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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. FRANCISCO BUENO MARTINEZ, Defendant and Appellant.	B236134 (Los Angeles County Super. Ct. No. NA084953)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Affirmed.

Thomas T. Ono, 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, Senior Assistant Attorney General, Linda C. Johnson and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Francisco Martinez was convicted, following a jury trial, of one count of second degree murder in violation of Penal Code section 187. The jury found true the allegation that appellant used a deadly or dangerous weapon within the meaning of section 12022, subdivision (b)(1). The trial court sentenced appellant to a total of 16 years in state prison.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support the murder verdict and further contending that the trial court erred in instructing the jury on voluntary manslaughter, provocation, the burden of proof on sudden quarrel, heat of passion and flight. Appellant additionally contends that the cumulative error was prejudicial. We affirm the judgment of conviction.

Facts

At the beginning of March 2010, appellant lived in a trailer on his grandmother's property. His grandmother, Mary Bueno, lived in the back house on the property. John Feehan, a homeless friend of appellant's, had been staying at Ms. Bueno's property for the preceding two to four weeks. Initially, Ms. Bueno said Mr. Feehan could sleep on the couch in the carport. After a couple of days, she felt sorry for Mr. Feehan because it was cold, and let him stay in a small shed with a bed in it. She asked him to do some yard work or car washing in exchange for staying there, but he never did.

Around 6:00 p.m., on March 1, 2010, appellant and Mr. Feehan went to McGeady's Pub. Appellant went to the pub two to three times a week, and Mr. Feehan went almost every day. They sat at the end of the bar, talking, sharing pitchers of beer, and playing pool together all night. According to the bartender, they did not appear to argue or act upset with each other. They did not appear drunk when they arrived or later that night. They drank three or four pitchers of beer, which was about average.

Mr. Feehan paid for the beer with a $50 bill, which was unusual. Mr. Feehan generally paid for his drinks with cash, usually small denominations, $1, $5, and $10 bills. Mr. Feehan also played in a pool tournament that night, which was $10 to enter.

According to the bartender, appellant and Mr. Feehan left the bar together around closing time at 2:00 a.m. They were in "good spirits." Appellant's speech may have been slurred, but he did not have any trouble walking.

The next morning, March 2, Ms. Bueno was moving trash cans in the early morning when she saw appellant. That was unusual because appellant usually slept late. Appellant helped her with the trash cans. At trial, Ms. Bueno said that she detected the odor of alcohol on appellant and that he appeared drunk.[1] Ms. Bueno asked, "Where is your friend?" Appellant said he was asleep. Appellant told her Mr. Feehan was going to sleep all day. He also told her Mr. Feehan had money the night before and had bought appellant drinks and food. Ms. Bueno was out of Flamin' Hot Cheetos, and appellant said he would get her some. Ms. Bueno gave appellant some money for the Cheetos and her car keys. She expected him to come back quickly.

Appellant did not return that day. When Ms. Bueno awoke the next morning, March 3, appellant still had not returned. Ms. Bueno went to the shed near appellant's trailer and saw Mr. Feehan lying on the ground. His shoes were on, sticking out of a blanket. Ms. Bueno kicked his shoe to wake him, but he did not wake up.

Ms. Bueno went to get her other grandson, Miguel, who lived in the front house. Miguel yelled Feehan's name. When he got no response, he tapped Feehan's foot. Miguel then moved the blanket from his face. Miguel first saw Feehan's right hand on top of his head, and it looked injured. Miguel said, "Grandma, this man is dead." Ms. Bueno called 911.

Paramedics arrived quickly. They noticed the body lying on its back, on top of a mattress, covered by a blanket. They immediately knew the man was dead because of the smell, the look, rigor mortis, and the flies. They pulled the blanket down to uncover his face and saw that the man was not breathing. They saw facial trauma, and a lot of blood around the man and the blanket. The paramedics declared Feehan dead at 11:40 a.m., and secured the scene.

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[1] She did not mention this to police.

