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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICARDO JIMENEZ, Defendant and Appellant.	B263954 (Los Angeles County Super. Ct. No. PA078006)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ricardo Jimenez appeals from the judgment entered following his conviction by jury of second degree murder with personal use of a deadly and dangerous weapon. (Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1).) We affirm.

FACTUAL SUMMARY

1. *People's Evidence.*

a. The Present Offense.

On August 28, 2013, appellant went with his girlfriend, Maria Josephina Jimenez,[1] and Maria's friend Nancy, to the Monsterz, Inc. tattoo shop on Yarnell Street in Sylmar. Maria had been dating appellant for approximately five months. That night, Maria drove appellant and Nancy in Maria's red Toyota Corolla to get a tattoo from Hector Oviedo, who arrived around 6:00 p.m. During the next few hours, appellant and Nancy went back and forth to a nearby liquor store to buy beer, while Oviedo tattooed Maria. Nancy had socialized with appellant and Maria before. On this and prior occasions, she had never seen Maria threaten, or act violently towards, appellant.

Appellant and Nancy each drank six cans of beer. Nancy testified Maria had a single sip of beer and was sober while Oviedo tattooed Maria. Although Oviedo, a tattoo artist, did not know if Maria drank alcohol before arriving, he testified at trial that he did not see Maria drinking and she did not appear to be under the influence of alcohol while he was tattooing her. Oviedo told clients they could not drink while he was tattooing them. He had been tattooing for 13 years and he could tell if someone had

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[1] Maria Jimenez was also known and referred to at trial as "Josie." Since she shared the same surname as appellant, we will refer to her as "Maria" instead of Jimenez. Maria's friend Nancy Romero will be referred to as "Nancy" throughout.

been drinking, because drinking would cause profuse bleeding during tattooing. Maria's bleeding was normal.

About 11:00 p.m. or 11:30 p.m., appellant accused Maria and Oviedo of flirting with each other. Appellant became disrespectful and belligerent, and repeatedly called Maria a "bitch," "slut," and "ho." According to Nancy, Maria and Oviedo were not flirting. Oviedo testified appellant appeared to be drunk and he told appellant to calm down. The shop manager, David Govea, also told appellant to relax and testified Maria and appellant argued. He also testified appellant did not seem angry but was nonchalant.

Appellant repeatedly told Govea that appellant did not trust "bitches." Govea indicated to appellant that Oviedo was merely tattooing Maria. Nancy also tried to calm appellant and told him Maria was not flirting. Appellant kissed Nancy and she backed away. Appellant told Nancy that Maria and Nancy were "worth shit" and he could "get better bitches than [them]."

Appellant asked Nancy why she had not told Maria that Nancy had orally copulated him. Nancy later took Maria inside the shop's restroom and tried telling her about the oral copulation incident. Nancy testified that while she was in the restroom with Maria, appellant banged on the door, Maria opened it, and appellant entered and said, " 'I shoved my dick down your girlfriend's throat.' " Maria simply returned to her chair. Nancy tried to apologize but Maria said she did not want to talk. Maria was crying but did not yell at Nancy or appellant. Oviedo testified he heard appellant say, " 'That's why [Nancy] just gave me head in the parking lot.' " While Oviedo was tattooing Maria, appellant gestured, simulating oral copulation.

Maria tried to ignore him. Oviedo testified Maria was calm and ignored appellant.

Appellant had a pocket knife and was using it to clean his fingernails. Oviedo told appellant to put the knife away. Appellant asked if Oviedo was afraid of it, and appellant said something like, " 'I'm just messing with this shit. My bad.' " Appellant put away the knife. Govea told a detective the knife blade had a serrated edge and testified the blade was "probably a couple of inches" long.

At 12:20 a.m. on August 29, 2013, Nancy left the shop. About 12:35 a.m., Maria called Nancy, said they were still friends, asked Nancy to return, and said the two would talk. Maria sounded calm during the conversation. Nancy returned to a corner near the shop but Maria's car was gone. Shortly before 1:00 a.m., Oviedo finished Maria's tattoo. Oviedo was shocked because, despite everything that had happened, Maria was still very happy, very excited, and she loved the tattoo. Govea testified that after Maria and appellant left, the two argued in the parking lot.

About 12:40 a.m., Amber Gomez was turning onto Yarnell when she saw a red car turn onto the 210 freeway onramp. The red car drove very erratically before entering the freeway. Between 12:40 a.m. and 1:00 a.m., Kelly Besharaty was driving eastbound on the 210 freeway when she saw a red car enter the freeway from the Yarnell onramp. The red car weaved back and forth over lanes and at one point nearly hit the center divider. The car would slow to the side of the freeway, then accelerate. The car eventually drove near the center divider, its hazard lights activated, the car slowed, then reentered the freeway. The car's passenger door was open as the car proceeded in the left

lane. Besharaty testified that, within seconds, a body came out and rolled onto the freeway, and the red car later took off.

