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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY DAVID MULKEY,

Defendant and Appellant.

C063519

(Super. Ct. No. CRF08297)

Defendant Billy David Mulkey was charged with the second degree murder of Keith Hendricks. (Pen. Code, § 187, subd. (a)¹ -- count I.) As to the second degree murder charge, it was further alleged that defendant intentionally and personally discharged a firearm (a rifle). (§ 12022.53, subds. (b), (c) & (d).) Defendant was also charged with three counts of assault with a firearm (a shotgun) involving three alleged victims: Amanda Cavagnaro, Brian Maudlin, and Everett Hawkins. (§ 245, subd. (a)(2) -- counts II, III & IV.) The case proceeded to a jury trial at which defendant testified. Only defendant and the

¹ Undesignated statutory references are to the Penal Code.

victim were present at the time of the shooting, so defendant was the only eyewitness to what occurred when the victim was killed. The jury found defendant guilty of second degree murder and found true the firearm allegation. The jury acquitted defendant on the remaining charges.

Following denial of defendant's new trial motion grounded on claims of instructional error, the trial court sentenced defendant to a state prison term of 15 years to life for the second degree murder conviction and a consecutive state prison term of 25 years to life for the firearm enhancement. Defendant appealed.

On appeal, defendant contends that the trial court erred when it: (1) refused to instruct on involuntary manslaughter, (2) incorrectly instructed on antecedent threats related to imperfect self-defense, (3) instructed the jury with CALJIC No. 2.21.2, and (4) denied defendant's verbal posttrial motion, which he now characterizes as a "request to discharge his retained counsel." We reject defendant's arguments and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim here, Keith Hendricks, was shot and killed by defendant. After initially denying that he shot the victim, defendant eventually admitted to law enforcement and at trial that he did. The focus at trial was how the shooting occurred and the level of defendant's culpability for the homicide.

I. Trial

A. Prosecution's Case-In-Chief

1. The shooting

On June 22, 2008, the victim and his wife Rosales Hendricks were at their residence on Wild Rose Way in Yuba County.

Mrs. Hendricks's mother, Wanda Tallen, lived one block away on Wild Rose Way. Defendant lived next to Tallen. With the Hendricks's permission, several individuals lived in a trailer on the Hendricks's property, including Everett Hawkins, Ashley Hays, Amanda Cavagnaro, and Brian Maudlin.

The victim was five feet eight inches tall and weighed approximately 160 pounds. He had a "crippling" bone disease, walked "bent over" with a swing in his hip, and had an arthritic hand. The victim had previously sustained a gunshot wound to his right hand necessitating surgical reconstruction.

On the evening of June 22, 2008, around 6:00 to 7:00 p.m., Mrs. Hendricks received a telephone call from Tallen, who complained that defendant's dogs had gotten loose and attacked Tallen's dogs. The victim, dressed only in silk boxer shorts and wearing sandals, drove to his mother-in-law's house to assess the situation. After visiting Tallen, the victim drove toward defendant's property by himself. According to Mrs. Hendricks, the victim was upset. Indeed, this was not the first time the victim had discussed defendant's dogs with defendant.

Ten to 15 minutes after the victim left, Mrs. Hendricks heard two gunshots. Hawkins, Hays, Cavagnaro, and Maudlin also

heard two gunshots. The second shot occurred within seconds of the first.

Before the gunshots, Maudlin heard the victim screaming at defendant about the dogs, saying "your fucking dogs are chewing my dogs up back up on grandma's property again. You need to keep your dogs on a leash or p[e]nned up."² Preceding the gunshots, Hays heard both the victim and defendant yelling.

Following the two gunshots, Hawkins, Hays, Cavagnaro, and Maudlin spotted the victim's truck heading away from defendant's property, and they watched as the truck briskly passed the trailer on the Hendricks's property. The victim was not known to drive fast on that road (which was rocky and heavily rutted), so the rapid pace of the truck was unusual. The driver had something like a towel covering his face but based on his hair, the witnesses could tell that the driver was not the victim.

After the truck passed by the trailer, instead of going toward the Hendricks's homestead, the truck turned the other direction and was later heard crashing into a rock. When Hawkins and Maudlin reached the truck, it was still running and nobody was inside. Hawkins heard somebody running through the bushes and Maudlin heard a similar noise.

Concerned about the gunshots, Hawkins, Maudlin, and Cavagnaro drove to defendant's house. When they arrived at defendant's property, they found defendant standing on his property holding a shotgun. They mentioned the gunshots and

² Everyone referred to Tallen as "grandma."

inquired "over and over" about the victim, but defendant did not respond. Defendant looked up, stared off into space and uttered something about trying to be a good neighbor, or never wanting problems with his neighbors, or people "always starting --." What defendant said was jumbled and difficult to understand. Defendant ejected two shells from his gun, one of which was spent. Hawkins handed the spent shell to defendant and kicked the other shell into the bushes. Cavagnaro tried to step around defendant with her flashlight to look for the victim, but defendant pointed the shotgun at the trio and told them to get off his property. Hawkins thought the shotgun was not loaded. Nevertheless, they left defendant's property and went to the Hendricks residence, after which law enforcement was contacted.

2. The sheriff's investigation and defendant's statements

Deputies from the Yuba County Sheriff's Department, including Kai Jahnsen and William High, were dispatched to the scene at approximately 9:30 p.m. that night. The deputies met defendant at the entrance to his property. Defendant appeared nervous and sweaty.

The deputies informed defendant that they had received information that a neighbor had come to talk to him about a problem with dogs, shots were fired and the neighbor never returned. Defendant stated that his neighbor had left. The deputies indicated that they wanted to make sure he was not on the property and not injured. Defendant reluctantly allowed the deputies on his property.

Deputy High discovered a shotgun shell on the ground and picked it up. Deputies Jahnsen and High also observed what appeared to be a puddle of blood on the ground that was still moist and partially dried. Defendant claimed that the puddle came from a dog he had killed a few days earlier. When the deputies inquired as to the location of the carcass, defendant stated that he had burned it and showed the deputies the burn pile where the conflagration supposedly occurred. The deputies did not find any carcass or animal bones there. When the deputies inquired as to the gunshots heard earlier that evening, defendant stated that he had fired a few rounds to bring the dogs back home.

Detectives were called to defendant's property. Sergeant Million, the lead investigator, responded to the scene somewhere around midnight or the early hours of the morning on June 23 and spoke with Deputies High and Jahnsen. Deputy Jahnsen drove defendant to the Brownsville substation and Sergeant Million followed.

At the substation, Sergeant Million interviewed defendant for five to six hours with breaks in between. During the interview, defendant repeatedly denied shooting the victim. Defendant explained that the victim drove to defendant's property and a dispute ensued over the dogs. At one point, defendant's dogs were running behind the victim. Defendant feared the dogs were gathering in a pack formation, so defendant shot twice over the top of the dogs to scare them back to their pen. Everything calmed down, the victim drove off and defendant

did not see him again. At some point thereafter, some people who were yelling and screaming approached defendant. Defendant unloaded his shotgun in front of them and told them to leave. Million raised the possibility of defendant shooting the victim accidentally, when attempting to scare off the dogs, or in self defense, but defendant persistently denied shooting the victim. Defendant mentioned that the victim had threatened him before, had threatened him on the night of the shooting, and had threatened to shoot him in the past. Defendant further indicated that everyone in the area carries a gun because of mountain lions, and that the victim usually carried a gun. According to Sergeant Million, defendant seemed "startled and dazed" and was animated at times during the interview. Defendant commented that things seemed gray in his mind and were in a blur, and he explained that his brain had been damaged by Depakote and Lithium. Nevertheless, on multiple occasions during the interview, defendant "adamantly" denied that he had shot the victim. After the interview, defendant was transported to the main sheriff's office in Marysville.

Meanwhile, at defendant's residence, Deputy Brett Felion conducted a crime scene investigation in the early hours of June 23. The deputies had obtained a search warrant to search defendant's property. During the search, Deputy Felion found the victim's body in a wheelbarrow, covered by a tarp that was held in place by a tire. The body was located approximately 111 feet from the blood pool the deputies had discovered earlier. The deputies discovered a pistol grip shotgun lying on

the seat of a Ford F250 located on defendant's property, not far from the victim's body.

