THE PEOPLE, Plaintiff and Respondent, v. THAI BAO TRAN, Defendant and Appellant.

G035165

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

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PRIOR HISTORY: Appeal from a judgment of the Superior Court of Orange County, No. 97WF0108. Frank F. Fasel, Judge.

DISPOSITION: Affirmed.

COUNSEL: David M. McKinney, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: O'LEARY, J.; SILLS, P.J., RYLAARSDAM, J. concurred.

OPINION BY: O'LEARY

OPINION

Thai Ba Tran appeals from a judgment after a jury convicted him of two counts of first degree murder and found true he personally used a firearm during the commission of both counts. Tran argues the trial court erroneously admitted evidence, the district attorney committed misconduct, the court erroneously instructed [*2] the jury, and there was cumulative error. Although some of Tran's claims have merit, we conclude he was not prejudiced, and we affirm the judgment.

FACTS

It is undisputed Tran shot and killed Jeremy Foster and Thang Nguyen on December 10, 1996, at Bowling Green Park in Westminster. The district attorney proceeded on the theory Tran committed two counts of deliberate and premeditated first degree murder. Tran claimed he acted in self-defense or imperfect self-defense. To completely understand the shootings, we must begin with facts six months earlier when Nguyen learned Tran was dating his ex-girlfriend, Ly Bui.

June 1996-Nguyen Attacks Tran

Tran, Truong Le, and Jeff Nguyen (Jeff) drove to Bui's apartment. Le stopped his car near a car where Nguyen was standing. Le told Tran to not get out of the car because Nguyen was a very jealous person. Tran said he did not care, got out of the car, and walked towards the apartment entrance. Nguyen said, "'What the fuck are you saying?'" Tran responded, "'I wasn't talking to you[,]'" and he kept walking. Tran heard footsteps, turned around, and saw Nguyen running at him with the bottom half of a pool cue. Tran ran and tripped. Nguyen [*3] hit Tran with the pool cue

between one and 10 times. Nguyen repeatedly yelled, "'I am going to kill you, mother-fucker.'" Le and Jeff pulled Nguyen off Tran. Nguyen said, "'It's not over, it's not over yet,'" and left.

July 1996-Foster and Nguyen Attack Le

The next month, Tran, Le, and his brother, Quan Le (Quan), were at Spires Restaurant in Garden Grove. Foster, Nguyen, and Vy Le (Vy) [1] walked in. As Foster and Nguyen walked by their table, the men conversed. Nguyen motioned for Le to go outside. Le went outside and spoke with Foster and Nguyen. Foster hit Le on the head with a closed fist, and Le fell to the ground. Nguyen kicked Le several times. Quan came outside to help his brother. Quan attacked Nguyen, and they fought. Foster tackled Quan and knocked him into a car. Restaurant employees went outside and stopped the fight. Foster and Nguyen attacked Le because they could not find Tran.

1 Truong Le and Vy Le are not related.

July/August 1996-Tran Shoots at Foster at Spires

Approximately [*4] two weeks later, Tuan Tran (Tuan) was at Spires with friends, including Mark Reich. Foster and three friends walked in and they sat at a table. Reich borrowed money from someone at his table and used the pay telephone. [2] About 15 minutes later, Tuan, Reich, et al., paid for their food, Reich stayed inside and played video games, and Tuan went outside. Foster approached Reich, and they talked and shook hands. Reich walked outside and joined Tuan. They walked to the parking lot and saw Tran sitting in the rear passenger seat of a car with three other people, including Quan. Tuan walked to the car to speak with Tran. Tran, wearing black leather gloves, asked Tuan where Foster was and showed him a .22 Beretta handgun. Tuan saw Foster get up to leave the restaurant, and Tuan got into the car with Tran. When Foster got near his car, the car in which Tran and Tuan were riding made a u-turn and drove past Foster's car. As Foster was trying to get into his car, Tran, whose window was down, put his arm out the window and fired the gun at Foster from about 15 or 20 feet away. Tran pulled the trigger several times, but the gun did not fire. [3] Foster ran for cover. Tran said, "'Fuck. The gun [*5] is jammed.'" The car in which Tran and Tuan were riding sped away. During this time, Tran told Tuan "we have to get them before they get us."

2 There was conflicting testimony as to whether Reich paged Tran and asked him to come to the restaurant.

3 There was conflicting testimony as to whether the gun would have fired another shot without reloading. Regardless, the trigger still functioned.

September/October 1996-Tran Shoots at Foster While Driving

Sometime between one and two months later, Tran and Tim Dang left Spires in Tran's car. Foster, Martin Kanshige, and three others saw Tran leave and Foster said, "he wanted to go get him." They got into Foster's car to chase them. Foster caught Tran. Tran grabbed a .357 revolver that was hidden in an air conditioning vent and put it on his lap. Foster's car's passenger's side door was next to Tran's car's driver's side door-Kanshige, Foster's passenger, was next to Tran and their windows were down. Foster and Tran exchanged words. Tran said, "'You [*6] want shit?'" Tran steered with his left hand and lifted the gun with his right hand. Foster saw the gun and turned the steering wheel to the left, away from Tran. Tran had Dang hold the steering wheel, and he fired the gun twice. Kanshige felt one bullet go by his face, and the other bullet passed through the passenger door. Foster drove away. Tran said, "'I hope I hit those bastards[.]'" He also said it was not a bad shot for a moving target. After the second shooting, Tran told Tuan "he wanted to kill them."

December 10, 1996-Tran Shoots Foster and Nguyen

Le's House

In the afternoon, Foster, Nguyen, Vy, and Mark Danh drove to Le's house to ask him whether he and Quan were still friends with Tran. Foster told Le they attacked him at Spires because they could not find Tran. Tran had told Foster that he was no longer friends with the Le brothers. When Foster asked Le whether he was still friends with Tran, he responded, "[y]es." Foster was angry with Tran because he lied to him and shot at him. Foster told Le to tell Tran he wanted to talk to him. They left and went to Rockets and Pockets, a pool hall, in Huntington Beach.

Tran Shoots Foster and Nguyen

Foster [*7] and Nguyen left the pool hall in Foster's car. Before picking up Foster's girlfriend and going to a movie,

they went to a Taco Bell drive through. After getting their food, Foster drove away. Meanwhile, Tran was driving in his car in the same area with his girlfriend, Trinh Ly, in the passenger seat, and Tuan in the backseat. Tran went to a video store to rent videos for Ly because he had business to take care of that evening. As they drove, Tran said Foster was looking for him because Foster wanted him to reimburse Foster for the car window he shot out. Suddenly, Foster and Nguyen started tailgating them.

Tran said Foster was following him and told Ly to take the gun out of the air conditioning vent, but she did not. Tran grabbed a semi-automatic Smith and Wesson Sigma .40 caliber handgun and handed it to Tuan in the backseat. Tran told Ly to get the clip out of the vent and hand it to Tuan. She did and handed it to Tuan. Tran told Tuan to load the gun, which he did. Tran asked Tuan if the gun was loaded and he said, "[y]eah." Tuan put the gun in his belt under his sweater.

Foster stopped his car next to Tran's and said Tran lied to him thereby disrespecting him. Tran pulled his [*8] car into the supermarket parking lot and stopped; Foster followed. Foster got out of his car and walked to Tran's car's passenger's side window. In Vietnamese, Tran told Tuan to shoot Foster, but he did not. Foster leaned into Tran's car and told him to get out to fight. Foster again accused Tran of lying to him. Foster walked to the driver's side window and told Tran to get out of the car to fight and that he would take him down in seconds. Tran said not there because they would be caught and suggested they go to the park. Foster got into his car, and Nguyen drove away. Tran followed.

On the way to the park, Ly told Tran not to fight Foster, and Tran said, "'shut up.'" Tran told Ly and Tuan to switch seats when he stopped the car so they could take off quicker if something happened. In Vietnamese, Tran asked Tuan if he wanted to shoot Foster and Nguyen-Tuan did not respond. Tran said, "'No okay. I will do it.'" Tuan handed the gun to Tran, and he put it in his front waistband.

Foster stopped at Bowling Green Park, and Tran stopped behind him. Foster and Nguyen got out of the car-Foster standing at the back of the car and Nguyen standing at the side of the car holding a soft drink [*9] cup. Tran got out of the car and had the gun in his hand; he was trying to tuck it into his belt under his sweatshirt. Tuan moved to the driver's seat and rolled the window down. Tran walked to the front of his car, and Foster asked, "'What have you got?'" Tran pulled out the gun and pointed it at Foster. Foster said, "'I give you props, you know, I think you are down.'"

Nguyen moved towards Tran on Tran's left side. Tran turned towards him and said, "'step back[,]'" which he did. Nguyen told Tran to put the gun down. A car drove buy, and Tran lowered the gun. Tran turned towards Foster, smiling. Foster again said, "'I think you are down, I give you props, you know, point the gun to my face and I will look straight down the barrel.'" Tran turned towards Tuan and asked him if he heard what Foster had just said; Tuan nodded, "yes." Tran had a bigger smile on his face when he turned back towards Foster. Tran had the gun pointed at Foster's face and shot him twice. Foster was unarmed. Nguyen dropped his cup and ran. Tran chased him and shot him in the back several times. As Nguyen fell, Tran continued to shoot him in the back and stood over him and fired down at him. Tran ran back to [*10] the car with the gun in his hand. On his way, he stopped at Foster's body and shot him in the head. Sometime later, Tran told Tuan when he fired the last shot into Foster's head there was a lot of blood.

Tran ran to his car, sat in the passenger's seat, and told Tuan to drive. He dropped the gun on the passenger's side floor. The top portion of the gun was cocked back indicating the gun was empty. Tuan panicked and could not drive the manual transmission so he and Tran switched places. Tran was frantic and asked Tuan whether he had heard everything; Tuan said, "[y]es."

Nguyen was moaning as Tran drove past him. Tran angrily told Tuan to get out of the car and "finish him off." Tuan told him the gun was out of bullets. As Tran drove away, he said he should have "finished [him] off." Tran was afraid Nguyen was still alive and he would be caught. Tran said it was the third time he shot at Foster and he finally got him. Tran said, "'three strikes and you are out.'" He drove to Tuan's house.

Officer Bill Arganda responded to a "shots fired" call at Bowling Green Park. He saw Foster's car, and Foster and Nguyen lying on the ground next to the car. Foster had one wound below each eye [*11] and was bleeding from the face. There was a small crater in the asphalt near Foster's head. His right hand was between his stomach and beltline, and his left hand was partially inside his left front pocket. Nguyen had 10 gunshot wounds to his torso and arms. Twelve .40 caliber Smith and Wesson cartridge cases were recovered from the scene.

The Alibi and the Guns

At Tuan's house, Tran told Tuan and Ly to say they rented movies and watched them at Tuan's house. Tran and Tuan collected the guns including the gun used to kill Foster and Nguyen and put them in a black duffel bag.

Tran paged Anvy Nguyen (Anvy) to come help them dispose of the guns. Tran paged him with "911 187"-*Penal*

Code section 187 is the California murder statute. When Anvy called, Tran said he needed him to drive them around to get rid of the guns, but Anvy could not come.

Tran paged David Pham who arrived at Tuan's house approximately one hour later. Tran told Pham he shot Foster and Nguyen. After recounting the events leading to the shooting, Tran told Pham that after he pulled out the gun, Foster said, "he didn't have the balls to pull the trigger." Tran excitedly said he shot Foster [*12] at point blank range. Tran said Nguyen ran "'like a little bitch,'" and he shot him in the back as he ran away. Tran also said he had wiped the bullets clean that day and it was raining so the police would not be able to find any fingerprints. Pham told Tran to throw the gun away, but Tran refused saying it was like owning a Mercedes.

