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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CARL BRIGHT, Defendant and Appellant.	B264692 (Los Angeles County Super. Ct. No. BA414940)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Richard C. Neuhoff, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Carl Bright of second degree murder (Pen. Code § 187)[1] and found true the special allegation that defendant used a deadly and dangerous weapon in commission of the crime (§ 12022, subdivision (b)(1)). The trial court sentenced defendant to 16 years-to-life in state prison. Defendant contends that multiple errors at trial misled the jury regarding the elements of murder and manslaughter. He specifically argues that the jury was incorrectly led to believe: (1) provocation under a heat of passion theory of voluntary manslaughter must be sufficient to cause a reasonable person to kill; (2) only facts specifically testified to at trial could be considered in determining defendant's guilt; (3) imperfect self-defense requires consideration of what a reasonable person would believe; and (4) implied malice does not require that defendant deliberately acted with conscious disregard for human life. He further contends that any failure of trial counsel to object to the errors constituted ineffective assistance of counsel, and even if the individual errors do not warrant reversal, their cumulative effect was prejudicial.

We affirm the judgment.

FACTS

Prosecution

The Murder

Defendant and Robert Brown both lived in the Skid Row area of Los Angeles. Brown described defendant as being "a brother" to him. Brown was homeless and staying in a shelter. Defendant provided Brown food, lent him money, and let him wash his clothes and take showers in his apartment. They saw each other almost every day.

On June 10, 2013, Brown and defendant spoke on the phone about Brown

[1] All further statutory references are to the Penal Code unless otherwise specified.

repaying a $100 debt. Brown took the money to defendant's apartment at around 11:00 in the morning. Defendant came downstairs to admit Brown. He confided, "'I just need to trust you with something.'" Defendant normally would check Brown in as a guest before taking him upstairs, as required by the single resident occupancy hotel where he lived, but that day he led Brown straight to the stairwell and up to the apartment. He repeated that he needed to trust Brown when they reached the door. Defendant's apartment was usually immaculate, but when defendant opened the door, Brown saw that the entertainment center had been knocked over. There was blood everywhere.

Defendant led Brown to the bathroom, where a woman, later identified as Gina Marie Dodd, was lying in the bathtub. Brown asked if she was dead. Defendant replied, "'Yes. I had to kill the bitch.'"

Defendant told Brown that he had been out in front of his apartment the night before, when the woman stopped him and asked to come inside.[2] Defendant took her to his apartment, where they "part[ied]" for a while. He left the apartment, and returned to find her going through his belongings. He asked the woman what she was doing. She said that she was doing what she wanted. He responded, "'Oh, so basically you just going to do whatever you want? . . . No, you're not. Not here.'" Defendant grabbed the woman and began to choke her but "[h]e started getting weak. So that's when he took his hand off her and he told her, 'You get yourself together, I'm going to get myself together and you get the hell out of my apartment.'" The woman said she was not going anywhere and she was not going to stop going through defendant's things. He repeatedly insisted that she leave, but she refused. Defendant told Brown he was not going to let the woman disrespect him. He said he asked her if she "want[ed] to die tonight." The situation continued to escalate. Defendant could not remember what happened after that. He woke up and saw the woman's dead body. Defendant never told Brown that the woman

[2] In an interview with police, Brown said defendant told him the woman was smoking, got spooked, and needed to get inside. In his grand jury testimony, Brown stated that defendant said the woman told him she was trying to get away from someone and needed somewhere to go.

punched, kicked, or tried to stab him, and never said the woman had a screwdriver or other weapon in her hand, or that he was afraid of her.

Defendant cleaned the apartment after telling Brown what happened. He washed blood off the floor and walls, and put a bloody screwdriver in the dishwasher. He then smoked cocaine. Defendant wanted Brown to spend the night at the apartment as a hotel guest and help him get rid of the body. Brown feigned a willingness to help, but did not assist defendant or see defendant attempt to dispose of the body.

Brown left the apartment for a short while at some point. When he returned, the living room had been cleaned up. A little before 7:00 p.m., defendant and Brown went to buy some marijuana. While defendant had a conversation with a person on the street, Brown indicated that he was going to continue looking for some marijuana. Instead he walked to a nearby police station and reported the crime.

Search of Defendant's Apartment

Officer Hierberto Brito and his partner arrived at defendant's apartment sometime between 6:00 and 7:00 p.m. that evening. They waited for Sergeants Severins and Lopez to arrive, and then knocked on the door. Defendant opened the door and consented to Sergeant Severins's request to search the apartment. Officer Brito remained outside the apartment with defendant while the search was conducted. Defendant appeared to be under the influence of cocaine. He was agitated and fidgeting, and his breath smelled of the drug. Defendant had no obvious injuries to his hands or wrists and was walking normally.

Detectives discovered Dodd's body in the shower. She was clothed and appeared to be approximately 40 to 50 years old. There were puncture wounds to Dodd's torso. Her hair was wet, and parts of her blouse were burned. There was also a silver substance resembling nail polish on her body. The apartment smelled of acetone and there were several empty nail polish bottles. There were red stains in the living room that appeared to be blood. Officers recovered a screwdriver from the counter top.

Defendant's Arrest and Statement

Officers arrested defendant at approximately 7:10 that evening and took him to the police station later that night. Because the holding cell was very cold, officers handcuffed defendant to a bench outside the cell. Defendant suffered a seizure between 3:00 and 6:00 a.m. the next morning. He lost consciousness and broke or dislocated his arm, which was still handcuffed to the bench. He was transported to the hospital for treatment, but was returned to jail when he became responsive again later that day. Defendant was questioned by Detectives Sergio Ortiz and Al Marengo at about 5:00 p.m.