About 1:00 a.m., Roberto Salazar was driving a white Acura on the eastbound 210 Freeway when he saw a woman near a vehicle, waving her hands. Salazar changed lanes and, after checking his rearview mirror, saw through his front windshield what appeared to be "a head that popped forward from the ground." Salazar also testified the "person" appeared to be alive. He tried swerving but the Acura hit her. Maranda Juarez, a passenger, sat up when she heard Salazar scream. Juarez testified the Acura struck the woman and she was hunched over. The woman's blond hair was over her face, her arm covered her stomach, and she looked like she was stumbling. Besharaty testified three or four cars and at least three semi-trailer trucks struck Maria, but only the first car that hit her, a white car, stopped.

Los Angeles Police Detective Gretchen Schultz testified that about 3:00 a.m., she was at the freeway scene. The distance between the first bloodstains on the freeway and Maria's body was 378 feet. Additional body parts were strewn another 78 feet. What caught Schultz's attention was the multitude of body parts on the freeway. It looked to her as if Maria had exploded. Her head was essentially gone. At the scene, Schultz found red-stained real, and synthetic, blond hair. A car that hit Maria had blood on it from the front left side of the car to its left rear passenger door. The car's fender above the front left tire was dented and covered in blood.

Between 1:30 a.m. and 2:00 a.m., Pedro Tobar was sitting in his car in a gas station in Tujunga, California when appellant approached and asked to use Tobar's cell phone. Appellant looked desperate and had watery eyes as if he had been crying. Appellant had cuts on his hands but was not bleeding. Tobar let appellant use his phone. Appellant used it for 20 to 30 minutes, deleted numbers he had called, and returned the phone to Tobar.

From 2:29 a.m. through 3:03 a.m., appellant and a former girlfriend, Anilga Bandari, exchanged Facebook messages as follows. Appellant asked for Bandari's phone number "ASAP" and said he needed her. Bandari gave him her phone number. Appellant's subsequent messages included, "My life is dying," "I need to get away," "Please come get me," and "I need you ASAP. If not, I'm done."

At 3:05 a.m., appellant called Bandari from a phone number she did not recognize. Appellant asked her to pick him up. Bandari refused. Because appellant was acting strangely, Bandari asked if he had killed someone. Appellant replied, "Yes, I think so."

About 6:30 a.m., appellant arrived at the Glendale house of Jason Padilla. Padilla knew appellant from school, but had not seen him in years. Appellant asked for Padilla's brother, who was not there. Appellant used Padilla's cell phone. Less than an hour later, appellant left in a black car. Padilla did not see any injuries on appellant's face or hands, and did not see blood on appellant's clothes.

About 6:51 a.m., appellant called Bandari from another phone number she did not recognize. He asked her to pick him up and she agreed to meet him at 7:00 a.m. at a park near her house. At the park, appellant was sitting in the driver's seat of

his black Honda Civic. Bandari had told a previous deputy district attorney that appellant was changing his pants. Bandari testified she saw what looked like bloodstains on appellant's pants. Bandari opened the driver's door and found appellant crying. Bandari sat in the passenger seat.

Appellant told Bandari the following. Appellant's life was over. Something terrible had happened. Appellant wanted to leave for Tijuana or Las Vegas. He was going to jail forever. Appellant had argued with Maria (Josie) at a tattoo shop and she had been drunk. The two fought "through jealousy through her friends." The fight happened at a tattoo shop and "it was with her car." Appellant "had a pocket knife that she grabbed from him, and his right hand was all cut, because he was trying to grab it from her." Maria threw herself out the car. Appellant dropped off Maria's car somewhere and picked up his car. After he used his cell phone to send his first text message to Bandari, he broke the phone and threw it away.

Bandari testified appellant asked her to accompany him to Tijuana or Las Vegas, but she refused. She exited the car and he drove away. Bandari saw a few "lines of cuts" on appellant's right hand. They were not actively bleeding and were not bandaged.

Police found Maria's car about a half-mile from the Tujunga gas station where appellant had approached Tobar. There was a large amount of what appeared to be blood in the car's front passenger area, including on the dashboard, glove box, door, inside door window, armrest, front passenger door handle, and pillar behind the door. There was blood on the front passenger seat, including on the inside lower and back portions of that seat. Blood was also on the outside of the car's passenger side.

The driver's area of the car had little or no blood. There was blood on the steering wheel and a concentration of blood on the hand grip of the steering wheel. There was no blood on the driver's seat or on the driver's side of the dashboard. There was blood-stained blond hair on the driver's floorboard. The rearview mirror had been ripped off, causing the windshield to crack, and the radio had been smashed.

Los Angeles County Deputy Medical Examiner Paul Gliniecki conducted Maria's autopsy and testified as follows. Maria died from blunt force traumatic injuries and incise injuries. An incise injury was an injury caused by a sharpened instrument. Maria's body was in pieces but Gliniecki found seven incise injuries to each of her hands plus two such injuries to her upper back. The incise wounds were defensive and a knife would create an incise wound. A person received a defensive wound when someone attacked the person with an instrument, the person used a hand or arm to block the attack, and the surface of the hand or arm was wounded in the process. Toxicology results for Maria were negative for drugs or alcohol. Gliniecki opined at trial that Maria's death was a homicide.

