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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MANUEL ARMENDARIZ, Defendant and Appellant.	B238000 (Los Angeles County Super. Ct. No. VA117980)

APPEAL from a judgment of the Superior Court of Los Angeles County. Roger Ito, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Manuel Armendariz of second degree murder in violation of Penal Code section 187, subdivision (a)[1] (count 1). The jury found that defendant personally and intentionally discharged a handgun, which caused great bodily injury and death to the victim within the meaning of section 12022.53, subdivision (d).

The trial court sentenced defendant to a term of 40 years to life in state prison. The sentence consisted of 15 years to life as the base count, plus a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d).

Defendant appeals on the grounds that: (1) the trial court erred in not instructing on the lesser included offense of heat of passion manslaughter; (2) it was error to instruct with CALCRIM No. 522 that provocation should be considered in deciding whether murder is reduced to manslaughter where only imperfect self-defense manslaughter instructions were given; (3) the trial court committed reversible error by not instructing the jury that an unintentional killing during an assaultive felony constitutes voluntary manslaughter; and (4) there was insufficient evidence to sustain a finding of murder, since the uncontroverted testimony showed that defendant acted in perfect or imperfect self-defense.

FACTS

Prosecution Evidence

On the afternoon of November 16, 2010, Ruben Saenz drove a black Escalade to a shopping area in the City of Bell. Josue Lemus was the front-seat passenger, Juan Valencia was sitting behind him, and a young man named Arturo was in the right rear passenger seat. When they arrived at the shopping area, Valencia got out of the car and entered a small market while the other young men waited in the car. They listened to music as they waited.

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

Lemus noticed a man, later identified as defendant, impatiently standing at the corner across the street. When the traffic light turned green, defendant crossed the street toward the parking lot where the Escalade was parked. Lemus saw that defendant was Hispanic, and he was wearing a gray shirt, gray shorts, and a baseball cap. Defendant walked through the parking lot. Lemus then saw Valencia exit the market while looking down. Valencia and defendant bumped into each other. Although Lemus could not hear what Valencia and defendant were saying to each other, he knew "they were like kind of arguing." The two men were standing to the rear of the Escalade, and Lemus observed them while he looked backward over his right shoulder. It looked as if they were going to fight, but no one took a swing. Then Lemus heard defendant say, "Oh, yeah, oh, yeah" just before pushing Valencia. Valencia took two or three steps back upon being pushed. At that point, defendant took a gun from his waist area and fired a shot at Valencia. A couple of seconds later, defendant fired again. Lemus recognized the gun as a .357-caliber revolver. After the first shot, Lemus could not see Valencia because Valencia was trying to "hide" behind the Escalade. After firing the second shot, defendant ran. Lemus and Saenz both noticed that defendant had a distinctive tattoo under his eye.[2] Lemus never saw Valencia reach into his pockets for anything during the argument, and he never saw him move toward defendant after the first shot. Neither Valencia nor anyone else in the Escalade was carrying a gun or a weapon of any kind.

After defendant ran away, Valencia got back into the Escalade. No one noticed any injuries to him at that point. Saenz proceeded to follow defendant through the neighborhood in the Escalade. They eventually lost sight of defendant when he ran into the driveway of a home.

As Saenz began to make a U-turn, he and Lemus noticed that Valencia was "breathing real hard." Valencia told them he had been hit. They called 911 and

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[2] Defendant has a cursive "W" tattooed on his cheek bone below his left eye.

returned to the shopping area lot to wait for paramedics. Valencia was taken to the hospital, where he died.

Deputy Medical Examiner Job Augustine found one bullet entry wound in Valencia's left lateral abdomen and no exit wound. A bullet was found on the right side of Valencia's abdomen. Dr. Augustine measured Valencia at a height of 5'11" and a weight of 220 pounds.

Los Angeles County Sheriff's Department Homicide Detective Gary Sica arrived at the scene of the shooting at around 6:00 p.m. A citizen had provided a fired bullet, slightly deformed and jacketed, to one of the officers at the crime scene. There were no expended shell casings at the scene, which was consistent with the firing of a revolver. Detective Sica examined the Escalade and found one bullet hole in the right rear taillight housing.

Lemus and the others gave police a description of the man who shot Valencia and later worked with a sketch artist. A few days later, after being admonished, Lemus was shown two or more photographic lineups so that he could identify Valencia's killer.

