

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HOA DIHN TRAN,

Defendant and Appellant.

A131099

(Alameda County  
Super. Ct. No. C160885)

Hoa Dihn Tran (appellant) was convicted, following a jury trial, of second degree murder and possession of a firearm by a felon. On appeal, he contends (1) the trial court erred in failing to instruct the jury sua sponte on imperfect self-defense; (2) the trial court's intoxication instruction was erroneous; (3) the trial court erred in instructing on efforts to suppress evidence; and (4) the errors were cumulatively prejudicial. We shall affirm the judgment.

***PROCEDURAL BACKGROUND***

Appellant was charged by information with the murder of Tho Tu (Pen. Code, § 187(a)—count one),<sup>1</sup> and with possession of a firearm by a felon (former § 12021, subd. (a)(1)—count two). The information alleged, as to count one, that appellant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)), personally and intentionally discharged a firearm (§ 12022.53,

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

subd (c)), and personally used a firearm (§§ 12022.5, subd. (a)(1) & 12022.53, subd. (b)). The information further alleged, as to both counts, that appellant had suffered one prior serious felony conviction (§ 667, subd. (a)(1)) and one prior strike conviction (§§ 667, subd. (e)(1) & 1170.12, subd. (c)(1)).

Following a jury trial, the jury found appellant guilty of second degree murder and possession of a firearm by a felon. The jury also found the enhancement allegations to be true.

On January 31, 2011, the trial court sentenced appellant to 66 years to life in state prison.

Also on January 31, 2011, appellant filed a notice of appeal.

### ***FACTUAL BACKGROUND***

This case involves the August 27, 2003 shooting death of Tho Tu at the Pho H-Uyen restaurant-bar in downtown Oakland.

Minh Tu, sister of homicide victim Tho Tu, testified that her brother was born in 1977 in Vietnam. He came to the United States at age 13. He graduated from college in 2003, shortly before his death, with a degree in computer engineering. He had never been involved in a crime.

Quyem “Rebecca” Bui, a friend of appellant, testified that she was at a restaurant in August 2003, but did not remember anything about the night because it was so long ago.<sup>2</sup> She remembered going to the Oakland Police Department some time after that night, but did not remember what she told police then.

Bui’s recorded interview with police was played for the jury at trial. In the interview, which took place on October 14, 2003, Bui told police that, on the night Tu died, she was at a bar in Oakland with friends, including appellant;<sup>3</sup> his brother Binh; and

---

<sup>2</sup> Appellant’s trial took place in December 2010.

<sup>3</sup> Bui used appellant’s nickname “Tony.”

two other men, Bao and Dai. Appellant was a friend of her ex-boyfriend; she had known him for about three years. A fight started at the bar after someone started cursing at Dai, who was from North Vietnam, saying that North Vietnamese are “pussy-face.” Dai hit the man with a big glass and the whole group started fighting. Dai told appellant to come, and then Tho Tu—who Bui identified in a photograph police showed her—hit Dai and appellant with a chair.<sup>4</sup>

Bui started running around the restaurant and, at some point, saw appellant with a small gun in his hand. She did not see anyone else in the bar with a gun. She then saw people trying to push appellant outside. Appellant fired the gun and she ran behind the bar and sat down. She did not see anything after that, but heard another gunshot. She did not see the victim, Tu, get shot. After she came out from behind the bar, Bui saw Tu lying face down on the floor. She immediately left the bar and drove home.

Dai Nguyen,<sup>5</sup> who was at the bar on the night of the shooting, testified that he did not know appellant well and did not recall much about that night because he had been drinking and taking drugs. He came to the bar with his friend Bao. He did not remember seeing appellant at the bar that night. He knew the victim, Tho Tu, slightly; he was “a nice guy.” He did not recall if he saw Tu at the bar that night.

Police interviewed Dai on the evening after the shooting. A tape recording of that interview was played for the jury at trial. During the interview, Dai told police that he had known the victim, Tu, for years. He said he arrived at the bar at 12:30 or 1:00 a.m. with his friend Bao. He also was with appellant and appellant’s brother Binh. He drank about two beers over the course of the night. At some point, a man named Yung said

---

<sup>4</sup> On cross-examination at trial, Bui testified that she saw appellant “bleeding a lot” after he was hit with the chair.

