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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO ZERMENO,

Defendant and Appellant.

F076432

(Super. Ct. No. F15902916)

**ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]**

THE COURT:

It is hereby ordered that the opinion filed herein on April 17, 2020, be modified as follows:

1. In the concurring and dissenting opinion of Justice Smith, on page 3, the first paragraph under the heading “FACTUAL BACKGROUND,” should be replaced with the following:

Zermeno and Vargas were childhood friends and neighbors (having grown up together on the same ranch or settlement in Mexico). For the last five years before Vargas’s death, they lived together in a small trailer, on a rural property well outside the city limits of Firebaugh. The property belonged to Zermeno’s aunt and uncle, M.A. and E.A. M.A. and E.A. lived in a house on the property, on which also stood several trailers that they rented out. M.A., Zermeno’s aunt, had known Vargas for a long time as well, as they all hailed from the same hometown in Mexico. Vargas and Zermeno worked in the fields together; they shared a car and went to work together and came home together. M.A. testified that Vargas and Zermeno got along well. At the time of the shooting, Zermeno was 31 years old and Vargas 33 years old.

2. In the concurring and dissenting opinion of Justice Smith, on page 4, the first paragraph under the heading “The Scene of the Shooting,” should be replaced with the following:

Lorena E. lived in a trailer next to the one occupied by Zermeno and Vargas. In the early morning hours of May 7, 2015, she was awakened by the sound of Vargas moaning. She looked out and saw Vargas lying on the ground right in front of her trailer. Lorena alerted M.A. and E.A.—the time was between 1:00 a.m. and 2:00 a.m. E.A. went to investigate and found Vargas lying on a haystack, injured but alive. Zermeno was nowhere to be found. Emergency medical services (EMS) were immediately summoned—the call for service came in at 1:47 a.m.—but, by the time paramedics arrived, Vargas was dead from gunshot wounds.

3. In the concurring and dissenting opinion of Justice Smith, on page 45, footnote 15, the second sentence of the second paragraph should be replaced with the following:

EMS were called to the scene at 1:47 a.m., after Vargas was found alive by E.A., and EMS in turn alerted the sheriff’s department at 2:09 a.m.

Except for the modifications set forth above, the opinion previously filed remains unchanged.

This modification does not effect a change in the judgment.

SMITH, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

DETJEN, J.

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(Super. Ct. No. F15902916)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

SEE CONCURRING AND DISSENTING OPINION

Francisco Zermeno (defendant) stands convicted, following a jury trial, of first degree murder, during the commission of which he personally used a firearm and personally and intentionally discharged a firearm, proximately causing death. (Pen. Code,¹ §§ 187, subd. (a), 12022.5, subd. (a), 12022.53, subd. (d).) His motion for a new trial was denied, and he was sentenced to 50 years to life in prison and ordered to pay various fees, fines, and assessments.

Defendant raises four issues on appeal. As to those four issues, we have, as dictated by our Constitution, analyzed whether error occurred in the trial court and whether that error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.)² As to those issues, we conclude: (1) Any error in CALCRIM No. 521, as given, was harmless beyond a reasonable doubt; (2) Defendant has failed to establish ineffective assistance of counsel based on defense counsel's failure to request that the jury be instructed on voluntary intoxication; and (3) The trial court did not abuse its discretion by denying defendant's new trial motion; but (4) The matter must be remanded for resentencing with respect to the firearm enhancements.

FACTS

As of early May 2015, defendant and Hugo Vargas lived together in a trailer behind the residence of M.A. and E.A. in a rural area of Firebaugh.³ There were several other trailers there as well, and they formed somewhat of a U-shape. Defendant and Vargas had known each other since they were children and had lived together in the trailer for about five years. M.A. had never seen any friction between them.

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

² The dissent addresses ineffective assistance of trial counsel. We decline (see *post*) to adopt the analysis it employed on that issue.

³ Unspecified dates in the statement of facts are from the year 2015.

Pursuant to California Rules of Court, rule 8.90, we refer to some persons by their first names or initials. No disrespect is intended.

Between 1:00 a.m. and 2:00 a.m. on May 7, the woman who lived in the trailer in front of defendant and Vargas was awakened by Vargas moaning and saying he needed help. Vargas was lying on the ground and appeared to be in pain, so she telephoned M.A. and asked her to check on him.

M.A. and E.A. found Vargas dragging himself along the ground. M.A. called 911, then E.A. attended to Vargas as directed by the person on the phone. Paramedics arrived 15 to 20 minutes later. M.A. did not see defendant anywhere. E.A. even yelled his name, but there was no response.

When Fresno County Sheriff's Deputy Bright arrived Vargas was on the ground, basically in the middle of the courtyard area formed by the trailers. A paramedic had already pronounced him dead. Vargas appeared to have two small gunshot wounds to his abdominal area. When the body was moved by coroner's personnel, it was discovered that he also had two gunshot wounds to the back of the head. Three spent .22-caliber shell casings were found nearby. There were two areas of blood on the ground, as well as sunglasses, a hat, and a cell phone. A protective sweep of the trailers was conducted, but no suspect was found. The door to a small trailer was open. Lying in the doorway was a loaded .22-caliber pump action rifle. Its hammer was in the cocked position and it had one round in the chamber.⁴ Subsequent analysis showed the three spent casings were fired from this gun, which had a moveable forearm that had to be pulled rearward and then moved forward by the operator after each round was fired in order to chamber the next cartridge and prepare it to be fired again.

Bright remained on the scene for several hours. He received information from people living on the property that Vargas and defendant had lived in the trailer in which

⁴ An older rifle that was rusted and not in working condition was found inside the trailer. It was not loaded.

the rifles were found. At no time while he was there did Bright see defendant or interview anyone who identified himself as the other resident of the trailer.

Numerous Bud Light cans were found inside and outside the trailer. Four .22-caliber long rifle cartridges were found in various locations inside the trailer. No blood was found inside.

An autopsy revealed that Vargas was shot twice in the abdomen. They were not close contact gunshot wounds. Both bullets were recovered from the body.⁵ Because of the internal organs that were hit, death would have occurred within minutes. With respect to the head, there was an entrance wound and an exit wound. The end of the gun barrel was a minimum of two feet away when the shot was fired. The head injury did not produce significant enough injury or damage to the brain to contribute to the cause of death. The cause of death was liver, right lung, and colon injuries due to multiple gunshot wounds.

There were no injuries to Vargas's hands. Toxicology results showed his blood-alcohol content was 0.07 percent, while the result for his urine was .11 milligrams percent. The blood level of methamphetamine was 96 nanograms per milliliter, a low level, while the urine level was over 8,300 nanograms per milliliter. This suggested use one or two days before death.⁶

Shortly before 6:00 a.m. on May 7, Guadalupe O., a former coworker of defendant and Vargas, received a text message and missed phone call from defendant. When Guadalupe called defendant back shortly after 6:00 a.m., defendant asked for a ride. Guadalupe, who was working near an area of Dos Palos called "the Y," picked defendant

⁵ Because of a lack of individualizing characteristics, the bullets could not be identified or eliminated as having been fired from the rifle found in the trailer doorway.

⁶ Dr. Chambliss, who performed the autopsy, explained that when a drug or alcohol is first ingested, it is at its highest level in the bloodstream. As it gets broken down, it goes into the urine and raises the level there. In terms of effect on the brain and body, it is the blood level that matters.

up on a dirt road by a canal. Guadalupe could smell alcohol on defendant when defendant, who had been walking, got into Guadalupe's truck. Guadalupe observed no signs of intoxication such as slurred words or loss of balance, however. He did not see any injuries on defendant's person. Defendant said he was coming from Los Banos, but the police stopped him and took his car away that morning, which was why he was walking. He said Vargas was already at work.

On May 11, defendant walked into the lobby of the Corning Police Department and told the dispatcher that he was there to turn himself in, because he killed someone. When questioned by the dispatcher, defendant, who was calm, said it happened on a ranch and that he used a rifle. The dispatcher placed a telephone call to Fresno.

Detectives Maldonado and Galindo drove to Red Bluff that day, and met with defendant at the Tehama County jail, where he was being held. They interviewed defendant in Spanish.⁷ Defendant seemed alert, and said he was okay and had gotten some sleep. When advised of his rights, defendant said he understood. There did not appear to be any communication problems.

Defendant related that he and Vargas grew up next door to each other and had been friends for many years. They worked in orchards. They normally woke at 5:00 a.m. and started work at 6:00 a.m. They got to work, which was outside of Merced, in their car, with one person driving in the mornings and the other driving home. They went to work on May 6. They finished about 4:30 p.m., after which they stopped near Merced

⁷ The interview was recorded. At trial, a video recording of the interview, with audio muted because it was in Spanish, was admitted into evidence over defense objection that it was incomplete. An English translation of the interview was prepared and was reviewed by Maldonado for accuracy. Although the English transcript was before the trial court, by stipulation, for purposes of an Evidence Code section 402 hearing, it was not presented to the jury at trial. Instead, Maldonado was questioned about the content of the interview.

and got a three-pack of 24-ounce Bud Light cans. They also stopped at another location, where Vargas purchased a 12-pack of Bud Light. They then went home.

Defendant said they arrived at their trailer at about 6:00 p.m. and had dinner. Vargas drank two of the beers from the three-pack, while defendant drank the third. They split the 12-pack. Defendant said they were drunk, then explained they did not get “drunk drunk,” but were intoxicated and feeling good. Defendant denied that either of them used drugs that evening.

Defendant related that at about 11:00 p.m., he and Vargas argued about several things. Defendant said their arguments originally started about two years after they moved in together. They would argue back and forth and say mean things to each other. Vargas would demean defendant by calling him an idiot and saying other humiliating things. On the night of May 6, Vargas was intoxicated. He had started to get “crazy” when he drank too much. Defendant was already in bed. They started arguing. Vargas punched defendant in the mouth.⁸ Defendant fell down inside the trailer. Vargas walked outside, and defendant grabbed the rifle that they had stored underneath the bed. The gun was not kept loaded because of children in the area, and the bullets were kept on a ledge near the window so they would not be in the same place as the rifle. Defendant loaded the rifle with six to seven rounds, set it to the side, and watched television.

Defendant did not say how much time passed after the punch, but at some point, Vargas reentered the trailer and started arguing about the same things. There was no physical violence, but Vargas said something and defendant responded “how you fucking bother me,” and stood up. Vargas walked back outside, and defendant grabbed the gun. Vargas did not see the rifle while he was inside the trailer. Defendant said they both knew how to fire the weapon, as they would do target practice with cans.

⁸ Maldonado did not observe any bruising to defendant.

Defendant related that Vargas was standing near where the hat was subsequently found when defendant shot him. Defendant was standing about five to six feet away from Vargas. When defendant fired the first round, Vargas was facing him with a Bud Light can in his hand. Defendant shot Vargas twice, whereupon Vargas fell down. Defendant then shot Vargas a third time when Vargas was on the ground. Defendant did not know where the bullets struck Vargas.

Defendant said he was “blind with rage” when he shot Vargas. He was fed up with Vargas and shot at Vargas so Vargas would leave him alone. Several times during the interview, defendant said he was very angry or infuriated, and that he was “drowning with rage” and could not think. He said he should have just walked away, but it was too late.

Defendant related that after he shot Vargas, he put the rifle inside the trailer and got some boots, because he was wearing sandals. His and Vargas’s dogs started following him, so he came back and put them inside a cage. He did not try to assist Vargas. Instead, he fled. Defendant said he was tired of running and turned himself in because he wanted to pay for what he did. He repeatedly expressed remorse during the interview. When asked about his intent, defendant said he was defending himself against the argument, and he was fed up. He said he did not want to kill Vargas.

DISCUSSION

I

CALCRIM No. 521

Pursuant to CALCRIM No. 521, the jury was instructed:

“The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused death.

“The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may carry [sic] from person to person, and according to the circumstances. A decision to kill made rashly, impulsively or without careful consideration is not deliberate and premeditated. On the other hand, a cold calculated decision to kill can be reached quickly. The test is the extent of the reflection not the length of time.”

Defendant does not challenge this portion of the instruction. The court continued, however:

“A person commits an act willfully when he or she does it willingly or on purpose. A person deliberates if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act.”

“The defendant acts with premeditation if he decided to kill before completing the acts that caused death.” (Italics added.)

Defendant now contends the emphasized portion erroneously permitted jurors to convict him of first degree murder based on an implied malice theory of liability requiring reversal of his first degree murder conviction. We agree with defendant that it appears the trial court incorporated the challenged language from the portion of the instruction applicable to first degree murder by means of torture. That form of first degree murder does not require an intent to kill. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 201.) Nevertheless, any error was harmless beyond a reasonable doubt.⁹

“ ‘Murder is the unlawful killing of a human being . . . with malice aforethought.’ [Citation.] Malice aforethought may be express or implied. [Citation.] ‘Express malice is an intent to kill. . . . Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person

⁹ Defendant argues the error was not forfeited for appellate review, but, if it was, then defense counsel was ineffective for failing to object to the challenged portion of the instruction. The Attorney General does not claim forfeiture, and we address defendant’s contention on the merits. Accordingly, we do not reach the issue of ineffective assistance of counsel with respect to CALCRIM No. 521.

knowingly acts with conscious disregard for the danger to life that the act poses.’ [Citation.] A killing with express malice formed willfully, deliberately, and with premeditation constitutes first degree murder. [Citation.] ‘Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.’ [Citation.]” (*People v. Beltran* (2013) 56 Cal.4th 935, 941-942.)

Appellate courts apply the de novo standard of review to a claim of instructional error. (*People v. Rivera* (2019) 7 Cal.5th 306, 326; *People v. Posey* (2004) 32 Cal.4th 193, 218.) “When a defendant claims an instruction was subject to erroneous interpretation by the jury, he must demonstrate a reasonable likelihood that the jury misconstrued or misapplied the instruction in the manner asserted. [Citation.]” (*People v. Covarrubias* (2016) 1 Cal.5th 838, 926.) The California Supreme Court has applied this standard to conflicting instructions. (See *People v. Rogers* (2006) 39 Cal.4th 826, 873.) “In determining the correctness of jury instructions, we consider the entire charge of the court, in light of the trial record. [Citation.]” (*People v. Covarrubias, supra*, 1 Cal.5th at p. 926.)

Considered alone, the challenged portion of CALCRIM No. 521, as given in this case, had the potential to cancel out the definitions of willfulness and deliberation in the first paragraph of the instruction, making it conceivable the jury could have convicted defendant of first degree murder without deciding whether he acted with express malice, i.e., an intent to kill. (See *People v. Gonzalez* (2012) 54 Cal.4th 643, 662; *People v. Smith* (2005) 37 Cal.4th 733, 739.) Such error is akin to omitting or misdescribing an element of the offense, and does not require reversal if it is harmless beyond a reasonable doubt. (*People v. Gonzalez, supra*, at pp. 662-663; *People v. Hagen* (1998) 19 Cal.4th 652, 670; *People v. Lee* (1987) 43 Cal.3d 666, 676; see *Chapman v. California* (1967) 386 U.S. 18, 24.)

Under *Chapman*, the question we must consider “is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks . . . to the basis on which ‘the jury *actually rested* its verdict.’ [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

As given in the present case, CALCRIM No. 521 unequivocally told jurors that in order to convict defendant of first degree murder, they had to find defendant acted willfully, deliberately, and with premeditation. Jurors were twice told — including immediately after the challenged portion of the instruction — that defendant acted with premeditation “if he *decided to kill before completing the acts that caused death.*” (Italics added.) From the evidence, the “acts that caused death” could only have been defendant’s acts of shooting Vargas multiple times. Thus, jurors could not convict defendant of first degree murder without concluding, beyond a reasonable doubt, that he willfully and deliberately decided to kill before he finished firing the shots. Even assuming the challenged portion of the instruction, standing alone, would have permitted jurors to find defendant acted willfully if he merely fired the shots on purpose without intending to kill, the requirement that jurors find defendant decided to kill beforehand meant jurors had to find defendant intended to kill. This is particularly true in light of the instruction’s explanation of premeditation and deliberation.