At approximately 9:50 a.m. on June 23, Detective Michael Williamson interviewed defendant at the sheriff's office. Defendant had told another detective that he wanted to speak to somebody, so Detective Williamson met with him. Defendant informed Detective Williamson that he killed "Keith" (the victim) and that he was "just beginning to remember." Defendant explained that the victim drove up to defendant's property and approached defendant. The victim was angry and yelling about defendant's dogs getting loose. Defendant was carrying a 30/30 rifle that he always carried when he walked around his property. Defendant stated that he was shocked and scared by the victim's approach. The two exchanged words and, at some point, the victim pushed defendant and began slapping at him. Defendant conceded that he shot the victim, causing the victim to fall onto the ground. Defendant stated that he fired twice, but he could not remember the details of the second shot. Defendant acknowledged that the victim did not have a gun, knife or any other weapon. Upon seeing the victim on the ground, defendant could see the gunshot wound to the chest. Defendant attempted to stop the bleeding, but it was too severe and the victim died. Defendant explained that he put the body in a wheelbarrow and moved it, and that the body was still hidden in the wheelbarrow under a tarp near a trailer at the end of his driveway. Detective Williamson discussed the possibility that defendant had been driving the victim's truck and the accounts of

witnesses who observed a person driving the truck with a rag covering his or her face. Defendant did not recall driving the victim's truck, but acknowledged that he used paper towels to wipe his face and that is possibly what the witnesses had observed.

Later in the afternoon of June 23, Sergeant Million visited with defendant in a holding cell. Million asked defendant where the rifle was and defendant told Million where he had placed it. Based on defendant's directions, the deputies at the scene found the 30/30 lever-action rifle concealed in the brush on defendant's property. The rifle had been wedged in the brush some 15 to 30 feet off the trail as if to hide it.

On the morning of June 24, Sergeant Million spoke with defendant about his admission to detective Williamson that he shot the victim. Defendant stated that the victim had approached him, the victim swung on him, and because defendant felt he had no choice, he shot the victim.

Later on June 24, Detective Williamson relayed information from the victim's autopsy to Sergeant Million. Sergeant Million spoke with defendant again, hoping to clarify how the victim received his gunshot wounds. Defendant told Million that the victim had approached him in an angry manner. Defendant verbally described what occurred and physically demonstrated as he spoke. Defendant was holding a dog in his left hand and he had his lever-action rifle in his right hand down at his side. The victim slapped the dog out of defendant's hand and then swung at defendant with his right fist. As the punch followed

through and missed, defendant stepped back, grabbed his rifle with both hands and, from his hip, fired a shot at the victim. As defendant was falling back, he worked the lever action at hip level and fired a second shot. Initially, defendant said the victim had fallen onto his back when the second shot was fired. The autopsy information indicated that one shot entered the front portion of the victim's torso and another shot entered the back of victim's torso, so Million pointed out that what defendant described could not have happened. He asked defendant if he shot the victim in the back while the victim lay on the ground. Defendant stated that he would never do that, and then explained that the first shot spun the victim around and then defendant shot the victim in the back and the victim landed face-first on the ground. Defendant then rolled the victim onto his back, noticed that he had multiple wounds, and stated "why did you do that[?]"

Defendant stated that his wife was inside a building on the property, and she came out at one point. Defendant told her everything was okay and to go back inside. Defendant did not recall driving the victim's truck and crashing it, but he affirmatively stated that his wife did not drive the truck. Defendant tried to put the victim's body in the truck, but he could not lift the body inside. Eventually defendant put the victim in a wheelbarrow, pushed him a distance, and placed a tarp over the victim. Defendant recalled people confronting him after the shooting and inquiring about the victim's whereabouts.

Defendant unloaded his shotgun in front of them because he did not want to shoot them or harm them.

According to Sergeant Million, defendant appeared to be more rested and had more memory of the incident on June 24 as compared to defendant's previous interaction with Sergeant Million on June 23. Sergeant Million acknowledged that defendant told him during the interview on June 24 that he believed he had no choice and did not mean to shoot, that he never planned to shoot, that the shooting just happened under the circumstances, and defendant described the shooting as "the gun went off."

3. The rifle

Sergeant Million testified that a 30/30 lever-action rifle does not chamber a round automatically after being fired. Instead, the shooter must manually move the lever action to chamber another round of ammunition. He testified that it is preferable to carry this weapon with the hammer half-cocked because that position is a safety mechanism. The rifle will not accidentally discharge by touching the trigger or dropping it when the hammer is in the half-cocked position.

4. The autopsy

The autopsy revealed two gunshots to the torso. One bullet entered the victim's upper left chest and traveled from left to right, penetrating the right side of his heart and the right lung, exited just below his right armpit, and reentered the right arm. Bullet fragments were recovered from the right arm.

The path of this bullet was very slightly upward, maybe five degrees at the most.

The other bullet entered through the upper back, about three quarters of an inch to the right of the spine, penetrated the left lung, exited the chest, reentered through the top of the left armpit, and exited the outside surface of the upper left arm. This bullet traveled more steeply upward relative to the body than the chest wound. Either shot individually was fatal.

Based on the assumption that the shot to the left chest was first, the pathologist opined that the victim had been turned away from the shooter when that shot was fired, resulting in the left-to-right trajectory. "The shot [to the back] would follow if [the victim] continued to turn and wound up completely turned around with a second shot falling to his back with him also collapsing away from the direction of the shooter, causing the bullet to pass at a more upward angle as it went through his body."

Based on the location of the exit and reentry wound in the armpit, the forensic pathologist opined that the victim's right arm would have been down at his side when the chest wound was inflicted, but he could not give an opinion about the position of the left arm. However, the left arm would have been down at the victim's side when the gunshot wound to the back was inflicted based on the location of the exit and reentry wound in the armpit, and because the victim's right arm was broken, that

arm probably also would have been down when the victim was shot in the back.

Based on the stippling on the skin around both entry wounds, the forensic pathologist estimated that the shots were fired from approximately three to three and a half feet away. Had the muzzle been closer, there would have been more stippling around the entry wounds and the pattern of stippling would have been smaller. Also, at six to eight inches, gunpowder soot would be present.

B. Defense Case

1. Testimony of Phillip Routan

Phillip Routan had known defendant for 15 years and had met the victim probably eight to 15 times. Routan did not recall that the victim walked with a limp and he did not notice anything significant about the way the victim walked. On a single occasion about a year before the shooting, Routan observed the victim carrying a holstered pistol on defendant's property. Routan asked the victim about the pistol and the victim pulled it out and uttered some offensive term, but he did not threaten anyone with the gun. Routan did not know why defendant discharged his firearm at the victim, but if Routan were there at the time, he would have assumed the victim was armed and "it would have put [defendant] in a heightened state of being."

At approximately 10:00 p.m. on the night of the shooting, defendant called Routan and told him to drop everything, "get up to the mountain," and get defendant's wife out of there -- it

was an emergency. Although Routan asked defendant what was wrong, defendant did not elaborate and instead just said, "[G]et up here. It's an emergency. Get up here now." Routan set out for defendant's property but was eventually stopped by deputies on the scene.

2. Defendant's testimony

Defendant testified that he and the victim were longtime friends, "like family." They had an inconsistent relationship but "kept a peaceful rapport." Despite a hand operation, the victim had a good handshake and could handle a pistol. Within a month prior to the shooting, defendant had seen the victim "run like a gazelle."

Defendant owned and kept guns on his property, which he referred to as "mountain lion country." Defendant is a "Black Powder enthusiast" and has "been invited to join" such clubs as the "Sierra Muzzle Loaders." He indicated he had received firearm training in the Coast Guard, where he served for four years.

Defendant had previously observed the victim with a revolver and a rifle. The victim had a gun almost every time defendant saw the victim.

On one occasion, the victim stuck a rifle in defendant's face when defendant was trying to move some items on a pallet down the road. The victim's eyes were dilated and he looked wild. The victim's attitude changed when defendant stated he was glad to see the victim.

Occasionally defendant would visit the Hendricks residence whereupon defendant would be informed by Mrs. Hendricks that the victim was "off the hook," meaning that he was very angry. Defendant would "have a smoke" with the victim and "calm him down." Defendant "finally surmised" that the victim's anger spurts stemmed from the fact that he was "out of drugs," specifically methamphetamine. A mutual neighbor had informed defendant that the victim and others "were doing crank." One time defendant thought he saw methamphetamine crystals on a serving tray in the victim's room.

Earlier on the day of the shooting, the victim visited defendant's property while defendant was working on a dog pen. The victim stated that defendant's dogs had attacked one of Tallen's dogs and that defendant needed to apologize to her. Both the victim and defendant were concerned about the dog situation.

Subsequently, defendant visited Tallen's house with his wife to make peace. After defendant examined the injured dog, defendant concluded that the dog had been injured by cable or wire. Tallen was glad to see defendant and when defendant left Tallen's residence, everything was fine.

