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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. THOMAS NOLAN YANAGA, Defendant and Appellant.	2d Crim. No. B267571 (Super. Ct. No. 15F-05954) (San Luis Obispo County)

Thomas Nolan Yanaga appeals from the judgment entered after a jury had convicted him of second degree murder. (Pen. Code, §§ 187, subd. (a), 189.)[1] The jury found true an allegation that he had personally and intentionally discharged a firearm causing death. (§ 12022.53, subd. (d).) He was sentenced to prison for 40 years to life.

Appellant is half Japanese. He contends that the trial court erroneously excluded evidence of white supremacist

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

tattoos on the bodies of the deceased and a complaining witness, Ashley Moss. His theory is that the victim and the witness were biased against Japanese people. In addition, he argues that the trial court erroneously modified a standard jury instruction on the reduction of murder to manslaughter and failed to instruct sua sponte that, when he shot the deceased, he is presumed to have reasonably feared imminent death or great bodily injury. We affirm.

Facts

Ashley Moss and appellant were friends. They frequently used methamphetamine together. Moss was living rent-free in a spare bedroom in the home of appellant and his wife, Joyce Yanaga (Joyce).

Moss and the deceased, Marshall Savoy, had a dating relationship. Savoy visited Moss at appellant's home when appellant was present. Appellant told Savoy, "'You can come over any time you want.'" "'You don't have to call, just come over.'"

After 10:30 p.m. on March 13, 2015, Savoy went to the front door of appellant's home. Appellant opened the door, and Savoy asked if Moss were there. Appellant replied that Moss was inside a trailer, which was about 50 feet away from the front door of appellant's home. Appellant walked with Savoy to the trailer and knocked on its door. After Moss had opened the door, appellant returned home.

Inside the home, Joyce (appellant's wife) walked from the kitchen through a screen door into the attached garage to smoke a cigarette. Appellant followed her into the garage. They started arguing. Joyce "blew a gasket" and became "very angry." She said she wanted a divorce. Appellant yelled at her. The argument continued for 15 or 20 minutes.

Joyce heard "a loud banging on the outside of the [metal] roll-up garage door." She testified: "And then I heard the front door open and . . . someone walking through the house. And the next thing I knew, the [screen] door into the garage came flying open and there was [Savoy] . . . who . . . walked past me and went straight over to [appellant]." Savoy "smelled like beer." "He came in with a purpose. He was irritated. He seemed a little upset."

Appellant was sitting in a chair in the garage. Savoy "told [him] to quit yelling. . . . [Savoy] was tired of hearing him yell at everybody all the time. . . . 'Don't yell at your wife. Respect her. Don't yell at her. Quit dissing your wife, dissing women. You're a dog. I can beat you down.'" Savoy threatened "to smash [appellant's] head in." He "was starting to flex his arms and . . . move closer to [appellant]. His face was red. Just, like, pumped. . . . [L]ike trying to provoke [appellant] to fight him, and [appellant] wouldn't say anything and wouldn't move."

Joyce continued: Savoy took off his shirt, "wadded" it up, and threw "it back and forth between his hands." He was "trying to provoke" appellant, but appellant just "sat there." Savoy threw the shirt at appellant, but it landed to the side of him. Appellant stood up and walked to the screen door that led from the garage into the kitchen. He pressed a button that opened the metal roll-up garage door. After the door had opened, appellant said to Savoy in a "stern" voice, "'Please get off my property.'" Savoy said he would leave when appellant gave him the keys to appellant's car. Appellant refused to give him the keys and walked into the kitchen. Savoy followed behind appellant. Appellant repeatedly said to Savoy, "'Get out of my house.'"

Appellant was standing inside the kitchen when Savoy lunged at him. Joyce heard several loud "pops." Savoy spun around and went back into the garage. Appellant said to Joyce, "'I shot the gun. Call 911.'"

Deputy sheriffs responded to Joyce's 911 call. They found Savoy lying in the driveway of appellant's home. Appellant told the deputies, "'He charged me. . . . The gun's in the house.'" The gun was a .22-caliber semi-automatic pistol.