Defendant told the detectives that a strange woman ran up the stairs to his door on the morning of June 9. She said someone was chasing her, and asked him to let her in, so he brought her inside. The woman took out some pipes and asked for beer. Defendant left to buy her beer, and when he returned, she was rummaging through his belongings and stealing quarters from his "bank." He told the woman she had to leave. She screamed obscenities and used abusive language. Defendant could not tolerate her disrespect, and "one thing led to another."

Defendant said he "snapped" when the woman hit him across the jaw and called him "bitches and shit." He grabbed her, choked her, and told her, "You gotta go, you gotta go." He released his grip and let her go, again telling her that she had to leave. Defendant began to worry that he would lose his apartment because the woman had come upstairs without signing in and was making a lot of noise. She kept "cussing and carrying on." The woman grabbed a screwdriver, which defendant knocked out of her hand, and "it went from there." He stabbed the woman with a folding knife, which he disposed of later. The detectives asked defendant if he had tried to cut the woman up, and defendant responded, "Well, no, I didn't try to cut her up but if you gonna start something, (unintelligible) have to." When they asked again, he said, "I snapped at that point, I don't know." The detectives asked if he had tried to set the woman on fire, and he responded, "I thought about it." He tried to do it using alcohol, but then stopped

himself because "[t]his ain't something for you to do."

Defendant told the detectives he had personal problems. His mother, grandmother, and daughter had all died that year. He did not have a prior criminal record and had not caused any trouble at the hotel where he was living. He said he would never hit a woman, but he was "not to be fucked with . . . or disrespected." He explained that "anybody can be pushed."

After the interview concluded, defendant's face was photographed to document any possible injuries that the woman may have caused by hitting him in the jaw. Detective Ortiz did not observe any injuries other than the injuries to defendant's arm caused by the seizure.

Other Evidence

The autopsy on Dodd's body revealed the following: Dodd suffered sharp force injuries, blunt force injuries, and burns. There were 40 sharp force injuries, including 20 wounds which were incised, or superficial, and 20 stab wounds, three of which were fatal. Two of these fatal wounds were to Dodd's back, and one was to the rear of her left side. One of the fatal wounds was more likely to have been inflicted by a knife than by a screwdriver, but it was undetermined how the other two wounds were inflicted. Seventeen of the sharp force wounds were inflicted postmortem. The 23 remaining wounds were inflicted either before Dodd died or around the time of her death. Two postmortem injuries were consistent with attempts to remove Dodd's right big toe and her left arm. Dodd's left hand had seven wounds that appeared to be defensive. She had no wounds to her right hand.

Dodd had bruising on her shoulder, knees, feet, arm, and neck that appeared to have been inflicted before or near the time of death. The front of Dodd's neck was bruised, and the hyoid bone beneath this bruise had a minimally displaced fracture, an injuries consistent with manual strangulation, either by a hand or by a choke hold.

Dodd had second- and third-degree burns on approximately 30 percent of her

body. The burns were inflicted post-mortem. A toxicology screen revealed that Dodd had methamphetamine, marijuana, and cocaine in her system.

Defense

Dr. Ettie Rosenberg testified that the effect of ingesting a combination of methamphetamine, marijuana, and cocaine would be significantly greater on an individual than would be expected simply by adding together the effects of the individual substances. Someone who ingested the combination of drugs found in Dodd's body would likely exhibit irritability and aggression.

Neuropsychologist Deborah Miora diagnosed defendant as having dysexecutive syndrome. People with dysexecutive syndrome have difficulty inhibiting themselves, thinking about what they are doing, and weighing options. Dysexecutive syndrome is not listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM). Miora explained that the term "dysexecutive disorder" is a "way[] of describing brain-based behavior[]," that is "not inconsistent" with the DSM.

DISCUSSION

Defendant complains that he was prejudiced by several instructional errors at trial. The majority of defendant's arguments are based on the potential effect of the prosecutor's comments in closing argument and the trial court's responses to the jury's questions on the jury's understanding of the elements of the offenses set forth in the various verdicts the jury considered. Citing to *People v. Beltran* (2013) 56 Cal.4th 935 (*Beltran*), defendant characterizes these errors as instructional, and disavows any claim of prosecutorial misconduct conduct.[3] We consider the prosecutor's comments only as they

[3] In *Beltran*, the California Supreme Court considered the effect of the prosecutor's comments in closing argument on the trial court's instructions, noting that the issue was one of instructional error. (*Beltran*, *supra*, 56 Cal.4th at 954, fn. 15.)

pertain to the alleged instructional error.

Defense counsel did not object to the instructions defendant now challenges or to the trial court's responses to the jury's questions. "Generally, a party forfeits any challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [(*Hudson*)]; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087 (*Ramos*).) The rule of forfeiture does not apply, however, if the instruction was an incorrect statement of the law (*Hudson*, *supra*, 38 Cal.4th at p. 1012), or if the instructional error affected the defendant's substantial rights. (§ 1259; *Ramos*, *supra*, 163 Cal.App.4th at p. 1087.) '"Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." [Citation.]' (*Ramos*, *supra*, 163 Cal.App.4th at p. 1087.)" (*People v. Franco* (2009) 180 Cal.App.4th 713, 719.) Resolution of defendant's claims of ineffective assistance of counsel also requires that we assess the substance of his contentions. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 243.) We therefore consider defendant's contentions on the merits, despite his failure to object below.