Defendant then visited the Hendricks residence to inform the victim that he had made peace with Tallen. Defendant tried to explain that his dogs had not harmed Tallen's dog. The victim stated that he "didn't give a damn or something" and if defendant's "dogs come over on the property anymore, he would shoot them." Defendant responded that if the dogs went onto the

victim's property and the victim shot them, "there is nothing I can do." Defendant then "turned around and left in peace," but the victim had a "threatening attitude."

When defendant returned home, he noticed that two of his dogs had escaped from the pen, and he went looking for them in the woods. He carried his rifle because "the mountain lion was around" and his dogs typically yielded when signaled by his rifle. When defendant's wife screamed "Billy," he returned and noticed that the victim was on defendant's driveway wearing only silk-looking boxer shorts. Defendant was troubled by the victim's yelling.

Defendant had his dog "Scout" in his arm. He put the dog down and placed his 30/30 rifle in his left hand. Defendant said "peace, brother" to the victim. The victim was standing with the sun directly behind him. Defendant testified he "couldn't see anything" because he had sweat in his eyes. He could only "see where [the victim's] figure was." Defendant did not know whether the victim was carrying a firearm but defendant did not see one. There was, however, "something silver" in the victim's hand that "reflected from the sun."

The victim walked up to defendant as defendant descended a hill. Later during direct examination, defendant testified that he could see the victim's eyes and the victim looked "really mad, really angry." Defendant further observed that the victim's eyes were "really black and dilated." Defendant "knew he'd been doing crank."

Standing right in front of defendant, the victim said "I'm sick and tired of you and your God damn dogs, and I'm going to kill all your dogs and you too." The victim swung at defendant with an object in his right hand. Defendant testified that he did not know what the object was. He did not know whether it was a knife or a gun. Defendant moved back, holding his right hand up. The victim made contact about four or five inches above defendant's right wrist, leaving a mark that Sergeant Million later pointed out to defendant. Then the victim came back around with his left hand and slapped defendant on the top of his head and grabbed defendant's rifle. Defendant pulled back on the rifle. Defendant's hand came back on the hammer as he fell backward onto his elbows and the gun went off as he hit the ground. When asked whether the gun fires without pulling the trigger, defendant explained that he "think[s] if the hammer goes down" on his rifle then "the gun goes off." When the victim grabbed the gun and defendant pulled back on it, defendant's "hand slipped down the rifle." Defendant explained that "[i]t's possible when your hand is sliding down the rifle for the hammer and the trigger to get depressed and for the firing mechanism just to be released." Had the gun not fired, defendant believed the victim was going to kill him.

Defendant testified that he was "[p]ositive" the victim remained standing after the first shot was fired. The sun was still behind the victim and defendant could see the victim's silhouette. There was gravel under defendant's feet and defendant fell down onto his elbows again. Defendant testified

that "the gun went off again" -- "that's when the second shot evidently went off." The direct examination concluded as follows:

"[DEFENSE COUNSEL]: Do you remember if you cocked the gun the second time, and it's a yes or no or I don't know.

"[DEFENDANT]: The lever -- well, you can look at the gun. The lever goes down pretty easy. And when my hand got on it I was falling, so it was kind of flopping around a little bit.

"[DEFENSE COUNSEL]: Do you think you may have cocked the gun a second time?

"[DEFENDANT]: Well, it got cocked for sure. I closed it. That's when it went off is when I brought the lever up. That's when it went off.

"[DEFENSE COUNSEL]: Do you even remember seeing [the victim] at that point?

"[DEFENDANT]: I didn't see him at that moment.

"[DEFENSE COUNSEL]: Was it around the time frame that -- did that happen instantly at the time you saw a silhouette in the sun standing there?

"[DEFENDANT]: Yeah. It was fast. Everything was like a wreck on the freeway. It was -- that was it.

"[DEFENSE COUNSEL]: So you don't know which direction he was facing when the second shot went off?

"[DEFENDANT]: No. I couldn't tell. Sun was behind him.

"[DEFENSE COUNSEL]: Okay.

"[DEFENDANT]: I didn't know.

"[DEFENSE COUNSEL]: Okay. Did you intend to shoot [the victim]?

"[DEFENDANT]: I never had the intention to shoot [the victim].

"[DEFENSE COUNSEL]: Ever?

"[DEFENDANT]: Ever.

After the shooting, defendant tried to keep his dogs away from the body. Defendant attempted to move the body, finding a 12-inch crescent wrench in the process. Defendant believed he put the crescent wrench in the victim's truck. Defendant tried to put the victim's body in the victim's truck without success. Defendant sat in the victim's truck but he testified that he was "absolutely positive" he did not drive the victim's truck. After defendant was unable to get the body inside the truck, defendant put the body inside a wheelbarrow. During the shooting and afterward, defendant's wife remained in the cabin.

After the shooting, people arrived at defendant's property. They acted "kind of rowdy, insistent." "[O]ne lady was ramming [defendant] with her body like a football player." "She c[a]me roaring up in a real attitude" Defendant kept telling them they were trespassing and to leave. Defendant felt threatened, so he picked up a shotgun that someone had left at his property in exchange for a \$40 loan. Defendant emptied the shotgun in front of the people because he did not want anybody else to get hurt. Defendant never pointed the shotgun at them, but thinks he was "waving" it and telling them to get out of there, which they eventually did.

Defendant has had memory problems which, according to him, are exacerbated by trauma or stressful situations. Around 13 years preceding his testimony, defendant suffered from "toxic shock poisoning" caused by medication, including Depakote, which defendant believes has ruined his life.

Defendant testified that he did not remember being taken to the Brownsville Sheriff's substation or the initial interview that took place there. Consequently, he had no idea what he had said to the interviewer or if he had even talked to one. He did remember, however, waking up one morning, remembering that he had put the victim's body under a tarp to keep the dogs away from the body, and realizing that he needed to speak to an investigator about that. He denied ever lying to any law enforcement officers. As an explanation for why he remembered some things at later times, defendant testified, "The significance of certain things don't occur to me whenever I am in shock and trauma like that. I was chasing dogs, and I realize[d] I couldn't catch 14 dogs. And I had to move the body. I couldn't take care of the dogs, and then I collapsed on one of the cedar planks I had cut."

On cross-examination, defendant testified that he did not remember whether he ever told any law enforcement officer that the victim threatened to kill him or that the victim had struck him with a silver object, even though those things would have been important. He did not remember whether he told Sergeant Million about the crescent wrench he found and placed in the victim's truck. Defendant was asked "You killed Keith

Hendricks?" and defendant responded, "That's quite evident. I never denied it." He claimed to have no memory of denying that he killed the victim, although he does not think he did. And he was "[a]bsolutely certain" he did not drive the victim's truck off of his property.

At the end of defendant's testimony, the court posed the following questions to defendant:

"THE COURT: . . . Did you intend to shoot [the victim]?"

"[DEFENDANT]: By no means. No, sir.

"THE COURT: Did you intend for the rifle to be fired?"

"[DEFENDANT]: No, sir.

"THE COURT: Are you saying that the discharge of the rifle was accidental?"

"[DEFENDANT]: Basically. Yes, sir.

"THE COURT: 'Basically.' What does that mean?"

"[DEFENDANT]: For sure. That's basic."

C. Prosecution's Rebuttal Evidence

1. Toxicology evidence

No methamphetamine or amphetamine was found in the victim's system.

2. Defendant's statements

Defendant never told Sergeant Million that the victim threatened to kill defendant's dogs and defendant that evening. A statement of that magnitude would have been noted if made to other officers and then passed along to Sergeant Million. Defendant also never told Million that the victim had slapped him on the head or that the victim had grabbed the rifle during

the encounter. During Sergeant Million's June 24 interview, defendant indicated that before firing the second shot, defendant did a "trick" manipulation of the lever action at hip level before the shot was fired.

3. The rifle

Sergeant Million elaborated on the operation of the rifle and demonstrated how it works to the jury.

"[PROSECUTOR]: Let's assume that you've got several rounds in the magazine and one in the chamber. You've got the gun in the configuration it's in right now. What do you have to do to fire this gun at this point?

"[MILLION]: In order to fire this weapon you have to cock the hammer, which you take it and you have to pull the hammer all the way back . . . two clicks[.] The first click was a half cock, a safety mechanism. The second click is where it's in a firing position. In order to do it, I'm going to go ahead and drop the hammer. You have to pull the trigger here and it fires forward. Once it does that, it releases it. And in order to reload it, you have to take and move the mechanism back, move it all the way forward. Has to go all the way forward to such in order to have a shell to come up. You can see in here there is a slide when this magazine drops. Allows the shell, which pretty much takes up the majority of the loading port. And then in order to load it again, you have to forward this forward [sic] again like I did before. Pushes the bolt, grabs the base of the shell. The ejectors grab it, slide it forward. And it

clicks forward, and you have to have it clicked forward in order to fire.