Tran, Tuan, and Ly got into Pham's car. They drove to a friend's house, but he was not home. Tran told Pham to drive to Hung Huynh's house. Tran told Huynh he shot Foster and Nguyen. Tran told him he went to the park to take care of things. He said Foster had his hand in his pants when he got out of the car. He told Huynh that he shot Foster three times in the head and Nguyen 10 times in the back as he ran away. Tran told him he walked towards Nguyen, who was crying, and shot him in the head. Huynh said that was cold-blooded, but Tran said he did not care because "sooner or later if it was not him, too." Tran told Huynh he wanted to hide the guns at his house because the guns had been used in a crime. Huynh said he could not because he was on probation and expecting a baby. He said Tran should throw the . 40 caliber gun away, but Tran refused because [*13] it was expensive and he wanted money for it.

Tran and Tuan went to Pham's car and drove to Ly's house to drop her off. To support their alibi, Tran told Ly to call a friend when she got home and tell the friend she got into an argument with Tran at his house, he dropped her off down the street, and she had to walk home. After dropping of Ly, they drove to Christina's, "Strawberry's," apartment. On their way, Tuan and Pham told Tran to throw away the .40 caliber gun, but Tran said he could sell it. Strawberry was waiting on the street. Either Tran or Pham gave her the bag of guns, and she took the bag into her apartment. Pham drove Tran and Tuan to Tuan's house, and Pham left. Tran spent the night at Tuan's.

The next day, Anvy went to Tuan's house where he met Tuan, Tran, Pham, Dang, and Nghia Tran. Tran again recounted the events of the shooting. Tran said Foster was taunting him saying "'you bitch, you won't do it[,]'" or "'you are [*sic*] little pussy[.]'" Tran said he shot Foster because he was taunting him.

Within one week, Tuan gave Anvy the .40 caliber gun while Tran was present. Tuan told Anvy to get rid of the gun, which he did.

Sometime after the killings, Tran, [*14] Ly, and a friend drove to Minnesota to pick up the friend's dog. When they returned, Tran learned law enforcement officers were interviewing his friends. Tran told Ly he was going to the police station for an interview because it would make him look better. Tran told Ly to tell the police Tran picked her up, they ate, they rented movies, and Ly went home.

Tran and Ly went to the police station on December 20, 1996, and denied killing Foster and Nguyen or being at the park. Tran was relaxed, calm, and collected. Tran said he had an alibi for the time of the murder-he had a receipt from a video store. Tran claimed he heard about the killings from Tuan's sister, who heard it from a friend of Nguyen's family. Tran said there were rumors he was the one who killed Foster and Nguyen. Tran admitted having fights with Nguyen, but denied having shot at Foster. Tran said he had heard Foster was shot nine times and Nguyen seven times. Tran said Foster and Nguyen would not have agreed to meet him at an isolated area without backup. A redacted tape of the interview was played for the jury.

When Tran's interview was over, he went outside and told Ly law enforcement officers wanted to speak with [*15] her. Ly told officers the story Tran told her to tell them.

On January 10, 1997, Ly confessed to taking part in the killings, and she was arrested. Tran was arrested the same day. Law enforcement officers asked Tran if he wanted to tell his side of the story. Tran continued to deny killing Foster and Nguyen, although law enforcement officers told Tran that Tuan and Ly had told them what happened. A redacted tape of the interview was played for the jury.

Trial Court Proceedings

A second amended information charged Tran with two counts of murder (*Pen. Code, § 187, subd. (a)*) (count 1-Foster; count 2-Nguyen). [4] The information alleged a multiple murder special circumstance as to each count. (§ 190.2, subd. (a)(3).) The information also alleged Tran personally used a firearm as to each count. (§ 12022.5, subd. (a).) The district attorney notified the trial court it was seeking the death penalty.

4 All further statutory references are to the Penal Code, unless otherwise indicated.

[*16] At trial, the district attorney offered Ly's testimony. The district attorney initially charged Ly with being an accomplice to the offenses, and she spent over five years in jail before being granted immunity in exchange for her testimony. The district attorney eventually dismissed the charges. Ly testified Tran believed Foster posed a threat to him and on the night of the shootings, Tran knew Foster was angry at him and he was scared. Ly explained that when Foster and Nguyen got out of the car, both had their hands hidden inside their shirts. Ly did not see Foster make any threatening moves toward Tran with a weapon. Ly was not sure how many times Tran shot Foster, one or two, and he shot Nguyen 10 times. Although Ly admitted she had not told law enforcement officers this earlier, she stated that after Tran shot Nguyen, he walked back towards his car, turned towards Foster's car, and fired one more shot, but she was not sure where because she turned her head. Her testimony on this point was inconsistent. Ly testified she did not think there would be a shooting, only a fight.

The district attorney also offered Tuan's testimony. The district attorney initially charged Tuan with two [*17] counts of murder. In exchange for his testimony, the district attorney offered Tuan immunity on a different matter and promised no further jail time on this matter-he spent almost two years in jail. Tuan testified that after Tran handed him the gun, he loaded it either at Tran's direction or on his own; it had 13 bullets. As they followed Foster and Nguyen to the park, Tran asked Tuan if he wanted to shoot them. Tuan was either silent or said, "'no.'" Although he had not testified to it previously, Tran said he would do it himself and asked Tuan for the gun. Tuan handed Tran the gun, and he looked nervous and scared. Tuan testified Nguyen moved towards Tran and he told him to step back and Foster moved towards him and he also told him to step back. That is when Foster told Tran to point the gun at his face and he would stare down the barrel of the gun. After a car passed, Tran raised the gun and shot Foster twice in the face. After chasing and shooting Nguyen, Tran returned and shot Foster one more time. Tuan never saw Foster or Nguyen with a gun.

The district attorney also offered two letters into evidence. The first letter was written on August 11, 1996, to Thuy Nguyen (Thuy), before [*18] the killings. In the letter, Tran stated that when he finds Nguyen, "he is dead." The second letter was written in August 1997, after the killings, and stated, "'I thought I could take on the world with guns and knives, now I still think I can, except with my mind. If Buddha gives me a second chance at life, I know my life will be auspicious.'"

The district attorney offered expert testimony that a .40 caliber bullet caused the crater in the asphalt near Foster's head. Finally, the district attorney also offered expert testimony that based on the location of the wounds and the type of weapon, Tran returned and fired a third shot.

Tran testified on his own behalf. He said the conflict between he and Nguyen began when he started dating Nguyen's ex-girlfriend, Bui. He explained the day after Nguyen attacked him with the pool cue, Nguyen apologized to him. However, a few weeks later, Tran was at a pool hall and saw Nguyen and his friends. Tran's friend told him that Nguyen and his friends were going to attack Tran when he left. Tran left when Nguyen was not looking, and Nguyen chased him, but did not catch him. After recounting the circumstances of Foster and Nguyen's attack on Le, Tran [*19] said he heard a rumor Nguyen and Foster carried guns and he obtained a .22 caliber gun. [5]

5 Tuan testified he and Tran had discussed these rumors and stated Tran did not believe Foster carried a gun.

With regard to the first Spires shooting, Tran said Reich paged him and when he called, Reich told him Foster was there. When he got to the restaurant, he made eye contact with Foster as he was walking out. Tran held up the gun so Foster could see it and fired it into the air to warn Foster to stay away from him and his friends.

Tran testified he sold the .22 caliber gun and bought the .357 caliber gun because he felt he needed it for protection from Foster, Nguyen, and their friends. He hid the gun in the air conditioning vent of his car. As to the second shooting, Tran stated when Foster caught up to him, Foster challenged him. Tran said he shot at Foster because he thought Foster was going to shoot him. Tran said he aimed the first shot above the car and the second shot under the car.

Tran testified that [*20] after the second shooting, he "made peace" with Foster and Nguyen, but he still carried a gun in his car. Tran traded Anvy his .357 caliber revolver for the .40 caliber Smith and Wesson Sigma.

As to the December 10 incident, Tran explained he was at Tuan's house and Le told him Foster, Nguyen, Vy, and Danh visited him. Le told him Foster and Nguyen wanted to talk with him because he had lied to them about being friends with the Le brothers. Tran was concerned because lying to someone is disrespecting them in the "teen culture." Tran did not believe they just wanted to speak with him. Tran went to Huynh's house and the pool hall. After leaving the pool hall, Tran spoke with Le and he said Foster and Nguyen were at the pool hall looking for him.

Tran said he picked up Ly and they ate dinner. They picked up Tuan and rented movies. As they were driving, Tran noticed Foster was following him. Tran said, "'we should get them before they get us[.]'" Tran took the gun from the air conditioning vent and handed it to Tuan. Tran told Ly to give the clip to Tuan.

Tran explained that after they stopped at the supermarket parking lot, Foster asked Tran why he lied to him. Foster told Tran to [*21] "'get out of the car'" to fight, but Tran did not because he thought they would jump him. Tran did not see any weapons on Foster or Nguyen. Tran suggested they go to the park, and Foster said, "'follow me.'" Tran told Tuan and Ly to switch seats.

Tran said he followed Foster to the park despite being terrified and trying to drive away. Tran thought he could broker another peace deal. Tuan handed Tran the gun and said he had chambered a round. Foster stopped, and he and Nguyen got out of the car. Tran stopped his car about 10 feet behind Foster's car, put the gun in his waistband, and got out. Foster asked Tran what kind of gun he had, and Tran pulled the gun out and showed him. Foster said, "'I give you props for being down.'" Tran was flattered, smiled, and put the gun in his waistband.

After talking for approximately five to seven minutes about whether Tran was still friends with the Le brothers, Tran thought Nguyen was moving towards him from the left side. Tran pulled out the gun, pointed it at Nguyen, and told him to get back. Nguyen said, "no, I want this to end now." Nguyen stepped back. Tran thought Foster or Nguyen were going to kill or seriously injure him.

Tran thought [*22] Foster was moving towards him so he pointed the gun at his chest. Foster said, "point the gun to my face and I will look down the barrel." Tran turned to Tuan and asked him if he heard what Foster said. Foster repeated what he had said. Foster moved forward with his upper body and moved his hand up a little. Tran panicked and shot Foster twice in the face. Tran thought Foster was pulling out a gun. Tran acknowledged he never told anyone Foster moved towards him and denied shooting him a third time after he fell. Tran stated he saw a movement from his left and reacted-he shot. He thought Nguyen was going to get a gun so he shot Nguyen in the back over and over. As Nguyen lay on the ground, Tran shot him until the gun was empty. Tran knew he had 12 bullets in the gun. Tran ran to his car; he denied shooting Foster again. He denied making any comments to Tuan about finishing Nguyen off.

Tran offered expert testimony challenging the district attorney's theory about the crater in the asphalt and the ballistics evidence.

Finally, Tran offered the testimony of Dr. John Podboy, a clinical psychologist. Podboy testified concerning general adaptation syndrome, which is when a person perceives [*23] a serious threat, he or she simply responds in seconds without rational thought. The first stage is alarm when a person is prepared to fight or run. Additionally, overreaction to a perceived threat is common, and excessive wounding indicates this "fight or flight" syndrome.

The jury convicted Tran of first degree murder on both counts and found true all the allegations. At the penalty phase trial, the jury could not reach a penalty verdict, and the trial court declared a mistrial. The district attorney advised the court it would not be retrying the penalty trial. The court sentenced Tran on each count to life in state prison without the possibility of parole and four years on the firearm enhancement; the court stayed the sentence on count 2.

