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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RENNIE PRATT,

Defendant and Appellant.

A132470

(Alameda County
Super. Ct. No. C162757)

Defendant Rennie Pratt was sentenced to serve 21 years in state prison after a jury convicted her of voluntary manslaughter and found true a special allegation that she used a firearm during the commission of the offense. On appeal, she argues that the trial court erred in limiting a jury instruction concerning circumstantial evidence to matters of intent or mental state. She also contends the trial court abused its discretion in imposing the aggravated terms for manslaughter and firearm use. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Overview

Defendant had a stormy relationship with her boyfriend, Michael Porcella, who died of a gunshot wound to the head on April 10, 2009. Defendant shot Porcella as he stood at the screen door of a home they shared in Oakland. Defendant testified that the shooting was an accident and claimed the gun discharged as she was trying to remove the bullets from the gun. The prosecution tried the case on the theory that defendant, in a

jealous rage, lay in wait for Porcella and shot him through the screen door when he arrived home.

Procedural History

The Alameda County District Attorney filed an information charging defendant with murder. (Pen. Code,¹ § 187, subd. (a).) The information also contained special allegations that defendant personally used a firearm in the commission of the offense and caused great bodily injury to the victim. (§§ 12022.5, subd. (a), 12022.53, subds. (b), (c), (d), (g), 12022.7, subd. (a)(1).)

Following a jury trial, the jury acquitted defendant of murder but convicted her of the lesser included offense of voluntary manslaughter. (§ 193, subd. (a).) The jury found that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a).

The trial court sentenced defendant to serve 21 years in state prison, composed of the upper term of 11 years for voluntary manslaughter (§ 193, subd. (a)), plus the upper term of 10 years for the firearm use enhancement (§ 12022.5, subd. (a)). Defendant timely appealed from the judgment of conviction.

Prosecution Case

Porcella was a lawyer who moved into a one-bedroom cottage on Laguna Avenue in Oakland in 2007. The cottage was directly behind a two-bedroom home occupied by Lynelle and Ian Lacey.² The Laceys' home and Porcella's cottage were close together, with a walkway separating the two dwellings.

The Laceys first met defendant in July 2008 when Porcella brought her to the cottage. Defendant, a hair stylist, was Porcella's girlfriend and had three children from a previous relationship. Defendant moved into the cottage with Porcella in the fall of 2008.

The Laceys heard Porcella and defendant arguing the first day they met her. From about January 2009 onward, there were arguments that could be heard by the Laceys

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

²Where necessary to distinguish between Lynelle and Ian Lacey, we will refer to them as Mrs. Lacey and Mr. Lacey.

about every two weeks. On one occasion in January 2009, the Laceys were woken up by shouting. They hoped that defendant would move out because of the series of disturbances involving Porcella and defendant. The Laceys usually heard Porcella trying to calm defendant down during the arguments.

On December 27, 2008, Oakland police responded to a call of a woman screaming at Porcella's cottage in Oakland. The officers who responded saw no sign of visible injuries on either Porcella or defendant.

Porcella's mother, Karen Porcella (hereafter Mrs. Porcella), described an incident that occurred on February 28, 2009, in which three couples, including her son and defendant, were invited to their home in Walnut Creek. Defendant arrived at the home around 9:00 p.m., after everyone else was seated for dinner. Defendant drank a lot of wine at dinner. At one point, Mrs. Porcella heard shouting from outside after Porcella and defendant had left the table. She went outside and saw defendant's car in the middle of the street with the door open. As defendant sat in the car crying, Porcella told his mother to take the keys because defendant should not be driving. Mrs. Porcella took the keys and parked the car. She escorted defendant to a small room off the garage and checked on her several times. After Porcella and the other guests left, Mrs. Porcella brought defendant into the house, where they sat and talked with Porcella's father. Defendant told them she loved Porcella very much and wanted to marry him. She complained that Porcella had hit her car. Mrs. Porcella noticed a ding in the hood of the car that looked as though somebody had hit it with a fist.

Mrs. Porcella described another incident that took place on March 4, 2009. She had received a telephone call from her son around 6:00 p.m. saying that he needed his parents' help. When the parents arrived at Porcella's cottage, defendant was on the porch smoking and drinking. Upon seeing Porcella's parents, defendant went into the house, where two of her children were seated at a table. Defendant was stirring a pot very quickly with the flames high enough that Mrs. Porcella found it frightening. Defendant started ranting and complaining that Porcella had called her "the B word" and "the C word." She also complained that Porcella had made her move to Oakland, buy a car, and

leave her home. Mrs. Porcella offered to put defendant up at a hotel or have her stay with her and her husband, but defendant refused and said she was staying at the cottage.

When Porcella arrived and entered the bedroom, the children called him “daddy.” Defendant told the children that Porcella was not their father and that they should not call him that. After Mrs. Porcella instinctively placed her hand on defendant during the conversation, defendant told Mrs. Porcella to take her hands off and added, “now I see where he gets it.” Porcella pushed defendant up against a wall and took her phone after defendant threatened to call the police. As defendant screamed, Porcella handed the phone to his mother. When his mother offered to call the police, Porcella said she had better give defendant back her phone because he thought that taking it was illegal. Mrs. Porcella returned the phone to defendant. As defendant and the children were leaving, Mrs. Porcella called the police.

When the police arrived, Mrs. Porcella told the officer that defendant was out of control and perhaps should be committed under section “5150” because she was a danger to herself or others. The officers stated they could not remove defendant because she had established residence at the cottage. An officer suggested getting a restraining order. The police ultimately told Porcella’s parents that they had to leave. The parents left and met their son at their house in Walnut Creek.

The following day, Porcella printed out forms for a restraining order and began to fill them out. On the way to the courthouse to file the forms, Porcella changed his mind about seeking a restraining order. He told his mother he wanted to think about it for 24 hours.

A neighbor of Porcella’s testified that on the evening of April 10, 2009, shortly after 11 p.m., he saw Porcella driving up quickly toward the cottage. The neighbor who lived in the house immediately in front of Porcella’s cottage, Mrs. Lacey, testified that she was at home with her husband and a friend on April 10, 2009. At around 11:30 p.m., she was in the back bathroom of the house flossing and brushing her teeth. The distance from the Laceys’ bathroom window to the Porcella’s cottage was about 12 feet.

Mrs. Lacey described her nighttime routine as flossing her teeth, followed by brushing her teeth with an electric toothbrush for a two-minute cycle, ending with rinsing her mouth for 60 seconds with a fluoride rinse. This timing was relevant because Mrs. Lacey first heard footsteps on the stairs to Porcella's porch while she was either flossing or brushing her teeth. She next heard Porcella's and defendant's voices while she was brushing her teeth. The voices were low, and although she could not make out individual words, it sounded "a little bit contentious." Mrs. Lacey then heard more footsteps on the stairs, followed by Porcella saying clearly "get out" twice. Porcella said the words in a "normal clear speaking voice with no trace of emotion." At that point, Mrs. Lacey was rinsing her mouth. She then heard a loud pop. According to Mrs. Lacey, defendant said something like "oh my God" and started calling Porcella's name, sounding extremely distressed.

Mr. Lacey testified that he was studying in his back room at around 11:30 p.m. on April 10, 2009. He heard defendant's voice but could not make out any of the words. He then heard Porcella's voice, which he described as a little louder and clearer. According to Mr. Lacey, Porcella said "get out" twice and then said "put that down." Mr. Lacey then heard a pop. After the pop, there was silence for about five to 30 seconds. Mr. Lacey then heard defendant's voice beginning to wail and say, "Oh my God."

Mr. and Mrs. Lacey crouched on the floor and then ran to the kitchen. Mrs. Lacey heard defendant's voice becoming louder and softer, as if she were moving in and out of the cottage. It sounded as if she was "freaking out." Mrs. Lacey called 911.

Oakland police officer Michael Morris responded to the 911 call and arrived at the scene at about 11:30 p.m. Two other officers were already there. Officer Morris saw Porcella lying on the front steps of the cottage with papers next to him. Defendant was leaning over Porcella with both of her hands covered in blood. She told Officer Morris that Porcella was still breathing. Officers detained defendant and took her to a patrol car. An officer who responded to the scene stated that it appeared that defendant had been drinking although she did not smell of alcohol. Defendant's blood alcohol level was 0 percent at 5:20 a.m. the following morning.

A neighbor and a police officer attempted first aid on Porcella before the Oakland Fire Department arrived to continue efforts to save him. Porcella was pronounced dead at the scene.

