objected to the questions and argument nor sought a jury admonition. As we find no prejudice from any prosecutorial error during cross-examination or closing argument, we reject defendant's ineffective assistance claims.

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We agree that the abstract of judgment used to prove defendant's prior conviction for active participation in a criminal street gang does not establish the elements of the offense necessary to qualify the conviction as a prior serious felony and strike offense. We will therefore reverse the true finding and remand the matter to retry the prior serious felony and prior strike allegations.

I. BACKGROUND

Defendant fatally shot Ramon Garcia in August 2013 in a parking lot near downtown San Jose. He was charged with murder with the personal use of a firearm (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).) The information alleged a prior strike conviction (Pen. Code, §§ 667, subds (b)–(i), 1170.12) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)). Trial was held in 2018.

The prosecution called several percipient witnesses at trial: From his second story apartment on 3rd Street, one witness heard an escalating commotion and saw "a group of guys against one individual." An African American man wielded a bat at a Hispanic man who was "backing up" and being followed, and the others looked like they were "containing" the Hispanic man. The African American man swung the bat at the Hispanic man. The Hispanic man fell, held up his forearms to defend against the bat, and struggled to get up. He turned his back, and moved away from the man with the bat and from the witness's view.

From a yard sale on the corner of 3rd and Julian, a woman heard a noisy group of men approaching on the street. As the group got closer, an African American male hit a man on a bicycle with a large stick. The man fell, was hit again, and started to bleed.

From his westbound car stopped at the traffic light at Julian and 3rd, a man saw a group of four or five African American males running on 3rd toward Julian. The group was led by two men, one of whom carried a large wooden stick. The group arrived at Julian just as a Mercedes pulled up. The man with the stick approached the Mercedes, was handed a gun, and ran east on Julian. The other man who led the group remained at

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the corner and yelled " 'yeah, yeah, yeah' " as the witness heard shots being fired. The group appeared to be chasing a Hispanic male on a bicycle. The passenger in the same car saw the Mercedes pull up and observed people on the sidewalk. Someone grabbed something from the car and "speed walk[ed]" toward a nearby taqueria. She turned around and saw the person fire a gun, a man on a bicycle fall, and other people scatter.

A man who lived across the street from the taqueria parking lot witnessed the shooting from his driveway. A Hispanic man rode up on a bicycle followed by an African American male on foot. The Hispanic man jumped off the bike as he turned into the parking lot, raised his hands "almost like he was being arrested," and said " 'you got me. You got me.' " The African American man fired at the Hispanic man three times, and ran down 4th Street. Another man heard shots fired, saw an African American man run south on 4th Street, discard what looked like a baseball bat in an abandoned lot, and hand what looked like a gun to a someone on a bike.

Defendant testified that Garcia approached his friends Clompton and Kemp in St. James Park looking for drugs. Garcia took offense when defendant said something like " 'You all in my boy's face.' " Defendant did not know Garcia, who appeared high, but he apologized to Garcia, they "tapped" fists, and Garcia walked away. Garcia returned a few minutes later with two men on bicycles. Defendant thought one of the men had a gun because of the way he was touching his pants. Garcia said he felt disrespected and wanted to "take it down the street" to fight. Defendant agreed because he wanted to "get the threat away" from the children at the park, including his seven-month-old son. A small group, including defendant, Garcia, Garcia's two companions, and Clompton, proceeded to walk away from the park.

Defendant testified that he alone followed Garcia to a carport behind an apartment complex, where Garcia struck defendant's mouth with his fist. Defendant struck back, avoided a second blow, and slipped. Garcia struck defendant's lip with a shiny object which defendant thought was a knife. Defendant was unarmed, scared, and told Garcia

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he did not want to fight. Garcia held the shiny object which looked like an awl or screwdriver, motioned defendant to "come on," and defendant thought Garcia was going to stab him. Garcia swung again, defendant got "out of the way," but felt "a little pinch" in his side. As defendant ran toward the street where the onlookers remained, he felt a slash on his back and thought it was from a knife. As he walked toward the park, he saw an axe handle on the ground and picked it up. He did not want to fight, but the onlookers were egging on both sides.