We hold that the trial court did not err in instructing the jury, and that even if the trial court had erred, any error was harmless under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Because defendant's contentions fail on the merits, defense counsel did not render ineffective assistance by failing to object to the instructions in the trial court. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90 ["[f]ailure to raise a meritless objection is not ineffective assistance of counsel"].) Having concluded that the trial court did not err, we also reject defendant's contention that he suffered prejudice from cumulative errors at trial. (See *People v. Hines* (1997) 15 Cal.4th 997, 1061.)

Legal Principles

We review de novo the question of whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.]" (*Ramos*, *supra*, 163 Cal.App.4th at p. 1088.) "A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67-68 (*Cross*).) """In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Ramos*, *supra*, at p. 1088.)

Where error exists, we determine its prejudicial effect under the standard of review set forth in *Watson*, *supra*, 46 Cal.2d at page 836. (*People v. Flood* (1998) 18 Cal.4th 470, 490.) An error is prejudicial and requires reversal only when there is a "reasonable probability that the outcome of defendant's trial would have been different had the trial court properly instructed the jury . . . ." (*Ibid*.)

Proceedings

Jury Questions

Relevant here, the trial court instructed the jury on first degree premeditated murder (CALCRIM Nos. 520, 521) and the lesser included offenses of second degree murder (CALCRIM No. 520), and voluntary manslaughter under theories of heat of passion (CALCRIM No. 570) and unreasonable self-defense (CALCRIM No. 571). The jury was also instructed on justifiable homicide under a self-defense theory. (CALCRIM

No. 505.)

During deliberations, the jury asked:

"Are we to judge premeditation simply based on the evidence or does the defendant's state of mind during the incident become a factor we should consider? Are we to judge the defendant's state of mind during the incident or is our standard to be any normal average person [*sic*] state of mind?"

The trial court discussed the jury's question with counsel outside the presence of the jury. Initially the court stated it planned to answer the questions by directing the jury to review the instructions. The prosecutor agreed with this approach. Defense counsel argued the court should instead further clarify or provide more specific instructions on first and second degree murder because those crimes required a "specific state of mind." Defense counsel advocated that the court "actually mention[] the charges themselves."

"The Court: Well, the instructions -- the instructions, because it applies to voluntary, it applies to all of them, the instructions, when they refer to the defendant's state of mind, are talking about the defendant. When they're talking about whether a state of mind is objectively reasonable or unreasonable or whether a person of average disposition would react in the same fashion, those are objective standards. Otherwise, it's subjective.

"[Defense Counsel]: I understand. But if -- my recommendation is that we further clarify and explain that for murder one and murder two, that requires you take into consideration his subjective state of mind.

"The Court: All of them do. Voluntary does too.

"[Defense Counsel]: Well, the heat of passion is a reason.

"The Court: No. But at the same time he has to be -- it's both. There's an objective and subjective element to both voluntary manslaughter theories that were presented. Both of them. I mean, I could tell them that. There's subjective and objective elements."

The prosecutor maintained that referring the jury to the instructions was the better course, because "[t]he instructions will give them the exact state of mind that they need

for each crime." The court responded that it would instruct the jury regarding state of mind, but would not go into detail regarding specific charges.

Clarifying Instructions

The court addressed the jury as follows, without objection:

"Now yesterday I received a question that said: 'Are we to judge premeditation simply based on the evidence' -- I don't know what 'simply' means, but you are supposed to base it on the evidence -- 'or does the defendant's state of mind during the incident become a factor we should consider?'

"The answer to both questions is yes. Okay? The issues relating to -- when you look at the instructions, read the instructions, they talk about the defendant's state of mind. All the evidence that was received in the trial goes to make that determination as to what the defendant's state of mind is. When we're talking about particular states of mind in the instructions, for example, premeditation and deliberation, the defendant had to have deliberated and premeditated based on the definition given to you in the instructions. Okay?

"On the other hand, there are portions of state of mind -- any time you talk about state of mind, we're talking about the defendant's state of mind. However, there are concepts that involve both subjective -- that's the defendant's state of mind -- and objective tests. That's what a reasonable person would think. Okay?

"So when you see the word 'reasonable person' in the instructions or 'person of average disposition,' now we're no longer talking about the defendant. We're talking about an objective standard. We're talking about a reasonable person. Okay?

"And so certain concepts in the instructions relating to voluntary manslaughter contain both objective and subjective components. So they refer to both the defendant has to be acting with that particular state of mind and a reasonable -- and then those actions are also tested by a reasonable person standard, whether a reasonable person would believe X or react in the same manner. Okay? So, A, you have to react in that

manner, and, B, a reasonable person would have reacted in that manner.

"So look at those instructions because they'll define it.

"On justifiable homicide, again, that's another area, look at that. That involves a subjective component, what the defendant believed, and an objective component. All right? It's not just enough that the defendant believed it. It has to be a reasonable belief for it to be a justifiable homicide. Okay? So that's what we're talking about in terms of looking at it.

"When you look at state of mind in general, we're talking about his state of mind. How you judge that is you look at all the evidence. All right? All the surrounding evidence and circumstances in order to determine -- to draw those types of conclusions and any other evidence that comes into play. Okay?

"All right. So I believe that answers your questions from yesterday[.]"

Analysis

Standard for Provocation

Defendant first contends that the combination of the prosecutor's argument and the court's response to the jury's questions during deliberation caused the jury to incorrectly believe that the standard for provocation under a heat of passion theory of voluntary manslaughter is whether a reasonable person in defendant's position would be provoked to kill, rather than provoked to "react rashly from passion and not from judgment," which is the correct standard.