Porcella died of a gunshot wound. The doctor who performed the autopsy testified that the bullet entered the victim's head through the right eyelid, close to the nose. The bullet traveled on a 45-degree angle downward towards the victim's feet, then traveled through his spinal cord and lodged in the back of his neck. The damage to the spinal cord would have caused paralysis, which would have caused Porcella to collapse. The bullet would have caused death within three to five minutes. There were no powder burns on the victim. Porcella displayed scrapes and bruises consistent with falling after being shot. Tests of Porcella's blood revealed that his blood alcohol level was .11 percent. There was cocaine metabolite in his blood indicating use of cocaine between 8 and 24 hours previously.

Officer Morris performed a protective sweep and observed numerous items of evidence, some of which were later seized by a police department technician. A pistol was located on a couch about 8 to 10 feet from the front door of the cottage. The pistol was a Republic Arms .45 caliber Patriot model semi-automatic handgun (Patriot handgun). It was determined that the Patriot handgun fired the fatal shot. Near the Patriot handgun on the floor was a "slide-lock pin," which had fallen out of the gun. Officer Morris picked up the Patriot handgun in order to render it safe but found that the slide was jammed. It was later determined the gun was jammed because the slide lock pin had fallen out. Officer Morris observed that an expended casing was still in the gun's firing chamber, and one live round was still in the magazine.

Three other guns were found in the cottage. A Glock handgun and a box of ammunition were found on the top shelf of the closet. A Ruger rifle with no round in its firing chamber but three rounds in an attached magazine was found leaning up against the wall of the closet. Finally, a shotgun was found lying on the bedroom floor with its barrel facing the cottage's front door. The shotgun was not loaded.

A live .45 caliber bullet was found on the kitchen counter. The round may have been cycled through the Patriot handgun that was found on the couch. One live 9 millimeter round was found on the laundry room floor, and two additional 9 millimeter rounds were found on the kitchen floor. Officers observed a bullet hole through the frame of the metal screen door at the front doorway to the cottage. The hole was a little over 56 inches above the bottom of the door at a slight, one degree upward angle from the inside of the cottage to the outside.

Police officers seized two laptop computers from the cottage and recovered a cell phone from Porcella. An investigator testified that she observed about 3,500 photos that had been stored on the computers, cell phone, and other digital devices. About 30 of the photographs depicted Porcella with guns. Six of the photographs showed injuries to Porcella. None of the photos showed injuries to defendant.

An Oakland police department criminalist who testified as an expert in firearms described how the Patriot handgun operated. Ordinarily, pulling the trigger would cause a bullet to fire, ejecting the expended casing and reloading a live bullet from the magazine into the chamber. However, the Patriot handgun recovered from the crime scene had a defective slide lock pin, which could easily fall out if the gun were held in the wrong position. When the slide lock pin was missing, the slide was restricted in its movement, and the fired casing remained in the chamber. A new live round would be prevented from being pushed into the firing chamber. When the slide lock pin was in place, the gun would fire normally. The slide lock pin was not in place and the expended casing was stuck in the firing chamber when the Patriot handgun was recovered. The trigger pull on the Patriot handgun was 14 pounds. A common trigger pull is 8 to 10 pounds. The criminalist testified that the gun could not discharge without the trigger being pulled.

At trial, Mrs. Porcella recalled that her son had gotten a Glock handgun when he was around 18 years old. She also knew that Porcella had his grandfather's shotgun, which she once saw in the closet at the Oakland cottage. That was the only time she saw a gun at the cottage. Porcella's father testified that he had helped his son move into the

cottage and saw no guns at the time, although he knew that his son had the Glock handgun and his grandfather's shotgun. Mr. Lacey, Porcella's neighbor, testified that he had never seen guns in Porcella's cottage in the roughly five times he had been inside.

It was stipulated at trial that Mr. Lacey told an officer at the scene immediately after the shooting that he had heard defendant and Porcella talking, and then heard Porcella say "get out" at least twice.

Defense Case

Defendant testified in her own defense at trial. She had three children with Louie Garcia, although she had split up with Garcia years before meeting Porcella. She met Porcella in May of 2008. They moved in together at the end of October 2008.

According to defendant, Porcella loved guns and threatened to use them on a number of occasions. One time before defendant moved in with Porcella, he had showed her a gun in a car. Another time, Porcella pulled a gun while involved in an argument with a cousin. On another occasion, Porcella had threatened to shoot Garcia, the father of defendant's children, if he came over to their house. Defendant saw Porcella carrying the Patriot handgun many times, either in his backpack or in the trunk of his car. After the fight with his cousin, Porcella complained that defendant had not helped him and put a gun to her head. Many other times he would put a gun to her head to get her to shut up. Once he put her hand on a gun and told her to shoot herself. Defendant claimed to have never handled a gun before meeting Porcella.

Defendant testified that Porcella was a jealous person and accused her of having sex with Garcia. According to defendant, Porcella made her feel worthless and would put her down and call her names. Porcella also threatened to have her committed under Welfare and Institutions Code section 5150 as a threat to herself or others. She felt that their use of marijuana and cocaine was "horrible" and testified that drug use would make Porcella irritable.

Defendant claimed that Porcella was physically violent with her. She was afraid of him before they even moved in together. On the first occasion involving physical violence, he grabbed her by back of the neck, choked her, and asked if she wanted some

more. She claimed he pulled her hair and choked her about every two weeks. In response, she would scratch his face and raise her voice. On one occasion when defendant threatened to call the police, Porcella took pictures of the scratches on his face and said he would show them to the police and have defendant put in jail. She never reported anything because she was concerned that Porcella might lose his law license and she feared that he would kill her.

On December 27, 2008, defendant and Porcella had plans to go to a wedding but Porcella did not want to go. He hit her and, after defendant began screaming wildly for help, choked her and told her to shut up. The police came and Porcella told her to tell them that no violence had occurred. She did not tell on Porcella because she did not want him taken to jail.

Defendant testified about the time she went with Porcella to his parents' house for dinner. She and Porcella had an argument before arriving at the house and later, when defendant left the parents' house, Porcella jumped on the hood of her car and dented it. Mrs. Porcella came out when defendant screamed. That night, defendant told Mrs. Porcella that her son had been aggressive with her, to which Mrs. Porcella replied, "Oh dear."³

In early March 2009, Porcella was angry with defendant and said he would call his parents. When the parents arrived at the cottage, defendant finished cooking soup for her children. Mrs. Porcella told defendant that her son wanted her to pack up and leave. At the time, defendant told Mrs. Porcella that her son had been putting his hands on her, had almost killed her, and had a drug problem. Porcella took defendant's phone and slammed her against the wall after she threatened to call the police. Following that incident, defendant was ready to move out but made up with Porcella, who sounded like he meant it when he told her that they were going to work things out.

³At trial, Mrs. Porcella denied that defendant had told her during the conversation that Porcella had put his hands on defendant or that she had responded by saying, "Oh dear."

Defendant was not aware that Porcella had recorded a conversation on March 18, 2009 in which they had discussed suicide. She claimed that Porcella often talked about suicide. He would ask defendant how she wanted to kill herself and made her feel like he wanted her to do it.

At the end of March 2009, defendant packed a suitcase and went to the house of a male friend. She found a new apartment and got the keys to it on April 9, which was her birthday. On the day of her birthday, she had not seen Porcella for almost a week. Porcella contacted her during the day and that evening they went out to dinner. Following dinner, they went to a club, where they ingested cocaine. Back in the car, Porcella slammed defendant's head against the dashboard because he thought defendant had been flirting with his friend that evening. After returning home to the cottage, Porcella pulled her hair and put a gun to her head after she began screaming, saying he would kill her if she did not stop screaming.

The following morning, on April 10, 2009, Porcella did not allow defendant to leave to go to work. He slammed her back onto the bed and choked her. She finally left the cottage around 4:00 p.m. but agreed to attend an Oakland A's baseball game with Porcella that evening. She was not really sure that she wanted to go to the game with him but agreed to go after he showed up at her new apartment.

Before the game, defendant drank four beers and smoked marijuana. She and Porcella argued throughout the game about her moving out of the cottage. Defendant refused to leave the game with Porcella but she had no money. She ultimately got a ride to the cottage from a stranger. She claimed that she wanted to go back to the cottage because she had left things in Porcella's trunk. She also realized she had locked her own keys in her car and wanted to get a spare set of keys from the cottage.

