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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDREW ERIC LEMUS, Defendant and Appellant.	E080726 (Super.Ct.No. RIF2101065) OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge. Affirmed.

Alex Kreit, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

In 2023, a jury convicted Andrew Eric Lemus of one count of first degree murder. (Pen. Code, § 187, subd. (a); unlabeled statutory references are to this code.) On appeal, he challenges the sufficiency of the evidence for the lying-in-wait and premeditation and deliberation theories on which the jury was instructed. We conclude that there is substantial evidence supporting the premeditation and deliberation findings and accordingly do not analyze whether the evidence was sufficient to support the lying-in-wait theory.

Lemus also contends that the trial court prejudicially erred by admitting gang-related evidence and that his trial counsel was ineffective for failing to request certain jury instructions. We reject those contentions and affirm.

BACKGROUND

The victim, Danny P., died as the result of multiple stab wounds. He and Lemus were friends. Lemus admitted that he killed Danny. Lemus was charged by information with first degree murder. (§ 187, subd. (a).)

I. *The killing*

Shortly after 6:00 a.m. on February 21, 2021, law enforcement responded to a 911 call concerning a man who had been beaten and was lying on the ground. The caller told the dispatcher that she did not see any weapons, and she reported, "I don't know if he stabbed him or not." The caller initially reported that the man on the ground was screaming, but by the end of the call she reported that he was not moving or saying anything.

Three residents of an apartment complex across the street from the location of the stabbing heard loud screaming and cries for help. One of those witnesses called 911. The witnesses saw an upright man beat and kick another man, who was lying on the ground. The man who was standing quickly fled.

Law enforcement arrived and found Danny lying on the ground suffering from "serious trauma." One of the law enforcement officers recognized Danny from his appearance and tattoos, which included a "South Riverside" tattoo. Paramedics transported Danny to the hospital.

Danny sustained 49 stab wounds and died as a result of multiple stab wounds. Danny had stab wounds on his chest, back, head, neck, face, arms, tongue, collarbone, shoulder, and hand. A forensic pathologist testified that most of the wounds were three to four inches long and "pretty much flesh wounds, musculature, no major vessels are involved." One of the stab wounds to Danny's back hit his spine but did not result in "serious trauma." Two of the wounds to Danny's chest did "more damage"—one punctured his right lung, and one punctured the right ventricle of his heart. In addition, the forensic pathologist testified that two injuries on Danny's hand were defensive wounds, which the pathologist explained are generally sustained when a person attempts to shield themselves from an attack.

II. *The crime scene*

Danny was found lying in front of a wall with graffiti on it, which one law enforcement officer described as "gang tagging." The graffiti included "South Side Riva" and "MGF," which another officer explained stands for "Mi Gangster Familia."

The MGF graffiti was crossed out with a purple "X" that appeared to be fresh. Law enforcement found parts of a broken purple pen directly underneath the MGF graffiti and nearby Danny. Danny had purple ink dye and discoloration on a fingertip and the palm of his right hand.

A law enforcement officer opined that MGF had been crossed out because the area was considered "a different gang's territory." Asked whether he initially thought it was "a significant fact" that MGF was crossed out, the officer replied, "Based on my initial assessment of the scene, I believed it had something to do with the scene."

III. *Surveillance footage*

Law enforcement collected surveillance footage taken on the morning of February 21, 2021, from various residences and businesses in the neighborhood where Danny was killed. The recordings span a 45-minute period starting at 6:00 a.m. A crime analyst created a timeline exhibit consisting of the video footage and various photographs and maps, and the exhibit was admitted in the prosecution's case-in-chief. Brett Stennett, who was the lead detective on the case, testified about the timeline's contents.

Stennett described the footage as showing Lemus and Danny walking around the neighborhood casually from 6:00 a.m. to 6:19 a.m. Danny was wearing a heavy jacket and carrying a heavy bag around his neck, and Lemus was wearing long pants and a white shirt. There did not appear to be any signs of conflict between Lemus and Danny.