<sup>5</sup> Three witnesses at trial—Dai Nguyen, Ahn “Bao” Nguyen, and My Nguyen—have the same last name. We will use each of their first names in this opinion, to avoid confusion.

something disrespectful to Dai regarding where Dai was from in Vietnam. Dai got mad and slapped Yung in the face. A fight started and people used beer bottles and chairs. Tu fought with Bao. Tu was very physically aggressive because he was trying to protect his friend, Yung. Dai and Bao tried to break up the fight.<sup>6</sup> He grabbed appellant around the waist.

Dai was outside the door of the bar with appellant when he heard two or three gunshots. The shots came from close by. Dai saw someone who was two or three feet away from him shoot and run. It looked like appellant, but Dai said he could not be 100 percent sure because he ducked down after the shots. Eventually Dai acknowledged that he was 50 percent sure that appellant was the shooter. Tu was close to the bar when he was shot. Dai did not see a weapon in his hands. He did not see anyone else in the bar with a gun during the fight.

Minh Vy, a cook at the restaurant, testified that on the early morning of August 27, 2003, he saw a fight between two groups who were from North and South Vietnam. They were breaking chairs and bottles. Three or four people were bleeding badly and there was blood on the floor. After about 10 minutes, one man ran outside. He had blood all over him. Vy followed him outside. The man got a black gun from a black Acura parked in front of the restaurant. He went back inside the restaurant and Minh heard about three gunshots. Minh did not see him shoot, but saw him run back outside right after firing the shots and then saw him get into the Acura. A woman who was already in the car drove away. The man was named Tony, and he had a tattoo of a dragon on his left shoulder. Vy identified the gunman in a photo lineup less than a month after the shooting. He was “100 percent” sure that the person he identified was the shooter. He

---

<sup>6</sup> On cross-examination, Dai testified that someone hit appellant over the head with a chair. Dai did not see it happen, but saw Tu holding a chair afterwards. Appellant was “bleeding everywhere, pretty bad shape.” Dai later testified that chairs were flying all over the place, as well as beer bottles.

was a little uncertain whether appellant was the same person because, although he looked familiar, his appearance had changed. Other than the man, Tony, who shot the gun, Vy did not see anyone with a gun or knife that night.

Ky Lieu, a friend of the restaurant's owner, testified that he was at the restaurant at about 2:50 a.m. on August 27, 2003, but did not remember much because he drank a lot of beer. He saw appellant at the restaurant that morning, but he left when the fight started. Lieu acknowledged that, on October 17, 2003, he gave a statement at the Oakland Police Department. He did not lie to police, but he did not remember if he told police that appellant was shooting into the restaurant. Lieu's tape recorded interview with police was played for the jury at trial.

In that interview, Lieu said he was sitting at the bar when two groups of people started fighting. He did not see any weapons at that point. After the fight stopped, he went outside. He then saw a man he knew named Tony stand at the door and shoot into the bar with a handgun. Tony, who was standing near Lieu, fired three or four shots. Lieu did not see anyone else that night inside or outside the bar with a gun. He identified Tony, the man who shot into the bar, in a photo lineup. After the shooting, Tony left in a green Honda automobile with a female.

After the taped interview was played, Lieu acknowledged that he remembered seeing appellant standing outside the restaurant and shooting through its glass door. Appellant was about four or five feet away from the door when he shot the gun.

Ahn "Bao" Nguyen (Bao) testified that he was a good friend of appellant, whom he had known for 15 or 16 years. He was with appellant and several other friends at the restaurant on August 27, 2003, when a fight broke out between six or seven people. He saw appellant get hit in the head or eye and saw him bleeding a lot. Appellant then "was trying to either get a stick or a knife or gun or something, but I tried to prevent him from doing that." After the fighting stopped, the people involved continued to shout at each other. Appellant, their friend Dai, and some other people then went outside. Appellant

reentered the restaurant holding something black; Bao could not tell whether it was a car jack, a stick, a knife, or a gun. The shooting victim was still inside the restaurant, back near the pool table. When appellant ran inside, Bao and Dai tried to stop him from hitting people who were inside by grabbing him and holding him back. Appellant, Dai, and a few other people then went outside. About two minutes after appellant went back outside, Bao heard gunshots coming from outside. Bao, who was still inside the restaurant, did not see who the shooter was.