Blood samples taken from the inside front passenger window, passenger door handle, passenger door pillar, inside back portion of the front passenger seat, center console, armrest, and a cell phone case matched Maria's DNA. DNA on the driver's door armrest and steering wheel matched that of Maria and appellant.

b. Prior Domestic Violence.Jacqueline D. (Jacqueline), another former girlfriend of appellant, testified as follows. In 2005, when Jacqueline was 16 years old, she began dating appellant and she dated him for approximately three years. He

physically abused her weekly. On one occasion, they were arguing in his car and he strangled her. He would also punch her and give her a black eye, a bloody nose, and a bloody lip. He would also bite her. Appellant argued with her about her male friends. When men called Jacqueline, appellant assumed she was cheating on appellant. Appellant broke about five of Jacqueline's phones. He told Jacqueline that if he could not have her, no one could. On one occasion, they were in his car and she was sitting in the passenger seat, wearing a shirt he did not like. Appellant ripped it off her. He later told her that if he had to kill her, he would take her to a dark road, hug her, put a gun to the back of her head, and shoot her. On another occasion, he physically abused her, and the abuse included his grabbing her by her hair.

On one occasion in 2007, after Jacqueline and appellant had ended their relationship, appellant showed up and the two eventually began arguing. Jacqueline wound up in a car appellant was driving and she was terrified. She saw a male friend in another car so Jacqueline opened the car door nearest her. Appellant grabbed her by her hair, pulled her head down, and later called her a "bitch," but she eventually escaped from his car. On another occasion, appellant and Jacqueline argued at his house and he locked her in a room and cut up her clothes. Appellant sexually assaulted Jacqueline on multiple occasions and, on one such occasion, bit her breast, leaving a scar that existed at the time of trial. During one incident he was drunk and sodomized her against her will.

Natalie M. (Natalie), another former girlfriend of appellant, testified as follows. In 2008, when Natalie was 17 years old, she began dating appellant. He physically abused her frequently,

including pulling her hair out and choking her. Appellant often accused Natalie of cheating on him and he broke several of her cell phones. Appellant intentionally damaged her car on several occasions. Natalie repeatedly tried to end their relationship, but he told her that she would be with him or with no one. Appellant told her that he had a gun and he threatened to kill her. In about January 2010, appellant threatened to kill her and "blast [her] family's head[s] off." He also took her phone. Appellant sexually assaulted Natalie multiple times.

2. *Defense Evidence.*

In defense, appellant testified as follows. Appellant did not remember whether he punched Jacqueline in the face or pulled her hair. He suffered a 2008 misdemeanor conviction for a violation of Penal Code section 273.5, subdivision (a), for inflicting injury on Jacqueline. He did not rape her, or sodomize her against her will. Appellant did not remember whether Jacqueline opened the door of a moving car to escape from him, but he did not think she had done this. Appellant did not remember whether he had punched Natalie, but admitted to breaking her phone. He denied strangling her, threatening to blow her family's heads off, or raping her.

Concerning his relationship with Maria, appellant testified Maria never threatened him or beat him up. Their relationship was never "aggressive." Appellant never saw her threaten others and she did not have a reputation for violence. Maria was about five feet tall and weighed about 110 pounds. Appellant was five feet eleven inches tall, and weighed at least 100 pounds more than Maria.

About 4:30 p.m. to 5:00 p.m. on August 28, 2013, appellant, Maria, and Nancy arrived at the tattoo shop. Oviedo arrived

later. Appellant drank beer provided by the shop owner. Multiple times that night, appellant and Nancy went to a nearby liquor store, bought beer, and returned. Appellant poured beer in a cup for Maria, perhaps once or twice. During the evening, appellant and Nancy each had about 12 beers, and Maria had two or three.

While Oviedo was tattooing Maria, appellant thought she was becoming jealous because appellant and Nancy were going to the liquor store. Maria asked appellant if he and Nancy had engaged in oral copulation and he indicated yes. Maria took Nancy into the bathroom to talk. Appellant banged on the door and Maria opened it. Appellant told Maria that Nancy had orally copulated him. Appellant, using his hand, simulated oral copulation. Maria became angry and cried. Maria "stormed off," returned to the shop, and Oviedo continued tattooing her. Maria did not want to talk to appellant. Appellant continued drinking for one or two hours more.

When Oviedo finished tattooing Maria, appellant and Maria walked to the parking lot. Appellant apologized to Maria and they talked for awhile. Appellant was intoxicated and drove onto an embankment while entering the freeway. When appellant entered the freeway, he was trying to avoid an argument but Maria "exploded" on him concerning the oral copulation incident. Maria was "in [his] face," grabbing him by the shirt, and slapping him around. He began pushing her off him. She became increasingly angry and began holding the steering wheel. Maria was furious. The car began swerving. Maria sat back and appellant told her to "chill out" and asked what was she doing.

Maria reached for appellant's pocket knife that was clipped on his pocket. Appellant tried to push her hand away. Maria grabbed the knife and opened it. She was trying to attack him with the knife. Appellant was driving with one hand and trying to grab the knife with the other, and he was getting cut. Appellant began using two hands, pushing her off him. At some point Maria swung the knife at appellant and struck him in the chest. Appellant suffered cuts on his right index finger, two cuts on the palm of his left hand near his thumb, and a slash on the right side of his chest.