Tracy Peck, a criminalist with the Sheriff's Department, examined two fired bullets in connection with Valencia's shooting. One was from the body of the decedent and was consistent with a .38 or a .357 Magnum. The other bullet submitted as evidence was compared to the bullet from the decedent and found to have been fired from the same firearm.

After defendant's arrest, Joshua Ramirez, a deputy sheriff at the men's central jail, was placed in defendant's holding cell in an undercover capacity. He was dressed like a gang member. Deputy Ramirez struck up a conversation with defendant, who was "awake and alert and [ ] very talkative." Their conversation was recorded and later played for the jury. Because Deputy Ramirez was posing as a "Mexican gang member," he used certain slang words that defendant would only know "if he was a Mexican gang member."

Deputy Ramirez asked defendant if he was from Whittier, and defendant said he was from "South Side WCS." He said to call him "Suspect." Defendant told Deputy Ramirez that he "murked" someone from South Side 13th Street, and the police were "just investigating." Ramirez asked defendant "Why'd he get at you?" Defendant replied, "Cause he was—he was trying to trip on me dog so he came and his homies tried to trip on me and I just let him have it, dog." The following conversation ensued:

"Ramirez: It was just you alone?

"[Defendant]: Just me alone, yeah.

"Ramirez: And that fool—that fool got brave and shit, huh—

"[Defendant]: Yeah.

"Ramirez: 'Cause you were stopped solo and shit?

"[Defendant]: Yeah.

"Ramirez: Fuck that fool.

"[Defendant]: I ain't tripping though, they don't got nothing—got nothing on me.

"Ramirez: Pero—

"[Defendant]: Not shit.

"Ramirez: —Pero—fuck,—he's dead though, right?

"[Defendant]: Yeah, sure. Sure.

"Ramirez: Did you—when you shot him did you saw [sp] him die?

"[Defendant]: Yeah.

"Ramirez: Yeah?

"[Defendant]: _____ something—like that's why I'm saying, that why I'm saying—they don't got nothing on me dog.

"Ramirez: [It's better that way, that they die, so they don't talk.]

"[Defendant]: Yeah."

Defendant admitted shooting Valencia twice with a .38, and that a .38 is "the best thing to use in shit like that" because "[n]o evidence is left behind." Defendant said that "one was a hollow and one was a regular." He said that Valencia "tried to run, but I— [¶] . . . [¶] shot him in the back, dog." The conversation continued:

"Ramirez: Good homie, fuck. He didn't have a cuete [gun], huh?

"[Defendant]: No. His homies were right there though.

"Ramirez: And what did his homies do, nada?

"[Defendant]: They didn't do shit, dog. They tried chasing in the car, but I tried to like light 'em up, but they fucking pussed out.

"Ramirez: Good. Fuck them.

"[Defendant]: Yeah, but it's all good."

Defendant told Deputy Ramirez that he disposed of the gun "like the next day." He said he had been thinking of taking off to Mexico, but he was arrested. Defendant said that the shooting appeared in the Los Angeles Times. "It just said it was a gang thingy, and then that he got shot twice in the torso and he died in the hospital." The following exchange occurred:

"Ramirez: You probably—you probably—only shot him the leg. You probably hit his kidney.

"[Defendant]: Yeah, 'cause I hit him with a hollow tip and a regular.

"Ramirez: Oh, yeah, he's done.

"[Defendant]: That shit rocked him.

"Ramirez: Fuck that fool then. What kind of—what kind—[What make was your .38]?

"[Defendant]: Smith and Wesson.

"Ramirez: Smith and Wesson? Mine was a Ruger. I like Smith and Wesson better though.

"[Defendant]: Yeah.

"Ramirez: They fucking – they kick though. My shit kicked.

"[Defendant]: I don't know. That one didn't kick on me though. I didn't—well, I shot it like that. Just _____ shot it like that. I shot—I shot it at that fucking _____.

"Ramirez: He didn't even see it, huh?

"[Defendant]: Nah, 'cause there was a lot of people around us and shit."

After sheriff's deputies removed defendant from the holding cell to question him, Ramirez told the guards that defendant had been reenacting the shooting with body motions right before he was taken out.[3]

When defendant returned to the holding cell, he told Deputy Ramirez that the deputies told him there was a video of him running away. Defendant remarked that he had been wearing a hat. He had told his interviewers that he was not at the shooting scene. They got mad and tried to confuse him. Defendant said they were not going to let him go and said, "Damn, I'm gonna do some time, dog." Defendant told Deputy Ramirez whom to call for help in getting rid of the gun that the deputy used in the crime he purportedly committed.