The arguments of counsel confirmed the requirement of intent to kill. For example, although the prosecutor described shooting a gun at someone as demonstrating implied malice, he emphasized that for first degree murder, jurors had to find defendant acted willfully, deliberately, and with premeditation; defendant acted willfully if he intended to kill; and defendant’s actions prior to the shooting showed he had made a plan

to kill. In arguing against a finding of first degree murder, defense counsel stated such a finding required a careful weighing of the considerations for and against, and that the person thought about it and, knowing the consequences, chose to kill.

On this record, jurors could not have found premeditation without also finding intent to kill and deliberation. Accordingly, any error did not contribute to the verdict obtained and so was harmless beyond a reasonable doubt. (See *People v. Gonzalez*, *supra*, 54 Cal.4th at p. 663; *People v. Flood* (1998) 18 Cal.4th 470, 506; cf. *People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217-1218.)

II

FAILURE TO REQUEST INSTRUCTION ON VOLUNTARY INTOXICATION

At trial, defense counsel argued for a conviction of voluntary manslaughter based on sudden quarrel or heat of passion, or, at most, a conviction of second degree murder. Both during arguments concerning in limine motions and to the jury, she stated defendant and Vargas were drinking Bud Light, the alcohol content of which was such that it would take a great deal of beer to intoxicate a grown man. Counsel told the jury: “Those guys — they all drink. That’s what they do.” Defense counsel did not request a jury instruction on voluntary intoxication.¹⁰

Defendant now contends counsel’s performance was constitutionally inadequate. He asserts it is reasonably probable that jurors, had they known they could consider

¹⁰ CALCRIM No. 625, the pattern instruction, reads: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,] [] [or] the defendant was unconscious when (he/she) acted[,] [or] the defendant ____ <insert other specific intent required in a homicide charge or other charged offense>.” [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose.”

defendant's intoxication with regard to premeditation, would not have convicted him of first degree murder. We conclude defendant was not entitled to an instruction on voluntary intoxication; hence, he was not denied the effective assistance of counsel.

The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

"In any assessment of trial counsel's conduct of a criminal defense . . . we must make every effort 'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' [Citation.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 652, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see *People v. Cox* (1991) 53 Cal.3d 618, 656, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord, *Maryland v. Kulbicki* (2015) 577 U.S. ___, ___ [136 S.Ct. 2, 4] [court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct].) The California Supreme Court has "repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless

counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal *must be rejected*.’ [Citation.]” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266, italics added; see, e.g., *People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.) In other words, “in assessing a Sixth Amendment attack on trial counsel’s adequacy mounted on *direct appeal*, competency is *presumed* unless the record *affirmatively* excludes a rational basis for the trial attorney’s choice. [Citations.]” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260; see *People v. Earp* (1999) 20 Cal.4th 826, 896.) “ ‘[M]erely tactical errors by counsel are not deemed reversible [citation], for the decisions of counsel in the midst of trial cannot be second-guessed by the hindsight of an appellate court [citation].’ [Citation.]” (*People v. Cox, supra*, 53 Cal.3d at p. 656.) The fact a different tactic might have been more successful is not enough to establish deficient performance. (See *People v. Jennings* (1991) 53 Cal.3d 334, 379-380.) As an intermediate court, we are bound to follow these pronouncements. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)¹¹

Instances in which there is no conceivable tactical purpose for counsel’s actions are rare. (*People v. Lopez* (2008) 42 Cal.4th 960, 972.) “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. [Citations.]” (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8.)¹²

¹¹ Hence, we reject the dissent’s analysis.

¹² The dissent finds no reasonable tactical purpose for trial counsel’s actions under the guise of educating us as to how it would have better presented the case at trial had it been trial counsel. For example, the dissent states that, aside from defense counsel’s failure to request and utilize a voluntary intoxication instruction, defense counsel was ineffective for failing to introduce into evidence certain of defendant’s express statements to Maldonado and the complete English transcript of the interrogation, and for failing to highlight the concept of subjective provocation. (Dis. opn., *post*, at pp. 34-35, 39.) The dissent also implicitly accuses the prosecutor of committing misconduct by “actively massag[ing] the evidence” to defendant’s detriment. (*Id.* at p. 42.) Defendant did not raise any of these claims in his briefs on appeal. It is not our appellate role to search the

“Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.” (§ 29.4, subd. (b).) Because intoxication is not a defense to a crime, a trial court has no sua sponte duty to instruct thereon. A defendant may request a pinpoint instruction on the subject, however. (*People v. Saille* (1991) 54 Cal.3d 1103, 1120; see § 29.4, subd. (a).)

“A trial court must give a requested instruction only if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration. [Citations.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) With respect to voluntary intoxication, “ ‘[a] defendant is entitled to such an instruction only when there is substantial evidence of the defendant’s voluntary intoxication and the intoxication affected the defendant’s “actual formation of specific intent [or other mental state specified in section 29.4, subdivision (b)].” ’ [Citation.]” (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.) “The mere fact that a defendant may have been drinking prior to the commission of a crime does not establish intoxication or require the giving of a requested instruction thereon. [Citations.]” (*People v. Miller* (1962) 57 Cal.2d 821, 830-831.)

In the present case, even if we assume there was substantial evidence defendant was intoxicated at the time he shot Vargas, there was absolutely no evidence the intoxication affected whether he premeditated, deliberated, or harbored express malice.¹³

record for perceived deficiencies and misconduct so long as they can somehow be said to relate to the claim of ineffective assistance of counsel defendant actually raised. (*Kenworthy v. State* (1965) 236 Cal.App.2d 378, 401.) Advocacy and judicial decisionmaking are separate roles. (See *In re G.B.* (2018) 28 Cal.App.5th 475, 489.) What matters is whether the record affirmatively shows counsel could not have had *any* reasonable tactical purpose for her challenged acts or omissions.

¹³ The transcript of the English translation of defendant’s statement to detectives is contained in the clerk’s transcript’s on appeal. The translated exchange with regard to the effect on defendant of the beer he drank is as follows:

Although we might speculate on the subject, based on the amount of alcoholic beverage defendant reportedly consumed and whether he had built up a tolerance therefor given his apparent habit of imbibing on a daily basis, “speculation is not substantial evidence warranting a [voluntary intoxication] instruction.” (*People v. Beck and Cruz* (2019) 8 Cal.5th 548, 648.)

“[Maldonado]. Were you guys drunk?

“[Defendant]. Yes, a little bit, we always do.

“[Maldonado]. Yes. Did you get like drunk or just. . .

“[Defendant]. Well, no not drunk.

“[Maldonado]. . . . like they say; (English: feeling good?)

“[Defendant]. (Chuckling)

“[Maldonado]. Right?

“[Defendant]. Yeah, more or less, just a little bit.

“[Maldonado]. Feeling good.

“[Defendant]. What was that?

“[Maldonado]. That you were feeling- you guys felt good. . .

“[Defendant]. Yes.

“[Maldonado]. . . . with the- with a little bit of beer.

“[Galindo]. I think you have to drink a 24-pack before you get drunk with *Bud Light*.

“[Defendant]. You’re right (laughing).

“[Galindo]. Right? (Chuckling).

“[Defendant]. But when you get used to it, well it’s like either way you. . .

“[Galindo]. Oh, I know, I know, right? That’s true. It’s better. . . *Bud Light* is very smooth.

“[Maldonado]. Uh, and then tell me what happened.

“[Defendant]. Well, then. . . well we started arguing like that.

“[Maldonado]. Uh, huh (affirmative).

“[Defendant]. Because sometimes he got like real crazy when he drank too much. . .”

A number of cases support our conclusion an instruction on voluntary intoxication was not supported by substantial evidence.¹⁴

In *People v. Williams* (1997) 16 Cal.4th 635, the defendant sought an instruction on voluntary intoxication based on a witness's testimony that the defendant was " 'probably spaced out' " on the morning of the killings, and the defendant's comments to police that he was " 'doped up' and 'smokin' pretty tough then' " around that time. (*Id.* at p. 677.) The California Supreme Court rejected the claim the defendant was entitled to such an instruction, stating: "Assuming this scant evidence of defendant's voluntary intoxication would qualify as 'substantial,' there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent." (*Id.* at pp. 677-678.)

In *People v. Marshall* (1996) 13 Cal.4th 799, the defendant's blood-alcohol level was .10 percent almost three hours after his arrest, meaning it would have been higher at the time of the crimes. (*Id.* at p. 847.) Nevertheless, the California Supreme Court concluded the evidence did not require the giving of requested instructions on intoxication. It stated: "Although the offenses were committed after defendant had gone virtually without sleep for approximately 24 hours, and after he had drunk an unspecified

¹⁴ The dissent asserts the holdings in these cases are limited to their respective facts. (Dis. opn., *post*, at p. 30.) We are not persuaded the cases do not stand for the proposition for which we cite them, namely, that substantial evidence did not support the giving of an instruction on voluntary intoxication. The dissent asserts the evidence in the present case would have permitted the jury reasonably to infer that intoxication prevented defendant from deliberating and premeditating. (*Id.* at p. 33.) To the contrary, the evidence would have permitted only speculation on the subject. In this regard, it bears noting that defense counsel chose, as a matter of trial tactics, to emphasize evidence defendant did not deliberate and premeditate because he was "[d]rowning with rage." Given defendant's statements to law enforcement, and counsel's explanation to the jury that she knew defendant's blood-alcohol content was low because he was drinking light beer, which contained "hardly any alcohol," we cannot say this was unreasonable, particularly in light of evidence Vargas imbibed a greater amount of alcoholic beverage than defendant and yet his blood-alcohol level was only 0.07 percent.

number of alcoholic drinks over a period of some hours, evidence of the *effect* of defendant's alcohol consumption on his state of mind is lacking. One arresting officer testified that in his opinion defendant was sober when taken into custody. Although another officer testified defendant seemed 'dazed,' this falls short of a reasonable basis for concluding defendant's capacity to entertain the mental state required for murder was diminished.^[15] Defendant's blood-alcohol content, tested about three hours after the shootings, suggested some impairment, as might have rendered him an unsafe driver, but the record does not support a conclusion that at the time of the offenses defendant was unable to premeditate or form an intent to kill." (*Marshall, supra*, at p. 848.)

In *People v. Ramirez* (1990) 50 Cal.3d 1158, overruled on another ground in *People v. Saille, supra*, 54 Cal.3d at pages 1118-1119, the defendant testified that he had four or five beers at the first bar he visited on the night of the offense, and another four or five beers during the two and a half to three hours he was in the bar outside of which the murder occurred. He also testified he " 'was higher' " on the night of the killing than when he was arrested a few days later with a blood-alcohol level of .14 percent. (*Ramirez, supra*, at p. 1180.) Neither he nor witnesses who saw him at the second bar testified that his beer drinking had any noticeable effect on his mental state or actions, however. In addition, the defendant "purported to give a detailed account of all of the events of the night in question, and did not suggest that his drinking had affected his memory or conduct." (*Id.* at p. 1181.) The California Supreme Court concluded the trial court had no duty to instruct on intoxication, as "there was no evidence presented . . . suggesting that defendant's drinking had affected his mental state in a manner that might negate the specific intent or mental state required for first degree murder" (*Ibid.*)

¹⁵ The crimes in *Marshall* were committed before the defense of diminished capacity was abolished in 1982. (See § 25, subd. (a).)

In *People v. Olivas* (2016) 248 Cal.App.4th 758, the defendant, who was convicted of committing a lewd act on a child, argued his trial attorney was ineffective for failing to request a voluntary intoxication instruction when there was evidence the defendant drank regularly and was drunk when he touched the victim inappropriately. The defendant noted the minor testified she sometimes (but not always) smelled alcohol on the defendant's breath during touching incidents, and the defendant told the victim's mother that he may have " "disrespected" " the child when he was drunk. (*Id.* at pp. 771-772.) The Court of Appeal rejected the claim, stating: "Even assuming the foregoing provides substantial evidence that defendant was voluntarily intoxicated during at least some of the inappropriate touching incidents, defendant offered no evidence at trial to demonstrate how that intoxication might have resulted in his inability to formulate the specific intent necessary to violate section 288. [Citation.] Given the absence of such evidence, defense counsel could reasonably have made the tactical decision not to request a voluntary intoxication instruction." (*Id.* at p. 772.)

In *People v. Ivans* (1992) 2 Cal.App.4th 1654, the issue was whether the defendant was entitled to an instruction on voluntary intoxication based on his drug use. Both a witness who saw the defendant a few hours before the shootings, and the two victims, testified the defendant seemed calm and did not exhibit any symptoms of a person high on "speed." One of the victims testified the defendant was a regular user of the drug, and the victim assumed the defendant was high that morning, although the victim did not observe any specific symptoms. The defendant testified that at the time of the shootings, he had been high on speed for a month and had been awake for three or four days. He gave detailed testimony about the events of the morning, however. The appellate court found the evidence insufficient to show the defendant's drug use affected his mental state. (*Id.* at p. 1662.)

Defendant directs our attention to *People v. Reyes* (1997) 52 Cal.App.4th 975, which he says "more resembles" his case. It does not. That case concerned the

defendant's knowledge certain property was stolen. The defendant testified he was a longtime drug user who smoked methamphetamine and cocaine the day before the incident. He could not recall where he obtained the property in question, as, he testified, he had trouble remembering things of that nature when he used a lot of drugs. He also testified to picking up some items he spotted on a street curb. When asked why he did so, he explained that when he used drugs, he had a compulsion to go through trash. In his state of mind, he thought he was treasure hunting. (*Id.* at pp. 980-981.) The Court of Appeal concluded the trial court committed reversible error by instructing the jury that receiving stolen property, despite its knowledge requirement, was a general intent crime to which voluntary intoxication was no defense, and by precluding evidence regarding the defendant's mental disorders and their exacerbation by drug abuse. (*Id.* at pp. 985-986.)

Reyes's conclusion that evidence of voluntary intoxication is admissible to cast doubt on the scienter element of a general intent crime has been questioned on the ground *Reyes* is based on authorities that are either inapposite or no longer have precedential effect. (See *People v. Berg* (2018) 23 Cal.App.5th 959, 968-969.) Even if we assume *Reyes* has some value with respect to the issue before us, however, there was evidence in that case concerning the effect the defendant's drug use had on his mental state. Such evidence is absent here.

"Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf. [Citations.]" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1173, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116.) Because substantial evidence did not support the giving of an instruction on voluntary intoxication, and " 'unsupported theories should not be presented to the jury' " (*People v. Marshall, supra*, 15 Cal.4th at p. 40), defense counsel reasonably could have made the tactical decision not to request such an instruction (*People v. Olivas, supra*, 248 Cal.App.4th at p. 772). At the very least, the record does not preclude a

satisfactory explanation, and so we are required by California Supreme Court authority to reject defendant's claim on appeal. (*People v. Stewart* (2004) 33 Cal.4th 425, 459; *People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.)¹⁶

III

DENIAL OF NEW TRIAL MOTION

Defendant moved for a new trial in part on the ground the evidence was insufficient to support a conviction for first degree murder, in that it failed to prove, beyond a reasonable doubt, the murder was committed with the requisite willful premeditation and deliberation.¹⁷ In ruling on the motion, the trial court stated:

“The court has read and reviewed the notice of motion for a new trial on both bases consisting of 11 pages and, of course, the argument of both counsel this morning regarding the motion

“. . . [I]n this case, relating to the sufficiency of the evidence, the defendant exercised his constitutional right not to testify, and in his confession that was admitted into evidence . . . , that does indicate he loaded six to seven bullets in his rifle. The victim was shot three times. After the first two shots, the third shot being fired when the victim was on the ground and, as both parties recall, there was a very lengthy discussion about settlement of this case [¶] . . . [¶]

“The case was fully and fairly tried and fully and fairly and argued by both sides. The jury is the trier of fact and, in this case, there was sufficient evidence for the jury’s verdict, murder in the first degree together, with the enhancement found true by the jury. So, in light of all of

¹⁶ The dissent quotes at length from defense counsel’s summation to the jury, then disparages the clarity of counsel’s argument. (Dis. opn., *post*, at pp. 19-23.) This is, in our reading of counsel’s summation, factually unwarranted. Additionally, scornful or disparaging commentary is to be avoided. (*Obergefell v. Hodges* (2015) 576 U.S. ___, ___ [135 S.Ct. 2584, 2597].)

¹⁷ The other basis for the motion was the trial court’s asserted error in admitting the muted video of defendant’s statement to detectives. Defendant claimed the court allowed the prosecution’s witness to testify to the content of the video without permitting the defense to confront the witness with the actual audio from the recording.

what I stated and, of course, the record will stand for itself, the motion for new trial is denied” (Italics added.)

Defendant now contends the emphasized portion of the trial court’s ruling shows the court misunderstood the scope of its authority and duty when passing on a new trial motion based on insufficient evidence. He says it necessarily follows that the court abused its discretion in denying the motion, and he says the matter must be remanded for the trial court to reconsider the motion using the correct standard. We conclude no remand is required.

Section 1181, subdivision 6 authorizes the granting of a new trial, or modification of the verdict or judgment to a lesser degree of the crime or lesser included offense, “[w]hen the verdict . . . is contrary to law or evidence” “ ‘We review a trial court’s ruling on a motion for a new trial under a deferential abuse-of-discretion standard.’ [Citations.] ‘ “A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.” ’ [Citations.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) Although there is a “strong presumption” that a trial court ruling on such a motion properly exercised its “broad discretion” (*People v. Davis* (1995) 10 Cal.4th 463, 524), “an abuse of discretion arises if the trial court based its decision on impermissible factors [citation] or on an incorrect legal standard” (*People v. Knoller* (2007) 41 Cal.4th 139, 156).

In ruling on a motion for a new trial under subdivision 6 of section 1181, the trial court is required to weigh the evidence independently. (*People v. Davis, supra*, 10 Cal.4th at p. 523.) “While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as

a whole is sufficient to sustain the verdict. [Citations.]” (*People v. Robarge* (1953) 41 Cal.2d 628, 633 (*Robarge*).)

The California Supreme Court has said that “a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. [Citations.]” (*Robarge, supra*, 41 Cal.2d at p. 633; see *People v. Sarazzawski* (1945) 27 Cal.2d 7, 15, overruled on another ground in *People v. Braxton* (2004) 34 Cal.4th 798, 817.) This does not mean the court should disregard the verdict or decide what result it would have reached had the case been tried without a jury (*Robarge, supra*, 41 Cal.2d at p. 633); the trial court is “guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.]” (*People v. Davis, supra*, 10 Cal.4th at p. 524.) Instead, the court “should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict. [Citations.]” (*Robarge, supra*, 41 Cal.2d at p. 633.)

Accordingly, unlike an appellate court, which, in deciding whether evidence is legally sufficient to sustain a verdict, reviews the whole record in the light most favorable to the judgment to determine whether substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt (*People v. Johnson* (1980) 26 Cal.3d 557, 578), “[t]he [trial] court extends no evidentiary deference in ruling on a . . . motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a ‘13th juror.’ [Citations.] If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury’s verdict is ‘contrary to [the] . . . evidence.’ [Citations.] In doing so, the judge acts as a 13th juror who is a ‘holdout’ for acquittal.” (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.)

“An appellate court cannot order a new trial on the ground of insufficiency of the evidence if there is any substantial evidence by which the verdict can be supported. [Citations.] But a trial court can grant a motion for new trial where the evidence is legally sufficient and even where the only evidence is that of the prosecution. [Citations.]” (*People v. Sarazzawski, supra*, 27 Cal.2d at p. 16.) “Although the trial court is to be ‘guided’ by a presumption in favor of the correctness of the jury’s verdict [citation], this means only that the court may not *arbitrarily* reject a verdict which is supported by substantial evidence. The trial court is not bound by the jury’s determinations as to the credibility of witnesses or as to the weight or effect to be accorded to the evidence. [Citations.] Thus, the presumption that the verdict is correct does not affect the trial court’s duty to give the defendant the benefit of its independent determination as to the probative value of the evidence. [Citation.] If the court finds that the evidence is not sufficiently probative to sustain the verdict, it must order a new trial. [Citations.]” (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1251-1252.)

Defendant focuses on the trial court’s comments that the case was fully and fairly tried by a jury and that the jury’s verdict was supported by sufficient evidence, and says this “suggest[s]” the court was giving deference to the jury’s verdict rather than independently reweighing the evidence itself. Trial courts are presumed to know and apply the correct law in the exercise of their official duties, however (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456), and the correct standard was set out in defendant’s motion, which the court stated it had read. The court referenced the portion of defendant’s statement in which defendant spoke of loading the rifle, and the fact the victim was shot three times, with the third shot being fired when the victim was on the ground. It is apparent this was evidence the court found particularly persuasive in terms of establishing willful premeditation and deliberation. “There is no requirement that [the court] should discuss or even mention all or any of the matters considered in arriving at [its] decision to deny the motion.” (*People v. Cruz* (1960) 178 Cal.App.2d 83, 87.)

Under the circumstances, “[a]lthough it would have been preferable for the court to have been more specific, stating it was denying the motion based on its independent weighing of the evidence, its failure to do so and its use of less than artful language cannot be equated with having applied the wrong standard.” (*People v. Price* (1992) 4 Cal.App.4th 1272, 1276.)

IV

SENATE BILL NO. 620

Defendant was sentenced on October 11, 2017. At that time, the trial court lacked discretion to strike firearm enhancements. (§§ 12022.5, former subd. (c), 12022.53, former subd. (h).) Effective January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) (Stats. 2017, ch. 682, §§ 1-2) gave trial courts discretion to strike or dismiss enhancements imposed pursuant to sections 12022.5 and 12022.53 “in the interest of justice pursuant to Section 1385” (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

Defendant now contends his case should be remanded to afford the trial court the opportunity to exercise its discretion with respect to each affected enhancement. Respondent agrees, and so do we. Prior to imposing the sentence that was mandatory at the time, the court observed: “[T]his case presented a tragic set of circumstances. The defendant and the victim were co-workers. It appeared they were individuals who worked very hard in the fields. They shared living quarters. We have a defendant with no prior criminal record whatsoever, and over an argument and a punch as related in the defendant’s statement to law enforcement, over an argument, he shot and killed his roommate. [¶] This was a case, interestingly enough, after doing that, ultimately, he turned himself in to law enforcement in a Northern California county. And that is the circumstance that is rarely, if ever, seen in a homicide case where a suspect turns himself in and immediately confesses. [¶] And I believe, in essence, he deserves some recognition for the fact he turned himself in and confessed.”

In light of the foregoing comments, we cannot say whether the trial court would have imposed the then-mandatory firearm enhancement had it had discretion to do otherwise. Accordingly, we will remand the matter to give the court the opportunity to exercise its new discretion with respect to the section 12022.53, subdivision (d) enhancement. We note that in light of the finding pursuant to that statute, the court ordered the enhancement pursuant to section 12022.5, subdivision (a) to be stricken. If, upon remand, the trial court elects to strike the section 12022.53, subdivision (d) enhancement, it is free to revisit its decision with respect to the section 12022.5, subdivision (a) enhancement. (See *People v. Buycks* (2018) 5 Cal.5th 857, 893.)

DISPOSITION

The judgment of conviction is affirmed. Sentence is vacated, and the matter is remanded to the trial court to exercise its discretion pursuant to sections 12022.5, subdivision (c) and 12022.53, subdivision (h) and to resentence defendant accordingly.

DETJEN, J.

I CONCUR:

POOCHIGIAN, Acting P.J.

SMITH, J., Concurring and Dissenting.

Francisco Zermeno, a farmworker with no criminal history, shot and killed his childhood friend and roommate, Hugo Vargas, during an argument following a night of drinking. The shooting occurred late at night on May 6, 2015, outside a trailer the two shared. After initially fleeing the scene, Zermeno quickly turned himself in to authorities and confessed to fatally shooting Vargas. Zermeno said he was fully at fault and wanted to pay for what he had done. He was charged with first degree murder, along with a 25-year gun enhancement.

The only questions at trial were the circumstances under which Zermeno shot Vargas and Zermeno's mental state at the time. The answers to these questions would determine whether Zermeno was guilty of first degree murder, second degree murder, or voluntary manslaughter.¹ The prosecution's case was premised almost entirely on Zermeno's confession. However, the complete confession was not introduced in evidence; rather, one of the investigating detectives testified about selective parts. The defense's primary theory of the case was that Zermeno acted without deliberation and premeditation but, as addressed in detail below, this theory was inadequately developed and incompetently presented. Zermeno was convicted of first degree murder.

At sentencing, the trial court stated:

"I will preliminarily state, before the court pronounces judgment and sentence, that this case presented a tragic set of circumstances. The defendant and the victim were co-workers. It appeared they were individuals who worked very hard in the fields. They shared living quarters. We have a defendant with no prior criminal record whatsoever, and over an argument and a punch as related in the defendant's statement to law enforcement, over an argument, he shot and killed his roommate.

"This was a case, interestingly enough, after doing that, ultimately, he turned himself in to law enforcement in a Northern California county.

¹ The jury was not instructed on involuntary manslaughter.

And that is the circumstance [that] is rarely, if ever, seen in a homicide case[,] where a suspect turns himself in and immediately confesses.

“And I believe, in essence, he deserves some recognition for the fact [that] he turned himself in and confessed.”

Zermeno was sentenced to 50 years to life. Under the law at the time, the trial judge had no discretion in imposing sentence.

On appeal, Zermeno argues, among other issues, that his public defender counsel was ineffective in failing to request a jury instruction on voluntary intoxication. The standard jury instruction on voluntary intoxication clarifies that voluntary intoxication can negate the requisite mental state for a specific intent crime, including, in the case of first degree murder, express malice aforethought as well as deliberation and premeditation. I respectfully dissent in this case as I would find that defense counsel was ineffective in failing to properly develop the primary theory of defense that Zermeno acted without deliberation and premeditation, including by not requesting and utilizing a voluntary intoxication instruction. I would therefore modify Zermeno’s first degree murder conviction to a second degree murder conviction.

There was ample evidence of drinking and intoxication here, based on Zermeno’s interrogation statement alone, in which he acknowledged both he and Vargas had drunk a lot of beer and were intoxicated or buzzed. Indeed, the fatal argument occurred after both Zermeno and Vargas had been drinking for hours. Zermeno said the two of them—lifelong friends and comrades—got along very well when sober but when they were drunk, anything could happen. The evidence of intoxication and of the intoxication-fueled brawl, coupled with evidence of highly specific statements made by Zermeno during his interrogation to the effect he *actually did not* deliberate and premeditate in shooting and killing Vargas (only realizing what he had done after Vargas fell to the ground)—provided a solid evidentiary basis for an instruction on voluntary intoxication. In other words, the evidence readily and reasonably supported an inference that Zermeno was not thinking rationally on account of intoxication when he shot and killed Vargas. A

conclusion to the contrary, i.e., that the instant record is insufficient for a court to grant a defense request for a voluntary intoxication instruction, would inappropriately limit the application of this instruction to the rare case in which the defendant fits the caricature of a “falling down drunk,” or where there is *direct* evidence, say in the form of an explicit statement by the defendant, regarding the role of intoxication in the commission of the relevant crime, rather than *circumstantial* evidence leading to the same conclusion.

In my view, not only does the record amply support an instruction on voluntary intoxication, but counsel’s failure to request one is most difficult to excuse. I would find that defense counsel’s failure to request an instruction on voluntary intoxication, taken together with her broader failure to properly develop the theory that Zermeno acted without deliberation and premeditation, constituted deficient performance, and further, that the deficiency was prejudicial. I therefore conclude the proper remedy here is to modify Zermeno’s first degree murder conviction to a second degree murder conviction. Given my position, I would not reach Zermeno’s other challenges to the judgment of conviction and do not join the majority’s resolution thereof.²

FACTUAL BACKGROUND

Zermeno and Vargas were childhood friends and neighbors (having grown up together on the same ranch or settlement in Mexico). For the last five years before Vargas’s death, they lived together in a small trailer, on a rural property well outside the city limits of Firebaugh. The property belonged to Zermeno’s aunt and uncle, M.A. and E.A. M.A. and E.A. lived in a house on the property, on which also stood several trailers that they rented out. M.A., Zermeno’s aunt, had known Vargas for a long time as well, as they all hailed from the same hometown in Mexico. Vargas and Zermeno worked in the fields together; they shared a car and went to work together and came home together.

² However, I concur with the majority’s conclusion that the matter must be remanded for resentencing with respect to the firearm enhancement originally imposed.

M.A. testified that Vargas and Zermeno got along well. At the time of the shooting, Zermeno was 31 years old and Vargas 33 years old.

The Scene of the Shooting

Lorena E. lived in a trailer next to the one occupied by Zermeno and Vargas. In the early morning hours of May 7, 2015, she was awakened by the sound of Vargas moaning. She looked out and saw Vargas lying on the ground right in front of her trailer. Lorena alerted M.A. and E.A.—the time was between 1:00 a.m. and 2:00 a.m. E.A. went to investigate and found Vargas lying on a haystack, injured but alive. Zermeno was nowhere to be found. Emergency medical services (EMS) were immediately summoned—the call for service came in at 1:47 a.m.—but, by the time paramedics arrived, Vargas was dead from gunshot wounds.

Sheriff's deputies arrived thereafter, having been alerted by EMS at 2:09 a.m. Three .22-caliber spent shell casings were located near Vargas's body. A bullet strike mark was found on one of the other trailers on the property and a bullet was extracted from that spot; another two bullets were subsequently found in Vargas's body during his autopsy. A .22-caliber pump action rifle was lying right in the doorway of the trailer. Eight live rounds were found in the rifle, which was cocked and ready to fire. The shell casings found near Vargas's body were subsequently determined to have been fired from this rifle.

The interior of the trailer was searched pursuant to a warrant. The trailer was "pretty cluttered." Both the interior and exterior of the trailer were littered with cans of Bud Light.

The Autopsy of Vargas's Body

Dr. Michael Chambliss, a forensic pathologist and medical doctor, performed the autopsy of Vargas's body. Chambliss determined the cause of death was gunshot wounds and the manner of death was homicide. Chambliss noted the wounds in question were a chest wound to the right lung and an abdominal wound to the liver, both of which were

potentially fatal and would have caused death within minutes.³ The bullets that caused these wounds went along the rib margin and above the belly button, respectively, and were traveling front to back and upwards. Vargas also had bullet entry-and-exit wounds along the back of the head, but in this instance the bullet went “along the bottom portion of the brain” and did “not produce significant enough injury or damage to the brain” to contribute to the cause of death. All the shots were fired from some distance as indicated by the lack of gun powder residue around the wounds.