Legal Principles

Voluntary manslaughter is the intentional but nonmalicious killing of a human being, and is a lesser included offense of murder. (§ 192, subd. (a); *People v. Moye*

(2009) 47 Cal.4th 537, 549 (*Moye*); *People v. Benavides* (2005) 35 Cal.4th 69, 102; *People v. Lee* (1999) 20 Cal.4th 47, 59 (*Lee*).) A killing may be reduced from murder to voluntary manslaughter if it occurs upon a sudden quarrel or in the heat of passion on sufficient provocation. (*Beltran*, *supra*, 56 Cal.4th at pp. 942, 951; *People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*).) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201; *Beltran*, *supra*, at p. 942; *People v. Enraca* (2012) 53 Cal.4th 735, 759 (*Enraca*).)

A heat-of-passion theory of manslaughter has both an objective and a subjective component. (*Moye*, *supra*, 47 Cal.4th at p. 549; *Manriquez*, *supra*, 37 Cal.4th at p. 584.) "The provocation which incites the defendant to homicidal conduct . . . must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim." (*Lee*, *supra*, 20 Cal.4th at p. 59; *Manriquez*, *supra*, at p. 583.) The victim's conduct may have been physical or verbal, but it must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Beltran*, *supra*, 56 Cal.4th at p. 939; *Enraca*, *supra*, 53 Cal.4th at p. 759; *Lee*, *supra*, at p. 59.) To satisfy the subjective component, the defendant must have killed "while under 'the actual influence of a strong passion' induced by [adequate] provocation. [Citation.]" (*Moye*, *supra*, at p. 550.) """[N]o specific type of provocation [is] required,""" and "the passion aroused need not be anger or rage, but can be any """[v]iolent, intense, high-wrought or enthusiastic emotion""" [citation] other than revenge [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 163; *Beltran*, *supra*, at p. 950; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1139.)

Proceedings

In closing argument, the prosecutor discussed the level of provocation necessary to

reduce murder to manslaughter due to heat of passion:

"Heat of passion. The defendant was provoked, all right? We could probably all agree that the defendant was provoked in this case. I mean he ended up killing.

"The defendant acted rashly and under the influence of intense emotions. That one is up for argument. I don't think that he necessarily always acted rashly or under intense emotion, but certainly during certain periods he did.

"This is where the defendant fails. This is why it is not heat of passion. This is a reasonable standard the law injects into this as well. The provocation would cause a person of average disposition -- not [defendant] -- to act rashly and without due deliberation from passion rather than from judgment.

"A lot of technical words, a lot of legal stuff, but I'm going to try to break this down into a more simple fashion in a second.

"Slight or remote provocation is not sufficient. Okay? That's also where he fails because slapping somebody is not sufficient provocation to kill them. It is not enough that the defendant was simply [] provoked. That's what we're talking about. There's also a cooling off period between -- if you've been provoked and you had a chance to calm down, then it's not heat of passion.

"But let me -- don't worry about the screen for a second. Just let me talk to you about what we see in the law as something that would rise to the level of heat of passion. Okay? Sometimes it's easier to explain things by giving you examples rather than reading a bunch of legal words off of a board.

"Imagine this scenario. You've been married to your wife for 15, 20 years. You have children together. You have a family. You have a mortgage. You both work very hard. You both love each other. At least you think you do. You come home early from work. You open the door to surprise your wife. You go to the bedroom and she's in bed with another man. You lose control. This is the wife that you've loved. You've spent 15, 20 years with her. You've raised children together. She's cheating on you. You freak out. You grab the baseball bat that you have next to your bed just in case an intruder comes and you beat the living daylights out of the guy and you kill him.

"Is that murder? Probably not. Would somebody in the same position maybe entertain that those emotions might overcome you because of everything that you've spent your life for?

"The law says if somebody of an average disposition -- this could work for men or women -- would be under such strong emotions that you can't control yourself and you kill somebody, then that's heat of passion and voluntary manslaughter. Because it's not self-defense; right? They weren't going to attack you. You had no real reason for killing them. You didn't plan the attack at all. On the contrary, you came home early to surprise your wife.

"So that's the kind of heat of passion that we're talking about that knocked somebody down from murder to manslaughter.

"We are not talking about a provocation of your wife or your husband who had a little too much to drink and slaps you and you kill them, which is much more than what we have here.

". . . It's not heat of passion because a regular Joe wouldn't have acted that way under that kind of emotion because the woman wouldn't leave and she slapped him."

Discussion

Defendant argues that this case is analogous to *Beltran*, *supra*, 56 Cal.4th 935. The *Beltran* jury had been instructed regarding provocation with a modified version of CALCRIM No. 570 as it existed in 2006. (*Beltran*, *supra*, at p. 954.) The instruction stated, in pertinent part, that: "'In deciding whether the provocation was sufficient, consider whether a person of average disposition *would have been provoked and how such a person would react in the same situation knowing the same facts*.'" (*Ibid.* [italics added].) The prosecutor in *Beltran* argued to the jury that a reasonable person would not kill if "'[y]ou stub your toe'" or get "'cut off in traffic.'" (*Ibid.*) Defense counsel countered that the provocation need not have caused a person of average disposition to kill, but must have caused the person to act rashly and impulsively, without thinking. (*Id.*

at p. 943, fn. 4.) During deliberations, the jury asked: "'In instruction 570: "In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts." Does this mean to commit the same crime (homicide) or can it be other, less severe, rash acts[?]'" (*Id.* at p. 945.) The trial court responded: "'The provocation involved must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion that his judgment or reasoning process was obscured. This is an objective test and not a subjective test.'" (*Ibid*. [fn. omitted].) Beltran was convicted of second degree murder. (*Ibid*.)