Defendant was not sorrowful during his conversation with Deputy Ramirez. Deputy Ramirez and defendant were alone throughout the entire conversation and no

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3 At trial, the prosecutor questioned the deputy about defendant's re-enactment as follows:

"[Prosecutor]: When you said that he was reenacting what was going on, was this when he was describing how the murder went down?

"[Deputy Ramirez]: Right, sir. How he pointed the weapon, sir.

"[Prosecutor]: Do you recall how he was reenacting it: was he standing up? Reenacting it sitting down? Can you describe to us what he was doing?

"[Deputy Ramirez]: He was sitting down, sir, and he just basically said, you know, I went like this (indicating).

"[Prosecutor]: So he made a gesture from his waistband as if pulling out an object?

"[Deputy Ramirez]: Right, sir.

"[Prosecutor]: And extending his arm pointing it forward?

"[Deputy Ramirez]: Right, sir."

other gang members or inmates were sitting in the cell with them. Detective Ramirez knew that defendant was 16 or 17 years old, and he did not threaten or touch defendant.

Defense Evidence

Defendant testified that on the day of the shooting, he went to get some pizza at the strip mall. He bumped into Valencia by accident. Valencia told defendant, "What the fuck, homie?" and defendant responded, "My fault. We're cool." Defendant wanted to "keep it mellow." Valencia looked angry and used an angry tone of voice. He cursed at defendant. When defendant repeated, "We're cool," Valencia told defendant that "he didn't give a fuck 'cause this is South Side 13th Street." Valencia was "all up in" defendant's face. Defendant noticed that Valencia was "pretty big," around 5'10", whereas defendant was only 5'5" or 5'6".

It appeared to defendant that his efforts to calm down Valencia were not working. Valencia kept saying he did not "give a fuck," and he kept repeating where he was from. Valencia had his hands in his pockets, and he was "like, moving his hands in his pocket, like, trying to pull something—something, I don't know." Defendant thought Valencia had a weapon. As soon as Valencia approached defendant, defendant pulled out a gun because he "thought [ ] he was gonna—gonna shoot me or something and I just—I got—I got paranoid and scared and panicked, and I just let off the gun." Defendant carried the gun for protection because he had been shot at several years before by people older and larger than he was. He was afraid of losing his life because of Valencia's words and gestures. After he shot Valencia, he noticed that the Escalade was chasing him.

Defendant remembered telling Deputy Ramirez in the holding cell that he shot Valencia but he did not remember telling him that he shot Valencia in the back. Defendant did not know which part of Valencia's body he shot. He denied that he was trying to kill Valencia and said that he shot only because he was afraid and thought Valencia was going to pull out a weapon. He wanted only to make him back away or

get scared off. He denied telling Deputy Ramirez that he knew that Valencia was a gang member and he denied telling Deputy Ramirez that he shot at the Escalade as it was chasing him. He lied to Deputy Ramirez because "I was trying to show him that 'cause I thought—I knew he was older, he told me he was older, so I was trying to make him think that I was a hard core gang member. . . . I didn't want him to think that I was a pussy."

On cross-examination, defendant acknowledged that he was a member of the WCS gang and that his moniker was "Suspect." Although he had gang tattoos under his eye and on his chest, he was not proud of being in a gang. He carried the gun for protection because "if you do run into rival gang, there will be problems." He acknowledged that the shopping center was located within WCS gang territory. He denied that he went there looking for trouble. Defendant acknowledged that Valencia never hit or pushed him and that he never saw an actual gun or part of a gun on Valencia. He denied pushing Valencia away before he shot him. Defendant said he himself took a step back. He said he ran for his life when the Escalade began chasing him. He hid the gun behind a trailer home and never saw it again.

Defendant acknowledged that Deputy Ramirez did not grab him or force him to say things. He admitted that the deputy was polite and conversational. He lied to Deputy Ramirez because he was scared of him. Defendant admitted that many things he said to Deputy Ramirez were true, including that he used a .38, that he shot a guy from South Side 13th Street gang, that he was known as Suspect from WCS, and that he was chased by the Escalade after he shot the victim. Defendant told the interviewing detectives he was not even in the City of Bell on the day of the shooting. He never said that he felt threatened.