A recording taken at 6:21 a.m. and played for the jury shows Lemus attacking Danny. The recording was taken from a vantage point about five car lengths away. Only

a portion of the incident is visible, because the view is partially obstructed by tree branches. Our description of the incident is based in part on our review of the recording.

Stennett described the portion of the attack in which the two men are visible as follows: The recording depicted Lemus with "his left hand forward, possibly grabbing onto or pulling around [Danny] while [Lemus's] right hand and arm is making quick stab-like motions repeatedly towards [Danny's] torso." In the recording, Lemus is seen making about five stabbing motions. During that portion of the recording, the two men are in motion, with Lemus pushing Danny backward toward the left side of the screen, where the view is blocked by tree branches. As Danny and Lemus become obscured by a tree branch, Lemus appears to crouch forward toward the ground. Five to six seconds later, Lemus comes back into view for three seconds, during which he runs backward, stops, hesitates for a moment, and then, as described by Stennett, "aggressively charges back towards where [Danny] was last seen," where Lemus is again obscured by a tree branch.

During the portion of the recorded attack in which both men are visible, Danny did not charge at Lemus, fight back, or stand upright. Stennett described Danny as "already hunched over in a defeated position" from the moment that he came into view. Stennett opined that the heavy bag that Danny was wearing would have "encumbered" Danny and made it difficult for him to fight.

A recording taken at 6:22 a.m., the minute after the stabbing, showed Lemus fleeing from the scene. Recordings from various cameras on surrounding streets captured Lemus's movements for the next 20 minutes. Within five minutes, Lemus was wearing

shorts instead of long pants. Lemus took off his shirt and walked with it in his hand, revealing various tattoos. At one point while not wearing a shirt, Lemus looked up in the direction of a surveillance camera and then draped his shirt over his back, where he had a large tattoo. Lemus eventually discarded the shirt, which law enforcement found in a storm drain. The shirt had purple ink and Lemus's blood on it.

IV. *Lemus's statements to law enforcement*

Two weeks after the stabbing, law enforcement contacted Lemus. He had "significant injuries" on the knuckles and the joints of his right hand. Stennett opined that the injuries were consistent with Lemus "being in a punching fight with [his] fist."

Lemus was placed in a jail cell for four hours with undercover law enforcement officers posing as fellow inmates. The jail cell was under audio and video surveillance, which was recorded. Stennett observed the surveillance feed live and testified about what transpired. According to Stennett, Lemus seemed comfortable and not fearful while speaking with the undercover officers.

Lemus admitted killing Danny, saying "'I whacked him.'" Lemus told the undercover officers that he was high on methamphetamine during the incident. Lemus said of the killing that "he 'did it in just two minutes, just quick, bingo.'" An undercover officer stated, "'Damn, that's a good forty. Fuckin' two minutes, homeboy. Yeah, fuckin' fast. Edward Scissorhands, dawg. Poke holes in yo' ass.'" Lemus responded, "'A fuckin' haircut.'" He also said, "'Yeah, you can do a lot in a minute.'" Lemus disclosed to the undercover officers that after he killed Danny he buried the knife, took off his pants, and threw away his shirt.

Lemus explained to the undercover officers that Danny was "'talking shit'" to him and "'threatened [his] fuckin' grandparents.'" He also described an incident with Danny in 2017 or 2018 that had caused Lemus to be upset. One day in 2017 or 2018, Lemus and Danny were at Lemus's grandparents' house, and Danny left. After Danny left, he either saw or was contacted by law enforcement while passing through a park. Law enforcement left the park, went to Lemus's grandparents' house, and arrested Lemus. Lemus talked about how it angered and upset him "that he didn't get the heads-up" from Danny. Stennett opined that Lemus's recounting of the incident in 2017 or 2018 demonstrated that Lemus held a grudge against Danny for not warning him that law enforcement was going to Lemus's grandparents' house to arrest Lemus.