Defendant described that Garcia and the others followed him past the park, and on the next corner (3rd and Julian) defendant struck Garcia, who " 'was coming at' " him, on the shoulder with the axe handle. Defendant was scared because "nothing [was] going to stop" Garcia. Defendant swung the axe handle a second time, striking Garcia above the ear. Garcia fell, but "bounced right back up" just as defendant heard someone calling his name. Defendant turned and saw his friend Demo gesturing from a car. Defendant ran to Demo, who handed him a gun. Garcia jumped on his friend's bike, and defendant pursued him on foot. Garcia peddled less than a block before turning into a parking lot and stepping off the bike. Garcia was holding an awl when defendant "got up close to him [and] shot him." Garcia "went down," but he "got back up and motioned like he was going to swing the object again," and defendant "shot again."

Several 911 calls were admitted in evidence, in addition to the axe handle, and a video of the shooting captured on a home surveillance camera. Garcia's DNA was found on the handle and tip of an awl that was recovered from the parking lot. Defendant's DNA was not detected on the awl.

Defendant testified that he used someone else's name and a made-up social security number at the emergency room later that day, where he received sutures on his lip. He testified that he borrowed a car from someone he knew for a "couple hundred dollars," drove to San Francisco and threw the gun off the Golden Gate Bridge, before he

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went to the emergency room. Within weeks, he went to Las Vegas where he shaved his dreadlocks.

Clompton, whom defendant described as a "good friend" who would regularly "hang out with [defendant] and [defendant's wife]," testified that a man on a bicycle approached him in the park about "smoking weed." The man, who "came off wrong, the way he act[ed]," approached others, left the park, returned with someone else, and approached a table in the park "like in conversation." Then "everybody got up and left down the street," and it looked like there was going to be a fight. Clompton testified that he followed the group to the edge of the park, where he heard a loud commotion, "and a black guy came out, it looked like he was bleeding and it looked like he was trying to get away." Clompton could no longer see the group once they reached Julian Street. He testified on cross-examination that he did not know defendant, he had seen defendant twice before "around the park," but he did not know or remember what defendant's face looked like.

A toxicology report showed that Garcia was under the influence of alcohol and methamphetamine when he died. A psychiatrist testified regarding persons under the influence of alcohol and methamphetamine. He explained that "anyone who is intoxicated on alcohol and methamphetamine is at a higher risk of behaving violently." But he went on to state that "a [] male riding a bicycle and then being randomly assaulted from behind" does not describe violent behavior.

The jury was instructed on first degree murder, first or second degree murder with malice aforethought, justifiable homicide (self-defense), heat of passion voluntary manslaughter, and imperfect self-defense voluntary manslaughter. Defendant argued that he acted in self-defense to protect himself from a violent erratic man who had attacked him with an awl. The prosecutor argued that taking the gun from Demo and pursuing and shooting a retreating victim multiple times showed premeditation; there was no credible evidence of self-defense; and it defied logic that defendant would pursue Garcia, who

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was carrying an awl, when at the same time he was afraid of one of Garcia's associates who he believed was armed with a gun.

The jury found defendant guilty of first degree murder and found the firearm enhancement to be true. The court found true the prior strike and serious felony allegations. Defendant was sentenced to 80 years to life, composed of three 25-years-to-life terms (for murder, the prior strike, and the firearm enhancement), and five years for the prior serious felony conviction.

II. DISCUSSION

A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Defendant argues that trial counsel rendered ineffective assistance by failing to object on relevance and Evidence Code section 352 grounds to the prosecutor's questions regarding defendant's violation of court orders. An ineffective assistance claim requires a showing both that counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) "Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) If the record on appeal "sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' [citation], the case is affirmed." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) To prove prejudice, a defendant must affirmatively show a reasonable probability of a more favorable result but for trial counsel's errors. (*Ledesma*, at p. 746.) A reasonable probability is "a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

The prosecutor moved in limine to impeach defendant with prior convictions involving moral turpitude. The motion identified 12 convictions between 1998 and 2013,

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most involving possessing drugs for sale. In chambers, the prosecutor limited its request to three convictions: selling narcotics in 2010 (Health & Saf. Code, § 11352); possessing drugs for sale in 2006 (Health & Saf. Code, § 11351); and possessing a firearm as a felon in 2004 (Pen. Code, § 12021). The trial court ruled the three convictions admissible as impeachment evidence. Defendant did not object to the ruling.