The coroner removed the blanket from Feehan and noticed he was clothed, but his zipper was down, and his right front pants pocket was pulled out. There was blood on the left side of his face, and the sheets were soaked with blood. The coroner noticed more than 30 cuts and stabs on the left side of his face, as well as cuts on the neck, back of the hand, and collarbone area. There was a large pool of blood on the floor of the shed where Feehan's head had been. There was also blood splattered on the wall and ground.

The medical examiner identified 48 injuries caused by a sharp instrument, 38 of which were on the head and neck. One was on the left forearm, and eight were on the hands. The hand wounds were classified as defensive. Six of the head and neck wounds were stab wounds. One stab wound on the neck was clearly fatal. There were also injuries consistent with a neck compression by choke hold or by placing something on the neck and pressing down. The cause of death was determined to be a "combination of sharp force injuries and neck compression." At the time of his death, Feehan had a blood alcohol level of about .20.

Inside Feehan's pockets were a multi-tool, a lighter, nail clippers, and a small folding knife. There was no wallet or cash found on his person.

Inside appellant's trailer, police found pants, a flannel shirt, and a serrated knife, all of which appeared to have blood on them. The knife was inscribed with the name of St. Margaret Mary's Church. It had blood on it, but appeared to have been washed.

A red-brown stain on a shirt recovered from appellant's trailer had DNA from two people, with the major contributor being Feehan. DNA from the interior of that shirt was found to be a mixture of Feehan and appellant. The knife, pants, shirt, and shoes tested positive for blood.

After the police arrived, appellant called his grandmother three to four times. Eventually, a police officer spoke with appellant and learned where he was. Officers went to that location, which was about a mile away, and arrested appellant. Appellant's shoe had a dark stain on it that looked like blood, and his shirt was stained as well. He had cuts or scrapes on his hands. He looked nervous. When booked, appellant was 31 years old, weighed about 230 pounds, and was about 5 feet 9 inches tall.

Los Angeles Police Detectives Antonio Batres and Rodriguez interviewed appellant that night. Initially, appellant said he had last seen Feehan a couple days prior and that their last conversation was that Feehan was not feeling well and was going to be leaving to go to Redondo Beach. He later said he had seen him at 9:00 or 10:00 a.m. the day before and he "looked good."

Appellant initially said he and Feehan had last gone to McGeady's Pub the previous Saturday. He later said they had gone Monday night at 7:00 or 8:00. He said he drank one or two pitchers of beer and no hard liquor. He initially said Feehan left before him around 11:00 or 12:00 at night, but he later said they both arrived home. He said prior to going home, Feehan bought appellant a six-pack of beer, but he only drank two.

Appellant said he got home about 8:00 the morning of March 2, 2010, and he had something to eat. He said Feehan upset him by trying to "hustle" him, and he and Feehan argued and fought. Appellant said he was angry because Feehan had called him names, and used profanity toward him, and owed his grandmother money. He was angry because he was letting Feehan live there for free, and he was spending money on other things. He got upset when Feehan would not loan him $20, which he planned to pay back the next day.

Detective Batres looked at the injuries on appellant's hands, and appellant said they were old injuries. He described himself as a "fighter," and said he fights a lot. He admitted hitting Feehan hard while he was lying on the mattress. He described going to the kitchen to get a knife, and ultimately identified the St. Margaret Mary's knife as the one he used. After using the knife, appellant said he washed it and put it in the sink. Appellant also washed himself in the sink.

Detective Batres asked whether appellant knew what he did was wrong, and appellant said he did. Appellant said he took $10 and a lighter from Feehan's pocket. He said he did not have a wallet. He said he spent the $10 on beer and lost the lighter. Appellant had initially said Feehan loaned him the $10. Appellant finally said, "that's what me and him got in a fight for, some fucking stupid money."

Appellant described stabbing the victim in the face, head, and upper neck. He said he believed the knife was dull because he kept "poking him." Appellant used both hands.

Appellant said he had left home in his grandmother's car to get Flamin' Hot Cheetos the day before at 11:00 a.m. Before leaving, he changed his clothes because there was blood on the knee of the pants. He did not believe he could make it to Food-4-Less, because he was drunk, so he went to his friend's house.

Throughout the interview, appellant repeatedly said he had trouble remembering things because he had been drunk.