Appellant testified during direct examination, "I don't know, at one point, I actually got ahold of the knife. I was intoxicated. And I started swinging back. I could have struck her with it, from what I remember. I don't remember having the pocket knife actually in my hand." However, appellant testified during cross-examination as follows. Appellant did not remember swinging at Maria at all. It was possible he swung the knife at her, and it was possible he did so in self-defense. He did not believe he swung the knife at Maria.

The following occurred during the prosecutor's cross-examination of appellant:

"Q Is it possible you got so angry because of the fight, that you swung the knife at her?

"A I don't remember being angry. It was just more shocked at what was going on. Everything happened so fast, I don't know what to do . . . .

"Q So during the fight in the car, you weren't angry?

"A No.

"Q Not at all?

"A No.

"Q How would you describe your disposition when you were in the car as Maria is attacking you with the knife?

"A Trying to calm her down. I couldn't believe she was acting that way while I was driving on the freeway.

"Q So you were trying to calm her?

"A Yes.

"Q You were never angry?

"A No.

"Q And never violent?

"A No."

Maria opened her door and jumped out the car. Appellant testified that when he tried to reach for her, he "felt . . . some hair in my hand." The car hit the center divider. Appellant "pretty much froze," the car drifted, and he eventually exited the freeway. Appellant testified he saw the knife and "I guess it just kind of traumatized me, so I just threw it out."

3. *Rebuttal Evidence.*

In rebuttal, Detective Schultz testified as follows. On August 31, 2013, Schultz and her partner interviewed appellant at the police station. (A video of the interview was shown to the jury.) Appellant told Schultz the following.[2] Appellant and Maria had had a very good relationship. However, once, about two weeks before they went to the tattoo shop, Nancy had orally copulated appellant. At the tattoo shop, Nancy flirted with appellant and he flirted back. Appellant had about three cans of beer. When appellant told Maria that he and Nancy had had oral

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[2] The video of the interview, but not the transcript thereof, was admitted into evidence. However, in their briefs, the parties extensively cite, and/or quote from, the transcript. We therefore accept and cite it as accurate.

sex, Maria "flipped" and began arguing. When Maria and appellant left the shop, she was very angry and cursing at him.

Maria was yelling and cursing at appellant as he drove onto the freeway. Appellant was trying to calm Maria. Maria grabbed the steering wheel. Appellant got control of the car and saw Maria "go for [his] pocket knife." Appellant was trying to control the car while moving his hand, and she "sliced" appellant. Appellant was going to take the knife from her and "kind of . . . pushed her hand." Appellant pushed her forearm back. He was punching her arm while she swung the knife at him. Appellant was trying to grab the knife but just kept waving his arms back so he would not get hit. He was "just . . . trying to control the car and protect [himself]."

Appellant also stated the following. Appellant and Maria "sparred . . . a couple of times" and she said, " 'I can't take this anymore.' " Maria opened the car door, and her last words were, " 'God, take me with you.' " Appellant did not push her out. Maria jumped out of the car. Appellant told Schultz, "I . . . felt the car, . . . hit her."

Appellant did not kill Maria. He did not stab her. Appellant did not know how Maria received an injury that caused so much blood. He did not know if she stabbed herself. Appellant did not call 911 because he was afraid. He threw the knife out of the car, perhaps as he drove towards Palmdale. Appellant abandoned Maria's car in Tujunga because it had blood on it and he panicked. A detective asked if appellant stopped anywhere to seek help. Appellant replied, "I just . . . gas. Like, stopped for drinks, stuff. That's it."

ISSUES

Appellant claims the trial court erroneously: (1) allowed his impeachment with a misdemeanor conviction, (2) refused to instruct on voluntary manslaughter based on sudden quarrel and/or heat of passion, (3) failed to give an instruction relating intoxication to perfect self-defense and imperfect self-defense, and (4) refused to continue his sentencing hearing.

DISCUSSION

1. *Appellant's Impeachment With His Misdemeanor Conviction Was Not Prejudicial Error.*

During a break in appellant's testimony, the prosecutor proposed to impeach appellant with "a misdemeanor conviction for a violation of Penal Code section 273.5, [subdivision] (a)[3] in 2008, which is infliction of injury on a former dating partner as to Jacqueline [D.]" Appellant's counsel later stated, "we object and as to the introduction of anything having to do with a misdemeanor conviction" (*sic*) and submitted the matter. After further discussions, the court asked appellant's counsel, "just as to the fact of the prior conviction, what is the defense's position?" Appellant's counsel replied, "We object. Submitted."

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3 In 2008, Penal Code section 273.5, subdivision (a), stated, in relevant part, "Any person who willfully inflicts upon a person who is his or her . . . cohabitant, [or] former cohabitant, . . . corporal injury resulting in a traumatic condition, is guilty of a felony."