"[PROSECUTOR]: And it's immediately available to fire once you do that?

"[MILLION]: It's cocked, and you have to fire it again. If you are going to fire it, you have to pull the trigger again. You can see it actually fires again. If it was back, in order to put it back to safe you actually have to disengage the hammer, let it go all the way forward with your thumb controlling it so it doesn't discharge. And you have to pull it back to the half cock and . . . it's in half cock safety, should not be able to fire. And it cannot."³

D. Jury Instructions and Verdict

Among other instructions, the court instructed the jury on accident, self-defense, two forms of second degree murder, and voluntary manslaughter. Despite defendant's request, the court did not instruct the jury on involuntary manslaughter. The jury found defendant guilty of second degree murder, and found true the firearm allegation. The jury found defendant not guilty of assault with a firearm on Cavagnaro, Maudlin, and Hawkins.

³ It may be that the combination of the oral description and visual demonstration made Million's description of the rifle's cycle of operation clear to the jury. We do not have the benefit of the visual demonstration, but infer from Million's testimony in the prosecution's case-in-chief and the quoted testimony in the prosecution's rebuttal case that in order to fire a shot after a shot is fired, one has to work the lever action to rechamber a round, pull the hammer back two clicks, and then pull the trigger.

E. New Trial Motion and Sentencing

Defendant filed a new trial motion in which he contended the trial court erred in failing to instruct on involuntary manslaughter as requested by the defense at trial.

At the hearing on the motion, before defense counsel tendered oral argument, defendant himself verbally addressed the court. Defendant referenced "*Marsden*"⁴ and stated that he wanted a new trial, complaining that his "disabled" and "distracted" condition had prevented the "truth" from coming forward. The trial court explained to defendant that his counsel's motion for a new trial would be heard that morning and that a *Marsden* motion was not an appropriate motion because his counsel was retained, not appointed.

Thereafter, the trial court heard argument on the new trial motion and denied it.

The trial court sentenced defendant to a state prison term of 15 years to life for the second degree murder and a consecutive state prison term of 25 years to life for the firearm enhancement. Defendant appealed.

II. DISCUSSION

A. Refusal to Instruct on Involuntary Manslaughter

While acknowledging that "accident" was his "prime" theory of defense, defendant contends that the trial court committed reversible error when it refused his request to instruct on involuntary manslaughter, a lesser included offense to murder.

⁴ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Defendant asserts that the lesser offense of involuntary manslaughter was "a close flip side of accident" and the trial court should have instructed the jury on involuntary manslaughter, a "key middle-ground theory of unlawful homicide" that was "in between accident and murder or voluntary manslaughter."

"An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense but not the greater, charged offense. [Citation.] '[E]very lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury.'" (*People v. Thomas* (2012) 53 Cal.4th 771, 813 (*Thomas*), citing *People v. Breverman* (1998) 19 Cal.4th 142, 154, 155, 162 (*Breverman*).) Doubts concerning the sufficiency of the evidence should be resolved in favor of the accused. (*People v. Flannel* (1979) 25 Cal.3d 668, 685.) Involuntary manslaughter is a lesser included offense of murder. (*Thomas, supra*, 53 Cal.4th at p. 813; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.) We review de novo whether the trial court erred in failing to instruct on involuntary manslaughter. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

To put defendant's argument in context, a brief review of the instructions given by the trial court, as well as pertinent legal principles, is warranted.

Defendant testified that he accidentally shot the victim. He did not intend to fire the rifle. The trial court instructed

the jury on "accident."⁵ "Generally, the 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.) As we will explain, the jury's verdict of murder and its true finding on the firearm allegation reflects a rejection of this theory.

Defendant's testimony also raised the possibility that if the killing was not accidental, he justifiably killed the victim in self-defense. Indeed, defendant painted the victim as the aggressor who swung at defendant with something metallic in his hand. Although he did not intend to fire his rifle, defendant testified that he thought he would have been killed had the gun not discharged. The court instructed the jury on complete self-defense, which, if applicable, would have precluded criminal

⁵ The trial court instructed in the language of CALJIC No. 4.45, omitting bracketed language pertaining to criminal negligence: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show neither criminal intent or purpose, he does not thereby commit a crime."

We cannot determine from our review of the record why the parties presented the court with CALJIC jury instructions rather than CALCRIM instructions. The CALCRIM instructions "are approved by the Judicial Council as the state's official instructions pursuant to the California Rules of Court [and t]he Rules of Court strongly encourage their use." (Rule 2.1050(e); see preface to Jud. Council of Cal., Crim. Jury Instr. (2007-2008) p. XIII, 3d par.) It is recommended that a trial court use the Judicial Council instructions unless the court finds that different instructions would more accurately state the law and be understood by jurors. (Cal. Rules of Court, rule 2.1050(e).)

liability. Again, the jury's verdict of murder and its finding on the firearm allegation reflects a rejection of this theory as well.

If the killing was not accidental or in self-defense, the instructions told jury to determine whether defendant killed the victim unlawfully either by committing second degree murder or voluntary manslaughter.

The trial court properly instructed the jury on the definition of murder and two theories of second degree murder -- murder with express malice and murder with implied malice. "Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a); *People v. Lasko* (2000) 23 Cal.4th 101, 107 (*Lasko*)). "Malice may be express or implied." (*Lasko, supra*, 23 Cal.4th at p. 107.) "'Malice is express when the killer harbors a deliberate intent to unlawfully take away a human life. Malice is implied when the killer lacks an intent to kill but acts with conscious disregard for life, knowing such conduct endangers the life of another.'" [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 751.) "Murder that is committed with [express or implied] malice but is not premeditated is of the second degree." (*People v. Ramirez* (2006) 39 Cal.4th 398, 464 (*Ramirez*)).

The trial court properly instructed on voluntary manslaughter grounded on heat of passion and imperfect self-defense. Voluntary manslaughter is the unlawful killing of a human being without malice. (*People v. Blakeley* (2000) 23 Cal.4th 82, 87 (*Blakeley*)). "A defendant lacks malice and

is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense"--the unreasonable but good faith belief in having to act in self-defense.'" (*Lasko, supra*, 23 Cal.4th at p. 108; accord, *Blakeley, supra*, 23 Cal.4th at pp. 85, 88.) The former is referred to as "heat of passion" (*People v. Moyer* (2009) 47 Cal.4th 537, 549 (*Moyer*)), and the latter is known as "imperfect self-defense" (*People v. Cruz* (2008) 44 Cal.4th 636, 664).

A defendant who *intentionally* but unlawfully kills in heat of passion or in imperfect self-defense is guilty of voluntary manslaughter. (*Lasko, supra*, 23 Cal.4th at pp. 104, 110-111; *Blakeley, supra*, 23 Cal.4th at pp. 85, 88-91.) A defendant who, acting with conscious disregard for life and knowledge that his conduct is life-endangering, *unintentionally* but unlawfully kills in heat of passion or in unreasonable self-defense is also guilty of voluntary manslaughter. (*Lasko, supra*, 23 Cal.4th at p. 104; *Blakeley, supra*, 23 Cal.4th at p. 88.) Although such killings are done intentionally or with a conscious disregard for life, heat of passion or imperfect self-defense reduces the killing from "murder to voluntary manslaughter by *negating the element of malice that otherwise inheres* in such" homicides. (*Moyer, supra*, 47 Cal.4th at p. 549.)

The jury was further instructed: "If you are convinced beyond a reasonable doubt and unanimously agree that the killing

was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.” (CALJIC No. 8.72.)

Involuntary manslaughter is the unlawful killing of a human being during (1) the commission of an ordinarily lawful act done without due caution and circumspection or (2) the commission of a misdemeanor or a noninherently dangerous felony which is dangerous to human life under the circumstances of its commission. (§ 192, subd. (b); *People v. Cox* (2000) 23 Cal.4th 665, 674-675; *People v. Butler* (2010) 187 Cal.App.4th 998, 1006-1007.)

Defendant contends on appeal that an involuntary manslaughter instruction on both theories should have been given. According to defendant, the jury *could have found* the first shot was accidental and “they *could easily have found* either shot was discharged in a grossly negligent manner, particularly based on the evidence one had to manipulate the lever and/or the hammer to fire the rifle.” (Italics added.) Further, defendant argues, “[b]ased on the same evidence the firearm required manipulation to fire, they *could also have found* misdemeanor brandishing” (Italics added.) Or the jury “*could likewise readily find* excessive (and grossly negligent) force in reasonable self-defense [citation] or a shooting short of conscious disregard of life in unreasonable self-defense” because the jury *could have found* that the shooting occurred during the commission of the misdemeanor of

brandishing a firearm and that the gun discharged accidentally.⁶ (Italics added.) Brandishing a firearm is committed when a person draws or exhibits a firearm, in the presence of another person, "in a rude, angry, or threatening manner." (§ 417, subd. (a)(2).) "[A]n accidental shooting that occurs while the defendant is brandishing a firearm in violation of section 417 could be involuntary manslaughter. [Citations.]" (*Thomas, supra*, 53 Cal.4th at p. 814.)