DISCUSSION

I. Erroneously Admitted Statement-Tuan's Guilty Plea to Second Degree Murder

Tran argues the trial court erroneously admitted the factual basis in Tuan's *Tahl* [6] form because it was not a *prior* consistent statement. Although we agree the court erroneously admitted the statement, we conclude the error was harmless.

6 *In re Tahl (1969) 1 Cal.3d 122, 81 Cal. Rptr. 577*.

[*24] Tuan was arrested on January 10, 1997, and was charged with the same offenses and enhancements as Tran. Tuan testified at Tran's preliminary hearing on July 10 and 31, 1998. Tran said that when he testified at the preliminary hearing, he knew the district attorney was going to offer him a deal, but he did not know the specifics. On September 25, 1998, Tuan entered into a plea agreement with the district attorney. He pled guilty to second degree murder and was sentenced to probation for seven years in exchange for "testify[ing] truthfully whether called by the defense or prosecution at all hearing or trials." Defense counsel argued, and the trial court agreed, Tuan did not write the statement. The court noted it was common practice in Orange County for the district attorney to write the factual basis for the plea. Tran testified he was released from jail on October 2, 1999, at the end of the preliminary hearing. [7] On June 14, 2004, near the end of cross-examination, the following colloquy occurred:

7 The preliminary hearing ended on October 21, *1998*.

[*25] "[Defense counsel]: And January 8[], 1997, the day you got arrested, you said that you were interviewed by the police for a long, long, long time?

"[Tuan]: Yes.

"[Defense counsel]: Hours?

"[Tuan]: Yes.

"[Defense counsel]: For a long, long, long time you did not admit to knowing anything about this shooting, right?

"[Tuan]: Yes.

"[Defense counsel]: And do you remember the officers trying to persuade you with all sorts of reasons to tell them what you knew?

"[Tuan]: Yes.

"[Defense counsel]: And do you remember one of the things that they kept repeating over and over again was that you would be much better off as a witness than as a defendant?

"[Tuan]: I believe they said it was a suspect, yes, I remember that.

"[Defense counsel]: Better off as a witness than a suspect?

"[Tuan]: Yes.

"[Defense counsel]: And if you tell them what you knew, it would be better for you?

"[Tuan]: Yes.

"[Defense counsel]: So that -- and then you told them a lot of what you remembered at that time about the incident, right?

"[Tuan]: Yes."

During redirect examination, Tuan testified he pled guilty to a reduced charge of second degree murder, he remained in custody [*26] until he pled guilty and testified, and he was on probation. The following colloquy then occurred:

"[District attorney]: At some point on the night of December 10[], 1996, did you think there was going to be a shooting?

"[Tuan]: Yes.

"[District attorney]: At what point did you realize or think there was going to be a shooting?

"[Tuan]: When we left the Stater Bros. parking lot on our way over to the Bowling Green Park.

"[District attorney]: What was it as you left the parking lot at Stater Bros. that made you think there was going to be a shooting that night?

"[Tuan]: At this point I was sitting in the front passenger [seat]. I still had the gun under my -- my belt buckle. [Tran] asked me if I wanted to shoot them and I didn't respond to him.

"[District attorney]: And after [Tran] asked that question and you didn't respond to him, did he say something else?

"[Tuan]: Yes.

"[District attorney]: What did he say?

"[Tuan]: He said something to the matter, 'okay, I will do it,' and he asked for the gun.

"[District attorney]: And was it at that point that you thought there was going to be a shooting?

"[Tuan]: Yes, at that point he put on his gloves [*27] and I knew something was going to happen." On recross examination, defense counsel stated, "When . . . did you ever, before 35 seconds ago, tell anybody that [Tran] said, 'I'll do it' and then asked for the gun? When did you ever say that before?" Tuan responded either he told the police or when he testified at the preliminary hearing. After defense counsel challenged Tuan to find those statements in the preliminary hearing transcripts from July 10 and 31, 1998, Tuan could not.

The following week, when discussing exhibits, the trial court addressed the admissibility of the *Tahl* form from Tuan's second degree murder plea. [8] The district attorney stated it initially was prepared to use the statement to impeach

Tuan if necessary. The district attorney said, however, that because Tuan said he thought there was going to be a shooting, it was using the statement to show a prior consistent statement. The district attorney explained that "when counsel got up and said, 'you never said that before,' I just sat here and knew that there was a prior statement that he made all the way back at the time of his plea."

> 8 The factual basis for Tuan's guilty plea was as follows: "On 12-10-96 in Orange County I willfully and unlawfully aided and abetted the murder of . . . Foster and . . . Nguyen by getting in the driver's seat of . . . Tran's car and by loading the gun for . . . Tran, knowing . . . Tran was going to shoot . . . Foster and . . . Tran did shoot and kill . . . Foster and then . . . Nguyen[.]"

[*28] Defense counsel stated: "Well, first of all, the rule on prior consistent statements is that it has to be prior to the inconsistent statement, okay[.] [P] He testified -- if he testified to what counsel says, he expected the shooting, I had already gone over and over and over that on his very first statement, January 8[], 1997. He did not -- he indicated he did not expect a shooting. He never said that he expected a shooting. [P] On his next statement, which was June of 1997, he did not say that he expected a shooting. He indicated he didn't expect a shooting. I took him through, over the course of his testimony, every single prior inconsistent statement. And for a prior consistent statement to come in, it has to be prior to the inconsistent statements, and that is not. [P] Moreover, he didn't write that, he didn't dictate the terms of that. And, I didn't get a chance to cross-examine him on why he signed that, when we know the answer is his lawyer said, 'sign this, you get out of jail free. Don't sign this, and you don't.' [P] So that isn't even a statement that he is making. That's a statement that [the district attorney] wants, and it is inconsistent [with] everything [*29] he has said before. What he said in trial is inconsistent with everything he said before, and that is not a prior consistent statement under the Evidence Code. [P] Moreover, he has to confront the witness with it, give him an opportunity to explain it, give me an opportunity to cross-examine him on it. So, that's why. He never did say, and he is not saying anything there. It is not even his handwriting."

The trial court stated: "With respect to the *Tahl* form. I think that there is probative value to the factual basis. Prior inconsistent or prior consistent statement notwithstanding. I think, again, it is another [*Evidence Code section] 780* issue regarding the credibility of a witness." Defense counsel stated the statement was hearsay. The court said, "Whether or not either side, either counsel, examined on factual basis or not for tactical reasons, whatever. I think in and of itself the probative value outweighs the prejudicial effect. [Tuan's] signature is on page 2 of the *Tahl* form . . . . I think that it is a matter of weight as opposed to admissibility on that particular issue." Defense counsel stated, "I believe we left [Tuan] on call. [P] [*30] . . . [P] Because, I am now going to cross-examine him about that. If that's coming in, I want to ask him did he write that, did he understand that, what was he told to do about it. And it will implicate his conversations with his attorney, but I think I should be allowed to go there." The court agreed, but defense counsel did not recall Tuan. The court admitted the *Tahl* form into evidence. During closing argument, the district attorney repeated the factual basis in the *Tahl* form for Tuan's plea to second degree murder.

Tran argues the trial court erroneously admitted the factual basis for Tuan's guilty plea because it was not a prior consistent statement. Tran asserts the statement does not satisfy *Evidence Code section 791, subdivisions (a)* or *(b)*, because it was made after the inconsistent statements and the improper bias or motive. The Attorney General seems to agree the statement was not admissible pursuant to *Evidence Code section 791*.

The Attorney General notes the statement "was not made before the purportedly inconsistent statement of January 8, 1997, so it appears not admissible under subdivision (a) . . . ." Additionally, [*31] the Attorney General asserts analysis under *Evidence Code section 791, subdivision (b)*, is complicated because it is difficult to determine when the improper bias or motive arose, but it is unnecessary "to work out this conundrum" because "the statement was clearly admissible under *Evidence Code sections 780* and *788* . . . ." The Attorney General claims the statement was admissible regardless of whether *Evidence Code section 791* was satisfied.

As we explain below, we conclude *Evidence Code section 780* is not an independent statutory basis for admitting evidence. The evidence, in this case, a prior consistent statement, must still satisfy the applicable evidentiary rules governing the admissibility of evidence, here, *Evidence Code sections 1236* and *791*. Finally, we conclude *Evidence Code section 788* does not provide an alternative basis for admitting the evidence because the Attorney General was not using the *Tahl* form to impeach Tuan and admissibility of a felony conviction to impeach is limited [*32] to the conviction, and not its factual basis.

Evidence Code section 1200, the hearsay rule, states, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated[]" is inadmissible. However, *Evidence Code section 1236* provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in

compliance with [*Evidence Code] section 791*."

Evidence Code section 791 provides: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [P] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and *the statement was made before the alleged inconsistent statement*; or [P] (b) An express or implied charge has been made that his testimony at the hearing [*33] is recently fabricated or is influenced by bias or other improper motive, and *the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen*." (Italics added; see *People v. Kennedy (2005) 36 Cal.4th 595, 614* (*Kennedy*).)

Because the Attorney General does not attempt to argue Tran's statement was admissible pursuant to *Evidence Code section 791*, we will treat this as a concession and need not discuss it further. However, we must determine whether either *Evidence Code sections 780* or *788* were a proper basis for admitting the statement.

Evidence Code section 780 states: "*Except as otherwise provided by statute*, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [P] . . . [P]

(g) A statement previously made by him that is consistent with his testimony at the hearing." (Italics added.) We review a trial court's ruling on the [*34] admissibility of evidence for an abuse of discretion. (*People v. Brown (2003) 31 Cal.4th 518, 534*.)

Here, the trial court concluded the statement was admissible pursuant to *Evidence Code section 780* despite defense counsel's hearsay objection. It did so presumably because on recross-examination, defense counsel attacked Tuan's credibility, and the court concluded the statement was probative. However, based on *Evidence Code section 780*'s language and purpose, we conclude a prior consistent statement, to be admissible, must comply with Evidence Code sections 1296 and *791*.

Evidence Code section 780 begins, "Except as otherwise provided by statute . . . ." This language means the items listed in *Evidence Code section 780* may be considered by the court or jury in determining the credibility of a witness, except where they are inadmissible pursuant to other statutes. Here, the jury could consider the prior consistent statement if that statement satisfied *Evidence Code sections 1236* and *791*, which as the Attorney [*35] General concedes it did not.

Additionally, *Evidence Code section 780* lists those items that have a tendency in reason to affect a witness's credibility. The Law Revision Commission Comment states, "So far as the admissibility of evidence relating to credibility is concerned, [s]ection 780 is technically unnecessary because [s]ection 351 declares that 'all relevant evidence is admissible. . . . Limitations on the admissibility of evidence offered to attack or support the credibility of a witness are stated in Article 2 (commencing with [s]ection 785).'" *Evidence Code section 780* is merely a catalog of items that affect the credibility of witnesses subject to those limitations listed in Article 2, including *Evidence Code section 791*.

As to *Evidence Code section 788*, it provides: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . . ." However, "'The scope of inquiry when a criminal defendant is impeached with evidence of a prior felony conviction does not [*36] extend to the facts of the underlying offense.' [Citation.]" (*People v. Shea (1995) 39 Cal.App.4th 1257, 1267* (*Shea*).)

Here, the district attorney specifically stated that although it was prepared to impeach Tuan with the statement, it did not need to and was seeking its admission as a prior consistent statement. To now assert it was using the statement to attack Tuan's credibility is disingenuous. Additionally, *Evidence Code section 788* allows a witness to be impeached with the felony conviction, and not the facts underlying the conviction. (*Shea, supra, 39 Cal.App.4th at p. 1267*.) Therefore, the factual statement in the *Tahl* form was not admissible pursuant to *Evidence Code section 788*. Although we have concluded the trial court erroneously admitted the statement, we must now determine whether the error was prejudicial.