In his defense, appellant offered the testimony of a toxicologist who explained that someone with a blood alcohol level of .19 or .20 would be intoxicated. That person would have mental confusion, loss of critical thinking or judgment, problems processing information, and might misjudge situations. Depending on the type of motor skill being tested, impairment was generally known to occur by a level of .08, and often as low as .05.

Based on a hypothetical that two people were drinking about the same amount through the night, and their weight was within 40 pounds of each other, and one person had a blood alcohol level of .19 or .20, the toxicologist opined that the other person would be within 15 to 20 percent of the first, and would be intoxicated.

Feehan was 6 feet 2 inches, and weighed about 187 pounds at the time of his death.

Appellant also offered the testimony of a psychologist, who stated that a person who has been drinking can have trouble remembering events. Based on a hypothetical where two men, who were regular drinkers, drank three to four pitchers of beer from 6:00 p.m. until 2:00 a.m., and then drank another six-pack, and one died between 3:00 a.m. and 8:00 a.m., and at the time of death the decedent had a blood alcohol level of .20, and when the surviving person was seen about 8:30 a.m., he was described as drunk, the psychologist testified that the surviving person would have been intoxicated at the time of death. Intoxication would generally be characterized by impaired perception and social judgment, aggression, possibly impaired motor function, and even falling into a coma.

If the hypothetical was changed so that the surviving person drank one to two pitchers of beer, and two cans of a six-pack between 6:00 p.m. and 2:00 a.m., that would make a difference on the person's intoxication level because there was less alcohol consumed.

The psychologist testified that someone who committed an act while intoxicated and later tried to cover up the act would be acting out of remorse or regret or shame, not intoxication.

Appellant also called Detective Batres as a witness. The detective testified that Ms. Bueno told him that she saw appellant the morning of March 2, 2010, about 8:30 a.m., and he was fully dressed, which was unusual. Appellant told her Feehan was sleeping, and that he did not need any more blankets and wanted to sleep all day. Appellant said Feehan was going to a place in Redondo Beach.

Discussion

1. Sufficiency of the evidence

Appellant contends that there is insufficient evidence to show that he acted with malice, and therefore insufficient evidence to support his conviction for second degree murder. We do not agree.

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or

reevaluate a witness's credibility. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice may be express or implied. Malice "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) Malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to human life, which act was deliberately performed by a person who knows his conduct endangers the life of another and who acts with conscious disregard for life. (*People v. Lasko* (2000) 23 Cal.4th 101, 107.)

Appellant contends that there is no evidence to show that he was actually aware that his acts were dangerous to human life. There is no direct evidence of such awareness, but direct evidence is not required. "It is settled that the necessary element of malice may be inferred from the circumstances of the homicide." (*People v. Lines* (1975) 13 Cal.3d 500, 505.)

Appellant inflicted two wounds which together were fatal to the victim. First, he put sufficient force on the victim's neck to crush a bone in the neck. Appellant next stabbed repeatedly at the victim's face, head and neck, and cut a large blood vessel in the victim's neck, resulting in the victim losing a large amount of blood. The circumstances of the stabbing particularly show a conscious disregard for human life. Appellant told police that he believed that the knife was dull because he kept poking at the victim. He used both hands to wield the knife. He acknowledged that he was aware that one stab wound went through the victim's cheek. He also told police that the victim said, "Man, you stabbed me" and that he said, "So" and did it again. He acknowledged that he saw a lot of blood while he was stabbing the victim. Thus, there is substantial evidence to support a finding of implied malice. (See *People v. Lines*, *supra*, 13 Cal.3d at p. 505 [ample evidence of implied malice where defendant shot victim in the head at close range].)

Further, after he stopped stabbing the victim, he made no attempt to get help. Rather, he covered the body with a blanket, decreasing the likelihood that anyone would

find the victim and summon help. This behavior also shows a conscious disregard for human life. (See *People v. Burden* (1977) 72 Cal.App.3d 603, 620–621 ["A defendant's lack of concern as to whether the victim lived or died, expressed or implied, has been found to be substantial evidence of an 'abandoned and malignant heart' by the appellate courts of this state"]; *People v. Ogg* (1958) 159 Cal.App.2d 38, 51 ["Defendant's failure to seek the assistance of his friends or to obtain medical aid even though he knew that his wife was seriously injured indicates a heartless attitude and callous indifference toward her"].)