On appeal, the parties argued regarding the nature of the provocation sufficient to constitute heat of passion. Beltran contended that the correct standard was whether the provocation would have caused a person of average disposition to act rashly and impulsively, without thinking. The Attorney General maintained that the requisite provocation must be of such a nature that a person of average disposition would be provoked to kill. Beltran also contended that the prosecutor's closing argument, the jury instructions, and the trial court's response to a question from the jury all reflected the same error of law regarding the degree of provocation necessary to negate malice and reduce the degree of homicide to voluntary manslaughter. He argued that this error permitted the jury to reject his claim of voluntary manslaughter, and reach a verdict of second degree murder, if it found that the victim's provocation would have caused a reasonable person to act rashly, but was not sufficient to cause such a person to kill. The Court of Appeal reversed, agreeing with Beltran as to the standard for provocation, and concluding that the relevant jury instruction was at least ambiguous, if not misleading, and that under the circumstances of the case, the error was prejudicial. (*Beltran*, *supra*, 56 Cal.4th at p. 945.)

The California Supreme Court agreed with the Court of Appeal that "[t]he proper standard focuses upon whether the person of average disposition would be induced to react from passion and not from judgment." (*Beltran*, *supra*, 56 Cal.4th at p. 939.) But,

contrary to the Court of Appeal, the Supreme Court held that the language of CALCRIM No. 570 was unambiguous "as written," and would have been "unproblematic" "under ordinary circumstances." (*Beltran*, *supra*, at p. 954.) It concluded that in the particular circumstances before it, however, that the parties' arguments may have "muddied the waters." (*Ibid*.) The Court explained that the prosecutor's examples, "although hardly clear, seemed to suggest that the jury should consider the ordinary person's conduct and whether such a person would kill." (*Ibid*.) The Supreme Court ultimately reversed the Court of Appeal, reasoning that the jury had asked for clarification of the standard for provocation, and the trial court had responded with a correct statement of law, such that it was "not reasonably probable that any possible ambiguity engendered by counsel's argument misled the jury." (*Beltran*, *supra*, at p. 956.) The Supreme Court additionally held that the defendant had not been prejudiced under *Watson*, *supra*, 46 Cal.2d 818, because "'the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citations.]" (*Beltran*, *supra*, at p. 956.)

Defendant argues that the instant case closely parallels *Beltran*, with the exception that here, the court's response to the jury's question created further confusion causing prejudicial error. We disagree. The instant case differs from *Beltran* in significant ways, but is similar to *Beltran* in that (1) the trial court accurately responded to the jury's questions, and (2) the evidence supporting a result more favorable to defendant is comparatively weak when evaluated against the strong evidence in support of defendant's conviction for second degree murder.

The *Beltran* jury was instructed under a modified version of the original CALCRIM No. 570, adopted in 2006. As *Beltran* noted, CALCRIM No. 570 was revised in 2008, with the result that the relevant language was revised to state: "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 from judgment*." (*Beltran*, *supra*, 56 Cal.4th at p. 954, fn. 14 [italics

added].) This was the version of the instruction given at defendant's trial.[4] The language of the 2008 revision articulates the law in a clear manner, and includes the crucial language of the standard articulated in *Beltran*—"would have reacted from passion rather than from judgment"—which was omitted from the earlier instruction. (See *Beltran*, *supra*, at pp. 939, 948, 954, fn. 14.) Whatever ambiguity existed in the 2006 version of CALCRIM No. 570 "as written," the 2008 version is unambiguous and is not easily susceptible to manipulation by counsel's arguments.[5] The relevant language of CALCRIM No. 570 [2008 rev.] states the law fully and correctly. The trial court did not err in instructing the jury in this case, nor could there have been any latent ambiguity in the instructions in light of the prosecutor's closing argument.

Moreover, in *Beltran*, the jury's question demonstrated that it was confused as to the standard for provocation, as it asked for clarification of the standard specifically. (*Beltran*, *supra*, 56 Cal.4th at p. 945.) The jury question in this case related to premeditation, not provocation. The jury asked: "Are we to judge premeditation simply based on the evidence or does the defendant's state of mind during the incident become a factor we should consider? Are we to judge the defendant's state of mind during the incident or is our standard to be any normal average person [*sic*] state of mind?"

Defendant suggests the jury's inquiry concerns both first degree murder and voluntary manslaughter. He construes the second sentence of the jury question as pertaining to voluntary manslaughter. We are not persuaded.[6] The only point raised in

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[4] Although defendant refers to the language in the two versions of the instruction as "similar," "essentially the same," and "substantively the same," he does not provide the language of either version in his briefs, or compare the language of the two versions.

[5] We note that this language has remained unchanged throughout the three revisions subsequent to 2008.

[6] Because the first part of the jury's question references premeditation, it is more likely that both parts relate to first degree murder, for which premeditation is required, or that the second part of the question refers to the relevant mental state in the charges generally.

the second sentence relates to the application of an objective or subjective state of mind, without reference to the issue of provocation. There is no indication that the jury misunderstood the court's full and correct instruction regarding the standard for provocation.

Defendant argues that, unlike the trial court in *Beltran*, here the court's statement referring the jury to the instructions on the subjective and objective components of voluntary manslaughter did not properly inform the jury of the required mental state. As viewed by defendant, the trial court's response "reinforce[ed] the prosecution's incorrect statements that provocation requires that 'somebody of an average disposition . . . would be under such a strong emotion that you can't control yourself *and you kill somebody*' and would have 'acted that way.'" Defendant reasons that the trial court improperly "emphasized that [defendant's] actions were 'to be tested by a reasonable person standard, whether a reasonable person would . . . *react in the same way*' as [defendant] did. . . . 'So, . . . 'A, you [the defendant] have to react *in that manner*, and, B, a reasonable person would have reacted *in that manner*.'"