Since the error is one of state evidentiary law, we apply the standard of prejudice articulated in *People v. Watson (1956) 46 Cal.2d 818, 836* (*Watson*). (See, e.g., *People v. Vasquez (2006) 39 Cal.4th 47, 66* (*Vasquez*).) Pursuant to that [*37] standard, we must determine "whether, in light of the entire record, '"it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."' [Citations.]" (*Id. at p. 66*.)

Here, apart from the statement, there was strong evidence Tran committed deliberate and premeditated murder. After Nguyen attacked Tran and the Le brothers, Tran shot at Foster from a moving car at Spires as Foster ran to get into

his car. After this shooting, Tran told Tuan "we have to get them before they get us." A few months later, Tran shot at Foster as they drove their cars. After this shooting, Tran told Tuan "he wanted to kill them."

More importantly, on the night in question, as Foster was following Tran, Tran grabbed a gun from the air conditioning vent in his car. After stopping at Stater Bros. and being challenged to fight, Tran, who was unarmed at that point, said he did not want to fight there because he would get caught, and suggested they go the park, a more secluded place. On the way to the park, Tuan handed the gun to Tran, and he put it in his front waistband. When Tran got out of the car, he pulled out the gun. [*38] Ly testified she did not see Foster with a weapon or make any threatening move towards Tran. Tuan testified he did not see Foster make any sudden movements towards Tran or a gun. There was overwhelming evidence Tran shot Foster twice in the face without any provocation, and he shot Nguyen in the back 10 times as he ran away. Additionally, there was evidence that as he was walking back to his car, he shot Foster in the face a third time. Finally, although the post-shooting evidence alone would be insufficient to show premeditation and deliberation, there was a plethora of evidence after the shootings, which we will not repeat here, that demonstrates Tran intended to kill Foster and Nguyen, including his statements to Tuan leaving the park and statements to friends during the week following the shooting. Therefore, it is not reasonably probable Tran would have received a more favorable result had the court not admitted the statement.

II. Prosecutorial Misconduct

Tran argues the district attorney, Michael Murray, committed numerous acts of misconduct. We conclude some of Tran's allegations have merit and others do not. We will review each instance, focus on the district attorney's [*39] transgressions, and address the issues of cumulative error and prejudice.

A. Misstatements of the Law

Tran alleges the district attorney misstated the law in three areas:

(1) immunity; (2) voluntary manslaughter; and (3) a defendant's Fifth Amendment rights. We will discuss each allegation in turn.

1. Immunity

Relying on *People v. Frye (1998) 18 Cal.4th 894* (*Frye*), Tran argues the district attorney committed prosecutorial misconduct because: (a) on direct examination, the district attorney improperly suggested witnesses were testifying truthfully because of their immunity agreements; (b) during closing argument, the district attorney repeatedly referred to the witnesses' immunity agreements; and (c) during closing argument, the district attorney stated a judge immunized the witnesses and, therefore, the witnesses' testimony must be truthful. We conclude his last contention has merit.

a. Direct Examination

Tran claims the district attorney improperly vouched for Ly, Tuan, Dang, and Anvy by suggesting they were testifying truthfully because of their immunity agreements. We will provide the relevant portions of the transcript below.

During [*40] direct examination of Ly, the district attorney asked her what she understood her immunity agreement to mean. The trial court overruled defense counsel's improper rehabilitation objection. She responded, "The immunity, to my understanding it means that I am protected from incriminating myself in what I say on the stand unless I lie . . . ." Later, at the end of redirect examination, the following colloquy occurred:

"[District attorney]: Okay. Now, right now as you testify here today you have immunity, right?

"[Ly]: Right.

"[District attorney]: No matter what you said in previous statements do you feel that you can testify here today and say anything that is the truth and be protected --

"[Defense counsel]: Objection, your honor, this is improper rehabilitation of an impeached witness.

"[Trial court]: No. Overruled. You may answer.

"[Ly]: Can you repeat that?

"[District attorney]: Do you feel like as long as you tell the truth having immunity that you can say anything truthful, ma'am?

"[Ly]: Yes.

"[District attorney]: And have you, with the understanding that you have immunity here, have you told the truth today?

"[Ly]: Yes."

During direct examination [*41] of Tuan, the following colloquy took place:

"[District attorney]: Sir, I asked you this morning if on or about May 28[], 2004[,] you went to a courtroom over in this building, Judge Marion's court, and received immunity for your testimony in court; did that happen?

"[Tuan]: Yes.

"[District attorney]: What is your understanding of what this immunity means in terms of your testimony here?

"[Tuan]: After I was granted immunity, my understanding was that I had to tell the truth on the stand; and if I don't, I would jeopardize myself, incriminate myself on the stand.

"[District attorney]: Okay. Do you think that anything that you say here even about involvement in other crimes can be used against you in any way?

"[Tuan]: I believe there is a slight chance.

"[District attorney]: Okay. Do you understand that this immunity agreement means that anything you testify to today cannot be used against you in some sort of criminal prosecution as long as you tell the truth; do you understand that?

"[Tuan]: Yes.

"[District attorney]: Prior to the date of this immunity agreement, this order and petition for immunity, had you ever been told that other things that you might [*42] have been involved in couldn't be used against you; do you understand the question?

"[Tuan]: No, I don't.

"[District attorney]: Okay. You remember when you went to court on this immunity petition May 28[], 2004?

"[Tuan]: Yes.

"[District attorney]: Prior to that day, had anybody told you that other things that you were involved in potentially couldn't be used against you? [P] . . . [P]

"[Tuan]: Yes.

"[District attorney]: Okay. You are telling the truth today?

"[Defense counsel]: Objection, your honor, argumentative and asking for an opinion.

"[Trial court]: Overruled. You may answer.

"[Tuan]: Yes."

During direct examination, Dang testified that during his interview with police officers shortly after the shootings, he told "half" the truth. Then the following colloquy occurred:

"[District attorney]: Okay. Well, you testified yesterday that now you have immunity, right?

"[Dang]: Yes.

"[District attorney]: For anything you say from the witness stand, as long as it is the truth, right?

"[Dang]: Yes.

"[District attorney]: The only thing you can get in trouble for is if you perjure yourself. Do you understand that?

"[Dang]: Yes."

Finally, [*43] during direct examination of Anvy, the following colloquy took place:

"[District attorney]: And after you had [the immunity] agreement, did you provide a taped statement . . . with your attorney present?

"[Anvy]: Yes, sir.

"[District attorney]: Did you tell the truth in that statement?

"[Defense counsel]: I am going to object, your honor. I think it is inappropriate credibility bolstering.

"[Trial court]: Overruled.

"[District attorney]: Sir, did you tell the truth in that statement?

"[Anvy]: As to my knowledge, yes, sir."

Tran acknowledges the district attorney must inform the jury its witnesses testified with immunity and may inform them of the terms of the immunity agreements. (*Frye, supra, 18 Cal.4th at p. 971*.) However, he claims the district attorney "impermissibly [made] myriad additional references to the immunity and to the fact that his witnesses were believable because of their immunized status."

As to Tuan and Ly, the district attorney questioned them concerning whether they had immunity, what the immunity agreement meant to them, and whether they testified truthfully. With respect to Dang and Anvy, the district attorney questioned [*44] them regarding whether they had immunity and whether they had testified truthfully. The district attorney's questions were not based on matters outside the record, nor did they portray the district attorney's office as privy to information bearing on the witnesses' veracity that was not admitted at trial. The district attorney's questions were based on matters in the record concerning their immunity agreements and credibility, and they were proper. (*People v. Medina (1995) 11 Cal.4th 694, 757* (*Medina*) [prosecutorial assurances regarding apparent honesty or reliability of prosecution witnesses based on record cannot be characterized as improper "vouching," which usually involves attempt to bolster witness by reference to facts outside record].)

A district attorney has a duty to disclose to the jury any inducements made to a prosecution witness to testify and may properly read the precise terms of the immunity agreement. (*Frye, supra, 18 Cal.4th at p. 971*.) Here, the district attorney made an effort to establish the terms of the immunity grant through examination of witnesses. We agree the district attorney tested the limits of what is permissible [*45] during its direct examination of the two witnesses, but we conclude the comments do not rise to the level of misconduct.

b. Closing Argument-Tuan and Ly

Tran claims the district attorney committed misconduct by repeatedly referring to Tuan's and Ly's immunity agreements. During closing argument, the district attorney made numerous references to the fact Tuan and Ly testified with immunity. First, with respect to Tuan, the district attorney stated: "And then answer this question, why would [Tuan] lie? He has got immunity for his testimony in this case. He has already pled guilty on the murders. Why would he lie? What is the incentive for [Tuan] to lie?" He then said, "[Tuan], who has got immunity and has already pled guilty and has nothing to fear on this case . . . ." Finally, he said, "So do you believe [Tuan] when he says, 'that's what [Tran] told me to do?' [Tuan] with immunity, who has already pled guilty. Or, do you believe [Tran] when he says, 'No, I never said that.'"

Second, as to Ly, the district attorney said: "You heard from . . . Ly. She had immunity. He wanted someone else to support his alibi, and he tells . . . Ly, 'I will shoot you, I will kill [*46] you if you don't back up my story.' That's what she testified to. [P] Why say that? She has immunity. She can't get in trouble for lying to the police, she can't get in trouble for any potential involvement in this case. [P] . . . [P] But, did she lie about [Tran] threatening to kill her? Why? What does she get from that? What does she get out from under from that? She has immunity."

"Regarding the scope of permissible prosecutorial argument, ""a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness'" [citation], and he may "use appropriate epithets . . . ."'" [Citation.]' [Citation.]" (*People v. Stanley (2006) 39 Cal. 4th 913, 951-952* (*Stanley*).)

Considering each of the complained-of [*47] comments in context, we find that although the district attorney unnecessarily belabored the issue of immunity in an apparent attempt to establish the credibility of his witnesses, we cannot say the questioning exceeded the limitations articulated in *Frye*. While we do not approve of the district attorney's method of arguing the immunity issue, we find no misconduct.

c. Closing Argument-Court's Approval

Tran claims the district attorney committed misconduct during closing argument by suggesting that because a judge immunized the witnesses, their testimony must be truthful. During closing argument, the district attorney stated: "And they received immunity because if I subpoenaed them, they had Fifth Amendment rights. And they can't be compelled to answer questions. Unless they have immunity. It is the constitution. There is no nefarious reason for that, nobody has been bought and paid for. In fact, it is quite the opposite. . . . [P] When a witness receives immunity, they are absolutely free, and in fact ordered by the court, to answer questions truthfully. It is in the court order with the petitions. They must, once they have no Fifth Amendment concerns, meaning they can [*48] be asked questions by the defense or the prosecution, they must answer the questions truthfully. Because anything they say can't be used against them." He added, "Remember, I petition for immunity, the court determines whether it is going to be granted, and ultimately grants it and orders it."

It is not true that immunized witnesses are ordered by the court to tell the truth. Nor is it true that immunized witnesses must answer questions truthfully. A grant of immunity is not some kind of judicial truth serum. It is simply a guarantee that a witness will be immune from prosecution based on the witness's testimony if the witness testifies truthfully. A truthful witness who has been granted immunity will not be subject to prosecution, whereas a witness who testifies falsely will be subject to prosecution. While immunity from prosecution may be a compelling factor in a witness's decision to testify truthfully, a grant of immunity does not equate to an order by the court that the witness testify truthfully. (§ 1324; see *People v. Boyer (2006) 38 Cal.4th 412, 454-457*.) A deliberate misrepresentation as to the court's role in the granting of immunity is misconduct.