Bao participated in an audiotaped interview with police on the morning of the shooting. That interview was played at trial for the jury. In the interview, Bao said he tried to push appellant out of the restaurant after appellant entered with a handgun. As he held appellant, the gun fired a shot into the floor. Appellant then walked outside, still holding the gun. About one minute later, Bao heard two gunshots coming from outside. The shots went through the glass door of the restaurant and hit the victim in the chest. The victim was standing about 10 feet away from the door. Bao did not see who shot into the restaurant, but he did not see anyone else with a gun. He did not see the victim with either a gun or a knife during the fight.

After the tape was played, Bao testified on cross-examination that, after the fight was over, words were exchanged between a number of people, including appellant and the victim. The victim was cursing and said something like, “ ‘This is not over yet. There’s still more to come.’ ” As Bao pushed appellant out the door of the restaurant after appellant came back in with a gun, the victim, who was yelling, followed them towards the front door. Shortly after that, Bao heard the shots fired from outside.

My Nguyen (My) testified that he had known appellant since childhood. My had a stroke in March 2003 and appellant, who was a good friend, visited him and helped him with many things. My was at the restaurant on the morning of the shooting in August 2003, along with appellant and two other friends, Bao and Dai. They were drinking beer. A fight broke out between their group and another group. My tried to protect himself.

Bao came over to help him and told him to get out, so My went home. My said he did not remember much about that morning, claiming that his stroke had affected his short-term memory.

My had been interviewed by police on January 12, 2004, and an audiotape of the interview was played at trial. In the interview, My said that he, appellant, Dai, Bao, and Rebecca (Bui) were at the bar drinking beer in the early morning of August 27, 2003, when a fight started. The fight began after someone said something negative about the part of Vietnam Dai was from, and Dai hit him. The fight was between My's group of friends and another group. Appellant pushed one of the men who was hitting Dai and the man hit appellant in the head with a metal chair, causing his head to bleed.

My then saw appellant run out of the restaurant to his car, which was parked right in front of the restaurant's doors. About a minute later, he came back inside holding a black handgun. He said something like, " 'Who just hit me? . . . Who just hit me with the chair?' . . . [A]nd that guy said, 'Me, whattsup?' And [appellant] said, 'Man, I want you out—come outside. Me and you, one-and-one.' [The man responded,] [l]ike, 'I don't wanna come outside.' " Bao then grabbed appellant and said something like, " 'No, (Tony), you don't know what you're doing[.]' " Appellant then fired the gun twice.<sup>7</sup> Other than appellant, My did not see anyone at the restaurant with a gun.

My then drove appellant home in appellant's car, an Acura Legend. My asked appellant where the gun was, and appellant said, " 'I don't know.' " He did not show the gun to My. My told appellant, " 'You're stupid. What did you do that for?' " Appellant responded, " 'You know that guy hit me in the head with a chair and I'm bleeding . . . .' " Appellant was mad. He also was drunk; My believed he had drunk about six or seven beers, and he told My he had smoked pot. Appellant's head was still bleeding and My

---

<sup>7</sup> Oakland Police Officer Brian Medeiros testified that he interviewed My Nguyen in January 2004. My had said that, after appellant was hit in the head with a chair, he became emotional, ran outside, and returned with a pistol.

offered to take him to a doctor or the hospital, but appellant said he would not go and did not want to get arrested.

My first learned that someone had been shot at the restaurant when appellant called him later that morning and said he had watched the news. He said, “ ‘Man, I think I killed somebody. It’s on the news here now.’ ” My asked him what he was going to do, and appellant said he might leave the country and asked if My could send him money if he needed it.

Chyuan Dam, a friend of Tho Tu’s who was at the restaurant at the time of the fight and shooting, testified that he did not see Tu approach the front door of the restaurant during or after the fight. Just before he heard gunshots, Dam, Tu, and another friend moved back towards the back of the bar. He did hear Tu arguing loudly with someone during the fight.

Oakland Police Officer Eric Milina testified that he arrived at the scene at 2:55 a.m. on August 27, 2003. Tu was lying on the floor of the restaurant with gunshot wounds to his abdomen and back. Milina found one live round inside the restaurant and two expended casings outside, directly in front of the entrance to the bar; one casing was on the sidewalk and one was in the street, at the curb. Milina saw no weapons inside or outside the restaurant. Tu was not in possession of any weapon.