Appellant was pronounced dead at the scene. The cause of death was multiple gunshot wounds.

Ashley Moss, Savoy's girlfriend, provided a version of events that differed from Joyce's version. Moss testified: While standing at the doorway of the trailer, she saw Savoy walk toward the front door of appellant's home. Appellant and Joyce were yelling inside. Savoy did not bang on the roll-up garage door. After Savoy had entered the home, she heard him say: "'You don't treat women like that. You treat women with respect. I have daughters.'" Moss heard appellant and Savoy yelling at each other. She went to the back of the home and looked through the kitchen window. She did not see Savoy. She saw appellant grab a gun that was on the kitchen island. He inserted a cartridge clip into the gun. With a "happy smirk" on his face, he walked out of the kitchen toward the garage. Appellant said, "'Hey, Marshall.'" Moss could not see appellant at this point. She heard gunshots. She saw appellant "run back in or walk back inside yelling at his wife to call 911 and tell them that there was an intruder."

The night before Savoy was shot, Moss heard appellant say, "'I have always wondered what it would be like to kill somebody.'" That same night, Wesley Hart, Moss's and

Savoy's friend, heard appellant say: "'I just want to kill someone. I just want to shoot somebody.'" On January 1, 2015, about two months before the shooting, appellant threatened Maddison McCullough, "'I'll kill you on my property and say it's an intruder and get away with it.'" McCullough was Savoy's close friend.

Appellant did not testify. Shortly after the shooting, he made a statement to the police in which he described the events leading to the shooting. His description is largely consistent with Joyce's testimony. According to appellant, he was inside the garage with Joyce when appellant came "bargin' in." Without knocking, Savoy "burst through the [screen] door [into the garage], gets in my face." He "[j]ust starts mouthin' off about, you know, just starts ramblin'." He "tell[s] me he was gonna bash my head in." Appellant thought Savoy "was gonna smack me in the head and fuckin' crush my skull in." "And, then all of a sudden he charges me." Appellant fired the gun three or four times.

Exclusion of Savoy's "White Power" Tattoos

Before trial, appellant sought to admit photographs depicting tattoos on Savoy's arms. The back of one arm was tattooed "white." The back of the other arm was tattooed "power." Defense counsel noted that appellant "is half Japanese." Thus, "when Mr. Savoy takes off his shirt . . . everyone can see the 'white power' coming at you . . . . He didn't take off the white shirt just to show [appellant] how buff he is and he's ready to fight; he wanted to show him who was coming at him."

The court replied that "[n]ot in a million years" does appellant look Asian. It asked defense counsel if Savoy had "ever made some kind of anti-Asian statement or used a slur towards [appellant]." Counsel responded, "No." The court declared: "I

think you're trying to bias the jury on an issue that's not really here." "I'm not going to allow any photographs of Mr. Savoy's white power tattoos, as despicable as they may be. I think it's more prejudicial than probative." "This is, in the court's opinion, . . . not a racially motivated case."

Appellant contends that, in excluding the white power tattoos, the trial court abused its discretion. The court acted pursuant to Evidence Code section 352, which provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant [or victim] and which has very little effect on the issues. . . .'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

"A trial court's exercise of discretion under section 352 will be upheld on appeal unless the court abused its discretion, that is, unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner. [Citations.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 806.) The trial court did not abuse its discretion. The tattoos were extremely prejudicial. Their admission would have "evoked an emotional bias" against Savoy. (*People v. Karis*, *supra*, 46 Cal.3d at p. 638.) The tattoos had little, if any, probative value. There is no evidence that Savoy's threatened assault was racially motivated. Savoy never uttered a racial slur. Defense counsel did not claim that Savoy had deliberately displayed the tattoos on the back of his arms so that appellant would "see the 'white power' coming at" him. In his statement to the police, appellant mentioned nothing about

the tattoos. Nor did he say that Savoy was prejudiced against him because of his Japanese ancestry. The court properly took into consideration its own perception that "not in a million years" does appellant look Asian. Thus, there is no evidentiary basis for appellant's assertion, "In terms of what [appellant] actually and reasonably thought, Savoy's act of taking off his shirt while attacking [appellant] was no different than had he shouted out 'white power.'"