[*49] *2. Voluntary Manslaughter*

Tran cites approximately seven different instances where the district attorney stated a finding of voluntary manslaughter gives the defendant a "'break.'" Tran contends the district attorney misstated the law and exacerbated the problem with his repeated misstatements. Tran also contends the district attorney committed misconduct when he stated voluntary manslaughter requires the jury to find malice. We will address each assertion in turn.

a. Give Defendant a Break?

Last year another panel of this court addressed the same issue in *People v. Najera (2006) 138 Cal.App.4th 212*. In *Najera*, the district attorney during closing argument "described voluntary manslaughter as a 'legal fiction[]' several times and, interestingly, also described manslaughter as a way "'you can cut the defendant a break[.]'" The *Najera* prosecutor also indicated voluntary manslaughter was a way "'to throw the defendant a bone[.]'" The *Najera* court excused the "'cut the defendant a break'" comment and the "'throw the defendant a bone'" comment "as vigorous argument." But, the court concluded the use of the term "'legal fiction'" was improper. [*50] (*Id. at pp. 220-221*.) The court then concluded defendant had forfeited his claim of prosecutorial misconduct by failing to object. (*Id. at p. 224*.)

In excusing the district attorney's comments as vigorous argument, the *Najera* court cited *People v. Young (2005) 34 Cal.4th 1149* (*Young*), which cited *People v. Pensinger (1991) 52 Cal.3d 1210, 278 Cal. Rptr. 640* (*Pensinger*). These cases hold it is not improper for a district attorney, if warranted by the evidence, to use forceful language as long as such vigorous argument is not principally aimed at arousing the passion or prejudice of the jury.

In *Young*, the district attorney argued the crimes were not simple killings, they were "'*serial* killing[s][,]" and indicated defendant was "'*terrorizing and killing people*.'" (*Young, supra, 34 Cal.4th at p. 1195*.) In *Pensinger*, it was alleged the district attorney committed misconduct for describing the defendant as "'very violent, a maniac,'" and later as "'a perverted maniac[.]'" (*Pensinger, supra, 52 Cal.3d at p. 1251*.) In both cases, the district attorney's [*51] comments referred to the defendant and were not attempts to define the law.

Here, we have a serious misstep by the district attorney in his attempt to explain the definition of voluntary manslaughter; it is not simply a powerful argument regarding the facts of the case. To explain a jury may give a defendant "'a break'" by finding him guilty of voluntary manslaughter suggests to the jury it may ignore the law and reach whatever verdict it finds equitable under the circumstances. We find this portion of the district attorney's argument to be misconduct.

b. Malice

Tran contends the district attorney committed misconduct when he stated voluntary manslaughter requires the jury to find malice. During closing argument, the district attorney stated: "Voluntary manslaughter is, in layman's terms, murder with an excuse. Okay. It is murder with an excuse. It means that malice, intent to kill again, malice, when you hear that word people think, oh, that means you have to prove that there was a hatred for the victim, or you didn't like him. It just means intent to kill. Malice gets negated. . . . [P] . . . [P] Still requires intent to kill, which is malice. Which is malice. But you [*52] get a break . . . ." Defense counsel objected that the district attorney misstated the law as to

manslaughter because malice is not an element. The trial court overruled the objection.

We agree "'it is improper for the prosecutor to misstate the law generally[.]'" (*People v. Hill (1998) 17 Cal.4th 800, 829-830* (*Hill*).)

In *People v. Blakeley (2000) 23 Cal.4th 82, 87-88*, the California Supreme Court explained the differences between murder and the lesser offense of manslaughter. The court stated, "Manslaughter is 'the unlawful killing of a human being without malice.' [Citation.] A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" [citation], or when the defendant kills in "unreasonable self-defense"-the unreasonable but good faith belief in having to act in self-defense [citations].'" (*Ibid*.) It may be advantageous for this district attorney to engage in a thoughtful reading of this case and others dealing with the issue of malice.

The record reveals the trial court immediately addressed the error. The [*53] court overruled defense counsel's objection, but then immediately stated: "Ladies and gentlemen, you know you are going to be listening to about two day's [*sic*] worth of argument from both lawyers. Okay. I want to emphasize the fact that if anything concerning the law said by any one of the lawyers conflicts with my instructions on the law, and I intend to give you the instructions that apply in this trial after they are done with arguments, if anything they say conflicts with the court's instructions on the law, you are required to follow the court's instructions on the law."

Additionally, the trial court instructed the jury with *CALJIC No. 1.00*, "Respective Duties Of Judge And Jury," which stated in relevant part, "You must accept and follow the law as I state it to you, regardless of whether you agree with it. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." Finally, the court properly instructed the jury on voluntary manslaughter. Although the trial court improperly overruled Tran's objection, we presume the jury [*54] followed the trial court's instructions, including the instruction that to the extent the law as given by the trial court conflicted with the law as stated by the attorneys, "the jury was to follow the court's instructions." (*People v. Boyette (2002) 29 Cal.4th 381, 436*.) We agree the district attorney blundered in his discussion of malice, but find ineptness rather than misconduct to be the cause of the gaffe.

3. Fifth Amendment Rights

Tran argues the district attorney committed misconduct when during closing argument he misstated Tran's Fifth Amendment rights and instead suggested Tran had a constitutional right to lie on the witness stand. The Attorney General contends appellate review of this issue is forfeited because defense counsel did not object. Tran responds an objection would have been futile, it is a pure question of law, it implicates federal constitutional rights, and defense counsel was ineffective for not objecting. We will address his claim to forego a claim of ineffective assistance of counsel. (*People v. Coffman and Marlow (2004) 34 Cal.4th 1, 92* (*Coffman*).)

During closing argument, the district attorney stated: "The defense [*55] is going to get up here and say, you know what, he has a right not to tell that to the police. He has got a right not to say what happened. Okay. I don't know what that means. Does he have a right to come in and lie to the police? I guess, constitutionally, he does. Okay. You still need to decide why he is doing it. [P] Constitutionally, he has that right. He can lie to the police. And, constitutionally, ladies and gentlemen, he can get up on the witness stand and lie to you constitutionally. He can do anything he wants."

The Attorney General states, "The prosecutor misspoke when he said that [Tran] had a constitutional right to lie on the witness stand." Rather than a mere slip of the tongue, we view it as blatant misstatement of the law. It is against the law to take the witness stand, swear to tell the truth, and make material statements one knows to be false. (§ 118.) Needless to say, neither the federal nor state constitution protects such behavior. We are particularly troubled by the district attorney's assertion he does not know what it means for a defendant to refuse to speak to the police regarding the facts of the case. We presume the district attorney's legal education [*56] was not so shoddy that this concept was not adequately explained to him in his criminal procedure class. We also find it remarkable that a district attorney could have progressed to a position in the prosecutor's office that allows him to try capital murder cases without learning such fundamental constitutional concepts. We conclude the district attorney's obvious misstatement of the law constitutes prosecutorial misconduct.

B. Duty to Convict

Relying on *U.S. v. Young (1985) 470 U.S. 1, 84 L. Ed. 2d 1*, Tran contends the district attorney committed misconduct when he stated he had done his job and implied it was then up to the jury to do its job and convict Tran.

During rebuttal, the district attorney argued:

"[District attorney]: Putting words in peoples' mouth, [defense counsel] called me everything under the sun, a ventriloquist. Unethical. I apparently bought testimony. I am not going there. I am not going there. This is a professional, a professional presentation of the evidence. I am not going to stand here and sling mud with somebody. I leave that to the newspapers and the [televisions]. I am a county employee. I come in here and I present the [*57] evidence, period. [P] If you want to buy what she is marketing, and you want to let that defendant who murdered two people in cold blood walk out of here tomorrow, I have done my job.

"[Defense counsel]: I object to that, your honor.

"[Trial court]: All right, overruled. [P] Let's proceed.

"[District attorney]: And that's what I am here to do, my job. And that is to call the percipient witnesses, to put on the evidence, to instruct you on the law, after the judge has decided what law you will get, to try and explain to you what happened. And then my job is done. I go home. My job is done."

It is not misconduct to remind the jury to do precisely what it is supposed to do: its duty. Nor is it improper for a district attorney to urge the jury to convict the defendant. (See *People v. Bradford (1997) 15 Cal.4th 1229, 1380*; *People v. Wash (1993) 6 Cal.4th 215, 261-262*.) In *U.S. v. Young*, the United States Supreme Court explained the district attorney stated, "'I don't know whether you call it honor and integrity, I don't call it that, [defense counsel] does. If you feel you should acquit him for that it's your pleasure. I don't think [*58] you're doing your job as jurors in finding facts as opposed to the law that this [j]udge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it.' [Citation.]" (*U.S. v. Young, supra, 470 U.S. at pp. 5-6*.) The Court concluded this was improper because it placed undue pressure on the jury. (*Id. at p. 18*.) *U.S. v. Young* is inapposite.

Here, the district attorney's remarks were far less extreme. He did not tell the jury, or imply, it would not do its job unless it convicted Tran. In essence, the district attorney said he had done his job, and it was up to the jury to do its job. Albeit, to define his job as simply, "I come in here and I present the evidence, period[,]" may have been disingenuous on the district attorney's part. His closing argument is indicative of a county employee who is a little more vested in the outcome than the job description the district attorney proffered. We also note the district attorney misstated his duties when he told the jury that in addition to presenting evidence his duty was "to instruct you on the law," [*59] but he then continued to explain his duty was to, "after the judge has decided what law you will get, to try and explain to you what happened." Implicitly, the district attorney acknowledged it was the court's duty, not his, to instruct the jury on the law. Contrary to Tran's claim, the district attorney did not convey the notion he had personal knowledge of Tran's guilt, but rather, that the evidence supported the conclusion Tran murdered Foster and Nguyen. There was no misconduct in this regard.

C. Victims Voiceless

Tran contends the district attorney committed misconduct by appealing to the jury's sympathies when he stated the jury could not hear from Foster and Nguyen because Tran had murdered them.

"It is 'settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt.' [Citation.]" (*People v. Arias (1996) 13 Cal.4th 92, 160-161*.)

During closing argument, the district attorney responded to defense counsel's opening argument where she stated there was no evidence Tran fired a third shot at [*60] Foster as he walked back to his car. After stating there was evidence-Ly heard a shot and Tuan saw Tran fire a third shot in the vicinity where Foster had fallen and Ly heard a third shot-the following colloquy occurred:

"[District attorney]: You know what's clear from the two percipient witnesses? Absolutely clear? Undeniably clear? There was a final shot, ladies and gentlemen. You can call crime scene people, you can call police officers who were at the crime scene. You have, and you heard testimony from two percipient witnesses. The only better witnesses would be . . . Foster and . . . Nguyen. But, see, [Tran] murdered them.

"[Defense counsel]: Object to the argument, your honor.

"[District attorney]: And you don't get --

"[Trial court]: Overruled.

"[District attorney]: And you don't get to hear from them because he murdered them."

The district attorney's statement was a comment, albeit in stark terms, on the state of the evidence: Tuan saw Tran fire a third shot, Ly heard a third shot, and the other two people present were dead. We are not convinced this comment was an appeal for the jury to view the crimes though the eyes of the victims. (*Stanley, supra, 39 Cal.4th at pp. 951-952* [*61] [district attorney may vigorously argue """case and is not limited to 'Chesterfieldian politeness"""].) Although we conclude the district attorney's comment as to the absence of the testimony from the victims was blunt, we do not find it rose to the level of misconduct. Additionally, the trial court instructed the jury with *CALJIC No. 1.00*, which stated the jury must base its decision on the facts and the law and not be influenced by "sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling."