Defendant's incomplete recitation of the trial court's response omits the court's explanation that the instructions would "refer both as to the defendant has to be acting with a particular state of mind and . . . whether a reasonable person would believe X or react in the same manner. . . . [¶] So look at those instructions because they'll define it." As described by defendant, it appears the court was addressing how the jury should evaluate defendant's actions, and not his mental state. Instead, the record shows that the court directed the jury to refer to the instructions to determine the necessary state of mind for each charge. Defendant's concern regarding the court's explanation that the defendant or a reasonable person must "react in that manner" is also misplaced. As the Supreme Court in *Beltran* stated when discussing the trial court's response to the jury's question: "Telling the jury to consider how a person of average disposition 'would react' properly draws the jury's attention to the objective nature of the standard and the effect the provocation would have on such a person's state of mind." (*Beltran*, *supra*, 56 Cal.4th at p. 954 [fn. omitted].)

Here, as in *Beltran*, the court's response to the jury's question was accurate and responsive to its question. The court explained that all of the charges required consideration of defendant's subjective mental state, but that when the instructions referred to a "reasonable person" or "person of average disposition" the jury was also required to consider how a reasonable person—not defendant—would react. In those instances, the court admonished the jury to review its instructions to determine how to employ the reasonable person standard, which necessarily included how to correctly employ the standard to evaluate provocation.

We also reject the contention that the prosecutor incorrectly stated the standard for provocation. But even assuming that portions of the prosecutor's argument were legally incorrect, and that defense counsel was remiss for failing to object to the instructions and the court's responses, defendant cannot show prejudice. Given the significant difference in the 2006 and 2008 versions of CALCRIM No. 570, it was not likely that the prosecutor's arguments would have caused confusion. The jury was told that "[n]othing that the attorneys say is evidence"; that it must follow the law as explained by the court; and that if the attorneys' comments on the law conflicted with the court's instructions, it was bound to follow the instructions. (CALCRIM Nos. 222, 200.) "[W]e presume that the jury relied on the instructions, not the arguments, in convicting defendant." (*People v. Morales* (2001) 25 Cal.4th 34, 47; *People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Najera* (2006) 138 Cal.App.4th 212, 224 (*Najera*).) "Arguments by counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, [citation], and are likely viewed as the statements of advocates; the latter . . . are viewed as definitive and binding statements of the law.' [Citations.]" (*People v. McDowell* (2012) 54 Cal.4th 395, 438.) Given the foregoing, it is not reasonably probable the jury disregarded the trial court's instructions in favor of the prosecutor's formulation of the law.

Nor is it probable that the result would have been more favorable for defendant had the jury been admonished not to consider the prosecutor's remarks. As was the case

in *Beltran*, here, "[g]iven the strong evidence supporting defendant's murder conviction and the comparatively weak evidence of any legally adequate provocation, a different result was not reasonably probable." (*Beltran*, *supra*, 56 Cal.4th at p. 957.) Defendant told Brown he was provoked by the woman going through his things, taking money from his "bank" of quarters, and "disrespecting" him verbally. Later, when he spoke with detectives, he added that the woman had hit him once in the jaw and reached for a screwdriver, which he knocked out of her hand. Assuming Dodd behaved as described by defendant, which is not likely given the complete lack of injury to defendant, these are not the type of provocations that would cause a reasonable person to react rashly from passion rather than from judgment. (See *Najera*, *supra*, 138 Cal.App.4th at p. 226 [calling defendant a "faggot," pushing him to the ground, and fighting with him "would not drive any ordinary person to act rashly or without due deliberation and reflection"]; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 826 ["voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words, a technical battery, or slight touching"].) Moreover, defendant's statements indicated that he was thinking through what was happening—he was angry at being disrespected and concerned that he could lose his housing because the woman had come upstairs without signing in and was "cussing and carrying on." (See *Beltran*, *supra*, at p. 950 ["One does not act rashly . . . simply by acting imprudently or out of anger. Even imprudent conduct done while angry is ordinarily the product of some judgment and thought, however fleeting"].) Defendant had the presence of mind to stop choking the woman in the midst of their confrontation. He said that after he began choking her, he let the woman go, and told her he would get himself together, and that she should get herself together, too, and leave his apartment. By exercising this restraint, defendant demonstrated that he was evaluating the situation rather than reacting blindly. He recognized that he did not have himself sufficiently "together," and made a decision to change course. The evidence strongly supports the conclusion that defendant weighed the consequences of his actions, but that when the woman persisted in her belligerent behavior, he ultimately decided he was "not to be fucked with . . . or disrespected" and

had been "pushed" too far. That he reached this conclusion through reflection, and not as a result of a rash response, is bolstered by his utter lack of remorse in describing the killing to Brown. Defendant did not express shock or disbelief at his own actions. He simply told Brown he "'had to kill the bitch.'"

Consideration of Inferences

Defendant contends that the following argument from the prosecutor led the jury to believe that it was not permitted to draw inferences from the facts, and should disregard anything that it did not hear from the witness stand:

"What is the evidence? Nothing the attorneys say is evidence. Why is that important? Well, when we get up here and talk to you, and specifically when the defense talked in their opening statement to you and said things like she was out of control, she came at him with a screwdriver, he had to hold her back, he had to choke her around the throat with his arm, all of those things, not evidence. If you didn't hear any of it from the witness stand, you'd have to disregard it. [¶] . . . [¶] . . . [¶] If you are unable to point to any piece of evidence that came from that stand that said that he was afraid, self-defense does not apply. And there was no evidence of it, ladies and gentlemen. None of the witnesses that testified for the prosecution ever said that man, [defendant], was ever afraid."