The issue of self-defense arose several times during Lemus's conversation with the undercover officers. An undercover officer asked Lemus if he stabbed Danny in self-defense, and Lemus responded, "'No, it wasn't.'" Lemus also told the undercover officers that in order to reduce his bail he planned to tell law enforcement that he killed Danny in self-defense. One of the undercover officers told Lemus that he had to make his story believable, to which Lemus responded, "'Yeah, I got drunk. Got fuckin' high with some bitch. Fuckin', I was, like, knocked out.'" While discussing self-defense, Lemus also told the undercover officers, "'But I don't want to assume shit, you know what I mean? That's why I'm ready to go—go get my discovery, see what's on the paperwork, and then it's the only way.'" Lemus explained that he wanted to "'see what the detectives have and basically start the story from there.'"

Stennett and another detective interrupted the jail cell surveillance operation to interview Lemus. Lemus told the detectives that he and Danny had a "personal issue with each other" when they encountered each other on the morning of the stabbing. Lemus also told the detectives that he and Danny argued because Danny threatened Lemus's grandparents, causing Lemus to feel disrespected. Lemus was unable to describe the threats. Lemus also told the detectives that he had been high on methamphetamine.

Lemus told the detectives that both he and Danny had knives, and he explained that "'it was him or me.'" Lemus could not describe Danny's knife and admitted that Danny did not injure him with the knife. Lemus said that Danny had his back to Lemus while crossing something out with purple ink, but Stennett did not explain the context in which Lemus made that statement. Lemus said that he had a three- to four-inch long pocket knife. Lemus told the detectives that he discarded both knives in an unspecified dumpster.

When Lemus returned to the jail cell after the interview, the undercover officers were still there and asked Lemus if he told "'the story'" previously discussed. Lemus replied, "I told them a verbal altercation. From there, it was words. And the first one—because he threatened my family, so that's the only reason we got into it." He also described telling the detectives that "'it was him or me.'" Asked by the undercover officers whether the detectives believed the story, Lemus responded, "'They didn't really buy it, but they bought it.'"

Stennett testified that during the course of his 18-year career as a law enforcement officer he had encountered people under the influence of methamphetamine "probably many hundreds of times." On the basis of Stennett's review of the footage of Lemus and Danny before and during the stabbing, Stennett opined that it did "not at all" appear to him that Lemus "was so high he had no idea what he was doing." Stennett did not believe that Lemus had any apparent symptoms of being under the influence of methamphetamine. Stennett instead described Lemus's actions as "very purposeful."

V. *The verdict*

The jury was instructed that it could find that Lemus committed first degree murder under either of two theories—willful, deliberate, and premeditated murder or murder by lying in wait—and that the jurors did not need to agree on the theory. The jury found Lemus guilty of first degree murder. (§ 187, subd. (a).) The verdict form did not identify the theory on which the jury relied.

DISCUSSION

I. *Sufficiency of the evidence*

Lemus contends that there is insufficient evidence to support a finding of either premeditation and deliberation or lying in wait, so there is not sufficient evidence to support the first degree murder conviction. We disagree as to the finding of premeditation and deliberation. We accordingly do not analyze the sufficiency of the evidence supporting the lying-in-wait theory, given that there is no affirmative evidence in the record that the jury relied on that theory. (*People v. Nelson* (2016) 1 Cal.5th 513, 552 (*Nelson*).)

"A murder that is premeditated and deliberate is murder in the first degree." (*People v. Jurado* (2006) 38 Cal.4th 72, 118; § 189, subd. (a).) "'In this context, "premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."'" (*Jurado*, at p. 118.) In determining whether a finding of premeditation and deliberation is adequately supported, we often consider three kinds of evidence—"preexisting motive, planning activity, and manner of killing." (*Id.* at pp. 118-119; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) But those guidelines—referred to as the *Anderson* factors—"are descriptive and neither normative nor exhaustive," so "reviewing courts need not accord them any particular weight." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 420; *People v. Rivera* (2019) 7 Cal.5th 306, 324.)