The court impliedly overruled the objection, stating the court would allow the impeachment. During cross-examination, the prosecutor asked appellant without further objection if he had suffered a "2008 misdemeanor conviction for a violation of Penal Code section 273.5, [subdivision] (a), injury on a former dating partner for the abuse you inflicted on your prior girlfriend, Ms. Jacqueline [D.]" Appellant admitted he had.

Appellant claims the trial court erred by permitting the prosecutor to impeach appellant with the misdemeanor conviction. The claim is unavailing. A misdemeanor conviction offered, as here, to prove the underlying conduct as impeachment evidence is inadmissible hearsay. (*People v. Wheeler* (1992) 4 Cal.4th 284, 288, 290, 298-300 (*Wheeler*).) Accordingly, in *Wheeler*, our Supreme Court "conclude[d] that evidence of a misdemeanor *conviction*, whether documentary or *testimonial* is inadmissible hearsay when offered to impeach a witness's credibility." (*Id.* at p. 300, second italics added; *People v. Chatman* (2006) 38 Cal.4th 344, 373 (*Chatman*) ["[m]isdemeanor convictions themselves are not admissible for impeachment]; accord, *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1514-1515 (*Cadogan*).)

However, a defendant may waive the above "hearsay claim by making no trial objection on that specific ground." (*Wheeler, supra,* 4 Cal.4th at p. 300; *id.* at pp. 288, 290; *Cadogan*, *supra,* 173 Cal.App.4th at pp. 1507, 1515.) Appellant waived the issue (and any concomitant due process issue) by failing to pose a

hearsay objection to the prosecutor's eliciting of testimony from appellant that he suffered the misdemeanor conviction.[4]

Even if the hearsay issue were not waived and the court erred by permitting the challenged impeachment, it does not follow we must reverse the judgment. First, "[m]isdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying *conduct* may be admissible." (*Chatman*, *supra,* 38 Cal.4th at p. 373.) The misdemeanor conviction involved Jacqueline as the victim. However, leaving aside the misdemeanor conviction, we note Jacqueline and Natalie testified, and appellant does not contend their testimony was inadmissible. Their testimony was admissible for all

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[4] We asked for, and received, supplemental briefing on the issues of waiver and whether appellant received ineffective assistance of counsel assuming appellant's trial counsel failed to pose a hearsay objection. Regarding the waiver issue, appellant argues, inter alia, he objected to the misdemeanor conviction and "the trial court was placed on notice that a question existed as to the conviction's admissibility under the hearsay rule by virtue of the *prosecutor's* reference to the *Duran* case [i.e., *People v. Duran* (2002) 97 Cal.App.4th 1448 [*Duran*]]." (Italics added.) However, the prosecutor cited *Duran* as supporting *admission* of the misdemeanor conviction into evidence and the prosecutor did not further discuss *Duran,* why it supported admission, or *Duran's documentary* hearsay issue. We reject appellant's arguments in his supplemental letter brief that he did not waive the hearsay issue as to his *testimony*. We accept his concession that, in the present case, "trial defense counsel did not specifically object to the admission of the 2008 conviction on the ground that it constituted inadmissible hearsay, which is the argument that appellant has advanced in this appeal."

purposes,[5] including as impeachment evidence. In particular, their testimony was evidence of appellant's conduct. It was evidence of his conduct in violation of Penal Code section 273.5, subdivision (a). (See *People v. Burton* (2015) 243 Cal.App.4th 129, 136 [a Penal Code section 273.5 violation is a crime of moral turpitude].) It was also evidence of his felonious sexual conduct. (See *People v. Mazza* (1985) 175 Cal.App.3d 836, 843-844 [rape and forcible sodomy are crimes of moral turpitude].) That conduct was far more impeaching than a single 2008 misdemeanor conviction.

Second, there is no dispute there was sufficient evidence supporting appellant's conviction. In fact, there was overwhelming evidence of his guilt. The collective testimony of Maria's friend Nancy, the tattoo artist Oviedo, and the shop manager Govea was that appellant, not Maria, was under the influence. They collectively testified that he was belligerent, using profanity towards Maria, and insulting her while she

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[5] During pretrial Evidence Code section 402 proceedings, the court ruled the testimony of Jacqueline and Natalie would be received pursuant to Evidence Code section 1109 as domestic violence propensity evidence. (Evid. Code, § 1109, subds. (a)(1), (d)(3); Pen. Code, § 13700, subds. (a) & (b).) However, appellant never requested, and the court did not give, a limiting instruction telling the jury the testimony of Jacqueline and Natalie was admissible only as propensity evidence. Their testimony was therefore admissible for all purposes. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1170; *People v. Vinson* (1969) 268 Cal.App.2d 672, 674; *People v. Scahill* (1967) 250 Cal.App.2d 108, 114; see *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316 [trial court has no sua sponte duty to give limiting instruction regarding section 1109 evidence].)

remained nonviolent and calm. Appellant displayed a knife at the tattoo shop and admitted to having the knife in the car. Maria was alive when she left the shop and the evidence indicated that they remained together until she was ejected from the car and struck by oncoming traffic.