Vargas was found, by means of toxicology tests, to have a blood alcohol content of 0.07 and a urine alcohol level of 0.11. Chambliss explained that alcohol in the blood stream is “broken down” over time and gradually becomes more concentrated in the urine. Vargas also had a low level of methamphetamine in his blood (96 nanograms per milliliter) and a “sizable amount” or level (“over 8,300”) in his urine. Chambliss noted: “Generally, when you take methamphetamine, it’s going to be much higher [in the urine] than what that level is in the blood [stream].” Regarding the effects of methamphetamine, Chambliss explained: “You can see paranoia starting to develop in that individual by having hallucinations sometimes. So you get a whole gamut of different things as they’re coming down that could be, even up to aggression sometimes

³ Dr. Chambliss testified that Vargas had a “minutes type of death” because of “the structures that [were] hit.” He explained: “The liver is something that takes time to accumulate enough blood in that abdominal area minutes before an individual dies. So that is a minutes situation by itself. [¶] The right lung area is also a minutes type of situation. The bullet goes and strikes the lung. You have two situations there. You have blood accumulation in the chest cavity and you have the timeframe it takes for that lung to collapse because that is an environment that needs the lung to be expanded, so that takes minutes as well. [¶] So you have a minute situation in the chest, you have a minute situation in the abdomen. Either one of those particular wounds have that same wound course.” Chambliss also clarified that a “minutes” death was generally understood to mean the injured person would die within the first hour of infliction of the injury. However, Chambliss was not asked to opine as to how long it would have taken Vargas to die of his gunshot wounds.

you can get at that particular time.” Chambliss further observed that alcohol and drugs “work together” to bring about “accentuated” effects. Regarding potential tolerance in chronic drinkers, Chambliss noted that, as a general matter “it would be more likely than not” that regular drinkers develop some tolerance to alcohol. He clarified, however, that it would nonetheless require “more questions about the nature of [a person’s] drinking”—“what [does the person] drink, how often [does the person] drink”—before any determination could be made as to whether the person is “going to develop tolerance” or could in fact tolerate alcohol.

Chambliss found various abrasions on Vargas’s arms and legs but did not detect any injuries on Vargas’s hands. Chambliss testified: “Well, what we have, is we have abrasions on Mr. Vargas’s body, which are the types of things that can occur during a struggle. [¶] Now, how that took place, these abrasions, did they occur as a result of a struggle, someone could allege that. Or there are [other] possibilities of how you have these abrasions. But the more abrasions you have, then you can, in some cases, give an opinion that a struggle took place.” Chambliss further clarified: “The absence of injury on somebody’s hands does not mean the individual did not get involved in something. Because it’s not there does not mean it didn’t happen.”

Zermeno’s Actions Following the Shooting

A little before 6:00 a.m. on May 7, 2015, Zermeno’s former coworker, Guadalupe, received a text message from Zermeno asking him for a ride (Guadalupe referred to Zermeno by his nickname, Pancho). Guadalupe agreed to collect Zermeno from a spot along the bank of the Arroyo Canal. The area is one of “only fields.” When Guadalupe met up with Zermeno, the latter was on foot. Guadalupe noticed Zermeno was smelling of alcohol. Guadalupe took Zermeno to a Chevron station at the intersection of Highways 33 and 152 in Dos Palos, an area commonly known as the “Y,” because Zermeno wanted to buy beer. Zermeno bought a couple of 24-ounce Bud Light beers.

Surveillance footage from the Chevron station showed Zermeno buying beer at approximately 6:19 a.m. that morning. Zermeno was a regular customer at the Chevron.

When Guadalupe asked after Vargas, Zermeno told him the latter was already at work. Guadalupe dropped Zermeno off at the nearby Azusa Market as Zermeno said he had a ride to work from the market. Surveillance footage from Azusa Market showed Zermeno buying another beer, at approximately 12:00 p.m. on May 7, 2015. Zermeno was a regular customer at the Azusa Market as well, frequenting it with his coworkers. Later that night, at approximately 10:00 p.m., Zermeno was at the Greyhound bus terminal in Fresno, as reflected on surveillance footage from the terminal.

Four days later, on May 11, 2015, Zermeno walked into the police station in Corning, a small town north of Chico. He informed the dispatcher at the counter in the lobby that he was turning himself in for shooting and killing someone with a rifle. The dispatcher noted Zermeno was “forthcoming” during the interaction.

Zermeno’s Police Interrogation

Fresno County Sheriff’s Detectives Adam Maldonado and Juan Galindo drove four and a half hours north to interrogate Zermeno at the Tehama County Jail in Red Bluff. The interrogation commenced at 10:26 p.m. and continued for approximately two hours; it was conducted in Spanish. Zermeno confessed to shooting Vargas with the rifle found at the scene.

A video recording of the interrogation was played for the jury during Detective Maldonado’s trial testimony. However, because the interrogation was in Spanish, the sound on the recording was muted during the playback. Although an English transcription of the complete interrogation was prepared by Maldonado and is part of the record, it was *not* admitted into evidence (nor was the transcript provided to the jury during the muted video playback). Rather, Maldonado testified about the substance of the interrogation.

I have summarized below Detective Maldonado's testimony regarding the interrogation. I have also summarized, under a separate heading, Zermeno's complete interrogation statement as reflected in the English transcript, as numerous highly relevant and exculpatory statements Zermeno made during the interrogation were not addressed during Maldonado's testimony and were never revealed to the jury. The interrogation in its entirety is relevant to the resolution of Zermeno's claim of ineffective assistance of counsel raised in this appeal.

Detective Maldonado's Testimony about Zermeno's Police Interrogation

Detective Maldonado testified about Zermeno's police interrogation. Maldonado acknowledged Zermeno was "a simple man," not a sophisticated criminal. Zermeno had clarified he had only a fourth-grade education in Mexico and had never been arrested before.

Zermeno told Maldonado that he and Vargas were "childhood friends," having grown up "next door to each other," in Mexico. He and Vargas rented living quarters from Zermeno's uncle and aunt. Zermeno worked in pistachio orchards and Vargas worked in almond orchards.

Zermeno described the events of the day of May 6, 2015, a Thursday. Zermeno and Vargas generally worked from 6:00 a.m. to 4:30 p.m. Afterwards, "[t]hey would usually stop in Merced, or outside Merced, and get a three pack of 24-ounce Bud Light cans." On May 6, 2015, in addition to their usual beer purchase in Merced, they also drove to the Azusa Market in the Y area of Los Banos. "Hugo got out and bought a 12 pack of Bud Light." "[T]hey arrived [home] at about 6:00 p.m." and "had dinner." "Hugo usually drank two of the beers of the three pack. [Zermeno] would drink one. They would split the twelve pack." This is what they did on May 6, 2015. Zermeno explained "they were intoxicated, feeling good" or buzzed. "He initially said they were drunk, but then he stated they don't get drunk drunk but they were intoxicated." Zermeno "denied that either of them used drugs."

At about 11:00 p.m., Zermeno and Vargas had an argument. Zermeno said “different things cause[d] arguments. One being [Vargas’s] aunt had passed away. That made [Vargas] upset. Another being the roosters. They argued over roosters. They had approximately 200.” “They argued about one [rooster] being better than the other.” They would argue back and forth. When Vargas was “intoxicated,” *as he was that night*, he would “demean” Zermeno “by calling him idiot and other humiliating things.” This trend had been escalating for the last two years.

During the argument on the night at issue, “[Vargas] punched [Zermeno] in the mouth.” Zermeno “defended himself” but fell inside the trailer. “[Zermeno] said that [Vargas] walked outside and [Zermeno] went and grabbed the rifle that they had stored underneath the bed”; they used the rifle for “target practice with cans.” Zermeno “loaded it with six to seven rounds.” The bullets were “kept loose on a ledge.” Zermeno then “continued to watch TV.”

A little later, Vargas, who had gone outside to drink beer, “came inside and started arguing about the same things.” Zermeno told him he “fucking bother[ed]” him. Vargas “walked back outside.” Zermeno “grabbed the gun” and shot Vargas three times from a distance of about five to six feet. Vargas was holding a can of Bud Light and facing Zermeno at the time.

Zermeno was “blind with rage.” “He said he shot [Vargas] once, he shot him twice. [Vargas] fell down, then he shot him again when he was on the ground.” “[Zermeno] couldn’t describe where he shot him.” He did not know where the bullets struck. “[T]hroughout the interview,” Zermeno iterated he was blinded by rage. *He was not thinking.* “He just shot at [Vargas] like this, just so he would leave [him] in peace.” *He did not want to kill Vargas.*

Afterwards, Zermeno threw the rifle inside the trailer, got some boots, and “fled.” “[A]s he was running away, the dogs thought he was playing with them and ... followed

him. He came back to put them inside ... a cage.” He then walked through the fields to Dos Palos, which was about nine miles away.

Zermeno said his friend Jose gave him a ride from Dos Palos to the Y area of Los Banos. Eventually, Zermeno acknowledged it was Guadalupe who gave him the ride. From Los Banos, Zermeno took a bus to Sacramento and another one to Chico. He broke his cell phone because “family members told him that the police [could] track him if he had his phone on.” He thought about Vargas and what had happened and could not eat as a result. He turned himself in because he wanted to pay for what he had done.

Detective Maldonado asked Zermeno whether the punch Vargas delivered warranted a gunshot in return. “[Zermeno] said, ‘I know it doesn’t. I know it doesn’t. Honestly, I know it doesn’t.’” Zermeno said “he should have [walked away] but it was too late.” Zermeno “[c]ontinuously” expressed remorse and did not try to implicate anyone else in the shooting. “He said if he could take it back, he would.” He said he ran because he got scared.

Transcript of Zermeno’s Interrogation (Not in Evidence, Nor Shown to Jury)

During his interrogation, as reflected in the transcript, Zermeno said Vargas and he were “very good” friends. They had grown up together as neighbors too. In fact, they came to the United States together in 2007.

On May 6, 2015, Zermeno and Vargas bought three 24-ounce cans of Bud Light, and an additional 12-pack of Bud Light. Zermeno drank one 24-ounce can of Bud Light and six additional cans of Bud Light. Vargas drank the rest. They were both a little drunk and buzzed.

Vargas tended to get “real crazy when he drank too much ... [¶] ... and he wanted to beat somebody up.” Zermeno stated: “And that day he came in and I was already in bed right there at the house and then he started to ... well, the only thing I did was to defend myself, really. But in the end well I’m the one to blame, right? I did it, I mean, I’m really the one you have to blame and I’m not denying anything.”

Zermeno continued: “I just defended myself, really. Well, because I was fed-up ... it was like the same thing all the time. And I would try to leave, but really where would I go, my job was right there. And honestly I was thinking of moving, because it was the same subject all the time, every day the same thing ... [¶] ... and sometimes he wouldn’t even let me sleep ... [¶] ... he would always reproach me [¶] [and say] things like, you’re an idiot or you’re this or those kinds of fucking things, just a bunch of humiliating things [¶] ... [¶] it got to the point where I just got tired of it and well what happened-happened. [¶] ... I shot him with the rifle. [¶] Three times. [¶] ... [¶] I was blind with rage and I did what I did and that was it. [¶] ... [¶] And I really got scared and I ran, honestly. [¶] That’s why I came here yesterday.... [¶] If I have to pay for what I did, I’ll pay for it. Well, it’s ... it’s better if I do.”

Zermeno explained that he and Vargas got along great when they were both sober. But when they were drunk, it was totally different in that anything could happen. Zermeno iterated Vargas would react badly when he drank alcohol. Detective Galindo asked whether Vargas, for his part, was fed up with Zermeno’s drinking. Zermeno acknowledged that Vargas would threaten to move because of the situation too. Zermeno added: “And sometimes – other times when we had those arguments what I would do was get in my car and I would go like to the field and sleep over there. And in the morning[,] I would go and pick him up ... but that time ... well ... God only knows what happen[ed].”

Zermeno described the fatal incident. The argument started around 11:00 p.m. Zermeno was in bed but Vargas was still drinking. Zermeno encouraged Vargas to go to sleep, telling him: ““And we have [to] get up early and drive and it’s going to be tough if you get sick on the ride over there.” Instead, Vargas picked an argument and even punched Zermeno. Zermeno explained: “[A]nd so at that time everything came rushing into my head ... [¶] ... maybe it was rage over everything he had done to me.” He added: “And I went and put bullets in the rifle.” Zermeno continued: “He kept on

drinking over there outside and I stayed inside the house. [¶] ... [¶] I got the rifle and I sat down right there on the edge of the bed and I turned the television on, right? [¶] Just like that. And then he came back inside again. And that's when that happened. [¶] ... [¶] I had the rifle right there on the side. [¶] It was loaded, *but I wasn't thinking about anything big like that, but I ... I mean at that time I really couldn't ...* (Italics added.)

Zermeno continued: "And like I said, well I just told him like this, 'Oh, how you fuckin' bother me.' And then I got up with the rifle like this.... [¶] ... [W]e were inside and then he went back outside again like that ... [¶] ... that's when he saw me with the rifle and that's when I shot him ... actually." Zermeno noted he had followed Vargas outside. Zermeno explained: "I didn't point [the rifle] at him or even shoot where – or shoot him wherever I wanted. [¶] It just happened like that." When asked whether he pointed the rifle up or down, Zermeno said: "Well, that's what I, I can't remember. Well, all I did was – I don't know if I pointed up or down. I mean I don't have ... [¶] ... well, at that moment how am I going to know exactly how I shot him, right? That's what I don't understand either, if I had ... well the only thing I did was what I told you."

Zermeno did not want to kill Vargas. He said: "Well as soon as I saw him I didn't want to, but it was already ... like I said, I was blind with rage, so I just pressed it and because ..." He further described his mental state: "Well, at the moment I wasn't feeling anything, just when – as soon as I saw him [on the ground] right there ... that's when I felt awful. I thought, *what the hell did I do?*" (Italics added.) It was close to midnight when it was all over.

Zermeno had the following exchange with Detective Galindo:

"G. What can happen when you use a rifle?

"A. But, but you see sometimes you just grab it out of sheer rage.

"G. I, I understand.

“A. *But you don’t realize the consequences or what you’re going to do until later.*

“G. I understand you completely. You weren’t, you weren’t ... you were angry.

“A. I was angry, *but I didn’t want to do that either. And after I did it ... then what could I do? What I did was try to flee.*” (Italics added.)

Zermeno said the shots were fired *not even seconds apart* and Vargas fell down right away. He further explained: “At that moment [I shot him,] I didn’t even think about it ... that’s true. *But if I had thought about it, do you think I would’ve done it and took his life away? No, what I should’ve done was take off, right?*” (Italics added.) Zermeno explained he “didn’t think things through.” Zermeno described his mental state further, stating: “*And then after it happened that’s when I realized what I did and that’s when I reacted but it was too late.*” (Italics added.) He added: “I thought that if I ran away everything would sound better to me.” Detective Galindo asked: “Did you keep thinking about [Vargas]?” Zermeno replied: “Yes. Well, yes, do you think I wasn’t going to think about him, he was my friend for many years?” Zermeno lamented: “I feel bad, bad, bad, that’s why I want to pay for what I did.”

Detective Galindo asked Zermeno whether he put the bullets in Vargas because he wanted to kill him. They had the following exchange:

“G: And that’s why you put the bullets in him because you were already ...

“A: Yes, but sometimes you do something like that ... but it goes in an instant and then you realize that ...