We review the jury's finding of premeditation and deliberation for substantial evidence. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1068-1069.) "We review the entire record to determine whether it discloses reasonable and credible evidence to allow a rational trier of fact to determine guilt beyond a reasonable doubt." (*People v. Cardenas* (2020) 53 Cal.App.5th 102, 119, fn. 11.) "We draw all reasonable inferences in favor of the judgment." (*Ibid.*) "Matters of credibility of witnesses and the weight of the evidence are "'the exclusive province'" of the trier of fact." (*Ibid.*)

Lemus argues that there is insufficient evidence that he acted with premeditation and deliberation under any of the *Anderson* factors—motive, planning, and manner of

killing. We are not persuaded. There was evidence of all three factors, from which a jury could reasonably conclude that Lemus acted with both premeditation and deliberation.

The evidence as to manner of killing in particular supports a finding of premeditation and deliberation. Lemus stabbed Danny 49 times. Danny had stab wounds on his chest, neck, head, and back. Two of the wounds to Danny's chest were lethal, puncturing his heart and a lung. The jury could reasonably infer premeditation and deliberation from the number of stab wounds and from the location of some of those wounds, particularly the ones that punctured Danny's heart and lung. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658-659 (*San Nicolas*); *People v. Elliot* (2005) 37 Cal.4th 453, 471; *People v. Pride* (1992) 3 Cal.4th 195, 248.)

Moreover, the attack occurred in multiple stages. In the recorded portion of the attack, Lemus pushed Danny backward while holding on to him and repeatedly stabbing him, eventually leaving Danny on the ground. Several seconds later, Lemus ran away and then charged back toward Danny. Though what happened next is not visible in the recording, the jury could reasonably infer from the large number of stab wounds that Lemus resumed stabbing Danny. Regardless of whether Lemus had time to reflect before he began stabbing Danny, Lemus had sufficient time to reflect when he ran away from Danny after the initial stabbing, before aggressively charging back toward Danny to resume the attack. (*People v. Streeter* (2012) 54 Cal.4th 205, 244 (*Streeter*) [the defendant's acts that "occurred in stages" demonstrated premeditation and deliberation]; *People v. Horning* (2004) 34 Cal.4th 871, 902 (*Horning*) ["premeditation can occur in a short time"].)

Lemus describes the manner of killing as 49 stab wounds inflicted after a 20-minute casual walk with his friend, describing it as "'an unconsidered explosion of violence'" that would be inconsistent with premeditation and deliberation. (See *Horning*, *supra*, 34 Cal.4th at pp. 902-903.) The argument fails. Even if Danny's injuries were "only suggestive of rage, an inference of premeditation is not precluded." (*San Nicholas*, *supra*, 34 Cal.4th at p. 659.) "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*People v. Hillery* (1965) 62 Cal.2d 692, 702; *In re George T.* (2004) 33 Cal.4th 620, 631.) Moreover, the argument fails to address the fact that the attack occurred in stages and that Lemus had more than enough time to reflect when, over the course of about three seconds, he ran away from Danny, stopped, hesitated for a moment, and then charged back toward Danny to reinitiate the attack. (See *Streeter*, *supra*, 54 Cal.4th at p. 244.)

There also was strong evidence that Lemus had a preexisting motive to kill Danny. Lemus told the undercover officers that he was angered and upset by an incident involving Danny that occurred several years earlier. According to Lemus, Danny failed to warn him that law enforcement were about to arrest Lemus at his grandparents' house. Lemus also told detectives that he had some sort of "'personal issue'" with Danny when they encountered each other the morning of the stabbing. From that evidence, the jury could reasonably infer that Lemus harbored resentment toward Danny from the prior incident and that the anger about that incident motivated Lemus to kill Danny. (See

People v. Gonzales and Soliz (2011) 52 Cal.4th 254, 295 [evidence that a killing was committed for retaliation supports a finding of premeditation and deliberation].)