The physical evidence showed that appellant repeatedly stabbed Maria, causing 14 incise wounds to her hands and two to her upper back before she was found on the highway. In comparison, appellant's injuries were minimal. Tobar, who encountered appellant shortly after he abandoned Maria's car in Tujunga, saw cut marks on appellant's hand, but saw no bleeding or facial injuries. Padilla saw appellant in Glendale a few hours after the freeway incident yet he did not notice any blood or injuries. Appellant's former girlfriend Bandari testified to seeing cuts on appellant's hand but noted that the cuts were not bleeding or bandaged.

In contrast, the front passenger area of Maria's car had large amounts of blood. Her blood was on the backrest and the seat of the front passenger seat, the glove box, passenger door, inside window, armrest and the pillar behind the door. Whereas, appellant's blood was found only on the driver's side door armrest and on the steering wheel.

Despite appellant's testimony that Maria "exploded" on him and grabbed his knife in the car, appellant admitted that Maria had never before threatened or physically attacked him. He never saw her threaten or act violently toward anyone. Moreover, Nancy's testimony confirmed this nonviolent assessment of Maria and her relationship with appellant. Maria was also physically much smaller than appellant.

In addition, there was evidence of consciousness of guilt, namely, appellant's flight from the homicide scene, disposal of Maria's car, desire to flee the country, and disposal of the homicide weapon. He never inquired about Maria's condition and did not turn himself in to the police until August 31, 2013. Shortly after abandoning Maria's car, appellant told Bandari that something terrible had happened and that he wanted to flee to Tijuana or Las Vegas.

Finally, the evidence of appellant's prior acts of domestic violence against two previous girlfriends, Jacqueline and Natalie, demonstrated that appellant had a pattern of physically abusing women. Both former girlfriends testified to appellant's jealous, controlling, and violent character traits. They also testified to his prior assaults, often precipitated by jealousy, that were similar to the present offense.

Here, the evidence of appellant's guilt was overwhelming, rendering harmless any trial court error in allowing the People to elicit from appellant testimony that he suffered the misdemeanor conviction in 2008. The alleged evidentiary error was not prejudicial under any standard. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). It follows appellant did not receive ineffective assistance of counsel by his trial counsel's failure to pose a hearsay objection to the challenged impeachment. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).)

2. *The Court Did Not Err by Refusing to Instruct on Voluntary Manslaughter Based On Sudden Quarrel or Heat of Passion.*

During discussions about proposed jury instructions, the defense requested instructions on self-defense (CALCRIM No. 505) and voluntary manslaughter based on imperfect self-defense (CALCRIM No. 571). The court granted both requests.

Then, defense counsel asked the court to instruct on voluntary manslaughter based on sudden quarrel or heat of passion. Although defense counsel acknowledged that a heat of passion defense was inconsistent with appellant's trial testimony, he argued that circumstantial evidence suggested that appellant was provoked into stabbing Maria. In response, the court stated, "I heard no evidence where the defendant stated that he acted rashly and under, use of intense emotion that obscured his reasoning or judgment." (*Sic*.) The court later stated, "[I] don't see the basis for provocation. It's actually contrary to what the defendant said. He said he wasn't angry. Nothing has been pointed out to me to support an inference that he was angry, that he was acting rashly in response to anger. So – and the various elements of provocation." The court refused to give the instruction. The jury convicted appellant of second degree murder.[6]

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[6] The jury acquitted appellant of first degree murder.

Appellant claims the court's refusal to instruct on the alternative theory of heat of passion was error. He argues "[a] reasonable juror could have concluded that whatever animus between appellant and Maria that existed at the tattoo shop grew when the two began arguing in the car and that appellant stabbed her in a sudden rage." We disagree and conclude no instructional error occurred.

Voluntary manslaughter is a lesser included offense of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813 (*Thomas*).) For murder to be reduced to voluntary manslaughter based on a sudden quarrel or heat of passion theory, both " 'provocation *and* heat of passion must be affirmatively demonstrated.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) "[T]o warrant instructions on provocation and heat of passion, there must be substantial evidence in the trial record to support a finding that, at the time of the killing, defendant's reason was (1) actually obscured as a result of a strong passion; (2) the passion was provoked by the victim's conduct; and (3) the provocation was sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1481.) This instruction has both an objective requirement that there be sufficient provocation by the victim and a subjective requirement that the victim's statements or conduct had an effect on defendant's state of mind, such that he killed in the heat of passion. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*).) We consider whether there was substantial evidence, viewed in the light most favorable to appellant, to support an instruction on heat of passion. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1139 (*Millbrook*).)

Appellant asserts that there was evidence that Maria and appellant began arguing at the tattoo shop and this disagreement culminated in the car. That evidence included appellant's testimony that, in the car, Maria "exploded" on him concerning the oral copulation incident, was "in [his] face," grabbed him by the shirt and slapped him around, began holding the steering wheel while he was driving on a freeway, and was furious. It also included the evidence of Maria's alleged knife assault upon appellant, during which she allegedly cut appellant's hands and chest. Thus, appellant argues that there was evidence the victim verbally and physically provoked him in the car. If we assume without deciding that this was sufficient provocation, we then turn to the subjective requirement that appellant acted in the heat of passion when he responded to the provocation and stabbed Maria repeatedly in her car.