Defendant admitted the prior convictions on direct examination. The prosecutor elicited on cross-examination that at the time Demo handed him the gun, defendant knew he had been convicted of drug dealing and possessing a gun as felon; knew he was not supposed to handle a gun; and decided to take the gun even though he had been ordered not to have one. In further cross-examination, the prosecutor elicited that defendant "definitely knew that [he] [was] not supposed to be a felon in possession" at the time he was convicted of possessing a firearm as a felon; the court had ordered him "not [to] have any firearms for the rest of [his] life"; and he "disobeyed that order."

Defendant argues trial counsel should have objected to the prosecutor's questions because a felon's use of a gun in self-defense is not unlawful under *People v. King* (1978) 22 Cal.3d 12, 23 (holding Penal Code former section 12021, prohibiting a felon from possessing a concealable firearm, does not restrict a felon's use of a concealable firearm in self-defense). Defendant posits that the admissions were not relevant to his credibility or to whether he was acting in self-defense; trial counsel should have objected so that the jury would not infer he was disposed to violence and less likely to be credible because he possessed a gun in *this* case.

Defendant argues he was prejudiced by counsel's failure to object because the prosecution's case depended on defendant's credibility, and evidence that he "possess[ed] a gun illegally and against a court order provided necessary ammunition to the argument that he should not be believed." In defendant's view, the case was close because no witness saw how the incident started, and there was no evidence that he knew Garcia, planned to kill Garcia, or had motive to kill Garcia. The trial court instructed the jury

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with CALCRIM No. 226 that a witness's credibility can be judged by, among other things, whether "the witness [has] been convicted of a felony" and whether "the witness [has] engaged in other conduct that reflects on his or her believability." Defendant contends he was deprived of a fair trial because the instruction on witness credibility, combined with the prosecutor's closing argument that "[h]e was ordered by the Court to say the truth, but he's disobeyed prior court orders," permitted the jury to make an adverse credibility finding.

The Attorney General argues that no deficient performance occurred because defendant objected to the prior conviction pre-trial, and those objections continued through trial. Indeed, defendant objected in limine to impeaching with *undisclosed* prior convictions, but not with moral turpitude convictions generally, and he admitted the felon in possession conviction on direct examination. He also objected to using the *record* of a conviction or a no contest plea to impeach, and to prior bad act evidence under Evidence Code section 1101, subdivision (b) without a ruling outside the jury's presence. The asserted error defendant complains of here is different. He asserts error as to the questions eliciting that he "knew [he was] not supposed to handle a gun" when he took it from Demo, he "knew he was 'not supposed to be a felon in possession,' " and he "knew [he] "disobeyed a court order by possessing the gun." Defendant's in limine motions did not encompass those issues.

To the extent trial counsel should have objected to questions about defendant acting unlawfully and contrary to a court order by taking the gun from Demo to defend himself, the resulting testimony was not prejudicial. Defendant's credibility was properly impeached with the three moral turpitude felony convictions, including the conviction in 2004 for unlawfully possessing a firearm. (*People v. Robinson* (2011) 199 Cal.App.4th 707, 713 ["possession of a firearm by a felon is a crime of moral turpitude, as it denotes a 'readiness to do evil' "].) Defendant's credibility was also challenged by evidence of his providing a false name to Kaiser and fleeing to Nevada

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where he changed his appearance. But more importantly, defendant's culpability does not rest on his credibility, as he argues. The prosecution's witnesses testified that defendant beat Garcia with the axe handle, and Garcia acted defensively up to and at the time he was shot. For the jury to accept defendant's version of events, it would have to find six independent percipient witnesses not credible.

Nor do the jury's questions during deliberations demonstrate that the case was close as to self-defense or manslaughter. The jury requested readback of defendant's testimony, the testimony of the witness who saw the group on 3rd Street from his second story window, and the testimony of the witness who observed defendant after the shooting. Those requests do not reveal the jury's deliberative process. The jury also asked the court whether the definition of "deliberate" in CALCRIM No. 521 (defining "deliberately" for purposes of first degree murder) applied to the term in CALCRIM No. 520 (elements of implied malice for second degree murder) and to "expand on the definitions in 521 (especially [the] 2nd paragraph)."[1] That question indicates that the jury was carefully considering first and second degree murder.