Appellant argues, in effect, that it is unreasonable to infer that he was aware that his conduct was dangerous to human life because he was intoxicated at the time of the acts. Appellant is mistaken.

"Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated or harbored express malice aforethought." (§ 22, subd. (b).) Thus, evidence of voluntary intoxication is not admissible to negate implied malice. (See *People v. Turk* (2008) 164 Cal.App.4th 1361, 1374-1375; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115.)

In his reply brief, appellant contends that nothing in *Turk, supra,* precludes consideration of voluntary intoxication in determining whether appellant "consciously and actually intended to kill." It is not completely clear what appellant means by this phrase. Under the authorities cited in *Turk*, voluntary intoxication may be considered in a murder case for only two purposes: (1) to negate express malice or (2) if voluntary

intoxication has resulted in unconsciousness, to reduce the killing to involuntary manslaughter. (*People v. Turk, supra,* 164 Cal.App.4th at p. 1376.)[2]

To the extent that appellant contends that the evidence shows that he was unconscious, he is mistaken. "To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, at the time, conscious of acting.' [Citation.]" (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 417.) Appellant was conscious of acting. In his statement to police, appellant recalled hitting and stabbing the victim. The fact appellant claimed not to recall all the details of his attack does not support an inference that he was unconscious when he committed the killing, nor does the expert's opinion that appellant's blood alcohol content might have been around .20 at the time of the killing. (*Id*. at pp. 418-419.)

Appellant further contends that this Court should not view the evidence in the light most favorable to the judgment because the prosecution was "bound" by its presentation of appellant's statement as to how the killing occurred "in the absence of proof to the contrary." (See *People v. Collins* (1961) 189 Cal.App.2d 575, 591.) As respondent points out, appellant gave different versions of how the killing occurred. It is not

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[2] "Prior to 1981, voluntary intoxication could negate malice, both express and implied, and/or intent to kill. [Citation.] Therefore, voluntary intoxication, even short of unconsciousness, could result in either voluntary manslaughter, where the defendant's intoxication negated malice, or involuntary manslaughter, where the defendant's intoxication negated both malice and intent to kill. [Citation.] After the 1981 abolition of the diminished capacity doctrine, voluntary intoxication could no longer reduce a killing from murder to voluntary manslaughter. [Citation.] However, prior to the 1995 amendment to section 22, subdivision (b), voluntary intoxication could still negate malice, both express and implied, and could also negate intent to kill. [Citation.] Thus, prior to 1995, voluntary intoxication, short of unconsciousness, could still result in a conviction for involuntary manslaughter. [Citation.]" (*People v. Turk, supra,* 164 Cal.App.4th at p. 1376.) That is no longer the case. However, voluntary intoxication which results in unconsciousness can still reduce murder to involuntary manslaughter. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 418 [court must instruct on involuntary manslaughter if there is substantial evidence that defendant was unconscious due to voluntary intoxication].)

possible for the prosecution to be "bound" by all those versions. Nothing in *Collins* gives the defendant the right to choose which of several versions of his story the prosecution will be "bound" by by. Further, as appellant acknowledges, the *Collins* rule does not apply where there is evidence in the record which conflicts with the defendant's account of events. (*People v. Lines, supra*, 13 Cal.3d at p. 505 [manner of killing showed implied malice and contradicted defendant's account of killing]; *People v. Bloyd* (1987) 43 Cal.3d 333, 349 [ballistics evidence was inconsistent with defendant's version of events and supported a finding of implied malice].) As we explain, *ante*, the circumstances of the killing show implied malice and contradict appellant's claim that he did not intend to hurt the victim, that he felt bad about what he did, and that he did not realize that he had killed the victim.

2. Voluntary manslaughter – assaultive felony

Appellant contends that the trial court erred in failing to instruct the jury sua sponte that voluntary manslaughter may also arise from an unintentional killing without malice that occurs during the commission of an inherently dangerous assaultive felony.