“G: But you thought about it right ... [¶] ... [¶]

“A: But, but I didn’t – *at that moment I wasn’t think about anything.* I mean, *I didn’t* – if you think that I was thinking: I’m going to kill him [and] I know what the consequences were going to be, right?

“G: By getting the rifle, right? At the moment you got the rifle ...

“A: But in that, in that moment I didn’t feel – I felt in my head – I mean, *it was as if I wasn’t thinking of anything* and that’s the truth. And like I told you, *by the time I reacted, it was after he fell and, and yes that’s when I realized.* And that’s when I said, What the hell did I do?

“G: I’m sure when you turned yourself in today that you felt bad, uh ... since this happened until today, during those past few days, did you feel bad about what happened?

“A: Yes, honestly, I did. That’s what I’m telling you, I...

“G: But not until today’s date ... you felt so bad that, that you decided to turn yourself in, right?

“A: No, honestly I felt even worse. Now I feel a little bit better because I’m going to try to pay for what I did.

“G: And now you’re talking ...

“A: Yes, yes, that’s right. Who could I talk to over there [at the scene]—with nobody, that’s what I’m telling you, I felt bad over there.

“G: Uh, huh (affirmative).

“A: And that’s why I decided on my own to try [to] remedy the wrong, even though you can’t remedy anything because I can’t give him his life back.

“G: Yeah.

“A: But I’ll try to pay for the wrong I did.

“G: These cases are very difficult because ... you think that it’s just you and [Vargas], but the thing is it isn’t, there’s a lot of people that are going to be affected.

“A: Well, yes, you’re right, all of his family.

“G: They’re neighbors over there in Mexico.

“A: That’s what I said.

“G: A lot of people, it’s going to affect a lot of people.

“A: Yes, and even more because like I said, we live like up here and they lived down there like that. And well I always got along real good with them and he always got along with our family.

“G: Yes.

“A: But ... we can't turn back time; if we could then it would be something else.

“G: Oh, well yes ... he would be fine right now. But that's the way things turned out. Um, what we're going to do, we're going to take a 'break' for a few minutes.

After the break, Detective Maldonado questioned Zermeno:

“Q: I'm going to ask you again, uh ... when you shot him, uh Hugo ... did you want to kill him?

“A: *Well, that's what I said, I didn't, I didn't see the consequences. I was blind at that moment.*

“Q: Uh, uh (affirmative).

“A: *And after I shot him that's when I realized, well that's what I said. It wasn't really my intention to do that because look ... if I had wanted to do that, I would've tried to take care of myself or no?*

“Q: Uh, uh (affirmative). But ... like my partner asked you, when you were loading the rifle – putting the bullets in ...

“A: Well, at the time that's what I told you, I was drowning with rage. Because of the same thing, I was just fed-up with the same thing almost every day.

“Q: And you did, and you were thinking that you were going to shoot him at the time?

“A: *Oh, well at that time I wasn't thinking about anything, that's what I've been telling you. By the time I clearly, clearly realized ... that's when he fell and I saw him down on the ground. And that's when I reacted and I said, 'What the hell did I do?'*

“Q: Uh, huh (affirmative). And then you shot him because you guys were arguing?

“A. Yes.

“Q. Okay. Just because of that?

“A. And because he hit me and I got angry, that’s what I said.

“Q. ... Why do you think a punch deserves a gunshot?

“A. I know it doesn’t, I know it doesn’t. Honestly, I know it doesn’t ... and that’s the truth. *But that’s what I said, at the time you’re not thinking about that. In that moment I wasn’t really thinking.* Well, that’s what I’m saying, before something else happened I was trying to leave. It was better if I took off in the car and then... come back later.

“Q. Uh, after he fell and you took off running, did you think he was dead?

“A. Well honestly, I ... you always think the wors[t].

“Q. Uh, huh (affirmative).

“A. But I always had the illusion I thought: Hopefully God willing maybe he’s alive.”⁴ (Italics added.)

DISCUSSION

I. Ineffective Assistance of Counsel

The defense’s trial theory was that Zermeno was not guilty of first degree murder but rather of second degree murder or heat of passion manslaughter. In closing, defense counsel mainly argued that in killing Vargas, Zermeno did not act with deliberation and premeditation, thereby precluding a finding of first degree murder. Counsel also argued the prosecution could not prove, beyond a reasonable doubt, that the killing was not a heat of passion manslaughter, thereby precluding a finding of second degree murder.

Zermeno argues defense counsel rendered ineffective assistance of counsel in presenting the former argument, that is, that Zermeno did not kill Vargas with

⁴ Regarding the people Zermeno contacted after the shooting, Zermeno noted: “And no I don’t think it’s necessary to get them in any trouble because I’m the one who’s guilty, not them.” He continued: “I mean, I started thinking these past few days when I thought about it; there’s no point of getting my family into trouble ... I have to pay for what I did, honestly.” Zermeno also said he never thought of running to Mexico; he was just seeking out a “calm place.”

deliberation and premeditation. Specifically, Zermeno argues counsel was ineffective in failing to request an instruction on voluntary intoxication and, in turn, failing to argue that he did not deliberate and premeditate on account of his intoxication.

I conclude defense counsel was deficient in failing to adequately develop and present the theory that Zermeno killed Vargas without deliberation and premeditation and that the deficiency was prejudicial. In short, counsel was ineffective in this regard, requiring modification of Zermeno's conviction for first degree murder to a second degree murder conviction.

A. Applicable Law

"To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that this deficient performance caused prejudice in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*); see also *People v. Wader* (1993) 5 Cal.4th 610, 636.)" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1122-1123.) In determining whether an attorney's conduct so affected the reliability of the trial as to undermine confidence that it "produced a just result" (*Strickland, supra*, 466 U.S. at p. 686), we consider whether "but for" counsel's purportedly deficient performance, "there is a reasonable probability the result of the proceeding would have been different." (*People v. Cash* (2002) 28 Cal.4th 703, 734 (*Cash*); see *Strickland, supra*, at p. 694.)

B. Primary Theory of Defense: Zermeno Not Guilty of First Degree Murder Because He Acted Without Deliberation and Premeditation

In closing argument, defense counsel conceded that Zermeno shot Vargas and caused his death. She contended the case was "about what kind of homicide this is." Counsel further argued: "So, I think the only areas that we really, really need to look into

is [Zermeno's] state of mind." She reiterated: "The only thing that is relevant is what was going on in [Zermeno's] head."

In line with this focus, the primary theory of defense that counsel addressed in her argument was that Zermeno was not guilty of first degree murder because he killed Vargas *without* deliberation and premeditation. Counsel also appeared to argue that the government was required to prove, beyond a reasonable doubt, that the killing was not a heat of passion manslaughter. However, counsel did not make an affirmative case that Zermeno's crime was voluntary manslaughter by systematically addressing the elements of voluntary manslaughter. She did not, for example, explain how the critical element of provocation, which is external to the defendant and is measured objectively, was satisfied by the facts in evidence.⁵ Indeed, counsel barely mentioned the terms "manslaughter" or "voluntary manslaughter," referring to "manslaughter" only twice in passing and "voluntary manslaughter" only once (at the very end of her closing argument).⁶ In short,

⁵ The jury was instructed on voluntary manslaughter in relevant part:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. The defendant killed someone because of a sudden quarrel or in the heat of passion if 1, *the defendant was provoked*; 2, as a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and 3, *the provocation would have caused a person of average disposition to act rashly and without due deliberation*[,] that is from passion rather than from judgment." (Italics added.)

⁶ Regarding her references to "manslaughter," counsel first stated: "Now ... we're a little different here because we're not starting out as someone who says I'm not guilty, I'm not guilty of anything and the government has to work so incredibly hard to show there is any crime at all. We're not there. Where we're at is he admits shooting [Vargas] in a rage which qualifies as *manslaughter*, but he's presumed to be innocent of murder which is what the government must prove." (Italics added.)

Counsel next referenced "manslaughter" when she was addressing the prosecution's burden of proof: "The standard is so much higher because of what – the value we place. And unless it is proven beyond a reasonable doubt that he committed murder, murder, not *manslaughter*, murder, he's entitled." (Italics added.)

counsel did not present a serious argument that the killing was a heat of passion manslaughter.

Counsel spent more time arguing that Zermeno was guilty, at most, of second degree murder, because he killed Vargas without deliberation and premeditation.⁷ Signaling that the primary theory of defense was that Zermeno did not deliberate and premeditate in shooting Vargas, counsel posited that deliberation and premeditation “are the two main topics that we have got to evaluate whether these were present.”

More specifically, counsel argued:

“Now, was the – did the government prove the killing was unlawful? Well, we admit that, because it is not justified or in any way. So we have already a portion of – something just happened – malice aforethought. That’s first degree. That has to be – first degree has to have deliberation and premeditation. Those are the two main topics that we have got to evaluate whether these were present.

“Deliberation. You know, it means kind of what it does in a common language that you weigh the consideration for and against your choice. Then deciding – knowing the consequences, decide to go forward, even after weighing.

“And the premeditation is if you start the act, you finish the act, and you decide to kill before completing the act that caused the death. These all – when looked into and made sure that they line up appropriately is what it takes to be first degree murder. That’s just not the case here. It simply

Towards the very end of her argument, defense counsel argued: “Mr. Zermeno should not be found guilty of first degree murder due to his lack of premeditation and deliberation, and he should not be found guilty of second degree because the government cannot prove beyond a reasonable doubt that this was not a heat of passion. Therefore, the verdict, the just verdict, is guilty but guilty to *voluntary manslaughter*.” (Italics added.) This was her *only* reference to “voluntary manslaughter,” although earlier in her argument, counsel made an extraneous reference, in passing, to “involuntary manslaughter.”

⁷ While in closing argument defense counsel emphasized that Zermeno acted without deliberation and premeditation, in opening argument she noted only that “this is a voluntary manslaughter because of the rage.”

isn't. Because it was – he was asleep. It's a sudden thing. It wasn't planned. You would be surprised."

Defense counsel gave some examples of textbook cases of premeditated murder, the facts of which bore no similarity to the facts of the instant matter. Without any references to specific jury instructions, counsel argued: "The government here has to prove that he acted with this premeditation and deliberation, rather than the heat of passion. As the judge said, it doesn't require anger, rage, or any specific emotion, though he clearly had rage over and over and over again. It can be any violent or intense emotion that causes a person to act without deliberation." Counsel confusingly added: "It is not an element of – you'll get the jury instructions and they've enumerated the elements whether [Vargas] saw the gun or not. I don't think that is in dispute." Counsel continued: "[Zermeno] said [Vargas] didn't see him coming but that doesn't change whether ... [Zermeno] was in this state of mind, because that's the ultimate question in this case. What was he thinking?"

After a disjointed line of argument, counsel contended: "Ponder first degree murder. You have to carefully have weighed the considerations for and again[st].... Looked around, thought about it, and knowing the consequence, chose to kill. You're deliberating it. You're thinking about it. ¶¶ A decision made rashly and impulsively and without consideration, clearly is not – the other side of the coin – is not deliberate and premeditated, and these are mandatory for first degree murder. You have to both deliberate and premeditate. Absolutely."

Counsel then addressed the facts of the case, but she did not frame the discussion with reference to specific jury instructions, limiting the efficacy of her comments. In addition, despite the fact that Zermeno consumed at least 96 ounces of Bud Light in the hours immediately preceding the shooting, counsel inexplicably minimized his level of intoxication, stating Zermeno had a low blood alcohol content although there was absolutely *no* evidence regarding Zermeno's blood alcohol content in the record.

Counsel argued:

“[Zermeno] admitted, you know – turned himself in, and somehow the government’s position is that he’s not telling the truth about the facts surrounding what happened on May 6th. He tells them exactly. I left the rifle, okay? ... I shot him three times. Traveled very far, which is – I assume if one had been drinking, that if they’re running and sweating they would smell pretty terrible of alcohol. And I know the [blood alcohol] is low because I don’t – it’s Bud Light. Bud Light doesn’t have hardly any alcohol in it. It seems like it would take a lot. [¶] Those guys – they all drink. That’s what they do. [¶] ... [¶]

“Now, there are things that certainly – certainly one must be accountable for. Shot him. He took off. He changed his shoes. He told the detective he put the dogs in a rooster cage but nobody said anything about letting them out. Apparently they were out, so I don’t know what really happened there. It is a mystery. It is unimportant. There are contradicting facts and don’t know why. And he bought beer. Yes, it seems to be a staple. [¶] ... [¶]

“Now also, there’s a discussion of, well, he sat and he watched TV but he wasn’t asked how long. It really wasn’t drawn out. It’s not like he’s going to the living room and sitting down. This is one room. If you are getting off the bed, you’re sitting staring at the TV. You can stand, and I would welcome any contradiction to this, that you could nearly stand in one spot, grab the gun, grab the ammunition that’s up there and load it and be sitting there watch TV afterward, thinking this is just crazy.

“I’m just – I’ve just had too much. You can kind of see the environment that they live in. It’s – it’s just – it’s just sad, and I’m sure it affects one’s ability to just – just think it is so depressing that it would not be hard for someone to get to their final straw, no matter who it was.

“There are no statements – this is where – kind of the entrance to the place. There’s no statements that say he was cool and calculated. It’s pure speculation that he was sitting there cool. Again, that’s a tiny little spot. There’s just no evidence to that. He didn’t manipulate the detectives, clearly, to try to sidestep things. He’s just not that sophisticated.

“... Again, if there was evidence of being calm, cool, and collected, we didn’t hear – *we heard some snippets from his interview as to statements he made which was very cumbersome [in the absence of the audio or transcript]. It makes it difficult to get a feel for what was going*

on The only thing that is relevant is what was going on in his head before, not if he had a beer at the Chevron or the Azusa. I believe he admitted that. [¶] ... [¶]

“Killing is not a murder if they kill because of a sudden quarrel or heat of passion. A person was provoked. I think the timeline speaks about, you know, can go all the way back to when they were children. They came over. They lived together. Everything is fine. Last couple of years there’s been problems. [Vargas] has been acting differently. Well, it’s possible that the toxicology results are the reason for the different behavior. Can’t say for certain but it is an explanation. It makes sense. [¶] ... [¶]

“So, here we go. [Vargas’s] fallen apart the last two years. He’s sitting in there. He got real crazy when he drank too much. Wanted to beat someone. He came in and I was in bed and he started. With just a little bit he would attack you. I was angry, when asked. Yes, I was angry. Infuriated? Yes. I was blind with rage. He said, when I was loading the rifle[,] I was drowning in rage. I was blind at the moment that he shot.

“Again, this these are the thoughts that are going through his mind and he’s getting a little upset and a little upset and getting a little worse and he’s getting more and more upset. More emotional. He’s starting to feel the rage come up in him. Then it gets worse and worse and worse, he says to the officers. I – why did you shoot him, or when did you shoot him? I didn’t want to. But it was already – like I said, I was blind with rage. I just pressed it because, then they get cut off. At the moment I wasn’t feeling anything. As soon as I saw him right there I got upset. So, it’s just that trigger, the last straw. Then this is – he says, I was blind with rage. I did what I did. I didn’t – he says – if you think I was thinking I’m going to kill him, that’s wrong. He wasn’t thinking. He was not thinking about anything. [¶] ... [¶]

“Again, we’ve got to review where we’re at here. To prove murder, prove each element, the premeditation, the deliberation, for second degree that it wasn’t heat of passion. Again, it’s difficult. It is subjective but it is a state of certainty.