B. PROSECUTORIAL MISCONDUCT CLAIMS

Defendant argues the prosecutor committed misconduct in cross-examination and in arguing the law on heat of passion voluntary manslaughter. As a general rule, " ' "[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety." ' " (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) During defendant's cross-examination, counsel

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[1] The second paragraph of CALCRIM No. 521 instructs: "The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time."

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objected to several questions as either argumentative or calling for speculation. But he did not make all possible objections to the questions and argument he now challenges, and he did not request an admonishment. Defendant has failed to show that further objection would have been futile or that any harm caused by the asserted misconduct would not have been cured with an admonition. Defendant has therefore forfeited his misconduct claims. He argues in the alternative that trial counsel was ineffective for failing to properly object to the asserted misconduct, which we now address.

1. Lack of Objection During Cross-Examination

Defendant testified on direct examination that Garcia took offense to the remarks he made in the park; Garcia challenged him to a fight; a crowd followed but remained on the street when Garcia and defendant entered a carport where they fought with no onlookers; Garcia used a sharp tool against defendant; defendant retreated to the street where he found a wooden axe handle; and defendant was scared and believed Garcia was high.

We set out the relevant portions of defendant's cross-examination, italicizing the questions defendant views as improper: The prosecutor asked defendant *if it was "just a coincidence" that the crowd stopped following him and Garcia as they entered the carport*. The court overruled defendant's objection that the question called for speculation, but the prosecutor rephrased the question anyway: "So this group of people that are following you, *they stop for no reason* and you go into this carport area and there is no one else there?" Defendant agreed. The prosecutor asked defendant about the axe handle he found after retreating from the carport: "It's just on the ground on the sidewalk?" Defendant said it was. The prosecutor asked, "*Just randomly when you needed it?*" After the court sustained an argumentative objection, the prosecutor probed what happened when defendant found the axe handle. Defendant said he attempted to run away, but he "didn't literally run" and was "walking backwards" toward the park.

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Garcia was facing him but turned "to take the hit" when defendant struck him on the head. Garcia was also "initially" facing defendant and "moved to take the hit" when defendant struck Garcia on his back.

The prosecutor asked, "Then [Garcia] is walking away from you right and you follow him[] [¶…¶] … on 3rd going toward[] Julian[?]" Defendant explained, "I followed him, but he didn't walk away," and "I was being followed. I followed him from 3rd up to Julian toward[] 4th." The prosecutor asked, "You were not afraid when you were following him, were you?" Defendant said he was, and the prosecutor asked, "Why would you follow someone that you are afraid of?" Defendant said, "I didn't know if he was going to get another weapon or anything of that nature or repercussions or anything." The prosecutor then commented, "*That doesn't make sense to me*," and asked "[Y]ou're on 3rd walking toward[] Julian, and Mr. Garcia's back is toward[] you. You are walking behind him?" Defendant said, "We were on Julian and 3rd, we were right on the corner; so there is no coming back up to Julian."

After eliciting that Garcia was biking away from defendant, the prosecutor asked "And you decide to get a gun?" Defendant said yes. The prosecutor asked defendant *how the person who gave him the gun knew he was on 3rd and Julian*? The court sustained an objection to the question as calling for speculation. After asking about defendant's relationship to Demo and Demo's timing, the prosecutor asked, "*He knew that you needed a gun at that point?*" The court sustained an objection. The prosecutor asked, "*How would he [Demo] know?*" and the court sustained another objection. Defendant said he had not seen Demo earlier that day, to which the prosecutor posed, "*But he was able to know that you were at 3rd and Julian right when you needed a gun he was there?*" The court sustained defendant's objections on grounds that the question was argumentative and called for speculation. The prosecutor asked, "He was able to give you a gun at 3rd and Julian; right?" Defendant agreed. He testified that Demo was a passenger in the car, and he did not know the driver. The prosecutor asked, "*Demo*

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knew you were at 3rd and Julian, he was in the passenger seat, and he was able to hand you a gun*?*" Defendant objected, and the prosecutor was instructed to rephrase the question.