D. Defense Counsel Obfuscates the Truth

Tran argues the district attorney committed misconduct when he "suggest[ed] that defense counsel, in objecting to the introduction of [Tran's August 11, 1996, letter to Thuy], was trying to prevent the jury from hearing the truth." He also claims the district attorney's argument "was . . . exacerbated by the fact that CALJIC

No. 1.02 incongruously [and thus improperly] admonishes the jury not to speculate as to sustained objections, but does not offer the same admonishment as to objections that are overruled."

During closing argument, the district attorney stated: "If the defendant [*62] has his way, you are not getting any of that evidence. You will never know that he wrote a letter in August saying, 'when I find [Nguyen], he is dead.' You will never know that he shot at . . . Foster. You will never know that he even obtained a gun, much less three guns. You will never know that he shot at . . . Foster again. And, you will never know that he was at the crime scene because the defendant wasn't there, according to him. [P] He has done everything in his power to keep the evidence away from the jury. Everything. He has done everything in his power to manipulate the police, to manipulate his friends, his so-called friends, to feed them different pieces of information. And, he will do everything in his power to manipulate this jury."

The Attorney General argues Tran forfeited appellate review of this issue because he did not object at trial. Tran responds any objection would have been futile because of *CALJIC No. 1.02*, the trial court would have undoubtedly overruled the objection, and it would have weakened his case. We will address his claim to forego a claim of ineffective assistance of counsel. (*Coffman, supra, 34 Cal.4th at p. 92*.) [*63]

Tran claims the district attorney's italicized statements were misconduct because: (1) they implied defense counsel objected to admission of the August 11, 1996, letter to keep the letter from the jury; and (2) *CALJIC No. 1.02*, which requires the jury not to speculate as to the reason defense counsel objected to a sustained objection, but is silent as to overruled objections, allowed the jury to speculate as to why defense counsel objected to admission of the letter. We disagree.

When read in context, the district attorney's argument concerned Tran's attempt to keep evidence from the police and consequently the jury. The district attorney referred to the "defendant," meaning Tran, and used the pronoun, "he" and never referred to "defense counsel" or "her." Although the jury never heard any evidence about Tran trying to destroy or otherwise prevent police officers from finding the letter, the necessary implication was Tran tried to keep all the damaging evidence from the police and jury. Further, as Tran concedes, the jury was not present when defense counsel objected to admission of the letter. We think it is a stretch to conclude from the district attorney's [*64] argument the jury inferred defense counsel objected to admission of the letter, and then based on *CALJIC No. 1.02*, speculated defense counsel was attempting to obfuscate the truth. We conclude the district attorney's statements were not misconduct. Therefore, we need not address Tran's contention former *CALJIC No. 1.02* was an improper instruction.

E. Defense Failed to Produce a Witness

Relying on *People v. Ford (1988) 45 Cal.3d 431, 247 Cal. Rptr. 121* (*Ford*), Tran contends the district attorney committed misconduct when he argued Tran failed to call a logical witness, Bao Nguyen (Jeff), to testify when he was "arguably" unavailable.

Although a district attorney may comment on the defendant's failure to call a logical witness, the district attorney commits misconduct when he comments on the defendant's failure to call a logical witness who was unavailable to testify. (*People v. Wolfe (1954) 42 Cal.2d 663, 668*; *People v. Frohner (1976) 65 Cal.App.3d 94, 108-109, 135 Cal. Rptr. 153*.)

In *Ford*, the court sated, "We recognize that a rule permitting comment on a defendant's [*65] failure to call witnesses is subject to criticism if applied when the reason for his failure to do so is ambiguous, or if the defendant is simply standing on his right to have the state prove his guilt. Therefore, the trial court must have discretion to determine when the circumstances of the case are such that comment is not permissible. When the defendant has taken the stand,

however, and offered an alibi defense in which he identifies other persons who could support his testimony, and those witnesses are available and subject to subpoena, there should be no question but that comment is appropriate and permissible." (*Ford, supra, 45 Cal.3d at p. 447*.)

During closing argument, the district attorney was discussing the severity of Nguyen's attack on Tran with the pool cue. The district attorney stated Le testified Nguyen hit Tran one time, and Tran testified Nguyen hit him multiple times and Le and Jeff had to pull Nguyen off Tran. The following colloquy then took place:

"[District attorney]: Ask yourself if that's the truth, why wasn't . . . Le asked that by the defense? Why did . . . Le, when he was on the witness stand, never testify that he got out of the car [*66] and dragged . . . Nguyen off the defendant to stop the fight? Why did the defense's own witness not testify to that? Because it didn't happen. [P] Where is Bao Nguyen? Where is this guy Jeff? He was there. Did they call him? No. All we got was a version from the defendant that was different than Truong Le's version about how many times he was hit and how it ultimately stopped. [P] See, because when the defendant testifies, he can say anything he wants, because they don't ever call anybody to corroborate that.

"[Defense counsel]: Objection, your honor.

"[Trial court]: Grounds?

"[Defense counsel]: They will be instructed that neither side has to call witnesses.

"[Trial court]: Overruled.

"[District attorney]: It is called failure to call a logical witness. That's what that is called.

"[Defense counsel]: Your honor, I would like to approach.

"[District attorney]: You will get an instruction --

"[Defense counsel]: I would like to approach.

"[Trial court]: All right."

At sidebar, the district attorney stated he never looked for Jeff, and defense counsel said they looked for him for months. After the trial court asked whether Jeff was available, the district [*67] attorney repeated he did not look for him, and defense counsel argued evidence they could not find Jeff was irrelevant and stated the district attorney knew its argument was misconduct. The court stated, "If the objection is prosecutorial misconduct, it is overruled."

The district attorney may comment on the defendant's failure to call a logical witness, and Jeff was a logical witness to support Tran's testimony Nguyen hit him multiple times with a pool cue. The district attorney stated he did not look for Jeff, and defense counsel did not present any evidence at trial that Jeff was unavailable to testify. Indeed, Tran states in his brief Jeff was "arguably unavailable." We conclude the district attorney's statement was not misconduct. In any event, the trial court instructed the jury with *CALJIC No. 2.11*, "Production Of All Available Evidence Not Required," which stated neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence.

F. Posttraumatic Stress Disorder

Tran claims the district attorney committed misconduct when he repeatedly mentioned posttraumatic stress disorder (PTSD) [*68] because there was no evidence supporting that theory and Tran did not raise it as a defense. "'Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. . . . Whether the inferences the prosecutor draws are reasonable is for the jury to decide.' [Citations.] [However], it is misconduct for the prosecutor to state facts not in evidence or to imply the existence of evidence known to the prosecutor but not to the jury. [Citation.]" (*People v. Smith (2003) 30 Cal.4th 581, 617*.)

Tran offered Podboy's testimony concerning "fight or flight" syndrome. During direct examination, Podboy testified it was also known as general adaptation syndrome. During cross-examination, the district attorney asked Podboy how many times he had testified concerning "fight or flight" syndrome. Podboy responded, "I am going to say about 20, or I am going to add to my answer that, the posttraumatic stress disorder variant of fight or flight." Later, the district attorney asked him if he had published any articles on "fight or flight" syndrome, and he stated, "Well, I have one about posttraumatic stress disorder, and that's a variant of fight or flight." The [*69] district attorney said, "Let's talk specifically about fight or flight." Podboy stated he had not published on that topic. The district attorney asked Podboy where in the Diagnostic and Statistical Manual of Mental Disorders IV (DSM) one would find the term "fight or flight," Podboy replied, "It is not in there. It is a basic concept. It is subsumed, though, in the section under P.T.S.D., I

think criterion D." Podboy said, "fight or flight" syndrome is also called general adaptation syndrome, general stress response syndrome, emergency response syndrome, and at least five or six others.

In an effort to establish prosecutorial misconduct, Tran cites to at least seven instances where the district attorney mentioned PTSD to argue the district attorney created a "straw-man defense," PTSD, and after "fusing" the two defenses (PTSD and "fight or flight" syndrome), destroyed both the "artificial" defense, and his "real" defense. Tran states Podboy never said PTSD and "fight or flight" syndrome were "intertwined," but only that PTSD was a "variant" of "fight or flight" syndrome. Tran states this "is not the same as saying fight or flight is a form of posttraumatic syndrome." Based on our [*70] review of the record, that is exactly what Podboy said.

In large part, the district attorney argued there was no evidence to support "fight or flight" syndrome or any of its associated concepts as testified to by Podboy. (*People v. Stitely (2005) 35 Cal.4th 514, 559-560* (*Stitely*) [referring to the defense argument as ridiculous, outrageous, and a legal smokescreen was not misconduct]; see *People v. Bemore (2000) 22 Cal.4th 809, 846-847* (*Bemore*) [district attorney has great latitude in describing defects in defense tactics and factual account].) It is not misconduct for the district attorney to argue based on the evidence presented at trial or the reasonable inferences drawn therefrom a particular defense does not apply. Because Podboy had testified "fight or flight" syndrome was included in PTSD, it was permissible for the district attorney to argue neither applied. We find no misconduct.

G. Attack on Defense Counsel

Tran argues the district attorney committed misconduct by attacking his defense counsel. He contends the district attorney impugned defense counsel's integrity and the district attorney violated his federal constitutional [*71] rights when he accused defense counsel of crafting a defense and likened her conduct to the sellers of such deadly products as cigarettes and asbestos. As we explain below, we agree certain comments by the district attorney constituted misconduct.

The Attorney General argues Tran waived appellate review of these contentions because he did not immediately object to the analogy. Tran contends defense counsel did object at the end of the district attorney's three-page argument. Based on our review of the record, we agree with Tran. Although Tran did not immediately object to the district attorney's analogy, when after making the analogy and stating that for the jury to believe Tran's story, they would have to ignore all the facts dating back to Nguyen's first attack on Tran, the district attorney stated, "If you want to buy what she is marketing, and you want to let [Tran] who murdered two people in cold blood walk out of here tomorrow, I have done my job." The trial court overruled defense counsel's objection. We conclude Tran preserved appellate review of this issue, and we will address the merits of his claim.

1. Impugning Defense Counsel's Integrity

Tran complains the district [*72] attorney impugned defense counsel's integrity on several occasions. First, during closing argument, the district attorney subtly implied defense counsel was attempting to create confusion for the jury. Tran also relies on the district attorney's statement that at the time Tran spoke with police, "he [didn't] have the assistance of a fine attorney[.]" He claims this suggests he did not have a defense until defense counsel fabricated one for him. Next, during rebuttal argument, the district attorney while commenting on the evidence, stated defense counsel through "one of her various periods of histrionics throughout the trial[.]" Finally, Tran complains the district attorney, again in rebuttal, stated, "Now, I don't know what kind of salesperson you have to be to market that as something other than what it is." He argues this question is particularly egregious because it "rhetorically asks what kind of a person would try to market such a defense?"

Tran's first claim begins with comments made by the district attorney regarding Tuan's testimony. The district attorney argued that when Tuan testified he said the defendant told him to "mess up the details" when you speak to the police [*73] because "it will wreck havoc with the investigation." It is the district attorney's follow-up comment that is the basis of Tran's complaint. The district attorney continued, "Do you think that's still happening, Ladies and Gentlemen? Do you think that the details are being messed with a little bit? Do you think that's going to make things difficult for you during deliberations? Oh, the defense hopes so."