The issue of whether voluntary manslaughter can be premised on an unintentional killing without malice that occurs during commission of an inherently dangerous assaultive felony is currently pending before the California Supreme Court. (*People v. Bryant* (2011) 198 Cal.App.4th 134, review granted November 16, 2011, S196365.)

The only published opinion to discuss this theory of voluntary manslaughter is *People v. Garcia* (2008) 162 Cal.App.4th 18. The court in that case considered whether the trial court had erred in failing to instruct the jury that an unintentional killing without malice that occurs during the course of an inherently dangerous assaultive felony was involuntary manslaughter. The court found that the trial court did not err, because such a killing could not be involuntary manslaughter. The court remarked that such a killing "is *at least* voluntary manslaughter." (*Id*. at p. 31, italics added.) The court's discussion of voluntary manslaughter is thus dicta.

We will assume for the sake of argument that such a theory of voluntary manslaughter is a viable one. We see no prejudice to appellant from the lack of an instruction on this theory.

Whether a defendant was prejudiced by a failure to instruct on a lesser included offense is reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Breverman* (1998) 19 Cal.4th 142, 177-178.) Under that standard, "posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether 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." (*People v. Breverman, supra,* 19 Cal.4th at p. 177.) The verdict must be upheld unless it appears reasonably probable the defendant would have obtained a more favorable outcome if the error had not occurred. (*Id*. at p. 178.)

As the Court in *Garcia, supra,* explained in discussing this theory, if a defendant commits an inherently dangerous assaultive felony, and "the People could prove [the defendant] had acted with a conscious disregard for [the victim's] life (implied malice) and had not killed [the victim] because he was provoked or unreasonably sought to defend himself, [the defendant] would be guilty of murder." (*Id*. at p. 32.) It is only in the absence of proof of implied malice that the crime would be voluntary manslaughter.[3] (*Ibid.*)

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[3] "Absent proof of malice—whether because malice was negated by provocation or the doctrine of imperfect self-defense or because of an absence of proof that 'the circumstances attending the killing show[ed] an abandoned and malignant heart' (Pen. Code, § 188) – [the defendant] committed manslaughter, 'the unlawful killing of a human being without malice.' (Pen. Code, § 192; see *People v. Rios* [(2000)] 23 Cal.4th [450,] 465 [97 Cal.Rptr.2d 512, 2 P.3d 1066] ['manslaughter is a killing which, through criminal, *lacks the murder element of malice*'].)" (*People v. Garcia, supra,* 162 Cal.App.4th at p. 32.)

As we discuss, *ante*, the evidence that appellant acted with implied malice is quite strong. Appellant admitted hitting the victim while he was lying down on a mattress, breaking off the attack to go to his trailer and get a knife, returning with the knife, and using it on the victim. He also acknowledged stabbing the victim in the face, head and neck. Appellant told police that he believed that the knife was dull because he kept poking at the victim. He used both hands to wield the knife. He acknowledged that he was aware that one stab wound went through the victim's cheek. He also told police that the victim said, "Man, you stabbed me" and that he said, "So" and did it again. He acknowledged that he saw a lot of blood while he was stabbing the victim. Once appellant broke off his attack, he failed to seek help for the victim, and in fact put a blanket over the victim, which covered up the victim's injuries.

The only evidence that appellant lacked malice was his statement to police that he was angry at the victim over money at the time of the killing, did not realize that he was stabbing the victim that hard and felt bad about what he did. This is very weak evidence that appellant lacked a subjective awareness that his conduct endangered human life, particularly when considered with his other statements. We see no reasonable probability that a jury would have convicted appellant of voluntary manslaughter under the *Garcia, supra,* theory if instructed on it.

3. Provocation instruction

Appellant contends that the trial court erred in instructing the jury with CALJIC No. 8.42 on provocation because it could mislead the jury into thinking that the test for provocation is whether a reasonable person, when provoked, would have committed the killing. Appellant is mistaken.

CALJIC No. 8.42 states in pertinent part: "The question to be answered is whether or not, 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 passion rather than from judgment." This language has long been in the CALJIC

instruction, and it is not misleading. It is correct statement of the law. (See *People v. Lee* (1999) 20 Cal.4th 47, 59 [provocation must be "sufficiently provocative so that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection"].)