DISCUSSION

I. Lack of Heat of Passion Voluntary Manslaughter Instruction

A. Defendant's Argument

Defendant contends that the trial court should have given sua sponte the instruction on the heat of passion type of voluntary manslaughter contained in CALCRIM No. 570.[4] Defendant argues that there was substantial evidence that he acted in the heat of passion in the midst of a quarrel provoked by Valencia and that Valencia was the provocateur. According to defendant, the trial court's error violated his rights under California state law, as well as his federal due process rights to a jury

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[4] CALCRIM No. 570 provides as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. 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. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

trial and to present a complete defense, and the *Chapman* standard[5] of prejudice is the proper one.

B. Proceedings Below

During the jury instruction conference, defense counsel asked the trial court to add only one instruction to the list the prosecutor had prepared: CALCRIM No. 505 on imperfect self-defense. The court believed there was sufficient evidence for the instruction to be given and for argument by the defense on that point. Neither party had any objection to the list of instructions the trial court announced it would read.

The trial court instructed the jury, inter alia, on "Homicide: General Principles" (CALCRIM No. 500); "First Or Second Degree Murder With Malice Aforethought" (CALCRIM No. 520); "First Degree Murder" (CALCRIM No. 521); "Provocation: Effect On Degree Of Murder" (CALCRIM No. 522); "Justifiable Homicide: Self-Defense Or Defense Of Another" (CALCRIM No. 505); and "Voluntary Manslaughter: Imperfect Self-Defense – Lesser Included Offense." (CALCRIM No. 571.)

The prosecutor argued to the jury that defendant acted with express malice and that defendant was guilty of first degree murder. He stated that defendant's self-defense argument was not plausible, since there was no evidence of anything more than an argument between the two young men. Defense counsel argued to the jury that defendant believed he was in imminent danger of being shot and shot the victim in self-defense. Counsel asserted that this was a plausible alternative, and the jury should convict defendant of manslaughter.

C. Relevant Authority

In criminal cases "'[a] trial court has a duty to instruct the jury "sua sponte on general principles which are closely and openly connected with the facts before the

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5 *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

court.”’” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824; see *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) “In a murder case, this means that both heat of passion and unreasonable self-defense, as forms of voluntary manslaughter, must be presented to the jury if both have substantial evidentiary support.” (*Breverman*, *supra*, 19 Cal.4th at p. 160.) The trial court’s sua sponte duty arises even if the defendant objects to the instruction and regardless of the defendant’s theory of defense. (*Id*. at p. 162.) We review de novo the claim a court failed to properly instruct the jury on the applicable principles of law. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

In determining whether substantial evidence exists, trial courts should not usurp the jury’s function of evaluating the credibility of witnesses. (*Breverman*, *supra*, 19 Cal.4th at p. 162.) Substantial evidence means, in this context, “‘“evidence from which a jury composed of reasonable [persons] could . . . conclude[]”’ that the lesser offense, but not the greater, was committed.” (*Ibid*.) Due process does not require more. (*Hopper v. Evans* (1982) 456 U.S. 605, 611.) Speculation is insufficient to require the giving of an instruction on a lesser included offense. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

Voluntary manslaughter is a lesser included offense of murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645; *Breverman*, *supra*, 19 Cal.4th at p. 154.) To establish voluntary manslaughter based on sudden quarrel or heat of passion, both provocation and heat of passion must exist, and they must both be affirmatively demonstrated. (*People v. Lee* (1999) 20 Cal.4th 47, 60.) The heat of passion requirement for manslaughter has both an objective and a subjective component. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) The reasonableness of the circumstances giving rise to the heat of passion is viewed objectively. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1215-1216.) The provocation must be of such a character as to “cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.” (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411-1412.) Additionally, the provocation must be caused by the victim (*People v. Lee*, at

p. 59) and the killing must occur "'suddenly'" in response to this provocation (*People v. Daniels* (1991) 52 Cal.3d 815, 868). As for the subjective component, the killer's reason actually must have been obscured due to strong passion that was aroused by provocation, such that he acts "'"from this passion rather than from judgment."'" (*Breverman, supra*, 19 Cal.4th at p. 163.)

D. No Error

Mindful of the above-mentioned principles, we conclude the record in this case does not reflect sufficient evidence to warrant instruction on voluntary manslaughter based on heat of passion. As noted, heat of passion has both objective and subjective components. (*People v. Steele, supra*, 27 Cal.4th at p. 1252.) We conclude that both elements are lacking in this case.