Dr. Thomas Rogers, a forensic pathologist, testified that he performed an autopsy on Tho Tu. The cause of death was multiple gunshot wounds. The major gunshot wounds included a shot to the left front side of the abdomen and a shot to the right back side of the body.

Oakland Police Officer Brian Medeiros testified that an arrest warrant was issued for appellant on August 28, 2003. Appellant was arrested in Southern California in March 2008. The gun used in the shooting was never recovered.

## **DISCUSSION**

### **I. Trial Court's Failure to Instruct on Imperfect Self-Defense**

Appellant contends the trial court erred in failing to instruct the jury sua sponte on imperfect self-defense. (See CALJIC No. 5.17.)<sup>8</sup>

#### **A. Trial Court Background**

Defense counsel requested instructions related to self-defense, including CALJIC No. 5.17, regarding imperfect (or “unreasonable”) self-defense. The trial court denied the request, stating, “I think the evidence indicates more of a sudden quarrel heat of passion second, vol kind of issue [sic]. So I will not be giving those.”

#### **B. Legal Analysis**

“ ‘ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citations], but not when there is no evidence that the offense was less than that charged. [Citations.]’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) “[T]he trial court need

---

<sup>8</sup> CALJIC No. 5.17 provides in relevant part: “A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter.

“As used in this instruction, an ‘imminent’ [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer.”

not instruct on a lesser included offense whenever *any* evidence, no matter how weak, is presented to support an instruction, but only when the evidence is substantial enough to merit consideration by the jury. [Citation.]” (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.)

“Self-defense requires an actual and reasonable belief in the need to defend against an imminent danger of death or great bodily injury. [Citation.] If, however, the killer actually, but *unreasonably*, believed in the need to defend himself or herself from imminent death or great bodily injury, the theory of ‘imperfect self defense’ applies to negate malice. [Citation.] The crime committed is thus manslaughter, not murder. [Citation.]” (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1261.)

Imperfect or unreasonable self-defense is “not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder. Accordingly, when a defendant is charged with murder the trial court’s duty to instruct *sua sponte*, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense.” (*People v. Barton, supra*, 12 Cal.4th at pp. 200-201.)

Here, according to appellant, the substantial evidence supporting imperfect self-defense included the evidence that Tu had hit appellant over the head with a metal chair, causing appellant to bleed profusely; Tu told appellant, “ ‘This is not over yet. There is more to come’ ”; after appellant left the restaurant, Tu walked toward the front door in an “aggressive and threatening manner”; and appellant and Tu were only 10 to 15 feet apart

when appellant fired at least two shots, killing Tu. We do not agree that this evidence was sufficient to require the trial court to give an unreasonable self-defense instruction.

The evidence shows that Tu was unarmed, at least 10 feet away from appellant, and inside the restaurant when appellant shot him from the sidewalk outside. In light of this evidence, there simply is not *substantial* evidence in the record that appellant actually believed, as he stood outside the restaurant, that he was in imminent danger of being killed or suffering great bodily injury and that the immediate use of deadly force against Tu was therefore necessary. (See CALJIC No. 5.17.) This is so even assuming that Tu was walking toward the door when appellant shot him and that Tu had said, moments before, “ ‘This is not over yet.’ ” In addition, appellant never showed or expressed any actual belief that he was in imminent danger. Rather, he expressed only anger and a desire for revenge, as when he returned to the restaurant with a gun and told Tu to come outside to settle things and when he later told My Nguyen that he shot Tu because “that guy hit me in the head with a chair and I’m bleeding.”

The evidence as a whole simply was not such that a jury could *reasonably* conclude that appellant killed Tu in the unreasonable but good faith belief that he had to act in self-defense. (See *People v. Barton, supra*, 12 Cal.4th at pp. 200-201.) Hence, the extremely slight evidence to which appellant refers simply is not sufficient to trigger the trial court’s sua sponte duty to instruct on unreasonable self-defense. (See *Barton*, at p. 195, fn. 4 [trial court is not required to instruct on lesser included offense “whenever any evidence, no matter how weak, is presented to support an instruction”].)