The People contend that there is not substantial evidence supporting any theory of involuntary manslaughter. As for criminal negligence, the People contend that, at most, defendant was "somewhat negligent" by failing to carry his rifle in the

⁶ During the instruction conference and in his new trial motion, the defense argued only one theory of involuntary manslaughter -- criminal negligence. No elaboration was provided by defendant during the instruction conference. When the trial court asked defense counsel for comments on involuntary manslaughter during the instruction conference, counsel told the court, "Just submit that it could be under . . . criminal negligence, and I submit that pursuant to the use notes on this." In his new trial motion, defendant argued that "the act of carrying a loaded firearm and pulling back on the weapon in the vicinity of the trigger mechanism along with pulling the lever action upward on a gravel slope could constitute acting without 'due caution and circumspection.'" During the hearing on the new trial motion, defense counsel argued, "I would suggest in terms of whether or not there was substantial evidence as necessary for consideration of the terms of being [in]voluntary instructions, that they very well could have parceled the two shots as being different; one as being accident; second as clearly coming from criminal negligence where [defendant] testified that he re-cocking [*sic*] and pulling the lever action up while pointing a loaded firearm in the direction of [the victim], did frantically kind of pull away on loose gravel. . . . And I believe it was part and parcel of the full gambit for the jurors to consider."

half-cocked position rather than with the hammer down. As for defendant's brandishing theory, the People point out that there is no evidence defendant exhibited his rifle in a rude, angry, or threatening manner, a component of the actus reas element of brandishing a firearm.

We need not determine whether the trial court erred in not giving involuntary manslaughter instructions under any theory advanced by defendant⁷ because any error was harmless.⁸

1. Harmless error

"The failure to instruct on a lesser included offense in a noncapital case does not require reversal 'unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.' [Citation.] 'Such posttrial review focuses not on what a reasonable jury *could* do [as defendant here contends], but what such a jury is *likely* to have

⁷ Accordingly, we decline defendant's invitation to comment on the validity of the CALCRIM bench notes, which indicate that involuntary manslaughter instructions should always be given in homicide cases where the court instructs on accident. (Bench Notes to CALCRIM No. 510, p. 256.)

⁸ Although it appears from *Breverman, supra*, 19 Cal.4th at p. 165, that error in failing to instruct on a lesser included offense is subject only to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, the California Supreme Court has not always adhered to this position, at times applying the stricter standard of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1267-1268 [collecting cases on this point and ultimately determining that any error in failing to instruct on the lesser included offense of second degree murder was harmless under *Chapman*].) We conclude that under either standard, any error in failing to instruct on involuntary manslaughter here was harmless.

done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.'" [Citation.] (*Thomas, supra*, 53 Cal.4th at p. 814, fn. omitted.)

Here, the evidence supporting the jury's verdict is compelling. On the other hand, no evidence other than defendant's trial testimony supports defendant's claim that the gun accidentally discharged. The inconsistencies and discrepancies in defendant's testimony presented a *comparatively weak* alternative explanation for the evidence that showed that defendant intentionally fired his rifle twice, killing the victim with malice aforethought. As we have noted, the victim was shot once in the chest and once in the back. Both lethal shots hit center mass. Defendant's unconvincing trial testimony explaining the shooting was suspect in several particulars.

The left-to-right bullet path of the shot to the left side of the victim's chest indicates that the left side of the victim was turned toward the muzzle when the rifle was fired. Also, the relatively level path of the bullet is inconsistent with defendant's description of falling to the ground and the gun discharging after his elbows hit the ground.

Assuming the shot to the chest was first (defendant obviously does not contend the contrary), the pathologist's

opinion was that the wound to the back was inflicted after the victim was spun around by the shot to the chest. The right-to-left and upward bullet path of the wound to the back suggests that at this point, the victim was turned somewhat to his right relative to the muzzle of the gun and "collapsing away from the direction of the shooter" when the second shot was fired. The pathologist's opinion was corroborated by defendant's own interview statements to Sergeant Million on June 24. Defendant told Million the first shot spun the victim around and then defendant shot the victim in the back, and the victim then fell face-first on the ground.

Defendant testified that the victim grabbed the rifle just prior to the first shot and he tried to pull the rifle away, yet there was no testimony indicating that stippling or powder residue was found on the victim's hands or arms. The location of the exit and reentry wounds indicate the victim's right arm was down by his side when the shot to the chest was fired and both arms were down to the sides when defendant shot the victim in the back. Based on the stippling pattern around each entry wound, the muzzle was some three to three and a half feet away from the entry wounds when both wounds were inflicted.

Defendant's belated claim that he thought the victim was under the influence of methamphetamine because he noticed his eyes were dilated was unconvincing and inconsistent with other evidence. The testimony was unconvincing because defendant also testified that the sun was behind the victim, sweat was in defendant's eyes and he could see only the victim's silhouette,

which was why he could not see the object in the victim's hand. The notion that the victim was under the influence of methamphetamine (thus providing an actual and reasonable belief in the need to defend oneself with deadly force) was inconsistent with the toxicology findings. The victim tested negative for methamphetamine.

Defendant's trial testimony that the victim attacked him with a wrench is unconvincing and inconsistent. It is unconvincing because defendant was openly carrying a rifle when the victim supposedly attacked defendant with a wrench. It is inconsistent with defendant's prior statements in which he never mentioned a wrench or metallic object. As noted, defendant told Million on June 24 that the victim threw a punch and missed him. Defendant said he saw no weapon at that time. There is no testimony that law enforcement found any wrench defendant claimed to have found and placed in the victim's truck.

Defendant's claim that he did not drive the victim's truck away (and, by implication, that he did not cover his face when doing so) was also unconvincing and the jury would have been justified in viewing this conduct as part of an attempt to cover up an intentional shooting. Hiding the body and hiding the gun also reflected attempts at concealing an intentional shooting. Defendant's lies to law enforcement -- for example, the source of the blood pool the responding deputies observed, his claim that the victim had come and gone, and his repeated denials in the initial interview that he shot the victim -- also reflect an

early attempt to conceal purposeful conduct.⁹ Moreover, not only did defendant initially deny shooting the victim, but he denied that he acted in self-defense or that any accidental shooting occurred. And these attempts at concealment are inconsistent with defendant's claim that he was dazed and confused immediately after the shooting.

Defendant's testimony on how the rifle discharged is not consistent with his prior statements on that point or the testimony concerning the operation of the rifle. On June 23, defendant told Detective Williamson that the victim started pushing and slapping at him. Defendant said he shot the victim, causing him to fall almost immediately to the ground. He claimed not to remember the details of the second shot that was fired. And he told Williamson the victim did not have a gun, knife or any other weapon.

On June 24, defendant told Sergeant Million that the victim swung on him and he shot the victim because he felt he had no choice. Later on June 24, defendant clarified that the victim slapped defendant's dog out of defendant's hand and then the victim swung at defendant with his right *fist*. At that point, defendant stepped back, grabbed his rifle with both hands and,

⁹ The jury was instructed on consciousness of guilt in the language of CALJIC No. 2.03: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

from his hip, fired the first shot at the victim. Defendant then held the gun from his hip and engaged in a "trick" manipulation of the weapon and shot the victim again after the victim spun around from the first shot and while defendant was falling backward.

These earlier statements were in stark contrast to defendant's trial testimony where defendant claimed he set his dog down, which was followed by the victim swinging a metallic object in his right hand at defendant, then swinging at defendant with his left hand, slapping defendant on the top of the head, and then grabbing defendant's rifle, the first shot thereafter discharging accidentally as defendant pulled back on the gun and the second shot discharging because defendant accidentally worked the lever action, pulled the hammer back all the way and pulled the trigger, all as the result of pulling back on the gun and falling to the ground a second time.

Defendant relied on faulty memory when unable to explain incriminating evidence. But this claim was also unpersuasive because his memory appeared selective. For example, he was able to remember new details about how the rifle discharged each time it was fired, but he could not remember initially lying to the investigators.