The prosecutor asked defendant about the handoff, defendant's prior convictions, and how he pursued Garcia with the gun. Defendant explained that he followed Garcia from 3rd and Julian to the parking lot with a gun "out of fear" and because he was "afraid of what [Garcia] is going to do." The prosecutor asked, "Instead of running away [in] the opposite direction, you follow him?" Defendant said he did. The prosecutor pressed, "You followed him with a gun?" Defendant said he did, and the prosecutor asked, "*How does that make sense?*" The court sustained an argumentative objection, and the prosecutor asked defendant about the shooting.

The prosecutor later inquired about defendant's state of mind. The prosecutor asked whether defendant accidently gave Kaiser the wrong name and social security number; whether he accidently decided to drive to San Francisco to dispose of the gun; and whether it was his decision to go to Las Vegas and shave his head. The prosecutor asked, "*Are you saying right now, as you sit here, when you were talking to your lawyer, that you accidentally shot Mr. Garcia?*" Counsel objected, and the prosecutor rephrased the question, asking "Are you trying to tell us that you accidentally shot Mr. Garcia?" Defendant said no, and he "wasn't thinking." Defendant denied planning to meet Demo on 3rd and Julian, but he agreed he "chased after Mr. Garcia when his back was toward[] [him]," and shot him five times.

Defendant argues that the prosecutor's question—"*Are you saying right now, as you sit here, when you were talking to your lawyer, that you accidentally shot Mr. Garcia?*"—was an improper comment on defendant's post-arrest silence. While we acknowledge some ambiguity, we understand the phrase "when you were talking to your lawyer" to refer to defendant testifying on direct examination, and not to defendant

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"providing his story for the first time after obtaining counsel." Counsel was not deficient for not objecting to that question.

Defendant argues the quoted italicized questions were improper because they elicited information of which he had no personal knowledge. And the repeated questions about what Demo knew when he arrived with the gun were argumentative and conveyed to the jury that the prosecutor did not believe defendant was credible. We agree the questions, as phrased, called for speculation and were argumentative. But multiple objections were sustained on those grounds, and we see no deficient performance by counsel for not objecting further or seeking an admonishment. Counsel's objections alerted the jury to the speculative and argumentative nature of the prosecutor's questions. Not seeking an admonishment may have been a tactical decision not to draw further attention to what was clearly a problematic aspect of defendant's case. Although "it is improper for a prosecutor to argue that he has superior knowledge of sources unavailable to the jury" (*People v. Williams* (1997) 16 Cal.4th 153, 257), that is not what occurred here.

Nor do we see a reasonably probability that an outcome more favorable to defendant would have resulted had counsel sought an admonishment regarding the prosecutor's questions. The evidence from percipient witnesses showed defendant beating Garcia and fatally shooting him as he held up his hands. An admonishment would not have changed the evidence or prevented the prosecutor from arguing at the close of the case that defendant's version of events was not credible.

2. Lack of Objection During Closing Argument

The jury was instructed with CALCRIM No. 570 on the heat of passion theory of voluntary manslaughter: "1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] [AND] [¶] 3. The provocation would have

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caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment."

Trial counsel argued that defendant acted in self-defense. Turning to the elements of first degree murder, he then argued that the killing was not deliberate or premeditated. He explained that provocation can be used to distinguish between first and second degree murder and also in deciding whether the killing was manslaughter. He continued: "I'm discussing the rules of manslaughter because it's my job. I have to talk about this, and I want you guys to understand these rules. I don't agree that this is manslaughter. I think [defendant] was acting in self-defense, but I have to discuss this, and I want you to understand the rules governing manslaughter in addition to the rules governing self-defense."

Counsel argued defendant acted without motive and in self-defense after Garcia provoked a fight. Counsel urged the jurors to consider manslaughter if they did not believe defendant had acted in self-defense. He argued that heat of passion manslaughter "is upon sudden quarrel"; that "[c]learly, whatever happened began because of this fight"; and that "the fear of being stabbed, the fear of being called out to fight and then … sudden[ly] somebody pulls out an awl and tries to stab you, that could invoke a strong emotion in a person." He argued such provocation "would have caused a person of average disposition to act rashly and without due deliberation … from passion rather than judgment," and posited, "So you have to consider how would the average person feel being attacked with a weapon? Would that evoke an emotion? Would that be a strong emotion? Yes, it would." Counsel explained imperfect self-defense, and argued it would apply if defendant's beliefs about imminent danger or the immediate need to use deadly force would be unreasonable to the average person.