“And again, this is about the law in the abstract. That this Supreme Court Justice is giving his definition what his thoughts were in this particular case, and it’s so important that we embrace this standard.... [¶] ... [¶]

“The government has the burden of proof. They do not kill as a result of sudden quarrel or heat of passion. [¶] ... [¶]

“Mr. Zermeno should not be found guilty of first degree murder due to his lack of premeditation and deliberation, and he should not be found guilty of second degree because the government cannot prove beyond a reasonable doubt that this was not a heat of passion. Therefore, the verdict, the just verdict, is guilty but guilty to voluntary manslaughter.” (Italics added.)

The excerpts quoted above are the most comprehensible parts of defense counsel’s closing argument. For the most part, counsel’s argument was muddled, rambling, and hard to follow. Counsel did not relate her references to legal concepts and the facts to specific jury instructions, adding to the lack of clarity.

C. Counsel was Deficient in Failing to Properly Develop and Present the Primary Defense Theory that Zermeno did not Deliberate and Premeditate

As mentioned, the primary theory of defense was that Zermeno was guilty, at most, of second degree murder, because he killed Vargas without deliberation and premeditation. However, as discussed in more detail below, counsel failed properly to develop and present this theory—mischaracterizing or omitting key facts and muddling or omitting relevant legal concepts—thereby severely undercutting the efficacy of her argument.

Counsel missed many opportunities to persuade the jury that Zermeno killed Vargas without deliberation and premeditation. Specifically, she failed to marshal evidence that Zermeno was intoxicated and to request an instruction on voluntary intoxication, whereby she could have buttressed the defense by arguing Zermeno did not deliberate and premeditate as a result of intoxication. She also failed to address the concept of subjective provocation (on which the jury was actually instructed). Had counsel utilized instructions on voluntary intoxication and subjective provocation, she could have argued that, on account of his intoxication, Zermeno had an explosive, *subjective* reaction to provocative conduct by Vargas, precluding deliberation and premeditation on Zermeno’s part. Nor did counsel move, under Evidence Code section

356, to introduce the English transcript of Zermeno's interrogation into evidence. Had the transcript been in evidence, counsel could have highlighted Zermeno's express statements to the effect *he did not realize what he was doing until after the fact* and *he did not consider the consequences in shooting at Vargas*. Moreover, had the transcript been in evidence, the jury would have been able to evaluate Zermeno's credibility with reference to his own words and in the context of his entire interrogation statement.

Given these interrelated failures—which are discussed in detail below—I conclude counsel was deficient in not properly developing and presenting the primary defense theory that Zermeno did not deliberate and premeditate in shooting Vargas. In addition, for reasons addressed below, I further conclude that counsel's deficient performance was prejudicial. I would therefore credit Zermeno's claim of ineffective assistance of counsel and modify his conviction to second degree murder.

(1) Voluntary Intoxication

The record in this case contains evidence, direct and circumstantial, showing that both Vargas and Zermeno were intoxicated on the night in question and that their fatal argument—including Zermeno's "blind rage" reaction to verbal badgering and physical pushing and punching by Vargas—was reasonably driven by intoxication. This evidence was highly relevant and helpful to the defense given that the primary theory of defense was that Zermeno did not deliberate and premeditate in shooting and killing Vargas.

However, counsel failed to request an instruction on voluntary intoxication. A voluntary intoxication instruction would have given counsel a framework for deploying the evidence of intoxication and of lack of deliberation and premeditation on Zermeno's part (as reflected in Zermeno's interrogation statements) in the service of the primary theory of defense. Rather than harnessing this evidence to bolster the theory of defense, counsel actually played down the evidence of intoxication and its effect on Zermeno's mental state.

Under the circumstances, there is no rational explanation for counsel’s failure to request an instruction on voluntary intoxication and to use it to articulate a more finely-tuned theory of defense—one to which most people, including jurors, could readily relate—to the effect that Zermeno’s intoxication precluded him from deliberating and premeditating. Indeed, counsel herself noted, in a post-trial motion for new trial that she filed, that Zermeno’s intoxication *did* in fact preclude him from deliberating and premeditating. More specifically, counsel noted in the motion: “[T]he weight of the evidence presented at trial supports the conclusion that whatever decision Mr. Zermeno made was rash and impulsive, while in a rage, *made while under the influence of alcohol.*” (Italics added.) Given this assessment of the case by counsel herself, her failure to request a voluntary intoxication instruction at trial cannot reasonably be dismissed as an acceptable strategic choice or tactical decision.

Penal Code section 29.4, subdivision (b) provides: “Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.” (See *People v. Soto* (2018) 4 Cal.5th 968, 975 [voluntary intoxication relevant to mental states of premeditation and deliberation].) CALCRIM No. 625 is the standard jury instruction delineating the role of voluntary intoxication. CALCRIM No. 625 provides:

“You may consider evidence, if any, of voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation.

“A person is *voluntarily intoxicated* if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing it can produce an intoxicating effect, or willingly assuming the risk of that effect.

“You may not consider evidence of voluntary intoxication for any other purpose.”

A defendant charged with first degree murder can request an instruction on voluntary intoxication to show that, because of his intoxication, he did not in fact intend to kill, or deliberate or premeditate, thereby raising a reasonable doubt regarding the existence of the requisite mental states for the crime (this is known as a ‘diminished actuality’ defense). (*People v. Horton* (1995) 11 Cal.4th 1068, 1119 (*Horton*) [“evidence of voluntary intoxication is relevant to the extent it bears upon the question whether the defendant *actually* had the requisite specific mental state required for commission of the crimes at issue]; *People v. Saille* (1991) 54 Cal.3d 1103, 1117, 1120 [“[the] defendant [has] the duty to request an instruction which relates the evidence of his intoxication to an element of a crime, such as premeditation [or] deliberation”]; *People v. Verdugo* (2010) 50 Cal.4th 263, 295 [instruction on voluntary intoxication is a pinpoint instruction that is given upon request].)

The trial court must grant a request for a pinpoint instruction, such as the voluntary intoxication instruction, if supported by substantial evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 214-215; *People v. Marshall* (1997) 15 Cal.4th 1, 39 [trial court must give requested instruction “if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration”]; *People v. Wickersham* (1982) 32 Cal.3d 307, 324 [a jury instruction is warranted when reasonable jurors can conclude the particular facts underlying the instruction did exist], overruled on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 200; *People v. Mentch* (2008) 45 Cal.4th 274, 288 [in ruling on a request for a jury instruction, the trial court does not assess credibility but only considers whether ““there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt”” as to an element of the crime]). More specifically, a voluntary intoxication instruction is warranted *when the jury can reasonably infer* that, as a result of his voluntary intoxication, a defendant did not form the specific mental states required for the crime, here express malice aforethought as well as deliberation and/or premeditation. (See *Horton, supra*, 11 Cal.4th 1068, 1119 [indicating voluntary

intoxication instruction would be warranted where defendant intoxicated and there is evidence that defendant did not harbor the requisite, specific mental state at the time of the crime]; *People v. Seaton* (2001) 26 Cal.4th 598, 666 [indicating voluntary intoxication instruction proper *where reasonable inference may be drawn* that intoxication prevented the defendant from forming requisite mental state]; *People v. Reyes* (1997) 52 Cal.App.4th 975, 980-981, 986 [same]; *People v. Saille, supra*, 54 Cal.3d at pp. 1116-1117 [when crime requires particular mental state, defendant must have opportunity to prove he did not possess that state, *by raising a reasonable doubt*.)]

Here, there was ample evidence that Zermeno was intoxicated at the time he shot and killed Vargas. During his interrogation, Zermeno told detectives that, on the night at issue, he had 96 ounces of Bud Light beer and Vargas had 108 ounces. Zermeno specifically acknowledged both were intoxicated and feeling good (or buzzed).⁸ Zermeno further explained that he and Vargas got along well when sober but things got combustible when they were intoxicated. Zermeno's description of flying into a "blind rage" also suggests he was intoxicated, as he indicated he reacted in a way he would not have, had he been sober (Zermeno stated that normally, if he was angry with Vargas, he would drive off and sleep in his car). There was also evidence that Zermeno was still reeking of alcohol hours past the shooting, after walking nine miles across fields to the Arroyo Canal, where he met Guadalupe, who gave him a ride to town to buy more beer. Finally, the sheriff's deputy who searched the area after the shooting, testified she observed "numerous" Bud Light cans strewn inside and outside the trailer in which

⁸ Detective Maldonado testified at trial that Zermeno, during his interrogation, explained that on the night in question, Zermeno and Vargas "were intoxicated, feeling good" or buzzed. Maldonado added: "[Zermeno] initially said they were drunk, but then he stated they don't get drunk drunk but they were intoxicated."

Zermeno and Vargas lived. In short, there was solid evidence showing Zermeno was intoxicated when he grabbed the rifle and shot and killed Vargas.⁹

In addition to the evidence of intoxication, there was also solid evidence suggesting Zermeno actually did not deliberate and premeditate before he shot Vargas. For example, during his interrogation, Zermeno repeatedly and unwaveringly told the detectives that he shot Vargas without thinking and *without considering the consequences of his actions*. He also emphatically explained that he fired the shots in a matter of seconds and the import of his actions dawned on him only after he became cognizant that Vargas was on the ground. At one point he said, “At that moment [I shot him,] I didn’t even think about it ... that’s true. *But if I had thought about it, do you think I would’ve done it and took his life away? No, what I should’ve done was take off, right?*” (Italics added.) Zermeno described his mental state further, stating: “*And then after it happened that’s when I realized what I did and that’s when I reacted but it was too late.*” (Italics added.) He explained, “[Y]ou see sometimes you just grab [the rifle] out of sheer rage,” “[*b*]ut you don’t realize the consequences or what you’re going to do until later.” (Italics added.) Zermeno repeated: “[As] I said, *I didn’t, I didn’t see the consequences. I was blind at that moment.*” (Italics added.) He iterated: “And after I shot him that’s when I realized.... *It wasn’t really my intention to do that because look ... if I had wanted to do that, I would’ve tried to take care of myself or no?*” (Italics added.) In sum, there was

⁹ There is no evidence regarding how fast Zermeno drank the 96 ounces of beer or what his blood alcohol content was at the relevant time. As for Vargas, blood drawn during the autopsy was found to have a blood alcohol content of 0.07, while the alcohol content of urine drawn during the autopsy was “.11 milligrams percent.” The doctor who performed the autopsy explained the discrepancy: “Any particular drug or alcohol that goes in the body gets broken down by either the liver or by the kidney, and that particular substance goes into the urine. So you expect when a drug or alcohol is first taken, it’s going to be at its highest in the bloodstream and then it gets broken down and becomes less, and it goes into the urine where the urine [alcohol content] gets higher and higher. So this is a common or expected type of situation to have lower alcohol level ... in the blood with a higher level in the urine.”

substantial evidence for the jury to conclude that Zermeno's intoxication spurred him into a rage and that Zermeno did not actually deliberate and premeditate because of his underlying intoxication.

Counsel, however, did not request a voluntary intoxication instruction. Nor did counsel ensure that the full range of Zermeno's highly exonerating statements about his mental state were in evidence. While counsel elicited from Detective Maldonado that Zermeno said he was not thinking at the time and did not intend to kill Vargas, Zermeno's repeated and more specific—indeed express—statements to the effect that he did not consider “the consequences” of his actions, or even realize what he was doing, until *after* the fact, were not in evidence. Given the evidence that Zermeno had been drinking and acknowledged he was intoxicated on the night of the killing, *had* counsel introduced into evidence Zermeno's emphatic statements about his *actual* failure to deliberate and premeditate, and marshaled the evidence of his statements that he *actually* did not intend to kill Vargas, the trial court, in light of the whole record, would have been required to grant a defense request for a jury instruction on voluntary intoxication.

The majority writes that a voluntary intoxication instruction was not warranted because “there was absolutely no evidence [Zermeno's] intoxication affected whether he premeditated, deliberated, or harbored express malice.” (Maj. opn. *ante*, at p. 14.) The majority cites five cases in support of its conclusion: *People v. Williams* (1997) 16 Cal.4th 635 (*Williams*); *People v. Marshall* (1996) 13 Cal.4th 799 (*Marshall*); *People v. Ramirez* (1990) 50 Cal.3d 1158 (*Ramirez*), overruled on other grounds in *People v. Saille*, *supra*, 54 Cal.3d at pp. 1118-1119; *People v. Olivas* (2016) 248 Cal.App.4th 758 (*Olivas*); and *People v. Ivans* (1992) 2 Cal.App.4th 1654 (*Ivans*). All of these cases, which held that a voluntary intoxication (or diminished capacity) instruction was properly not given, are, however, distinguishable. In all but one of these cases, the theory of defense was that the defendant did not commit the charged crime at all. Furthermore, in all the cited cases, while there was some evidence the defendant used drugs or had been

drinking, there was essentially *no evidence* showing the defendant *actually* did not form the requisite specific intent (or *actually* did not have the capacity to form the requisite specific intent), in committing the charged offenses. Consequently, there was no basis for the jury to reasonably infer that the drugs or drinking actually precluded the defendant from forming the requisite mental state (or affected his capacity to do so). These cases therefore properly held that an instruction on voluntary intoxication (or diminished capacity) was not warranted.

The holdings of the cases cited by the majority are limited to their respective facts. Since the facts of the instant case are completely different and entirely distinguishable, the latter cases have no application here. Critically, here the record contained strong and highly persuasive evidence, in the form of Zermeno's own interrogation statements, that directly established he *actually did not* deliberate and premeditate in shooting Vargas. Not one of the cited cases reasonably suggests that the very different record here would preclude a voluntary intoxication instruction. On the contrary, the majority misconstrues the import of the cases it cites to support its conclusion.

In *Williams, supra*, 16 Cal.4th 635, the defendant was charged with four counts of first degree murder. (*Id.* at p. 647.) “[The] [d]efendant presented an alibi defense.” (*Id.* at p. 650.) The question was whether the trial court should have granted a defense request for an instruction on voluntary intoxication. The defense request was based on the testimony of a witness that on the morning of the murders, the defendant was “‘probably spaced out.’” (*Id.* at pp. 676-677.) The trial court had denied the request because of the ambiguity of the term “spaced out,” explaining that it generally connotes mere distractedness. (*Id.* at p. 677.) On appeal, the defendant contended that, during a police interrogation six months after the murders, he had commented that “‘around the time of the killings[,] he was ‘doped up’ and ‘smokin’ pretty tough then.’” (*Ibid.*) However, unlike the instant case, there was *no evidence* that, in committing the murders, the defendant actually failed to form the requisite mental state for first degree murder.

Therefore, the *Williams* court concluded that, even assuming the “scant evidence of defendant’s voluntary intoxication would qualify as ‘substantial,’ there was no evidence at all that voluntary intoxication had any effect on defendant’s ability to formulate intent.” (*Id.* at pp. 677-678.)