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.] 'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.' [Citation.]" (*Hill, supra, 17 Cal.4th at pp. 832-834*.)

Here, the district attorney went so far as to tell the jury the defense hopes to make matters difficult for you during deliberations. This attack on defense counsel was improper.

As to the "fine attorney" comment, when defense counsel objected, the district attorney stated he was not referring to her. Although defense counsel said the jury was not aware Tran [*74] had a prior attorney, the comments alerted them to that fact. We do not find this comment to be misconduct.

We next address the district attorney's reference to defense counsel's "various periods of histrionics throughout the trial." The district attorney may remind the jury "it should not be distracted from the relevant evidence." (*People v. Gionis (1995) 9 Cal.4th 1196, 1218* (*Gionis*).) But, the use of the "histrionics" was inappropriate. This term has long been disfavored because of its negative connotations. Although it was a poor choice of words on the part of the district attorney because a full reading of the record suggests that ignorance not insensitivity is the explanation for its use, we do not find the comment to rise to the level of misconduct.

Lastly, we address the district attorney's rhetorical question as to "what kind of salesperson you have to be to market that as something other than what it is."

"It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury [citation]. Such attacks on counsel's credibility risk focusing the jury's attention [*75] on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom. [Citations.] [P] Nevertheless, the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. [Citations.] In so doing, the prosecutor may highlight the discrepancies between counsel's opening statement and the evidence. [Citation.] Misconduct claims also have been rejected where the prosecutor anticipates the flaws likely to appear in counsel's closing argument based on evidence that was introduced [citation], and where the prosecutor criticizes the defense theory of the case because it lacks evidentiary support [citation]." (*Bemore, supra, 22 Cal.4th at p. 846*.)

Here, though, the district attorney did not focus his comments on the defense case, but on the defense attorney. He did not cite deficiencies in tactics or its factual account, nor did he highlight discrepancies or point to flaws in defense counsel's argument. Rather than argue the defense theory lacked evidentiary support, the district attorney inferred the defense attorney was a reprobate. A district [*76] attorney may properly attack the defense case in an effort to secure a conviction, but this personal attack on the defense attorney was improper and amounted to misconduct.

2. Marketing Deadly Products

During rebuttal argument, the district attorney also stated: "And I look at things like cigarettes in the United States, or asbestos sales, which, believe it or not, people are still selling asbestos. And I look at things like that and go, come on, this is the 21st century, who now doesn't know the dangers of cigarette smoking? Everybody knows that. And I have very good friends that still smoke. And they know it. [P] Yet somebody has sold them that product, in spite of everything they know, in spite of absolutely overwhelming medical documentation. In spite of a warning, what product has a warning like that on the label, hey, but these, they will kill you. [P] And the same thing goes with asbestos and other dangerous type products that are sold that we know will kill you. [P] Yet somebody markets that product. And they do it very well. It is marketing. It is marketing. [P] And they sell it to educated people. And they sell it to people who know better. And they sell it [*77] to people who are confronted with contradictory evidence every single day. It is an art. It is an art. [P] And the message is, don't believe your lying eyes. Don't believe what is right in front of you. Don't believe what you can see. Don't believe what you heard. And don't believe your common sense. Buy what I am selling. [P] In order for you to believe that anything happened here except two murders, you must believe what the defense is marketing to you. You must." Although we will not repeat them verbatim, Tran then cites at least 13 instances, where during rebuttal argument the district attorney accused defense counsel of marketing a defense.

Tran also objects to what he characterizes as an attempt by the district attorney to contrast his role as a county employee who merely presents the evidence with defense counsel who was a marketer of an unsafe product. We quote the district attorney's argument: "I am a county employee. I come in here and I present the evidence, period." A district attorney is not just a county employee who simply comes in and presents the evidence and lets the cards fall where they may. A competent district attorney ethically advocates a position. The [*78] district attorney's suggestion that prosecutors play a mundane role in the criminal justice system is disingenuous, but we do not find it to be misconduct.

Tran states, "The unmistakable notion conveyed to the jury by this cigarette/asbestos marketing analogy was that defense counsel knew his product ([Tran] in this instance) was a killer, and [defense counsel] knew as well that all the evidence demonstrated he was a killer."

We again acknowledge the district attorney has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. (*People v. Huggins (2006) 38 Cal.4th 175, 207* [defense counsel has a tough job and will come in at the lowest price possible not misconduct]; *Stitely, supra, 35 Cal.4th at p. 560* [defense counsel's argument was a legal "smokescreen" not misconduct]; *Medina, supra, 11 Cal.4th 694, 759* [defense counsel trying to get you to

buy something not misconduct].)

Here, though, the district attorney's use of the cigarette/asbestos marketing analogy was not focused on deficiencies in the defense case, but was a direct attack on defense counsel and an attempt to incite the [*79] passion of the jury. The district attorney denigrated people who sell cigarettes and asbestos, suggesting these sellers introduce killing agents into society. By analogy, the district attorney essentially argued that by tenaciously defending her client, counsel was attempting to introduce a killer into society. A logical inference for the jury to draw from this argument would be that if they agreed with defense counsel, they would be responsible for releasing a killer into society.

It is improper for a district attorney to appeal to "'the passion or prejudice of the jury.'" (*Young, supra, 34 Cal.4th at p. 1195*.) "A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury." (*Pensinger, supra, 52 Cal.3d at p. 1251*.) The district attorney's harsh analogies went beyond vigorous argument. Cigarettes and asbestos were in no way connected to the evidence in this case and the district attorney committed misconduct when he employed such inflammatory analogies.

H. Prejudice

[*80] We have concluded the district attorney committed misconduct by misstating the law with respect to immunity, the elements of voluntary manslaughter, and a defendant's constitutional right to lie. And, we have further determined the district attorney transgressed by impugning the integrity of defense counsel by arguing she was intentionally attempting to confuse the jury and was attempting to perpetrate a fraud by marketing something other than what it is. And finally, we have concluded the district attorney crossed the line with his analogies. We now must determine the impact of the district attorney's wrongdoing. However, we must first determine the applicable standard of review.

Tran claims some of the above-mentioned instances of prosecutorial misconduct are reviewed under the more onerous *Chapman v. California (1967) 386 U.S. 18, 17 L. Ed. 2d 705*, beyond a reasonable doubt standard, while others are reviewed pursuant to the less onerous *Watson, supra, 46 Cal.2d at p. 836*, reasonable probability standard. We conclude claims of prosecutorial misconduct are reviewed for *Watson* error.

"A defendant's conviction will not be reversed for prosecutorial [*81] misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.]" (*People v. Crew (2003) 31 Cal.4th 822, 839*.)

As we explain above more fully, there was compelling evidence Tran committed deliberate and premeditated murder. Tran does not dispute he killed the two victims, but he claims he was acting in self-defense or imperfect self-defense. Tran acknowledged ongoing hostility between him and Nguyen that began when Tran started dating Nguyen's ex-girlfriend. Before the incident in question, Tran twice shot at Foster and twice threatened Foster and Nguyen. As for the incident in question, Tran admitted he grabbed a gun from the air conditioning vent in his car as Foster followed him and handed it to Tuan and that when both cars stopped in a supermarket parking lot he armed himself. At Stater Bros., it was Tran who suggested they go to the secluded park to settle their differences. As he drove to the park, Tran put the gun in his front waistband, and when he got out of the car, he pulled out the gun. There was overwhelming evidence Tran shot Foster twice in the face without [*82] any provocation, he shot Nguyen in the back 10 times as he ran away, and as he was walking back to his car, he shot Foster in the face a third time. Tran's attempt to counter this evidence was weak. Based on all the evidence, it was not reasonably probable Tran would have received a better result had the district attorney not committed the misconduct detailed above.

Our conclusion Tran was not prejudiced by Michael Murray's numerous acts of misconduct does not mean we approve of or condone his tactics and behavior. The district attorney should take little solace in the fact we have affirmed Tran's convictions, which we have done based on the strength of the evidence against him. We are troubled by the frequency in which we see prosecutorial misconduct and share in the frustration of our colleagues in the Second District Court of Appeal. (See *People v. Zurinaga (2007) 148 Cal.App.4th 1248* [courts' difficulty in controlling prosecutorial misconduct and frustrated at frequency in which courts deal with it].) We feel obligated to remind the district attorney of his duty: "'The duty of the district attorney is not merely that of an advocate. His duty is not to obtain [*83] convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial . . . .' [Citations.] 'Nor is the role of the prosecutor . . . simply a specialized version of the duty of any attorney not to overstep the bounds of permissible advocacy . . . . In all his activities, his duties are conditioned by the fact that he "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . ."' [Citations.]" (*People ex rel. Younger v.*

Superior Court (1978) 86 Cal.App.3d 180, 204, 150 Cal. Rptr. 156.)

I. Cumulative Error

Tran contends the cumulative effect of the prosecutorial misconduct requires reversal. Although the district attorney committed several instances of misconduct, we have concluded Tran was not prejudiced. Therefore, this claim has no merit.

III. Jury Instructions

A. CALJIC Nos. 5.17 and *5.55*

[*84] Tran contends the trial court erroneously instructed the jury with the bracketed portion of *CALJIC Nos. 5.17* and *5.55* because there was an insufficient factual basis. We disagree.

"Generally, '[a] party is not entitled to an instruction on a theory for which there is no supporting evidence.' [Citation.]" (*People v. Tufunga (1999) 21 Cal.4th 935, 944*.) "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]" (*People v. Guiton (1993) 4 Cal.4th 1116, 1129*.) We review claims of instructional error de novo. (*People v. Shaw (2002) 97 Cal.App.4th 833, 838*.)

The trial court instructed the jury with *CALJIC No. 5.17*, "Actual But Unreasonable Belief in Necessity to Defend-Manslaughter," which stated: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable [*85] person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter. [P] As used in this instruction, an 'imminent' [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [P] [*However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] . . . [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] . . . adversary's [use of force], [attack] [or] [pursuit]*.]" (Italics added.)

The trial court also instructed the jury with *CALJIC No. 5.55*, "Plea of Self-Defense May Not Be Contrived," which provided, "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense."

Tran claims the trial court erroneously instructed the jury with the italicized portion of *CALJIC No. 5.17*, and with *CALJIC No. 5.55*. [*86] He asserts there was no evidence he was the initial aggressor, and therefore the instructions were erroneous. The Attorney General argues there was evidence Tran was the aggressor and it was for the jury to determine who was the aggressor. We agree with the Attorney General the instruction was legally correct and based on sufficient evidence. (*In re Christian S. (1994) 7 Cal.4th 768, 773, fn. 1* (*Christian S.*).) [9]

> 9 "It is well established that the ordinary self-defense doctrine-applicable when a defendant *reasonably* believes that his safety is endangered-may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances." (*Christian S., supra, 7 Cal.4th at p. 773*.)

The evidence [*87] demonstrated Foster chased Tran to the Stater Bros., parking lot, and when they stopped, Foster walked to Tran's car and twice told him to get out of the car and fight. To this point, we would be inclined to agree with Tran the evidence demonstrated Foster was the aggressor. However, Tran suggested they go to a park because it was more secluded, and *he followed Foster to the park*. At the park, Foster and Nguyen got out of the car. There was no evidence either Foster or Nguyen had a gun, but there was testimony both had their hands in their pockets. Additionally, Tran testified he heard a rumor they carried guns, but Tuan refuted that testimony. Tran got out of the car with the gun in his hand. Based on this evidence, it was for the jury to decide if Tran had an actual but unreasonable belief in the necessity to defend himself against Foster and Nguyen or he created the circumstances by having a gun thereby legally justifying Foster's and Nguyen's use of force. The jury could have found Tran created the circumstances escalating the level of violence by bringing a gun to a garden variety fist fight. Based on all the evidence, it was for the jury to decide who the aggressor was and [*88] whether Tran acted in self-defense. Additionally, the trial court properly instructed the jury with *CALJIC No. 5.55*, whether Tran sought a quarrel with the intent to create a real or apparent necessity of exercising self-defense. Therefore, the trial court properly instructed the jury with *CALJIC Nos. 5.17* and *5.55*.