The Supreme Court addressed a similar query in *Manriquez*, where the only evidence before the trial court as to the defendant's state of mind during the shooting was a witness's "testimony [that] portrayed defendant as attempting to exert a calming influence on the victim." (*Manriquez, supra,* 37 Cal.4th at p. 585.) The court held that the "subjective element of the heat of passion theory clearly was not satisfied" (*ibid*.) where there was "no showing that defendant exhibited anger, fury, or rage" (*ibid*.), thus, the trial court did not err in refusing to give a heat of passion instruction. (*Id.* at pp. 585-586.)

In contrast, in *Millbrook*, the court reversed an attempted murder conviction, finding that the trial court had a sua sponte duty to instruct on heat of passion even though the defendant asserted self-defense and testified he shot a fellow party guest out of fear and panic. (*Millbrook, supra*, 222 Cal.App.4th at

p. 1139.) Notwithstanding that testimony, several other guests had witnessed the quarrel before the shooting and the shooting itself. These witnesses testified about defendant's reactions to the victim's provocation, including that defendant was angered and intimidated. (*Id*. at pp. 1139-1140.) Thus, the court reasoned that the jury could have relied on this "other evidence" (*id*. at p. 1140) to find defendant had "shot spontaneously and [was] under the influence of extreme emotion." (*Ibid*.)

Here, the only evidence of defendant's state of mind during the stabbing consisted of his prior statements to Detective Schultz and appellant's own trial testimony. Appellant told Schultz that appellant was "just . . . trying to control the car and protect himself." He himself testified that, before the alleged knife assault by Maria, she sat back, appellant told her to "chill out," and he asked what she was doing. He denied he was ever angry at all, denied he was ever violent, and testified he was trying to calm Maria. The only evidence presented concerning appellant's state of mind consistently portrayed him as calm and in control.

Even if there was legally adequate provocation from the victim, there was no substantial evidence that appellant's " 'reason was actually obscured as the result of a strong passion aroused by' " such provocation (*Thomas*, *supra,* 53 Cal.4th at p. 813), therefore, the court did not err by refusing to instruct on voluntary manslaughter based on heat of passion.

Further, during jury argument, appellant's counsel commented, "[appellant] didn't set out to think, I think I'm going to kill Maria. And *it wasn't a rash* decision. The decision was, I'm *just trying to control that car*, so I can get home. That's what he told you." Unlike the case in *Millbrook*, in the present case

there were no living witnesses (other than appellant) to the alleged argument and subsequent use of lethal force, here, his stabbing of Maria in the car. In light of all of the above and the overwhelming evidence of guilt, we conclude no prejudicial instructional error occurred. (Cf. *Watson*, *supra,* 46 Cal.2d at p. 836; *Chapman*, *supra,* 386 U.S. at p. 24.)

3. *The Trial Court Did Not Err by Failing to Give an Instruction Relating Voluntary Intoxication to Perfect or Imperfect Self-Defense.*

At appellant's request, the court, during its final charge and using CALCRIM No. 625, instructed the jury on voluntary intoxication. That instruction stated, in relevant part, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation. [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose." The court also instructed on perfect self-defense and imperfect self-defense. Appellant did not object to the trial court's instructions nor did he request any modification of CALCRIM No. 625.

Appellant now claims the trial court erroneously failed to give sua sponte an instruction relating voluntary intoxication to perfect and imperfect self-defense. He argues (1) CALCRIM No. 625 limited consideration of voluntary intoxication to the issues of intent to kill, and premeditation and deliberation, (2) perfect and imperfect self-defense each require "the defendant to *actually* believe he is in imminent danger and needs to use deadly force," and (3) the trial court erred by giving CALCRIM No. 625 because it precluded consideration of voluntary intoxication as it relates

to that actual belief. He also argues he received ineffective assistance of counsel to the extent his trial counsel failed to object to, or request modification of, CALCRIM No. 625.

However, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) CALCRIM No. 625 was correct in law and responsive to the evidence. Appellant did not request clarifying or amplifying language concerning the instruction; thus, his claim that the instruction was misleading or incorrect is forfeited on appeal.

Assuming appellant did not waive the issue, we note as to the merits that in *People v. Soto* (2016) 248 Cal.App.4th 884, review granted October 12, 2016, S236164 (*Soto*), the Sixth District "h[e]ld the trial court erred by precluding the jury from considering evidence of defendant's voluntary intoxication with respect to his claim of imperfect self-defense." (*Id.* at p. 888.) We also note, however, that our Supreme Court granted review in *Soto*. The issue of whether the trial court in *Soto* committed prejudicial instructional error is pending before our Supreme Court.