In *Marshall*, *supra*, 13 Cal.4th 799, the defendant was charged with murdering several family members, among other related crimes. (*Id.* at pp. 816-817.) The question was whether the trial court should have given an instruction on the now-abolished diminished capacity defense, which was based on voluntary intoxication. (*Id.* at p. 846 & fn. 8.) The defendant testified *someone else* committed the crimes. (*Id.* at p. 822.) While there was evidence the defendant had been drinking before the murders were committed, there was essentially *no evidence* of the defendant’s actual state of mind in committing the murders (the evidence at best showed that the defendant seemed “‘dazed’” upon his arrest shortly *after* the murders). (*Id.* at p. 848.) The court therefore found the evidence “[fell] short of a reasonable basis for concluding defendant’s capacity to entertain the mental state required for murder was diminished.” (*Id.* at p. 848.) The court in turn concluded that a diminished capacity instruction was properly not given. (*Ibid.*)

In *Ramirez*, *supra*, 50 Cal.3d 1158, the defendant was charged in the rape, sodomy, and murder of a woman outside a bar; the defendant and the woman had earlier been seen drinking and hanging out at the bar. (*Id.* at pp. 1168-1169.) The question was whether the trial court was required *sua sponte* to instruct the jury on voluntary intoxication.¹⁰ The theory of defense was that *some other person* had committed the crimes, after the defendant left the bar. (*Id.* at pp. 1170.) While there was evidence the

¹⁰ *Ramirez* determined that voluntary intoxication was one of “‘the general principles of law’ [citation] on which the trial court must instruct the jury even in the absence of a request.” (*Ramirez*, *supra*, 50 Cal.3d at p. 1180.) *Ramirez* was subsequently overruled on this point by *People v. Saille*, *supra*, 54 Cal.3d at pp. 1118-1119.

defendant had been drinking that night, unlike the instant case, there was *no evidence* he actually did not have the requisite specific intent in committing the offense. (*Id.* at pp. 1180-1181.) The *Ramirez* court therefore concluded the evidence did not show that the “defendant’s drinking had affected his mental state in a manner that might negate the specific intent or mental state required for first degree murder.” (*Id.* at p. 1181.) The *Ramirez* court in turn found the trial court was not required to sua sponte instruct on voluntary intoxication with regard to the first degree murder charge. (*Ibid.*)

In *Olivas*, *supra*, 248 Cal.App.4th 758, the defendant was charged with lewd and lascivious acts on a minor. The question was whether counsel was ineffective in failing to request an instruction on voluntary intoxication. The defense theory was that *none of the charged acts had occurred*, as the minor victim was lying. (*Id.* at pp. 771-772.) While there was evidence showing the defendant was a frequent drinker, there was *no evidence* showing the defendant actually did not possess the requisite specific intent in committing the lewd acts at issue. (*Id.* at pp. 762, 771-772.) The *Olivas* court concluded counsel properly did not request a voluntary intoxication instruction as “such a request would have been inconsistent with the primary defense theory that no misconduct occurred.” (*Id.* at p. 771.) Moreover, since there was *no evidence* of the defendant’s mental state in committing the offenses, the *Olivas* court further noted counsel may properly have refrained from requesting a voluntary intoxication instruction because there was no way to show how “intoxication might have resulted in [the defendant’s] inability to formulate the specific intent necessary to violate section 288.” (*Id.* at p. 772.)

Finally, in *Ivans*, *supra*, 2 Cal.App.4th 1654, the defendant was charged with two counts of attempted first degree murder; he testified he shot at the victims after he saw one of them pull out what appeared to be a gun. (*Id.* at pp. 1660-1661.) The question in *Ivans*, like the question in *Ramirez*, was whether the trial court was required sua sponte to instruct the jury on voluntary intoxication. (*Id.* at p. 1661.) While there was evidence showing the defendant had used drugs, there was *no evidence* the defendant actually did

not form the requisite specific intent for the crimes. The *Ivans* court concluded the evidence was therefore “insufficient to show that Ivans’s drug use had affected his mental state,” and in turn “no sua sponte instruction on voluntary intoxication was required.” (*Id.* at p. 1662.)

The present matter is distinguishable from the cases cited by the majority and discussed above. The record here warranted an instruction on voluntary intoxication. First, in the present case, Zermeno admitted he killed Vargas and the *only* issue at trial was Zermeno’s mental state in doing so. Second, the primary theory of defense was specifically that Zermeno did not deliberate and premeditate in shooting Vargas (not an alibi defense or a defense that someone else had committed the crime or it did not happen at all). Third, there was ample evidence that Zermeno had been drinking and was intoxicated or buzzed on the night of the shooting. Fourth, and most importantly, *in contradistinction to the cases relied on by the majority*, here the record contained strong and highly persuasive evidence, in the form of Zermeno’s own interrogation statements, that directly established he *actually did not* deliberate and premeditate in shooting Vargas. Therefore, unlike the cases discussed above, in the instant matter the evidence *would have permitted* the jury *reasonably to infer* that intoxication prevented Zermeno from deliberating and premeditating. Finally, it bears mention that “[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.” (*People v. Wilson* (1967) 66 Cal.2d 749, 763; *People v. Rodriguez* (1969) 274 Cal.App.2d 487, 497.)

I conclude that, viewing the record as a whole and considering the primary theory of defense, there is no reasonable explanation for counsel’s failure to (1) request an instruction on voluntary intoxication, and (2) use the instruction to bolster and fine tune her argument that Zermeno shot Vargas without deliberation and premeditation. I would therefore find counsel was deficient in these respects.

(2) *The Transcript of Zermeno's Interrogation Statement*

As mentioned, here defense counsel was deficient in failing to properly develop and present the primary theory of defense, i.e., that Zermeno shot and killed Vargas without deliberation and premeditation. Aside from her failure to request and utilize a voluntary intoxication instruction, another aspect of counsel's deficiency was her related failure to introduce into evidence, through cross-examining Detective Maldonado or otherwise, Zermeno's express statements to the effect he shot Zermeno without thinking things through, without considering the consequences of what he was doing, and even without realizing what he was doing. Indeed, as discussed below, counsel should have moved to introduce into evidence the complete English transcript of the interrogation pursuant to Evidence Code section 356 (the rule of completeness).

The prosecution introduced parts of Zermeno's interrogation statement into evidence through the testimony of Detective Maldonado, cherry-picking the parts that were favorable to the prosecution. Defense counsel, for her part, restricted herself to a limited cross-examination of Maldonado, eliciting evidence of only a small sample of the statements Zermeno made during his interrogation and skipping many that were critical to his defense. Counsel complained that cross-examination was "very cumbersome" and an inadequate mechanism for the job of presenting Zermeno's statements to the jury. She noted the "tedious" process made it "difficult" to give the jury a "feel for what was going on." Given counsel's professed frustration as well as the importance of Zermeno's interrogation statement to his defense, there is no reasonable explanation as to why she would not have sought to admit the English transcription of the interrogation into evidence pursuant to Evidence Code section 356 (the rule of completeness). (See, e.g., *People v. Crawl* (1938) 28 Cal.App.2d 299, 307-308 [where a defendant's statement is resorted to as evidence, the exclusion of any portion made at the same time is error unless the excluded portion is an immaterial and irrelevant portion of a conversation which does not relate to or explain the admitted portion]; *People v. Stallworth* (2008) 164

Cal.App.4th 1079, 1098 [holding that “either the [defendant’s] statement should have been excluded in its entirety or the full, unredacted statement should have been admitted under Evidence Code section 356”].) At a minimum, counsel should have conducted a comprehensive cross-examination to ensure that all of Zermeno’s statements about his mental state were introduced into evidence.

Normally, when a recorded interrogation is offered into evidence, the recording constitutes the evidence of what was said and a transcript of the recording is used only as an aid in following and understanding the recording. If the recording and the transcript conflict, the recording controls. (See, e.g., *People v. Brown* (1990) 225 Cal.App.3d 585, 598-599.) However, when the recording is in a foreign language, the English translation controls and is the evidence of what was said. Therefore, counsel could have simply requested admission of the English transcript of Zermeno’s interrogation into evidence or asked that a court interpreter translate the recorded interrogation for the jury. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 304; *United States v. Fuentes-Montijo* (9th. Cir. 1995) 68 F.3d 352, 354-355.)

As it turned out, the jury never heard, among other critical details, Zermeno’s emphatic statements that he did not think of the consequences when he shot Vargas, that the shots were fired in a matter of seconds, and that he did not think through the import of his actions until after the fact. Most importantly, the jury did not have before it Zermeno’s explanation of his mental state in his *own words*—which constituted the strongest and most favorable evidence for his defense. Under the circumstances, had counsel moved to introduce the English transcript of Zermeno’s interrogation statement into evidence under Evidence Code section 356, to ensure the jury had before it Zermeno’s complete statement, the court would have been required to admit it.

In a post-trial motion for new trial filed by counsel, she confirmed she “would have been happy” had the interrogation transcript been in evidence or provided to the jurors “to guide them while they watched the video,” as this “would have benefitted” her

client. At that hearing, counsel also referenced a sidebar discussion that occurred during the trial, in which provision of the transcript to the jury was discussed. However, counsel confirmed she *never* moved, on or off the record, to admit the interrogation transcript into evidence pursuant to Evidence Code section 356.

There is no reasonable explanation for counsel's failure to move to admit the full interrogation transcript, given that she herself noted the importance of providing to the jury the complete picture of Zermeno's interrogation. During Detective Maldonado's testimony, she even commented that, "had the interview been in English, we would have played the interview." Furthermore, counsel referred, in her opening statement, to specific exculpatory statements that Zermeno made during his interrogation—yet she failed to introduce even these statements into evidence. In her opening statement, counsel stated: "[Zermeno] came in and he told the truth. And he said, 'At that moment, I didn't feel. I felt in my head as if I wasn't thinking of everything, and that's the truth.... And like I told you, by the time I reacted, I realized it, that's when I said, 'What the hell did I do?'" *That's what I said. I didn't see the consequences. I was blind at the moment.*" (Italics added.) However, because of counsel's slipshod cross-examination of Maldonado, and the inherent limitations of using cross-examination to convey a defendant's actual words, neither this statement, nor any of the other statements in which Zermeno expressly clarified *he did not consider the consequences* of his actions or *realize what he was doing* until after the fact, were introduced into evidence. The omitted statements are directly relevant to the elements of deliberation and premeditation, required for first degree murder. There is no way to justify the omission of these statements from the evidence presented to the jury.

Rather than moving to introduce into evidence the English transcript of the interrogation pursuant to Evidence Code section 356, counsel made a garbled and confusing objection when a soundless video recording of the interrogation was played for the jury: "I object. It is not the event in its entirety because it's muted. It is not – the

entire incident isn't recorded. It's not whole. Just for the record."¹¹ The parties had previously stipulated that the English transcript generated by Detective Maldonado was accurate; yet defense counsel never argued that should the prosecutor introduce parts of the interrogation through Detective Maldonado's testimony and show the muted video, the entire interrogation transcript would be admissible under the rule of completeness set forth in Evidence Code section 356.

Since the jury did not have the benefit of Zermeno's full interrogation statement, an incomplete and misleading picture of the statement emerged at trial. For example, during the evidentiary phase, Detective Maldonado was asked: "Did you ask the defendant if he knew the consequences of what would happen if he shot a rifle at somebody?" Maldonado responded: "He said he could kill someone."¹² But, crucially,

¹¹ As she subsequently clarified, counsel's objection was that, by muting the sound, Zermeno's explanation of a specific action in the video—i.e., his demonstration of the stance and manner of holding the rifle when firing the shots at Vargas—was not presented contemporaneously with the visual depiction thereof. Next, in arguing that the "entire incident isn't recorded," counsel was objecting to the fact that, while almost all of the interrogation was video recorded, a residual part at the end was only audio recorded.

¹² Detective Maldonado was evidently referring to an exchange between Detective Galindo and Zermeno, which occurred as follows:

"G. We're all here – we all know right here, but you know as soon as you use a rifle ... what can happen, right?

"A. Yes, I know. I really do.

"G. What can happen when you use a rifle?

"A. But, but you see sometimes you just grab it out of sheer rage.

"G. I, I understand.

"A. *But you don't realize the consequences or what you're going to do until later.*

"G. I understand you completely. You weren't, you weren't ... you were angry.

Zermeno had actually clarified that, when he grabbed the rifle on the night in question, he was *not* thinking, “I’m going to kill [Vargas],” and that sometimes one “grabs [a rifle] out of sheer rage” but does not “realize the consequences *or* what [one’s] going to do[,] until later.” These statements were not in evidence to contextualize Maldonado’s selective recounting of Zermeno’s interrogation statement. (Italics added.)

(3) Subjective Provocation

Defense counsel was deficient in her handling of the primary theory of defense, i.e., that Zermeno did not act with deliberation and premeditation, in yet another way. Specifically, in her closing argument, counsel did not highlight the concept of, and instruction on, subjective provocation, which serves to negate the mental states of deliberation and premeditation, thereby reducing first degree murder to second degree murder.

Subjective provocation is addressed in CALCRIM No. 522 (Provocation: Effect on Murder), with which the jury was instructed in this case. Specifically, the jury was instructed as follows: “Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. If you conclude that the defendant committed murder, but was provoked, consider the provocation in considering whether the murder was first degree or second degree. Consider the provocation in deciding whether the defendant committed murder or manslaughter.”¹³ (CALCRIM No. 522.)

“A. I was angry, *but I didn’t want to do that either*. And after I did it ... then what could I do? What I did was try to flee. (Italics added.)

¹³ As to voluntary manslaughter, however, the jury was further instructed that the provocation had to be such that it “would have caused *a person of average disposition* to act rashly and without due deliberation[,] that is from passion rather than from judgment.”

CALCRIM No. 522 posits that first degree murder is reduced to second degree murder when premeditation and deliberation are negated by heat of passion arising from provocation. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296.) Unlike the objective heat of passion inquiry in the context of voluntary manslaughter, the test of provocation sufficient to preclude deliberation and premeditation is entirely *subjective*. “If the provocation would not cause an average person to experience deadly passion but it precludes the defendant from subjectively deliberating or premeditating, the crime is second degree murder.” (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.) Thus, the provocation sufficient to mitigate first degree murder to second degree murder requires only a finding that the defendant’s subjective mental state was such that he did not deliberate and premeditate before deciding to kill. (*People v. Fitzpatrick, supra*, at pp. 1295-1296.)

Subjective provocation is therefore an entirely different concept than the provocation required to reduce murder to the heat of passion form of voluntary manslaughter, which provocation has to be sufficient to “cause an *ordinary person of average disposition* to act rashly or without due deliberation and reflection.” (*People v. Lee* (1999) 20 Cal.4th 47, 59 (*Lee*).) Here, the primary theory of defense was that Zermeno did not deliberate and premeditate in killing Vargas, and defense counsel argued that Zermeno was provoked. However, counsel never explained to the jury that while provocation in the context of voluntary manslaughter is evaluated under an objective standard, the test of provocation for purposes of reducing first degree murder to second degree murder is purely subjective. This is a critical distinction, whereby *any* provocation eliciting a subjective reaction is sufficient for negating deliberation and premeditation, while only the type of provocation that would cause “an ordinary person of average disposition” to react with passion negates malice and reduces a murder to manslaughter. (*Lee, supra*, at p. 59.)

Zermeno told the detectives interrogating him that Vargas was verbally harassing him by calling him names such as “idiot” and also punched him. Zermeno explained: “I was just fed-up with the same thing almost every day.” He added: “I felt in my heart that I was fed-up and I don’t want to live like that.” He also said: “And then after it happened that’s when I realized what I did and that’s when I reacted but it was too late.” Although the evidence of provocation and Zermeno’s reaction may not have added up to a case for voluntary manslaughter, it certainly suggested that what happened here was a classic case of subjective provocation, particularly in light of the evidence of Zermeno’s intoxication. (See *People v. Valentine* (1946) 28 Cal.2d 121, 132 [“provocation which is not ‘adequate’ to reduce the class of the offense [from murder to manslaughter] may nevertheless *raise a reasonable doubt* that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation” (italics added)]; *People v. Wright* (2015) 242 Cal.App.4th 1461, 1481 [intensity of subjective reaction to provocation reasonably heightened by intoxication].)