Although Lemus agrees that "killing in revenge for a previous disagreement is the kind of motive that could suggest reflection," he contends that there was no "evidence—direct or circumstantial—that Lemus was considering the 2017/2018 incident prior to his altercation with [Danny] or that it motivated him to attack" Danny, given that Lemus did not directly tell the undercover officers what motivated him to act and that there was no evidence that Lemus and Danny had not seen each other in the intervening years. The arguments lack merit. In analyzing whether substantial evidence supports the finding of premeditation and deliberation, we review the sufficiency of the evidence presented, "not whether hypothetical evidence would have strengthened the prosecution's case." (*People v. Vargas* (2020) 9 Cal.5th 793, 821-822 (*Vargas*).) Moreover, the fact that Lemus told the undercover officers about the earlier incident in the context of admitting and bragging about killing Danny supports the reasonable inference that Lemus's years-long resentment about that incident was significant to Lemus and is what motivated the killing. In addition, Lemus's argument wrongly assumes that his motive for killing Danny must have been rational. (*People v. Pettigrew* (2021) 62 Cal.App.5th 477, 495.) Even if Lemus's motivation "was totally unreasonable," "the incomprehensibility of the motive does not mean that the jury could not reasonably infer that [Lemus] entertained and acted on it." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1238.)

In any event, a jury also could reasonably infer from the circumstances of the attack that Lemus developed another motive to kill Danny during the attack. Given that Lemus ran away from Danny after stabbing him repeatedly, hesitated for a moment, and then rushed back toward Danny to resume the attack, the jury could reasonably infer that Lemus went back to finish the job of killing Danny in order to eliminate the possibility that Danny would identify Lemus as the attacker. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1292 ["the jury could conclude that [the] defendant strangled [the victim] and cut her throat, and that [the defendant's] motive was to avoid detection"].)

There also was evidence that Lemus planned to kill Danny before the attack. From the evidence of the fresh purple graffiti on a nearby wall, the broken purple pen parts at the scene, the purple ink on Danny's right hand, the stab wounds that Danny sustained on his back, the recording showing Lemus stabbing Danny while they faced each other, and Lemus's statement that Danny had his back to Lemus while writing on a wall, the jury could reasonably infer that Lemus initially stabbed Danny when Danny was writing on the wall with his back to Lemus. Given that Danny and Lemus were casually walking together for 20 minutes before Lemus stabbed Danny, even though Lemus later disclosed that he had a "personal issue" with Danny that morning, the jury could reasonably infer that Lemus, who was armed, planned to kill Danny but waited until Danny was particularly vulnerable and defenseless, with his back turned.

Moreover, the fact that Lemus paused the attack for several seconds and then resumed it was further evidence of planning. The jury could reasonably infer that Lemus developed the plan to kill Danny during the several second period in which he ran away

from Danny, stopped, momentarily hesitated, and then ran back to Danny to resume the attack. The evidence of the recorded portion of the attack thus supports a reasonable inference that there was more than "adequate" time after Lemus initially withdrew "to have reached the deliberate and premeditated decision to kill" (*San Nicolas, supra*, 34 Cal.4th at p. 658), as opposed to a "mere unconsidered or rash impulse hastily executed" (*People v. Thomas* (1945) 25 Cal.2d 880, 901).

Lemus argues that the prosecution introduced "no evidence of planning activity" and that the circumstances surrounding the killing—namely, that the attack occurred shortly after sunrise in a populated area directly across the street from an apartment complex—"'strongly suggest a lack of a plan to kill.'" (Italics omitted.) Again, the argument wrongly focuses on hypothetical evidence that would be stronger evidence supporting the finding of premeditation and deliberation. (*Vargas, supra*, 9 Cal.5th at pp. 821-822.) Even if Lemus could have planned the killing better, the evidence supports a reasonable inference that he did plan the killing, however poorly. (*People v. Moore* (2011) 51 Cal.4th 386, 408.) Moreover, the argument fails to address the significance of the pause in the attack, which independently supports an inference of planning.