Because of the lack of probative value of the tattoo evidence, we reject appellant's contention that the trial court's ruling deprived him of his constitutional right to a meaningful opportunity to present a complete defense.

Exclusion of Moss's White Supremacist Tattoo and Views

Before trial, appellant sought to admit evidence that Moss had been tattooed with the number "1488," a white supremacist symbol. Defense counsel explained that the number 14 refers to a 14-word sentence authored by a white supremacist "who killed [a] Jewish talk show host." The number 8 "refers to the eighth letter of [the] English alphabet, which is H; and 88 represents HH, Heil Hitler." Counsel claimed that the tattoo was relevant because it showed "bias against a racial group."

Pursuant to Evidence Code section 352, the trial court excluded the evidence because "it's more prejudicial than probative." The court said, "I'm not going to allow you to cross-examine her on any white power issues."

Appellant claims that the trial court abused its discretion. He asserts: "Evidence of Moss's tattoo would have shown that she subscribed to white supremacist views, so much so that she chose to permanently mark her body with a white supremacist symbol. This, in turn, would have a tendency to

show that she had a bias against non-white people, including [appellant], whose last name [Yanaga] unequivocally signaled his Japanese origin." (See *People v. Williams* (1991) 228 Cal.App.3d 146, 150 ["A complaining witness may be asked questions that inferentially establish a prejudice against the race to which the defendant belongs"]; *In re Anthony P.* (1985) 167 Cal.App.3d 502, 511-513.)

The trial court did not abuse its discretion. The tattoo was extremely inflammatory and had minimal, if any, probative value as to Moss's credibility. The record is devoid of evidence that she was prejudiced against appellant because of his Asian ancestry. In his reply brief appellant acknowledges that, "independent of her bias in favor of Savoy," there is no evidence that Moss was biased against appellant. "Instead, the only evidence showed she was not biased." Appellant notes: "[T]he state of the evidence was that 'Moss and appellant were friendly and . . . appellant never behaved inappropriately toward her. Moss was also being helped by appellant, who provided her a place to stay.'" Moss may not even have known that appellant is of Asian ancestry or that his last name is Japanese. The trial court opined that appellant does not look Asian. Thus, based on her white supremacist tattoo, no reasonable juror would have concluded that Moss was so racially biased against appellant that she would testify falsely against him.

Moreover, the trial court did not prohibit appellant from cross-examining Moss on racial bias against Asians. It prohibited him from cross-examining her "on any white power issues," i.e., issues concerning the belief that whites are superior to and should exert power over other races. Appellant wrongly contends that, "[b]y ruling that [he] could not refer to Moss's

tattoos . . . or to her white supremacist views generally, the trial court precluded [him] from questioning Moss about her racial bias against non-whites like [appellant]." Appellant could have cross-examined Moss about racial bias against Asians without referring to her tattoo or "white power issues."

We reject appellant's claim that the trial court's ruling violated his constitutional right to confront and cross-examine witnesses against him. "'[A] trial court may restrict cross-examination on the basis of the well-established principles of Evidence Code section 352, i.e., probative value versus undue prejudice. [Citation.] There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced a significantly different impression of credibility.' [Citations.]" (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 119.) Cross-examination of Moss about her white supremacist tattoo and "white power issues" would not "'reasonably have produced a significantly different impression of [her] credibility.'" (*Ibid.*)

We also reject appellant's claim that the trial court's ruling denied him a fair trial in violation of due process. "Ordinarily, proper application of the statutory rules of evidence does not impermissibly infringe upon a defendant's due process rights. [Citations.]" (*People v. Ardoin*, *supra*, 196 Cal.App.4th at p. 119.)