Upon arriving at the cottage, defendant called Porcella and told him she needed to retrieve items from his car. Porcella responded by calling her a vulgar name and telling her he was going to shoot her. Defendant knew that Porcella was at a friend's house only a block and a half away. Porcella texted, "be there in 10."

When defendant walked into the cottage, she saw a gun on the floor. She saw the Patriot handgun when she went into the bedroom to retrieve her spare car keys. She was frightened and picked up the gun to unload it because she thought Porcella might use it to shoot her. She also took some of the bullets she saw and walked to the kitchen to throw them in the trash but then dropped them on the floor instead. She was texting Porcella throughout this period. The last text message she sent read, “yeah, thought so, cheat.”

Defendant testified about how she had attempted to unload the Patriot handgun. She stated that she had pulled the slide back and picked a bullet out of the chamber with her left index finger. After putting that bullet down, she then moved the slide back again and looked for another bullet, but the slide kept getting jammed.⁴ Defendant claimed that, during the time she was trying to unload the gun, she did not see Porcella standing on the porch or hear his voice.

The gun then went off. The court noted that defendant demonstrated the gun’s barrel was tilted slightly upward at the moment, such that “the front of the gun was . . . about a half inch above the knuckles . . . as she was holding it on the grip.”

Defendant put the gun down on the couch. According to defendant, she then went outside where, for the first time, she saw Porcella lying on the ground. She called out his name and said, “oh my God.” She picked him up and saw there was blood on his eye and on her hand. She claimed that she tried to call 911 without success. Her phone began calling Porcella’s phone instead of calling 911. She put her hand in Porcella’s pocket and retrieved his cell phone as well as his car keys. She testified at trial that she did not intend to shoot the gun or shoot at Porcella.

Defendant conceded that in the numerous texts she had exchanged with Porcella, she often complained about the relationship. The texts contained complaints about physical violence, jealousy, and name calling. However, defendant conceded that none

⁴In rebuttal, the prosecutor’s firearms expert testified that when the Patriot handgun malfunctioned with the slide pin falling out, it would have been very difficult to pull the slide back and remove a cartridge from the chamber. The expert attempted to do so but could not remove a cartridge.

of the texts mentioned complaints about guns or about Porcella trying to get her to commit suicide. Defendant acknowledged instances in which she had felt jealousy over Porcella.

She testified about an incident in February 2009 in which she had texted Garcia that she had taken 14 to 18 “Trim Spa” pills after learning that her step father had raped her sister. Garcia texted Porcella to check on defendant. Porcella later texted defendant that he could not be with someone who was so impulsive. Defendant also discussed a series of texts in which Porcella stated that he wanted her to get her own place.

Defendant’s former coworker testified at trial that she had seen bruises on defendant’s arms and neck on more than one occasion. The coworker had also seen defendant wearing massive amounts of makeup on her neck. Defendant’s former employer testified that he had helped defendant’s mother look for defendant’s car after her arrest. The car was locked and the keys to the car were found in the center console.

DISCUSSION

1. *Jury Instruction Concerning Circumstantial Evidence*

Defendant contends the trial court erred by failing to instruct the jury with CALCRIM No. 224, which describes the manner in which a jury is to treat circumstantial evidence the prosecution offers to prove facts necessary to find a defendant guilty. She asserts it was error to limit the instruction on circumstantial evidence to issues of intent or mental state, as set forth in CALCRIM No. 225. Defendant complains that the failure to give the more expansive circumstantial evidence instruction was prejudicial because her accident defense revolved around circumstantial evidence that the Patriot handgun was defective. As we will explain, we do not agree that the court erred in refusing to give CALCRIM No. 224 or that any error was prejudicial.

A. Background

At trial, the court announced its intention to instruct the jury with CALCRIM No. 225, which explains how the jury should weigh circumstantial evidence bearing upon the defendant’s intent or mental state. Defendant requested that the court instruct the jury

with CALCRIM No. 224, which is a more general circumstantial evidence instruction that is not limited to matters of intent or mental state.⁵

The trial court declined to instruct the jury with CALCRIM No. 224 but did give CALCRIM No. 225.⁶ The court explained that there is no duty to give CALCRIM No. 224 “when the circumstantial evidence is incidental to and corroborative of direct evidence” or when “ ‘intent is the only element proved by circumstantial evidence’ ” The court elaborated: “And we have no controversy here, and we have direct evidence . . . that Rennie Pratt shot and killed Michael Porcella. There’s no issue in this case about that fact. The issue in this case is solely as to Ms. Pratt’s mental state, running the gamut of not guilty of any crime all the way up to guilty of first degree murder. [¶] Ms. Pratt testified as to a state of affairs that would be not guilty of any crime, and

⁵CALCRIM No. 224 reads as follows: “ ‘Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.’ ” (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186 [citing CALCRIM No. 224].)

⁶As given at trial, CALCRIM No. 225 reads as follows: “An intent or mental state may be proved by circumstantial evidence. Before you [may] rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact [essential] to a conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent or mental state. [¶] If you can draw two or more reasonable conclusions from the circumstantial evidence and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state, and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent or mental state was not proved by circumstantial evidence. [¶] However, when considering circumstantial evidence you must accept only reasonable conclusions and reject any that are unreasonable.”

excusable homicide by mistake or accident. That means that if the jury is to conclude in what I'm assuming the prosecution is going to argue about her mental state, it will be all circumstantial evidence based on [a] whole variety of items of evidence that we've gotten, text messages and other things. But also I'm assuming that the jury should not believe her explanation, which I believe would be a circumstantial realm as well. On that basis looking at the use notes in those two instructions I concluded that 225 should be given.”

B. Analysis

CALCRIM Nos. 224 and 225 both instruct the jury on the proper use of circumstantial evidence. CALCRIM No. 225 is to be used in place of CALCRIM No. 224 “ ‘when the defendant’s specific intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence.’ ” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1171.) Both instructions “provide essentially the same information on how the jury should consider circumstantial evidence, but CALCRIM No. 224 is more inclusive.” (*Id.* at p. 1172.)

The more general circumstantial instruction—CALCRIM No. 224 or its predecessor CALJIC No. 2.01⁷—is proper where issues such as identity rest primarily on circumstantial evidence. (*People v. Rogers* (2006) 39 Cal.4th 826, 885.) However, it is error to give the more specific instruction on circumstantial evidence of intent or mental state (CALCRIM No. 225 or its predecessor CALJIC No. 2.02) where the defendant’s intent is not the only element of the prosecution’s case resting on circumstantial evidence. (*People v. Rogers, supra*, at p. 885; *People v. Cole* (2004) 33 Cal.4th 1158, 1222.)

Defendant contends the question of whether the Patriot handgun was defective was an issue of fact, not of her mental state. She further argues that it is error to equate a factual finding supporting the defense of mistake or accident with a state of mind. While

⁷“CALCRIM No. 224 corresponds to former CALJIC No. 2.01 and CALCRIM No. 225 corresponds to former CALJIC No. 2.02. Case law addressing CALJIC instructions is still generally applicable to the corresponding CALCRIM instruction.” (*People v. Contreras* (2010) 184 Cal.App.4th 587, 591, fn. 4.)

it may be a factual question whether the Patriot handgun was defective, we do not agree with defendant's assertion that the fact bears upon a question other than intent in this case.

“[T]he claim that a homicide was committed through misfortune or by accident ‘amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime.’ ” (*People v. Jennings* (2010) 50 Cal.4th 616, 674; accord, *People v. Anderson* (2011) 51 Cal.4th 989, 997–998.) A defendant in such a case is entitled to a pinpoint instruction relating the theory of accident to the evidence of intent, but only upon request. (*People v. Anderson, supra*, at p. 998, fn. 3.)

Here, the only contested issues concerned defendant's intent when she shot the victim. It is undisputed that defendant shot and killed Porcella. The trial court instructed the jury on murder, voluntary manslaughter, and involuntary manslaughter. The court also instructed jurors that they could acquit defendant of all charges if the prosecution failed to prove beyond a reasonable doubt that the killing was not an accident. The difference between these various levels of culpability turned on defendant's *mental state*. The defense of accident was offered to negate the element of intent.

Defendant argues that her “defense revolved around circumstantial evidence.” She claims there was circumstantial evidence that the Patriot handgun was defective, that the shot was not well aimed, and that the bullet's trajectory suggested an errant round. While this evidence may be circumstantial, it bears upon her intent and not upon whether she actually fired the shot that killed Porcella. The prosecution's evidence of defendant's intent was also circumstantial. The prosecution focused on the history between defendant and Porcella as well as upon the testimony of the neighbors who heard an interaction between defendant and Porcella that was inconsistent with defendant's claim of an accidental shooting. Intent was the only element of the prosecution's case that turned on circumstantial evidence. Consequently, the trial court did not err in limiting the circumstantial evidence instruction to issues of intent or mental state.