Although provocation may be verbal, derogatory name-calling has been held to be insufficient provocation to inflame the passions of a reasonable person to reduce murder to voluntary manslaughter. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 585-586 (*Manriquez*); *People v. Najera* (2006) 138 Cal.App.4th 212, 226; *People v. Dixon* (1961) 192 Cal.App.2d 88, 91 ["Words or gestures, no matter how grievous or insulting, are not sufficient provocation . . . ."].) "'While no particular cause for such heat of passion is expressly prescribed by law. . . . There must be "considerable" provocation, such at least as would stir the resentment of a reasonable man. A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter . . . .'" (*People v. Wells* (1938) 10 Cal.2d 610, 623.)

In the instant case, according to defendant, the provocation consisted of Valencia repeatedly asking defendant where he was from and in declaring his (Valencia's) gang affiliation. Valencia also got face to face with defendant. We do not believe these words and actions by Valencia would "arouse feelings of homicidal

rage or passion in an ordinarily reasonable person." (*People v. Pride* (1992) 3 Cal.4th 195, 250.) "Although the provocative conduct may be verbal, . . . such provocation 'must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment.'" (*Manriquez, supra*, 37 Cal.4th at pp. 585-586.) In *Manriquez*, for example, this standard was not met where the evidence showed the victim "called defendant a 'mother fucker' and . . . also taunted defendant, repeatedly asserting that if defendant had a weapon, he should take it out and use it. Such declarations . . . plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment." (*Id*. at p. 586.) In *People v. Najera*, *supra*, 138 Cal.App.4th 212, the victim called the defendant a "'jota' (translated as 'faggot')" and pushed him to the ground. (*Id*. at p. 216.) Citing *Manriquez*, the Court of Appeal concluded the "taunt would not drive any ordinary person to act rashly or without due deliberation and reflection," and that the physical attack did not make any difference. (*People v. Najera*, at p. 226; see also *People v. Oropeza* (2007) 151 Cal.App.4th 73, 76, 83 [mutual yelling and offensive hand gestures exchanged between two cars on highway were not adequate provocation for one passenger shooting at other car].)

In the instant case, although defendant, a WCS gang member, may have been offended or felt "disrespected" by Valencia's repeated gang allusions, defendant's reaction is judged by a reasonable person standard and not a reasonable gang-member standard. The California Supreme Court has "rejected arguments that insults or gang-related challenges would induce sufficient provocation in an *ordinary* person to merit an instruction on voluntary manslaughter. [Citations.]" (*People v. Enraca* (2012) 53 Cal. 4th 735, 759.) Also, the provocation that incites the defendant to homicidal conduct must be caused by the victim or by conduct reasonably believed by the defendant to have been engaged in by the victim. (*Manriquez, supra*, 37 Cal.4th at p. 583.) Here, what amounted to a verbal argument was escalated by defendant himself when he pushed Valencia. Whatever it was that Valencia said, a defendant may not

"'"set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused . . . ."'" (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1215-1216.)

There was also a lack of evidence that defendant's reason was in fact obscured by passion at the time he fired the gun. Appellant himself testified that he tried "to keep it mellow." He tried to calm Valencia down so that they could talk it out. Appellant points out that Valencia was taller and heavier than he, but this adds little to his argument of heat of passion. Appellant also asserts that his act of pushing the victim shows the existence of heat of passion. However, defendant's act of pushing Valencia away before reaching for his gun is more indicative of a rational distancing of Valencia in order to have access to his gun and prepare to shoot rather than a rash act of passion. Although the eyewitnesses reported what appeared to be an argument, it was limited to words until the very end. Defendant never testified that he was overcome by his emotions. To the contrary, he testified that he wanted to make peace with Valencia, and, when that failed, defendant shot him in imperfect self-defense.

Defendant also argues that the fact he acted out of fear might support a finding he acted in the heat of passion. This contention is not persuasive. In any event, the jury was instructed on perfect and imperfect self-defense, but rejected these theories, indicating that they did not believe he acted out of fear. Defendant also contends that the fact that the jury rejected first degree murder and convicted only on second degree murder shows that the jury rejected premeditation in favor of a rash action. According to defendant, had the jury been given the opportunity to consider whether the rashness was objectively reasonable, it is not clear beyond a reasonable doubt that they would have convicted him of murder rather than manslaughter. We believe there was abundant evidence of second degree murder, as explained in the last section of this opinion. Therefore, it is mere speculation to assert that the jury believed defendant's act of shooting was rash. Although the jury rejected premeditation, it found that defendant acted in a conscious disregard for Valencia's life. The jury had before it the evidence that defendant shot at Valencia twice, and the second time occurred when

Valencia was trying to hide behind the Escalade. It appears defendant's bullet struck the car. Defendant actually told Deputy Ramirez that he shot Valencia in the back when he tried to run away.