Had counsel requested an instruction on voluntary intoxication and moved to introduce into evidence Zermeno’s complete interrogation transcript, counsel could have bootstrapped a subjective provocation theory onto a voluntary intoxication theory, to argue that, after drinking all evening with Vargas, Zermeno had an explosive—*subjective*—reaction to Vargas’s verbal badgering and aggressive conduct, preventing him from deliberating and premeditating.

(4) Conclusion: Defense Counsel’s Performance was Deficient

To recapitulate, although the defense’s theory of the case centered on the lack of deliberation and premeditation, counsel did not request an instruction on voluntary intoxication, did not move to admit the English transcript of Zermeno’s police interrogation into evidence, and did not explain that subjective provocation was sufficient to negate deliberation and premeditation. Had counsel taken these steps, she could have presented a far more convincing and relatable case that Zermeno acted without

deliberation and premeditation, given the circumstances of the crime as well as the broader context of the lifelong friendship between Zermeno and Vargas.

Zermeno and Vargas were childhood friends, with no evidence of any deep-seated antagonism. They generally got along well, a fact that Zermeno's aunt and landlady confirmed. Zermeno also told detectives that he and Vargas got along well when sober, but fell into intense arguments when drinking. Zermeno drank a lot of beer on the night of the shooting and also described his state of mind in terms that were consistent with intoxication and reflected a lack of deliberation and premeditation, leading to the reasonable inference that intoxication, in tandem with subjective provocation, actually prevented Zermeno from forming the relevant mental states. After the shooting, Zermeno made no effort to hide evidence, simply flinging the rifle in the doorway of the trailer before taking off. He turned himself in relatively quickly and repeatedly expressed remorse, explaining he felt so bad after the shooting that he could not eat. He said turning himself in was a relief.

Despite the fact that a theory of voluntary intoxication would have strongly buttressed Zermeno's primary defense, counsel affirmatively undercut this defense by mischaracterizing and minimizing the relevant facts, ignoring the related defense of subjective provocation, and failing to move to admit the transcript of Zermeno's interrogation statement into evidence. There is no reasonable explanation for counsel's failures given her own assessment of the case in a post-trial new trial motion: "[T]he weight of the evidence presented at trial supports the conclusion that whatever decision Mr. Zermeno made was rash and impulsive, while in a rage, *made while under the influence of alcohol.*" (Italics added.) I would therefore find counsel's performance was deficient because she failed to properly develop and present the defense theory that

Zermeno did not deliberate and premeditate, and, in turn, was not guilty of first degree murder.¹⁴

D. Counsel's Deficiencies were Prejudicial

I would also have no difficulty finding that counsel's deficient performance prejudiced Zermeno's defense, in that it undermined confidence in the outcome. I would therefore find that counsel rendered ineffective assistance in this case, requiring modification of Zermeno's first degree murder conviction to a second degree murder conviction.

The prosecution's case turned entirely on cherry-picked parts of Zermeno's interrogation statement recounted in Detective Maldonado's words, with the sole issue in contention being Zermeno's mental state. As the transcript of Zermeno interrogation reveals, Zermeno's full statement supported a case for second degree murder more than it supported a case for first degree murder. However, defense counsel failed to properly harness the evidence in the interrogation statement that showed that Zermeno did not act with express malice aforethought or deliberation and premeditation. Had defense counsel not performed deficiently, she could have made a much stronger case for second degree murder than she actually did. The prejudice on account of counsel's deficiencies was compounded by the argument of the prosecutor, who actively massaged the evidence in closing argument, to Zermeno's detriment. The prosecution's theory was that Zermeno acted with express malice aforethought, as well as with deliberation and premeditation. The prosecutor emphasized the evidence showed that after Zermeno grabbed the rifle that night, he waited virtually a full hour before shooting Vargas. The prosecutor contended

¹⁴ The majority contends counsel was not deficient as she chose, as a matter of trial tactics, to "emphasize evidence defendant did not deliberate and premeditate because he was '[d]rowning in rage.'" (Maj. opn. *ante*, at p. 16, fn. 14.) However, as counsel herself noted in the new trial motion she filed, a theory that Zermeno did not deliberate and premeditate because he was drowning with rage would only be strengthened by the evidence that Zermeno was intoxicated.

the long delay showed that Zermeno methodically deliberated and premeditated the killing. However, as discussed below, this representation of the evidence, while highly potent, had no basis in the record. Not only did defense counsel not rebut this baseless argument, but because the transcript of Zermeno's interrogation statement was not in evidence, the jury could not unearth the inaccuracies in the prosecutor's argument for itself. In sum, counsel was deficient in not properly developing and presenting the theory of defense but also in facilitating misleading characterizations of the evidence and creative arguments by the prosecutor.

In his closing argument, the prosecutor argued that getting the rifle and loading it represented "little tiny decisions and details" that showed deliberation and premeditation on Zermeno's part. The prosecutor further contended that the fact that Zermeno fired multiple shots also showed he had a plan to kill Vargas that night. The prosecutor continued: "As [Zermeno] sits on that bed, and as he has gone underneath the mattress, pulled out that rifle, he loads the rifle, and then what does he do with it? Does he go outside because he's so mad? No. He sits down, and he cools off, and he contemplates what he's going to do next." The prosecutor added: "And he sits there calm and cool on the bed." The prosecutor noted: "The amount of time required for deliberation and premeditation may vary from person to person, and according to the circumstances, and a cold, calculated decision can be reached quickly. The test is the extent of the reflection, not the length of time."

Had defense counsel properly utilized the evidence that Zermeno was intoxicated that night and requested an instruction on voluntary intoxication, she could have effectively countered the prosecutor's argument that Zermeno coolly and calmly contemplated what he was going to do and the consequences thereof. Similarly, defense counsel could have countered the prosecutor's argument by highlighting the statements Zermeno made supporting a subjective provocation defense with reference to the instruction on subjective provocation. Had counsel moved to introduce the English

transcript of Zermeno's interrogation statement, she could have highlighted Zermeno's statement to the effect that when he loaded the rifle, he "wasn't thinking about anything big" because he "really couldn't" think at that point and "wasn't really thinking." He also explained: "[Y]ou see sometimes you just grab [the rifle] out of sheer rage," "[b]ut you don't realize the consequences or what you're going to do until later." (Italics added.) Additionally, Zermeno indicated that the shots were fired instantaneously, noting there was "not even a second" between shots. However, Zermeno's words were not in evidence.

The prosecutor next focused on the point that "the argument in this case ... starts around 11 o'clock on the night of May 6th, and it ended with gunshots around twelve o'clock." He emphasized, "We're talking about one hour." The prosecutor added, "*The defendant told detectives that the punch happens closer to the 11 o'clock hour and after the punch, which I would submit to you, is also questionable under the circumstances, but after the punch the defendant goes and obtains the rifle.*" (Italics added.) The prosecutor continued: "*[The shooting] was nearly an hour from the first argument and the punch.*" (Italics added.)

However, as clear from the interrogation transcript, Zermeno did not say that the punch occurred at or close to 11:00 p.m. Zermeno indicated that the argument started around 11:00 p.m. and *the entire incident*—including the argument, the punch, the subsequent loading of the rifle, and the shooting—was all over a little before midnight. Zermeno *did not specify*, with respect to this period, how long the argument lasted and when, in relation to the beginning of the argument, he was punched and then loaded the rifle. Similarly, although he indicated some time passed between the moment he loaded the rifle and the moment he shot Vargas, he did not specify how long or short that period was.

Detective Maldonado's testimony about Zermeno's statements on this point was to the same effect. Maldonado testified that the only description of the interaction between

Vargas and Zermeno that night was provided by Zermeno. Maldonado clarified that Zermeno did not provide a time line for specific events leading up to the shooting. Maldonado indicated Zermeno was not asked about the length of the period he was inside the trailer with the rifle. Rather, Maldonado testified that Zermeno simply noted the duration of the entire incident, from start to finish, was about one hour, with the argument beginning around 11:00 p.m. and Zermeno leaving the scene around midnight.¹⁵

Thus, there was no evidence for the idea, as the prosecutor contended, that Zermeno loaded the rifle and then sat for an hour with the rifle ready at his side before he shot Vargas. On the contrary, based on Zermeno's statement, it was equally possible that the argument simmered for the entire hour, while the period between the punch and the loading of the rifle on the one hand and the shooting on the other, was a fraction of that time, even a matter of minutes. Indeed, in his opening statement, the prosecutor acknowledged as much: "You're going to hear evidence that after the defendant loaded the rifle, he placed it down at a location inside the trailer and sits there *for a few minutes.*" (Italics added.)

However, since the transcript of Zermeno's interrogation statement was not in evidence, the prosecutor was unchallenged in his closing statement arguing, without any evidentiary basis, that Zermeno spent virtually *the entire hour* premeditating and

¹⁵ At another point in his testimony, Detective Maldonado stated that Zermeno said the incident "started about 11:00 [p.m.]" and ended "about 11:30 [p.m.]." However, this timeline misrepresents Zermeno's interrogation statement.

Other evidence suggested that Zermeno's time estimates possibly were inaccurate. EMS were called to the scene at 1:47 a.m., after Vargas was found alive by E.A., and EMS in turn alerted the sheriff's department at 2:09 a.m. This evidence, in combination with the testimony of the doctor who performed the autopsy to the effect that Vargas would have died within "minutes" of being shot, suggested that the shooting occurred closer to, or after, 1:00 a.m. The doctor who conducted the autopsy explained that death occurring within minutes generally meant that death occurred within an hour of the fatal injury. However, the doctor was not asked to give a more specific opinion on the issue of how long after the shooting Vargas died.

deliberating the killing: “[Zermeno] found a rifle, got it ready to go, and didn’t execute that plan for nearly an hour.”¹⁶ The prosecutor emphasized a timeline that had no basis in the record but was highly damaging to the defense theory that Zermeno did not deliberate and premeditate in shooting Vargas. Counsel’s failure to properly develop the theory that Zermeno did not deliberate and premeditate in shooting Vargas was compounded by her inability to counter the prosecutor’s improper argument with reference to the English transcript of the interrogation (or even Detective Maldonado’s testimony).

¹⁶ The prosecutor’s argument appears to stem from a deliberately strained interpretation of Zermeno’s statement and Detective Maldonado’s recounting of it. Zermeno indicated the argument began around 11:00 p.m., when Zermeno was in bed and Vargas came into the trailer and began needling Zermeno. At some point during the argument, Zermeno was out of bed and the two kept arguing. Zermeno explained: “[W]e were arguing and he even punched me right here.” Zermeno added: “And he even knocked me down right there.” At some point, Zermeno loaded bullets into the rifle; Vargas was outside at the time. Zermeno watched TV inside the trailer. Vargas “came back in again ... to argue over the same thing.” Vargas went back outside; Zermeno also went outside with the rifle. Zermeno explained: “[T]hat’s when he saw me with the rifle and that’s when I shot him ... actually.” Zermeno explained: “Well, as soon as I saw him[,] I didn’t want to, but it was already ... like I said, I was blind with rage, so I just pressed it.” It was almost midnight by that point, and Zermeno immediately fled.

During Detective Maldonado’s testimony about Zermeno’s interrogation, the prosecutor asked the detective: “[D]id [Zermeno] give any description as to roughly when [the] argument occurred?” Maldonado answered: “About 11:00 p.m.” The prosecutor then discussed various other issues before circling back to the argument, to ask: “Did the defendant describe to you that, on the evening of May 6th, that [Vargas] came into – inside the trailer where the defendant was inside the trailer and that he and [Vargas] had some sort of interaction inside the trailer around 11:00 p.m. that night?” Maldonado responded, “Yes, he did.” The prosecutor then asked: “What did he say?” Maldonado replied: “He said they again started arguing and [Vargas] punched him in the mouth.” Maldonado never said when the punch occurred in relation to when the argument began, just as Zermeno never gave a timeline for when specific events occurred after the argument began. However, the prosecutor misrepresented the record to argue the punch occurred close to 11:00 p.m., whereupon Zermeno loaded the rifle and waited for an hour before shooting Vargas.

Furthermore, the prosecutor, ignoring the fact that the jury was instructed on subjective provocation, contended: “Now, when it comes to provocation, the law does not say that if something makes you mad, you can kill and we’ll discount that murder. That’s not the law.” The prosecutor referenced only the objective provocation that applies in the context of voluntary manslaughter, arguing: “The law says, in deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation, and knowing the same facts, would have reacted from passion rather than judgment. And in this case, I would submit to you that an hour long argument or an hour long dispute is sufficient time to cool off.” This argument, which obscured the fact that Zermeno’s interrogation statement supported the theory of subjective provocation, was left unanswered because defense counsel failed to mention the mitigating role of subjective provocation in the context of murder. Zermeno explained he reacted violently to Vargas’s needling and argumentation because “it was like the same thing all the time,” to the point that Zermeno “was fed-up” with having to “live that way.” Zermeno also said: “And that’s what happens when, when something starts to ... it’s like the day comes when you’re just fed-up and you just can’t do anything [rationally].” In contrast to the prosecutor’s argument that a drawn-out argument would not be provocative, Zermeno appears to be saying that it was in fact the ongoing, interminable, and repetitive nature of the argument that caused him to snap. Under these circumstances, defense counsel’s failure to address subjective provocation and highlight the jury instruction on subjective provocation—so as to bolster the theory of defense and counter the prosecutor’s argument—was prejudicial.

The prosecutor also argued that Zermeno made up a bunch of lies in his interrogation. The prosecutor contended: “We’re going to go through a few of those dishonest statements later and the significance of those dishonest statements. I would ask for one moment to put aside the defendant’s statement, put aside what he says about the ... killing and think about the actions that he took to kill [Vargas] that night.” The

prosecutor contended: “I would submit to you that the defendant’s story is merely that, it’s just a story about something that he contrived, but it is not the truth about what happened that night.” Given this context, defense counsel’s failure to move, under the rule of completeness, to provide the jury with the English transcription of Zermeno’s complete interrogation statement was prejudicial because, without a complete transcript, the jury could not properly assess Zermeno’s credibility.

I conclude that defense counsel was deficient in developing and presenting the primary defense theory that Zermeno was not guilty of first degree murder because he acted without deliberation and premeditation. Defense counsel did not properly utilize evidence that Zermeno was intoxicated or request an instruction on voluntary intoxication, which permits the jury to consider whether, as a result of intoxication, the defendant did not deliberate or premeditate in committing a murder. Nor did counsel argue the theory of subjective provocation, which clarifies that a defendant’s subjective reaction to *any* degree of provocation can negate deliberation and premeditation. Finally, counsel did not move to introduce into evidence the English transcript of Zermeno’s interrogation, which would have allowed the jury to consider his own words to the effect that he did not deliberate or premeditate in shooting Vargas and to properly assess his credibility. Counsel’s failures not only seriously undermined counsel’s own argument but also meant there was no effective rebuttal to the prosecutor’s arguments, which, but for counsel’s failures, would have been far less persuasive.

Here, “but for” counsel’s deficient performance, “there is a reasonable probability the result of the proceeding would have been different,” in that, given the instant record, Zermeno would have been convicted of second degree murder rather than first degree murder. (*Cash*, *supra*, 28 Cal.4th at p. 734; see *Strickland*, *supra*, 466 U.S. 668 at p. 694; *In re Sixto* (1989) 48 Cal.3d 1247, 1257 [“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”].) Counsel therefore rendered

ineffective assistance with respect to the defense that Zermeno was not guilty of first degree murder because he did not act with deliberation and premeditation.

I would modify Zermeno's first degree murder conviction to a second degree murder conviction, and remand to give the People the opportunity to retry Zermeno for first degree murder, should they so elect.

SMITH, J.