The case law relied upon by defendant does not dictate a different result. In *People v. Rogers, supra*, 39 Cal.4th at page 885, the court concluded it was error to limit

the circumstantial evidence instruction to issues of intent or mental state because the prosecution relied substantially on circumstantial evidence to prove the identity of the perpetrator. Likewise, in *People v. Davis* (1965) 235 Cal.App.2d 214, 224–225, the circumstantial evidence at issue—testimony by a ballistics expert—was offered to prove identity and not to prove that the defendant possessed a particular mental state. Where, as here, the only contested elements involve the defendant’s state of mind, CALCRIM No. 225 is wholly adequate.

Defendant contends she had a right to an instruction on her theory of the case. As a general matter, “a defendant has a right to an instruction that pinpoints the theory of the defense [citations]; however, a trial judge must only give those instructions which are supported by substantial evidence.” (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.) The principle relied upon by defendant is inapplicable. She did not ask for a pinpoint instruction focused on her theory of the case. Instead, she asked the court to read a general circumstantial evidence instruction because she claimed her accident defense was supported by circumstantial evidence. The instruction she sought is generally addressed to the situation in which an element of the prosecution’s case rests substantially on circumstantial evidence. Intent was the only element of the prosecution’s case that rested primarily on circumstantial evidence.

It would have been inappropriate to read CALCRIM No. 224 to the jury even if it could somehow be characterized as a pinpoint instruction. When a circumstantial inference is not the primary means by which a fact is sought to be proved, CALCRIM No. 224 may confuse the jury and should not be given. (Cf. *People v. Brown* (2003) 31 Cal.4th 518, 562 [discussing CALJIC No. 2.01, the predecessor of CALCRIM No. 224].) In this case, the primary support for defendant’s accident defense was not circumstantial. Rather, she presented direct evidence supporting her defense by testifying that the Patriot handgun fired accidentally. The circumstantial evidence that the Patriot handgun was defective or prone to jamming was simply corroborative of the direct evidence. Under the circumstances, it was not error to refuse to give CALCRIM No. 224.

Even if we were to conclude the trial court erred in failing to give CALCRIM No. 224, defendant was not prejudiced by the error. Because any error in failing to instruct on the evaluation of circumstantial evidence does not constitute a violation of federal constitutional principles, reversal is not required unless it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. McKinnon* (2011) 52 Cal.4th 610, 677; *People v. Rogers, supra*, 39 Cal.4th at pp. 886–887.) Here, there is no reasonable probability of a different result in the absence of the asserted error. First, as noted above, the key evidence supporting defendant’s theory of an accidental shooting was her own testimony. That evidence was direct and not circumstantial in nature. Second, the prosecutor did not dispute that the Patriot handgun was defective, that it was possible for the firing pin to fall out, or that the gun was found in a jammed position. The prosecutor’s theory at trial did not turn on whether the Patriot handgun functioned properly. Even if the Patriot handgun were defective and the slide pin had fallen out, there was still no showing that it would have fired by itself without pulling on the trigger.

The problem with defendant’s story on the witness stand was not that it lacked corroboration but rather that it lacked plausibility. The crucial evidence in the case was given by the neighbor, Mrs. Lacey, who testified that she clearly heard defendant and Porcella engaged in conversation before the shooting. She heard Porcella tell defendant repeatedly to “get out” before the fatal shot was fired. Mr. Lacey testified to nearly identical facts, including that Porcella told defendant to “put that down” immediately before the shot was fired. Further, it was stipulated at trial that Mr. Lacey told an officer essentially the same story immediately after the shooting. In light of this testimony, there is little room for doubt that defendant knew of Porcella’s presence at the door, despite her testimony to the contrary. Wholly apart from whether the gun was defective, defendant’s testimony about the interaction with Porcella immediately before the shooting was not credible. In closing argument, the prosecutor emphasized evidence that demonstrated the improbability of defendant’s version of events, including the fact that it would have been nearly impossible for her not to see someone standing just eight feet away on a lighted

front porch on the other side of a screen door. The Lacey's testimony eliminated any possibility the jury would have accepted defendant's claim that the gun accidentally discharged before she was even aware of Porcella's presence. There is no reasonable probability that instructing the jury as defendant urged would have had an effect on the verdict.

2. Sentencing Factors

Defendant challenges the upper terms imposed for voluntary manslaughter and the firearm use enhancement, contending the trial court abused its discretion by relying upon inapplicable or factually unsupported sentencing factors. She claims it was error to impose aggravated terms because the factors upon which the court relied did not distinguish the offense from the "ordinary manslaughter that included gun use." She also contends that use of "lying" as an aggravating factor amounted to being punished for the criminal offense of perjury without the benefit of due process or a jury trial on the offense. In addition, she argues that the trial court effectively nullified the jury's verdict by relying on lying-in-wait and premeditation theories that were rejected by the jury. As we explain below, we find no error that merits resentencing defendant.

A. Factual Background

At the outset of the sentencing hearing, the court announced a lengthy tentative ruling. The court began by noting that probation was prohibited absent unusual circumstances (§ 1203, subd. (e)(2)) and that this case presented no such circumstances, stating "this case is absolutely the most serious end of cases of this type"

Turning to the selection of a prison term, the court stated its intention to impose the upper term of 11 years for voluntary manslaughter and the upper term of 10 years for the firearm use enhancement. The court began its recitation of sentencing factors by stating emphatically, "Ms. Pratt is a liar." According to the court, defendant "lied repeatedly in her testimony." The court went on to cite numerous instances in which she had lied, including her claim that the shooting was an accident, her testimony that she was the victim of domestic violence, and her version of the events leading up to the killing.

As the basis for the upper term on the manslaughter conviction, the court cited defendant's lying as well as the fact the crime involved great violence, great bodily harm, or "other acts disclosing a high degree of cruelty, viciousness, or callousness." (Cal. Rules of court, rule 4.21(a)(1).)⁸ As an additional basis for the upper term, the court found that the victim was particularly vulnerable in that he was unarmed.

In support of the upper term on the firearm use enhancement, the court found that the crime involved a high degree of planning and sophistication. (Rule 4.421(a)(8).) The court also found that defendant took advantage of a position of trust in committing the crime. (Rule 4.421(a)(11).) In terms of factors relating to the defendant, the court found that she engaged in violent conduct indicating that she was a serious danger to society (Rule 4.421(b)(1)), and that she had engaged in escalating domestic violence directed at Porcella that culminated in the homicide. The court found one circumstance in mitigation in that defendant had an insignificant criminal history. (Rule 4.423(b)(1).)

Following argument by counsel and statements by friends of the victim as well as defendant, the trial court confirmed its tentative ruling and imposed a total sentence of 21 years.

B. Standard of Review and Governing Legal Principles

Under section 1170, subdivision (b), "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." The court's sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (*Ibid.*) A trial court abuses its discretion when "it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid.*)

⁸Further rule references are to the California Rules of Court.

“Neither section 1170 nor the California Rules of Court attempt to provide an inclusive list of aggravating circumstances. Thus, a trial court is free to base an upper term sentence upon any aggravating circumstance that (1) the court deems significant and (2) is reasonably related to the decision being made.” (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196 (*Moberly*); see rule 4.408(a).) “Facts relevant to sentencing need to be proved only by a preponderance of the evidence” (*People v. Towne* (2008) 44 Cal.4th 63, 86 (*Towne*).)

“[T]he existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term.” (*People v. Black* (2007) 41 Cal.4th 799, 813.) “An aggravating circumstance is a fact that makes the offense ‘distinctively worse than the ordinary.’ ” (*Id.* at p. 817.)