## **II. The Trial Court’s Erroneous Intoxication Instruction**

Appellant contends the trial court’s instruction on the effect of intoxication on the charged crimes was erroneous. (See CALJIC No. 4.21.1.)

### **A. Trial Court Background**

The trial court instructed the jury with CALJIC No. 4.21.1, as follows: “It is the general rule that no act committed by a person while in a state of voluntary intoxication is

less criminal by reason of this conviction [*sic*]. Thus, in the crime charged in count two, the fact that the defendant is voluntarily intoxicated is not a defense and does not relieve the defendant of responsibility for the crime. This rule applies in this case only as to count two.

“However, there is an exception as to the general rule, namely, where a specific intent or mental state is an essential element of a crime. In that event, you should consider the defendant’s voluntary intoxication in deciding whether the defendant possessed the required specific intent or mental state at the time of the commission of the alleged crime.

“Thus, in the crime charged in *count two*, [*sic*] or the lesser crimes, a necessary element is the existence in the mind of the defendant of a certain specific intent or mental state which is included in the definition of the crimes set forth elsewhere in these instructions.

“If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether the defendant had the required mental state or specific intent.

“If from all the evidence you have a reasonable doubt whether the defendant formed that mental state or specific intent, you must find that he did not have that mental state or specific intent.” (*Italics added.*)

As shown in italics above, the court erroneously instructed the jury that the intoxication defense was applicable only to count two (possession of a firearm by a felon), when in fact it was only applicable to count one (murder). Both the written and oral instruction contained this error.<sup>9</sup>

---

<sup>9</sup> Although not mentioned by the parties, the trial court’s oral instruction also substituted the word “conviction” for the correct word, “condition,” in the first sentence of the instruction.

## **B. Legal Analysis**

Respondent acknowledges that the instruction was incorrect. Respondent argues, however, that appellant forfeited this issue by failing to object and seek correction in the trial court. We disagree. This is not a case, as respondent asserts it is, of the court failing to expand, modify, or refine a jury instruction. Rather, the court gave an incorrect statement of the law in its instruction that had the potential to confuse the jury. (See *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172 [appellate court may review any instruction given even if no objection was made thereto in trial court, “ ‘ “if the substantial rights of the defendant were affected” ’ ”].)

Respondent further argues, on the merits, that this was a minor error involving just one word (count “two”), and that the instructions as a whole made clear to the jury that the intoxication defense applied to count one. We tend to agree with appellant that this error was so confusing that it was not necessarily cured by other instructions that explained that count one, not count two, involved specific intent.

Assuming that the mistake was not cured by other instructions, we nonetheless find the instructional error harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; see also *People v. Chun* (2009) 45 Cal.4th 1172, 1205 (*Chun*).

In *Chun, supra*, 45 Cal.4th at page 1205, the undisputed evidence showed that three people in a vehicle were hit by multiple gunshots fired at close range from three different firearms. Our Supreme Court held that the trial court had incorrectly instructed the jury on the elements of second degree felony murder. The court, however, found the error harmless beyond a reasonable doubt. It reasoned: “No juror could have found that defendant participated in this shooting . . . without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life—which is a valid theory of malice. In other words, on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life [i.e.,

implied] malice. The error in instructing the jury on felony murder was, by itself, harmless beyond a reasonable doubt.”

The trial court in this case instructed the jury on second degree murder under either express or implied malice theories, without any requirement for unanimity as to one theory or the other. (See CALJIC No. 8.11.) With the 1995 amendment to section 22, subdivision (b), voluntary intoxication is no longer admissible to negate implied malice.<sup>10</sup> (See *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298.) Thus, the intoxication instruction was applicable only to the express malice theory of murder.

The evidence in this case showed that appellant fired at least two gunshots into a restaurant that he knew was full of people and, in fact, hit the victim twice from some 10 feet away. We conclude the jury could not have found that appellant committed murder under an express malice theory without also finding that he had acted with implied malice, i.e., that he intentionally committed an act that was dangerous to human life, with knowledge of the danger to and with conscious disregard for human life. (See CALJIC No. 8.11; see also *Chun, supra*, 45 Cal.4th at p. 1205; accord, *People v. Hach* (2009) 176 Cal.App.4th 1450, 1457 [jury must have found implied malice second degree murder where defendant fired rifle directly into car from 10 feet away with knowledge that there were two people inside of it].) Accordingly, the error in instructing the jury on the

---

<sup>10</sup> Section 22 now provides: “(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

“(b) 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.