Finally, even if the trial court had given the heat of passion instruction, the testimony and defendant's conversation with Deputy Ramirez provided strong evidence that defendant shot Valencia in cold blood rather than in the heat of passion. Therefore, even assuming for argument that the trial court erred, the error was harmless under either the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) or *Chapman* test (*Chapman*, *supra*, 386 U.S. 18) because no evidence suggests defendant may have killed under the influence of a heat of passion caused by adequate provocation.

Accordingly, substantial evidence did not support a lesser included offense of voluntary manslaughter on a heat of passion theory, and the trial court was not required, either as a matter of state law or federal constitutional law, to instruct upon the theory sua sponte. (*People v. Ayala* (2000) 23 Cal.4th 225, 283; see also *Hopper v. Evans*, *supra*, 456 U.S. at p. 611.)

II. Trial Court's Reading of CALCRIM No. 522

A. Defendant's Argument

Defendant contends that the trial court erred in including a bracketed portion on provocation in relation to manslaughter when reading CALCRIM No. 522, since provocation is not an element of imperfect self-defense, but only an essential part of heat of passion manslaughter. The jury was likely to interpret the instruction in an erroneous manner and believe that defendant was impliedly required to prove provocation before he could assert imperfect self-defense, which lessened the burden of proof for the prosecution by raising the bar on the defense. Defendant asserts the error must therefore be judged under the *Chapman* standard of harmless error.

B. Relevant Authority

"In determining the correctness of jury instructions, we consider the instructions as a whole. [Citation.] An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237; see also *People v. Smithey* (1999) 20 Cal.4th 936, 963.) Jury instructions are also considered in the context of the arguments of counsel. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

C. Proceedings Below

The trial court read CALCRIM No. 522 as follows: "Provocation may reduce a murder from first degree to second degree *and may reduce a murder to manslaughter*. The weight and significance of the provocation, if any, are for you to decide. If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. *Also, consider the provocation in deciding whether the defendant committed the murder or manslaughter*." (Italics added to indicate bracketed portion.)

D. Any Error Harmless

At the outset, it appears this claim has been forfeited for failure to suggest modification of CALCRIM No. 522 in the trial court. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 ["'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'"].) Even if we view the claimed error as violative of defendant's substantial rights, however, and thus not requiring an objection in the trial court (see § 1259; *People v. Kelly* (2007) 42 Cal.4th 763, 791), defendant's claim fails on the merits.

We believe it is speculation to suggest that the jury was led to believe provocation was to be considered in conjunction with the imperfect self-defense type of manslaughter to defendant's detriment. The jury was told that defendant acted in

imperfect self-defense if he believed he was in imminent danger of death or great bodily injury, and he believed the immediate use of deadly force was necessary to defend against the danger, and at least one of those beliefs was unreasonable. (CALCRIM No. 571.) The jury was told to consider *all* of the circumstances *as they appeared to the defendant* in evaluating his beliefs. (*Ibid*.) The jury was thus encouraged to consider Valencia's apparent anger and body language as they appeared to defendant in making its evaluation, and to the extent that a jury member may have attached the label of "provocation" to these circumstances, it could not have injected an objective standard into the assessment of the reasonableness of defendant's beliefs or prejudiced defendant in any way.

Moreover, the instructions as a whole made clear that the prosecutor bore the burden of proving that defendant did not act in self-defense—imperfect or otherwise. The trial court read CALCRIM No. 521 regarding the People's burden of proof to show that defendant committed a first degree murder. (CALCRIM No. 521.) The trial court read CALCRIM No. 505, which told the jury that the People had the burden of proving beyond a reasonable doubt that the killing was not justified. The trial court also instructed the jury with CALCRIM No. 571, which described the requirements for reducing a killing from murder to voluntary manslaughter based on imperfect self-defense and informed the jury that the People had the burden of proving beyond a reasonable doubt that defendant was not acting in imperfect self-defense. These instructions expressly stated that the People had the burden of proving that defendant's act did not constitute a crime less than first-degree murder. Considering these instructions and the standard instructions on the presumption of innocence and the prosecution's burden to prove guilt beyond a reasonable doubt (CALCRIM No. 220), there was no likelihood that CALCRIM No. 522 as read by the trial court caused the jury to shift the burden to defendant to prove that he had been provoked. Furthermore jurors are presumed to be intelligent and capable of understanding and correlating jury instructions. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028; *People v. Carey*

(2007) 41 Cal.4th 109, 130.) "'With regard to criminal trials, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is '"whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process."' [Citation.]"'" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 182.) Applying these principles here, we conclude defendant was not prejudiced by the trial court's reading of the bracketed portions of CALCRIM No. 522.