The prosecutor argued in rebuttal that defendant had lied, he did not act in self-defense, and no independent witness testified that Garcia had threatened him. Anticipating the trial court's instruction to the jury that, "If you decide that a witness

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deliberately lied to you about something significant in the case, you should consider not believing anything that witness says" (CALCRIM No. 226), the prosecutor argued that the jury should reject everything defendant said, leaving "[n]o direct evidence of anything that relates to heat of passion, imperfect self-defense, [or] self-defense." He continued: "*And this is the standard. Would an average – would a reasonable person run after someone that had a screwdriver and shoot them down because they had an unreasonable fear of that person?* No. There's nothing that shows heat of passion, nothing." He argued that defendant's conduct after acquiring the gun demonstrated both a premeditated and deliberate killing, and that "[t]his isn't heat of passion. *It can't just evoke the defendant's emotions. It has to be a person of average disposition. Would a normal person have acted the way [defendant] did? No. That's not how the average person – person of average disposition would have acted*."

Defendant argues the italicized comments prejudicially misstated the law. The legal standard for heat of passion provocation does not ask whether an average person would have been provoked into killing the victim: "Adopting a standard requiring such provocation that the ordinary person of average disposition would be moved to *kill* focuses on the wrong thing. The proper focus is placed on the defendant's state of mind, not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection. ... [P]rovocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is whether the average person would *react* in a certain way: with his reason and judgment obscured." (*People v. Beltran* (2013) 56 Cal.4th 935, 949.) Provocation focuses on whether the surrounding circumstances were sufficient to cause a reasonable person to act rashly. "How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*People v. Najera* (2006) 138 Cal.App.4th 212, 223.)

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The prosecutor misstated the law by referring to how an average or reasonable person would have acted in defendant's circumstances, instead of asking whether an ordinary person's reason and judgment would have been obscured in defendant's circumstances. Even assuming defense counsel had no tactical reason for not objecting to the misstatements, we see no prejudice on this record. The trial court instructed the jury correctly with CALCRIM No. 570 (voluntary manslaughter based on heat of passion). We presume the jury followed the court's accurate instructions rather than the prosecutor's misstatements (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), and nothing in the record suggests otherwise.

The subjective component of heat of passion manslaughter requires that the defendant "acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment." (CALCRIM No. 570.) Defendant testified that after picking up the axe handle, "I kept saying I didn't want to fight, but the crowd was trying to egg it on on both sides." That statement alone demonstrates that defendant's reasoning and judgment were not obscured by Garcia's purported aggression. Consistent with defendant's testimony, trial counsel argued that defendant had acted in self-defense and not under heat of passion. Overwhelming evidence demonstrated that defendant killed with malice, and we see no reasonable probability that the jurors would have returned a verdict more favorable to defendant had the prosecutor's misstatements about voluntary manslaughter been corrected during argument.

C. CUMULATIVE PREJUDICE

We reject defendant's argument that there was cumulative prejudice rising to the level of a due process violation. "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Defendant received due process and a fair trial. He was able to present his defense, and he was not prejudiced by either the prosecutor's

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questions related to defendant's prior gun possession conviction, or by counsel's performance during cross-examination and closing argument.

D. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH A PRIOR SERIOUS FELONY OR STRIKE CONVICTION

In a bifurcated proceeding, the trial court found true that defendant suffered a conviction in 2001 for active participation in a gang, and that it qualified as both the prior serious felony and prior strike alleged in the amended information. Defendant argues the abstract of judgment used to prove the conviction is insufficient to establish the elements of the offense as described by the California Supreme Court in *People v. Rodriguez* (2012) 55 Cal.4th 1125.