There are a number of circumstances in which dual use of a particular fact is prohibited for purposes of sentencing. (*Moberly, supra*, 176 Cal.App.4th at p. 1197.) A fact found and charged as a sentence enhancement may not be used as an aggravating circumstance for purposes of imposing the upper term on the offense to which the sentence enhancement is applied. (*Ibid.*; § 1170, subd. (b); rule 4.420(c).) In addition, a fact that is an element of the crime for which punishment is imposed may not be used to support an upper term sentence. (*Moberly, supra*, at p. 1197; rule 4.420(d).) There is also a restriction on the use of a fact to support both an upper term and a consecutive sentence, although “ ‘one relevant and sustainable fact may explain a series of consecutive sentences.’ ” (*Moberly, supra*, at pp. 1197–1198.) Notwithstanding these restrictions on the dual use of facts at sentencing, the “dual use of a fact or facts to aggravate both a base term and the sentence on an enhancement is not prohibited.” (*Id.* at p. 1198; accord, *People v. Chism* (2014) 58 Cal.4th 1266, 1336.) Thus, in *Moberly* it was not error to rely upon the same significant factor in imposing the upper term for both voluntary manslaughter and the related firearm use enhancement. (*Moberly, supra*, at pp. 1197–1198.) With these principles in mind, we proceed to consider defendant’s challenges to the circumstances in aggravation cited by the trial court.

C. Lying

Defendant challenges the trial court's use of lying as an aggravating circumstance on two grounds. First, she argues that uncharged perjury may not be used for the purpose of enhancing punishment but may only be considered as it relates to the defendant's character and prospects for rehabilitation. In this case, defendant claims the court improperly used perjury to increase punishment. Second, she argues that the trial court erred in using perjury as a sentencing factor without making express findings as to each element of a perjury charge. Defendant's claims lack merit.

As a threshold matter, the Attorney General argues that defendant forfeited these issue by failing to specify the nature of her objection at the time of trial. Her counsel objected to the use of lying as a sentencing factor but did not specify the grounds urged on appeal—i.e., the sense in which perjury may be considered or the failure to make express findings. We will assume without deciding that counsel's general objection preserved the issues for appeal.

“It is settled, under both federal and state law, that a court may enhance a defendant's sentence upon finding the defendant committed perjury at trial.” (*People v. Howard* (1993) 17 Cal.App.4th 999, 1002 (*Howard*)). A finding that a defendant committed perjury at trial “ ‘may be considered as one fact to be considered in fixing punishment as it bears upon defendant's character and rehabilitation.’ ” (*Ibid.*) However, it is a violation of the defendant's due process rights “if a sentence enhancement amounts to punishment for an uncharged perjury offense for which there is no conviction” (*Ibid.*)

In this case, the record contains no explicit statement concerning the significance the trial court gave to the supposed perjury. In other words, the court did not expressly state it was limiting its consideration of perjury to issues of defendant's character or her prospects for rehabilitation. There is a split of California authority as to whether a court must expressly state the sense in which perjury is considered in sentencing a defendant. (*Howard, supra*, 17 Cal.App.4th at p. 1003.) “The court in *In re Perez* (1978) 84 Cal.App.3d 168, 173 [148 Cal.Rptr. 302], held that in order to avoid the risk of

unlawful punishment for an uncharged offense, the judge must state ‘the sense in which [the perjury] has been considered, or such sense should otherwise clearly appear from the record.’ The court in *People v. Montano* [(1992) 6 Cal.App.4th 118] at pages 121–122, rejected this aspect of *Perez* and found no requirement of a special statement of the judge’s reasoning.” (*Howard, supra*, at p. 1003.)

The reasoning in *People v. Montano* is persuasive and is “in accord with the most fundamental presumption underlying appellate review, the presumption of correctness.” (*Howard, supra*, 17 Cal.App.4th at p. 1003.) As explained in *People v. Montano*: “No other court has applied the *Perez* requirement of an affirmative, on the record statement that a defendant’s perjury was considered only for its reflection on the defendant’s character and amenability to rehabilitation. We believe this requirement is too stringent and conflicts with the presumption that a judgment or order of the lower court is correct. [Citation.] In our view, unless the record affirmatively shows the lower court used the fact of the defendant’s perjury for an impermissible purpose, the reviewing court should presume it was used for the permissible purpose.” (*People v. Montano, supra*, 6 Cal.App.4th at p. 122.)

The record here does not affirmatively disclose that the trial court assigned some impermissible significance to the fact of defendant’s perjury. To the contrary, the thrust of the court’s discussion concerning lying focused on defendant’s character and the permissible consideration of perjury as a sentencing factor. The court did not just state that defendant lied repeatedly but emphasized that she was manipulative and that her lies showed she was not remorseful. Among other things, the court pointed out that, in defendant’s discussions with her probation officer, she could not seem to pick between an imperfect self defense theory—which would have involved an intentional killing—or an accidental discharge of the Patriot handgun. This observation does not bear upon whether defendant should be punished for lying under oath but instead relates to whether she has accepted the consequences of her actions and is amenable to rehabilitation.

We conclude it can be presumed from the record that the court used the fact of lying for a permissible purpose and not to punish defendant for an uncharged perjury

offense. Indeed, the record in this case would probably pass muster even under the rule announced in *Perez*, because the sense in which the court used the fact of perjury is clear. (*In re Perez, supra*, 84 Cal.App.3d at p. 173.) The remedy in *Perez* for failure to specify the significance of perjury is to remand the matter to the trial court for resentencing. (*Ibid.*) No purpose would be served by remanding the matter to the trial court in this case even if we were to conclude the court erred in failing to announce the purpose for which it considered perjury. We do not believe it is reasonably likely the court would impose a more lenient sentence if directed to state the explicit purpose for which lying was considered. (See *People v. Aragon* (1992) 11 Cal.App.4th 749, 765 [discussing harmless error in connection with failure to state sense in which perjury was considered].) Thus, we reject defendant's contention that the court used the fact of perjury for the purpose of imposing additional punishment for an uncharged offense.

Defendant also complains that the trial court failed to make express findings encompassing all the elements of a perjury violation. As support for this proposition, defendant relies on *Howard, supra*, 17 Cal.App.4th at page 1004, in which the court concluded that "when imposing an aggravated sentence because of perjury at trial, the sentencing judge is constitutionally required to make on-the-record findings encompassing all the elements of a perjury violation. In California, those elements are a willful statement, under oath, of any material matter which the witness knows to be false."

The court in *Howard* explained the concern that a jury's verdict finding a defendant guilty may not reflect that the jury also found that the defendant testified untruthfully. (*Howard, supra*, 17 Cal.App.4th at pp. 1003–1004.) The court gave the example of a defendant who gives inaccurate testimony due to " 'confusion, mistake or faulty memory' " or who testifies as to " 'matters such as lack of capacity, insanity, duress or self-defense.' " (*Id.* at p. 1003.) In such cases, the testimony may be truthful but still may be insufficient to excuse criminal liability. (*Ibid.*) According to the *Howard* court, the requirement of express findings ensures that any enhancement to the sentence is properly based on a finding that the defendant was not truthful. (*Id.* at p. 1004.)

In *Howard*, the trial court did no more than state that the jury’s verdict supported an implied finding the jury found beyond a reasonable doubt that the defendant committed perjury at trial. (*Howard, supra*, 174 Cal.App.4th at p. 1002.) The appellate court concluded the failure to make express findings was error but nonetheless concluded the error was harmless. (*Id.* at pp. 1004–1005.) The court reasoned that the case was not one in which the defendant had given inaccurate testimony due to confusion, mistake, or some other reason to believe the testimony might have been truthful but still insufficient to relieve the defendant of liability. Rather, the sole issue for the jury to decide was whether to believe the defendant or the victim. Consequently, despite the absence of express findings, “the record provide[d] adequate assurance that there was no violation of the constitutional right to testify—i.e., that the court’s reliance on perjury as an aggravating factor was properly based on truthfulness.” (*Id.* at p. 1005.) The court concluded the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. (*Howard, supra*, at p. 1005.)

In this case, the court made express findings that defendant lied under oath. The court found that defendant lied about the shooting being an accident, lied about incidents of domestic violence involving Porcella, and lied about events leading up to the killing. The court gave specific examples of lies made by defendant. The court also stated that “[t]he jury found that she lied that this was an accident.” This is not a case in which the court simply inferred from the jury’s verdict that defendant committed perjury at trial. The court expressly found that defendant was not truthful. Although the court did not specify the other elements of a perjury charge, it is plain that the statements were offered under oath, were voluntary, and were material. Defendant does not suggest otherwise.

Even if there were some deficiency in the court’s stated reasons for finding that defendant lied at trial, any such deficiency was harmless beyond a reasonable doubt for the reasons explained in *Howard, supra*, 174 Cal.App.4th at page 1005. The court’s reliance on lying as a basis for aggravating the sentence was properly based on untruthfulness, as the court’s express statements made clear.

Accordingly, we conclude the court did not err in relying on lying as a circumstance in aggravation.