“(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.”

relationship of intoxication to the specific intent requirement of express malice murder was harmless beyond a reasonable doubt.

### ***III. The Trial Court's Instruction on Efforts to Suppress Evidence***

Appellant contends the trial court erred in instructing, pursuant to CALJIC No. 2.06, on efforts to suppress evidence.

#### ***A. Trial Court Background***

During trial, the prosecutor requested that the trial court instruct the jury with CALJIC No. 2.06, regarding the suppression of evidence. The prosecutor explained that a “firearm was used in the commission of the offense. The defendant fled the scene and destroyed or disposed of that firearm that was used. The police executed a search warrant on his residence shortly thereafter within the next day or so as well as on his vehicle and the gun wasn’t recovered in those locations. [¶] So there was an active effort on the defendant’s part to dispose of that evidence.” Defense counsel objected, arguing that CALJIC No. 2.06 “is not geared towards that type of situation where a person absconds after committing a crime with a weapon and that weapon is simply not located.”

The trial court ultimately instructed the jury with CALJIC No. 2.06, as follows: “If you find that the defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence, these attempts may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

The prosecutor argued several times during closing argument that appellant destroyed or disposed of the gun, which the jury could use to find consciousness of guilt.

#### ***B. Legal Analysis***

“ ‘[F]or a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference.’

[Citation.]” (*People v. Hart* (1999) 20 Cal.4th 546, 620, quoting *People v. Hannon* (1977) 19 Cal.3d 588, 597, disapproved on another ground by *People v. Martinez* (2000) 22 Cal.4th 750, 762-763; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102 [before CALJIC No. 2.06 may be given, “there need only be some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference”].) “To support an inference that the defendant attempted to suppress evidence, the record need not establish that the evidence actually was destroyed. [Citations.]” (*People v. Hart*, at p. 620.) Thus, CALJIC No. 2.06 is properly given when the jury could reasonably infer from the evidence that the defendant attempted to suppress evidence. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1224 [cautionary nature of, inter alia, CALJIC No. 2.06 “benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory”].)

Here, the evidence showed that, at the time of the shooting, appellant had a gun in his possession. The evidence further showed that, shortly thereafter, police officers searched appellant’s car and his apartment, but never found the gun. While it is possible that appellant took the gun with him when he fled, the evidence showing that the gun was not found after these searches constituted “some evidence,” warranting the giving of CALJIC No. 2.06. (See *People v. Hart*, *supra*, 20 Cal.4th at p. 620.) Hence, the court did not err in giving CALJIC No. 2.06.

Moreover, even were there *no* evidence to support the giving of this instruction, any error would be harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence presented at trial that appellant was the shooter was overwhelming. Indeed, during closing argument, defense counsel explicitly conceded that appellant shot Tu, saying, “[There] was never an issue who shot Tho Tu. . . . Tony Tran shot Tho Tu.” In addition, the instruction did not inform the jury that appellant suppressed evidence. Rather, it said that *if* the jury found that appellant attempted to suppress evidence against

himself, that *could* be considered as a circumstance tending to show guilt. (See CALJIC No. 2.06; see also *People v. Jackson, supra*, 13 Cal.4th at p. 1224.)<sup>11</sup>

#### ***IV. Cumulative Effect of the Errors***

Appellant contends that, even if none of the errors in themselves require reversal, the cumulative effect of those errors resulted in prejudicial error. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.) We disagree.

We have concluded that none of the alleged errors were prejudicial. Nor do we find that the cumulative effect of any errors calls into doubt the jury's verdict or undermines the fairness of the trial in this case, particularly in light of the strong evidence of guilt. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

#### ***DISPOSITION***

The judgment is affirmed.

---

<sup>11</sup> Appellant notes that the prosecutor described the gun in closing argument as the "murder weapon," and said its suppression by appellant showed consciousness of guilt as it related "to the murder." The prosecutor's remarks do not affect our conclusion that appellant was not prejudiced by any error in instructing the jury with CALJIC No. 2.06.

---

Kline, P.J.

We concur:

---

Haerle, J.

---

Richman, J.

A131099, *People v. Tran*