Erroneous Modification of Jury Instructions

The trial court gave CALCRIM No. 570 on the reduction of murder to voluntary manslaughter where the defendant killed because of a sudden quarrel or in the heat of passion (hereafter sufficient provocation). It also gave CALCRIM No. 571 on the reduction of murder to voluntary manslaughter

where the defendant killed in imperfect self-defense.[2] The last paragraph of CALCRIM No. 570 provides: "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*." (Italics added.) The last paragraph of CALCRIM No. 571 provides: "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.) In the last sentence of both paragraphs, the trial court struck the word "murder" and replaced it with the word "manslaughter."[3]

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[2] "An instance of imperfect self-defense occurs when a defendant acts in the actual but unreasonable belief that he or she is in imminent danger of great bodily injury or death. [Citation.] Imperfect self-defense differs from complete self-defense, which requires not only an honest but also a reasonable belief of the need to defend oneself. [Citation.] It is well established that imperfect self-defense is not an affirmative defense. [Citation.] It is instead a shorthand way of describing one form of voluntary manslaughter. [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132.)

[3] The original instructions said "murder," not "manslaughter." Immediately after the court had completed reading the original instructions to the jury, defense counsel asked to approach the bench. The bench conference was not reported. The settled statement on appeal says: "At the bench conference . . . , the attorneys and Judge Trice recognized a typographical error at the end of the reading of CALCRIM 570 and 571. The parties agreed that both instructions should have ended with the word 'manslaughter' instead of the word

The modification was erroneous. "[I]f the fact finder determines the killing was intentional and unlawful, but is not persuaded beyond reasonable doubt that [sufficient] provocation (or imperfect self-defense) was absent, it should acquit the defendant of murder and convict him of voluntary manslaughter. [Citations.]" (*People v. Rios* (2000) 23 Cal.4th 450, 462.) Appellant argues that the modification was reversible error because it "foreclosed a guilty verdict on voluntary manslaughter, forcing the jury to make an all-or-nothing choice between murder or acquittal. *The error was equivalent to not instructing the jury at all on voluntary manslaughter*." (Italics added.)

"A challenged instruction is not viewed "'in artificial isolation,'" but is considered in the context of the instructions as a whole and the entire record. [Citation.] We are . . . obligated to regard the [jury] as intelligent and capable of understanding and correlating all instructions they are given. [Citation.]" (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1155, fn. omitted; see also *Middleton v. McNeil* (2004) 541 U.S. 433, 437 [124 S.Ct. 1830, 158 L.Ed. 2d 701] (*Middleton*) [""[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge"""].)

"[T]he instructions were at worst ambiguous because they were internally inconsistent." (*Middleton*, *supra*, 541 U.S. at p. 438.) "When reviewing ambiguous instructions, we inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights. [Citation.]

'murder.'" Following the bench conference, the court instructed the jury that "murder" should be replaced with "manslaughter." On the instructions provided to the jury in the jury room, a line was drawn through "murder." Someone printed "manslaughter" next to "~~murder~~."

Applying the same standard to the conflicting instructions at issue here, we conclude it is not reasonably likely the jury determined the [voluntary manslaughter] instructions meant nothing at all." (*People v. Rogers* (2006) 39 Cal.4th 826, 873.)

The instructions as a whole made clear that the jury should acquit appellant of murder, not voluntary manslaughter, if the People failed to carry their burden of proving beyond a reasonable doubt that he had not killed in imperfect self-defense or because of sufficient provocation. CALCRIM Nos. 570 and 571 correctly provided: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed" in imperfect self-defense or because of sufficient provocation. The instructions listed the elements of sufficient provocation and imperfect self-defense. Furthermore, the court gave CALCRIM No. 522, which provided: "Provocation may reduce a murder from murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] Consider the provocation in deciding whether the defendant committed murder or manslaughter." The court also gave CALCRIM No. 3517, which informed the jury that if it found appellant not guilty of murder, it could convict him of the "lesser crime" of voluntary manslaughter.

This case is similar to *Middleton*, *supra*, 541 U.S. 433. There, the defendant was convicted in California of second degree murder. On appeal, he contended that the trial court had erroneously instructed the jury on imperfect self-defense. The challenged instruction provided, ""'An 'imminent' peril is one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer *as a reasonable person*.'"" (*Id*. at p. 435, italics added.) The italicized language

had been added to the standard instruction and was erroneous. There is no "reasonable person" requirement for imperfect self-defense. (See *People v. Por Ye Her* (2010) 181 Cal.App.4th 349, 353 [actual belief in need to defend based on *unreasonable* belief in imminent danger of death or great bodily injury is "sufficient to transform perfect self-defense into imperfect self-defense"].)