Finally, nothing in the argument of either the prosecutor or defense counsel suggested that defendant was required to prove provocation before he could assert imperfect self-defense. Defense counsel emphasized that defendant was the only source that could explain what he was feeling, which the video of the encounter could not show. The prosecutor argued that defendant's claim of fear was not credible because of his failure to explain his actions to the interviewing deputies when given the opportunity, his conversation with Deputy Ramirez, and the fact that he was never grabbed or threatened by Valencia. The prosecutor was entitled to point out the circumstantial evidence against defendant's claim of fear. Given the instructions as a whole and the arguments, we believe defendant's argument is without merit.

III. Lack of Sua Sponte Instruction on a Third Theory of Voluntary Manslaughter

A. Defendant's Argument

Defendant contends the trial court had a duty to instruct sua sponte on a type of voluntary manslaughter extracted from the rejection of a theory of involuntary manslaughter espoused by the appellant in *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*). According to defendant, the trial court was obliged to tell the jury that an unintentional killing committed without malice during the course of an inherently dangerous assaultive felony constituted voluntary manslaughter.

B. Relevant Authority

Even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 824.) This includes instructing on lesser included offenses that are supported by substantial evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 115.)

C. No Sua Sponte Duty

Defendant asserts that in *Garcia*, the court held that it was reversible error for the trial court not to instruct that an unintentional killing without malice committed during the course of an inherently dangerous assaultive felony constituted voluntary manslaughter.[6] Defendant contends that, because he acted suddenly and upon provocation by a larger gang member of whom he was afraid, and because he did not intend to kill Valencia, this theory of voluntary manslaughter applies to him. Therefore, the trial court was required to instruct the jury on this theory, since it constitutes a lesser-included-offense instruction required by the due process guarantee of the state and federal constitutions, and the instruction was supported by substantial evidence.

Initially, we believe defendant inaccurately recites the holding in *Garcia*. In that case, the court merely affirmed the trial court's denial of Garcia's request for an instruction on *involuntary* manslaughter as a lesser included offense of murder. (*Garcia*, *supra*, 162 Cal.App.4th at p. 22.) While carrying a shotgun, Garcia was confronted by the victim, who told him to put the gun away. The two men began yelling, and when the victim moved toward Garcia, Garcia struck out at him with the butt of the shotgun to "back him up." The gun hit the victim in the face, causing him

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6 The issue defendant presents is currently pending before the California Supreme Court in *People v. Bryant* (2011) 198 Cal.App.4th 134, review granted November 16, 2011, S196365.

to fall to the ground and hit his head. He subsequently died from his head injury. (*Id*. at p. 23.) Garcia was charged with second degree murder, and the jury found him guilty of voluntary manslaughter. (*Id*. at pp. 23, 25.)

The trial court instructed the jury on both types of voluntary manslaughter (heat of passion and imperfect self-defense) as a lesser included offense of murder. (*Garcia*, *supra*, 162 Cal.App.4th at pp. 25-26.) On appeal, Garcia contended that the trial court erred by refusing to instruct on *involuntary* manslaughter on the theory that the killing "was committed without malice and without either an intent to kill or conscious disregard for human life." (*Id*. at p. 26.) The *Garcia* court addressed at length the issue of whether an unintentional killing without implied malice during commission of an inherently dangerous felony (aggravated assault) could support an instruction for involuntary manslaughter. (*Id*. at pp. 28-31.) The court concluded that the trial court properly declined to instruct on involuntary manslaughter. (*Id*. at p. 32.) In rejecting Garcia's claim, the court stated that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*Id*. at p. 31.)