D. Acts Disclosing Cruelty, Viciousness, or Callousness

Defendant next challenges the trial court's finding under rule 4.421(a)(1) that the crime involved "great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness"

Fundamentally, defendant argues that death and use of a gun do not distinguish this crime from any other manslaughter with use of a firearm. According to defendant, any non-accidental homicide is by definition violent and causes great bodily harm. In the trial court and again on appeal, defendant urges that using great violence as a factor in aggravation is a prohibited dual use of a fact inherent in the underlying offense and the firearm use enhancement. She further contends that a single, poorly aimed shot is not indicative of callousness. As we explain, we are not persuaded that the court abused its discretion.

The court explained its reasoning as follows: "Just to be really clear, this is not a situation where [defendant] shot [the victim] in the leg and the bullet happened to hit his upper thigh hitting an artery causing him to bleed to death in an effort to defend herself and disable him. It involved a direct strike between the eyes on a moving target as he was trying to get out of the way. [¶] As to the callousness and viciousness and cruelty, I'll again note that she engaged in all kinds of after the killing but before calling for help activity such as finding his cell phone and going through his pockets, things of that nature. Those things indicate a level of viciousness and callousness, especially callousness. Especially callousness."

Earlier in the sentencing hearing, the court expounded upon the facts suggesting callousness, noting that defendant carefully set aside the gun and began a series of telephone calls that made it appear that she was trying to call 911. There was a discernable pause after the fatal shot. By the time the police arrived, defendant was covered in blood yet Porcella's cell phone, her cell phone, and the murder weapon had no blood on them, suggesting that defendant was engaged in activity after the killing to alter

evidence before rendering aid to Porcella. The court stated: “There was no concern for Michael Porcella at that point, none whatsoever. No concern at all. She was doing other activities before she took the first step to render aid.”

Defendant’s activities after the shooting support the trial court’s finding of callousness. The circumstance in aggravation cited by the court provides that “[t]he crime involved . . . *other acts* disclosing a high degree of . . . callousness” (Rule 4.421(a)(1), italics added.) Wholly apart from violence and the infliction of great bodily injury—which are part of every manslaughter—the acts committed by defendant after the killing demonstrated callousness that is not inherent in a typical manslaughter with use of a firearm.

Further, as the court pointed out, one could infer from the evidence at trial that the shot between the eyes was not accidental but was an intentional act of viciousness by defendant. The evidence supports an inference that defendant shot Porcella as he ducked to avoid being hit. To the extent defendant protests that the jury acquitted her of committing the killing with malice, she overstates her case. “The jury’s verdict did not imply a rejection of the evidence of malice; it merely meant that the jury did not feel malice was proven beyond a *reasonable doubt*. The standard governing a sentencing court is far less stringent; the court need only determine whether aggravating factors are established by a *preponderance* of the evidence.” (*People v. Levitt* (1984) 156 Cal.App.3d 500, 515.) In this case there was sufficient evidence to support the trial court’s finding.

We find no merit in the contention that the court violated the prohibition against dual use of facts to support an upper term sentence. In the cases upon which defendant relies, it was improper to impose the firearm use enhancement *and* select the upper term on the underlying offense based on the threat of violence or great bodily injury where the threat of violence or great bodily injury could only be based upon the use of a firearm. (See *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1028; *People v. Arbee* (1983) 143 Cal.App.3d 351, 356.) Here, the use of a firearm did not supply the basis for the

aggravating circumstance. Rather, it was defendant's conduct after the shooting as well the manner in which Porcella was killed that supported the sentencing factor.

In sum, the trial court's findings were amply justified by the evidence. The precise manner of killing showed defendant acted with more viciousness than is necessary for an ordinary voluntary manslaughter. Defendant's hesitation in aiding the victim revealed her callousness. There was no abuse of discretion in relying on this aggravating circumstance to impose the upper term.

E. Particularly Vulnerable Victim

As used in rule 4.421(a)(3), a particularly vulnerable victim is one who is vulnerable "in a special or unusual degree, to an extent greater than in other cases." (*People v. Smith* (1979) 94 Cal.App.3d 433, 436.) "Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." (*Ibid.*)

The trial court found that Porcella was a particularly vulnerable victim (rule 4.421(a)(3)), reasoning that defendant was armed and Porcella was not. The court also found that defendant hid the fact she possessed a gun ready to shoot Porcella dead, and that "when [Porcella] became aware she had a gun, it appears that he immediately tried to move to his left to take cover, and she fired a lethal shot before he was able to accomplish that, hitting him right between the eyes."

Defendant disputes that Porcella was particularly vulnerable, citing the history of domestic violence and the fact he was much larger than defendant. The trial court specifically rejected the claim that Porcella inflicted domestic violence upon defendant, finding instead that it was Porcella who "suffered from repeated and continuous physical and psychological abuse inflicted by [defendant]." According to the court, Porcella "showed a lot of patience with [defendant] despite her erratic, irrational, out-of-control behavior that was laced with violence."

As for the contention that Porcella was much larger than defendant, the fact that defendant procured a gun and concealed it from an unarmed, unsuspecting victim obviously negates the point. In *People v. Eades* (1979) 95 Cal.App.3d 688, the court

faced a somewhat similar contention in that the defendant there argued that a healthy police officer with access to weapons could not be considered particularly vulnerable. (*Id.* at p. 690.) The appellate court disagreed under circumstances in which the defendant, “without warning or any apparent motivation or provocation . . . from the rear seat of a moving vehicle, shot the driver victim twice at point-blank range.” (*Ibid.*) In response to the contention that the police officer victim was not particularly vulnerable, the court stated: “The devious and sudden manner in which defendant shot and killed the victim rendered the availability of weapons and the victim’s training irrelevant. The police officer was as open to attack as any other person would have been, regardless of age, physical stature, or mental capabilities.” (*Ibid.*) Likewise, in this case the manner in which defendant confronted Porcella rendered any size advantage he might have had irrelevant. He was not only unarmed but also apparently unaware that defendant had concealed a loaded weapon as he returned to the cottage. (Cf. *People v. Nevill* (1985) 167 Cal.App.3d 198, 205 [victim was particularly vulnerable because she was unarmed, unsuspecting, and physically and mentally abused by defendant who shot her in the bedroom of her own home].)

Defendant relies upon *People v. Spencer* (1996) 51 Cal.App.4th 1208 (*Spencer*) for the proposition that a voluntary manslaughter verdict premised on imperfect self-defense is incompatible with a finding of victim vulnerability. The case is distinguishable. There, the trial court construed the verdict to be premised upon imperfect self-defense—i.e., the defendant’s unreasonable but genuine belief in the need for self-defense. (*Id.* at p. 1223.) The appellate court concluded that a defendant’s honest belief in the need to defend against imminent danger is inconsistent with victim vulnerability. (*Ibid.*) In addition, the *Spencer* court observed there was a conflict in the case law regarding whether a trial court is at liberty to disregard a jury’s finding and make its own findings under a lesser standard of proof, but it did not resolve the issue because there was no indication the trial court opted to make its own findings. (*Ibid.*)

The conflict identified by the *Spencer* court was resolved in *Towne, supra*, 44 Cal.4th at pages 85 to 89, in which the Supreme Court held that a trial court may base

a sentencing decision upon facts the jury implicitly found not to be true. Unlike in *Spencer*, the trial court in this case was skeptical of the claim that defendant committed the crime as a result of an unreasonable but honest belief in the need to defend herself. Because the court did not adopt or limit itself to an imperfect self-defense theory, there was nothing inconsistent in the court's finding that the victim was particularly vulnerable. Further, in this case the court plainly chose to make its own findings. Even if those findings were inconsistent with an implicit finding derived from the jury's verdict, that result is permissible under *Towne*. Consequently, *Spencer* does not aid defendant.⁹

Defendant's reliance on *People v. Piceno* (1987) 195 Cal.App.3d 1353 is likewise misplaced. *Piceno* stands for the proposition that all victims of felony drunk driving are vulnerable, rendering inapplicable the aggravating circumstance of a particularly vulnerable victim. (*Id.* at pp. 1358–1359.) The court in *Piceno* pointed out that such victims are simply in the wrong place at the wrong time, and the “drunk driver does not seek to take deliberate advantage of the vulnerability of victims, unlike the situation in other criminal cases.” (*Id.* at p. 1358.) The holding in *Piceno* is limited to the context of felony drunk driving victims. As stated by the court in *People v. Levitt, supra*, 156 Cal.App.3d at page 515, “[f]elony drunk driving *presupposes* an entirely innocent and unsuspecting victim; voluntary manslaughter does not.” Moreover, unlike in the drunk driving situation, a defendant may take deliberate advantage of a victim's vulnerability in a voluntary manslaughter case. Indeed, the trial court in this case effectively concluded that defendant took advantage of Porcella's vulnerability by confronting him when he was unarmed and unsuspecting.