Defendant points to no specific instruction given by the trial court that could have been rendered ambiguous by the prosecutor's argument. Instead, he argues that the jury's use of the word "simply" in its question—"Are we to judge premeditation simply based on the evidence or does the defendant's state of mind during the incident become a factor we should consider?"—indicated that it was confused as to whether it could consider inferences. Defendant concedes that the jury's question "pertained on its face only to first-degree murder (of which he was acquitted)," but argues that "it allowed the jurors to continue to believe that inferences regarding [defendant's] state of mind were not matters that were 'based on the evidence' from the witness stand." In defendant's view, the jury

was asking "whether its duty was to assess premeditation '*simply* from the evidence' (i.e., simply from direct testimony 'from the witness stand') *or* whether its role was to consider 'the defendant's state of mind' (which would have required *inferences* to be drawn that no witness had testified to)."

Defendant asserts that the trial court's response of "yes" to each of the jury's "mutually exclusive, alternate views of the law" further confused the jury. Again, his recitation of the trial court's response to these questions is incomplete:

"The trial court responded to the first question first. 'I don't know what "simply" means,' the court said, 'but you are supposed to base it on the evidence.' The court then added that '[t]he answer to both those questions [i.e., to both parts of the first question] is yes.'"

Defendant omits that the trial court explained: "When you look at state of mind in general, we're talking about [defendant's] state of mind. How you judge that is you look at all the evidence. All right? All the surrounding evidence and circumstances in order to determine -- to draw those types of conclusions and any other evidence that comes into play." "All the evidence that was received in the trial goes to make that determination as to what the defendant's state of mind is."

Thus, "yes" was a logical, accurate response to both jury questions. The trial court removed "simply" from the question and told the jury that it must consider all of the evidence, and in addition, it must consider the defendant's mental state, which was based on "[a]ll the surrounding evidence and circumstances." There was nothing contradictory in the trial court's response. Even if we were to accept defendant's interpretation of the jury's questions, the answer "yes" to the question of whether it was permitted to consider defendant's mental state, was also an answer of "yes" as to whether it could draw inferences.[7]

[7] It is highly unlikely that the jury understood the prosecutor to be stating that only witness testimony and direct evidence could be considered. The prosecutor was directly responding to defense counsel's statements in opening argument that "[the woman] was out of control, she came at [defendant] with a screwdriver, he had to hold her back, he

Additionally, any error is harmless in light of the relative strength of the evidence in support of the conviction, as we discussed above.

Imperfect Self Defense

Defendant contends that the trial court's response to the jury's question, "Are we to judge the defendant's state of mind during the incident or is our standard to be any normal average person [*sic*] state of mind?" injected confusion regarding the imperfect self-defense theory of voluntary manslaughter by telling the jury that imperfect self-defense included an objective component.

"'Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.' [Citations.]" (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1446.)

The jury was instructed as to imperfect self-defense under CALCRIM No. 571:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense.

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had to choke her around the throat with his arm." His argument reiterated the trial court's instructions in CALCRIM No. 222, that: "'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence. [¶] Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true."

Additionally, later in closing argument, the prosecutor implored the jury to "base your decision on the evidence, and the evidence is the words of the defendant, the words of Mr. Brown . . . and then the physical evidence." He then went on to describe how lack of self-defense could be inferred from the facts, including physical facts like the nature and severity of the wounds to Dodd's body.

"If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. *The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.*

"The defendant acted in imperfect self-defense if:

"1. The *defendant actually believed* that he was in imminent danger of being killed or suffering great bodily injury;

"AND

"2. The *defendant actually believed* that the immediate use of deadly force was necessary to defend against the danger;

"BUT

"3. At least one of those beliefs was *unreasonable.*

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

"In evaluating the *defendant's beliefs*, consider all the circumstances as they were known and appeared *to the defendant.*

"The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

Defendant objects to the following portion of the trial court's response to the jury's question regarding when to apply an objective and/or subjective standard with respect to mental state: "However, there are concepts that involve both subjective -- that's the defendant's state of mind -- and objective tests. That's what a reasonable person would think. [¶] . . . [¶] . . . [S]o certain concepts in the instructions relating to voluntary manslaughter contain both objective and subjective components. So they refer to both the defendant has to be acting with that particular state of mind and . . . then those actions are also tested by a reasonable person standard, *whether a reasonable person would believe X* or react in the same manner. Okay? So, A, you have to react in that manner, and, B, *a reasonable person would have reacted in that manner.* [¶] So look at

those instructions because they'll define it." (Italics added.)

The trial court's response to the jury concerning "certain concepts in the instructions relating to voluntary manslaughter," was accurate and unambiguous. Defendant omits the portion of the trial court's response to the jury in which it specified that the jury was to employ an objective standard in specific circumstances: "So *when you see the word* '*reasonable person*' *in the instructions or* '*person of average disposition*,' now we're no longer talking about the defendant. We're talking about an objective standard. We're talking about a reasonable person. Okay?" (Italics added.) Given this explicit instruction, it is highly unlikely that the jury would misunderstand when the objective standard should be applied.

Additionally, CALCRIM No. 571 clearly states when defendant's own belief's must be considered: Defendant must have "actually believed" he was in imminent danger of being killed or suffering great bodily injury, and "actually believed" that the immediate use of deadly force was necessary to defend against the danger. The instruction also advises the jury regarding what to consider when evaluating "defendant's beliefs."