Appellant's reliance on *People v. Najera* (2006) 138 Cal.App.4th 212 to show error is misplaced. The Court in *Najera* considered a claim that the prosecutor committed misconduct by arguing that the issue for the jury was whether a reasonable person in the defendant's position would have killed the victim. The Court found that this was an incorrect statement of the law. (*Id*. at pp. 223-224.) Nothing in *Najera* remotely suggests that CALJIC No. 8.42 is misleading.[4]

Apart from citing *Najera, supra,* appellant simply asserts without elaboration that the language could be interpreted to mean that the test is whether a reasonable person would respond to provocation by committing the killing. It cannot.

We note that an early version of CALCRIM No. 570 stated in part: "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." The instruction was revised due to concern that it could mislead the jury in the manner described by appellant. The language of CALCRIM No. 570 is not remotely similar to the language of CALJIC No. 8.42.

4. Burden of proof instruction – voluntary manslaughter

Appellant contends that the trial court erred in instructing the jury with CALJIC No. 8.42 because it does not tell the jury that the People are required to prove the absence of a sudden quarrel or heat of passion.

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[4] In fact, the Court of Appeal in *Najera* impliedly found that any misconduct was cured by the trial court's direction to the jury to follow the jury instructions and not the prosecutor's description of the law. (*Id*. at p. 223.) The jury instructions included CALJIC No. 8.42. (*Id.* at p. 215.)

CALJIC No. 8.50 correctly instructed the jury that "the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel." The instructions are to be read and evaluated as a whole, "to determine whether there is a reasonable likelihood the jury applied the [challenged] instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186.) There is no likelihood that the jury failed to understand that CALJIC Nos. 8.42 and 8.50 went together and required the prosecution to prove beyond a reasonable doubt that the killing was not done in the heat of passion or upon a sudden quarrel.

5. Flight instruction

Appellant contends that the trial court erred in instructing the jury with CALJIC No. 2.52 concerning flight because the evidence of flight was insufficient to support a consciousness of guilt inference.

Over appellant's objection, the trial court gave the following jury instruction: "The flight of a person after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight which this circumstance is entitled is a matter for you to decide."

In general, a flight instruction is proper "where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt. [Citation.] '"[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested."'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

Appellant contends that the uncontroverted evidence shows that he did not immediately leave the crime scene, but went outside and helped his grandmother move the trash cans, then later left his grandmother's to buy Cheetos for her. He contends that this evidence is not sufficient to support an inference of consciousness of guilt.

After killing the victim, appellant changed his clothes and concealed the victim's body under a blanket. He went outside, encountered his grandmother and helped her move some trash cans. His grandmother asked where the victim was and appellant replied: "He is asleep, and I'll go get you what you need, grandma." Appellant added that the victim was going to sleep all day. His grandmother asked if the victim needed more blankets, and appellant replied, "I don't think so." There is varying testimony about what time appellant actually left the house. After Ms. Bueno testified about having the conversation with appellant about Feehan sleeping, however, the prosecutor asked her, "And what happened next?" She replied, "I gave [appellant] the money to buy me what I needed, and I gave him the car keys and he left." Ms. Bueno acknowledged that she did not know the exact time appellant left. Appellant took his grandmother's money and car, and left, ostensibly to get her Cheetos. He never returned.

Flight need not occur immediately after the crime to support an inference of consciousness of guilt. It can also occur if the evidence shows that suspicion has focused on the defendant, or arrest is imminent. (*People v. Howard* (2008) 42 Cal.4th 1000, 1021.) Here, appellant left after his grandmother asked questions about the victim's whereabouts. At the same time appellant answered his grandmother's questions about the victim, appellant offered to go and get Cheetos for her. Appellant never returned. That is sufficient to support an inference that appellant fled under the pretext of getting Cheetos to avoid detection and arrest. The flight instruction was properly given.

6. Cumulative error

Appellant contends that cumulative instructional error requires reversal. We have found at most one instructional error, and found it harmless. Accordingly, we do not consider appellant's claim of cumulative error.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.