As our high court has observed, in the context of cases like this one, "[a]n unintentional shooting resulting from the brandishing of a weapon can be murder if the jury concludes that the act was dangerous to human life and the defendant acted in

conscious disregard of life. [Citations.]” (*Thomas, supra*, 53 Cal.4th at pp. 814-815.) Thus, in such a scenario, “[i]n order to find defendant guilty of only involuntary manslaughter, the jury would have had to conclude *both* that the shooting was accidental and that defendant had acted without malice.” (*Id.* at p. 815.) Based on the evidence that the victim was shot twice, including once in the back, the evidence concerning the operation of the 30/30 lever-action rifle, and defendant’s story of how the shooting occurred, which evolved, from his initial denials to his claim that the victim threatened to kill him and his dogs and then swung at him with a wrench, the jury was not reasonably likely to have convicted defendant of involuntary manslaughter had instructions for that lesser offense been given under any theory.

Our analysis is supported by the fact the jury found true the allegation that defendant personally and *intentionally* discharged a firearm. Indeed, setting aside our assessment of the evidence for the moment, “[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085-1086.) ““In such cases the issue should not be deemed to have been removed from the jury’s consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by

the jury." [Citations.]'" (*People v. Elliot* (2005) 37 Cal.4th 453, 476.)

Here, the jury was properly instructed on the firearm enhancement: "If you find [defendant] guilty of the crime thus charged, you must determine whether [defendant] *intentionally and personally discharged* a firearm and proximately caused death to a person in the commission of that felony. [¶] The word 'firearm' includes a 30/30 lever action rifle. [¶] *The term 'intentionally and personally discharged a firearm' . . . means that the defendant himself must have intentionally discharged it.* [¶] A proximate cause of death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death and without which the death would not have occurred. [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

The firearm allegation was set forth in a separate verdict form, entitled "Count I, Finding I," which told the jury to "Answer the following only if you have found the defendant guilty of the charge in Count One, Murder." The jury found defendant guilty of second degree murder and completed Finding I, concluding, beyond a reasonable doubt, that defendant "did personally and intentionally discharge a firearm . . . proximately causing great bodily injury or death."

Based on the jury's finding (i.e., Finding I), the jury clearly rejected the notion that defendant discharged his

rifle unintentionally. Accordingly, for this additional reason, any error in failing to instruct on involuntary manslaughter grounded on criminal negligence or brandishing was harmless.

Endeavoring to avoid the impact of the jury's finding on the firearm allegation, defendant attempts to fashion a few theories of involuntary manslaughter that could be feasible even though defendant personally and intentionally discharged the rifle. These theories are all unavailing.

First, defendant contends that the jury's finding did not specifically state, and therefore did not resolve, whether defendant personally and intentionally discharged his firearm at the victim. This argument gets defendant nowhere. At a minimum, the jury found that defendant personally and intentionally discharged his firearm, proximately causing the victim's death.¹⁰ In the face of the jury's finding, an involuntary manslaughter theory premised on the notion that defendant did not fire his rifle at the victim would only be viable if there was evidence that, notwithstanding defendant's personal and intentional discharge of his firearm, it was defendant's criminal negligence that caused the victim's death. For example, if defendant personally and intentionally fired

¹⁰ Although Finding I stated "great bodily injury or death," the corresponding jury instruction mentioned only death; the victim died, and the jury convicted defendant of second degree *murder*. Therefore, the jury necessarily determined that defendant's personal and intentional discharge resulted in death. Even defendant himself recognizes in his appellate briefing that the jury entered a "true finding [defendant] intentionally discharged a firearm causing death."

warning shots in the air to quell further escalation but, through criminal negligence, ended up hitting the victim instead, an involuntary manslaughter theory might make sense. Here, however, there was no evidence from which the jury could find that although defendant personally and intentionally discharged his firearm, he negligently did so for some purpose other than shooting the victim.

Second, defendant suggests that the jury could have found that he killed the victim during the commission of misdemeanor brandishing (§ 417, subd. (a)(1)), making an involuntary manslaughter instruction proper. But again, there is no evidence to support the theory that defendant personally and intentionally discharged his firearm during a mere act of brandishing. Moreover, as our high court has noted, an involuntary manslaughter theory grounded on brandishing only works if defendant accidentally discharged the weapon. (*Thomas, supra*, 53 Cal.4th at p. 815.) Otherwise, “[a]n unintentional shooting resulting from the brandishing of a weapon can be murder if the jury concludes that the act was dangerous to human life and the defendant acted in conscious disregard of life. [Citations.]” (*Id.* at pp. 814-815.) Alternatively, the intentional discharge of a firearm in a criminally negligent manner has been regarded as an inherently dangerous felony that would support a verdict of second degree felony murder. (*People v. Howard* (2005) 34 Cal.4th 1129, 1136; *People v. Clem* (2000) 78 Cal.App.4th 346, 348, 350-351 [concluding that the intentional discharge of a firearm in a grossly negligent manner

is an inherently dangerous felony for purposes of the felony-murder rule].)

Third, citing *People v. Welch* (1982) 137 Cal.App.3d 834 (*Welch*), defendant suggests that the jury could have found that he personally and intentionally discharged his firearm and killed the victim in an act of "excessive force" used in self-defense, conduct defendant asserts falls within the ambit of involuntary manslaughter. Again, we are not persuaded.

Assuming the excessive force theory of involuntary manslaughter defendant asserts is still viable after *Welch* was overruled in *Blakeley, supra*, 23 Cal.4th at page 91, there is no evidence to support the notion that defendant lacked a subjective awareness of the risk created to human life by overzealously defending himself through personally and intentionally firing his rifle a few feet from the victim. Indeed, defendant himself testified that "when you're that close a range that long a barrel, it's not hard to hit whatever is in front of you." (Cf. *People v. Mayfield* (1997) 14 Cal.4th 688, 777 [in the absence of an honest belief that the degree of force used in self defense was necessary, "a person's use of excessive force in response to an officer's use of excessive force does not negate malice"].)

Moreover, defendant's claim of self-defense is grounded primarily on his testimony. Like his claim of accident, the discrepancies and inconsistencies tainting his testimony render his claim of self-defense weak compared to the other evidence. As we have noted, our high court has said that reviewing courts

look not to what the jury *could have* done had involuntary manslaughter instructions been given, but what the jury was *likely to* have done in light of the evidence in determining whether the error was harmless. (*Thomas, supra*, 53 Cal.4th at p. 814.) Thus, in light of the evidence we discussed *ante*, we conclude it is unlikely the jury would have rejected defendant's testimony that the gun unintentionally discharged, but then accepted the notion that he somehow acted in the actual need to defend himself and used excessive force in doing so.

We conclude that the evidence supporting the judgment is so *relatively strong*, and the evidence supporting a conviction of involuntary manslaughter on any theory advanced by defendant was so *comparatively weak*, that there is no reasonable probability that instructions on involuntary manslaughter under any theory advanced by defendant would have changed the result. (*Thomas, supra*, 53 Cal.4th at p. 814.)¹¹

2. Reversible per se

Endeavoring to avoid harmless error review, defendant cites *United States v. Escobar De Bright* (9th Cir. 1984) 742 F.2d 1196 (*Escobar*) and contends that involuntary manslaughter was a "defense theory" of the case and therefore the failure to instruct on it is not subject to harmless error review. We disagree.

¹¹ By extension, the trial court did not err in denying defense counsel's motion for a new trial based on the failure to instruct on involuntary manslaughter.

In *Escobar*, the Ninth Circuit concluded that when a defendant's "theory of the case" is supported by law and has a foundation in the evidence, the failure to instruct on it is "reversible *per se*." (*Escobar, supra*, 742 F.2d at p. 1201.) *Escobar* reasoned: "The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error. Jurors are required to apply the law as it is explained to them in the instructions they are given by the trial judge. They are not free to conjure up the law for themselves. Thus, a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal." (*Escobar, supra*, 742 F.2d at pp. 1201-1202; see also *United States v. Romm* (9th Cir. 2006) 455 F.3d 990, 1002.)

We conclude that, even assuming involuntary manslaughter could be regarded as a defense theory of the case, the failure to instruct on it is not immune from harmless error review.

First, we note that the rule in *De Bright* is not universally accepted. Other federal courts have applied harmless error review to the failure to instruct on a defense theory. (See, e.g., *United States v. Gregoire* (8th Cir. 2011)

638 F.3d 962, 969.) Moreover, at least one Ninth Circuit decision has indicated that *Escobar's* reversible per se rule does not account for the United State Supreme Court's subsequent decision in *Neder v. United States* (1999) 527 U.S. 1, 20 [144 L.Ed.3d 35]. (See *United States v. Kayser* (9th Cir. 2007) 488 F.3d 1070, 1077, fn. 7.) We further note that more recently the United States Supreme Court reaffirmed its view that errors immune from harmless error analysis are the exception, not the rule, and that "harmless-error analysis applies to instructional errors so long as the error at issue does not ""vitiat[e] all the jury's findings."" (Hedgpeth v. Pulido (2008) 555 U.S. 57, 61 [172 L.Ed. 2d 388], quoting *Neder, supra*, 527 U.S. at p. 11.)