In sum, we conclude that there is substantial evidence supporting the jury's finding that Lemus committed a premeditated and deliberate murder. Because a finding of premeditation and deliberation is supported by substantial evidence and there is no affirmative evidence in the record that the jury relied on the lying-in-wait theory, we do not analyze the sufficiency of the evidence of lying in wait. (*Nelson, supra,* 1 Cal.5th at p. 552.)

II. *Gang evidence*

Lemus contends that the trial court prejudicially erred by admitting any gang evidence. We conclude that any error was not prejudicial.

A. *Relevant proceedings*

Lemus moved to exclude any evidence that he belonged to a gang, arguing that it was irrelevant and highly prejudicial because he was not charged with a gang-related offense or enhancement. At a pretrial hearing on the motion, the prosecution explained that the only gang evidence that it intended to introduce involved the graffiti on the wall near the site of the stabbing. The prosecutor argued that the evidence was relevant to establishing motive because it was possible that "a fight ensued regarding the tagging," and it was probative regardless of gang membership because it placed both Danny and Lemus at the scene. Defense counsel argued that the evidence should be excluded because it was highly prejudicial and had limited probative value because Lemus was not contesting that he killed Danny or that they argued.

The court denied the motion, finding that the proffered gang evidence was relevant to establishing the circumstances that led to the killing and "[p]erhaps motive" and that the probative value was "not substantially outweighed by any probability of prejudicing the jury against the defendant or confusing the issues or causing any undue influence." The court concluded that a limiting instruction would sufficiently address defense counsel's concerns.

During trial, two law enforcement officers provided gang-related testimony. Officer Orlando Solano responded to the crime scene and testified about the "South Side

Riva and MGF gang tagging" on the wall. He opined that MGF was crossed out because the area was in "a different gang's territory." Solano initially believed that the crossing-out of the graffiti "had something to do with the scene." On cross-examination, Solano testified that he was able to identify Danny in part on the basis of a "South Riverside" tattoo that Danny had on his chest.

At the conclusion of Solano's testimony, the court gave the following limiting instruction: "You've heard a little testimony just now relative to tattoos, relative to gang graffiti or tagging letters, I guess, MFG (sic) being crossed out. Okay. This is not a gang case. Okay. There are no gang allegations. The purpose is not meant to infer or imply that either Mr. Lemus or the decedent were members of a criminal street gang or were acting on behalf of or at the behest of a street gang or that there was any gang activity being carried out. [¶] The sole purpose of the evidence was for identification purposes. Also, talking about a purpose of the description, the area itself, and tattoo for identification, the letters that were crossed out regarding whether there's gangs involved, gang activity. No. Disregard all that. It's just for a limited purpose of description of the area and perhaps evidence found or produced in that area."

Detective David Riedeman testified that "MGF" stood for "Mi Gangster Familia." At the conclusion of Riedeman's testimony, the court gave the following limiting instruction: "I gave you an admonishment previously regarding the limited purpose of the—some of this evidence regarding the lettering, the crossing out of the lettering. And, again, this is not a gang case. You're not to consider there's gang activity going on; that either Mr. Lemus or the decedent were members of a criminal street gang or there's any

acting on behalf of a gang. [¶] The primary purpose, a part of this last testimony, was the crossing out, the coloring of the—or crossed out and the fact it was purple pen in that vicinity. That is the sole limited purpose. This is not a gang case."

During closing argument, the prosecutor's only reference to the "MGF" graffiti was to claim that it, along with the broken purple pen, revealed that Danny was first stabbed when he was writing on the wall. Defense counsel argued that Lemus and Danny were "talking together peacefully" when "[s]omething happened quick," like an argument "[m]ost probably because of the wall" and because Danny "was crossing off something on the wall."