Penal Code section 186.22, subdivision (a) (section 186.22(a)) makes it unlawful to "actively participate[] in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and [to] willfully promote[], further[], or assist[] in any felonious criminal conduct by members of that gang." Under Penal Code section 1192.7, "any felony offense, which would also constitute a felony violation of [Penal Code] section 186.22," qualifies as a "serious felony," and in turn, a strike offense. (Pen. Code, §§ 667, subds. (d)(1), (e), 1192.7, subd. (c)(28).)

In 2012, the Supreme Court held that section 186.22(a) is not violated when an active gang member commits a felony offense but acts alone. (*People v. Rodriguez*, *supra*, 55 Cal.4th at p. 1139.) In *People v. Strike* (2020) 45 Cal.App.5th 143, review denied June 10, 2020 (*Strike*), the appellate court held that the "change in the interpretation of section 186.22(a) rendered a pre-*Rodriguez* conviction inconclusive on its face as to whether it qualified as a strike." (*Strike*, at p. 150.) Strike pleaded guilty in 2007 to active gang participation under section 186.22(a). He admitted the prior conviction in a 2017 prosecution, and the superior court found the admission extended to the elements of section 186.22 "as now understood," based on the allegations in the 2007

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charging document that a codefendant was a member of defendant's gang. (*Strike*, at pp. 146–147.) Because the record did not show Strike admitted the factual allegations contained in the 2007 charging document as part of his guilty plea, the superior court in 2017 was found to have engaged in impermissible fact finding. (*Id*. at pp. 152–153.) The inquiry "invade[d] the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' " (*Id*. at p. 152; *People v. Gallardo* (2017) 4 Cal.5th 120, 124 ["when the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt' "].) The matter was remanded for a new hearing on the prior strike for the prosecution to demonstrate, based on the record of the 2007 proceeding, that the defendant's guilty plea encompassed a relevant admission in light of *Rodriguez*'s clarification that the defendant must have committed the offense with at least one other gang member. (*Strike*, at p. 154.)

The Attorney General invites us to conclude that *Strike* was wrongly decided. We are not persuaded here to depart from the conclusion in *Strike* and *People v. Gallardo* that Sixth Amendment principles limit the trial court's role " 'to determining the facts that were necessarily found in the course of entering the conviction.' " (*Strike*, *supra*, 45 Cal.App.5th at p. 152.)

The Attorney General also argues "[a]ny violation of section 186.22, subdivision (a), is a strike offense," the record establishes that defendant suffered a conviction under section 188.22, and defendant must attack his prior conviction in a collateral proceeding where he would have the burden of proving the conviction is invalid. But defendant is not challenging the *validity* of his prior conviction, only whether it has been shown to qualify as a serious felony under Penal Code section 1192.7 (and in turn as a strike). Under that section, the conviction must satisfy the current (i.e.,

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post-*Rodriguez*) understanding of the offense. We agree the record establishes defendant's 2001 conviction for gang participation, but the abstract of judgment alone does not prove that the conviction constitutes a violation of section 186.22(a) as interpreted in *Rodriguez*. (*Strike*, *supra*, 45 Cal.App.5th at p. 150.) "The prosecution had to prove defendant admitted all of the elements of the offense as explained by *Rodriguez*, including that he committed a felony offense with another member of his gang." (*Ibid*.) We will accordingly reverse the true findings regarding the serious felony and strike allegations, and remand the matter for retrial of the prior conviction allegations and resentencing. (*Id.* at p. 155.)

III. DISPOSITION

The true findings regarding the prior serious felony and strike allegations are reversed. The judgment is vacated, and the matter is remanded to retry the prior serious felony and prior strike allegations and for resentencing.

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Grover, J.

WE CONCUR:

Greenwood, P. J.

Elia, J.

H046446 – *The People v Moore*

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DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL

Case Name: ***People v. Moore***
Case No.: **H046446**

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the within ***PETITION FOR REVIEW*** to the following parties hereinafter named by:

_X_ **BY ELECTRONIC TRANSMISSION** - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

Served electronically via TrueFiling.com:
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_X_ **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

Shaun Alexander Moore, BH8167
Salinas Valley State Prison
P.O. Box 1050
Soledad, CA 93960

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I declare under penalty of perjury the foregoing is true and correct. Executed this 18th day of February, 2022, at San Jose, California.

/s/ *Priscilla A. O'Harra*
Priscilla A. O'Harra

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