Nonetheless, there is no need to decide whether in this case the trial court's failure to give a clarifying instruction relating voluntary intoxication to perfect and imperfect self-defense was error. We evaluate under the *Watson* standard of prejudice any erroneous failure of a trial court to provide clarifying or amplifying instructions. (Cf. *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132; *People v. Andrews* (1989) 49 Cal.3d 200, 215; *People*

v. Ross (2007) 155 Cal.App.4th 1033, 1054-1055.) Here, there was overwhelming evidence of appellant's guilt. There is no reasonable probability the jury would have reached a different outcome had the court instructed on intoxication as urged by appellant. The alleged instructional error was harmless under any conceivable standard. (Cf. *Watson*, *supra,* 46 Cal.2d at p. 836; *Chapman*, *supra,* 386 U.S. at p. 24.)[7]

4. *The Trial Court Properly Denied Appellant's Continuance Motion.*

From June 3, 2014, the date of appellant's preliminary hearing, to April 3, 2015, the date the jury convicted appellant, inclusive, deputy public defender Michael Miller represented appellant. On April 3, 2015, the court scheduled sentencing for May 1, 2015. On April 27, 2015, Miller filed a sentencing memorandum.

On May 1, 2015, the court called the case for sentencing. The prosecutor, appellant, and Miller were present. Appellant personally stated, "My attorney ain't present, so I would like to postpone. Mr. Miller has been fired, and he's no longer my attorney." The court asked if appellant had hired new counsel. Appellant replied yes and stated, "[h]e's not present."

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[7] The record sheds no light on why appellant's trial counsel failed to object to, or request modification of, CALCRIM No. 625. Nor does the record reflect that defense counsel was asked for an explanation and failed to provide one. Moreover, we cannot say there simply could have been no satisfactory explanation for his failure to object to, or request modification of, the instruction. (Cf. *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268.) Appellant has failed to demonstrate he received ineffective assistance of counsel concerning this instruction. (See *Ledesma, supra,* 43 Cal.3d at pp. 216-217.)

The court indicated it normally did not continue cases in such circumstances unless the new counsel was present. Appellant stated, "I believe he's in trial right now." The court indicated the alleged new counsel had not appeared or filed anything indicating he was new counsel. Appellant replied, "I can after I postpone. Until he shows up in two weeks."

The prosecutor objected. Miller stated, "It's the first I've heard of it, Judge. So I've had no contact with anybody who indicated that they were substituting in." The prosecutor stated, "The first I've heard of it, too. And I have victims and witnesses in court." Appellant stated he had an attorney and wanted to continue the hearing with new counsel present.

The court indicated the alleged new counsel was not present and had not filed anything with the court, therefore the court would not continue the case. Appellant indicated Miller was not his attorney and appellant did not feel comfortable with his continued representation. The court told appellant that Miller was still his attorney and the court had not relieved him as counsel.

The court asked if there was anything else and appellant stated, "[j]ust want to wait two weeks, if possible." The court confirmed the People were objecting to a continuance. The court indicated it did not find good cause.

The court asked for Miller's position on the matter and he replied that appellant was entitled to whomever he wanted to represent him. The court indicated that was correct but the alleged new counsel was not present. Miller stated he agreed and therefore had no position on the matter. After a recess, the court stated its clerk had not received a phone call from an attorney stating that the attorney had been retained. The court later

stated, "No good cause has been shown. The motion to continue is denied." The court later observed there had been no notice.

Appellant then stated, "Well, I would like to go pro per." The court stated appellant could represent himself if he was ready to proceed with sentencing. Appellant said he wanted to file a new trial motion. The court denied as untimely appellant's motion to represent himself. After the court handled other matters, appellant began arguing with the court as to whether Miller or the alleged new counsel was appellant's counsel. The court finally asked appellant not to address the court. After the court handled additional matters, appellant again personally raised the issue of his alleged new counsel. The court later sentenced appellant to prison.

Appellant claims the trial court abused its discretion and violated his Sixth Amendment right to counsel by refusing to continue the sentencing hearing to permit substitution of counsel. We disagree. A trial court has broad discretion to grant or deny a continuance motion. (*People v. Frye* (1998) 18 Cal.4th 894, 1012-1013.) Appellant has the burden of demonstrating that a denial of such a motion was an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) " '[B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.' " (*People v. Alexander* (2010) 49 Cal.4th 846, 934.)

Here, appellant surprised the court and both counsel by his representation that he had fired Miller and had hired new counsel. Appellant's request was untimely. He had almost a month after his conviction and prior to the sentencing to retain counsel and request a continuance. Nothing in the record proves appellant hired new counsel. Nothing in the record demonstrates any alleged new counsel ever contacted the court or the public defender. In fact, appellant did not even provide the name of this alleged new counsel.

As to appellant's requests to represent himself, to have an opportunity to file a new trial motion, and to have Miller relieved as counsel, appellant failed to state grounds for any of those requests. Appellant does not claim Miller rendered ineffective assistance of counsel concerning any matter, including his representation during sentencing or his decision to not file a new trial motion. The court indicated its willingness to permit appellant to be represented by new counsel if the latter were present on that day, but that was not the case. Given the surprise request and the complete lack of a detailed basis or justification for the continuance, the court reasonably could have concluded appellant's request was a dilatory tactic. This is not a case in which there was an unreasoning and arbitrary insistence by the court upon expeditiousness in the face of a justifiable request for delay. The court's denial of appellant's continuance motion was well within its sound discretion and the court did not violate appellant's right to counsel or right to due process. (Cf. *People v. Jeffers* (1987) 188 Cal.App.3d 840, 849-851.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOSWAMI, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.