B. *Analysis*

Assuming for the sake of argument that the trial court abused its discretion by admitting the gang-related evidence, reversal would be warranted only if it is reasonably probable that the verdict would have been more favorable to Lemus absent the claimed error. (*People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Watson* (1956) 46 Cal.2d 818, 836.) We conclude that any error in admitting the gang-related evidence did not prejudice Lemus.

There was ample evidence that Lemus acted with premeditation and deliberation when he killed Danny, independent of the evidence of the nearby gang-related graffiti. As we have explained, there was strong evidence from which the jury could infer that Lemus planned the attack and had a preexisting motive to kill Danny that had nothing to do with gangs or the possible gang affiliation of either man. In addition, given that the attack occurred in two distinct stages, there also was strong evidence that Lemus

developed a motive and plan to kill Danny during the attack that also had nothing to do with gangs. And, as we have already explained, the jury could reasonably infer premeditation from the number of stab wounds Danny sustained and from the location of the fatal wounds to his chest. (See, e.g., *San Nicolas*, *supra*, 34 Cal.4th at pp. 658-659.)

Relying on *People v. Avitia* (2005) 127 Cal.App.4th 185, Lemus argues that the introduction of gang evidence was prejudicial because the issue of whether the killing constituted first degree murder or second degree murder was "highly contested and the prosecution's evidence was 'far from overwhelming.'" In *Avitia*, the court concluded that the erroneous admission of gang-related evidence—an officer's testimony that the defendant had gang graffiti on posters in his bedroom—required reversal of a conviction for grossly negligent discharge of a firearm. (*Id.* at pp. 191-195.) The court held that the evidence was prejudicial because it undercut the defendant's credibility as a witness and the prosecution's case was "not overwhelming." (*Id.* at pp. 194-195.) *Avitia* is distinguishable because notwithstanding Lemus's argument to the contrary, there was overwhelming evidence that he killed Danny with premeditation and deliberation, and the account of the killing that Lemus relayed to the detectives was already greatly undermined by the statements he made to the undercover officers in the jail cell.

Moreover, in addition to the overwhelming evidence supporting the finding of premeditation and deliberation, the trial court instructed the jury that it could only consider the gang-related testimony for the purposes of the identification of Danny by law enforcement and a description of the crime scene, including that purple pen parts were found in the vicinity. The court specifically and repeatedly instructed the jury that it

should not consider whether Lemus and Danny were gang members or "were acting on behalf of or at the behest of a street gang or that there was any gang activity being carried out." We presume that the jury followed those instructions not to consider the gang-related evidence "for an improper purpose." (*People v. Chhoun* (2021) 11 Cal.5th 1, 30 (*Chhoun*); *People v. Washington* (2017) 15 Cal.App.5th 19, 26 [appellate courts generally "presume that juries can and will dutifully follow the instructions they are given, including instructions that limit a jury's consideration of evidence for certain purposes"].)

Lemus contends that the limiting instructions were not sufficient to negate the prejudicial effect of the gang evidence, because the instructions were ambiguous, not clear, and not repeated after the close of evidence. We disagree. We discern no ambiguity. The limiting instructions sufficiently conveyed that the jury could not consider the gang-related evidence for the purpose of considering whether Lemus and Danny were gang members or affiliates or whether the crime had anything to do with gang activity. We presume that the jury followed those instructions. (*Chhoun*, *supra*, 11 Cal.5th at p. 30.)

Moreover, we reject Lemus's contention that the two limiting instructions would have been better if they were reinforced by a limiting instruction given to the jury at the close of the case. Nothing in the record indicates that Lemus's counsel requested such an instruction, and that may have been a tactical decision—counsel could reasonably have feared that repeating the instruction would have the effect of drawing attention to the gang-related evidence just before the jury started deliberating. In any event, the limiting

instructions given during trial sufficiently directed the jury not to consider whether Lemus and Danny were gang members or affiliates or whether the killing had anything to do with gang activity. The limited value of the evidence was reinforced by the prosecution's closing argument, in which the gang-related nature of the graffiti was not even mentioned.