Second, the California Supreme Court, whose decisions we are bound to follow, has subjected the failure to instruct on a claimed defense to a harmless error analysis, even where the defense was supported by substantial evidence. (See *Thomas, supra*, 53 Cal.4th at pp. 814-815 [failure to instruct on voluntary and involuntary manslaughter]; *People v. Randle* (2005) 35 Cal.4th 987, 993, 1003-1004 [failure to instruct on imperfect defense of others], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201; *People v. Salas* (2006) 37 Cal.4th 967, 971, 973 & fn. 8, 983-984 [failure to instruct on good faith/absence of guilty knowledge].)

Third, *Escobar's* reversible per se rule is not inflexible - it is subject to caveats applicable here. *Escobar's* per se rule applies when the omission of an instruction "precludes the jury from considering" the defendant's theory. (*Escobar, supra*,

742 F.2d at p. 1201.) Here, because the jury was asked whether defendant personally and intentionally discharged his firearm, the jury was not precluded from considering (and defense counsel was not precluding from advancing) a theory that the rifle went off because defendant engaged in conduct short of personally and intentionally discharging his rifle.

We conclude that *Escobar's* reversible per se rule is not controlling, and apply California harmless error rules here.

B. Antecedent Threats

Defendant acknowledges that the trial court properly instructed the jury that it could consider antecedent threats on the question of self-defense. Defendant argues, however, that the trial court erred because "no instruction was given allowing jurors to consider antecedent threats on the question of imperfect self-defense voluntary manslaughter," and this resulted in "skewed and misleading" instructions.

"In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.] When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. If the meaning of instructions as communicated to the jury was unobjectionable, the instructions cannot be deemed erroneous. [Citations.] The meaning of instructions is no longer determined under a strict test of whether a 'reasonable juror' *could* have understood the charge as

the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276 (*Dieguez*).)

Here, the jury received instructions on self-defense and imperfect self-defense. Using CALJIC No. 5.50.1, the trial court instructed the jury on antecedent threats: "Evidence has been presented that on a prior occasion the alleged victim threatened the defendant. If you find that this evidence is true, you may consider that evidence on the issues of whether the defendant *actually* and reasonably believed his life or physical safety was endangered at the time of the commission of the alleged crime. [¶] In addition, a person whose life or safety has been previously threatened, or assaulted by another is justified in acting more quickly and taking harsher measures for self protection from assault by that person than would a person who had not received threats from or previously been assaulted by the same person." (Italics added.)

Nothing in the language of CALJIC No. 5.50.1 indicates it is applicable only to complete self-defense. While reminding the jury that there was evidence that the victim previously threatened defendant, the instruction further stated that if the jury found the evidence to be true, the jury could then "consider that evidence on the *issues* of whether the defendant *actually* and reasonably believed his life or physical safety was

endangered.” (Italics added.) Contrary to defendant’s claim, the instruction did not limit the jury’s consideration of prior threats solely to the issue of complete self-defense. Rather, the instruction told the jury it should consider such evidence in deciding the “issues” of whether defendant’s belief was both *actual* and reasonable. Thus, the instruction told the jury to consider the prior threats when deciding whether defendant actually believed he needed to defend himself -- the mens rea predicate to negating malice by imperfect self-defense. The jury was instructed to “[c]onsider the instructions as a whole and each in light of all the others,” so the jury was required to consider CALJIC No. 5.50.1 in connection with the imperfect self-defense instruction. Finally, in his closing argument, defense counsel mentioned the prior threats evidence and shortly thereafter discussed the concept of imperfect self-defense without any suggestion that the prior threats could not be considered on this topic.

For all these reasons, we reject defendant’s claim of instructional error. There is not a reasonable likelihood that the jury believed that prior threats evidence could only be considered on the issue of reasonable self-defense.

C. “Wrongful Conduct”

Defendant contends that the trial court erred in failing to define the term “wrongful conduct” in CALJIC No. 5.17.

Using CALJIC No. 5.17, the trial court instructed the jury on unreasonable self-defense: “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 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. [¶] However, this principle is not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force or attack or pursuit."¹²

Defendant argues that the term "wrongful conduct" in the last sentence of CALJIC No. 5.17 is overbroad and misleading, and it "acutely and improperly restricted the availability of unreasonable self defense." Defendant contends that the jury could have been "tempted to apply this broad language ('wrongful conduct') as an easy way to reject voluntary manslaughter if they found [defendant] acted foolishly (i.e., wrongfully) in

¹² The trial court's oral reading of the last sentence in CALJIC No. 5.17 included all three bracketed options describing the adversary's conduct -- "[use of force]," "[attack]" "[or]" "[pursuit]." The written copy of the instructions provided to the jury included only two options -- "[use of force] or [attack]," and the bracket including the word "pursuit" is crossed out. Defendant does not assert error based on this discrepancy.

carrying his firearm down with him to confront his friend, or manipulating the firearm in an open or dangerous manner." We are not persuaded.

At the outset, we note that the last sentence of CALJIC No. 5.17 is a correct statement of the law. In nearly identical words, the California Supreme Court has repeatedly observed: "the ordinary self-defense doctrine--applicable when a defendant *reasonably* believes that his safety is endangered--may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances." (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; accord, *People v. Valencia* (2008) 43 Cal.4th 268, 288.)

Turning to defendant's claim of error, his focus on the term "wrongful conduct" CALJIC No. 5.17 is unduly narrow. As we have noted, "[i]n reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.]" (*Dieguez, supra*, 89 Cal.App.4th at p. 276.)

Looking at the larger context, the instruction informed the jury that the "unlawful or wrongful" conduct subject to consideration is that which "created the circumstances which legally justified his adversary's use of force or attack." And

the trial court gave several other instructions which explained when force or attack by anyone is legally justified. In addition to instructing on justifiable homicide in self-defense (CALJIC No. 5.12), the court instructed the jury with CALJIC No. 5.50: “. . . In the exercise of his right of self-defense a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.” The court further instructed with CALJIC No. 5.51: “Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an actual belief and fear that he is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if that individual so confronted acts in self-defense upon those appearances and from that fear and actual beliefs, the person’s right of self-defense is the same whether the danger is real or merely apparent.” Further, the jury was informed with CALJIC No. 5.52 that “right of self-defense exists only so long as the real or apparent threatened danger continues to exist. When the danger ceases to appear to exist, the right to use force in self-defense ends.” Finally, in the context

of defining "assault," the jury was informed that "a willful application of physical force upon the person of another is not unlawful when done in lawful self-defense."

Thus, taken together, the numerous other instructions sufficiently explained to the jury the circumstances under which defendant's adversary's (i.e., the victim's) use of force would be legally justified, dispelling any fear that the jury would liberally apply the term "wrongful conduct" to include foolish conduct, or any other behavior, that fell short of justifying the victim's use of force. There is not a reasonable likelihood that the jury misapplied the term "wrongful conduct" to improperly restrict the applicability of imperfect self-defense.

D. CALJIC No. 2.21.2

Defendant contends that the trial court erred in instructing the jury with CALJIC No. 2.21.2¹³ because, according to defendant, it operated to lessen the prosecution's burden of proof with respect to dispositive prosecution and defense testimony. The California Supreme Court, however, has repeatedly concluded that CALJIC No. 2.21.2 does not unconstitutionally lessen the prosecution's burden of proof. (See, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 678;

¹³ CALJIC No. 2.21.2 reads as follows: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all of the evidence, you believe the probability of truth favors his other testimony in other particulars."

People v. Vines (2011) 51 Cal.4th 830, 885; *People v. Solomon* (2010) 49 Cal.4th 792, 827; *People v. Martinez* (2009) 47 Cal.4th 399, 448; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 221; *People v. Nakahara* (2003) 30 Cal.4th 705, 714; *People v. Hillhouse* (2002) 27 Cal.4th 469, 493; see *People v. Beardslee* (1991) 53 Cal.3d 68, 94-95.) Accordingly, we reject defendant's argument. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

E. Discharge of Retained Counsel

Defendant contends that the trial court erred when, at the hearing on his new trial motion, the trial court declined his request to "discharge retained counsel." Defendant's argument is based on the following exchange that occurred between defendant and the court at the outset of the hearing:

"THE COURT: [Defendant] is present with counsel. District Attorney is represented by both trial counsel. And is Defense ready to proceed? First, on the motion for new trial.

"[DEFENSE COUNSEL]: Well, Your Honor, first, [defendant], although I talked to him, he does want -- he did want to -- he has some kind of *Marsden* motion that he wanted to address to the Court.