Finally, the court's statement that that the jury would have to consider "whether a reasonable person would believe X" in relation to the instructions for voluntary manslaughter was correct. To determine whether defendant was not guilty because he killed in self-defense or guilty of voluntary manslaughter under an imperfect self-defense theory, the jury had to decide whether "defendant's belief in the need to use deadly force was reasonable," which necessarily required that the jury determine what a reasonable person would believe in defendant's circumstances.

The trial court did not err in its response to the jury, but even if error had occurred, it was harmless for the reasons previously discussed.

Implied Malice

The jury was instructed on express and implied malice as defined in CALCRIM

No. 520. Defendant argues for the first time on appeal that CALCRIM No. 520 was internally inconsistent as to implied malice, because the jury was instructed implied malice requires that a defendant "deliberately acted with conscious disregard for human life," but later in the same instruction the jury was advised that malice aforethought "does not require deliberation." He argues that there is a reasonable likelihood that the jury understood the "does not require deliberation" instruction to prevail over the earlier instruction that it determine whether defendant "deliberately acted with conscious disregard for human life," particularly in light of CALCRIM No. 521's definition of "deliberation" as required for a conviction for first degree murder, which uses the terms "deliberate" and "deliberation" interchangeably.

As relevant here, the jury was instructed under CALCRIM No. 520 that:

"The defendant acted with *implied malice* if:

"1. He intentionally committed an act;

"2. The natural and probable consequences of the act were dangerous to human life;

"3. At the time he acted, he knew his act was dangerous to human life;

"AND

"4. He *deliberately acted with conscious disregard for human life*.

"Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. *It does not require deliberation* or the passage of any particular period of time." (*Id.*, italics added.)

CALCRIM No. 520 referred the jury to CALCRIM No. 521 for the elements of first degree murder, which includes the definition of "deliberation." The jury was instructed in part: "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 vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.*" (*Id.*, italics added.)

To the extent defendant argues that CALCRIM No. 520 is ambiguous, he has forfeited the issue by failing to seek a clarifying instruction in the trial court. CALCRIM No. 520 is a correct statement of the law, including its definition of implied malice and the admonition that malice aforethought does not require deliberation. CALJIC No. 8.11 ("Malice Aforethought"—Defined), the CALJIC analog to CALCRIM No. 520, has been upheld as a correct statement of law by our Supreme Court. (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1222 (*Dellinger*); see also *People v. Knoller* (2007) 41 Cal.4th 139, 152 (*Knoller*) [emphasizing that the language of CALJIC No. 8.11 and CALCRIM No. 520 articulate the standard set forth in *Dellinger*].) CALJIC No. 8.11 includes language indistinguishable from CALCRIM No. 520, and defines implied malice as requiring that defendant committed an intentional act "deliberately performed," but admonishing that "'aforethought' does not imply deliberation or the lapse of considerable time." Because CALCRIM No. 520 accurately defines implied malice, defendant may not complain on appeal that the instruction is ambiguous or incomplete because he did not request clarifying language in the trial court. (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Canizalez* (2011) 197 Cal.App.4th 832, 849.)

The contention also fails on the merits. The mental state of deliberation is an essential element of one form of first degree murder, but it is not required for second degree murder. (*People v. Hansen* (1994) 9 Cal.4th 300, 307, overruled on another ground in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1200, ["Second degree murder is the unlawful killing of a human being with malice, but without the additional elements [of] willfulness, premeditation, and deliberation[] that would support a conviction of first

degree murder. [Citations]"].) Despite the language of section 188 defining express malice—malice is "express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature"—our Supreme Court has long held that deliberate intent is not an element of second degree murder. (*People v. Saille* (1991) 54 Cal.3d 1103, 1114-1115, citing *People v. Valentine* (1946) 28 Cal.2d 121, 131-132 ["Deliberate intent, under the statute (Pen. Code, §§ 187, 189) is not an essential element of murder, as such. It is an essential element of one class only of first degree murder and is not at all an element of second degree murder"].) "In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less." (*Knoller*, *supra*, 41 Cal.4th at p. 143 [approving language that implied malice requires an act "deliberately performed"].) As used in CALCRIM No. 520, the requirement that a defendant "deliberately acted" reflects no more than a legislative determination, subject to long-standing judicial interpretation, that implied malice exists when "the killing was the result of an intentional act" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103) committed "'with conscious disregard for[] human life'" (*Dellinger*, *supra*, 49 Cal.3d at p. 1222). Accordingly, CALCRIM No. 520 correctly advises the jury that implied malice requires that the defendant "deliberately acted with conscious disregard for human life" but that the mental state of deliberation is not required to prove either form of malice aforethought.

Assuming some ambiguity exists in CALCRIM No. 520, reversal is not required. The parties' emphasis at trial was on whether the killing was a murder of the first or second degree, and no argument was made that defendant did not act deliberately as required for implied malice. In view of the instructions and the parties' arguments, there is not "a reasonable likelihood the jury understood the instruction in the way asserted by the defendant." (*Cross*, *supra*, 45 Cal.4th at p. 68.) The record strongly supports a finding that defendant killed with express malice, considering the nature and extent of the wounds inflicted by defendant. It is doubtful that the jury had cause to rely on implied malice as a theory of murder. Given the multitude of injuries defendant inflicted on Dodd, it is not reasonably probable the jury failed to find, at a minimum, that defendant

acted with implied malice when he "deliberately acted with conscious disregard for human life." We are skeptical that error occurred, but if so, defendant has not established prejudice. (Cal. Const., art. VI, § 13; *Watson*, *supra*, 46 Cal.2d at p. 836.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

RAPHAEL, J.*

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