Thus, the language on which defendant relies as support for the trial court's sua sponte obligation is dictum arising from the *Garcia* court's rejection of the appellant's involuntary manslaughter theory, and not from an intention to create a third category of voluntary manslaughter. Neither *Garcia* nor any other authority establishes the theory of voluntary manslaughter upon which defendant relies. It is well established that voluntary manslaughter occurs when there is an unlawful killing based upon sudden quarrel or heat of passion or in an actual, but unreasonable, belief in the need to defend against imminent death or great bodily injury. (§ 192, subd. (a).)

Furthermore, although the court in *People v. Bryant*, *supra*, 198 Cal.App.4th at pages 155, 157, found that an instruction based on the *Garcia* dictum should have been given, and that the trial court prejudicially erred in not doing so, the case was taken up for review on the same day that defendant's set of jury instructions were compiled and

read to the jury. The trial court could hardly have acquired a sua sponte duty to follow *People v. Bryant* during the short period of its viability as citable authority. As the California Supreme Court has stated, "the *sua sponte* 'rule seems undoubtedly designed to promote the ends of justice by providing some judicial safeguards for defendants from the possible vagaries of ineptness of counsel under the adversary system. Yet the trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly. The judge need not fill in every time a litigant or his counsel fails to discover an abstruse but possible theory of the facts.'" (*People v. Flannel* (1979) 25 Cal.3d 668, 683.) Even if the theory that defendant extracts from *Garcia* is eventually recognized as a valid basis for voluntary manslaughter, it was not, at the time of his trial, a general principle of law upon which the trial court was required to instruct sua sponte.

Moreover, in the instant case, the evidence would not warrant such an instruction because defendant clearly killed Valencia with implied malice at the very least. Malice is implied "when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*People v. Cook* (2006) 39 Cal.4th 566, 596.) Here, the evidence showed that defendant pushed Valencia away and then pulled out his gun and shot him at point-blank range in the abdomen. Unlike Garcia, defendant did not strike with one unfortunate blow of a bludgeon. Instead, he used bullets.

The trial court had no sua sponte duty to instruct the jury on voluntary manslaughter pursuant to the dictum in *Garcia*, and there was no instructional error.

IV. Sufficiency of the Evidence of Murder

A. Defendant's Argument

Defendant contends the evidence was insufficient to sustain a finding of murder where the uncontroverted credible testimony showed that he acted in either perfect or

imperfect self-defense. Therefore, his conviction should be reversed or reduced to voluntary manslaughter under an imperfect self-defense theory.

B. Relevant Authority

"The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134 , 1138.)

Given this court's limited role on appeal, appellant bears an enormous burden in claiming there was insufficient evidence to sustain the verdict. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Reversal for insufficiency of the evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Accordingly, when the evidence is largely circumstantial, reversal is not warranted simply because the evidence might support contrary findings equally as well as those made by the trier of fact. (*People v. Ceja*, *supra*, 4 Cal.4th at pp. 1138-1139.)

C. Evidence Sufficient

Defendant cites a litany of cases where, he asserts, self-defense was established as a matter of law because the evidence was uncontroverted and established all of the elements for a finding of self-defense. Defendant argues that, viewed as a whole, the record in his case establishes as a matter of law that his was a case of self-defense. He states that Valencia's behavior was a classic example of gang confrontation, and it was reasonable for defendant to fear that the "assault" against him would shortly lead to great bodily injury or death. Valencia was taller, heavier, and older, and defendant had experienced problems with gangs in the area. Valencia got up close and face to face

with defendant and was moving his hands in his pockets. Defendant's reaction was justified based on his belief that Valencia had a gun. Even if his reaction was excessive, he contends, imperfect self-defense is established as a matter of law.

We disagree. As we have stated previously, there was sufficient evidence to support a finding of implied malice at a minimum. Defendant and Valencia had a brief verbal confrontation. Regardless of what Valencia said to defendant, the evidence showed that defendant escalated the verbal confrontation into a physical one by pushing Valencia, which caused him to take two or three steps backward. Defendant then pulled out his gun and shot Valencia twice, the first time at nearly point-blank range. Valencia turned and tried to hide behind the Escalade, and defendant fired at him once again. Defendant's conversation with Deputy Ramirez revealed that defendant knew he was using a hollow point bullet. At such close range, defendant clearly exhibited a conscious disregard for Valencia's life, if not express malice. The jury did not believe defendant's assertions that he was fearful because of his past experiences and the fact that Valencia was purportedly moving his hands around in his pockets. Under the standard of review articulated *ante*, there was sufficient evidence to uphold the jury's verdict.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