"THE COURT: Were you appointed or retained?

"[DEFENSE COUNSEL]: I am retained.

"THE COURT: *Marsden* motions don't apply to retained counsel.

"THE DEFENDANT: Well, Your Honor, according to this *Marsden* motion, I was able to obtain --

"THE COURT: Mr. Mulkey, *Marsden* motions don't apply when you have hired an attorney. They only apply when there is Court-appointed counsel.

"THE DEFENDANT: I'm not an attorney but I have some problem[s]. I'm a disabled man. This is why I took the remaining money from my mother's inheritance -- she died, my mother -- to hire these people to represent me, and why witnesses were not called for my defense. When the officer showed at the scene, all I could do is inform him of my condition. That was all I was able to do. My story has not come forward. When I was examined in the court, I was distracted by a story of a lady I took care of from seven and a half years from telling what happened. And the story has been confused, misrepresented. And the truth has not come forward. I was requesting, sir, a new trial so that this could happen.

"THE COURT: There is a motion for a new trial that [the] Court will be considering this morning.

"THE DEFENDANT: Thank you, sir. I have not understood everything. Our communication has been very limited. And I -- just as I told one judge, I've been postponed and postponed for a year and a half. And I didn't want to be postponed the first time. I tried to tell the story to the investigator shortly after arrest. I was not able to that night because of my condition. And I only wanted the truth to come forward. I am now at a loss because of my condition. But I thank Your Honor for hearing me.

"THE COURT: Okay, as I indicated, since counsel was retained, the *Marsden* motion -- a *Marsden* motion is not an appropriate motion to bring. Therefore, the court is prepared to go forward on the motion for new trial, which I have reviewed."

Defendant characterizes this exchange as a "failure" of the trial court "to honor" a "timely, non-dilatory request to discharge" his "retained counsel." We disagree with this characterization.

The rule from *Marsden* is well settled: "'When a defendant seeks to discharge his appointed counsel and substitute another [appointed] attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" [Citation.] The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would "substantially impair" the defendant's right to effective assistance of counsel.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488.)

It equally well settled that *Marsden* is inapplicable when a defendant wishes to discharge retained counsel. A criminal defendant has the right to defend with the retained counsel of his or her choice, which naturally includes the right "to discharge an attorney whom he [or she] hired but no longer wishes to retain." (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) A defendant is not required to show cause in order to discharge retained counsel. (*People v. Munoz* (2006) 138 Cal.App.4th 860, 869.) Nevertheless, a defendant's right to discharge retained counsel is "not absolute" (*Ortiz, supra*, 51 Cal.3d at p. 983), and the trial court retains "latitude in balancing the right to counsel of choice against the needs of fairness [citation], and against the demands of its calendar" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 152 [165 L.Ed.2d 409]). In its discretion, the trial court may deny a motion to discharge retained counsel if the discharge will result in significant prejudice to the defendant, or if it is untimely, i.e., if it will result in disruption of the orderly process of justice. (*Ortiz, supra*, 51 Cal.3d at p. 983.)

No party disputes that the trial court correctly decided *Marsden* was inapplicable. Further, no party disputes that defendant had the right to discharge his retained counsel. The real question is whether defendant ever *invoked* this right. Defendant argues that he did, and the People contend that he did not. We agree with the People.

Although we have not been directed to any controlling authority that articulates a standard for determining whether

a statement or set of statements constitutes a sufficient invocation of a defendant's right to discharge retained counsel, we have no trouble concluding that defendant's so-called request here was ambiguous, equivocal, and insufficient to assert his right to discharge retained counsel.

There must be a much more clear expression of intent to discharge than what is presented here. Our premise is consistent with what is required in other contexts to invoke counsel-related rights. For example, to invoke a defendant's right under *Marsden* to substitute one appointed counsel for another, ""there must be "at least some clear indication by defendant that he wants a substitute attorney."" [Citation]."" (*People v. Sanchez* (2011) 53 Cal.4th at p. 91; see *id.* at pp. 80, 84, 89-90; accord, *People v. Dickey* (2005) 35 Cal.4th 884, 920.) Grumblings about counsel's performance is insufficient. (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8; *People v. Lee* (2002) 95 Cal.App.4th 772, 780.) Similarly, for a criminal defendant to invoke his right to proceed without counsel, there must be an "unequivocal" demand for self-representation. (*People v. Valdez* (2004) 32 Cal.4th 73, 99.) Finally, for a suspect to invoke his right to counsel after receiving *Miranda*¹⁴ warnings, the "suspect must do so 'unambiguously.'" (*Berghuis v. Thompkins* (2010) ___ U.S. ___ [176 L.Ed.2d 1098, 1111].)

¹⁴ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

Apart from being consistent with what is necessary to invoke other counsel-related rights, there is good reason for requiring a clear expression of intent to discharge retained counsel. The overarching right at issue is the defendant's right to counsel of *choice*. Quite naturally, it is up to the defendant (not the court) to *choose* whether to discharge the attorney he has retained. Even the sharpest criminal defense attorneys are subject to criticism by their clients, and even the sharpest client criticism of an attorney does not necessarily mean that the client desires new counsel. A criminal defendant who is not fully pleased with retained counsel has as much right to maintain that counsel as he does to discharge that counsel and seek different representation, and "[h]is right to decide for himself who best can conduct the case must be respected wherever feasible.'" (*Ramirez, supra*, 39 Cal.4th at p. 422.) Should courts loosely interpret ambiguous comments and criticism of counsel by a defendant as invoking the right to discharge, this would unduly favor the right to discharge over the right to maintain, and, at the same time, run the risk of unnecessarily interfering with the attorney-client relationship. Requiring a clearer expression of intent to discharge than what was said here, which can be done with simple words, obviates these concerns and helps ensure that a defendant's true wishes are respected.¹⁵

¹⁵ For these same reasons we reject defendant's assertion, unsupported by authority on point, that the trial court, "[a]t

Looking at the undisputed comments from defendant, we see nothing in the record that is a clear expression of an intent to discharge his retained counsel. True, defense counsel indicated that defendant had "some kind" of *Marsden* motion that he wanted to discuss, and defendant himself indicated he was able to obtain a "*Marsden*" motion, which could possibly signal that defendant wanted another attorney. When defendant spoke further, however, his true concern was revealed.

Defendant's focus was not discharging his attorney, but the desire for a do-over in order to better tell his story so that his idea of the "truth" could "come forward." After he was informed the court was prepared to hear the new trial motion, defendant thanked the court.

Not once did defendant state that he wanted to hire another attorney. Nor did he state he wanted the court to appoint a new attorney. Nor did he state he no longer wanted his current attorney to represent him in the new trial motion or for any other purpose related to the case. Defendant simply expressed that he wanted another trial.

Defendant repeatedly and squarely blamed his "condition" for preventing the truth from coming forward, and he clearly stated he was "at a loss because of [his] condition" (but not because of his counsel). Defendant also claimed that during trial, when he testified, he was distracted "by a story of a

a minimum, failed to exercise informed discretion" by asking questions of defendant.

lady" he took care of in the past. This distraction had nothing to do with his counsel's trial performance.

The only apparent criticism defendant levied against his attorney was limited communication, some undesired postponements, and a fragmented ambiguous statement about not calling unidentified witnesses ("and why witnesses were not called for my defense"). But again, despite these criticisms, defendant never once stated he wanted a different attorney, and these criticisms can be made just as easily by a defendant who wishes to maintain his retained counsel as someone who desires new representation.

Defendant's reliance on *People v. Lara* (2001) 86 Cal.App.4th 139 is unpersuasive. There, on the day the defendant's case was assigned for trial, the defendant made several critical comments attacking his trial counsel. (*Lara, supra*, 86 Cal.App.4th at pp. 146-147.) Among other things, the defendant indicated that he did not feel his counsel was "prepared with the witnesses or anything in the case." (*Id.* at p. 146.) The trial court actually "interpreted [defendant's] comments as a request to discharge his attorney." (*Id.* at p. 156.) Here, by contrast, the trial court never interpreted defendant's comments as a request to discharge retained counsel, and wisely so.

We conclude that defendant did not provide a clear expression of intent to discharge his retained counsel. Accordingly, despite having an opportunity to do so, defendant did not invoke his right to discharge his retained counsel.

Having not invoked his right to discharge his retained counsel, there was no corresponding request before the trial court upon which it could act. Therefore, the trial court did not err in declining to discharge defendant's retained counsel and proceeding in the manner in which it did.

DISPOSITION

The judgment is affirmed.

_____ MURRAY, J.

We concur:

_____ RAYE, P. J.

_____ BLEASE, J.