Given the strength of the evidence supporting the verdict, the limiting instructions given to the jury, and the lack of reference to the evidence in the prosecutor's closing argument, we conclude that there is no reasonable probability that Lemus would have obtained a more favorable result if no gang-related evidence had been admitted.

III. *Alleged instructional error*

Lemus argues that he received ineffective assistance of trial counsel because counsel "does not appear to have" requested jury instructions on voluntary intoxication (CALCRIM No. 625) and provocation (CALCRIM No. 522). The arguments lack merit.

"To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and counsel's deficient performance was prejudicial, that is, there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Sepulveda* (2020) 47 Cal.App.5th 291, 301 (*Sepulveda*); *Strickland v. Washington* (1984) 466 U.S. 668, 687-692.) We presume "that counsel's actions fall within the broad range of reasonableness, and afford 'great deference to counsel's tactical decisions.'" (*People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*).)

A defendant asserting ineffective assistance of counsel on direct appeal bears a "'difficult'" burden because "a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had 'no rational tactical purpose' for an action or omission." (*Mickel*, *supra*, 2 Cal.5th at p. 198.) "On direct appeal, if the record '"sheds no light on why counsel acted or failed to act in the manner challenged,"' we must reject the claim '"unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation."'" (*People v. Caro* (2019) 7 Cal.5th 463, 488.) If the record contains no explanation for counsel's actions, then we have "no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel's actions or failure to take certain actions were objectively unreasonable." (*Mickel*, at p. 198.)

The record is not adequate on direct appeal to assess whether Lemus's counsel provided ineffective assistance by failing to request CALCRIM Nos. 522 and 625, because counsel agreed to have the jury instructions conference conducted off the record. During trial, the court indicated outside the presence of the jury that it was prepared to discuss jury instructions. Defense counsel responded: "Essentially, for the jury instructions, defense would be incorporating by reference the People's instructions and then just adding—requesting to add the [CALCRIM Nos.] 505, 570, 571, 572 instructions. Those are basically the self-defense, imperfect self-defense, heat of passion, voluntary manslaughter." After defense counsel made this statement, the court asked both counsel if they were "willing to waive the court reporter" with the understanding

that any objections would be "put . . . on the record later on." Defense counsel responded, "I would propose that we waive reading (sic) of the court reporter unless there's a specific one that we need to object to." The prosecutor agreed. On the record the following morning, both the prosecutor and defense counsel agreed that they discussed and reviewed the "final packet" in the judge's chambers and that it was "agreed upon without exception."

Because there is no reporter's transcript of the instructions conference held in chambers, the record does not reveal whether defense counsel did or did not request CALCRIM Nos. 522 or 625 or whether he contemplated them in any way. Indeed, in his opening brief, Lemus implicitly acknowledges the deficiency, asserting that trial counsel "does not appear to have" requested the instructions. It is possible that even if defense counsel did not request those instructions, they were discussed and counsel explained why he did not request them. It is also possible that a discussion about other instructions elucidated a reason or reasons why defense counsel did not request CALCRIM Nos. 522 and 625, if they in fact were not requested. Without a reporter's transcript, we cannot even confirm on direct appeal whether Lemus's counsel did or did not request the instructions, let alone any basis counsel may have had for whatever choice counsel made. We accordingly have "no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel's actions or failure to take certain actions were objectively unreasonable." (*Mickel, supra,* 2 Cal.5th at p. 198.) Lemus consequently cannot carry his burden of showing "'affirmative evidence that

counsel could have had "no rational tactical purpose"'" for proceeding as he did at trial. (*Sepulveda*, *supra*, 47 Cal.App.5th at p. 302.)

For the foregoing reasons, we conclude that Lemus's ineffective assistance claim must be pursued on habeas corpus, and we decline to address its merits on direct appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MENETREZ
J.

We concur:

McKINSTER
Acting P. J.

RAPHAEL
J.