⁹We also tend to agree with the Attorney General that *Spencer* assigned too much significance to the fact that a defendant genuinely but unreasonably believes in the need for self-defense. While a defendant who is convicted of manslaughter on an imperfect self-defense theory may have genuinely believed in the need for self-defense, it is still an *unreasonable* belief that does not rule out the possibility the victim is particularly vulnerable. *Spencer* focuses on the mindset of the defendant instead of the actual vulnerability of the victim.

We conclude the trial court did not abuse its discretion in finding that the victim was particularly vulnerable.

F. Planning and Sophistication

Defendant contends that planning and sophistication was not a proper circumstance in aggravation. She argues the trial court's factual findings were impliedly rejected by the jury, although her primary argument seems to be that there was insufficient evidence of planning activity. Her arguments lack merit.

As explained above, the trial court was free to disregard the jury's implied findings and make its own findings supported by a preponderance of the evidence. (*Towne, supra*, 44 Cal.4th at pp. 85–89.) Further, the trial court explained the factual basis for its finding at some length. The court began by noting that a “high degree of planning and sophistication in my mind does not necessarily mean she was skilled or good at it.” The court listed the facts supporting its finding. First the court had already pointed out that defendant knew Porcella would be returning home and had a ten minute head start on him. The fact the guns were scattered about the cottage in a manner uncharacteristic of Porcella suggested defendant verified all of his firearms were present inside the home. The court next noted that defendant went through the steps necessary to load the gun, and that she may have even tried to load more than one gun. Next, defendant concealed from Porcella the fact she was armed when he arrived at the cottage. The court referred to the evidence there was a discussion of up to two minutes before Porcella told defendant to put the gun down, a fact that supported an inference that defendant had been hiding the gun during that discussion. The court found from the fact that the argument was held at a low voice level that, in contrast to other arguments between defendant and Porcella, defendant was “not emotionally out of control at the time that she killed Michael Porcella, nor was she out of control in the few minutes before that period.” The court concluded that the texts between the parties supported a fair inference that defendant had started thinking of killing Porcella days before he was killed. Finally, the court pointed out that, after the killing, defendant took actions consistent with planning, including carefully setting aside the murder weapon, attempting

to make bogus 911 calls, and going through Porcella's pockets, with hands that apparently were not yet bloody, before eventually calling for help and attempting to aid Porcella.

The facts cited by the trial court constitute evidence of planning. Because the court's findings are supported by a preponderance of the evidence, it is of no consequence that those findings may conflict with an implied jury finding rejecting premeditation. It should be noted, however, that the jury's verdict is not necessarily inconsistent with planning and premeditation. As the trial court pointed out, a voluntary manslaughter committed as a result of an honest but mistaken belief in the need for self-defense may involve planning and sophistication.

In *People v. Levitt, supra*, 156 Cal.App.3d at page 516, the appellate court held that, "notwithstanding the jury's verdicts of manslaughter," there was sufficient evidence to support the trial court's finding of planning and premeditation. The defendant's planning activity "rendered him more culpable than other manslaughterers . . ." (*Ibid.*) The same is true here. The fact that defendant planned the killing and its aftermath at least to some degree renders her more culpable than other persons convicted of voluntary manslaughter. There was no error in relying on planning and sophistication as an aggravating circumstance.

G. Position of Trust

The final aggravating circumstance defendant challenges is the trial court's finding that "[t]he defendant took advantage of a position of trust or confidence to commit the offense." (Rule 4.421(a)(11).) Defendant argues that the court relied upon the same facts supporting planning and sophistication. She also contends there was no special relationship that distinguished the offense from an ordinary manslaughter, and she again raises the argument that the court's findings were contrary to the jury's verdict.

The court made the following findings related to defendant taking advantage of a position of trust: "[S]he took advantage of a position of trust or confidence to commit the offense[;] it seems absolutely clear to [me] that Michael Porcella had no idea what was awaiting him when we was returning home. . . . [¶] And she took advantage of the

relationship that she had and the pattern of interaction she had. It appears to me that this was not a very healthy relationship. It had a cycle of accusations of jealousy followed by arguments. [¶] Maybe some of this was stimulated by alcohol or drug use, but it seemed to me from the large amount of evidence that we looked at that there was [an ongoing] pattern of accusations by Ms. Pratt accusing Mr. Porcella of cheating, no matter how ridiculous the situation, followed by some sort of blowup argument, followed by kissing and making up, for lack of a better term. [¶] It appears to me that's what Mr. Porcella expected when he was returning to his home. He was not expecting to be subjected to lethal assault. So because that was the pattern of their relationship I find that she took advantage of a position of trust or confidence to commit this offense.”

We disagree with defendant's contention that the facts underlying this aggravating circumstance were the same as those supporting planning and sophistication—both of which were offered to aggravate the term for the firearm use enhancement. The court discussed the facts supporting planning and sophistication separately from the facts underlying abuse of a position of trust. More importantly, there was a factual distinction. The two circumstances do not simply turn on the same lying-in-wait theory, as defendant suggests. In discussing planning and sophistication, the court emphasized steps that were taken by the defendant both before and after the crime. When the court discussed taking advantage of a position of trust, it focused on the parties' intimate relationship and defendant being able to use that relationship to induce Porcella to return to the cottage where, as the court pointed out, Porcella had no reason to believe that he would be fatally assaulted. In any event, even if the same facts did support both sentencing factors, we observe that just one aggravating circumstance was sufficient to justify the imposition of the upper term for the firearm use enhancement. (See *People v. Black*, *supra*, 41 Cal.4th at p. 813.)

Defendant claims the relationship between defendant and Porcella did not constitute the type of “special relationship” that must exist to establish a position of trust or confidence. We disagree. The decision in *People v. Hoover* (2000) 77 Cal.App.4th 1020 is instructive. There, the victim had dated and lived with the defendant, whom she

accompanied to a motel because she wanted to explain that she was involved in another relationship. (*Id.* at p. 1024.) After they entered the motel room, the defendant referred to the victim's new boyfriend and hit the victim in the nose. (*Ibid.*) In upholding the aggravating circumstance that the defendant took advantage of a position of trust or confidence, the court reasoned: "It is also patently obvious that defendant was able to exploit his intimate relationship with the victim and to induce her to come to the motel room where she would be vulnerable to attack." (*Id.* at p. 1031.) Likewise in this case, defendant was able to exploit her relationship with Porcella by going to his cottage following an argument with the expectation that he would return to his home when he learned she was there. The nature of the relationship and defendant's exploitation of that relationship are facts not present in an ordinary voluntary manslaughter.

As for the claim the court's findings are contrary to either a heat-of-passion or an imperfect self-defense theory, we address the issue in more depth in the following section but simply reiterate here that a sentencing court may base a decision on facts the jury implicitly rejected. (*Towne, supra*, 44 Cal.4th at pp. 85–89.) In sum, we find no error in aggravating the sentence on the basis of the court's finding that defendant abused a position of trust or confidence.

H. Aggravated Term Based Upon Facts Rejected by Jury

Underlying almost all of defendant's complaints about her sentence is the claim the trial court improperly relied upon facts the jury rejected in order to aggravate her sentence. Indeed, defendant devotes an entire section of her appellate brief to this argument. As set forth above, we find no merit in this contention but will address defendant's specific arguments in more detail below.

The record of the sentencing hearing leaves no doubt that the trial court would have convicted defendant of a more serious offense if it had been the trier of fact. Immediately before pronouncing sentence, the court stated: "I need to speak about the jury's verdict for a moment. I think based on the evidence that I heard, had I been a voting juror I would have reached a different conclusion." Despite the court's view that defendant should have been convicted of a greater crime, the court clarified that it was

bound by the jury's decision and would sentence defendant accordingly: "On the other hand, I also find that the jury reached a conclusion that's within the boundaries of the evidence that was presented, that it was not an irrational or unreasonable decision, and I absolutely respect the decision and I'm going to honor it."