B. CALJIC No. 5.50.1

Tran argues the trial court erroneously instructed the jury with *CALJIC No. 5.50.1* because language in the instruction precluded the jury from finding imperfect self-defense. [10] Not so.

10 Tran did not object to *CALJIC No. 5.50.1*, but the Attorney General does not argue forfeiture. We will address the merits of Tran's claim.

CALJIC No. 5.50.1, "Prior Threats/Assaults by Victim," stated: "Evidence has been presented that on . . . prior occasion[s] the alleged victim [threatened] [or] [assaulted] [*89] [or participated in an assault or threat of physical harm upon] the defendant. If you find that this evidence is true, you may consider that evidence on the issues of whether the defendant *actually and reasonably believed* [his] . . . life or physical safety was endangered at the time of the commission of the alleged crime. [P] In addition, a person whose life or safety has been previously threatened, or assaulted by . . . [others] is justified in acting more quickly and taking harsher measures for self protection from an assault by . . . [those persons], than would a person who had not received threats from or previously been assaulted by the same . . . [persons]." (Italics added.)

Relying on the italicized language, Tran claims the instruction precluded the jury from considering Foster and Nguyen's prior attacks as to imperfect self-defense, which requires a finding of an actual but unreasonable belief in the necessity to defend oneself. We conclude *CALJIC No. 5.50.1* was proper.

In *People v. Minifie (1996) 13 Cal.4th 1055, 1069*, the California Supreme Court stated: "We note that this case involves an assault, not a homicide, [*90] and thus no question of *imperfect* self-defense is presented. [Citation.] To support a claim of imperfect self-defense, evidence of third party threats may also be admissible if there is evidence the defendant actually, even if unreasonably, associated the victim with those threats." Although dicta, the court has suggested the jury may consider evidence of prior threats and assaults when a defendant raises imperfect self-defense. Therefore, we must now consider whether *CALJIC No. 5.50.1* misstates the law.

In addition to *CALJIC No. 5.50.1*, the trial court also instructed the jury with all the self-defense instructions, including, *CALJIC No. 5.12*, "Justifiable Homicide In Self-Defense," which stated: "The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing *actually and reasonably* believes: [P] 1. That there is imminent danger that the other person will either kill [him] . . . or cause [him] . . . great bodily injury; and [P] 2. That it is necessary under the circumstances for [him] . . . to use in self-defense force or means that might [*91] cause the death of the other person for the purpose of avoiding death or great bodily injury to [himself] . . . ." (Italics added.)

As we explain above, the court also instructed the jury on imperfect self-defense, *CALJIC No. 5.17*, which provided, "A person who kills another person in the *actual but unreasonable belief* in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder." (Italics added.)

CALJIC No. 5.50.1 reminded the jury there was evidence Foster and Nguyen threatened, assaulted, or participated in an assault or threat of physical harm upon Tran. The instruction then stated that if the jury found the prior evidence true, it could "consider that evidence *on the issues of whether* the defendant actually and reasonably believed" he was in danger at the time of the crime. (Italics added.) Contrary to Tran's claim, the instruction's language did not limit the jury's consideration of prior threats or assaults evidence only to the issue of reasonable self-defense. Rather, the instruction tells the jury it may consider [*92] the prior threats or assaults evidence in deciding whether Tran's belief was actual and reasonable. In doing so, the jury must necessarily consider the same evidence if it concludes the defendant's belief was actual and unreasonable. Therefore, the trial court properly instructed the jury with *CALJIC No. 5.50.1*.

C. CALJIC No. 2.06

Tran contends the trial court erroneously instructed the jury with *CALJIC No. 2.06* because the instruction did not specify the witness intimidation evidence concerned Trinh Ly. The Attorney General argues any error was invited because after stating she would offer a pinpoint instruction, defense counsel failed to do so. As we explain below, we conclude Tran invited any error, but he was not prejudiced.

When discussing jury instructions, defense counsel objected to *CALJIC No. 2.06* because there was no suppression of evidence. The district attorney stated Ly testified Tran threatened her. After the trial court overruled defense counsel's objection, the district attorney inquired whether the trial judge thought it applied to hiding the guns as well. Defense [*93] counsel believed it applied, "but patterned to be by concealing evidence." The court concluded it applied to both,

Ly and concealing evidence, and overruled the objection. Defense counsel asked whether any reference to "'destroying evidence'" would be omitted, and the court responded, "yes," and stated Ly's name would be added.

After arguing whether the instruction should state Ly was an accomplice, the court asked the district attorney how he proposed submitting the instruction, "witness intimidation as it relates to . . . Ly?" The district attorney responded, "Yes." The court moved to concealing, and the parties agreed, "concealing of evidence[.]" The court asked counsel whether they "want[ed] to leave it "general[,]" i.e., "gun versus . . . Ly." The district attorney wanted the instruction to be general, and defense counsel stated, "No, no, I don't want vague, your honor, I want it pinpointed so they don't start thinking wild theories. I would much rather have it specific." The court stated that if defense counsel requested a pinpoint instruction, she had a right to have a pinpoint instruction. Defense counsel said, "[y]eah[,]" and the district attorney responded, "that's [*94] fine." Defense counsel then stated, "I will redo it pinpoint." Defense counsel did not offer a pinpoint instruction.

The trial court instructed the jury with *CALJIC No. 2.06*, "Efforts to Suppress Evidence," which provided, "If you find that a defendant attempted to suppress evidence against [himself] . . . in any manner, such as [by the intimidation of a witness] . . . [by concealing evidence] . . ., this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." The court omitted references to offers to compensate a witness, and destroying evidence. The court, however, did not include a reference to Ly.

Tran claims there was no invited error because defense counsel only offered to submit a pinpoint instruction on the issue of concealing issue, not on the intimidation of Ly issue. We disagree.

When defense counsel stated, "I will redo it pinpoint[,]" she did not limit it to the concealment issue. Defense counsel objected to *CALJIC No. 2.06* and stated she would offer [*95] a pinpoint instruction, but did not. Any error caused by this otherwise proper instruction was invited. (*Coffman, supra, 34 Cal.4th at pp. 101-103* [*CALJIC No. 2.06* did not give rise to irrational presumption of guilt]; see *Medina, supra, 11 Cal.4th at p. 763*; *People v. Pollock (2004) 32 Cal.4th 1153, 1176* [trial court required to give pinpoint instructions only upon request]; but see *People v. Green (1995) 34 Cal.App.4th 165, 177* [if defense counsel suggests or accedes to erroneous instruction because of neglect or mistake we do not find invited error].)

In any event, Tran was not prejudiced by *CALJIC No. 2.06* because it is not reasonably probable he would have received a better result had the trial court given the requested pinpoint instruction. (*Watson, supra, 46 Cal.2d at p. 836*.) *CALJIC No. 2.06* stated that efforts to suppress evidence were "not sufficient by itself to prove guilt[.]" And, the court instructed the jury with *CALJIC No. 1.00*, which stated the jury "must determine what facts have been [*96] proved from the evidence received in the trial and not from any other source." This language precluded the jury from inferring Tran had tried to suppress other evidence. Finally, as we explain more fully above, there was overwhelming evidence Tran committed deliberate and premeditated murder.

IV. Admission of Two Letters

Relying on *People v. Carter (1957) 48 Cal.2d 737* (*Carter*), Tran argues the trial court erroneously admitted the two letters Tran wrote to Thuy after the close of rebuttal because the district attorney should have introduced the letters during its case-in-chief. Again, we disagree.

Section 1093, states, in pertinent part, "The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court: [P] . . . [P] (c) The district attorney, or other counsel for the people shall then offer the evidence in support of the charge. The defendant or his or her counsel may then offer his or her evidence in support of the defense. (d) The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to [*97] offer evidence upon their original case." "The order of proof rests largely in the sound discretion of the trial court[.]" (*Coffman, supra, 34 Cal.4th at p. 68*.)

"The purpose of the restriction in . . . section [1093] is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence. Thus proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. [Citations.] A defendant's reiterated denial of guilt and the principal facts that purportedly establish it does not justify the prosecution's

introduction of new evidence to establish that which defendant [*98] would clearly have denied from the start." (*Carter, supra, 48 Cal.2d at pp. 753-754*.)

Tran relies on this language in *Carter* to contend the trial court erroneously admitted the two letters from Tran to Thuy during rebuttal because they should have been admitted in its case-in-chief. The Attorney General argues the letters were identified during its case-in-chief, the trial court ruled them admissible, there existence was testified to by officers, and they were admitted between rebuttal and surrebuttal as is customary. Tran responds the court erroneously admitted the letters after the district attorney had called its last witness, and the first time the jury heard the contents of the letters was during closing argument. As we explain below, the court did not erroneously admit the letters.

There is no dispute defense counsel was aware of the existence of the August 11, 1996, letter where Tran said next time he saw Nguyen he was dead, and the August 14, 1997, letter where Tran said he was going to take on the world with his mind instead of with knives and guns before trial. Defense counsel identified the two letters as "in limine issues." At an *Evidence Code section 402* [*99] hearing, defense counsel argued they were inadmissible, and the court disagreed ruling both letters were admissible. At a later hearing, the district attorney stated he was not going to use the letters in his case-in-chief, but possibly in rebuttal. During the district attorney's case-in-chief, an officer testified Thuy gave him a box of letters, including the two letters in question. Another officer testified he acquired the letters from the first officer and transported them to the police department. At trial, Tran took the stand and testified on his own behalf; the letters were not discussed. Defense counsel rested subject to the exhibits.

After Tran had called his last witness, the trial court addressed the exhibits. The district attorney moved the exhibits be admitted into evidence. Defense counsel again objected to the two letters and argued they were inadmissible subject to redacting gang and sexual references. The court overruled all defense counsel's objections, including the contention the district attorney did not confront Tran with the letters and let him explain or deny. The court stated defense counsel was free to recall Tran if it chose to do so. Defense counsel did [*100] not.

Tran complains the next time the letters were discussed was during the district attorney's closing argument. As we explain, it is clear Tran knew about the letters as he sought to have them excluded. The existence of the letters was testified to during trial. Tran took the stand and testified, but not concerning the letters. After the district attorney rested, the exhibits, including the letters, were admitted. Tran could have explained or denied the letters during surrebuttal. He chose not to. Although it appears the first time the jury heard about the letters' contents was during closing argument, defense counsel did not object to that argument. Thus, the trial court properly admitted the letters after the close of rebuttal. In any event, Tran was not prejudiced by admission of the letters. As we explain above, there was overwhelming evidence Tran committed deliberate and premeditated murder independent of the letters. Therefore, it is not reasonably probable Tran would have received a more favorable result had the court not admitted the two letters.

V. Cumulative Error

Tran claims the cumulative effect of the alleged error was prejudicial. As we explain above, we [*101] conclude there was error, but found it harmless. Therefore, Tran's claim the cumulative effect of the errors were prejudicial has no merit.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P.J.

RYLAARSDAM, J.