The California Court of Appeal acknowledged the instructional error but upheld the defendant's conviction. It reasoned: "'[R]eversal is not required because "[e]rror cannot be predicated upon an isolated phrase, sentence or excerpt from the instructions since the correctness of an instruction is to be determined in its relation to the other instructions and in light of the instructions as a whole." Here, when all of the jury instructions on voluntary manslaughter and imperfect self-defense, are considered in their entirety, it is not reasonably likely that the jury would have misunderstood the requirements of the imperfect self-defense component of voluntary manslaughter. . . .'" (*Middleton*, *supra*, 541 U.S. at pp. 435-436.)

The defendant sought federal habeas relief. "The Ninth Circuit held that the erroneous . . . instruction 'eliminated' [defendant's] imperfect self-defense claim . . . ." (*Middleton*, *supra*, 541 U.S. at p. 437.) The United States Supreme Court reversed the Ninth Circuit. It noted that, on at least three occasions, the instructions had correctly informed the jury of the elements of imperfect self-defense. "Given three correct instructions and one contrary one, the state court did not unreasonably apply federal law when it found that there was no reasonable likelihood the jury was misled." (*Id.* at p. 438.)

The Supreme Court's reasoning applies to the erroneous substitution of "murder" for "manslaughter" in the last

sentence of the last paragraphs of CALCRIM Nos. 570 and 571. In view of the multiple correct instructions on the reduction of murder to voluntary manslaughter, it is not reasonably likely that the error led the jury to misapply the law and violate appellant's rights.

We reject appellant's claim that the "reasonable likelihood" test is inapplicable because the instructions' substitution of "manslaughter" for "murder" is "facially erroneous." The instruction in *Middleton* was also facially erroneous, but the Supreme Court approved the application of the "reasonable likelihood" test. Relying on *Middleton*, in *People v. Mehserle*, *supra*, 206 Cal.App.4th at p. 1155, fn. 18, the Court of Appeal stated, "Defendant erroneously argues the 'reasonable likelihood' test does not apply when the instruction is 'facially incorrect.' [Citation.]"

Appellant contends that, "[b]y mis-instructing the jury on voluntary manslaughter, the trial court also mis-instructed the jury on an element of murder" because "the *absence* of provocation or imperfect self-defense is an element of murder. Consequently, the erroneous instruction lightened the prosecution's burden to prove murder."

The contention is without merit. The absence of provocation or imperfect self-defense is not an element of murder. "[P]rovocation and imperfect self-defense, though they do not justify or excuse an intentional . . . homicide, mitigate the offense by *negating the murder element of malice,* and thus *limit* the crime to manslaughter." (*People v. Rios*, *supra*, 23 Cal.4th at p. 454.) "If the issue of provocation or imperfect self-defense is . . . 'properly presented' in a murder case [citation], the *People* must prove *beyond reasonable doubt* that these circumstances

were *lacking* in order to establish the murder element of malice. [Citations.]" (*Id*. at p. 462.) Here, CALCRIM No. 570 instructed the jury, "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." CALCRIM No. 571 instructed, "The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in []imperfect self defense . . . ." The instructions, therefore, did not lighten the prosecution's burden to prove murder. By finding appellant guilty of murder, the jury necessarily found that the People had met their burden of proving beyond a reasonable doubt that he did not kill in imperfect self-defense or as the result of a sudden quarrel or in the heat of passion.

Alleged Duty to Give CALCRIM No. 3477 Sua Sponte

Appellant argues that the trial court had a duty to instruct the jury sua sponte pursuant to CALCRIM No. 3477. The instruction provides that, if the defendant used deadly force against an intruder inside the defendant's home, it is presumed that the defendant reasonably feared imminent peril of death or great bodily injury if the intruder had unlawfully and forcibly entered the home and the defendant knew or reasonably believed that the entry had been unlawful and forcible. The presumption is rebuttable. To overcome the presumption, "the People must prove that the defendant did not have a reasonable fear of imminent death or injury . . . when [he] used force against the intruder. If the People have not met this burden, you must find the defendant reasonably feared death or injury." (*Ibid.)*

CALCRIM No. 3477 is based on section 198.5, which provides: "Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be

presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who . . . has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred." (§ 198.5.)