Defendant's complaint about the court imposing an aggravated term based upon judicial fact finding rests upon principles established by the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct 2531], *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct 856] (*Cunningham*), and their progeny. The principle underlying this line of cases is that "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham, supra*, 127 S.Ct at pp. 863–864.) The key limitation on a sentencing court's fact finding authority is that, " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Sandoval, supra*, 41 Cal.4th at p. 835.) Before its amendment in 2007, section 1170, subdivision (b) provided that the court " 'shall order the imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' " (*Sandoval, supra*, 41 Cal.4th at p. 836.) In *Cunningham*, the United States Supreme Court concluded that, under California's determinate sentencing law as it existed before amendment in 2007, the middle term was the statutory maximum that could be imposed based solely on the jury's verdict. (*Sandoval, supra*, 41 Cal.4th at p. 836.) Consequently, the court held that the determinate sentencing law as it existed before 2007 violated the defendant's Sixth Amendment right to a jury trial because it allowed the trial court to impose a term beyond the presumptive statutory maximum (i.e., the middle term) based on facts that were neither found true by a jury nor admitted by the defendant. (*Cunningham, supra*, 549 U.S. at p. 281 [127 S.Ct at pp. 863–864].)

In response to *Cunningham*, the Legislature amended section 1170, subdivision (b) to eliminate the presumption that the middle term is to be imposed and instead specified

that the trial court has discretion to impose the lower, middle, or upper term in any case in which a statute specifies three possible terms. (See *Sandoval*, *supra*, 41 Cal.4th at p. 845.) In *Sandoval*, the California Supreme Court noted that such an amendment “cure[s] the constitutional defect in the statute, because the United States Supreme Court repeatedly has made clear in the line of decisions culminating in *Cunningham* that it ‘ha[s] never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. [Citations.] . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.’ ” (*Sandoval*, *supra*, 41 Cal.4th at p. 844.)

Here, defendant was sentenced under the amended version of section 1170, subdivision (b) that afforded the trial court the discretion to impose any of the three possible terms provided for by statute. Consequently, this case does not present the concern raised in *Cunningham* about the trial court relying on facts neither found by the jury nor admitted by the defendant to increase the sentence beyond the statutory maximum.

Even though sentencing occurred after the amendment of the determinate sentencing law, defendant nevertheless argues that the amended version of section 1170, subdivision (b) cannot be read “to allow a sentencing court to nullify a jury verdict of acquittal.” While defendant seems to concede that the sentencing court may engage in fact finding to support imposition of an upper term sentence—even if those facts are not implied by the jury’s verdict—she takes issue with the notion that the court may rely on facts inconsistent with the jury’s verdict. The issue defendant raises was directly addressed in *Towne*, *supra*, 44 Cal.4th at page 71, in which the court held that, “because facts considered by the court in selecting the appropriate sentence within the available sentencing range need not be proved beyond a reasonable doubt, a trial court . . . is not prohibited from considering evidence underlying charges of which a defendant has been acquitted.”

The court in *Towne* explained that facts relevant to sentencing need only be proved by a preponderance of the evidence. (*Towne, supra*, 44 Cal.4th at p. 86.) An acquittal merely reflects that the jury was not convinced beyond a reasonable doubt of the defendant's guilt; it does not rule out the possibility that the same facts would satisfy a preponderance of the evidence standard of proof. (*Ibid.*) Unless the jury makes specific findings, it cannot be said that the jury necessarily rejects any facts when it returns a general verdict. (*Ibid.*) Thus, it is not inconsistent for the sentencing court to make factual findings under a preponderance of the evidence standard even when those findings are not supported by a jury's verdict, which necessarily must be based upon proof beyond a reasonable doubt. Further, consideration of conduct underlying acquitted charges does not violate a defendant's Sixth Amendment right to a jury trial. (*Ibid.*)

Here, the jury returned general verdicts. Although the jury rejected first degree murder based on premeditation and lying-in-wait theories, the verdict does not foreclose the possibility that facts supporting those theories meet a preponderance of the evidence standard but fall short of proof beyond a reasonable doubt. A voluntary manslaughter verdict premised on a heat-of-passion or imperfect self-defense theory does not amount to an implied finding that there was no premeditation or circumstances supporting a lying-in-wait theory. Rather, the jury may have simply concluded that there was not proof beyond a reasonable doubt of premeditation or lying-in-wait, or it may have reasoned that the prosecutor had not proved beyond a reasonable doubt that defendant's purported belief in the need for self-defense was less than genuine. The verdict does not rule out the possibility of premeditation and circumstances supporting a lying-in-wait theory.

Defendant complains she was deprived of the benefit of an acquittal by virtue of the trial court sentencing her as if she were guilty of a lying-in-wait murder. We disagree. The *Towne* court considered the contention that "permitting a judge who disagrees with the jury's verdict of acquittal to essentially correct that verdict by imposing a higher sentence on the offense of which the defendant was convicted would undermine the jury's role as the fact finder." (*Towne, supra*, 44 Cal.4th at p. 87.) In rejecting the argument, the court stated: "Permitting a judge to consider evidence of

conduct underlying counts of which the defendant was acquitted does not in any way undermine the jury's role in establishing, by its verdict, the maximum authorized sentence. Even if the trial court . . . did sentence defendant based upon a view of the evidence that would have justified a guilty verdict on one or more of the crimes . . . of which defendant was acquitted, the court would not thereby have been 'correcting' any perceived error in the jury's verdict. The trial court was limited by the jury's verdict to imposing a sentence authorized for the crime of which the defendant was convicted." (*Id.* at pp. 87–88.)

In this case, defendant received the benefit of an acquittal of first degree murder. The upper terms for voluntary manslaughter and the firearm use enhancement constituted an authorized sentence justified by the jury's verdict. The 21-year determinate sentence she received was far less than a 25-years-to-life sentence (or 35-years-to-life sentence with the firearm use enhancement) that defendant would have received if she had been convicted of first degree murder. It is simply incorrect to say that defendant was deprived of the benefit of the jury's acquittal on first degree murder charges.

In an apparent effort to get around the directly applicable holding in *Towne*, defendant makes a tortured argument that the facts in *Towne* did not really support the court's broad holding. *Towne* involved a prostitution solicitation gone wrong. The male defendant solicited prostitution from the male victim. (*Towne, supra*, 44 Cal.4th at p. 71.) As the two men drove around, violent acts were committed although it was disputed who was the aggressor. (*Id.* at pp. 71–72.) The victim eventually fled and the defendant left with the victim's car. (*Id.* at p. 71.) The jury acquitted the defendant of all violence-related offenses, including kidnapping for robbery and carjacking, and convicted the defendant only of felony "joy riding." (*Id.* at p. 73.) The court aggravated the term based upon infliction of fear, notwithstanding the jury's implied rejection of violence-based offenses. (*Id.* at pp. 73–74.)

Defendant sifts the facts to arrive at a theory under which the trial court's use of infliction of fear as an aggravating factor was not necessarily inconsistent with the jury's rejection of all of the fear-related charges. Frankly, defendant's argument is a little

confusing but it does not alter our view of the *Towne* holding. We agree it was not necessarily inconsistent for the trial court to make a finding of infliction of fear and for the jury to reject fear-based offenses. A finding of fear may have been supported by a preponderance of the evidence even though there was not proof beyond a reasonable doubt that the defendant inflicted fear. The *Towne* court plainly held that facts underlying acquitted conduct may be considered by a court in selecting the appropriate sentence. (*Towne, supra*, 44 Cal.4th at p. 71.) An effort to selectively interpret the facts of the case does not change the fundamental holding of *Towne*.

Defendant claims the United States Supreme Court has yet to decide whether a sentencing court's reliance on acquitted conduct violates the Sixth Amendment and urges this court to adopt the view that use of acquitted conduct to aggravate a sentence amounts to a constitutional violation. We find no merit in defendant's position, but even if we did, we are bound to follow our Supreme Court's decision in *Towne*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we reject defendant's challenge to the court's reliance on facts underlying charges of which she was acquitted.

I. Cumulative Error

As a final matter, defendant argues that the cumulative impact of the sentencing errors requires remand for resentencing. Because we conclude there was no abuse of discretion as to any individual sentencing factor, there could be no cumulative error when the sentencing factors are considered as a whole. In any event, even if the court relied in part upon improper reasons for its decision, the sentence may be set aside only if it is reasonably probable “ ‘that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.’ ” (*People v. Jones* (2009) 178 Cal.App.4th 853, 861.) In light of the court's emphatic and clear statements at the sentencing hearing reflecting its view that it would have found defendant guilty of a more serious offense if it had been the trier of fact, there is no reasonable probability the court would have selected a lesser sentence but for its consideration of one or more sentencing factors that defendant claims is invalid.

DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.