In *People v. Owen* (1991) 226 Cal.App.3d 996, the appellate court considered whether the trial court had a duty to instruct sua sponte pursuant to section 198.5. The appellate court concluded, "[T]he [trial] court had no sua sponte duty to give an instruction based on section 198.5 because the jury was adequately instructed on the law pertinent to the facts of the case, including that encompassed in section 198.5, by the instructions given." (*Id*. at p. 1005.) The appellate court explained: "The effect of the [section 198.5] presumption is to impose upon the People the burden of proof as to the nonexistence of the presumed fact [i.e., the defendant's reasonable fear of imminent peril of death or great bodily injury]. (Evid. Code, § 606.) The burden, therefore, was on the People to prove beyond a reasonable doubt that defendant did not have a reasonable fear of imminent peril of death or injury . . . when he killed the victim. [Citations.] However, this burden already rested upon the prosecution independently of the presumption created by section l98.5 - and the jury was so instructed in the instant case." [4] (*Id*. at p. 1005.)

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[4] But see *People v. Silvey* (1997) 58 Cal.App.4th 1320, 1334-1337 (conc. & dis. opn. of Wallin, Acting P.J., disagreeing with *Owen*). See also *Judd v. Lamarque* (E.D. Cal., Mar. 22, 2007, No. 2:02-cv-1083-JKS) 2007 U.S.Dist. Lexis 21948, at *13, fn. 4,

We need not decide whether *Owen* was correctly decided or whether it is distinguishable. If the trial court erroneously failed to give CALCRIM No. 3477 sua sponte, "it is not reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 837; see *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [error in state law is "subject to the traditional *Watson* test"]; *People v. Randle* (2005) 35 Cal.4th 987, 1003, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1200-1201 ["Any error in failing to instruct on imperfect defense of others is state law error alone, and thus subject . . . to the harmless error test articulated in *People v Watson*"].)

Any error was harmless under the *Watson* test because the jury rejected the theory of imperfect self-defense and convicted appellant of murder. Pursuant to CALCRIM No. 571, the trial court instructed on imperfect self-defense as follows: "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 . . . . [¶] [¶] 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. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in []imperfect self-defense . . . ." (Italics added.)

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discussing *Owen* and the *Silvey* dissent.

We presume that the jury followed this instruction. (*People v. Homick* (2012) 55 Cal.4th 816, 851.) Thus, by convicting appellant of murder, the jury necessarily found that the People had met their burden of proving beyond a reasonable doubt that appellant was not acting in imperfect self-defense, i.e., he did not *actually* believe that he was in imminent danger of death or great bodily injury and that the immediate use of deadly force was necessary to defend against the danger. (CALCRIM No. 571.) It is therefore not reasonably probable that, had the jury been instructed on the presumption of CALCRIM No. 3477, it would have made the contradictory finding that appellant had *reasonably* feared imminent danger of death or great bodily injury. A defendant cannot reasonably fear what he does not actually fear.

Appellant would have had a stronger case of prejudicial error had the jury convicted him of voluntary manslaughter based on an actual but unreasonable fear of imminent danger of death or great bodily injury. In such circumstances, CALCRIM No. 3477's presumption of reasonable fear arguably could have affected the outcome. (See CALCRIM No. 571 ["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"].) Here, the jury found that appellant neither reasonably nor unreasonably believed in the need to use deadly force.

Appellant claims that his counsel was ineffective for failing to request CALCRIM No. 3477. The standard for evaluating a claim of ineffective counsel is set forth in *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]: "First, [appellant] must show that counsel's

performance was deficient. . . . Second, [appellant] must show that the deficient performance prejudiced the defense."

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.) To prove prejudice, appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) As explained above, there is no reasonable probability that the result would have been different had the trial court instructed the jury pursuant to CALCRIM No. 3477.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

John A. Trice, Judge

Superior Court County of San Luis Obispo

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